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MEMORANDUM FOR:

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From: Christopher H. Schroeder
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Re: Jurisdiction Regarding Capital Construction Fund Program

This memorandum responds to your request for our opinion resolving a jurisdictional dispute between the Departments of Transportation and Commerce, on the one hand, and the Department of the Treasury, on the other hand, concerning the administration of the Capital Construction Fund program established under the Merchant Marine Act.[1]

I.

Under the CCF program, DOT and Commerce enter into agreements with companies to establish tax-favored funds in order to encourage the construction of U.S.-flag vessels. The favorable tax treatment for the funds may be described generally as the deferral of taxes

[1] The authority to administer the Capital Construction Fund ("CCF") program with respect to fishing vessels is vested in the Department of Commerce ("Commerce"), acting through the National Oceanic and Atmospheric Administration ("NOAA"), and with respect to all other vessels, it is vested in the Department of Transportation ("DOT"), acting through the Maritime Administration ("MARAD"). In this opinion, we will generally refer only to the Commerce and DOT and not their subordinate Administrations. Similarly, the component of the Department of the Treasury ("Treasury") that is directly involved is the Internal Revenue Service, but we will refer to Treasury and not its component agency.

indefinitely for income that is deposited into the funds and earnings generated by the funds, as well as the continuation of the tax deferral for certain withdrawals from the funds.

DOT and Commerce are engaged in jurisdictional disputes with Treasury over both rulemaking and administrative authority with respect to the CCF program. Treasury claims it has the rulemaking authority, either exclusively or shared with DOT and Commerce, to issue policy regulations for the CCF program that Treasury had previously agreed with DOT and Commerce would be issued unilaterally by DOT and Commerce. In addition, Treasury claims it has the administrative authority to reject determinations made by DOT and Commerce to enter into CCF agreements or to approve or disapprove deposits into or withdrawals from CCF funds. The agencies have also disagreed about the proper allocation of agency responsibility with respect to various other administrative authority issues.

The agencies have submitted to this Office extensive briefs concerning their jurisdictional disputes,[2] and representatives of this Office and the agencies have met to discuss the various issues raised in the briefs. Although there are a myriad of issues regarding the allocation of agency responsibilities with respect to the CCF program, the request for our opinion was prompted by two specific disputes. One dispute concerns Treasury's assertion of authority to disallow a tax deferral under a CCF agreement with DOT on the grounds that the company claiming the deferral was ineligible to enter into the agreement. The other dispute concerns Treasury's assertion that Commerce lacks authority to issue a regulation allowing parties to CCF agreements to make qualified (i.e., nontaxable) withdrawals from CCF funds for purposes of making safety improvements to their vessels.

This opinion resolves these two specific disputes, in both cases ruling in favor of the position of DOT and Commerce. Given the technical nature of many of the remaining questions raised by the agencies and the likelihood that our resolution of them could have significant, unanticipated consequences for administration of the CCF program or the Internal Revenue Code, we do not believe it would be prudent at this point to go further and issue an opinion comprehensively defining all of the responsibilities of the agencies relating to the program. Instead, we anticipate that our decisions on the two specific disputes, together with the discussion contained in our opinion, may provide sufficient guidance to allow the agencies to agree among themselves as to how these responsibilities should be allocated. We are prepared to work informally with the agencies in this regard if they so desire, and will also remain available to issue a supplemental opinion should that become necessary.

[2] See Joint Brief of the Department of Transportation and Department of Commerce (June 30, 1995); Brief of the Department of the Treasury and the Internal Revenue Service (Aug. 21, 1995); Joint Reply Brief of the Department of Transportation and Department of Commerce (Oct. 20, 1995); Reply Memorandum of the Department of the Treasury and the Internal Revenue Service (Nov. 13, 1995).

In light of the length of this opinion, it may be useful for us to provide an outline of the discussion that follows. Section II of the opinion reviews the Merchant Marine Act's text and history relating to the CCF program and concludes that when given the authority in 1970 to administer the CCF program, DOT and Commerce received broad administrative and rulemaking authority. This authority includes the authority to make certain decisions that have beneficial tax consequences, so long as the companies receiving CCF agreements comply with applicable requirements. Section III rejects Treasury's argument that the Tax Reform Act of 1986 altered the authority of DOT and Commerce in this regard. Based on the conclusions and analysis in Sections II and III, Section IV addresses the two specific disputes presented to us, concluding (A) that Commerce has the authority to issue regulations providing that a nontaxable withdrawal may be made from a CCF fund to make safety improvements and (B) that Treasury does not have the authority to disallow a tax deferral on the grounds that DOT incorrectly determined that a company was eligible to enter into a CCF agreement.

II.

In 1936, Congress enacted the Merchant Marine Act, 1936 ("Merchant Marine Act"), Pub. L. No. 74-835, 49 Stat. 1985 (1936) (codified as amended at 46 U.S.C. app. §§ 1101-1294), "declar[ing] [it] to be the policy of the United States to foster the development and encourage the maintenance of [the] merchant marine." Id. § 1101. The Act was amended in 1970 by the Merchant Marine Act of 1970 ("1970 Act"), Pub. L. No. 91-469, sec. 21, 84 Stat. 1018, 1026-32 (codified at 46 U.S.C. app. § 1177). The overall purpose of the 1970 Act was "to revitalize our merchant marine," S. Rep. No. 1080, 91st Cong., 2d Sess. 9 (1970), reprinted in 1970 U.S.C.C.A.N. 4188, 4188. Congress had determined that "[c]learly, the time has come for a major initiative in revitalizing our merchant fleet. Concern about the future of our security and commerce require no less." Id. at 17, reprinted in 1970 U.S.C.C.A.N. at 4191.

The CCF program was established by section 21 of the 1970 Act. 84 Stat. at 1026-32. The Senate report accompanying the 1970 Act indicated that "these [CCF] provisions will do more than anything else in the bill to help the ship operating, and therefore the shipbuilding industry to build ships in United States yards which are so urgently needed to modernize our United States merchant marine." S. Rep. No. 1080 at 43, reprinted in 1970 U.S.C.C.A.N. at 4216-17. The report made it clear that section 21 was intended to establish a tax subsidy for the shipbuilding industry:

> **Tax Deferred Reserve Fund.** – Section 21 would entitle certain shipping companies to defer payment of income taxes upon agreement to deposit this income into a fund to replace or add new ships for use in the U.S.-flag merchant marine. Subsidized liner operators have had this privilege under the Merchant Marine Act since 1936. The privilege is being extended to presently unsubsidized American-flag operators.

> This authority will do more than any other provision of this bill to build ships in United States shipyards to be operated under the American flag.

Id. at 39, reprinted in 1970 U.S.C.C.A.N. at 4212-13 (emphasis added).

Plainly, then, the 1970 Act was designed to provide a tax subsidy for the shipbuilding industry through the CCF program. None of the parties dispute this. Moreover, a review of the text of the statute, as well as its legislative history and the subsequent implementation of the statute, also confirms that the 1970 Act vested in the Commerce and Transportation Departments[3] the authority to take administrative and rulemaking actions that would have the effect of granting the statutory tax subsidy to particular companies as long as the companies complied with applicable requirements.

Under the CCF provisions of the Merchant Marine Act, companies become entitled to the tax subsidy upon their agreement to deposit income into a capital construction fund for eligible vessels, subject to compliance with the agreement and regulations governing such agreements. Under section 607(a), "[a]ny citizen of the United States owning or leasing one or more eligible vessels . . . may enter into an agreement with the Secretary [of Commerce or Transportation] . . . to establish a capital construction fund . . . with respect to any or all of such vessels. Any [such] agreement . . . shall provide for the deposit in the fund of the amounts agreed upon as necessary or appropriate to provide for qualified withdrawals under [section 607(f)]." 46 U.S.C. app. § 1177(a). The tax subsidy itself is provided for in section 607(d) (providing for deferral of income taxes for deposits into CCF funds) and section 607(g) (tax deferral continues for qualified withdrawals). See id. §§ 1177(d), (g). Section 607(f) provides that "qualified withdrawals" must be for the purpose of the acquisition, construction, or reconstruction of qualified vessels (or associated barges and containers) or the payment of indebtedness related thereto. Finally, section 607(a) also provides that "[t]he deposits in the fund, and all withdrawals from the fund, whether qualified or nonqualified, shall be subject to such conditions and requirements as the Secretary [of Commerce or Transportation] may by regulations prescribe or are set forth in such agreement." Id.

Thus, the Secretaries of Commerce and Transportation are authorized to enter into agreements that, by operation of the statute, entitle the contracting companies to a tax subsidy that encourages the acquisition, construction, or reconstruction of qualified vessels; and the Secretaries are also authorized to regulate the content of those agreements by

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[3] In 1970, both NOAA and MARAD were components of the Commerce Department. Accordingly, the 1970 Act and its legislative history refer only to Commerce, and not to DOT. MARAD was moved to DOT by the Maritime Act of 1981, Pub. L. No. 97-31, 95 Stat. 151 (codified at 46 U.S.C. §§1601-1610 (1981)). In this opinion, we shall deem any references to Commerce in the 1970 Act or its legislative history to include DOT.

insisting on particular agreement terms or by issuing regulations governing the agreements. In addition, the Secretaries have the authority to withdraw the tax subsidy for noncompliance with the CCF agreement: "[I]f the Secretary determines that any substantial obligation under any agreement is not being fulfilled, he may, after notice and opportunity for hearing to the person maintaining the fund, treat the entire fund or any portion thereof as an amount withdrawn from the fund in a nonqualified withdrawal." Section 607(f)(2), 46 U.S.C. app. § 1177(f)(2).[4]

The legislative history of the 1970 Act confirms that the Secretaries of Commerce and Transportation were given the authority to grant or withdraw the tax subsidy authorized by the statute. The discussion in the Senate report of the provisions governing the establishment of CCF agreements and the process for making deposits and qualified withdrawals tracks the statutory language referring to the authority of those Secretaries. See S. Rep. No. 1080 at 43-54, reprinted in 1970 U.S.C.C.A.N. at 4217-28.[5] More generally, in contrasting the administrative authority the Treasury Department had prior to the 1970 Act with the "more specific statutory framework" of the amended Merchant Marine Act, which makes specific grants of authority to the Secretaries of Commerce and Transportation to administer the CCF program, the Senate report implicitly confirms the primary authority of those Secretaries with respect to the granting of the tax subsidy:

> Since under present law only 13 shipping companies use the tax deferred reserve funds, the Treasury Department was able to administer the funds through closing agreements signed with each company. [The 1970 Act's] expansion of the availability of the tax deferral privilege, however, makes it impractical for the Treasury Department to continue the practice of signing closing agreements with each company. For this reason the bill provides a more specific statutory framework for determining the tax status of deposits into and withdrawals from the fund.

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[4] Nonqualified withdrawals are taxable in the year of the withdrawal at the highest marginal rate. 46 U.S.C. app. § 1177(h)(3)(A).

[5] The discussion in the Senate report of specific examples of how these provisions are to be enforced cite the Secretary of Commerce as the enforcing official. See, e.g., S. Rep. No. 1080 at 44, reprinted in 1970 U.S.C.C.A.N. at 4217 ("any citizen of the United States . . . who owns or leases . . . eligible vessels may enter into an agreement with the Secretary of Commerce to establish a capital construction fund"); id. at 44, reprinted in 1970 U.S.C.C.A.N. at 4218 ("The deposits to be made in the fund and all withdrawals from the fund . . . are to be subject to conditions and requirements prescribed by the Secretary of Commerce in regulations or in the agreement."); id. at 49, reprinted in 1970 U.S.C.C.A.N. at 4223 ("For a withdrawal to be qualified, it must be in accord with the agreement with the Secretary of Commerce."). See also 116 Cong. Rec. 16,588, 16,598 (1970) (statement of Rep. Lennon) ("To be eligible for the tax deferral treatment [under the 1970 Act], a citizen of the United States who owns or leases vessels must enter into an agreement with the Secretary of Commerce to establish one of these capital construction funds. The agreement with the Secretary of Commerce is to prescribe the conditions and requirements under which deposits in the fund are to be used for constructing or acquiring vessels.").

Id. at 44-45, reprinted in 1970 U.S.C.C.A.N. at 4217. The primary authority of Commerce (and subsequently DOT) was explicitly recognized in a statement by one of the floor managers of the 1970 Act. See 116 Cong. Rec. 16,588, 16,592 (1970) (statement of Rep. Mailliard) ("[The Merchant Marine] Committee determined that §607 of the act should be completely rewritten to eliminate the need for the IRS closing agreements. . . . This revision will permit the administration of the tax deferral system by the Secretary of Commerce in conjunction with the Secretary of the Treasury without the need for individual closing agreements.") (emphasis added). Thus, prior to the 1970 Act, Treasury administered a limited tax deferral system; under the 1970 Act, Commerce (and DOT) were to administer an expanded tax deferral program, while coordinating with Treasury.

Soon after enactment of the 1970 Act, Commerce (then the parent of both NOAA and MARAD) wrote Treasury a letter indicating that pursuant to the rulemaking authority just granted to it by the 1970 Act, it would issue regulations on policy issues within its jurisdiction under the Merchant Marine Act and "[t]he fact that the resolution of such policy issues produces tax consequences will not, by that fact alone, confer joint [rulemaking] jurisdiction upon the Department of the Treasury." Letter to John S. Nolan, Deputy Assistant Secretary for Tax Policy, from Roy G. Bowman, Deputy Maritime Administrator for Program Implementation (Mar. 29, 1971). Treasury's response stated that "[w]e agree." Letter to Roy G. Bowman from John S. Nolan (Apr. 7, 1971).

Subsequently, under the authority vested in him by section 607(a), the Secretary of Commerce issued separate regulations on behalf of NOAA and MARAD governing the subjects of the eligibility to establish a fund, deposits and withdrawals. See 39 Fed. Reg. 33,675 (1974), codified at 50 C.F.R. Part 259 (NOAA); 41 Fed. Reg. 4265 (1976), codified at 46 C.F.R. Part 390 (MARAD). These regulations made it clear that Commerce believed that its authority to enter into CCF agreements included the authority to grant tax deferral benefits. See 46 C.F.R. § 390, app. II, art. 15 ("The Maritime Administrator agrees that the Federal income tax benefits provided in the Act and the rules and regulations shall be available to the Party if the Party shall carry out its obligations under this Agreement.").

Commerce's authority to issue regulations governing eligibility to establish a fund, deposits and withdrawals was expressly acknowledged by Treasury in the joint regulation issued by Commerce and Treasury in 1976. Section 3.1(b) of the joint regulations provides as follows: "For rules relating to eligibility for a fund, deposits, and withdrawals and other aspects, see the regulations prescribed by the Secretary of Commerce in titles 46 (Merchant Marine) and 50 (Fisheries) of the Code of Federal Regulations." 41 Fed. Reg. 5812, 5814 (1976), 41 Fed. Reg. 23,960, 23,962 (1976); codified at 26 C.F.R. § 3.1(b). Under the joint regulation, rules on those subjects are to be within Commerce's (subsequently DOT's and Commerce's) exclusive authority, while Commerce and Treasury shared joint authority to issue regulations "provid[ing] rules for determining the income tax liability of any person

a party to an agreement with the Secretary of Commerce establishing a [CCF fund]." 26 C.F.R. § 3.1(a).[6]

The joint regulation also reflected Treasury's recognition that Commerce possessed final administrative decisionmaking authority regarding deposits into CCF funds:

> All amounts deposited in the fund shall be presumed to have been deposited pursuant to an agreement unless, after an examination of the facts upon the request of [Treasury,] the Secretary of Commerce determines otherwise. [Treasury] will request such a determination where there is a substantial question as to whether a deposit is made in accordance with an agreement.

Id. at § 3.3(b). Although the joint regulation does not contain similar provisions expressly recognizing Commerce's final administrative decisionmaking authority regarding the establishment of agreements and the approval of withdrawals, allocating such authority to Commerce is consistent with Commerce's responsibility under section 607(a) to negotiate agreements and regulate withdrawals and with its exclusive rulemaking authority under section 3.1(b) of the joint regulation.

In summary, the statutory text and legislative history of the 1970 Act, as well as the subsequent implementation by Commerce, DOT and Treasury, indicate that the Merchant Marine Act gave Commerce and DOT substantial final administrative and rulemaking decisionmaking authority to confer (or decline to confer) tax deferral benefits under the CCF program -- through the authority of Commerce and DOT to enter into CCF agreements, establish rules regarding eligibility for a CCF fund and fund deposits and withdrawals, and administer those rules. The question we consider next is whether this authority was diminished by the enactment of the Tax Reform Act of 1986.

III.

Section 261 of the Tax Reform Act of 1986 ("Tax Reform Act"), entitled "Provisions Relating To Merchant Marine Capital Construction Funds," amended section 607 of the Merchant Marine Act and repeated certain of its provisions in a new section 7518 of the Internal Revenue Code ("Revenue Code"). See Pub. L. 99-514, § 261, 100 Stat. 2085, 2208-16 (1986), codified at 26 U.S.C. § 7518. Treasury argues that the effect of repeating Merchant Marine Act provisions in the Revenue Code was to bring those provisions under Treasury's pre-existing administrative (see 26 U.S.C. § 7801(a)) and rulemaking (see 26 U.S.C. § 7805(a)) authority under the Code, thereby reducing or eliminating rulemaking or administrative authority DOT and Commerce previously held under the Merchant Marine Act

[6] Section 607(l) of the Merchant Marine Act provides the statutory basis for the joint rulemaking authority: "The Secretary of the Treasury and the Secretary [of Commerce or Transportation] shall jointly prescribe all rules and regulations, not inconsistent with the foregoing provisions of this section, as may be necessary or appropriate to the determination of tax liability under this section." 46 U.S.C. app. § 1177(l).

as a result of the 1970 amendments. Based on our review of the statutory text and legislative history of the Tax Reform Act, we do not agree that the authority of DOT and Commerce has been diminished.

A.

Section 261 of the Tax Reform Act contained seven subsections. Subsection (a) was a "purpose" section, stating that the purpose of the section was to coordinate the application of the Revenue Code with the CCF program.

Subsection (b) amended the Revenue Code by adding a new section 7518, entitled "Tax Incentives Relating to Merchant Marine Capital Construction Funds." New sections 7518(a)-(h) of the Revenue Code are identical in substance to sections 607(b)-(i) of the Merchant Marine Act. Subsection (b) thus repeated section 607 in the Revenue Code, with the significant exception that section 607(a) was not repeated in the Code.

Apart from subsection (d), the remaining subsections of section 261 were either technical or conforming change provisions or substantive tax law provisions.[7] Subsection (d) added a new subsection (m) to section 607 of the Merchant Marine Act requiring the Secretary of Commerce and the Secretary of Transportation to make annual reports to the Secretary of the Treasury regarding the establishment, maintenance, and termination of CCF funds under their jurisdiction.

We find nothing in these provisions of the Tax Reform Act that expressly transfers any authority over the CCF program to Treasury. In addition, we find unpersuasive Treasury's argument that the repeating of provisions of section 607 of the Merchant Marine Act in a new section 7518 of the Revenue Code impliedly effected such a significant transfer. First of all, section 607(a), which is the principal source of the authority of DOT and Commerce to administer the CCF program, was not repeated in the Revenue Code. Nor was it amended, or the matters it covers addressed in any way, by the Tax Reform Act. Section 607(a) provides that any U.S. citizen owning or leasing one or more eligible vessels may enter into an agreement with DOT or Commerce -- under terms and conditions set out by DOT or Commerce regulations or in the agreements themselves -- to establish a CCF with respect to eligible vessels. Section 607(a) also provides that deposits and withdrawals,

[7] Subsection (c) excluded the tax paid on nonqualified CCF withdrawals from the definition of "regular tax liability" for purposes of certain alternative minimum tax calculations. Subsection (e) made conforming changes to section 607 to add references to new section 7518 of the Revenue Code, pegged certain dividend exclusions from the CCF tax deferral to the provisions in the Revenue Code, taxed amounts not withdrawn from the fund after 25 years, and taxed nonqualified withdrawals at the highest marginal rate. Subsection (f) amended a table of sections in the Revenue Code to add section 7518, and subsection (g) set forth the effective date for the amendments made by section 261.

whether qualified or nonqualified, are subject to such conditions or requirements as DOT or Commerce prescribe by regulation or in the agreements.

The Tax Reform Act's continuation of the authority of the Secretaries of Transportation and Commerce was underscored by the Act's incorporation by reference of the Merchant Marine Act's definition of "Secretary." The applicable "definitions" provision of the Merchant Marine Act, section 607(k), was not repeated in the Revenue Code, or amended, but rather was cross-referenced in the Code to the Marine Act. Subsection (i) of section 7518 of the Code provides that "[f]or purposes of this section, any term defined in section 607(k) of [the Merchant Marine Act] which is also used in this section (including the definition of 'Secretary') shall have the meaning given such term by such section 607(k) as in effect on the date of the enactment of this section." (Emphasis added.) Section 607(k) defines the term "Secretary" to mean either "Secretary of Transportation" or "Secretary of Commerce." The Revenue Code thus expressly recognizes the continuing authority of DOT and Commerce.

Treasury argues that the repeating of Merchant Marine Act provisions in the Revenue Code impliedly effected a transfer of administrative and rulemaking authority because the pre-existing general administrative and rulemaking provisions in the Revenue Code grant to the Secretary of the Treasury administrative and rulemaking authority over everything in the Code. See 26 U.S.C. § 7801(a) ("Except as otherwise expressly provided by law, the administration and enforcement of this title shall be performed by or under the supervision of the Secretary of the Treasury."); id. at § 7805(a) ("Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title . . . .").

Because the Revenue Code does not purport to vest administrative authority in Treasury where such authority is vested elsewhere by other law, see id. § 7801(a), Treasury's argument is without force to the extent that such authority is expressly vested in DOT and Commerce by section 607 of the Merchant Marine Act. The question is closer with respect to rulemaking authority because the Revenue Code rulemaking provision makes an exception only for authority expressly "given" in the Code, whereas the Code's administrative provision allows for exceptions in any statute. However, DOT and Commerce make a reasonable argument that section 7518 of the Code expressly gives such authority to the Secretaries of Transportation and Commerce by recognizing that CCF funds are established under section 607 of the Merchant Marine Act (§ 7518(a)), by defining "Secretary" to mean the Secretary of Transportation or Commerce "[f]or purposes of [section 7518]" (§ 7518(i)), and by referring throughout to authority possessed by the Secretaries of Transportation and Commerce.[8]

[8] For example, the subsections of section 7518 expressly acknowledge the authority granted to the Secretaries of Commerce and Transportation to establish CCF funds under the Merchant Marine Act, (a)(1); jointly define (with Treasury) the term "net proceeds", (a)(1)(C); set trustee and other fiduciary requirements

Perhaps even more to the point, DOT and Commerce convincingly argue that because section 607(a) of the Merchant Marine Act is not repeated in the Revenue Code, the Code does not grant the Secretary of the Treasury any administrative or rulemaking authority in derogation of the authority DOT and Commerce possess under that section. Thus, the Revenue Code does not give Treasury any rulemaking authority over the establishment of CCF agreements or the terms and conditions of deposits and withdrawals in those agreements.

Although we do not find the statutory text to be clear and unambiguous on this issue, we are inclined to believe that DOT and Commerce have the better of the argument based on the statutory text. However, whatever doubt we might have on the basis of the wording of the statutory provisions is removed when we consider that Treasury is necessarily arguing that the Tax Reform Act of 1986 impliedly effected a substantial transfer to Treasury of the authority given to DOT and Commerce under the Merchant Marine Act. That is, Treasury maintains that the Tax Reform Act impliedly repealed the authority previously given to DOT and Commerce under the Merchant Marine Act. Thus, we find it appropriate to apply the "cardinal rule" of statutory construction that "repeals by implication are not favored." Posadas v. National City Bank, 296 U.S. 497, 503 (1936). The Supreme Court has adopted what amounts to a "clear statement" rule with respect to statutory repeals.[9] Accordingly, before we could find that the Tax Reform Act repealed the authority of DOT and Commerce under the Merchant Marine Act, we would require a clear statement of congressional intent -- if not in the text, at least in the legislative history. However, as discussed above, the Tax Reform Act itself contains no such statement, and as we discuss next, the Act's legislative history contains no statement whatsoever, much less a clear statement, of any intent to repeal or alter in any way the administrative or rulemaking authority of DOT or Commerce.

B.

Section 261 was proposed in the House of Representatives. As summarized in the House report accompanying the Tax Reform Act:

> The bill coordinates the application of the Internal Revenue Code of 1985 with the capital construction fund program of the Merchant Marine Act of 1936, as amended. In addition, new requirements are imposed, relating to (1) the tax

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for CCF accounts, (b)(1); approve investments from CCF funds, (b)(2); promulgate regulations regarding qualified withdrawals, (e)(1); determine nonqualified withdrawals (including determining what constitutes a failure of a company to fulfill its obligations under a CCF agreement), (e)(2); jointly set (with Treasury) the rate of interest for nonqualified withdrawals, (g)(4)(B); and determine when a CCF fund balance exceeds appropriate construction limits, (g)(5)(D).

[9] See, e.g., United States v. Borden Co., 308 U.S. 188, 198 (1939) ("The intention of the legislature to repeal 'must be clear and manifest.'" (quoting Red Rock v. Henry, 106 U.S. 596, 602 (1883)); Morton v. Mancari, 417 U.S. 535, 551 (1974) ("clearly expressed congressional intention"); Traynor v. Turnage, 485 U.S. 535, 547-48 (1988) (citing cases).

> treatment of nonqualified withdrawals [i.e., the penalty for nonqualified withdrawals was increased], (2) certain reports to be made by the Secretaries of Transportation and Commerce to the Secretary of the Treasury, and (3) a time limit on the amount of time monies could remain in a fund without being withdrawn for a qualified purpose.

H.R. Rep. No. 426, 99th Cong., 1st Sess. 191 (1985).

Collapsing the House report's identification of two purposes (coordination and new requirements) into a description of section 261 as having the single purpose of coordination, the Conference Committee report summary statement was as follows:

> The rules providing special tax treatment for capital construction funds are retained, but modified to coordinate the application of the Internal Revenue Code with the Merchant Marine Act: (1) the maximum rate of tax is imposed on nonqualified withdrawals; (2) the Secretaries of Transportation and Commerce are required to make reports to the Secretary of Treasury regarding monies in funds: (3) a taxpayer whose fund balance exceeds the amount appropriate for the vessel construction program that was determined when the fund was established must develop appropriate program objectives within three years or treat the excess as a nonqualified withdrawal; [and] (4) a 10-year limit is imposed on the amount of time monies can remain in a fund; monies not withdrawn after a ten-year period are treated as nonqualified withdrawals according to a schedule, beginning with 20 percent in the 11th year and ending with 100 percent in the 15th year.

H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-104 (1986).

We find it quite significant that neither of these summaries[10] even mentions that the Merchant Marine Act provisions were being repeated in the Revenue Code,[11] much less contains any suggestion of a shift in jurisdiction. Moreover, the use of the term "coordinate" in both the House and Conference Committee reports tends to suggest the lack of any substantive change in the administration of the CCF program. A standard dictionary definition of "coordinate" is that it means "to bring into a common action, movement or condition . . . to regulate and combine in harmonious action." Webster's Third New International Dictionary at 501 (1986). Thus, we can understand the administration of the CCF program as being coordinated by means of repeating certain tax-related Merchant Marine Act provisions in section 7518 of the Revenue Code and enacting reporting

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[10] The Senate report accompanying the Tax Reform Act did not address section 261.

[11] As discussed infra, the repeating of Merchant Marine Act provisions in the Revenue Code was mentioned in the more specific, section-by-section portion of the House report, although there was no identification of any jurisdictional implications.

procedures to ensure that Treasury is informed of DOT and Commerce decisions affecting the tax liability of CCF fundholders.

Repeating the Merchant Marine Act provisions in the Revenue Code served the coordination purpose of having provisions of interest to both the merchant marine and tax communities available in the respective U.S. Code titles with which they were familiar. In this regard, the coordination purpose can be viewed as the same as the coordination purpose underlying Commerce's 1976 republication of the already-published Commerce and Treasury joint regulation. In June 1976, Commerce published in the Federal Register, to be codified in title 46 of the Code of Federal Regulations ("CFR"), a verbatim version of the joint regulations published by Commerce and Treasury in January 1976, which were codified in title 26 of the CFR. Commerce gave the following explanation:

> The new part [391 in title 46] contains the joint CCF regulations as published in the Federal Register on January 29, 1976. The purpose of this publication is to provide persons working in the maritime industry, who are familiar with Title 46 of the Code of Federal Regulations, easy access to the joint CCF regulations.

41 Fed. Reg. 23,960 (1976).[12]

In addition, the coordination purpose for imposing a reporting requirement on DOT and Commerce is self-evident. Under that requirement, DOT and Commerce must report annually to Treasury on CCF agreements entered into, maintained or terminated, as well as withdrawals and deposits and determinations of noncompliance with CCF agreements. It is obviously helpful to Treasury in discharging its tax administration responsibilities to know what decisions DOT and Commerce have made in administering the CCF program. In light of our interpretation of the authority that DOT and Commerce possessed prior to enactment of the Tax Reform Act, we understand these requirements to apply against the backdrop that Congress intended that DOT and Commerce would remain the agencies charged with making the determinations on the transactions identified in the reports.

Treasury has not brought to our attention, nor have we found, any statement in the legislative history indicating an intent to shift jurisdiction to the Secretary of the Treasury, or for that matter any indication in the hearing record that the administration of the CCF

[12] Moreover, even prior to enactment of the Tax Reform Act it was clear that Treasury had an administrative and regulatory role to play in determining tax liability in light of eligibility determinations made and regulations promulgated by Commerce and DOT. Repeating the relevant provisions of the Merchant Marine Act in the Revenue Code is consistent with this role.

program was a problem that needed to be addressed.[13] Certainly, neither the House nor Conference Committee report describes any shift in jurisdiction. See H.R. Rep. No. 426, 99th Cong., 1st Sess. 190-195 (1985); Joint Conf. Rep. No. 841, 99th Cong., 1st Sess. II-104 (1986).

Indeed, the repeating of Merchant Marine Act provisions in the Revenue Code was characterized in the legislative history as a "recodification": "The tax provisions relating to capital construction funds are recodified as part of the Internal Revenue Code of 1985. For purposes of the Internal Revenue Code of 1985, defined terms shall have the meaning given such terms in the Merchant Marine Act of 1936, as amended . . . ." H.R. Rep. No. 426 at 192.[14] No explanation was given as to the purpose for, or significance of, this "recodification."

"Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" Finley v. United States, 490 U.S. 545, 554 (1989) (quoting Anderson v. Pacific Coast S.S. Co., 225 U.S. 187, 199 (1912)). Accordingly, for us to interpret this aspect of the Tax Reform Act as effecting anything other than a repeating of existing law, we would require a clear statement of congressional intent, either in statutory text or legislative history, that a substantive change was intended. However, as discussed above, Congress expressed no intention in the Tax Reform Act or its legislative history to transfer any authority over the CCF program to Treasury. The congressional silence in this regard stands in stark contrast to the express statements in the statutory text and legislative history of the 1970 Act amending the Merchant Marine Act to give new administrative and rulemaking authority to Commerce (and later DOT).[15]

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[13] During the consideration of the Tax Reform Act, the Reagan Administration's position with respect to the CCF program was not that there were problems with the program's administration or that jurisdiction concerning the program should be transferred, but rather that the program should be eliminated. See Letter from the Acting Assistant Secretary of the Treasury, Tax Policy, to the Chairman of the House Subcommittee on Merchant Marine (July 10, 1985), reprinted in 131 Cong. 30,751, 30,752 (1985).

[14] See also Staff of Joint Comm. on Taxation, 99th Cong., 2d Sess., General Explanation of the Tax Reform Act of 1986, 176 (Comm. Print 1987) (same).

[15] See, e.g., 46 U.S.C. app. § 1177(a) (administrative and regulatory authority granted to the Secretaries of Commerce and Transportation); S. Rep. No. 1080 at 44, reprinted in 1970 U.S.C.C.A.N. at 4217 ("any citizen of the United States . . . who owns or leases . . . eligible vessels may enter into an agreement with the Secretary of Commerce to establish a capital construction fund."); id. at 44, reprinted in 1970 U.S.C.C.A.N. at 4218 ("The deposits to be made in the fund and all withdrawals from the fund . . . are to be subject to conditions and requirements prescribed by the Secretary of Commerce in regulations or in the agreement."); id. at 49, reprinted in 1970 U.S.C.C.A.N. at 4223 ("For a withdrawal to be qualified, it must be in accord with the agreement with the Secretary of Commerce."); 116 Cong. Rec. 16,588, 16,598 (1970) (statement of Rep. Lennon) ("To be eligible for the tax deferral treatment [under the 1970 Act], a citizen of the United States who owns or leases vessels must enter into an agreement with the Secretary of Commerce to establish one of these capital construction funds. The agreement with the Secretary of Commerce is to prescribe the conditions and

IV.

In Section II of this opinion we conclude that the 1970 amendments to the Merchant Marine Act vested significant administrative and rulemaking authority in the Secretaries of Commerce and Transportation to confer tax deferral benefits on shipping companies (so long as they comply with applicable requirements), and in Section III we conclude that the Tax Reform Act of 1986 did not diminish that authority. As stated in Section I, this opinion will not resolve all jurisdictional questions that might arise or that have been identified in the briefs, but rather will resolve only the two specific disputes that prompted the request for our opinion. We do not believe the questions raised in the two disputes are close or difficult. They are easily resolved by a straightforward application of the general conclusions we reach in Sections II and III. We emphasize that those general conclusions may not control the resolution of jurisdictional questions that arise in some cases, and applying those conclusions may present close and difficult questions in others, especially with respect to tax administration matters of the kind that Treasury has traditionally had responsibility for in other contexts.

A.

Based upon an objection by Treasury, Commerce has not yet published a final rule modifying its CCF regulation to allow holders of fishing vessel CCF agreements to make qualified withdrawals for the purpose of making safety improvements to their vessels. DOT and Commerce believe that a regulation of this kind is within their exclusive authority over deposits into or withdrawals from CCF funds, while Treasury asserts that the repeating of Merchant Marine Act provisions in the Revenue Code brought such regulations under Treasury's general rulemaking authority under the Code or, in the alternative, that they fall within the joint rulemaking authority the agencies share under the Merchant Marine Act.

The proposed Commerce regulation would constitute a policy determination that a withdrawal from a CCF fund to make safety improvements to a vessel furthers the purposes of the Merchant Marine Act and therefore should be treated as "qualified" -- thereby triggering the consequence under the Act that the withdrawal is not treated as a taxable event. We agree with DOT and Commerce that, consistent with the joint regulation issued by Commerce and Treasury in 1976,[16] this regulation falls within Commerce's authority to issue regulations under section 607(a) of the Merchant Marine Act. Section 607(a), which

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requirements under which deposits in the fund are to be used for constructing or acquiring vessels."); id. at 16,592 (statement of Rep. Mailliard) ("[The Merchant Marine] Committee determined that §607 of the act should be completely rewritten to eliminate the need for the IRS closing agreements . . . This revision will permit the administration of the tax deferral system by the Secretary of Commerce in conjunction with the Secretary of the Treasury without the need for individual closing agreements.").

[16] See 26 C.F.R. § 3.1(b) ("For rules relating to eligibility for a fund, deposits, and withdrawals and other aspects, see the regulations prescribed by the Secretary of Commerce in titles 46 (Merchant Marine) and 50 (Fisheries) of the Code of Federal Regulations.").

was not repeated in the Revenue Code, provides that "[t]he deposits in the fund, and all withdrawals from the fund, whether qualified or nonqualified, shall be subject to such conditions and requirements as the Secretary [of Commerce or Transportation] may by regulations prescribe or are set forth in such agreement . . . ." 46 U.S.C. app. § 1177(a) (emphasis added). This kind of policy regulation falls within Commerce's exclusive rulemaking authority under section 607(a), not the joint rulemaking authority under section 607(l) for such "rules and regulations . . . as may be necessary or appropriate to the determination of tax liability" under the CCF program. Id. § 1177(l).

As discussed in Section II, the correspondence between Commerce and Treasury in 1971 and the joint regulation issued by those agencies in 1976 made it clear that the agencies understood that the policymaking authority with respect to what would be a qualified withdrawal fell within Commerce's authority.[17] Moreover, a regulation encouraging safety improvements to vessels directly relates to the core responsibility given to DOT and Commerce by the 1970 Act to take actions "to revitalize our merchant marine," S. Rep. No. 1080 at 9, reprinted in 1970 U.S.C.C.A.N. at 4188, while bearing little relation to Treasury's responsibilities and expertise in the administration of the tax laws.

We find unpersuasive Treasury's claim of new and superior rulemaking authority based on the Tax Reform Act of 1986.[18] Section 607(a), the provision on which DOT and Commerce base their rulemaking authority for the CCF program, was not repeated in the Revenue Code, and the legislative history does not suggest an intention to transfer that authority to Treasury. We do not believe that merely repeating substantive tax-related provisions in the Revenue Code triggers the Treasury rulemaking authority under the Code such that the general Treasury authority trumps the specific DOT and Commerce rulemaking authority set forth in the Merchant Marine Act.

B.

The disagreement between the agencies over administrative authority was precipitated by tax adjustment notices Treasury sent to a company that has a CCF agreement with DOT. A provision of the Merchant Marine Act (also repeated in the Revenue Code) specifies that deposits into a CCF fund shall be considered deferred taxable income. The Treasury notices proposed to disallow the tax deferral for deposits the company had made into their fund. Treasury asserted that the company was not eligible to enter into a CCF agreement because the vessels owned by the company are not eligible vessels under the Merchant Marine Act

[17] Indeed, in 1981 Commerce issued such a regulation. See 46 Fed. Reg. 54,563 (1981) (authorizing qualified withdrawals for energy saving improvements).

[18] It is noteworthy that at no time in the decade since the 1986 Tax Reform Act was enacted has Treasury sought to modify the joint regulation (or to issue its own regulations) based on its current theory that ever since 1986 Treasury has had the exclusive authority to issue regulations of the kind DOT and Commerce have heretofore issued.

definition (this definition was not repeated in the Revenue Code). The Treasury position rested on its assertion that the vessels do not meet the statutory requirement that they be operated in the foreign or domestic commerce of the United States. DOT responded to Treasury by defending the granting of the agreement on the ground that the vessels do meet the statutory requirement (i.e., they do operate in commerce) and by stating that the discretion to enter into CCF agreements is vested by statute in DOT.[19]

We have concluded that Treasury's assertion of authority over this kind of decision is unjustified. As discussed in Section II, DOT has been given the authority under the Merchant Marine Act to administer a program designed to encourage the development of the merchant marine through the establishment of tax-favored CCF funds, and section 607(a) of that Act expressly vests in DOT the authority to enter into agreements with companies to establish CCF funds. No provision of the Merchant Marine Act or the Tax Reform Act gives Treasury the authority to overrule DOT's decision that a shipping company is eligible to enter into a CCF agreement.

For Treasury to intercede after DOT has entered into an agreement establishing such a fund and reject DOT's decision is flatly inconsistent with the grant of authority to DOT to administer the program. After all, the main purpose of the program is to establish tax-favored funds. If Treasury is to control this determination, then it effectively controls the program. Moreover, Treasury's grounds for rejecting DOT's determination do not fall within an area Treasury could claim as its exclusive expertise: "operating in commerce" is not inherently a tax concept.

Under Treasury's interpretation, DOT and the company it authorizes to establish a CCF fund would actually be treated like two private parties that may contract in the expectation of one of them receiving a tax benefit. It would be Treasury and not DOT that would be the government agency responsible for determining whether the agreement satisfies the CCF fund eligibility requirements of the Merchant Marine Act governing the establishment of CCF agreements. Such an interpretation is inconsistent with DOT's statutory authority under section 607(a) to enter into agreements with companies owning or leasing "eligible vessels" for the purpose of establishing CCF funds, and inconsistent with the purpose of the CCF program.

We seriously doubt that Treasury would have asserted such authority prior to the enactment of the Tax Reform Act of 1986, and Treasury has not brought to our attention any indication that it ever did. For the reasons expressed throughout this opinion, we cannot

[19] Treasury notes that the tax secrecy laws prevent discussing the facts of this specific dispute as they relate to the specific taxpayer. There is no need, however, to discuss those facts in order to resolve the jurisdictional dispute. Rather, we will consider the class of decisions illustrated by the specific dispute: situations where Treasury asserts jurisdiction to disallow deposits into a CCF fund on the ground that the CCF agreement should not have been entered into because the vessels covered by the agreement do not meet the definition of eligible vessel under the Merchant Marine Act.

accept the argument that the mere repeating of certain provisions of the Merchant Marine Act in the Revenue Code effected such a dramatic change in the responsibility for administering the CCF program that DOT would no longer have the authority to take the initial step of entering into a binding CCF agreement.

V.

In closing, we wish to stress the limited reach of this opinion. Our conclusions are that the Tax Reform Act of 1986 did not diminish the significant administrative and rulemaking authority vested in DOT and Commerce under the Merchant Marine Act to grant tax deferrals to eligible shipping companies (so long as they comply with applicable requirements), and that the position of DOT and Commerce on the two specific disputes presented to us is correct. We recognize, however, that Treasury has substantial authority relating to tax liability under the CCF program, based on its administrative and rulemaking authority under the Internal Revenue Code. It has not been necessary for us to determine the scope of that authority in order to resolve the two specific disputes, and we do not believe it would be prudent for the opinion to attempt to define all of the responsibilities of the agencies relating to the program. We urge the agencies to work together to resolve those questions based on the guidance that the opinion does provide. Please let us know if we can be of assistance in that process.