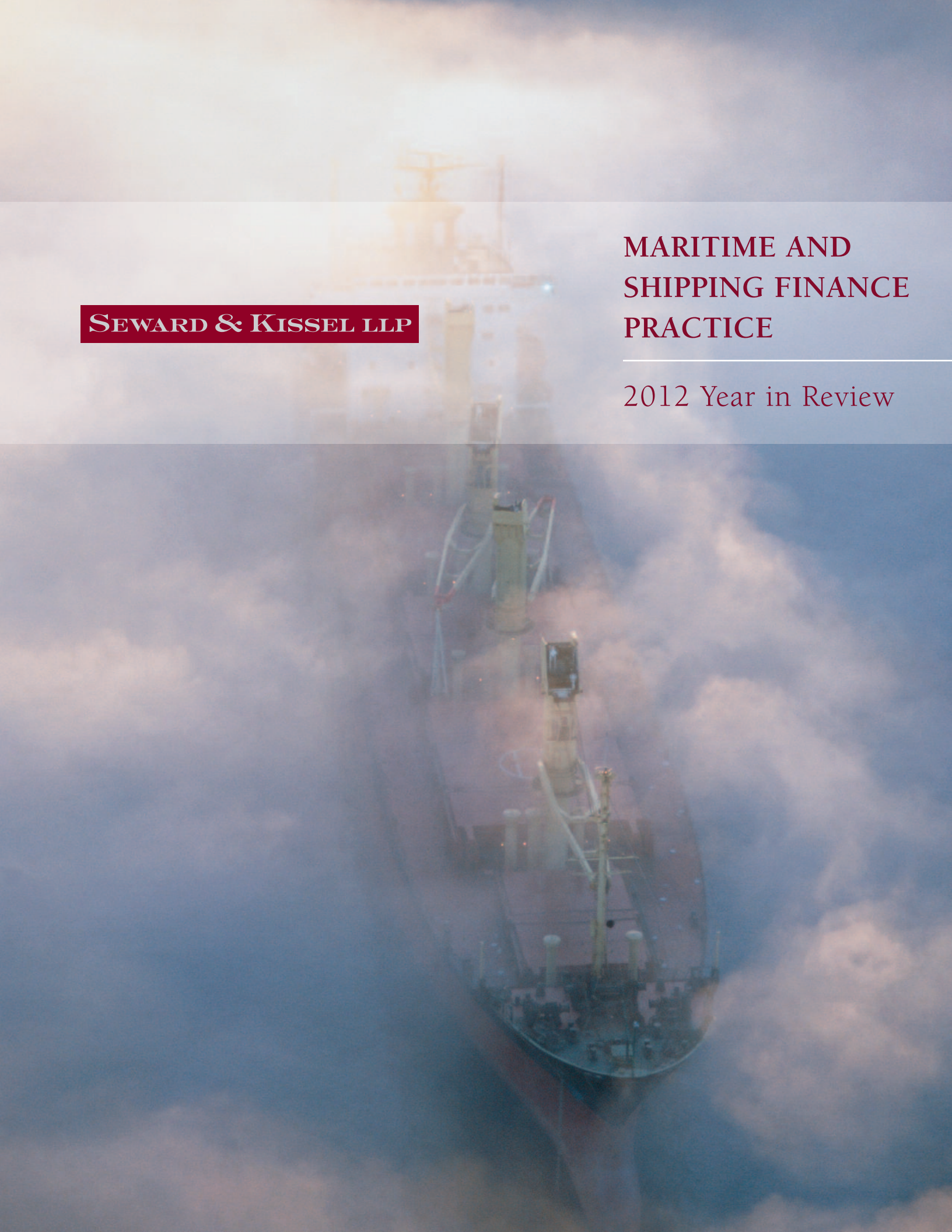

SEWARD & KISSEL LLP

MARITIME AND SHIPPING FINANCE PRACTICE

2012 Year in Review

To Our Friends and Clients

2012 was another tumultuous year in the maritime industry. Looking back on our year in review for 2011, it is safe to say that in one respect, we were spot on: the maritime Industry as we knew it would not be the same. We saw the bankruptcy of shipping stalwarts and the exodus from the shipping industry of premier shipping lenders.

There are still many unanswered questions. Have we finally hit the bottom, or is this just another false floor? Will the banks become more aggressive with respect to seizing collateral? Have we seen the last of the big shipping bankruptcies, or are there more on the horizon? How will U.S., EU and United Nations sanctions regimes impact the industry? Will FATCA regulations lead to more transparency? Will the "Shipping Banks" finally return and will they all be chasing the same tier one shipping companies? Does private equity have the stomach for shipping, or will this just be a brief flirtation with shipping that will end on the first upswing, or further downswing?

The team at Seward & Kissel LLP is here to help guide our clients through these tumultuous times. Our unique insight and capabilities have been honed through decades of experience in both good and bad markets and as a result of our being involved in all facets of the maritime industry including ship finance, public offerings and private placements, private equity investments, purchase and sale transactions, mergers and acquisitions and from our having acted in varied capacities in each of these types of transactions.

Seward & Kissel continues to be an industry leader in the shipping arena. Our attorneys are experienced in handling the transactions and issues that arise when the shipping markets expand and contract. From the booming loan and public offering markets in the mid two thousands to the restructurings and bankruptcies of the 1980s, through the boom and bust of the high yield market in the late 1990s and earlier this century, to the most recent foreclosures, restructurings and insolvencies, Seward & Kissel attorneys have been involved every step of the way.

We are pleased that we have had the opportunity to provide guidance to our clients in both good and difficult times, and look forward to continuing to assist our clients as the maritime industry finds its bearing and charts its course for 2013 and beyond.

Seward & Kissel LLP

Public Companies That Are "Resource Extraction Issuers" Must Disclose Certain Government Payments

Background

In August 2012, the United States Securities and Exchange Commission (the "SEC") adopted rules that require each "resource extraction issuer" (including foreign issuers and smaller reporting companies that file annual reports with the SEC) to disclose payments that they have made annually to foreign governments and the U.S. federal government in connection with the commercial development of oil, natural gas or minerals. The SEC adopted these new rules as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") to address the United States' participation in the "Extractive Industries Transparency Initiative," or EITI.

The EITI was first announced in 2002 by then-U.K. Prime Minister Tony Blair at the World Summit on Sustainable Development in Johannesburg, South Africa. The EITI has developed a voluntary framework under which governments publicly disclose their revenues from oil, gas, and minerals and companies make parallel disclosures regarding payments that they are making to obtain access to publicly owned resources. The EITI disclosure framework was designed to foster integrity and accountability in the development of the world's natural resources. Following his signing the Dodd-Frank Act into law, in September 2011, U.S. President Barack Obama announced the "Open Government Partnership" to enhance transparency into various U.S. government activities. As part of the U.S. National Action Plan for the Open Government Partnership, the U.S. re-affirmed its commitment to implementation of the EITI.

New SEC "Form SD"

To comply with the new rules, resource extraction issuers must file a "Form SD" that contains the required information, prepared in the form of an exhibit and electronically tagged in the SEC's "eXtensible Business Reporting Language" format (XBRL). Form SD must be filed within 150 days following the end of each fiscal year that ends after September 30, 2013. For issuers that report on a December 31 fiscal year, the first filing must be made no later than May 30, 2014. For the first report only, resource extraction issuers with fiscal years that start before September 30, 2013 (*i.e.*, issuers that use a December 31 fiscal year end) need only disclose payments made after September 30, 2013.

These new disclosure requirements apply to all cash or in-kind payments made to foreign governments or the U.S. federal government by Exchange Act reporting oil, natural gas, and mining companies, domestic and foreign, in connection with the commercial development of oil, natural gas, or minerals.

Who is Covered

The new disclosure requirements apply to all domestic and foreign companies, including smaller reporting companies, that file Form 10-K or Form 20-F annual reports with the SEC, and that are engaged in the commercial development of oil, natural gas, or minerals.

As used in the rules, the term "commercial development" includes exploration, extraction, processing, and export of oil, natural gas, or minerals, or the acquisition of a license for any such activity.

Information Required

The new rules and Form SD require disclosure of any "payment" (or series of related payments) that exceeds $100,000 that is made by a resource extraction issuer or a subsidiary or other entity controlled by it that is made to the U.S. federal government or a foreign government (whether national or sub-national, and including any department, agency, or instrumentality thereof, or a company owned thereby). A "payment" is defined as an amount paid to further the "commercial development" of oil, natural gas or minerals. The SEC has stated that the types of payments related to commercial development activities that need to be disclosed include:

- taxes (including income taxes);
- royalties;
- fees (including licensing fees);
- production entitlements;
- bonuses;
- dividends; and
- infrastructure improvements.

Further, the disclosure must provide the following information in respect of these payments:

- type and total amount of payments made for each project;
- type and total amount of payments made to each government;
- total amounts of the payments, by category;
- currency used to make the payments;
- financial period in which the payments were made;
- business segment of the resource extraction issuer that made the payments;
- the government that received the payments and the country in which the government is located; and
- the project of the resource extraction issuer to which the payments relate (except that income taxes and other taxes and fees payable at the entity level do not need to be disclosed on a project basis).

Uncertain Application to Shipowners

The new SEC reporting regime certainly applies to those that are engaged in the exploration, extraction and export of oil, natural gas and minerals (*e.g.*, the major oil companies). The SEC goes on to note in its release that the new rules "could require companies that may only be engaged in exporting oil, natural gas, or minerals and that may not have engaged in exploration, extraction, or processing of those resources to provide payment disclosure", leaving open the question of whether a vessel owner who charters-out its vessels to a user would be deemed to be engaged in commercial development activities and subject to the new rules solely by virtue of being involved in the chain of cargo transportation. In its rule release, the SEC explicitly states that transportation activities are not a focus of the EITI, which focuses on exploration and production activities. While the SEC has excluded certain types of transportation from commercial development activities (such as internal transportation from a mine to a refining facility), it has not excluded transportation activities that relate to export. As such, it remains unclear as to whether, and to what extent, the chartering activities of shipowners would require Form SD disclosure.

Seward & Kissel has been in contact with the SEC staff, who is in the process of formulating a response to various questions raised by industry participants that relate to these regulations, and we expect that further interpretive guidance will be forthcoming.

Litigation Developments

The litigation department continues to handle complex litigation matters for shipping companies, from defending securities, commercial and traditional maritime cases, to advising on piracy and sanctions issues. The following are examples:

Securities Claims

In *Rabbani v. DryShips, Inc.*, shareholders brought securities class action claims in federal court in St. Louis against DryShips, several of its officers and directors, as well as underwriters of certain of the company's equity offerings. Plaintiffs alleged that the defendants breached their fiduciary duties in connection with statements concerning shipping and offshore industry-related transactions, and that the company committed securities fraud. Seward & Kissel moved on behalf of the company to dismiss the action, arguing that Plaintiffs' allegations were legally insufficient and that their claims were barred by statutes of limitations. The motion to dismiss was granted. This is one of many securities claims handled by the firm's litigators in 2012.

Arbitration

In the first maritime arbitration to arise from a piracy off Somalia, *SH Tankers v. Koch Shipping, Inc.*, Seward & Kissel successfully confirmed an arbitration award for Koch Shipping, defeating a petition to compel Koch to proceed in arbitration. The arbitration panel had ordered the shipowner to post $14 million in security for Koch's counterclaims and stayed the arbitration until it posted the security. The shipowners sought to compel Koch to proceed with the arbitration and prosecute its counterclaims without security being posted saying that Koch had "refused to arbitrate." The court denied the shipowner's request and granted Koch's cross-petition to confirm the award. Seward & Kissel lawyers were involved in numerous arbitrated matters in 2012.

Sanctions Issues

Since the passage in 2010 of the U.S. Comprehensive Iran Sanctions and Divestiture Act ("CISADA") and the legislative acts and executive orders that followed, Seward & Kissel has been advising shipping industry participants (including shipowners, charterers, brokers, banks, insurance companies, and others) in the sanctions area. Iran sanctions regimes were augmented both in late 2011 and in mid-2012. The purpose of these sanctions regimes is to stifle Iran's economy and its ability to develop nuclear weapons. Every company with any contact with Iran is at risk. In addition, new regulations compel public shipping companies to report contacts with Iran. Further, the firm advises companies worldwide on the U.S. Foreign Corrupt Practices Act ("FCPA") and similar legislation. Seward & Kissel has extensive experience in these areas and advises companies worldwide about the "dos and don'ts" of doing business abroad.

The Iran Threat Reduction Act

The U.S. Iran Threat Reduction and Syria Human Rights Act of 2012, or ITRA, was signed into law by President Obama on August 10, 2012 to strengthen existing U.S. sanctions against Iran by further restricting access to the Iranian energy sector and enhancing current financial sanctions against the country as well as expanding U.S. sanctions against Iran and Syria in response to human rights abuses. Of particular importance to U.S. public companies, Section 219 of ITRA requires companies filing annual and quarterly reports with the SEC to disclose Iran-related activities, which, depending on the nature of the activities, have the potential to lead to the imposition of sanctions.

Reporting Obligations

The new disclosure obligations apply to annual or quarterly reports filed after February 6, 2013, of all reporting companies, including foreign private issuers, that "knowingly" engage in one or more of the activities identified in the ITRA and listed below during the period covered by the report. For purposes of ITRA, "knowingly" includes actual knowledge as well as situations where the issuer should have known of such activities. Activities requiring disclosure include, among others:

> ***Transportation of Crude Oil from Iran.*** Transportation by a person who is a controlling beneficial owner of, or otherwise owns, operates, controls or insures a vessel used to transport crude oil from Iran to another country.

> ***Concealing Iranian Origin of Crude Oil and Refined Petroleum Products.*** The concealment of crude oil or petroleum products transported by vessel from Iran, including the suspension of a vessel's satellite tracking device or concealment of the ownership, operation or control of a vessel by the government of Iran or an affiliated entity.

> ***The Development, Production or Exportation of the Petroleum Resources of Iran.*** Activities including (i) activities that directly or significantly contribute to the enhancement of Iran's ability to develop petroleum resources, (ii) the sale, lease or provision of goods, services, technology, information or support for the construction, modernization or repair of petroleum infrastructure or (iii) the exportation of refined petroleum products to Iran, including the provision of ships or shipping services to deliver refined petroleum products to Iran.

If a company engages in prohibited activities covered under ITRA, it must disclose a detailed description of each such activity, including the nature and extent of the activity, the gross revenues and net profits, if any, attributable to the activity, and whether the company intends to continue the activity. The required disclosure must be made in its annual or quarterly report covering the period in which the activity took place and a company will generally be required to separately file with the SEC, concurrently with the annual or quarterly report, a notice that the disclosure of that activity has been included in that annual or quarterly report. Information filed with the SEC will be publicly

available upon filing, and the SEC is required to promptly submit any disclosures made by a reporting company under ITRA to, among others, the Department of Treasury, the Department of State or other appropriate U.S. executive agency.

Enhanced Sanctions

Upon receipt of such information, the government is obligated to initiate an investigation into the possible imposition of sanctions under ITRA. ITRA also broadens the sanctions regime against Iran by increasing the number of sanctions to be imposed by the United States government from three (3) to five (5) sanctions per violation for anyone found to knowingly engage in prohibited activities with Iran and also expands the types of sanctions that may be imposed. Further, ITRA may impose liability on U.S. parent companies for the activities of their foreign subsidiaries where such activities by the U.S. parent company would be prohibited, effectively preventing U.S. companies from circumventing regulations and avoiding sanctions by having a foreign subsidiary conduct business activities with Iran in which it could not engage directly.

Conclusion

ITRA imposes both significant new reporting obligations on public companies in the United States as well as new and more stringent sanctions on entities that are found to be engaged in prohibited activities with Iran. For a more detailed discussion of the new law and its implications for the shipping industry, including a list of the additional sanctions to which companies may be subject, please see Seward & Kissel's more detailed discussion in the publication "The Iran Threat Reduction and Syria Human Rights Act of 2012 and Section 13(r) of the Securities Exchange Act of 1934" dated February 22, 2013, that is available on the firm's website.

Shipping and Chapter 11

Chapter 11 remains a choice for shipping companies attempting to reorganize.

Following on the heels of the 2011 filings of Marco Polo, Omega Navigation, Trailer Bridge and General Maritime, 2012 saw chapter 11 filings by TBS International, Fastship, B+H Ocean Carriers, and Overseas Shipholding Group (OSG).

Chapter 11 presumably attracts shipping companies because of the opportunities (with different levels of attraction and confidence to different companies), among other things, to stop action against the shipping company through imposition of the automatic stay, negotiate, or force collective treatment on creditors to negotiate, a retained or new equity stake for existing equity or management, and terminate burdensome charters and newbuilding contracts.

Lessons Learned

Pre-arranged chapter 11s generally fare better

TBS International, General Maritime and Trailer Bridge, while facing varying degrees of difficulty in their individual chapter 11 cases, were able to navigate through chapter 11 and emerge as reorganized companies. Substantial work and negotiations to reach agreement with key constituencies preceded the chapter 11 filings, ultimately providing the requisite elements for successful chapter 11 cases.

Free-fall or defensive filings don't fare so well

Marco Polo and Fastship were free-fall (no pre-arranged agreements) cases that concluded, after much delay and expense, in liquidations. Omega Navigation did not liquidate, but the Company did reach a settlement with its senior lender, HSH Nordbank, pursuant to which HSH repossessed the eight Omega vessels subject to the bankruptcy filing, which are reportedly valued at less than HSH's outstanding loans secured by the vessels. Additionally, HSH agreed to pay all the professional fees of all

parties to the bankruptcy proceedings as well as pay $5.3 million to the Company's founder and CEO to settle outstanding litigation. While the debtor has argued that it should be entitled to retain assets held by joint venture entities that were not part of the bankruptcy filing, the Court rejected this motion, finding that proceeds from the remaining assets should be distributed to the junior and unsecured creditors.

Some observations

Chapter 11 cannot cure the ills of the marketplace. Dropping rates and scrap values, causing decreasing confidence in a market turnaround, in many respects make chapter 11s more difficult, unless management, equity and lenders can see eye-to-eye and negotiate a fair resolution. This is often difficult, as management and equity typically see the situation as market driven, with better times around the corner, and would like to stay the course, which they hope will see them through to better times. Lenders, on the other hand, in many instances are becoming less patient and less flexible, as they become less bullish about the prospects of a market turnaround. When this is coupled with internal pressures to raise capital, the difficulty is compounded. Further, if the vessels are aged, a lender may feel that getting today's scrap value is the only rational option when compared to running vessels at a loss and/or with risk of arrest, dry-dock expense and a continuing uncertain market.

When vessels are not ready for scrapping, someone has to run them. If the borrower and the lender have a good working relationship, and if the lender does not need immediate liquidity, reaching a reasonable deal with appropriate risk and upside allocation is in the best interests of both sides.

Write-downs and distressed investor money may help. As European banks are able to take write-downs on their loans, they may find it acceptable and even useful to sell their loans to distressed investors, who will provide instant liquidity to the lenders, and get them away from a challenging restructuring market that often requires substantial management time from the lenders. On the other hand, if lenders are willing to invest the time required and work closely with their outside advisors, and where required put new money into good borrowers, they may make it through this difficult cycle better than had they sold to a distressed investor.

Conclusion

With continued uncertainty in charter rates and growing pressures for liquidity, 2013 may bring more chapter 11 cases in the shipping sector and new learning in the area.

FATCA for Shipping Companies: A Brief Primer

The U.S. Foreign Account Tax Compliance Act of 2010 ("FATCA") has been getting a lot of attention lately for its impact on foreign banks with U.S. accountholders. Although the impact of FATCA will be felt most directly in the global financial industry, it will have a significant, and so far largely unreported, impact on the shipping industry.

In January 2013, the Internal Revenue Service (the "IRS") published over 500 pages of final regulations interpreting FATCA (the "Final Regulations"). Based on the Final Regulations, this article looks at the impact of FATCA on the global shipping industry.

What is FATCA?

FATCA was enacted in March of 2010 as part of an effort to crack down on tax evasion by U.S. persons who had hidden money in offshore financial accounts.

FATCA has two key provisions. The first, contained in Section 1471 of the Internal Revenue Code of 1986, as amended (the "Code"), requires every "foreign financial institution" (an "FFI") to enter into an agreement with the IRS to report the names of and certain other information regarding its U.S. accountholders to the IRS on an annual basis. If an FFI fails to enter into such

an agreement, then the FFI is subject to a 30% U.S. withholding tax on U.S. source interest, dividends, salaries, rents, royalties, compensations, and the gross proceeds from the sale of any property which could produce U.S.-source dividend or interest income (a "withholdable payment"). Unless an exception applies, banks, brokerage firms and investment funds are treated as FFIs and are required to comply with these provisions. The IRS has entered into a series of "intergovernmental agreements" (an "IGA") with other countries which modify the FATCA requirements with respect to FFIs located in those countries.

The second provision, contained in Section 1472 of the Code, provides that a 30% U.S. withholding tax will be imposed on any withholdable payment to a non-financial foreign entity (an "NFFE") unless the NFFE identifies to the payor each of its 10% U.S. owners and the payor identifies such persons to the IRS.

How FATCA Will Potentially Impact the Shipping Industry

The FATCA rules will have a significant impact on the shipping industry. Any shipping company that has U.S. voyages, borrows money from a bank or attempts to open a bank account may find itself dealing with FATCA. Although FATCA withholding does not become effective until January 1, 2014, in the case of interest and dividends, and January 1, 2017, in the case of gross proceeds, FFIs will begin entering into agreements with the IRS in mid-2013 and have already begun to reform their procedures for FATCA compliance.

FATCA will impact the shipping industry in three main areas: (1) the application of tax gross-up provisions in credit agreements subject to FATCA, (2) potential withholding on charter hire payments and (3) the implementation of additional procedures for banks when companies open accounts.

Credit Agreements

FATCA will have a significant impact on credit agreements entered into (or guaranteed) by U.S. borrowers and even those involving non-U.S. borrowers. Under current law, interest income paid by a U.S. person to a foreign person is subject to a 30% U.S. withholding tax. However, in practice, interest paid by a U.S. borrower to a foreign person is typically not subject to this withholding tax because it is exempt from withholding either as "portfolio interest" or pursuant to an applicable U.S. income tax treaty.

Typical credit agreements by U.S. borrowers require a non-U.S. lender (or assignee) to provide an IRS Form W-8BEN (or other applicable form) to the borrower (or its agent) in order for the non-U.S. lender to claim exemption from, or a reduction in, U.S. withholding tax. In the event that U.S. withholding tax does apply, then the borrower will often agree in the credit agreement to "gross-up" the lender by paying additional amounts so that the amount received by the lender after the imposition of any U.S. withholding tax is the same as the amount the lender would have received if there were no such withholding tax imposed. A typical "gross-up" provision does not apply if the lender fails to provide a completed IRS Form W-8BEN to the borrower.

Under FATCA, a 30% U.S. withholding tax will apply to payments with respect to obligations entered into (or substantially modified) after December 31, 2013, of interest and gross-proceeds by U.S. borrowers to most non-U.S. lenders unless the lender registers as an FFI with the IRS (or otherwise qualifies for an exemption from FATCA, for example, under an IGA). Although interest and gross proceeds paid by non-U.S. borrowers are not expected to be subject to FATCA withholding, many non-U.S. lenders have been insisting that specific FATCA language nevertheless be included in credit agreements with non-U.S. borrowers.

The Final Regulations provide that an FFI will be able to avoid FATCA withholding by registering with the IRS and providing a W-8BEN to the borrower.

In negotiating recent credit agreements, the question has been raised as to whether a "gross-up" is available for the FATCA withholding tax. The industry view on this topic has varied depending upon the residence of the borrower and the identity of the lender. However, for loans entered into beginning in 2013, the industry standard will likely be that the FATCA withholding tax is excluded from the taxes for which a "gross-up" is available. From the perspective of the borrower, this makes a great deal of sense as the lender has a choice whether or not to comply with FATCA. If the lender were to decide not to comply with FATCA, then the borrower should not bear the economic burden of a decision which is wholly within the lender's control. On the other hand, from the perspective of the lender, its dealings with a U.S. borrower (or a non-U.S. borrower with a U.S. guarantor) could potentially impose a significant compliance obligation on the lender and arguably, the borrower, as a beneficiary (in the form of a loan) should bear those costs.

In summary, foreign lenders and U.S. borrowers (and guarantors) negotiating credit agreements should ensure that the tax gross-up provisions in their credit agreements adequately address FATCA and that their counsel closely review the FATCA or regular tax gross-up provisions in their documents.

Withholding and Reporting of Charter Hire Payments

Under Section 1472 of the Code, unless an exception applies, any "withholdable payment" made to an NFFE will be subject to a 30% U.S. withholding tax if the NFFE fails to identify its 10% U.S. owners or certify that it does not have any 10% U.S. owners. Under the general sourcing rules of the Code, income derived from transportation that begins or ends in the United States is treated as being 50% derived from U.S. sources. As a result, charter hire paid with respect to a vessel that has a voyage which begins or ends in the United States is, in part, U.S.-source income and could potentially be subject to withholding under FATCA.

The Final Regulations provide that a "withholdable payment" does not include payments for services, the use of property, equipment leases, transportation or freight. Time charter hire is effectively paid for services, that is, for the use of a fully-crewed and managed vessel. Therefore, payments of time charter hire should not be treated as "withholdable payments." Likewise, payments under a contract of affreightment should be treated as payments for "transportation" and therefore should not be withholdable payments. Payments of bareboat charter hire are payments for the use of property, namely a vessel (but not for its crew or management). Therefore, the above exception should also apply to bareboat charter hire payments.

Although the Final Regulations appear to largely exempt charter hire payments from withholding under FATCA, a shipping company could potentially earn other types of income that are treated as "withholdable payments" under FATCA. For example, payments under freight forward agreements could potentially be subject to withholding, as could income from interest, dividends and other investment proceeds from U.S. sources.

Although each of these items is treated as a "withholdable payment," there are several exceptions pursuant to which no reporting or withholding is required when payments are made to an NFFE.

The Final Regulations provide an exception for publicly traded companies and their affiliates. The test for whether the shares of a company are publicly traded is similar to the test under Section 883. In general, the shares of a company will be treated as publicly traded if (1) a class representing more than 50 percent of the vote or value of the company's shares is listed on an "established securities market" (which includes the major U.S. exchanges and most major foreign exchanges), (2) trades in such class are effected (other than in de minimis amounts) on at least 60 days during each year and (3) the trading volume of such class during the year is at least ten percent of the outstanding shares. A class of stock which is traded on an established securities market in the United States will be deemed to satisfy requirements (2) and (3), provided that such stock is regularly quoted by dealers making a market in the stock.

The most important exception to these rules available to shipping companies may be the exception afforded to "active NFFEs." Under this exception, no withholding or reporting is required if less than 50% of the gross income of the NFFE for the prior calendar year was "passive income" and less than 50% of the value of the NFFE's assets (tested quarterly) during the prior calendar year produced or were held for the production of passive income. "Passive income" consists of dividends; interest; rents and royalties (other than those derived in the active conduct of a trade or business by the NFFE's employees); annuities; capital gains from the disposition of assets producing dividends; gains from commodities transactions (except certain hedging transactions); gains from foreign currency transactions; income from notional principal contracts; and gains and income from certain insurance transactions.

The active NFFE exception presents several potential issues for shipping companies. First of all, since bareboat charter income is generally treated as passive rental income, a company which has a significant number of vessels on bareboat charter may not be an active NFFE. Second, the test looks to the prior calendar year during which the NFFE may not have been active (for example, if it is in a start-up phase). Finally,

much like the passive foreign investment company rules, cash is apparently treated as a passive asset, which can cause a company to fail the asset test at the end of a quarter after a large capital infusion or in a start-up period.

For many shipping companies (particularly those with only occasional bareboat charters), the active NFFE exception will be of great use, but the qualification for this exception will need to be closely monitored.

In summary, non-U.S. shipping companies should begin to determine whether or not they qualify for one of these exceptions and determine whether they have any 10% U.S. owners. In addition, counterparties who may be paying amounts to shipping companies should determine whether any amounts paid are "withholdable payments" and, if so, implement policies and procedures to obtain an appropriate IRS Form W-8 from any non-U.S. payee to whom they are making a payment.

Bank Accounts

In order to comply with FATCA and avoid the 30% withholding tax, non-U.S. banks and other FFIs must conduct a fairly significant due diligence process on both existing accounts and newly opened accounts. Many banks have already begun to implement these procedures. Although these procedures are similar to existing "know your customer" and anti-money laundering procedures, they differ in some critical respects.

As a result, when shipping companies seek to open bank accounts with non-U.S. banks, they will likely be required to provide significant information regarding their U.S. beneficial owners (or otherwise claim an exemption from FATCA reporting).

For example, a shipping company which is owned in part by a discretionary trust or a trust with U.S. beneficiaries may be required to provide additional information regarding the trust and its beneficiaries. In certain circumstances, a foreign trust may even have to register with the IRS as an FFI. There are specific attribution rules that are applicable to trusts and shipping companies may have to determine whether they have any 10% U.S. owners after the application of these attribution rules This may require providing information regarding the ultimate ownership of a closely-held family enterprise, the disclosure of which may not have been required in the past.

In summary, shipping companies maintaining or opening a non-U.S. bank account should be prepared for additional questions from their banks regarding whether they have any 10% U.S. owners.

Conclusion

FATCA will likely have a significant effect on the international shipping industry. Industry participants should begin to familiarize themselves with these rules and put procedures in place now to deal with FATCA.

LIBOR

Historically, shipping loans have borne interest at a rate equal to the lender's cost of funds plus an agreed upon margin. As the shipping loan markets became more sophisticated, and loans went from single ship, bilateral loans to multi-vessel syndicated loans, the concept of reference banks, where some or all of the lenders in a facility would provide their respective cost of funds and an average of those quoted rates plus the margin would be the interest rate payable under the loan, became the shipping industry norm. As time progressed and the shipping markets flourished, borrowers with strong balance sheets started to demand that their lenders use a quoted benchmark as their cost of funds. After all, why should the borrower pay a higher rate of interest because one or more of its lenders was unable to borrow at what was the published, and at that time believed to be, the rate at which banks could borrow from each other?

Generally, the interest rate benchmark used in the shipping market is LIBOR, or the London Interbank Offered Rate. LIBOR is intended to represent the rate at which one British Bankers' Association (BBA) member bank can obtain an unsecured loan in a specified currency for a specified period of time from another member bank. LIBOR is published daily in numerous currencies and for multiple tenors and is essentially calculated by averaging the submissions received from contributing banks who quote their projected cost of borrowing in those currencies and for those tenors.

While substituting LIBOR for the lenders' cost of funds generally works well, it may be, and has been, costly for lenders during market turmoil. For example, many lenders have expressed their frustration in the recent past due to the quoted LIBOR rate being less, sometimes significantly so, than their actual cost of funds,

which at best reduces their profit margin and at worst causes lending losses notwithstanding timely payments by the borrower. Due to this real disparity, and other industry concerns with LIBOR, the UK government commissioned an independent review of LIBOR, which was completed late last year.

While certain LIBOR reforms have been recommended, such as (i) reducing the number of currencies and/or tenors in the reported rates (the data for which may have been too thin to support a reliable benchmark rate), (ii) publishing each contributing bank's submissions after a three month delay (to provide transparency and discourage the submission of artificial rates) and (iii) corroborating each contributing bank's submissions (which are generally estimates) with actual borrowing costs, market conditions may still cause lenders' cost of lending to exceed the margin they are able to obtain from borrowers.

However, reverting solely back to "base rate" funding, which could be a burden for multi-lender based loans if a lender must certify to the borrower its cost of borrowing, may not be necessary. Already these types of loan agreements generally include "market disruption clauses," which address situations in which benchmark rates do not adequately reflect the lenders' cost of lending or of maintaining a certain facility. Typically, market disruption clauses provide for a minimum percentage of the lenders to declare a triggering event, such as the benchmark rate being no longer ascertainable or reliable, the "required" lenders' cost of borrowing exceeding their cost of lending, or specific currency deposits not being sufficiently available to the "required" lenders in the ordinary course of their business. However, even where the "required" lenders could invoke the market disruption clause, many may forgo this remedy for reputational or customer relations reasons.

Generally, after an invocation of the market disruption clause, "base rate" lending becomes the mechanism to calculate the lending rate on a substitute basis until such time as the cause of the triggering event subsides. In sum, lenders must carefully review the "boilerplate" LIBOR provisions to ensure that they have adequate protection against displacement in the LIBOR market.

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