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MEMO: MARPOL Annex VI, Marine Fuel Oil 0.50% Sulfur Cap Enforcement

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January 1, 2020 begins the era of the IMO 2020 Marine Fuel 0.50% Sulfur Cap

It has been called "the single most expensive environmental regulation the shipping industry has ever faced." January 1, 2020 is a date that looms large in the minds of shipowners worldwide, because that is the date on which the IMO's new regulations significantly reducing the permissible sulfur content of marine fuel oil will take effect. New Year's Day 2020 is the firm date set by the IMO's Marine Environment Protection Committee ("MEPC") for the implementation of a global sulfur cap of 0.50% m/m (mass/mass) on all bunker fuels – the "IMO 2020" rule. This represents a significant cut from the 3.5% m/m global limit currently in place for HSFO, and the market disruption that will result is a growing source of anxiety and consternation in the corner offices of shipping companies around the world.

The MEPC Sub-Committee on Pollution Prevention and Response ("PPR") met in January 2017 to explore what actions the IMO could take to ensure consistent and effective implementation of the 0.50% sulfur limit. In addition to the immediate increase to operating costs from the higher-priced IMO 2020-compliant marine fuel, an inconsistent and ineffective implementation of the rule may increase uncertainty and further distort the market. If some owners purchase the more expensive fuels, while others continue to burn HSFO and hope to evade enforcement action and penalties, the industry will not get an accurate picture of the real market demand for 0.50%-sulfur marine fuel. By compelling non-exempt vessels to take on the more expensive low-sulfur bunkers, this new worldwide regulatory standard introduces a significant change to a vessel's operating costs. Those higher fuel costs are substantial enough to cause serious commercial distortion in the shipping market if there is uneven implementation and enforcement of the IMO 2020 0.50% sulfur limit. Simply put, unless this burdensome and costly regulation is applied and enforced fairly and uniformly in the various national jurisdiction, more ship operators may be able to flout the new rule and obtain a competitive advantage over others who purchase the pricier low-sulfur fuel.

The PPR sub-committee held an "intersessional" meeting last month (July 9 - 13, 2018) to develop detailed guidelines to support the consistent implementation of the IMO 2020 0.50% sulfur rule. The sub-committee's task during this meeting was to address a range of issues, including:

- development of draft guidelines for consistent implementation of the 0.50% sulfur limit;
- development of draft amendments to MARPOL Annex VI relating to the testing and verification procedure of in-use fuel oil samples that accompany the bunker delivery notes from the fuel supplier – expected to be adopted at MEPC's spring 2020 meeting and enter into force in summer 2021;

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- development of draft amendments to:
  - 2009 Guidelines for Port State Control under the revised MARPOL Annex VI (resolution MEPC.181(59));
  - 2010 Guidelines for monitoring the worldwide average sulfur content of fuel oils supplied for use on board ships (resolution MEPC.192(61), as amended by resolution MEPC.273(69)); and
  - Guidelines for onboard sampling for the verification of the sulfur content of the fuel oil used on board ships (MEPC.1/Circ.864).

The PPR sub-committee will issue a report to the MEPC at its October 2018 meeting (MEPC 73). MEPC 73 is expected to approve the PPR's draft guidelines and issue them in order to provide shipping industry participants with much-needed additional information as they finalize their compliance planning before the entry into effect of the IMO 2020 limit.

But the IMO and its various committees and sub-committees have no enforcement authority of their own. The IMO is merely a specialized agency of the UN; current authority to enforce violations of IMO 2020 resides with the offending vessel's Flag State, which will often have limited resources and questionable commitment to vigorous enforcement of environmental regulations. Port States have no enforcement authority over the use of non-compliant fuel while on the high seas. On the other hand, Port States such as the U.S. are often much more eager to strictly enforce maritime environmental laws, as recent experience has shown in the case of MARPOL Annex I prosecutions for inaccurate maintenance of oil record books on ships calling in U.S. ports, even when the underlying alleged violation occurred far outside its territorial waters.

The U.S. will likely attempt to enforce the IMO 2020 rule in a manner similar to its rigorous investigations and zealous prosecutions under MARPOL Annex I

MARPOL Annex VI sets mandatory air emissions standards for ocean-going vessels, but signatory nations must enact implementing legislation to enforce the standards in their jurisdictions. The United States implemented the MARPOL treaty through passage of the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. §§ 1901-1915 (2008). Both foreign-flagged and U.S.-flagged vessels greater than 400 gross tons are regulated under the APPS when they are operated within U.S. territorial waters and therefore must comply with MARPOL Annex VI regulations including the forthcoming IMO 2020 0.50% marine fuel sulfur limit. The APPS criminalizes the knowing violation of MARPOL and the regulations issued thereunder, including Annex VI regulations for the prevention of air pollution from ships. 33 U.S.C. § 1908(a), (c)(1). Annex VI, Regulation 14.1.3 limits the sulfur content of any fuel oil used onboard ships to 0.50% m/m after January 1, 2020 (*i.e.*, IMO 2020). The APPS authorizes the United States Coast Guard ("USCG") to investigate potential MARPOL violations as part of their Port State Control authority, while the U.S. Environmental Protection Agency ("EPA") takes the lead role in assessing penalties.

Under 33 U.S.C. § 1904, ships in U.S. ports are subject to onboard inspection by the USCG to verify that the ship carries a valid International Air Pollution Prevention ("IAPP") Certificate and Engine International Air

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Pollution Prevention ("EIAPP") Certificate. If the ship does not have valid certificates or the condition of the ship does not substantially agree with the particulars of its certificates, the USCG may order the ship detained, until it is found that she can proceed to sea without unreasonable threat of harm to the marine environment or public health and welfare, by requesting the refusal or revocation of U.S. Customs clearance or permit to proceed. Under 33 U.S.C. § 1907(f), the USCG investigators are authorized to inspect ships for compliance with Annex VI and take enforcement actions if any violations are discovered. 33 U.S.C. § 1908(e) authorizes the USCG to demand a Letter of Undertaking, bond, or other surety satisfactory in lieu of revoking or withholding the vessel's customs clearance when it appears that the owner, operator, or person in charge may be subject to fine or civil penalty under APPS. The USCG may take enforcement action itself or refer violations to the EPA for enforcement action.

Vessels calling at U.S. ports are required to maintain bunker delivery notes, signed by the Master or officer in charge of the operation, for three years. (Regulation 18.5 and 40 C.F.R. § 1043.70). They must also maintain, for one year, representative samples corresponding to the bunker deliver notes for the marine fuels taken on board at the time of delivery from the supplier. (Regulation 18.8.1 and 40 C.F.R. § 1043.70). The USCG investigators will review the ship's Bunker Delivery Notes and fuel samples for each fuel delivery to ensure the vessel uses IMO 2020 low sulfur fuel. Ship owners and operators should be diligent in fully documenting any inability to obtain compliant fuel despite good faith efforts and submit a Fuel Oil Non-Availability Report, a self-disclosure mechanism a vessel owner or operator makes to the EPA via its Central Data Exchange.

In the event the USCG discovers a violation of Annex VI, including the IMO 2020 low sulfur rule, the U.S. government will likely follow the same script it has used for many years in the enforcement of MARPOL Annex I violations related to the maintenance of the Oil Record Book – it will use the strict record-keeping requirements of the APPS to "bootstrap" jurisdiction over alleged criminal violation of the marine fuel oil sulfur limits, even when the offending fuel was purchased and supplied to the vessel at a distant port outside of U.S. waters. Shipowners and operators whose alleged violations of the IMO 2020 sulfur rule by improper bunker delivery note record-keeping are referred to the DOJ for prosecution will likely face their typical overbearing prosecutorial tactic: the filing of several charges under multiple federal statutes in an effort to compound the potential fines and the adoption of a strong negotiating posture *vis-a-vis* the accused vessel owners and/or operator to coerce a large settlement and/or guilty pleas.

We anticipate that U.S. prosecutors will continue to attempt to punish alleged MARPOL non-compliance occurring on the high seas or in a foreign port by bringing their usual laundry list of seemingly unrelated domestic law charges: (1) The False Statement Act, 18 U.S.C. § 1001; (2) Conspiracy, 18 U.S.C. § 371; Obstruction of Justice, 18 U.S.C. §1505; Tampering with Witnesses, 18 U.S.C. § 1512; and Sarbanes-Oxley, 18 U.S.C. § 1519. The owners and/or operators may be charged with conspiracy to commit fraud against the United States and under Sarbanes-Oxley for the broad, sweeping offense of being one who "knowingly alters… conceals, covers up, falsifies, or makes a false entry in any record… with the intent to impede, obstruct, or influence the investigation or the proper administration of any matter within the jurisdiction of

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any department or agency of the United States." 18 U.S.C.§ 1519. The shipboard employees responsible for maintaining accurate bunker delivery notes and sample records may be accused of knowingly altering or making false entries with the intention of misrepresenting and obstructing a USCG investigation while in the territorial jurisdiction of the U.S. These domestic law charges will be in addition to the substantial civil penalties provisions under APPS.

Conclusion

There is no doubt that IMO 2020 will be one of the most disruptive changes to the shipping industry in recent memory, and the impact of the new rules will extend beyond maritime industry participants and may ultimately affect the pocketbooks of consumers worldwide. We will continue to closely monitor all developments as we rapidly approach the IMO 2020 January 1st deadline. Given the potential for substantial monetary fines and the severity of possible criminal sentences, it is important for shipowners and operators to carefully plan for compliance with the new IMO 2020 marine fuel sulfur limits. The attorneys at Gaitas, Kennedy & Chalos stand ready to address any questions vessel owners or operators may have regarding compliance with the new IMO 2020 regulations, or to assist with managing other environmental regulatory compliance issues for vessels calling at the Port of Houston and ports throughout the United States.