

2020 GLOBAL LOW SULFUR FUEL

Date: 5 December 2018

U.S. Maritime Alert

By: Barry M. Hartman, Michael J. Lignos

In our July 9, 2018, alert titled "*Do You Clearly See What's Coming: Having 20/20 Vision For the New 2020 Global Low Sulfur Requirements for the Shipping Industry*," [1] we reported on the International Maritime Organization Working Group meeting scheduled to take place in July 2018, in London among Flag and Port State representatives, along with other industry stakeholders and observers. The purpose of the meeting was, among other things, to consider and develop recommended measures that promote consistent enforcement and effective implementation of the low-sulfur fuel oil (0.50%) requirements that will come into effect globally on January 1, 2020. In August, we reported on the results of that meeting in our alert entitled "*20/20 Vision for the 2020 Global Low Sulfur Requirement for the Shipping Industry: Do We See Things Any More Clearly After the July 2018 IMO Intersessional Working Group Meeting?*" [2] In that alert, we noted that many of the key issues relating to implementation and enforcement would be discussed—and ideally resolved—at the Seventy-Third Session of the Marine Environment Protection Committee ("MEPC 73"), which took place between October 22 and 26, 2018.

Now, MEPC 73 has come and gone, and compliance and enforcement are just over a year away. And yet, many of the key questions that were posed at the meeting remain unanswered—most notably, how effective implementation and consistent enforcement will occur. Some of the issues most relevant to ship owners and operators, including for example the development of guidance on ship implementation planning for 2020 and best practices for fuel oil suppliers, were kicked down the road again until yet another intersessional meeting scheduled for February 2019, or even until the next MEPC meeting (i.e., MEPC 74) in May 2019. What is clear is that vessel owners and operators need to begin developing their Ship Implementation Plans, as that is the only tool that is likely to help them achieve compliance or, in a worst-case scenario, to protect them from potential liability if they are unable to find a sufficient and suitable supply of compliant fuel where and when they need it. This alert focuses on those issues and considerations that are most relevant to vessel owners and operators.

What is clear?

Perhaps the most important, practical impact of MEPC 73 is that the Committee rejected efforts to delay the carriage ban—that is, the IMO rule that prohibits vessels from carrying noncompliant fuel after March 1, 2020. [3] That effective date has been upheld and reaffirmed. This means that, starting on March 1, vessels subject to the regulation may not carry noncompliant fuel for the purposes of burning such fuel for propulsion as a contingency in case they are unable to find compliant fuel to burn at a later time. The only potential way a vessel may be permitted to bunker and burn noncompliant fuel without facing penalties is if the vessel operator is able to show that it took good-faith efforts to secure compliant fuel, and files a timely Fuel Oil Nonavailability Report ("FONAR") with the relevant authority. Showing such good-faith effort means having a plan in place *before* January 1, 2020, that addresses the vessel's procedures for obtaining compliant fuel. That plan, which is referred to as the "ship implementation plan" ("SIP") (see MEPC 73/5, Appendices 1–3), was considered at the MEPC

Subcommittee on Pollution Prevention and Response ("PPR") Intersessional meeting in July, and was presented to MEPC 73, but it was again put off for further discussion at the next PPR meeting (chaired by the United States) in February 2019.

Owners and operators must consider the following issues relevant to implementation and enforcement:

1. What should an effective Ship Implementation Plan address?

- a. Do fuel systems need to be modified, and is there a schedule for doing so, as well as a schedule for meetings with manufacturers and classification societies?
- b. Is tank cleaning necessary, and is it scheduled?
- c. How will different fuels be allocated to bunkers?
- d. Fuel purchasing:
 - 1. Are sources identified at relevant ports?
 - 2. When will this be confirmed?
 - 3. Is fuel purchasing sufficiently tied to voyage plans?
 - 4. What are the contingencies if compliant fuel cannot be obtained?
 - 5. How is responsibility for finding compliant fuel allocated among parties (i.e., to charterers or subcharterers)?
 - 6. How will noncompliant fuel be de-bunkered and managed?
- e. Fuel changeover:
 - 7. How, when, and where will tank cleaning be performed?
 - 8. Is there a plan for changeover?
 - 9. What is the timing?
 - 10. Is the crew properly trained?
- f. Who is responsible for FONARs?
- g. Have appropriate evaluations and preparation been made depending on whether distillates or residuals will be used?

2. Will the PPR provide more guidance as to Ship Implementation Plans and will there be consensus among Port and Flag States regarding their content for purposes of enforcement?

- a. How important will SIPs be to how Port or Flag States evaluate good-faith efforts to obtain compliant

fuel (and to carrying noncompliant fuel after March 1, 2020)?

b. Must a vessel plan to de-bunker noncompliant fuel obtained when the operator in good faith could not identify compliant fuel sources, and what happens if the operator obtains noncompliant fuel and then compliant fuel becomes available?

Vessel owners and operators should have qualified, technical personnel to address these questions, and once a plan is developed, should consider what kind of outside review would be appropriate, since this may be the owner's/operator's only way to demonstrate good-faith efforts to obtain compliant fuel and avoid enforcement exposure if those efforts are unsuccessful or if circumstances change after the vessel has bunkered noncompliant fuel.

Notes:

[1] <http://www.klgates.com/do-you-clearly-see-whats-coming-07-06-2018/>

[2] <http://www.klgates.com/2020-vision-for-the-2020-global-low-sulfur-requirement-for-the-shipping-industry-08-31-2018/>

[3] MEPC 73 also rejected a proposal for an experience-building phase after January 1, 2020, which would allow the gathering of data on the availability and performance of compliant fuel. Though widely and incorrectly reported as an effort to "delay" implementation, the proposal and its sponsors, expressly provided that it was not intended to delay the effective date in any respect.

[4] <https://www.bimco.org/en/news/priority-news/20181113-bimco-adopts-2020-bunker-clauses.aspx>

KEY CONTACTS



BARRY M. HARTMAN
PARTNER

WASHINGTON DC
+1.202.778.9338
BARRY.HARTMAN@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.