

U.S. Paper on Flag State Investigations as part of the Compliance Monitoring Scheme

October 10, 2018

At the CMS-IWG, the United States tabled some proposed language related to Flag State Investigations (FSI) as part of the revised CMM on the Compliance Monitoring Scheme (CMS). It was clear from discussions around the room that it would be helpful if the United States provided a fuller explanation of our proposal. Below, we first describe the elements of our revised FSI process, and then provide revised text for consideration of inclusion in the revised CMS CMM.

The United States sees the FSI portion of the CMS process as an essential element of any robust CMS. Without it, we have serious concerns regarding our ability to ensure that Members are accountable for taking action as responsible flag CCMs. But we recognize that there is room for improvement in the current process. The goal of this proposal is to make the FSI portion of the CMS more objective, clearer, simpler, meaningful, and less time consuming. As discussed further below, we are proposing to separate the FSI portion of the CMS out from the main CMR assessments.

Our proposal has several elements:

1. CCMs would continue to fill out an Investigation Status Report (ISR) for cases under investigation, prior to TCC, but the ISR report would be modified to focus on objective criteria in a simpler format. Previously, TCC has identified the following elements as essential to determining whether a flag State is undertaking an investigation into alleged violations by its vessels:

- Has an investigation been started? (Yes/No)
- If yes, what is the current status of the investigation? (Ongoing, Completed)
- If the alleged violations stem from an observer report, have you obtained the observer report? (Yes/No)
- If no, what steps have you taken to obtain the observer report?
- What was the outcome of the investigation? (Closed – no violation; Infraction – not charged; Infraction – charged)
- If no violation, provide a brief explanation
- If infraction, but not charged, provide a brief explanation
- If infraction charged, how was it charged (e.g., penalty/fine, permit sanction, verbal or written warning, etc.) and level of charge (e.g., penalty amount, length of sanction, etc.)

2. CCMs would be assessed separately for compliance with implementation and FSI, such as how we currently do it for reporting deadlines. If a CCM has implemented an obligation, but has ongoing investigations of alleged violations by its vessels, it would be assessed as Compliant against that obligation in the main CMR process.

3. FSIs would be assessed separately from the main CMR. If all CCMs are now providing their FSI information in a standardized format (see #1 above), then the Secretariat can produce a table with all CCMs' information. This will be provided on the secure side in advance of TCC. For all entries that have complete information and are ongoing, they will be assessed as FSI. For all entries that have complete information and are completed, they will be assessed as Compliant [or Completed?]. Individual cases that are ongoing or have been completed would not need to be discussed unless a CCM has questions about the information provided about the completed investigation. For all entries where an investigation has not been started or where there are incomplete or missing entries, they will be afforded a Non-Compliant status. The Provisional and Final CMR will include a separate table for FSI information.

4. The FSI assessments will be investigation by investigation, so it is not an all or nothing proposition. When an investigation is completed and all the ISR information is provided, that investigation will not be carried over onto the table for the following year.

5. Where an investigation has been ongoing for two years, a responsible CCM will have to report to TCC annually, until complete, on the status of the investigation and steps it has taken to progress the investigation, and based on that report, TCC may reconsider the CCM's assessment status. What this does is focus TCC's attention on those cases that are not getting resolved through the ordinary course of flag CCM action and have been stalled for some reason or another.

6. This revised process maintains the need for CCMs to undertake investigations into alleged violations and report back to the Commission on the outcomes, but it eliminates the more burdensome, time-consuming, and subjective aspects of the current process of reviewing other CCMs' national laws and domestic penalties for all cases.

Proposed language for inclusion in revised CMS CMM:

[This language could be inserted before Section IV or V in the CMS-IWG draft. In addition, if this approach is agreed, additional conforming edits will be needed through the measure, and some introductory language may be needed.]

Investigation Status Report

1. Where there are alleged violations identified in a CCM's dCMR, that CCM shall provide an Investigation Status Report (ISR) for each alleged violation to the Secretariat with the dCMR that provides the following information:

- (a) Has an investigation been started? (Yes/No)
- (b) If yes, what is the current status of the investigation? (Ongoing, Completed)
- (c) If the alleged violations stem from an observer report, have you obtained the observer report? (Yes/No)
- (d) If no, what steps have you taken to obtain the observer report?
- (e) What was the outcome of the investigation? (Closed – no violation; Infraction – not charged; Infraction – charged)

- (f) If no violation, provide brief explanation
- (g) If infraction, but not charged, provide brief explanation
- (h) If infraction charged, how was it charged (e.g., penalty/fine, permit sanction, verbal or written warning, etc.) and level of charged (e.g., penalty amount, length of sanction, etc.)

2. The CCM may work together with the Secretariat to draft the ISR. This report shall be attached to that CCM's comments to the dCMR.

3. Where an investigation has been notified as ongoing, through the preparation of an ISR, and all of the elements of the ISR as stated in paragraph 1 are included, TCC shall assess that CCM as "Flag State Investigation" for that investigation.

4. Where an investigation has been notified as completed, through the preparation of an ISR, and all the elements of the ISR as stated in paragraph 1 are included, TCC shall assess that CCM as "Compliant"[or "Completed"?] for that investigation.

5. When an investigation has not been started or all elements of the ISR as stated in paragraph have not been included, TCC shall assess that CCM as "Non-Compliant" for that investigation.

6. The assessments in paragraphs 3 – 5 will be taken without discussion unless a CCM has a specific concern or if there are updates from the Secretariat based on new information received.

7. Where an investigation has been ongoing for two years, that CCM shall report to TCC annually on the status of the investigation and steps it has taken to progress the investigation, and based on that report, the TCC may reconsider the CCM's assessment status.