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MAINBRACE

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INSIDE

THIS ISSUE

A NOTE FROM THE EDITOR

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As we launch into a new year, uncertainty remains the word of the day. Whatever your political leanings, it would be hard to dispute that the inauguration of the Trump administration augurs change on many fronts, from shifting and testing political alliances to evolving trade and energy policies and infrastructure development and growth. Predicting just how and when change will come, however, seems more difficult than ever.

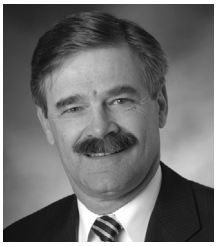
Change brings challenges, but change also presents opportunities, and the businesses that will thrive and survive any change are those that can most consistently put themselves in the right place at the right time. Luck is always a factor, but as it's often been said: those who work the hardest tend to have the most luck. Part of that hard work involves studying and understanding what is driving the changes that seem certain to alter the commercial landscape in the coming years.

Blank Rome's policy and political law practice has never been more relevant, with our attorneys well-versed in the myriad government relations and regulatory compliance matters that are at the forefront of our national and global news headlines these days. As such, we dedicate much of this issue of *Mainbrace* to attempting the impossible: predicting how the Trump administration might impact the shipping and commercial world as the new administration attempts to implement its world view. It is a daunting task, but hopefully one that will trigger thought and reflection on possible new opportunities for the coming year.

In the meantime, we wish everyone a happy, healthy, and prosperous 2017!

The Future of the Maritime Industry under a Trump Administration — Part I

BY JONATHAN K. WALDRON, MATTHEW J. THOMAS, AND JOAN M. BONDAREFF



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Those engaged in the maritime industry are extremely interested in what the Trump administration will mean for our industry. Although a challenging task, here is what we see in some key areas as we look into our "crystal ball," just as the new administration gets started.

Transportation Secretary Elaine Chao has Maritime Experience

As an initial point, we think it is very good news for the maritime industry that Elaine Chao was appointed to lead the Department of Transportation where she served as deputy secretary in the first Bush administration. The incoming secretary not only has extensive government management experience as the former secretary of labor, but she also served as the deputy maritime administrator and former chairman of the Federal Maritime Commission. Ms. Chao is married to the Majority Leader of the Senate, Mitch McConnell (R-KY), and enjoys close working relationships with many in Congress, making her an especially effective advocate for the Trump administration's transportation priorities. In addition, Ms. Chao is the daughter of a merchant mariner turned prominent ship owner, giving her a unique lifelong exposure to international shipping. And it is worth noting in this regard that her sister is deputy chairman of the Foremost Group, an international shipping and transportation company based in New York.

Infrastructure Proposal and Port Wish List

Secretary Chao has spoken of her support for the Trump infrastructure proposal while stressing the need to "expedite the process of making repairs" and "decreasing regulatory burdens" (as reported by CNN reporter J. Diamond on December 21, 2016). President Trump has announced, at various times, that he wants to spend one trillion dollars on fixing America's infrastructure. Since the American Society of Civil Engineers rated America's infrastructure as a D+ in its most recent report card, we agree that this should be a Trump administration priority. Ports and states can certainly benefit from a targeted infrastructure package. The American Association of Port Authorities has already published its wish list for a port infrastructure proposal to include more money for the Port Security Grant Program and the Diesel Emissions Reduction Act Program, increasing FAST Act investments, and making full use of the Harbor Maintenance Tax. It remains to be seen how such a package will be funded, however; President Trump's proposal is to reportedly fund it with repatriated foreign taxes. Thus, the Congressional Budget Office will have to "score" this effort to account for its effect on the overall U.S. budget. And it will be up to House Republicans to decide whether to support a stimulus package that they did not support when President Obama proposed it.

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(continued from page 2)

Importantly, the maritime industry will need to make a forceful case to secure a fair share of any infrastructure package for improvement of ports, waterways, intermodal connections, and other shipping projects. The lure of generous federal spending on "infrastructure" has numerous industry sectors—not just roadbuilders and transit, but also rail, pipeline, telecoms, and utilities—already jockeying for position with the new Congress and administration. Unfortunately, ports and the maritime sector are often shortchanged in competing with these other sectors.

FY 2017 Budget Woes

The U.S. government is currently operating under a Continuing Resolution ("CR") that runs out on April 28, 2017. This means that agencies have no leeway to initiate new programs. The theory of the extended CR is that the new administration will have time to submit its budget for the rest of FY 2017 as well as for FY 2018. This remains to be seen. Currently, we anticipate a continuing CR for the rest of FY 2017 while the FY 2018 budget is being considered.

> ► Indeed, the Coast Guard issued a request for quotes on December 22, 2016, for industry studies to identify solutions for the heavy polar icebreaker that minimize cost, schedule, production, and technology risk, which indicates that the Coast Guard expects to award multiple industry study contracts in early 2017.

Key Maritime Programs

Below are the key maritime programs administered by the Maritime Administration ("MARAD"), U.S. Coast Guard, U.S. Customs and Border Protection ("CBP"), and Bureau of Ocean Energy Management ("BOEM") that will be affected by the new Trump administration, and our preliminary prognosis on their future.

The Maritime Security Program ("MSP") – currently funded at $300M to cover 60 vessels in the MSP fleet. Although the MSP is a subsidy program to help keep a limited number of ship and other intermodal assets under the U.S. flag for national defense purposes, we anticipate that this program will continue to be supported in the budget because of its relation to national security and defense.

The Jones Act – we expect that provisions restricting domestic shipping to U.S.-owned, flagged, and built vessels will continue largely unchanged, in line with the Trump administration's focus on protecting U.S. industries. The recent emphasis on Jones Act enforcement, through the creation of a new Jones Act Division of Enforcement ("JADE") in CBP, likely will continue and could be enhanced under a Trump regime.

Cargo Preference – these programs provide critical support for U.S. shipping companies, but they also fall under the rubric of support programs for industry that we expect President Trump may not support. U.S.-flag ships depend on shipping U.S.-impelled cargo, including military and agricultural products, for their livelihood. It remains to be seen whether MARAD will exercise the strong oversight and enforcement for these programs that Congress granted it in 2014.

Title XI Loan Guarantees and Shipbuilding – President Trump has touted rebuilding our military assets and building up the Navy fleet to 350 ships from its current roster of 272. This will mean an increase in the Navy's budget of more than eight billion dollars over present budgeting. The shipyards are anxious for this work. (*See* Shipbuilders Council of America comments at http://shipbuilders.org.) An increase in the Navy's budget to support more ship construction will mean an increase in the deficit, unless offsets are found in civilian programs.

It is unclear how the Trump administration will handle subsidies. We would expect the new administration to look at this on an industry sector-by-sector basis. In this regard, it is unclear how funding for title XI loan guarantees for civilian shipbuilding will be handled, taking into account that there is some support in Congress for this loan guarantee program, but it has certainly had its vocal critics, too.

Time for New Icebreakers?

The United States lags severely behind Russia when it comes to a fleet of polar icebreakers. In fact, the United States barely has one operating polar icebreaker now. This compares to the Russian fleet of over 24 icebreakers, including those built for Arctic defense. Building new icebreakers in U.S. yards will create many high-tech jobs, and we hope that the Trump administration will support the U.S. Coast Guard's request for funding the development and construction of at least two polar icebreakers.

Indeed, the Coast Guard issued a request for quotes on December 22, 2016, for industry studies to identify solutions for the heavy polar icebreaker that minimize cost, schedule, production, and technology risk, which indicates that the Coast Guard expects to award multiple industry study contracts in early 2017. This will be followed by a request for a proposal for the detailed design and construction of heavy polar icebreakers in 2018.

More Maritime Programs

Small Shipyard Grants – although this is also a subsidy program of sorts, members of Congress from shipbuilding districts have been very supportive of this program and we anticipate that Congress will continue to fund it because, for a modest

investment, the program benefits a number of small yards and their constituents across the nation. It also provides high-skilled jobs and manufacturing for shipyard improvements, such as cranes and floating dry docks.

Marine Highway Program Grants – MARAD has tried for a number of years without much success to get this program, also called Short Sea Shipping, off the ground. The first grants for establishing a marine highway were awarded in October 2016. (*See* www.marad.dot.gov for more information.) Unless small ports and communities along the sea routes, and their members of Congress, can make a better case for continuing this program, we do not anticipate that it will continue to be funded.

Marine Environmental Grants – Congress has recently appropriated approximately three million dollars a year for MARAD to issue small grants for environmental projects, including studies

on hydrogen fuel cells, batteries, and ballast water technology, among other studies. We doubt that this program will survive President Trump's budget cuts. It will be up to the new Congress to decide whether it's worth funding.

Federal Maritime Commission – the Federal Maritime Commission ("FMC"), an independent agency that oversees competition rules for international liner shipping companies, forwarders, and terminals in the United States, has been in the headlines recently. Prolonged overcapacity led to accelerating consolidation in the container shipping industry last year, and the remaining major carriers have reordered into three main alliance groupings. While the FMC's statutory powers are relatively limited, its current role of overseeing these changes in the competitive landscape and trying to ease disruptions for concerned shippers is expected to continue. In addition, a new Trump-appointed chair could dust off the FMC's trade law powers to retaliate against foreign government policies that are "unfavorable to shipping," unfairly disadvantaging U.S. maritime companies or U.S.-foreign waterborne trade.

Offshore Renewable Energy Up in the Air

Offshore Wind and Other Renewable Energy Projects – the Obama administration gave strong support to the development of Offshore Wind ("OSW") and succeeded in awarding a total of 12 commercial leases in the Atlantic Outer Continental Shelf ("OCS"), including last month's sizeable award off the end of Long Island to Statoil for a significant amount of money. In addition, the first commercial OSW project in state waters went operational in December 2016—the Deepwater Wind project off Block Island, Rhode Island. European developers have flocked to areas of the OCS adjacent to states that support OSW in other offshore areas on the Atlantic coast of the United States. However, these projects have also been supported by the Production Tax Credit ("PTC"), which was enacted last year and continues the PTC for five years, albeit at a reduced rate. We do not think that congressional tax reformers will extinguish this popular tax credit, but this is uncertain under a Trump administration. The incoming secretaries of the interior and energy will have to decide how much support to continue to give to offshore renewable energy projects. It is perhaps a good sign that incoming Energy Secretary Rick Perry is from a state that has extensive (onshore) wind projects.

Offshore Oil and Gas – we fully expect the Trump administration to be friendlier to offshore oil and gas development than the Obama administration. In the more near-term, President Trump could take policy action to help offshore drillers turn a profit at a time when prices remain low. Subsequent action could include opening up more offshore areas.

U.S. Coast Guard and Environmental Protection Agency Enforcement

Environmental – we expect the Trump administration to generally cut-back on environmental regulation of industry. However, because most of the environmental regulation of shipping is driven by international treaties and agreements, we do not expect any significant changes with regard to our industry. With regard to federal and state environmental regulations such as ballast water and attempts to enact the Vessel Incidental Discharge Act to preempt state laws, it will remain difficult to enact such legislation in view of continued strong state interests in Congress. *(continued on page 5)*

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Trade Sanctions

Trade Sanctions – the Obama administration rolled back long-standing maritime restrictions on Cuba trade, issuing general licenses for passenger vessels, allowing cargo ships to move broader ranges of approved goods from U.S. ports to Cuba, and significantly easing the so-called "180-day rule" that blocked international vessels from the United States after trading to Cuba. With regard to Iran, the sanctions-easing nuclear deal last year led to a resurgence in global bulk and liner operators serving Iran's ports (and some breathing space for insurers and other service providers that play a role in those operations). The new administration and Congress are expected to take a more hard-line sanctions stance, however (especially with regard to Iran). As a result, compliance issues related to serving Cuba and Iran will need to be watched closely in the months ahead.

On the other hand, the administration's apparent intention to forge closer relations with Russia could lead to an easing of sanctions that have sharply curtailed U.S. companies' dealings with Russia's offshore energy sector, as well as mariners and maritime companies based in the now-embargoed Crimea region. This may set up a conflict with congressional Republicans who favor increased sanctions on Russia following its hacking of the Democratic Campaign Committee computers.

Broader Trade Policies – of broader concern to much of the shipping sector is the question of what the new president's tough rhetoric on trade will mean for the growth of waterborne trade in the years ahead. President Trump has assembled a trade team who share his skepticism for free trade agreements like the North America Free Trade Agreement ("NAFTA"), and his critical and confrontational trade views towards China, in particular. Ship owners, investors, and lenders will be watching closely to see whether a U.S. retreat from free-trade principles (*e.g.,* the expected jettisoning of the Trans Pacific Partnership and Transatlantic Trade and Investment Partnership, and adoption of import tariffs and restrictions aimed at Chinese-made goods) will dampen trade growth and prolong the painful cycle of overcapacity affecting the container, dry bulk, and other shipping sectors.

Monitoring Developments

In conclusion, we are hopeful that the Trump administration and 115th Congress will continue to support and enhance useful maritime programs, but maritime issues usually receive lower priority in a new administration. Thus, it will likely take an extended amount of time to determine the direction of the Trump administration and Congress with regard to the issues discussed above. We will continue to monitor developments and provide updates as appropriate. ◘

Ballast Water Challenges Continue: Several New Things You Should Know

BY JEANNE M. GRASSO

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On December 2, 2016, the U.S. Coast Guard ("USCG") reached a watershed moment in the implementation of its ballast water management regulations by announcing the first USCG type-approved ballast water management system ("BWMS"), a filtration/ultraviolet system manufactured by Optimarin AS, based in Norway. This USCG type-approval has been more than four years in the making, since the USCG's Final Rule for Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters went into effect on June 21, 2012 ("Final Rule"). On December 23, 2016, the USCG type-approved two more systems—one ultraviolet system and one electro-chlorination system, manufactured by Alfa Laval Tumba AB in Sweden and OceanSaver AS in Norway, respectively.

These type-approvals represent a significant step forward towards compliance with U.S. law and the USCG's Final Rule. The seascape has changed dramatically with these three type-approvals, and owners/operators must evaluate whether these

three BWMSs are appropriate for their vessels or whether other compliance options may be feasible. If none are appropriate, an owner/operator may still apply for an extension, thus extending a particular vessel's compliance date. To recap, the compliance options that are now available are: 1) install and operate a USCG type-approved BWMS; 2) use water from a U.S. public water system; 3) use an International Maritime Organization-approved and USCG-authorized Alternate Management System ("AMS")

for up to five years from the vessel's compliance date; 4) do not discharge ballast water into U.S. waters (*i.e.*, within 12 miles of the U.S. coast); or 5) discharge ballast water to an onshore facility or to another vessel for purposes of treatment.

Prior to December 2, 2016, option 1 was not an option and, principally on that basis, over 13,000 vessels received extensions to their compliance dates from the USCG. Prior to December 2, extensions were fairly easy to obtain; post December 2, it is a whole new ball game.

- To clarify the compliance issues and obligations, the USCG released the Marine Safety Information Bulletin ("MSIB") 14-16 simultaneous with the first type-approval announcement, which provides useful guidance. Like before, the USCG may still grant an extension to a vessel's compliance date if the owner/operator documents that, despite all efforts, compliance with one of the five approved ballast water management methods is not possible. No longer, however, may an owner/operator simply say a type-approved BWMS is not available, since three are now available. As such, an owner/operator requesting an extension must provide the USCG with an explicit statement supported by documentation that installation of each type-approved system is not possible on each of their vessels. Batch applications will no longer be accepted—extension requests must be for individual vessels. Such documentation may include written correspondence between the owner/operator and the BWMS manufacturers confirming that systems are not available for installation until after the vessel's compliance date; documentation that there are vessel design limitations with the type-approved systems currently available; documentation regarding safety concerns related to installing the type-approved systems currently available; and any other situation that may preclude a vessel from being fitted with a type-approved system, such as lack of shipyard availability.

> ► The seascape has changed dramatically with these three type-approvals, and owners/operators must evaluate whether these three BWMSs are appropriate for their vessels or whether other compliance options may be feasible.

The MSIB 14-16 and the USCG's "Highlights and Tips" for extensions also provide additional guidance on some key points, as follows:

- current extension letters will remain valid until the compliance date specified in the extension letter (it is important to note that extensions expiring on January 1, 2018, are not automatically extended to the vessel's next drydock after that date);
- extensions may still be granted, but only for the minimum time needed;
- the status of submitted extension requests for vessels with compliance dates on or after January 1, 2019, will be changed from "received" to "held in abeyance" and the owner/operator will be required to submit documentation, if it still wants the extension, regarding why the type-approved systems are not appropriate for that particular vessel;
- any vessel with an AMS may use that AMS for up to five years after the compliance date and the vessel's compliance date will remain the same;
- supplemental extensions must now be submitted at least one year in advance, rather than three months in advance as was the case prior to the type-approvals; and
- priority will be determined based solely on the order an extension application is received and not based on urgency.

Based on the more stringent requirements for extensions, owners/operators must be diligent in planning for their upcoming compliance obligations and evaluating whether any of the three type-approved systems would be appropriate for their vessels. It is imperative that this evaluation be done well in advance of the compliance date, as any requests for extensions, including supplemental extensions, must be submitted at least one year in advance for vessels on an individual basis. Fleet requests or group requests will be rejected.

Finally, during the extension period, it is imperative that owners/operators not become complacent. Because compliance with ballast water requirements is a port state control priority, owners/operators must ensure that accurate ballast water records are maintained onboard their respective vessels, such as the ballast water management plan, ballast water exchange forms, the vessel's current extension letter, and records verifying the date the vessel entered its last dry dock. Overall, while these type-approvals are an incremental step in the right direction, it is still a long walk to compliance. Stakeholders therefore must ensure compliance with the shifting and complex ballast water regime or risk civil or criminal penalties. ◘

Blank Rome's Maritime Practice Ranked in *U.S. News – Best Lawyers®* 2017 "Best Law Firms"

Blank Rome LLP is pleased to announce that the Firm's maritime practice was highly ranked in the national *U.S. News & World Report – Best Lawyers®* 2017 "Best Law Firms" survey, and received numerous regional top-tier rankings throughout the Firm's offices. To view Blank Rome's full 2017 rankings, please click here.

Best Lawyers BEST LAW FIRMS U.S.News & WORLD REPORT 2017

Blank Rome's industries and services recognized in this year's survey include:

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- Litigation
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- Securities Litigation
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The U.S. News & World Report – Best Lawyers® survey rankings are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer reviews from leading attorneys in their field, and a review of additional information provided by law firms as part of the formal submission process. For more information on the methodology, please visit bestlawfirms.usnews.com. ◻

Maritime Cybersecurity: Protecting Passengers and Their Private Information in the Maritime Industry

BY KATE B. BELMONT

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Cybersecurity has become a critical focus for all industries reliant on information technology ("IT"). Massive data breaches, cyber espionage, and hacking events sponsored by nation states around the globe occur with growing frequency.

Trailblazing Cybersecurity Regulations in the Financial Services Industry

In response to the obvious and undeniable necessity of cybersecurity, certain industries, such as financial services, have aggressively tackled the challenges of cybersecurity head on.

For example, in late 2016, the New York Department of Financial Services issued first-of-its-kind cybersecurity regulations for banks and insurers that focus on protecting and ensuring the security and privacy of sensitive personal information. These regulations require banks, insurers, money service businesses, and virtual currency operators to put in place cybersecurity programs, increase the monitoring of third-party vendors, and appoint chief information security officers. Additionally, risk assessments are to be performed periodically, and it is further required that a company's cybersecurity plan is to be reviewed and approved by either a senior officer or the board of directors.

These regulations are trailblazing, as no other state or federal regulatory agency has yet to adopt formal cybersecurity regulations. These rules and regulations could become the model for cybersecurity regulation across various industries nationwide.

Where the Maritime Industry Stands on Cybersecurity

Unlike the financial services industry, the maritime industry does not yet have any cybersecurity regulations, but it is moving forward to address the challenges of incorporating comprehensive cybersecurity into business operations. There were significant developments in 2016, with the introduction of the *Industry Guidelines on Cyber Security Onboard Ships,* produced in January by the Baltic and International Maritime Council ("BIMCO"), Cruise Lines International Association ("CLIA"), International Chamber of Shipping ("ICS"), INTERCARGO, and INTERTANKO ("the BIMCO working group"), followed by the release of the International Maritime Organization's *Interim Guidelines on Maritime Cyber Risk Management,* approved in June. However, the maritime industry has yet to adopt formal regulations. As such, the New York Department of Financial Services' cybersecurity regulations could serve as a model for the maritime industry.

Passenger shipping, in particular, is a sector of the maritime industry that is routinely responsible for personal, private, and/or highly sensitive information, including addresses, credit card numbers, health and medical information, and passport details. This industry must be vigilant and proactive in protecting such data from intentional and unintentional dissemination, and has taken significant steps to address the challenges of cybersecurity in order to mitigate the risk of massive losses arising out of data breaches.

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Maritime Cybersecurity: Protecting Passengers and Their Private Information in the Maritime Industry (continued from page 8)

Industry-Focused Cyber Attacks: A Cautionary Tale

In today's world, the risk of a hack and subsequent data breach is great for all industries, and the cost of such a breach is even greater. Over the past several years, many companies have suffered data breaches that resulted in losses of hundreds of millions of dollars. For example, after Target suffered a massive data breach that compromised the credit and debit card information for 40 million of its customers, Target accrued well over $252 million in expenses, including settlements paid to banks and credit card companies as well as a settlement of a federal class action lawsuit brought by customers.

> ► The maritime industry must be vigilant, and continue to develop comprehensive cybersecurity and cyber risk management programs. We recommend including cybersecurity training for crew members, upgrading IT products, maintaining system performance and integrity, and developing breach response plans.

The recent Ashley Madison data breach settlement is yet another example of the risks companies face when failing to protect customers' personal information in the cyber realm. In July 2015, Ashley Madison was the victim of criminal hackers and suffered a data breach that exposed millions of customers' addresses, credit card numbers, and sexual preferences. As a result, Ashley Madison was subject to claims that lax cybersecurity was responsible for the breach. In December 2016, it was announced that the U.S. Federal Trade Commission, as well as several state attorneys general, had reached a settlement with Ashley Madison that included sanctions against the company of $17.5 million (which was reduced to $1.6 million because of the company's inability to pay). The settlement agreement also requires Ashley Madison to bolster its cybersecurity practices and its protection of customer data.

The Ashley Madison case was one of the largest data breaches that the Federal Trade Commission has investigated, and its cooperation with overseas regulators was unprecedented. As such, this is a clear warning that state and federal authorities will continue to prioritize cybersecurity and hold companies accountable for failing to protect the privacy and personal information of consumers.

Vigilance Required

The maritime industry must be vigilant, and continue to develop comprehensive cybersecurity and cyber risk management programs. We recommend including cybersecurity training for crew members, upgrading IT products, maintaining system performance and integrity, and developing breach response plans. The fall-out from the Ashley Madison data breach serves as a cautionary tale, and the recent cybersecurity regulations issued by the New York Department of Financial Services are instructive in developing an effective cybersecurity regime for the maritime industry. ◘

Red Sky in Morning: Seventh Circuit Reverses Seaman's Manslaughter Convictions

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A December 2016 United States Court of Appeals decision highlights a recent, troubling trend of aggressive criminal prosecution of vessel owners and crew members following marine casualties involving a fatality. In a remarkable opinion, the Seventh Circuit in *United States v. Egan Marine Corp.* overturned the criminal convictions of a tug owner and the tug's master for violation of 18 U.S.C.A. § 1115, colloquially referred to as the "Seaman's Manslaughter statute." Nos. 15-2477 & 15-2485, 2016 WL 7187386 (7th Cir. Dec. 12, 2016).[1]

The prosecution stemmed from a casualty involving an explosion on board a slurry oil barge underway between Joliet and Chicago, Illinois. The casualty resulted in the death of a deckhand and a subsequent oil discharge. The government initially filed a civil suit against the tug owner, Egan Marine, seeking damages on the grounds that Egan Marine and its employees were grossly negligent and/or violated a safety regulation such that Egan Marine should not be able to limit its liability for the oil discharge pursuant to OPA 90. The crux of the government's factual allegations in the civil suit was that the master had acted in a grossly negligent manner by directing the decedent to warm up a pump using a propane torch, and that the flame had caused the explosion and the subsequent discharge of oil. *United States v. Egan Marine Corp.,* No. 08 C 3160, 2011 WL 8144393 (N. D. Ill. Oct. 13, 2011).

Following a bench trial, the district court judge found that the government had failed to prove, by a preponderance of the evidence, that the deceased crew member was using a propane torch on the cargo pump of the vessel at the time of the incident, and thus the court allowed Egan Marine to limit its liability.[2] *Id.* at *3. The government did not appeal from that adverse decision.

The Criminal Case

Two years after the civil case concluded and six days before the statute of limitations would have run, the government made the surprising decision to file criminal charges under the Seaman's Manslaughter statute against Egan Marine, together with the master of the tug, who had not been a party in the civil case. Each defendant was charged with a violation of the statute through misconduct and negligence based on the same factual allegation that was at the core of the prior civil suit (*i.e.,* the use of a propane torch on the deck of the tank barge had caused the explosion and led to the death of the crew member). Both defendants were also charged with a negligent violation of the Clean Water Act. Following a bench trial, the district court judge found both the master and Egan Marine guilty. The master was

sentenced to six months' imprisonment and a one-year supervised release, Egan Marine was placed on probation for three years, and the two were held to be jointly and severally responsible for restitution in the amount of nearly $6.75 million. Nos. 15-2477 & 15-2485, 2016 WL 7187386.

The Seaman's Manslaughter statute criminally penalizes simple negligence, which requires only proof of a breach of duty. The statute does not require the government to prove "criminal negligence," which is defined as gross negligence or "heat of passion," which require proof of a "wanton or reckless disregard for human life."[3] *United States v. O'Keefe,* 426 F.3d 274, 279 (5th Cir. 2005).

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BLANK ROME LLP

Celebrating 70 Years

Dear Friends of Blank Rome:

Did you know that in 1946, Blank Rome started as a Philadelphia-based law firm of just two attorneys, then known as the law offices of Blank & Rudenko? We recently celebrated our 70th anniversary by reflecting upon the many milestones and successes we have achieved on behalf of our clients, for the communities in which we live and work, and as an innovative firm that continues to grow and evolve.

As a friend of Blank Rome, I invite you to join us in celebrating the hard work and dedication that has transformed us from a small, regional firm to the current-day Blank Rome with numerous offices throughout the U.S. and in Shanghai and more than 620 attorneys.

To commemorate each turning point in our history, we've created an animated timeline that will guide you through the years and highlight important occasions along the way. I hope you'll spend a few moments navigating the facts, photos, interactive maps, and abbreviated history we've assembled here:

www.blankrome.com/70

It has been a true honor to lead Blank Rome through what have been some of our most transformative and successful years. With your ongoing support and confidence in us, we have stayed true to our culture, expanded our reach by practice and geography to meet our clients' needs, embraced technological advances, affected case law and legislation, and made a positive impact on our communities. Thank you for being a part of our history, and we look forward to what the future brings.

Sincerely,

Alan J. Hoffman, Chairman and Managing Partner
215.569.5505 | Hoffman@BlankRome.com

Blank Rome Announces 2017 Promotions

Blank Rome LLP is pleased to announce that the following attorneys have been elected partner and elevated to of counsel, effective January 1, 2017. The newly elected partners are Mayling C. Blanco, Dayna C. Finkelstein, Andrew J. Haas, Alex E. Hassid, Nikhil A. Heble, Michael A. Iannucci, Rustin I. Paul, Christopher J. Petersen, James J. Quinlan, and Jonathan M. Robbin. The new of counsel are Marquel S. Jordan, Jason I. Miller, Kevin M. O'Malley, and Adrien C. Pickard.

"We congratulate this exceptional group of attorneys on their new roles at Blank Rome," said Alan J. Hoffman, Chairman and Managing Partner. "We approach our elevation decisions as a long-term investment in the Firm and are confident that this group of talented attorneys will continue to provide exceptional service to our clients and further strengthen our business."

ASSOCIATES ELECTED PARTNER

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White Collar and Defense and Investigations
NEW YORK

Dayna C. Finkelstein
Real Estate
PHILADELPHIA

Andrew J. Haas
Tax, Benefits, and Private Client
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Alex E. Hassid
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Energy, Environment, and Mass Torts
PHILADELPHIA

Jonathan M. Robbin
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Red Sky in Morning: Seventh Circuit Reverses Seaman's Manslaughter Convictions (continued from page 10)

On appeal, both Egan Marine and the master argued that their criminal prosecution should have been barred based on the doctrine of issue preclusion or collateral estoppel, asserting that the government should not be allowed to file criminal charges based on allegations that the master had ordered the deceased crew member to use a propane torch on the cargo pump after the government had failed to prove that key fact in the prior civil action. The Court of Appeals agreed with the defendants' position that the criminal charges were precluded based on the factual findings and the judgment in the prior civil action. This was true even for the master who had not been named in the civil case because the claim in the civil action was that the owner was vicariously liable for the master's conduct, and when a court rejects a claim of vicarious liability based on a worker's conduct, the worker is as much entitled to the benefit of that judgment as is the employer. 2016 WL 7187386 at *3 (citing cases). The Court of Appeals reversed the convictions and remanded the case for entry of judgments of acquittal.

► The criminal prosecution in *Egan Marine* is the latest example of the aggressive pursuit of felony criminal charges in the wake of marine casualties involving fatalities, even though the filing of such charges pushes beyond the boundaries of prudent statutory interpretation or the reasonable exercise of prosecutorial discretion.

The criminal prosecution in *Egan Marine* is the latest example of the aggressive pursuit of felony criminal charges in the wake of marine casualties involving fatalities, even though the filing of such charges pushes beyond the boundaries of prudent statutory interpretation or the reasonable exercise of prosecutorial discretion.

The Resurgence of the Seaman's Manslaughter Statute

This disturbing tendency was also evident in the charging decisions made by federal prosecutors following the *Deepwater Horizon* disaster in 2010, in which 11 rig employees died. In that case, the prosecutors hedged their bets and filed 22 felony charges against the two mobile offshore drilling unit "well site leaders," 11 counts based on alleged violations of the Seaman's Manslaughter statute, and 11 counts based on alleged violations of the involuntary manslaughter statute, which requires proof of gross negligence. In that case, the district court judge granted the defendants' pre-trial motion to dismiss the 11 Seaman's Manslaughter counts, based on the finding that the well site leaders were not within the class of persons to whom the statute applied because they were not responsible for marine functions on board the vessel. *See United States v. Kaluza,* Criminal Action No. 12-265, 2013 WL 6490341, at *18-28 (E.D. La. 2013) *aff'd* 780 F. 3d 647 (5th Cir. 2015). Following the dismissal of those 11 counts and the affirmance of that decision on appeal, the prosecutors made the decision voluntarily to dismiss the 11 remaining involuntary manslaughter counts, which would have required proof of gross negligence, notwithstanding the fact that there had been no intervening change in the underlying facts of the case.

In a similar case, following an explosion caused by a welding accident aboard an offshore oil platform that resulted in the deaths of three workers, federal prosecutors filed involuntary manslaughter charges against Black Elk Energy Offshore Operations, LLC, the platform owner and operator, and a construction company that was performing maintenance work on the platform as an independent contractor. However, the government also filed felony criminal charges against the owner/operator, the two independent contractors, and three employees of independent contractors for violations of the safety regulations promulgated under the Outer Continental Shelf Land Act ("OCSLA"). The independent contractor defendants challenged this novel application of the OCSLA regulations, and the district court granted their pre-trial motion to dismiss the OCSLA counts against the independent contractor defendants based on the determination that the OCSLA regulations do not apply to independent contractors. *United States v. Black Elk Energy Offshore Operations,* LLC, 5-cr-197, 2016 WL 1458925 (E.D. La. April 14, 2016). The court found that because the defendant contractors had not been designated as agents of the owner and operator of the platform, they could not be charged with criminal liability under OCSLA. *Id.* at *4.[4]

Conclusion

Even though the district courts in *Kaluza* and *Black Elk Energy* and the Court of Appeals in *Egan Marine* ultimately entered orders dismissing felony criminal charges that had been improvidently filed against corporate and individual defendants, that fact is a cold comfort to the defendants who were forced to endure the ordeal and expense of a federal criminal prosecution. While the courts to date have been unwilling to expand the application of the Seaman's Manslaughter statute or other maritime regulations imposing criminal liability such as OCSLA, the fact remains that vessel owners, charterers, and crew members

are at real risk of facing federal criminal charges when a fatality occurs as a result of a maritime casualty. This risk should inform the actions of owners, charterers, and shipboard officers from the moment a casualty involving a fatality occurs—from *minute* one, not just day one. Every response plan for a casualty involving a fatality should include clear guidance to shoreside and shipboard personnel with respect to a range of action points, including:

- the management of the scene and all related communications systems in a manner designed to preserve information;
- the immediate engagement of experienced criminal defense counsel to conduct a thorough post-casualty investigation and to serve as the primary point of contact with all government investigators;
- the determination of whether any individual employees or ship's officers may be considered subjects of the criminal investigation; and
- the careful advisement of all relevant employees, officers, and crew members regarding their rights and responsibilities in connection with the ensuing investigation.

In sum, all segments of the maritime industry should be mindful of the significant criminal enforcement risks that exist following a maritime casualty involving a fatality. Federal prosecutors have demonstrated a clear willingness to push the prosecutorial envelope in such cases. Sailors should take warning.

1. The government has been granted until January 26, 2017, to file a petition for rehearing.
2. The court did impose $100,000 in civil penalties for the discharge, as provided by 33 U.S.C. §1321.
3. For a person employed on a vessel, the statute penalizes "misconduct, negligence, or inattention to his duties," whereas for an owner or charterer, the standard penalizes a "knowing and willful" act. Both have been equated to simple negligence, and not the "gross negligence" or "heat of passion" standard for what is typically referred to as criminal negligence. *See O'Keefe,* 426 F.3d at 279.
4. The government has filed an interlocutory appeal of this decision. *United States v. Black Elk Energy Offshore, et al.* No. 16-30561 (5th Cir. May 17, 2016).

Blank Rome Earns Perfect Score in 2017 Corporate Equality Index

Firm Receives 100% on Human Rights Campaign Foundation's 5th Annual Scorecard on LGBT Workplace Equality

Blank Rome LLP is pleased to announce that it has received a perfect score of 100 percent on the 2017 Corporate Equality Index ("CEI"), a national benchmarking survey and report on corporate policies and practices related to LGBT workplace equality, administered by the Human Rights Campaign ("HRC") Foundation. With this score, Blank Rome has been designated for the second year in a row as a "Best Place to Work for LGBT Equality" by the HRC, and joins the ranks of 517 major U.S. businesses that also earned top marks this year.

"We are honored to once again be recognized by the HRC for our ongoing commitment to fostering an inclusive and diverse work environment," said Alan J. Hoffman, Chairman and Managing Partner at Blank Rome. "For more than 70 years, Blank Rome has been proud to support all of our colleagues by promoting workplace equality each and every day, and we look forward to continuing to advance our efforts through our formal Diversity Committee and affinity groups."

The 2017 CEI rated 1,043 businesses in the report, which evaluates LGBT-related policies and practices, including non-discrimination workplace protections, domestic partner benefits, transgender-inclusive health care benefits, competency programs, and public engagement with the LGBT community. For more information on the 2017 Corporate Equality Index, or to download a free copy of the report, visit www.hrc.org/cei.

The Human Rights Campaign Foundation is the educational arm of America's largest civil rights organization working to achieve equality for lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people. The HRC envisions a world where LGBTQ people are embraced as full members of society at home, at work, and in every community.

The Dual Threats of "Wrongful Arrest" and "Counter-Security" in U.S. Maritime Actions: Practical Considerations for the Foreign Litigant

BY JEREMY A. HERSCHAFT AND LAUREN B. WILGUS

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Restraining maritime property *ex parte* within the district of a United States federal court represents a challenging and "high stakes" area of admiralty practice for the American maritime litigator. Given the significance of this unique type of litigation and its inevitable impact on maritime commerce, two preliminary questions are almost always asked by our foreign colleagues at the outset of conflict. First, once an arrest or attachment occurs, can the defendant respond with a wrongful arrest or attachment claim against the initiating plaintiff? Second, what is "counter-security," and is it available in the United States to the defendant whose property has just been attached or seized? Both of these important questions will be addressed below.

The Opening Salvo: U.S. Maritime Attachment ("Rule B") and Arrest ("Rule C") Actions

One of the principal advantages of U.S. admiralty jurisdiction is the opportunity to utilize the distinctive U.S. maritime procedural devices of the "Rule B" attachment and "Rule C" arrest procedures. Rules B and C are the principal ways to restrain maritime property in the United States and, in turn, later serve as the basis for a potential wrongful arrest/attachment claim and counter-security demand. A brief explanation of each procedure is outlined below.

Rule B codifies the U.S. maritime **attachment** practice and allows the plaintiff to assert jurisdiction over property of a defendant who "cannot be found within the district" of a particular federal court by attaching her property that *is* coincidentally located in the district. Such property can be tangible (often a ship or cargo) or intangible (perhaps funds in a bank account). There are generally three reasons to attach property via Rule B: 1) to acquire jurisdiction in respect of claims against an absent defendant; 2) to obtain security for a claim; and 3) to seize property in connection with the enforcement of a foreign judgment. Ultimately, any Rule B judgment is limited to the value of the attached property, unless the defendant appears in the action.

In order to secure a writ of maritime attachment under Rule B, four prerequisites must be met: (1) the plaintiff must have a maritime *in personam*[1] claim against the defendant; (2) the defendant cannot be found within the district in which the action is commenced; (3) property belonging to the defendant is present or will soon be present in the district; and (4) there must be no statutory or general maritime law prohibition to the attachment. If satisfied, the plaintiff will file a verified *ex parte* complaint with the court to attach the property at issue. In the event the court grants the *ex parte* attachment, the plaintiff will be required at the outset to post funds on deposit with the U.S. Marshal to cover their costs in effectuating the attachment and maintaining the property thereafter.[2]

Rule C codifies the U.S. maritime **arrest** practice and can only be used by a plaintiff who has a maritime lien on a defendant's maritime property. There are many types of claims that give rise to maritime liens under U.S. law, and thus many causes of action that trigger the availability of the Rule C *in rem* arrest action. Like Rule B, the property must be within the district of the federal court at the time of the Rule C arrest.

The process for asserting the Rule C action is very similar to the Rule B description outlined above—the plaintiff will submit a verified *ex parte* complaint to the court in the district where the property is located, and will otherwise be required to post funds to cover the U.S. Marshal's costs for arresting the property and maintaining custody of same thereafter. At the conclusion of the trial, the seized property may ultimately be sold at auction to satisfy the lien.

Returning Fire: The Defendant's Potential Claim for "Wrongful" Arrest/Attachment

A claim for wrongful arrest or attachment was succinctly outlined almost 80 years ago in the landmark Fifth Circuit Court of Appeals decision of *Frontera Fruit Co., v. Dowling.*[3] In that case, the plaintiff acted on the advice of counsel and arrested a vessel based upon an alleged maritime lien. The suit was dismissed for various reasons, and the party later arrested the vessel for a second time (again upon the advice of counsel) where it was subsequently determined that the plaintiff did not have a maritime lien on the ship. The defendant vessel interests sued the arresting plaintiff for wrongful arrest.

Upon review of the case, the Fifth Circuit held "the gravamen of the right to recover damages for wrongful seizure or detention of vessels is the **bad faith, malice,** or **gross negligence** of

the offending party."[4] The court said the rationale for awarding damages in such cases was "analogous to those in cases of **malicious prosecution.**" Indeed, the *Frontera* court recognized that even though the plaintiff counsel's advice had proven to be erroneous, the arrest action itself was not asserted against the defendant in bad faith and that "the advice of competent counsel, honestly sought and acted upon in good faith is alone a **complete defense** to an action for malicious prosecution."[5] Thus, the bar for asserting a successful wrongful arrest claim was set very high by the *Frontera* court—a defendant's commercial annoyance with the arrest or sincere frustration *ex post facto* that its asset has been seized will not rise to the level of "wrongful" without corollary evidence of **bad faith, malice,** or **gross negligence** on the part of the arresting party.[6] In sum, a plaintiff does not wrongfully restrain maritime property by asserting a *bona fide* claim "to protect its interest."[7]

Numerous courts, including courts in the Second and Fifth Circuits, have interpreted and applied the *Frontera* rationale, and the current state of U.S. maritime law provides for a claim of wrongful arrest/attachment in only limited instances upon the heightened showing of bad faith, malice, or gross negligence, with corresponding damages, which may include a claim for attorneys' fees.[8] The burden of proof in asserting a wrongful arrest claim lies with the party alleging the wrongful arrest.[9] If proven, a wrongful arrest or attachment will be vacated by the court and provable damages may be awarded to the defendant whose property has been wrongfully restrained. Courts will specifically infer bad faith where there is a total lack of probable cause for a plaintiff's arrest, although the "probable cause" standard itself has not been defined with perfect clarity.[10] As such, legitimate disputes between the parties about the underlying maritime claim will probably not be enough to pass over the heightened "wrongful" arrest threshold.

The Parting Shot: "Counter-Security" in the U.S. Maritime Litigation

The word "counter-security" has different meanings throughout the maritime legal world, which may cause confusion to foreign counsel and clients when appreciating the *U.S.* meaning of that term in the context of a maritime arrest/attachment. In some foreign jurisdictions, counter-security is understood to mean a deposit of funds that the plaintiff must provide to the court *before* the arrest occurs to cover potential liabilities for a wrongful arrest. However, U.S. courts do **not** require the arresting plaintiff to post pre-attachment or arrest funds to cover against a potential future wrongful arrest/attachment claim. All that is required of the U.S. plaintiff at the start of the Rule B or Rule C action is to provide the U.S. Marshal with funds to cover the administrative costs of the arrest or attachment until such time as a substitute custodian can be appointed or the matter is resolved.

Where the defendant has a **separate, but related** cause of action against the arresting plaintiff, for example, where a defendant claims that the *plaintiff herself* breached a maritime contract that forms the underlying basis of the dispute and arrest, the defendant may assert a "counterclaim" against the plaintiff. Under Supplemental Admiralty Rule E(7), if a defendant asserts a counterclaim against a plaintiff arising out of the same "transaction or occurrence" as the original claim, the plaintiff **must** give "counter-security" for the damages demanded in the defendant's counterclaim unless the court, for cause shown, directs otherwise. Courts, however, have generally held that a claim for wrongful arrest does not arise out of the same "transaction or occurrence" as the original claim and, therefore, countersecurity is not required. In sum, this procedural illustration demonstrates that the U.S. version of counter-security is unique; it speaks to the defendant's separate counterclaim against the plaintiff and is posted by the plaintiff (if at all) *after* the arrest/attachment occurs in response to the defendant's counterclaim.

Conclusion

Whether you act on behalf of the sword or stand in defense via the shield, it is important to appreciate how maritime wrongful arrest and attachment actions and "counter-security" are specifically addressed in U.S. maritime courts. A working knowledge of both concepts will assist the client and foreign lawyer alike when they find themselves (and their or their adversary's valuable maritime property) in troubled American waters.

1. *In personam* refers to courts' power to adjudicate matters directed against a party, as distinguished from *in rem* proceedings over disputed property.
2. The initial amount that is required to cover the U.S. Marshal's costs for a Rule B action in the Southern District of Texas is $10,000, which must be replenished in equal increments depending on the length of the action as funds are drawn down by the Marshal—all unused funds are eventually returned to the arresting party. The $10,000 deposit is also required for a Rule C arrest, discussed below.
   In the Southern District of New York, the U.S. Marshal requires an initial deposit of $2,000 for Rule B attachments and Rule C arrests. This initial fee covers the U.S. Marshal's fee for the day and the fee for liability insurance, which must be replenished as the funds are drawn down. In addition, if the arresting/attaching party does not appoint a substitute custodian, the U.S. Marshal requires an additional deposit of $6,000 per week.
3. 91 F. 2d 293, 297 (5th Cir. 1937); s*ee Result Shipping Co. v. Ferruzzi Trading USA, Inc.,* 56 F.3d 394, 402 n.5 (2d Cir. 1995) (citing *Frontera Fruit Co., v. Dowling* with approval); *see also Sea Trade Mar. Corp. v. Coutsodontis,* 2011 U.S. Dist. LEXIS 80668 (S.D.N.Y. July 25, 2011).]
4. Emphasis supplied.
5. *Id.; see Sea Trade Mar. Corp.,* 2011 U.S. Dist. LEXIS 80668 at *29 citing *Markowski v. S.E.C.,* 34 F.3d 99, 105 (2d Cir. 1994)("To invoke an advice of counsel defense in the Second Circuit, a party must 'show that he made a complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith.'")
6. *See, e.g., Parsons, Inc. v. Wales Shipping Co.,* 1986 U.S. Dist. LEXIS 20710, 1986 WL 10282, at *3 (S.D.N.Y. Sept. 9, 1986) (dismissing a counterclaim for wrongful attachment due to counterclaimant's failure to demonstrate bad faith).
7. *Cardinal Shipping Corp., v. M/S Seisho Maru,* 744 F. 2d 461, 475 (5th Cir. 1984); *see also Yachts for All Seasons, Inc. v. La Morte,* 1988 U.S. Dist. LEXIS 15399 (E.D.N.Y. Dec. 30, 1988) ("In order to collect attorneys' fees, the party must prove that the seizing party acted in bad faith, with malice or with a wanton disregard." citing Cardinal Shipping Corp., 744 F.2d 461 at 474).
8. *Cardinal Shipping Corp.,* 744 F.2d at 474; *see Allied Mar., Inc. v. Rice Corp.,* 2004 U.S. Dist. LEXIS 20353 (S.D.N.Y. 2004) (court denied request for attorney's fees because there has been no showing that plaintiff acted in "bad faith").
9. *Id.; see Result Shipping Co. v. Ferruzzi Trading USA, Inc.,* 56 F.3d 394, 402 n.5 (2d Cir. 1995).
10. *See El Paso Prod. Gov., Inc. v. Smith,* 2009 WL 2990494 (E.D. La. Apr. 30, 2009).

Critical GAO Bid Protest Deadlines and Timeline

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Almost daily, clients call our office seeking to protest the award of a federal government contract. Unfortunately, sometimes these calls are too late. While contracts can be protested at the agency level, the Court of Federal Claims, and the Government Accountability Office ("GAO"), GAO protests are the most common. The deadlines by which a protester must take certain actions to file a timely protest are confusing. Below we address some of the trickier and/or mandatory deadlines a potential protester must meet to file a timely protest, and we provide a useful sample timeline for protesters to follow during this critical process.

WHAT: Pre-Award Protests
WHEN TO FILE: On or before the date for submission of proposals

Under the GAO's rules, to be timely, a protester must file a pre-award protest prior to the deadline for submission of proposals. Pre-award protests challenge the terms or "ground rules" of the competition as stated in the solicitation, such as, for example, challenging the agency to clarify or remove confusing, ambiguous, or unduly restrictive requirements. You must file a pre-award protest on or before the date and time set by an agency for receipt of proposals. You cannot wait to see whether you win the award and then file a protest challenging the rules of the competition, because by then it will be too late. Also, under the GAO's standing requirements, even if you file a pre-award protest, you must also timely submit a proposal to the agency. Failure to do so means you do not have standing to protest.

WHAT: Post-Award Protests—Think Three (3), Five (5), Ten (10)
WHEN TO FILE: There are two considerations for filing a timely post-award protest:

1. **Is the protest timely filed so that the GAO will consider the protest?**
2. **Is the protest timely filed at the GAO so that the automatic stay of performance under the Competition in Contracting Act ("CICA") will apply to preserve the status quo during the pendency of the protest?**

To be timely filed at the GAO, a disappointed offeror must file its protest within ten (10) calendar days after "the basis for the protest is known or should have been known, whichever is earlier" **OR** within five (5) calendar days of a debriefing that is requested and required, whichever is later. Three (3) days after award, certain procurements (FAR Part 15) require the agency to provide a debriefing. If a debriefing is required, you must submit a written request for a debrief within three (3) calendar days of the date of notification of award. In addition, you must accept the first reasonable date offered by the agency for the debrief. One consideration to keep in mind is that if you timely request a required debriefing, you may not file a protest until you receive that debriefing, irrespective of the foregoing dates.

Filing a timely post-award protest can be tricky, so follow these considerations to avoid having your protest dismissed on timeliness grounds:

To be timely filed at the GAO for purposes of getting the automatic stay, a disappointed offeror needs to file its protest within 10 calendar days of award or within five calendar days of a timely requested and required debriefing. You must accept the first-offered debriefing date, otherwise you will lose the five-calendar-day allowance, and thus your clock will start to run from the default 10-day period. You should also note that the five-day period only applies to required debriefings. This is important, because not all procurements entitle a disappointed offeror to a debriefing. For example, a Federal Supply Schedule ("FSS") procurement under FAR Part 8 does not entitle a disappointed bidder to a debriefing. As such, a voluntary, as opposed to a required, debrief will not impact the timely filing requirement for purposes of obtaining an automatic stay.

Finally, regardless of whether you abide by the 10-day or five-day period for filing to get an automatic stay, it is very important that you file as early as possible on the 10th or fifth day (whichever applies to your case), because the stay is triggered only when the GAO physically calls the agency to notify them that a protest has been filed. While under the law, the GAO has one business day to make this call (and, therefore, if you are very cautious, you should file on the ninth or fourth day), as a matter of practice, the GAO makes the phone call on the same day your protest is filed. But, you should file in the morning or before noon, to give the GAO as much time as possible to make this critical call. The foregoing deadlines are critical to filing a timely GAO protest to have the GAO hear the merits of the case, and to obtain an automatic stay.

Other Important Considerations

Lastly, the following important considerations should be kept in mind:

- In terms of counting the days, if a deadline calendar day falls on a weekend or federal holiday, the date rolls over to the next business day that the GAO is open.

- Task order protests (under ID/IQ contracts) carry their own set of rules. At present, only the GAO can hear ID/IQ task order protests. The Court of Federal Claims has no jurisdiction over task order protests. For the moment, the GAO has jurisdiction to hear Department of Defense ("DOD") task orders valued in excess of $10 million, or protests of such task orders under $10 million that assert that the agency has changed the scope of the order as it was originally solicited. The GAO does not presently have jurisdiction over civilian task orders, regardless of dollar amount or scope. This will be changing soon, however. The 2017 NDAA, if signed into law, will raise the jurisdictional bar for DOD task orders from $10 million to over $25 million, but will restore and keep the GAO's jurisdiction over civilian orders at over $10 million.

Sample Timeline

Set forth below are all of the deadlines of which a protester should be aware, from the date a protest is filed to the date the GAO issues a decision. Protesters should seek legal advice before making a determination on whether to protest as an unsuccessful bidder, and for guidance throughout the process. ◻ —

DAYS AFTER POST-AWARD PROTEST	REQUIREMENTS
0	▸ An interested party files a timely protest at the GAO. The protest should contain a request for a protective order, relevant documents, and a hearing, if warranted.
1	▸ Within one day, the protester must file a redacted copy of the protest suitable for public filing. ▸ The protester must also forward a copy of the protest to the contracting officer within one day of filing the protest. ▸ Also within one day, the GAO must notify the agency of the protest and a stay will be issued, so long as the GAO's notification occurs within the time period prescribed by the Competition in Contracting Act ("CICA").
2 to 90	▸ The awardee may intervene in the protest. ▸ Agencies and intervenors may file motions to dismiss. Many motions to dismiss are based on issues of procedure, including timeliness.
25	▸ Date of the agency's "Five Day Letter." ▸ The Five Day Letter sets forth the agency's determinations on whether requested documents exist, and which documents the agency intends to produce.
27	▸ The protester may file objections to the agency's Five Day Letter within two days of receiving it (usually, Day 27).
30	▸ The agency's report is due to the protester and any intervenors. The report includes the contracting officer's Statement of Facts, the agency's Memorandum of Law, and all responsive documents.
40	▸ The protester's and intervenor's comments on the agency report are due. ▸ The protester's comments focus on rebutting agency arguments and supporting its own arguments, with additional information from the record. ▸ Supplemental protest grounds based on the agency report are also due within 10 days of the date on which the protester learns of (or should have learned of) the new bases of protest (typically, Day 40).
45 to 99	▸ The agency provides supplemental reports in response to supplemental protest grounds. ▸ If the GAO determines that a hearing is required, the hearing preparations and hearing will occur during this period.
100	▸ The GAO issues a decision on the protest on or before the 100th day. ▸ To the extent practicable, the GAO will consolidate the original protest and any supplemental protests within the 100-day timeframe.

The Future of the Maritime Industry under a Trump Administration – Part II

BY JONATHAN K. WALDRON, JOAN M. BONDAREFF, SEAN T. PRIBYL, AND KATE B. BELMONT

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In offering his views on foreign policy and national security, President Trump's "Put America First" policy proposes to make the interests of the American workforce and national security his top priorities. In a step generally considered to be in direct support of that policy, President Trump has nominated retired Marine Corps General John Kelly to head the Department of Homeland Security ("DHS"). As a career Marine and former head of the United States Southern Command ("SOUTHCOM"), Kelly is tapped to lead an agency primarily responsible for managing U.S. borders, protection of critical infrastructure, enforcing immigration laws, preventing terrorism, and overseeing cybersecurity, among other issues. Kelly appears to be up for the challenge, possessing unique experience in maritime and national security issues, both of which may bode well for the DHS and Coast Guard, as well as U.S. domestic maritime interests.

> ► Importantly, the CSIS Report recognizes "that the best approach is to strengthen the DHS." The CSIS Report also notes the private sector generally prefers a civilian agency when dealing with cyber issues.

Arctic

As a DHS component agency, the Coast Guard will certainly continue to play a direct role in national and border security, missions deemed priorities by the Trump administration. One area of significance could be the changing Arctic environment, which presents several security challenges that makes it a national priority.

The Coast Guard is responsible for preserving and protecting American sovereign rights and resources in the polar regions. The National Security Strategy of May 2010 outlined U.S. Arctic interests, stating in part that the United States, as an Arctic nation, must meet national security needs in the Arctic region. This was followed by the Coast Guard Arctic Strategy of May 2013, again reiterating the national security interests in the Arctic.

Ensuring the integrity of sovereign borders and security of U.S. Arctic waters, however, requires adequate Coast Guard and national assets, and polar icebreakers enable the United States to maintain defense readiness and support national security activities. Unfortunately, shortfalls in Coast Guard polar capabilities have been evident for years, including the need for additional icebreakers, an issue necessarily linked to the evolution of U.S. Arctic strategy. In response, the Coast Guard signaled a FY17 budget priority that includes meeting future challenges in the polar regions by accelerating the current acquisition of a heavy icebreaker and plan for additional icebreakers.

The Coast Guard Commandant, Admiral Zukunft, has recently reaffirmed the stance that the Coast Guard is the main sea service for protecting the Arctic, in essence since the Navy has historically devolved Arctic security responsibilities to the Coast Guard. Accordingly, Admiral Zukunft believes the Coast Guard needs a new icebreaker not merely for breaking ice, but as "an instrument to enforce sovereignty." Notably, Admiral Zukunft also cited an independent High Latitude analysis that suggested the Coast Guard needs not just one icebreaker, but three heavy and three medium icebreakers. The commandant highlighted that without a new icebreaker, the United States will merely be observers in the Arctic, as opposed to active and effective participants in shaping regional safety and security. President Trump has also indicated that he wants to revive shipbuilding in the United States, albeit for naval shipbuilding for a "350-ship" Navy. The FY17 National Defense Authorization Act ("NDAA") already authorized funding for nine new ships for the Navy—including a $490 million plus-up for shipbuilding programs above the president's budget request, but unfortunately President Trump has not expressed specific intentions on Coast Guard shipbuilding.

Secretary Kelly clearly brings a robust national security background, although his national security views on polar operations are yet-to-be defined. Under the new administration, building a polar icebreaker in domestic shipyards would of course directly support three of President Trump's top priorities—U.S. job creation, shipbuilding, and national security—and may very well continue to be Coast Guard priorities in a FY18 budget.

South China Sea

Additionally, under President Trump's administration and a Secretary Kelly-led DHS, the Coast Guard may find itself even further from U.S. shores as the Coast Guard has expressed an interest in expanding its role in patrolling the waters of the South China Sea. The area has been host to a longstanding maritime dispute between China and several Asian countries (*see* "Foul Weather and Heavy Seas May Follow South China Sea Ruling" in Blank Rome's September 2016 edition of Mainbrace), and President Trump has already signaled an ability to ratchet up tensions between the United States and Beijing on South China Sea topics. While the U.S. Navy has historically served as the visible extension of U.S. interests in the regions, the Coast Guard has proposed it could play that role in a less threatening way, with Admiral Zukunft even suggesting the establishment of a permanent Coast Guard presence in the South China Sea. It remains to be seen to what extent the White House or DHS will ask the Coast Guard to stretch its assets and manpower in support of national security in Asia while still serving its many other statutory missions, such as icebreaking and border security. The Coast Guard has signaled their priorities, which appear to align, at least in part, with President Trump's national security vision, and with Secretary Kelly at the helm, the Coast Guard may very well be poised for increased budgeting and DHS allocations to support these budget requests. The question remains which national security priority will prevail first—the southern border, polar regions, or South China Sea.

Cybersecurity

The DHS is also tasked with protecting the 16 critical infrastructure sectors that provide the essential services that support the U.S. economy and national security—sectors such as transportation (*i.e.*, maritime) and energy. These sectors are deemed vital to the United States, the incapacitation or destruction of which would have a debilitating effect on the economy and national security. Critical infrastructure is vulnerable to a range of threats, including cyber attacks. In fact, the Center for Strategic and International Studies Cyber Policy Task Force recently issued a report, A Cybersecurity Agenda for the 45th President ("CSIS Report"), citing critical infrastructure as the area of greatest risk from a cyber attack, with the transportation and energy sectors being the most likely targets for such an attack.

Significantly, President Trump has publicly expressed a controversial intention to ask the Defense Department ("DOD") and the chairman of the Joint Chiefs of Staff "to develop a comprehensive plan to protect America's vital infrastructure from cyberattacks and all other form of attacks"—on day one. Such a transfer of cyber responsibilities would, in essence, shift the federal government's private sector cybersecurity responsibilities to the military, placing the military in charge of protecting the private sector from cyber risk, a contentious issue in both government and civilian circles.

As stated in the CSIS Report, the military's responsibilities include "defending the military's networks and systems, providing offensive cyber support to regional military commands, and defending the nation from a cyber-attack of significant consequences." Notably, the divergent DOD and DHS cyber responsibilities and authorities do not easily overlap, and would run counter to established roles and initiatives under the Cybersecurity Act of 2015, Presidential Policy Directive 41, and Cybersecurity Information Sharing Act of 2015. That said, Secretary Kelly may face immediate pressure to prioritize immigration and border enforcement over such issues as cybersecurity. Accordingly, an argument could be made that the DOD and/or the National Security Agency should assume DHS cyber activities.

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If President Trump tasks the DOD with assuming cybersecurity roles traditionally reserved to the DHS, it remains to be seen what role the Coast Guard, as maritime industry regulator but member of CYBERCOM and CGCYBER, will play in a military DOD-led vice civilian DHS-led cybersecurity approach. More importantly, such a move to militarize cyber defenses may not be well-received in the civilian maritime sector. If President Trump strips the DHS of their cybersecurity authority in favor of the DOD, the military could potentially upend current maritime industry cybersecurity practices. The maritime industry currently enjoys limited formal requirements for reporting, compliance, and information sharing, and is essentially self-regulated.

In reality, removing such well-entrenched responsibilities from the DHS in favor of the DOD may prove a daunting task, both politically and practically. House Homeland Security Chairman Michael McCaul (R-TX) has recently warned that reallocating cyber defense authorities from the DHS to the military would be a "grave mistake." He has noted that removing DHS authorities would conflict with the CSIS Report conclusions that favor reinforcing DHS capabilities over transferring DHS cybersecurity responsibilities to the DOD, particularly for critical infrastructure, calling such a decision "unwise."

Importantly, the CSIS Report recognizes "that the best approach is to strengthen the DHS." The CSIS Report also notes the private sector generally prefers a civilian agency when dealing with cyber issues.

The Coast Guard and maritime industry have a vested interest in whether there is federal regulation of cybersecurity. Cyber risks to the maritime sector have received significant attention over the past several years both domestically and internationally. Consequently, the Coast Guard has placed emerging cyber risks as a strategic and budgetary priority for 2017, in furtherance of its cyber strategy, although the Coast Guard has stopped short of promulgating formal cybersecurity regulations.

Nonetheless, as previously reported in our June 2016 maritime advisory, "Updated Guidance on the Cybersecurity Information Sharing Act of 2015," even absent formal regulations, the maritime industry has made a significant commitment to addressing cyber risk management by introducing *Industry Guidelines on Cyber Security Onboard Ships,* issued by the BIMCO working group in January 2016, and has welcomed the *IMO Interim Guidelines on Maritime Cyber Risk Management,* approved in June 2016. However, the maritime industry has been reluctant to support formal cybersecurity regulations, and both the Coast Guard and IMO have been hesitant to issue such regulations.

While President Trump has indicated that cybersecurity will be a significant focus in the early days of the new administration, a transition of power from the DHS to the DOD would have significant impact throughout the transportation and energy sectors, particularly for the maritime industry. Congressman McCaul has signaled intentions to introduce legislation to reorganize the DHS during President Trump's first year in office, legislation that would likely be included into the House National Defense Authorization Act for FY17. Accordingly, cybersecurity initiatives should be monitored during the first months of the new administration given the potential impact on the private sector, with significant implications for the maritime industry.

Maritime Security Program

The Maritime Security program ("MSP"), administered by the Maritime Administration ("MARAD"), may continue to be a vital element to national security in support of the U.S. military's strategic sealift and global response capabilities. The MSP maintains a core fleet of U.S.-flag privately owned ships, logistics management services, and infrastructure and terminals facilities. This fleet supports DOD requirements during war and national emergencies, and without the MSP fleet, the United States would not have assured access to U.S.-flag commercial vessels to support DOD operations. The MSP also retains a labor base of skilled American mariners who are available to crew the U.S. government-owned strategic sealift and U.S. commercial fleets. With an U.S.-flag fleet composed of approximately 80 ships engaged in foreign trade, the U.S. merchant marine is dwarfed by, for example, the Chinese deep sea fleet of close to 4,000 vessels. At a time when President Trump has publicly touted challenges to China in foreign policy and trade, the MSP and focus on U.S. shipping interests may very well become more important than ever.

President Trump's pick of Elaine Chao as Transportation Secretary adds a Cabinet member with extensive maritime experience and a background supporting the MSP. Secretary Chao will have direct oversight of MARAD, and has a decades-long positive relationship with U.S. maritime labor organizations, who have enthusiastically endorsed her. Fortunately for President Trump, he also inherits a viable MSP on which to build upon as he looks to enhance American seapower and U.S. jobs. The FY17 NDAA Conference agreement significantly increased the authorization for the MSP above the level in the president's budget request, bringing the total FY17 authorization for the program to $300 million. The FY17 NDAA increases the annual stipend for the 60 vessels participating in the MSP fleet from $3.5 million per vessel to $5 million per vessel.

Overall, national security remains at the forefront of the Trump administration's focus. What is missing is a clear mandate that outlines the defined roles of those agencies with a maritime nexus. The first President Trump budget will give us a better sense of what his priorities are. Maritime stakeholders should closely monitor his first 100 days of office as policies take shape and views on maritime security issues become clearer.

Risk-Management Tools for Maritime Companies

COMPLIANCE REVIEW PROGRAM

Blank Rome Maritime has developed a flexible, fixed-fee Compliance Review Program to help maritime companies mitigate the escalating risks in the maritime regulatory environment. The program provides concrete, practical guidance tailored to your operations to strengthen your regulatory compliance systems and minimize the risk of your company becoming an enforcement statistic. **To learn how the Compliance Review Program can help your company, please visit www.blankrome.com/compliancereviewprogram.**

MARITIME CYBERSECURITY REVIEW PROGRAM

Blank Rome provides a comprehensive solution for protecting your company's property and reputation from the unprecedented cybersecurity challenges present in today's global digital economy. Our multidisciplinary team of leading cybersecurity and data privacy professionals advises clients on the potential consequences of cybersecurity threats and how to implement comprehensive measures for mitigating cyber risks, prepare customized strategy and action plans, and provide ongoing support and maintenance to promote cybersecurity awareness. Blank Rome's maritime cybersecurity team has the capability to address cybersecurity issues associated with both land-based systems and systems onboard ships, including the implementation of the BIMCO Guidelines on Cyber Security Onboard Ships. **To learn how the Maritime Cybersecurity Review Program can help your company, please visit www.blankrome.com/cybersecurity or contact Kate B. Belmont (KBelmont@BlankRome.com, 212.885.5075).**

TRADE SANCTIONS AND EXPORT COMPLIANCE REVIEW PROGRAM

Blank Rome's Trade Sanctions and Export Compliance Review Program ensures that companies in the maritime, transportation, offshore, and commodities fields do not fall afoul of U.S. trade law requirements. U.S. requirements for trading with Iran, Cuba, Russia, Syria, and other hotspots change rapidly, and U.S. limits on banking and financial services, and restrictions on exports of U.S. goods, software, and technology, impact our shipping and energy clients daily. Our team will review and update our clients' internal policies and procedures for complying with these rules on a fixed-fee basis. When needed, our trade team brings extensive experience in compliance audits and planning, investigations and enforcement matters, and government relations, tailored to provide practical and businesslike solutions for shipping, trading, and energy clients worldwide. **To learn how the Trade Sanctions and Export Compliance Review Program can help your company, please visit www.blankromemaritime.com or contact Matthew J. Thomas (MThomas@BlankRome.com, 202.772.5971).**

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An incident may occur at any time. Blank Rome's **Maritime Emergency Response Team ("MERT")** will be there wherever and whenever you need us. In the event of an incident, please contact any member of our team.

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