SUBCHAPTER K—REGULATIONS UNDER PUBLIC LAW 91–469

PART 390—CAPITAL CONSTRUCTION FUND

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AUTHORITY: Secs. 53501, *et seq.*, of Title 46, United States Code, formerly, sec. 607, Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1177); 49 CFR 1.66.

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§ 390.1 Scope of the regulations.

(a) *In general*—(1) *Scope.* The regulations prescribed in this part govern the capital construction fund (''fund'') authorized by 46 U.S.C. 53501 *et seq.*

(2) *Establishment of a fund.* A fund is established by an agreement (''agreement''), which is a contract between the party (''party'') and the United States.

(3) *Purpose of the fund.* Chapter 535 provides that any agreement entered into with the Secretary of Transportation must be for the purpose of providing replacement vessels, additional vessels or reconstructed vessels to be built and documented in the United States and operated in the United States foreign, Great Lakes or noncontiguous domestic trade.

(4) *Benefits of a fund.* Chapter 535 provides for the nontaxability of certain deposits of money or other property placed into a fund established pursuant to an agreement within certain ceilings. These ceilings are equal to:

(i) Earnings or gains realized from the operation of an agreement vessel;

(ii) Net proceeds realized from the sale or other disposition of an agreement vessel or from insurance or indemnification from the loss of an agreement vessel; and

(iii) Earnings from the investment or reinvestment of amounts on deposit in the fund.

(5) *Delegation.* The Secretary of Transportation has delegated the authority for matters relating to the United States Merchant Marine to the Maritime Administrator, Department of Transportation (''Maritime Administrator'').

(b) *Act.* For purposes of this part, the term Act shall mean Chapter 535 of Title 46, United States Code.

(c) *Joint regulations.* For purposes of this part, the term *joint regulations* shall mean the regulations prescribed by the Secretary of Transportation and the Secretary of the Treasury under Chapter 535 and published in title 26, part 3 of the Code of Federal Regulations (reprinted in part 391 of this chapter).

(d) *Cross references.* For rules relating to the Federal Income Tax aspects of a fund, see the joint regulations. For rules governing agreements relating to the fisheries of the United States, see the separate Secretary of Commerce regulations published in title 50, part 259 of the Code of Federal Regulations.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§ 390.2 Application for an agreement.

(a) *In general*—(1) *Application instructions.* The Maritime Administrator has adopted instructions for making application for an agreement. These instructions are contained in appendix I to

this part. MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable.

(2) *General eligibility requirements.* Chapter 535 specifies who is eligible for a fund and the application instructions specify what information is required to establish such eligibility. An applicant must:

(i) Be a citizen of the United States within the meaning of 46 U.S.C. 50501, as amended (46 U.S.C. 802, 803). See part 355 of this title for requirements for establishing United States citizenship;

(ii) Own or be the lessee of one or more eligible vessels or share thereof as defined in 46 U.S.C. 53501, or be party to a contract for the construction of one or more eligible vessels, or share thereof, as defined in paragraph (b) of § 390.5;

(iii) Have a program which furthers the purposes of the Act (see § 390.3 relating to policy considerations) and provides for the acquisition, construction or reconstruction of a qualified vessel, as defined in 46 U.S.C. 53501(5). Such provisions state that the vessel will be operated in the United States foreign, Great Lakes, noncontiguous domestic, or short sea transportation trade as defined in 46 U.S.C. 53501 and 46 U.S.C. 109(b); and

(iv) Demonstrate the financial capabilities to accomplish the program.

(b) *Information which may be required in conjunction with the application.* An applicant must provide such facts, documents and materials as the Maritime Administrator may require in considering whether to enter into an agreement. An applicant should be ready to make available such applicable materials, including, but not limited to: Design plans, data concerning the reasonableness of the cost of the program, construction contracts, financial statements, certificates of incorporation, bylaws, articles of partnership, stock ownership data and other information including judgments and pending litigation which would affect the proposed program. The specific information required is set forth in the instructions.

(Approved by the Office of Management and Budget under control number 2133–0027)

[41 FR 4265, Jan. 29, 1976, as amended at 47 FR 25530, June 14, 1982; 68 FR 62539, Nov. 5, 2003; 69 FR 61452, Oct. 19, 2004; 73 FR 56740, Sept. 30, 2008]

§ 390.3 Policy considerations.

(a) *In general.* It is the policy of the United States, as set forth in 46 U.S.C. 50501, that for the national defense and the development of its foreign and domestic commerce, the United States shall have a merchant marine: sufficient to carry a substantial portion of its water-borne export and import foreign commerce and to provide shipping service essential for maintaining the flow of such commerce at all times; capable of serving as auxiliaries in time of war or national emergency; owned and operated by United States citizens insofar as practicable and composed of the best equipped, safest and most suitable types of vessels, constructed and documented in the United States and manned with United States citizens.

(b) *Unacceptable programs*—(1) *In general.* The Maritime Administrator will not enter into an agreement where the proposed program is not, in his opinion, in consonance with the policies of the Act.

(2) *Specific unacceptable programs.* The Maritime Administrator will not enter into an agreement where the proposed program is merely to accomplish the following:

(i) Reconstruction of an existing vessel, unless such reconstruction will exceed $1,000,000 in cost, will be capitalized under the Internal Revenue Code of 1986, as amended, and the regulations thereunder and will result in a vessel which is significantly more competitive;

(ii) Acquisition of an existing vessel; or

(iii) Payment of the principal on existing indebtedness.

(3) *Waiver.* The Maritime Administrator may, for good cause shown, waive the provisions of paragraph (b)(2) of this section. For example, the Maritime Administrator may waive the monetary limit in paragraph (b)(2)(i) of

this section where the applicant proposes to reconstruct a small vessel.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§ 390.4 Description of the agreement.

(a) *In general.* The agreement consists of a standard part and appended schedules. The standard part of the agreement contains recitals, covenants and warranties which apply to all parties. The appended schedules set forth the particular program of the party and contain other information unique to each agreement. See § 390.6 (relating to administration of the agreement) for procedures and criteria for the modification of schedules.

(b) *Schedule A—Eligible agreement vessels.* Schedule A lists the names of eligible agreement vessels (as defined in § 390.5), whether owned or leased, and the allowable percentage of the depreciation ceiling, if any, available for deposit purposes by the party. See § 390.7 (relating to deposits) for allowable depreciation in the case of leased vessels.

(c) *Schedule B—Program*—(1) *In general.* Schedule B sets forth the program of the party including the cost of the program and the time in which the program shall be accomplished.

(2) *Items in Schedule B.* Schedule B shall contain:

(i) A statement describing each qualified agreement vessel (as defined in § 390.5) to be acquired, constructed or reconstructed. In the case of reconstruction, the statement will include a general description of the work to be performed;

(ii) The anticipated date on which the acquisition, construction or reconstruction of each qualified agreement vessel will commence;

(iii) The anticipated total cost, including any costs which will not be paid from the fund, of the acquisition, construction or reconstruction of each qualified agreement vessel; and

(iv) The amount to be withdrawn from the fund with respect to the acquisition, construction or reconstruction of each qualified agreement vessel.

(3) *Submission of contracts.* When a contract is executed for any acquisition, construction or reconstruction relating to the agreement, such contract shall be submitted within 30 days after execution to the Maritime Administrator who shall then determine whether such undertaking is in accordance with the program set forth in Schedule B.

(d) *Schedule C—Depositories.* Schedule C lists, by name and address, the depositories of the fund. See § 390.7 (relating to deposits).

(e) *Schedule D—Minimum deposits.* Schedule D sets forth the minimum deposits which must be made into the fund. See § 390.7 (relating to deposits) for the procedure in setting minimum deposits.

(f) *Submission of proposed schedules.* An applicant shall submit proposed schedules with his application. The specific information required in such schedules is set forth in the application instructions referred to in paragraph (a)(1) of § 390.2. A sample agreement (standard part and appended schedules) is contained in appendix II to this part.

§ 390.5 Agreement vessels.

(a) *In general.* 46 U.S.C. 53501 states the requirements for eligible, qualified and agreement vessels. The rules in this section further define such terms and state how vessels must be listed on Schedules A and B in the agreement.

(b) *Eligible agreement vessels*—(1) *Definition.* An eligible agreement vessel, which may be used to establish ceilings for deposit purposes, is any vessel:

(i) Constructed in the United States, and if reconstructed, reconstructed in the United States; the term *constructed or reconstructed in the United States* includes any vessel which was constructed or reconstructed outside of the United States but documented under the laws of the United States on April 15, 1970, or constructed or reconstructed outside of the United States for use in the United States foreign commerce pursuant to a contract entered into before April 15, 1970;

(ii) Documented under the laws of the United States;

(iii) Operated in the foreign or domestic commerce of the United States;

(iv) Engaged primarily in the waterborne carriage of men, materials, goods or wares; and

(v) Designated in the agreement as an ''eligible agreement vessel.''

(2) *Scope of the term ''eligible agreement vessel.''* For purposes of generating ceilings for deposits under 46 U.S.C. 53505 and the joint regulations the term *eligible agreement vessel* includes any:

(i) Tug or barge;

(ii) Vessels which have been contracted for or are in the process of construction; and

(iii) Share interest in a vessel; the party is considered to have a share interest in an eligible agreement vessel if the party has the right to use the vessel to generate income or a right to the proceeds or a portion of the proceeds from its use even if the party does not have a proprietary interest in the vessel for purposes of State or Federal law.

(3) *Foreign or domestic commerce.* For the purpose of paragraph (b)(1)(iii) of this section the term *foreign or domestic commerce* means the water-borne carriage of men, materials, goods or wares between:

(i) Two points in the United States;

(ii) A point in the United States and a point in a foreign country; or

(iii) Two points in the same foreign country or points in two different foreign countries.

(c) *Qualified agreement vessels*—(1) *Definition.* A qualified agreement vessel which may be acquired, constructed or reconstructed with the aid of qualified withdrawals, is any vessel:

(i) Constructed in the United States, and if reconstructed, reconstructed in the United States; the term *constructed or reconstructed in the United States* includes any vessel which was constructed or reconstructed outside of the United States but documented under the laws of the United States on April 15, 1970, or constructed or reconstructed outside of the United States for use in the United States foreign commerce pursuant to a contract entered into before April 15, 1970;

(ii) Documented under the laws of the United States;

(iii) Operated in the United States foreign, Great Lakes, noncontiguous domestic, or short sea transportation trade.

(iv) Engaged primarily in the waterborne carriage of men, materials, goods or wares; and

(v) Designated in the agreement as a ''qualified agreement vessel.''

(2) *Scope of the term ''qualified agreement vessel.''* For purposes of making qualified withdrawals under 46 U.S.C. 53509 and the joint regulations the term *qualified agreement vessel* includes any:

(i) Cargo handling equipment which the Maritime Administrator determines will be used primarily on a qualified agreement vessel. Normally any auxiliary equipment which is ordinarily carried from port to port, excluding equipment that needs frequent replacement due to normal wear and tear, and is used in conjunction with the loading or unloading of the vessel is deemed to be cargo handling equipment;

(ii) Ocean-going towing vessel or barge which the Maritime Administrator determines is suitable for the trade in which the party intends to operate such vessel or barge, or any comparable vessel or barge operated on the Great Lakes which is suitable for its intended trade; and

(iii) Proprietary interest in a qualified agreement vessel as, for example, that which may result from a joint venture or partnership.

(3) *Foreign trade.* Foreign trade shall mean the water-borne carriage of men, materials, goods or wares between:

(i) A point in the United States and a point in a foreign country;

(ii) Two points in the domestic trade permitted under the first sentence of 46 U.S.C. 53101 note; or

(iii) Two points in the same foreign country or points in two different foreign countries in the case of liquid and dry bulk cargo carrying services provided the party demonstrates that such operating flexibility is needed to compete with foreign flag vessels in its operations or in competing for charters.

(4) *Great Lakes trade.* Great Lakes trade shall mean the waterborne carriage of men, materials, goods or wares between points on the Great Lakes and their connecting and tributary waterways in the immediate environs of the Great Lakes.

(5) *Noncontiguous domestic trade.* Noncontinguous domestic trade shall mean the water-borne carriage of men, materials, goods or wares between:

(i) The contiguous 48 States on the one hand and Alaska, Hawaii, Puerto Rico and the insular territories and possessions of the United States on the other hand; and

(ii) Any point in Alaska, Hawaii, Puerto Rico and the insular territories and possessions of the United States, and any other point in Alaska, Hawaii, Puerto Rico and such territories and possessions.

(6) Short Sea Transportation Trade. The term short sea transportation trade means the carriage by vessel of cargo—

(i) That is:

(A) Contained in intermodal cargo containers and loaded by crane on the vessel; or

(B) Loaded on the vessel by means of wheeled technology; and

(ii) That is:

(A) Loaded at a port in the United States and unloaded either at another port in the United States or at a port in Canada located in the Great Lakes Saint Lawrence Seaway System; or

(B) Loaded at a port in Canada located in the Great Lakes Saint Lawrence Seaway System and unloaded at a port in the United States.''

(7) *Nonqualified operations.* Nonqualified operations for qualified agreement vessels include:

(i) Positioning vessels in support of domestic operations prohibited by Chapter 535;

(ii) Use of barges as docks and ramps;

(iii) Except as provided in (c)(8) (i) and (ii) of this section:

(A) Foreign-to-foreign trade, consisting of voyages originating and ending in foreign ports, with no intermediate domestic cargo operation, and

(B) Trade from foreign ports to and form U.S. oil rigs in international waters; and

(iv) Bunkering in support of nonqualified trade operations.

(8) *Permissible operations.* Permissible operations for qualified agreement vessels include:

(i) Foreign-to-foreign trade in the case of vessels operating as part of U.S.-flag service and carrying cargo originating in or destined for U.S. ports, i.e., U.S.-flag feeder vessels;

(ii) Foreign-to-foreign trade, including the lightering of foreign-flag vessels, in the case of vessels carrying liquid or dry bulk cargoes when the carrier has demonstrated to the Administrator:

(A) The need for such foreign-to-foreign shipments (as required by 46 U.S.C. 109 and paragraph (c)(iii) of this section), and

(B) That the proposed cargo would qualify as liquid or dry bulk cargo;

(iii) Ship assist work, including lightering or shifting of a vessel at the end or beginning of a noncontiguous domestic, short sea transportation trade, Great Lakes or U.S. foreign trade voyage. In addition, the lightering of foreign-flag vessels in U.S. ports is permitted.

(9) *United States construction.* An agreement vessel is considered to be of United States construction if:

(i) It is built entirely in a shipyard or shipyards within any of the United States and the Commonwealth of Puerto Rico;

(ii) All components of the hull and superstructure are fabricated in the United States; and

(iii) The vessel is assembled entirely in the United States.

(d) *Agreement vessels*—(1) *Definition.* The term *agreement vessel* means any eligible or qualified vessel which is subject to an agreement.

(2) *Scope of the term ''agreement vessel.''* For purposes of generating ceilings and making qualified withdrawals the term *agreement vessel* includes containers, trailers or barges which are part of the complement of an agreement vessel. The complement is limited to three times the container, trailer or barge capacity of the vessel, unless the Maritime Administrator shall agree to a different complement.

[41 FR 4265, Jan. 29, 1976, as amended at 55 FR 34928, Aug. 27, 1990; 73 FR 56740, Sept. 30, 2008; 74 FR 17097, Apr. 14, 2009]

§ 390.6 Administration of the agreement.

(a) *In general.* The Maritime Administrator will administer and enforce the agreement in a manner which will insure that the fund is properly established, that the assets in the fund are used to accomplish the program and that the party fully complies with all obligations and responsibilities. This

section specifies the reports which must be submitted to the Maritime Administrator and sets forth the procedures for administering the agreement.

(b) *Reporting requirements*—(1) *In general.* This paragraph describes the reports required to be submitted to the Maritime Administrator by the party.

(2) *Submission dates.* Reports must be submitted annually, in triplicate, for the party's taxable year not later than 90 days after the close of each reporting period. An affidavit regarding the operation of qualified agreement vessels as required by paragraph (b)(7) of this section shall be submitted concurrently with each annual report.

(3) *Cumulation.* The annual report submitted following the close of the party's taxable year shall be cumulative for the party's entire taxable year.

(4) *Certification.* The annual report shall be accompanied by an opinion of an independent certified public accountant to the effect that exhibits (see paragraph (b)(5) of this section) composing the accounting have been prepared in accordance with all published orders, rules, regulations and instructions issued or adopted by the Maritime Administrator.

(5) *Format.* The reports shall consist of the following exhibits:

(i) ''Exhibit A''—a summary of cash, securities and stock on deposit (showing the adjusted basis for securities and stock), including a subtotal of cash, securities and stock on deposit, net amount of accrued deposits to and accrued withdrawals from the fund and the fund total at the end of the period, and if applicable, a summary of the portion of the fund which represents a ''CCF: Security Amount'' pursuant to an Agreement Covering the Dual Use of a Capital Construction Fund;

(ii) ''Exhibit A–1''—a summary of balances in all cash accounts within the fund at the end of the period;

(iii) ''Exhibit A–2''—a summary of the securities and stock within the fund at the end of the period (showing both the adjusted basis and fair market value of each item);

(iv) ''Exhibit A–3''—a summary of the accrued deposits to and accrued withdrawals from the fund at the end of the period;

(v) ''Exhibit B''—a transcript of transactions occurring within the fund during the period by date;

(vi) ''Exhibit C''—a summary showing the opening balance, additions thereto due to deposits to the fund, subtractions therefrom due to withdrawals from the fund, and the closing balance for the period for each of the three separate accounts: ordinary income account, capital gains account and capital account; and

(vii) ''Exhibit D''—a summary, by vessel, of the qualified withdrawals made from the fund during the period.

(6) *Sample report.* A sample report is contained in appendix III of this part.

(7) *Affidavit.* An official of the party who is knowledgeable about the operation of the party's qualified agreement vessels shall submit an affidavit for each taxable year indicating that the party's qualified agreement vessels operated only in qualified trades during such taxable year, or if any such vessel operated in a trade other than a qualified trade, the details of such operation. See § 390.5(c) of this part for a description of what constitutes a qualified trade. A sample affidavit is contained in appendix V of this part.

(8) *Failure to submit reports.* The failure by a party to make the timely submission of any report or affidavit required by this section shall constitute a material breach of the agreement unless the Maritime Administrator shall determine that such failure was excusable. See § 390.13 (relating to the failure to fulfill a substantial obligation under the agreement).

(c) *Review in the event of changed circumstances.* Each agreement provides that the party shall promptly inform the Maritime Administrator of any change in circumstances which affects its agreement. Such changes may be mere form, such as a change of the party's name, or substantive such as the sale of an eligible agreement vessel. The Maritime Administrator may require a full review of the agreement if in his opinion the changed circumstances materially affect the agreement.

(d) *Modification of agreement*—(1) *In general.* The agreement is subject to

modification and amendment by mutual consent. However, except in special circumstances, the Maritime Administrator will not consent to modification or amendment of the standard part of the agreement unless such modification or amendment is of uniform application to similarly situated parties. The Maritime Administrator will normally agree to modification or amendment of the schedules subject to the restriction in paragraph (d)(2) of this section.

(2) *Limitations on modification of schedules.* The Maritime Administrator will not agree to modification or amendment of the schedules (as described in § 390.4) when, in his opinion, such modification or amendment delays imposition of Federal Income Tax in a manner not contemplated or authorized by the Act, or if the proposed modification or amendment would not be in consonance with the policies of the Act, these rules and regulations or the joint regulations.

(e) *Fund adjustment upon modification.* Upon application by a party for modification or amendment of the agreement, the Maritime Administrator will determine whether the requested modification or amendment would result in an amount held in the fund in excess of an amount determined to be necessary or appropriate to carry out the program. If such an excess is created in the fund by such modification or amendment, the Maritime Administrator will require a nonqualified withdrawal (as defined in § 390.10) of such excess as a condition to the modification or amendment.

[41 FR 4265, Jan. 29, 1976, as amended at 41 FR 39751, Sept. 16, 1976; 55 FR 34928, Aug. 27, 1990]

§ 390.7 Deposits into the fund.

(a) *In general*—(1) *Source of deposits.* 46 U.S.C. 53505 provides ceilings within which fund deposits may be made. This section provides rules for the qualification of depositories, timing of deposits, the type of property which may be deposited and the level of deposits.

(2) *Tax aspects of deposits.* For the Federal Income Tax aspects of deposits into a fund, see 46 U.S.C. 53507 and § 3.3 of the joint regulations (§ 391.3 of this chapter).

(b) *Depositories*—(1) *In general.* 46 U.S.C. 53506 provides that amounts in a fund must be kept in the depository or depositories specified in the agreement and be subject to such trustee or other fiduciary requirements as the Maritime Administrator may specify.

(2) *Qualifications.* The Maritime Administrator has established general qualifications for depositories for all maritime programs authorized under the Act, including the capital construction fund program. The general qualifications are published in part 351 of this title.

(3) *Fiduciary requirements.* Except in unusual circumstances, the Maritime Administrator will not impose special trustee or other fiduciary requirements upon depositories of a fund. For rules relating to a fund held in trust for investment purposes, see paragraph (h) of this section.

(4) *Type and name of accounts.* Unless otherwise specified in the agreement, the party may select the type or types of accounts in which assets of the fund may be deposited. For example, the party may select a savings account for cash and a trust account for intangible property which is held in the fund. Each account shall be in the name of the party and identified as a capital construction fund account.

(5) *Compensating balances.* The obligation of the assets in the fund as a compensating balance shall constitute a material breach of the agreement.

(c) *Timing of deposits*—(1) *In general.* 46 U.S.C. 53507(b) provides that deposits shall not be taxable only when they are made in accordance with the agreement and not later than the time provided in the joint regulations.

(2) *Deposits prior to the time provided in joint regulations.* The party may make deposits for any taxable year prior to the time provided in joint regulations in accordance with the following rules:

(i) Amounts representing taxable income attributable to the operation of agreement vessels for a taxable year may be deposited at any time during such taxable year, and thereafter within the time provided for in the joint regulations, based upon the party's estimated Federal taxable income for such vessels for the entire taxable year;

(ii) Amounts representing net proceeds from the sale or other disposition (including mortgaging) with respect to agreement vessels may be deposited when accrued and thereafter within the time provided for in the joint regulations;

(iii) Amounts representing receipts from the investment or reinvestment of amounts held in a fund may be deposited when accrued and thereafter within the time provided for in the joint regulations; and

(iv) Amounts representing depreciation with respect to agreement vessels for a taxable year may be deposited at any time during such taxable year, and thereafter within the time provided for in the joint regulations.

(3) *Deposits required prior to the time provided in joint regulations.* The Maritime Administrator may require that deposits be made earlier than the latest time provided for in the joint regulations. Generally, the Maritime Administrator will require early deposits only when necessary for the party to meet its agreed upon obligations.

(d) *Types of property which may be deposited into a fund*—(1) *Form of deposits.* Deposits may be made into a fund only in the form of money or intangible property of the type in which assets of the fund may be invested pursuant to 46 U.S.C. 53506, the Agreement, and these regulations, other than the securities or common and preferred stock of the party or a company related to the party within the meaning of paragraph (d)(2) of this section, except that in the case of deposits representing net proceeds from the sale or other disposition of any agreement vessel to other than a purchaser or transferee related to the party (within the meaning of paragraph (d)(2) of this section) or deposits representing receipts from the investment or reinvestment of amounts held in a fund, any intangible property received may be deposited.

(2) *Related purchaser.* For purposes of this paragraph a purchaser or transferee is a related person to the party if—

(i) The relationship between purchaser or transferee and the party would result in disallowance of losses under section 267 or 707 of the Code, or

(ii) The purchaser or transferee and the party are members of the same controlled group of corporations (as defined in section 1563(a) of the Code, except that ''more than 50 percent'' shall be substituted for ''at least 80 percent'' each place it appears therein).

(e) *Level of deposits*—(1) *In general.* 46 U.S.C. 53504 states that the agreement must provide for the deposit in the fund of amounts agreed upon but only to the extent necessary or appropriate to provide for qualified withdrawals to accomplish the program set forth in the agreement.

(2) *Maximum level of deposits.* The party shall not be permitted to deposit more than is necessary to complete its program. See § 390.4 (relating to description of the agreement).

(3) *Minimum level of deposits.* Each agreement shall contain an agreed upon minimum deposit schedule applicable to each three-year period under the agreement. The minimum deposit shall be calculated taking into consideration the scheduling of the anticipated qualified withdrawals. The purpose of the minimum deposit is to insure that the party has made a sufficient commitment to accomplish its program. See § 390.13 (relating to failure to fulfill a substantial obligation under the agreement).

(4) *Determination of minimum deposits.* The minimum deposit shall be set by the Maritime Administrator. In determining the minimum deposit, the Maritime Administrator shall give consideration to the anticipated ceilings, financial history, current conditions and future business expectations of the party.

(5) *Waiver of minimum deposit.* The Maritime Administrator shall waive a failure to meet the minimum deposit schedule when the party has deposited all allowable taxable income as specified in Article 5(c) of this agreement attributable to the operation of agreement vessels, net proceeds from all sales or other dispositions of agreement vessels, all receipts from the investment or reinvestment of amounts held in the fund and all earned depreciation on agreement vessels. The Maritime Administrator may also waive the minimum deposit schedule in any case where the party can demonstrate

that such deposits will adversely affect its ability to operate its agreement vessels. In the event of a waiver, the Maritime Administrator may require modification of the schedules. See §390.6 (relating to administration of the agreement).

(6) *Selection of ceiling.* Except as may be otherwise provided in the agreement or these rules and regulations, the party may choose the ceilings with respect to which deposits are made.

(f) *Allocation of depreciation deposits*—(1) *In general.* 46 U.S.C. 53505(b) provides that in the case of a lessee of an eligible agreement vessel the maximum amount which may be deposited with respect to such vessel, under the depreciation ceiling, shall be reduced by any amount which the owner is required or permitted to deposit with respect to such vessel under its depreciation ceiling.

(2) *Method of allocation.* When an agreement vessel is leased, the party's agreement shall fix a percentage of the annual depreciation which the party may deposit. The percentage shall be that agreed upon between the lessors and the lessees unless the Maritime Administrator determines that the agreed upon percentage will result in an accumulation of assets in the fund or funds which is greater than or less than an amount necessary or appropriate to carry out the party's program. See paragraph (e) of this section (relating to level of deposits).

(g) [Reserved]

(h) *Funds held in trust for investment purposes.* A fund may be transferred in whole or in part to the control of an unrelated trustee for investment purposes with the prior written permission of the Maritime Administrator. The Maritime Administrator shall approve such a transfer when:

(1) The trustee meets the requirements for a depository under paragraph (b) of this section;

(2) The trust instrument provides that all investment restrictions stated in 46 U.S.C. 53506 and §390.8 of these regulations will be observed;

(3) The trust instrument provides that the trustee will give consideration to the party's withdrawal requirements under the agreement when investing the fund;

(4) The trustee agrees to be bound by all rules and regulations which have been or will be promulgated governing the investment or management of the fund.

(i) *Federal ship mortgage guarantee or insurance.* A fund may serve in lieu of a Restricted Fund required in connection with Federal Ship Mortgage Guarantee or Insurance under 46 U.S.C. Chapter 537 and the regulations thereunder upon approval by the Maritime Administrator. Approval by the Maritime Administrator shall be conditioned upon the execution by the party of an agreement, satisfactory in form and substance to the Maritime Administrator, governing the dual use of the fund. Applications for permission to use the fund in this dual capacity should be made in writing to the Secretary, Maritime Administration.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§390.8 Investment of the fund.

(a) *In general.* 46 U.S.C. 53506 provides that assets in the fund must be invested in accordance with certain restrictions. The rules in this section provide for the quality of securities, restrictions on the type of stock in which a fund may invest, related company investments and miscellaneous prohibited activities.

(b) *Permissible investments*—(1) *In general.* The party, at its discretion, or the party's trustee, if established pursuant to paragraph (h) of §390.7, may invest in the types of securities specified in this paragraph.

(2) *Interest bearing securities.* The party or the party's trustee may invest in any obligation of the United States Government, including any agency or instrumentality thereof, and in the interest bearing securities listed below:

(i) Any obligation of a state or local government, including any agency or instrumentality thereof, or any domestic obligation, which is rated by Moody's Investors Service, Inc., as ''Baa'' or better or by Standard and Poor's Corporations as ''BBB'' or better;

(ii) Bankers' acceptances, certificates of deposit, repurchase agreements, and short-term commercial obligations,

provided that the latter must be readily marketable and rated not lower than ''Prime'' by Moody's Investors Services, Inc. or ''B'' by Standard & Poor's Corp.; and

(iii) Any unsubordinated obligation of an issuer that has any unsecured securities with a credit rating of ''Baa'' or better if rated by Moddy's Investors Services, Inc., or ''BBB'' or better if rated by Standard and Poor's Corporation, or by an issuer that has a commercial paper rating not lower than ''Prime'' by Moody's Investors Service, Inc. or ''B'' by Standard and Poor's Corporation.

(3) *Guaranteed interest bearing securities.* The party or the party's trustee may invest in interest bearing securities which do not meet the investment criteria set forth in this paragraph (b) *Provided,* That:

(i) The types of interest bearing securities and their terms and conditions are acceptable to the Maritime Administration;

(ii) All principal and interest of the interest bearing securities are unconditionally guaranteed in a form satisfactory to the Maritime Administration and neither the securities nor the obligation to pay interest on the securities is that of a party or a company related to the party within the meaning of section 482 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder; and

(iii) The guarantor, which may be an affiliate of the party, must be either a person that has any unsecured securities with a credit rating of ''Baa'' or better if rated by Moody's Investors Services, Inc., or ''BBB'' or better if rated by Standard & Poor's Corporations, or a person whose commercial paper rated not lower than ''Prime'' by Moody's Investors Services, Inc. or ''B'' junior securities are rated in the highest grade by Moody's Commercial Paper Service or in one of the two highest grades by Standard & Poor's Corporations, and is otherwise acceptable to the Maritime Administration.

(4) *Common and preferred stocks.* The party or the party's trustee may invest in the following common and preferred stocks:

(i) Stock of domestic corporations which is fully listed and registered at the time of purchase on an exchange registered with the Securities and Exchange Commission as a national securities exchange and which would be acquired by prudent men of discretion and intelligence in such matters who are seeking a reasonable income and the preservation of their capital; and

(ii) Preferred stock of a corporation if the common stock of that corporation meets the requirements of this paragraph and if the preferred stock of such corporation would meet such requirements but for the fact that such preferred stock cannot be listed and registered as required because it is nonvoting stock.

(c) *Limitations on investments*—(1) *Interest bearing securities.* The value of securities of any one issuer held in the Fund compared to the value of the total assets of the fund shall not exceed 10 percent in the case of nongovernmental securities referred to in paragraph (b)(2)(i) of this section.

(2) *Common and preferred stock.* The value of common and preferred stock of any one issuer held in the fund shall not exceed 25 percent of the value of the total assets of the fund. In no case may more than 60 percent of the value of the total assets of the fund be invested in common or preferred stock.

(3) *Margin or short sale.* No interest bearing securities or common and preferred stock shall be purchased on margin or be sold short for the account of a fund.

(4) *Related company investments.* Funds shall not be invested in the interest bearing securities or common and preferred stock of the party or of a company related to the party within the meaning of section 482 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder.

(5) *Subsequent investments.* If at any time the fair market value of the interest bearing securities or common and preferred stock in the fund is more than the limitations stated in this paragraph (c), any subsequent deposit to or withdrawal from the fund or investment made within the fund shall be made in such a way as tends to restore the fund to a posture in which the fair market values of such securities or stock do not exceed such limitations. Values of such securities and stocks

shall be the fair market values as determined by the party on the last day of each semi-annual and annual reporting period.

[41 FR 4265, Jan. 29, 1976, as amended at 42 FR 34882, July 7, 1977; 43 FR 51636, Nov. 6, 1978; 55 FR 34928, Aug. 27, 1990; 73 FR 56740, Sept. 30, 2008]

§ 390.9 Qualified withdrawals.

(a) *In general*—(1) *Defined.* In accordance with 46 U.S.C. 53509, qualified withdrawals are those made from a fund in accordance with the agreement, but only if they are for:

(i) The acquisition, construction or reconstruction of a qualified agreement vessel;

(ii) The acquisition, construction or reconstruction of barges or containers which are part of the complement of a qualified agreement vessel; or

(iii) The payment of the principal on indebtedness incurred in connection with the acquisition, construction or reconstruction of a qualified agreement vessel or a barge or container which is part of the complement of a qualified agreement vessel.

(2) *Tax aspects of a qualified withdrawal.* For the tax aspects of a qualified withdrawal, see 46 U.S.C. 50510 and §3.6 of the joint regulations (§391.6 of this chapter).

(b) *Purpose of qualified withdrawals*—(1) *Acquisition of qualified agreement vessels.* (i) The term *acquisition of a qualified agreement vessel* shall mean any transaction, including a corporate merger, where the party obtains a proprietary interest in an existing vessel and such a proprietary interest will, in the opinion of the Maritime Administrator, further the purposes and policies of the Act. See §390.3 (relating to policy considerations).

(ii) Qualified withdrawals for the acquisition of a qualified agreement vessel shall only be allowed for amounts determined by independent appraisal to be the fair market value of the vessel, at the time of the acquisition, or the actual cost directly allocable to acquiring only the vessel, whichever is less.

(2) *Construction of qualified agreement vessels.* The term *construction of a qualified agreement vessel* shall mean the construction of a vessel with the aid of qualified withdrawals.

(3) *Reconstruction of qualified agreement vessels.* Once an agreement has been entered into, the term *reconstruction of a qualified agreement vessel* shall mean any improvement to an existing vessel which increases the vessel's competitiveness and involves an aggregate sum in excess of $100,000. The Maritime Administrator may waive the monetary limit in this subparagraph in the case of small vessels.

(4) *Payment of principal on indebtedness.* 46 U.S.C. 53509(a)(2) provides that any indebtedness which the party proposes to pay through qualified withdrawals must be shown to the satisfaction of the Maritime Administrator to have been incurred in direct connection with the acquisition, construction or reconstruction of a qualified agreement vessel. The fact that indebtedness is secured by an interest in a qualified agreement vessel is insufficient by itself to demonstrate the direct connection. It is not necessary that the lien or mortgage securing the indebtedness be on the vessel. For example, if the party mortgages an office building in order to finance the construction of a vessel, payments of principal on the mortgage may be made with qualified withdrawals.

(c) *Limitations on qualified withdrawals*—(1) *Capitalized costs requirement.* All qualified withdrawals must be for costs which are capitalized under the Internal Revenue Code of 1986, as amended, and the regulations thereunder and so reported on the party's Federal Income Tax return.

(2) *Executed contract requirement and reimbursement of general funds.* Qualified withdrawals may be made for the purpose of reimbursing general funds subject to the following limitations:

(i) Qualified withdrawals may not be made until a construction, reconstruction or acquisition contract is executed. However, the party may reimburse its general funds for expenditures applicable to the construction, reconstruction or acquisition contract which occurred prior to the date of contracting if such reimbursements are made within 120 days from the date of such contracting.

(ii) The party may also reimburse its general funds for expenditures which could have been paid initially by a qualified withdrawal, if such reimbursements are made within 120 days of such expenditure.

(iii) The party may reimburse its general funds for expenditures made prior to the time an agreement or amendment is entered into, but after the party has made application therefor, if such expenditures would otherwise qualify for reimbursement pursuant to paragraphs (c)(3) (i) and (ii) of this section but for the fact that an agreement or amendment has not been executed, and if such reimbursement is effected within 120 days of the execution of an agreement or amendment.

(3) *Prepayment of indebtedness.* The party shall not prepay principal on indebtedness with qualified withdrawals without the prior written consent of the Maritime Administrator.

(4) *Qualified withdrawals paid to related persons.* A withdrawal, including payments for indebtedness, paid to a related person, within the meaning of section 482 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder, shall not constitute a qualified withdrawal unless the Maritime Administrator determines that no portion of such payment constitutes a dividend, a return of capital or a contribution of capital under the Internal Revenue Code. Transactions which include payments to a related person, will be approved if the cost of the item to be acquired, constructed or reconstructed through qualified withdrawals is or was at the time of the acquisition, construction or reconstruction its fair market value. The party must obtain the prior written permission of the Maritime Administrator before any qualified withdrawals may be paid to a related person. Any such withdrawal prior to approval shall be a nonqualified withdrawal.

(d) *Permission to make qualified withdrawals.* Once a program has been approved, prior approval of the Maritime Administrator is not required for specific qualified withdrawals except as provided in paragraphs (c)(4) and (c)(5) of this section. However, the Maritime Administrator will give prior approval to qualified withdrawals upon written request.

[41 FR 4265, Jan. 29, 1976, as amended at 55 FR 34929, Aug. 27, 1990; 73 FR 56740, Sept. 30, 2008]

§ 390.10 Nonqualified withdrawals.

(a) *In general*—(1) *Defined.* Any withdrawal from a fund which is not a qualified withdrawal is a nonqualified withdrawal.

(2) *Tax aspects of a nonqualified withdrawal.* For the tax aspects of a nonqualified withdrawal, see 46 U.S.C. 53511 and § 3.7 of the joint regulations (§ 391.7 of this chapter).

(b) *Permission required*—(1) *In general.* The prior written permission of the Maritime Administrator is required before a nonqualified withdrawal may be made.

(2) *Failure to secure permission.* A nonqualified withdrawal made without the prior written permission of the Maritime Administrator shall constitute a material breach of the agreement unless the Maritime Administrator shall determine that failure to obtain prior written consent was excusable. See § 390.13 (relating to failure to fulfill a substantial obligation under the agreement).

(3) *Types of nonqualified withdrawals which will be permitted.* Generally, the Maritime Administrator will give permission to make nonqualified withdrawals when:

(i) The party has incurred operating losses from the operations of agreement vessels which have impaired his working capital and it becomes necessary to reimburse its general funds to the extent of such losses;

(ii) The party desires to make an expenditure for research, development or design and such an expenditure is incident to new and advanced ship design, machinery and equipment;

(iii) The withdrawal would be a qualified withdrawal except for the fact that there is no tax basis left that can be reduced; or

(iv) The party demonstrates, to the satisfaction of the Maritime Administrator, that it cannot fulfill its program due to circumstances beyond its

control or due to a change in circumstances which makes the completion of its program economically unfeasible.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§ 390.11 Sale or other disposition of agreement vessels.

(a) *Eligible agreement vessels.* The sale or other disposition (including mortgages) of eligible agreement vessels shall not require prior approval of the Maritime Administrator, but shall require written notification within 10 days after the sale or other disposition. Such notification shall include a description of the transaction, the identity of the transferee, the proceeds to be realized, the date of the transaction and whether the proceeds will be deposited into the fund.

(b) *Qualified agreement vessels*—(1) *In general.* If a qualified agreement vessel whose basis has been reduced through the application of qualified withdrawals is sold or disposed of (including mortgaged) within one year, interest on the amount of gain attributable to the basis reduction shall attach if the Maritime Administrator determines that the disposition was contrary to the policies of the Act, the joint regulations or these regulations. See § 390.13 (relating to failure to fulfill a substantial obligation under the agreement).

(2) *Period of one year defined.* The one-year period shall mean 365 days from the date of final delivery from the shipyard in the case of construction or reconstruction and 365 days from the date of first loading of the vessel in the case of an acquisition.

(3) *Prior approval.* The party shall obtain the written approval of the Maritime Administrator prior to the sale or other disposition (including mortgage) of a qualified agreement vessel.

(4) *Deposit requirement.* The Maritime Administrator will not normally require the deposit of the net proceeds from the sale of a qualified agreement vessel but shall require the deposit of the net proceeds from the mortgage of a qualified agreement vessel for which qualified withdrawals from the fund have been made.

(c) *Sale or other disposition of agreement vessels to related persons*—(1) *In general.* Section 3.2(c)(4) of the joint regulations (§ 391.2(c)(4) of this chapter) requires that the net proceeds from the sale or other disposition of an agreement vessel shall be the fair market value of the vessel when the party and the purchaser are owned or controlled directly or indirectly by the same interests within the meaning of section 482 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder. In such case, the party shall furnish data to establish that the amount realized or to be realized is the fair market value.

(2) *Data to be submitted.* Sufficient data must be submitted to support a determination by the Maritime Administrator of the fair market value including the original cost of the vessel, dates of original delivery, acquisition and reconstruction, as applicable, cost of improvements, sales price, costs of sale and any other information which would assist in making such determination.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§ 390.12 Liquidated damages.

(a) *Liquidated damages*—(1) *In general.* Each agreement entered into under Chapter 535 shall contain a liquidated damages provision for the purpose of placing the party into its prefund position for each day a qualified agreement vessel is operated in violation of the geographic trading restrictions contained in the Act and § 390.5. The liquidated damages provision requires that the party repay the time value of the deferral of Federal Income Tax which the party has received.

(2) *Calculation of liquidated damages.* The liquidated damages specified in this paragraph shall be calculated as follows:

(i) With respect to each vessel operated in violation of the applicable trading restrictions, add (A) the sum of qualified withdrawals for the vessel which have been made from the ordinary income and capital gain accounts to the date of breach, and (B) the amount of any unpaid principal on indebtedness for the vessel which may be paid from the fund less any portion of such amount which by operation of law

must be withdrawn from the capital account balance on deposit in the fund on the date of the breach.

(ii) Multiply the total derived in paragraph (a)(2)(i) of this section by an assumed effective Federal Income Tax rate of 30 percent;

(iii) Compound the product derived in paragraph (a)(2)(ii) of this section at 8 percent annually (A) for 20 years, if the duration of the trading restrictions applicable to the vessel is 20 years in accordance with paragraph (b)(1)(i) of this section; (B) for 10 years, if the duration of the trading restrictions applicable to the vessel is 10 years in accordance with paragraphs (b)(1) (ii), (iii) or (iv) of this section; or (C) for 5 years, if the duration of the trading restrictions applicable to the vessel is 5 years in accordance with paragraph (b)(1)(iv) of this section.

(iv) Subtract the amount calculated in paragraph (a)(2)(ii) of this section from the product derived in paragraph (a)(2)(iii) of this section;

(v) Divide the result derived in paragraph (a)(2)(iv) of this section by 2; and

(vi) Divide the result derived in paragraph (a)(2)(v) of this section (A) by 7300 (days) if the duration of the trading restrictions applicable to the vessel is 20 years; (B) by 3650 (days) if the duration of the trading restrictions applicable to the vessel is 10 years; or (C) by 1825 (days) if the duration of the trading restrictions applicable to the vessel is 5 years.

(3) *Formula.* The calculation of the daily rate of liquidated damages may be reduced to the following formula:

$$X = [I(QT) - S]/2D$$

Where:

X = Daily rate in dollars.
Q = Summation of qualified withdrawals, other than withdrawals from the capital account, permitted from the fund.
T = Assumed effective tax rate of 30 pct.
S = Tax savings = $(Q)(T)$.
I = Discount factor to be applied for vessels subject to 20-yr trading restriction = 4.660957; for vessels subject to 10-yr trading restriction = 2.158925; for vessels subject to 5-yr trading restriction = 1.469328 (value of $1 compounded at 8 pct for 20, 10, and 5 yr respectively).
D = 7,300 d for vessels subject to 20-yr trading restriction; 3,650 d for vessels subject to 10-yr trading restriction; 1,825 d for vessel subject to 5-yr trading restriction.

The formula may be further reduced to:

$$X = 0.5491436Q/7{,}300$$

for vessels subject to 20 year trading restriction,

$$X = 0.1738388Q/3{,}650$$

for vessels subject to 10 year trading restriction,

$$X = 0.0703992Q/1{,}825$$

for vessels subject to 5 year trading restriction.

(4) *Example.* The provisions of paragraphs (c)(2) and (c)(3) of this section may be illustrated by the following example:

Assume that a qualified agreement vessel has been constructed with qualified withdrawals from a fund. The total cost was $20 million of which $6 million was withdrawn from the fund for a downpayment. Pursuant to the agreement, an additional $4 million may be withdrawn from the fund to pay principal on indebtedness. Thus, $10 million has been or may be withdrawn from the fund with respect to this vessel. The daily rate of liquidated damages would be:

$X = 0.5491436\ (10{,}000{,}000)/7300$ or $X = \$752.25$

(5) *Payment of liquidated damages.* The amount derived in paragraph (a)(2) of this section shall be the daily rate of liquidated damages and shall be paid to the Maritime Administrator, for deposit in the Treasury of the United States, within 30 days from the date the qualified agreement vessel first entered the prohibited geographic trade and shall be for all amounts owing from such date thereafter until the date payment is due. Payments, for continuing breaches, shall be made at 30 day intervals.

(6) *Other remedies.* Nothing in this paragraph shall diminish the Maritime Administrator's other remedies for breach under the Act, the rules and regulations or the agreement.

(b) *Duration of restrictions*—(1) *In general.* The geographic trading restrictions in the Act and § 390.5 and the liquidated damages provision shall apply for:

(i) 20 years from the date of final delivery on qualified agreement vessels constructed or acquired within one year of final delivery from the shipyard with the aid of qualified withdrawals;

(ii) 10 years from the date of completion of reconstruction for qualified agreement vessels reconstructed with the aid of qualified withdrawals;

(iii) 10 years from the date of acquisition of qualified agreement vessels acquired with the aid of qualified withdrawals more than one year after final delivery of the vessel from the shipyard;

(iv) 10 years from the date of the first qualified withdrawal from the fund to pay the existing indebtedness on a qualified agreement vessel which was included in Schedule B for that purpose unless the qualified vessel was more than fifteen years old on the date of the first qualified withdrawal in which case the period shall be five years.

(2) *Transfer of qualified agreement vessel.* In the event a qualified agreement vessel is sold or transferred to another person (see paragraph (b)(3) of § 390.11 requiring prior permission), the transferor shall require in the bill of sale that the transferee agree with the Maritime Administrator to comply with the geographic trading restrictions and to pay liquidated damages for any breach of such agreement that occurs after the transfer. The transferor shall remain liable for any violations that occurred prior to the approved transfer. However, in the case of a like kind exchange which is governed by section 1031 of the Internal Revenue Code of 1986, as amended, if the vessel acquired by the party has an economic life equal to or greater than the length of the geographic trading restrictions that remain applicable to the transferred vessel, the acquired vessel shall be deemed to be a qualified agreement vessel and the geographic trading restrictions of the transferred vessel shall attach to the acquired vessel.

[41 FR 4265, Jan. 29, 1976, as amended at 42 FR 34283, July 5, 1977; 73 FR 56740, Sept. 30, 2008]

§ 390.13 Failure to fulfill a substantial obligation under the agreement.

(a) *In general.* 46 U.S.C. 53509(c) requires the Maritime Administrator to determine whether there has been a failure to fulfill a substantial obligation under an agreement.

(b) *Contracting Officer's tentative conclusion*—(1) *Notice.* If the Contracting Officer tentatively concludes that any substantial obligation under the agreement, the joint regulations or these regulations is not being fulfilled by the party he shall serve written notice of his tentative conclusion upon the party by certified mail with return receipt requested. The notice shall contain the following information:

(i) A statement of the grounds upon which the tentative conclusion is based;

(ii) The amount the Contracting Officer tentatively concludes should be withdrawn as a nonqualified withdrawal; and

(iii) A statement that the tentative conclusion shall become a final decision unless the party requests, within 30 days, an opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion.

(2) *Effect of notice.* The notice of the tentative conclusion shall become a final decision as described in paragraph (d)(1) of this section, unless within 30 days of receipt of such a written notice the party by personal delivery or by certified mail, requests the opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion, in which case no further withdrawals from the fund, without the written prior approval of the Contracting Officer, shall be made by the party until a binding final decision is reached by the Maritime Administration.

(c) *Basis for Contracting Officer's tentative conclusion.* In determining whether a party has not fulfilled a substantial obligation under its agreement, the Contracting Officer shall consider among other things:

(1) The effect of the party's action or omission upon its ability to either carry out the purpose of the fund, accomplish its Schedule B program (see § 390.4(c)) or satisfy its minimum level of deposits in Schedule D (see § 390.4(e)).

(2) Whether the party has made material misrepresentations in connection with its application, agreement or any modification or amendment thereto or has failed to disclose material information that may affect its agreement or the purpose of the fund.

(d) *Contracting Officer's decision and appeals to the Maritime Administrator*—(1) *Where there has not been a request to cure or to be heard.* If the Contracting Officer issues a written notice under paragraph (b) of this section and the party does not request within 30 days an opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion, the Contracting Officer's tentative conclusion shall become the final decision, which decision shall be final, conclusive and binding upon the party, and no appeal therefrom shall be taken to the Maritime Administrator.

(2) *Where there has been a request to cure or to be heard.* If the Contracting Officer issues a written notice under paragraph (b) of this section and the party requests within 30 days an opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion, the party shall be offered such an opportunity. Request to cure must include a proposal to cure the breach. If the Contracting Officer accepts the party's proposal to cure its breach, then such determination shall be final. A party requesting to be heard and offer evidence in opposition to the Contracting Officer's tentative conclusion shall be permitted to submit, in writing, any information, evidence or argument within a period set by the Contracting Officer after considering the wishes of the party. The Contracting Officer shall reduce his final decision to writing and furnish the party a copy, by certified mail—return receipt requested, which decision shall be final and conclusive and shall bind the party unless within 30 days of receipt of the decision the party appeals from said decision by personal delivery or by certified mail to the Maritime Administrator with notice to the Contracting Officer.

(e) *Appeals to the Maritime Administrator.* Appeals with a request for a hearing on the record, if desired, are to be transmitted pursuant to paragraph (d) of this section and are to be addressed to the Maritime Administrator. Upon the filing of an appeal, the Contracting Officer shall transmit the entire record and a copy of his final decision to the Maritime Administrator. If a request for a hearing on the record is granted, the Maritime Administrator shall proceed pursuant to the Rules of Practice and Procedure in part 201 of this title. The decision of the Maritime Administrator on any question of fact shall be final, conclusive and binding upon the party unless determined by a court of competent jurisdiction to be fraudulent, capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§ 390.14 Departmental reports and certification.

(a) *In general.* For each calendar year, the Secretary of Transportation shall provide the Secretary of the Treasury, within 120 days after the close of such calendar year, a written report with respect to those capital construction funds under the Secretary of Transportation's jurisdiction.

(b) *Content of reports.* Each report shall set forth the name and taxpayer identification number of each person:

(1) Establishing a capital construction fund during such calendar year;

(2) Maintaining a capital construction fund as of the last day of such calendar year;

(3) Terminating a capital construction fund during such calendar year;

(4) Making any withdrawal from or deposit into (and the amounts thereof) a capital construction fund during such calendar year; or

(5) With respect to which a determination has been made during such calendar year that such person has failed to fulfill a substantial obligation under any capital construction fund agreement to which such person is a party.

[55 FR 34929, Aug. 27, 1990]

APPENDIX I TO PART 390—U.S. DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION—APPLICATION INSTRUCTIONS

INSTRUCTION REGARDING APPLICATION FOR A CAPITAL CONSTRUCTION FUND

An application for a capital construction fund under 46 U.S.C. 53501 *et seq.*, the Rules and Regulations prescribed jointly by the

Secretary of the Treasury and the Secretary of Transportation (26 CFR Part 3 and reprinted in 46 CFR Part 391, the ''Joint Regulations'') and individually by the Secretary of Transportation (46 CFR Part 390, the ''SOC Regulations'') shall be prepared and submitted in the form specified by these instructions.

The application must be legible and shall be submitted in six (6) complete sets, including the required Schedules and Exhibits. The application shall be filed with the Secretary, Maritime Administration, Washington, DC 20590. Three of these sets must be duly executed and certified by the Applicant. The name of the Applicant shall be shown on all accompanying papers for identification.

All questions contained in the application must be responded to; if a question is not applicable the respondent should so state. Additional information may be requested if such information is necessary to aid the Contracting Officer in making a determination to enter into a Capital Construction Fund Agreement.

U.S. DEPARTMENT OF TRANSPORTATION,
MARITIME ADMINISTRATION

APPLICATION FOR ESTABLISHMENT OF A CAPITAL CONSTRUCTION FUND UNDER SECTION 607, MERCHANT MARINE ACT, 1936, AS AMENDED

The undersigned _____ (''Applicant''), a citizen of the United States within the meaning of 46 U.S.C. 50501, as amended, hereby applies under section 607 of the Merchant Marine Act, 1936, as amended (''Act''), the Rules and Regulations jointly prescribed by the Secretary of the Treasury and the Secretary of Transportation (''Joint Regulations'') and individually by the Secretary of Transportation (''SOC Regulations'') to establish a Capital Construction Fund to aid in the acquisition, construction or reconstruction of a qualified vessel, the acquisition, construction or reconstruction of barges, containers or trailers which are part of the complement of a qualified vessel and the payment of the principal on indebtedness incurred in connection with the acquisition, construction or reconstruction of a qualified vessel or a barge, container or trailer which is part of the complement of a qualified vessel. The fund hereby applied for will be effective for deposits relating to the taxable year beginning _____, 20____ and ending _____, 20____, and for subsequent taxable years. In support of this application, the Applicant submits the following information:

I. *As to the identity of and other General Information of the Applicant* (the following data is required to prove the Applicant's citizenship to the satisfaction of the Secretary; also see 46 CFR Part 355):

A. *Natural Persons.* If the Applicant is a natural person, the following identifying information should be submitted:

1. Name.
2. Address.
3. Date of birth.
4. Place of birth.
5. Citizenship.
6. Principal place of business.
7. Trade name under which business is conducted.

B. *Partnerships, Associations, Unincorporated Companies.* If the Applicant is a partnership, association, or unincorporated company, the following identifying information should be submitted:

1. Name of partnership, association, or unincorporated company.
2. Business address.
3. Date and place of organization.
4. Name of all partners (general, limited and special) of the partnership or trustees and holders of beneficial interests in the association or company.
5. Share owned by each partner, trustee, or beneficial owner.
6. Date of birth of each.
7. Place of birth of each.
8. Citizenship of each.

C. *Incorporated Companies.* If the Applicant is an incorporated company, the following identifying information should be submitted:

1. Exact name of Applicant.
2. State in which incorporated and date of incorporation.
3. Address of principal executive offices, and of important branch offices, if any.
4. The following information with respect to each officer and director of the corporation:
   a. Name and address.
   b. Office.
   c. Citizenship.
   d. Capital shares owned (specify type, whether voting or non-voting and percentage of total of each type issued if five percent (5%) or more).
5. The name, address and citizenship of and number of capital shares owned by each person not named in answer to item 4, owning of record, or beneficially if known, five percent (5%) or more of the issued capital shares of any class stock of the Applicant.
6. A brief statement of the general effect of each voting agreement, voting trust, or other arrangement whereby the voting rights in any shares of the Applicant are owned, controlled, or exercised, or whereby the control of the Applicant is in any way held or exercised by any person not the holder of legal title to such shares. (Give the name, address, citizenship, and business of any such person, and, if not an individual, include the form of organization.)

II. *As to the Business and Affiliations of the Applicant.* A. A brief description of the principal business activities during the past five

years of the Applicant and of any predecessor or predecessors of the Applicant; if any change is presently contemplated, a brief statement of the nature and circumstances thereof.

B. A list of all companies or persons that are related within the meaning of section 482 of the Internal Revenue Code of 1954, as amended, and the regulations thereunder (''related companies'') or that directly or indirectly through one or more intermediaries, control, are controlled by, or are under common control with the Applicant, together with an indication of the nature of the business transacted by each, the relationships between the companies named, and the nature and extent of the control. This information may be furnished in the form of a chart.

C. A statement whether during the past 5 years the Applicant or any predecessor or related company has been in bankruptcy or in reorganization under II-B of the Bankruptcy Act or in any other insolvency or reorganization proceedings, and whether any substantial property of the Applicant or any predecessor or related company has been acquired in any such proceeding or has been subject to foreclosure or receivership during such period. If so, give details.

D. A statement of whether the Applicant or any predecessor or related company is now or during the past 5 years was involved in any litigation or subject to any outstanding judgments. If so, give details.

E. Describe any contemplated plan of reorganization or recapitalization involving new capital, the consolidation or mergers of the Applicant with related or other companies, debt elimination, or other changes or modifications in the corporate or individual structure, and indicate by appropriate financial statements the anticipated results thereof.

III. *As to the Management of the Applicant.* A. A brief description of the principal business activities during the past 5 years of each director and each principal executive officer of the Applicant.

B. The name and address of each other organization engaged in business activities related to those carried on or to be carried on by the Applicant with which any person named in the answer to the preceding item has any present business connection; the name of each such person, and briefly the nature of such connection.

IV. *Description of Vessels, Barges, Containers or Trailers which Applicant Proposes to be Incorporated in Capital Construction Fund Agreement for the Purpose of Making Deposits.* Vessels must be eligible vessels as that term is defined in 46 U.S.C. 53501 and §390.5(b) of the SOC Regulations. Undocumented barges, containers or trailers must be part of the complement of an eligible vessel as that term is defined in section 607(b) of the Act and §390.5(d) of the SOC Regulations:

A. *Vessels.* Provide in a tabular form headed ''Schedule A'' (see prescribed format in appendix II) the vessels owned or leased by the Applicant which the Applicant proposes to be designated as ''Eligible Agreement Vessels'' for the purposes of making deposits into a Capital Construction Fund pursuant to the provisions of 46 U.S.C. 53501 *et seq*, giving:

a. Name and official number.

b. Specific type.

c. Capacity (tons of cargo, number of containers, barges, etc.).

d. Whether owned or leased, and if leased the owner and the owner's address.

e. Date and place of construction.

f. If reconstructed, date of redelivery and place of reconstruction.

g. Date documented under laws of the United States.

h. Area of operation.

i. Full details concerning the service in which the Applicant operates or will operate each vessel; if the vessel is used for multiple purposes indicate the percentage of time in which the vessel is engaged in each service.

B. *Barges, Containers, and Trailers.* Provide in a tabular form headed ''Schedule A'' (see prescribed format in appendix II) the barges, containers, and trailers owned or leased by the Applicant which the Applicant proposes to be incorporated in an Agreement for purposes of making deposits into a Capital Construction Fund pursuant to the provisions of 46 U.S.C. 53501 *et seq*, giving:

a. Number of barges, containers or trailers which are part of the complement of an eligible vessel; name and official number of barges which are not a part of the complement of an eligible vessel.

b. Specific type.

c. Size or capacity.

d. Whether owned or leased, and if leased the owner and the owner's address.

e. Date and place of construction.

f. If reconstructed, date of redelivery and place of reconstruction.

g. Date documented under the laws of the United States.

h. Area of operation.

i. The vessel or vessels for which the barges, containers and trailers are part of the complement; full details concerning the service in which the Applicant operates or will operate each barge which is not a part of a complement.

V. *Purposes for which Qualified Withdrawals are Proposed.* Applicant is advised that information furnished in response to sections A, B, C and D of this item is for the purpose of inducing the United States to enter into an agreement to establish a Capital Construction Fund pursuant to 46 U.S.C. 53501 *et seq.* In connection therewith attention is directed to 46 U.S.C. 53509(c) which states, ''Under joint regulations, if the Secretary of Transportation determines that any substantial

obligation under any agreement is not being fulfilled, he may, after notice and opportunity for hearing to the person maintaining the fund, treat the entire fund or any portion thereof as an amount withdrawn from the fund in a nonqualified withdrawal.'' Also see §390.13 of the SOC Regulations.

A. *Acquisition or Construction of Vessels.* Provide in form headed ''Schedule B'' (see prescribed format in appendix II) the proposed program for the acquisition or construction of vessels, giving:

a. Number, type and commercial characteristics of vessels to be acquired or constructed.

b. Whether vessels will be replacements or additions, and if replacements identify vessels to be replaced.

c. Projected date of acquisition or award of construction contract.

d. Projected date of commencing operations.

e. Estimated total cost.

f. Method by which estimated total cost of project was determined.

g. Estimated amount of Capital Construction Fund monies to be used as down payment by the Applicant.

h. Estimated amount of borrowings and the amount of such borrowings to be retired by qualified withdrawals from the Capital Construction Fund, including anticipated terms of such financing.

i. Intended area of operation.

j. Full details concerning the use of the proposed vessel; if the vessel is to be used for multiple purposes indicate the approximate percentage of time in which the vessel will be engaged in each service.

B. *Acquisition or Construction of Barges, Containers and Trailers.* Provide in a form headed ''SCHEDULE B'' (see prescribed format in appendix II) the proposed program for acquisition or construction of barges, containers and trailers giving:

a. Number, type and size of barges, containers and trailers.

b. Whether barges, containers and trailers will be replacements or additions, if replacements, identify barges, containers or trailers to be replaced.

c. Projected date of acquisition or award of construction contract.

d. Projected date of introduction into service.

e. Estimated total cost.

f. Method by which estimated total cost of project was determined.

g. Estimated amount of Capital Construction Fund monies to be used as down payment by the Applicant.

h. Estimated amount of borrowings and the amount of such borrowings to be retired by qualified withdrawals from the Capital Construction Fund including anticipated terms of such financing.

i. Identification of vessels for which the barges, containers and trailers will be part of the complement, and the vessel's area of operation. In the case of barges which are not a part of the complement of a vessel provide the barges' intended area of operation.

j. Full details concerning the use of the proposed barge; if the barge is to be used for multiple purposes indicate the approximate percentage of time in which the barge will be engaged in each service.

C. *Reconstruction of Vessels.* Provide in a form headed ''SCHEDULE B'' (see prescribed format in appendix II) the proposed program for reconstruction of vessels, giving:

a. Identification of vessels to be reconstructed.

b. Nature and extent of proposed reconstruction.

c. Projected date of award of reconstruction contract.

d. Projected date of commencing operations with reconstructed vessels.

e. Estimated total cost.

f. Method by which estimated total cost of project was determined.

g. Estimated amount of Capital Construction Fund monies to be used as down payment by the Applicant.

h. Estimated amount of borrowings and amount of such borrowings to be retired by qualified withdrawals from the Capital Construction Fund, including anticipated terms of such financing.

i. Intended area of operation.

j. Full details concerning the use of the proposed vessel; if the vessel is to be used for multiple purposes indicate the approximate percentage of time in which the vessel will be engaged in each service.

D. *Reconstruction of Barges, Containers and Trailers.* Provide in a form headed ''SCHEDULE B'' (see prescribed format in appendix II) the proposed program for reconstruction of barges, containers and trailers, giving:

a. Number, type and size of barges, containers and trailers.

b. Nature and extent of proposed reconstruction work.

c. Projected date of award of reconstruction contract.

d. Projected date of completion of reconstruction work.

e. Estimated total cost.

f. Method by which estimated total cost of project was determined.

g. Estimated amount of Capital Construction Fund monies to be used as down payment by the Applicant.

h. Estimated amount of borrowings and amount of such borrowings to be retired by qualified withdrawal from the Capital Construction Fund including anticipated terms of such financing.

i. Identification of vessels for which the barges, containers, and trailers will be part of the complement, and the vessel's area of

operations. In the case of barges which are not a part of the complement of a vessel provide the barges' area of operation.

j. Full details concerning the use of the proposed barge; if the barge is to be used for multiple purposes indicate approximate percentage of time in which the barge will be engaged in each service.

E. *Payment of Principal on Existing Indebtedness Incurred in Connection with the Acquisition, Construction or Reconstruction of a Qualified Vessel or a Barge, Container or Trailer which is Part of the Complement of a Qualified Vessel.* Provide in a form headed ''Schedule B'' (see prescribed format in appendix II) the proposed program for payments of principal on existing indebtedness incurred in connection with the acquisition, construction, or reconstruction of qualified vessels, barges, containers, or trailers, giving:

a. Name, official number or other identifying information for the vessel, barge, container, or trailer.

b. Whether the debt was incurred for acquisition, construction or reconstruction, demonstrating evidence of a direct connection between the qualified vessel and the debt which was incurred.

c. The aggregate principal balance of such indebtedness as of the date of this application.

d. The dates and amounts of payments of principal to liquidate the outstanding debt in accordance with the applicable loan agreements or other documents.

VI. *As to the Depository to be Used for the Capital Construction Fund.* Provide in a tabular form headed ''Schedule C'' (see prescribed format in appendix II) the full name and complete address of the financial institution which will act as depository. Indicate the type of account, i.e., checking, savings, trust, in which the fund will be held.

VII. *Proposed Schedule of Minimum Amounts Available for Deposit into the Capital Construction Fund.* Provide in a tabular form headed ''Schedule D'' (see prescribed format in appendix II) a proposed program for deposits into the Capital Construction Fund commencing with the beginning of the first taxable year for which the Agreement applies. The applicant is advised that the purpose of Schedule D is to insure that a sufficient commitment has been made to accomplish the objectives contained in Schedule B. Minimum annual deposits are not required, but a minimum amount must be deposited for each 3 year period under the Agreement. For each such 3 year period of the proposed Schedule D the Applicant will indicate not only the minimum amount to be deposited, but also the source of such deposit, giving amounts expected to be derived from:

a. Ordinary income attributable to the operation of agreement vessels.

b. Net proceeds from the sale or other disposition of agreement vessels.

c. Receipts from the investment or reinvestment of amounts held in the fund.

d. Earned depreciation on agreement vessels.

VIII. *Financial Statements and Reports of the Applicant Including Predecessors.* A. *Financial Statements.* For each of the past three fiscal years provide:

1. Statements of Financial Conditions.
2. Statements of Operations.
3. Statements of Retained Earnings.

B. *Reports.* If the books of the Applicant were audited by an independent certified public accountant copies of the public accountant's reports shall be submitted for each of the past three fiscal years.

IX. *As to Exhibits Furnished.* At the time of original filing, the following exhibits, properly identified, shall be furnished:

Exhibit I—A copy of the Certificate of Incorporation of the Applicant or other organization papers including all amendments thereto presently in effect.

Exhibit II—A copy of the By-Laws or other governing instruments of the Applicant, including all amendments thereto presently in effect.

Exhibit III—Such other financial statements, copies of contracts, schedules and other required data which the Applicant desires to incorporate by reference.

X. A statement of any additional information which, in the opinion of the Applicant, is necessary to make the application and attached exhibits true and complete.

XI. A specific written request, pursuant to 5 U.S.C. 552(b)(4), must accompany the application if the Applicant wishes certain trade secrets, financial and commercial information contained in this application to be withheld from disclosure. The Maritime Administrator, Department of Transportation will endeavor to respect such a request, acting within the limits of the applicable provisions of the Freedom of Information Act.

State of _____ County of _____ ss.:

Dated _____, 20____

Name of Applicant

_____

By _____ Name and Title

I, _____, do certify that I am the (Title of Office) of (Exact Name of Applicant), the Applicant on whose behalf I have executed the foregoing application; that the Applicant is a citizen of the United States within the meaning of 46 U.S.C. 50501; that this application is made for the purpose of inducing the United States of America to permit the Applicant, pursuant to section 607 of the Merchant Marine Act, 1936, as amended, the Joint Regulations and the SOC Regulations to establish a Capital Construction Fund for the purposes set forth in 46 U.S.C. 53501; that I have carefully examined the application and all documents submitted in connection

therewith and, to the best of my knowledge, information and belief, the statements and representations contained in said application and related documents are full, complete, accurate, and true.

Subscribed and sworn to before me, a _____ in and for the State and County above named, this _____ day of _____, 20___.

My Commission expires _____.

NOTE: The United States Criminal Code makes it a criminal offense to knowingly and willfully falsify, conceal or cover up by any trick, scheme, or device, a material fact from, or make any false, fictitious or fraudulent statements or representations or make or use any false writing or document knowing the same to contain any false, fictitious or fraudulent statement to, any department or government agency of the United States as to any matter within its jurisdiction (18 U.S.C. 1001).

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008; 74 FR 17097, Apr. 14, 2009]

APPENDIX II TO PART 390—SAMPLE CAPITAL CONSTRUCTION FUND AGREEMENT

[Contract No. MA/CCF—]

CAPITAL CONSTRUCTION FUND AGREEMENT WITH

This Capital Construction Fund Agreement (''Agreement''), made on the date hereinafter set forth, by and between the United States of America, represented by the Maritime Administrator, Department of Transportation (''Maritime Administrator''), and _____, a corporation organized and existing under the laws of the State of _____ (''Party''), a citizen of the United States of America.

Whereas: 1. The Party has applied for the establishment of a Capital Construction Fund (''Fund'') under section 607 of the Merchant Marine Act, 1936, as amended (''Act'');

2. The Party is the owner or lessee or has contracted for the construction of one or more eligible vessels as defined in 46 U.S.C. 53501, which vessels are listed in Schedule A hereof;

3. The Party has a program for the construction or acquisition of qualified agreement vessels as defined in 46 U.S.C. 53501, which program is described in Schedule B hereof;

4. The Maritime Administrator and the Party desire to enter into an Agreement for the purpose of providing replacement vessels, additional vessels, or reconstruction vessels, built in the United States and documented under the laws of the United States for operation in the United States foreign, Great Lakes, or noncontiguous domestic trade;

5. The Maritime Administrator has determined that the Party qualifies for an Agreement under the Act; and

6. The Maritime Administrator has authorized the award of an Agreement upon the terms and conditions set forth herein subject to the Act, as it may be amended from time to time, and such rules and regulations as shall be prescribed by the Secretary of Transportation or his delegate, either alone or jointly with the Secretary of the Treasury, as necessary to carry out the powers, duties, and functions vested in them by the Act (''rules and regulations'').

Now, therefore in consideration of the premises the Maritime Administrator and the Party hereby agree as follows:

1. *Establishment of a Fund:* (A) A Fund is hereby established for the purposes set forth in Article 2 hereof, pursuant to such terms and conditions as shall be prescribed in this Agreement, the Act, or the rules and regulations.

(B) The Fund shall be established in the depositories listed in Schedule C hereof.

2. *Purpose of the Fund:* The Fund established hereunder shall be utilized to provide for replacement vessels, additional vessels, or reconstructed vessels, built in the United States and documented under the laws of the United States for operation in the United States foreign, Great Lakes, or noncontiguous domestic trade, and to provide for qualified withdrawals to achieve the program set forth in Schedule B hereof.

3. *Term of the Agreement:* This Agreement shall be effective on the date of execution by the Maritime Administrator and shall continue until terminated under Article 4.

4. *Termination of Agreement:* (A) This Agreement may be terminated at any time under any of the following circumstances:

(1) Upon written mutual agreement by the parties;

(2) Upon written notice by the Party that a change has been made in the rules and regulations which would have a substantial effect upon the rights or obligations of the Party.

(B) This Agreement shall terminate upon completion of the program as set forth in Schedule B hereof.

(C) Upon termination of this Agreement pursuant to paragraphs (A) and/or (B) hereof all amounts remaining in the Fund shall be treated as if withdrawn in a nonqualified withdrawal (as that term is defined in the Act and the rules and regulations) on the date of termination of this Agreement.

5. *Deposits to be made into the Fund:* (A) Subject to any restrictions contained in the Act, the rules and regulations, or this Agreement, the Party may deposit, for each taxable year to which this Agreement applies, amounts representing:

(1) Taxable income attributable to the operation of the vessels listed in Schedule A or B hereof;

(2) The depreciation allowable under section 167 of the Internal Revenue Code of 1986, on the vessels listed in Schedule A or B hereof;

(3) The net proceeds from the sale or other disposition of any of the vessels listed in Schedule A or B hereof; and

(4) The net proceeds from insurance or indemnity attributable to the vessels listed in Schedule A or B hereof.

(B) The Party shall deposit for each taxable year to which this Agreement applies:

(1) All receipts from the investment or reinvestment of amounts held in the Fund, except that the Party shall not be permitted to deposit more than is necessary to complete its program set out in Schedule B hereof; and

(2) The net proceeds from the mortgage of any vessel listed in Schedule B hereof for which qualified withdrawals from the Fund have been made.

(C) Notwithstanding anything in paragraph (A) or (B) hereof to the contrary, the Party shall make the minimum deposits set forth in Schedule D hereof at the time and in such amounts as may be set forth therein. The Party specifically agrees to deposit up to one hundred percent of allowable taxable income attributable to the operation of agreement vessels in order to meet its obligations under this paragraph.

(D) In the event that any leased vessel listed in Schedule A hereof is included in another capital construction fund agreement, the maximum amount of depreciation which the Party may deposit in respect to that vessel shall be calculated by using the allowable percentage of the depreciation ceiling listed for that vessel in Schedule A hereof.

6. *Withdrawals from the Fund:* (A) The Party may make such qualified withdrawals (as that term is defined in the Act and the rules and regulations) as shall be necessary to fulfill the obligations set forth in Schedule B hereof. Any such qualified withdrawal may be made without the consent of the Maritime Administrator, except as required by the rules and regulations.

(B) Any other withdrawal from the Fund shall be made only upon the prior written consent of the Maritime Administrator, as required by the rules and regulations.

7. *Investment of the Fund:* (A) The Party, at its discretion, may invest assets held in the Fund in accordance with the Act and the rules and regulations.

(B) The Party agrees that when investing assets held in the Fund to make such investments as will insure that sufficient cash is available at the time qualified withdrawals are required in accordance with the program described in Schedule B hereof.

8. *Pledges, Assignments and Transfers:* (A) The Party agrees not to assign, pledge or otherwise encumber, either directly or indirectly or through any reorganization, merger, or consolidation, all or any part of this Agreement, the Fund, or any assets in the Fund without the prior written consent of the Maritime Administrator; *Provided, however,* The Party may transfer the assets of the Fund, in whole or in part, to an investment trustee, as provided in the rules and regulations.

(B) The Party shall not obligate any assets in the Fund as a compensating balance.

(C) The Party may not sell, transfer or otherwise dispose of any vessel, or part thereof, described in Schedule B hereof without the prior written consent of the Maritime Administrator.

9. *Records and Reports:* (A) The Party and each affiliate, domestic agent, subsidiary or holding company connected with, or directly or indirectly controlling or controlled by the Party shall keep its books, records, and accounts relating to the maintenance, operation, servicing of the vessel(s) and/or service(s) covered by this Agreement in such form as may be prescribed by the Maritime Administrator under the rules and regulations.

(B) The Maritime Administrator agrees not to require the duplication of books, records and accounts required to be kept in some other form by the Interstate Commerce Commission or the Secretary of the Treasury, so long as the information required in paragraph (A) hereof is made available to the Maritime Administrator.

(C) The Party agrees to file, upon notice from the Maritime Administrator, balance sheets, profit and loss statements, and such other statements of financial operations, special reports, charters, ships' logs, memoranda of facts and transactions, as in the opinion of the Maritime Administrator may affect the Party's performance under this Agreement.

(D) The Maritime Administrator may require by regulation that any of such statements, reports and memoranda shall be certified by independent certified public accountants acceptable to the Maritime Administrator.

(E) The Maritime Administrator may require the Party to establish and maintain systems of control of expenses and revenues in connection with the operation of the agreement vessel(s).

(F) The Party agrees to submit promptly to the Maritime Administrator any contract executed in connection with the program described in Schedule B hereof.

(G) The Maritime Administrator is hereby authorized to examine and audit the books, records, and accounts of all persons referred to in this Article whenever he may deem it necessary or desirable.

10. *Modification and Amendment:* This Agreement may be modified or amended at any time by mutual written consent.

11. *Incorporation of Schedules:* The attached Schedules A, B, C, and D are incorporated into and made a part of this Agreement.

12. *Liquidated Damages:* (A) In the event that the Party operates any qualified agreement vessel described in Schedule B hereof in geographic trades other than those permitted by 46 U.S.C. 53501 *et seq*, this Agreement, and/or the rules and regulations, the Party shall pay to the United States an amount of liquidated damages for each day of such impermissible geographic trading which shall constitute the time value of the deferral of Federal income tax which the Party has received. The amount shall be calculated in accordance with the rules and regulations.

(B) The Party agrees to pay the daily rate of liquidated damages to the Maritime Administrator, for deposit in the Treasury of the United States, within the time limits provided for in the rules and regulations.

(C) Nothing in this Article shall in any way be construed to diminish or waive any of the Maritime Administrator's other remedies for breach under the Act, the Agreement, or the rules and regulations.

(D) Notwithstanding the fact that the Agreement may be terminated pursuant to the provisions of Article 4 hereof, or otherwise, the provisions of this Article 12 shall continue in effect as follows:

(1) In the case of a vessel constructed or acquired within one year of final delivery from the shipyard after construction with the aid of qualified withdrawals, for a period of twenty (20) years from the date of such vessel's final delivery;

(2) In the case of a vessel reconstructed or acquired more than one year after final delivery from the shipyard after construction with the aid of qualified withdrawals, for a period of ten (10) years from the date of such vessel's final delivery from the shipyard after reconstruction or the date of such vessel's acquisition; and

(3) In the case of a vessel included in Schedule B hereof as a qualified agreement vessel in regard to which qualified withdrawals from the Fund have been made to pay existing indebtedness, for a period of ten (10) years from the date of the first qualified withdrawal in regard to such vessel, *Provided, however,* That if such vessel was more than fifteen (15) years old on the date of the first qualified withdrawal in regard thereto, such conditions shall continue for a period of five (5) years in regard to such vessel.

13. *Warranties and Representations by the Party:* The Party hereby warrants and represents that:

(A) The Party is a citizen of the United States within the meaning of section 2 of the Shipping Act, 1916, as amended, and will continue to be so for the term of this Agreement. The Party agrees that, each year, within thirty (30) days after the annual meeting of its stockholders, it shall file a supplemental affidavit as evidence of its continuing United States citizenship, provided that any changes in data last furnished with respect to officers, directors, and stockholders holding five percent or more of the issued and outstanding stock of each class or series which would result in a loss of the Party's status as a United States citizen shall be promptly reported to the Maritime Administrator.

(B) The Party owns, is the lessee, or has contracted for the construction of one or more eligible vessels (within the meaning of 46 U.S.C. 53501) as listed in Schedule A hereof.

(C) The qualified vessels described in Schedule B hereof: (1) Were or will be constructed or reconstructed in the United States, except as provided in the Act and the rules and regulations;

(2) Are or will be documented under the laws of the United States and will continue to remain so documented; and

(3) Will be operated in the foreign, Great Lakes or noncontiguous domestic trade of the United States within the meaning of the Act and the rules and regulations

(D) The Party will meet its deposit obligations as agreed upon in Article 5 of this Agreement.

(E) The Party will promptly inform the Maritime Administrator, in writing, of any change in circumstances which would tend to adversely affect the ability of the Party to carry out its obligations under the Agreement.

(F) The Party will faithfully conform to all rules and regulations governing the Agreement and the Fund.

(G) Nothing of monetary value has been improperly given, promised, or implied for entering into this Agreement. The Party further warrants that no improper personal, political or other activities have been used or attempted in an effort to influence the outcome of the discussions or negotiations leading to the award of this Agreement. Breach of this warranty shall constitute an event of default for which the Maritime Administrator shall have the right, notwithstanding Article 4, to terminate this Agreement without liability to the United States.

14. *Default in Obligations:* (A) If the Maritime Administrator determines that any substantial obligation under this Agreement is not being fulfilled by the Party, he may, under the rules and regulations and after the Party has been given notice and an opportunity to be heard, declare a breach and treat the entire Fund, or any portion thereof, as an amount withdrawn in a nonqualified withdrawal.

(B) The Maritime Administrator shall provide an opportunity for the Party to cure a breach declared pursuant to Paragraph (A) of this Article 14.

(C) Events of breach by the Party shall include, but shall not be limited to: (1) Failure in any respect to use due diligence in performing the program set forth in Schedule B hereof;

(2) Obligating the assets in the Fund as a compensating balance;

(3) Failure to make deposits required in Schedule D hereof;

(4) Failure to secure written permission from the Maritime Administrator when such permission is required by the rules and regulations;

(5) Failure to submit reports and/or records on a timely basis as provided in Article 9 hereof;

(6) Any material misrepresentation made by the Party or any failure by the Party to disclose material information in connection with this Agreement whether before or after execution hereof and whether made in an application, report, affidavit, or otherwise; or

(7) Failure by the Party to comply with any provisions of 46 U.S.C. 53501 *et seq*, the rules and regulations, or this Agreement.

15. *Extension of Federal Income Tax Benefits:* The Maritime Administrator agrees that the Federal income tax benefits provided in the Act and the rules and regulations shall be available to the Party if the Party shall carry out its obligations under this Agreement.

UNITED STATES OF AMERICA, MARITIME ADMINISTRATOR, DEPARTMENT OF TRANSPORTATION

(SEAL)
Attest:
By _____
(Secretary)

(SEAL)
By _____
(Secretary)
Attest:

By _____
(Contracting Officer)

_____
(Secretary)

Approved as to form: (Date of Execution)
_____ By _____
(Assistant General Counsel, Maritime Administration) (President)

XYZ CO—SCHEDULE A—ELIGIBLE AGREEMENT VESSELS

(a)	(b)	(c)	(d)	(e)
Name of vessel	Specific type	Capacity	Owned or leased and owner is leased	Date and place constructed
SS *Smith,* official No. 236425..	Tanker	56,000 dwt	Leased: ABC Ships, Inc., San Diego, Calif., 50 percent of depreciation ceiling.	1962, American Steel, San Francisco, Calif.
SS *Brown,* official No. 325111.	.....do	265,000 dwt	Owned	1974, Southern Shipyards, Mobile, Ala.
SS *Jones,* official No. 190528..	Container ship	30,000 dwt, 500 400-ft containers.	.....do	1954, Bond Shipyard, New York, N.Y.
Hercules, official No. 256,125.	Oceangoing tugboat	105 ft 2,000 hp	.....do	1968, Washington Iron Works, Seattle, Wash.
XYZ–1, official No. 257,164.	Roll-on, roll-off barge	1,200 gr ton, 45 40-ft containers.	.....do	1968, Washington Iron Works, Seattle, Wash.
XYZ–2, official No. 260,138.	.....do	.....do	.....do	1969, Washington Iron Works, Seattle, Wash.
OTC–35, official No. 262,170.	.....do	1,500 gr ton, 60 40-ft containers.	Leased; Oregon Towing Co., Portland, Oreg., 100 percent of depreciation ceiling.	1969, J. & J. Shipyard, Portland, Oreg.
200 trailers, Nos. 111032–A–10677B–1M through 11032–A–10877B–1M.	Dry cargo	40 ft	Leased; International Leasing Co., New York, N.Y. 0 percent of depreciation ceiling.	1968, Acme Container Corp., New York, N.Y.
1,500 containers, Nos. 312 A through 1312 A..	Refrigerated dry cargo.	.....do	Owned	1969, Aluminum Products, Inc., Dallas, Tex.

XYZ CO—SCHEDULE A—ELIGIBLE AGREEMENT VESSELS (CONTINUED)

	(f)	(g)	(h)	(i)
	Date and place reconstructed	Date documented	Area of operation	Details of service
SS *Smith,* official No. 236425.	Not available	1962	Noncontiguous domestic trade.	Carriage of crude oil from Valdez, Alaska, to west coast of the continental United States.
SS *Brown,* official No. 325111.	.....do	1974	U.S. foreign trade	Worldwide carriage of crude oil.
SS *Jones,* official No. 190528.	1970, Litton Systems, Mississippi.	1954	U.S. foreign and noncontiguous trade.	Container service between Japan and California via Hawaii.
Hercules, official No. 256,125.	Not available	1968	Domestic	Towing roll-on, roll-off barges from Puget Sound to San Francisco.
XYZ–1, official No. 257,164.	.....do	1968	.....do	Carriage of trailer type containers between Puget Sound and San Francisco.
XYZ–2, official No. 260,138.	.....do	1969	.....do	Do.
OTC–35, official No. 262,170.	.....do	1969	.....do	Do.
200 trailers, Nos. 111032–A–10677B–1M through 11032–A–10877B–1M.	.....do	NA	.....do	For use on Barges *XYZ–1, XYZ–2,* and *OTC–35.*
1,500 containers, Nos. 312 A through 1312 A..	.....do	NA	U.S. foreign noncontiguous domestic trade.	For use as complement of SS *Jones.*

XYZ CO., PROGRAM OBJECTIVES—I. ACQUISITION OR CONSTRUCTION OF VESSELS

Vessel name, and official number	General characteristics	Approximate cost	Amount to be withdrawn from fund	Approximate date of—		Anticipated area of operation
				Contract	Delivery	

XYZ CO., PROGRAM OBJECTIVES—II. RECONSTRUCTION OF VESSELS

Vessel name, and official number	General characteristics	Approximate cost	Amount to be withdrawn from fund	Approximate date of—		Anticipated area of operation
				Contract	Delivery	

XYZ CO., PROGRAM OBJECTIVES—III. PAYMENT OF PRINCIPAL ON EXISTING INDEBTEDNESS

Vessel name and official number	Purpose of indebtedness	Amount to be paid from fund

XYZ CO., SCHEDULE C—DEPOSITORIES FOR CAPITAL CONSTRUCTION FUND

Name	*Address*
1. First American Bank checking account	2001 Park Ave., San Francisco, Calif. 94109.
2. Southern California National Bank investment trustee established pursuant to sec. 390.7 of the SOC regulations.	1 Waterfront Place, San Francisco, Calif. 94101.

XYZ CO. SCHEDULE D—MINIMUM DEPOSITS

[In thousands]

Taxable year	Ordinary income	Net proceeds	Fund interest	Depreciation	Total
1973 to 1975	$3,150	[1] $2,400	$250	.....	$5,800
1976 to 1978	2,900	[2] 1,500	325	.....	4,725
1979 to 1981	3,000	.....	350	85	3,435

XYZ CO. SCHEDULE D—MINIMUM DEPOSITS—Continued

[In thousands]

Taxable year	Ordinary income	Net proceeds	Fund interest	Depreciation	Total
1982 to 1984	2,800		74	125	3,000
1985 to 1987	2,850		90	60	3,000
1988 to 1990	2,900		100		3,000
1991 to 1993	3,000		100		3,100
1994 to 1996	3,100		110		3,210
1997 to 1999	3,250		120		3,370
2000	3,200		120		3,320
Total					35,960

[1] Net proceeds from sale of barges *XYZ–1* and *XYZ–2* for $1,200,000 each.
[2] Net proceeds from sale of tug *Hercules.*

[41 FR 4265, Jan. 29, 1976, as amended at 42 FR 43632, Aug. 30, 1977; 74 FR 17097, Apr. 14, 2009]

APPENDIX III TO PART 390—U.S. DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION—SAMPLE SEMIANNUAL REPORT

[Illustrative sample of the report required by the Maritime Administration pursuant to 46 CFR part 390 prescribing the capital construction fund reporting requirements to be followed by those companies which are party to a capital construction fund agreement]

EXHIBIT A—XYZ CO., SUMMARY OF CASH, SECURITIES, AND STOCK ON DEPOSIT AND NET ACCRUED DEPOSITS TO AND ACCRUED WITHDRAWALS FROM THE CAPITAL CONSTRUCTION FUND AS OF JUNE 30, 19____

	Thousands
Cash (exhibit A–1 and B)	$1,025
Securities and stock—adjusted basis (exhibit A–2 and B)	2,560
Fund total for tax purposes on deposit (exhibit C)	3,585
Net accrued deposits and withdrawals (exhibit A–3)	450
Fund total (agrees with balance sheet submitted at this date) on deposit for book purposes—June 30, 19____	4,035
Portion of fund total for tax purposes as of June 30, 19____, which represents a "CCF: Security amount" pursuant to an agreement covering the dual use of a capital construction fund	*Thousands*
Balance brought forward	$403
Deposits	82
Total "CCF: Security Amount"	485

EXHIBIT A–1—XYZ COMPANY

SUMMARY OF CASH ON DEPOSIT IN CAPITAL CONSTRUCTION FUND AS OF JUNE 30, 19____

	Thousands
First American Bank, San Francisco, Calif., checking account No. 654–0876–211	$1,025
Total cash in capital construction fund at June 30, 19____	1,025

EXHIBIT A–2—XYZ CO., SUMMARY OF SECURITIES AND STOCK (ADJUSTED BASIS AND FAIR MARKET VALUE) IN CAPITAL CONSTRUCTION FUND AS OF JUNE 30, 19____(IN THOUSANDS)

	Adjusted basis	Fair market value
Treasury notes—due July 4, 19____, $800,000 face value, 1st American Bank, San Francisco, Calif., trust account No. 610–2135	$760	$760
Negotiable certificate of deposit—due July 31, 19____, $500,000 at 8 percent, 1st American Bank, San Francisco, Calif., CD No. 186007	500	500
U.S.A. Motors, Inc.—class A common stock, 5,000 shares, Southern California National Bank, trust account No. 358–21	625	725
Energy Co., Inc.—1st preferred, 4,100 shares, Southern California National Bank, trust account No. 358–21	205	255
Boon Corp.—class A common stock, 10,000 shares, Southern California National Bank, San Francisco, Calif., trust account No. 358–21	470	520
Total securities and stock in capital construction fund at June 30, 19____	2,560	2,760

EXHIBIT A–3—XYZ CO., SUMMARY OF NET ACCRUED DEPOSITS AND WITHDRAWALS IN CAPITAL CONSTRUCTION FUND AS OF JUNE 19____

	Thousands
Accrued deposits:	
19____ income (6 mos. ended June 30, 19_____	$500
Depreciation	200
Total	700
Accrued withdrawals: Progress payment made from general fund—hull 210	250
Net accrued deposits and withdrawals in capital construction fund at June 30, 19____	450

EXHIBIT B—XYZ CO., TRANSCRIPT OF TRANSACTIONS IN THE CAPITAL CONSTRUCTION FUND FOR THE 6 MOS. ENDED JUNE 30, 19____

Date	Description of transaction	Cash		Securities and stock (at adjusted basis)		Detail
		Debit	Credit	Debit	Credit	
Jan. 1, 19____	Balances brought forward	$1,500,000		$2,000,000		
Jan. 1, 19____	Bond debt payment—SS *Smith.*		$250,000			
Jan. 3, 19____	Deposit 19____ depreciation	300,000				
Jan. 4, 19____	Purchased Treasury notes—90 days at 6-percent discount..		752,000	752,000		$800,000 at 6-percent discount.
Feb. 29, 19____	Dividends earned	4,500				$0.45 per share on 10,000 shares Boon Corp.
Mar. 15, 19____	Progress payment No. 3 hull 210..		172,500			
Apr. 4, 19____	Sale of Treasury notes—cost	752,000			752,000	
	Income from sale	48,000				
Apr. 4, 19____	Purchased Treasury notes 90 days at 5-percent discount.		760,000	760,000		$800,000 at 5-percent discount.
Apr. 15, 19____	Deposit from 19____ earnings	310,000				
May 15, 19____	Progress payment No. 4—hull 210..		180,000			
June 15, 19____	Sale of stock—cost	200,000			200,000	4,000 shares at $56.25 per share.
	Gain on sale of stock	25,000				Energy Co., Inc.
	Balances carried forward	1,025,000		2,560,000		

EXHIBIT C—XYZ CO., SUMMARY OF TOTAL TRANSACTION AFFECTING THE TAX ACCOUNT BALANCES IN THE CAPITAL CONSTRUCTION FUND FOR THE 6 MOS. ENDED JUNE 30, 19____

	Ordinary income	Capital gain	Capital	Total
Opening balance, Jan. 1, 19____	$1,000,000	$1,000,000	$1,500,000	$3,500,000
Deposits, income, transfers in, etc	362,500	25,000	300,000	687,500
Total	1,362,500	1,025,000	1,800,000	4,187,500
Withdrawals, losses, transfers out, etc			602,500	
Balance at June 30, 19____	1,362,500	1,025,000	1,197,500	3,585,000

EXHIBIT D—XYZ COMPANY

SUMMARY BY VESSEL OF QUALIFIED WITHDRAWALS FROM THE FUND FOR THE SIX MONTHS ENDING JUNE 30, 19____

A. Acquisition or Construction of Vessels

(1) 80,000 dwt tanker: No qualified withdrawals have been made to date; construction is presently scheduled to commence in mid-1977.

(2) 130-foot ocean tug hull No. 210:

Balance brought forward	$700,000
Qualified withdrawals during period	352,500
Total qualified withdrawals to date	1,052,500

130-foot ocean tug hull No. 211: No withdrawals have been made to date;

construction is presently scheduled to commence in November 1975

B. Acquisition or Construction of Barges, Containers and Trailers

250-foot tank barge: No qualified withdrawals have been made to date; construction presently scheduled to commence in November 1975.

C. Reconstruction of Vessels

None.

D. Reconstruction of Barges, Containers, and Trailers

None.

E. Payment of Principal on Existing Indebtedness

SS *Smith*—Official No. 236425:

Balance brought forward	$500,000
Qualified withdrawals during period	250,000
Total qualified withdrawals to date	750,000

APPENDIX IV TO PART 390—SAMPLE ADDENDUM TO MARITIME ADMINISTRATION CAPITAL CONSTRUCTION FUND AGREEMENT

This Agreement, made by the Maritime Administrator, Department of Transportation (''Maritime Administrator'') and _____ (''Party''), a citizen of the United States of America, as an Addendum to that certain agreement, Contract No. MA/CCF—

Whereas: 1. On _____, the parties hereto entered into a Capital Construction Fund Agreement (''Agreement'') under 46 U.S.C. 53501 *et seq*;

2. The parties hereto desire to modify that Agreement in the manner hereinafter set forth;

3. The parties hereto have agreed to said amendment and desire to incorporate the same into the Agreement.

Now, therefore, in consideration of the premises the Maritime Administrator and the Party agree as follows:

Notwithstanding the provisions of Article 4(A)(2) of the Agreement, the Party may, within sixty (60) days after notice appears in the FEDERAL REGISTER that the Regulations jointly prescribed by the Secretary of the Treasury and the Secretary of Transportation have been finalized, terminate the Agreement, if such Regulations have a substantial effect on the rights or obligations of the Party. Upon termination of the Agreement pursuant to this Addendum No. ____ the provisions of the Internal Revenue Code of 1986, the Act, and the rules and regulations shall apply to all funds remaining in the Fund as if such funds were withdrawn in a non-qualified, withdrawal, as that term is defined in the Act and the rules and regulations.

In witness whereof, the Secretary and the Party have executed this addendum, in quadruplicate, effective as of the date indicated below.

UNITED STATES OF AMERICA,
Secretary of Transportation,
Maritime Administrator,

Department of Transportation

By ..... (Contracting Officer)	By.....
Date	Title.....
Attest:	Attest:
By ..... (Secretary)	By.....
.....	Title.....
(SEAL)	(SEAL)

Approved as to form:

.....
(Assistant Chief Counsel
Maritime Administration)

[G.O. 109, Rev., Amdt. 6, 42 FR 43634, Aug. 30, 1977, as amended at 73 FR 56741, Sept. 30, 2008; 74 FR 17097, Apr. 14, 2009]

APPENDIX V TO PART 390—SAMPLE QUALIFIED TRADE AFFIDAVIT

AFFIDAVIT

State of _____
County of _____

I, _____, (Name) being duly sworn, depose and say:

1. That I am the _____ (Title) of _____. (Name of party)

2. That I am fully acquainted with and have knowledge of the operations of all qualified agreement vessels owned or operated by my company and identified in Capital Construction Fund Agreement, MA/CCF _____.

3. That I have full knowledge of the trading restrictions and liquidated damages provisions pertaining to qualified agreement vessels, as stipulated in46 U.S.C. 53501 *et seq*, and in the rules and regulations of 46 CFR Part 390.

4. That based on my inspection of Company records and to the best of my knowledge and belief, except as noted below in statement 5 of this affidavit, during the period _____ (Beginning of taxable year) through _____ (End of taxable year) my company operated its qualified agreement vessels only in the United States, foreign, Great Lakes, and noncontiguous domestic trade in accordance with Capital Construction Fund Agreement, MA/CCF _____.

5. Exceptions to statement 4 of this Affidavit are as follows (indicate exceptions below or attach a supplemental statement if additional space is needed; if there are no exceptions, write ''none''):

(Affiant)

Subscribed and sworn to before me, a Notary Public in and for the State, City and County above named, this _____ day of _____, 19____.

(Notary Public)

My commission expires _____, 19____

[41 FR 39751, Sept. 16, 1976; 74 FR 17097, Apr. 14, 2009]

PART 391—FEDERAL INCOME TAX ASPECTS OF THE CAPITAL CONSTRUCTION FUND

Sec.

391.0 Statutory provisions; section 607, Merchant Marine Act, 1936, as amended.
391.1 Scope of section 607 of the Act and the regulations in this part.
391.2 Ceiling on deposits.
391.3 Nontaxability of deposits.
391.4 Establishment of accounts.
391.5 Qualified withdrawals.
391.6 Tax treatment of qualified withdrawals.
391.7 Tax treatment of nonqualified withdrawals.
391.8 Certain corporate reorganizations and changes in partnerships, and certain transfers on death. [Reserved]
391.9 Consolidated returns. [Reserved]
391.10 Transitional rules for existing funds.
391.11 Definitions.

AUTHORITY: Secs. 204(b) and 607(l), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114, 1177), Reorganization Plans No. 21 of 1950 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840) as amended by Pub. L. 91–469 (84 Stat. 1036), Dept. of Commerce Organization Order 10–8 (38 FR 19707), July 23, 1973.

SOURCE: 41 FR 23960, June 14, 1976, unless otherwise noted.

§ 391.0 Statutory provisions; section 607, Merchant Marine Act, 1936, as amended.

SEC. 607 (a) Agreement Rules.

Any citizen of the United States owning or leasing one or more eligible vessels (as defined in subsection (k)(1)) may enter into an agreement with the Secretary of Transportation under, and as provided in, this section to establish a capital construction fund (hereinafter in this section referred to as the ''fund'') with respect to any or all of such vessels. Any agreement entered into under this section shall be for the purpose of providing replacement vessels, additional vessels, or reconstructed vessels, built in the United States and documented under the laws of the United States for operation in the United States foreign, Great Lakes, or noncontiguous domestic trade or in the fisheries of the United States and shall provide for the deposit in the fund of the amounts agreed upon as necessary or appropriate to provide for qualified withdrawals under subsection (f). The deposits in the fund, and all withdrawals from the fund, whether qualified or nonqualified, shall be subject to such conditions and requirements as the Secretary of Transportation may by regulations prescribe or are set forth in such agreement; except that the Secretary of Transportation may not require any person to deposit in the fund for any taxable year more than 50 percent of that portion of such person's taxable income for such year (computed in the manner provided in subsection (b)(1)(A)) which is attributable to the operation of the agreement vessels.

(b) Ceiling on Deposits.

(1) The amount deposited under subsection (a) in the fund for any taxable year shall not exceed the sum of:

(A) That portion of the taxable income of the owner or lessee for such year (computed as provided in chapter 1 of the Internal Revenue Code of 1954 but without regard to the carryback of any net operating loss or net capital loss and without regard to this section) which is attributable to the operation of the agreement vessels in the foreign or domestic commerce of the United States or in the fisheries of the United States.

(B) The amount allowable as a deduction under section 167 of the Internal Revenue Code of 1954 for such year with respect to the agreement vessels.

(C) If the transaction is not taken into account for purposes of subparagraph (A), the net proceeds (as defined in joint regulations) from (i) the sale or other disposition of any agreement vessel, or (ii) insurance or indemnity attributable to any agreement vessel, and

(D) The receipts from the investment or reinvestment of amounts held in such fund.

(2) In the case of a lessee, the maximum amount which may be deposited with respect to an agreement vessel by reason of paragraph (1)(B) for any period shall be reduced by any amount which, under an agreement entered into under this section, the owner is required or permitted to deposit for such period with respect to such vessel by reason of paragraph (1)(B).

(3) For purposes of paragraph (1), the term *agreement vessel* includes barges and containers which are part of the complement of such vessel and which are provided for in the agreement.

(c) Requirements as to Investments.

Amounts in any fund established under this section shall be kept in the depository or depositories specified in the agreement and shall be subject to such trustee and other fiduciary requirements as may be specified by the Secretary of Transportation.

They may be invested only in interest-bearing securities approved by the Secretary of Transportation; except that, if the Secretary of Transportation consents thereto, an agreed percentage (not in excess of 60 percent) of the assets of the fund may be invested in the stock of domestic corporations. Such stock must be currently fully listed and registered on an exchange registered with the Securities and Exchange Commission as a national securities exchange, and must be stock which would be acquired by prudent men of discretion and intelligence in such matters who are seeking a reasonable income and the preservation of their capital. If at any time the fair market value of the stock in the fund is more than the agreed percentage of the assets in the fund, any subsequent investment of amounts deposited in the fund, and any subsequent withdrawal from the fund, shall be made in such a way as to tend to restore the fund to a situation in which the fair market value of the stock does not exceed such agreed percentage. For purposes of this subsection, if the common stock of a corporation meets the requirements of this subsection, and if the preferred stock of such corporation would meet such requirements but for the fact that it cannot be listed and registered as required because it is nonvoting stock, such preferred stock shall be treated as meeting the requirements of this subsection.

(d) Nontaxability for Deposits.

(1) For purposes of the Internal Revenue Code of 1954—

(A) Taxable income (determined without regard to this section) for the taxable year shall be reduced by an amount equal to the amount deposited for the taxable year out of amounts referred to in subsection (b)(1)(A).

(B) Gain from a transaction referred to in subsection (b)(1)(C) shall not be taken into account if an amount equal to the net proceeds (as defined in joint regulations) from such transaction is deposited in the fund.

(C) The earnings (including gains and losses) from the investment and reinvestment of amounts held in the fund shall not be taken into account,

(D) The earnings and profits of any corporation (within the meaning of section 316 of such Code) shall be determined without regard to this section, and

(E) In applying the tax imposed by section 531 of such Code (relating to the accumulated earnings tax), amounts while held in the fund shall not be taken into account.

(2) Paragraph (1) shall apply with respect to any amount only if such amount is deposited in the fund pursuant to the agreement and not later than the time provided in joint regulations.

(e) Establishment of Accounts.

For purposes of this section—

(1) Within the fund established pursuant to this section three accounts shall be maintained:

(A) The capital account,

(B) The capital gain account, and

(C) The ordinary income account.

(2) The capital account shall consist of—

(A) Amounts referred to in subsection (b)(1)(B),

(B) Amounts referred to in subsection (b)(1)(C) other than that portion thereof which represents gain not taken into account by reason of subsection (d)(1)(B),

(C) 85 percent of any dividend received by the fund with respect to which the person maintaining the fund would (but for subsection (d)(1)(C)) be allowed a deduction under section 243 of the Internal Revenue Code of 1954, and

(D) Interest income exempt from taxation under section 103 of such Code.

(3) The capital gain account shall consist of—

(A) Amounts representing capital gains on assets held for more than 6 months and referred to in subsection (b)(1)(C) or (b)(1)(D), reduced by—

(B) Amounts representing capital losses on assets held in the fund for more than 6 months.

(4) The ordinary income account shall consist of—

(A) Amounts referred to in subsection (b)(1)(A),

(B)(i) Amounts representing capital gains on assets held for 6 months or less and referred to in subsection (b)(1)(C) or (b)(1)(D), reduced by—

(ii) Amounts representing capital losses on assets held in the fund for 6 months or less,

(C) Interest (not including any tax-exempt interest referred to in paragraph (2)(D)) and other ordinary income (not including any dividend referred to in subparagraph (E)) received on assets held in the fund,

(D) Ordinary income from a transaction described in subsection (b)(1)(C), and

(E) 15 percent of any dividend referred to in paragraph (2)(C).

(5) Except on termination of a fund, capital losses referred to in paragraph (3)(B) or in paragraph (4)(B)(ii) shall be allowed only as an offset to gains referred to in paragraph (3)(A) or (4)(B)(i), respectively.

(f) Purposes of Qualified Withdrawals.

(1) A qualified withdrawal from the fund is one made in accordance with the terms of the agreement but only if it is for:

(A) The acquisition, construction, or reconstruction of a qualified vessel,

(B) The acquisition, construction, or reconstruction of barges and containers which are part of the complement of a qualified vessel, or

(C) The payment of the principal on indebtedness incurred in connection with the acquisition, construction or reconstruction of

a qualified vessel or a barge or container which is part of the complement of a qualified vessel.

Except to the extent provided in regulations prescribed by the Secretary of Transportation, subparagraph (B), and so much of subparagraph (C) as relates only to barges and containers, shall apply only with respect to barges and containers constructed in the United States.

(2) Under joint regulations, if the Secretary of Transportation determines that any substantial obligation under any agreement is not being fulfilled, he may, after notice and opportunity for hearing to the person maintaining the fund, treat the entire fund or any portion thereof as an amount withdrawn from the fund in a nonqualified withdrawal.

(g) Tax Treatment of Qualified Withdrawals.

(1) Any qualified withdrawal from a fund shall be treated—

(A) First as made out of the capital account.

(B) Second as made out of the capital gain account, and

(C) Third as made out of the ordinary income account.

(2) If any portion of a qualified withdrawal for a vessel, barge, or container is made out of the ordinary income account, the basis of such vessel, barge, or container shall be reduced by an amount equal to such portion.

(3) If any portion of a qualified withdrawal for a vessel, barge, or container is made out of the capital gain account, the basis of such vessel, barge, or container shall be reduced by an amount equal to—

(A) Five-eighths of such portion, in the case of a corporation (other than an electing small business corporation, as defined in section 1371 of the Internal Revenue Code of 1954), or

(B) One-half of such portion, in the case of any other person.

(4) If any portion of a qualified withdrawal to pay the principal on any indebtedness is made out of the ordinary income account or the capital gain account, then an amount equal to the aggregate reduction which would be required by paragraphs (2) and (3) if this were a qualified withdrawal for a purpose described in such paragraphs shall be applied, in the order provided in joint regulations, to reduce the basis of vessels, barges, and containers owned by the person maintaining the fund. Any amount of a withdrawal remaining after the application of the preceding sentence shall be treated as a nonqualified withdrawal.

(5) If any property the basis of which was reduced under paragraph (2), (3), or (4) is disposed of, any gain realized on such disposition, to the extent it does not exceed the aggregate reduction in the basis of such property under such paragraphs, shall be treated as an amount referred to in subsection (h)(3)(A) which was withdrawn on the date of such disposition. Subject to such conditions and requirements as may be provided in joint regulations, the preceding sentence shall not apply to a disposition where there is a redeposit in an amount determined under joint regulations which will insofar as practicable, restore the fund to the position it was in before the withdrawal.

(h) Tax Treatment of Nonqualified Withdrawals.

(1) Except as provided in subsection (i), any withdrawal from a fund which is not a qualified withdrawal shall be treated as a nonqualified withdrawal.

(2) Any nonqualified withdrawal from a fund shall be treated—

(A) First as be made out of the ordinary income account,

(B) Second as made out of the capital gain account, and

(C) Third as made out of the capital account.

For purposes of this section, items withdrawn from any account shall be treated as withdrawn on a first-in-first-out basis; except that (i) any nonqualified withdrawal for research, development, and design expenses incident to new and advanced ship design, machinery and equipment, and (ii) any amount treated as a nonqualified withdrawal under the second sentence of subsection (g)(4), shall be treated as withdrawn on a last-in-first-out basis.

(3) For purposes of the Internal Revenue Code of 1954—

(A) Any amount referred to in paragraph (2)(A) shall be included in income as an item of ordinary income for the taxable year in which the withdrawal is made.

(B) Any amount referred to in paragraph (2)(B) shall be included in income for the taxable year in which the withdrawal is made as an item of gain realized during such year from the disposition of an asset held for more than 6 months, and

(C) For the period on or before the last date prescribed for payment of tax for the taxable year in which this withdrawal is made—

(i) No interest shall be payable under section 6601 f such Code and no addition to the tax shall be payable under section 6651 of such Code.

(ii) Interest on the amount of the additional tax attributable to any item referred to in subparagraph (A) or (B) shall be paid at the applicable rate (as defined in paragraph (4)) from the last date prescribed for payment of the tax for the taxable year for which such item was deposited in the fund, and

(iii) No interest shall be payable on amounts referred to in clauses (i) and (ii) of

paragraph (2) or in the case of any nonqualified withdrawal arising from the application of the recapture provision of section 606(5) of the Merchant Marine Act of 1936 as in effect on December 31, 1969.

(4) For purposes of paragraph (3)(C)(ii), the applicable rate of interest for any nonqualified withdrawal—

(A) Made in a taxable year beginning in 1970 or 1971 is 8 percent, or

(B) Made in a taxable year beginning after 1971, shall be determined and published jointly by the Secretary of the Treasury and the Secretary of Transportation and shall bear a relationship to 8 percent which the Secretaries determine under joint regulations to be comparable to the relationship which the money rates and investment yields for the calendar year immediately preceding the beginning of the taxable year bear to the money rates and investment yields for the calendar year 1970.

(i) Certain Corporate Reorganizations and Changes in Partnerships.

Under joint regulations—

(1) A transfer of a fund from one person to another person in a transaction to which section 381 of the Internal Revenue Code of 1954 applies may be treated as if such transaction did not constitute a nonqualified withdrawal, and

(2) A similar rule shall be applied in the case of a continuation of a partnership (within the meaning of subchapter K of such Code).

(j) Treatment of Existing Funds.

(1) Any person who was maintaining a fund or funds (hereinafter in this subsection referred to as ''old fund'') under this section (as in effect before the enactment of this subsection) may elect to continue such old fund but—

(A) May not hold moneys in the old fund beyond the expiration date provided in the agreement under which such old fund is maintained (determined without regard to any extension or renewal entered into after April 14, 1970),

(B) May not simultaneously maintain such old fund and a new fund established under this section, and

(C) If he enters into an agreement under this section to establish a new fund, may agree to the extension of such agreement to some or all of the amounts in the old fund.

(2) In the case of any extension of an agreement pursuant to paragraph (1)(C), each item in the old fund to be transferred shall be transferred in a nontaxable transaction to the appropriate account in the new fund established under this section. For purposes of subsection (h)(3)(C), the date of the deposit of any item so transferred shall be July 1, 1971, or the date of the deposit in the old fund, whichever is the later.

(k) Definitions.

For purposes of this section—

(1) The term *eligible vessel* means any vessel—

(A) Constructed in the United States and, if reconstructed, reconstructed in the United States,

(B) Documented under the laws of the United States, and

(C) Operated in the foreign or domestic commerce of the United States or in the fisheries of the United States.

Any vessel which (i) was constructed outside of the United States but documented under the laws of the United States on April 15, 1970, or (ii) constructed outside the United States for use in the United States foreign trade pursuant to a contract entered into before April 15, 1970, shall be treated as satisfying the requirements of subparagraph (A) of this paragraph and the requirements of subparagraph (A) of paragraph (2).

(2) The term *qualified vessel* means any vessel—

(A) Constructed in the United States and, if reconstructed, reconstructed in the United States,

(B) Documented under the laws of the United States, and

(C) Which the person maintaining the fund agrees with the Secretary of Transportation will be operated in the United States foreign, Great Lakes, or noncontiguous domestic trade or in the fisheries of the United States.

(3) The term *agreement vessel* means any eligible vessel or qualified vessel which is subject to an agreement entered into under this section.

(4) The term *United States,* when used in a geographical sense, means the continental United States including Alaska, Hawaii, and Puerto Rico.

(5) The term *United States foreign trade* includes (but is not limited to) those areas in domestic trade in which a vessel built with construction-differential subsidy is permitted to operate under the first sentence of section 506 of the Act.

(6) The term *joint regulations* means regulations prescribed under subsection (1).

(7) The term *vessel* includes cargo handling equipment which the Secretary of Transportation determines is intended for use primarily on the vessel. The term *vessel* also includes an ocean-going towing vessel or an ocean-going barge or comparable towing vessel or barge operated on the Great Lakes.

(8) The term *noncontiguous trade* means (i) trade between the contiguous forty-eight States on the one hand and Alaska, Hawaii, Puerto Rico and the insular territories and possessions of the United States on the other hand, and (ii) trade from any point in Alaska, Hawaii, Puerto Rico, and such territories and possessions to any other point in Alaska, Hawaii, Puerto Rico, and such territories and possessions.

(l) Records; Reports; Changes in Regulations.

Each person maintaining a fund under this section shall keep such records and shall make such reports as the Secretary of Transportation or the Secretary of the Treasury shall require. The Secretary of the Treasury and the Secretary of Transportation shall jointly prescribe all rules and regulations, not inconsistent with the foregoing provisions of this section, as may be necessary or appropriate to the determination of tax liability under this section. If, after an agreement has been entered into under this section, a change is made either in the joint regulations or in the regulations prescribed by the Secretary of Transportation under this section which could have a substantial effect on the rights or obligations of any person maintaining a fund under this section, such person may terminate such agreement.

§ 391.1 Scope of section 607 of the Act and the regulations in this part.

(a) *In general.* The regulations prescribed in this part provide rules for determining the income tax liability of any person a party to an agreement with the Secretary of Transportation establishing a capital construction fund (for purposes of this part referred to as the ''fund'') authorized by section 607 of the Merchant Marine Act, 1936, as amended (for purposes of this part referred to as the ''Act''). With respect to such parties, section 607 of the Act in general provides for the nontaxability of certain deposits of money or other property into the fund out of earnings or gains realized from the operation of vessels covered in an agreement, gains realized from the sale or other disposition of agreement vessels or proceeds from insurance for indemnification for loss of agreement vessels, earnings from the investment or reinvestment of amounts held in a fund, and gains with respect to amounts or deposits in the fund. Transitional rules are also provided for the treatment of ''old funds'' existing on or before the effective date of the Merchant Marine Act of 1970 (see § 391.10).

(b) *Cross references.* For rules relating to eligibility for a fund, deposits, and withdrawals and other aspects, see the regulations prescribed by the Secretary of Transportation in title 46 (Merchant Marine) and by the Secretary of Commerce in title 50 (Fisheries) of the Code of Federal Regulations.

(c) *Code.* For purposes of this part, the term *Code* means the Internal Revenue Code of 1954, as amended.

§ 391.2 Ceiling on deposits.

(a) *In general*—(1) *Total ceiling.* Section 607(b) of the Act provides a ceiling on the amount which may be deposited by a party for a taxable year pursuant to an agreement. The amount which a party may deposit into a fund may not exceed the sum of the following subceilings:

(i) The lower of (*a*) the taxable income (if any) of the party for such year (computed as provided in chapter 1 of the Code but without regard to the carryback of any net operating loss or net capital loss and without regard to section 607 of the Act) or (*b*) taxable income (if any) of such party for such year attributable under paragraph (b) of this section to the operation of agreement vessels (as defined in paragraph (f) of this section) in the foreign or domestic commerce of the United States or in the fisheries of the United States (see section 607(b)(1)(A) of the Act),

(ii) Amounts allowable as a deduction under section 167 of the Code for such year with respect to the agreement vessels (see section 607(b)(1)(B) of the Act),

(iii) The net proceeds (if not included in paragraph (a)(i) of this section) from (*a*) the sale or other disposition of any agreement vessels or (*b*) insurance or indemnity attributable to any agreement vessels (see section 607(b)(1)(C) of the Act and paragraph (c) of this section), and

(iv) Earnings and gains from the investment or reinvestment of amounts held in such fund (see section 607 (b)(1)(D) of the Act and paragraphs (d) and (g) of this section).

(2) *Overdeposits.* (i) If for any taxable year an amount is deposited into the fund under a subceiling computed under paragraph (a)(1) of this section which is in excess of the amount of such subceiling for such year, then at the party's option such excess (or any portion thereof) may—

(*a*) Be treated as a deposit into the fund for that taxable year under another available subceiling, or

(*b*) Be treated as not having been deposited for the taxable year and thus, at the party's option, may be disposed of either by it being—

(*1*) Treated as a deposit into the fund under any subceiling available in the first subsequent taxable year in which a subceiling is available, in which case such amount shall be deemed to have been deposited on the first day of such subsequent taxable year, or

(*2*) Repaid to the party from the fund.

(ii)(*a*) When a correction is made for an overdeposit, proper adjustment shall be made with respect to all items for all taxable years affected by the overdeposit, such as, for example, amounts in each account described in § 391.4, treatment of nonqualified withdrawals, the consequences of qualified withdrawals and the treatment of losses realized or treated as realized by the fund. Thus, for example, if the party chooses to have the fund repay to him the amount of an overdeposit, amounts in each account, basis of assets, and any affected item will be determined as though no deposit and repayment had been made. Accordingly, in such a case, if there are insufficient amounts in an account to cover a repayment of an overdeposit (as determined before correcting the overdeposit), and the party had applied the proceeds of a qualified withdrawal from such account towards the purchase of a qualified vessel (within the meaning of § 391.11(a)(2)), then such account and the basis of the vessel shall be adjusted as of the time such withdrawal was made and proceeds were applied, and repayment shall be made from such account as adjusted. If a party chooses to treat the amount of an overdeposit as a deposit under a subceiling for a subsequent year, similar adjustments to affected items shall be made. If the amount of a withdrawal would have exceeded the amount in the fund (determined after adjusting all affected amounts by reason of correcting the overdeposit), the withdrawal to the extent of such excess shall be treated as a repayment made at the time the withdrawal was made.

(*b*) If the accounts (as defined in § 391.4) that were increased by reason of excessive deposits contain sufficient amounts at the time the overdeposit is discovered to repay the party, the party may, at his option, demand repayment of such excessive deposits from such accounts in lieu of making the adjustments required by paragraph (a)(2)(ii)(*a*) of this section.

(iii) During the period beginning with the day after the date an overdeposit was actually made and ending with the date it was disposed of in accordance with paragraph (a)(2)(i)(*b*) of this section, there shall be included in the party's gross income for each taxable year the earnings attributed to any amount of overdeposit on hand during such a year. The earnings attributable to any amount of overdeposit on hand during a taxable year shall be an amount equal to the product of—

(*a*) The average daily earnings for each one dollar in the fund (as determined in paragraph (a)(2)(iv) of this section),

(*b*) The amount of overdeposit (as determined in paragraph (a)(2)(vi) of this section), and

(*c*) The number of days during the taxable year the overdeposit existed.

(iv) For purposes of paragraph (a)(2)(iii)(*a*) of this section, the average daily earnings for each dollar in the fund shall be determined by dividing the total earnings of the fund for the taxable year by the sum of the products of—

(*a*) Any amount on hand during the taxable year (determined under paragraph (a)(2)(v) of this section), and

(*b*) The number of days during the taxable year such amount was on hand in the fund.

(v) For purposes of this paragraph—

(*a*) An amount on hand in the fund or an overdeposit shall not be treated as on hand on the day deposited but shall be treated as on hand on the day withdrawn, and

(*b*) The fair market value of such amounts on hand for purposes of this subparagraph shall be determined as provided in § 20.2031–2 of the Estate Tax Regulations of this chapter but without applying the blockage and other special rules contained in paragraph (e) thereof.

(vi) For purposes of paragraph (a)(2)(iii)(*b*) of this section, the amount of overdeposit on hand at any time is an amount equal to—

(*a*) The amount deposited into the fund under a subceiling computed under paragraph (a)(1) of this section which is in excess of the amount of such subceiling, less

(*b*) The sum of—

(*1*) Amounts described in paragraph (a)(2)(vi)(*a*) of this section treated as a deposit under another subceiling for the taxable year pursuant to paragraph (a)(2)(i) of this section,

(*2*) Amounts described in paragraph (a)(2)(vi)(*a*) of this section disposed of (or treated as disposed of) in accordance with paragraphs (a)(2) (i) or (ii) of this section prior to such time.

(vii) To the extent earnings attributed under paragraph (a)(2)(iii) of this section represent a deposit for any taxable year in excess of the subceiling described in paragraph (a)(1)(iv) of this section for receipts from the investment or reinvestment of amounts held in the fund, such attributed earnings shall be subject to the rules of this paragraph for overdeposits.

(3) *Underdeposit caused by audit adjustment.* [Reserved]

(4) *Requirements for deficiency deposits.* [Reserved]

(b) *Taxable income attributable to the operation of an agreement vessel*—(1) *In general.* For purposes of this section, taxable income attributable to the operation of an agreement vessel means the amount, if any, by which the gross income of a party for the taxable year from the operation of an agreement vessel (as defined in paragraph (f) of this section) exceeds the allowable deductions allocable to such operation (as determined under paragraph (b)(3) of this section). The term *taxable income attributable to the operation of the agreement vessels* means the sum of the amounts described in the preceding sentence separately computed with respect to each agreement vessel (or share therein) or, at the party's option, computed in the aggregate.

(2) *Gross income.* (i) Gross income from the operation of agreement vessels means the sum of the revenues which are derived during the taxable year from the following:

(*a*) Revenues derived from the transportation of passengers, freight, or mail in such vessels, including amounts from contracts for the charter of such vessels to others, from operating differential subsidies, from collections in accordance with pooling agreements and from insurance or indemnity net proceeds relating to the loss of income attributable to such agreement vessels.

(*b*) Revenues derived from the operation of agreement vessels relating to commercial fishing activities, including the transportation of fish, support activities for fishing vessels, charters for commercial fishing, and insurance or indemnity net proceeds relating to the loss of income attributable to such agreement vessels.

(*c*) Revenues from the rental lease, or use by others of terminal facilities, revenues from cargo handling operations and tug and lighter operations, and revenues from other services or operations which are incidental and directly related to the operation of an agreement vessel. Thus, for example, agency fees, commissions, and brokerage fees derived by the party at his place of business for effecting transactions for services incidental and directly related to shipping for the accounts of other persons are includible in gross income from the operation of agreement vessels where the transaction is of a kind customarily consummated by the party for his own account at such place of business.

(*d*) Dividends, interest, and gains derived from assets set aside and reasonably retained to meet regularly occurring obligations relating to the shipping or fishing business directly connected with the agreement vessel which obligations cannot at all times be met from the current revenues of the business because of layups or repairs, special surveys, fluctuations in the business, and reasonably forseeable strikes (whether or not a strike actually occurs), and security amounts retained by reason of participation in conferences, pooling agreements, or similar agreements.

(ii) The items of gross income described in paragraphs (b)(2)(i) (*c*) and (*d*) of this section shall be considered to be derived from the operations of a particular agreement vessel in the same proportion that the sum of the items of gross income described in paragraphs (b)(2)(i) (*a*) and (*b*) of this

section which are derived from the operations of such agreement vessel bears to the party's total gross income for the taxable year from operations described in paragraphs (b)(2)(i) (*a*) and (*b*) of this section.

(iii) In the case of a party who uses his own or leased agreement vessels to transport his own products, the gross income attributable to such vessel operations is an amount determined to be an arm's length charge for such transportation. The arm's length charge shall be determined by applying the principles of section 482 of the Code and the regulations thereunder as if the party transporting the product and the owner of the product were not the same person but were controlled taxpayers within the meaning of § 1.482–1(a)(4) of the Income Tax Regulations of this chapter. Gross income attributable to the operation of agreement vessels does not include amounts for which the party is allowed a deduction for percentage depletion under sections 611 and 613 of the Code.

(3) *Deductions.* From the gross income attributable to the operation of an agreement vessel or vessels as determined under paragraph (b)(2) of this section, there shall be deducted in accordance with the principles of § 1.861–8 of the Income Tax Regulations of this chapter, the expenses, losses, and other deductions definitely related and therefore allocated and apportioned thereto and a ratable part of any expenses, losses, or other deductions which are not definitely related to any gross income of the party. Thus, for example, if a party has gross income attributable to the operation of an agreement vessel and other gross income and has a particular deduction definitely related to both types of gross income, such deductions must be apportioned between the two types of gross income on a reasonable basis in determining the taxable income attributable to the operation of the agreement vessel.

(4) *Net operating and capital loss deductions.* The taxable income of a party attributable to the operation of agreement vessels shall be computed without regard to the carryback of any net operating loss deduction allowed by section 172 of the Code, the carryback of any net capital loss deduction allowed by section 165(f) of the Code, or any reduction in taxable income allowed by section 607 of the Act.

(5) *Method of accounting.* Taxable income must be computed under the method of accounting which the party uses for Federal income tax purposes. Such method may include a method of reporting whereby items of revenue and expense properly allocable to voyages in progress at the end of any accounting period are eliminated from the computation of taxable income for such accounting period and taken into account in the accounting period in which the voyage is completed.

(c) *Net proceeds from transactions with respect to agreement vessels.* [Reserved]

(d) *Earnings and gains from the investment or reinvestment of amounts held in a fund*—(1) *In general.* (i) Earnings and gains received or accrued by a party from the investment or reinvestment of assets in a fund is the total amount of any interest or dividends received or accrued, and gains realized, by the party with respect to assets deposited in, or purchased with amounts deposited in, such fund. Such earnings and gains are therefore required to be included in the gross income of the party unless such amount, or a portion thereof, is not taken into account under section 607(d)(1)(C) of the Act and § 391.3(b)(2)(ii) by reason of a deposit or deemed deposit into the fund. For rules relating to receipts from the sale or other disposition of nonmoney deposits into the fund, see paragraph (g) of this section.

(ii) Earnings received or accrued by a party from investment or reinvestment of assets in a fund include the ratable monthly portion of original issue discount included in gross income pursuant to section 1232(a)(3) of the Code. Such ratable monthly portion shall be deemed to be deposited into the ordinary income account of the fund, but an actual deposit representing such ratable monthly portion shall not be made. For basis of a bond or other evidence of indebtedness issued at a discount, see § 391.3(b)(2)(ii)(b).

(2) *Gain realized.* (i) The gain realized with respect to assets in the fund is the excess of the amount realized (as defined in section 1001(b) of the Code and

the regulations thereunder) by the fund on the sale or other disposition of a fund asset over its adjusted basis (as defined in section 1011 of the Code) to the fund. For the adjusted basis of nonmoney deposits, see paragraph (g) of this section.

(ii) Property purchased by the fund (including property considered under paragraph (g)(1)(iii) of this section as purchased by the fund) which is withdrawn from the fund in a qualified withdrawal (as defined in §391.5) is treated as a disposition to which subdivision (i) of this subparagraph applies. For purposes of determining the amount by which the balance within a particular account will be reduced in the manner provided in §391.6(b) (relating to order of application of qualified withdrawals against accounts) and for purposes of determining the reduction in basis of a vessel, barge, or container (or share therein) pursuant to §391.6(c), the value of the property is its fair market value on the day of the qualified withdrawal.

(3) *Holding Period.* Except as provided in paragraph (g) of this section, the holding period of fund assets shall be determined under section 1223 of the Code.

(e) *Leased vessels.* In the case of a party who is a lessee of an agreement vessel, the maximum amount which such lessee may deposit with respect to any agreement vessel by reason of section 607(b)(1)(B) of the Act and paragraph (a)(1)(ii) of this section (relating to depreciation allowable) for any period shall be reduced by the amount (if any) which, under an agreement entered into under section 607 of the Act, the owner is required or permitted to deposit for such period with respect to such vessel by reason of section 607(b)(1)(B) of the Act and paragraph (a)(1)(ii) of this section. The amount of depreciation depositable by the lessee under this paragraph is the amount of depreciation deductible by the lessor on its income tax return, reduced by the amount described in the preceding sentence or the amount set forth in the agreement, whichever is lower.

(f) *Definition of agreement vessel.* For purposes of this section, the term *agreement vessel* (as defined in §391.11 (a)(3) and 46 CFR 390.6) includes barges and containers which are the complement of an agreement vessel and which are provided for in the agreements, agreement vessels which have been contracted for or are in the process of construction, and any shares in an agreement vessel. Solely for purposes of this section, a party is considered to have a ''share'' in an agreement vessel if he has a right to use the vessel to generate income from its use whether or not the party would be considered as having a proprietary interest in the vessel for purposes of State or Federal law. Thus, a partner may enter into an agreement with respect to his share of the vessel owned by the partnership and he may make deposits of his distributive share of the sum of the four subceilings described in paragraph (a)(1) of this section. Notwithstanding the provisions of Subchapter K of the Code (relating to the taxation of partners and partnerships), the Internal Revenue Service will recognize, solely for the purposes of applying this part, an agreement by an owner of a share in an agreement vessel even though the ''share'' arrangement is a partnership for purposes of the Code.

(g) *Special rules for nonmoney deposits and withdrawals*—(1) *In general.* (i) Deposits may be made in the form of money or property of the type permitted to be deposited under the agreement. (For rules relating to the types of property which may be deposited into the fund, see 46 CFR 390.7(d), and 50 CFR part 259.) For purposes of this paragraph, the term *property* does not include money.

(ii) Whether or not the election provided for in paragraph (g)(2) of this section is made—

(*a*) The amount of any property deposit, and the fund's basis for property deposited in the fund, is the fair market value of the property at the time deposited, and

(*b*) The fund's holding period for the property begins on the day after the deposit is made.

(iii) Unless such an election is made, deposits of property into a fund are considered to be a sale at fair market value of the property, a deposit of cash equal to such fair market value, and a purchase by the fund of such property for cash. Thus, in the absence of the

election, the difference between the fair market value of such property deposited and its adjusted basis shall be taken into account as gain or loss for purposes of computing the party's income tax liability for the year of deposit.

(iv) For fund's basis and holding period of assets purchased by the fund, see paragraphs (d) (2) and (3) of this section.

(2) *Election not to treat deposits of property other than money as a sale or exchange at the time of deposit.* A party may elect to treat a deposit of property as if no sale or other taxable event had occurred on the date of deposit. If such election is made, in the taxable year the fund disposes of the property, the party shall recognize as gain or loss the amount he would have recognized on the day the property was deposited into the fund had the election not been made. The party's holding period with respect to such property shall not include the period of time such property was held by the fund. The election shall be made by a statement to that effect, attached to the party's Federal income tax return for the taxable year to which the deposit relates, or, if such return is filed before such deposit is made, attached to the party's return for the taxable year during which the deposit is actually made.

(3) *Effect of qualified withdrawal of property deposited pursuant to election.* If property deposited into a fund, with respect to which an election under paragraph (g)(2) of this section is made, is withdrawn from the fund in a qualified withdrawal (as defined in § 391.5) such withdrawal is treated as a disposition of such property resulting in recognition by the party of gain or loss (if any) as provided in paragraph (g)(2) of this section with respect to nonfund property. In addition, such withdrawal is treated as a disposition of such property by the fund resulting in recognition of gain or loss by the party with respect to fund property to the extent the fair market value of the property on the date of withdrawal is greater or less (as the case may be) than the adjusted basis of the property to the fund on such date. For purposes of determining the amount by which the balance within a particular account will be reduced in the manner provided in § 391.6(b) (relating to order of application of qualified withdrawals against accounts and for purposes of determining the reduction in basis of a vessel, barge, or container (or share therein) pursuant to § 391.6(c), the value of the property is its fair market value on the day of the qualified withdrawal. For rules relating to the effect of a qualified withdrawal of property purchased by the fund (including deposited property considered under paragraph (g)(1)(iii) of this section as purchased by the fund), see paragraph (d)(2)(ii) of this section.

(4) *Effect of nonqualified withdrawal of property deposited pursuant to election.* If property deposited into a fund with respect to which an election under paragraph (g)(2) of this section is made, is withdrawn from the fund in a nonqualified withdrawal (as defined in § 391.7(b)), no gain or loss is to be recognized by the party with respect to fund property or nonfund property but an amount equal to the adjusted basis of the property to the fund is to be treated as a nonqualified withdrawal. Thus, such amount is to be applied against the various accounts in the manner provided in § 391.7(c), such amount is to be taken into account in computing the party's taxable income as provided in § 391.7(d), and such amount is to be subject to interest to the extent provided for in § 391.7(e). In the case of withdrawals to which this subparagraph applies, the adjusted basis of the property in the hands of the party is the adjusted basis on the date of deposit, increased or decreased by the adjustments made to such property while held in the fund, and in determining the period for which the party has held the property there shall be included, in addition to the period the fund held the property, the period for which the party held the property before the date of deposit of the property into the fund. For rules relating to the basis and holding period of property purchased by the fund (including deposited property considered under paragraph (g)(1)(ii) of this section as purchased by the fund) and withdrawn in a nonqualified withdrawal see § 391.7(f).

(5) *Examples.* The provisions of this paragraph are illustrated by the following examples:

Example (1). X Corporation, which uses the calendar year as its taxable year, maintains a fund described in § 391.1 X's taxable income (determined without regard to section 607 of the Act) is $100,000, of which $80,000 is taxable income attributable to the operation of agreement vessels (as determined under paragraph (b)(1) of this section). Under the agreement, X is required to deposit into the fund all earnings and gains received from the investment or reinvestment of amounts held in the fund, an amount equal to the net proceeds from transactions referred to in § 391.2(c), and an amount equal to 50 percent of its earnings attributable to the operation of agreement vessels provided that such 50 percent does not exceed X's taxable income from all sources for the year of deposit. The agreement permits X to make voluntary deposits of amounts equal to 100 percent of its earnings attributable to the operation of agreement vessels, subject to the limitation with respect to taxable income from all sources. The agreement also provides that deposits attributable to such earnings may be in the form of cash or other property. On March 15, 1973, X deposits, with respect to its 1972 earnings attributable to the operation of agreement vessels, stock with a fair market value at the time of deposit of $80,000 and an adjusted basis to X of $10,000. Such deposit represents agreement vessel income of $80,000. At the time of deposit, such stock had been held by X for a period exceeding 6 months. X does not elect under subparagraph (2) of this paragraph to defer recognition of the gain. Accordingly, under subparagraph (1)(iii) of this paragraph, the deposit is treated as a deposit of $80,000 and X realizes a long-term capital gain of $70,000 on March 15, 1973.

Example (2). The facts are the same as in example (1), except that X elects in accordance with subparagraph (2) of this paragraph not to treat the deposit as a sale or exchange. On July 1, 1974, the fund sells the stock for $85,000. The basis to the fund of the stock is $80,000 (see subparagraph (1)(ii)(*a*) of this paragraph). With respect to non fund property, X recognizes $70,000 of long-term capital gain on the sale includible in its gross income for 1974. With respect to fund property, X realizes $5,000 of long-term capital gain (the difference between the amount received by the fund on the sale of the stock, $85,000, and the basis to the fund of the stock, $80,000), an amount equal to which is required to be deposited into the fund with respect to 1974, as a gain from the investment or reinvestment of amounts held in the fund. Since the fund held the stock for a period exceeding 6 months, the $5,000 is allocated to the fund's capital gain account under § 391.4(c).

Example (3). The facts are the same as in example (2), except that the fund sells the stock on July 1, 1974, for $75,000. As the basis to the fund of the stock is $80,000 with respect to fund property, X realizes a long-term capital loss on the sale (the difference between the amount received by the fund on the sale of the stock, $75,000, and the basis to the fund of the stock, $80,000), of $5,000, an amount equal to which is required to be charged against the fund's capital gain account under § 391.4(e). Under subparagraph (2) of this paragraph, X recognizes $70,000 of long-term capital gain with respect to nonfund property on the sale which is includible in its gross income for 1974.

Example (4). The facts are the same as in example (2), except that on July 1, 1974, X makes a qualified withdrawal (as defined in § 391.5(a)) of the stock and uses it to pay indebtedness pursuant to § 391.5(b). On the disposition by X considered to occur under subparagraph (3) of this paragraph on the qualified withdrawal, X recognizes $70,000 of long-term capital gain with respect to nonfund property, which is includible in its gross income for 1974, and a long-term capital gain of $5,000 with respect to fund property, an amount equal to which is allocated to the fund's capital gain account under § 391.4(c). The fund is treated as having a qualified withdrawal of an amount equal to the fair market value of the stock on the day of withdrawal, $85,000 (see subparagraph (3) of this paragraph). In addition, $85,000 is applied against the various accounts in the order provided in § 391.6(b). The basis of the vessel with respect to which the indebtedness was incurred is to be reduced as provided in § 391.6(c).

Example (5). The facts are the same as in example (2), except that X withdraws the stock from the fund in a nonqualified withdrawal (as defined in § 391.7(b)). Under subparagraph (4) of this paragraph, X recognizes no gain or loss with respect to fund or nonfund property on such withdrawal. An amount equal to the basis of the stock to the fund ($80,000) is applied against the various accounts in the order provided in § 391.7(c), and is taken into account in computing X's taxable income for 1974 as provided in § 391.7(d). In addition, X must pay interest on the withdrawal as provided in § 391.7(e). The basis to X of the stock is $10,000 notwithstanding the fact that the fair market value of such stock was $85,000 on the day of withdrawal (see paragraph (g)(4) of this section).

§ 391.3 Nontaxability of deposits.

(a) *In general.* Section 607(d) of the Act sets forth the rules concerning the income tax effects of deposits made with respect to ceilings described in

section 607(b) and §391.2. The specific treatment of deposits with respect to each of the subceilings is set forth in paragraph (b) of this section.

(b) *Treatment of deposits*—(1) *Earnings of agreement vessels.* Section 607(d)(1)(A) of the Act provides that taxable income of the party (determined without regard to section 607 of the Act) shall be reduced by an amount equal to the amount deposited for the taxable year out of amounts referred to in section 607(b)(1)(A) of the Act and §391.2(a)(1)(i). For computation of the foreign tax credit, see paragraph (i) of this section.

(2) *Net proceeds from agreement vessels and fund earnings.* (i)(*a*) Section 607(d)(1)(B) provides that gain from a transaction referred to in section 607(b)(1)(C) of the Act and §391.2(a)(1)(iii) (relating to ceilings on deposits of net proceeds from the sale or other disposition of agreement vessels) is not to be taken into account for purposes of the Code if an amount equal to the net proceeds from transactions referred to in such sections is deposited in the fund. Such gain is to be excluded from gross income of the party for the taxable year to which such deposit relates. Thus, the gain will not be taken into account in applying section 1231 of the Code for the year to which the deposit relates.

(*b*) [Reserved]

(ii)(*a*) Section 607(d)(1)(C) of the Act provides that the earnings (including gains and losses) from the investment and reinvestment of amounts held in the fund and referred to in section 607(b)(1)(D) of the Act and §391.2(a)(1)(iv) shall not be taken into account for purposes of the Code if an amount equal to such earnings is deposited into the fund. Such earnings are to be excluded from the gross income of the party for the taxable year to which such deposit relates.

(*b*) However, for purposes of the basis adjustment under section 1232(a)(3)(E) of the Code, the ratable monthly portion of original issue discount included in gross income shall be determined without regard to section 607(d)(1)(C) of the Act.

(iii) In determining the tax liability of a party to whom paragraph (b)(1) of this section applies, taxable income, determined after application of paragraph (b)(1) of this section, is in effect reduced by the portion of deposits which represent gain or earnings respectively referred to in paragraph (b)(2) (i) or (ii) of this section. The excess, if any, of such portion over taxable income determined after application of paragraph (b)(1) of this section is taken into account in computing the net operating loss (under section 172 of the Code) for the taxable year to which such deposits relate.

(3) *Time for making deposits.* (i) This section applies with respect to an amount only if such amount is deposited in the fund pursuant to the agreement and not later than the time provided in paragraph (b)(2) (ii), (iii), or (iv) of this section for the making of such deposit or the date the Secretary of Transportation provides, whichever is earlier.

(ii) Except as provided in paragraph (b)(2) (iii) or (iv) of this section, a deposit may be made not later than the last day prescribed by law (including extensions thereof) for filing the party's Federal income tax return for the taxable year to which such deposit relates.

(iii) If the party is a subsidized operator under an operating-differential subsidy contract, and does not receive on or before the 59th day preceding such last day, payment of all or part of the accrued operating-differential subsidy payable for the taxable year, the party may deposit an amount equivalent to the unpaid accrued operating-differential subsidy on or before the 60th day after receipt of payment of the accrued operating-differential subsidy.

(iv) A deposit pursuant to §391.2(a)(3)(i) (relating to underdeposits caused by audit adjustments) must be made on or before the date prescribed for such a deposit in §391.2(a)(4).

(4) *Date of deposits.* (i) Except as otherwise provided in paragraphs (b)(4) (ii) and (iii) of this section (with respect to taxable years beginning after December 31, 1969, and prior to January 1, 1972), in §391.2(a)(2)(i), or in §391.10(b), deposits made in a fund within the time specified in paragraph (b)(3) of this section are deemed to have been made on the date of actual deposit.

(ii)(*a*) For taxable years beginning after December 31, 1969, and prior to January 1, 1971, where an application for a fund is filed by a taxpayer prior to January 1, 1972, and an agreement is executed and entered into by the taxpayer prior to March 1, 1972,

(*b*) For taxable years beginning after December 31, 1970, and prior to January 1, 1972, where an application for a fund is filed by a taxpayer prior to January 1, 1973, and an agreement is executed and entered into by the taxpayer prior to March 1, 1973, and

(*c*) For taxable years beginning after December 31, 1971, and prior to January 1, 1975, where an agreement is executed and entered into by the taxpayer on or prior to the due date, with extensions, for the filing of his Federal income tax return for such taxable year, deposits in a fund which are made within 60 days after the date of execution of the agreement, or on or before the due date, with extensions thereof, for the filing of his Federal income tax return for such taxable year or years, whichever date shall be later, shall be deemed to have been made on the date of the actual deposit or as of the close of business of the last regular business day of each such taxable year or years to which such deposits relate, whichever day is earlier.

(iii) Notwithstanding paragraph (b)(4)(ii) of this section, for taxable years beginning after December 31, 1970, and ending prior to January 1, 1972, deposits made later than the last date permitted under paragraph (b)(4)(ii) but on or before January 9, 1973, in a fund pursuant to an agreement with the Secretary of Transportation acting by and through the Administrator of the National Oceanic and Atmospheric Administration, shall be deemed to have been made on the date of the actual deposit or as of the close of business of the last regular business day of such taxable year, whichever is earlier.

(c) *Determination of earnings and profits.* [Reserved]

(d) *Accumulated earnings tax.* As provided in section 607(d)(1)(E) of the Act amounts, while held in the fund, are not to be taken into account in computing the ''accumulated taxable income'' of the party within the meaning of section 531 of the Code. Amounts while held in the fund are considered held for the purpose of acquiring, constructing, or reconstructing a qualified vessel or barges and containers which are part of the complement of a qualified vessel or the payment of the principal on indebtedness incurred in connection with any such acquisition, construction, or reconstruction. Thus, for example, if the reasonable needs of the business (within the meaning of section 537 of the Code) justify a greater amount of accumulation for providing replacement vessels than can be satisfied out of the fund, such greater amount accumulated outside of the fund shall be considered to be accumulated for the reasonable needs of the business. For a further example, although amounts in the fund are not taken into account in applying the tax imposed by section 531 of the Code, to the extent there are amounts in a fund to provide for replacing a vessel, amounts accumulated outside of the fund to replace the same vessel are not considered to be accumulated for the reasonable needs of the business.

(e) *Nonapplicability of section 1231.* If an amount equivalent to gain from a transaction referred to in section 607(b)(1)(C) of the Act and § 391.2(c) (1) and (5) is deposited into the fund and, therefore, such gain is not taken into account in computing gross income under the provisions of paragraph (b)(2) of this section, then such gain will not be taken into account for purposes of the computations under section 1231 of the Code.

(f) *Deposits of capital gains.* In respect of capital gains which are not included in the gross income of the party by virtue of a deposit to which section 607(d) of the Act and this section apply, the following provisions of the Code do not apply; the minimum tax for tax preferences imposed by section 56 of the Code; the alternative tax imposed by section 1201 of the Code on the excess of the party's net long-term capital gain over his net short-term capital loss; and, in the case of a taxpayer other than a corporation, the deduction provided by section 1202 of the Code of 50 percent of the amount of such excess. However, section 56 may apply upon a nonqualified withdrawal

with respect to amounts treated under § 391.7(d)(2) as being made out of the capital gain account.

(g) *Deposits of dividends.* The deduction provided by section 243 of the Code (relating to the deductions for dividends from a domestic corporation received by a corporation) shall not apply in respect of dividends (earned on assets held in the fund) which are deposited into a fund, and which, by virtue of such deposits and the provisions of section 607(d) of the Act and this section, are not included in the gross income of the party.

(h) *Presumption of validity of deposit.* All amounts deposited in the fund shall be presumed to have been deposited pursuant to an agreement unless, after an examination of the facts upon the request of the Commissioner of Internal Revenue or his delegate, the Secretary of Transportation determines otherwise. The Commissioner or his delegate will request such a determination where there is a substantial question as to whether a deposit is made in accordance with an agreement.

(i) *Special rules for application of the foreign tax credit*—(1) *In general.* For purposes of computing the limitation under section 904 of the Code on the amount of the credit provided by section 901 of the Code (relating to the foreign tax credit), the party's taxable income from any source without the United States and the party's entire taxable income are to be determined after application of section 607(d) of the Act. Thus, amounts deposited for the taxable year with respect to amounts referred to in section 607(b)(1)(A) of the Act and § 391.2(a)(1)(i) (relating to taxable income attributable to the operation of agreement vessels) shall be treated as a deduction in arriving at the party's taxable income from sources without the United States (subject to the apportionment rules and paragraph (i)(2) of this section) and the party's entire taxable income for the taxable year. Amounts deposited with respect to gain described in section 607(d)(1)(B) of the Act and § 391.2(c) (relating to net proceeds from the sale or other disposition of an agreement vessel and net proceeds from insurance or indemnity) and amounts deposited with respect to earnings described in section 607(d)(1)(C) of the Act and paragraph (b)(2)(ii) (relating to earnings from the investment and reinvestment of amounts held in a fund) of this section are not taken into account for purposes of the Code and hence are not included in the party's taxable income from sources without the United States or in the party's entire taxable income for purposes of this paragraph.

(2) *Apportionment of taxable income attributable to agreement vessels.* For purposes of computing the overall limitation under section 904(a)(2) of the Code the amount of the deposit made with respect to taxable income attributable to agreement vessels pursuant to § 391.2(a)(1)(i) which is allocable to sources without the United States is the total amount of such deposit multiplied by a fraction the numerator of which is the gross income from sources without the United States from the operation of agreement vessels and the denominator of which is the total gross income from the operation of agreement vessels computed as provided in § 391.2(b)(2). For purposes of this paragraph, gross income from sources without the United States attributable to the operation of agreement vessels is to be determined under sections 61 through 863 of the Code and under the taxpayer's usual method of accounting provided such method is reasonable and in keeping with sound accounting practice. Any computation under the per-country limitation of section 904(a)(1) shall be made in the manner consistent with the provisions of the preceding sentences of this paragraph.

§ 391.4 Establishment of accounts.

(a) *In general.* Section 607(e)(1) of the Act requires that three bookkeeping or memorandum accounts are to be established and maintained within the fund: The capital account, the capital gain account, and the ordinary income account. Deposits of the amounts under the subceilings in section 607(b) of the Act and § 391.2 are allocated among the accounts under section 607(e) of the Act and this section.

(b) *Capital account.* The capital account shall consist of:

(1) Amounts referred to in section 607(b)(1)(B) of the Act and § 391.2

(a)(1)(ii) (relating to deposits for depreciation),

(2) Amounts referred to in section 607(b)(1)(C) of the Act and §391.2(a)(1)(iii) (relating to deposits of net proceeds from the sale or other disposition of agreement vessels) other than that portion thereof which represents gain not taken into account for purposes of computing gross income by reason of section 607(d)(1)(B) of the Act and §391.3(b)(2) (relating to nontaxability of gain from the sale or other disposition of an agreement vessel),

(3) Amounts representing 85 percent of any dividend received by the fund with respect to which the party would, but for section 607(d)(1)(C) of the Act and §391.3(b)(2)(ii) (relating to nontaxability of deposits of earnings from investment and reinvestment of amounts held in a fund), be allowed a deduction under section 243 of the Code, and

(4) Amounts received by the fund representing interest income which is exempt from taxation under section 103 of the Code.

(c) *Capital gain account.* The capital gain account shall consist of amounts which represent the excess of (1) deposits of long-term capital gains on property referred to in section 607(b)(1) (C) and (D) of the Act and §391.2(a)(1) (iii) and (iv) (relating respectively to certain agreement vessels and fund assets), over (2) amounts representing losses from the sale or exchange of assets held in the fund for more than 6 months (for purposes of this section referred to as ''long-term capital losses''). For purposes of this paragraph and paragraph (d)(2) of this section, an agreement vessel disposed of at a gain shall be treated as a capital asset to the extent that gain thereon is not treated as ordinary income, including gain which is ordinary income under section 607(g)(5) of the Act (relating to treatment of gain on disposition of a vessel with a reduced basis) and §391.6(e) or under section 1245 of the Code (relating to gain from disposition of certain depreciable property). For provisions relating to the treatment of short-term capital gains on certain transactions involving agreement vessels or realized by the fund, see paragraph (d) of this section. For rules relating to the treatment of capital losses on assets held in the fund, see paragraph (e) of this section.

(d) *Ordinary income account.* The ordinary income account shall consist of:

(1) Amounts referred to in section 607(b)(1)(A) of the Act and §391.2(a)(1)(i) (relating to taxable income attributable to the operation of an agreement vessel),

(2) Amounts representing (i) deposits of gains from the sale or exchange of capital assets held for 6 months or less (for purposes of this section referred to as ''short-term capital gains'') referred to in section 607(b)(1) (C) or (D) of the Act and §391.2(a)(1) (iii) and (iv) (relating respectively to certain agreement vessels and fund assets), reduced by (ii) amounts representing losses from the sale or exchange of capital assets held in the fund for 6 months or less (for purposes of this section referred to as ''short-term capital losses''). For rules relating to the treatment of certain agreement vessels as capital assets, see paragraph (c) of this section,

(3) Amounts representing interest (not including any tax-exempt interest referred to in section 607(e)(2)(D) of the Act and paragraph (b)(4) of this section) and other ordinary income received on assets held in the fund (not including any dividend referred to in section 607(e)(2)(C) of the Act and paragraph (d)(5) of this section),

(4) Amounts representing ordinary income from a transaction (involving certain net proceeds with respect to an agreement vessel) described in section 607(b)(1)(C) of the Act and §391.2(a)(1)(iii), including gain which is ordinary income under section 607(g)(5) of the Act and §391.6(e) (relating to treatment of gain on the disposition of a vessel with a reduced basis) or under section 1245 of the Code (relating to gain from disposition of certain depreciable property), and

(5) Fifteen percent of any dividend referred to in section 607(e)(2)(C) of the Act and paragraph (b)(3) of this section received on any assets held in the fund.

(e) *Limitation on deduction for capital losses on assets held in a fund.* Except on termination of a fund, long-term (and short-term) capital losses on assets held in a fund shall be allowed only as an offset to long-term (and short-term) capital gains on assets held in the fund,

but only if such gains are deposited into the fund, and shall not be allowed as an offset to any capital gains on assets not held in the fund. The net long-term capital loss of the fund for the taxable year shall reduce the earliest long-term capital gains in the capital gain account at the beginning of the taxable year and the next short-term capital loss for the taxable year shall reduce the earliest short-term capital gains remaining in the ordinary income account at the beginning of the taxable year. Any such losses that are in excess of the capital gains in the respective accounts shall reduce capital gains deposited into the respective accounts in subsequent years (without regard to section 1212, relating to capital loss carrybacks and carryovers). On termination of a fund, any net long-term capital loss in the capital gain account and any net short-term capital loss remaining in the ordinary income accounts is to be taken into account for purposes of computing the party's taxable income for the year of termination as a long-term or short-term (as the case may be) capital loss recognized in the year the fund is terminated. With respect to the determination of the basis to a fund of assets held in such fund, see § 391.2(g).

§ 391.5 Qualified withdrawals.

(a) *In general.* (1) A qualified withdrawal is one made from the fund during the taxable year which is in accordance with section 670(f)(1) of the Act, the agreement, and with regulations prescribed by the Secretary of Transportation and which is for the acquisition, construction, or reconstruction of a qualified vessel (as defined in § 391.11(a)(2)) or barges and containers which are part of the complement of a qualified vessel (or shares in such vessels, barges, and containers), or for the payment of the principal of indebtedness incurred in connection with the acquisition construction, or reconstruction of such qualified vessel (or a barge or container which is part of the complement of a qualified vessel).

(2) For purposes of this section the term *share* is used to reflect an interest in a vessel and means a proprietary interest in a vessel such as, for example, that which results from joint ownership. Accordingly, a share within the meaning of § 391.2(f) (relating to the definition of ''agreement vessel'' for the purpose of making deposits) will not necessarily be sufficient to be treated as a share within the meaning of this section.

(3) For purposes of this section, the term *acquisition* means any of the following:

(i) Any acquisition, but only to the extent the basis of the property acquired in the hands of the transferee is its cost. Thus, for example, if a party transfers a vessel and $1 million in an exchange for another vessel which qualifies for nonrecognition of gain or loss under section 1031(a) of the Code (relating to like-kind exchange), there is an acquisition to the extent of $1 million.

(ii) With respect to a lessee's interest in a vessel, expenditures which result in increasing the amounts with respect to which a deduction for depreciation (or amortization in lieu thereof) is allowable.

(b) *Payments on indebtedness.* Payments on indebtedness may constitute qualified withdrawals only if the party shows to the satisfaction of the Secretary of Transportation a direct connection between incurring the indebtedness and the acquisition, construction, or reconstruction of a qualified vessel or its complement of barges and containers whether or not the indebtedness is secured by the vessel or its complement of barges and containers. The fact that an indebtedness is secured by an interest in a qualified vessel, barge, or container is insufficient by itself to demonstrate the necessary connection.

(c) *Payments to related persons.* Notwithstanding paragraph (a) of this section, payments from a fund to a person owned or controlled directly or indirectly by the same interests as the party within the meaning of section 482 of the Code and the regulations thereunder are not to be treated as qualified withdrawals unless the party demonstrates to the satisfaction of the Secretary of Transportation that no part of such payment constitutes a dividend, a return of capital, or a contribution to capital under the Code.

(d) *Treatment of fund upon failure to fulfill obligations.* Section 607(f)(2) of the Act provides that if the Secretary of Transportation determines that any substantial obligation under the agreement is not being fulfilled, he may, after notice and opportunity for hearing to the party, treat the entire fund, or any portion thereof, as having been withdrawn as a nonqualified withdrawal. In determining whether a party has breached a substantial obligation under the agreement, the Secretary will consider among other things, (1) the effect of the party's action or omission upon his ability to carry out the purposes of the fund and for which qualified withdrawals are permitted under section 607(f)(1) of the Act, and (2) whether the party has made material misrepresentations in connection with the agreement or has failed to disclose material information. For the income tax treatment of nonqualified withdrawals, see § 391.7.

§ 391.6 Tax treatment of qualified withdrawals.

(a) *In general.* Section 607(g) of the Act and this section provide rules for the income tax treatment of qualified withdrawals including the income tax treatment on the disposition of assets acquired with fund amounts.

(b) *Order of application of qualified withdrawals against accounts.* A qualified withdrawal from a fund shall be treated as being made: First, out of the capital account; second, out of the capital gain account; and third, out of the ordinary income account. Such withdrawals will reduce the balance within a particular account on a first-in-first-out basis, the earliest qualified withdrawals reducing the items within an account in the order in which they were actually deposited or deemed deposited in accordance with this part. The date funds are actually withdrawn from the fund determines the time at which withdrawals are considered to be made.

(c) *Reduction of basis.* (1) If any portion of a qualified withdrawal for the acquisition, construction, or reconstruction of a vessel, barge, or container (or share therein) is made out of the ordinary income account, the basis of such vessel, barge, or container (or share therein) shall be reduced by an amount equal to such portion.

(2) If any portion of a qualified withdrawal for the acquisition, construction or reconstruction of a vessel, barge, or container (or share therein) is made out of the capital gain account, the basis of such vessel, barge, or container (or share therein) shall be reduced by an amount equal to—

(i) Five-eights of such portion, in the case of a corporation (other than an electing small business corporation, as defined in section 1371 of the Code), or

(ii) One-half of such portion, in the case of any other person.

(3) If any portion of a qualified withdrawal to pay the principal of an indebtedness is made out of the ordinary income account or the capital gain account, then the basis of the vessel, barge, or container (or share therein) with respect to which such indebtedness was incurred is reduced in the manner provided by paragraphs (c) (1) and (2) of this section. If the aggregate amount of such withdrawal from the ordinary income account and capital gain account would cause a basis reduction in excess of the party's basis in such vessel, barge, or container (or share therein), the excess is applied against the basis of other vessels, barges, or containers (or shares therein) owned by the party at the time of withdrawal in the following order: (i) Vessels, barges, or containers (or shares therein) which were the subject of qualified withdrawals in the order in which they were acquired, constructed, or reconstructed; (ii) agreement vessels (as defined in section 607(k)(3) of the Act and § 391.11(a)(3)) and barges and containers which are part of the complement of an agreement vessel (or shares therein) which were not the subject of qualified withdrawals, in the order in which such vessels, barges, or containers (or shares therein) were acquired by the party; and (iii) other vessels, barges, and containers (or shares therein), in the order in which they were acquired by the party. Any amount of a withdrawal remaining after the application of this paragraph is to be treated as a nonqualified withdrawal. If the indebtedness was incurred to acquire two or more vessels,

barges, or containers (or shares therein), then the basis reduction in such vessels, barges, or containers (or shares therein) is to be made pro rata in proportion to the adjusted basis of such vessels, barges, or containers (or shares therein) computed, however, without regard to this section and adjustments under section 1016(a) (2) and (3) of the Code for depreciation or amortization.

(d) *Basis for depreciation.* For purposes of determining the allowance for depreciation under section 167 of the Code in respect of any property which has been acquired, constructed, or reconstructed from qualified withdrawals, the adjusted basis for determining gain on such property is determined after applying paragraph (c) of this section. In the case of reductions in the basis of any property resulting from the application of paragraph (c)(3) of this section, the party may adopt a method of accounting whereby (1) payments shall reduce the basis of the property on the day such payments are actually made, or (2) payments made at any time during the first half of the party's taxable year shall reduce the basis of the property on the first day of the taxable year, and payments made at any time during the second half of the party's taxable year shall reduce the basis of the property on the first day of the succeeding taxable year. For requirements respecting the change of methods of accounting, see §1.446–1(e)(3) of the Income Tax Regulations of this chapter.

(e) *Ordinary income treatment of gain from disposition of property acquired with qualified withdrawals.* [Reserved]

§ 391.7 Tax treatment of nonqualified withdrawals.

(a) *In general.* Section 607(h) of the Act provides rules for the tax treatment of nonqualified withdrawals, including rules for adjustments to the various accounts of the fund, the inclusion of amounts in income, and the payment of interest with respect to such amounts.

(b) *Nonqualified withdrawals defined.* Except as provided in section 607 of the Act and §391.8 (relating to certain corporate reorganizations, changes in partnerships, and transfers by reason of death), any withdrawal from a fund which is not a qualified withdrawal shall be treated as a nonqualified withdrawal which is subject to tax in accordance with section 607(h) of the Act and the provisions of this section. Examples of nonqualified withdrawals are amounts remaining in a fund upon termination of the fund, and withdrawals which are treated as nonqualified withdrawals under section 607(f)(2) of the Act and §391.5(d) (relating to failure by a party to fulfill substantial obligation under agreement) or under the second sentence of section 607(g)(4) of the Act and §391.6(c)(3) (relating to payments against indebtedness in excess of basis).

(c) *Order of application of nonqualified withdrawals against deposits.* A nonqualified withdrawal from a fund shall be treated as being made: First, out of the ordinary income account; second, out of the capital gain account; and third, out of the capital account. Such withdrawals will reduce the balance within a particular account on a first-in-first-out basis, the earliest nonqualified withdrawals reducing the items within an account in the order in which they were actually deposited or deemed deposited in accordance with this part. Nonqualified withdrawals for research, development, and design expenses incident to new and advanced ship design, machinery, and equipment, and any amount treated as a nonqualified withdrawal under the second sentence of section 607(g)(4) of the Act and §391.6(c)(3), shall be applied against the deposits within a particular account on a last-in-first-out basis. The date funds are actually withdrawn from the fund determines the time at which withdrawals are considered to be made. For special rules concerning the withdrawal of contingent deposits of net proceeds from the installment sale of an agreement vessel, see §391.2(c)(6).

(d) *Inclusion in income.* (1) Any portion of a nonqualified withdrawal which, under paragraph (c) of this section, is treated as being made out of the ordinary income account is to be included in gross income as an item of ordinary income for the taxable year in which the withdrawal is made.

(2) Any portion of a nonqualified withdrawal which, under paragraph (c) of this section, is treated as being

made out of the capital gain account is to be included in income as an item of long-term capital gain recognized during the taxable year in which the withdrawal is made.

(3) For effect upon a party's taxable income of capital losses remaining in a fund upon the termination of a fund (which, under paragraph (b) of this section, is treated as a nonqualified withdrawal of amounts remaining in the fund), see § 391.4(e).

(e) *Interest.* (1) For the period on or before the last date prescribed by law, including extensions thereof, for filing the party's Federal income tax return for the taxable year during which a nonqualified withdrawal is made, no interest shall be payable under section 6601 of the Code in respect of the tax on any item which is included in gross income under paragraph (d) of this section, and no addition to such tax for such period shall be payable under section 6651 of the Code. In lieu of the interest and additions to tax under such sections, simple interest on the amount of the tax attributable to any item included in gross income under paragraph (d) of this section is to be paid at the rate of interest determined for the year of withdrawal under paragraph (e)(2) of this section. Such interest is to be charged for the period from the last date prescribed for payment of tax for the taxable year for which such item was deposited in the fund to the last date for payment of tax for the taxable year in which the withdrawal is made. Both dates are to be determined without regard to any extensions of time for payment. Interest determined under this paragraph which is paid within the taxable year shall be allowed as a deduction for such year under section 163 of the Code. However, such interest is to be treated as part of the party's tax for the year of withdrawal for purposes of collection and in determining any interest or additions to tax for the year of withdrawal under section 6601 or 6651, respectively, of the Code.

(2) For purposes of section 607(h)(3)(C)(ii) of the Act, and for purposes of certain dispositions of vessels constructed, reconstructed, or acquired with qualified withdrawals described in § 391.6(e), the applicable rate of interest for any nonqualified withdrawal—

(i) Made in a taxable year beginning in 1970 and 1971 is 8 percent.

(ii) Made in a taxable year beginning after 1971, the rate for such year as determined and published jointly by the Secretary of the Treasury or his delegate and the Secretary of Transportation. Such rate shall bear a relationship to 8 percent which the Secretaries determine to be comparable to the relationship which the money rates and investment yields for the calendar year immediately preceding the beginning of the taxable year bear to the money rates and investment yields for the calendar year 1970. The determination of the applicable rate for any such taxable year will be computed by multiplying 8 percent by the ratio which (*a*) the average yield on 5-year Treasury securities for the calendar year immediately preceding the beginning of such taxable year, bears to (*b*) the average yield on 5-year Treasury securities for the calendar year 1970. The applicable rate so determined shall be computed to the nearest one-hundredth of 1 percent. If such a determination and publication is made, the latest published percentage shall apply for any taxable year beginning in the calendar year with respect to which publication is made.

(3) No interest shall be payable in respect of taxes on amounts referred to in section 607(h)(2) (i) and (ii) of the Act (relating to withdrawals for research and development and payments against indebtedness in excess of basis) or in the case of any nonqualified withdrawal arising from the application of the recapture provision of section 606(5) of the Merchant Marine Act, 1936, as in effect on December 31, 1969.

(f) *Basis and holding period in the case of property purchased by the fund or considered purchased by the fund.* In the case of a nonqualified withdrawal of property other than money which was purchased by the fund (including deposited property considered under § 391.2 (g)(1)(ii) as purchased by the fund), the adjusted basis of the property in the hands of the party is its adjusted basis to the fund on the day of the withdrawal. In determining the period for

which the taxpayer has held the property withdrawn in a nonqualified withdrawal, there shall be included only the period beginning with the date on which the withdrawal occurred. For basis and holding period in the case of nonqualified withdrawals of property other than money deposited into the fund, see § 391.2(g)(4).

§ 391.8 Certain corporate reorganizations and changes in partnerships, and certain transfers on death. [Reserved]

§ 391.9 Consolidated returns. [Reserved]

§ 391.10 Transitional rules for existing funds.

(a) *In general.* Section 607(j) of the Act provides that any person who was maintaining a fund or funds under section 607 of the Merchant Marine Act, 1936, prior to its amendment by the Merchant Marine Act of 1970 (for purposes of this part referred to as ''old fund'') may continue to maintain such old fund in the same manner as under prior law subject to the limitations contained in section 607(j) of the Act. Thus, a party may not simultaneously maintain such old fund and a new fund established under the Act.

(b) *Extension of agreement to new fund.* If a person enters into an agreement under the Act to establish a new fund, he may agree to the extension of such agreement to some or all of the amounts in the old fund and transfer the amounts in the old fund to which the agreement is to apply from the old fund to the new fund. If an agreement to establish a new fund is extended to amounts from an old fund, each item in the old fund to which such agreement applies shall be considered to be transferred to the appropriate account in the manner provided for in § 391.8(d) in the new fund in a nontaxable transaction which is in accordance with the provisions of the agreement under which such old fund was maintained. For purposes of determining the amount of interest under section 607(h)(3)(C) of the Act and § 391.7(e), the date of deposit of any item so transferred shall be deemed to be July 1, 1971, or the date of the deposit in the old fund, whichever is the later.

§ 391.11 Definitions.

(a) As used in the regulations in this part and as defined in section 607(k) of the Act—

(1) The term *eligible vessel* means any vessel—

(i) Constructed in the United States, and if reconstructed, reconstructed in the United States,

(ii) Documented under the laws of the United States, and

(iii) Operated in the foreign or domestic commerce of the United States or in the fisheries of the United States. Any vessel which was constructed outside of the United States but documented under the laws of the United States on April 15, 1970, or constructed outside the United States for use in the U.S. foreign trade pursuant to a contract entered into before April 15, 1970, shall be treated as satisfying the requirements of paragraph (a)(1) of this section and the requirements of paragraph (a)(2)(i) of this section.

(2) The term *qualified vessel* means any vessel—

(i) Constructed in the United States and, if reconstructed, reconstructed in the United States,

(ii) Documented under the laws of the United States, and

(iii) Which the person maintaining the fund agrees with the Secretary of Transportation will be operated in the U.S. foreign, Great Lakes, or noncontiguous domestic trade or in the fisheries of the United States.

(3) The term *agreement vessel* means any eligible vessel or qualified vessel which is subject to an agreement entered into under section 607 of the Act.

(4) The term *vessel* includes cargo handling equipment which the Secretary of Transportation determines is intended for use primarily on the vessel. The term *vessel* also includes an ocean-going towing vessel or an ocean-going barge or comparable towing vessel or barge operated in the Great Lakes.

(b) Insofar as the computation and collection of taxes are concerned, other terms used in the regulation in this part, except as otherwise provided in the Act or this part, have the same

meaning as in the Code and the regulations thereunder.

[29 FR 10464, July 28, 1964]

PART 392 [RESERVED]

PART 393—AMERICA'S MARINE HIGHWAY PROGRAM

Subpart A—General Provisions

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393.1 Special definitions.

Subpart B—Marine Highway Route and Project Designations

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Subpart C—Department of Transportation Efforts to Foster and Support America's Marine Highways

393.4 DOT Support for planning activities.
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SOURCE: 82 FR 56904, Dec. 1, 2017, unless otherwise noted.

Subpart A—General Provisions

§ 393.1 Special definitions.

For the purposes of this part:

(a) *Administrator* means the Maritime Administrator, Maritime Administration, U.S. Department of Transportation USDOT. The Administrator is responsible for administering the America's Marine Highway Program (AMHP) and making route and project recommendations to the Secretary.

(b) *Department* means the U.S. Department of Transportation.

(c) *Cargo* on a Marine Highway service means goods transported in commerce and generally refers to, but is not limited by, the types and kinds of cargo that are described in the definition of ''Short sea transportation'', in paragraph (k) of this section. Neither weight nor proportionality are considered under this definition. The term as used in this context is generally interchangeable with the term ''Freight'', defined in paragraph (d) of this section.

(d) *Freight* on a Marine Highway service means goods transported in commerce and generally refers to, but is not limited by, the types and kinds of cargo that are described in the definition of ''Short sea transportation'', in paragraph (k) of this section. Neither weight nor proportionality are considered under this definition. The term as used in this context is generally interchangeable with the term ''Cargo'', defined in paragraph (c) of this section.

(e) *Marine Highway Routes* or *Routes* mean commercially navigable coastal, inland, and intracoastal waters of the United States as designated by the Secretary. This includes connections between U.S. ports and Canadian ports on the Great Lakes-Saint Lawrence Seaway System, and non-contiguous U.S. ports. Marine Highway Routes are a component of the Nation's surface transportation system. Each Marine Highway Route is described in terms of the specific landside transportation routes (road or railway) that it supplements or to which it connects. All previously designated Marine Highway ''corridors,'' ''connectors,'' and ''crossings'' are now designated as ''Routes.''

(f) *Marine Highway Projects* are planned or contemplated new services, or expansions of existing services, on designated Marine Highway Routes, that seek to provide new modal choices to shippers, reduce transportation costs, and/or provide public benefits, which include reduced air emissions, reduced road maintenance costs, and improved safety and resiliency impacts. Project Applicants propose projects and the Secretary may designate projects consistent with this part.

(g) *Project Applicant* means a public entity with operations, or administrative areas of responsibility, that are adjacent to or near the relevant Route that applies for designation of a Marine Highway Project pursuant to this part. Eligible applicants include State governments (including State departments of transportation), metropolitan planning organizations, port authorities and tribal governments.

(h) *Program Office* means Office of Marine Highways and Passenger Services.

(i) *Route Sponsors* are public entities with operations or administrative areas of responsibility that are adjacent to or related to the relevant Route that recommend a commercially navigable waterway for designation as a Marine Highway Route. Eligible Route Sponsors include State governments (including State departments of transportation), metropolitan planning organizations, port authorities, non-Federal navigation districts and tribal governments.

(j) *Secretary* means the Secretary of Transportation.

(k) *Short sea transportation* means the carriage by a U.S. documented vessel of cargo—

(1) That is—

(i) Contained in intermodal cargo containers and loaded by crane on the vessel;

(ii) Loaded on the vessel by means of wheeled technology;

(iii) Shipped in discrete units or packages that are handled individually, palletized, or unitized for purposes of transportation; or

(iv) Freight vehicles carried aboard commuter ferry boats; and

(2) That is—

(i) Loaded at a port in the United States and unloaded either at another port in the United States or at a port in Canada located in the Great Lakes-Saint Lawrence Seaway System; or,

(ii) Loaded at a port in Canada located in the Great Lakes-Saint Lawrence Seaway System and unloaded at a port in the United States.

(l) *United States documented vessel* means a vessel documented under 46 CFR part 67.

Subpart B—Marine Highway Route and Project Designations

§ 393.2 Marine Highway Routes.

(a) *What are the minimum eligibility requirements for MARAD to recommend a Marine Highway Route for the Secretary to designate?* (1) MARAD may recommend Marine Highway Routes that relieve landside congestion along coastal corridors or that promote short sea transportation; and

(2) That advance the objectives of the AMHP in paragraph (c) of this section.

(b) *When can a Route Sponsor request designation of a Marine Highway Route?* (1) The Department accepts Marine Highway Route designation requests any time. Route Sponsors must submit designation requests through the Program Office.

(2) The Maritime Administration publishes all designated Routes on its Web site. Go to *http://www.marad.dot.gov* and search ''America's Marine Highways'' to see the current list.

(c) *What should Route Sponsors consider when preparing Marine Highway Route designation requests?* (1) Route Sponsors designation requests should explain how a proposed route will help achieve the following objectives:

(i) Establishing Marine Highway Routes as extensions of the national surface transportation system;

(ii) Developing multi-jurisdictional coalitions and partnerships that focus public and private efforts to improve reliability and resiliency of the Route for freight and passengers;

(iii) Obtaining public benefits as described in paragraph (d)(1)(vi) of this section; and

(iv) Identifying potential savings that could be realized by providing an alternative to existing supply chains through short sea transportation.

(2) [Reserved]

(d) *What information should Route Sponsors include in their designation requests?* (1) One or more eligible Route Sponsors may submit Marine Highway Route designation requests to the Program Office. Designation requests should include the following information:

(i) *Physical Description of the Proposed Marine Highway Route.* Describe the proposed Marine Highway Route, and its connection to existing or planned transportation infrastructure and intermodal facilities. Include key navigational factors such as available draft, channel width, bridge air draft, or lock clearance, and any foreseeable impacts on navigation or commerce. When available, include one or more maps of the proposed Route.

(ii) *Surface transportation regions served.* (A) Land transportation routes

that would benefit. Provide a summary of any land transportation route that the Marine Highway Route would benefit. Include a description of the route, its primary users, the nature, locations and occurrence of travel delays, urban areas affected, and other geographic or jurisdictional issues that impact its overall operation and performance.

(B) U.S. Domestic Shipping Lane Served. For Marine Highway Routes that pass through waters outside U.S. territorial waters, provide a summary of the shipping routes or trade lanes that the Marine Highway Route would benefit. Include a description of the route, its primary users, the nature, locations and occurrence of travel delays, urban areas affected, and other geographic or jurisdictional issues that impact its overall operation and performance.

(iii) *Involved parties.* Provide the organizational structure of the Route Sponsors and supporters recommending the Route designation, including business affiliations and private sector stakeholders. Multi-jurisdictional coalitions may include State Departments of Transportation, metropolitan planning organizations, municipalities and other governmental entities (including tribal governments). Include the extent to which these entities have expressed support for the route designation and describe any affiliations with environmental groups or civic associations, or affiliations with any foreign interests.

(iv) *Volume and characteristics.* If authoritative data are available, provide the volume of passengers and/or cargo that are candidates for shifting to water transportation on the proposed Route. Otherwise provide estimates for this information, include identified shippers, manufacturers, distributors, and other entities that could benefit from a Marine Highway alternative, and the extent to which these entities have expressed support for the Marine Highway Route designation request.

(v) *Congestion reduction.* Describe the extent to which the proposed Route could relieve landside congestion in measurable terms, if applicable. Include any known offsetting land transportation infrastructure savings (either construction or maintenance) that would likely result from the Route, if applicable.

(vi) *Public benefits.* Provide, if known, the net savings over status quo in emissions, including greenhouse gases, energy consumption, landside infrastructure maintenance costs, safety and system resiliency. Specify if the Marine Highway Route represents the most cost-effective option among other modal improvements. Include consideration of the implications future growth may have on the proposed Route.

(vii) *Public costs.* If applicable and known, identify any costs that may result from designation of the route. If able, provide costs that are quantifiable such as the additional cost of emissions or energy consumption required to effectively leverage the benefits of the designated route. These costs should be a component in the net savings identified in paragraph (d)(1)(vi) of this section.

(viii) *Impediments.* Describe known or anticipated obstacles to utilization of the proposed Marine Highway Route. Include any strategies, either in place or proposed, to deal with the impediments.

(2) [Reserved]

(e) *How will the Program Office evaluate and recommend Marine Highway Route designation requests?* (1) The Program Office will evaluate and recommend Route Designations based on an analysis and technical review of the information provided by the Route Sponsor. The Maritime Administration will recommend Routes that receive a favorable technical review, and meet other criteria described in this part, for designation by the Secretary.

(2) The Program Office may consider additional factors and may request supplemental information during the review process. USDOT will notify Route Sponsors as to the status of their request in writing once the Secretary makes a determination.

§ 393.3 Marine Highway Projects.

(a) *What are the minimum eligibility requirements for MARAD to recommend a Marine Highway Project for the Secretary to designate?* (1) MARAD may recommend only those Marine Highway Projects that will use U.S. documented

vessels and mitigate landside congestion or promote short sea transportation.

(2) MARAD may recommend only those Marine Highway Projects that:

(i) Involve the carriage of cargo in Short Sea Transportation as defined in paragraph (k) of this section;

(ii) Involve new or expand existing services for the carriage of cargo; and

(iii) Are on a designated Marine Highway Route.

(3) Proposed Route Designations are accepted at any time, and may be submitted together with the proposed Project Designation.

(4) Successful Project Applicants must demonstrate a direct connection between a proposed Marine Highway Project and the carriage of cargo through ports on Designated Marine Highway Routes.

(b) *When does the Program Office accept Marine Highway Project designation applications?* (1) The Administrator will announce by notice in the FEDERAL REGISTER and on MARAD's AMHP Web site open season periods to allow Project Applicants opportunities to submit Marine Highway Project designation applications.

(2) [Reserved]

(c) *What should Project Applicants include when preparing a Marine Highway Project designation application?* (1) The market or customer base to be served by the service and the service's value proposition to customers. This includes—

(i) A description of how the market is currently served by transportation options;

(ii) Identities of shippers that have indicated an interest in, and level of commitment to, the proposed service;

(iii) Specific commodities, markets, and shippers the Project is expected to attract;

(iv) Extent to which interested entities have been educated about the Project and expressed support, and

(v) A marketing strategy for the project if one exists.

(2) *Operational framework.* A description of the proposed operational framework of the project including origin/destination pairs, transit times, vessel types, and service frequency.

(3) *The cost model for the proposed service.* The cost model should be broken down by container, trailer, or other freight unit, including loading and discharge costs, vessel operating costs, drayage costs, and other ancillary costs. Provide a comparison cost model outlining the current costs for transportation using landside mode (truck and rail) alternatives for the identified market that the proposed project will serve. Provide the project's financial plan and provide projected revenues and expenses. Include labor and operating costs, drayage, fixed and recurring infrastructure and maintenance costs, vessel or equipment acquisition or construction costs, etc. Include any anticipated changes in local or regional short sea transportation, policy or regulations, ports, industry, or other developments affecting the project. In the event that public sector financial support is being sought, describe the amount, form and duration of public investment required. Applicants may email *mh@dot.gov* to request a sample cost model.

(4) An overall quantification of the net public benefits estimated to be gained through the successful initiation of the Marine Highway Project, including highway miles saved, road maintenance savings, air emissions savings, and safety and resiliency impacts.

(5) *Marine Highway Route(s).* Identify the designated Marine Highway Routes the Project will utilize.

(6) *Organization.* Provide the organizational structure of the proposed project, including an outline of the business affiliations, environmental, non-profit organizations and governmental or private sector stakeholders.

(7) *Partnerships:*—(i) *Private sector partners.* Identify private sector partners and describe their levels of commitment to the proposed service. Private sector partners can include terminals, vessel operators, shipyards, shippers, trucking companies, railroads, third-party logistics providers, shipping lines, labor, workforce and other entities deemed appropriate by the Secretary.

(ii) *Public sector partners.* Identify State Departments of Transportation, metropolitan planning organizations,

municipalities and other governmental entities, including tribal entities, that Project Applicants have engaged and the extent to which they support the service. Include any affiliations with environmental groups or civic associations.

(iii) *Documentation.* Provide documents affirming commitment or support from entities involved in the project.

(8) *Public benefits.* These measures reflect current law and are consistent with USDOT's Strategic Goals. Project Applicants should organize external net cost savings and public benefits of the Project based on the following six categories:

(i) *Emissions benefits.* Address any net savings, in quantifiable terms, now and in the future, over current emissions practices, including greenhouse gas emissions, criteria air pollutants or other environmental benefits the project offers.

(ii) *Energy savings.* Provide an analysis of potential net reductions in energy consumption, in quantifiable terms, now and in the future, over the current practice.

(iii) *Landside transportation infrastructure maintenance savings.* To the extent the data is available indicate, in dollars per year, the projected net savings of public funds that would result in road or railroad maintenance or repair, including pavement, bridges, tunnels or related transportation infrastructure from a proposed project. Include the impacts of accelerated infrastructure deterioration caused by vehicles currently using the route, especially in cases of oversize or overweight vehicles. This information applies only to projects for a marine highway service where a landside alternative exists.

(iv) *Economic competitiveness.* To the extent the data is available, describe how the project will measurably result in transportation efficiency gains for the U.S. public. For purposes of aligning a project with this outcome, applicants should provide evidence of how improvements in transportation outcomes (such as time savings, operating cost savings, and increased utilization of assets) translate into long-term economic productivity benefits.

(v) *Safety improvements.* Describe, in measurable terms, the projected safety improvements that would result from the proposed operation.

(vi) *System resiliency and redundancy.* To the extent data is available, describe, if applicable, how a proposed Marine Highway Project offers a resilient route or service that can benefit the public. Where land transportation routes serving a locale or region are limited, describe how a proposed project offers an alternative and the benefit this could offer when other routes are interrupted as a result of natural or man-made incidents.

(9) *Proposed project timeline.* Include a proposed project timeline with estimated start dates and key milestones. If applicable, include the point in the timeline at which the enterprise is anticipated to attain self-sufficiency.

(10) *Support and investment required.* Describe any known or anticipated obstacles to either implementation or long-term success of the project. Include any strategies, either in place or proposed, to mitigate impediments. Identify specific infrastructure gaps such as docks, cranes, ramps, etc. that will need to be addressed in order for the project to become economically viable. Include estimates for the required investments needed to address the infrastructure gaps.

(11) *Environmental considerations.* Project Applicants must provide all information necessary to assist MARAD's environmental analysis of the proposed project, pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and other environmental requirements.

(d) *How will the Program Office evaluate and recommend Marine Highway Project applications for designation?* (1) The Program Office will evaluate and recommend for designation by the Secretary those Projects based on an analysis and technical review of the information provided by the Project Applicant. MARAD will recommend Projects that operate on a designated Marine Highway Route, receive a favorable technical review, and meet other criteria described in this part, for designation by the Secretary.

(2) The Program Office may consider additional factors and may request

supplemental information during the review process. USDOT will notify Project Applicants as to the status of their application in writing once the Secretary makes a determination.

(e) *How will MARAD support designated America's Marine Highway Projects?* (1) Upon designation as a Marine Highway Project, the Department Program Office will coordinate with the Project Applicants to identify the most appropriate departmental actions to support the project. USDOT support could include any of the following, as appropriate and subject to agency resources:

(i) Promote the service with appropriate governmental, regional, State, local or tribal government transportation planners, private sector entities or other decision makers to the extent permitted by law.

(ii) Coordinate with ports, State Departments of Transportation, metropolitan planning organizations, localities, other public agencies and the private sector to support the designated service. Efforts can be aimed at identifying resources, obtaining access to land or terminals, developing landside facilities and infrastructure, and working with Federal, regional, State, local or Tribal governmental entities to remove barriers to success.

(iii) Pursue commitments from Federal entities to transport Federally owned or generated cargo using the services of the designated project, when practical or available.

(iv) In cases where transportation infrastructure is needed, Project Applicants may request to be included on the Secretary's list of high-priority transportation infrastructure projects under E.O. 13274, ''Environmental Stewardship and Transportation Infrastructure Project Review.''

(v) Assist with developing individual performance measures for Marine Highway Projects.

(vi) Work with Federal entities and regional, State, local and tribal governments to include designated Projects in transportation planning.

(vii) Coordinate with public and private entities to resolve impediments to the success of Marine Highway Projects.

(viii) Conduct research on issues specific to Marine Highway Projects.

(ix) Advise Project Applicants on the availability of various Federal funding mechanisms to support the Projects.

(x) Maintain liaison with Project Applicants and representatives of designated Projects to provide ongoing support and identify lessons learned and best practices for other projects and the overall Marine Highway program.

(2) [Reserved]

(f) *How will the Department protect confidential information?* (1) If your application, including attachments, includes information that you consider to be a trade secret or confidential commercial or financial information, or otherwise exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552), as implemented by the Department at 49 CFR part 7, you may assert a claim of confidentiality.

(2) *What should I do if I believe my Project designation application contains confidential or business sensitive information?* (i) Note on the front cover that the submission ''Contains Confidential Business Information (CBI);''

(ii) Mark each affected page ''CBI;'' and

(iii) Clearly highlight or otherwise denote the CBI portions. The USDOT protects such information from disclosure to the extent allowed under applicable law.

(3) *What will happen if information related to my Project designation application is the subject of a request under the Freedom of Information Act (FOIA)?* We will apply the procedures contained in 49 CFR part 7 to a request from non-Federal third-parties for information related to documents you submit under this part. We will consider your claim of confidentiality at the time someone requests the information under FOIA. Only information that is ultimately determined to be confidential under that procedure will be exempt from disclosure under FOIA.

(g) *Is there a specific format required for project designation applications and attached documents?* (1) When responding to specific solicitations for Marine Highway Projects by the Program Office, Project Applicants should include all of the information requested by

paragraph (c) of this section organized in a manner consistent with the elements set forth in that section. The Program Office reserves the right to ask any applicant to supplement the data in its application, but expects applications to be complete upon submission. The narrative portion of an application should not exceed 20 pages in length. Documentation supporting the assertions made in the narrative portion may also be provided in the form of appendices, but limited to relevant information. Applications may be submitted electronically via *regulations.gov* (*http://www.regulations.gov*). Applications submitted in writing must include the original and three copies and must be on 8.5″ x 11″ single spaced paper, excluding maps, Geographic Information Systems (GIS) representations, *etc.*

(2) In the event that the Project Applicant of a Marine Highway Project that has already been designated by the Secretary seeks a modification to the designation because of a change in project scope, an expansion of the project, or other significant change to the project, the Project Applicant should request the change in writing to the Secretary via the Maritime Administrator. The request must contain any changed or new information that is relevant to the project.

(h) *What does the Program Office do to ensure designated projects are developing properly?* (1) Once designated projects enter the operational phase (either start of a new service, or expansion of existing service), the Program Office will evaluate them regularly to determine if the project is likely to achieve its objectives.

(2) Overall project performance will be assessed according to three categories—exceeds, meets, or does not meet original projections—in each of the three areas defined below:

(i) *Public benefit.* Does the Project meet the stated goals in shifting specific numbers of vehicles (number of trucks, rail cars or automobiles) off the designated landside routes? The Program Office will assume other public benefits, including energy savings, reduced emissions, and safety improvements to be a direct derivative of either numbers of vehicles reduced, or vehicle/ton miles avoided, unless specific factors change (such as a change in vessel fuel or emissions).

(ii) *Public cost.* Is the overall cost to the Federal Government (if any) on track with estimates at the time of designation? The overall cost to the Federal Government represents the amount of Federal investment (*i.e.*, direct funding, loan guarantees or similar mechanisms) reduced by the offsetting savings the project represents (road/bridge wear and tear avoided, infrastructure construction or expansion deferred).

(iii) *Timeliness factor.* Is the project on track for the point at which the enterprise is projected to attain self-sufficiency? For example, if the project was anticipated to attain self-sufficiency after 36 months of operation, is it on track at the point of evaluation to meet that objective? This can be determined by assessing revenues, cargo and passenger trends, expenses and other factors established in the application review process.

(i) *Can a Project designation expire or be terminated?* (1) Project Designations are effective for a period of five years, or until the date the project is completed, or MARAD cancels the designation. Project Designation will expire after three years of inactivity.

(2) Project Applicants wishing to extend a Project Designation must submit an updated application no later than six months before the five-year designation period ends. Project Applicants who no longer wish to maintain project designation may submit a request to the Secretary to revoke their designation.

Subpart C—Department of Transportation Efforts To Foster and Support America's Marine Highways

§ 393.4 DOT Support for planning activities.

(a) *How does DOT provide support?* (1) The Program Office engages in coordination and planning activities with Federal, State, local and tribal governments and planning and private entities organizations to encourage the use of designated Marine Highway Routes and Projects. These activities include:

(i) Working with these entities to assess plans and develop strategies, where appropriate, to incorporate Marine Highway transportation and other short sea transportation solutions to their statewide and metropolitan transportation plans, including the Statewide Transportation Improvement Programs and State Freight Plans.

(ii) Facilitating groups of States and multi-State transportation entities to determine how Marine Highway transportation can address port congestion, traffic delays, bottlenecks, and other interstate transportation challenges to their mutual benefit.

(iii) Identifying other Federal agencies that have jurisdiction over services, or which currently provide funding for components of services, in order to determine which agencies should be consulted and assist in the coordination process.

(iv) Organizing the Department's modal administrations, including Federal Highway Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, Saint Lawrence Seaway Development Corporation, and Federal Transit Administration, as appropriate, for support and to evaluate costs and benefits of proposed Marine Highway Routes and Projects.

(2) [Reserved]

(b) [Reserved]

§ 393.5 DOT Support for Marine Highway-related research.

(a) *How does DOT support research?* (1) The Program Office works in consultation with public and private entities as appropriate, within the limits of available resources, to identify impediments, develop incentives, and conduct innovative research, in support of the America's Marine Highway Program or in direct support of specific designated Marine Highway Routes and Projects. The primary objectives of selected research projects are to:

(i) Identify markets, cargoes, and service parameters that could facilitate the development of new or expanded Marine Highway Services.

(ii) Identify existing or emerging technology, vessel design, infrastructure designs, and other improvements that would reduce emissions, increase fuel economy, and lower costs of Marine Highway transportation and increase the efficiency of intermodal transfers.

(iii) Identify impediments to the establishment of Marine Highway services.

(iv) Identify incentives to increase the use and efficiency of Marine Highway services.

(b) The Secretary, in consultation with the Administrator of the Environmental Protection Agency, may conduct research on short sea transportation regarding:

(1) The environmental and transportation benefits to be derived from short sea transportation alternatives for other forms of transportation;

(2) Technology, vessel design, and other improvements that would reduce emissions, increase fuel economy, and lower costs of short sea transportation and increase the efficiency of intermodal transfers; and

(3) Solutions to impediments to short sea transportation projects designated.

§ 393.6 America's Marine Highway Program Project grants.

(a) *How does MARAD administer the AMHP grant program?* (1) The Associate Administrator for Intermodal Systems Development manages the program under the guidance and the immediate administrative direction of the Maritime Administrator.

(2) MARAD establishes grant program priorities as reflected in its grant opportunity announcements and, from time-to-time, issues clarifying guidance documents through the MARAD Web site and the FEDERAL REGISTER.

(3) The Administrator makes funding recommendations to the Secretary, who has the authority to award grants.

(b) *How does MARAD make grant opportunities known?* (1) MARAD determines which grant opportunities it will offer, and establishes application deadlines and programmatic requirements when grant funds become available to the AMHP.

(2) The MARAD staff prepares Notice of Funding Opportunity (NOFO) announcements consisting of all information necessary to apply for each grant

and publishes the announcement in the FEDERAL REGISTER and on *grants.gov*.

(c) *How may an applicant apply for an AMHP grant?* (1) Applicants may apply for a grant using *grants.gov* or, in connection with a FEDERAL REGISTER announcement, by submitting the necessary information to the AMHP Office in electronic form.

(2) [Reserved]

PARTS 394–399 [RESERVED]