

# IMO 2020 IS HERE: TOP 10 CONSIDERATIONS FOR FOREIGN FLAG VESSELS CALLING ON U.S. PORTS AND U.S. FLAG VESSELS OPERATING WORLDWIDE

Date: 31 January 2020

## U.S. Maritime Alert

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For years we have been discussing the new global cap on sulphur emissions that was implemented by the International Maritime Organization (“IMO”) and accepted by all signatory countries. [1] The IMO Global Sulphur Cap, which took effect on January 1, 2020, may be among the greatest regulatory challenges to face the maritime industry in recent memory. The ban on the carriage of non-compliant fuel (“Carriage Ban”), which takes effect on March 1, 2020, will likely have even more significant enforcement ramifications. In December 2019, the U.S. Coast Guard (“Coast Guard”) held a public meeting to further discuss how the new IMO 2020 Sulphur Cap would be consistently implemented and enforced. On January 13, 2020, the Coast Guard issued updated MARPOL Annex VI enforcement guidance.

Many questions persist, and only time will tell how some of these uncertainties will actually play out. There are a number of key issues owners, operators, and charterers should focus on to maximize their compliance efforts and minimize risk. These issues are discussed in further detail in our white paper, which may be accessed here. The top 10 issues are summarized below:

1. ECA Sulphur Limit Remains Unchanged: The sulphur limit applicable to vessels operating in the North American and Caribbean Emissions Control Areas (“ECA”) remains unchanged (0.10% m/m).
2. Means of Compliance With Global Sulphur Cap: For vessels operating outside the ECA, there are generally two ways to comply: (a) ensure fuel oil used on board ships does not exceed 0.50% m/m; or (b) ensure the vessel is equipped with an equivalent means of compliance, approved by the flag Administration (e.g. Exhaust Gas Cleaning Systems “EGCS” — i.e. “scrubbers”).
3. Submit Fuel Oil Non-Availability Reports (“FONAR”) to Coast Guard (not the EPA): As of June 30, 2019, FONARs are to be submitted to the Coast Guard (no longer to the EPA). Submission of a FONAR is an acknowledgement of non-compliance and is not an exemption or waiver. The filing of a FONAR will be taken into account by the Coast Guard when making its enforcement decisions. Failure to file a FONAR when required will likely have enforcement consequences.
4. Vessels Fitted With EGCS or Other Equivalency – Flag Administration Approvals: Vessels fitted with EGCS or similar equivalent means of compliance must ensure its flag Administration's approval of the equivalency is available on the public area of IMO's Global Integrated Shipping Information System. Failure to do so may result in unnecessary delay, or other complications with the Coast Guard.

5. Update Vessel's Safety Management System ("SMS") & Adopt a Ship Implementation Plan ("SIP"): Recent Coast Guard enforcement guidance is clear that vessel owners and operators are expected to update their SMS to address MARPOL Annex VI compliance, which will be a factor taken into account in making their enforcement decisions. An SIP, consistent with applicable IMO guidelines and fully integrated into the vessel's SMS, should be instituted, outlining how the ship has prepared to comply with the new requirements, and how it will handle fuel non availability issues.
6. Equipment Casualties or Failures – MARPOL Annex VI Safety Exemption & Reporting: For all equipment failures and casualties, vessels should follow applicable Coast Guard (and flag state) reporting requirements for marine casualties and hazardous conditions. For equipment failures or casualties involving EGCS systems, consult reporting standards in IMO Circular MEPC.1/Circ.883.
7. Carriage Ban Takes Effect March 1, 2020: As of March 1, 2020, MARPOL Annex VI prohibits the carriage of fuel oil in excess of 0.50 % m/m, unless the ship has been fitted with an approved EGCS system. This Carriage Ban applies to bunker fuel oil to be consumed onboard, but does not apply to non-compliant fuel oil carried as cargo. The Coast Guard has made clear that vessels may be required to offload the non-compliant fuel prior to leaving port or at the next port, and may be subject to other enforcement actions, as provided for under U.S. law and applicable IMO guidelines. See MEPC.1/Circ.881, Guidance for Port State Control on Contingency Measures for Addressing Non-Compliant Fuel Oil. All steps should be taken to offload non-compliant fuel by March 1, 2020. Note: for non-compliant fuel previously purchased in the United States, coastwise trade rules under the Jones Act may further restrict a vessel's ability to offload the fuel in the United States, causing additional delay and cost.
8. Inspections by Coast Guard & Fuel Oil Sampling: Vessel examinations are conducted in the U.S. in accordance with established IMO and Coast Guard regulations and policies. Be familiar with them. Vessel owners and operators are reminded to purchase fuel from reputable suppliers; to follow the best practices guidance in IMO Circular MEPC.1/Cir. 875; to ensure that they have appropriate charter party clauses in place allocating clear responsibility in regard compliant fuel; and to fully document all fuel oil quality disputes. Special rules may apply to samples tested with marginal exceedances.
9. Be Transparent and Maintain Accurate Records: This cannot be emphasized enough. The overwhelming majority of MARPOL enforcement actions in the United States involve records that were inaccurately maintained, either intentionally or negligently, and usually involve crewmembers not being truthful with the Coast Guard. Maintaining accurate and complete records, making required reports, and being truthful with Coast Guard inspectors is essential.
10. Enforcement: The Coast Guard has a range of enforcement options (beyond control actions) it may pursue under U.S. law to address non-compliance with MARPOL Annex VI. These include a Letter of Warning; Notice of Violation (up to \$10,000); civil penalties (up to \$74,552 per violation, per day); referral to EPA for civil penalty enforcement; or the Coast Guard may refer the case to the U.S. Department of Justice for criminal prosecution against owners, operators, and individuals (penalties up to \$500K per violation, plus potential jail time for individuals). The Coast Guard's decision to enforce a case, and which enforcement option it chooses, is determined by the facts and circumstances of the alleged non-compliance, including the factors discussed in paragraph 9 above. All of the above enforcement options to one degree or another, will also impact the Coast Guard's future decision-making under its vessel targeting program.

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## NOTE

[1] <http://www.klgates.com/international-maritime-organization-imo-approves-authority-for-us-to-impose-stringent-new-air-emission-standards-for-large-oceangoing-vessels-04-06-2010/>

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

<http://www.klgates.com/2020-global-low-sulfur-fuel-12-05-2018/>

[http://www.klgates.com/files/Publication/87dd0cd7-93fe-4669-bdfa-f8d9fb6f42a7/Presentation/PublicationAttachment/7191ea3d-0055-49cf-b406-fd869ab1699c/Ship\\_Implementation\\_Plans.pdf](http://www.klgates.com/files/Publication/87dd0cd7-93fe-4669-bdfa-f8d9fb6f42a7/Presentation/PublicationAttachment/7191ea3d-0055-49cf-b406-fd869ab1699c/Ship_Implementation_Plans.pdf)

<http://www.klgates.com/industry-predictions-for-2020-from-the-maritime-professionals-at-kl-gates-01-23-2020/>

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