

Issue: The State of Delaware has been registering vessels that operate overseas – flying a U.S. flag – and suspected of being involved in illegal activities abroad. In 2016 the Coast Guard communicated the issue to Delaware. Existing vessel documentation regulations found in 46 CFR part 67 would seem to allow a vessel to document with the state and conduct foreign trade. However, this seem sto be in conflict with existing vessel documentation statutes, specifically 46 U.S.C. § 12102 (Vessels Requiring Documentation), which states:

(a) In general.--Except as otherwise provided, a vessel may engage in a trade only if the vessel has been issued a certificate of documentation with an endorsement for that trade under this chapter.

The Office of Boating Safety has requested LMI-P to determine if State registered vessel are allowed to conduct international trade.

BLUF: On its face 46 U.S.C. § 12102 would appear to require all vessels engaged in a trade be documented for that trade. A registry endorsement, which is for foreign trade, is available to a documented vessel under 46 U.S.C. § 12111 (Registry). Reading 12102 and 12111 together indicates that a vessel must be documented and hold a registry endorsement to conduct foreign trade. However 46 CFR 67.7 (Vessels Requiring Documentation) only requires vessels of at least 5 net tones which engage in fisheries or coastwise trade to hold a certificate of documentation with the appropriate endorsement. A plain reading of this regulation states that only vessel engaged in coastwise trade or fisheries require Federal documentation. Furthermore, 46 CFR 67.9 (Vessels excluded from or exempt from documentation), contains an exemption from documentation for vessels not operating on the “Navigable Waters of the United States”. These two regulation give the impression that a vessels of any tonnage could register the vessel with a U.S. State and conduct foreign trade, as long as the vessel does not operate in U.S. waters.

The authority for a State to register (or number) a vessel comes from 46 U.S.C. § 12301 (Numbering vessels) which states that an undocumented vessel equipped with propulsion machinery shall have a number issued by the proper issuing authority in the State which the vessel is principally operated. The implementing regulations for this authority¹ are found in 33 CFR Part 173 and 174. These regulations state that a certificate of number for a State registered vessel becomes invalid 60 days after the vessel is no longer “principally operated” in the State where the certificate was issued.² The Coast Guard has defined “operate” as, “[to] use, navigate, or employ.”³ The Coast Guard goes on to define “State of Principal Operations” as, “the state in whose waters a vessel is or will be operated most during a calendar year.”⁴ These regulatory definition mean that a vessel registered in a State must operate in the State’s waters for at least one day every year.

The requirement to primarily operate on State waters negates the explicit exemption found in 46 CFR 67.9 because a vessel registered in a State must physically operate within navigable waters

¹ Authority to implement regulations for the State numbering program is given to the Secretary under 46 U.S.C. § 12302(a)

² See 33 CFR 173.77(d) and 174.13

³ See 33 CFR 173.3 and 174.3

⁴ *Id.*

of the U.S. to conduct international trade. This means that a vessel that does not operate in State waters may not register with a State and only has the option to be documented with the U.S. Government if it wants the ability to fly the U.S. flag.

This revelation, however, does not explain why 46 CFR 67.7 only explicitly requires vessel involved in coastwise trade or fisheries to be federally documented. An analysis of statutory and regulatory history helps answer that question.

Analysis:

In 1967 the Coast Guard assumed the authority to document vessels from the Customs Bureau. This transfer was conducted in preparation for the Coast Guard's transfer from the Department of Treasury to the Department of Transportation. In 1969 the Coast Guard published the final rule (34 FR 20102) transferring existing Customs vessel documentation regulation found under 19 CFR Part 3 to 46 CFR Part 67. In the final rule, the substantive language of the regulations did not change in the transfer.

In 1969 the regulation for exemptions of documentation, found in 46 CFR 67.01-11 (predecessor to 46 CFR 67.9), did not exempt vessels not operating on the navigable waters of the U.S. Rather under 46 CFR 67.07-11 (Registers) vessel operating in the foreign trade were required to be registered⁵ with the Coast Guard.

Vessels of the United States engaged in foreign trade shall be registered, except as provided for in subpart 67.61 with respect to vessels on the northern, northeastern, and northwestern frontiers.

Among other authorities, the regulation cited 46 U.S.C. § 11 (Repealed 1980) (Vessels entitled to registry; coastwise trade; ocean mail service contracts) as authority to require registration of a vessel engaged in foreign trade. Though the language of 46 U.S.C. § 11 did not specifically require a vessel conducting foreign trade to hold a registry endorsement, the language of the statute was deemed authority to require the endorsement by regulation.

In 1982, 46 CFR Part 67 was rewritten to conform to the newly passed 1980 Vessel Documentation Act (46 U.S.C. § 65a-w (Repealed 1983)). In the House Report accompanying the Act, Congress explained that the purpose of the new laws were to simplify the numerous complex documentation laws and permit administrative changes to improve procedures and increase efficiency. The report best states the purpose of the new act on page 4:

As previously noted, our existing vessel documentation laws are fragmented and some date back to the early 1790s. H.R. 1196 is a comprehensive bill that would extract from these existing laws, and restate in a concise and orderly manner, the purposes and objectives of vessel documentation. The bill would eliminate the restrictive administrative details of present law, and would delegate responsibility and regulatory authority for the administration of the vessel documentation

⁵ In 1969, 46 CFR 66.03-11 defined the term "Documented" as, "*registered, enrolled and licensed, or licensed under the laws of the United States, whether permanently or temporarily.*"(emphasis added)

program within specific guidelines. This would permit the Coast Guard to introduce modern procedures and to apply up to date business techniques to better meet the changing needs of the maritime industry and the public. (emphasis added)

H.R. REP. 96-428, 4, 1980.

46 U.S.C. § 65h was the law governing registry endorsements.

- (a) A registry *may be issued* for any vessel that is eligible for documentation.
- (b) A vessel for which a registry is issued *may be employed* in foreign trade or trade with [various US territories]. (emphasis added)

By using the language “may be issued” and “may be employed” the statute is permissive in nature and does not prescribe that a vessel must be documented and possess a registry endorsement prior to engaging in foreign trade.

In discussing the amended registry law the House Conference Report stated:

Certificate of documentation: Registry. This section provides that a certificate of documentation in the form of a registry *may be issued* to any vessel meeting the requirements of section 4, thus entitling it to be employed in the same foreign trade in which it may now be employed under existing law. (emphasis added)

H.R. REP. 96-428, 9, 1980.

The report again uses the permissive language “may be issued” confirming the permissive nature of the endorsement.

In 1981, in response to the passage of the Vessel Documentation Act, the Coast Guard published an NPRM (46 FR 56318-01) indicating it was going to change the existing regulation with the stated purpose of,

The proposed regulations fulfill this mandate by: updating and simplifying the archaic language and syntax of the present regulations to make it easier to determine which requirements apply in a given situation; eliminating all reporting requirements not specifically mandated by the Act or absolutely essential to the documentation function, thereby reducing paperwork burdens on the public; and codifying existing administrative procedures not presently treated in the regulations.

In the proposed 46 CFR 67.01 rule the NPRM goes on to specifically discuss vessel that are exempted from documentation. To that point, the text of the NPRM plainly stated that a registry endorsement was not required, but available, for a vessel to participate in foreign trade.

Proposed subpart 67.01 contains general information intended to enable a reader to determine whether his vessel is required to be documented, exempt from documentation, or eligible for documentation at his option. *There are instances in*

which a vessel may be eligible for documentation but is not required, as a matter of law, to be documented before engaging in a given activity - e.g., registry is not a prerequisite to engage in foreign trade. (emphasis added)

The NPRM does not explain why the Coast Guard felt that registry was not required for foreign trade, but it likely had to do with the permissive language of the new law. As discussed above, 46 U.S.C. § 65h (Registry), was permissive and did not specifically require the vessel to have a registry endorsement to conduct foreign trade. It is likely the Coast Guard interpreted the use of the word "may" as providing the owner of the vessel the option of documenting the vessel as registry but not requiring the endorsement to participate in foreign trade.

Reading 46 U.S.C. § 65h in context with surrounding statutes also supports the Coast Guard's interpretation that the Act did not require a vessel be documented to conduct foreign trade. 46 U.S.C. § 65i-k, the documentation laws for coastwise trade, Great Lakes license, and fisheries specifically require a certificate of documentation (COD) and endorsement in order to be employed in those trades. A COD for registry was not specifically required to participate in foreign trade, like the other trades, this lack of a specific mandate could be interpreted that a COD is not required, but is optional.

Though 46 U.S.C. § 65h has been modified several times since 1980, the permissive language of the statute has not changed in a way that would require rewriting the regulations. 46 U.S.C. § 65a-w was recodified in 1983 to 46 U.S.C. Chapter 121 under the "Act to revise, consolidate, and enact certain laws related to vessels and seamen as subtitle II of title 46, United States Code, 'Shipping'" (Pub. L. 98-89). Specifically "Registry" under 46 U.S.C. § 65h was recodified as 46 U.S.C. § 12105, the language of the statute did not change. Paragraph (a) of the statute was modified in 1989 by Pub L. 101-225 (CGAA 1990) to read, "(a) A certificate of documentation may be endorsed with a registry endorsement." This change was considered a technical amendment and was not discussed in the legislative history, nor did it change the permissive nature of the statute. The law was again modified in the 2006 Coast Guard Authorization Act (Pub L. 109-241) recodifying it to 46 U.S.C. § 12111 and modified again in the 2008 National Defense Authorization Act (Pub L. 110-181). The CGAA and NDAA added additional requirements for vessels owned by Trusts to obtain a registry endorsement, if it desires to have one, and a registry endorsement requirement to vessels that provide certain services to MODUs on the OCS, but did not change the permissive nature of the registry endorsement for the majority of vessels.

Because the permissive language for the statute did not change, it follows that there would be no change to the regulations that also did not require a registry endorsement to operate in foreign trade.

Conclusion:

The permissive language of 46 U.S.C. § 12111 to allow foreign trade without documentation has not changed over the years, regardless of the recodification and other textual changes to the statute.. Ultimately exemption from documentation in 46 CFR 67.9 for vessels working in the foreign trade that do not enter U.S. navigable waters is supported by the plain language of the

statute, the prescriptive language found in the surrounding statutes (coastwise, Great Lakes, and fisheries), and the legislative history.