

## MARAD'S RESPONSE TO COMMENTS AND FINAL ACTION UNDER SECTION 3502(b) OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2021 REGARDING THE ECO TIME CHARTER

Pursuant to section 3502(b) of the National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283 (Jan. 1, 2021) (“Section 3502(b)”), the Maritime Administration (“MARAD”) is required to make publicly available on our website our final action with respect to a request for confirmation that a charter for a passenger vessel is encompassed by the general foreign transfer approval pursuant to 46 CFR § 221.13(a) after provision of notice and opportunity for public comment.

On July 30, 2021, the Maritime Administration published a detailed summary of the October 22, 2019, time charter confirmation request from River 1, LLC (“River 1”), a 100% citizen-owned affiliate of Edison Chouest Offshore (“ECO”),<sup>1</sup> on our website seeking public comment. At the close of a thirty-day comment period, MARAD received comments from a coalition of U.S. coastwise cruise operators, the Passenger Vessel Association, and American Cruise Lines, Inc. By this notice, MARAD responds to the comments (summarized below), reconsiders ECO’s request, and issues our final action required by Section 3502(b)(2).

### **Discussion of Comments**

The commenters state that MARAD has not released sufficient information about the time charter creating a concern about the *bona fide* nature of the time charter.

We disagree. MARAD published a “detailed summary” of the confirmation request on our website as required by Section 3502(b) of the National Defense Authorization Act for FY 2021. In that notice, MARAD described terms of the proposed charter that we considered important in making our determination. In disclosing those terms on our website, MARAD also complied with FOIA exemption 4 (5 U.S.C. § 552(b)(4)), which exempts from disclosure privileged and confidential commercial or financial information submitted to the Government.

Commenters asserted that most of the charter would not be commercially confidential except for charter rates and personally identifiable information as a matter of law.

We disagree. The commenters provided no statutes, regulations, or caselaw supporting this assertion. ECO submitted its time charter as privileged and confidential, commercially-sensitive information, exempt from disclosure under FOIA exception 4. MARAD’s FOIA appeals process, not Section 3502(b), is the appropriate procedure for addressing the release of any information MARAD disclosed.

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<sup>1</sup> River 1 is a member of the Edison Chouest Offshore family of companies comprising a number of closely-held, affiliated entities that own coastwise-qualified vessels. We refer to ECO and River 1 interchangeably as the vessel owner in this action.

The commenters state that MARAD has failed to give the public MARAD's understanding of the standards for distinguishing time charters from demise/bareboat charters and for determining whether a transaction results in the transfer of a controlling interest to a non-citizen.

We disagree. Section 3502(b) does not require MARAD to provide its understanding of the standard for distinguishing time charters from bareboat charters when publishing a detailed summary of a time charter confirmation request. Nevertheless, our standards are public. MARAD applies well-known, black letter maritime law to distinguish between bareboat and time charters, which we provided in the detailed summary and discuss below.

In this regard, one commenter provided a "typical judicial formulation" of a bareboat charter as a charter under which "the full possession and control of the vessel is transferred to the [bareboat] charterer." In contrast, under a time charter "the vessel owner retains possession and control of the vessel; provides whatever crew is needed and is responsible for normal operating expenses." We generally agree with the formulation described by the commenter, and in applying the details of the proposed charter, published on MARAD's website and discussed below, it is clear that the proposed charter is not a bareboat charter. ECO, the vessel owner, retains "full possession and control of the vessel," and "provides whatever crew is needed and is responsible for normal operating expenses."

MARAD also typically goes beyond examination of charter terms to look for indicia that a charter transfers a controlling interest in a vessel. MARAD's controlling interest analysis is also public. In reviewing the ECO charter, we applied the principles outlined in our discussion of the Final Rule promulgating our foreign transfer regulations at 46 CFR Part 221. *See* 56 Fed. Reg. 30654, 30656 (Jul. 3, 1991) (providing examples of MARAD controlling interest determinations and analysis). MARAD also considered factors in our American Fisheries Act (AFA) citizenship regulation at 46 CFR § 356.11 to determine indicia of impermissible non-citizen control because our foreign transfer regulations at 46 CFR Part 221, which govern this matter, do not provide similar non-citizen control standards. MARAD developed its AFA indicia of control factors, in part, from its experience in making foreign transfer and citizenship determinations pursuant to Sections 2 and 9 of the Shipping Act of 1916 (46 U.S.C. § 50501).

The commenters also claimed, in this regard, that MARAD improperly relied on its AFA regulations when analyzing the proposed charter.

We disagree. In promulgating the current general approval in our foreign transfer regulations in 1991, MARAD declined to list indicia of non-citizen control in the regulation because we found that the sweeping nature of the general approval made controlling interest analysis "of much less importance." 56 FR 30654, 30656 (Jul. 3, 1991). Hence, the indicia of impermissible non-citizen control found in our AFA regulations represent the most recent regulatory expression of MARAD's foreign control analysis, albeit including indicia of particular applicability to commercial fishing vessels.

Commenters also were concerned that MARAD did not consider indemnity provisions in the charter.

MARAD does not view indemnity provisions as controlling indicators of an improper transfer of control where such provisions will not result in a non-citizen time charterer absorbing the normal risks of vessel ownership and operation. MARAD considered the indemnity provisions of the time charter and found them unobjectionable, which we confirm below.

Commenters contended that the charter cannot be a *bona fide* time charter because ECO proposed a “bespoke” charter party instead of using a generic time charter form such as the BIMCO ROPAXTIME charter party. One commenter asked whether MARAD compared ECO’s charter to the BIMCO CRUISEVOY, a voyage charter, or other commercially-available charter forms.

MARAD disagrees that a time charter cannot be bespoke. The use or non-use of publicly available form charters is not dispositive in determining whether a charter is a *bona fide* time charter. While MARAD has often reviewed time charters using a BIMCO form, these charters are frequently customized by the addition of new provisions and modification or deletion of the form-charter’s provisions to suit the needs of a particular transaction or the interests of the parties. Thus, many form charters end up being “bespoke.” Moreover, MARAD routinely reviews and approves “bespoke” time charters including time charters for vessels participating in the Maritime Security Program. Whether a charter is bespoke or based on a publicly available template, MARAD reviews its terms to determine whether it is a *bona fide* time charter or a device to transfer impermissible control of the vessel to a non-citizen. We did not compare ECO’s time charter to the CRUISEVOY charter party because the CRUISEVOY is a voyage charter party and not a time charter party.

Commenters stated that MARAD improperly engaged in after-the-fact *ad hoc* rationalizations, suggesting that MARAD did no review or analysis of the proposed charter before concluding that the proposed charter was a time charter.

MARAD disagrees. MARAD’s confirmation was supported by written analysis applying the same principles MARAD has already identified, including principles expressed in rulings identified by the commenters. We did not include that analysis in our original confirmation letter to ECO because, in addition to ECO’s FOIA-exempt confidential business information (of which ECO was aware), it also contained attorney work product and attorney-client privileged material.

One commenter asserted that MARAD did not apply standards from previous decisions such as *Letter to American President Lines, Ltd. – Subsidy Revisions Necessitated by Proposed Merger*, 27 Ship Reg. Rep. 1246, 1249 (MARAD, 1997) (“*Letter to APL*”); *Letter to Lykes Bros. Steamship Co., Inc. – Asset Purchase Agreement*, 27 Ship Reg. Rep. 1094, 1095 (MARAD, 1997); or *In the Matter of the Application by Lykes Bros. Steamship Co., Inc. for Transfer and Assignment of Subsidy Agreements to Sea Crews, II Inc.*, 27 Ship Reg. Rep. 1106, 1108 (Sec’y Transp., 1997).

We disagree. MARAD’s analysis was consistent with the examples the commenter cited. Our analysis is restated below.

Commenters were concerned that the charter may include restricted off-hire and hell or high water provisions. One commenter stated that “the general definitions [of bareboat charter and time charter] indicate that time charter hire is generally not payable if the vessel is unavailable, whereas bareboat charter hire is payable on a ‘hell or high water’ basis.”

We disagree. The commenter did not provide any citations to “general definitions” of bareboat and time charters that address off-hire and hell or high water provisions and did not explain why such provisions would be inimical to a time charter. The commenter cites no caselaw distinguishing between a bareboat charter and time charter on the basis of the presence of off-hire restrictions or hell or high water provisions. Contrary to the commenters’ assertion that hell or high water clauses are somehow improper in time charters, MARAD has found cases where hell or high water clauses were present in time charters. *See e.g., Regent Seven Seas v. Rolls Royce*, 2007 WL 601992 (S.D. Fla. 2007); *Construcciones Industriales del Golfo v. Searex*, 182 F.3d 914 (5<sup>th</sup> Cir. 1999); *Aeron Marine Shipping v. U.S.*, 26 Cl. Ct. 946, 953 (F. Cl. 1992); and *J/O EBONY KS v. Dredge Stuyvesant*, 804 F.Supp. 898, 899 (S.D. Tex. 1992). Further, none of the Maritime Subsidy Board rulings, submitted as exhibits by one of the commenters, mention off-hire or hell or high water clauses as reasons for approving or disapproving the time charters submitted for MARAD review.

Contrary to the commenters’ assertion, off-hire restrictions and hell or high water clauses are not unusual in time charters. Even the ROPAXTIME form charter, cited by one commenter as an example of a commercial standard for passenger vessel time charters, has default terms which restrict off-hire and obligate the time charterer to make regular hire payments “without discount.” This is a hell or high water payment condition in substance.

MARAD has approved time charters to non-citizens which include express hell or high water clauses and no provision for off-hire for vessels participating in the Maritime Security Program. Moreover, in *Letter to American Presidents Lines*, cited by a commenter, MARAD reviewed and approved a bespoke form of time charter containing a hell or high water clause and no provision for off-hire.

Nevertheless, we confirm that the proposed time charter contains hire payment requirements and off-hire provisions substantively similar to the time charters we approved in *Letter to American Presidents Lines* and time charters for vessels participating in the Maritime Security Program.

Commenters demanded that MARAD do the following: (i) immediately provide public notice that it is withdrawing our notice of July 30, 2021; (ii) promulgate a regulatory standard for differentiating time charters from bareboat/demise charters; (iii) publish our analysis of the time charter using this standard; and (iv) issue a final action. The commenters asserted that these steps are required pursuant to the Administrative Procedure Act (APA).

We decline to withdraw our notice of July 30, 2021, because, as discussed above, that notice complied with Section 3502(b) by providing a detailed summary of the time charter confirmation request. We also decline to conduct new rulemaking because Section 3502(b) does not direct MARAD, expressly or impliedly, to promulgate bareboat and time charter definitions in our foreign transfer regulations. We disagree that Congress intended Section 3502(b) to incorporate

the notice and comment rulemaking requirements of the APA and note that Section 3502(b) prescribes specific notice and comment procedures that differ from the procedures required by 5 U.S.C. § 552(a). In particular, Section 3502(b) requires MARAD to publish a detailed summary of a time charter confirmation request on its website and allow opportunity for public comment before publishing its final action on our website. To interpret Section 3502(b) as requiring MARAD to follow the notice and comment procedures of 5 U.S.C. § 552(a) instead of those of Section 3502(b) would make the text of Section 3502(b) superfluous. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

To the extent 5 U.S.C. § 552(a) applies to this matter at all, MARAD's longstanding general foreign transfer approval at 46 CFR § 221.13(a), which covers time charters of coastwise vessels, was subject to notice and comment rulemaking in 1991. *See* 56 Fed. Reg. 30654 (Jul. 3, 1991). At that time, MARAD decided not to provide a list of indicia of control which could be used to determine whether a charter is more properly a time charter or a bareboat charter. *Id.* at 30656. Instead, we stated MARAD would continue to review charters on a case-by-case basis which we did with the proposed charter in this instance. *Id.* As such, the applicability of the general approval to time charters is neither a new policy nor a new rule. An APA challenge to the general approval rule as applied to time charters is time-barred under the six-year statute of limitations of 28 U.S.C. § 2401(a). The proper procedure to address the commenters' concerns is to petition MARAD to amend our foreign transfer regulations to exclude time charters of coastwise passenger vessels from the general approval in the same way bareboat charters of coastwise vessels are currently excluded.

### **Review and Final Action Regarding ECO's Time Charter Confirmation Request**

Pursuant to Section 3502(b)(2), after providing notice and an opportunity for public comment, we are providing our final action determining whether the proposed time charter between ECO and Viking USA, Ltd. is covered by the general approval of 46 CFR § 221.13(a).

ECO proposes to time charter a passenger vessel to Viking USA, Ltd., a documentation citizen but not a coastwise citizen, on a long-term basis. ECO will remain the vessel's owner and, through a U.S.-citizen owned affiliate, will operate the vessel the same as any owner that time charters a vessel. Viking USA will use the vessel primarily on the Mississippi River. The vessel will be constructed in the U.S. by an affiliate shipyard of ECO. Based on its representations to MARAD, ECO is a U.S. citizen within the meaning of 46 U.S.C. § 50501(d).

Time charters of coastwise vessels to non-citizens are automatically approved pursuant to the general foreign transfer approval found at 46 CFR § 221.13(a). Bareboat charters of coastwise vessels to non-citizens are not covered by the general approval and must be approved by MARAD pursuant to a written transfer order. 46 CFR § 221.13(a)(1)(iii). As a matter of a longstanding policy that the benefit of operating a vessel in the coastwise trade should be reserved to U.S. citizens, MARAD does not approve applications for bareboat charters of coastwise vessels to non-citizens. 40 Fed. Reg. 28,832 (Jul. 9, 1975).

A time charter is a contract to use a vessel for a specified period, although the vessel owner retains possession and control of the vessel. *See generally* Thomas J. Schoenbaum, 2 *Admiralty*

*and Admiralty Law* 168-180 (2nd Edition, 1994) (1997 update). The time charterer obtains the right to designate the ports of call and the cargo carried. *Black's Law Dictionary* 228 (7<sup>th</sup> ed. 1999). A time chartered vessel is normally fully equipped and crewed by the owner, who is responsible for the vessel's operation and navigation, as well as payment of operating expenses, including maintenance and repair, crew's wages, and insurance. The vessel owner and charterer bear the expenses related to their respective functions and for any damage they cause, respectively. *Id.*

The time charterer is usually responsible for expenses relating to the cargo that is loaded and ports used, and may also be required to pay for bunkers. Variable costs involved with the movement of the vessel are typically components of the charter hire, and in this way recovered by the vessel owner from the time charterer.

In contrast, a bareboat charter is a "charter under which the shipowner provides the ship, and the charterer provides the personnel, insurance, and other materials necessary to operate it." *Id.* Essentially, all attributes of vessel ownership and control, except title to the vessel, are transferred from the vessel's owner to the bareboat charterer, who enjoys the benefits and risks of the vessel's operation. *See generally Guzman v. Pichirilo*, 369 U.S. 698, 82 S. Ct. 1095, 8 L. Ed. 2d 205, 1962 A.M.C. 1142 (1962); *Black's Law Dictionary* at 229-230 (defining a demise charter as a "charter under which the shipowner surrenders possession and control of the vessel to the charterer, who then succeeds to many of the shipowner's rights and obligations").

After examination of the proposed charter, we find the following:

1. ECO will be responsible for providing the crew for the vessel;
2. The vessel master, employed by ECO's vessel manager, will have complete control of the vessel and will oversee and command the vessel's operation;
3. The vessel master will have overriding authority over Viking's hospitality contractor staff with respect to operation of the vessel;
4. ECO will be responsible for maintenance and repair of the vessel;
5. ECO will be responsible for procuring bunkers;
6. ECO will be responsible for paying and provisioning the vessel's crew;
7. ECO will be responsible for insuring the vessel including Hull and Machinery, Employer's Liability Insurance, and Protection and Indemnity coverage;
8. ECO will be responsible for paying for the vessel's operating expenses;
9. ECO will indemnify Viking for claims arising out of ECO's operation of the vessel; and
10. Viking will indemnify River 1 with respect to any injury to passengers or any of Viking's invitees, contractors, or vendors.

Therefore, we confirm that the charter submitted by ECO is a time charter and not a bareboat charter because ECO will continue to be the vessel's operator and will retain the rights and obligations of a vessel owner under the charter as would be expected under a time charter.

Our analysis does not end at determining that the formal elements of a time charter are present in a particular charter party. In *In the Matter of the Application by Lykes Bros. Steamship Co., Inc.*

*for Transfer and Assignment of Subsidy Agreements to Sea Crews II Inc.* (1997), the Secretary of Transportation noted:

...the concept of control is not susceptible of scientific definition or quantification; it is not possible to say what relationships other than outright ownership always constitute control or to provide a bright-line distinction between what is and what is not control.

We have further scrutinized the proposal to determine whether the charter and related circumstances will result in excessive elements of control by a foreign corporation or citizens and find the following:

1. Based on its representations to MARAD, ECO and its affiliate, River 1, LLC (the vessel's direct owner), are U.S. citizens within the meaning of 46 U.S.C. § 50501;
2. The U.S. Coast Guard has determined that ECO and River 1, LLC (the vessel's direct owner), are eligible to document vessels with coastwise endorsements;<sup>2</sup>
3. The ECO time charter neither enables the time charterer to cause the vessel owner to sell the vessel nor includes a purchase option in favor of the time charterer;
4. The time charter's term, even including extension options, does not cover the vessel's entire expected useful life. ECO will enjoy complete use and enjoyment of the vessel free of the charter for at least ten years upon the conclusion of the optional extension periods;
5. The time charterer has no control over the negotiation of labor agreements applicable to the crew employed by the vessel's owner/operator;
6. The time charterer will not indemnify the owner/operator for oil pollution liability or other risks expected to be borne by a vessel owner and operator;
7. ECO will not be sheltered from the normal risk of owning and operating the vessel;
8. The time charter will not preclude ECO from taking on additional unrelated business - instead, the time charter expressly provides that ECO may operate cruise vessels in the same market upon delivery of the vessel;
9. ECO will retain ultimate authority in establishing the operating budget for the vessel;
10. An ECO affiliate will serve as vessel manager;
11. In the event the ECO affiliate vessel manager is discharged for cause, ECO will retain the exclusive authority to appoint an independent, substitute vessel manager for the vessel; and
12. Viking's payment of advance charter hire will not result in the impermissible transfer of control because, on balance, (i) the advance charter hire, if treated as an equity contribution, would be less than the 25% foreign ownership limit imposed by 46 U.S.C. § 50501(d); (ii) the financial risk ECO will bear is substantial and typical of a vessel owner in that ECO, and not Viking, is responsible for repaying the vessel construction loans; and (iii) ECO and its affiliates have no ownership or management connection to Viking or its affiliates and vice versa.

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<sup>2</sup> See Letter from Christina G. Washburn, Director, National Vessel Documentation Center, to Gary Chouest, Edison Chouest Offshore (December 27, 2019).

Based on the forgoing, we find that the proposed time charter will not result in an impermissible transfer of control over ECO or the vessel to a non-citizen and confirm that, as a time charter, the charter is subject to the blanket foreign transfer approval of 46 CFR § 221.13(a) requiring no written MARAD approval. MARAD reaffirms its December 20, 2019, confirmation letter to ECO.