A New Law Allows Yachts Over 300 Gross Tons To Fly the U.S. Flag but…

On August 13, 2018, President Trump signed the John S. McCain National Defense Authorization Act for Fiscal Year 2019 into law (“NDAA” or the “Act”). The principal objective of the Act is to provide funding for the armed forces. More specifically, $717 billion dollars in funding. A serious part of what must be done to provide for the common defense.

Of the 1100 pages in the Act, which I admit to not having read in full (!), 1098 pages did not deal with yachting. Only two did and can be found in Section 3529 of the NDAA. You might be justified in asking yourself: “what does yachting have to do with our national defense?” or “what are these two pages doing in the defense budget?” Perhaps Dunkirk illustrates the answer to your questions. This idea is not totally farfetched as historically, major yachts like J.P. Morgan’s CORSAIR or John Whitney’s ’s APHRODITE were routinely requisitioned for the war efforts in the Spanish American War and in World War I, respectively. Nowadays it may just be that patriotic Americans who own yachts that are in excess of 300 gross tons wish to fly an American flag.

While the Act only dedicated two pages to addressing the wideheld concerns of yacht owners over the United States’ perspective on Large recreational Vessel regulations, this change in the law has been described as “significant”. It has further been written that “yacht owners will no longer be chased from American shores…” On the other hand, it is more likely that Americans who own the larger yachts have ulterior motives. Consider U.S. Senator John Kerry who keeps his yacht in Newport rather than Boston perhaps due to the great difference in Use tax rates between Rhode Island’s 0% rate and Massachusetts’ 6% (minimum) rate. Of course, there did not seem to be any kind of urgency to the legislation.

The changes addressed by §3529 of NDAA push us to take a closer look at what has been the definition of a Yacht, a definition written 98 years ago, at the turn of the twentieth century and at the onset of the Second Industrial Revolution. In 1920, members of our Congress probably could not have imagined that a true yacht would ever be over 300 gross tons. CORSAIR IV was the biggest and fastest yacht ever built in the U.S. and, like much of what J.P. Morgan did, CORSAIR IV was an outlier. Whitney’s APHRODITE had a length of 74 feet over all. CORSAIR IV and APHRODITE were exceptions of their time. In other words, Congress’s view was that due to the rarity of large yachts like CORSAIR IV and APHRODITE anything that big must be commercial. Accordingly, a yacht was defined as a vessel of not more than 300 gross tons and thus any vessel over 300 gross tons had to be registered commercial.

It is also true, that in the past, some more influential Owners have opted to have their yachts qualify for an American Flag through an Act of Congress. The yacht LIMITLESS comes to mind. The Act of Congress process has always proved to be expensive and time consuming. Of course, most owners were never even made aware of this option unless they had knowledgeable maritime lawyers as counsel

Stated differently, up until the enactment of NDAA Americans with vessels exceeding the 300 gross ton limit were only able to flag their yachts in the U.S. if they registered them as commercial vessels.

The decision to register as a commercial vessel is not without its challenges and it presented Owners with certain issues, including different standards of construction and operational standards as, in many cases, the closest analogous vessel might be one commercially registered for the carriage of goods. These vessels were subjected to inspection by United States Coast Guard under what is known as a “seagoing motor vessel” standard, a standard that does not completely adequately address the operation or construction of a luxury yacht.

Even the concept of gross tonnage can present problems since it is calculated based on the “moulded volume of all enclosed spaces of the ship” and is used to determine things such as a ship’s manning regulations, safety rules and equipment, registration fees, and port dues. Almost all of these metrics represent higher operational costs to the operator.

It is also true that different flag states use slightly different rules for determining gross tonnage. For example, a 40 meter Westport is over 300 gross tons when admeasured under the International Rules and below 300 Gross tons when measured under the United States Rules.

As a consequence of these complexities, most Owners of yachts of any size have opted to register their yachts under so-called flags of convenience.

If yachts are flagged under a “Flag of Convenience” and it seems, the operational inconvenience level is rather low. These foreign flag yachts can still cruise in U.S. waters under a Cruising Permit. This is true of course provided the foreign flag offers reciprocal cruising privileges to vessels flying the American flag and that the vessel seeking a cruising permit be designated as a recreational or pleasure vessel..

Those foreign flagged yachts visiting the United States under a Cruising Permit can stay for up to one year, at which point they have to leave and stay outside of United States waters for 15 consecutive days before becoming eligible to return.

Most legislators were unaware that amending a Bill making its way through Congress might allow Americans to flag their yachts under the American Flag, and most legislators are indifferent. Consider representatives of districts in North Dakota or, say, Utah where constituents are more concerned about the overall passage of a Defense Act rather than the details that could largely impact the Yachting Industries of coastal cities.

However, this was not the case with certain astute legislators who have realized the effects that the legislation will have in their districts and have announced that the new legislation will result in an increase of large recreational vessels being registered under the American Flag, which would lead to more U.S. jobs, meaning jobs held by American nationals, in the ship construction, repair and supporting industries.

§3529, the Amendment to NDAA, was influenced by the efforts of Republican Congressman Rob Bishop who represents Utah’s 1st Congressional District. It is hard to see how a Congressman from Utah would have a sophisticated understanding of the yacht construction industry. It is far more likely that he has a sophisticated understanding of Mr. Tilman Fertitta who wants his next yacht to fly the American flag. Mr. Fertitta is the billionaire owner of Landry’s Inc. and the Houston Rockets. The yacht world appreciates Mr. Fertitta’s love of yachting as he is at this time building his 5th yacht which, as word has it, will fly the American Flag.

The new law is not without its limitations: Vessels registered under it can engage only in recreational use. No commercial use is permitted. Bareboat chartering is allowed since bareboat chartering is not considered commercial use. To be registered, the yacht will need to be duty paid which means more revenue to the U.S. Treasury.

For the time being, the vessels which are registered under the new law, must also comply with all other requirements for US documentation, including U.S. citizenship requirements for the yacht’s owner and crew. Owners must disclose the identity of the yacht’s beneficial owner to the United States Coast Guard. With respect to crew, all U.S. labor and immigration laws must be observed.

It is not at all clear how the new law will benefit U.S. based shipyards and repair facilities any more than they already benefit from the yacht repair business. Shipyards are safe harbors for vessels flying almost any flag.

The new law requires that the United State Coast Guard develop a specific non-commercial code of regulations for recreational vessels over 300 gross tons. The United States Coast Guard has one-year to complete the new code. The new code will go into effect in 2020.

In the interim, a private yacht, registered with a foreign flag and over 300 gross tons, which is MCA-compliant with the so-called LY3 Code, will be able to fly the American flag. This is interesting since the United States Coast Guard has for this interim period accepted the standards of the Coast Guard of another nation, namely the Maritime and Coastguard Agency of the United Kingdom.

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