



**Testimony of Aaron C. Smith,
President and CEO of the Offshore Marine Service Association**

Prepared for:

**The U.S. House Committee on Transportation and Infrastructure
Subcommittee on the Coast Guard and Maritime Transportation**

And the Hearing on:

Commercial and Passenger Vessel Safety

November 14, 2019

Chairman Maloney, Ranking Member Gibbs, and Members of the Subcommittee, thank you for allowing me to speak at this important hearing. My name is Aaron Smith, and I have the pleasure of serving as the President and CEO of the Offshore Marine Service Association (OMSA).

Who We Are.

OMSA is the association for the domestic offshore marine transportation industry. Traditionally, many of our members own and operate the U.S.-flagged vessels engaged in constructing, maintaining, and servicing oil and gas infrastructure on the Outer Continental Shelf (OCS). More recently and in increasing numbers, OMSA members are engaged in constructing and servicing the offshore wind market along the East Coast.

OMSA's members also include many shipyards that construct, maintain, repair, and modernize both privately and government-owned U.S. fleets. In addition, we represent associated suppliers and allied companies that provide supplies, services, and training to these vessel operators and shipyards.

In total, OMSA represents approximately 170 companies and their approximately 12,000 employees. While these companies and employees are primarily based in the Gulf Coast, OMSA has an increasing presence on the East and West Coasts. In addition to geographic disparity, we also represent business of varying size, from large publicly traded companies to small family-owned businesses. Some of our members have hundreds of vessels while others operate only one or two.

Importance of Safety to Our Organization and Membership.

OMSA has two stated and complementary purposes. Our organization exists to promote the highest standards of safety. Specifically, we work to constantly improve the training of mariners and offshore workers and ensure international and domestic laws and regulations are written and implemented in a way that benefits mariners, contractors, workers, vessel operators, the general public, and the environment.

Toward this end, OMSA is one of three accreditation bodies to conduct SafeGulf training. SafeGulf is a standardized safety orientation program that ensures everyone who works in the energy industry—onshore or offshore—receives the same comprehensive, independently audited safety training. Additionally, as a member of the SafeGulf Advisory Group, OMSA helps set the standards for this program, working to ensure that as the offshore energy industry changes, the SafeGulf orientation changes with it.

Additionally, OMSA created their own system dynamic positioning operator (DPO) training and certification scheme, one which exceeded the existing industry standards.

Dynamic positioning (DP) is used to hold vessels in position in situations where mooring or anchoring cannot be utilized; usually, this means when two vessels or a vessel and an installation are close to each other. As such, DP operations are, by their very nature, safety critical activities. The existing training system did not adequately account for this criticality. Thus, OMSA created its own program, called the Offshore Service Vessel Dynamic Positioning Authority (OSVDPA). This DPO certification program is an improvement upon the existing industry standard, including increased assessments, increased experience verification systems, and true-to-life simulations.

I am proud to also run the OSVDPA and via my work with the OSVDPA, I also sit on the Marine Technology Society DP Committee's Guidance and Standards Subcommittee. This committee sets design, operational, and competency standards intended to improve the safety of the DP industry. Also, I am currently part of an Oil Company International Marine Forum (OCIMF) ad hoc working group to re-write the OCIMF DP risk assurance guidelines.

The importance of safety and the constant drive toward zero incidents is operationalized by OMSA members. You see it in the safety management systems of OMSA members. These systems include the policies and procedures which are utilized to prevent, respond to, and correct incidents. The specificity of these systems is truly impressive.

They include not only training requirements, procedures for big operations, requirements for job safety analyses (or JSAs), and stop work authority. They include seemingly minor components like how workers should park their cars and admonishments about using cell phones while driving to and from work.

The result of these systems is quantifiable. Every year OMSA collects Total Recordable Incident Rate (TRIR) data from its member companies. Last year, the collective OMSA TRIR was 0.29. For comparison, the Bureau of Safety and Environmental Enforcement (BSEE) reported that the TRIR for the oil and gas production sector was 0.8, drilling and well operations was 0.6, and construction and decommissioning was 0.7. In short, the OMSA Member TRIR is significantly lower than any peer group.

Importance of Industry Partnership with the U.S. Coast Guard.

While OMSA, OMSA Members, and the offshore energy industry have taken immense measures to improve the safety of our industry, there is another party that must be recognized as one of the primary factors for the safety of our industry. Specifically, the safety advancements achieved by our industry could not have happened without the U.S. Coast Guard. The Coast Guard is not only our industry's regulator, they are also who the offshore industry calls when everything has gone wrong. They are our first, and often only responders.

The roles of regulator and rescuer are in addition to the roles our Coast Guardsmen and women play as part of our national and homeland security apparatus, protecting our borders—both land and sea borders—and conducting drug interdictions on our Outer Continental Shelf (OCS) and on the high seas beyond.

For all of these reasons, it is unconscionable that 2018 started with a 35-day period where our 42,000 Coast Guardsmen protected our industry and our nation were not receiving a paycheck for doing so. In my mind, the single most important thing this Subcommittee, Committee, and Congress can do to provide for the safety of our industry is to ensure that disagreements in Washington never cause those protecting or rescuing us from being paid for doing so.

Safety of the U.S.-Flagged Fleet.

When these two parties, the U.S. offshore marine industry, and the U.S. Coast Guard work together the result is the impressive safety record indicated by the TRIR stats previously cited.

Beyond the safety culture of OMSA members and the professionalism of the U.S. Coast Guard, this record is also in many cases a result of U.S. Coast Guard regulations covering the U.S.-flagged fleet which are more stringent than those governing foreign-flagged vessels that operate in U.S. waters. The net result is that the U.S. has created an uneven playing field that favors foreign vessels and mariners in our own waters.

While most nations meet the standards set by the International Maritime Organization (IMO) conventions, such as the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), International Convention for the Safety of Life at Sea (SOLAS), and the International Convention for the Prevention of Pollution from Ships (MARPOL), these are only minimum standards. Above those conventions each flag state has more extensive regulations for the ships in their registry.

The U.S. Coast Guard's regulations and policies are some of the more stringent within IMO White List nations. However, many of these regulations are only applicable or are only applied to U.S.-flagged vessels. OMSA has compiled a list of some of the more ready examples.

Incident Reporting:

At 46 C.F.R. § 4 is the requirement for U.S.-flagged vessels reporting marine casualties to the U.S. Coast Guard. This regulation is more stringent than those same requirements for foreign flagged vessels operating in U.S. waters. Specifically, when a vessel is operating beyond the boundary line (12 nautical miles from shore) U.S.-flagged

vessels must report incidents resulting in injuries to less than five people; groundings; allisions; loss of propulsion steering, or other impairment of the vessel its components and cargo; adverse impact to the vessel's seaworthiness; and significant harm to the environment must be reported.

Obviously, that is all information that is good for a safety regulator to have. It is especially problematic to think that the foreign-flagged vessels operating in U.S. waters are not reporting this information when such vessels are often in U.S. waters for days, week, months, and even years without coming into port. As such, unless the vessel operator or the charterer proactively reports an incident to the Coast Guard, the Coast Guard may never know about—as purely hypothetical examples—a foreign-flagged accommodation vessel losing power and floating through a crowded field, or a foreign-flagged tug hitting an installation.

Foreign Manning:

The differences in U.S.-flagged vessel regulations and foreign-flagged vessel regulations are not constrained to the vessel itself. 33 C.F.R. § 141.5 allows vessels with an ownership structure that is more than 50 percent foreign to employ foreign nationals in U.S. waters. Specifically, these foreign mariners are provided a five-year visa to come and work as a mariner in the U.S. Moreover, the employer of such a mariner does need to prove that there is a lack of U.S. mariners before the visa is issued. In fact, the vessel operator does not need to even regularly prove the vessel is more than 50 percent foreign owned; once this determination is made one time, it is good for the life of the vessel. Finally, when foreign mariners work in U.S. waters, there is not a requirement that they are paid U.S. wages. As such, many of these mariners will be paid a fraction of what a U.S. mariner would be paid, thereby creating a lucrative cost advantage for the foreign vessel operators.

The problems with how these regulations are implemented extend beyond the economic disadvantages to U.S. vessel operators. The implementation of these regulations also causes situational awareness and security problems for the U.S. Coast Guard on our OCS. These foreign mariners are issued visas with little oversight. Which is a problem when you consider the critical nature of the work that is done on the OCS and the catastrophic results that can occur when things go wrong. The problem is further exacerbated when one considers that many of these mariners come from nations that cannot be considered allies. Specifically, one of the largest pools of mariners for the offshore energy industry are Russian nationals.

Mariner Verses Industrial Worker:

On the topic of mariners is a provision in the U.S. Code which disadvantages U.S. vessel operators. 46 U.S.C. § 8701 requires all persons aboard a U.S.-flagged vessel to have a merchant mariner credential, essentially a Coast Guard license. Conversely, almost every foreign-flagged vessel only requires the marine crew to have such a license. This law has only recently been enforced by the U.S. Coast Guard; however, it is very costly for U.S. vessel operators. The amount of training and other requirements which are part of a U.S. Coast Guard license is at least \$7,000, plus the time it takes to secure such a license.

This is especially problematic because as offshore energy operations have gotten more complex, and the safety culture of vessel operators, charterers, and third parties has improved, more and more personnel have been added to the lists of people on board a vessel. These additional personnel are remote operated vehicle (ROV) pilots, crane operators, acoustic data experts, representatives of the charterers and vendors, and other professionals. They are not engaged in the operation of the vessel nor are they ever unescorted in critical areas. For this reason, in almost every country in the world, they are not required to be a licensed mariner. However, they are in the U.S. system. This is another U.S. regulation that makes a U.S. flagged vessel more expensive than a similarly equipped foreign-flagged vessel.

Portable Accommodation Modules (PAMs):

Offshore energy vessels are designed to be versatile so that they can perform a variety of missions. To customize these vessels, owners, charterers, or third-party vendors and contractors will install modules on a vessel. These

modules can be as simple as a completely freestanding shipping container with a light and a workbench inside or as complex as living quarters completely integrated into a vessel's power, water, and HVAC systems.

As the risk level varies greatly between the above examples, international industry standards have differing inspection requirements. The American Bureau of Shipping (ABS) has internationally accepted guidelines which distinguish between Portable Accommodation Modules (PAMs), which must be inspected, and industrial modules which do not “so long as the modules are unmanned during heavy weather and sufficient space for the entire complement of personnel assigned to work in the unit(s) is provided in a deckhouse, superstructure, or module complying fully with applicable structural requirements.”

In contrast to the existing industry standards, in 2016, the USCG released the CG-ENG Policy Letter 01-16, Portable Accommodation Module (PAM) Guidance, (PAM Policy Letter), which applies to “any non-integral enclosed space that is installed on a host vessel or facility, and occupied by personnel for berthing, recreational, service, or industrial purposes”—essentially any module placed on a vessel.

Not only does the PAM Policy Letter apply a single standard to modules with varying risk profiles, its requirements are onerous. The Policy Letter requires all plans, arrangements, and specifications for the module itself, where it will be placed on the vessel, and how it will be attached to the vessel and/or connected to any vessel system to be submitted to the relevant Coast Guard inspector, the Authorized Classification Society (ACS), and/or the Marine Safety Center (MSC).

In addition to plan approval, a physical inspection is required by the USCG. This requirement is difficult to comply with, as scheduling these inspections requires a minimum of two weeks. With the “just-in-time” nature of the offshore energy industry these timelines can simply not be adhered to.

That fact would not be as problematic if every vessel operating on the U.S. OCS had to comply with the PAM Policy Letter. However, that is not true. The PAM Policy letter again applies only to U.S.-flagged vessels. Foreign-flagged vessels have been able to take advantage of this requirement, taking jobs from U.S. vessels based upon the fact they could get the work done sooner because they did not have to wait for Coast Guard inspections.

Inspection Forms:

Additionally, in the last year our industry has noticed a new enforcement regime on U.S.-flagged vessels. For example, the U.S. Coast Guard has long used CG-835V “Vessel Inspection Requirements” to document deficiencies found on U.S.-flagged vessels. In the past, minor, immediately corrected items found during an inspection were not recorded on an 835 but were, instead, addressed on the spot, or documented on a “work list” and addressed immediately after the inspection. This system reflected the lower risk profile carried with addressing these items.

However, OMSA members no longer find these accommodations to be provided. Instead, every single deficiency is now documented by USCG personnel on an 835. While that might not sound like much of a burden, the problem is all deficiencies documented on an 835 need to be corrected and then the correction needs to be inspected in a follow up by a Coast Guard or other third-party inspector. Which means the vessel operator either has to wait for a Coast Guard inspector to become available or pay a third party to have the repair inspected. This change in strategy means that it might cost a vessel operator thousands of dollars and a day at the dock to have the changing of a light bulb inspected.

Once again, the 835-inspection system is only for U.S.-flagged vessels, thereby creating a cost and time-based competitive disadvantage for U.S.-flagged vessels when compared to their foreign-flagged competitors.

Lack of Jones Act Enforcement.

The above are just a few examples of how U.S.-flagged vessels carry a higher standard of safety and security when compared to foreign-flag vessels operating in the same space and providing the same services. Thus, one of the

best ways the safety of the maritime industry can be increased is to fully enforce the Jones Act. Enforcement of this statute is OMSA's second primary mission, one complementary of our mission to increase the safety of our industry.

Unfortunately, the Jones Act is not currently fully enforced as it relates to the offshore energy industry. Specifically, for the last three decades, the Federal Government has allowed foreign vessels to do work the Jones Act reserves for U.S.-flagged vessels. In addition to benefiting foreign companies, foreign ships, and foreign mariners to the detriment of U.S. mariners, shipyard works and U.S. taxpayers it also increases the number of vessels on our OCS that comply with a lower safety standard.

Unfortunately, CBP has allowed this to happen by confusing and degrading the clear standard proffered by the Jones Act by issuing interpretations of the statute that are directly contrary to the Jones Act's text, structure, and purpose.

Specifically, between 1976 and 2009, CBP issued several letter rulings which allowed foreign flag vessels to transport offshore energy cargos (called "merchandise" under the Jones Act) from U.S. ports to locations on the U.S. OCS. These letter rulings are CBP's responses to private correspondence. They were issued without any notice or comment before their publication.

Without any basis in law, CBP's letter rulings have green lit proposals by foreign vessel operators to transport merchandise to and from U.S. points on the OCS, using vessels that do not comply with the standards that U.S.-flagged vessels have to meet.

The problem started in Letter Ruling HQ 101925 (also known as T.D. 78-387 Oct. 7, 1976). In this letter, CBP permitted the foreign-built vessel to transport pipeline connectors, pipe and repair materials, wellhead equipment, and other materials from the U.S. mainland to a point on the OCS. CBP has applied—and extended—the flawed reasoning of that letter ruling dozens of times.

Furthermore, CBP has issued letter rulings that improperly narrow the definition of "merchandise" that must be transported by Jones Act qualified vessels. By its plain language, the Jones Act applies to the all transportation of "merchandise," and defines that term with broad, sweeping language by specifically including even "valueless material" in 46 U.S.C. § 55102(b), and prescribing only limited, explicit exceptions for narrow categories of merchandise, such as empty cargo containers – and only then when a foreign government extends reciprocal privileges to such items. Despite this binding law by Congress, CBP has mis-interpreted "merchandise" in an unlawfully narrow fashion, labeling as "vessel equipment" exempt from the Jones Act large categories of articles, such as oilfield equipment, that are transported by a vessel from a port and installed on the OCS by vessels that comply with a lower safety standard enforced by the U.S. Coast Guard.

2009 Revocation Effort.

CBP realized its errors and in 2009 issued a notice that it intended to revoke many of these flawed letter rulings. That notice was very candid when it admitted that the agency had not been following the law:

CBP recognizes that allowing a foreign-flagged vessel to transport articles that are not needed to navigate, operate, or maintain that vessel or for the safety and comfort of the persons on board that vessel, but rather to accomplish a[n] activity for which that vessel would be engaged, would be contrary to the legislative intent of [the Jones Act] (Proposed Modification and Revocation of Ruling Letters Relating to the Customs Position on the Application of the Jones Act to the Transportation of Certain Merchandise and Equipment between Coastwise Points, 43 Cust. B. & Dec. No. 28, at 61 (July 17, 2009)) (2009 Notice).

The Notice also stated:

CBP recognizes that allowing foreign-flagged vessels to transport merchandise from one U.S. point and install that merchandise at another point on the OCS on the condition that it merely be accomplished ‘on or from that vessel’ would be contrary to the legislative intent of [the Jones Act] (2009 Notice).

CBP failed, however, to revoke the unlawful letter rulings. On September 15, 2009, at the urging of foreign vessel owners and charterers of vessels who were benefiting from CBP’s unlawful opinions, CBP made a final decision to withdraw its proposed action and announced that a “new notice ... will be published in the *Customs Bulletin* in the near future.” While the suspension of the 2009 Notice of Revocation was disappointing, CBP did not reverse its determination that its letter rulings were inconsistent with the Jones Act.

After the 2009 Notice of Revocation:

Three things happened after CBP suspended their 2009 Notice of Revocation. First, relying on CBP’s promise to act “in the near future,” OMSA members invested \$2 billion in U.S. shipyards to construct dozens of the state-of-the-art vessels required to do the work covered by the Revocation notice. Not only were these vessels built with the latest technology, they also were, obviously, U.S.-flagged, and therefore subject to increased safety standards when operating in U.S. waters, when compared to foreign-flagged vessels as evidenced by the above examples.

Second, OMSA spent countless hours meeting with CBP and documenting violations of the Jones Act that exist under the faulty letter rulings.

Finally, CBP issued letter rulings which accurately upheld the law. Specifically, it issued three rulings referred to as the “Koff” rulings (HQ H 225102) (September 24, 2012); (HQ H235242) (November 15, 2012); and (HQ H242466) (July 3, 2013). In these rulings, CBP correctly enforced the Jones Act, stating that a foreign-flag heavy lift vessel could not move merchandise between two points on the U.S. OCS, even though the moves made by this vessel were relatively short in distance. These rulings were viewed as problematic within the offshore energy community for two reasons. First there were not U.S. vessels to conduct the operations at issue in the letter rulings. The vessels necessary are large, highly specified vessels that conduct very rare but very important projects. These projects are so rare that the small fleet of vessels that perform these operations need a worldwide steam of projects—and heavily government subsidized shipyards—to be profitable.

While the Jones Act community was pleased that these letters represented CBP adhering to the statute, those who sought to utilize these vessels were not pleased, not only because of the specific operations in question—which again happen only rarely—but also because the denial of these letter ruling requests represented the apparent change in enforcement posture evident in the Koff rulings could spill into the countless other areas of projects that happen on a daily basis in which CBP had been allowing foreign vessels to engage.

2017 Notice of Revocation.

The “near future” promised by the suspension of the 2009 revocation effort appeared to come on January 18, 2017 with CBP issuing another notice of revocation. The 2017 Notice proposed the revocation or modification of 25 letter rulings which allow foreign-flagged vessels to move energy related merchandise from U.S. ports to locations on the U.S. OCS.

Like the 2009 notice, the 2017 Notice demonstrated remarkable and laudable honesty, stating that it had created wholesale exceptions to the Jones Act that were not found in the statute. It also stated that the CBP-created loopholes were not found in statute and should be withdrawn. (See “Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment between Coastwise Points,” 51 Cust. B. & Dec. No. 3, at 4 (Jan. 18, 2017)) (2017 Notice).

OMSA and numerous OMSA members submitted comments in support of the 2017 Notice. In addition to these comments, 34 U.S. Representatives—including half of the members of this Subcommittee—and 10 U.S. Senators sent letters in support of CBP’s 2017 Notice.

Despite this second acknowledgement that they were not enforcing the laws that Congress had passed and the widespread support this Notice received, on May 10, CBP once again made a final decision to withdraw their revocation notice stating, “[b]ased on the many substantive comments [it] received,” it needed “further research on the issue” and was therefore “reconsider[ing]” whether to withdraw and/or revoke the letter rulings identified in the 2017 Notice (Withdrawal of Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment between Coastwise Points, 51 Cust. B. & Dec. No. 19, at 11 (May 10, 2017)).

This notice and comments from CBP personnel to congressional staff are unfortunate because they seem to indicate that CBP’s sustained acknowledgment that its letter rulings flouting the Jones Act do not matter. Further, the comments by CBP imply that the Administration is allowed to discuss and study if it wants to comply with the laws passed by Congress.

After Withdrawal of the 2017 Notice.

It is clear who benefited from the withdrawal of the 2017 Notice. Foreign vessel owners and their trade associations claimed victory. One email I received from a London-based trade association for the international competitors of OMSA members called it a “fantastic result” and that everyone should “celebrate a positive result.”

OMSA members were not in a celebratory mood. In fact, 12 days after CBP withdrew the 2017 Notice, one OMSA member lost a lucrative job to a foreign flag vessel. The job in question was work that was covered by the revocation notice. The foreign vessel that took this contract was able to do so by not complying with the above-described U.S. regulations and was able to underbid the OMSA member by 25 percent.

Again, OMSA attempted to work with CBP and the Administration to help them find a way to follow the law. As part of these discussions, it became apparent that CBP would not be able to move our issue forward until it was able to find a solution to the “heavy lift” problem.

This “problem” is the plain reading of the Jones Act and its prohibition on foreign-flagged vessels engaging in “any part” of the transportation of merchandise. Understanding that the U.S. market did not have any of these heavy lift vessels because of the factors listed above, OMSA worked with members of this committee and Congressional leaders, including Chairman DeFazio, Congressman Graves of Louisiana, Congressman Garamendi, Congressman Scalise, and Congressman Lowenthal to develop a legislative solution.

We worked with this Committee and these members because OMSA understood that if changes to the Jones Act are necessary, Congress should enact them. Our solution was based on an existing legislative solution that provides market transparency and the ability to utilize foreign-flagged heavy lift vessels when there is not a suitable U.S. vessel available.

2019 Revocation Effort.

Last month, CBP again issued a revocation notice. (See *Customs Bulletin* (Vol. 53, No. 38, October 23, 2019) “Proposed modification and revocation of ruling letters relating to CBP’s application of the Jones Act to the transportation of certain merchandise and equipment between coastwise points”) (2019 Notice).

Just as the 2009 and 2017 Notices had before, the 2019 notice again confirmed that a number of previously issued letter rulings are not consistent with the Jones Act and must be revoked or modified.

Unfortunately, CBP did not follow the heavy lift solution proposed by this Committee and adopted by the U.S. House of Representatives. Instead, the 2019 notice revokes the previously mentioned Koff Rulings and replaces them with interpretive guidance which will allow for foreign-flagged vessels to transport merchandise when engaged in lifting operations. This definition does not only cover those very specialized and rare operations I mentioned before. Instead, the loophole offered by CBP applies to the lifting of any offshore subsea merchandise. These are operations that the dozens of U.S. vessels that have been built since the 2009 notice conduct on a daily basis – at least, those that haven't been idled.

This definition is also very problematic because it proposes to create loopholes in the Jones Act which would allow for foreign-flagged vessels to move merchandise on the OCS, provided the foreign-flagged vessels claim such movements are necessary for safety or practical purposes.

As previously stated, OMSA and OMSA members view safety as vitally important and we stand behind the safety of the U.S.-flagged maritime industry. We have doubts that the reasoning CBP adopts will actually increase safety; that is, the CBP proposal effectively encourages additional lifts of merchandise by multiple vessels, instead of using U.S. vessels that can transport from shore and have cranes to lift. Moreover, in the statute there is not a safety exemption to the Jones Act, and we worry about operators using this flawed reasoning by CBP as a pretext to violate the law and use cheap foreign vessels. In addition, we agree that heavy lift operations need to happen; for that reason we worked with this committee to provide for a legally viable way for these operations to happen in a safe and transparent manner. And again, the CBP's new loophole covers the work that can and is conducted by U.S.-flagged vessels, vessels that when operated in U.S. waters adhere to a higher safety standard than their foreign-flagged counterparts. If safety is the goal, these U.S.-flagged vessels should be utilized.

For all of the reasons stated above, OMSA will continue to strive for increases in safety in our industry and increased Jones Act enforcement. We believe these goals will complement each other. We are grateful for the support for this mission provided by this Committee and we look forward to continuing to work with you on these important missions.

Thank you for the opportunity to testify before the committee on such an important matter. I look forward to your questions.