

### TO ALL MEMBERS

12 October 2020

Dear Sirs

### US Oil Pollution California - Increased criminal penalties for oil spill related offences

#### Executive Summary

Members are advised that new fines will be applicable in California from 1 January 2021 for ship sourced oil pollution damage in Californian State waters.

For members trading to California, these legislative changes will result in:

1. A doubling of certain existing fines up to a maximum of US\$1,000,000 for each violation, with each day or partial day of a violation being considered a separate violation.
2. The courts being empowered to impose a new additional fine of up to US\$1,000 per gallon of oil spilled in excess of 1,000 gallons.

In each case a fine may be imposed if the violator knowingly caused, or reasonably should have known that their actions would lead to, an oil spill into Californian State waters.

#### Background

On 24 September 2020, the Governor of California signed Californian Assembly Bill (AB) 3214 into law and that will provide for such increased penalties and fines by means of amendments to California's Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (the 'Act'). Under the current Act, such civil and criminal penalties can be imposed under various statutes, with Government Code §8670.3 defining liable persons ('violator') as an individual, trust, firm, joint stock company, or corporation, including, but not limited to, a government corporation, partnership, and association, and thereby including shipowners, operators and masters amongst other parties involved in the transportation chain.

The original draft Assembly Bill set out to:

1. increase the level of Californian State certification of financial responsibility (COFR) - that a tank or non-tank vessel operating in Californian waters must demonstrate in order to cover damages caused by an oil spill – from US\$1 billion to US\$2 billion for tank vessels and US\$300 million to US\$600 million for non-tank vessels

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2. double the existing level of certain criminal fines that shall be imposed in the event of an oil spill
3. empower the courts to impose an additional criminal fine of up to US\$10,000 per gallon of oil spilled.

In each case, the liability would be determined on the basis that the violator knowingly caused, or reasonably should have known that their actions would lead to, an oil spill in Californian State waters. Under California law, the phrase 'reasonably should have known' has been equated with a simple negligence standard.

Members will be aware that the International Group clubs do not issue the Federal or State COFRs that tank and non-tank vessels are required to obtain in order to trade to the US, but that the IG clubs provide cover for oil pollution damage of up to US\$1 billion per ship per incident (and which covers third party claims as well as fines where they fall under the club rules) that is needed in order to obtain a COFR.

### **AB 3214 – Californian legislature**

Following direct representations from the International Group and local shipowner and energy organisations to the Bill sponsor, the proposed COFR increases were removed from the draft Bill. The Bill sponsor also reduced the potential per gallon fine from up to US\$10,000 per gallon down to a maximum of US\$1,000 per gallon in excess of 1,000 gallons spilled, however it was not possible to remove this from the legislation in its entirety or reduce it further. The Bill sponsor also retained the doubling of existing criminal fines.

### **Governor of California – signature of AB 3214**

The International Group, in co-operation with the International Chamber of Shipping (ICS), subsequently made direct representation to the Governor of California to veto AB 3214. The International Group and the ICS also engaged local interests and sought to engage maritime labour unions to make similar representations given the implications for a wide number of parties both domestically in California and internationally.

Unfortunately, the Governor did not exercise his right to veto and signed the legislation into law on 24 September with an effective date of 1 January 2021.

The increased/new criminal fines under the Act may be imposed where the violator:

1. Knowingly fails to follow the direction or orders of the administrator in connection with an oil spill.
2. Knowingly fails to notify the Coast Guard that a vessel is disabled within one hour of the disability and the vessel, while disabled, causes a discharge of oil that enters marine waters.
3. Knowingly engages in or causes the discharge or spill of oil into waters of the state, or a person who reasonably should have known that he or she was engaging in or causing the discharge or spill of oil into waters of the state.
4. Knowingly fails to begin clean-up, abatement, or removal of spilled oil as required.



A person convicted of violating any of the above prohibited acts shall be subjected to a fine of not less than US\$10,000 and not more than US\$1,000,000 for each violation with each day or partial day of a violation being considered a separate violation. (Members should note, as mentioned above, that there are various existing civil and criminal fines which may be imposed in addition to those that are the subject of this circular).

The legislation further provides that 'the court may also impose upon a person convicted of violating subdivision (a) (ie paragraphs 1 thru 4 above), a fine of up to one thousand dollars (US\$1,000) per gallon spilled in excess of 1,000 gallons of oil.'

In relation to paragraphs 1, 2 and 4 above, these fines may only apply where conduct is intentional. However, paragraph 3 refers not only to knowing conduct, but also to '...a person who should have reasonably known...' such that under California law a shipowner might be exposed to fines for violation of this provision even in the event of simple negligence on their part.

The International Group Clubs are considering the potential impact on cover for pollution risks of this new legislation having in mind the potential for very substantial fines to be issued against a polluter and will advise Members further in that regard.

The International Group and the ICS will also consider the possibility of taking steps to address industry's concerns arising from this new law, although any such steps will not affect its entry into force date in California on 1 January 2021.

We will inform members in this regard as soon as possible.

All clubs in the International Group are issuing similar circulars.

Yours faithfully

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