August 30, 2018

Via electronic submission to: http://www.regulations.gov/

Ms. Shannon Joyce
Office of Information and Regulatory Affairs
725 17th Street NW,
Washington DC 20503

RE: Maritime Regulatory Reform Request for Information (Docket: OMB-2018-0002)

Ms. Joyce,

Thank you for the opportunity to provide comments in response to Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB) request for comments on Maritime Regulatory Reform. We appreciate the OIRA's efforts to evaluate maritime regulation and policy as it has the potential to affect our industry as well as the local, state, and federal economies dependent on a strong, offshore oil and gas development program.

The Offshore Operators Committee (OOC) is an offshore oil and natural gas trade association that serves as a technical advocate for companies operating on the U.S. Outer-Continental Shelf (U.S. OCS). Founded in 1948, the OOC has evolved into the principal technical representative regarding regulation of offshore oil and natural gas exploration, development, and producing operations. The OOC's member companies are responsible for approximately 99% of the oil and natural gas production from the GOM. Comments made on behalf of the OOC are submitted without prejudice to any member's right to have or express different or opposing views.

Overview: The Jones Act and Offshore Construction Activities

The issue of how the Jones Act applies to offshore construction activities needs to be resolved so that the industry can plan and safely execute offshore projects with regulatory certainty.

Our members continue to be challenged by increasingly restrictive Jones Act rulings and interpretations relative to offshore construction activities that are promulgated via U.S. Customs and Border Protection (CBP) Ruling Letters. Instead of regulatory clarity and certainty - or guidance via the CBP's obligation to provide *Informed Compliance* on this issue - the industry has

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come to rely on the ad-hoc ruling process used by the agency. These rulings have become a form of default precedence. Adding to the uncertainty, CBP has twice now (2009 and 2017) attempted to revoke decades of precedent contained in over two dozen ruling letters while providing only a partial modification in its place. Even though both proposals were withdrawn, the need for resolution around this issue remains. Your request for information under this Docket provides an excellent opportunity in this regard as modifications to the regulations in 19 CFR Part 4 could provide a reliable, consistent regulatory framework to address this issue.

Fundamentally, the issue of Jones Act application on the OCS is one of vessel capability and capacity. In certain vessel categories, the U.S. coastwise-qualified vessel inventory is deficient in both capability and capacity, and for certain specialized vessel capability, the U.S. fleet offers no alternatives whatsoever. As part of the 2017 comment period related to the CBP notice to revoke or modify certain Jones Act Rulings, a comprehensive and highly accurate vessel capability analysis was provided by the International Marine Contractors Association (IMCA)[1].

Specifically, the vessels of concern are those that can conduct heavy lifts, deep-water pipelay, and deep-water drilling. The U.S. coastwise-qualified fleet has **no** deep-water drilling vessels, deep-water pipelay vessels, or heavy lift vessels that can conduct lifts over 1000 tons with a hook height of 200 feet or greater. Despite this lack of coastwise-qualified vessel capability, CBP rulings over time have evolved into an increasingly restrictive interpretation of the protectionist law; ironically, to protect capabilities that do not exist in the U.S fleet in the first place.

CBP has invoked the Outer Continental Shelf Lands Act (OCSLA) to expand the application of the Jones Act well beyond its plain language and original intent to reach OCS construction activities. The Jones Act is a protectionist trade law and says nothing about construction activities more than 200 miles beyond the border of the United States. Further, CBP purports to rely on OCSLA to expand the Jones Act but ignores the objectives of OCSLA. For example, CBP has made it clear that it does not consider safety when issuing rulings. This however, ignores one of the key mandates of OCSLA *"operations in the Outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillage, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health*" (43 USC 1332(6)). Thus, it seems, recent CBP rulings and the application of Jones Act to offshore construction activities conflict with the very law CBP uses to apply the Jones Act to the OCS.

[1] Please refer to ***"Marine Construction Vessel Impacts of Proposed Modifications and Revocations of Jones Act Letters Related to Offshore Oil and Natural Gas Activities"***, IMCA, April 2017. The report as well as the IMCA and Joint Trade comments are linked here: https://www.imca-int.com/core/marine-policy-regulatory-affairs/briefing/jones-act-reports/

CBP also maintains this report, the IMCA comment letter, and the economic analysis commissioned by the American Petroleum Institute on their website at this address: https://nemo.cbp.gov/jonesact/60ResponsesPart4of7IMCA.pdf

Modification to Existing CBP Regulations is Recommended

We strongly recommended that CBP modify the regulations in 19 CFR Part 4 to clearly delineate "construction" from "transportation". In doing so, CBP should consider the unique nature of offshore construction activities on the OCS and the specialized vessels required to perform this work safely and in a technically sound manner. Additionally, the terms "merchandise" and "vessel equipment" defined in previous CBP rulings as used in the context of offshore construction activities that are performed by vessels should be codified into regulation.

As OCS activity has progressed further and further offshore, the need for larger, more specialized, and more capable vessels to support certain construction activities has increased. Without these specialized vessels, the oil and gas infrastructure on the GOM OCS would not exist as it does today.

Criteria Outlined in Executive Order 13777

We feel this issue clearly touches on many of the aspects of Regulatory Reform identified in Executive Order 13777:

(i) Eliminate jobs or inhibit job creation: Due to the current framework of the ad-hoc ruling process and overall regulatory uncertainty around this issue, the increasingly restrictive interpretation of how the Jones Act applies to certain OCS construction activities may force some operators to scale back or completely reconsider progressing any offshore development projects. This will clearly have wide ranging economic impacts for the U.S. service providers who would be hired to build and install components as well as those who would be utilized to support the 20 to 30-year (or more) lifespan of an offshore production facility and associated infrastructure. The current unrealistic and restrictive view that "transportation" includes even slight lateral movement during an offshore lift may also force operators to fabricate modules in overseas yards and/or source components from outside the U.S. to avoid being forced to use a less capable vessel, which imposes unnecessary risks to personnel and the environment. This would obviously move those jobs overseas as well and, ironically, do the exact opposite of what the Jones Act was enacted to protect.

(ii) Are outdated, unnecessary, or ineffective: In our view, the Jones Act continues to be distorted to cover an activity its authors clearly could not have envisioned when it was enacted nearly 100 years ago. If CBP intends to continue extending the Jones Act to the OCS, modification of the regulations is needed to provide regulatory clarity to delineate offshore construction activities from the traditional coastwise transportation activities the Jones Act was originally written to protect.

(iii) Impose costs that exceed benefits: In 2014, an oil and gas production company was notified that a planned lift to install a topsides module onto a fixed platform jacket offshore would not comply with the Jones Act. The provided reason was that the vessel (a derrick barge) was not built in the U.S. It was, however, U.S.-owned and crewed by U.S. workers.

More critical, this vessel possessed the required capability to lift the entire module in one lift and install it. This has been a common, technically sound principle of offshore construction for decades as fewer lifts result in less risk to personnel and the environment. Because the lifting vessel had to move very short distances (less than 200 meters) to provide the necessary "safety setback" to avoid undersea infrastructure (in case the lift failed), this small movement was considered "transportation" in the context of the Jones Act despite the fact the topsides module had already been transported to the construction site by a coastwise-qualified vessel. Previous CBP rulings have allowed small movements as "necessary and incidental" to the lifting operation to take place. More recent rulings have taken this language out and only allowed the lifting vessel to rotate on its axis or move the lift only with its crane. This makes certain lifts impossible and unnecessarily increases the risk for others. The operator canceled this operation and was forced to hire the only coastwise-qualified vessel that had close to the required capability do the work. For this less capable coastwise-qualified vessel to do the work, however, the module had to be sectioned into over 10 pieces, resulting in over 10 lifts to complete the operation. The added delays and associated costs immediately exceeded any conceivable benefit. This example and others like it should highlight how challenging this issue has become. It is impossible to see how this can be viewed as a victory for the Jones Act.

Responses to Questions from the OIRA RFI

In addition to the criteria in EO 13777, we also considered the following questions listed in your notice (Request for Information):

(1) Are there regulations that have become unnecessary, ineffective, or are no longer justified, and if so what are they?

As discussed above, the Jones Act was enacted nearly 100 years ago and has become distorted to address activities that its original authors never envisioned. A modern regulatory construct is long overdue. It is clear, as explained above, changes are needed at a foundational level, such as determining a clear distinction between coastwise transportation and offshore construction. Further, CBP should re-evaluate the actual application of the Jones Act on OCS activities.

(2) Are there rules or reporting requirements that have become outdated and, if so, how can they be modernized to better accomplish their objective?

The U.S. build requirement of the Jones Act is a significant limiting factor. It is unrealistic given U.S. shipyard capability to construct the types of specialized construction vessels that are most restricted by Jones Act application offshore (e.g. drillship MODUs, heavy lift vessels, and deep-water pipelay vessels). The U.S. regulatory scheme for the previously mentioned specialized vessels further inhibits the ability of a U.S. operator to build these vessels to comply with the Jones Act. Larger, more complex specialized vessels would need to be built to an Industrial Vessel inspection standard as they would not qualify for the less restrictive Offshore Supply Vessel (OSV) inspection requirements. They would also not benefit from the operational cost savings provided by reduced crewing (manning) that OSVs follow under their

regulatory scheme. Modifications to the CBP regulations in 19 CFR Part 4 could be done in such a way to protect Jones Act transportation and allow the most capable, purpose-built vessel to perform the highly complex and technically challenging offshore construction work that cannot presently be supported by the coastwise-qualified fleet.

(3) Are there rules that have not achieved their intended purpose or otherwise not operating as well as expected such that a modified, or different approach at lower cost should be considered?

19 CFR 4 should be modified to delineate *Transportation* from *Construction Activity. Transportation* could be accomplished by a coastwise-qualified vessel, but a *Construction Activity* should be accomplished by the safest, most efficient, purpose-built vessel.

(4) Are there rules that are preventing, curtailing, or causing the decision to outsource maritime related activities that would otherwise add value to the domestic economy? What types of economically beneficial maritime activities might be animated if these rules were abolished?

As discussed above, there is great uncertainty resulting from the ad-hoc process by which CBP has managed construction activity on the OCS along with CBP twice proposing to revoke, and then withdrawing the proposed revocation of, several critical rulings. Because of this uncertainty, operators may not elect to advance certain deep-water projects that could be worth several billions of dollars and, provide millions in royalty payments to the U.S. Government, while simultaneously providing the operators of coastwise-qualified vessels with 20-30+ years of service work. Offshore oil and gas construction activities were not envisioned when the Jones Act was enacted nearly 100 years ago and do not fall within the plain language of the statute. If CBP continues to apply the Jones Act to offshore construction activities while also continuing to narrow or change its interpretation of critical terms such as “merchandise”, operators may not be able to continue with deepwater projects that require the use of foreign flagged vessel for safe installation.

(5) Do agencies currently collect information that they do not need or use effectively?

CBP does not use their own rulings effectively relative to the issue of Jones Act application to offshore construction activities. As mentioned above, this has become an ad-hoc process and does not serve as a workable, predictable, reliable, or adequate substitute for Informed Compliance around this issue.

(6) Are there regulations, reporting requirements, or regulatory processes that are unnecessarily complicated or could be streamlined to achieve statutory obligations in more efficient ways?

The appropriate sections of 19 CFR 4 need to be modified to provide more clarity and regulatory flexibility around offshore construction activities. The terms *Merchandise, Vessel Equipment, Point in the United States, Field, Construction Activity,* and *Transportation* need to be better defined in the context of offshore construction activities that require certain specialized vessel capabilities that do not exist in the coastwise-qualified fleet. This is

necessary so that the operation can be conducted in a technically sound manner and to a level of safety consistent with the requirements of OCSLA.

(7) Are there rules or reporting requirements that haves been overtaken by technological developments? Can new technologies be leveraged to modify, streamline, or do away with existing regulatory or reporting requirements?

The technology required to develop, build, install, and maintain offshore infrastructure has been continually evolving and advancing since operators first started production on the U.S. OCS. The need for new technologies will only increase as we continue to develop deepwater areas for exploration and production. As discussed above, the types of specialized vessels that possess the required capabilities to safety perform certain kinds of offshore construction do not exist in the coastwise-qualified fleet.

The OOC will be glad to assist you with any effort undertaken to modify regulation and policy regarding the application of the Jones Act to offshore construction activities. Should you wish to discuss further or have questions, please feel free to contact me at greg@offshoreoperators.com.

Sincerely,

Greg Southworth
Associate Director
Offshore Operators Committee