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Navigating the Maritime Regulatory Response to the COVID-19 Pandemic

Maritime stakeholders should examine key guidance documents that have been published by U.S. government agencies in response to the coronavirus pandemic. Some of these guidance documents create new opportunities for stakeholders, while others may impact operations in U.S. waters. Regardless of effect, businesses involved in maritime commerce should be aware of these updates and plan accordingly. For example, companies who depend on non-U.S. citizen crews for operations in U.S. waters should be adequately prepared to equip crew with support letters during visa interviews and transit to the United States. And, vessel owners and operators with upcoming ballast water compliance dates should examine whether installation is feasible in this climate and seek extensions to their compliance date if it is not.

NEW DEVELOPMENTS

The COVID-19 pandemic and the logistical and operational challenges it has caused have raised a host of questions within the maritime industry. A number of government agencies have sought to clarify expectations and even ease some requirements for the industry. Some of these changes, such as changes to the approach to extending the compliance date for installation of ballast water management systems, were directly intended to benefit the maritime industry. Other updates, such as the U.S. entry restrictions instituted via a Presidential Proclamation, did not target the maritime industry, but the impact was felt by companies that rely on the ability to have crewmembers travel through the United States. Below is a summary of some key guidance documents that are affecting the maritime industry during this pandemic.

ANALYSIS

Visas and Entry Restrictions

On March 14, 2020, a Presidential Proclamation entitled “Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus” ([available here](#)) was issued, which included a travel ban for several countries. This Proclamation contained an exception for “any alien traveling as a nonimmigrant pursuant to a C1, D, or C-1/D nonimmigrant visa as a crewmember or any alien otherwise traveling to the United States as air or sea crew.” However, there have been significant problems for holders of B-1 visas for offshore work, which stems from differing interpretations from U.S. Customs and Border Protection (“CBP”) and the State Department. To date, industry is

still experiencing difficulty with some embassies, which apparently are not recognizing that B-1 crew type visas are exempt from the Presidential Proclamation and should be considered mission critical, leading to reluctance on the part of some embassies around the world to issue these visas on an emergency basis. Support letters should be provided to crew seeking appointments and these crew type visas.

Once a crewmember has a visa, the crewmember needs to be admitted to the United States by CBP. On March 19, 2020, CBP issued a clarification to the Presidential Proclamation that exempted B-1 visa holders that are crew members. Specifically, CBP stated that “as it relates to the Presidential Proclamation of March 14, 2020, it is CBP’s policy determination that aliens applying for admission in the B (visitor) visa classification who are engaged in lightering, OCS activity, wind farm activity, private air/sea crew and other similar crewmember activities fall within the exceptions cited in the proclamation for crew.” Similarly, the State Department clarified on May 7, 2020 that while routine visa services are suspended worldwide, air and sea crews are considered mission-critical and may be processed during the suspension of routine visa services. Companies should ensure that crewmembers holding B-1 visas have an adequate support letter requesting appointments with U.S. embassies overseas so they can be issued appropriate crew type visas and while in transit to help ensure their ability to enter the United States.

Jones Act

The Jones Act (also known as the “Coastwise Merchandise Statute,” 46 U.S.C. § 55102 *et seq.*) remains in force despite the coronavirus pandemic. While there have been rumors of requests to the administration to waive the Jones Act due to the economic downturn and precipitous drop in oil prices, such a scenario is unlikely given both the glut of supply in the United States and lack of demand. In the meantime, vessels carrying cargo that originates in the United States must be cautious to comply with the Jones Act at all times. With the world economy in a state of flux, there are numerous ongoing contract disputes and shipment cancellations. If, for example, a contract cancellation or dispute requires that merchandise originating from the United States be returned to the United States, the return of the merchandise must be done in accordance with the Jones Act. Such operations need to be carefully planned to avoid inadvertently transporting merchandise between two points in the United States, which is transportation subject

to the Jones Act and reserved for coastwise qualified U.S. flag vessels. Importantly, penalties are generally assessed as the value of the merchandise transported in contravention of the Jones Act.

Ballast Water

The U.S. Coast Guard (“USCG”) issued Marine Safety Information Bulletin (“MSIB”) 14-20, *COVID-19: Ballast Water Management Extensions*, regarding extending the compliance date to install ballast water management system (“BWMS”) in light of the COVID-19 pandemic ([available here](#)). In a change from previous policy, the USCG will grant extensions of 12 months upon request. For these short extensions, there is no need to provide any supporting documentation, only a request and an application spreadsheet. The intent of these extensions is to help solve problems related to delays in installations and commissioning of BWMSs due to travel restrictions, shipping delays, availability of drydocking, and other similar issues. For vessels that undergo a credit drydock during this one-year extension period but cannot complete installation of a BWMS, however, the USCG’s expectation is that owners/operators will complete as much work as possible during the drydock to avoid the need for future drydock availability.

If a longer compliance date extension is needed, however, the USCG’s “normal” extension process, which has been in place for the past several years, will apply and the USCG will require sufficient documentation and a justification to grant an extension. Such scenarios could include manufacturers being unable to deliver a BWMS in time to meet a vessel’s upcoming drydock and an owner providing justification to extend the compliance date to the next drydock or out-of-service period. Such an extension can avoid an unplanned drydocking, which would have significant financial consequences. For owners/operators that seek an extension beyond 12 months, they will need to demonstrate efforts to come into compliance, which include a contract with a manufacturer, documentation of the COVID-related delay, 3D scanning, feasibility studies, and engineering drawings, among other supporting documentation.

Recommendations for Managing Suspected COVID-19 Onboard

The Centers for Disease Control and Prevention (“CDC”) created and has been frequently updating guidance for ships visiting the United States to help prevent, detect, and medically manage suspected COVID-19 cases onboard

([available here](#)). The guidance addresses monitoring of crew and passengers, hygiene, isolation of crew or passengers onboard, use of personal protective equipment, reporting, and vessel supplies and cleaning.

Hazardous Condition Reporting

The USCG issued MSIB 06-20, *Vessel Reporting Requirements for Illness or Death*, to address and clarify vessel reporting requirements related to COVID-19 ([available here](#)). The MSIB reminds industry that any illness of a person onboard during the 15 days prior to arrival at a U.S. port must be reported to both the USCG and CDC. The illness of a person onboard that may adversely affect the safety of the vessel or port is also a hazardous condition under USCG regulations, which the must immediately be reported to the nearest Captain of the Port (“COTP”). A second MSIB, 02-20 (Change 4), makes clear that any person exhibiting symptoms consistent with COVID-19 or other flu like illness, regardless of whether the symptoms meet the regulatory definition of an ill person onboard, is considered a hazardous condition that must be reported immediately ([available here](#)).

Many COTP zones are requiring an “*Attestation of Hazardous Condition*” be completed to obtain clearance for entry. Any changes in conditions onboard after the attestation is submitted must also be reported immediately.

Port and Facility Operations

MSIB 07-20 (Change 2), *COVID-19 – Port and Facility Operations*, was published by the USCG to address COVID-19 related port and facility issues ([available here](#)). Although the MSIB confirms that applicable regulations remain in force, it provides special considerations to address current operational concerns. It provides methods for the Declaration of Security and Declaration of Inspection to be completed electronically and via phone or radio to maintain safe social distancing. The guidance further reminds facilities that they are not permitted to impede the embarkation/disembarkation of crewmembers and that they must continue to provide waste reception facilities. Finally, the guidance states that should a situation arise where the

facility will not be able to comply with applicable facility security requirements, the facility should contact the COTP to request permission to temporarily deviate from the requirements.

CONCLUSIONS AND RECOMMENDATIONS

The COVID-19 pandemic has altered the regulatory landscape in the United States. Maritime companies with crews travelling to the United States for projects in U.S. waters should check their crewmembers’ visa status and provide support to ensure such personnel can enter the United States. Vessel owners and operators, as well as cargo owners, need to be mindful that the Jones Act is still very much in force in the United States and plan operations accordingly. Vessel owners, operators, and managers should review any vessels with upcoming ballast water compliance dates to determine whether an installation in 2020 is still feasible and analyze whether requesting an extension is supported by their current circumstances. Finally, USCG guidance documents should also be reviewed in advance to help ensure cargo operations go smoothly without delays.

For additional information, please contact:

Jeanne M. Grasso, Washington, D.C. Office
Partner and Co-Chair, Maritime
202.772.5927 | grasso@blankrome.com

Jonathan K. Waldron, Washington, D.C.
Partner, Maritime
202.772.5964 | waldron@blankrome.com

Dana S. Merkel, Washington, D.C. Office
Associate, Maritime
202.772.5973 | dmerkel@blankrome.com

Stefanos N. Roulakis, Washington, D.C. Office
Associate, Maritime
202.772.5958 | sroulakis@blankrome.com