Published on *The National Law Review* https://natlawreview.com

Congress Enacts Major Expansion of Capital Construction Fund, Creating New Opportunities for Marine Financing of Jones Act Vessels

Article By:

Felisa E. Sanchez

William N. Myhre

The FY 2023 National Defense Authorization Act (NDAA) includes language that makes significant changes to the Capital Construction Fund (CCF), expanding the vessels eligible for CCF to include those engaged in the domestic or Jones Act trade. This change opens the door for vessels engaged in this service to participate in the CCF program, creating options for financing ship construction, reconstruction, and acquisition. With limited exceptions, vessels operating in the domestic trade were not previously eligible for the CCF program.

CCF Program History

The CCF program was created to assist owners and operators of U.S.-flag vessels in accumulating the large amounts of capital necessary for the modernization and expansion of the U.S. merchant marine. The program is designed to counterbalance the competitive advantage afforded to vessel operators who construct vessels in foreign jurisdictions with lower shipbuilding costs. The CCF encourages domestic "construction, reconstruction, or acquisition of vessels through the deferment of Federal income taxes on certain deposits of money or other property placed into a CCF."[1]

Any vessel constructed, reconstructed, or acquired with funds withdrawn from a CCF account must be documented in the United States and operate within certain trades, which, prior to the NDAA, were the "United States foreign, Great Lakes, noncontiguous domestic, or short sea transportation trade."[2] The agency responsible for administering the CCF for all but fishing vessels is the Department of Transportation's Maritime Administration (MARAD). MARAD has in recent years accepted in the CCF program offshore wind vessels, offshore support vessels, and crew transfer vessels as coming within the noncontiguous domestic trade category, as well as certain ferries in the short sea transportation trade. The Department of Commerce's National Oceanic and Atmospheric Administration administers the CCF program for fishing industry vessels.

Changes to The CCF Program

Under the changes implemented by the NDAA, vessels eligible for the CCF program include vessels engaged in the “foreign *or domestic trade* of the United States.”[3] Under the governing statute, foreign trade also includes very limited areas “in domestic trade in which a vessel built with a construction-differential subsidy is allowed to operate under the first sentence of section 506 of the Merchant Marine Act, 1936.”[4] While domestic trade is not defined in the statute,[5] Congress’ intent is understood to extend the CCF program to vessels in the coastwise or Jones Act trade. Thus, the NDAA extends the CCF program to any vessel engaged in the “foreign or domestic trade of the United States” and not just the U.S. foreign, Great Lakes, noncontiguous domestic, and short sea transportation trades.

This change will significantly expand the vessels eligible for the CCF program to include U.S.-flag inland vessels and barges, towing vessels, and many others operating in or intending to operate in the Jones Act trade. The change also raises questions whether MARAD will apply the new amendment to vessels that have already been constructed, reconstructed, or acquired with CCF withdrawals and are subject to CCF agreements that provide for the payment of liquidated damages for use in the coastwise trade, as well as if MARAD will enforce those contractual provisions.

We acknowledge the contributions to this publication from our law clerk Brian J. Hopkins.

FOOTNOTES

[1] U.S. Dep’t of Transp. Mar. Admin., Capital Construction Fund, https://www.maritime.dot.gov/grants/capital-construction-fund.

[2] 46 U.S.C. § 53501(5)(A)(iii).

[3] National Defense Authorization Act for Fiscal Year 2023, H.R. 7900, 117th Cong. §§ 3544, 3545 (emphasis added).

[4] 46 U.S.C. § 53501(8).

[5] *See id*. § 53501.

National Law Review, Volume XII, Number 350