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DEPARTMENT OF TRANSPORTATION

Maritime Administration

46 CFR Part 296

RIN 2133-AB85

Maritime Security Program

AGENCY: Maritime Administration, Department of Transportation

ACTION: Final rule.

SUMMARY: The Maritime Administration (“MARAD”) is amending its regulations to implement amendments to the Maritime Security Act of 2003 by the National Defense Authorization Act for Fiscal Year 2013 (“NDAA 2013”), the Consolidated Appropriations Act, 2016 (“CAA 2016”), and the National Defense Authorization Act for Fiscal Year 2016 (“NDAA 2016”). The revisions to the regulations, among other things, make changes to vessel eligibility for participation in the Maritime Security Program (“MSP”), authorize the extension of current MSP Operating Agreements, amend the procedures for the award of new MSP Operating Agreements, extend the MSP through 2025, update the MSP Operating Agreement payments and schedule of payments, and eliminate the Maintenance and Repair Pilot Program.

DATES: This final rule becomes effective on **[insert date 30 days after publication in the Federal Register]**.

FOR FURTHER INFORMATION CONTACT: William G. McDonald, Director, Office of Sealift Support, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE, Washington, DC 20590. Telephone (202) 366-0688; Fax (202) 366-5904, electronic mail to William.G.McDonald@dot.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 3508 of the NDAA 2013 authorized the extension of the Maritime Security Program through fiscal year 2025. Under section 3508, the Secretary of Transportation, acting through the Maritime Administrator, is authorized to offer to extend the existing 60 MSP Operating Agreements through fiscal year 2025. Section 3508 authorized a new payment schedule of increasing MSP Operating Agreement payments through fiscal year 2025. These payment amounts were subsequently updated by the CAA 2016 and the NDAA 2016. Section 3508 of the NDAA 2013 also provided a new procedure for awarding MSP Operating Agreements, including a new priority system for the award of operating agreements. Under the new priority, award will be first based on vessel type as determined by military requirements and then based on the citizenship status of the applicant. Section 3508 revised the procedure for the transfer of MSP Operating Agreements by eliminating the requirement to first offer an MSP Operating Agreement to a U.S. Citizen under 46 U.S.C. 50501. In addition, Section 3508 eliminated the procedure for early termination of MSP Operating Agreements based on the availability of replacement vessels. Section 3508 also eliminated the eligibility of Lighter Aboard Ship (LASH) vessels to participate in the MSP Fleet as a stand-alone category of vessel. The rule eliminates the Maintenance and Repair Pilot Program, which has sunset and was not extended by the NDAA 2013. The rule also updates MARAD's address for the purposes of submitting required reports and vouchers.

Rulemaking Analysis and Notices

Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review) and DOT Regulatory Policies and Procedures. Under E.O.

12866 (58 FR 51735, October 4, 1993), supplemented by E.O.13563 (76 FR 3821, January 18, 2011) and DOT policies and procedures, MARAD must determine whether a regulatory action is “significant” and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the EOs. The Orders define “significant regulatory action” as one likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal government or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; and (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the EOs.

A determination has been made that this rulemaking is not considered a significant regulatory action under section 3(f) of Executive Order 12866. This rulemaking will not result in an annual effect on the economy of \$100 million or more. It is also not considered a major rule for purposes of Congressional review under Pub. L. 104-121. This rulemaking is also not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034, February 26, 1979). The costs and overall economic impact of this rulemaking do not require further analysis because the rulemaking will create no additional costs or new substantive burdens to participants in or applicants to the existing program as it addresses only new processing procedures.

Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

This rule is not an EO 13771 regulatory action because this rule is not significant under EO 12866.

Executive Order 13132 (Federalism)

This rulemaking was analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"), and it has been determined that it does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. The revisions to the regulations, among other things, make changes to vessel eligibility for participation in the MSP, authorize the extension of current MSP Operating Agreements, amend the procedures for the award of new MSP Operating Agreements, update the MSP Operating Agreement payments and schedule of payments, and eliminate the Maintenance and Repair Pilot Program. This rulemaking has no substantial effect on the States, or on the current Federal-State relationship, or on the current distribution of power and responsibilities among the various local officials. Nothing in this document preempts any State law or regulation. Therefore, MARAD did not consult with State and local officials because it was not necessary.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires MARAD to assess whether this rulemaking would have a significant economic impact on a substantial number of small entities and to minimize any adverse impact. MARAD certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities because MSP participants (13 in total) and applicants (11 in the most recent solicitation for applications) do not constitute a substantial number of small entities.

Executive Order 13211 (Energy Supply, Distribution, or Use)

MARAD has determined that this rulemaking will not significantly affect energy supply, distribution, or use. Therefore, no Statement of Energy Effects is required.

Executive Order 12630 (Taking of Private Property)

This rulemaking will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

International Trade Impact Assessment

This rulemaking does not contain standards-related activities that create unnecessary obstacles to the foreign commerce of the United States.

Privacy Impact Assessment

Section 522(a)(5) of the Transportation, Treasury, Independent Agencies, and General Government Appropriations Act, 2005 (Pub. L. 108–447, div. H, 118 Stat. 2809 at 3268) requires the Department of Transportation and certain other Federal agencies to conduct a privacy impact assessment of each proposed rule that will affect the privacy of individuals. Claims submitted under this rule will be treated the same as all legal claims received by MARAD. The processing and treatment of any claim within the scope of this rulemaking by MARAD shall comply with all legal, regulatory and policy requirements regarding privacy.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 requires Agencies to evaluate whether an Agency action would result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$156 million or more (as adjusted for inflation) in any 1

year, and if so, to take steps to minimize these unfunded mandates. This rulemaking will not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It will not result in costs of \$156 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objectives of the rule.

Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et seq.), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. This rulemaking updates the regulations due to amendments to the Maritime Security Act. This rulemaking contains no new or amended information collection or recordkeeping requirements that have been approved or require approval by OMB.

Comments on the Proposed Rule

In response to the agency's Federal Register document published on August 5, 2015 (80 FR 46527) seeking public comment on its proposed revisions to 46 CFR part 296, a total of five separate comment submissions were made by or on behalf of the following entities: APL Marine Services, Ltd. and its affiliated companies ("APL"), American Roll-on Roll-off Carrier Group

Inc. (“ARC Group”), Schuyler Line Navigation Company, LLC, Liberty Global Logistics LLC, and the Transportation Trades Department, AFL-CIO (“TTD”). The agency responds below to all comments.

One commenter noted that 46 CFR 296.30(h)(2) of the existing regulations was omitted from the proposed rulemaking and should be retained in a final rule. We agree. The NDAA 2013 did not eliminate the provision permitting an owner or operator of an MSP vessel to transfer and register such a vessel under an acceptable foreign registry in the event sufficient funds are not appropriated for any fiscal year by the 60th day of that fiscal year. The text of 46 CFR 296.30(h)(2) is retained in the final rule.

The commenter also noted that the definition of Foreign Commerce unduly omitted certain services that were not affected by the NDAA 2013. We agree. While excluding from the definition of Foreign Commerce certain bulk carrying services, the NDAA 2013 did not otherwise substantively change the definition of Foreign Commerce. The proposed definition unnecessarily eliminated currently MSP-eligible services. Therefore, these existing services are retained in the final rule. The commenter also recommended amending 46 CFR 296.31(d)(2), to make that section more consistent with the text of 46 U.S.C. 53105(a) and the regulatory definition of Foreign Commerce of 46 CFR 296.2. We agree that 46 CFR 296.31(d)(2), as currently drafted, is inconsistent with 46 U.S.C. 53105(a) with its use of “foreign trade,” an undefined term, instead of “foreign commerce” and thus may invite confusion. Accordingly, we are amending 46 CFR 296.31(d)(2) by replacing “foreign trade” with “foreign commerce” and retaining reference to the registry endorsement requirement.

Three commenters recommended increasing annual payments under the MSP. Two recommended an annual payment of \$5 million per vessel starting in fiscal year 2017. MSP

payment amounts are established by statute. MARAD cannot adjust annual payment amounts without a corresponding legislative authorization. Nevertheless, the increased payments authorized by the NDAA 2016 and CAA 2016 are included in the final rule.

Two commenters critiqued MARAD's administration of the MSP and made recommendations that would require significant amendments to our regulations. These recommendations are beyond the scope of the current rulemaking implementing the NDAA 2013, but will be considered in the event of a future rulemaking.

List of Subjects in 46 CFR Part 296

Assistance payments, Maritime carriers, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Maritime Administration amends 46 CFR part 296 as follows:

PART 296- MARITIME SECURITY PROGRAM (MSP)

1. The authority citation for part 296 is revised to read as follows:

AUTHORITY: Pub. L. 108-136, Pub. L. 109-163, Pub. L. 112-239; 49 U.S.C. 322(a), 46 U.S.C. chapter 531, 49 CFR 1.93.

2. Amend § 296.2 by:

a. Revising the definitions of *Foreign Commerce*, *MSA 2003*, *Participating Fleet Vessel*, and *Section 2 Citizen*; and

b. Removing the definition of *Lash Vessel*.

The revisions to read as follows:

§ 296.2 Definitions.

Foreign Commerce means a cargo freight service, including direct and relay service, operated exclusively in the foreign trade or in mixed foreign and domestic trade allowed under a registry endorsement under 46 U.S.C. 12111 where the origination point or the destination point of any cargo carried is the United States, regardless of whether the vessel provides direct service between the United States and a foreign country, or commerce or trade between foreign countries.

MSA 2003 means the Maritime Security Act of 2003, as amended.

Participating Fleet Vessel means a vessel that--

(1) On October 1, 2015—

(i) Meets the requirements of paragraph (1), (2), (3), or (4) of section 53102(c) of the MSA; and

(ii) Is less than 20 years of age if the vessel is a tank vessel, or is less than 25 years of age for all other vessel types; and

(2) on December 31, 2014, is covered by an MSP Operating Agreement under 46 U.S.C. chapter 531.

Section 2 Citizen means a United States citizen within the meaning of 46 U.S.C. 50501, without regard to any statute that “deems” a vessel to be owned and operated by a United States citizen within the meaning of 46 U.S.C. 50501.

3. Amend § 296.11 by revising paragraph (a)(3) to read as follows:

§ 296.11 Vessel requirements.

(a) ***

(3) The vessel is self-propelled and —

(i) Is a tank vessel that is 10 years of age or less on the date the vessel is included in the Fleet; or

(ii) Is any other type of vessel that is 15 years of age or less on the date the vessel is included in the Fleet;

§§ 296.21, 296.22, 296.23 [Removed and reserved]

4. Remove and reserve §§ 296.21 through 296.23.

5. Revise § 296.24 to read as follows:

§ 296.24 Subsequent awards of MSP Operating Agreements.

(a) MARAD intends to ensure that all available MSP Operating Agreements are fully utilized at all times in order to maximize the benefit of the MSP. Accordingly, when an MSP Operating Agreement becomes available through termination by the Secretary or early termination by the MSP contractor, and no transfer under 46 U.S.C. 53105(e) is involved, MARAD will reissue the MSP Operating Agreement pursuant to the following criteria:

(1) The proposed vessel shall meet the requirements for vessel eligibility in 46 U.S.C. 53102(b);

(2) The applicant shall meet the vessel ownership and operating requirements for priority in 46 U.S.C. 53102(c); and

(3) Priority will be assigned on the basis of vessel type established by military requirements specified by the Secretary of Defense. After consideration of military requirements, priority shall be given to an applicant that is a United States citizen under section 50501 of this title.

(b) MARAD shall allow an applicant at least 30 days to submit an application for a new MSP Operating Agreement.

(c) MARAD and USTRANSCOM will determine if the applications received form an adequate pool for award of a reissued MSP Operating Agreement. If so, MARAD will award a reissued MSP Operating Agreement from that pool of qualified applicants in its discretion according to the procedures of paragraph (a) of this section, subject to approval of the Secretary of Defense. MARAD and USTRANSCOM may decide to open a new round of applications. MARAD shall provide written reasons for denying applications. In as much as MSP furthers a public purpose and MARAD does not acquire goods or services through MSP, the selection process for award of MSP Operating Agreements does not constitute an acquisition process subject to any procurement law or the Federal Acquisition Regulations.

6. Revise § 296.30 to read as follows:

§ 296.30 General conditions.

(a) *Approval.* The Secretary, in conjunction with the Secretary of Defense, may approve applications to enter into a MSP Operating Agreement and make MSP Payments with respect to vessels that are determined by the Secretary to be commercially viable and deemed by the Secretary of Defense to be militarily useful for meeting the sealift needs of the United States in time of war or national emergencies. The Secretary announced an initial award of 60 MSP Operating Agreements on January 12, 2005. In June 2014, the Secretary extended the term of all 60 MSP Operating Agreements through FY 2025.

(b) *Effective date—* (1) *General rule.* Unless otherwise provided, the effective date of an MSP Operating Agreement is October 1, 2005.

(2) *Exceptions.* In the case of an Eligible Vessel to be included in an MSP Operating Agreement that is on charter to the U.S. Government, other than a charter under the provisions of an Emergency Preparedness Agreement (EPA) provided by 46 U.S.C. 53107, as amended, unless an earlier date is requested by the applicant, the effective date for an MSP Operating Agreement shall be:

- (i) The expiration or termination date of the Government charter covering the vessel; or
- (ii) Any earlier date on which the vessel is withdrawn from that charter, but not before October 1, 2005.

(c) *Replacement vessels.* A Contractor may replace an MSP vessel under an MSP Operating Agreement with another vessel that is eligible to be included in the MSP under section 296.11(a), if the Secretary, in conjunction with the Secretary of Defense, approves the replacement vessel.

(d) *Termination by the Secretary.* If the Contractor materially fails to comply with the terms of the MSP Operating Agreement:

- (1) The Secretary shall notify the Contractor and provide a reasonable opportunity for the Contractor to comply with the MSP Operating Agreement;
- (2) The Secretary shall terminate the MSP Operating Agreement if the Contractor fails to achieve such compliance; and
- (3) Upon such termination, any funds obligated by the relevant MSP Operating Agreement shall be available to the Secretary to carry out the MSP.

(e) *Early termination by Contractor, generally.* An MSP Operating Agreement shall terminate on a date specified by the Contractor if the Contractor notifies the Secretary not later than 60 days before the effective date of the proposed termination that the Contractor intends to terminate the MSP Operating Agreement. The Contractor shall be bound by the provisions relating to vessel

documentation and national security commitments, and by its EPA for the full term, from October 1, 2005, through September 30, 2025, of the MSP Operating Agreement.

(f) [Reserved]

(g) *Non-renewal for lack of funds.* If, by the first day of a fiscal year, sufficient funds have not been appropriated under the authority of MSA 2003, as amended, for that fiscal year, the Secretary will notify the Senate Committees on Armed Services and Commerce, Science, and Transportation, and the House of Representatives Committee on Armed Services, that MSP Operating Agreements for which sufficient funds are not available will not be renewed for that fiscal year if sufficient funds are not appropriated by the 60th day of that fiscal year. If only partial funding is appropriated by the 60th day of such fiscal year, then the Secretary, in consultation with the Secretary of Defense, shall select the vessels to retain under MSP Operating Agreements, based on the Secretaries' determinations of the most militarily useful and commercially viable vessels. In the event that no funds are appropriated, then all MSP Operating Agreements shall be terminated, and each Contractor shall be released from its obligations under the MSP Operating Agreement. Final payments under the terminated MSP Operating Agreements shall be made in accordance with § 296.41. To the extent that funds are appropriated in a subsequent fiscal year, former MSP Operating Agreements may be reinstated if mutually acceptable to the Administrator and the Contractor, provided the MSP vessel remains eligible.

(h) *Release of vessels from obligations.* If sufficient funds are not appropriated for payments under an MSP Operating Agreement for any fiscal year by the 60th day of that fiscal year, then—

(1) Each vessel covered by a terminated MSP Operating Agreement is released from any further obligation under the MSP Operating Agreement;

(2) The owner and operator of a non-tank vessel may transfer and register the applicable vessel under foreign registry deemed acceptable by the Secretary and the SecDef, notwithstanding 46 U.S.C. chapter 561 and 46 CFR part 221;

(3) If section 902 of the Act is applicable to a vessel that has been transferred to a foreign registry due to a terminated MSP Operating Agreement, then that vessel is available to be requisitioned by the Secretary pursuant to section 902 of the Act; and

(4) Paragraph (h) of this section is not applicable to vessels under MSP Operating Agreements that have been terminated for any other reason.

(i) *Foreign transfer of vessel.* A Contractor may transfer a non-tank vessel to a foreign registry, without approval of the Secretary, if the Secretary, in conjunction with the Secretary of Defense, determines that the contractor will provide a replacement vessel:

(1) Of equal or greater military capability and of a capacity that is equivalent or greater as measured in deadweight tons, gross tons, or container equivalent units, as appropriate;

(2) That is a documented vessel under 46 U.S.C. chapter 121 by the owner of the vessel to be placed under a foreign registry; and

(3) That is not more than 10 years of age on the date of that documentation.

(j) *Transfer of MSP Operating Agreements.* A contractor under an MSP Operating Agreement may transfer the agreement (including all rights and obligations under the MSP Operating Agreement) to any person that is eligible to enter into the MSP Operating Agreement under this chapter if the Secretary and the Secretary of Defense determine that the transfer is in the best interests of the United States. A transaction shall not be considered a transfer of an MSP Operating Agreement if the same legal entity with the same vessels remains the contracting party under the MSP Operating Agreement.

7. Amend § 296.31 by revising paragraphs (a) and (d)(2) to read as follows:

§ 296.31 MSP assistance conditions.

(a) *Term of MSP Operating Agreement.* MSP Operating Agreements are authorized for 20 years, starting on October 1, 2005, and ending on September 30, 2025, but payments to Contractors are subject to annual appropriations each fiscal year. MARAD may enter into MSP Operating Agreements for a period less than the full term authorized under the MSA 2003, as amended.

(d) ***

(2) *Operation:* Be operated exclusively in the foreign commerce or in mixed foreign commerce and domestic trade allowed under a registry endorsement issued under 46 U.S.C. 12111, and shall not otherwise be operated in the coastwise trade of the United States; and

8. Amend § 296.32 by revising the introductory text to read as follows:

§ 296.32 Reporting requirements.

The Contractor shall submit to the Director, Office of Financial Approvals, Maritime Administration, 2nd Floor, West Building, 1200 New Jersey Ave., SE, Washington, DC 20590, one of the following reports, including management footnotes where necessary to make a fair financial presentation:

9. Revise § 296.40 to read as follows:

§ 296.40 Billing procedures.

Submission of voucher. For contractors operating under more than one MSP Operating Agreement, the contractor may submit a single monthly voucher applicable to all its MSP Operating Agreements. Each voucher submission shall include a certification that the vessel(s)

for which payment is requested were operated in accordance with § 296.31(d) and applicable MSP Operating Agreements with MARAD, and consideration shall be given to reductions in amounts payable as set forth in § 296.41(b) and (c). All submissions shall be forwarded to the Director, Office of Accounting, MAR-330, Maritime Administration, 2nd Floor, West Building, 1200 New Jersey Ave., SE, Washington, DC 20590. Payments shall be paid and processed under the terms and conditions of the Prompt Payment Act, 31 U.S.C. 3901.

10. Amend § 296.41 by revising paragraph (a) to read as follows:

§ 296.41 Payment procedures.

(a) *Amount payable.* An MSP Operating Agreement shall provide, subject to the availability of appropriations and to the extent the MSP Operating Agreement is in effect, for each Agreement Vessel, an annual payment equal to \$2,600,000 for FY 2006, FY 2007, FY 2008; \$2,900,000 for FY 2009, FY 2010, FY 2011; \$3,100,000 for FY 2012, FY 2013, FY 2014, and FY 2015; \$3,500,000 for FY 2016; \$4,999,950 for FY 2017; \$5,000,000 for FY 2018, FY 2019, and FY 2020; \$5,233,463 for FY 2021; and \$3,700,000 for FY 2022, FY 2023, FY 2024, and FY 2025. This amount shall be paid in equal monthly installments at the end of each month. The annual amount payable shall not be reduced except as provided in paragraphs (b) and (c) of this section.

Subpart G [Removed]

11. Remove Subpart G, consisting of § 296.60.

Dated: November 28, 2017

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.
Secretary, Maritime Administration

[FR Doc. 2017-25898 Filed: 11/30/2017 8:45 am; Publication Date: 12/1/2017]