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Navigating Future Changes to the

Jones Act Offshore

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The last five months of 2009 found the offshore industry and the Obama Administration in a tumultuous storm involving the role of foreign vessels operating in support of Outer Continental Shelf (OCS) exploration, development, and production. To say the least, the issue has been controversial and confrontational. On reflection of these events, the following is written to summarize the current state of affairs and to suggest a way forward for the Obama Administration to make future changes—if it decides to propose changes again in 2010—to the longstanding Jones Act precedent that industry has relied on for so long and made substantial financial investments. In short, if the decision is to move forward with another proposal, and if it would make substantial and substantive changes to the Jones Act regime offshore, it should be done through "Notice and Comment" resulting in a final rule published in the Federal Register.

History of the Jones Act Offshore

The Jones Act was enacted in 1920 with the intent to ensure that vessels operating in the coastwise trade were U.S.-flagged and U.S.-built primarily to facilitate the national defense of the United States through the development of a well-equipped and suitable merchant marine with the capability to carry much of its commerce and to be available to support naval logistic operations in time of war or emergency. In essence, the Jones Act prohibits foreign-flag vessels from transporting "merchandise" between U.S. coastwise points. For over 50 years, the Jones Act mostly regulated vessels engaged in the traditional transportation of goods between ports.

It was not until years later, in the 1970s, that CBP began to interpret and apply the Jones Act to offshore oil and gas operations and offshore "coastwise points" that are oil and gas platforms and other structures that are attached to the seabed of the OCS pursuant to the Outer Continental Shelf Lands Act. CBP issues "Interpretive Rulings" to individual parties seeking such rulings in order to validate contemplated operations and to avoid CBP enforcement action by confirming that an owner/operator's legal analysis with regard to offshore activities is harmonious with CBP's position. CBP has never gone through a full regulatory rulemaking process through the Federal Register in order to publish a final rule (other then a simple recitation of the statutory language) as is typical for most regulatory regimes in the United States. Rather, this evolving case-by-case interpretive ruling process has resulted in the establishment of long-standing precedent on which industry has relied for 30 years.

The Rationale for the Proposed Changes in 2009

CBP proposed a sea of changes in the use of foreign-flag vessels offshore on July 17, 2009 citing the need to revoke or modify over 20 rulings issued over a span of more than 30 years including a reinterpretation of a 1939 ruling, which has been consistently interpreted by CBP for over 70 years. The CBP rationale for this proposal was that CBP had made a multitude of errors in issuing interpretive rulings for many years. Moreover, CBP followed its Customs Bulletin publication process which would have resulted in the issuance of a final decision within 30 days of publication of its proposal and which would become effective 60 days after issuance of the final decision despite the broad ranging implications of this action. In reality, the CBP action was predicated on a written complaint from one domestic association about a single ruling. In reaction to this complaint, CBP decided not only to revoke that ruling, but went far beyond what was requested in reaching back to revoke or modify a multitude of rulings. Some industry insiders have said that the system has been broken for years and that powerful foreign interests pressed CBP over the years to issue expansive interpretations based on tenuous analyses which has been at cross purposes with the intent of Congress. However, a realistic review of actions taken during previous Administrations does not reflect this. Serious complaints about potential problems with this regime have only arisen in recent months. And, although Congress has taken various actions to let the Executive Branch know that it should enforce the Jones Act more vigorously, Congress has not taken any action to suggest that existing CBP precedent with regard to its decisions offshore is flawed and needs to be changed. Yet, for some inexplicable reason, CBP decided to take drastic action to upset years of substantial precedent in an expedited manner through its Customs Bulletin "Interpretive Ruling" process. Fortunately, through the efforts of industry, and the intervention of the Department of Homeland Security ("DHS"), this process was cut short and CBP withdrew its proposal on October 1, 2009. Industry continues to monitor the situation closely, awaiting a decision from DHS and CBP as to how the agencies intend to proceed. To many in the industry, it is unclear why the Administration would want to propose any more changes. This is because the lead for determining that the current regime is broken and that such drastic action should be taken, should come from Congress, not the Administration. In short, there does not seem

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to be any persuasive reason for the Administration to take any new sweeping action in 2010 when the offshore Jones Act regime has been working well for decades.

From a procedural stand point, should DHS and CBP determine that it is appropriate to propose changes again, it clearly should be undertaken pursuant to publication in the Federal Register and the "Notice and Comment" procedures under the Administrative Procedures Act ("APA") and not through publication of an "Interpretive Rule" in the Customs Bulletin. As discussed below, although CBP has the authority to issue a proposed "Interpretive Ruling" in the Customs Bulletin to modify or revoke an interpretive Jones Act ruling, these procedures are limited to the modification or revocation of individual rulings, not broad and sweeping changes to the entire Jones Act regime.

Specifically, Interpretive Rules are not subject to Notice and Comment under the APA. It is clear under existing case law, however, that the July 17, 2009 CBP proposal, and any subsequent action taken by CBP to effectively overturn 30 years of existing precedent, constitutes rulemaking requiring Notice and Comment in the Federal Register under the APA. This is because, for all practical purposes, agency action that would have the practical effect of altering over 30 years of precedent that impacts the entire offshore industry, can not be characterized as an "Interpretive Rule" subject to the procedures governing publication in the Customs Bulletin. An "Interpretive Rule" can only be used to reinterpret actions previously issued by an agency to provide for consistency in an agency's position or policy. On the other hand, the use of an "Interpretive Rule" cannot be used to completely modify an existing regime. Clearly, the July 17, 2009 proposal, and any future proposal that would have such broad implications, would be considered a substantive rulemaking by the courts and thus subject to Notice and Comment in the Federal Register under the APA. Most importantly, following this process would provide all stakeholders in the industry the opportunity to fully vet this issue with DHS and CBP, ultimately resulting in a final rule, which would provide the necessary foundation for industry to rely on rather than the ad hoc "Interpretive Rule" process it has been subject to for so long.

In conclusion, although it does not seem necessary for CBP or DHS to propose any major changes to the current Jones Act Regime offshore at this time, if it decides to do so, it should ensure that it navigates any such proposal through Notice and Comment in the Federal Register to avoid a grounding of any such proposal on rocks or shoals.