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INTRODUCTION

The American Institute of Marine Underwriters ("AIMU") presents the 2018 Issues Book to provide its members with new information related to laws, global trends, international relations, and judicial opinions that may impact the global maritime insurance industry.

The Issues Book is divided into four parts. The first part addresses international developments of interest to the ocean marine insurance industry and highlights noteworthy actions taken by the United Nations and the International Maritime Organization, as well as those of other internationally recognized maritime and insurance-related entities. It also surveys recent changes to the laws of various countries that may affect the marine insurance industry. The second part focuses on relevant federal legislative, executive, administrative, and regulatory changes in the United States. The third part of the Issues Book addresses state legislation and regulation (to the extent there are any issues of interest to ocean marine insurers in the U.S.). Finally, the fourth part describes recent case law in the area of marine insurance, including any cases in which AIMU has submitted an amicus brief.

The issues discussed in this Book are monitored on an ongoing basis. Members should contact AIMU for further information or questions relating to the material contained in this Book.

Disclaimer: The materials contained herein are provided for informational purposes only and do not constitute professional advice; you should not rely on the information below without first seeking the advice of a competent professional. Further, this 2018 Issues Book is intended, but not guaranteed, to be current, complete and up-to-date.
I. INTERNATIONAL ISSUES

A. ROTTERDAM RULES

In January 2008, a Working Group created in 2002 by the United Nations Commission on International Trade Law (UNCITRAL) adopted a draft convention on contracts for the international carriage of goods wholly or partly by sea. The final text was approved in December 2008 by the General Assembly and was opened for signature at a ceremony in Rotterdam from September 21 to 23, 2009. The Rotterdam Rules will enter into force on the first day of the month one year after 20 countries have ratified the convention. As of August 2017, 25 countries had signed the convention, but only three had ratified it: Republic of Congo, Spain, and Togo. See http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html for further information on the current status of the Rotterdam Rules.

The U.S. delegation to the Convention played a major role in the drafting of the Rules, which reflects several important changes sought by U.S. shipping interests, and represents several years’ effort to build international uniformity on liability for the carriage of goods by sea. Several major compromises were essential to reaching consensus.

**Liability and Liability Limits:** Perhaps the most noteworthy reform of the new Convention centers around freedom of contract. Under the Convention, parties to volume contracts will be free to contract for higher or lower liability limitations than provided for by the Convention. Such contractual derogations will not be binding on third parties without their consent.

The Convention rejects the “tackle-to-tackle” approach in favor of the “door-to-door” approach, under which the Convention’s rules will apply as between the immediate parties to the contract, to the carrier’s responsibilities for the entire contractual period of carriage, which in a multimodal shipment will often be from the carrier’s receipt of the goods at an inland location in one country all the way to the carrier’s delivery of the goods at an inland location in another country. Furthermore, the Convention provides for automatic Himalaya clause protection for maritime performing sub-contractors: they will receive all the defenses and limitations of the carrier. Non-maritime performing parties will receive Himalaya clause protection only where contracted for.

The liability limits for the carrier in the Convention are slightly higher than those contained in the Hague Rules. The limits adopted are 875 SDR per package or 3 SDR per kilogram. By contrast, the Hague/Visby limits are 667 SDR per package or 2 SDR per kilogram, and the limits in the Hague Rules are 835 SDR per package or 2.5 SDR per kilogram. Shippers and carriers may depart from these limits by voluntary agreement in a volume contract. To review all of the Convention’s provisions, see: http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html.

**Jurisdiction:** The Convention sets forth a default provision which allows the claimant the option to pursue litigation in a jurisdiction contained on a list which includes: the domicile of the defendant; the place where the goods are received or the port where they are loaded on a ship; and the place where the goods are delivered or the port of final discharge. However, in cases where the shipper and carrier have agreed to a specific jurisdiction for resolving disputes, that choice
would be enforced if it was freely negotiated and contained in a volume contract. The forum selected would be binding on a third party if it was contained in a transport document, “timely and adequate” notice is given to the third party, and the forum is in one of the places set forth in the default provision. The provisions on jurisdiction will be applicable to trade with countries which “opt in” to them. It is expected that the U.S. will opt in to these provisions.

**Delay:** The Working Group decided to eliminate from the Convention liability on the part of the carrier for consequential damages -- meaning those involving pure economic damages and no physical loss -- arising from delay, thus leaving the matter to national or common law. Also, such liability will apply to carriers only if there is an agreement to make delivery by a specific time.

**Current Status:** On January 19, 2011, Spain became the first signatory to ratify the Rules. It has since been joined by Togo, Congo, and Cameroon.

On June 3, 2011, the National Industrial Transportation League, the World Shipping Council, the U.S. Maritime Law Association, the National Retail Federation, the Transportation Institute, and UPS sent a joint letter to the Chairman and the Ranking Member of the Senate Committee on Foreign Relations requesting them to ask the Secretary of State to send the Convention to the President so he can transmit the Convention to the Senate for ratification. In the letter, the organizations indicated their support for the Rules and their confidence that US ratification would “lead to [the Convention’s] international entry into force.”

In June 2013, the United States Department of State completed its “ratification package” for the Rotterdam Rules. The package was sent to the Maritime Administration, the Federal Maritime Commission, and the Department of Justice for inter-agency review.

As of October 2018, the President’s office has not sent the Rotterdam Rules to the Senate for consideration. The continuing delay in the U.S. is attributable primarily to opposition by some U.S. port authorities and terminal operators. However, proponents of the Rules have continued to diligently work to overcome that opposition and encourage ratification of the Rules in the U.S. AIMU supports ratification of the Rules.

**B. PIRACY**

Incidents of piracy continue to present significant financial and operational challenges to international trade in 2018, although incidents of piracy have trended down in recent years. The International Maritime Organization (“IMO”) reported 221 acts of piracy and armed robbery against ships for the year 2016, a decrease of 82 (27%) incidents from the 303 in 2015. The International Chamber of Commerce (“ICC”) International Maritime Bureau global piracy report announced 180 total incidents in 2017, which is a slight decrease from the 191 incidents reported in 2016 and represents the lowest annual number of incidents since 1995. Piracy also continued to plague Southeast Asia in 2017. For current information on piracy incidents, visit the International Maritime Bureau Piracy Reporting Centre website at [https://icc-ccs.org/piracy-reporting-centre](https://icc-ccs.org/piracy-reporting-centre).
Although Somalian piracy remains a concern for the international shipping community, there has been a notable decrease in piracy in the region. The formerly “high risk” region reported just 21 attacks in 2016 and 15 attacks in 2015, compared with 75 attacks in 2012 and 237 attacks in 2011, according to the ICC. The ICC reported just 5 actual and attempted attacks in Somalia 2017.

Despite piracy attacks remaining relatively low in recent years, a new hotbed for attacks has continued to develop around the South China Sea (68 reported attacks) and West Africa (62 reported attacks). Two thirds of the total reported attacks in 2017 were recorded in just five locations: Bangladesh (11); (Venezuela (12); the Philippines (22); Nigeria (33); and Indonesia (43). These attacks represent the bulk of incidents of piracy worldwide. A number of the attacks in West Africa represent the resurgence of “petro-piracy,” which involves the hijacking of tankers for oil theft. The IMO also reported a significant increase in pirate attacks in 2018 in Nigeria’s territorial waters and the Gulf of New Guinea. The first quarter of 2018 alone saw 66 reported incidents around West Africa. Pirate activity in the region has reportedly caused freight costs to rise dramatically amid insurance fears. For current information on piracy incidents, visit the International Maritime Bureau Piracy Reporting Centre website at https://icc-ccs.org/piracy-reporting-centre.

**Multinational Responses:** In January 2009, the U.S. and 20 other countries established a combined military task force, known as CTF-151, which coordinates counter-piracy efforts in international waters in accordance with United Nations Security Council Resolutions. In brief, the mission of CTF-151 is to disrupt piracy and armed robbery at sea and to secure global maritime commerce. Command of the CTF-151 changed hands in March 2017 when a team from Pakistan handed over command to Japan, led by Rear Admiral Tatsuya Fukuda.

The U.N. Office on Drugs and Crime (“UNODC”) has also been working with officials in Kenya, Somalia (particularly in Somaliland and Puntland), Mauritius, Seychelles, Tanzania, and Maldives on judicial and prison reforms targeted at counter-piracy efforts. For a report on the UNODC’s current efforts in those regions, see the UNODC Maritime Crime Programme annual report at http://www.unodc.org/unodc/en/piracy/.

In August 2018, the European Council decided to extend the mandate of the European Naval Force (“EU NAVFOR”) Somalia Operation Atlanta through December 31, 2020. The counter-piracy military operation was launched in 2008 as the first naval operation conducted by the European Union. The operations objectives are the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast and the protection of shipping and fishing activities as well as EU missions and programs in the region. The operations headquarters had been based in the United Kingdom, but following the Brexit decision, the European Council decided to move the operational headquarters to Spain and the Maritime Security Center Horn of Africa to France beginning in March 2019.

**The United States’ National Response:** In 2014, the United States became the 20th nation to join ReCAAP. The organization, which was established in 2006, aims to combat piracy in Southeast Asia through international cooperation and information sharing, capacity building, and cooperative arrangements. To find out more about ReCAAP, please see http://www.recaap.org/AboutReCAAPISC.aspx.
**Best Practices:** In August 2011, the U.K. Marine Trade Operations (“UKMTO”) issued “BMP4: Best Management Practices for Protection against Somalia Based Piracy,” in association with a number of other industry organizations including the International Group of Protection and Indemnity Clubs. BMP4 includes a detailed protocol on how to prepare for and respond to attacks in the high risk area (“HRA”) for Somali piracy. Specifically, BMP4 outlines Ship Protection Measures that include practices to deter pirates from attempting to board a vessel, physical barriers that make attempts to board more difficult, and additional security on board in the event that pirates are successful in gaining access to a vessel. To review BMP4, see http://oceansbeyondpiracy.org/matrix/united-kingdom-marine-trade-operations-ukmto.

The U.S. Coast Guard issued Maritime Security (“MARSEC”) Directive 104-6 to provide direction to U.S. flagged vessels operating in high-risk areas where acts of piracy and armed robbery against ships are prevalent. U.S. flag ships operating in such high-risk waters are required to comply with the MARSEC Directive. The most recent reversion of the Directive was announced in April 2014, has not been made accessible to the general public because it contains security-sensitive information. For more information, please see the Federal Register’s website at https://www.federalregister.gov/articles/2014/04/25/2014-09385/revisions-to-maritime-security-directive-104-6-guidelines-for-us-vessels-operating-in-high-risk or e-mail LCDR Aaron Demo, U.S. Coast Guard, telephone 202-372-1272, email aaron.w.demo@uscg.mil.

**Use of Privately Contracted Armed Security Personnel:** As of mid-2013, most maritime nations, international organizations, and shipping industry members have acquiesced to the fact that privately contracted armed security personnel (“PCASP”) are playing an increasingly prominent role in counter-piracy efforts. Although the Netherlands and Japan historically have been the only major maritime nations that outlaw armed security on registered vessels, in November 2013 the Japanese government passed a law permitting Japanese vessels to employ armed security guards onboard their vessels. The debate has therefore shifted from the propriety of employing PCASP to what rules and restrictions should govern their use of force, conduct, and movement across international borders.

**Djibouti Code of Conduct 2017**

On January 10-12 of 2017, the signatories to the Djibouti Code of Conduct met in Jeddah, Saudi Arabia to adopt a revised Code of Conduct, which is known as the “Jeddah Amendment to the Djibouti Code of Conduct 2017.” The Jeddah Amendment addresses concerns about crimes of piracy, including armed robberies against ships and other illicit maritime activities. Under the Jeddah Amendment, signatories will cooperate to the fullest possible extent to repress transnational organized crime in the maritime domain, maritime terrorism, and other illegal activities at sea. The Jeddah Amendment also provides that the signatories will liaise and co-operate with States, and coordinate activities with each other to facilitate rescue, interdiction, investigation, and prosecution. For more information about the Jeddah Amendment, see http://www.imo.org/en/OurWork/Security/PIU/Pages/DCoC.aspx.
C. INTERNATIONAL SANCTIONS ON IRAN
(for information on U.S. Sanctions, see Section II.B below)

On June 9, 2010, the U.N. Security Council adopted Resolution 1929, which subjects Iran to a new regime for inspection of suspicious cargo, for the purpose of detecting and stopping smuggling by Iran. States should inspect any vessel in their territory suspected of carrying prohibited cargo, as well as cooperate in such inspections on the high seas. The resolution imposes a ban on bunkering services and States are barred from providing critical support services, such as fuel and water, to ships suspected of carrying prohibited cargo. Additionally, Resolution 1929 blocks States from financial transactions, including insurance or reinsurance that could contribute to Iran’s nuclear proliferation. For more information, see the U.N. Security Council press release about Resolution 1929 at:

In addition to the U.N. resolutions, the United States, Saudi Arabia, the United Arab Emirates, and other nations are forming a coalition of “like minded countries” with a common goal of limiting the development of Iran’s nuclear weapons program. In November 2011, Great Britain and Canada announced that they would cease all transactions with the Iranian financial services industry and the Central Bank of Iran. These actions coincided with the United States’ November 2011 Executive Order concerning Iran, and its decision to designate Iran as a “jurisdiction of primary money laundering concern” under Section 311 of the Patriot Act (see continued discussion below under U.S. Federal Legislation and Regulation).

On July 27, 2010, the European Council adopted sanctions against Iran that targeted its energy and financial sectors. The European Union froze the assets of 120 Iranian organizations and imposed travel bans on their personnel on December 1, 2011. On January 23, 2012, it prohibited the creation of new contracts for the purchase of Iranian oil and required termination of all existing EU contracts for Iranian oil, so as to create an EU embargo on Iranian crude and petroleum products. The sanctions also prohibited all trade in petrochemicals, precious metals, gold, and diamonds between the EU and Iran, and froze the assets of the Central Bank of Iran and Iranian firms that support shipping by the Islamic Republic of Iran Shipping Lines (“IRISL”). Additionally, they imposed a ban on the insurance and reinsurance of tankers carrying crude oil from Iran.

For up to date news about the sanctions against Iran, visit:

On November 24, 2013, the P5+1 (United States, Russia, China, United Kingdom, and France, plus Germany) concluded negotiations with Iran in Geneva, resulting in the passage of the Joint Plan of Action (“JPOA”). The JPOA suspends U.S. and EU sanctions temporarily on Iran’s petrochemical exports, as well as gold and precious metals. In return, Iran promises to restrict its nuclear program and submit to enhanced monitoring by the IAEA. For a breakdown of the JPOA’s provisions, see
On July 20, 2015, the United Nations Security Council unanimously endorsed a resolution detailing the scope of an agreement reached with Iran regarding nuclear proliferation. Diplomatic efforts by China, France, Germany, the Russian Federation, the United Kingdom, the United States, and Iran have culminated in the Joint Comprehensive Plan of Action (JCPOA). Pursuant to the JCPOA, Iran will agree to nuclear oversight as detailed in the Non-Proliferation Treaty (NPT) and, in return, all UN Security Council sanctions as well as multilateral and national sanctions relating to Iran’s nuclear program will be lifted. Of special note, the European Union has lifted sanctions on the financial sector, sanctions related to shipping and shipbuilding and the transport sector generally, and sanctions relating to the provision of insurance or reinsurance.

The schedule for lifting sanctions began with the endorsement of the JCPOA by the UN Security Council on July 20, 2015. The sanctions against Iran were officially lifted on January 16, 2016, after the International Atomic Energy Agency confirmed that Iran had successfully completed all of its agreements from the July 2015 resolution. As a result, Iran gained access to $50 billion in frozen assets and earned the right to sell and purchase goods, including its vast reserves of oil, in the international market. Importantly, the lifting of multi-national sanctions under the JCPOA does NOT affect the United States’ primary sanctions against Iran. For more information on U.S. primary sanctions, see Section II.B.

On May 8, 2018, the President Trump announced his decision to cease the United States’ participation in the JCPOA and to begin re-imposing the U.S. nuclear-related sanctions that were lifted to effectuate the JCPOA sanctions relief, following wind-down periods of 90 and 180 days. The first of the wind-down periods ended August 6, 2018, when President Trump issued Executive Order 13846 (E.O.), “Reimposing Certain Sanctions With Respect to Iran.” EO 13846 re-imposed relevant provisions of five prior Iran sanctions executive orders that which had been revoked or amended by E.O. 13716 in January 16, 2016. Pursuant to executive order and the President’s March 8, 2018 national security memorandum regarding the JCPOA, OFAC revoked, or amended, as appropriate, general and specific licenses issued in connection with the JCPOA and issued new authorizations to allow the wind down of transactions and activities that were previously authorized pursuant to the those revoked or amended licenses. The second, and final, wind-down period ended November 4, 2018 and all remaining sanctions that had been lifted or waived pursuant to the JCPOA came back into full effect on November 5, 2018. For more information on the re-imposition of Iranian sanctions, see: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf

The European Union (“EU”) has rejected the United States’ withdrawal from the JCPOA and has publicly vowed to preserve the deal and work-around the newly re-imposed US sanctions on Iran. In August 2018, the EU updated its “Blocking Regulation,” originally introduced in 1996, which provides protection against the application of certain US secondary sanctions when they affect the interests of European Union persons engaging in international trade and related commercial activities. The blocking regulation prohibits EU persons from complying with any requirement or prohibition within the extra-territorial sanctions identified in the regulation without authorization and is intended to allow EU persons to freely decide whether to do business in sanctioned countries.
In October 2018, the United Kingdom’s High Court ruled that an insurer could not rely on a sanctions-related exclusion clause to resist paying out on a marine cargo insurance policy governed by English law in light of the impending re-imposition of US secondary sanctions against Iran. The judge in the case concluded that the sanctions-related exclusion clause did not extend to the “exposure to the risk of being sanctioned” and, additionally, triggering the clause would not extinguish the insurers’ liability to pay the claim entirely. Although the court was asked to consider the application of the blocking regulation, the judge did not reach an ultimate conclusion regarding the blocking regulation and focused on the operation of the contract terms. The decision raised some speculation about whether insurers would seek to amend standard sanctions clauses and whether parties would seek to address the type of exposure to sanctions risks at issue in the case.

D. WRECK REMOVAL

In May 2007, at a Diplomatic Conference in Kenya, the International Maritime Organization (IMO) adopted a Wreck Removal Convention. The Convention creates liability on the part of ship owners for the cost of dealing with wrecks beyond a country’s territorial sea, requires ship owners to maintain financial responsibility to compensate a country that takes needed action, and allows direct action against the insurer that provides the certificate of financial responsibility to a ship owner. Liability is limited in accordance with the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims, which entered into force in 2004. The Convention creates an obligation on the ship operator and/or master to report a “wreck” to the affected state party. “Wreck” is defined to include a sunken or stranded vessel and also an object, such as a container, that is lost overboard. For a review of the Convention’s text, see http://archive.basel.int/ships/abandonment/wrc.

The Wreck Removal Conference adopted a Resolution inviting the IMO Legal Committee to create a single insurance certificate covering multiple liability and compensation conventions. The new Convention also includes an optional clause enabling States Parties to apply certain provisions to their territory, including their territorial sea.

The Convention entered into force on April 14, 2015 following the deposit of a ratification instrument by Denmark on April 14, 2014. Since the treaty was adopted, it has been ratified by 37 states. For the IMO’s press release on this development, see http://www.imo.org/MediaCentre/PressBriefings/Pages/Wreck-removal-convention-to-enter-into-force.aspx.
E. ATHENS PROTOCOL

In October 2006, the IMO Legal Committee adopted a model reservation to the 2002 Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea (the “Protocol”). Although the United States has not ratified the Protocol, the required ten ratifications were reached in 2013: Albania, Belgium, Belize, Denmark, Latvia, Netherlands, Palau, Saint Kitts and Nevis, Serbia, and Syrian Arab Republic. The European Union has also ratified the Protocol, which is set to enter into force on April 23, 2014. As a precondition to ratification of the Protocol, signatories must denounce the 1974 Convention, which limited liability to 46,666 Special Drawing Rights (“SDR”) per carriage, whereas the 2002 Protocol raises that limit to 250,000 SDR per passenger per occasion, unless the carrier proves that the damage resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable, and irresistible character, or was wholly caused by a third party. Further, if the damage exceeds the new Protocol, the carrier may be liable up to 400,000 SDR per passenger per occasion unless it can prove that its own fault or neglect did not cause the damage. The 2002 Protocol also defines the carrier’s limit of liability for loss of or damage to luggage. Signatories to the Protocol may opt for higher limits, or eliminate them altogether, through their national laws. For more information on the Athens Protocol, see http://www.imo.org/About/Conventions/ListOfConventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-(PAL).aspx.

F. SHIP RECYCLING

The IMO Ship recycling convention (“Hong Kong Convention”) provides guidelines to ensure that ships are properly recycled when they reach the end of their operational lives. The convention will go into force 24 months after 15 states, representing 40% of world merchant shipping by gross tonnage, have acceded. As of August 2018, only six states had acceded to the Hong Kong convention (Panama, Norway, Congo, France, Belgium, and Denmark).

In 2013, the European Parliament and the Council of the European Union adopted the EU Ship Recycling Regulation. The regulation’s objective is to reduce the negative impacts linked to the recycling of ships flying flags of EU Member States. In December 2016, the regulation adopted an EU list of ship recycling facilities and beginning January 2019, the regulations mandate that end-of-life EU-flagged vessels must be recycled in facilities on the EU list. Prior to the list going into effect, 95 percent of the global recycling takes place in five countries, all outside Europe, while the list contains only recycling yards located within the EU. Public comments on the 4th version of the EU list closed on October 19, 2018.

G. HNS CONVENTION

In 1984, IMO convened a conference to consider a new instrument dealing with compensation for accidents involving hazardous and noxious substances (HNS) but the issue proved to be so complex that the attempt had to be abandoned. Because of the heavy workload of the Legal Committee, it was not until 1996 that the matter could be considered again. The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (HNS) by Sea was adopted in London in May 1996 by IMO.
A Correspondence Group was established at the 80th session of the Legal Committee to assist the Committee in monitoring the implementation of the HNS Convention. Its website contains all of the Group’s correspondence and many useful documents which will help in answering any difficulties regarding implementation of the regime. The Correspondence Group’s website is [http://folk.uio.no/erikro/WWW/HNS/hns.html](http://folk.uio.no/erikro/WWW/HNS/hns.html).

The Correspondence Group has also produced an overview to the HNS Convention, agreed to by the Legal Committee at its 84th session, which provides straightforward but fundamental information on the key issues that fall within the scope of the Convention.

However, by 2009, the HNS Convention had still not entered into force, due to an insufficient number of ratifications. A second International Conference, held in April 2010, adopted a Protocol to the HNS Convention (2010 HNS Protocol), that was designed to address practical problems that had prevented many States from ratifying the original Convention. On April 21, 2017, Norway became the first State to ratify the 2010 Protocol. As of October 2018, fourteen states have adopted the 1996 Protocol, and eight states have signed the 2010 Protocol subject to ratification: Canada, Denmark, France, Germany, Greece, Netherlands, Norway, and Turkey. As of October 2018, four states have ratified the 2010 Protocol: Canada, Denmark, Norway, and Turkey. For current information on the status of the HNS convention, visit [http://www.hnsconvention.org/Pages/Status.aspx](http://www.hnsconvention.org/Pages/Status.aspx).

### H. ARREST OF SHIPS


### I. TRADE ISSUES

The current round of free trade negotiations in the World Trade Organization, known as the Doha Round, was launched in 2001. It includes an effort to improve cross-border market access for insurers and other providers of financial services. The negotiations were temporarily suspended in July 2006 due to a lack of progress, revived in 2007, but reached another impasse in 2008.
The Doha Round saw significant progress made in December 2013 at the WTO’s Bali Ministerial Conference. The Bali Package trade agreement is the first agreement reached by the WTO to be approved by all of its members and resulted in provisions on trade facilitation, agriculture, and development issues. For a more in-depth review of the Bali Package, see http://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm.

The Doha Round made further progress following the WTO’s Tenth Ministerial Conference in Nairobi, Kenya, in December 2015, reaching several agreements resulting in the Nairobi Package. The Nairobi Package largely deals with issues affecting the WTO’s poorest member-countries but one significant resolution reached was for WTO members to commit to eliminating subsidies on farm exports. For a thorough breakdown of resolutions reached in the Nairobi Package, see https://www.wto.org/english/news_e/news15_e/mc10_19dec15_e.htm.

Although the Doha round of free trade negotiations have yet to conclude in full, the United States government continues to advance a series of bilateral and regional free trade agreements, most of which include provisions supported by AIMU to allow cross-border sales of ocean marine insurance. Such cross-border access for ocean marine insurers is also part of the standard U.S. negotiating position for the Doha Round.

The North American Free Trade Agreement (“NAFTA”) adopted in 1993 promised cross-border access for truckers in the three countries party to the Agreement. In 2007, under a pilot program established by the Federal Motor Carrier Safety Administration (FMCSA), Mexican trucks became eligible to apply for authority to carry international cargoes on long hauls. Until the pilot program was launched, Mexican trucks had been restricted to operating in zones near the U.S./Mexican border. AIMU supports NAFTA, which includes a section allowing Mexican shippers to purchase cargo insurance on exports and imports from U.S. and Canadian marine insurers. As of October 2018, President Trump announced a re-negotiation of NAFTA. The new trade deal with Mexico and Canada, the United States-Mexico-Canada Agreement (“USMCA”), subject to approval by Congress, will replace NAFTA, though it leaves NAFTA’s provisions largely intact, with key changes primarily focused on the automotive and dairy industries. Additionally, the fate of the Trade in Services Agreement (“TiSA”), a trade initiative focused exclusively on the global service industries, remains uncertain, and the Trump administration has not committed to continuing negotiations on behalf of the U.S.

Since the start of 2018, President Trump began announcing new series of tariffs on imports of certain goods, beginning with tariffs on washing machines and solar panels in January 2018. The first significant series of tariffs applied ten and twenty-five percent tariffs on imports of aluminum and steel, respectively, from most countries and subject to an exclusion process. President Trump cited national security concerns under Section 232 of the Trade Expansion Act of 1962 as the basis for the aluminum and steel tariffs. Following the announcement of these tariffs, US trading partners such as the European Union and Canada proposed retaliatory tariffs and several have since imposed them on various US goods. As of November 2018, four countries have been granted permanent waivers from the steel and aluminum tariffs: Argentina, Australia, Brazil, and South Korea. Negotiation over tariffs also figured heavily in NAFTA discussions and, as of November, 2018, remain a potential obstacle to the signing of the NAFTA replacement, the USMCA. For a copies of the steel and aluminum proclamations, see: https://www.whitehouse.gov/presidential-
Beginning in March 2018, President Trump also announced the first in a series of escalating tariffs against imports of Chinese goods, citing Section 301 of the Trade Act of 1974 and concerns over theft of intellectual property. The March 22, 2018 memorandum initially proposed to apply tariffs to approximately $50 billion in Chinese goods. China responded by announcing retaliatory tariffs against 128 American products, including pork, which became effective April 2, 2018. On April 3, 2018, another list of proposed tariffs on imports of over 1300 Chinese goods was announced, including products as varied as medical devices, aircraft parts, and flat-screen televisions. On April 4, 2018, both President Trump and China announced additional tariff plans. Throughout 2018, President Trump and China have announced escalating “tit for tat” tariffs against Chinese and American goods, respectively. As of September 2018, the US had levied ten percent tariffs on approximately $200 billion in Chinese goods, set to increase to twenty-five percent by the end of 2018. As of November 2018, amid bitter exchanges regarding trade, President Trump has discussed potentially imposing tariffs on all remaining imports from China. The status and scope of US-China tariffs has evolved rapidly throughout 2018 and is expected to remain volatile.

J. POLAR REGIONS

The International Maritime Organization has adopted the International Code for Ships Operating in Polar Waters (“Polar Code”). The Polar Code entered into force on January 1, 2017. It is comprised of two sections, the first addresses safe design, construction and operation and the second addresses environmental protection. Unlike preexisting conventions, the Polar Code takes into account the unique risks associated with operating in polar regions including, but not limited to, ice, low temperatures, remoteness, severe weather, and the pristine environment. One of the key features of the Polar Code is the requirement for a Polar Operations Manual, which will address the design standards for a given ship including the operational assumptions that informed those standards as well as providing operating guidance to the crew and pilots on the vessel. The working group to develop the operational manual expects completion of the joint industry guidance in the spring of 2019. The Polar Code also includes requirements for additional safety and navigation equipment. Regarding the environmental aspects, the Polar Code limits operational discharges and noxious liquid substances. There are also additional protections from damage meant to reduce the chance for spilling oil or other noxious substances. For further information see: http://www.imo.org/en/MediaCentre/HotTopics/polar/Pages/default.aspx.

On July 22, 2015, the United States Coast Guard issued regulations establishing temporary safety zones around the Shell contracted vessel FENNICA, which is participating in Shell’s planned Arctic oil drilling. The regulations are meant to create a safe Voluntary First Amendment Area for those individuals electing to exercise their First Amendment right to protest oil drilling in the Arctic by approaching the FENNICA in small boats or kayaks. The regulation creates a “no wake” area around the FENNICA within a rectangle measuring 500 yards in front and 100 yards to the port, starboard, and astern of the vessel.
In May 2018, the IMO approved Bering Strait and Bering Sea ship routing measures proposed by the United States and the Russian Federation. In November 2017, the U.S. and Russia had proposed a system of two-way routes for vessels in the region in response to increased shipping traffic there. Following their approval, the six two-way routes and six precautionary areas go into effect on December 1, 2018. They represent the first internationally recognized ship routing measures approved by the IMO for polar waters. The routes are voluntary for all domestic and international ships and do no limit commercial fishing or subsistence activities. The routes are designed to help mariners avoid shoals, reefs, and islands and to reduce the potential for marine casualties and environmental disasters.

In August 2018, the International Union of Marine Insurers published a position paper on Arctic Sailings. Among other things, the IUMU position paper urges more infrastructure support to facilitate the provision of adequate insurance for Arctic sailings. The paper also lists a number of considerations for assessing voyage risk in Arctic sailings, and cites limited historical information and constantly changing ice conditions as reasons behind the cautious approach to risk assessment currently taken by marine insurers. In the paper, the IUMI supported the implementation of the Polar Code, consideration of an instrument to support non-SOLAS vessels in polar waters, and greater surveys to produce more reliable charts. The paper also predicts that, because of the heightened probability and potentially severe consequences of incidents occurring in the Polar region, insurance would only be available, if at all, on a case-by-case basis in certain defined areas of the region. For a copy of the IUMI position paper, see: https://iumi.com/opinions/position-papers.

K. SOLAS VGM REQUIREMENTS

The International Maritime Organization adopted new amendments to the International Convention for the Safety of Life at Sea ("SOLAS") requiring shippers to provide documentation showing verification of the gross mass ("VGM") of all packed containers shipped between IMO signatory countries. The SOLAS VGM requirements went into force on July 1, 2016. The requirements provide that all shippers must provide an accurate VGM prior to a container being loaded on a vessel. If no VGM is provided, a container may not be loaded at the terminal. This requirement presents significant problems as, in most cases, shippers are not on site where the container is being loaded. Thus, shippers are forced to rely on terminal and carrier personnel to assure that an accurate VGM has been provided. Though most countries have not enacted any enforcement regime with respect to the SOLAS VGM requirements, it is possible that, as the requirements become more familiar to both shippers and regulatory officials, rules Penalizing violators may be passed which could cause shipper’s to incur fines and, possibly, criminal charges. For further information about the history of SOLAS, see: http://www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/HistoryofSOLAS/Pages/default.aspx.

The IMO has suggested three practical methods for properly determining the VGM of containers, including: (1) having packed containers carried by trucks prior to shipment weighed on a weighbridge and subtracting the weight of the truck to determine the total weight of the packed container; (2) weighing all items going into the container, including packing and securing
materials, which the container is being packed, and adding the weight of the goods to the listed weight of the container; and (3) contracting to have containers shipped by the shipper weighed by third parties at the terminal port. Many shippers have opted to employ the third method and begun paying flat fees per container to terminal personnel to weigh containers for them. Reported fees have ranged as low as $25 per container, though higher costs have been reported at some terminals. As enforcement regimes are clarified in different jurisdictions, pricing for terminal weighing services should stabilize, allowing shippers to more accurately anticipate shipping costs.

A nonprofit database of global container information initially launched in 2016 to help shippers meet the demands of SOLAS, BoxTech, is increasingly being used outside of SOLAS to identify containers that have been sold, are lost or stolen, or tied up in a bankruptcy case. The database is managed by the Bureau International des Containers ("BIC") and includes information on more than 30 percent of the global container fleet. Based on user feedback, BIC has added new features to database, including the ability to search the database for a specific container and create a list of containers of interest to see if they are involved in a bankruptcy situation or lost or stolen. Information about the BoxTech database is available at: https://www.bic-boxtech.org/.

L. YORK ANTWERP RULES 2016 AND GUIDELINES

The York-Antwerp Rules for the Adjustment of General Average ("YAR") have existed since the 1860's and have been the subject of revisions at approximately 20 to 25 year intervals. Early versions of the Rules were drafted by commercial interests and average adjusters, to bring uniformity to the adjustment of general average; since the late 1940’s revisions have taken place under the auspices of the Comité Maritime International ("CMI"), which is often described as their "custodian." The Rules do not have the force of law (although different versions have been incorporated at different times in the national laws of countries as diverse as the Soviet Union, Egypt, and Norway) and they become binding on the parties to a common maritime adventure by reason of their incorporation into the contract of carriage, typically embodied in a charter party or bill of lading, and their application is near-universal.

On May 6, 2016, at the General Assembly of the CMI in New York City, the York-Antwerp Rules 2016 were approved by 42 countries in attendance, with none opposed and none abstaining. A number of changes were made to YAR simply for clarity, and a consistent numbering protocol was adopted. Commentary on the substantive changes is available on the www.thegapage.com website.

A set of CMI Guidelines for the Adjustment of General Average also were adopted in New York. This was a new document developed by the IWG, in preference over a suggestion that the York Antwerp Rules should be expanded to include a set of definitions and its stated intention is to "assist in dealing with general average cases and to provide:

- general background information
- guidance as to recognized best practices
- an outline of procedures
YAR 2016 and the Guidelines are available on the CMI website at
https://comitemaritime.org/recent-work/general-average-2/

Additionally, the CMI has formed a Standing Committee on General Average, consisting of
industry representatives and average adjusters. This committee will revise the Guidelines from
time to time and currently is working on model general average security documents with the goal
of finalizing them for agreement at the next CMI Colloquium, scheduled to take place on Mexico
City during September 29th/October 2nd, 2019.

[With thanks to Jonathan Spencer, US representative on the CMI Standing Committee on General
Average, for the foregoing summary]

M. HANJIN BANKRUPTCY

Hanjin Shipping, formerly one of the largest container carriers in the world, filed for bankruptcy
in South Korea on August 31, 2016. South Korean courts declared Hanjin bankrupt and ordered
that its assets be liquidated on February 17, 2017. A parallel bankruptcy proceeding, filed in the
U.S. Bankruptcy Court for the District of New Jersey on September 2, 2016, is ongoing. Most
claims related to the Hanjin bankruptcy have been resolved, though the liquidation proceedings
are ongoing.

N. AUTONOMOUS VESSELS

Development of autonomous vessels is the newest advance in technology to impact the maritime
sector. Companies in Denmark, Norway, and Great Britain are investing substantially in the
development of container ships and other vessels such as tugboats and ferries that are intended to
operate autonomously, without the need for a crew. In June 2017, Rolls-Royce and tug operator
Svitzer successfully performed a demonstration of a remotely operated commercial vessel in
Copenhagen harbor.

In June 2017, the Unmanned Cargo Ship Development Alliance launched in Shanghai, China. The
group plans to have an unmanned cargo ship in the water by October 2021. The Alliance is chaired
by China’s HNA Technology Group Co, Ltd. and was formed with nine members, including Rolls-
Royce, the American Bureau of Shipping, Wartsila, and several Chinese research institutes,
shipbuilding groups, and classification societies. The Alliance held its inaugural meeting and first
council in Shanghai in June 2017.

In November 2017, the United Kingdom launched an Industry Code of Practice for the design,
construction, and operation of autonomous maritime systems. The Code is designed to set initial
standards and best practice for all those involved with the development and operation of
autonomous systems. The Code was prepared by the UK Maritime Autonomous Systems Working
Group and was published through the Society of Maritime Industries.

In response to the development of autonomous vessels, the IMO has formed a working group to
examine the technology and develop appropriate regulation for autonomous vessels. Part of the
working group’s efforts will include testing of the safety and security of autonomous surface ships,
including issues such as interactions with reports, responses to incidents, and protections for the marine environment. In May 2018, IMO’s senior technical body, the Maritime Safety Committee (“MSC”) endorsed a framework for a regulatory scoping exercise, including preliminary definitions of Maritime Autonomous Surface Ships (“MASS”) and degrees of autonomy, methodology for conducting the exercise, and a plan of work. The correspondence group on MASS is scheduled to report back to MSC in December 2018 regarding tests of the framework of the regulatory scoping exercise.

The Comité Maritime International has also formed an International Working Group to study issues relating to autonomous vessels, including the regulatory environment and insurance.

**O. EUROPEAN DATA PRIVACY REGULATIONS**

Europe’s general data protection regulation (the GDPR) went into effect on May 25, 2018. The GDPR’s broad jurisdiction made the regulation applicable to many U.S. companies which were not previously subject to European data protection law. In addition, the GDPR expanded existing substantive EU data protection obligations. The GDPR is available at: [https://gdpr-info.eu/](https://gdpr-info.eu/). For more information on EU data protection, including the GDPR, see: [https://ec.europa.eu/info/law/law-topic/data-protection_en](https://ec.europa.eu/info/law/law-topic/data-protection_en).

**P. IMO SULPHUR CAP**

Beginning on January 1, 2020, the IMO will reduce and limit sulfur content in marine fuels to 0.5%. The current cap is 3.5%. The purpose is to reduce sulfur oxide emissions and therefore benefit the environment and health.

The IMO has declined requests to delay implementation, meaning that shipowners are scrambling for means to comply. While it has been suggested that the refiners should bear at least part of the cost of compliance, thus far the cost will remain with shipowners.

This will likely result in increased costs to shippers and possibly increased machinery damage claims; but that remains to be determined.

**II. U.S. FEDERAL LEGISLATION AND REGULATION**

**A. U.S. SANCTIONS ON IRAN**

Note that U.S. sanctions on Iran have evolved rapidly since the passage of the JCPOA (see Section I.C above); the information below is current as of October 2018.

On July 20, 2015, the United Nations Security Council unanimously endorsed a resolution detailing the scope of an agreement reached with Iran regarding nuclear proliferation. Pursuant to that agreement, the United States will lift all nuclear-related sanctions on Iran. Sanctions to be lifted include those applicable to the Iranian financial sector, those limiting the provision or underwriting of insurance or reinsurance policies, and those relating to transactions with Iran’s shipping and shipbuilding sectors and port operators.

The schedule for lifting sanctions began with the endorsement of the Joint Comprehensive Plan of
Action ("JCPOA") by the UN Security Council on July 20, 2015. “Adoption Day” occurred ninety days after endorsement on October 18, 2015. As of Adoption Day all parties began to lift sanctions, effective as of “Implementation Day.” Implementation Day, the day upon which the IAEA (International Atomic Energy Agency) verified that Iran had implemented the agreed upon nuclear-related measures as specified in the JCPOA, occurred on January 16, 2016. Importantly, the lifting of sanctions pursuant to the JCPOA affected only U.S. secondary sanctions; primary economic sanctions, including restrictions preventing U.S. citizens from engaging in transactions with Iranian entities and prohibiting Iran from moving money through U.S. banks, remained in effect. On March 8, 2018, President Trump announced his decision to withdraw from the JCPOA. For a breakdown of which economic sanctions affecting Iran remain in effect, see https://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx.

**Federal Legislation:** On August 10, 2012, President Obama signed into law the Iran Threat Reduction and Syria Human Rights Act of 2012. The thrust of the Act is to expand penalties on entities that transact business with the Iranian energy sector and to close the loopholes in the existing sanctions by imposing additional sanctions on shippers, insurers, and financial institutions. In 2013, the United States enacted the National Defense Authorization Act for Fiscal Year 2013, which included the Iran Freedom and Counter-Proliferation Act of 2012 ("IFCA"). The IFCA targets Iran’s shipping, shipbuilding, and energy sectors and makes sanctionable the provision of significant financial support of such activities. Notably, the IFCA also calls for sanctions on underwriting services, insurance, or reinsurance to persons and activities targeted by U.S. sanctions against Iran.

On December 15, 2016, President Obama signed into law the Iran Sanctions Extension Act, which reauthorized the Iran Sanctions Act of 1996. This Act does not expand sanctions, but instead extends the sanctions previously imposed under the Iran Sanctions Act of 1996 for ten additional years, through the end of 2026. Three days later, on December 18, President Obama signed the Consolidated Appropriations Act which loosened the restrictions on coal and fuel exports to Iran (discussed in greater detail in Subsection I below). On March 8, 2018, President Trump announced his decision to withdraw from the Joint Comprehensive Plan of Action and re-impose sanctions on Iran. As of October 2018, he has issued Executive Order 13486 regarding the re-imposition of sanctions and corresponding wind-down of the JCPOA, with additional guidance promised before the end of the final wind-down period on November 4, 2018. On August 2, 2017, the President signed the “Countering America’s Adversaries Through Sanctions Act” (CAATSA), which among other things, imposed new sanctions on Iran, Russia, and North Korea. The act can be found here: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/hr3364_pl115-44.pdf. OFAC has published guidance on CAATSA at: https://www.treasury.gov/resource-center/sanctions/Programs/Pages/caatsa.aspx.

**Executive Orders and Section 311 of Patriot Act:** Executive Order 13590 was revoked by Executive Order 13716, issued by President Obama on January 16, 2016. This Executive Order directs the Secretary of the Treasury, in consultation with the Secretary of State, to impose sanctions on any person who knowingly provides significant support to, or goods or services in support of, any activity or transaction for the benefit of an Iranian person included on the list of specially designated nationals and blocked persons maintained by the Office of Foreign Assets Control of the Department of the Treasury. The Executive Order also blocks all property and
interests in property in the United States of individuals engaged, on or after January 2, 2013, in diverting goods intended for the people of Iran.

**Trump Administration:** The Trump administration initially recertified compliance by Iran in accordance with the 2015 Iran Nuclear Deal. However, President Trump repeatedly condemned the deal in the past and said his administration intended to toughen enforcement of the deal, apply new sanctions on Iran for its support of terrorism and other destabilizing activities, and negotiate with European partners to craft a broader strategy to increase pressure on Tehran. The Iran Nuclear Deal was brokered by President Obama, and it limited Tehran’s nuclear ability in return for lifting international oil and financial sanctions. For a brief summary on the Iran Nuclear Deal, see [https://www.nytimes.com/interactive/2015/03/31/world/middleeast/simple-guide-nuclear-talks-iran-us.html](https://www.nytimes.com/interactive/2015/03/31/world/middleeast/simple-guide-nuclear-talks-iran-us.html).

On May 8, 2018, the President Trump announced his decision to cease the United States’ participation in the JCPOA and, following a wind-down period, to re-impose the U.S. nuclear-related sanctions that were previously lifted under the Obama administration to effectuate the JCPOA sanctions relief. The first of the wind-down periods ended August 6, 2018, when the President issued Executive Order 13846 (E.O.), “Reimposing Certain Sanctions With Respect to Iran.” EO 13846 re-imposed relevant provisions of five prior Iran sanctions executive orders that were revoked or amended by E.O. 13716 in January 16, 2016. Pursuant to the executive order and the President’s March 8, 2018 national security memorandum regarding the JCPOA, OFAC revoked, or amended, existing general and specific licenses issued in connection with the JCPOA and issued new authorizations to allow the wind down of transactions and activities that were previously authorized pursuant to the those revoked or amended licenses. The second, and final, wind-down period ended November 4, 2018 and all remaining sanctions that had been lifted or waived pursuant to the JCPOA came back into full effect on November 5, 2018. As part of the re-imposition of sanctions, on November 5, 2018, the Treasury Department’s Office of Foreign Assets Control sanctioned more than 700 individuals, entities, aircrafts, and vessels and amended the Iranian Transactions Sanctions Regulations to reflect the re-imposition.

For more information on the re-imposition of Iranian sanctions, see: [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf); [https://www.treasury.gov/resource-center/sanctions/Programs/pages/iran.aspx](https://www.treasury.gov/resource-center/sanctions/Programs/pages/iran.aspx)

The European Union has rejected the United States’ withdrawal from the JCPOA and has publicly vowed to preserve the deal and work-around the newly re-imposed US sanctions on Iran. President Trump has indicated that his administration may respond to work-arounds with expanded sanctions.

**B. U.S. SANCTIONS ON CUBA**

In February 2011, OFAC published a final rule amending the Cuban Assets Control Regulations (31 CFR Part 515) (“Cuba Regulations”) to implement policy changes announced by President Obama on January 14, 2011. The policy changes were designed to increase people-to-people contact, support civil society in Cuba, enhance the free flow of information to, from, and among, the Cuban people, and help promote their independence from Cuban authorities.
On January 15, 2015, further amendments to the Cuba Regulations were published. These amendments facilitate travel to Cuba for authorized purposes, facilitate the provision by travel agents and airlines of authorized travel services and the forwarding by certain entities of authorized remittances, raise the limit on certain categories of remittances to Cuba, allow U.S. financial institutions to open correspondent accounts at Cuban Financial Institutions, and allow a number of other activities relating to, among other things, telecommunications, financial services, trade, and shipping. Notably, the amendments add § 15.580, which authorizes the provision of insurance coverage for global health, life, or travel insurance for individuals ordinarily resident in a country outside of Cuba who travel to or within Cuba.

On October 17, 2016 there was a further easing of U.S. sanctions. That easing included easing of restrictions on international cargo shipments involving or transiting through Cuba.

Importantly, notwithstanding the easing of the Cuba Regulations, the restrictions on trade by U.S. persons with Cuba remain largely in place. The changes to U.S. sanctions on Cuba do not allow insurers to pay claims or provide coverage (e.g. hull and cargo insurance, reinsurance) to entities travelling to Cuba unless such entities are authorized by a valid OFAC license to travel to Cuba. If an entity is licensed by OFAC, then the protections of the license extend to the entity’s insurers.

On June 16, 2017, President Trump announced intended changes to the Cuban regulations imposed by President Obama. The new regulations were issued November 8, 2017 and are intended to “channel economic activity away from the Cuban military and to encourage the government to move toward greater political and economic freedom for the Cuban people.” (For additional information, see: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_fact_sheet_11082017.pdf). These include restrictions on travel to Cuba and “people-to-people” outreach, as well as publishing a list of entities determined to be under the control of or acting on behalf of Cuban military, security, or intelligence services or people with whom certain transactions are prohibited (“Cuba Restricted List”). The Cuba Restricted List is distinct from the list of specially designated nationals (“SDNs”) has different effects. The new regulations are prospective and include provisions for previously existing contracts and licenses. For additional guidance, see https://www.treasury.gov/resource-center/sanctions/Programs/Pages/cuba.aspx. For answers to frequently asked questions, see https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_20170725.pdf.

There are several bills that were introduced in both houses of Congress in 2017, though none have passed either chamber yet, which push back against President Trump’s directive. One such pending bill is the Freedom for Americans to Travel to Cuba Act of 2017, introduced in the Senate with fifty-four co-sponsors. This bill would counteract the main effect of President Trump’s announcement and prohibit the President from placing restrictions on travel to or from Cuba by United States citizens, or any transactions incident to travel. However, in spite of widespread support in the Senate, the President ultimately would have the authority to veto the bill, making its passage unlikely.
C. OFAC REGULATIONS AND SANCTIONS

In November 2009, the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury issued Economic Sanctions Enforcement Guidelines. The guidelines are the first final rule published by OFAC, although they largely adopt the interim final rule issued in September of 2008. The OFAC guidelines emphasize the increased exposure businesses face in the area of international trade. Additionally they clarify the precautions businesses entering into these transactions should take to limit their exposure. The guidelines highlight the significance of both the effective compliance programs and the voluntary self-reporting of violations. OFAC received comments on the interim final rule from a number of organizations including: the American Bar Association, the American Insurance Association, and the National Foreign Trade Council. Comments focused around the definition of voluntary self-disclosure, a perceived move away from risk-based compliance, cooperation and tolling agreements, penalty calculation, penalty finding, and the violation process.

OFAC lists all of the sanctions programs that OFAC administers and enforces, including country-specific programs, on its website at http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx.

The past several years have seen an increased focus on sanctions activity and enforcement. In addition to a high number of executive orders, there have been several wide-ranging and high-profile acts introduced, including the Global Magnitsky Human Rights Accountability Act and the Countering America’s Adversaries Through Sanctions Act. Further, there has been significant volatility in certain American sanctions programs in recent years, namely reversals with regard to Cuba and Iran.

CAATSA: On August 2, 2017, the President signed the “Countering America’s Adversaries Through Sanctions Act” (“CAATSA). CAATSA, passed nearly unanimously by Congress, combines three Acts: Title I Countering Iran’s Destabilizing Activities Act of 2017; Title II Countering Russian Influence in Europe and Eurasia Act of 2017; and Title III Korean Interdiction and Modernization of Sanctions Act. CAATSA updates several existing sanctions programs, including sectoral sanctions relating to Russian and the Ukraine, as well as authorizes, and in some cases requires, the President to impose sanctions with respect to North Korea, Iran, and Russia. CAATSA also restricts the President’s ability to take terminate or waive certain Russian sanctions without congressional review. The Act directs the executive branch to gather certain information, develop particular strategies, submit determinations regarding designations, and prepare and submit detailed reports to Congress on certain subjects.

One of the most talked about provisions of CAATSA was Section 231, which requires the President to impose sanctions on persons – including person that are not US persons – who, after CAATSA’s enacting date, knowingly engage in significant transactions with parties that are part of, or operating for or on behalf of, the Russian defense or intelligence sectors, even if the transaction does not have any U.S. nexus. The Act also provided for sanctions for activities concerning: cyber security; crude oil projects; financial institutions; corruption; human rights abuses, export pipelines, privatization of stat-owned assets by government official; and arms transfers to Syria. Another provision that received a great deal of attention was Section 241 which required the Secretary of the Treasury to prepare and submit to Congress the so-called “Oligarch List” – a detailed report that would include the identification of significant senior foreign political figures and oligarchs in the Russian Federation, as determined by their closeness to the Russian regime and their net worth, as well as an assessment of their relationship with Russian President Vladimir Putin and other members of the Russian ruling elite.

Additionally, in September 2017, the President issued an executive order pursuant to CAATSA relating to North Korea. CAATSA modified and increased the President’s authority to impose sanctions with regard to North Korea and provided for sanctions against North Korean cargo and shipping, goods produced using North Korean convict or forced labor, and persons that employ North Korean forced laborers.

The act can be found here: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/hr3364_pl115-44.pdf. OFAC has published guidance on CAATSA at: https://www.treasury.gov/resource-center/sanctions/Programs/Pages/caatsa.aspx.

Iran: In response to the Iranian nuclear agreement discussed in greater detail above, OFAC released a Statement Relating to the Joint Comprehensive Plan of Action Implementation Day on January 16, 2016. In that Statement, OFAC confirmed that U.S. sanctions relief had been granted pursuant to the International Atomic Energy Agency’s verification that Iran completed its agreements to curtail its nuclear program. The statement went on to provide several guidelines and FAQ documents for entities to use while attempting to navigate the reduced, but not entirely rescinded, Iranian economic sanctions. On March 8, 2018, President Trump announced his decision to withdraw from the JCPOA and re-impose sanctions that were previously lifted, waived, or modified following the JCPOA. Executive Order 13486 was issued August 6, 2018 at the close
of the initial wind-down period, which included the revocation and amendment of previously issued authorizations, as well as the issuance of new and amended authorizations to effectuate the transition. Final wind-down of the JCPOA withdrawal occurred as of November 5, 2018 and updated guidance was issued on that date. For access to those FAQs and additional guidance on Iran, see http://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx.

On August 2, 2017, the President signed the “Countering America’s Adversaries Through Sanctions Act” (CAATSA), which among other things, imposes new sanctions on Iran, Russia, and North Korea. The act can be found here: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/hr3364_pl115-44.pdf. OFAC has published guidance on CAATSA at: https://www.treasury.gov/resource-center/sanctions/Programs/Pages/caatsa.aspx.

On February 20, 2013, OFAC published the names of 110 entities and individuals identified as the Government of Iran, Iranian financial institutions, or property or interest in property of the Government of Iran and updated its list of list of Specially Designated Nationals and Blocked Persons to identify those entities and vessels. That list continues to grow. The full list can be searched at http://sdnsearch.ofac.treas.gov/.

Libya: On February 25, 2011, President Obama issued Executive Order 13566 prohibiting all transactions with Libya. On July 1, 2011, OFAC issued Libyan Sanctions Regulations. In conjunction with the prohibition on transactions with Libya, individuals and entities have been designated as blocked. The list of blocked entities can be searched at http://sdnsearch.ofac.treas.gov/ using the Program name “LIBYA2." For further information on the OFAC regulations regarding Libya, see: http://www.treasury.gov/resource-center/sanctions/Programs/pages/libya.aspx.

Myanmar: Due to historic 2015 democratic elections and progress in the area of human rights in Myanmar (formerly Burma), on October 7, 2016 President Obama issued an executive order terminating U.S. sanctions against Myanmar. This is an important step towards normalizing relations with Myanmar as some version of U.S. sanctions has been imposed on the country for the past 20 years. For further information, see https://www.treasury.gov/resource-center/sanctions/Programs/pages/burma.aspx.

North Korea: North Korea has been subject to strict sanctions since 2008, stemming from a variety of Executive Orders (beginning with 13466) and legislation, which is continuing. Most recently, President Trump issued Executive Order 13810 in September 2017 imposing additional sanctions and secondary sanctions on foreign entities, including foreign financial institutions, for engaging in a wide variety of transactions involving North Korea. It also imposes a 180-day ban on visits to the U.S. by aircraft and vessels that have stopped in North Korea or engaged in a ship-to-ship transfer with such a vessel. Although U.S. persons were already broadly prohibited from transacting with North Korea, the new sanctions will significantly affect both U.S. and foreign businesses, by requiring foreign entities to cut business ties with North Korea or run the risk of being designated as blocked parties themselves and creating significant risk of supply chain, customer, and logistics disruption for U.S. companies, particularly those that engage in business in North Korea trading partner countries, such as China and Russia. Additionally, new
designations under the Executive Order include dozens of individuals in North Korea and around
the world, and a small number of financial institutions, several of which are identified as having a
location outside North Korea, specifically in China. On August 2, 2017, the President signed the
“Countering America’s Adversaries Through Sanctions Act” (CAATSA), which among other
things, imposes new sanctions on Iran, Russia, and North Korea. The act can be found here:
https://www.treasury.gov/resource-center/sanctions/Programs/Documents/hr3364_pl115-44.pdf.
OFAC has published guidance on CAATSA at:
https://www.treasury.gov/resource-center/sanctions/Programs/Pages/caatsa.aspx.
Despite a summit between President Trump and North Korea’s leader Kim Jong-Un, OFAC has
not lightened existing North Korea sanctions. For an overview of OFAC regulations regarding
North Korea, see https://www.treasury.gov/resource-center/sanctions/Programs/pages/nkorea.aspx.

Russia: Russia continues to face several new sanctions. Currently, the Russian Federation is
sanctioned under the Support for the Sovereignty, Integrity, Democracy, and Economic Stability
of Ukraine Act of 2014, which imposes asset blocking and U.S. exclusion sanctions on any official
of the government of the Russian Federation who is responsible for or complicit in directing acts
of significant corruption in Ukraine; and any individual who has materially assisted, sponsored, or
provided financial, material, or technological support for such acts. There are currently hundreds
of sanctioned individuals or entities. See https://sanctionssearch.ofac.treas.gov/.

On August 2, 2017, the President signed the “Countering America’s Adversaries Through
Sanctions Act” (CAATSA), which among other things, imposes new sanctions on Iran, Russia,
and North Korea. The act can be found here:
https://www.treasury.gov/resource-center/sanctions/Programs/Documents/hr3364_pl115-44.pdf.
OFAC has published guidance on CAATSA at:
https://www.treasury.gov/resource-center/sanctions/Programs/Pages/caatsa.aspx. Title II of
CAATSA relates to Russia, specifically “Countering Russian Influence in Europe and Eurasia Act
of 2017” and Ukraine-related directives. Pursuant to CAATSA, the President issued Executive
Order 13848 “Authorizing the Implementation of Certain Sanctions Set Forth in the Countering
America’s Adversaries Through Sanctions Act” on September 20, 2018. The E.O. provides
authority under the International Emergency Economic Powers Act (IEEPA) to the Secretary of
the Treasury to take certain actions to further implement sanctions and directs US Government
agencies to take all appropriate measures within their authority to ensure the full implementation
of those sanctions.

CAATSA heavily targets Russia, the sanctions are broad and individualized, but, where a person
fits the description of the sanctioned actor, include export sanctions, loan sanctions, procurement
sanctions, banking sanctions and several others. One of the most talked about provisions of
CAATSA was Section 231, which requires the President to impose sanctions on persons –
including person that are not US persons – who, after CAATSA’s enacting date, knowingly engage
in significant transactions with parties that are part of, or operating for or on behalf of, the Russian
defense or intelligence sectors, even if the transaction does not have any U.S. nexus. The Act also
provided for sanctions for activities concerning: cyber security; crude oil projects; financial
institutions; corruption; human rights abuses, export pipelines, privatization of stat-owned assets
by government official; and arms transfers to Syria. Another provision that received a great deal
of attention was Section 241 which required the Secretary of the Treasury to prepare and submit to Congress the so-called “Oligarch List” – a detailed report that would include the identification of significant senior foreign political figures and oligarchs in the Russian Federation, as determined by their closeness to the Russian regime and their net worth, as well as an assessment of their relationship with Russian President Vladimir Putin and other members of the Russian ruling elite.

For more information about CAATSA, see https://www.treasury.gov/resource-center/sanctions/Programs/Pages/caatsa.aspx.

**Somalia:** On April 12, 2010 President Obama issued an Executive Order which blocked “all property” located in the U.S. or in an overseas branch of a U.S. entity from (1) persons listed in the Annex of Specially Designated Nationals (SDN’s) to the Order, and (2) any “person determined by” Treasury, in consultation with State, “to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Somalia.” A guide to the Somalia sanctions is available at: http://www.treasury.gov/resource-center/sanctions/Programs/pages/somalia.aspx.

**Sudan:** Effective October 12, 2017, certain sanctions with respect to Sudan and the Government of Sudan were revoked, pursuant to E.O. 13761 of January 13, 2017, as amended by E.O. 13804 of July 11, 2017. Thus, as of October 12, 2017, U.S. persons were no longer prohibited from engaging in transactions that were previously prohibited under the Sudanese Sanctions Regulations, 31 C.F.R. part 538. The revocation did not affect OFAC sanctions related to the conflict in Darfur, the prior result of a national emergency declared in E.O. 13067, or OFAC designations of any Sudanese persons pursuant to sanctions authorities other than E.O.s 13067 and 13412. For an overview of OFAC regulations regarding Sudan, see https://www.treasury.gov/resource-center/sanctions/Programs/pages/sudan.aspx.

**Syria:** The Syrian sanctions program began in 2004. Up-to-date information concerning U.S. sanctions on Syria is available at http://www.treasury.gov/resource-center/sanctions/Programs/pages/syria.aspx. Current sanctions include a restriction on new investment in Syria by a U.S. person, the importation in the United States of any petroleum product, and prohibit transactions or dealings with foreign persons on the Specially Designated Nationals List. On August 3, 2015, additional individuals, entities, and vessels were added to the Specially Designated Nationals (“SDN”) List. The ongoing political situation in Syria has led to a number of parties added to SDN list and recent years have seen vigorous enforcement of Syria-related sanctions violations. As of September 2018, the US Senate Foreign Relations Committee has advanced a bill to impose new sanctions on Russia in relation to activities relating to Syria and support of the Syrian government. See https://www.treasury.gov/resource-center/sanctions/Programs/pages/syria.aspx.

regulation with a more comprehensive set of regulations which may include additional interpretive and definitional guidance. Moreover, on December 19, 2014, Executive Order 13685 was issued, prohibiting U.S. persons from exporting or importing any goods, services, or technology from the Crimea region of Ukraine, as well as restricting any investments in the area. On August 2, 2017, the President signed the “Countering America’s Adversaries Through Sanctions Act” (CAATSA), which among other things, amends the Ukraine-related directives, and imposes new sanctions on Russia. The act can be found here: [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/hr3364_pl115-44.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/hr3364_pl115-44.pdf). OFAC has published guidance on CAATSA at: [https://www.treasury.gov/resource-center/sanctions/Programs/Pages/caatsa.aspx](https://www.treasury.gov/resource-center/sanctions/Programs/Pages/caatsa.aspx).

For an overview of OFAC regulations regarding Ukraine, see [http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx](http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx).

**Venezuela:** Beginning in 2014 with the Venezuela Defense of Human Rights and Civil Society Act of 2014, the U.S. Government has imposed sanctions on individuals found to be responsible for violence in Venezuela. These sanctions were expanded with the signing of Executive Order 13692, “Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela,” by President Obama on March 8, 2015. These sanctions have been extended through the end of 2019 with the passage of the Venezuela Defense of Human Rights and Civil Society Extension Act of 2016. For an overview of OFAC regulations regarding Venezuela, see [https://www.treasury.gov/resource-center/sanctions/Programs/pages/venezuela.aspx](https://www.treasury.gov/resource-center/sanctions/Programs/pages/venezuela.aspx). In addition, new sanctions were imposed on Venezuela in August 2017, March 2018, and May 2018, following civil unrest and reports of widespread human rights violations in the country. The new sanctions targeted financial transactions with the Government of Venezuela and entities it owns or controls and specifically targeted dealings related to new debt, bonds, dividends, and securities, including the Venezuela’s oil-backed cryptocurrency.

**D. CARGO THEFT DETERRENCE**

In March 2006, legislation was enacted which renewed, with amendments, certain provisions of the 2001 anti-terrorism law known as the Patriot Act. The legislation incorporated several measures to deter cargo theft which were strongly advocated by AIMU, IMUA, and cargo security professionals. These provisions: (1) ordered creation of a new category for cargo theft in the Uniform Crime Reporting System; (2) ordered a review by the U.S. Sentencing Commission, which resulted in a two-level enhancement of the sentencing guidelines for violation of the federal law against cargo theft; and (3) directed the Attorney General to submit an annual report on cargo theft prosecutions. An earlier version of the legislation would have imposed a mandatory minimum sentence for cargo theft, but this proposal was dropped from the final bill.

The marine insurance industry was on the front lines in pushing these cargo theft measures over several years, beginning with comments to the Interagency Commission on Crime and Security in U.S. Seaports and continuing with Congressional testimony and follow-up visits to Congressional offices.

As of January 1, 2010, the FBI was to begin the implementation phase by initially accepting test data which captures this data element. Although the FBI is mandated to collect cargo theft data,
state and local law enforcement agencies are not required to report cargo theft data to the national UCR Program. Therefore, the FBI must rely upon the “good faith” reporting efforts of its voluntary contributors to make the cargo theft data collection a reality. Unfortunately, the lack of approval for funding requested in the original bill is hampering the FBI’s efforts to (1) implement congressionally requested actions and (2) populate multi-jurisdictional cargo theft task forces. AIMU has urged Congress to address this delay. AIMU, along with IMUA, also wrote to the FBI in June 2012, describing the cargo theft data collected as “woefully inadequate and incomplete” and describing cargo theft as a “very serious threat to the national economy and its citizens.” AIMU continues to closely monitor this situation.

E. TRIA

Legislation enacted in January 2015 amended and extended the Terrorism Risk Insurance Act (TRIA) program initially enacted in 2002 to create a federal backstop for private insurance of terrorism risks.

The specifics of the current program are as follows: (1) a single terrorist act must cause $5 million in damage to be certified for TRIA coverage; (2) once losses are expected to meet the threshold, the event must be certified as an “act of terrorism” by the U.S. Secretary of the Treasury in concurrence with the Attorney General of the United States and the U.S. Secretary of Homeland Security; (3) the aggregate insured loss from certified acts of terrorism must meet a minimum “program trigger” amount, the program trigger will be gradually increased each year from $100 million in 2015 to $200 million by 2020; and (4) an individual company must meet a deductible of 20% of its annual premiums for the government coverage to begin. Once these thresholds are passed, the insurer has a copay which started at 15% in 2015 and will gradually increase to 20% by 2020. If aggregate insured losses due to terrorism do not exceed $29.5 billion in 2015 up through $37.5 billion in 2019, the Secretary of the Treasury is required to recoup 140% of the government coverage through surcharges on property/casualty insurance policies. In 2020 the aggregate insured loss must exceed an amount equal to the average of all participating insurers’ deductibles over the previous three program years. The Congressional Budget Office has estimated that that amount may be as much as $50 billion. If the losses exceed the retention amount of between $29.5 billion and an estimated $50 billion, depending on year, the Secretary has discretion to apply recoupment surcharges, but is not required to do so.

The Treasury Department maintains a Resource Center on the Terrorism Risk Insurance Program, which is available at: http://www.treasury.gov/resource-center/fin-mkts/Pages/program.aspx. In June 2014, the Congressional Research Service published a Report for Congress on TRIA, which is available at: http://www.fas.org/sgp/crs/terror/R42716.pdf. Per the 2015 Act, the Government Accountability Office (“GAO”) reviewed various aspects of the TRIA and produced a report in January 2017 which reviewed alternative funding approaches for TRIA and examined how insurers manage their terrorism exposure and federal recoupment of losses, potential alternative funding approaches and their effects, as well as structure. The GAO reviewed related studies, analyzed several terrorism loss scenarios for each funding approach to estimate potential effects on market participants, and interviewed industry participants. They also solicited technical comments from the Treasury Department and the NAIC. The report is available at: https://www.gao.gov/products/GAO-17-62.
On June 29, 2018 the Federal Insurance Office published a required report on the Terrorist Risk Insurance Program. The report evaluated the overall effectiveness of the Program, changes or trends in the collected data, whether any aspects of the program have the effect of discouraging or impeding insurers from providing coverage, the impact of the program on workers comp insurers, and an estimate of the total amount of premiums earned on terrorism risk insurance since 2003. The report found the program be effective generally. The report also found that, since the program went into effect, private reinsurance capacity for terrorism risk increased substantially overall, though not in connection with losses arising from nuclear, biological, chemical, or radiological risks. The collected data for 2016 and 2017 indicated that the market for terrorism risk insurance was relatively stable and the Treasury Department did not observe any aspects of the program that discouraged or impeded insurers from providing property/casualty insurance in general or coverage for acts of terrorism specifically. The Treasury Department also estimated that the total earned premiums for terrorism risk insurance from 2013 to 2017 was approximately $37.6 billion or $45 billion including captive insurers. The report is available at: https://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/2018_TRIP_Effectiveness_Report.pdf.

The FIO will produce a report in 2019 on the competitiveness of small insurers in the terrorism risk insurance marketplace and will issue another report in 2020 on the effectiveness of the program.

F. PORT, MARITIME AND CARGO SECURITY

The Maritime Transportation Security Act (MTSA) of 2002 was enacted in response to the September 11, 2001 terrorist attacks. MTSA mandated numerous security programs, including domestic regulations to implement IMO’s International Ship and Port Facility Security (ISPS) Code. MTSA also mandated screening of transportation personnel through issuance of a Transportation Worker Identification Credential or Card (TWIC), a biometric credential that is intended to ensure only vetted workers are eligible to gain unescorted access to secure areas of a MTSA-regulated port or vessel. A proposed TWIC rule would establish electronic card reader requirements for certain Coast Guard-regulated vessels and facilities to use in controlling access to secure areas at those locations. The Coast Guard and Customs and Border Protection (CBP) are the principal agencies involved in enforcing the MTSA. These agencies employ a range of technologies and physical inspections of ships and shipping containers. On August 23, 2016, the U.S. Coast Guard issued a final rule concerning TWIC reader requirements. The rule is available at https://www.gpo.gov/fdsys/pkg/FR-2016-08-23/pdf/2016-19383.pdf and does not become effective until August 23, 2018.

The U.S. Coast Guard maintains an updated list of ports in countries which it determines have not instituted effective anti-terrorism measures. This latest list of affected countries is available at http://homeport.uscg.mil/mycg/portal/ep/programView.do?channelId=-18389&programId=63715&programPage=%2Fep%2Fprogram%2Feditorial.jsp&pageTypeld=13489&BV and includes: Cambodia, Cameroon, Comoros, Cote d’Ivoire, Equatorial Guinea, Gambia, Guinea-Bissau, Iran, Liberia, Libya, Madagascar, Nauru, Nigeria, Sao Tome and Principe, Syria, Timor Leste, Venezuela, and Yemen. Cuba was removed from the list in 2016.
and has yet to be replaced despite President Trump’s statements decrying President Obama’s loosening of Cuban restrictions. The statements and comments on those statements can be found here: [https://www.usatoday.com/story/news/politics/2017/06/16/donald-trump-cuba-miami/102917748/](https://www.usatoday.com/story/news/politics/2017/06/16/donald-trump-cuba-miami/102917748/). Ships that have docked in any of the designated ports in these countries on one of their last five stops will be denied entry to the U.S. unless they have taken extra security precautions, such as placing guards at all access points to the ship while it was in a blacklisted country.

G. CSI AND C-TPAT

The CBP was formally established in the Trade Facilitation and Trade Enforcement Act of 2015, signed into law by President Obama on February 24, 2016. Beyond the formal recognition of the agency, the Act sets up its formal responsibilities (notably that CBP is expected to enforce the Container Security Initiatives program of the Security and Accountability for Every Port, discussed below in Section H).

Customs and Border Protection (CBP) is responsible for the Container Security Initiative (CSI), which is a cooperative effort with host country governments to identify and screen high-risk shipments destined for the United States before they leave a participating port. By the end of 2009 the program had enlisted 53 ports in North, Central and South America, the Caribbean, Europe, Africa, the Middle East, and throughout Asia. These ports account for about 86 percent of all cargo containers destined for the U.S. Information about CSI is available at: [https://www.cbp.gov/border-security/ports-entry/cargo-security/csi/csi-brief](https://www.cbp.gov/border-security/ports-entry/cargo-security/csi/csi-brief).

CBP is also responsible for C-TPAT, the Customs-Trade Partnership Against Terrorism, a voluntary partnership between the government and private industry. More than 9,000 certified partners that span the gamut of the trade community have been accepted into the program. Certified participants agree to meet certain security standards in return for receiving expedited Customs entry for their goods. CBP is phasing in additional minimum security criteria which require participating importers to strengthen physical security for shipments and verify that their supply chain partners are taking steps to do the same.

CBP also recently published the Federal Register Notice on June 16, 2014, discussing the possibility of a “Trusted Trader Program Test.” Trusted Trader would be a new program that would combine both C-TPAT and Importer Self-Assessment (“ISA”), rendering ISA extinct. The Trusted Trader Program, if implemented, would employ higher standards of compliance to C-TPAT goals while also allowing for added benefits such as penalty offsets and ability to choose exam locations other than the port of arrival. For an in-depth breakdown of the Trusted Trader Program’s potential rules, see [http://www.customsandinternationaltradelaw.com/2014/06/articles/import/are-you-a-trusted-trader-c-tpat-is-no-longer-enough/?utm_source=14-0626+Thursday&utm_campaign=14-0626+Thursday+Daily+Bugle&utm_medium=email](http://www.customsandinternationaltradelaw.com/2014/06/articles/import/are-you-a-trusted-trader-c-tpat-is-no-longer-enough/?utm_source=14-0626+Thursday&utm_campaign=14-0626+Thursday+Daily+Bugle&utm_medium=email).

President Trump signed Executive Order 13785 on March 31, 2017, which requires the CBP to conduct risk assessments and identify covered importers who impose a risk to the revenue of the

The C-TPAT Reauthorization Act of 2017 was introduced in June 2017 and passed in Congress. The bill was received in the Senate in October 2017 and is still pending in the Senate.

At COAC’s August 2018 meeting, it presented an update on recommendations regarding CBP’s plan to roll out new C-TPAT criteria and the progress of the Trusted Trader Program, and announced the formation of a new Trade Compliance Working Group. At a trade conference in May 2018, CBP stated that it anticipated finalizing rulemaking to establish separate, supplemental continuous bonds on importers subject to antidumping and/or countervailing duties by the end of the year, with recommendations to be announced at the August 2018 meeting. CBP also announced that it was hoping to roll out a unified trusted trader program across various government agencies in 2019. In the fall of 2018, CBP also began the process of sharing the proposed new minimum security criteria (“MSC”) for the C-TPAT program – the first revision to the MSC since they were created 16 years previously. The update adds both new criteria categories and new criteria to existing categories. Members have until the end of October 2018 to review the proposed new MSC and submit feedback. It is expected that the new MSC will be rolled out in a phased approach in early 2019.

H. SAFE PORT ACT AND 100% CONTAINER SCANNING

Enacted in October 2006, the “Security and Accountability for Every Port Act”, or “SAFE Port Act,” revised many previously authorized port and maritime security policies and instituted some new requirements, as summarized below:

- Area security plans must include salvage response plans to identify equipment capable of restoring operational trade capacity and to ensure that waterways are cleared after a maritime transportation security incident.

- Facility security plans must include provisions establishing and controlling access to secure areas of a vessel or facility by those engaged in the surface transportation of intermodal containers in or out of a port facility.

- The Coast Guard must ensure that individuals who have undergone the Hazardous Materials Endorsement (HME) or Merchant Mariner Document (MMD) background check are not required to pay additional fees related to a similar background check for a transportation worker identification credential (“TWIC”) card. Additionally, provides for concurrent processing of an applicant for TWIC and MMD and a pilot program for vessel and facility card readers.

- By December 31, 2007, all containers entering the United States through the 22 ports through which the greatest volume of containers enter the United States by vessel shall be scanned for radiation.
The SAFE Port Act also required that pilot projects be established at three ports to test the feasibility of scanning 100 percent of U.S.-bound containers at foreign ports. To fulfill this requirement and determine the overall feasibility and efficacy of 100 percent scanning, in December 2007, DHS, the Department of State, and DOE jointly announced the formation of the Secure Freight Initiative (SFI) pilot program. In August 2007, two months before the SFI pilot began operations, the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act) was enacted, which requires, among other things, that by July 2012, 100 percent of all U.S.-bound cargo containers be scanned before being placed on a vessel at a foreign port, with possible extensions for ports at which certain conditions exist.

On May 2, 2012, former U.S. Department of Homeland Security Secretary Janet Napolitano officially notified the House Committee on Homeland Security that DHS had decided to extend the deadline for 100% container scanning to July 1, 2014. On May 16, 2014, DHS Secretary Jeh Johnson wrote a letter to the Senate Committee on Homeland Security explaining that the SAFE Port Act was a “highly improbable, hugely expensive” mandate that would hurt trade and was not the best option for securing U.S. ports. Another two-year extension for the 100% scanning mandate was granted on May 2, 2016 by DHS Secretary Johnson and set to expire in June 2018. A 2018 report issued by the House of Representatives Committee on Homeland Security Minority Staff recommended an amendment to the SAFE Port Act to prohibit further extensions of the scanning mandate unless port assessments that set forth the obstacles to implementation are completed.

Also under the Secure Freight Initiative is a project to acquire data elements to improve risk-based targeting of containers. The Importer Security Filing and Additional Carrier Requirements rule, commonly known as “10+2” in reference to the data required under the rule, increases the scope of information gathered on maritime shipments of cargo to the United States. On July 9, 2013 CBP began full enforcement of ISF, and started issuing liquidated damages against ISF importers and carriers for ISF non-compliance. For more information about the 10+2 rule, see http://www.cbp.gov/border-security/ports-entry/cargo-security/importer-security-filing-102.

Effective May 14, 2018, CBP adopted a proposed amendment to expand the definition of an Importer Security Filing (ISF) Importer, the party that is responsible for filing the ISF, for certain types of shipments. The definition now states that: “For purposes of this part, Importer Security Filing (ISF) Importer means the party causing goods to arrive within the limits of a port in the United States by vessel. For shipments other than foreign cargo remaining on board (FROB), the ISF Importer will be the goods' owner, purchaser, consignee, or agent such as a licensed customs broker. For immediate exportation (IE) and transportation and exportation (T&E) in-bond shipments, and goods to be delivered to a Foreign Trade Zone (FTZ), the ISF Importer may also be the party filing the IE, T&E, or FTZ documentation. For FROB cargo, the ISF Importer will be the carrier or the non-vessel operating common carrier.” Information on the amendment is available at: https://www.federalregister.gov/documents/2018/04/12/2018-07624/cbp-decision-no-18-04-definition-of-importer-security-filing-importer.

I. ENERGY POLICY
**Crude Oil Exports:** Enacted in December 2015, the Consolidated Appropriations Act, 2016 included a statement that no official of the Federal Government shall impose or enforce any restriction on the export of crude oil, though this is heavily qualified. This statement does not limit pre-existing laws that impose sanctions, but does purport to limit future restrictions.

**Oil Spill Liability Trust Fund:** Signed into law in October 2008, the Troubled Asset Relief Program, known as “TARP”, included among “revenue raisers” an amendment which increased the per barrel tax that supplies the Oil Spill Liability Trust Fund from 5 cents to 8 cents in 2009 and to 9 cents in 2017.

The legislation also repealed the requirement that the tax be suspended when the unobligated balance exceeds $2.7 billion.  (H.R. 1424; Public Law 110-374).

**Short Sea Shipping:** Enacted in December 2007, the Energy Independence and Security Act of 2007 contains an initiative to promote short sea shipping, also known as the Marine Highway Initiative. The legislation provides tax incentives to owners of U.S. documented vessels constructed in the United States and used to transport freight in the “short sea transportation trade”, defined as the U.S. coastwise trade or trade between Canadian Great Lakes ports and U.S. ports. Owners of eligible vessels will be able to defer taxes on income under the Capital Construction Fund (CCF) program administered by the MARAD. The CCF program currently covers only the foreign, Great Lakes and domestic non-contiguous trades.

The purpose of the short sea shipping initiative is to make the water mode more competitive with roads and rails and thus alleviate congestion and air pollution. The legislation calls on MARAD to designate short sea shipping projects, which may include both passenger and cargo operations, and work with public and private entities to develop landside facilities and infrastructure to support them.

**J. FEDERAL INSURANCE OFFICE**

Established under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”), the Federal Insurance Office (“FIO”), an agency within the Department of the Treasury, is tasked with monitoring the insurance sector. FIO, however, does not have direct regulatory authority over the insurance sector. Instead, state authority to regulate the insurance industry, as established in the federal McCarran-Ferguson Act of 1945, remains in force. The FIO nonetheless may recommend, through various mandated reports to the President and Congress, how to improve insurance regulation nationwide. Pursuant to the Dodd-Frank Act, the FIO Director must issue a report annually to the President and Congress “on the insurance industry and any other information deemed relevant by the Director or requested [by a Congressional] Committee.” The first of these annual reports was released on June 12, 2013 and can be found at http://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/FIO%20Annual%20Report%202013.pdf. The report covers the financial performance and condition of the principal insurance industry sectors. FIO’s annual report also provides reviews of insurer insolvencies, risk management, portfolio investment activities, and legal and regulatory developments. The long awaited “Modernization Report” was released in December of 2013 and recommended a hybrid model for insurance and regulation including

Finally, the Treasury Department recently released its Third Report On The Administration’s Core Principles For Financial Regulation (https://www.treasury.gov/press-center/press-releases/Pages/sm0193.aspx press release), which notes the realignment of the role of the FIO around five pillars of focus, and improving its coordination with state insurance regulators and transparency with the insurance industry; and adoption of uniform state data security standards and breach notification requirements based of the National Association of Insurance Commissioners' Insurance Data Security Model Law.

K. JONES ACT

The Jones Act, also known as the Merchant Marine Act of 1920, requires that any ship carrying cargo between two points in the United States must have been built in the United States and wholly owned by citizens of the United States. The purpose of the Jones Act is to support the United States merchant marine and shipbuilding and repair facilities.

Bills have recently been introduced to repeal the Jones Act, and the Act has garnered attention in the press following the devastation in Puerto Rico from Hurricane Maria; however, prospects for enactment of this legislation remain unclear, and appear increasingly unlikely following the death of a major proponent of repeal, Senator John McCain.

A study sponsored by the American Maritime Partnership, a coalition of businesses, associations, and labor unions that support the US domestic shipping industry and the Jones Act, released in July 2018 concluded that retail prices in Puerto Rico were not higher because of the Jones Act. The study used Walmart products sold in both San Juan, Puerto Rico and Jacksonville, Florida as a fact base, and found that Walmart prices were the same in both locations for the goods. The study did not look at cargo moving in tankers or dry bulk vessels.

The recent Ninth Circuit decision in Batterton v. Dutra Group (Case No. 15-56775, 9th Cir. 2018) has expanded the availability of punitive damages in the maritime context, potentially setting up another opportunity for the Supreme Court to address the issue of the prohibition on recovery of “non-pecuniary” damages under general maritime law and the Jones Act, and whether that encompasses punitive damages for unseaworthiness claims.

L. HUMAN RIGHTS

The National Defense Authorization Act for Fiscal Year 2017, signed into law on December 23, 2016, authorizes the President to impose U.S. entry and property sanctions against any foreign person (or entity) who is responsible for, or participated in (either materially or physically),
extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals in any foreign country. This law specifies that the authority to block and prohibit transactions in property and property interests does not include the authority to impose sanctions on the importation of goods.

M. CYBERSECURITY

An increasing risk in marine underwriting is the threat of cyber-attack. Ships are becoming larger and more expensive with the capacity to carry up to one billion dollars’ worth of cargo. Therefore, the potential for loss in the case of an attack is increasing exponentially. The actual risk of a cyber-attack is also increasing. INTERPOL identifies cybercrime as one of the fastest growing areas of crime where more criminals are exploiting the speed, convenience, and anonymity of modern technology to commit a diverse range of criminal activities. Unlike traditional risks that would arise under predictable circumstances, a cyber-attack may occur from any point in the world. Furthermore, many ships systems may be vulnerable to attack, including, but not limited to, navigation systems, logistics systems, or port tracking systems. Shipping lines are also dependent on the quality of the information that they receive. A cyber-attack may change the destination data for cargo, causing it to be misdelivered.

In June 2015, the United States Coast Guard (“USCG”) issued a publication on Cyber Security. It identified three strategic priorities: defending cyberspace, enabling operations, and protecting infrastructure. One strategy the USCG identifies to reduce cyber vulnerability for vessels and facilities is to develop guidance for commercial vessel and waterfront facility operators on how to identify and evaluate their cybersecurity-related vulnerabilities. The USCG’s Cyber Strategy report is available at https://www.uscg.mil/seniorleadership/DOCS/cyber.pdf. Consistent with that goal, the USCG published an issue of Waves on the Waterfront in August 2015 focused on Cyber Security and Cyber Risk Management. In that issue the USCG identifies three categories of steps that private vessel and facility operators can take to manage cyber risks: risk assessment, risk mitigation, and risk management.

On July 12, 2017 the USCG announced a draft Navigation and Inspection Circular (NVIC) 05-17; Guidelines for Addressing Cyber Risks at Maritime Transportation Security Act (MTSA) Regulated Facilities (the current MTSA is discussed above in Subsection F). The NVIC consists of two major parts, the first revalues the MTSA in light of cybersecurity, requiring regulated entities to demonstrate how they are addressing cyber-attacks. The second part lays out best recommended practices and expectations. NVIC is available at: https://www.federalregister.gov/documents/2017/07/12/2017-14616/navigation-and-vessel-inspection-circular-nvic-05-17-guidelines-for-addressing-cyber-risks-at. The USCG is looking for comments by September 11, 2017; comments must be submitted to the online docket via http://www.regulations.gov.

In February 2014, the National Institute of Standards and Technology (“NIST”) published a Framework for Improving Critical Infrastructure Cybersecurity. The Cybersecurity Framework was developed as a result of a collaborative effort between government and the private sector to develop a set of industry standards and best practices to help organizations manage cybersecurity risks. The Framework is designed to help organizations identify areas of improvement for their
cybersecurity practices. The Framework Core is a set of cybersecurity activities, desired outcomes, and applicable references. The Core consists of five concurrent and continuous functions: identify, protect, detect, respond and recover. The Framework also implements a tiered structure in which an organization identifies its current tier and then selects a desired tier based on organizational goals and the reduction of cybersecurity risk to critical assets and resources to levels acceptable to the organization. A copy of the framework is available on the NIST website at: http://www.nist.gov/cyberframework/.

On December 18, 2015, the Cybersecurity Information Sharing Act was enacted via a consolidated spending bill after a lengthy period of discussion and inaction by Congress. The bill encourages sharing of information about cyber threats between private companies and the federal government. The bill also created initiatives for the federal government to distribute cybersecurity information it receives to private industry. The bill also contains protections from civil suit for companies that wish to share cyber-threat and incursion data and inadvertently share personally identifiable information concerning customers. The cyber sharing program is, at this time, voluntary and its potential benefits have yet to be realized.

On December 28, 2016, President Obama signed Executive Order 13757, which amends Executive Order 13694. Executive Order 13694 recognized the increasing prevalence and severity of malicious cyber-enabled activities and imposed export restrictions on those found to be responsible for or complicit in cyber-enabled activities which are likely to threaten national security, foreign policy, or the economic health or financial stability of the United States. Executive Order 13757 expands this to include export restrictions on those who tamper with or cause a misappropriation of information with the purpose or effect of interfering with an election process. Additionally, Executive Order 13757 includes a specific list of Russian persons and entities to whom the sanctions apply without additional findings required. Executive Order 13757 is available at: https://www.federalregister.gov/documents/2017/01/03/2016-31922/taking-additional-steps-to-address-the-national-emergency-with-respect-to-significant-malicious.

N. MARITIME SECURITY PROGRAM (“MSP”)

In 1996, the Maritime Security Act was enacted. The Maritime Security Act establishes a fleet of active, commercially viable, militarily useful, privately-owned vessels to meet national defense and other security requirements. For more information on the Maritime Security Program see: http://www.marad.dot.gov/ships-and-shipping/strategic-sealift/maritime-security-program-msp/.

O. FOOD SAFETY MODERNIZATION ACT

The Food Safety Modernization Act (“FSMA”) was signed into law on January 4, 2011 and is the first significant reform to food safety laws in the past 70 years. The FSMA, among other things, grants rule-making authority to the Federal Drug Administration (“FDA”) to promulgate rules targeted at preventing contamination of foods transported to and throughout the United States in the global supply chain. Shippers and carriers, with some exceptions, are subject to the FDA rules and should have been preparing for the eventual passage of FSMA regulations. The most relevant rule for shippers and carriers is the recent rule on Sanitary Transportation of Human and Animal Food, which became final on April 6, 2016. The effective date of the final rule was April 6, 2017
for most businesses and April 6, 2018 for small businesses (employing fewer than 500 persons and having less than $27.5 million in annual receipts). The primary requirements of the Sanitary Transportation of Human and Animal Food rule provide for: (1) sanitary design and maintenance of vehicle and transportation equipment; (2) regulation of transportation operations, including mandated temperature controls and contamination protocol; (3) sanitation compliance training for shipper and carrier personnel; and (4) maintenance of records for written procedures and training. For more on the rule on Sanitary Transportation of Human and Animal Food, see https://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm383763.htm.

P. SUBCHAPTER M TOWING

The U.S. Coast Guard, after almost 10 years of development, released new rules, effective as of July 26, 2016, governing tug and tow boats at 46 C.F.R. Subchapter M. The new rule introduces a variety of regulations targeted at increasing safety for towing vessels, including requirements that all vessels be subject to inspections by either the Coast Guard or authorized third-party organizations to ensure compliance. The new rule applies to all U.S. towing vessels of 26 feet or more in length, as well as smaller vessels if they carry certain amounts of oil or hazardous material. For a complete review of the final rule, see https://www.federalregister.gov/documents/2016/06/20/2016-12857/inspection-of-towing-vessels. A timeline for implementation of the new rules and requirements is available at http://wow.uscgaux.info/Uploads_wowII/P-DEPT/Tow_Vessel_Timeline.pdf.

The final rules set July 20, 2018 as the compliance date for all towing vessels subject to Subchapter M. The Coast Guard has mandated a four-year phase-in period for towing vessels to obtain Certificates of Inspection (“COI”) for a quarter of their fleets each year, with the first quarter required to be certificated on or before July 22, 2019, with an additional quarter to be certificated each year until the final deadline of July 19, 2022. Owners operating only one towing vessel must obtain a COI by July 20, 2020. Certificate status and certificate compliance may be obtained and maintained either through Coast Guard inspection or the Towing Safety Management System, which permits owners to work with Coast Guard-approved third party organizations to provide oversight of and conduct vessel surveys and/or audits for a fleet of vessels.

Additional information is available from the Coast Guard at: https://www.dco.uscg.mil/tvncoe/ and https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Traveling-Inspector-Staff-CG-5P-TI/Towing-Vessel-National-Center-of-Expertise/SubMFAQs/.

III. STATE LEGISLATION AND REGULATION

Cybersecurity: Certain states have begun cybersecurity initiatives targeted at regulating and protecting the insurance industry. For example, the New York State Department of Financial Services (“DFS”) proposed the Cybersecurity Requirements for Financial Services Companies in September of 2016, passed and effective March 1, 2017. The rules are available at http://dfs.ny.gov/legal/regulations/proposed/rp500t.pdf. The Requirements apply to all insurers operating in New York. The Requirements set out minimum standards for cybersecurity, training, and risk assessment, though the rules are, by and large, flexible and do not impose onerous
requirements that could prove harmful to smaller or less sophisticated companies. The law, even in New York, continues to evolve, with new disclosure and compliance regulations unveiled on July 12, 2017. The regulations include a requirement that companies report unsuccessful cyberattacks to DFS if the attack is sufficiently serious to raise concern. Companies covered must comply by August 28, 2017. For reference, see: http://www.jdsupra.com/legalnews/dfs-issues-additional-guidance-for-98559/. Information available at: https://www.dfs.ny.gov/about/cybersecurity.htm. For guidance of how to follow the New York law, see: https://www.whitecase.com/publications/article/nys-department-financial-services-cybersecurity-regulation-goes-live-now-what, but each state will have different regulations. NAIC adopted a model data security law in October 2017, the Insurance Data Security Model Law. The model law creates rules for insurers, agents, and other licensed professionals covering data security, investigation and notification of breach, maintaining an information security program based on ongoing risk assessment, overseeing third-party service providers, investigating data breaches, and notifying regulators of cybersecurity events. The model law closely follows New York’s cybersecurity regulations. In May 2018, South Carolina became the first state to pass a cybersecurity law requiring insurers to establish a “strong and aggressive” program to protect companies and their customers from data breaches. Not to be outdone, in June 2018, California passed a sweeping consumer privacy law that has been described as one of the toughest data privacy laws in the US and has been compared to the EU’s GDPR. The law is set to come into effect at the start of 2010 and is expected to dramatically change how businesses, including major technology businesses based in California, handle data. For more information, see: https://www.caprivacy.org/.

**Reinsurance Collateral Requirements**: Additionally, the U.S. Trade Representative and the Secretary of the Treasury, pursuant to Title V of the Dodd-Frank Wall Street Reform and Consumer Protection Act, negotiated a covered agreement with the European Union on January 13, 2017, which, if finalized, would eliminate reinsurance collateral requirements for all European Union reinsurers that maintain a minimum capital and surplus of 226 million euros and a solvency ratio of 100% of the solvency capital requirement under Solvency II. States are displeased with this result and are fighting against it. See http://naic.org/cipr_topics/topic_covered_agreement.htm. However, reinsurance collateral reform is likely whether this covered agreement passes or not. The National Association of Insurance Commissioners (“NAIC”) Model Law and Regulation, becomes an accredited standard (NAIC is the standard-setting and regulatory support organization of state insurance regulations) on January 1, 2019 and, as such, all states are expected to adopt some reinsurance reform within the next year and a half (32 states have already adopted some reform). See http://www.businessinsurance.com/article/20170221/NEWS06/912311981?template=print.

**Liability Insurance Law Restatement**: The American Legal Institute postponed the final vote on its full liability insurance law restatement until 2018 and voted in May 2018 at its annual meeting to approve the restatement following approximately eight years of revisions. The current form of the restatement would give policyholders more clout in disputes with insurers, which insurers believe focuses too heavily on minority opinions. The debate remains open as the restatement is revised. For additional discussion, see:
EU/US Covered Agreement: The Covered Agreement, or the “Bilateral Agreement Between the United States of America and the European Union on Prudential Measures Regarding Insurance and Reinsurance,” signed in September 2017, eliminates reinsurance collateral and physical presence requirements for EU and US reinsurers. US states were required to take action with respect to reinsurance collateral reforms within 60 months or be subject to potential federal preemption. The Covered Agreement also contains provisions relating to group supervision, group capital, and information-sharing. EU and US insurers operating in each other’s markets will only be subject to worldwide insurance group oversight by supervisors in their home jurisdiction. Although critical of the Covered Agreement prior to its signing, as of April 2018, the NAIC has directed its committees to move forward with amending its model laws and regulations to be consistent with the EU/US Covered Agreement. Additional information available at: https://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/US_Covered_Agreement_Policy_Statement_Issued_September_2017.pdf.

IV. LEGAL CASES


A. Lozman v. Riviera Beach, Florida

In Lozman v. Riviera Beach, Florida, 133 S. Ct. 735 (2013), the Supreme Court held 7-2 that house boats do not qualify as ‘vessels’ within the meaning of the United States Code Rules of Construction § 3. Accordingly, house boats are not subject to federal maritime jurisdiction. The court reasoned that though house boats can float, there is nothing else about their character or general construction that suggests they are intended to transport people or items water. The court held that vessels do not fall within the scope of the statutory phrase unless a reasonable observer, examining all of the home’s physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water. Relevant, though not dispositive, criteria to examine included a structure’s lack of propulsion.

B. Sosebee, et al, v. Certain Underwriters at Lloyd’s, London, Case No. 1330738

In November 2013 AIMU submitted an amicus brief to the US Court of Appeals for the Fifth Circuit in this case, which involved claims by injured claimants against the owner of a workboat that collided with the fishing vessels in which the insured claimants were passengers. The claimants had brought an action against the owner’s P&I underwriters under Louisiana’s Direct Action Statute, seeking coverage under a P&I policy that incepted after the accident, on the theory that the P&I policy which was written on the SP23 form provided claims made coverage. The trial court had granted summary judgment in favor of underwriters, and the claimants appealed to the
Inasmuch as the SP23 form was promulgated by AIMU, AIMU submitted an amicus brief in the appeal, taking the position that the SP23 form provides occurrence-based, not claims made, coverage. The appeal was argued on March 31st, with counsel for AIMU in attendance participating in the argument. The Court issued its decision in April 2014, affirming the trial court’s ruling.

C. In Re Deepwater Horizon, BP v. Ranger Insurance et al. Case No. 13-0670

In Re Deepwater Horizon, BP v. Ranger Insurance et al. (13-0670) (2015) was one of many lawsuits resulting from the April 2010 drilling fiasco in the Gulf of Mexico. An explosion occurred on the Deepwater Horizon, a rig owned by Transocean and operated by BP. The explosion killed eleven, caused the rig to sink, and resulted in mass oil pollution. This lawsuit centered around the drilling contract between Transocean and BP, in connection with BP’s claim for additional insured status under Transocean’s liability policies. On appeal, the Fifth Circuit had previously held that BP was entitled to coverage, based on the terms of the insurance policy without reference to the scope of indemnity in the contract between Transocean and BP; the Court subsequently withdrew that opinion and certified two legal questions to the Texas Supreme Court (as the contract and policy were subject to Texas law). In July 2014, AIMU joined with the LMA and IUA in filing an amicus brief with the Texas Supreme Court on the two questions certified by the Fifth Circuit, arguing that the district court’s decision was correct.

The Texas Supreme Court ultimately needed to decide just the first question. Agreeing with AIMU’s position, the court relied on Urrutia v. Decker, 992 S.W.2d 440 (Tex. 1999) in holding that separate agreements can be incorporated into larger agreements if that is the parties’ intention. In this case, the court decided that the parties intended the drilling contract between Transocean and BP, in connection with BP’s claim for additional insured status under Transocean’s liability policies. On appeal, the Fifth Circuit had previously held that BP was entitled to coverage, based on the terms of the insurance policy without reference to the scope of indemnity in the contract between Transocean and BP; the Court subsequently withdrew that opinion and certified two legal questions to the Texas Supreme Court (as the contract and policy were subject to Texas law). In July 2014, AIMU joined with the LMA and IUA in filing an amicus brief with the Texas Supreme Court on the two questions certified by the Fifth Circuit, arguing that the district court’s decision was correct.


In March 2017, the Washington State Supreme Court held that punitive damages are available to plaintiffs bringing general maritime unseaworthiness claims. This case was significant because it was the first state supreme court to decide this issue.

The court relied on the recent U.S. Supreme Court case, Atlantic Sounding Co. v. Townsend, 557 U.S. 404, 129 S. Ct. 2561 (2009), in which the U.S. Supreme Court ruled that seamen are permitted to recover punitive damages from their employers for the employers’ willful and wanton disregard of their obligations to pay maintenance and cure. The Tabingo court reasoned that because Congress has not directly addressed what damages are available for unseaworthiness claims, punitive damages are not barred from recovery. Additionally, the Tabingo court considered the policy implications that would result from its ruling, explaining that by making punitive damages
available to plaintiffs who are successful with their unseaworthiness claims, that would help with effectuating the goal of providing seamen with special protections as “wards of admiralty,” as provided under the common law.

The defendant has filed a Petition for Certiorari with the U.S. Supreme Court, asking the Court to hear a further appeal from the Washington Supreme Court’s ruling. As of November 1, 2017, the petition was pending, with prospects for the U.S. Supreme Court actually agreeing to hear the case unclear.

E.  **In re Larry Doiron, Inc. and In re Crescent Energy Services, L.L.C. (5th Circuit)**

**In re Larry Doiron, Inc., 879 F.3d 568 (5th Cir. 2018)(en banc); and In re Crescent Energy Services, L.L.C., 896 F.3d 350 (5th Cir. 2018)**

In the *Doiron* case, the U.S. Court of Appeals for the Fifth Circuit enunciated a new test for determining whether a contract for services in the offshore energy industry is maritime, and therefore whether the indemnity provisions in such contracts are enforceable (they generally are under federal maritime law but are not under certain state laws, such as the Louisiana Oilfield Anti-Indemnity Act). The recently enunciated test, which was applied in the *Crescent Energy* case, provides that a contract will be deemed to be maritime if the parties anticipated that a vessel would “play a substantial role in the completion of the contract.”

Given the difficulty in applying such a test and the resulting uncertainty for underwriters of the offshore energy industry, AIMU filed an amicus curiae brief in support of a Petition for a Writ of Certiorari to the U.S. Supreme Court, asking the Court to hear the case and overturn the Fifth Circuit’s *Doiron* decision. The Petition is currently pending.

F.  **Anadarko Petroleum Corp. v. Houston Casualty Co., Texas Supreme Court 2018**

**Anadarko Petroleum Corp. v. Houston Casualty Co., Texas Supreme Court 2018**

AIMU (along with the Lloyd’s Market Association and the International Underwriting Association) also filed an amicus brief in the pending appeal of this case to the Supreme Court of Texas. The case involves policy offshore energy policy provisions expressly defining underwriters’ indemnification obligation (usually by limiting it to the Ultimate Net Loss) and subjecting it to a single limit of liability for all indemnifiable losses. When the loss relates to a joint venture, the limits are often expressly written to scale the limit of the total indemnifiable amount to the percentage of interest owned by the insured in the joint venture. In this case, the policy obligated the underwriters to indemnify Anadarko for amounts it paid to settle and defend covered claims. Because Anadarko only held a partial interest in the joint venture involved in the claim, the policy scaled the limits of this coverage to the percentage of Anadarko's interest in the Deepwater Horizon project. Policy language and market realities support this approach to underwriting risk and insuring participants in ventures involving large exposures. The amici are concerned because when their members underwrite these policies to insureds whose insured interests include joint venture participation, the insurers must be able to rely on policy wording and customary market practices to limit their liability to that expressed in the insuring agreement. The amici therefore urged the Texas Supreme Court to deny Anadarko's request to judicially
rewrite a policy provision in lieu of giving the Policy language its express meaning.

G. Batterton v. Dutra Group, Case No. 15-56775 (9th Cir. 2018)

In January 2018 the Ninth Circuit Court of Appeals addressed the availability of punitive damages in connection with a seaman’s claim for unseaworthiness, resulting in a split among the Circuits on this issue. Specifically, the Ninth Circuit held in Batterton that a seaman can recover punitive damages in a claim for unseaworthiness against a vessel owner under general maritime law, whereas the Fifth Circuit had previously held to the contrary in 2014 in the case of McBride v. Estes Well Services. While the U.S. Supreme Court addressed the availability of punitive damages in connection with a vessel owner’s wanton failure to pay maintenance and cure in the Miles v. Apex Marine case, the Ninth Circuit’s decision in Batterton has expanded the availability of punitive damages in the maritime context, potentially setting up another opportunity for the Supreme Court to address the issue. In short, the issue to be addressed would be the prohibition on recovery of “non-pecuniary” damages under general maritime law and the Jones Act, and whether that encompasses punitive damages for unseaworthiness claims.