

New Maritime Developments Update

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Analysis of Recent Coast Guard Regulations Implementing Maritime Security Requirements

New Development

The United States Coast Guard published on July 1, 2003, a set of six interim rules establishing comprehensive industry-wide maritime security requirements that are effective immediately. Comments are due by July 31. The Coast Guard plans to implement final rules in November 2003 in accordance with the deadline set forth in the Maritime Transportation Security Act of 2002 (MTSA).

Summary

The six interim rules consist of:

1. Implementation of National Maritime Security Initiatives
2. Area Maritime Security
3. Vessel Security
4. Facility Security
5. Outer Continental Shelf Facility Security
6. Automatic Identification System

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This Maritime Development Advisory (Advisory) focuses on key issues set forth in the first of the six rulemakings: "Implementation of National Maritime Security Initiatives." This Advisory also provides a brief overview of the other five rulemakings and their applicability. Each of the remaining five rulemakings will be summarized in separate advisories.

As explained in greater detail below, not all aspects of the MTSA have been implemented at this time. The Coast Guard has identified some of those sections of the MTSA (e.g., cargo security measures and personnel access control systems) that will be implemented in future rulemakings.

Analysis

1. Implementation of National Maritime Security Initiatives

Overview

This rulemaking contains a general discussion of the new subchapter H of Title 33 of the Code of Federal Regulations. It also includes an analysis of the Coast Guard's methodology for implementing the new rules, a summary of costs and benefits associated with implementing the new requirements, the definitions of terms used in all six rulemakings, a review of new communications requirements, and a discussion of the Maritime Security (MARSEC) Levels. In addition, the rulemaking pro-

vides a review of public comments received on the 40 issues published in the December 20, 2002, Federal Register Notice concerning this matter (67 Fed. Reg. 78742).

Purpose of Regulations

All of the interim regulations implement certain security-related provisions of the MTSA, security-related amendments to the International Convention for the Safety of Life at Sea (SOLAS), and the International Ship and Port Facility Security Code (ISPS Code) to detect, deter, disrupt, and respond to attacks against the critical maritime infrastructure of the United States. Both the SOLAS amendments and the ISPS Code have been incorporated into this rulemaking.

Applicability of Regulations

Unless otherwise stated, the new regulations apply to vessels, structures, and facilities of any kind, located under, in, on, or adjacent to "waters subject to the jurisdiction of the U.S.," which means the navigable waters of the United States (12-mile limit), the Exclusive Economic Zone (EEZ), and, for Outer Continental Shelf (OCS) facilities, the waters superadjacent thereto.

Alternative Security Programs

Owners and operators of most vessels and facilities may develop third-party or industry organization (i.e.,

based on industry standards) Alternative Security Programs (ASP), subject to Coast Guard approval, that provide an equivalent level of security provided under the new regulatory standards. While most of the substantive requirements for each ASP are listed in each applicable regulation, the Implementation of National Maritime Security Initiatives regulation contains requirements affecting the submittal and approval of ASPs.

Equivalent Security Measures

For any security measure required by the new regulations, an owner or operator may substitute an “equivalent” security measure that has been approved by the Coast Guard as meeting or exceeding the effectiveness of the required measure.

MARSEC Levels

The Coast Guard uses MARSEC Levels to advise the maritime community of the level of risk to vessels, ports, and other “maritime elements” across the nation. A change in the MARSEC Level (one being the lowest and three being the highest) will be accomplished in accordance with the procedures set forth in the Area Maritime Security Plans (Area Plan), and vessel and facility security plans. While the MARSEC Levels will generally be implemented consistent with the Homeland Security Advisory System (HSAS), the Coast Guard may adjust the MARSEC Level to address any security concerns affecting the national transportation system. In addition, each Coast Guard Captain of the Port (COTP) retains discretion to temporarily change the applicable MARSEC Level independent of the HSAS to reflect uniquely maritime concerns in a particular area.

MARSEC Directives issued by the Coast Guard will be considered “sensitive security information” and will

therefore not be available to the general public. Affected owners and operators will need to contact either the relevant COTP or District Commander to get a copy of the MARSEC Directive and will need to establish that they “need to know” the information contained in the Directive. Implementation of additional security requirements, consistent with the vessel or facility security plan, must occur within the time frame mandated by the Directive.

Enforcement and Penalties

The Coast Guard intends to vigorously enforce compliance with these new regulations. Owners and operators of vessels and facilities not in compliance with the new subchapter H will be subject to rigorous enforcement actions, including suspension or revocation of security plan approval (thus preventing the vessel/facility from legally operating), a civil penalty of \$25,000 per violation, or a criminal penalty.

Communication between Ports, Facilities, and Vessels

Should there be a change in the MARSEC Level, the COTP will issue a local Broadcast Notice to Mariners, a MARSEC Directive, or another communication as detailed in the Area Plan. Likewise, the COTP will communicate any threats that may lead to a transportation security incident to appropriate port stakeholders, vessels, and facilities in the COTP’s area of responsibility. A “transportation security incident” is broadly defined to mean a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area.

Owners or operators of vessels or facilities required to have a security plan must implement actions or measures described in the vessel or facility plan for the three MARSEC Levels (the vessel or

facility must be operating at MARSEC Level 1 as a default) and then confirm to the Coast Guard the attainment of those MARSEC Level-specific measures, actions, or requirements should the MARSEC Level be elevated. Owners and operators required to have a security plan must report to the National Response Center, without delay, activities that may result in a transportation security incident, breaches of security, and the occurrence of a transportation security incident.

Declarations of Security, Risk Assessment Aides, and Credentialing

The Implementation of National Maritime Security Initiatives regulation also addresses several other matters, including requirements related to Declarations of Security, the internet addresses for websites containing risk assessment aides that may be used to assist in assessments (such as Navigation and Vessel Inspection Circulars), and minimum requirements for personal identification credentials accepted under the access control provisions of the MTSA. Identification credentials must be laminated (or otherwise secure), contain the individual’s full name and photo, and bear the name of the issuing authority (the government, an employer, union, or trade association).

Cargo Security Measures

Regulations addressing cargo security will be promulgated in the near future. The Coast Guard therefore cautions owners or operators against creating and/or installing cargo security measures before the specific regulations have been issued. The Coast Guard intends to work with other agencies to develop cargo security guidelines that can be used until promulgation of these regulations.

Security of Information

Information contained in port, vessel, and facility security assessments and plans has been designated “sensitive security information” (SSI) and thus is generally exempt from disclosure under the Freedom of Information Act. Owners and operators of vessels and facilities may request, however, a determination of a higher designation than SSI for their plans.

Recognized Security Organization

Though the ISPS Code allows contracting governments to delegate security-related duties to a third-party recognized security organization, the Coast Guard intends to keep control over the approval of assessments, plans, and other security measures. The Coast Guard leaves open the possibility that it may delegate duties at some point in the future.

Permanent Hull Markings

Under SOLAS, passenger vessels of 100 gross tons ITC and upwards on an international voyage, and cargo vessels of 300 gross tons ITC and upwards on an international voyage, should be permanently marked with an identification number on their hull in an easily accessible place. The Coast Guard is not requiring these markings for any other vessels.

Continuous Synopsis Record Requirement

The SOLAS amendments require vessels to carry an up-to-date “Continuous Synopsis Record” detailing, among other things, the name of the flag state, the date of registry, and the vessel’s International Maritime Organization (IMO) identification number. The Coast Guard is not extending this requirement to domestic vessels.

Security Alert System Requirement

Until vessel security plans and Area Plans are established and exercised to evaluate communications systems and possible flaws, the Coast Guard does not intend to impose on vessels engaged on domestic voyages the SOLAS amendments’ requirement of an onboard security alert system.

Seafarer’s Identification Criteria Requirement

The MTSA mandates the creation of a standardized “transportation security card.” Currently, the Coast Guard, the Transportation Security Administration, and the Maritime Administration are developing a nationwide Transportation Worker Identification Card (TWIC) program. It is anticipated that the TWIC program will eventually fulfill the MTSA transportation security card requirements. Thus, these rulemakings do not implement the identification requirements of the MTSA.

In addition, the International Labor Organization (ILO) has recently concluded a new convention addressing seafarer’s identification. Until the TWIC program is implemented and the Coast Guard has an opportunity to review the new ILO convention to develop domestic policy regarding seafarer identification, the Coast Guard will continue to accept identification documents set forth in the August 7, 2002, Federal Register (67 Fed. Reg. 51082). Acceptable identification includes military identification cards, federal employee badges, a state driver’s license, merchant mariner’s documents, identification documents issued by a company, union, or trade association, and valid passports.

2. Area Maritime Security

The Area Maritime Security rulemaking establishes requirements for Area Plans and Area Maritime Security

Committees (Area Committees). Area Plans, covering geographic areas corresponding to COTP zones, contain the details of security measures, both operational and physical, for a port or ports. The regulation sets forth mandatory elements of the Area Plans, which include MARSEC Level-specific security requirements, preventive measures, and response procedures. Area Plans are developed by the COTP in conjunction with an Area Committee, which is appointed by the COTP. The Area Committee will include individuals with certain skills and port operational knowledge, and should represent all aspects of the relevant maritime community.

3. Vessel Security

The Vessel Security regulations establish security measures for certain vessels calling on U.S. ports. Generally, all ships subject to SOLAS, most Coast Guard inspected vessels greater than 100 gross registered tons, and most towing vessels are subject to these regulations. Some of the requirements imposed on vessel owners or operators by this rulemaking include: (1) appointment of Company and Vessel Security Officers to oversee company/vessel security; (2) creation and implementation of training programs for vessel personnel, including drills and exercises; (3) development of maintenance procedures for security systems and equipment; (4) creation of MARSEC Level-specific security measures; (5) creation of security incident procedures (i.e., post-incident procedures designed to prohibit entry into affected areas, deny access except to emergency personnel, evacuation, etc.); (6) development of procedures for the completion of Declarations of Security for vessel-to-vessel and vessel-to-facility interfaces; (7) conduct of vessel security assessments and development of vessel

security plans that must be approved by the Coast Guard; and (8) waiver and equivalency procedures.

4. Facility Security

The Facility Security regulations affect facilities that handle certain dangerous cargoes, facilities that receive vessels certified to carry more than 150 passengers, facilities that receive commercial vessels greater than 100 gross registered tons on international voyages (including vessels solely navigating on the Great Lakes), and fleeting facilities/areas for barges carrying certain bulk or dangerous cargoes. This rule-making contains provisions similar to the eight general issues listed above regarding the Vessel Security rulemaking. Facility Security Plans must be submitted to and approved by the Coast Guard.

5. Outer Continental Shelf Facility Security

OCS Facility Security regulations establish security measures for mobile offshore drilling units (MODUs) not subject to SOLAS and certain fixed and floating facilities located on the OCS. The rule imposes multiple responsibilities on the owner or operator of an OCS facility similar to those requirements set forth in the Vessel and Facility Security regulations. OCS facility security plans must be submitted to and approved by the Coast Guard.

6. Automatic Identification System

The Automatic Identification System (AIS) regulations establish technical and performance standards for an AIS, mandated by the MTSA and SOLAS amendments. An AIS system provides real-time information on a vessel, including the name, position, course, and speed of the vessel, to other vessels and onshore stations. The rule-making imposes deadlines for the instal-

lation of AIS equipment onboard all vessels subject to SOLAS, Vessel Traffic Service users, and on many other commercial vessels. The rulemaking also sets forth requirements for detection centers, call signs, frequencies, and monitoring areas.

In addition to the interim rule, the Coast Guard also published a notice and request for comments concerning the expansion of the AIS requirements to vessels engaged solely in the domestic trade. Comments for this interim rule must be submitted before September 29, 2003.

Recommendations

Owners and operators of vessels and facilities and other interested parties affected by these new security requirements should review the Coast Guard's maritime security regulations to determine the implications of those regulations on their operations. Interested parties have only until July 31 to submit their comments. Interested parties should also be aware that the Coast Guard will hold a public meeting at the Grand Hyatt in Washington, D.C. on July 23, 2003, from 9 a.m. to 5 p.m. □

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