

ISPS Code Confusion

By

Kenneth Gale Hawkes, Esq.

Confusion abounds within the yachting industry regarding the new security regulations and their effect on individual yachts. This confusion stems from a clear misunderstanding of the requirements and erroneous information being disseminated within the industry by some lawyers, yacht managers, government officials and so-called private “maritime security experts.”

On November 25, 2002, President George Bush signed into law the Maritime Transportation Security Act of 2002. This Act has become known as the MTSA. Less than three weeks later, on December 13, 2002, the International Maritime Organization (IMO) adopted the 2002 Amendments to the Safety of Life at Sea Convention (SOLAS). These amendments were ratified by the 167 members of IMO on January 1, 2004. Contained in those amendments is the now infamous International Ship and Port Facility Security Code (ISPS Code). Both the MTSA and the ISPS Code became effective on July 1, 2004, and their purpose is to improve the security of ships and ports—the former with regards to the United States, and the latter with regards to the international maritime industry as a whole. While they contain similar provisions, the U.S. regulations promulgated under the MTSA (the CFRs) and the ISPS Code are not identical, and yacht owners and captains need to understand the relationship between the two in order to know what regulations apply at any given time and place.

The MTSA is domestic legislation. It is applicable to all U.S.-flag vessels within certain parameters, all “SOLAS vessels,” foreign-flag *commercial* vessels over 100 gross tons engaged in international voyages calling at U.S. ports, and U.S. ports and port facilities. Even though the MTSA incorporates the ISPS Code by reference, it does not require the existence of the ISPS Code to be effective. Consequently, the U.S. Coast Guard’s stated intent to *implement* the MTSA *through* the ISPS Code is causing considerable confusion. This is because the ISPS Code is extremely vague, which allows for all sorts of individual interpretations and legal challenges. Furthermore, because of its fundamental conceptual flaw that allows each of the 167 member states to interpret it as each state sees fit, the ISPS Code has created not a uniform system of maritime security, as intended, but rather, a non-uniform system fraught with clear uncertainties and legal loopholes.

Unlike the ISPS Code, which is supposed to be self-regulating among the member states, the MTSA contains a \$25,000-per-violation civil penalty provision for violation of the Act, and “any person” violating the act, such as a yacht’s owner, captain, designated security officer, or yacht manager, can be held personally liable. So, if the U.S. Coast Guard intends to implement the Act through the requirements of the ISPS Code, and the ISPS Code is so vague and ambiguous as to leave serious doubt that the Coast Guard’s interpretation regarding ISPS Code compliance is correct, and non-compliance with the Code is considered a violation of the MTSA for which fines in the hundreds of thousands of dollars may be levied, litigation of the Coast Guard’s assessment of those fines is a certainty.

So what should a yacht owner, captain, or yacht management company do to ensure the yacht complies with the applicable security regulations, and what should they do if someone tells them they are not complying? The answer is simple: call a maritime lawyer who understands the security requirements.

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