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Customs Withdraws Jones Act Offshore Rulemaking

New Development

On November 15, 2010, U.S. Customs and Border Protection ("CBP") withdrew an Advance Notice of Proposed Rulemaking ("ANPRM") regarding the transportation of merchandise and equipment by foreign-flag vessels engaged in the support of Outer Continental Shelf ("OCS") activities. The ANPRM was under review by the Office of Management and Budget ("OMB") when it was withdrawn prior to publication in the Federal Register. As discussed in more detail below, this would appear to mean that most of CBP's OCS-related rulings issued over the last 30 years remain valid as precedent, subject to CBP review on a case-by-case basis when it considers new requests for rulings by industry for future projects.

Background

The coastwise merchandise statute, commonly called the Jones Act, prohibits the transportation of merchandise between U.S. coastwise points by any vessel that is not "coastwise-qualified," i.e., U.S.-built, U.S.-flag, 75% U.S.-owned, and never sold foreign. However, CBP has long maintained that equipment of a vessel is not "merchandise" for purposes of the Jones Act, and therefore such equip-

ment may be carried between coastwise points aboard a non-coastwise-qualified vessel without violating the Jones Act.

On July 17, 2009, CBP proposed modifying or revoking previously-issued ruling letters in which CBP had made determinations as to whether certain equipment would be considered vessel equipment or merchandise, and hence whether the item could (or could not) be carried and used aboard non-coastwise-qualified vessels between coastwise points. In its proposal, CBP sought to modify over 20 rulings issued over a span of more than 30 years, including its interpretation of a 1939 ruling that had been consistently interpreted by CBP for over 70 years. CBP reasoned that it had made errors in issuing the interpretive rulings and therefore needed to provide more consistency and clarity to the offshore industry. This proposal came less than four months after CBP's revocation of a ruling it issued on February 20, 2009, in which it determined that multi-function well head assemblies called "Christmas trees" could be considered vessel equipment and therefore could be transported between coastwise points and installed by foreign-flag vessels. In its revocation notice, CBP stated that withdrawal of the Christmas tree ruling was necessary pending further clarification of the definition of vessel equipment and review

of past rulings in which CBP determined certain items carried aboard a vessel were equipment (and not merchandise).

On September 15, 2009, CBP withdrew its July 17, 2009 proposed modification and revocation notice amid criticism from interested parties and industry groups regarding, among other things, the process by which CBP was seeking to modify the rules regarding coastwise transportation of vessel equipment. CBP had followed a process, never before utilized for a proposal of this magnitude, of publishing the proposal in the Customs Bulletin rather than the Federal Register, hence avoiding OMB review. This process would have resulted in the issuance of a final decision by CBP within 30 days after publication of its proposal. Furthermore, the proposal would have become effective 60 days after issuance of the final decision, despite the broad ranging and significant implications of the policy changes.

Withdrawal of Rulemaking

CBP initiated a rulemaking utilizing the Notice and Comment procedures under the Administrative Procedure Act by submitting an ANPRM to OMB for review on March 17, 2010. An ANPRM is often the first formal step in a rule-making process where significant impacts are expected. Had

it been issued, the ANPRM would have asked a series of questions, the answers to which would have formed the basis for a proposed rule. However, the rulemaking never got off the ground, as CBP withdrew the draft ANPRM on November 15, 2010 amid concerns from the Office of the U.S. Trade Representative and other federal agencies that, among other things, CBP's proposal could have serious foreign trade implications.

Recommendations and Conclusions

Given the controversy surrounding whether a particular item is vessel equipment or merchandise since the revocation of the 2009 "Christmas tree" ruling, CBP has not issued any rulings involving the transportation of equipment or merchandise to points on the OCS since then, leaving the offshore industry to operate in a state of uncertainty. Now that the ANPRM has been withdrawn, CBP is reviewing its policy with regard to the issuance of Jones Act rulings offshore.

Accordingly, owners, operators, charterers and other parties that have an interest in offshore operations potentially involving the use of non-coastwise-qualified vessels and the transportation of merchandise and/or carriage of equipment should confer with counsel and CBP with regard to seeking offshore Jones Act rulings for future projects. ■

For Additional Information

If you have questions or desire assistance, please contact:

Jeanne M. Grasso
202.772.5927
Grasso@BlankRome.com

Jonathan K. Waldron
202.772.5964
Waldron@BlankRome.com

Thomas Z. Cheplo
202.772.5912
Cheplo@BlankRome.com