



September 2022

MARITIME ADMINISTRATION

Actions Needed to Enhance Cargo Preference Oversight

GAO Highlights

Highlights of [GAO-22-105160](#), a report to congressional committees

Why GAO Did This Study

Cargo preference requirements are intended to support the U.S.-flag shipping industry. The requirements are designed to ensure the industry, among other things, has sufficient vessels and trained mariners to supplement the cargo-carrying capacity of military ships during times of war or national emergency.

The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 included a provision for GAO to review federal agencies' actions to monitor compliance with cargo preference requirements and to review MARAD's enforcement activities. This report examines: (1) the extent to which MARAD has monitored and reported on agencies' compliance with cargo preference requirements and (2) MARAD's efforts to enforce cargo preference requirements, among other objectives.

For this report, GAO reviewed relevant federal laws, regulations, and policies; collected and reviewed cargo preference data available to MARAD for fiscal years 2012 through 2020; and conducted interviews with MARAD officials, among others.

What GAO Recommends

GAO is making two recommendations to MARAD to: (1) publicly report, on an annual basis, the cargo preference data it receives and (2) take steps to develop regulations to oversee and enforce cargo preference requirements.

DOT concurred with GAO's recommendations.

View [GAO-22-105160](#). For more information, contact Andrew Von Ah at (202) 512-2834 or vonaha@gao.gov.

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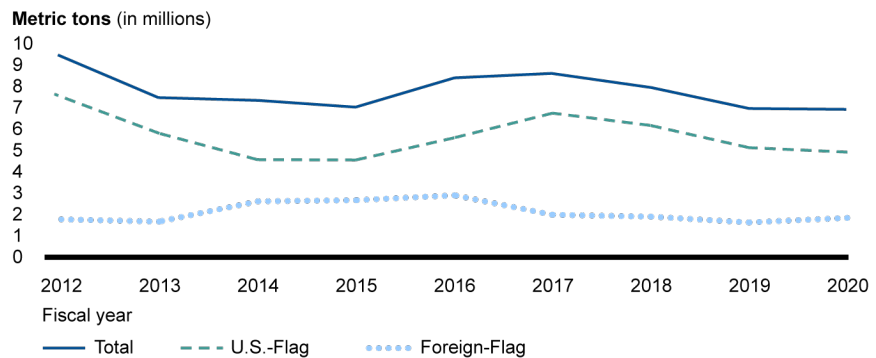
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What GAO Found

Federal "cargo preference" laws, regulations, and policies require that when cargo owned or financed by the federal government is shipped internationally, certain percentages of that cargo be carried on vessels registered in the United States (U.S.-flag vessels). The Maritime Administration (MARAD), within the Department of Transportation, monitors federal agencies' cargo volumes to calculate the percentage of U.S.-flag shipments. However, MARAD has not publicly reported these data since 2013. According to data received by MARAD, and provided to GAO, total government-wide cargo volumes decreased 27 percent from fiscal years 2012 through 2020, and U.S.-flag volumes decreased 36 percent (see figure). Although MARAD no longer reports the data because a statutory reporting requirement was eliminated by a 2008 law, the elimination of this requirement does not preclude MARAD from reporting data. Without public reporting by MARAD, Congress and others lack visibility into federal agencies' cargo shipments, including the amounts shipped on U.S.-flag vessels. Public reporting would also provide an important accountability incentive for federal agencies to monitor their shipping activities to demonstrate that they are meeting cargo preference requirements.

Data Received by MARAD on Federal Agencies' Cargo Volumes, Including U.S.- and Foreign-Flag Vessels' Tonnage, Fiscal Years 2012 through 2020



Source: GAO analysis of data received by the Maritime Administration (MARAD). | GAO-22-105160

MARAD has taken steps to identify potential instances of noncompliance with cargo preference requirements and collaborated with federal agencies and contractors to encourage compliance. However, MARAD has not taken enforcement actions. For example, MARAD has notified federal agencies and contractors about potential contract violations, and has encouraged shipping additional cargo on U.S.-flag vessels. However, according to MARAD officials, MARAD has not taken any enforcement actions, in part, because it has not developed regulations necessary to take such action. MARAD has not developed regulations primarily due to challenges in reaching consensus with other agencies on how to implement cargo preference requirements. Without taking steps to evaluate options for developing regulations that achieve sought-after consensus with agencies, MARAD will continue to lack the tools necessary to oversee and enforce agencies' compliance with cargo preference requirements.

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Abbreviations

1904 Act	Cargo Preference Act of 1904
1954 Act	Cargo Preference Act of 1954
DFARS	Defense Acquisition Regulation Supplement
DOD	Department of Defense
DOT	Department of Transportation
FAR	Federal Acquisition Regulation
MARAD	Maritime Administration
NDAA for 2009	Duncan Hunter National Defense Authorization Act for Fiscal Year 2009
OMB	Office of Management and Budget
SDDC	Surface Deployment and Distribution Command
USAID	U.S. Agency for International Development
USDA	U.S. Department of Agriculture

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September 12, 2022

The Honorable Maria Cantwell
Chair
The Honorable Roger F. Wicker
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate

The Honorable Peter A. DeFazio
Chairman
The Honorable Sam Graves
Ranking Member
Committee on Transportation and Infrastructure
House of Representatives

The federal government ships many types of cargo internationally across the ocean, including military supplies, food supplies for nations that suffer from famine, and government employees' household goods and personal vehicles. In general, when cargo owned or financed by the federal government is shipped, federal "cargo preference" laws, regulations, and policies require that certain percentages of such cargo be carried on ships registered in the United States (U.S.-flag vessels).¹ The requirements are intended to support the U.S.-flag shipping industry so that the United States has a merchant marine capable of supplementing the capacity of the U.S. military with U.S.-flag vessels and trained mariners during times of war or national emergency, while also providing transportation for the nation's maritime commerce.²

Although cargo preference requirements have been in place in some form since 1904, the number of oceangoing vessels in the U.S.-flag fleet has fallen over time. According to data from the Department of Transportation's Maritime Administration (MARAD), the fleet of U.S.-flag vessels engaged in international trade has declined from 199 vessels at

¹For the purposes of this report, the term U.S.-flag vessel refers to a vessel of the United States registered and operated under the laws of the United States, used in commercial trade of the United States, and that is primarily owned and operated by U.S. citizens.

²See 46 U.S.C. § 50101 and H. R. Rep. No. 83-2329 at 1 (1954) with respect to 46 U.S.C. § 55305; and S. Rep. No. 58-182 at 2 (1904) and H. R. Rep. No. 58-1893 at 3, 6 (1904) with respect to 10 U.S.C. § 2631.

the end of 1990 to 84 vessels in 2021.³ As we have previously reported, the operating costs of U.S.-flag vessels are generally higher than the operating costs of foreign-flag vessels, and government support—such as cargo preference laws— is intended to help maintain a fleet of internationally trading U.S.-flag vessels.⁴

The Secretary of Transportation, through MARAD, supports the U.S.-flag fleet, in part, by collecting data on federal agencies' cargo shipments and monitoring U.S.-flag cargo volumes. MARAD was granted new authorities to take certain cargo preference-related enforcement actions through amendments made by the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA for 2009).⁵ Those authorities include assessing civil penalties “against any person” for noncompliance with cargo preference requirements. As discussed later in this report, to date, MARAD has not issued regulations implementing those authorities.

Section 8404 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 includes a provision for GAO to examine federal agencies' actions to monitor and ensure compliance with cargo preference requirements and to review MARAD's enforcement activities.⁶ This report examines:

- the extent to which MARAD has monitored and reported on federal agencies' compliance with cargo preference requirements;
- the extent to which MARAD has provided direction to federal agencies on how to meet cargo preference requirements; and

³For the purposes of this report, we use the term “internationally trading” to refer to the U.S.-flag, oceangoing vessels shipping government impelled cargo internationally. These do not include U.S.-flag vessels supporting domestic trade.

⁴In addition, the U.S. government also financially supports internationally trading U.S.-flag vessels by providing an annual stipend for specific vessels through the Maritime Security Program. GAO, *Maritime Security: DOT Needs to Expediently Finalize the Required National Maritime Strategy for Sustaining U.S.-Flag Fleet*, [GAO-18-478](#) (Washington, D.C.: Aug. 8, 2018). However, GAO has also found that the application of cargo preference in the delivery of international food assistance does not clearly contribute to sealift capacity. GAO, *International Food Assistance: Cargo Preference Increases Food Aid Shipping Costs, and Benefits Are Unclear*, [GAO-15-666](#) (Washington, D.C.: Aug. 26, 2015).

⁵Pub. L. No. 110-417, § 3511(b), 122 Stat. 4356, 4769-70 (2008)(codified as amended at 46 U.S.C. § 55305(d)(2)).

⁶Pub. L. No. 116-283, 134 Stat. 3388, § 8404, 134 Stat 3388, 4722 (2020).

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- MARAD’s efforts to enforce cargo preference requirements.

To determine the extent to which MARAD has monitored and reported on federal agencies’ compliance with cargo preference requirements, we analyzed data from MARAD’s Cargo Preference Overview System—the database MARAD uses to manage bills of lading data MARAD received from agencies’ contractors and other entities. We requested 10 years of data from fiscal years 2012 through 2021, although fiscal year 2020 was the most current complete data available at the time of our review.⁷ We also analyzed summary data that MARAD receives from the Department of Defense (DOD) on an annual basis, which includes bill of lading data for DOD cargos plus six additional streams of military shipment data provided by DOD for fiscal years 2012 through 2020. In addition, we reviewed cargo preference data maintained by three selected agencies, including tonnage volumes (volume) shipped when USAID determined a U.S.-flag vessel was not available or based on other authorities for fiscal years 2012 through 2021. We selected the three agencies—DOD; the U.S. Agency for International Development (USAID); and the U.S. Department of Agriculture (USDA)—that shipped the most cargo in 2019 according to MARAD’s data.

We interviewed MARAD officials to understand how MARAD uses the data and information it receives to monitor and report on federal agencies’ compliance with cargo preference requirements, and to identify any additional sources of cargo preference-related data federal agencies provide to MARAD.⁸ To assess the reliability of MARAD’s data, we reviewed MARAD documentation related to the data and agency officials’ responses to our questions about the reliability of the data. We also tested the data for outliers or obvious errors and compared MARAD total and U.S.-flag cargo volume data to the three selected agencies’ data. We

⁷In general, a bill of lading is a document issued by a carrier to acknowledge receipt of cargo for shipment. For contracts that may involve ocean transportation of supplies, Federal Acquisition Regulation (FAR) and Defense Acquisition Regulation Supplement (DFARS) provisions require that copies of ocean bills of lading containing a range of information, including the sponsoring U.S. government agency, vessel name and flag of registry, date of loading, description of the commodity, port of discharge, and the gross weight of the shipment be filed with MARAD. See, FAR provisions at 48 C.F.R. §§ 47.507(a), 52.247-64(c); DFARS provisions at 48 C.F.R. §§ 247.574, 252.247-7023. See also, FAR provisions relating to USAID ocean transportation contracts at 48 C.F.R. §§ 747.507, 752.247-70.

⁸For the purposes of this report, we use the term “federal agencies” to refer to any U.S. government department or agency that may ship, procure, finance, or furnish cargo subject to cargo preference requirements.

determined that the data received by MARAD were sufficiently reliable for the purpose of providing the approximate annual metric tonnage of cargo shipped by federal agencies on U.S.-flag carriers, foreign-flag carriers, and in total. We then compared MARAD's efforts to report on federal agencies' compliance with cargo preference requirements to federal internal control standards for externally communicating quality information.⁹

To determine the extent to which MARAD has provided direction to federal agencies on how to meet cargo preference requirements, we reviewed cargo preference laws and regulations, MARAD documentation, and interviewed MARAD officials. Specifically, we analyzed MARAD documentation on direction MARAD has provided federal agencies on two key areas that we determined would be necessary for agencies to implement and to meet cargo preference requirements outlined in the various cargo preference laws and regulations. For the purposes of this report, we refer to these as "key cargo preference procedures:" 1) determining the availability of U.S.-flag vessels and sharing this information with MARAD; and 2) calculating U.S.-flag rates. We compared MARAD's efforts to provide direction to federal agencies to federal internal control standards for externally communicating quality information, as well as to our prior work on enterprise risk management practices.¹⁰

We also selected seven federal agencies' and obtained policies and procedures these agencies identified for implementing cargo preference requirements. We selected these agencies to learn more about how a wider range of federal agencies implement cargo preference requirements, and included a mix of high- and lower-volume shippers based on the cargo preference data received by MARAD. These federal agencies included the five largest volume shippers in fiscal year 2019: DOD, USAID, USDA, Export-Import Bank, and Department of State, as well as from two lower-volume shippers: the Department of

⁹GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: Sept. 10, 2014). Internal control is a process effected by an entity's management, oversight body, and other personnel that provides reasonable assurance that the objectives of an entity will be achieved.

¹⁰[GAO-14-704G](#). GAO, *Enterprise Risk Management: Selected Agencies' Experiences Illustrate Good Practices in Managing Risk*, [GAO-17-63](#) (Washington, D.C.: Dec. 1, 2016).

Transportation (DOT) and the Department of Energy.¹¹ We requested that these federal agencies identify any policies in place to monitor cargo preference compliance.¹² We then reviewed the policies and documentation provided by these seven selected agencies. We also interviewed officials from the seven selected agencies about how they implement key cargo preference procedures and any policies they have to monitor agency staff and contractor compliance with cargo preference requirements.

To examine MARAD's efforts to enforce cargo preference requirements, we reviewed MARAD documentation and interviewed MARAD officials on actions taken to prescribe regulations to implement the enforcement authorities provided to MARAD in the NDAA for 2009, and any additional actions MARAD has taken to encourage compliance with cargo preference requirements. We compared MARAD's cargo preference oversight efforts to MARAD's 2020 *National Maritime Strategy*. We also interviewed a selection of maritime industry stakeholders to obtain perspectives on MARAD's oversight efforts, including four ocean carriers¹³ operating U.S.-flag vessels, three maritime industry associations, three freight forwarders, and two USAID implementing partners.¹⁴ We selected those entities to provide broad coverage of maritime industry stakeholders that participate in shipping cargo supported by U.S. government funding.

We conducted this performance audit from April 2021 to September 2022 in accordance with generally accepted government auditing standards.

¹¹Fiscal year 2019 data were the most recently complete data available at the time of the review's scoping and agency selection process.

¹²We requested that selected agencies identify policies to monitor cargo preference compliance, which could include regulations, guidance, procedures, memorandums of understanding, or other documentation issued by the agency to agency staff or to parties involved in the cargo shipping process, such as contractors, sub-contractors, loan or grant recipients.

¹³For the purposes of this report, we refer to an ocean carrier as a vessel-operating company participating in the ocean transportation of passengers or cargo for compensation.

¹⁴For the purposes of this report, the term "freight forwarder" refers to entities that provide ocean transportation services to federal shipping agencies, acting as an intermediary between the agency or contractor and the final destination for the goods. The term "implementing partners" refers to entities such as non-governmental organizations that are awarded U.S. government grants to carry out food assistance activities overseas and international humanitarian aid organizations.

Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Cargo Preference Requirements

Cargo Preference is the general term used to describe the various federal laws, regulations, and policies that require certain portions of all “government-impelled” cargo be moved via U.S.-flag vessels.¹⁵ Cargo preference requirements collectively apply to:

- all military cargo transported by sea by DOD;
- the transportation by sea of all U.S. government personnel and their personal effects (household goods);
- all private vehicles transported at U.S. government expense;
- all export cargo financed by loans made by an instrumentality of the U.S. government, such as those financed by the Export-Import Bank;¹⁶ and

¹⁵According to MARAD, cargo preference requirements apply to “government-impelled” cargo—any cargo supported by U.S. government funding, including cargo moving as a direct result of federal government involvement, such as military transportation of supplies by sea; indirectly through financial sponsorship of a federal program, such as USAID supported food aid; or in connection with a loan, grant, loan guarantee, or other financing provided by the federal government.

¹⁶The Export-Import Bank is the official export credit agency of the United States, and it assists in financing the export of U.S. goods and services to international markets. Cargo generated by Export-Import Bank loans and loan guarantees are subject to certain cargo preference requirements and provisions. Specifically, Public Resolution 17, 48 Stat. 500 (1934) (codified at 46 U.S.C. § 55304), provides the non-binding sense of Congress that any loans made by a federal agency to foster the export of U.S. goods shall provide that such goods may only be transported on U.S.-flag vessels unless the Secretary of Transportation certifies that such vessels are not available in sufficient number or tonnage capacity, on necessary schedules, or at reasonable rates.

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- half of the gross tonnage of other U.S. government cargo—including international food aid shipped by USAID and USDA.¹⁷

Two Cargo Preference Acts (enacted respectively in 1904 and 1954) outline key requirements on the use of U.S.-flag vessels for shipping government-impelled cargo. For example:

- Under the law commonly referred to as the Cargo Preference Act of 1904, (1904 Act) as amended, DOD supplies may be shipped by sea only on a U.S.-flag vessel. The Secretary of Defense may waive this requirement if such a vessel is not available at a fair and reasonable rate for commercial vessels of the United States or is otherwise not available.¹⁸
- Under the law commonly referred to as the Cargo Preference Act of 1954 (1954 Act), as amended, at least 50 percent of the gross tonnage of federal government-impelled cargoes must be transported on privately owned—rather than government owned—U.S.-flag commercial vessels to the extent such vessels are available at fair and reasonable rates for commercial vessels of the United States.¹⁹ The minimum percentage requirement for cargo preference for food

¹⁷For the purposes of this report, we are focused on cargo shipped internationally, which does not include domestic shipments subject to Jones Act requirements. The law commonly referred to as the Jones Act and several other statutory requirements implicated by the Jones Act collectively require that vessels carrying merchandise between any two points in the United States be predominately owned and crewed by U.S. citizens, registered under the U.S. flag, and built in the United States. Section 27 of the Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988, 999 (1920) (codified as amended at 46 U.S.C. § 55102).

¹⁸Cargo Preference Act of 1904, Pub. L. No. 58-198, 33 Stat. 518 (codified as amended at 10 U.S.C. 2631). While the law does not define the term “fair and reasonable,” federal regulations contain additional information related to these determinations, as we discuss further in this report.

¹⁹Cargo Preference Act of 1954, Pub. L. No. 83-664, 68 Stat. 832 (codified as amended at 46 U.S.C. 55305). A DFARS provision implementing the 1904 Act generally provides that the 1954 Act is applicable to DOD, but DFARS coverage of the 1954 Act is not required because compliance with the 1904 Act’s 100 percent U.S.-flag vessel requirement historically has resulted in DOD exceeding the 1954 Act’s minimum 50 percent requirement. 48 C.F.R. § 247.570(b).

aid has fluctuated since 1954, and currently, 50 percent of food aid is required to be transported on U.S.-flag vessels.²⁰

Both the federal agencies that own or finance cargo and MARAD have responsibilities to uphold cargo preference laws. Generally, federal departments and agencies having responsibility for a program subject to the 1954 Act are required to administer such programs in accordance with the requirements of the 1954 Act and under regulations and guidance issued by the Secretary of Transportation, as delegated by the Secretary to MARAD.²¹ Under the NDAA for 2009 amendments to the 1954 Act, the Secretary of Transportation, through MARAD, is solely responsible for determining if a federal program is subject to the 1954 Act cargo preference requirements and is to conduct an annual review of the administration of the programs that are subject to such requirements.

To date, MARAD has not issued regulations implementing the enforcement authorities granted to MARAD in amendments made by the NDAA for 2009. These authorities include taking certain actions in response to violations of the cargo preference requirements enacted in the Cargo Preference Act of 1954. For example, the NDAA for 2009 granted MARAD the authority to direct “make up” cargoes if federal agencies fall short of the minimum percentage of cargo required to be shipped on U.S.-flag vessels;²² impose civil penalties “against any person” for violations of cargo preference requirements; and take other

²⁰The minimum percentage requirement for cargo preference food aid has fluctuated since 1954, including a requirement for an additional 25 percent of commodity tonnage required by the Food Security Act of 1985 that was subsequently repealed by the Moving Ahead for Progress in the 21st Century Act of 2012, thereby reducing the minimum level of food aid required to be transported on U.S.-flag vessels from 75 to 50 percent. See, Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat 1354, 1491; Moving Ahead for Progress in the 21st Century Act of 2012, Pub. L. No. 112-141, Div. F, § 100124, 126 Stat. 405, 915.

²¹Under the Cargo Preference Act of 1954, such departments and agencies are to take steps necessary and practicable to ensure compliance with this requirement, to the extent that privately-owned commercial vessels are available at fair and reasonable rates for commercial vessels of the United States in those cargoes by geographic areas. MARAD has issued regulations describing its method for calculating fair and reasonable rates. See 46 C.F.R. Part 382.

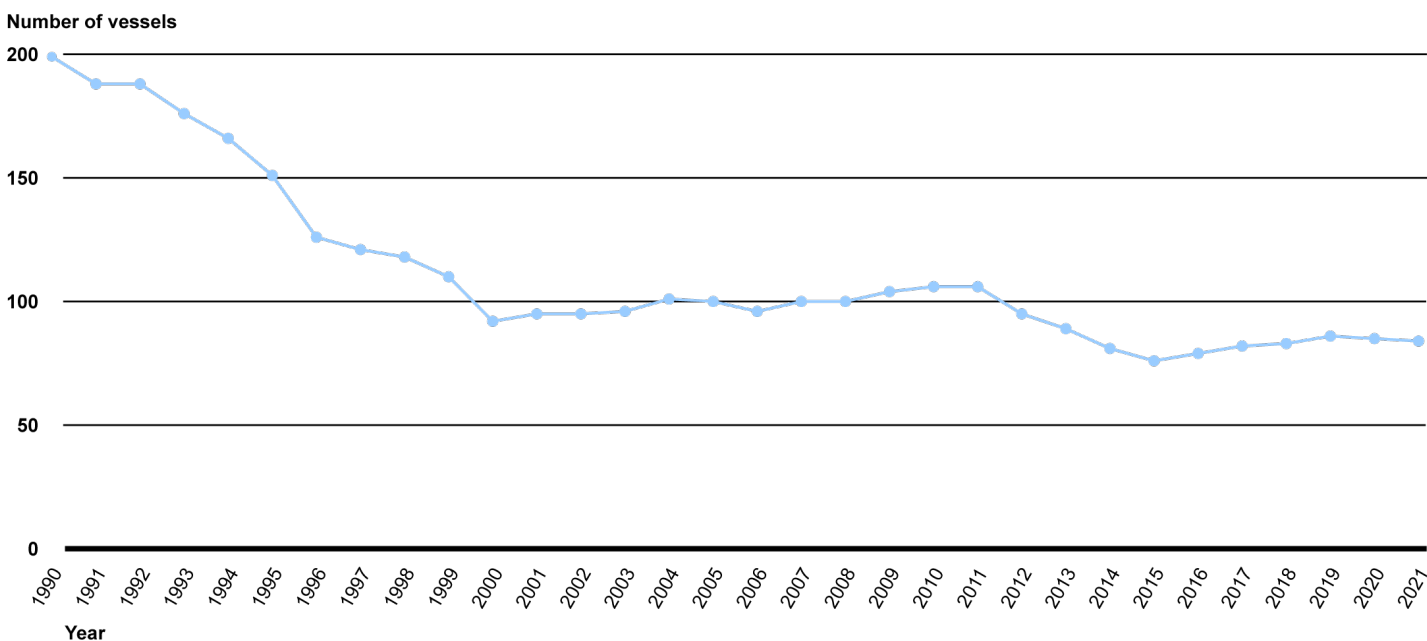
²²MARAD may direct agencies to require the transportation of cargo shipments not otherwise subject to the cargo preference requirements, to be shipped on U.S.-flag vessels, in equivalent amounts to cargo determined to have been shipped on foreign-flag carriers in violation of the applicable cargo preference requirements. 46 U.S.C. § 55305(d)(2)(B).

measures under the Federal Acquisition Regulation (FAR) or contract.²³ The NDAA for 2009 also provided the Secretary of Transportation with discretion to prescribe rules if deemed necessary to carry out the authorities it granted.

Trends in U.S-Flag Vessel Fleet Size

The size of the internationally trading U.S.-flag fleet has declined over many decades (see fig. 1). According to MARAD data, the fleet of U.S.-flag vessels declined 58 percent from 199 vessels in 1990 to 84 vessels in 2021. However, this decline largely occurred in the 1990s, and the decline in the fleet has been less substantial over the last 20 years. For example, according to MARAD data, the fleet of U.S.-flag vessels declined 9 percent from 2000 to 2021. The U.S.-flag fleet includes a mix of vessel types—container, general cargo, dry-bulk, roll-on/roll-off, and tankers. These vessels are designed to carry a range of cargo, including dry cargo, liquids, bulk food aid commodities, intermodal containers, and vehicles.

Figure 1: Number of Internationally Trading U.S.-Flag Vessels, 1990 to 2021



Source: GAO analysis of Maritime Administration data on non-Jones Act eligible ocean-going vessels. | GAO-22-105160

²³Pub. L. No. 110-417, § 3511(b), 122 Stat. 4356, 4769 (2008) (codified as amended at 46 U.S.C. § 55305(d)(2)(B)-(D)).

As GAO has previously reported, the decline in the U.S.-flag internationally trading fleet is largely due to the difficulty U.S.-flagged carriers have competing for business in the international shipping market.²⁴ Notably, U.S.-flag vessels have a variety of requirements that raise certain operating costs compared to foreign-flag vessels including the cost of labor, maintenance and repair, and insurance, according to a 2011 MARAD study.²⁵ The most significant of the higher costs relate to the cost of the crew, as vessels sailing under the U.S. flag have a “citizen crew” requirement—meaning that crew must predominately be U.S. citizens. The 2011 MARAD study found that U.S.-flag vessel owners are subject to various work rules and protections, staffing requirements, and training requirements that raise the cost of labor relative to foreign-flag vessels. MARAD officials also noted that the cost of living, income taxes, and healthcare expenses also contribute to elevated labor costs for U.S.-flag vessels. The 2011 MARAD study estimated the costs associated with operating international vessels under the U.S. flag to be, on average, more than two and a half times higher than the operating costs of foreign-flagged vessels. Also, in 2018, we reported that in dollar terms, the cost premium for U.S.-flag vessels over foreign-flag vessels had increased since 2010.²⁶

Federal Agencies and the International Shipping Process

MARAD’s Office of Cargo and Commercial Sealift promotes the use of U.S.-flag vessels in the movement of cargo on international waters and is responsible for monitoring the required use of U.S.-flag vessels in the international movement of federally sponsored cargo.²⁷ In support of this mission, MARAD maintains a list of all U.S.-flag vessels, coordinates with carriers on services and trade routes offered, and offers assistance to federal agencies that own or finance international cargo. In addition, MARAD officials communicate with federal agencies and contractors on cargo preference requirements and offer educational materials, such as MARAD-developed cargo preference training modules. MARAD monitors federal agencies’ cargo volumes primarily by reviewing bills of lading that agencies’ ocean transportation contractors are required to submit to

²⁴[GAO-18-478](#).

²⁵MARAD, *Comparison of U.S. and Foreign-Flag Operating Costs*, September 2011.

²⁶[GAO-18-478](#).

²⁷The process of transporting government equipment and supplies by sea for military purposes is often referred to as “sealift.”

MARAD.²⁸ Under certain circumstances, federal regulations require agencies to seek the concurrence of MARAD on whether U.S.-flag vessels are available at “fair and reasonable” rates.²⁹

DOD ships the most cargo internationally of any federal agency, largely relying on privately owned U.S.-flag vessels to transport its cargo in peacetime and to supplement the government-owned reserve fleet in times of war or crisis.³⁰ DOD finances and ships a range of items, including military cargo and supplies, foreign military assistance, and DOD personal property, including private vehicles and household goods. USAID, USDA, and other civilian agencies also finance or ship international cargo, based on the agency’s mission and activities. For example, USAID provides food assistance for emergency needs such as disasters and crises outside the United States, and both USAID and USDA’s Foreign Agricultural Service provide food aid in non-emergency situations.³¹ Finally, other civilian agencies may ship other cargo financed

²⁸Federal Acquisition Regulations require that federal agency contracts for transportation of supplies by sea include contract clauses requiring contractors to submit bills of lading to MARAD after a shipment occurs. See, e.g., FAR 48 C.F.R. §§ 47.507(a), 52.247-64(c); see also, DFARS 48 C.F.R. §§ 247.574, 252.247-7023.

²⁹See, e.g., 46 C.F.R. § 381.5, 48 C.F.R. § 47.506(c). We have previously reported that the fair and reasonable provision in the Cargo Preference Act of 1954 helps ensure that U.S.-flag vessels do not overcharge federal agencies required to ship on U.S.-flag vessels and that MARAD will find a rate to be fair and reasonable if it is less than or equal to MARAD’s estimate of the cost of the voyage in question plus a reasonable profit, among other considerations. [GAO-15-666](#).

³⁰U.S. government owned reserve cargo vessels are held in reduced operating status with minimal crew in peacetime. When put into full operating status—such as for a surge related to a wartime effort—the government can add additional trained and qualified mariners to operate them.

³¹With respect to USAID, Title II of the Food for Peace Act, as amended, authorizes the provision of food assistance to, among other things, respond to emergency needs such as disasters and crises outside the United States, and targets the underlying causes of hunger and malnutrition through development food assistance programs. 7 U.S.C. § 1721 et seq. Section 3001 of Pub. L. No. 110-246, 122 Stat. 1652, 1820 (2008), the Food Conservation, and Energy Act of 2008, changed the title of the underlying legislation from the Agricultural Trade Development Assistance Act of 1954, Pub. L. No. 83-480, 68 Stat. 454 (1954), to the Food for Peace Act. USDA’s Foreign Agricultural Service administers food aid programs, including the Food for Progress program and the McGovern-Dole International Food for Education and Child Nutrition program. Food for Progress responds to non-emergency food aid situations by supporting agricultural value chain development, expanding revenue and production capacity, and increasing incomes in food-insecure countries. The McGovern-Dole program responds to nonemergency food aid needs by supporting education and nutrition for schoolchildren, particularly girls, expectant mothers, and infants.

by the federal government, such as goods purchased with Export-Import Bank loans, or personal vehicles or household goods for agency personnel.

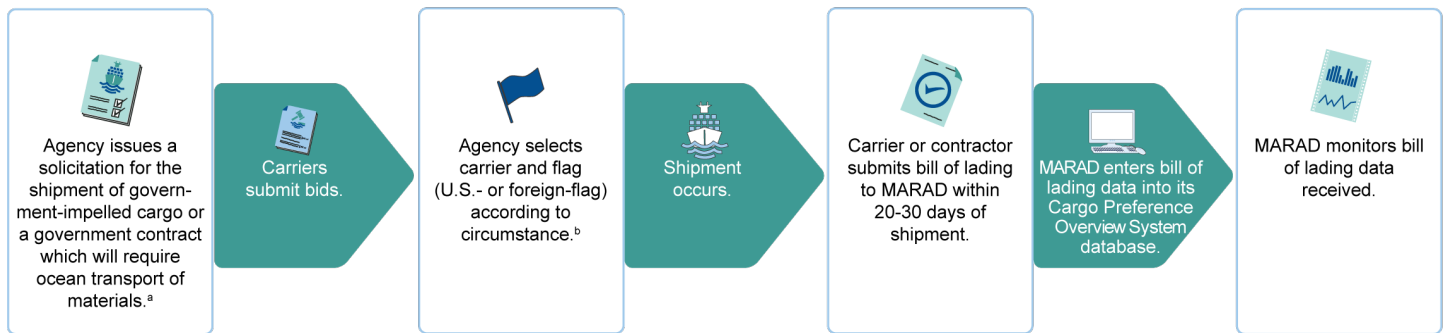
Typically, federal agencies and their contractors—entities arranging transportation and providing transportation services—follow a series of steps to procure shipping services (see fig. 2). Agencies generally work with contractors to identify ocean carriers (carriers) operating U.S.-flag vessels to transport cargo for a given project. According to MARAD officials, an agency's prime contractor may employ subcontractors, freight forwarders, or other logistics providers to manage the agency's transportation process and reporting requirements. Agencies such as USAID and USDA rely on implementing partners to deliver food aid to beneficiaries, while many DOD defense transportation system shipments are made through DOD's Universal Services Contract.³² Federal agency contractors are to submit documentation—in the form of bills of lading—to MARAD for government-impelled cargo, as required by federal acquisition regulations.³³ For each shipment that occurs, the agency's contractor is required to submit a bill of lading to MARAD with information on the U.S. government agency sponsoring the cargo, vessel's name and flag of registry, description of the commodity, gross weight of the shipment, and other information.³⁴

³²During peacetime and wartime operations, DOD contracts with commercial vessel operators to transport cargo on their vessels either through vessel charter contracts or through regularly scheduled shipping routes via the Universal Services Contract.

³³See FAR provisions at 48 C.F.R. §§ 47.507(a), 52.247-64(c); DFARS provisions at 48 C.F.R. §§ 247.574, 252.247-7023. See also, FAR provisions relating to USAID ocean transportation contracts at 48 C.F.R. §§ 747.507, 752.247-70.

³⁴Bills of lading are to contain a range of information, including the sponsoring U.S. government agency, vessel name and flag of registry, date of loading, description of the commodity, port of final discharge, and the gross weight of the shipment. See, FAR provisions at 48 C.F.R. § 52.247-64; DFARS provisions at 48 C.F.R. § 252.247-7023. See also, FAR provisions relating to USAID ocean transportation contracts at 48 C.F.R. § 752.247-70. For contracts that involve ocean transportation, required FAR and DFARS clauses require the contractor to submit copies of the bills of lading to MARAD within 20 working days from date of loading on all shipments loaded from the United States, and 30 working days for shipments loaded outside the United States. The reporting requirement applies whether cargo moves on a U.S.-flag or foreign-flag vessel and is irrespective of cargo origin or destination (including foreign-to-foreign cargo movements).

Figure 2: Summary of Process Used by Federal Agencies to Procure International Shipping Services and Provide Information to MARAD



Source: GAO analysis of selected cargo preference requirements and Maritime Administration (MARAD) information on the international shipping process. | GAO-22-105160

^aAccording to MARAD, cargo preference requirements apply to “government-impelled” cargo—any cargo supported by U.S. government funding, including cargo moving as a direct result of federal government involvement, such as military transportation of supplies by sea; indirectly through financial sponsorship of a federal program, such as USAID supported food aid; or in connection with a loan, grant, loan guarantee, or other financing provided by the federal government.

^bFor each shipment that occurs, the agency’s contractor is required by federal acquisition regulation provisions to submit a bill of lading to MARAD with information on the shipment.

MARAD Monitors Cargo Volumes but Does Not Determine Agencies’ Compliance with Cargo Preference Requirements or Publicly Report Data

MARAD Monitors Agencies’ Cargo Volumes on U.S.-flag Vessels, Which Have Generally Declined Since 2012

MARAD officials told us they continually compile and monitor federal agencies’ cargo volumes using the bills of lading MARAD receives from federal agency contractors and additional data provided by DOD. Specifically, MARAD receives bills of lading submitted by contractors and other entities after shipments occur to compile data on U.S.- and foreign-

flag volumes and commodities shipped by each federal agency.³⁵ MARAD enters the relevant cargo preference data received into its Cargo Preference Overview System, which MARAD officials use to monitor trends in cargo volumes and run reports. In addition, MARAD receives an annual data package from DOD, with six additional data sources that MARAD officials combine with data from bills of lading to track DOD shipments on an annual basis.³⁶ According to MARAD officials, DOD is the only federal agency that provides additional cargo-preference-related data directly to MARAD beyond the bills of lading that contractors submit to MARAD.

MARAD officials use the bill of lading data and additional DOD data to track overall cargo volumes to provide insight into each federal agencies' overall activity. MARAD officials also told us that they review the data to monitor trends in each agencies' overall shipping activity, and use their analysis to identify opportunities to engage with the responsible federal agency to promote the use of U.S.-flag vessels. MARAD officials told us that they have taken steps to improve their monitoring of the data. For example, MARAD updated its Cargo Preference Overview System in early 2022, to enable MARAD to input the bill of lading data much faster and run automated reports, providing MARAD more timely tools to track

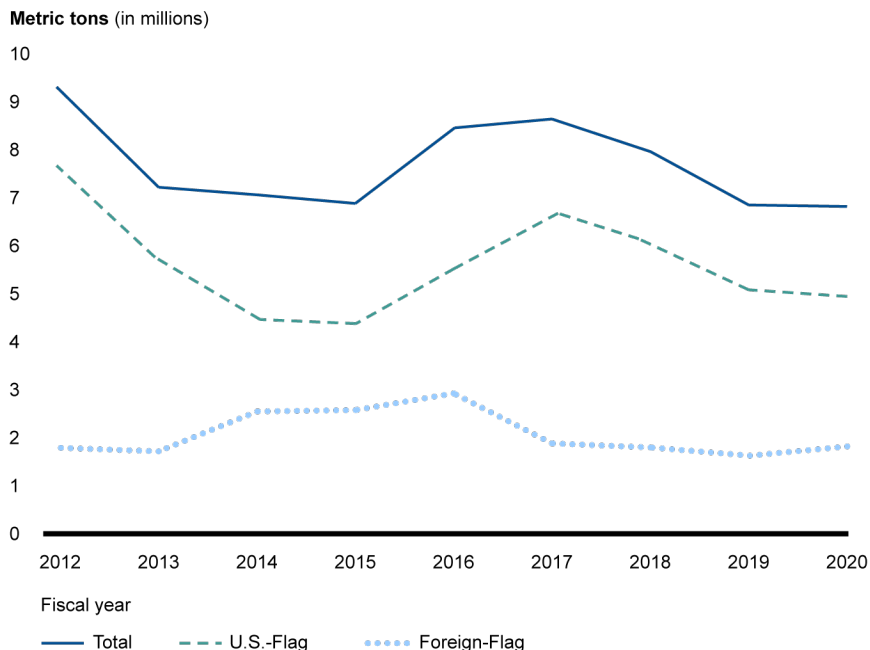
³⁵MARAD officials told us that they consider the prime contractor—the entity that has entered into a prime contract with the federal agency (e.g., DOD, USAID, State)—to be the responsible reporting party (per FAR and DFARS), but that in practice, they receive bills of lading from a range of entities, such as federal agencies, sub-contractors, freight forwarders, or logistics providers.

³⁶On an annual basis, DOD provides MARAD with additional data that MARAD officials said provides a more complete picture of DOD cargo volumes and supplements the more limited bill of lading data submitted to MARAD by defense contractors that do not ship under the additional DOD data sources. These sources include the Military Surface Deployment and Distribution Command's (SDDC) Integrated Booking System and direct booking data from the system SDDC's largest customers use to directly secure bookings with U.S. carriers at pre-fixed rates; U.S. Transportation Command data on privately owned vehicles and household goods; and Military Sealift Command data on dry cargo charters and tanker charters. MARAD combines these data with the bills of lading data it receives on DOD shipments.

the tonnage of cargo shipped on U.S.- and foreign-flag vessels for the available cargo preference data regarding federal agencies.

According to data received by MARAD, total government-wide cargo volumes have fluctuated but generally decreased from fiscal year 2012 through 2020 (see fig. 3). Over this time period, total cargo volumes based on MARAD’s data decreased 27 percent, while U.S.-flag volumes decreased 36 percent. According to MARAD officials, reductions in U.S. military activities and the drawdown in the number of DOD personnel stationed overseas contributed to declines in total government-wide volumes between 2013 and 2015. Data received by MARAD also indicate an increase in food aid volumes from 2015 to 2016. From fiscal year 2012 through 2020, MARAD received bills of lading representing shipments from an average of 10 federal agencies a year.

Figure 3: Data Received by MARAD on Federal Agencies’ Cargo Volumes Shipped Internationally, Including Tonnage on U.S.- and Foreign-Flag Vessels, Fiscal Years 2012 through 2020

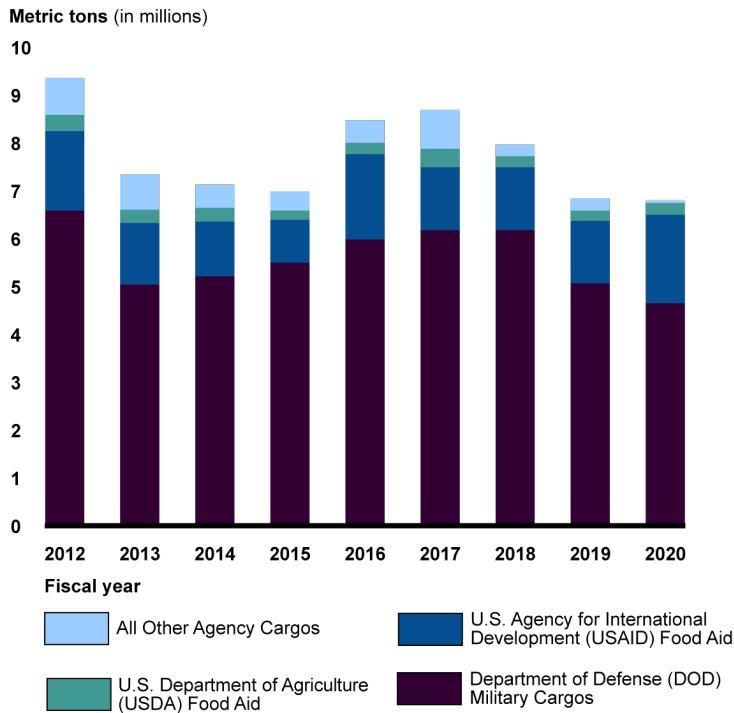


Source: GAO analysis of data received by the Maritime Administration (MARAD). | GAO-22-105160

Notes: Data received by MARAD includes the bills of lading that MARAD receives for all federal agencies; data are maintained in MARAD’s Cargo Preference Overview System, as well as additional data on military shipments provided by DOD to MARAD annually.

The federal government's use of U.S.-flag vessels is driven in large part by DOD, which ships the vast majority of international cargo, as well as USAID and USDA, which ship food aid for humanitarian assistance and international development programs (see fig. 4). In 2020, DOD shipped approximately 4.6-million metric tons of cargo, representing 68 percent of the total government cargo, according to data MARAD received. The two agencies shipping food aid—USAID and USDA—ship the second and third highest volumes of cargo, respectively. For example, in 2020, USAID shipped approximately 1.8-million metric tons of food aid (27 percent of total government cargos), and USDA shipped approximately 247,000 total metric tons of food aid (4 percent of total government cargos), according to MARAD data. In comparison, in 2020, all other agencies (a total of 14, which includes DOD when it is shipping civilian cargo and USAID and USDA when they are shipping non-food aid cargo) shipped a combined total of approximately 57,000 metric tons, which was 1 percent of total government cargos, according to the data MARAD receives.

Figure 4: Data Received by MARAD on Total Cargo Volumes Shipped Internationally for DOD, USAID, USDA, and All Other Civilian Agencies, Fiscal Years 2012 through 2020



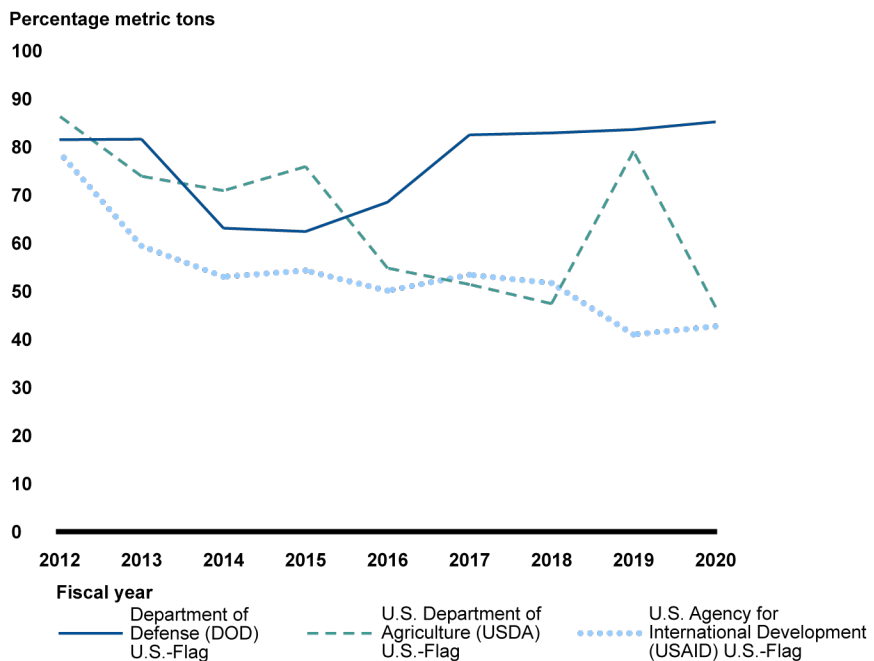
Source: GAO analysis of data received by the Maritime Administration (MARAD). | GAO-22-105160

Notes: Data received by MARAD include the bills of lading that MARAD receives for all federal agencies; data are maintained in MARAD’s Cargo Preference Overview System, as well as additional data on military shipments provided by DOD to MARAD annually. In July 2012, the minimum percentage of food aid required to be carried on U.S.-flag vessels was reduced from 75 percent to 50 percent, beginning in fiscal year 2013.

The estimated percentage of cargo shipped on U.S.-flag vessels for DOD, USAID, and USDA fluctuated from fiscal year 2012 through 2020—according to the bill of lading data received by MARAD for all agency shipments, and the additional data DOD provides MARAD (see figure 5). DOD volumes on U.S.-flag vessels varied from 82 percent of DOD’s total volume in 2012 before declining to 62 percent in 2015, and increasing to 85 percent in 2020. In total, USAID and USDA’s use of U.S.-flag vessels decreased for both agencies by approximately 46 percent from 2012 through 2020, based on MARAD’s data. The percentage of cargos shipped on U.S.-flag vessels by USAID declined from a peak of 79 percent in 2012 to a low of 41 percent in 2019. Similarly, USDA’s metric tonnage shipped on U.S.-flag vessels ranged from approximately 86

percent in 2012 to 47 percent in 2020. As we have previously reported, following the reduction in the required minimum percentage of food aid carried on U.S. flag vessels in 2012 from 75 percent to 50 percent, USAID was able to substantially increase the proportion of food aid transported by foreign-flag vessels.³⁷

Figure 5: GAO Analysis of Data Received by MARAD Estimating the Percentage of Cargo Volumes Shipped Internationally on U.S.-Flag Vessels by DOD, USAID, and USDA, Fiscal Years 2012 through 2020



Source: Source: GAO analysis of data received by the Maritime Administration (MARAD). | GAO-22-105160

Notes: Data received by MARAD include the bills of lading that MARAD receives for all federal agencies; data are maintained in MARAD’s Cargo Preference Overview System, as well as additional data on military shipments provided by DOD to MARAD annually. In July 2012, the minimum percentage of food aid required to be carried on U.S.-flag vessels was reduced from 75 percent to 50 percent, beginning in fiscal year 2013. According to MARAD officials, percentages displayed are not intended to be determinative of agency compliance. Rather, these figures only reflect data reported to MARAD.

³⁷As discussed in greater detail below, USAID calculates its percentage of cargo volumes shipped on U.S.-flag vessels in a different manner than is reflected in the data received by MARAD.

DOD, USAID, and USDA officials provided several reasons why the percentage of cargo volumes shipped on U.S.-flag carriers fluctuated from year to year for their respective agencies. In particular:

- According to DOD officials, the decline in U.S.-flag shipments from 2014 through 2016 was due, largely, to the limited availability of U.S.-flag tanker vessels during those years. As previously stated, the minimum tonnage requirements for agencies under the 1904 Act and the Cargo Preference Act of 1954 apply only to the extent that vessels of the United States and privately owned commercial vessels of the United States, respectively, are available at fair and reasonable rates.
- USAID and USDA officials told us that the majority of the food aid cargo—bulk commodities such as grain—must be shipped on dry-bulk vessels and that the existing fleet was not sufficient to meet the transportation needs of the two agencies. At the time of our review, there were a total of three U.S.-flag dry-bulk vessels in service. According to USAID officials, they have to work around the availability of certain U.S.-flag vessels to facilitate emergency and non-emergency program deliveries of bulk food aid, and often rely on foreign-flag vessels when U.S.-flag vessels are not available.³⁸

We have previously reported that the supply of U.S.-flag dry-bulk vessels is constrained, in part, by a provision in the Cargo Preference Act of 1954 under which foreign-built or foreign-documented vessels that reflag into the U.S. registry must wait 3 years before they are able to participate in the transportation of preference food-aid cargo as a U.S.-flag vessel. We refer to this provision as the 3-year waiting period, as discussed below.³⁹

In addition, MARAD officials told us that USAID recently inquired about a blanket waiver from cargo preference requirements because USAID does not believe that the dry-bulk vessels it uses are militarily useful. However,

³⁸In addition, as discussed later in this report, when calculating the aggregate percentage of tonnage shipped by U.S.-flag vessels, USAID excludes cargos shipped on a foreign-flag vessel in instances where USAID determined that a U.S.-flag ship was not available. In contrast, MARAD's data include these cargos because the bills of lading that MARAD receives for USAID cargos on foreign-flag vessels do not indicate whether USAID has determined that a U.S.-flag vessel was not available at the time of procurement.

³⁹In 2011, GAO made a Matter for Congress to consider amending the Cargo Preference Act of 1954 to eliminate the 3-year waiting period imposed on foreign vessels that acquire U.S.-flag registry before they are eligible for carriage of preference food-aid cargos. To date, Congress has not acted on this matter. GAO, *International Food Assistance: Funding Development Projects through the Purchase, Shipment, and Sale of U.S. Commodities Is Inefficient and Can Cause Adverse Market Impacts*, [GAO-11-636](#) (Washington, D.C.: June 23, 2011).

according to MARAD, DOD has recently chartered a dry-bulk vessel to support its operations, and MARAD noted that these vessels provide training opportunities for U.S.-mariners.

MARAD Does Not Determine Cargo Preference Compliance or Publicly Report on Cargo Volumes

MARAD officials told us that they do not use the agency cargo volume data they receive to determine an agency's compliance with cargo preference requirements. The officials cited the following two reasons for not doing so:

- First, MARAD officials told us that MARAD is not obligated to make compliance determinations under existing laws. However, the officials acknowledged that MARAD would need to make compliance determinations to take enforcement actions under the authorities it received in the NDAA for 2009. MARAD officials stated that MARAD is not in a position to use those authorities because it has not issued regulations to implement them, as discussed in greater detail below.
- Second, according to MARAD officials, they cannot fully determine federal agency compliance because there is currently no mechanism in place to validate whether MARAD has received all bills of lading for an agencies' government-impelled cargo. While MARAD officials said they do not know how much data on agencies' shipments they may be missing, occasionally, carriers will notify MARAD about cargo shipped on a foreign-flag vessel, and MARAD officials have found in some cases that bills of lading had not been submitted.

The mission of MARAD's Office of Cargo and Commercial Sealift is to promote and monitor the use of U.S.-flag vessels in the movement of cargo, and to oversee the administration of and compliance with U.S. cargo preference laws and regulations. According to federal internal control standards, entities should externally communicate the necessary quality information to achieve objectives.⁴⁰ Furthermore, the NDAA for 2009 amendments require DOT to perform an annual review of agencies' programs subject to cargo preference requirements. MARAD officials told us that MARAD has not completed agency-level annual reviews due to a lack of implementing regulations, as discussed in greater detail below. The officials also said that they do not believe that these annual reviews would require MARAD to make compliance determinations. However, these required annual reviews could facilitate MARAD's mission of overseeing cargo preference compliance and provide a useful venue for

⁴⁰[GAO-14-704G](#).

MARAD to publicly communicate the data it receives about federal agencies' cargo volumes.

For a number of years, MARAD reported agencies' cargo preference data in publicly available annual reports to Congress. These reports contained data on federal agencies' annual cargo volumes, including metric tons shipped on U.S.-flag vessels. However, the agency has not published such reports since 2013. MARAD officials told us that they no longer publically report these types of annual statistics, due in part, to limited resources, and because the statutory requirement for MARAD to annually report federal cargo preference data was eliminated. However, the elimination of the reporting requirement occurred in the NDAA for 2009 and MARAD continued to issue annual reports that cover shipments through fiscal year 2013.⁴¹ The legislative history of the NDAA for 2009 does not address why the requirement was removed or whether its removal was intentional. Moreover, the absence of a mandated reporting requirement does not preclude MARAD from this public reporting, and MARAD officials told us that they would not be averse to resuming MARAD's public reporting of cargo preference data.

Without public reporting from MARAD on the total cargo volumes and amounts shipped on U.S.- and foreign-flag vessels for each federal agency, the public lacks information on whether each agency is meeting cargo preference requirements. For example, because MARAD has not reported the bill of lading data it receives since 2013, maritime stakeholders and the broader public do not have information on trends in U.S.-flag cargo volumes since that time (see fig. 5). Moreover, MARAD's resuming of its public reporting would provide Congress with useful information on how MARAD is monitoring trends in U.S. and foreign-flag shipments toward achieving its mission of overseeing the administration of cargo preference laws.

⁴¹MARAD officials noted that the NDAA for 2016 also removed an agency-level annual reporting requirement. See Pub. L. No. 114-92, § 1074, 129 Stat. 726, 996 (2015).

MARAD Has Provided Some Direction to Agencies on Requirements but Faces Challenges Establishing Key Procedures for Agencies

MARAD Has Offered Agencies Direction on Cargo Preference Requirements but Has Not Clarified How Agencies Should Implement Key Procedures

MARAD's Office of Cargo and Commercial Sealift has provided some direction to agencies and contractors by providing information on applicable requirements, answering cargo preference-related questions, and sharing available training resources. MARAD officials told us that when they learn of an agency's new project or contract, they contact the relevant entity and provide information on the applicable cargo preference requirements based on the project or contract. For example, MARAD officials said that in 2021, when they became aware of Department of State contract awards for Overseas Building Operations projects in Albania and Tunisia, MARAD officials sent an email to the contractors that outlined the requirement to transport at least 50 percent of the gross tonnage of ocean-borne cargo onboard privately owned commercial U.S.-flag vessels, provided an overview of the applicable FAR-reporting requirements, and included a list of current U.S.-flag carriers.

In multiple emails we reviewed between MARAD and agency contractors, MARAD officials consistently identified applicable requirements and directed contractors to publicly available cargo preference training and to the MARAD website. In addition, MARAD officials told us that when they are aware of a planned project or contract, they also request the relevant entity provide shipping plans to help MARAD monitor related shipments.

However, MARAD has not clarified how agencies across the federal government should implement two procedures that we identified as being key for meeting cargo preference requirements outlined in the various cargo preference laws and regulations. Those procedures are:

- determining the non-availability of U.S.-flag vessels and sharing related information with MARAD; and

-
- calculating agencies' percentages of cargo volume shipped on U.S.-flag vessels.

The NDAA for 2009 amendments to the 1954 Act require each federal department or agency responsible for a program subject to the cargo preference requirements in the 1954 Act to administer that program in accordance with the requirements of the 1954 Act and under regulations and guidance issued by the Secretary of Transportation, as delegated by the Secretary to MARAD. Due in part to the lack of specific regulations or clarifying guidance from MARAD, we found that our seven selected agencies' procedures related to the two procedures varied, and in some cases differed from MARAD officials' perspectives on how these requirements should be implemented. MARAD officials told us that although MARAD has some cargo preference regulations, those regulations are not as comprehensive as they could be and that additional direction to federal agencies in the areas we identified could be helpful.

Determining the Non-availability of U.S.-flag Vessels and Sharing This Information with MARAD

The three primary cargo preference laws include exceptions for agencies to use foreign-flag vessels in cases when U.S.-flag vessels are not available, based on a "determination of non-availability." However, with the exception of the provision applicable to DOD, MARAD officials acknowledged that the cargo preference requirements do not explicitly address which agency or agencies have statutory authority for making determinations of non-availability.⁴² In addition, MARAD's cargo preference regulations do not address the process by which MARAD makes non-availability determinations or the factors it considers.

We found that five of our seven selected agencies have developed their own policies for making such non-availability determinations, but MARAD officials do not always agree with those policies. USDA and DOT officials told us that they do not have documented procedures for making determinations of non-availability. In contrast, the Department of State and USAID have documented procedures for making such determinations, which according to officials with these agencies do not require MARAD approval. For example, Department of State officials said that its Office of Logistics Operations is responsible for reviewing and approving determinations of non-availability for its freight shipments, and that overseas posts track their determinations of non-availability separately. According to the officials, the Office of Logistics Operations

⁴²Under the 1904 Act, DOD may make its own determinations related to the availability of U.S.-flag vessels. Pub. L. No. 58-198, 33 Stat. 518 (1904) (codified as amended at 10 U.S.C. § 2631).

has recently developed a system to track its determinations of non-availability, and that it may provide reports to MARAD of its determinations of non-availability once reporting intervals are established between the two agencies.

USAID's policy states that determinations of non-availability are made within a single office with transportation responsibilities at USAID.⁴³ USAID officials told us these determinations are made when USAID does not receive offers from U.S.-flag vessels, and that the vast majority of USAID's determinations of non-availability are due to the limited number of bulk vessels in the U.S.-flag fleet. According to USAID officials, shipping food aid on a foreign-flag vessel may allow USAID to respond more quickly to emergencies, such as in cases when U.S.-flag ships are not immediately available. USAID officials told us that they do not include MARAD in the determination process and that, in their view, MARAD's concurrence is not required. However, MARAD officials also told us that they should have a role in determining the availability of U.S.-flag ships for federal agencies and that they did not agree with USAID's procedures.

In contrast, based on DOD's explicit statutory authority to make its own determinations of non-availability,⁴⁴ DOD policy requires its contracting officers to request determinations of non-availability at each level of their command chain, and encourages contracting officers to contact MARAD for assistance in securing U.S.-flag vessels. DOD officials told us that U.S. Transportation Command officials work with MARAD to gather information on current market conditions and available vessels and that MARAD officials try to locate U.S.-flag vessels that DOD's contracting officers may have missed.

We also found that USAID and USDA track their determinations of non-availability or other instances where they might not use U.S.-flag vessels; but do not consistently share this information with MARAD. USAID and USDA officials told us they monitor instances in which their agencies have determined no U.S.-flag vessels are available. USAID also tracks

⁴³USAID, *Automated Directives System* "Chapter 315: Cargo Preference."

⁴⁴As discussed earlier, a DFARS provision implementing the 1904 Act provides that the 1954 Act is applicable to DOD. However, compliance with the 1904 Act's 100 percent U.S.-flag vessel requirement historically has resulted in DOD exceeding the 1954 Act's minimum 50 percent requirement. 48 C.F.R. § 247.570(b). Within this context, DOD officials developed and agreed upon a process that includes consultation with MARAD on these determinations.

instances in which it relies upon one of its statutory emergency authorities (referred to as “notwithstanding” authorities) to ship food aid that effectively overrides the application of other federal law requirements, such as cargo preference requirements, to such shipments.⁴⁵ According to USAID officials, the agency may rely upon notwithstanding authority in carrying out its underlying statutory authorities, including to maximize the assistance provided, and where security concerns for U.S.-flag vessels may negatively impact or inhibit delivery of shipments to certain locations, among other considerations.

However, MARAD does not have complete information on these determinations:

- According to USAID data, from fiscal year 2016 through 2021, USAID either determined that no U.S.-flag vessel was available in 153 instances, representing shipments totaling approximately 2.3-million metric tons (approximately 26 percent of USAID’s total metric tons during this period).⁴⁶ According to USAID officials, they notify MARAD when USAID has determined that no U.S.-flag vessels were available by sending a notice to MARAD after awarding a contract to a foreign-flag vessel. We found that USAID sent MARAD 40 notices of these determinations from fiscal year 2016 through 2021. These notices stated that USAID does not believe the shipment should count towards USAID’s overall cargo preference total or any cargo preference compliance calculation. In addition, MARAD officials told us that they received three requests for assistance from USAID related to U.S.-flag vessel availability over this time period.
- According to USAID data, USAID also relied on a “notwithstanding” authority in 24 instances, representing shipments totaling

⁴⁵For example, section 202 (a) of the Food for Peace Act as amended, authorizes the provision of agricultural commodities to meet emergency food needs “notwithstanding any other provision of law.” Pub. L. No. 101-624, 104 Stat. 3636 (1990) (codified as amended at 7 U.S.C. § 1722). When Congress wishes to confer discretion unrestrained by other laws, its practice has been to include the words “notwithstanding any other provision of law” or similar language. The Honorable Robert Aderholt, B-327212 (2016), 2016 WL 1391443, citing 14 Comp. Gen. 578 (1935). The Supreme Court has stated, “[T]he use of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section.” *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993). As both a legal and a practical matter, notwithstanding authority effectively overrides both a conflicting statute and its underlying regulations.

⁴⁶USAID defines a “shipment” as one line in its data (e.g., each type of food item on each voyage).

Calculating the Percentage of
Cargo Volumes Shipped on
U.S.-flag Vessels

approximately 539,000 metric tons (approximately 6 percent of USAID's total metric tons during this period). USAID officials said they did not send any letters to MARAD regarding the use of notwithstanding authority because decisions related to these shipments are made internally within USAID and not typically shared outside of the agency consistent with their statutory and delegated authorities.

- According to USDA data, USDA determined that no U.S.-flag vessel was available for 18 shipments totaling approximately 350,200 metric tons from fiscal year 2016 through 2021 (approximately 17 percent of USDA's total metric tons during this period).⁴⁷ MARAD officials told us that they received two requests for assistance from USDA related to U.S.-flag vessel availability over this time period.

Beyond USAID and USDA, MARAD officials told us that they do not have access to any data on other federal agencies' cargo shipments based on determinations of non-availability and that the officials are only able to track requests for determinations of non-availability submitted by federal agencies to and for MARAD review. MARAD officials told us that agencies are not required to share information related to their determinations of non-availability, in part, because MARAD has not established in regulation the process by which non-availability determinations should be made or the information agencies should share with MARAD in making such determinations.

MARAD has not provided direction to agencies on how to calculate the percentage of cargo that federal agencies carry on U.S.-flag vessels. Such guidance could describe the timeframes, geographic areas, units of activity (i.e., individual programs, projects, or contracts), and other factors that MARAD uses when monitoring agencies' cargo volumes. As mentioned above, MARAD officials told us that because they do not necessarily receive bills of lading for all federal agency shipments subject to cargo preference requirements, MARAD is unable to reliably assess agencies' and their contractors' compliance with cargo preference

⁴⁷USDA defines a "shipment" as unique instances of country per vessel type per fiscal year. USDA officials monitor their shipments on a country-by-country basis. The 1954 Act requires that at least 50 percent of the gross tonnage of federal agency-shipped cargoes, including U.S. food aid commodities be shipped on privately owned commercial U.S.-flag vessels in a manner that will ensure a fair and reasonable participation of commercial vessels of the U.S. in those cargoes by geographic areas, but the law does not define "geographic area." Pursuant to a court order granting both parties' joint motion of an agreed order in connection with a law suit filed against USDA, USDA must measure compliance with cargo preference laws for the Food for Progress program and Section 416(b) programs on a country-by-country basis to the extent practicable. See, *Farrell Lines, Inc. v. USDA*, 1:98CV02046 EGS (D.C. Sep. 17, 1998).

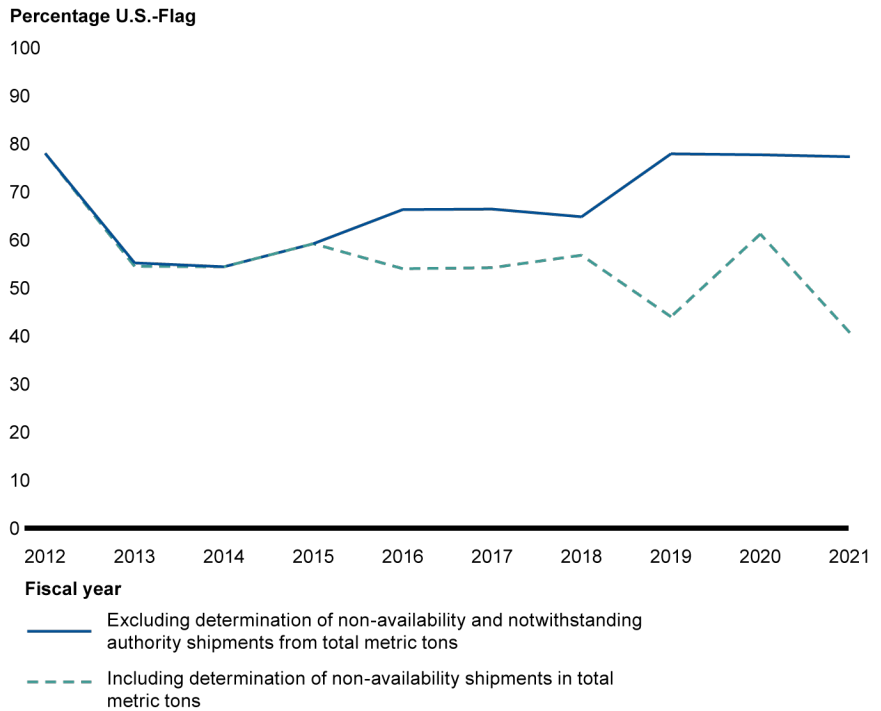
statutory requirements regarding the percentage of cargo that must be carried on U.S.-flag vessels.

We found that without direction from MARAD about how to calculate the percentage of cargo that federal agencies carry on U.S.-flag vessels, agencies use inconsistent methods to calculate their percentages of cargo volumes shipped on U.S.-flag vessels. For example, DOD officials told us that, when calculating the overall percentage of metric tons shipped on U.S.-flag vessels for their internal monitoring, they include—as part of the total metric tons shipped—cargo shipped on foreign vessels due to determinations of U.S.-flag non-availability.

In contrast, USAID’s policy calls for excluding cargo amounts shipped based on USAID determinations of non-availability and the use of a “notwithstanding” authority when tracking the aggregate percentage of tonnage shipped by U.S.-flag. USAID publicly reports the annual percentage of cargos shipped on U.S.-flag vessels on its website using this method. When the percentage of volumes shipped on U.S.-flag vessels is calculated using USAID’s method of excluding foreign-flag shipments based on its determinations of U.S.-flag non-availability or a “notwithstanding” authority, the agency is consistently above the minimum 50 percent requirement in the 1954 Act.⁴⁸ See figure 6. If the determination of non-availability shipments are included in the total metric tons shipped, the percentage of volumes shipped on U.S.-flag vessels for USAID falls below the minimum 50 percent requirement in 2019 and 2021. According to USAID officials, notwithstanding authority overrides other federal law requirements, which exempts these cargoes from being counted towards the minimum 50 percent requirement.

⁴⁸As previously discussed, the reduction in the required minimum percentage of food aid to be carried by U.S. flag vessels from 75 percent to the current requirement of 50 percent, likely accounts for much of the reduction in the percentage of cargos transported on U.S.-flag vessels from 2012 to 2013. In July 2012, the Moving Ahead for Progress in the 21st Century Act of 2012 reduced the minimum required level of food aid to be shipped on U.S.-flag vessels from 75 to 50 percent. Pub. L. No. 112-141, Div. F, § 100124, 126 Stat. 405, 915.

Figure 6: USAID Data on the Percentage of USAID Food Aid Cargo Volumes Shipped on U.S.-flag Vessels, Fiscal Years 2012 through 2021



Source: GAO analysis of U.S. Agency for International Development (USAID) data. | GAO-22-105160

Note: USAID monitors its cargo preference-related data, including (1) instances and cargo volumes shipped where USAID has determined no U.S.-flag vessels are available (non-availability) and (2) instances where cargo is shipped pursuant to an emergency authority to ship food aid, “notwithstanding” requirements in other federal laws including cargo preference. This is referred to as using a “notwithstanding” authority. According to USAID officials, notwithstanding authority overrides other federal law requirements, which exempts these cargoes from being counted towards the minimum 50 percent requirement. In July 2012, the minimum percentage of food aid required to be carried on U.S.-flag vessels was reduced from 75 percent to 50 percent, beginning in 2013.

MARAD Has Faced Challenges in Establishing Key Cargo Preference Procedures and Has Not Fully Assessed Options to Address Them

MARAD has not clarified for agencies how to implement these two key cargo preference procedures, in part, because it has not been successful in completing a rulemaking to establish these procedures. A federal statutory cargo preference requirement directs agencies to implement

their programs in accordance with MARAD regulations and guidance.⁴⁹ MARAD officials told us that in 2009 MARAD began developing regulations to clarify how agencies should implement cargo preference requirements. However, the officials said that in 2017 MARAD terminated the effort, due in part to challenges reaching consensus with other federal agencies on how to implement cargo preference requirements. According to USAID officials, during this process, MARAD received feedback from federal agencies with different views on a number of issues, including determinations of non-availability, calculations of compliance, and geographic areas. In addition, MARAD officials also said that formalizing any additional guidance outside of a rulemaking would likely be considered a significant regulatory action by the Office of Management and Budget (OMB). The officials said this process would require interagency and OMB review to assess the potential effects on other agencies.⁵⁰

MARAD officials identified additional factors that they believe have made it difficult to obtain federal agency consensus and prevented the agency from providing additional direction in the two areas identified above. Specifically, MARAD officials stated that each federal agency supply chain is different and that complying with cargo preference requirements can, at times, disrupt certain agencies' programs by inducing poor logistics. For example, according to Department of State officials, the limited availability of U.S.-flag vessels with direct routes to South America can result in government employees' personal effects cargo being shipped from the United States to Europe on U.S.-flag, and then from Europe to South America on foreign-flag. The requirement to use a U.S.-flag carrier can result in an unnecessary burden to government employees serving overseas, according to the officials.

⁴⁹Specifically, the NDAA for 2009 amendments to the 1954 Act require each department or agency responsible for a program subject to the 1954 Act cargo preference requirements to administer such programs in accordance with the 1954 Act and regulations and guidance issued by the Secretary of Transportation, as delegated to MARAD.

⁵⁰A 1993 executive order (the basic principles of which were reaffirmed in a 2021 presidential memorandum regarding Modernizing Regulatory Review) and OMB's related guidance require federal agencies to submit regulatory actions classified as significant to OMB for review and approval. The scope of the executive order includes guidance that creates a serious inconsistency or otherwise interferes with an action taken or planned by another agency. OMB's related guidance says that when the significance of a regulatory action relates to potential effects on other agencies, the Office will provide the agencies with copies of the draft regulatory action. See Exec. Order 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) and OMB, *Guidance for Implementing E.O. 12866*, M-94-3, Oct. 12, 1993.

Although MARAD has faced challenges in reaching consensus with agencies, MARAD officials stated that MARAD has not abandoned a cargo preference rulemaking and has held internal discussions about advancing a rulemaking. However, we found that MARAD has not fully considered options to reach the interagency consensus sought to complete a rulemaking or otherwise provide direction to agencies on how to implement cargo preference procedures. For example, agencies can supplement the typical informal rulemaking process through a “negotiated rulemaking” as a way to gather feedback toward a goal of reaching a consensus in the development of a proposed rule. Through this process, an agency considering drafting a rule convenes a negotiated rulemaking committee for negotiations, consistent with the Negotiated Rulemaking Act of 1990.⁵¹ The committee is generally composed of representatives of the agency and the various interest groups to be affected by a potential regulation. However, MARAD officials told us that they have not considered this option, or others, as a means to overcome the obstacle of interagency disagreements.

MARAD officials also identified three issues related to statutory language in the 1954 Act that create challenges for MARAD in overseeing agencies’ compliance with cargo preference requirements:

- The 1954 Act’s requirement to ship a minimum of 50 percent of cargo volumes on privately owned commercial U.S.-flag vessels, is to be computed separately for certain “vessel types.” However, MARAD officials noted that the vessel types specified in the 1954 Act do not include container vessels, which became common after the 1954 Act.
- The officials also stated that undefined language related to “geographic areas” in the Act complicates how cargo preference

⁵¹Rulemaking at most regulatory agencies follows the Administrative Procedure Act’s informal rulemaking process, also known as “notice and comment” rulemaking, which generally requires agencies to publish a notice of proposed rulemaking in the *Federal Register*, provide interested persons an opportunity to comment on the proposed regulation, and publish the final regulation, among other things. See, 5 U.S.C. § 553. See, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 561-570a). If the committee comes to a unanimous consensus on the content of a potential regulation, the agency may use it as the basis of a proposed rule. In enacting the Negotiated Rulemaking Act of 1990, Congress made several findings, including that (1) negotiated rulemaking, in which the parties who will be significantly affected by a rule participate in the development of the rule, can provide significant advantages over adversarial rulemaking, and (2) negotiated rulemaking can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court.

compliance should be calculated, such as by country, region, or otherwise.⁵²

- In addition, the officials noted that the 3-year waiting period, in effect, limits the supply of vessels needed to deliver bulk food-aid. As previously discussed, the 1954 Act provision requires foreign-built or foreign-documented vessels that reflag into the U.S. registry to wait 3 years before they are able to participate in the transportation of preference food-aid cargo as a U.S.-flag vessel. According to MARAD officials, this waiting period presents further challenges to MARAD in ensuring that USAID and USDA have sufficient U.S.-flag vessels to deliver bulk food aid.

In May 2022, MARAD submitted a legislative proposal to Congress to address the 3-year waiting period challenge. This proposal was included in a bill to authorize MARAD programs for fiscal year 2023.⁵³ However, MARAD has not developed legislative proposals to clarify the challenges it has identified regarding the definitions of “vessel types” and “geographic areas,” largely because it has prioritized developing the current proposal to address the 3-year waiting period challenge.⁵⁴

Standards for Internal Control in the Federal Government calls for agencies to identify, analyze, and respond to risks to help achieve their defined objectives, and for agencies to externally communicate the necessary quality information to achieve their objectives.⁵⁵ Similarly, our prior work has demonstrated that effective risk management involves, among other things, comprehensively identifying risks, assessing the impact of risks, and determining the appropriate response.⁵⁶

⁵²In 2015, GAO made a matter for congressional consideration addressing the definition of geographic areas. Specifically, GAO stated that Congress should consider clarifying cargo preference legislation regarding the definition of “geographic area” to ensure that agencies can fully utilize the flexibility Congress granted to them when it lowered the cargo preference for food aid requirement. [GAO-15-666](#). To date, legislation to address this matter has not been enacted.

⁵³See Maritime Administration Authorization Act for Fiscal Year 2023, S. 4357, 117th Cong. § 103 (2022).

⁵⁴In addition, MARAD officials told us they also requested in the 2023 Presidential Budget Proposal that Congress fully fund the new Tanker Security Program to add 10 vessels to the U.S. fleet.

⁵⁵[GAO-14-704G](#).

⁵⁶[GAO-17-63](#).

MARAD has assessed some of the challenges it faces, but not taken steps to address them. In 2021, MARAD's Office of Cargo and Commercial Sealift completed an internal review that identified the specific steps MARAD, federal agencies, and the agencies' contractors are supposed to follow when the agencies procure shipping services. The officials said they used this informal internal review to better understand the tools currently available to promote compliance with cargo preference laws and included recommendations to address the challenges. For example, the review recommended that MARAD issue guidance to agencies to administer their programs in accordance with the cargo preference provisions of the 1954 Act as amended by the NDAA for 2009. The review also included a recommendation that MARAD regain control of authority from the Department of State and from USAID to make determinations of non-availability for those agencies' shipments. However, MARAD has not taken steps to pursue the recommendations of its internal review that would require regulatory action.

MARAD has identified its lack of regulations as a key impediment to providing direction to agencies and determining their compliance with cargo preference requirements. However, because MARAD has not taken steps to evaluate options to develop these regulations and achieve the sought-after consensus with federal agencies, it lacks a means to overcome this challenge. Without additional steps by MARAD to overcome its challenges, federal agencies will continue to lack clarity and consistent direction on how to implement cargo preference requirements. In addition, action by MARAD to develop a legislative proposal to address the statutory challenges it has identified would help Congress determine whether statutory changes are necessary to ensure compliance with U.S. cargo preference laws and regulations.

MARAD Has Identified Potential Instances of Noncompliance but Not Taken Cargo Preference Enforcement Actions

MARAD has taken steps to identify and address potential instances of noncompliance. For example, MARAD officials told us that they have worked with federal agencies and contractors to identify additional cargos to be shipped on U.S.-flag vessels to compensate for prior cargo volumes sent on foreign-flag vessels. MARAD has also recommended to some federal agencies that they take action to address contract violations and notified federal agencies and contractors about potential contract

violations.⁵⁷ In addition, MARAD is working to utilize an additional data source that could help it investigate potential instances of non-compliance.

- **Recommending other agencies take action to address contract violations.** MARAD officials told us they have occasionally recommended that certain federal agencies use their own authorities to seek contract remedies against contractors for violations of contractual cargo preference-related requirements. For example, MARAD officials told us about three cases in which they shared information related to a potential violation with DOD contracting officers, and in some cases, the agency has been able to recoup money from the contractor because the contractor had not met U.S.-flag contractual requirements. Officials from our selected agencies identified a few instances in which their agencies had taken actions against contractors between 2012 and 2021. More specifically, officials from DOD, the Department of State, and USDA told us their agencies had each taken one action.
- **Notifying federal agencies and contractors of potential cargo preference-related violations.** MARAD officials told us that they notify federal agencies and contractors about potential violations of cargo preference-related contractual requirements when they are made aware of them. For example, in 2021 MARAD sent a letter notifying an association of contractors that some of its members were potentially in violation of certain contractual cargo preference-related requirements for DOD shipments to Guam. The letter described what the contractors should do to comply, and warned the association that if repeated violations were alleged, DOD could consider taking action against the contractors. MARAD also posted an advisory on the applicability of cargo preference requirements to DOD contractors servicing Guam on the MARAD website and contacted the relevant DOD contracting office describing MARAD's concern. According to MARAD officials, this outreach resulted in an increase in the bills of lading reported to MARAD for related shipments in the region.
- **Working to utilize an additional data source to investigate potential non-compliance.** MARAD officials also told us that

⁵⁷In general, when contractors do not perform the work as specified in a contract, contracting officers have a variety of remedies available to protect the government's interest. Depending upon the circumstances, these actions could include not paying the contractor for the work it did not perform to terminating the contract for default. Additionally, agency suspension and debarment officials may consider suspending or debarring a contractor when in the public interest for specified causes.

additional data would facilitate the agency's use of its authorities provided under the NDAA for 2009 to require make-up cargoes and take other measures under the FAR or the contract. MARAD officials told us they are working to utilize an additional data source to supplement MARAD's current sources of cargo preference data. More specifically, MARAD entered into a memorandum of understanding with Customs and Border Protection in 2021 to allow MARAD to access Customs' import and export data. The officials told us that the Customs data cannot be used to comprehensively and readily identify potential violations of cargo preference requirements because the data do not currently indicate which shipments were made or financed by federal agencies. However, MARAD officials said these data will help them, in specific circumstances, investigate potential instances of non-compliance.

However, MARAD has not taken any enforcement actions in response to violations of cargo preference requirements. According to MARAD officials, their agency has not taken such actions, in part, because it has not issued regulations to carry out the enforcement authorities granted by the NDAA for 2009. As previously noted, the NDAA for 2009 amendments to the 1954 Act authorized MARAD to take certain enforcement actions, including: (1) assessing civil penalties "against any person" for violations of cargo preference requirements, (2) requiring "make up" cargoes if federal agencies fall short of the percentage of cargo required to be shipped on U.S.-flag vessels, and (3) taking other measures under the FAR.

According to MARAD officials, regulations are required for MARAD to impose civil penalties, and could facilitate MARAD's use of other enforcement actions. The officials said regulations would allow MARAD to address comprehensive due process considerations, such as establishing through the rulemaking process what constitutes a violation for which a civil penalty may be imposed. MARAD officials noted that for MARAD to assess civil penalties, MARAD would need to make defensible compliance determinations based on regulations. Specifically, DOT policy requires certain procedural requirements governing enforcement actions initiated by DOT, including civil penalties, to be set forth in procedural regulations to, among other things, satisfy the principles of due process.⁵⁸ For similar reasons, regulations would also facilitate any enforcement activities conducted using the other two enforcement authorities granted

⁵⁸Department of Transportation, *Procedural Requirements for DOT Enforcement Actions*, Memorandum for Secretarial Officers and Heads of Operating Administrations (Feb. 15, 2019).

to MARAD in the NDAA for 2009, according to MARAD officials. As a result, MARAD officials told us that the agency does not intend to use those authorities until it issues supporting regulations.

Without additional efforts by MARAD to develop regulations to assist with its oversight and to enforce compliance with cargo preference requirements, MARAD will continue to lack the tools necessary to meet its maritime goals and objectives. MARAD's maritime goals and objectives establish the importance of enforcing cargo preference requirements. More specifically, MARAD's 2020 *National Maritime Strategy* established the objective of improving the capability of U.S.-flag vessels through a combination of efforts including enforcement of cargo preference requirements.⁵⁹

MARAD officials told us that federal agencies and their contractors are able to ignore and circumvent the cargo preference laws partly because MARAD is unable to use the enforcement authorities granted in the NDAA for 2009. Taking steps to develop regulations to implement these authorities would help federal agencies better communicate the consequences of noncompliance with cargo preference requirements to their contractors, and help provide greater assurance that such requirements are upheld.

Conclusions

Federal laws have established cargo preference requirements to help ensure that the United States has a merchant marine capable of supplementing the cargo-carrying capacity of the U.S. military. In addition, the requirements are intended to help ensure the nation has sufficient vessels and trained mariners during times of war or national emergency, as well as providing transportation for maritime commerce. However, because MARAD has not reported the data it receives on federal agencies cargo shipments since 2013, Congress and the maritime industry lack insight into whether federal agencies are making progress toward meeting their cargo preference requirements. Public reporting would also provide an important accountability incentive for federal agencies to monitor their shipping activities and demonstrate that they are

⁵⁹The Howard Coble Coast Guard and Maritime Transportation Act of 2014 directed DOT in consultation with the Secretary of the department in which the U.S. Coast Guard is operating to submit to Congress a national maritime strategy that included, among other things, the identification of federal regulations and policies that reduce the competitiveness of U.S.-flag vessels in international transportation as well as recommendations to make U.S.-flag vessels more competitive and to ensure compliance by federal agencies with cargo preference laws. Pub. L. No. 113-281, § 603, 128 Stat. 3022, 3061 (2014).

meeting cargo preference requirements. Similarly, until MARAD takes steps to develop regulations to oversee and enforce compliance with cargo preference requirements, MARAD's ability to meet its objective of effectively overseeing cargo preference requirements will continued to be limited. The first step for MARAD to take is to evaluate the regulatory development options available to MARAD to address disagreements with and amongst agencies over how to implement cargo preference requirements; such disagreements have hindered MARAD's prior efforts to develop regulations. In addition, developing and communicating a legislative proposal could help Congress assess whether any statutory changes are needed to better position MARAD to oversee and enforce cargo preference requirements.

Recommendations

We are making the following two recommendations to MARAD:

The Administrator of MARAD should publicly report, on an annual basis, the cargo preference data it receives to provide information on the total cargo volumes and amounts shipped on U.S.- and foreign-flag vessels for each federal agency. (Recommendation 1)

The Administrator of MARAD should take steps to develop regulations to oversee and enforce compliance with cargo preference requirements. These steps should include evaluating options for overcoming challenges to developing such regulations, such as: (1) using a negotiated rulemaking as a means to address challenges achieving consensus on how to implement cargo preference requirements, and (2) developing and communicating a legislative proposal to address statutory challenges MARAD has identified. (Recommendation 2)

Agency Comments and Our Response

We provided a draft of this report to DOT, DOD, Export-Import Bank, Department of State, Department of Energy, USDA, and USAID for review and comment.

In written comments provided by DOT (reproduced in app. I), DOT generally agreed with our findings and concurred with our recommendations. In these written comments, MARAD noted that it recognizes the critical importance of federal laws requiring that government-impelled cargoes be carried on U.S.-flagged vessels to support and sustain an economically viable and militarily useful U.S.-flagged fleet in international trade. MARAD also clarified its position on whether it intends to restart the rulemaking process. According to MARAD, it has not abandoned the rulemaking process and it has started evaluating options to advance a rulemaking related to cargo preference.

MARAD stated that it intends to discuss the ideas that result from that effort with other federal agencies and the Office of Information and Regulatory Affairs, the office within OMB that reviews Executive Branch regulations. According to MARAD, it will use those discussions to determine whether a negotiated rulemaking process might lead to a consensus regulation. We are encouraged by MARAD's response and will monitor the agency's progress implementing our recommendations.

In written comments provided by USAID (reproduced in app. II), USAID stated that, as described in this report, USAID calculates its compliance with cargo preference requirements by subtracting determination of non-availability cargoes and cargoes for which notwithstanding authority has been relied upon from the total metric tonnage shipped on U.S.-flag vessels. USAID also noted that it is often called upon to respond in extraordinary circumstances and to crises around the world by delivering emergency food assistance, and that it relies upon statutory notwithstanding authorities to override the application of certain federal law requirements to ensure that life-saving emergency assistance reaches the greatest number of vulnerable people in a timely manner.

In regard to the Cargo Preference Act, USAID stated that it relies upon notwithstanding authority in extremely limited cases to maximize both the amount of assistance and the efficiency with which that assistance is provided through its humanitarian relief operations. USAID asserts that MARAD has no statutory or regulatory authority to require that cargoes shipped pursuant to a notwithstanding authority be counted for purposes of compliance with cargo preference requirements. In response to USAID's statement that the Cargo Preference Act and the underlying regulations do not apply when USAID relies on notwithstanding authority to ship cargo, we provided additional context on USAID's reliance on its notwithstanding authority in our final report.

USAID also provided comments on our recommendation to DOT that the Administrator of MARAD should publicly report, on an annual basis, the cargo preference data it receives to provide information on the total cargo volumes and amounts shipped on U.S.- and foreign-flag vessels for each federal agency. USAID stated that such reporting should also include contextual information about the trade-offs made regarding the policy purposes of those agencies' statutory authorities. We note that our recommendation does not call for—but also does not preclude—such additional contextual information.

DOT, USAID, and the Department of State each provided technical comments on our report, which we incorporated as appropriate. DOD, USDA, the Department of Energy, and the Export-Import Bank did not have any comments on our report.

We are sending copies of this report to the appropriate congressional committees, the Secretary of Transportation, the Secretary of Defense, the Secretary of Agriculture, the Secretary of Energy, the Secretary of State, the Administrator of the U.S. Agency for International Development, the President and Chair of the Export-Import Bank of the United States, and other interested parties. In addition, the report is available at no charge on the GAO website at <https://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-2834 or vonaha@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix III.



Andrew Von Ah
Director, Physical Infrastructure Issues

Appendix I: Comments from the Department of Transportation



U.S. Department of
Transportation

Office of the Secretary
of Transportation

Assistant Secretary
for Administration

1200 New Jersey Avenue, S.E.
Washington, DC 20590

August 29, 2022

Andrew Von Ah
Director, Physical Infrastructure
Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Von Ah:

The Maritime Administration (MARAD) exists to promote the U.S. merchant marine, which is vital to our national security. The Agency recognizes the critical importance of Federal laws requiring that government-impelled cargoes be carried on U.S.-flagged vessels to support and sustain an economically viable and militarily useful U.S.-flagged fleet in international trade. For this reason, MARAD aggressively seeks Federal compliance with cargo preference statutes and regulations.

It is crucial that this report fully reflect MARAD's current actions in support of full implementation of cargo preference requirements so that it may accurately inform future efforts to improve compliance by Federal agencies. Pursuant to its statutory mission, MARAD is in continuous, direct engagement with acquisition officials and contractors throughout the Federal sector to guide and compel compliance with cargo preference mandates. While MARAD has yet to impose financial penalties (noting that such penalties can only be imposed for failures that are willful and knowing), MARAD is effective in working with agencies and their contractors throughout project lifecycles so that their supply chains can maximize the utilization of available U.S.-flag vessel services, and to facilitate make-up cargoes as necessary. This direct engagement helps to eliminate any confusion that may arise as to the practical application of the cargo preference requirements and assists the Federal sector in identifying available vessels. In addition, and as a matter of practice, MARAD has worked consistent with the authority under 46 U.S.C. § 55305(d)(2)(B) to ensure that agencies make up for cargoes improperly transported by foreign vessels by employing U.S.-flag vessels for an equal or greater volume. Over the last decade, MARAD facilitated make up cargoes related to more than 50 Federal projects. Additionally, there are over 40 current projects through which MARAD is actively pursuing make up cargoes to replicate volumes transported on foreign vessels. Requiring make-up cargoes is a remedy expressly provided under the National Defense Authorization Act of 2009 (2009 NDAA) amendment to the cargo preference requirements in 46 U.S.C. § 55305 and produces opportunities for the U.S.-flagged fleet to carry cargoes.

In addition, the statement that MARAD does not intend to restart the process to revise the cargo preference regulations is not correct. In 2017, MARAD formally withdrew a rulemaking effort from the Regulatory Agenda; however, MARAD has not abandoned a cargo preference rulemaking.

**Appendix I: Comments from the Department of
Transportation**

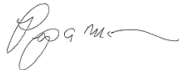
Early in the current Administration, MARAD started evaluating options to advance a rulemaking. We have every intention of discussing the ideas that result from that effort with other Federal agencies and OIRA. MARAD will also use those discussions to determine whether a negotiated rulemaking process might lead to a consensus regulation.

This Administration has proposed a measure to help address the lack of available U.S.-flag vessels to meet the Government's logistical needs, which is a key concern in enabling agency compliance with cargo preference requirements. Specifically, as part of its annual legislative proposal for MARAD, the Administration proposed that Congress make it easier for our U.S.-flagged merchant fleet to grow to meet available cargo opportunities by eliminating the statutory 3-year period that vessels entering the U.S. flag must wait before they are eligible to carry preference cargoes. Moreover, in the 2023 Presidential Budget Proposal, the Administration requested that Congress fully fund the new Tanker Security Program at \$60 million, which would add 10 vessels to the U.S.-flagged fleet.

Upon review of the draft report, MARAD concurs with GAO's recommendations for MARAD to: (1) publicly report on an annual basis the cargo preference data it receives and (2) take steps to develop regulations to oversee and enforce cargo preference requirements.

We will provide a more detailed response to report recommendations within 180 days of the final report's issuance. Please contact Gary Middleton, Director of Audit Relations and Program Improvement, at (202) 366-6512 with any questions or if you would like to obtain additional details.

Sincerely,



Philip A. McNamara
Assistant Secretary for Administration

Appendix II: Comments from the U.S. Agency for International Development



Thomas Melito
Managing Director
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20226

Re: Action Needed to Enhance Cargo Preference Oversight (GAO-22-105160)

Dear Mr. Melito:

I am pleased to provide the formal response of the U.S. Agency for International Development (USAID) to the draft report produced by the U.S. Government Accountability Office (GAO) titled, *Action Needed to Enhance Cargo Preference Oversight* (GAO-22-105160).

USAID strictly adheres to Cargo Preference Act requirements by ensuring that at least 50 percent of all tonnage by vessel type is shipped on U.S. flag vessels each fiscal year (FY). In FY 2021, USAID shipped 1.7 million metric tons of food assistance overseas, more than 75 percent of which were shipped on bulk carriers. However, USAID does not always receive offers from U.S. flag carriers, in large part due to a lack of available ships that can meet the requirements of USAID's solicitations. In these cases, USAID will issue determinations of non-availability and notify the United States Maritime Administration (MARAD) accordingly. USAID relies on statutory notwithstanding authority to override the application of federal law requirements in extremely limited cases to ensure that life-saving emergency assistance reaches the greatest number of people in need in a timely fashion.

I am transmitting this letter and the enclosed comments from USAID for inclusion in the GAO's final report. Thank you for the opportunity to respond to the draft report, and for the courtesies extended by your staff while conducting this engagement. We appreciate the opportunity to participate in the complete and thorough evaluation of Cargo Preference Act compliance.

Sincerely,

Colleen R. Allen

Colleen Allen
Assistant Administrator
Bureau for Management

Enclosure: a/s

**COMMENTS BY THE U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT ON
THE DRAFT REPORT PRODUCED BY THE U.S. GOVERNMENT
ACCOUNTABILITY OFFICE (GAO) TITLED, *Action Needed to Enhance Cargo Preference
Oversight (GAO-22-105160)***

The U.S. Agency for International Development (USAID) would like to thank the U.S. Government Accountability Office (GAO) for the opportunity to respond to this draft report. USAID is committed to complying with the requirements of the Cargo Preference Act (CPA). USAID calculates compliance with the CPA by determining the percentage of the total metric tonnage shipped on U.S.-flag vessels after subtracting cargoes subject to a Determination of Non-Availability (DNA) and cargoes for which notwithstanding authority has been relied upon.

When USAID does not receive a U.S.-flag bid which meets the tender on any given solicitation, the Agency selects the lowest cost foreign flag vessel and advises MARAD in writing of the results of the procurement, via a DNA. The cargoes subject to DNAs are not counted when calculating USAID's compliance with the CPA because no U.S.-flag offers were received for these cargoes, and, therefore, USAID did not have the option to select a U.S.-flag vessel for these cargoes, per the terms of the statute.

Recognizing that USAID is often called upon to respond in extraordinary circumstances and to crises around the world, Congress authorized the USAID Administrator to provide agricultural commodities to meet emergency food needs notwithstanding any other law as part of the Food for Peace Act (7 U.S.C. 1722(a)). Congress also separately has authorized the President, through the International Disaster Assistance (IDA) authority in the Foreign Assistance Act of 1961 (FAA), as amended: 1) to furnish assistance to any foreign country, international organization, or private voluntary organization, on such terms and conditions as the President may determine, for international disaster relief and rehabilitation, including assistance relating to disaster preparedness, and to the prediction of, and contingency planning for, natural disasters abroad, notwithstanding the FAA or any other Act, and; 2) to make available emergency food assistance, including in the form of funds, transfers, vouchers, and agricultural commodities (including products derived from agricultural commodities) acquired through local or regional procurement, to meet emergency food needs arising from manmade and natural disasters, notwithstanding the FAA or any other Act (22 U.S.C. 2292(b) & (c)). The latter authority, enacted as part of the Global Food Security Act in 2016, also made it the policy of the United States that funds made available by Congress to carry out the IDA authority "are intended to provide the President with the greatest possible flexibility to address disaster-related needs as they arise and to prepare for and reduce the impact of natural and man-made disasters." (See 22 U.S.C. 2292a(d)(1)).

Accordingly, USAID relies on these statutory notwithstanding authorities to override the application of certain federal law requirements to ensure that life-saving emergency assistance reaches the greatest number of vulnerable people in need in a timely manner. In the case of the Cargo Preference Act, USAID relies upon notwithstanding authority in extremely limited cases to maximize both the amount of assistance and the efficiency with which that assistance is provided through its humanitarian relief operations. In contexts like Yemen and Somalia, where food is scarce due to conflict and drought, beneficiaries often rely on the rations provided by

**Appendix II: Comments from the U.S. Agency
for International Development**

USAID and its partners to feed their families, and the delivery of food in a timely, safe, and cost-efficient way is critical to saving as many lives as possible. In those extremely limited cases where USAID does rely on notwithstanding authority to ship humanitarian cargo, the Cargo Preference Act and the underlying regulations intended to implement that statute do not apply as a legal or practical matter, and the cargo in question is not included for purposes of calculating compliance with Cargo Preference Act requirements. USAID asserts that MARAD has no statutory or regulatory authority to require that cargoes shipped pursuant to a notwithstanding authority be counted for purposes of CPA compliance, and the suggestion in this report that MARAD can do so would be contrary to Congressional intent in providing these notwithstanding authorities in the first place. USAID therefore respectfully requests that GAO provide a clear explanation in the final report of the effect of notwithstanding authority on the application of other federal law requirements, such as the Cargo Preference Act, and remove any suggestion in the report that MARAD has the regulatory authority to apply the CPA to cargoes that ship subject to notwithstanding authority.

On the management recommendation to publicly report compliance levels: If the intent is to report Executive branch compliance levels toward a particular policy purpose of the Cargo Preference Act, the information reported for individual agencies should also include contextual information about the trade-offs made regarding the policy purposes of those agencies' statutory authorities should also be included. For USAID's activities, for example, our humanitarian assistance authorities serve a foreign policy purpose; delays or reductions in quantity of actual food aid provided and numbers of people in need reached due to increased costs from Cargo Preference Act compliance are also relevant information for the public's understanding.

Appendix III: GAO Contact and Staff Acknowledgments

GAO Contact

Andrew Von Ah at (202) 512-2834 or VonAhA@gao.gov.

Staff Acknowledgements

In addition to the individual named above, Matt Barranca (Assistant Director); Maria Wallace (Analyst-in-Charge); Amy Abramowitz; Melissa Bodeau, Ming Chen; Melanie Maralit Diemel; Noah Gerber; David Goldstein; Geoffrey Hamilton; Minette Richardson; Kelly Rubin; Deirdre Sutula; Janet Temko-Blinder; and Judith Williams made key contributions to this report.

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