

# Coastwise trade in the United States

The US coastwise laws impose restrictions on the ownership and operation of vessels in US domestic trade. There are several statutes that make up the coastwise laws of the United States. For purposes of this overview, we will focus on the Coastwise Merchandise Statute (46 USC. § 55102), commonly known as the Jones Act.



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The Jones Act restricts the transportation of merchandise between coastwise points<sup>1</sup> to vessels that are owned, operated and controlled by US citizens. The purpose of the Jones Act is to ensure that US domestic trade is carried out by US built, manned, flagged and controlled ships. The Jones Act has a dual purpose which is to ensure that the nation maintains a sizable fleet of US owned and crewed commercial vessels, which are available for military use in national emergencies.

#### The Jones Act defined

Pursuant to the Jones Act, to operate in the US coastwise trade, a vessel must be a coastwise-qualified vessel. Subject to limited exceptions, such a vessel must be:

- built in the United States
- documented (ie registered) under the US flag
- manned by predominantly US crews
- never operated under a foreign-flag
- owned and operated by US-organised companies or persons that are controlled and 75% owned by US citizens at every tier of ownership.

The Jones Act does not prohibit foreign flag vessels from calling on one or more coastwise points, so long as the vessel does not transport merchandise between coastwise points. Transportation of merchandise between coastwise points must be accomplished by a coastwise-qualified vessel unless the 'continuity of the voyage' is broken. This requires showing that there is no intent that the laden merchandise will return to the United States.

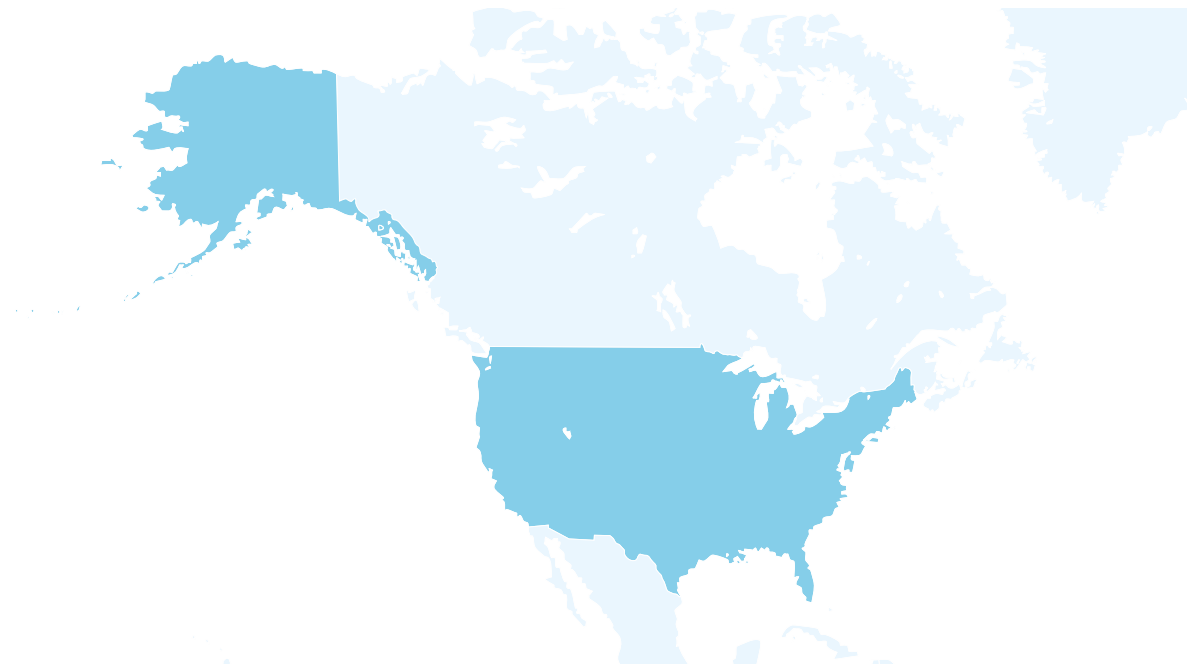
#### What is merchandise?

Merchandise is broadly defined as 'goods, wares, and chattels of every description, and includes merchandise the importation of which is prohibited<sup>2</sup>'. This definition includes 'valueless materials or any dredged material regardless of whether it has commercial value<sup>3</sup>'. Merchandise does not include equipment or supplies of the vessel, which include anything 'necessary and appropriate for the navigation, operation and maintenance of the vessel and for the comfort and safety of the persons on board<sup>4</sup>'.

Additionally, there are some instances where merchandise is sufficiently altered as to become a new and different product. The transportation of such items, such as blended chemicals or bulk products, is not subject to the Jones Act.<sup>5</sup>



The US Coast Guard (USCG) makes determinations as to a vessel's eligibility for the Jones Act trade, whereas US Customs and Border Protection (CBP) enforces the Jones Act.



### Waivers

Under applicable law, two types of Jones Act waivers exist, both of which require a demonstration that the waiver is needed 'in the interest of national defense'. The first is requested by the Secretary of Defense and is granted automatically by the Secretary of Homeland Security (DHS).<sup>6</sup> The other may be granted at the discretion of the Secretary of DHS, only if the Administrator of the Maritime Administration (MARAD) first determines that no coastwise-qualified vessels are available and capable of providing the proposed transportation.<sup>7</sup>

In September 2017, in response to Hurricanes Harvey, Irma and Maria, the Secretary of DHS issued a series of waivers at the request of the Secretary of Defense, allowing the carriage of cargo by foreign flagged vessels in the Gulf region and to and from Puerto Rico. Similar waivers have been granted following other significant weather events, as well as after oil spills such as the *Exxon Valdez* or drawdowns of the US strategic petroleum reserve after which energy supplies were affected. Historically, however, these type of waivers have been issued under the second type of waiver process (ie by the Secretary of DHS after a MARAD determination).

### Enforcement and penalties

CBP issues rulings at the request of parties seeking confirmation as to whether a contemplated transportation complies with the coastwise laws, which are publicly available to search.<sup>8</sup> Basic tenets of compliance with coastwise laws can be gleaned from reviewing prior CBP rulings, but it is advisable to seek a ruling or advice of counsel if there is any question as to whether the proposed activities will comply with the Jones Act.

The penalty for violating the Jones Act generally is forfeiture of the relevant merchandise, or an amount equal to the value of such merchandise or the actual cost of transportation, whichever is greater.<sup>9</sup> The penalty may be recovered from any person transporting the merchandise, or causing it to be transported, including the importer, consignee, master, vessel agent or vessel owner/operator. Such penalties may be mitigated upon application to CBP and explanation of extenuating circumstances.

### Club cover for breaches of US Jones Act?

Generally speaking, a member who is penalised for breach of the Jones Act would not be entitled to a reimbursement from the club. Members are obliged to comply with applicable local laws as a condition of cover. A member cannot seek reimbursement from the club for liabilities which have been incurred owing to the member's privity or willful misconduct. If the member is involved in some extraordinary event, necessitating unscheduled cargo operations which turn out to fall foul of the Jones Act, the member could submit their claims to the board for consideration pursuant to the sue & labour, omnibus or discretionary fines rules. Where there is any doubt, members are encouraged to contact the New York team for guidance.

1 Coastwise points is defined to encompass all inland waters and the US points on the Great Lakes, all points in the US territorial sea and points on the Outer Continental Shelf, such as wells, platforms and anchored vessels.

2 19 USC. §1401(c)

3 46 USC. § 55110

4 HQ 115356 (22 May 2001)

5 See 19 CFR 4.80b(a)

6 46 USC. § 501(a)

7 46 USC. § 501(b)

8 <https://rulings.cbp.gov/home>

9 46 USC. § 55102(c)