U.S. COAST GUARD SIGNALS INTENT TO REQUIRE SAFETY MANAGEMENT SYSTEMS FOR DOMESTIC PASSENGER VESSELS

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Maritime Alert

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More than 6000 U.S. flag commercial vessels carry more than 200 million passengers annually on domestic voyages in the United States. These include ferries, dinner-cruise vessels, sightseeing and excursion vessels, dive boats, and overnight cruise vessels, among many others, operating along the coastlines and internal waters throughout the United States. By way of comparison, prior to the coronavirus pandemic, approximately 14 million passengers annually embarked on large cruise ships that call on ports throughout North America.

Under existing law, the overwhelming majority of these U.S. flag commercial passenger vessels are not subject to the International Safety Management Code ("ISM Code")[1] because they do not carry passengers on international voyages. As a result, such vessels are not required to implement a Safety Management System ("SMS"). Domestic passenger vessels are subject to comprehensive design, construction, and licensing regulations, but current regulations do not specifically require vessel owners and operators to develop and implement a formal, written SMS. It appears that is about to change.

In the wake of a series of major marine casualties involving loss of life, and various safety recommendations from the National Transportation Safety Board ("NTSB"), the U.S. Coast Guard is now poised to propose new regulations for domestic passenger vessels. It recently issued a public notice that it intends to issue an Advanced Notice of Proposed Rulemaking in which it will seek input from the public regarding the scope, content, benefits, and costs of new regulations requiring domestic passenger vessel owners and operators to develop and implement an SMS. This notice may be accessed here.

What the new regulations will look like, and what this means for the domestic passenger vessel industry, is presently unclear, but this does raise several questions:

- Will all domestic passenger vessels be required to satisfy the ISM Code and current regulations in 33 CFR Part 96, and if so, is that operationally and financially feasible?
- Will alternatives be available to accommodate smaller-scale operators, beyond what is provided for under current regulations for passenger vessels engaged in international voyages?
- Will external and internal audits be required, and who will perform them?
- Will the U.S. Coast Guard delegate its authority to Recognized Organizations (i.e., approved classification societies) to perform statutory inspections on its behalf?
- What will this cost the domestic passenger vessel industry?

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While the answers to these and other questions remain unclear, prior history with the ISM Code and similar safety management regulations for towing vessels makes several things clear:

Industry Should be Engaged: It will be critically important for the passenger vessel industry to be fully engaged in any legislative and rulemaking process. The Coast Guard will provide a period to comment on its Advanced Notice of Proposed Rulemaking, once published. Engagement by the passenger vessel industry now and in the future is crucial.

Consider Developing an SMS Now: Owners and operators should consider developing an SMS now. The Coast Guard and the Passenger Vessel Association have long encouraged, but not required, domestic passenger vessel owners and operators to voluntarily adopt an SMS, and have provided "templates" in this regard.[2] Vessel owners and operators who prepare now and voluntarily develop an SMS that is specifically tailored for the scale and scope of their operations will likely find a much easier transition to the new regulations.

More "Paperwork" Is Not Necessarily Better: History has proven that "more paperwork" is not necessarily better. The implementation of an SMS undoubtedly has the potential to create an additional administrative burden. However, an SMS does not have to be and should not be overly burdensome. A high-quality SMS enhances safety, and the efficiency and quality of operations, at the same time. Generally, the ISM Code and related regulations tend to afford great flexibility for vessel owners and operators to define their SMS according to their operations. We expect and hope the Coast Guard will follow this approach. In our experience, vessel owners and operators can lose sight of this regulatory flexibility and adopt burdensome administrative requirements that are not legally required and do not necessarily advance vessel safety or efficiency.

Understand the Legal Risks: Owners and operators should understand the legal risks in establishing an SMS, and design the SMS with those risks in mind. The ISM Code and similar requirements for safety management systems aim to mitigate risk by requiring vessel owners and operators to establish written, auditable operational, and safety procedures to address those risks. Quite often, this translates into shoreside personnel providing significant oversight and control of day-to-day vessel operations. In the event of a marine accident involving injury, loss of life, property damage, or pollution, excessive oversight or control of vessel operations by shoreside managers under an SMS could significantly increase legal risks under applicable law. Moreover, in cases where the SMS is cumbersome and establishes excessive recordkeeping or reporting requirements that do not advance vessel safety, failure to satisfy those requirements often serves as a "gotcha" in any litigation or investigation. The SMS should be designed with these considerations in mind, to ensure effective safety and operational procedures on the one hand, yet also mitigate the legal risks to the vessel owner and operator in the event of a significant casualty.

Conduct a Detailed Risk Assessment: Before developing and implementing an SMS, vessel operators should conduct a detailed risk assessment of operations. This will help ensure that the most significant safety and compliance risks are adequately addressed in the SMS. This concept is codified in ISM Code 1.2.2.2, but the utility of a risk assessment can often be overlooked in developing an efficient and effective SMS. Simply adopting an "off the shelf" SMS has the potential to result in operational and safety inefficiencies and one that does not adequately address risks unique to a particular operation.

Safety Culture: Last, but certainly not least, perhaps the single greatest factor in determining the effectiveness of any SMS is the "safety culture" of the company. Establishing and maintaining that level of corporate commitment

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from top to bottom is hard work. While a strong safety culture will not completely eliminate the risk of a casualty, it is undeniably essential to implementing an efficient and effective SMS.

Our firm's global maritime practice group provides clients comprehensive legal, transactional, legislative, and regulatory advice. We routinely represent clients in marine casualty investigations, before the U.S. Coast Guard and NTSB, and related civil and criminal litigation. We also advise vessel owners and operators on all aspects of compliance with and enforcement of U.S. and international maritime regulations. Should you need further information regarding the above, please feel free to contact the authors.

FOOTNOTES

[1]*See* International Safety of Life at Sea Convention ("SOLAS"), Chapter IX; 46 U.S.C. §§ 3201-3205 and 33 CFR Part 96. The ISM Code requires vessel owners and operators to implement a Safety Management System, which is a comprehensive system of safety and operational procedures intended to prevent injury or loss of life, to protect the marine environment, and to mitigate the risk of vessel and property damage. The ISM Code also requires systematic internal and external audits to help ensure compliance with applicable safety standards and regulations.

[2]One “template” that the U.S. Coast Guard has endorsed, as meeting the objectives and functional requirements of the ISM Code and 33 CFR Part 96, is the Passenger Vessel Association's Flagship Program.

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