# MAINBRACE

APRIL 2019 • NO. 1

BLANKROME maritime

## CONTENTS


1. Note from the Editor
2. Heads or Tails? Making Sense of Crypto-Tokens Issued by Emerging Blockchain Companies
5. Blank Rome Maritime *Safe Passage* Blog
6. The Vision Is Clearer—Offshore Wind Farms Are Appearing on the U.S. Horizon
10. Severe Weather Emergency Recovery Team
12. Recent Blank Rome Maritime Rankings
13. The Maritime Industry: The DOJ FCPA Unit's Next Port of Call
15. Ballast Water Management—Latest Developments
16. The Maritime Outlook for the 116th Congress
19. *Perspectives: Celebrating Diversity and Inclusion in Practice* (March 2019)
20. Recent Maritime Elevations, Appointments, and Additions
21. Surviving the VIDA Loca
23. MARPOL Compliance Alert: D.C. Court of Appeals Shuts the Door on APPS Relief
24. Noteworthy Maritime Publications
26. Court-to-Court Communication and Letters of Request in Cross-Border Litigation and Asset Tracing
29. About Blank Rome
30. Risk Management Tools for Maritime Companies
31. Blank Rome's Maritime Industry Team

# Note from the Editor

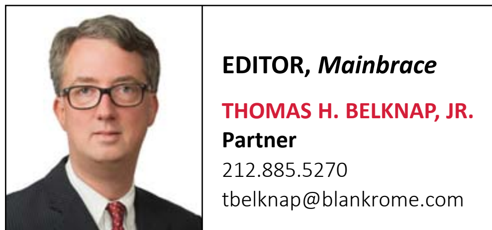
**BY THOMAS H. BELKNAP, JR.**

**Spring seems to be upon us, at last.** Perhaps we have no right to complain about the weather, but that has never stopped us! It seems like our New York, Washington, D.C., and Philadelphia offices spend the winter months coveting our Houston office's weather, and our Houston office in turn spends the summer being envious of their fellow East Coast colleagues. Spring, perhaps, is that narrow window of time when everyone has something to be happy about. Spring is also a particularly exciting time for our New York office this year, as we get ready to relocate from our current Chrysler Building address to the iconic 1271 Avenue of the Americas building near Rockefeller Center. We hope that you will all come visit us once we've settled in!

In the meantime, we have a great new issue of *Mainbrace* for your reference and enjoyment. As always, we cover a lot of ground in this edition, and I think the range of timely topics aptly mirrors the breadth of Blank Rome's Maritime practice. Jeremy Herschaft and Michelle Gitlitz offer a terrific article that moves past the basics of "what is blockchain" and discusses several new and practical applications that we are starting to see emerge in the maritime industry, and Joan Bondareff provides timely updates and developments on offshore wind farms in the United States as well as collaborates with Genevieve Cowan to offer a helpful summary of the opening weeks of the 116th Congress. We have an excellent article from our white collar defense attorneys, Carlos Ortiz and Mayling Blanco, with the assistance of our own maritime attorney Alexandra Clark, about the application of the Foreign Corrupt Practices Act in shipping, as well as an article from our bankruptcy & restructuring colleagues, Rick Antonoff and Evan Zucker, concerning court-to-court communications in cross-border insolvency cases. Additionally, Jeanne Grasso provides updates on recently announced ballast water regulations from the U.S. Coast Guard as well as critical provisions and obligations under the Vessel Incidental Discharge Act of 2018. Last, but certainly not least, Greg Linsin and Dana Merkel discuss critical MARPOL compliance matters, notably involving APPS violations, and we provide some noteworthy news and recognitions that honor the significant work of our maritime attorneys and practice.

We hope that you enjoy this issue. We also remind you that the articles published in past issues of *Mainbrace* do not just disappear. We have created an online archive for these articles called *Safe Passage* that can be found at safepassageblankrome.com. Past articles are searchable by topic and by author, providing a helpful reference tool for your research.

As always, we welcome your feedback as well as any suggestions that you may have for articles for our next issue. Happy spring!



**EDITOR, *Mainbrace***

**THOMAS H. BELKNAP, JR.**
**Partner**
212.885.5270
tbelknap@blankrome.com

# Heads or Tails? Making Sense of Crypto-Tokens Issued by Emerging Blockchain Companies

**BY JEREMY A. HERSCHAFT AND MICHELLE ANN GITLITZ**

JEREMY A. HERSCHAFT
PARTNER

MICHELLE ANN GITLITZ
PARTNER

**Over the past 18 months,** members of the international maritime community have expressed a keen interest in exploring how 21st century blockchain technology can modernize the ancient world of seaborne commerce. Blockchain has in turn spawned many novel business ideas from various start-up companies throughout the marine industry. These new business ventures all generally seek to employ blockchain to streamline the logistics process and to provide greater security and transparency to the commercial endeavor. At the same time, these companies are setting a new course through uncharted waters with respect to how they 1) generate startup capital, and 2) propose to conduct day-to-day business in the electronic, digital asset (or crypto) realm.

This article explores these dual business components using two types of digital assets: the "security token" to attract capital, and the "utility token" to carry out business interactions. Both are well suited for the maritime area, though maritime blockchain startup companies should be mindful of the regulatory requirements for implementing tokens into their business in the United States.

**Basic Principles**

The business of shipping has modernized dramatically over the last quarter-century, but in many respects the parties to a shipping transaction remain "siloed" in their positions along the commercial chain. For example, entities involved in an international shipping transaction (such as the seller, carrier, broker, NVOCC, receiver, cargo/marine insurers, and associated intermediary banking institutions) remain compartmentalized; they rarely communicate simultaneously. Each entity has its own system of records and methods of verification concerning their specific portion of the deal (the proverbial private accounting "ledger"). To complicate things further, the parties—who each have *different* ledgers that are not necessarily in sync or collectively accurate—all look to centralized institutions (such as banks) that are trusted to separately issue letters of credit and/or verify that funds are in place so that the deal can go forward. There are many aspects of this structure that create the potential for inaccuracies and error, as well as the ever-present risk of a fraudulent party wreaking havoc along some portion of the commercial chain.

Blockchain technology seeks to upend this current segmented format by using a powerful electronic database—which can necessarily be tailored to the industry, contracting parties, and deal at issue—to decentralize the entire process and provide all parties with access to a single "master electronic ledger" for each transaction. Cryptography used in the blockchain technology secures the data on the master ledger, making it difficult for any one party to manipulate the contents of the ledger without approval from all other parties, or for third parties not involved in the transaction to access the ledger. As new information becomes available concerning the transaction (*e.g.,* vessel progress, the exchange of bills of lading, the movement of currency, etc.), new electronic entries (or "blocks") are added to the ledger, which are linked to prior blocks in the chain of transactions that all parties can observe in real time. Blockchain also allows a very high level of privacy with respect to the parties to the transaction, and it can be tailored to only involve the key participants of the deal (thus reducing the risk of third-party scams). In this fashion, the blockchain ledger has the potential to unify all key parties to the transaction and dramatically streamline the way in which maritime business is conducted.

Cryptography used in the blockchain technology secures the data on the master ledger, making it difficult for any one party to manipulate the contents of the ledger without approval from all other parties, or for third parties not involved in the transaction to access the ledger.

*(continued on page 3)*

## Recent Maritime Blockchain Innovations, Security Token Offerings, and Utility Tokens

Blockchain has already received considerable attention from many larger, traditional maritime commercial concerns. For example, Maersk has already partnered with IBM to create a far-reaching blockchain program for its liner trade. Of course, many new maritime startup companies also hope to be a part of the maritime blockchain revolution. Most of these new companies similarly focus their business models on the basic components of the marine supply chain, such as the movement of containers, the exchange of bills of lading, the tracking of cargoes and vessels and carrier availability, and the tracing of marine bunker fuels, etc. However, in contrast to long-established maritime concerns with ample funds to support a "blockchain initiative," these emerging maritime blockchain companies often do not have significant amounts of startup capital beyond a tight circle of private investors. Regardless, the *way* in which these new companies propose to generate their startup capital is novel: they seek to create a company-specific cryptocurrency "coin" to drive their initial funding. This is a radical concept, as it seeks to shift startup capital away from established *fiat* currencies and traditional stock certificates to an electronic security token model where interests in a company are issued in compliance with state and federal securities laws—but in a digital format.

In an "Initial Public Offering" ("IPO"), a private maritime startup company seeking capital might "go public" by offering shares of its newly issued stock to the market and/or institutional investors, and these share offerings would be regulated by the U.S. Securities and Exchange Commission ("SEC"), which among other things is responsible for protecting investors and regulating securities. Alternatively, a private startup company might seek capital from a smaller group of investors who meet certain asset and/or income requirements ("accredited investors") and issue securities using a specific exemption to the federal securities laws for private transactions (which is beyond the scope of this article). In the latter case, the securities offering is not reviewed or approved by the SEC like an IPO.

In contrast to these traditional fundraising formats, many blockchain startup companies (including some maritime startup companies) are now electronically manufacturing their own company-unique "tokens" and then offering these tokens to the public. These offerings are sometimes referred to as "Initial Coin Offerings" ("ICOs"). The token-manufacturing process can be accomplished online with the assistance of a few savvy computer programmers using blockchain technology. In general, once the tokens are created, the startup company will offer a set number of company-specific tokens to the market in exchange for startup capital. However, in the United States, when a company raises capital through a token offering in this fashion, those tokens are generally considered securities. Thus, the nomenclature for this type of offering is now commonly known as a "Security Token Offering" ("STO"). As discussed below, STOs must comply with U.S. state and federal securities laws. Putting aside these regulatory issues for the moment, it is easy to appreciate that the streamlined nature of the STO (versus the more traditional and laborious methods of an IPO or private equity crowdsource) may be appealing to the 21st century maritime marketplace.

Companies are now issuing STOs relying on an aforementioned exemption to the federal securities law, or they have attempted to issue STOs pursuant to a more streamlined public offering using the SEC's "Regulation A+." Regulation A+ offerings require SEC review and approval. A number of proposed Regulation A+ security token offerings have been filed with the SEC, but to our knowledge, none have been approved as of yet. These offerings are to fund their startup capital and the sale of the token is structured as an ownership stake in the startup, similar to traditional equity securities.

Maritime blockchain companies can also electronically issue utility tokens, which are not capital-raising security tokens, but are instead used to facilitate specific transactions and access custom applications directly on the maritime startup company's online platform. For example, a maritime blockchain container booking start-up's unique utility token could be used to book shipping containers on that company's website, or a utility token created by a bill of lading registration startup could be used to add a bill of lading onto that company's specific bill of lading blockchain database. The utility token therefore has great potential to electronically streamline the entire maritime logistics chain.

**U.S. Regulatory Paradigm for Token Offerings**

Whether labeled a security token or utility token, tokens in general are now being closely scrutinized by the SEC and various other U.S. and international regulatory authorities. In July 2017, the SEC issued an investigative report (the "DAO Report") asserting that digital tokens—depending on how they are issued and the purpose of the issuance—may be securities and therefore subject to the agency's jurisdiction based on existing paradigms for the essence of securities. Since then, the SEC has begun exercising more active oversight of virtual currency activities in a variety of ways, including through enforcement actions and investigations, and has begun providing additional guidance to market participants about the appropriate classification of virtual currencies.

The U.S. Commodities Futures Trading Commission ("CFTC") has also exercised jurisdiction over virtual currencies that fall within the ambit of the commodities regulators, particularly when fraud is allegedly involved. Virtual currencies have been determined to be commodities under the Commodity Exchange Act in certain circumstances. While its regulatory oversight authority over commodity cash markets is limited, the CFTC maintains general anti-fraud and manipulation enforcement authority over virtual currency cash markets as a commodity in interstate commerce.

The Federal Trade Commission ("FTC") has also asserted jurisdiction to protect consumers from deceptive marketing schemes involving virtual currencies. The Consumer Financial Protection Bureau ("CFPB") has issued a consumer advisory warning consumers about the risks of virtual currencies. Finally, the Internal Revenue Service ("IRS") has issued guidance that virtual currency is treated as property for U.S. federal tax purposes and has been aggressive in pursuing proper reporting and payment of cryptocurrency gains by taxpayers. On the state level, several states have established or begun to develop regulatory frameworks concerning virtual currency, particularly in connection with money transmission and securities offerings. Accordingly, among the SEC, CFTC, FTC, CFPB, IRS, and state regulators, there are many regulatory considerations to be had in creating, transacting, and otherwise dealing in and with virtual currencies.

> This is a radical concept, as it seeks to shift startup capital away from established *fiat* currencies and traditional stock certificates to an electronic security token model where interests in a company are issued in compliance with state and federal securities laws—but in a digital format.

**Conclusion**

Security and utility tokens represent exciting new concepts for the maritime industry. However, whether a maritime company offers a security token or a utility token, it must be mindful of the various U.S. state and federal laws that apply to token offerings and issuances—even if those tokens may arguably not be securities. These are uncharted electronic waters, and it will be interesting to witness what effect, if any, the "token phenomenon" will ultimately have on the maritime arena as it adapts to meet the demands of modern international commerce. ◻ – ©2019 BLANK ROME LLP

**We invite our readers to dive into our archive** of *Mainbrace* newsletters and maritime development advisories, as well as keep abeam with all of our current and upcoming analyses on trending maritime topics and legislation, in our ***Safe Passage*** blog.

**safepassage.blankrome.com**

BLANKROME
maritime

blankrome.com/maritime

# The Vision Is Clearer—Offshore Wind Farms Are Appearing on the U.S. Horizon

**BY JOAN M. BONDAREFF**

JOAN M. BONDAREFF
OF COUNSEL

**The United States is on the precipice** of developing a robust offshore wind ("OSW") industry. This article reviews recent developments on the federal and state level that have made it so.

The Trump administration, while demonstrating a clear preference for fossil fuels, has continued the past precedents of permitting offshore wind farms. To date, the Bureau of Ocean Energy Management ("BOEM") at the Department of the Interior has approved 16 commercial wind leases, and more sales in wind energy areas ("WEAs") along the Atlantic Coast are expected later this year. A major auction was conducted on December 14, 2018, for three leases off the coast of Massachusetts, resulting in a total auction price of $405 million. Even BOEM found this to be a "bonanza." The winners were Equinor (former Statoil), Vineyard Wind (Copenhagen and Avangrid renewables), and Mayflower (Shell and EDP Renewables). The West Coast and Hawaii are considering floating wind platforms.

The first commercial OSW farm has been in operation for over one year in state waters without any hiccups in providing clean reliable energy to the residents of Block Island, Rhode Island. European developers are partnering with U.S. companies to share their expertise in OSW development, and the production tax credit was left intact in the 2017 tax reform legislation.

The Trump administration, while demonstrating a clear preference for fossil fuels, has continued the past precedents of permitting offshore wind farms. To date, the Bureau of Ocean Energy Management ("BOEM") at the Department of the Interior has approved 16 commercial wind leases, and more sales in wind energy areas ("WEAs") along the Atlantic Coast are expected later this year.

These are all positive signs for the U.S. OSW market. In addition, the price of both wind and solar is declining and becoming more competitive with natural gas.

This article reviews some of the legal hurdles an offshore wind farm developer has to clear, and suggests some ways to shorten the journey. The article also reviews new state policies recently enacted or announced to support renewable energy and OSW.

## Federal Laws, Policies, and Tax Incentives

On the federal level, a developer first has to secure a lease on the Outer Continental Shelf ("OCS") from BOEM. This is actually the simplest part of the process because BOEM has done a good job laying out the areas for wind energy development along both the Atlantic and Pacific seaboards and has broad authority over the leasing process pursuant to the Energy Policy Act of 2005. The sales receipts from BOEM auctions of OCS leases have ranged from $448,000 to $135 million, the latter for the Massachusetts sales noted above.

After winning the bid for a lease sale on the OCS, a developer has to submit a Site Assessment Plan ("SAP") and a Construction and Operations Plan ("COP") to BOEM for review and approval under the National Environmental Policy Act and other related environmental protection laws. 30 C.F.R. 582.600 *et seq.*

The developer next has to cross the Rubicon of finding the right U.S.-built vessels to bring the heavy equipment out to the wind farm. The United States lacks certain heavy-lift vessels, or, when available, they are not located near the Atlantic or Pacific Coasts. Compliance with the Jones Act, while challenging, can be accomplished through a mix of U.S. and foreign-flag vessels. For example, foreign-flag vessels can transport the turbines from Europe to an offshore wind farm without violating the Jones Act. This model was successfully used at the Deepwater Wind farm in Rhode Island state waters.

Once the wind farm is constructed on the OCS, the energy has to be brought to shore via a cable crossing state waters and connecting onshore to the grid. This is subject to state and other federal regulation, including potentially the U.S. Army Corps of Engineers, state departments of environmental protection, and state corporation commissions if ratepayers are involved.

*(continued on page 7)*

The Vision Is Clearer—Offshore Wind Farms Are
Appearing on the U.S. Horizon (continued from page 6)

After that, the developer must find a purchaser for the wind. As noted above, the price of wind is coming down, making it more competitive with fossil fuel sources. The wind itself can be purchased by utilities, state agencies, or private entities using either virtual or real power purchase agreements.

### Tax Credits and Research Grants

The cost of offshore wind can be decreased as a result of federal tax credits and grants. The federal production tax credit ("PTC") was renewed in 2015, and extended until 2020. The Internal Revenue Service on May 5, 2016, issued Notice 2016-31, which provided a generous interpretation of the PTC-enabling companies to use the credit, provided construction has begun sometime during the four-year period. For example, if construction begins on a facility on January 15, 2016, and the facility is placed in service by December 31, 2020, the facility will be considered to have met the IRS prior rulings for continuous service. However, the 2015 extension of the PTC also phased out the credit over the ensuing four years so that by January 1, 2020, the amount of the tax credit is reduced from 100 percent to 40 percent. The PTC was under attack during deliberations on the latest tax reform bill, but was ultimately left in place.

Federal grants can also support OSW development. These grants are administered by the Department of Energy ("DOE"). In the past 10 years, the DOE has awarded a total of $190 million in grants to 73 OSW demonstration projects. In May 2016, the DOE transferred some of the grant funds from some earlier recipients to others, depending on the DOE's assessment of how far along the individual projects were. The Virginia Offshore Wind Technology Advancement Project ("VOWTAP"), for example, lost out on this process because they could not confidently state that their project would come on line before 2020. Winners included Fishermen's Energy Atlantic City Wind Farm, Lake Erie Energy Development Corporation's Icebreaker Project, and the University of Maine's New England Aqua Ventus I Project. The latter project may be in jeopardy as a result of Governor LePage's 2018 moratorium on new wind permits in Maine, challenged in court by the Maine Renewable Energy Association. And, VOWTAP has been renamed the Coastal Virginia Offshore Wind ("CVOW") Project as a result of Dominion Energy's alliance with Ørsted.

It remains to be seen whether the Trump budget continues to support financial assistance to OSW projects in 2019–2020. Fortunately, in 2018, the DOE awarded $18.5 million to the New York State Energy and Research Development Authority ("NYSERDA") to conduct research to lower the cost of OSW. These funds were matched by New York State so that a total of $40 million is now available for research that states and other groups can petition for.

### State Competition and Cooperation for OSW Farms

The sale of offshore wind into the grid is greatly facilitated by state laws and policies that encourage or require the use of renewable energy. Several states have adopted, or are in the process of adopting, such policies. For example, New Jersey and Maryland both enacted legislation establishing a system of ocean renewable energy credits, or ORECs, to support the cost of development and reduce the burden on ratepayers, but the trajectory for implementation has varied greatly in each state.

### New Jersey

Former New Jersey Governor Chris Christie of New Jersey signed the Offshore Wind Economic Development Act ("OWEDA") into law in 2010, but took no steps to implement it. N.J.S.A. 48:3-87.2 *et seq.* Incoming New Jersey Governor Phil Murphy signed an executive order on January 31, 2018, directing the NJ Bureau of Public Utilities ("BPU") to implement OWEDA to meet the new state goal of 3500 MW of OSW by 2030. N.J. Exec. Order No. 8. Two areas for OSW are currently leased off the coast of New Jersey—one belonging to Ørsted (formerly DONG Energy) and one to US Wind (a subsidiary of the Italian renewable energy firm Renexia). On September 17, 2018, the NJ BPU issued a solicitation for 1100 megawatts of offshore wind to help meet the state's goal of 3500 megawatts by 2030. Responses were due December 28, 2018.

### Maryland

In the case of Maryland, on April 9, 2013, then-Governor Martin O'Malley signed into law the Maryland Offshore Wind Energy Act of 2013. The Maryland law requires electricity suppliers to purchase ORECs and creates a "carve-out" for offshore wind energy in Maryland's Renewable Energy Portfolio Standard for up to 2.5 percent of total retail sales. In response to a survey taken of Maryland residents in 2012, the law specifies a maximum price for residential and non-residential electric customers. In February 2016, the Public Service Commission ("PSC") of Maryland opened the window for applications for a 180-day period. Two projects off the coast of Maryland and Delaware succeeded in winning PSC approval with accompanying ORECs on May 11, 2017—one belonging to US Wind and one to Deepwater Wind. Each project has to spend a percentage of costs in Maryland, commit to building a steel fabrication facility, provide funds for port infrastructure upgrades, and have minority business participation in the project.

### Massachusetts

Governor Baker of Massachusetts signed An Act to Promote Energy Diversity in 2016 to launch OSW. Utilities in the state are required to solicit 1600 MW of "cost-effective" OSW. Three bids were received by December 2017—one from Deepwater Wind, one from Ørsted, and one from Vineyard Wind (CIP/Avangrid). In the meantime, the state decided to select a project to bring hydroelectricity from Canada, but this project is under scrutiny at this writing because of the lack of a permit for a pipeline to transmit the power that would have run through the White Mountains of New Hampshire. This leaves an opportunity for OSW to be selected for this or a future competition. In fact, on December 14, 2018, BOEM awarded three new lease sales to auction winners Vineyard Wind, Equinor, and Mayflower at the bonanza price of $135 million per lease sale—the highest auction prices for offshore wind leases off the United States. Vineyard Wind is currently in the process of securing the necessary permits for bringing wind to Massachusetts and Rhode Island customers.

### New York

Other states have created a favorable environment for offshore wind by adopting renewable energy goals. For example, New York Governor Andrew Cuomo has established a goal of generating 50 percent of the state's electricity from renewable energy by 2030, which includes up to 2400 MW of OSW. New York developed a master plan that provides a "comprehensive state roadmap for advancing development of offshore wind in a cost-effective and responsible manner." N.Y. State Energy Research & Dev. Auth., New York State Offshore Wind Master Plan (2017). New York has also asked BOEM to identify and lease at least four new WEAs within a study area off the coast of New York and New Jersey, and expects to issue solicitations in 2018 and 2019 to develop at least 800 MW of OSW. New York will also invest $15 million in workforce development and infrastructure grants, and is working with BOEM to identify new WEAs off Long Island.

### Rhode Island

Rhode Island had the foresight in 2010 to adopt an Ocean Special Area Management Plan ("SAMP") for state waters. The SAMP identified sites for offshore renewable energy, thereby facilitating the siting of the Deepwater Wind farm off the coast of Block Island. The fact that Block Island did not have its own source of electricity and endured high costs also helped the Deepwater Wind project, which became operational by the end of 2016—the first OSW farm in the United States to achieve this distinction—and a model for others to follow. In addition, Rhode Island Governor Raimondo directed her energy team in February 2018 to work with the state's utilities to issue a procurement for up to 400 MW of affordable clean energy by the summer of 2018 and a request for procurement was announced on September 11, 2018.

Developers are certainly paying close attention to state laws encouraging and incentivizing offshore wind farms and are flocking to their shores over those of other states. In addition, the welcome door to foreign developers to participate in these projects has been a boon to reducing the costs of OSW. U.S. companies are certainly benefiting from their expertise.

### What Do Consumers Think?

No one has taken a national survey of public opinion, but it seems to this observer that the reaction would be mixed. Maryland did take a survey of its residents and, as a result, capped the rates that offshore wind developers could charge consumers. Some residents of the Maryland Eastern Shore objected to seeing wind turbines off their coast and their Representative Andy Harris introduced an appropriations rider to ban them inside of 24 miles.

*(continued on page 9)*

Residents of Cape Cod, Massachusetts, objected to an OSW farm because it would interfere with their view. This "NIMBY" syndrome virtually sank the Cape Wind project. On the other hand, current Massachusetts policy seems to be more favorable. See the discussion above on new Massachusetts legislation and the bonanza awards of three offshore wind leases to three companies.

In the case of Virginia, the price of electricity has traditionally been low, making it more challenging to have ratepayers assume the burden of paying more for offshore wind. But new Virginia legislation supported by Governor Northam may encourage the State Corporation Commission ("SCC") to approve the latest OSW pilot project, now called "CVOW" as being in the "public interest." This project is managed by Dominion with assistance from its main contractor, Ørsted. On November 2, 2018, the SCC approved the CVOW demonstration project of two turbines based on the dictates of the new state law.

All states considering OSW are weighing the benefits in new state jobs and clean energy with the costs to consumers from the price of OSW.

### What Can the U.S. and States Do to Develop and Encourage OSW?

Having laid out some of the challenges, the author feels obliged to identify some incentives for encouraging OSW development in the United States. The following is her wish list of positive incentives:

1. Create a national renewable energy policy, including a five-year leasing plan for offshore wind, highlighting the economic benefits and job creation of offshore wind. A recent report from the American Jobs Project, for example, highlighted the potential for 14,000 offshore wind-related jobs in Virginia. The national wind association AWEA touts 100,000 jobs created for all wind projects in the United States.

2. Establish a one-stop permitting shop in the federal government, modeled on the Ocean Thermal Energy Conversion Act of 1980 (Pub. L. No. 96-320), to avoid other agencies second-guessing BOEM's decisions. The Trump administration proposal for one-stop permitting for infrastructure projects may be another model.

3. Create a model law that states can use to promote OSW farms and a model power purchase agreement for OSW.

4. Maintain the PTC until renewable energy, including OSW, achieves price parity with the cost of fossil fuels.

5. Encourage states to cooperate across borders to enable them to share the costs and benefits of OSW. New York, Massachusetts, and Rhode Island are forming a regional alliance now with the assistance of the Clean Energy States Alliance. The NYSERDA R&D Consortium is an excellent model to use for cross-state cooperation on research for OSW technologies and impediments.

6. Educate the public on the benefits of clean energy, including OSW, through a program of state grants managed by the Department of Energy, and promote a tourist industry for visits to view offshore wind farms.

7. Continue to encourage experienced European OSW developers to lend their experience to U.S. developers.

8. Provide loan guarantees for new ship construction and grants for innovative research on OSW. Encourage U.S. shipyards to build Jones Act-qualified vessels for support vessels and perhaps one day larger heavy-lift vessels.

9. Continue to support the Federal Energy Regulatory Commission's present path of supporting the transmission of renewable energy into the power grid and working cooperatively with states to allow OSW developers to bid power into the grid.

### Summary

In summary, the winds of change are blowing favorably for new OSW farms in state and federal waters. As soon as these farms begin to produce clean, reliable, and cost-efficient energy, consumers will begin to demand them and may even welcome them in their view shed. ◻ – ©2019 BLANK ROME LLP

---

This article was first published January 23, 2019, in the ABA Section of Environment, Energy, and Resources.

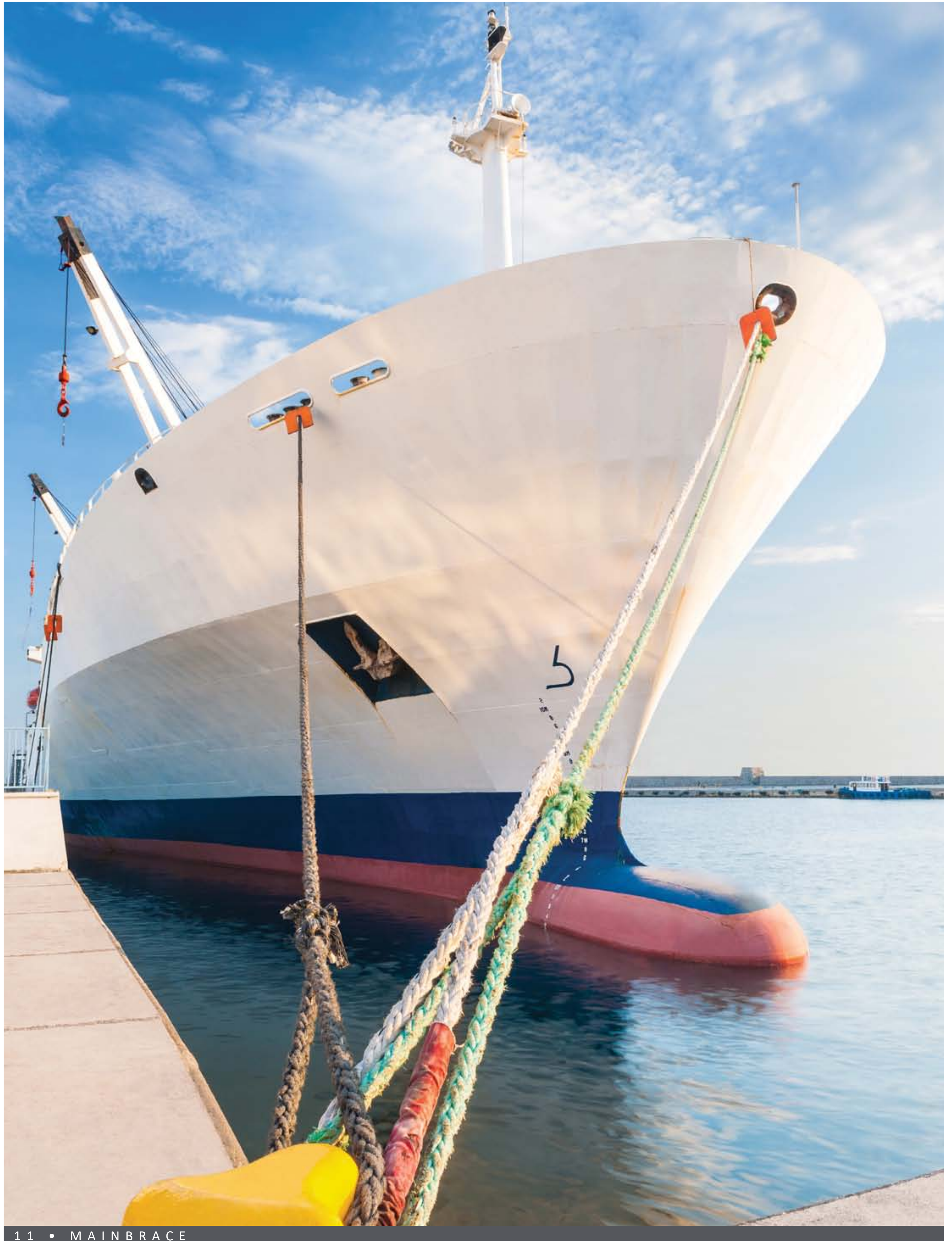
©2019 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

## Severe Weather Emergency Recovery Team

**Blank Rome's Severe Weather Emergency Recovery Team ("SWERT")** helps those impacted by natural disasters like Hurricanes Florence, Harvey, Irma, and Maria, and by wildfires and mudslides in California and Colorado. We are an interdisciplinary group with decades of experience helping companies and individuals recover from severe weather events. Our team includes insurance recovery, labor and employment, government contracts, environmental, and energy attorneys, as well as government relations professionals with extensive experience in disaster recovery.

**Learn more:**
**blankrome.com/SWERT**

BLANKROME



## RECENT BLANK ROME MARITIME RANKINGS

### *Chambers Global 2019*

***Chambers Global 2019* recognized Blank Rome** as a global leader in Shipping: Litigation – Global-wide, as well as Partner John D. Kimball as a leading shipping litigation attorney.

As published in *Chambers Global 2019:*

**Shipping Litigation – Global-wide**

**WHAT THE TEAM IS KNOWN FOR:** "Well-regarded shipping litigation practice, with considerable expertise in dealing with high-profile disputes, as well as maritime arbitration. Handles a wide range of issues, including casualties, charter party disputes, bankruptcy and environmental matters. Acts for a mix of owners, operators, charterers, financial institutions and shipyards. Respected both within the USA and internationally for its deep industry knowledge, and noted for its expertise in shipping issues as they intersect with environmental litigation."

**STRENGTHS:** "One peer described the team as a 'real quality outfit.'"

**John D. Kimball – Shipping: Litigation, Global-wide**

The "excellent" John Kimball offers clients a wealth of experience across a range of different matters, including collisions, Chapter 11 bankruptcies and high-value salvage. He is regularly instructed by both domestic and international P&I clubs and frequently sits as an arbitrator in shipping disputes. He is based in New York.

JOHN D. KIMBALL
PARTNER

To view all of Blank Rome's *Chambers Global 2019* rankings, please click here.

### *U.S. News & World Report – Best Lawyers 2019®*

Blank Rome's Maritime practice was ranked in the top national and regional tiers for Admiralty & Maritime Law, as well as nationally ranked in 29 practice areas and regionally ranked in 77 practice areas in the 2019 "Best Law Firms" survey by *U.S. News & World Report – Best Lawyers®.*

To view all of Blank Rome's *U.S. News & World Report – Best Lawyers 2019®* rankings, please click here.

### *Who's Who Legal 2018*

The following Blank Rome Maritime attorneys were recognized in *Who's Who Legal 2018* for their leading shipping industry knowledge and practices.

THOMAS H. BELKNAP, JR.
PARTNER

MICHAEL K. BELL
PARTNER

BRETT M. ESBER
SENIOR COUNSEL

JEANNE M. GRASSO
PARTNER

JOHN D. KIMBALL
PARTNER

RICHARD V. SINGLETON II
PARTNER

JONATHAN K. WALDRON
PARTNER

To view all of Blank Rome's *Who's Who Legal 2018* rankings, please click here.

# The Maritime Industry: The DOJ FCPA Unit's Next Port of Call

**BY CARLOS F. ORTIZ, MAYLING C. BLANCO, AND ALEXANDRA CLARK**

CARLOS F. ORTIZ
PARTNER

MAYLING C. BLANCO
PARTNER

ALEXANDRA CLARK
ASSOCIATE

**The maritime industry, by its nature,** involves the movement of goods and vessels across international borders, and requires routine interaction with government officials. Historically, many in the industry viewed bribery of these officials in many parts of the world as a "cost of doing business." Increased cooperation between the U.S. government and foreign governments has led to intensive efforts to investigate and fight corruption across the globe. Recent actions by the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") in the maritime-related oil and gas industry make it clear that Foreign Corrupt Practices Act ("FCPA") enforcement may soon take a closer look at the maritime industry.

As a preliminary matter, for over a decade, the oil and gas industry has been the focus of investigation and has seen more FCPA enforcement actions than any other industry.[1] In the last two years, however, some of these actions have involved maritime companies in the oil and gas trade. For companies with an international presence, which is the case for many maritime companies, a single bribe could expose the company and its employees to violations of antibribery laws in multiple jurisdictions. The maritime industry should understand the risks of violating the FCPA, how to mitigate them, and the consequences for violations.

## What Does the FCPA Prohibit and to Whom Does It Apply?

The anti-bribery provisions of the FCPA prohibit providing or promising to provide anything of value to a foreign official to gain an improper business advantage.

The FCPA originally applied only to U.S. companies and individuals and issuers of U.S. securities. In 1998, the FCPA's jurisdiction expanded to apply to any individual or company, regardless of nationality, engaging in prohibited acts in the United States. For foreign companies, the FCPA's expanded jurisdiction has a significant impact. Foreign companies can be liable for FCPA violations if a prohibited act occurs in the United States. Prohibited acts can be as simple as the transfer of money through U.S. banks or the routing of an e-mail through a U.S.-based server. Moreover, the FCPA imposes derivative liability on companies for the actions of its employees and for any third party acting on the company's behalf, as well as individuals involved in or authorizing such conduct.

## What Are the Consequences of a Violation of the FCPA?

Violators of the FCPA face serious consequences. Companies found guilty of violating the FCPA often pay tens of millions of dollars (or more) in criminal fines and/or civil penalties, and are forced to disgorge all profits obtained in connection with the bribery. In addition, a company in violation of the FCPA must bear the cost of investigation, the risk of potential imposition of a compliance monitor, suspension and/or debarment from government contracts, a limit on its ability to obtain an export license, and reputational damage. And it is not only the company facing liability—executives and employees at all levels may also be prosecuted for FCPA violations. In recent years, the government has enforced its stated policy to hold individuals accountable for FCPA violations. Individuals found guilty of violating the FCPA face criminal fines, civil penalties, and imprisonment.

## What Are the Risk Areas in the Maritime Industry?

The high-risk areas for FCPA violations in the maritime industry are:

- tendering process and requests for proposals with governments or state-owned businesses;
- use of third parties (*e.g.,* local agents, consultants, customs brokers, and freight forwarders);
- excessive gifts, entertainment, and travel provided to foreign officials that are not tied to a proper business purpose;
- mergers, acquisitions, and joint ventures;[2]
- tax and customs avoidance; and
- regulatory avoidance (*e.g.,* permits, environmental issues, and audits).

## What Can a Maritime Company Do to Mitigate Its Risks?

Because violating the FCPA requires an offer to give or giving something of value to a foreign official, companies should evaluate their FCPA liability by assessing their interactions with foreign officials. The FCPA's definition of "foreign official" is broad and includes employees of government agencies, legislators, employees of state-controlled entities, and consultants working on behalf of a government. Unique to the maritime industry, companies may deal with foreign officials who are employees of state-owned commodities, energy, or petroleum companies; government-controlled ports; and consultants working with or on behalf of foreign governments.

Companies must evaluate the risk of using third parties to conduct business outside of the United States. An intermediary, such as a local agent, can create individual and corporate FCPA liability by making payments to a foreign official on behalf of the company. Past FCPA prosecutions have included payments of commissions to third parties who used those funds, in part, to bribe foreign officials in exchange for contracts with state-owned companies. For companies concerned about FCPA exposure, the first question is whether the company is operating and/or transacting any type of business abroad with a foreign government, government-owned entities, or involving foreign officials—either directly, through joint ventures, or through agents. Implementation of an FCPA compliance program, educating employees about anti-corruption laws applicable to the company's operations, and thoroughly vetting third-party agents are important steps that a company must take to minimize risk.

## What Can a Company Do If There Already Has Been a Violation?

The FCPA does not mandate self-disclosure of wrongdoing. However, remediation of any known violation is necessary to minimize exposure. The DOJ offers credit for self-disclosure, and a company that uncovers and remediates a violation should decide if self-disclosure is a good option. Companies must have an effective anti-corruption program, and not merely a manual on the shelf. However, that program can be tailored to fit the size and operations of the company, taking into consideration its risks and resources.

## Why Is Now So Critical?

As a result of the investigations involving government officials in the oil and gas industries, most recently in Brazil and Venezuela, the DOJ has prosecuted numerous companies and individuals. These investigations and prosecutions, and the resulting cooperation agreements, provide prosecutors with a wealth of information and industry insight that will lead to additional investigations and prosecutions. The time to act and become compliant is now, before the DOJ or SEC comes calling. ◘ – ©2019 BLANK ROME LLP

This article was first published in the December 2018 edition of Blank Rome's *White Collar Watch* newsletter.

1. *See, e.g.*, Heat Map by Industry, Stanford Law School Foreign Corrupt Practices Clearinghouse, fcpa.stanford.edu/industry (Last accessed March 2019).
2. Blank Rome has reported on the DOJ's policy with respect to voluntary disclosures in the context of mergers and acquisitions. *See* DOJ Urges U.S. Companies Acquiring or Merging with Foreign Companies to Self-Disclose FCPA Misconduct Identified during Due Diligence.

# Ballast Water Management—Latest Developments

**BY JEANNE M. GRASSO**

JEANNE M. GRASSO
PARTNER

**Much has changed** over the past year regarding compliance with the U.S. Coast Guard's ("USCG") ballast water management requirements, and the horizon has gotten a bit clearer. There are now 16 ballast water management systems ("BWMS") with USCG type-approval and 10 more in the pipeline. As such, many companies have kicked their compliance efforts into high gear, yet ballast water management still remains challenging, largely because the United States is not party to the International Maritime Organization's ("IMO") Ballast Water Management Convention and regulates ballast water unilaterally under the National Invasive Species Act and the Clean Water Act. And, a new regime is on the horizon, the Vessel Incidental Discharge Act of 2018, which is discussed further on page 21 of *Mainbrace.*

Some shipowners have struggled to manage compliance in an efficient and effective way with both IMO and U.S. requirements because the compliance dates and type-approval regimes differ, which sometimes has resulted in the need for compliance date extensions. The USCG's extension policy has evolved as more type-approved systems become available, and the USCG just recently came out with a new policy via Maritime Commons. This new policy addresses and clarifies what the "next scheduled drydock" means, which triggers the compliance date.

The USCG's new interpretation sets forth a more practical approach for owners to plan for compliance. In short, it ties the anticipated compliance date to the vessel's statutory out-of-water survey date under SOLAS rather than triggering a new date as a result of drydock slips, installation of scrubbers, or emergency drydocks, which shortened the time to comply. This new policy is a welcome change that will lead to more certainty as it maintains the vessel's anticipated compliance date. Also, for those owners who have endeavored to comply, but ran into some challenges getting equipment on time or experienced installation hiccups or emergency drydocks, extensions are still available, but on a much more limited basis than in the past. What is imperative is a good faith, detailed plan to come into compliance, generally within a year.

Finally, to avoid problems in the United States regarding operational issues, it is important to have a contingency plan in place, which is incorporated into each vessel's ballast water management plan. Initially, an inoperable BWMS should be reported to the USCG Captain of the Port ("COTP") well in advance of arriving, to allow time to work through the compliance options. In making a decision, the COTP will examine how well you have prepared for operations and what steps you have taken to develop a contingency plan, such as training, maintenance, spares, and efforts to repair. Answers to these questions, as well as the vessel/company's compliance history, will guide the COTP's decision in terms of what he/she may allow if a BWMS is inoperable. ◻ – ©2019 BLANK ROME LLP

# The Maritime Outlook for the 116th Congress

**BY JOAN M. BONDAREFF AND GENEVIEVE COWAN***

**JOAN M. BONDAREFF**
OF COUNSEL

**GENEVIEVE COWAN**
LEGISLATIVE ANALYST

**When we last wrote about the 115th Congress,** it had just completed work on the Coast Guard Authorization Act of 2019 and Save Our Seas legislation. These bills were summarized in our *Mainbrace* (October 2018) article, Congress Passes Major Maritime Safety Legislation but Fails to Fund a New Icebreaker or Pass Authorization for Most Coast Guard Programs. Of notable significance since our last article, the 2019 spending deal finally provided funding for a new polar icebreaker, which is discussed in detail further below.

It seems as though the 115th Congress just ended and, in a way, it is true. The new fiscal year dictates that all FY2019 appropriations bills should have been enacted by October 1, 2018. However, due to a 35-day partial government shutdown and the residual delays from border wall negotiations, the last seven appropriations bills were not signed into law until February 15, 2019.

The 116th Congress began on January 3, 2019, with a change in House leadership. The 2018 midterm elections resulted in Democrats taking over control of the House of Representatives and consequently the leadership of all House committees. The maritime community should take particular note of Congressman Peter DeFazio (D-OR) becoming chairman of the House Transportation and Infrastructure Committee and Congressman Sean Patrick Maloney (D-NY) appointed as the new chairman of the Coast Guard and Maritime Subcommittee. The Ranking Members for that committee and subcommittee are Congressman Sam Graves (R-MO) and Congressman Bob Gibbs (R-OH), respectively.

The Senate remains in Republican hands, but there are significant changes in committee leadership there as well. For example, Senator Roger Wicker (R-MS) is now chairman of the Senate Commerce, Science, and Transportation Committee. Within that committee, a new Security Subcommittee was formed and Senator Dan Sullivan (R-AK) was appointed chairman. This subcommittee has legislative and oversight responsibility for the U.S. Coast Guard, U.S. Maritime Administration ("MARAD"), the Federal Maritime Commission, and navigation and merchant marine issues, generally.

## Highlights of the 2019 Spending Bills

On February 15, President Trump signed a seven-bill appropriations package (H.J. Res. 31) into law, narrowly missing Congress' self-imposed deadline. Immediately after signing the measure, the president proceeded to declare a national emergency in order to receive additional funding for a wall along the U.S.-Mexico border. The specifics of this funding had been the main sticking point throughout appropriations negotiations, resulting in a 35-day partial government shutdown, missed paychecks for federal workers and Coast Guard personnel, delayed grants, and a backlog of work at many agencies.

The final bill contains the final seven FY2019 appropriations, which fund: Agriculture-FDA, Commerce-Justice-Science, Financial Services, Homeland Security, Interior-Environment, State-Foreign Operations, and Transportation-HUD. The language is largely similar to the spending packages released by House Democrats (H.R. 648) and Senate Republicans (H.R. 268) during the partial government shutdown; the main changes occurred in the Homeland Security section.

The agreement would allocate the following amounts under the covered spending measures:

- **Agriculture-FDA:** $23 billion in discretionary funding, which is $32 million more than in FY2018.
- **Commerce-Justice-Science:** $71.5 billion in discretionary funding, which is $1.6 billion more than FY2018.
- **Financial Services:** $23.4 billion in discretionary funding, which is equal to the FY2018 level.
- **Homeland Security:** $49.4 billion in discretionary funding, which is $1.7 billion more than FY2018.

*(continued on page 17)*

The Maritime Outlook for the 116th Congress (continued from page 16)

- **Interior-Environment:** $35.6 billion in discretionary funding, which is $300 million more than FY2018.

- **State and Foreign Operations:** $54.2 billion in discretionary funding, including eight billion dollars in Overseas Contingency Operations ("OCO") funds that are not subject to spending caps. Overall, that's $200 million more than in FY2018.

- **Transportation-HUD:** $71.1 billion in discretionary funding, which is one billion dollars more than FY2018.

### Department of Homeland Security

The measure provides $10.3 billion in discretionary funding—including OCO funds—for the Coast Guard, which is $155.5 million less than in FY2018 and $577.7 million more than requested. The Coast Guard will also receive $1.74 billion in mandatory funding for retirement pay.

The bill provides $1.58 billion in acquisition funding for Coast Guard vessels. That would include $675 million for a new heavy polar icebreaker vessel that could be worth one billion dollars. The Coast Guard will be directed to use $655 million to produce the first Polar Security Cutter and $20 million to prepare for a second vessel. The agreement also would provide $15 million to extend the service life of the current *Polar Star* icebreaker.

### Department of Transportation—MARAD

According to the H.J. Res. 31 Joint Explanatory Statement, which explains how Congress believes funds should be directed, the conferees provided $149.44 million for MARAD's FY2019 operations and training account—seven million dollars of which was directed for the short sea transportation program also known as America's Marine Highways. The bill also provides three million dollars for administrative expenses of the Title XI program and directs the Department of Transportation to expedite processing applications that meet all the requirements of the program. To assist small shipyards, $20 million was provided for the small shipyard grant program, which is a boost from last year's appropriation.

Better Utilizing Investments to Leverage Development ("BUILD") grants, formerly known as Transportation Investment Generating Economic Recovery ("TIGER") grants, were given $900 million, which is a decrease of $600 million below this current year's level. For the first time ever, the conferees directed $292.730 million of that funding to MARAD's Port Infrastructure Development Program. Two-hundred million dollars is provided for coastal seaports and an additional $92.73 million was included for 15 coastal seaports that handled the greatest number of loaded foreign and domestic 20-foot equivalent units of containerized cargo in 2015. MARAD will provide these grants for infrastructure improvement projects for coastal seaports that are either within the seaport's boundary or outside its boundary if the project directly relates to port operations, or to an intermodal connection to a port that improves the safety, efficiency, or reliability of the movement of goods into, out of, or around coastal seaports. Eligible projects include, but are not limited to, highway or rail infrastructure that develops or extends intermodal connectivity, intermodal facilities, marine terminal equipment, wharf construction or redevelopment, vessel alternative fueling access and distribution, fuel efficient cargo handling equipment, freight intelligent transportation systems, and digital infrastructure systems.

### Department of Defense

The Defense and Labor-HHS-Education Appropriations Minibus (H.R. 6157) would provide $24.2 billion to procure 13 Navy ships. The measure would also provide $1.57 billion for the Navy to modify or enter into a contract for another Ford-class aircraft carrier.

### Key Legislative Issues under Review by the 116th Congress

**CLIMATE CHANGE:** With Democrats in control of the House, this issue has taken on a new urgency. A new Select Committee on Climate Crisis was established in the House and is led by Representative Kathy Castor (D-FL). The committee will probably not be allowed to issue subpoenas, as a permanent standing House committee can, nor will it be able to draft legislation. However, it can hold hearings, write reports, and bring public attention to political issues. Other committees such as the House Energy and Commerce Committee and the Senate Energy and Natural Resources Committee will have legislative jurisdiction over climate change issues.

Much attention has been paid to the Green New Deal that was introduced as a resolution on the House side by Representative Alexandria Ocasio-Cortez (D-NY) and on the Senate side by Senator Markey (D-MA). It remains to be seen whether the polarizing Green New Deal is solely aspirational or will eventually be enacted. The measure calls for vast reductions in carbon emissions and an economic overhaul that has gained staunch supporters as well as vehement opponents, especially on the Senate side.

**INFRASTRUCTURE:** Momentum has been building for Congress to pen a broad infrastructure deal in 2019; support comes from both sides of the aisle as well as the White House.

Though both sides support infrastructure improvements, how to achieve that goal may differ. Senate Commerce, Science, and Transportation Chairman Roger Wicker (R-MS) is not convinced that Congress will get a standalone infrastructure bill, as compared to a reauthorization, done this year. Meanwhile, House Transportation and Infrastructure Committee Chairman DeFazio (D-OR) wants to move an infrastructure package this year. The chairman is updating his "Penny for Progress" proposal, which would raise the gas tax about a penny to a penny-and-a-half a year to help pay for surface transportation projects. He plans to work with Ways and Means to identify funding options. An infrastructure package, which DeFazio previously said he is expected to submit to Majority Whip Steny Hoyer (D-MD) by the end of May, could include a wide range of infrastructure needs to include drinking water and rural broadband, in addition to more traditional forms that fall under his jurisdiction.

Both the House and Senate have already held committee hearings on the issue of infrastructure, but how each chamber will craft that legislation and which provisions will make it into the final bill remains to be seen.

**COAST GUARD AUTHORIZATION:** While the staff is considering ideas to add to the next Coast Guard Authorization bill, we do not expect one will be enacted until 2020.

**SAVE OUR SEAS ACT:** Senator Sullivan (R-AK) and Senator Whitehouse (D-RI) are currently working on an expanded version called Save Our Seas Act 2; details have not yet been released.

**FY2020 BUDGET:** The Trump administration just sent its FY2020 budget recommendation to Capitol Hill, which will probably be dead on arrival in the House. Hearings are being held and we will know later how the Congress disposes of the president's request. President Trump's FY2020 budget calls for a five-percent cut in non-defense discretionary spending and would allow for an increase in defense spending through overseas contingency operations war funds. Funds diverted from the Pentagon would be used to fund the president's pet project—the wall with Mexico. The president's budget recommends spending levels for the next fiscal year, but ultimately it is up to Congress to appropriate the funds they deem appropriate.

**NEW ENERGY LEGISLATION:** Senator Murkowski, who serves as chairman of the Senate Energy and Natural Resources Committee, is working on new energy legislation with a focus on grid security. This legislation could potentially be combined with a climate bill from the House. She has already held hearings on energy innovation in the United States and emphasizes the need to establish a shared, long-term strategy for energy policy and for alignment between industry, the federal government, and our National Laboratories.

**NATIONAL EMERGENCY DECLARATION:** On February 15, President Trump announced that he was declaring a national emergency and planned to unilaterally shift about seven billion dollars in federal resources to construct physical barriers along the U.S.-Mexico border. The president has the authority to declare an emergency in some cases under the National Emergencies Act. However, that law also gives Congress the ability to end the emergency by passing a joint resolution. If one chamber passes the resolution, the other must also take it up, voting on it within a total of 18 days. Sixteen state attorney generals have filed a lawsuit against the legality of the emergency declaration and 58 former national security advisers have written a lengthy paper opposing the declaration.

> The bill provides $1.58 billion in acquisition funding for Coast Guard vessels. That would include $675 million for a new heavy polar icebreaker vessel that could be worth one billion dollars. The Coast Guard will be directed to use $655 million to produce the first Polar Security Cutter and $20 million to prepare for a second vessel. The agreement also would provide $15 million to extend the service life of the current *Polar Star* icebreaker.

While the House and Senate both voted to block President Trump's declaration of a border emergency with simple majority votes, the president vetoed the measure and there are insufficient votes to override the veto.

## Conclusions

With a divided Congress, it's difficult to predict what will be enacted in 2019; bills that easily pass in one chamber could meet a very different fate in the other. In 2020, all eyes will be on the presidential campaign. Democratic members and moguls have already started joining the race. We do believe, however, that there are some bipartisan issues that could get some traction even in a divided Congress—a watered-down infrastructure bill and possibly an energy bill are among the top contenders. Also, be on the lookout for the Coast Guard Authorization Act and National Defense Authorization Act for 2020—two favorite vehicles that provide opportunities for maritime issues to be addressed. ◻ – ©2019 BLANK ROME LLP

---

*Genevieve Cowan serves as a legislative analyst at Blank Rome Government Relations LLC.

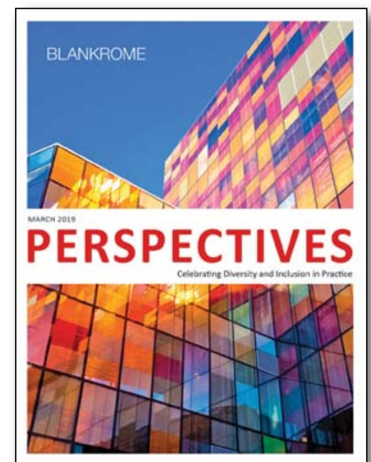
BLANKROME

MARCH 2019

# PERSPECTIVES

Celebrating Diversity and Inclusion in Practice

**Welcome to the March 2019 edition of *Perspectives,*** Blank Rome's diversity and inclusion newsletter that keeps you informed on our latest diversity news and provides insight on current diversity issues in the legal industry and beyond.




**Download *Perspectives***

## Featured in this edition:

- Highlights from the Blank Rome Women's Leadership Summit
- Update on our Diversity and Inclusion Committee and leadership
- Initiatives aimed at advancing women in law and promoting LGBTQ+ equality
- Profiles of LCLD Pathfinders in the Blank Rome Proust Questionnaire
- Overview of recent diversity and inclusion headlines, accolades, and events

**To learn more about Blank Rome's diversity and inclusion initiatives, please visit blankrome.com/diversity-inclusion.** ◻

# RECENT MARITIME ELEVATIONS, APPOINTMENTS, AND ADDITIONS

## New Maritime Elevations and Appointments

LAUREN B. WILGUS
OF COUNSEL

### Lauren B. Wilgus Elevated to Blank Rome Of Counsel

Blank Rome is pleased to announce that Lauren B. Wilgus was elevated from associate to of counsel in the Firm's Maritime and International Trade practice group, effective January 1, 2019. Lauren has more than 17 years of experience in the shipping industry and concentrates her practice in the areas of international and maritime litigation and alternate dispute resolution. She is also a member of the Firm's Maritime Emergency Response Team, and has been an active member in numerous maritime industry organizations throughout her career.

To learn more, please read Blank Rome Announces 2019 Promotions: 14 Partners, 4 Of Counsel.

RICHARD V. SINGLETON
PARTNER

### Richard V. Singleton Appointed Co-Chair of IBA's Maritime and Transport Law Committee

Blank Rome Partner Richard V. Singleton has been appointed to serve a two-year term as co-chair of the International Bar Association's ("IBA") Maritime and Transport Law Committee, one of the oldest and most established committees of the IBA.

To learn more on Richard's appointment, please click here.

JOAN M. BONDAREFF
OF COUNSEL

### Joan M. Bondareff Reappointed to Virginia Offshore Wind Development Authority

Blank Rome Of Counsel Joan M. Bondareff has been reappointed to a new four-year term on the Virginia Offshore Wind Development Authority where she has served as chair since November 2016.

To learn more, please read Virginia Offshore Wind Development Authority Elects New Officers (press release, January 4, 2019).

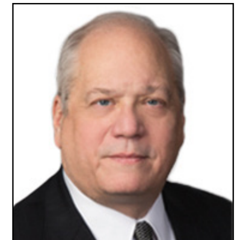
## New Energy Attorneys Bolster Maritime Practice

### Blank Rome Welcomes Experienced Energy Group to Firm's Washington, D.C., Office

Blank Rome welcomed Partners Mark R. Haskell and Brett A. Snyder and Of Counsel George D. Billinson to the Firm's Energy group in the Washington, D.C., office, on January 16. Together, they bring notable experience advising clients on a wide breadth of energy industry-related matters involving regulation, compliance, enforcement, transactions, and litigation.

MARK R. HASKELL
PARTNER

BRETT A. SNYDER
PARTNER



GEORGE D. BILLINSON
OF COUNSEL

In addition, their collective practice has significant maritime law synergies, with many of their projects involving the exports of liquified natural gas, natural gas liquids, and other commodities by ship. In joining Blank Rome and collaborating with the Firm's leading maritime practice and attorneys, they are now able to offer their clients service from wellhead to shipping contract.

To learn more, please read Blank Rome Continues Ongoing Lateral Expansion with the Addition of Energy Group in Washington, D.C. (press release, January 16, 2019).

# Surviving the VIDA Loca

**BY JEANNE M. GRASSO**

JEANNE M. GRASSO
PARTNER

**On December 4, 2018,** the Frank LoBiondo Coast Guard Authorization Act of 2018 (the "Act") was signed into law. Title IX of the Act is the Vessel Incidental Discharge Act of 2018 ("VIDA"). VIDA establishes a new framework for the regulation of discharges incidental to the normal operation of vessels, adding a new Section 312(p) to the Clean Water Act, *Uniform National Standards for Discharges Incidental to Normal Operation of Vessels.* VIDA is the culmination of years of discussion and debate within Congress and the maritime industry to bring consistency and certainty to the regulation of discharges from U.S. and foreign-flag vessels. How and whether this consistency and certainty will occur will be seen in the next several years.

## Background

VIDA was born primarily out of a lawsuit relating to the U.S. Environmental Protection Agency's ("EPA") exemption of vessels from the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") permitting program. By its terms, the NPDES permitting program, which regulates discharges of pollutants from point sources into the navigable waters of the United States (generally within three miles from shore), applies to discharges incidental to the normal operations of a vessel because a vessel is a point source when in navigable waters.

The EPA exempted vessels from the permitting program in 1973 because of the burden permitting thousands of vessels would have created. However, in 2006, a federal court determined that the EPA had exceeded its authority in exempting vessels from the permitting program and ordered the EPA to issue permits for discharges incidental to the normal operation of vessels. As a result, the EPA developed the 2008 Vessel General Permit ("VGP"), which went into effect in February 2009. The 2008 VGP was replaced by the 2013 VGP, which contained some more stringent requirements, including numeric limits on ballast water discharges, a requirement to use environmentally acceptable lubricants, and new monitoring requirements for ballast water, bilge water, and graywater.

The 2013 VGP was set to expire in December 2018, but the EPA extended it indefinitely following VIDA's enactment rather than issuing a new 2018 VGP. As such, the 2013 VGP will remain in effect until VIDA is fully implemented.

## EPA and USCG Obligations under VIDA

VIDA requires the EPA to develop federal performance standards for "marine pollution control devices"[1] to manage incidental discharges from vessels. These federal performance standards must be developed in consultation with the U.S. Coast Guard ("USCG") and the states, published for review and comment, and finalized within two years (*i.e.,* by December 2020).

The USCG and EPA are already working together to implement VIDA. The EPA is expected to publish its draft standards in January 2020, likely with a 60-day comment period. Once these standards are finalized, the USCG must develop regulations implementing the standards, including compliance, monitoring, inspections, and enforcement, within two years. Therefore, the current regulatory regime for the regulation of incidental discharges—including ballast water—will remain the status quo for at least *four more years.* (That said, the regulatory process is often replete with delays and challenges, so four years may be rather optimistic!)

In developing standards under VIDA, the EPA may not revise a performance standard to be less stringent than an existing requirement in either the VGP or USCG regulations *unless* information becomes available that was not reasonably available when the initial standard of performance was issued and that information would have justified a less stringent standard. The same is true for the USCG's regulations for monitoring and enforcing compliance, and governing the design, construction, testing, approval, installation, and use of marine pollution control devices.

## Other VIDA Provisions Important to the Maritime Industry

Setting uniform federal discharges standards for incidental vessel discharges and publishing new regulations for compliance and enforcement is at the heart of VIDA, but there are several other key provisions in VIDA of which the maritime industry should be aware:

- **Regulations under VIDA Will Preempt State and Local Law**
  - While state and local laws are generally preempted, some existing state law provisions, such as in Alaska, California, and the Great Lakes, have been incorporated into VIDA.
  - States may petition the USCG to establish stricter standards if the state can establish that more stringent regulation would reduce adverse effects of discharges and be economically achievable and operationally practicable.

- States also may petition to establish no discharge zones where certain types of discharges would not be allowed. Such petitions are subject to EPA and USCG approval.

- **VIDA Repealed the Small Vessel General Permit**
  - This repeal created a permanent exemption for small vessels (< 79 feet) and fishing vessels (except for ballast water).

- **States Will Have Inspection and Enforcement Authority over Federal Standards**
  - States may even charge a fee for such inspections.

- **VIDA Requires the USCG to Publish a Draft Policy Letter by June 2019**
  - The policy letter must describe type-approval testing methods and protocols for ballast water management systems that render non-viable (versus dead) the organisms in ballast water.
  - The USCG also must consider testing methods that use the most probable number ("MPN") statistical analysis to determine the concentration of organisms capable of reproduction.
  - There will be a 60-day comment period following publication of the draft letter.
  - The USCG must publish a final policy letter by December 4, 2019. Depending on the outcome, this could open the door for the acceptance of additional ballast water management systems that could not previously meet USCG's type-approval requirements.

- **VIDA Extended the Jurisdiction for Regulating Incidental Discharges to 12 Nautical Miles**
  - This marks a major change from the VGP, which only applied out to three nautical miles.

## Outlook

The EPA is likely to use the 2013 VGP as the starting point for setting performance standards under VIDA. Because the 2018 VGP was substantially drafted (but never published), the EPA should already have a solid head start. In fact, many in the industry expect the EPA's proposal to be similar to the current VGP.[2]

Finally, the EPA's new standards will still need to address the federal court ruling in 2015 that the EPA acted arbitrarily and capriciously in drafting the ballast water discharge provisions of its 2013 VGP.[3] In that case, the court found that the EPA failed to adequately explain why stricter technology-based effluent standards should not be applied, failed to give fair and thorough consideration to onshore treatment options, and failed to adequately explain why pre-2009 Lakers were exempted. The EPA was expected to address the court's ruling and reconsider the VGP ballast water provisions in the 2018 VGP, but because the 2018 VGP has been shelved, the court's findings must be implemented into the new standards and regulations under VIDA.

> Once these standards are finalized, the USCG must develop regulations implementing the standards, including compliance, monitoring, inspections, and enforcement, within two years. Therefore, the current regulatory regime for the regulation of incidental discharges—including ballast water—will remain the status quo for at least *four more years.*

## Conclusion

VIDA establishes a new framework for regulating discharges incidental to the normal operation of vessels and is one of the most sweeping changes in maritime environmental law in years. Many parts of VIDA are positive for the industry, yet others are concerning. Just how concerning will become clear during the implementation phase. In other words, "time will tell."

In the meantime, the maritime industry must remain engaged, participate in the expected public meetings, and actively review and comment on the proposals as they come out. Doing so will help ensure that VIDA provides the consistency and certainty necessary for an efficient and profitable maritime industry. ◻ – ©2019 BLANK ROME LLP

1. "Marine pollution control device" is defined as any equipment or best management practice (or a combination of the two) for installation or use onboard a vessel that is designed to treat, control, or otherwise manage a discharge incidental to the normal operation of a vessel, which is determined by the EPA and USCG to be the most effective equipment or management practice to reduce the environmental impacts of the discharge.
2. As a refresher, under the VGP, ship owners/operators are required to meet technology-based effluent limits (material storage, toxic and hazardous materials, fuel spills/overflows) and effluent limits related to 27 specific categories of discharges, such as such as deck runoff, bilge water, ballast water, chain locker effluent, oil-to-sea interfaces, fire main systems, graywater, and exhaust gas scrubber wash water, among others.
3. *See* Second Circuit: EPA Acted "Arbitrarily and Capriciously" regarding Ballast Water in the VGP, *Blank Rome Maritime Advisory* (October 2015, No. 9).

# MARPOL Compliance Alert: D.C. Court of Appeals Shuts the Door on APPS Relief

**BY GREGORY F. LINSIN AND DANA S. MERKEL**

GREGORY F. LINSIN
PARTNER

DANA S. MERKEL
ASSOCIATE

**Achieving sustained compliance** with the requirements of Annex I of the International Convention for the Prevention of Pollution from Ships ("MARPOL") has been a challenge for the commercial maritime industry. In far too many situations, the detection of noncompliant activity by the U.S. Coast Guard has resulted in criminal prosecutions with devastating consequences for the vessel operator, owner, and crew, and the risks for the maritime industry are only increasing as the deadlines for Annex V compliance loom. This article explains a proven system for commercial vessel owners to minimize or even eliminate these substantial enforcement risks.

## APPS Violations and *Angelex*

The Act to Prevent Pollution from Ships ("APPS"), which implements MARPOL in the United States, authorizes the Coast Guard to detain any vessel if there is reasonable cause to believe the "ship, its owner, operator, or person in charge" may be liable for APPS violations. There have been many legal challenges over the years to the U.S. Coast Guard's enforcement authority, including its jurisdiction over the vessels, bond amounts demanded, and non-monetary bond requirements, but all have failed. In December 2018, in the case of *Angelex Ltd. v. United States,* the D.C. Court of Appeals rejected the last untested avenue for potential relief for a vessel owner under APPS.

The underlying APPS prosecution that led to the *Angelex* decision involved Annex I violations detected aboard the *M/V Pappadakis.* After contested negotiations and an unsuccessful legal challenge, Angelex Ltd., the vessel owner, and the operator claimed they were unable to meet the $2.5-million-dollar bond requirements set by the Coast Guard. As a result, the *Pappadakis* was detained for nearly six months while the criminal prosecution of Angelex, the vessel operator, and the former chief engineer went forward. Following trial, the chief engineer was found guilty of the APPS violations, but Angelex and the vessel operator were acquitted.

Angelex then brought a separate action against the United States under a provision of APPS, 33 U.S.C. § 1904(h), which permits a vessel "unreasonably detained or delayed" to recover "any loss or damage suffered thereby." This was the first action brought under this provision of APPS. Angelex argued that it suffered losses due to a delay prompted by the failure of the Coast Guard to release the vessel earlier during the criminal proceedings and by an unreasonable bond demand. The court rejected Angelex's claim that the vessel should have been released at some point in the investigation when Angelex claimed that the Coast Guard should have known the owner would not be held liable. The court stated that when there is reasonable cause to detain a vessel for APPS violations, the vessel may be held until legal proceeding are complete. As both Angelex and the vessel operator had been indicted and there was no indication that the indictment was wrongfully obtained, the court held that the Coast Guard was authorized to detain the vessel until the legal proceedings were complete.

Angelex's main argument was that the detention was unreasonable because the bond demand was excessive. The court held that, generally, any bond amount below the maximum criminal fine is reasonable. Further, because the vessel itself is liable *in rem* under APPS, the maximum bond amount for a vessel is the sum of all fines potentially imposed on all parties liable under APPS. Thus, as Angelex and the operator were each potentially liable for $1.5 million, the vessel itself was potentially liable for three million dollars and the three-million-dollar bond demand was appropriate.

Angelex also argued that the bond amount was unreasonable in light of Angelex's financial condition at the time. The court summarily rejected this argument because Angelex failed to submit any proof of the company's financial state and, thus, there was no evidentiary basis on which to evaluate this claim. It's unclear whether this type of challenge to a bond amount would have been successful or could be in the future with proper evidence.

This case closes the door on the last untested challenge to the Coast Guard's enforcement authority under APPS. It is clear that courts will uphold the Coast Guard's ability to demand both a monetary bond and non-monetary bond conditions, and to detain a vessel throughout the entire legal proceedings if the bond demands are not met. Angelex's claim for damages was rejected even though Angelex was acquitted of the APPS violations, and its vessel was detained and unable to sail for nearly six months.

### Avoiding Enforcement Risks

The decision in the *Angelex* case is the latest reminder that MARPOL compliance risks must be proactively addressed by vessel owners and operators long before violations are detected in a port state control inspection. In fact, there is a system that has been used successfully by many responsible vessel owners and operators over the past several years that has been effectively and quietly resolving MARPOL compliance problems while avoiding the catastrophic consequences of a criminal enforcement proceeding. This system begins with investing in management improvements and developing a culture of compliance, including:

- **Enhanced Compliance Training.** Supplemental training for both engineering officers and unlicensed crewmembers is an effective tool to communicate the company's expectations and commitment to compliance. Training should be repeated periodically and updated as necessary.

- **Open Reporting System.** Providing a hotline or other electronic means of anonymous reporting *to the company* provides crewmembers with a means of transmitting information that they feel uncomfortable reporting directly to a supervisor or Designated Person Ashore. These systems allow companies to obtain valuable information that allows them to investigate internally and address the issue effectively, long before an enforcement action is initiated.

- **Audit Program.** Periodic audits of a vessel's waste management practices are critical to evaluate a company's level of compliance and identify opportunities for improvement. These audits should include a comparative analysis of the vessel's oil record book ("ORB") and the daily tank sounding logs. Both internal audit teams and third-party auditors can be effective. For improved reliability, some audits should be done unannounced.

*(continued on page 25)*

## NOTEWORTHY MARITIME PUBLICATIONS

### *Navigating Maritime Arbitration: The Experts Speak*

**Blank Rome Partner John D. Kimball** co-authored *Navigating Maritime Arbitration: The Experts Speak* (February 2019, Juris Legal Information, Arbitration Law), which brings together a collection of essays concerning virtually all aspects of maritime arbitration in the United States, with a strong focus on New York due to the volume of arbitrations the state holds.

The book features chapters written by a wide range of experienced arbitrators and attorneys who are widely recognized as being among the leading experts in maritime arbitration. In addition to John's chapter, "Arbitrators' Dilemma: Stick Your Head in The Sand?," **Blank Rome Partner Thomas H. Belknap, Jr.**, authored chapter 11, "Enforcing and Challenging Arbitral Awards."

To learn more, please visit arbitrationlaw.com/books/navigating-maritime-arbitration-experts-speak.

JOHN D. KIMBALL
PARTNER

THOMAS H. BELKNAP, JR.
PARTNER

### United States, *Ports & Terminals 2019*

**Blank Rome Partner Matthew J. Thomas** authored the "United States" chapter in Ports & Terminals 2019, a Getting the Deal Through publication by Law Business Research Ltd (2018).

To learn more, please visit blankrome.com/publications/united-states.

MATTHEW J. THOMAS
PARTNER

**MARPOL Compliance Alert: D.C. Court of Appeals Shuts the Door on APPS Relief (continued from page 24)**

- **Role of the Superintendent.** Frequent shipboard visits by the vessel's superintendent are vital in the creation of a positive compliance culture. The superintendent's familiarity with the vessel and crew allows for greater ability to identify potential compliance issues. The superintendent should take the time to engage with the unlicensed crew, as well as the ship's officers, and should also do spot checks of the ORB, the tank sounding records, and the Vessel General Permit documentation.

Several additional measures are being used by some vessel owners and operators to further enhance their environmental compliance program. CCTVs are used in critical areas of the machinery spaces on vessels. Shoreside debriefing interviews of crew members post-contract have proven to provide valuable insight into vessel operations and personnel. Some companies also offer monetary awards to crew members for information on compliance issues that proves to be reliable.

> It is clear that courts will uphold the Coast Guard's ability to demand both a monetary bond and non-monetary bond conditions, and to detain a vessel throughout the entire legal proceedings if the bond demands are not met.

**What to Do When a Problem Arises?**

Ultimately, the success of this system is built on the sobering recognition that, even after responsible owners/operators invest in compliance training, expend the resources needed to maintain and upgrade pollution prevention equipment, and then monitor shipboard operations through effective shoreside supervision, the risk of MARPOL noncompliance is not eliminated. Even the most attentive and dedicated owners and operators may be plagued with compliance issues. It has proven to be very difficult to eradicate rogue officers who ignore even the most emphatic training and who continue to engage in improper acts that are often irrational and ineffective. Therefore, the final critical element of the compliance system is for companies to take prompt and effective action when presented with evidence of potential noncompliance.

When there is any indication of potential noncompliance, whether through the open reporting system, audit findings, or superintendent observations, a thorough internal investigation must be undertaken immediately. Seizing the initiative in these circumstances not only helps control potential negative consequences of a violation, but also strengthens the company's overall environmental compliance culture and program. Depending on the circumstances and the extent of the noncompliant activity, consideration should be given to engaging counsel in assisting with the investigation to develop a complete factual record and provide legal advice concerning corrective actions or reporting obligations.

Vessel owners and operators should also engage with the vessel's flag state administration early and often. Under MARPOL, a vessel's flag state has primary responsibility for oversight of environmental compliance. While port and coastal states are authorized to perform port state control inspections or to investigate and consider enforcement actions for pollution events occurring in their territorial waters, these functions are secondary to the primary role of the flag state. The heightened enforcement role that the United States has assumed and the incentives created by the potential whistleblower awards under APPS have distorted the primary enforcement role that MARPOL grants to the flag states. By taking control of potential issues and working with the vessel's flag state administration to take corrective action, vessel owners are proceeding consistent with the intended assurance regime established by MARPOL and are far more likely to achieve a reasonable and balanced resolution.

By assisting vessel owners in the implementation of this system, we have had success avoiding investigations and vessel delays, even when the vessel has a recent history of noncompliant operations. By working with the vessel owners to investigate issues when they arise and assisting the owners in approaching the vessel's flag state administration, appropriate corrective actions were ascertained and completed. If warranted, corrective entries are then made in the vessel's ORB (or other regulatory logs). Assuming none of the noncompliant discharges occurred in U.S. territorial waters and the vessel's regulatory logs are accurate prior to calling on U.S. port, enforcement action by the United States is precluded.

**Conclusion**

As the decision in the *Angelex* case illustrates, U.S. courts will continue to uphold the Coast Guard's authority to aggressively initiate criminal enforcement actions, to demand both a monetary bond and non-monetary bond conditions, and even to detain a vessel throughout the entire legal proceedings if the bond demands are not met. To avoid these severe consequences, vessel owners and operators must invest in creating a strong culture of compliance and, when compliance issues arise, take appropriate steps to address them head on. ◘

– ©2019 BLANK ROME LLP

# Court-to-Court Communication and Letters of Request in Cross-Border Litigation and Asset Tracing

**BY RICK ANTONOFF AND EVAN J. ZUCKER**

RICK ANTONOFF
PARTNER

EVAN J. ZUCKER
ASSOCIATE

**An increasingly global economy** and the ease with which money and other property is transferred across national borders has led to more cross-border litigation and a call for greater cooperation and communication between foreign courts. But the ability for courts to communicate across borders has its limits. Recently, in *In re Zetta Jet USA, Inc.,*[1] a chapter 7 trustee asked a U.S. bankruptcy court to authorize sending a letter from the U.S. court to an Australian court, under 28 U.S.C. § 1781, asking the Australian court to continue an injunction against moving a vessel located in Australia pending the resolution of an avoidance action in the United States against the vessel's purported owner. The U.S. court refused to issue such a letter after concluding that a letter from a U.S. court requesting the Australian court to continue an injunction would be an unwarranted interference by the U.S. court in the Australian proceeding, and would offend principles of international comity by suggesting how the Australian court should rule on the injunction as well as preempting the Australian court's consideration of whether to vacate the injunction.[2]

> A court has broad discretion in deciding whether to issue a letter to a foreign court. The issuance of a letter is appropriate where it provides an efficient means to help litigants in an international proceeding and the requested relief is essential to the foreign litigation.

## Background

Zetta Jet USA, Inc. ("Zetta US") and Zetta Jet PTE ("Zetta Singapore," and together with Zetta US, collectively, the "Zetta Entities") operated an international luxury travel business that fell into financial distress largely due to allegedly fraudulent activity of its principal, Geoffrey Owen Cassidy. On September 15, 2017, Zetta US and Zetta Singapore each filed a voluntary petition for relief under chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Central District of California (the "U.S. Bankruptcy Court"). The cases were subsequently converted to chapter 7 cases and Jonathan King (the "Trustee") was appointed the chapter 7 trustee.

In connection with his investigation into the assets and affairs of the Zetta Entities, the Trustee discovered that Cassidy misappropriated company funds and fraudulently transferred company property, including a yacht named *Dragon Pearl.* The Trustee alleges that Cassidy systematically transferred ownership of the vessel through multiple holding companies to place the vessel beyond the reach of the Zetta Entities and their creditors. In late 2017, the Trustee learned that the *Dragon Pearl* was docked in Australian waters.

On October 13, 2017, the Trustee initiated a proceeding in the Australian court against several defendants seeking to recover the *Dragon Pearl* and have the vessel arrested. The Australian court issued an injunction appointing an admiralty marshal to take the *Dragon Pearl* into custody pending resolution of the yacht's ownership. In June 2018, the proceeding was dismissed due to the Trustee's inability to present his case. Thirty minutes after the proceeding was dismissed and the injunctive was terminated, the *Dragon Pearl* was again sold to another holding company, Linkage Access Ltd. ("Linkage"), for one dollar (USD).

Immediately after the transfer to Linkage, the Trustee commenced another proceeding in Australia seeking to arrest the vessel and enjoin further transfer of the *Dragon Pearl.* The Australian court denied the Trustee's request for the injunction and dismissed the proceeding, finding that it was barred by *res judicata*. An Australian appellate court granted leave to appeal on the basis that the Trustee intended

*(continued on page 27)*

**Court-to-Court Communication and Letters of Request in Cross-Border Litigation and Asset Tracing (continued from page 26)**

to seek avoidance of the transfer of the Dragon Pearl to Linkage under Australian law, and imposed an injunction preventing the transfer of title or changing the location of the Dragon Pearl until the appeal was resolved. The Trustee also commenced an action in the U.S. Bankruptcy Court to avoid the transfer to Linkage under U.S. law. Linkage moved to dismiss the Australian avoidance action and terminate the injunction.

### Trustee's Request for Court-to-Court Communication

Prior to the Australian court's ruling on Linkage's motion to dismiss, the Trustee filed a motion in the U.S. Bankruptcy Court requesting that it establish direct communications with the Australian court and recommend in a formal letter that the Australian court continue the injunction until the avoidance action in the U.S. Bankruptcy Court is resolved. The Trustee filed the motion under the fear that if the Australian avoidance action was dismissed during the pendency of the U.S. avoidance action, the injunction in Australia could be terminated, thereby allowing ownership of the *Dragon Pearl* to be further transferred and its location to be moved.

New Transport Investments Limited ("NT"), which claims an interest in the *Dragon Pearl,* objected to the Trustee's motion. NT argued that the Trustee's request is inappropriate because 1) letters of request are limited to requests for evidence or service of process on a person in a foreign jurisdiction, and 2) the Trustee is able to appear himself before the Australian court and argue that the injunction should not be vacated pending a resolution of the U.S. avoidance action.

### Cross-Border Judicial Communications

There are two statutory provisions addressing court-to-court communication in cross-border cases: 28 U.S.C. § 1781 and 11 U.S.C. § 1525.

First, 28 U.S.C. § 1781(a)(1) authorizes the U.S. State Department to receive letters from foreign tribunals and transmit those letters to U.S. tribunals. Conversely, § 1781(a)(2) authorizes the State Department to receive letters from U.S. tribunals and transmit them to foreign tribunals. More directly, 11 U.S.C. § 1781(b) allows court-to-court communications to occur without State Department involvement.

This section does not preclude:

1. the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

2. the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

A court has broad discretion in deciding whether to issue a letter to a foreign court. The issuance of a letter is appropriate where it provides an efficient means to help litigants in an international proceeding and the requested relief is essential to the foreign litigation. Typically, such letters are in the form of requests to obtain evidence or testimony abroad.[3] Courts are cautioned to exercise restraint in dealing with such international matters so that a court only imposes its domestic views in the most critical situations.[4]

Second, under 11 U.S.C. § 1525, a U.S. bankruptcy court "is entitled to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative, subject to the rights of a party in interest to notice and participation." Communication between courts under section 1525 "may be implemented by any appropriate means, including…communication of information by any means considered appropriate by the court." 11 U.S.C. § 1527.

## Court-to-Court Communication and International Comity

International comity is "concerned with maintaining amicable working relationships between nations, a 'shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.'" *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.,* 412 F.3d 418, 423 (2d Cir. 2005) (quoting *British Airways Bd. v. Laker Airways Ltd.,* [1984] E.C.C. 36, 41 (Eng. C.A.)). American courts have long recognized the importance of comity in cross-border bankruptcy cases. *(See generally In re Atlas Shipping A/S,* 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009); *In re Oi Brasil Holdings Cooperatief U.A.,* 578 B.R. 169, 213 (Bankr. S.D.N.Y. 2017).

In *Zetta Jet,* the U.S. Bankruptcy Court denied the Trustee's motion as violating principles of comity. The court found that the Trustee was "essentially seeking to have this Court place its finger on the scales of justice and improperly influence the Australian Court's decision…regarding the injunction."[5] This type of interference by a U.S. court in a foreign proceeding is improper. This is because the Australian court was already well familiar with the pendency of the cases in the United States and, if not, the parties could easily apprise the Australian court of the status of the litigation in the United States. Thus, the practical effect of having the U.S. Bankruptcy Court send a letter summarizing the status of the cases in the United States and how a ruling by the Australian court would affect the cases in the United States, would be for the U.S. Bankruptcy Court to improperly "weigh in" and influence the Australian court's decision.[6]

## Conclusion

*Zetta Jet* is a reminder that despite the growing prevalence of cross-border judicial proceedings, U.S. courts are guided by notions of international comity and will avoid taking actions that can be seen as influencing or pre-empting decisions of foreign courts. Parties requesting U.S. courts to engage in court-to-court communication with foreign courts should be mindful of these limits. ◻ – ©2019 BLANK ROME LLP

1. Case No. 17-21386 (Bankr. C.D. Calif.).
2. *Court's Tentative Ruling on "Motion for Order Approving Letter of Request and Authorizing Communication" Which was Adopted as the Court's Final Ruling at the Conclusion of the Hearing,* Case No. 17-21386 at ECF. No. 874 (Bankr. C.D. Ca. Nov. 28, 2018) (the "Decision").
3. 22 C.F.R. § 92.54; *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241, 248 n.1 (2004).
4. 48 C.J.S. International Law § 33.
5. Decision at 12.
6. *Id.* at 11-13.

# About Blank Rome

**Blank Rome is an Am Law 100 firm** with 13 offices and more than 600 attorneys and principals who provide comprehensive legal and advocacy services to clients operating in the United States and around the world. Our professionals have built a reputation for their leading knowledge and experience across a spectrum of industries, and are recognized for their commitment to pro bono work in their communities. Since our inception in 1946, Blank Rome's culture has been dedicated to providing top-level service to all of our clients, and has been rooted in the strength of our diversity and inclusion initiatives.

Our attorneys advise clients on all aspects of their businesses, including:

- corporate
- cross-border / international
- environmental
- finance and restructuring
- government contracts & regulatory
- government relations & political law
- insurance recovery
- intellectual property
- investigations & risk management
- labor & employment
- litigation
- maritime
- matrimonial & family law
- tax
- trusts & estates
- white collar defense and investigations

For more information, please visit blankrome.com.

## OFFICE LOCATIONS

**CINCINNATI**
1700 PNC Center
201 East Fifth Street
Cincinnati, OH 45202

**FORT LAUDERDALE**
Broward Financial Centre
500 East Broward Boulevard
Suite 2100
Fort Lauderdale, FL 33394

**HOUSTON**
717 Texas Avenue
Suite 1400
Houston, TX 77002

**LOS ANGELES**
2029 Century Park East
6th Floor
Los Angeles, CA 90067

**NEW YORK**
The Chrysler Building
405 Lexington Avenue
New York, NY 10174-0208

**PHILADELPHIA**
One Logan Square
130 North 18th Street
Philadelphia, PA 19103-6998

**PITTSBURGH**
Union Trust Building
501 Grant Street
Suite 850
Pittsburgh, PA 15219

**PRINCETON**
300 Carnegie Center
Suite 220
Princeton, NJ 08540

**SAN FRANCISCO**
555 California Street
Suite 4925
San Francisco, CA 94104

**SHANGHAI**
Shanghai Representative Office, USA
45F, Two IFC
8 Century Avenue, Pudong
Shanghai 200120
China

**TAMPA**
Fifth Third Center
201 East Kennedy Boulevard
Suite 520
Tampa, FL 33602

**WASHINGTON**
1825 Eye Street NW
Washington, D.C. 20006

**WILMINGTON**
1201 N. Market Street
Suite 800
Wilmington, DE 19801

# Risk Management Tools for Maritime Companies

**COMPLIANCE AUDIT PROGRAM**

Blank Rome Maritime has developed a flexible, fixed-fee Compliance Audit 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 Audit Program can help your company, please visit blankrome.com/complianceauditprogram.**

**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 and cyber risk management awareness. Blank Rome's maritime cyber risk management team has the capability to address cybersecurity issues associated with both land-based systems and systems onboard ships, including the implementation of the *Guidelines on Cyber Security Onboard Ships* and the *IMO Guidelines on Maritime Cyber Risk Management in Safety Management Systems.* **To learn how Blank Rome's Maritime Cyber Risk Management Program can help your company, please visit 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 blankrome.com/services/cross-border-international/international-trade or contact Matthew J. Thomas (mthomas@blankrome.com, 202.772.5971).**

## Blank Rome's Maritime Industry Team

**Our maritime industry team** is composed of practice-focused subcommittees from across many of our Firm's offices, with attorneys who have extensive capabilities and experience in the maritime industry and beyond, effectively complementing Blank Rome Maritime's client cases and transactions.

### Maritime Emergency Response Team ("MERT")

**We are on call 24 / 7 / 365**

In the event of an incident, please contact any of our MERT members listed in **red** below.

**William R. Bennett III** – NYC
CHAIR, BLANK ROME MARITIME

**Jeanne M. Grasso** – WAS
VICE CHAIR, BLANK ROME MARITIME

**Keith B. Letourneau** – HOU
CHAIR, BLANK ROME MARITIME

---

**Thomas H. Belknap, Jr.** – NYC
CO-CHAIR, MARITIME INDUSTRY TEAM

**Jeremy A. Herschaft** – HOU
CO-CHAIR, MARITIME INDUSTRY TEAM

**Matthew J. Thomas** – WAS
CO-CHAIR, MARITIME INDUSTRY TEAM

#### Bankruptcy

COMMITTEE CHAIR:

**Michael B. Schaedle** – PHL

Ira L. Herman – NYC
Regina Stango Kelbon – PHL/WIL
Rick Antonoff – NYC

#### Corporate/Financial/Transactional

COMMITTEE CHAIRS:

**Brett M. Esber** – WAS
**Stephen T. Whelan** – NYC

F. Humera Ahmed – NYC
Grant E. Buerstetta – NYC
Michael K. Clare – WAS
Lawrence F. Flick II – NYC/PHL
Michael Kim – NYC
R. Anthony Salgado – WAS
Peter Schnur – NYC
Brad L. Shiffman – NYC
Scott R. Smith – NYC
Robert P. Wessely – NYC
James C. Arnold – HOU

#### Dispute Resolution (Litigation, Arbitration and Mediation)

COMMITTEE CHAIRS:

**Thomas H. Belknap, Jr.** – NYC
**Douglas J. Shoemaker** – HOU

Michael K. Bell – HOU
Kate B. Belmont – NYC
William R. Bennett III – NYC
Alexandra Clark – NYC
Noe S. Hamra – NYC
Jeremy A. Herschaft – HOU
Jay T. Huffman – HOU
Emma C. Jones – WAS
John D. Kimball – NYC
Keith B. Letourneau – HOU
David G. Meyer – HOU
Jeffrey S. Moller – PHL
James J. Quinlan – PHL
Richard V. Singleton II – NYC
Alan M. Weigel – NYC
Lauren B. Wilgus – NYC

#### Employment/Labor/Tax/IP

COMMITTEE CHAIR:

**Joseph T. Gulant** – NYC

Susan B. Flohr – WAS
Anthony B. Haller – PHL
Brooke T. Iley – WAS

#### Enforcement/Criminal

COMMITTEE CHAIRS:

**Jeanne M. Grasso** – WAS
**Gregory F. Linsin** – WAS

#### Government Contracts

COMMITTEE CHAIR:

**Brian S. Gocial** – PHL

David M. Nadler – WAS
Harvey Sherzer – WAS

#### Regulatory/Energy/Environmental

COMMITTEE CHAIRS:

**Kevin J. Bruno** – NYC
**Matthew J. Thomas** – WAS

George T. Boggs – WAS
Joan M. Bondareff – WAS
Kierstan L. Carlson – WAS
Kevin R. Doherty – NYC
Frederick L. Ikenson – WAS
Dana S. Merkel – WAS
Stefanos N. Roulakis – WAS
Jonathan K. Waldron – WAS
C. J. Zane – WAS

**Please click on attorney names for contact information.**

Attorney Office Locations:
HOU – Houston • NYC – New York City • PHL – Philadelphia • WAS – Washington, D.C. • WIL – Wilmington

Attorney advertising. ©2019 Blank Rome LLP. All rights reserved. Please contact Blank Rome for permission to reprint. Notice: The purpose of this update is to identify select developments that may be of interest to readers. The information contained herein is abridged and summarized from various sources, the accuracy and completeness of which cannot be assured. This update should not be construed as legal advice or opinion, and is not a substitute for the advice of counsel.