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Electronic Recordkeeping – The Maritime Industry, Including in the United States, Sails Forward

NEW DEVELOPMENT

Long-awaited amendments to the International Convention for the Prevention of Pollution from Ships (“MARPOL”) entered into force on October 1, 2020, which expressly permit the use of electronic record books for certain MARPOL required logs. Although the United States reserved its decision regarding adoption of the amendments when they were approved by the International Maritime Organization (“IMO”) in May 2019, the United States ultimately accepted their adoption in accordance with the tacit acceptance procedure. Nonetheless, it is yet unclear how the amendments will be implemented in the United States or what additional security safeguards the United States may require. Bottom line, this is a significant and welcomed development.

BACKGROUND

Electronic record books have been the subject of much debate and consideration at the IMO and within the United States for a number of years. During MEPC 74 in May 2019, amendments were approved, revising MARPOL Annexes I, II, V, and VI to allow the use of electronic record books approved by the vessels’ Administration for the Oil Record Book (“ORB”), Cargo Record Book, Garbage Record Book, and Annex VI air pollution prevention recordkeeping requirements. In adopting the amendments, the IMO

stated the use of electronic record books “should be encouraged as it may have many benefits for the retention of records by companies, crew, and officers.” These amendments entered into force on October 1, 2020, although a number of flag States believed the previous MARPOL language provided them with the discretion to allow the use of electronic record books and had already approved their use on vessels for some years. Even so, the permissibility of using electronic record books to meet MARPOL requirements is now clear.

Along with the MARPOL amendments, Guidelines for the Use of Electronic Record Books under MARPOL (“Guidelines”), MEPC.312(74), were also adopted, which flag States are required to take into account in approving electronic recordkeeping systems. The Guidelines specify software system standards, such as ability to automatically record revisions and attempts to manipulate data, role-based access control, and data recovery and power source standards that should be considered. To accommodate port State inspections, the Guidelines also state that systems should be capable of printing out entries, pages, or the entire log, along with the name of the person that made each entry, a record of amendments, date and time of printing, page counts, and the name and version of the system.

Although the United States has moved toward electronic recordkeeping in a number of areas, such as with the Environmental Protection Agency's Vessel General Permit, the United States had not been supportive of transitioning MARPOL records to electronic systems. When the MARPOL amendments to allow electronic recordkeeping were approved, the United States reserved its position on their adoption and stridently spoke against electronic record books. The United States asserted that "the use of electronic record books should only be permitted after mandatory requirements for electronic record books are adopted and incorporated into the text of MARPOL...Without doing so, we would be reducing the level of care and environmental protection currently provided in MARPOL."

ANALYSIS

In the days preceding the amendments taking effect, discussion was still ongoing in the United States with respect to whether the amendments should be allowed to take effect or whether the United States would file a formal objection. We speculate that the U.S. Department of Justice ("DOJ"), which relies heavily on errors and omissions in handwritten paper record books for criminal enforcement actions, remained concerned about the prosecutorial value of and challenges associated with electronic records. Meanwhile, the U.S. Coast Guard and the U.S. Environmental Protection Agency have been moving towards electronic recordkeeping for many years, valuing the improved efficiency and ability for vessel owners and operators to maintain real-time oversight of vessel operations. It was not until the last hours prior to entry into force that the United States determined it would accept the amendments.

As the decision to accept the amendments came at such a late stage, the U.S. Coast Guard has not yet published guidance outlining the approval process for

electronic recordkeeping systems on U.S.-flag ships, nor its expectations with respect to foreign-flag vessels calling on U.S. ports. We anticipate such guidance and job aids to be forthcoming with respect to expectations during port-State control exams. Additionally, some amendments to U.S. Coast Guard regulations may also be required to remove requirements for paper records and set new requirements related to electronic recordkeeping, but this is not envisioned to occur anywhere in the near term.

CONCLUSION

The United States' acceptance of the MARPOL amendments regarding electronic recordkeeping is a significant and positive development and will allow shipowners and operators the opportunity for improved efficiency and oversight. Nonetheless, it will take some time for the U.S. Coast Guard to develop policies and guidance during this transition period. Owners and operators should thus strictly comply with their flag States' and IMO's guidance on electronic record keeping, train their crew members, and closely monitor the implementation of an electronic record keeping program. Once guidance from the U.S. Coast Guard is available, owners and operators should closely review it and incorporate such guidance into their procedures to help avoid MARPOL missteps.

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