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MARAD Exempts Some Newer Vessels from EPA Approval Process and Requires New Self-Certification for Other Vessels

New Development

The Maritime Administration ("MARAD") has issued a clarification of its regulations concerning the approval process for the proposed transfer of U.S.-flag vessels over 1,000 gross tons to foreign registries. In a Federal Register notice on June 27, 2011, MARAD stated that it will require the owner seeking approval of the reflagging of such a U.S.-flag vessel to provide a certification that it does not contain polychlorinated biphenyls ("PCBs") in regulated quantities and to provide notice to the Environmental Protection Agency ("EPA") of the transfer request. However, vessels built in the United States after 1985 are exempt from this requirement. Comments are due on the proposed clarification by July 27, 2011.

Background

In general, the transfer of a U.S.-flag vessel to another registry and/or to a non-U.S. citizen owner requires the prior approval of MARAD under 46 U.S.C. § 56101 (which is the current codification of Section 9 of the Shipping Act, 1916, as amended). Subject to certain exceptions, Section 56101 prohibits the sale, lease, charter, delivery, or other transfer (and any agreement to do so) to a non-U.S. citizen of any interest in or control of a U.S.-flag vessel owned by a U.S. citizen and the transfer of a U.S.-flag vessel to a foreign flag. In addition, the prohibitions of Section 56101 apply to vessels whose last documentation was the U.S. flag.

To implement the requirements of Section 56101, MARAD adopted regulations (46 C.F.R. Part 221) that grant general approvals for certain transfers of certain U.S.-flag vessels and interests in

such vessels to non-U.S. citizens and set forth procedures for the approval of transfers not covered by the general approvals. In general, transfers of vessels over 1,000 gross tons require prior MARAD approval under these regulations.

MARAD is permitted by 46 U.S.C. § 56101(b) to grant pre-approval for the foreign transfer of a vessel to promote financing of that vessel, provided that the approval is obtained before the vessel is documented under the U.S. flag.

In recent years, MARAD has agreed, on an informal basis, to refer foreign transfers of U.S.-flag vessels requiring its approval to the EPA for EPA's review of compliance with U.S. environmental laws, in particular the Toxic Substances Control Act ("TSCA"), which is codified at 15 U.S.C. §§ 2601-2629. (For a discussion of the emergence of EPA's involvement in MARAD's foreign transfer process, please refer to our article in the July 2010 edition of *Mainbrace*.) <http://www.blankrome.com/index.cfm?contentID=37&itemID=2270>.

TSCA prohibited the manufacture, processing, or distribution in commerce of polychlorinated biphenyls ("PCBs") one year after the law's enactment in 1977. Under EPA's regulations, the distribution in commerce, including for export, of PCBs at concentrations of 50 ppm or greater is prohibited, unless a waiver is granted. 40 C.F.R. §§ 761.20 and 761.97. Vessels manufactured before 1977 did contain PCBs in transformers, capacitors, and cables, among other places. However, vessels built in the United States after 1978 presumably do not include PCBs and, hence, are not affected by this prohibition. This distinction between older and newer vessels is largely reflected in the new MARAD exemption for vessels built in the United States after 1985 described below.

New Requirements for MARAD Approvals of Reflaggings

In a Federal Register notice published on June 27, 2011 (76 Federal Register 37,280), MARAD has stated that the approval process for the reflagging of U.S.-flag vessels over 1,000 gross tons will require shipowners to provide the following self-certification to MARAD:

Under civil and criminal penalties of law for the making or submission of false or fraudulent statements or representations (18 U.S.C. 1001 and 15 U.S.C. 2615), to the best of my knowledge and belief, I hereby certify that after the exercise of reasonable due diligence, the vessel(s) do(es) not contain polychlorinated biphenyls (PCBs) in amounts greater than or equal to 50 ppm as regulated by the Toxic Substances Control Act (15 U.S.C. 2601 et seq.).

This self-certification must be signed by a person with legal authority to act on behalf of the shipowner.

The MARAD notice also requires shipowners to provide notice to the EPA of the foreign transfer request and indicates that MARAD will provide the EPA with up to 30 days notice prior to MARAD approving any transfer request.

The new requirements described in MARAD's notice will apply to all transfer requests filed with it on or after February 14, 2011, but does not apply to transfer requests relating to vessels that were built in the United States after 1985, which are specifically exempted from the new requirements.

In addition, the MARAD notice indicates that the self-certification requirement will apply to "all future approvals under the provisions for granting advance foreign transfer approvals pursuant to 46 U.S.C. 56101(b), regardless of when the application is filed." Shipowners that receive pre-approval from MARAD under 46 U.S.C. § 56101(b) will be required to submit the self-certification described above prior to the transfer of the vessel to the foreign registry. If shipowners fail to submit the self-certification, MARAD's pre-approval will be void. In discussing the application of the self-certification to pre-approvals, the MARAD notice indicates that the self-certification text may be amended by MARAD.

Conclusions and Recommendations

The stated exemption of vessels built in the United States after 1985 from the additional requirements proposed in MARAD's notice is a welcome modification of the unwritten, foreign transfer approval process involving the EPA that has recently developed. This exemption should eliminate the delays in receiving MARAD approval of foreign transfer requests for qualifying vessels that have existed for the past several years as a result of the involvement of the EPA in the process.

Although the new self-certification requirement for vessels not built in the United States after 1985 appears to be a reasonable policy statement, the requirement for the shipowner to notify the EPA of the transfer and MARAD's policy of providing the EPA with 30 days notice prior to issuing foreign transfer approvals remain problematic. First, it is still not clear how long the overall approval process will take, so the clarification does not seem to improve the ability of shipowners to plan the time table for foreign transfers of their vessels. Second, the notice does not indicate whether the issuance of an EPA approval is a condition to the MARAD approval of the foreign transfer request. Third, there is no guidance as to which office of the EPA should be contacted by the shipowner or which office of the EPA will be contacted by MARAD—hence, the clarification does not appear to improve the coordination of the MARAD and EPA approval process.

While the statement of new policy from MARAD is a welcome change from its recent heretofore unwritten policy of referring all foreign transfers to the EPA, the new policy formalizes the process of applying TSCA to the foreign transfer of vessels—instituting a rule that did not exist before. In addition, MARAD has added a condition to foreign transfers of vessels of over 1,000 but under 3,000 gross tons that appears to be contrary to the provisions of MARAD's current regulations regarding such vessels. By issuing these new requirements as a clarification of its foreign transfer policies, MARAD has not issued any amendments to its foreign transfer regulations formally notifying interested parties of a change in those regulations.

Companies contemplating the reflagging of their U.S.-flag vessels should consider the effect the proposed changes to MARAD's approval process will have on their planned reflagging of vessels. In addition, such parties should review and comment on the MARAD notice as they deem appropriate by July 27, 2011.

For Additional Information

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