



**The U.S. Maritime Transportation Security Act,
The United States Coast Guard Interim
Regulations and What This Means for the
Canadian Maritime Community**

**(An addendum to “6 Facts the Canadian Maritime Community Must Know About
the Fast Track Implementation and Enforcement of the U.S. Maritime
Transportation Security Act” May 2003)**

A report prepared by COPE Solutions Inc.

Introduction

The Maritime Transportation Security Act (MTSA) of 2002 will come into effect on 1 Jan 2003 and apply to all ships in U.S. waters greater than 100 Gross Registered Tons. The potential implications to the Canadian Maritime Community were highlighted in "6 Facts the Canadian Maritime Community Must Know About the Fast Track Implementation and Enforcement of the U.S. Maritime Transportation Security Act" (available at www.copesolutions.com).

As required by the Act, the United States Coast Guard (USCG) issued interim regulations July 1st 2003 to provide guidance in complying with this legislation. These interim regulations do not address all the requirements stipulated in the MTSA and are particularly lacking (and in some areas contradictory) to the requirements this legislation imposes on foreign vessels in U.S. waters. These contradictions make it extremely difficult for non-U.S. ship owners and operators to identify the necessary measures required for compliance when the legislation becomes law. Canadian ship owners and operators should also realize that this unilateral American legislation does not attempt to put any burden on foreign governments or maritime regulators (unlike the ISPS) to achieve compliance. The burden rests directly on ship owners and port facility operators. The Government of Canada and specifically, Transport Canada has no obligation to ensure compliance to this legislation. The following is offered to provide some understanding to these inconsistencies and suggest the best way ahead for Canadian Maritime Community Stakeholders.

Background

In addition to the SOLAS amendments for Maritime Security and the adoption of the new International Code for the Security of Ships and Port Facilities (ISPS) as agreed at the IMO conference December 2002, the U.S. Congress decided to take a unilateral approach to maritime security in U.S. waters with the introduction of the MTSA 2002. Although largely based on the ISPS code, the MTSA stipulates additional requirements for ships operating in U.S. waters. It also specifically directs that the USCG will be the approval authority for ship security assessments and plans (including foreign ships) and that this approval authority will not be delegated.

The USCG disputes this requirement and in the interim regulations published July 1st 2003, declares that ISPS compliance (as regulated by contracting governments to the IMO) for SOLAS registered ships will be accepted as authority for compliance with the MTSA. (*Note: The interim regulations do not delegate approval for Canadian shipping of 100 gross registered tons or greater engaged on international travel solely within the Great Lakes and St. Lawrence Seaway as discussed below.*) The interim regulations also do not provide sufficient guidance to foreign shipping for compliance with those requirements of the MTSA which are in addition to ISPS.

Despite Congressional objection, the USCG has taken this position for two primary reasons. To begin, although Congress is legislating these requirements, they are not providing the resources necessary for the USCG to complete the work. The USCG does not have the resources necessary to examine and approve all U.S. port facility and ship security assessments and plans, never mind the thousands of foreign flagged vessels that travel to U.S. waters. Secondly, there is an opinion in American maritime legal



circles that there is a liability question to be considered. In the event of a security incident, the USCG could potentially be liable for damages if they had approved assessments and plans that did not prevent the event from taking place.

In order to understand this situation, it must be understood that unlike the Canadian parliamentary system of government, in the American style representative system, federal agencies such as the USCG do not directly answer to the law making body (Congress). Although Congress controls budget appropriations, Federal Agencies answer to the Executive, i.e. the President. Therefore, the USCG is within its mandate to interpret this legislation according to its own agenda. Of course, when the final version of this legislation is signed into law by the Executive, everyone, including Federal Agencies, must comply. The question that non U.S. ship owners and operators need answered, is whether the final legislation will reflect the USCG interpretation or the interpretation of Congress. If shipping companies follow only the guidance of the interim regulations, there is a risk that they will find themselves not in compliance when the final regulations are issued November 2003 and come into law 1 January 2004. The following sections summarize the key areas and differences between the draft MTSA legislation and the USCG interim regulations as they apply to Canadian stakeholders.

Vessel Vulnerability Assessments and Security Plans

The MTSA applies to all ships that pose a high risk of being involved in a transportation security accident. The USCG interprets this to be all SOLAS registered ships and non-SOLAS ships of 100 Gross Register Tons and greater. The MTSA requires all foreign ships operating in U.S. waters to submit vessel security assessments and security plans to the USCG by 29 December 2003. The USCG interim regulations declare that an International Ship Security Certificate issued by contracting governments for flag vessels in compliance with the ISPS code will be sufficient and that they do not intend to review and formally approve foreign vessel assessments and plans. However, the interim regulations do specifically identify three categories of foreign shipping that they will not delegate approval for, including **Canadian commercial vessels operating solely on the Great Lakes and St. Lawrence Seaway that are greater than 100 Gross Register Tons and/or carry more than 12 passengers**. There is no debate here: Owners and operators of Canadian commercial vessels in this category must submit vessel security assessments and plans to the USCG by 29 December 2003 and the plans must be fully implemented by July 2004.

Another issue concerning Canadian vessel vulnerability assessments and security plans concerns the requirement for Part B of the ISPS code. There is opinion in the Canadian Maritime Community that the requirement only extends as far as demonstrating that Part B is taken into account in order to be in compliance with the U.S. legislation. The Coast Guard has published its intent to require Part B as compulsory (USCG Security Notice dated 30 December 2002) however the interim regulations in some paragraphs state compliance means “part A, taking into account Part B” and in other paragraphs “Part A, and all relevant provisions of Part B”. A detailed examination of the considerations and requirements for assessments and plans that must be followed contained in the vessel security section of the interim regulations shows that in effect, “relevant provisions of Part B” covers the majority of this part of the ISPS code and is much more than only demonstrating Part B has been taken into account.



Finally, in preparing vessel security plans, Canadian ship owners and operators must be aware that the American regulations contain requirements in addition to ISPS compliance. American Maritime Lawyers Dennis Bryant and Brian Starer (Holland & Knight LLP) have summarized these additional requirements as:

- Identification of the Qualified Individual with authority to implement the ship security plan
- An explanation of how the ship security plan is consistent with the national and area maritime transportation security plans (Note: These plans are still under development and not yet issued)
- Identification of security measures available under contract or other means approved by the USCG, necessary to deter to the maximum extent practicable a transportation security incident or substantial threat of such a security incident
- Provisions for a comprehensive response to a transportation security incident, including notifying and coordinating with local, state and federal authorities (including the Director of the Federal Emergency Management Agency), securing the ship and evacuating persons on the ship
- A copy of the ship security assessment

Foreign Port Assessments

The MTSA requires the USCG to assess any port that originates maritime traffic bound for U.S. waters or is visited by ships in transit to U.S. waters for the effectiveness of anti-terrorism measures, including screening and security measures in place, compliance with appropriate security standards and the security management program of the port. However, it is not more specific than that. The interim regulations also do not provide further guidance for the requirements of foreign ports except that any vessel calling on a foreign port facility, where that port facility does not comply with SOLAS and the ISPS Code or that does not maintain effective anti-terrorism measures, will be subject to scrutiny through the U.S. Port State Control Program. The USCG does state that it is their intent to verify compliance of foreign port facilities in the future and that they will work with the relevant Contracting Governments to facilitate those evaluations.

It is most likely that the USCG will focus on those ports they believe to be non-secure. Canadian port facilities have made significant improvements in security in recent years and have established relationships with U.S. stakeholders. There is no specific requirement to have security assessments and plans completed for implementation of the MTSA. Canadian port facilities should not be directly affected by this legislation and should continue to work towards compliance with the ISPS code by July 2004.



Conclusion

The confusion and discrepancies between the draft MTSA and the USCG issued interim regulations make determining compliance requirements difficult. The legislation does not contain appreciable implications for Canadian Port Facilities (provided they continue achieving compliance with the ISPS code by July 2004) however both the legislation and the interim regulations directly effect Canadian shipping in the Great Lakes system. It is recommended that:

- Canadian Ship owners and operators complete vessel security assessments and plans and submit to USCG by 29 December 2003.
- The assessments and plans should be completed in accordance with both Part A and B of the ISPS code.
- The requirements contained in the American legislation (in addition to part A and B of the ISPS) should be included as an additional annex.

Canadian ships operating on international voyages in the Great Lakes system were specifically covered in the USCG regulations as having to submit assessments and plans by 29 December 2003. Failure to comply runs the very real risk of restricted access to U.S. waters and/or some form of port state control action.

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