

## Re: Department of Transportation

### Maritime Administration

#### Docket No. MARAD-2022-0057

Response to request for public comments on MARAD “website agency guidance” entitled *Every Mariner Builds a Respectful Culture* [EMBARC],” 87 Fed. Reg. 18461 (March 30, 2022)

Comments submitted by The US Merchant Marine Academy Alumni Association and Foundation (“AAF”)

AAF is a non-profit organization primarily dedicated to supporting and advancing the mission of the US Merchant Marine Academy (“USMMA”) and supporting its students and alumni in their role as a key element in safeguarding national security. All USMMA graduates have an eight-year military service obligation and make up over 80% of the US Navy Strategic Sealift Officer force, which supplies the merchant marine officers required for military sealift operations. Training for this duty requires experience on the commercial vessels which this nation uses in wartime to transport soldiers, weaponry, materiel, and other necessary supplies.

The Public Notice calls for comments generally and specifically seeks comments on several areas that AAF will address in this submission, particularly: the optional nature of the program, as written, unlawfully allows vessels to avoid their statutorily mandated training obligations; the limited application of EMBARC to only certain vessels is arbitrary and illegal; and the limited application of EMBARC only to midshipmen at USMMA but not to students at state maritime academies (SMAs) is also arbitrary and illegal. AAF submits these comments because it believes the EMBARC policy fails to fulfill the obligations the Maritime Administration (“MARAD”) has to all maritime cadets under its authority, resulting in: i) serious hindrances to this country’s national security; and ii) a failure to accomplish the very purpose of EMBARC as stated by MARAD itself: “EMBARC will help strengthen the maritime industry’s efforts to prevent and respond to incidents of SASH and other forms of misconduct and **help ensure a safer training environment for all cadets** [emphasis added].”<sup>1</sup>

As a preliminary matter, the EMBARC “Guidance” is referred to herein as the “Policy.” Please note however that this “Policy” was adopted informally without taking careful steps to ensure support from vessel operators and educational institutions alike.

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<sup>1</sup> Notice and Request for Comments, published by MARAD in the Federal Register on March 30, 2022.

## **The Policy Illegally Exempts Vessels From Providing Training They are Required by Statute to Provide.**

Despite MARAD presenting its policy as mandatory,<sup>2</sup> it and MARAD's website are unclear at best, if not deliberately vague, concerning a vessel's obligation to enroll in EMBARC. However, as written, EMBARC makes it very clear that a vessel may not accept a USMMA cadet for a training berth until the vessel has first enrolled in EMBARC. Nevertheless, there is no deadline for *any* vessel operator to enroll, and therefore no compulsion to enroll at all. It appears to be in practice an entirely voluntary program, save for the fact that a vessel operator may not take USMMA midshipmen aboard a vessel as cadets unless that vessel meets EMBARC standards. This inconsistent approach is confounding in light of the statutory obligation of certain vessels to provide training berths for USMMA midshipmen and for MARAD to assure the safety of those cadets during such training.

By statute [ 46 USC § 51307(b) and (c)], certain vessels are required to provide training berths for two (2) USMMA cadets "on each voyage." This applies to all vessels participating in the Maritime Security Program (MSP) and the Military Sealift Command (MSC), as well as the newly authorized Cable Security Fleet and Tanker Security Fleet.

However, the MARAD EMBARC standards state that they only apply to vessels to which SOLAS (International Convention for the Safety of Life at Sea 1974) "**applies**" or, put another way, only vessels that are "**subject to SOLAS**" may apply to EMBARC and hence take USMMA midshipmen aboard for training.<sup>3</sup>

Most, if not all, of the roughly 200 U.S.-flag commercial vessels (active vessels of 10,000+ gross tons only) are SOLAS certified (i.e., they hold all of the certifications necessary to meet the requirements of SOLAS); however, by its terms SOLAS does not *apply* unless the vessel is engaged in international travel, nor are certain MSC vessels subject to SOLAS regardless of their destinations.<sup>4</sup> Since some of the vessels mandated by statute to provide training berths to USMMA cadets (e.g., MSC ships) are not subject to SOLAS, they are prevented from enrolling in

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<sup>2</sup> "Accession into EMBARC must be completed as a prerequisite before U.S.-flag vessel commercial operators will be authorized to employ USMMA students as cadets aboard their vessels." Pg. 1, first paragraph, EMBARC Standards, promulgated on December 15, 2021

<sup>3</sup> While the EMBARC standards, published on December 15, 2021, state that EMBARC standards "apply to vessels to which SOLAS (International Convention for the Safety of Life at Sea 1974 applies." MARAD's 3/30/22 Federal Register post states that "EMBARC standards apply to owners and operators of vessels subject to the International Convention for Safety of Life at Sea 1974 (SOLAS)", The AAF views these two descriptions of the breadth of the standards' applicability as synonymous and uses them interchangeably throughout these comments.

<sup>4</sup> According to established case law, government-owned/commercially-operated vessels (GO-COs) and certain commercially-owned/commercially operated vessels (CO-COs) – specifically those carrying government cargos – are deemed to be "government-owned" and thus not "subject to" SOLAS, though many of these vessels nevertheless hold all of the certificates that would allow them to sail "subject to SOLAS".

EMBARC. In effect, these vessels are excused from their statutory obligation: they cannot train USMMA cadets without enrolling in EMBARC, but they **cannot** enroll in EMBARC.

MARAD does not have the authority to excuse the training obligation imposed by statute. All vessels covered by 46 USC § 51307(b) and (c) should not only be permitted to enroll in EMBARC, they must also be required to enroll in EMBARC **now** as a step necessary to complying with their statutory obligation to train USMMA midshipmen.

### **The Policy Arbitrarily Excludes from EMBARC Vessels Previously Used To Train USMMA Midshipmen**

Approximately 100 “Jones Act” vessels that traditionally, albeit voluntarily, took USMMA midshipmen aboard for training are no longer permitted to do so since they are not subject to SOLAS. In other words, because they sail between U.S. ports only – and are not making international voyages – the International Convention for the Safety of Life at Sea 1974 (SOLAS) does not apply. However, as noted above, most, if not all, are SOLAS certified. If a shipping company decided to divert a Jones Act vessel to undertake an international voyage, that vessel would immediately be subject to SOLAS, which would pose no obstacle as it would already possess a SOLAS certification. MARAD is irrationally barring vessels that have carried USMMA midshipmen for decades (and which are currently taking SMA students aboard) from eligibility to resume training USMMA midshipmen, based not on safety measures, but on voyage destinations.

The result of the current state of affairs is that a vague “policy” which has never undergone formal rule-making and which AAF, labor, and industry leaders alike have criticized, is now being promulgated as a requirement prior to enrolling USMMA cadets. Yet, because MarAd has no accompanying requirement that the vessels do so, the number of vessels available to train USMMA cadets is severely restricted and will remain so for the foreseeable future.

### **The Policy Illegally Allows Even Those Vessel Operators Mandated by the Policy to Enroll to Evade Their Statutory Training Obligations Indefinitely.**

Even those vessels not exempted from EMBARC (i.e., those to which SOLAS applies) are under no requirement to enroll immediately. While the Policy has the appearance of including a compliance timetable (Section V and VI), it is illusory—those deadlines are only triggered once the vessel enrolls in EMBARC, and the Policy sets no deadline for enrolling. Since the Policy bars them from training USMMA cadets until they enroll, they are thereby excused by MARAD from their statutory training duty until they choose to enroll. Vessels obligated to provide training berths to USMMA cadets should be required to enroll immediately. The statutory training obligation applies to “each voyage,” and each voyage a vessel makes without making berths available to two (2) USMMA cadets is a violation. Though the Secretary of

Transportation can decide whether to place a midshipman aboard a vessel, MARAD does not have the authority to arbitrarily exempt scores of vessels covered by the statute from their training obligations.

### **USMMA Cadets Are In Fact Being Deprived of Mission-Critical Training.**

The types of vessel and training opportunities available to USMMA midshipmen is critical to assure they will be ready to immediately assume their duties in the US Navy Strategic Sealift Officer force, and those are the very vessels and opportunities from which they are being excluded. Only 74 of the approximately 203 US flag vessels over 10,000 gross tons formerly available to USMMA cadets for training are even eligible to enroll in EMBARC (see discussion above), and none of those are under any deadline to enroll. Approximately a dozen vessels (24 training berths) are now enrolled in EMBARC, a serious shortfall for the 250 USMMA midshipmen who need training year-round aboard commercial vessels in order to graduate, become licensed and be adequately prepared to serve as SSOs. Ironically, because EMBARC is not required for a vessel accepting an SMA student, a number of SMA students are being allowed to accept training berths on 100+ U.S.-flag, SOLAS-certified vessels that MARAD has irrationally banned from applying to EMBARC. There are no comparable substitutes for the training experience that USMMA midshipmen are missing by being denied training berths on these vessels.

### **If Immediate EMBARC Compliance Is Not Possible, a Mandatory, Interim Plan Applicable to USMMA Cadets and SMA Students Should be Implemented.**

As pointed out above, roughly 200 commercial vessels over 10,000 GT were previously available to USMMA midshipmen for mission-critical training. More than half of these are no longer deemed eligible even to apply to take USMMA midshipmen aboard for training, including some that are obligated by law to provide USMMA cadets training berths. The Policy is also failing to protect all maritime cadets, to whom MARAD has an obligation. The fact that MARAD acknowledges industry resistance to EMBARC, and the resulting dearth of training berths for USMMA cadets, bears this out. If immediate compliance with EMBARC by all U.S.-Flag, SOLAS-certified vessels is unachievable, MARAD should recognize this and adopt an interim, achievable pathway that leads to a fully compliant program, which immediately applies to and protects equally all maritime students attending federally supported maritime programs.

### **Exclusion of SMA Students From EMBARC Protection Is Illegal and Dangerous.**

MARAD provides significant funding for maritime training through six state colleges and universities operating state maritime academies (SMAs). 46 CFR § 310.3. While the Policy bars

USMMA students from non-EMBARC-enrolled vessels, it does not apply to SMA students, so vessels arbitrarily ineligible to enroll in EMBARC may accept – and are accepting – SMA students as, conceivably, could EMBARC-eligible vessels that have chosen not to enroll. By applying EMBARC only to USMMA students and excluding SMA students, MARAD is failing in its obligations to both sets of students – denying USMMA midshipmen mandated training on the one hand and SMA students safety protections that MARAD has deemed essential on the other – and MARAD is simply wrong when it denies those responsibilities

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex by any institution of education that receives federal financial assistance. It applies to any federal agency, including MARAD, that provides funds to such educational programs, including the SMAs. Title IX requires MARAD, as the federal agency that distributes such funds to an educational program, to ensure that the program does not discriminate on the basis of sex, “by issuing rules, regulations or orders... consistent with the [objectives of §1681].” 20 USC § 1682. Each of the SMAs are, by name, identified as recipients from MARAD of federal aid. 46 CFR § 310.3. This gives MARAD both the authority and **the obligation** to impose requirements to protect SMA students from sexual assault, sexual harassment, and other forms of sex-based discrimination while they are aboard commercial vessels. The fact that the state systems operating the SMAs also have responsibilities to their students does not absolve MARAD from its statutory obligations.

Title IX does not apply to USMMA [20 USC § 1681(a)(4)], but, in the Merchant Marine Academy Improvement Act of 2017, Congress explicitly directed MARAD to adopt protections for USMMA midshipmen that incorporate the definitions in the Violence Against Women Act (34 USC § 12291) and require the MARAD policy to mirror the requirements of the Higher Education Act of 1965 (20 U.S.C. 1092(f)(8). 46 USC § 51318. The Higher Education Act applies to all institutions of higher education receiving federal financial assistance, including USMMA and the SMAs.

MARAD thus has both the authority and the responsibility to ensure protections for both USMMA students and SMA students. By adopting a policy that protects one but not the other, it is shirking its statutory obligations.

### **Conclusion.**

In its current form, EMBARC provides protection primarily to those who won't need it—USMMA students who, being largely excluded from training berths (because vessels are not enrolling in EMBARC), won't be aboard. SMA students are and will continue to be aboard ships in their place without EMBARC protection. The Policy is tantamount to mandating armor for those effectively barred from deployment and refusing to provide armor to those who are deployed in their place. Touting the quality of the armor misses the point.