

## SUBCHAPTER J—MISCELLANEOUS

### PART 350—SEAMEN'S SERVICE AWARDS

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AUTHORITY: 46 App. U.S.C. 2001, *et seq.*; 49 CFR 1.66.

SOURCE: 60 FR 49804, Sept. 27, 1995, unless otherwise noted.

#### § 350.1 Purpose.

The purpose of this part is to prescribe regulations to implement the Merchant Marine Decorations and Medals Act of 1988, 46 App. USC 2001, *et seq.*, to authorize the issue of decorations, medals, and other recognition for service in the U.S. merchant marine, and for other purposes, and to provide for the replacement of awards previously issued for service in the United States Merchant Marine under prior law.

#### § 350.2 Special medals and awards.

The Secretary of Transportation, acting through the Maritime Administrator, may award decorations and medals of appropriate design for individual acts or service in the U.S. Merchant Marine.

(a) *Medals, awards.* The Secretary may award the Distinguished Service Medal, Meritorious Service Medal and Gallant Ship Unit Citation Award, as prescribed under sections 3 and 4 of Pub. L. 100-324.

(b) *Nominations.* Nominations for these awards shall be reviewed and submitted by the MARAD Merchant Marine Awards Committee to the Maritime Administrator for approval.

(c) *Inquiries.* Direct all inquiries concerning eligibility and procedures for the issuance of these medals to Chairperson, Merchant Marine Awards Committee, Office of Maritime Labor, Training and Safety, Maritime Administration, U.S. Department of Transportation, Washington, DC 20590.

#### § 350.3 Other original recognition of service.

Under the provision of Pub. L. 100-324, the Administrator has the authority to review original applications for the following decorations:

(a) *World War II Service.* (1) *Merchant Marine Emblem*, awarded to merchant seamen for service during World War II from the period December 7, 1941 to July 25, 1947;

(2) *Victory Medal*, awarded to merchant seamen who served as members of the crews of ships for 30 days or more during the period December 7, 1941 to September 3, 1945;

(3) *Honorable Service Button*, awarded to merchant seamen who served as members of the crews of ships for 30 days or more during the period December 7, 1941 to September 3, 1945;

(4) *Mariner's Medal*, awarded to merchant seamen who, while serving on a ship from December 7, 1941 to July 25, 1947, were wounded or suffered physical injury as a result of an act of an enemy of the United States;

(5) *Merchant Marine Combat Bar*, awarded to merchant seamen who served on a ship which, at the time of such service, was attacked or damaged by an instrumentality of war, from December 7, 1941 to July 25, 1947. A star is attached if the seaman was forced to abandon ship. For each additional abandonment, a star is added;

(6) *Merchant Marine Defense Bar and Medal*, awarded to merchant seamen who served on merchant vessels between September 8, 1939 to December 7, 1941;

(7) *Atlantic War Zone Bar and Medal*, awarded to merchant seamen who served in the Atlantic War Zone, including the North Atlantic, South Atlantic, Gulf of Mexico, Caribbean, Barents Sea, and the Greenland Sea, between December 7, 1941 and November 8, 1945;

(8) *Mediterranean-Middle East War Zone Bar and Medal*, awarded to merchant seamen who served in the zone including the Mediterranean Sea, Red Sea, Arabian Sea, and Indian Ocean

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west of 80 degrees east longitude, between December 7, 1941 and November 8, 1945;

(9) *Pacific War Zone Bar and Medal*, awarded to merchant seamen who served in the Pacific War Zone, including the North Pacific, South Pacific, and the Indian Ocean east of 80 degrees east longitude, during the period December 7, 1941 to March 2, 1946;

(10) *Presidential Testimonial Letter*, signed by President Harry S Truman, to all active merchant seamen who sailed during World War II;

(11) *Philippine Defense Ribbon*, awarded to merchant seamen who served as members of crews of ships in Philippine waters, for not less than 30 days, from December 8, 1941 to June 15, 1942;

(12) *Philippine Liberation Ribbon*, awarded to merchant seamen who served as members of crews of ships in Philippine Waters for not less than 30 days from October 17, 1944 to September 3, 1945;

(b) *Korean Conflict Service*. Korean Service bar and medal for merchant seamen who served in waters adjacent to Korea during the Korean Conflict, between June 30, 1950 and September 30, 1953.

(c) *Service in the Vietnam Conflict*. Vietnam Service bar and medal awarded to merchant seamen who served in waters adjacent to Vietnam between July 4, 1965 and August 15, 1973.

(d) *Operations DESERT SHIELD AND DESERT STORM*. The Merchant Marine Expeditionary Award, authorized on May 22, 1991, to those American merchant seamen who directly participated from August 2, 1990 to December 31, 1991 in the war zone designated by Executive Order 12744 as “the Persian Gulf, Red Sea, Gulf of Oman, Gulf of Aden, and that portion of the Arabian Sea that lies north of 10 degrees north latitude and west of 68 degrees east longitude.”

### § 350.4 Eligibility for awards.

(a) *World War II awards*. Submission of the original applications for World War II merchant marine service awards to the Maritime Administration shall include:

(1) A copy of seaman's DD Form 214, “Certificate of Release or Discharge from Active Duty” with continuation

sheet, if provided. The DD Form 214 is required to verify merchant marine service on vessels during World War II. The application and instructions for applying for this document may be obtained from the Maritime Administration, Office of Maritime Labor, Training and Safety. If a seaman was not eligible for this discharge, the Maritime Administration will accept official documents, including ships' discharges;

(2) A summary of World War II sailing history to include—theater(s) of operation and ports of discharge; and

(3) Book number or United States Maritime Service (USMS) number and World War II home address.

(b) *Korean and Vietnam Awards*. Applicants for the Korean Service bar and medal, Vietnam Service bar and medal and the Merchant Marine Expeditionary Award shall provide copies of the ship(s) discharge(s) for the appropriate voyages. All awardees will be given an appropriate certification card or certificate for their awards.

(c) The information establishing eligibility, along with a written request, shall be directed to Office of Maritime Labor, Training & Safety, Maritime Administration, Washington, DC 20590, Attention: Merchant Marine Awards.

(d) MARAD has entered into agreements with vendors to supply the medals and decorations to eligible mariners at cost. After reviewing applications, MARAD will instruct eligible mariners to submit their orders for the medals and decorations to the following vendors.

OWNCO Marketing, 1705 SW. Taylor Street, Portland, OR 97205, (503) 226-3841

PIECES OF HISTORY, P.O. Box 4470, Cave Creek, AZ 85331, (602) 488-1377, (602) 488-1316 (FAX)

THE QUARTERMASTER UNIFORM COMPANY, P.O. Box 829, 750 Long Beach Blvd., Long Beach, CA 90801-0829, 800-444-8643 Toll Free 7:00 AM—7:00 PM

SHIP'S SERVICE STORE, United States Merchant Marine Academy, Kings Point, NY 11024, (516) 773-5000 ext. 5229

VANGUARD MILITARY EQUIPMENT CORP., 41-45 39th Street, Sunnyside, NY 11104, Toll Free 1-800-221-1264

VANGUARD INDUSTRIES WEST, 6155 Conte Del Cedro, Carlsbad, CA 92009, Toll Free 1-800-433-1334

PAST GLORY COMPANY, P.O. Box 4470, Alexandria, VA 22302, (703) 491-7544

(e) Compliance with the procedure set forth in paragraph (a) of this section is required when purchasing a replacement. Certification cards need not be presented to the authorized vendors in order to purchase the bars. The possession or display, including the wearing of any Merchant Marine decoration by other than authorized personnel is prohibited by law and subject to fine and imprisonment.

**§ 350.5 Replacement decorations.**

The following decorations that have been previously issued may be replaced at cost upon written request made to the Office of Maritime Labor, Training and Safety:

- (a) Distinguished Service Medal.
- (b) Meritorious Service Medal.
- (c) Mariner's Medal.
- (d) Gallant Ship Unit Citation Bar.
- (e) Presidential Testimonial Letter (no cost for replacement).

**§ 350.6 Unauthorized sale, manufacture, possession or display.**

The sale, manufacture, possession or display of any Merchant Marine decoration, or colorable imitations thereof, by anyone other than an authorized vendor is prohibited by law and subject to fine and imprisonment.

**§ 350.7 Special certificate of recognition.**

The Maritime Administration is authorized to issue a special certificate of recognition of service to an individual, or the personal representative of an individual, whose service in the U.S. Merchant Marine has been determined to be active duty under an earlier Act of Congress (Pub. L. 95-202). The issuance of this certificate to any individual does not entitle that individual to any rights, privileges or benefits under any law of the United States.

**PART 351—DEPOSITORIES**

- Sec.
- 351.1 Purpose.
- 351.2 Qualification of depository.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114.

**§ 351.1 Purpose.**

The purpose of this part is to set forth the criteria necessary for depositories of funds under all programs authorized by the Merchant Marine Act, 1936, as amended (46 U.S.C. 1101 et seq.) (Act).

[38 FR 8061, Mar. 28, 1973]

**§ 351.2 Qualification of depository.**

(a) *General qualification.* Any depository which is a member of the Federal Deposit Insurance Corporation will be approved for deposit of funds under the maritime programs authorized by the Act. With respect to the Capital Construction Fund program, any depository which is a member of the Securities Investor Protection Corporation, and is organized as a corporation under the laws of the United States, any State, territory, or possession thereof or the District of Columbia, will also be approved for the deposit of funds.

(b) *Limitation on amount of deposits.* No person making deposits under the programs authorized by the Act shall make or maintain deposits which exceed 5 percent of the depository's total deposits.

[38 FR 8061, Mar. 28, 1973, as amended at 63 FR 55039, Oct. 14, 1998]

**PART 355—REQUIREMENTS FOR ESTABLISHING UNITED STATES CITIZENSHIP**

- Sec.
- 355.1 General.
- 355.2 Requirements regarding evidence of U.S. citizenship; affidavit guide.
- 355.3 Criteria to be applied in support of stock data in affidavit.
- 355.4 Changes in citizenship data.
- 355.5 Additional material.

AUTHORITY: Secs. 2, 204, 39 Stat. 729, as amended, 49 Stat. 1987, as amended, 73 Stat. 597; 46 U.S.C. 802, 803, 1114, 11.

SOURCE: General Order 89, Rev., 35 FR 11558, July 18, 1970, unless otherwise noted.

**§ 355.1 General.**

(a) Under section 2, Shipping Act, 1916, as amended and section 905(c), Merchant Marine Act, 1936, as amended, no corporation is deemed to be a citizen of the United States unless:

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(1) It is organized under the laws of the United States or of a State, Territory, District, or possession thereof;

(2) Its chief executive officer, by whatever title, and the chairman of its board of directors are citizens of the United States, and no more of its directors than a minority of the number necessary to constitute a quorum are non-citizens (except that in the case of corporations under title VI, Merchant Marine Act, 1936, as amended, all directors must be citizens of the United States) and

(3) The controlling interest therein is owned by citizens of the United States or, in the case of a corporation operating any vessel in the coastwise trade, on the Great Lakes, or inland lakes of the United States, 75 per centum of the interest in such corporation is owned by citizens of the United States.

(b) As used in this part, the term "primary corporation" includes, but not exclusively, an applicant, for, or one already receiving, benefits under the Merchant Marine Act, 1936, as amended, as well as participants in certain transactions, such as banking institutions designated as lenders, mortgagees, and trustees pursuant to Public Law 89-346 (73 Stat. 597), as amended.

(c) To satisfy the statutory requirements, an Affidavit of U.S. Citizenship of a primary corporation by one of its officers duly authorized to execute such Affidavit, should be submitted. This affidavit should contain facts from which the corporation's citizenship can be determined. MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable.

[General Order 89, Rev., 35 FR 11558, July 18, 1970, as amended at 68 FR 62538, Nov. 5, 2003; 69 FR 34311, June 21, 2004; 69 FR 61451, Oct. 19, 2004]

§355.2 Requirements regarding evidence of U.S. citizenship; affidavit guide.

(a) In order to establish that a corporation is a citizen of the United States within the meaning of section 2, Shipping Act, 1916, as amended, the form of affidavit to be used as a guide is hereby prescribed for execution in behalf of the primary corporation and

filing with an application or, if required, subsequent filing within 30 days after the annual meeting of the stockholders (if the primary corporation is a wholly owned subsidiary and contrary to the bylaw provision does not hold the annual meeting of stockholders, the subsequent filing should be annually and related to the date of the original filing) as evidence of the continuing U.S. citizenship of a "person" as defined in section 1, Shipping Act, 1916, as amended, which shall read as follows:

AFFIDAVIT OF U.S. CITIZENSHIP

State of \_\_\_\_\_ County of \_\_\_\_\_ SS:

I, \_\_\_\_\_, (Name) of \_\_\_\_\_, (Residence address) being duly sworn, depose and say:

1. That I am the \_\_\_\_\_ (Title of office(s) held) of \_\_\_\_\_, (Name of corporation) a corporation organized and existing under the laws of the State of \_\_\_\_\_ (hereinafter called the "Corporation"), with offices at \_\_\_\_\_, (Business address) in evidence of which incorporation a certified copy of the Articles or Certificate of Incorporation (or Association) is filed herewith (or has been filed) together with a certified copy of the corporate Bylaws. [Evidence of continuing U.S. citizenship status, including amendments to said Articles or Certificate and Bylaws, should be filed within 30 days after the annual meeting of the stockholders or annually, within 30 days after the original affidavit if there has been no meeting of the stockholders prior to that time.];

2. That I am authorized by and in behalf of the Corporation to execute and deliver this Affidavit of U.S. Citizenship;

3. That the names of the Chief Executive Officer, by whatever title, Vice Presidents or other individuals who are authorized to act in the absence or disability of the Chief Executive Officer, by whatever title, the Chairman of the Board of Directors, and the Directors of the Corporation are as follows:

Table with 3 columns: Name, Title, Date and place of birth

(The foregoing list should include the officers, whether or not they are also directors, and all directors, whether or not they are also officers.)

and that each of said individuals is a citizen of the United States by virtue of birth in the United States, birth abroad of U.S. citizen parents, by naturalization, by naturalization during minority through the naturalization of a parent, by marriage (if a woman) to a

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U.S. citizen prior to September 22, 1922, or as otherwise authorized by law, except (give name and nationality of alien directors, if any); however, the Bylaws of the Corporation provide that \_\_\_\_\_ (Number) of the directors are necessary to constitute a quorum; therefore, the alien directors named represent no more than a minority of the number necessary to constitute a quorum. [In the case of corporations under title VI, Merchant Marine Act, 1936, as amended, all directors must be citizens of the United States. Further, obtaining evidence necessary to support this Affidavit of U.S. Citizenship is the responsibility of the affiant.];

4. Information as to stock, where Corporation has 30 or more stockholders:<sup>1</sup>

That I have access to the stock books and records of the Corporation; that said stock books and records have been examined and disclose (a) that, as of \_\_\_\_\_, (Date) the Corporation had issued and outstanding \_\_\_\_\_ (Number) shares of \_\_\_\_\_, (Class or series) the only class or series of stock of the Corporation issued and outstanding [if such is the case], owned of record by \_\_\_\_\_ (Number) stockholders, said number of stockholders representing the ownership of the entire issued and outstanding stock of the Corporation, and (b) that no stockholder owned of record as of said date five per centum (5%) or more of the issued and outstanding stock of the Corporation of any class or series. [If different classes or series of stock exist, give the same data for each class or series issued and outstanding, showing the monetary value and voting rights per share in each class or series. If there is an exception to the statement in clause (b), the name, address, and citizenship of the stockholder and the amount and class or series of stock owned should be stated.]

That the registered addresses of \_\_\_\_\_ owners of record of \_\_\_\_\_ shares of the issued and outstanding \_\_\_\_\_ (Class or series) stock of the Corporation are shown on the stock books and records of the Corporation as being within the United States, said \_\_\_\_\_ shares being \_\_\_\_\_ per centum (\_\_\_\_%) of the total number of shares of said stock (each class or series). [The exact figure as disclosed by the stock books of the corporation must be given and the per centum figure must not be less than 65 per centum, except that for a corporation operating a vessel in the coastwise trade, the per centum figure must be not less than 95 per centum. These per centum figures apply to corporate stockholders as well as to the primary corporation.]

(The same statement should be made with reference to each class or series of stock, if there is more than one class or series.)

4. Information as to stock, where Corporation has less than 30 stockholders:<sup>1</sup>

That the information as to stock ownership, upon which the Corporation relies to establish that the required percentage<sup>2</sup> of stock ownership is vested in citizens of the United States, is as follows:

<i>Name of stockholder</i>	<i>Number of shares owned (each class or series)</i>	<i>Percentage of shares owned (each class or series)</i>

and that each of said individual stockholders is a citizen of the United States by virtue of birth in the United States, birth abroad of U.S. citizen parents, by naturalization during minority through the naturalization of a parent, by marriage (if a woman) to a U.S. citizen prior to September 22, 1922, or as otherwise authorized by law.

NOTE: If a corporate stockholder, give information with respect to State of incorporation, the names of the officers, directors, and stockholders in the appropriate percentage of shares held, with statement that they are all U.S. citizens. Nominee holders of record of 5 percent or more of any class or series of stock and the beneficial owners thereof should be named and their U.S. citizenship affirmed.

5. That the controlling interest (or 75% of the interest)<sup>3</sup> in (each) said Corporation, as established by the data hereinbefore set forth, is owned by citizens of the United States; that the title to a majority (or 75%)<sup>3</sup> of the stock of (each) said Corporation is vested in citizens of the United States free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; that such proportion of the voting power of (each) said Corporation is vested in citizens of the United States; that through no contract or understanding is it so arranged that the majority (or more than 25%)<sup>3</sup> of the voting power of (each) said Corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; and that by no means whatsoever, is control of (each) said

<sup>2</sup>75% if Corporation is operating in the coastwise trade, on the Great Lakes, or on bays, sounds, rivers, harbors, or inland lakes of the United States; and controlling interest if Corporation is operating solely in the foreign trade, both terms as defined in section 2, Shipping Act, 1916, as amended.

<sup>3</sup>Strike inappropriate language.

<sup>1</sup>Strike inapplicable paragraph 4.

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Corporation (or any interest in said Corporation in excess of 25%)<sup>3</sup> conferred upon or permitted to be exercised by any person who is not a citizen of the United States; and

6. That affiant has carefully examined this affidavit and asserts that all of the statements and representations contained therein are true to the best of his knowledge, information, and belief.

Dated: \_\_\_\_\_

(Name of affiant)

Subscribed and sworn to before me, a Notary Public in and for the State and County aforesaid, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_.

(Notary Public)

My Commission expires: \_\_\_\_\_

PENALTY FOR FALSE STATEMENT: A fine or imprisonment, or both, are provided for violation of the proscriptions contained in 18 U.S.C. 1001 (see also 18 U.S.C. 286, 287).

(Approved by the Office of Management and Budget under control number 2133-0012)

[G.O. 89, Rev., 35 FR 11558, July 18, 1970, as amended at 35 FR 11686, July 22, 1970; 47 FR 25530, June 14, 1982; 69 FR 34311, June 21, 2004]

**§ 355.3 Criteria to be applied in support of stock data in affidavit.**

(a) The same criteria should be observed in obtaining information to be furnished for stockholders named (direct ownership of required percentage of shares of stock of each class or series) in the Affidavit as those observed for the primary corporation. If, on the other hand, the "fair inference rule" is applied with respect to stock ownership (see Collier Advertising Service, Inc. v. Hudson River Day Line, 14 Fed. Supp. 335), the extent of U.S. citizen ownership of stock should be ascertained in the requisite percentage (65 percent for foreign operation and 95 percent for coastwise operation) in order that the veracity of the statutory statements made in the Affidavit (paragraph 5) may be relied upon by the Maritime Administration.

(b) When applying the fair inference rule (where there are more than 30 stockholders, except where one or more of such number actually owns the controlling or 75 percent interest) in order to prove U.S. citizen ownership in the required percentages (1) for foreign operation, 65 percent of the shares of

stock of each class or series must be shown to be held by persons with registered addresses within the United States to prove that 51 percent or controlling interest is vested in citizens of the United States and (2) for coastwise operation, 95 percent of the shares of stock of each class or series must be shown to be held by persons having registered addresses within the United States to prove that 75 percent of the interest in the corporation is vested in citizens of the United States.

(c) If the primary corporation is consecutively owned by several "parent" corporations (holders of 100 percent of the stock of each or all classes or series of stock issued and outstanding), the facts should be given in proper sequence either by chart or in narrative form, revealing the facts of stock ownership. The information with respect to the ultimate parent should include data relative to the basis upon which controlling or 75 percent (depending upon whether the primary corporation operates in the domestic or foreign commerce) is established, together with the names of the owners of record or beneficial owners of 5 percent or more of each class or series of stock, if more than one class or series, and statement that such owners are citizens of the United States. In any case where different classes or series of stock exist, each class or series shall be treated depending upon whether "closely held" or "publicly held," individually in applying the fair inference rule, if applicable, or giving the relevant information with respect to United States citizens owning of record 51 percent or 75 percent of the interest.

**§ 355.4 Changes in citizenship data.**

It shall be incumbent upon the parties filing affidavits under this part to apprise the Maritime Administration promptly in writing relative to changes in data last furnished with respect to officers, directors, and stockholders holding 5 percent or more of the issued and outstanding stock of each class or series, together with statements concerning the citizenship status thereof.

**§ 355.5 Additional material.**

If additional material is determined to be essential to clarify or support the

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evidence of U.S. citizenship, such material shall be furnished by the aforementioned primary corporation upon request by the Maritime Administration.

### **PART 356—REQUIREMENTS FOR VESSELS OF 100 FEET OR GREATER IN REGISTERED LENGTH TO OBTAIN A FISHERY ENDORSEMENT TO THE VESSEL'S DOCUMENTATION**

#### **Subpart A—General Provisions**

Sec.

- 356.1 Purpose.
- 356.2 Waivers.
- 356.3 Definitions.

#### **Subpart B—Ownership and Control**

- 356.5 Affidavit of U.S. Citizenship.
- 356.7 Methods of establishing ownership by United States Citizens.
- 356.9 Tiered ownership structures.
- 356.11 Impermissible control by a Non-Citizen.

#### **Subpart C—Requirements for Vessel Owners**

- 356.13 Information required to be submitted by vessel owners.
- 356.15 Filing of affidavit of U.S. Citizenship.
- 356.17 Annual requirements for vessel owners.

#### **Subpart D—Mortgages**

- 356.19 Requirements to hold a Preferred Mortgage.
- 356.21 General approval of standard loan or mortgage agreements.
- 356.23 Restrictive loan covenants approved for use by lenders.
- 356.25 Operation of Fishing Industry Vessel by Mortgagees.

#### **Subpart E—Mortgage Trustees**

- 356.27 Mortgage Trustee requirements.
- 356.31 Maintenance of Mortgage Trustee approval.
- 356.37 Operation of a Fishing Industry Vessel by a Mortgage Trustee.

#### **Subpart F—Charters, Management Agreements and Exclusive or Long-Term Contracts**

- 356.39 Charters.
- 356.41 Management agreements.
- 356.43 Long-term or exclusive sales contracts.

- 356.45 Advance of funds.

#### **Subpart G—Special Requirements for Certain Vessels**

- 356.47 Special requirements for large vessels.
- 356.49 Penalties.
- 356.51 Exemptions for specific vessels.

#### **Subpart H—International Agreements**

- 356.53 Conflicts with international agreements.

#### **Subpart I—Review of Harvesting and Processing Compliance**

- 356.55 Review of compliance with harvesting and processing quotas.

AUTHORITY: 46 U.S.C. 12102; 46 U.S.C. 31322; Pub. L. 105-277, division C, title II, subtitle I, section 203 (46 U.S.C. 12102 note), section 210(e), and section 213(g), 112 Stat. 2681; Pub. L. 107-20, section 2202, 115 Stat. 168-170; 49 CFR 1.66.

SOURCE: 65 FR 44877, July 19, 2000, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 356 appear at 68 FR 5576, Feb. 4, 2003.

#### **Subpart A—General Provisions**

##### **§ 356.1 Purpose.**

(a) Part 356 implements the U.S. Citizenship requirements of the American Fisheries Act of 1998, as amended, Title II, Division C, Public Law 105-277, for owners, Mortgage Trustees, and Mortgagees of vessels of 100 feet or greater in registered length that have a fishery endorsement to the vessel's documentation or where a fishery endorsement to the vessel's documentation is being sought. This part also addresses ancillary matters of charters, management agreements, exclusive sales or marketing contracts, conflicts with international agreements, determinations regarding violations of harvesting or processing limits, and exceptions for certain vessels, vessel owners and Mortgagees from the general requirements of the rule.

(b) An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid

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OMB control number. Part 356 establishes a new requirement for the collection of information. The Office of Management and Budget (“OMB”) has reviewed and approved the information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and assigned OMB control number 2133-0530 to the information collection requirements of this part 356.

### § 356.2 Waivers.

In special circumstances and for good cause shown, we may waive the procedures prescribed in this part, provided the waiver is consistent with the requirements of the AFA and with the intent of this part.

[66 FR 45947, Aug. 31, 2001]

### § 356.3 Definitions.

For the purpose of this part, when used in capitalized form:

(a) *1916 Act* refers to section 2 of the Shipping Act, 1916, as amended, 46 App. U.S.C. 802. The Controlling Interest requirements of the Shipping Act are found in section 2(b), 46 App. U.S.C. section 802(b). The citizenship requirements for eligibility to own a vessel with a fisheries endorsement are found in section 2(c), 46 App. U.S.C. 802(c), and 46 U.S.C. 12102(c).

(b) *AFA* means the American Fisheries Act of 1998, as amended, Title II, Division C, of Public Law 105-277;

(c) *Affiliate or Affiliated* refers to a Person that directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the first Person. For the purposes of this definition the term “control” (including the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management policies of a Person, whether through the ownership of voting securities, by contract, as trustee or executor, or otherwise.

(d) *Charter* means any agreement or commitment by which the possession or services of a Fishing Industry Vessel are secured for a period of time, or for one or more voyages, whether or not a bareboat charter of the vessel. A long-term or exclusive contract for the sale

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of all or a portion of a Fishing Vessel’s catch is not considered a Charter.

(e) *Citizen of the United States, Citizen or U.S. Citizen:*

(1) Means an individual who is a Citizen of the United States, by birth, naturalization or as otherwise authorized by law, or an entity that in both form and substance, at each tier of ownership and in the aggregate, satisfies the requirements of 46 U.S.C. 12102(c) and section 2(c) of the 1916 Act, 46 App. U.S.C. 802(c). In order to satisfy the statutory requirements an entity other than an individual must meet the requirements of paragraph (e)(2) of this section and the following criteria:

(i) The entity must be organized under the laws of the United States or of a State;

(ii) Seventy five percent (75%) of the ownership and control in the entity must be owned by and vested in Citizens of the United States free from any trust or fiduciary obligation in favor of any Non-Citizen;

(iii) No arrangement may exist, whether through contract or any understanding, that would allow more than 25% of the voting power of the entity to be exercised, directly or indirectly, in behalf of any Non-Citizen; and

(iv) Control of the entity, by any other means whatsoever, may not be conferred upon or permitted to be exercised by a Non-Citizen.

(2) Other criteria that must be met by entities other than individuals include:

(i) In the case of a corporation:

(A) The chief executive officer, by whatever title, and chairman of the board of directors and all officers authorized to act in the absence or disability of such persons must be Citizens of the United States; and

(B) No more of its directors than a minority of the number necessary to constitute a quorum are Non-Citizens;

(ii) In the case of a partnership all general partners are Citizens of the United States;

(iii) In the case of an association:

(A) All of the members are Citizens of the United States;

(B) The chief executive officer, by whatever title, and the chairman of the



board of directors (or equivalent committee or body) and all officers authorized to act in their absence or disability are Citizens of the United States; and,

(C) No more than a minority of the number of its directors, or equivalent, necessary to constitute a quorum are Non-Citizens;

(iv) In the case of a joint venture:

(A) It is not determined by the Citizenship Approval Officer to be in effect an association or a partnership; and,

(B) Each co-venturer is a Citizen of the United States;

(v) In the case of a Trust that owns a Fishing Industry Vessel:

(A) The Trust is domiciled in the United States or a State;

(B) The Trustee is a Citizen of the United States; and

(C) All beneficiaries of the trust are persons eligible to document vessels pursuant to the requirements of 46 U.S.C. 12102(e);

(vi) In the case of a Limited Liability Company (LLC) that is not found to be in effect a general partnership requiring all of the general partners to be Citizens of the United States:

(A) Any Person elected to manage the LLC or who is authorized to bind the LLC, and any Person who holds a position equivalent to a Chief Executive Officer, by whatever title, and the Chairman of the Board of Directors in a corporation are Citizens of the United States; and,

(B) Non-Citizens do not have authority within a management group, whether through veto power, combined voting, or otherwise, to exercise control over the LLC.

(f) *Citizenship Approval Officer* means MARAD's Citizenship Approval Officer within the Office of Chief Counsel. The Citizenship Approval Officer's address is: Maritime Administration, United States Department of Transportation, Citizenship Approval Officer, MAR-220, Room 7232, 400 7th Street, SW., Washington, DC 20590.

(g) *Commercial Lender* means an entity that is primarily engaged in the business of lending and other financing transactions and that has a loan portfolio in excess of \$100,000,000, of which not more than 50 per centum in dollar amount consists of loans to borrowers

in the commercial fishing industry, as certified by the Commercial Lender to the Citizenship Approval Officer.

(h) *Controlling Interest*:

(1) Means, in the context of an entity, that in both form and substance, at each tier of ownership and in the aggregate, the entity satisfies the controlling interest requirements of section 2(b) of the 1916 Act, 46 App. U.S.C. 802(b). In order to satisfy the statutory requirements, an entity other than an individual must meet the requirements of paragraph (g)(2) of this section and the following criteria:

(i) The entity must be organized under the laws of the United States or of a State;

(ii) A majority of the ownership and control in the entity must be owned by and vested in Citizens of the United States free from any trust or fiduciary obligation in favor of any Non-Citizen;

(iii) No arrangement may exist, whether through contract or any understanding, that would allow a majority of the voting power of the entity to be exercised, directly or indirectly, in behalf of any Non-Citizen; and

(iv) Control of the entity, by any other means whatsoever, may not be conferred upon or permitted to be exercised by a Non-Citizen.

(2) Other criteria that must be met by entities other than an individual include:

(i) In the case of a corporation:

(A) The Chief Executive Officer, by whatever title, and the Chairman of the Board of Directors (or equivalent committee or body) and all officers authorized to act in their absence or disability are Citizens of the United States; and,

(B) No more than a minority of the number of its directors, or equivalent, necessary to constitute a quorum are Non-Citizens;

(ii) In the case of a partnership all general partners are Citizens of the United States;

(iii) In the case of an association:

(A) The Chief Executive Officer, by whatever title, and the Chairman of the Board of Directors (or equivalent committee or body) and all officers authorized to act in their absence or disability are Citizens of the United States; and,

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(B) No more than a minority of the number of its directors, or equivalent, necessary to constitute a quorum are Non-Citizens;

(iv) In the case of a joint venture:

(A) It is not determined by the Citizenship Approval Officer to be in effect an association or partnership; and

(B) A majority of the equity is owned by and vested in Citizens of the United States free and clear of any trust or fiduciary obligation in favor of any Non-Citizen;

(v) In the case of a Limited Liability Company (LLC) that is not found to be in effect a general partnership requiring all of the general partners to be Citizens of the United States:

(A) Any Person elected to manage the LLC or who is authorized to bind the LLC, and any Person who holds a position equivalent to the Chief Executive Officer, by whatever title, and the Chairman of the Board of Directors in a corporation and any Persons authorized to act in their absence are Citizens of the United States; and,

(B) Non-Citizens do not have authority within a management group, whether through veto power, combined voting, or otherwise, to exercise control over the LLC;

(3) A state or federally chartered financial institution that meets the Controlling Interest requirements of paragraphs (g)(1) and (2) of this section is deemed to be a Citizen of the United States for all purposes under subpart D of this part other than operation of the vessel pursuant to § 356.25.

(i) *Fishing Vessel* means a vessel of 100 feet or greater in registered length that has or for which the owner is seeking a fishery endorsement to the vessel's documentation and that commercially engages in the planting, cultivating, catching, taking, or harvesting of fish, shellfish, marine animals, pearls, shells, or marine vegetation or an activity that can reasonably be expected to result in the planting, cultivating, catching, taking, or harvesting of fish, shellfish, marine animals, pearls, shells, or marine vegetation;

(j) *Fishing Industry Vessel* means a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel;

(k) *Fish Processing Vessel* means a vessel of 100 feet or greater in registered length that has or for which the owner is seeking a fishery endorsement to the vessel's documentation and that commercially prepares fish or fish products other than by gutting, decapitating, gilling, skinning, shucking, icing, freezing, or brine chilling;

(l) *Fish Tender Vessel* means a vessel of 100 feet or greater in registered length that has or for which the owner is seeking a fishery endorsement to the vessel's documentation and that commercially supplies, stores, refrigerates, or transports (except in foreign commerce) fish, fish products, or materials directly related to fishing or the preparation of fish to or from a Fishing Industry Vessel or a fish processing facility;

(m) *Harvest* means to commercially engage in the catching, taking, or harvesting of fish or fishery resources or any activity that can reasonably be expected to result in the catching, taking or harvesting of fish or fishery resources;

(n) *Lender Syndicate* means an arrangement established for the combined extension of credit of not less than \$20,000,000 made up of four or more entities that each have a beneficial interest, held through an agent, under a trust arrangement established pursuant to 46 U.S.C. 31322(f). Other than the exercise by the agent of powers related to routine administrative matters, none of the entities in a Lender Syndicate may exercise powers related to the Lender Syndicate's extension of credit without the concurrence of at least one other unaffiliated beneficiary. Powers related to routine administrative matters include those concerning the day-to-day management of the extension of credit such as monitoring compliance with loan covenants, collateral inspections and similar matters; however, more substantive powers such as amending loan and mortgage documents, releasing guarantors or collateral, or administering the loan in the event of a default are not considered routine.

(o) *MARAD* means the Maritime Administration within the United States Department of Transportation. The terms "we, our, and us" may also be

used to refer to the Maritime Administration;

(p) *Mortgagee* means a Person to whom a Fishing Industry Vessel or other property is mortgaged. (See the definition of Non-Citizen Lender and Preferred Mortgage in this section)

(q) *Mortgage Trustee*, for purposes of holding a Preferred Mortgage on a Fishing Industry Vessel, means a corporation that:

(1) Is organized and doing business under the laws of the United States or of a State;

(2) Is authorized under those laws to exercise corporate trust powers;

(3) Is eligible to hold a Preferred Mortgage under 46 U.S.C. 31322(a)(4)(A)-(E);

(4) Is subject to supervision or examination by an official of the United States Government, or of a State;

(5) Has a combined capital and surplus (as stated in its most recent published report of condition) of at least \$3,000,000; and

(6) Meets any other requirements prescribed by the Citizenship Approval Officer.

(r) *Non-Citizen* means a Person who is not a Citizen of the United States within the meaning of paragraph (d) of this section, 46 U.S.C. 12102(c) and section 2(c) of the 1916 Act, 46 App. U.S.C. 802(c).

(s) *Non-Citizen Lender* means a lender that does not qualify as a Citizen of the United States.

(t) *Person* includes an individual, corporation, partnership, joint venture, association, limited liability company, Trust, and other entities existing under or authorized by the laws of the United States or of a State or, unless the context indicates otherwise, of any foreign country.

(u) *Preferred Mortgage* means a mortgage on a Fishing Industry Vessel that has as the Mortgagee:

(1) A person eligible to own a vessel with a fishery endorsement under 46 U.S.C. 12102(c);

(2) A state or federally chartered financial institution that is insured by the Federal Deposit Insurance Corporation;

(3) A farm credit lender established under title 12, chapter 23, of the United States Code [12 U.S.C. 2001 *et seq.*];

(4) A commercial fishing and agriculture bank established pursuant to State law;

(5) A commercial lender organized under the laws of the United States or of a State and eligible to own a vessel under 46 U.S.C. 12102(a); or

(6) A Mortgage Trustee that complies with the requirements of 46 U.S.C. 31322(f) and 46 CFR 356.27 through 356.31.

(v) *Related Party* means a holding company, subsidiary, affiliate, or associate of a Non-Citizen or an officer, director, agent, or other executive of the Non-Citizen or of a holding company, subsidiary, affiliate or associate thereof.

(w) *State* means a State of the United States, Guam, Puerto Rico, the Virgin Islands, American Samoa, the District of Columbia, the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States.

(x) *Submitted* means sent by mail and postmarked on that date, or sent by another delivery service or by electronic means, including E-mail and facsimile, and marked with an indication of the date equivalent to a postmark;

(y) *Trust* means:

(1) In the case of ownership of a Fishing Industry Vessel, a trust that is domiciled in and existing under the laws of the United States or of a State, of which the Trustee is a Citizen of the United States, and 100% of the interest in the Trust is held for the benefit of a Citizen of the United States; or

(2) In the case of a mortgage trust, a trust that is domiciled in and existing under the laws of the United States, or of a State, that has as its trustee a Mortgage Trustee as defined in this section, and that is authorized to act on behalf of a beneficiary in accordance with the requirements of §§ 356.27 through 356.31.

(z) *United States*, when used in the geographic sense, means the States of the United States, Guam, Puerto Rico, the Virgin Islands, American Samoa, the District of Columbia, and any other territory or possession of the United States; when used in other than the geographic sense, it means the United States Government.

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(aa) *United States Government* means the Federal Government acting by or through any of its departments or agencies.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5576, Feb. 4, 2003]

Subpart B—Ownership and Control

§ 356.5 Affidavit of U.S. Citizenship.

(a) In order to establish that a corporation or other entity is a Citizen of the United States within the meaning of section 2(c) of the 1916 Act, or where applicable, section 2(b) of the 1916 Act, the form of Affidavit is hereby prescribed for execution in behalf of the owner, charterer, Mortgagee, or Mortgage Trustee of a Fishing Industry Vessel. Such Affidavit must include information required of parent corporations and other stockholders whose stock ownership is being relied upon to establish that the requisite ownership in the entity is owned by and vested in Citizens of the United States. A certified copy of the Articles of Incorporation and Bylaws, or comparable corporate documents, must be submitted along with the executed Affidavit.

(b) This Affidavit form set forth in paragraph (d) of this section may be modified to conform to the requirements of vessel owners, Mortgagees, or Mortgage Trustees in various forms such as partnerships, limited liability companies, etc. A copy of an Affidavit of U.S. Citizenship modified appropriately, for limited liability companies, partnerships (limited and general), and other entities is available on MARAD's internet home page at <http://www.marad.dot.gov>.

(c) As indicated in § 356.17, in order to renew annually the fishery endorsement on a Fishing Industry Vessel, the owner must submit annually to the Citizenship Approval Officer evidence of U.S. Citizenship within the meaning of section 2(c) of the 1916 Act and 46 App. U.S.C. 12102(c).

(d) The prescribed form of the Affidavit of U.S. Citizenship is as follows:

State of \_\_\_\_\_ County of \_\_\_\_\_ Social Security Number: \_\_\_\_\_

I, \_\_\_\_\_, (Name) of \_\_\_\_\_, (Residence address) being duly sworn, depose and say:

1. That I am the \_\_\_\_\_ (Title of office(s) held) of \_\_\_\_\_, (Name of corporation) a corporation organized and existing under the laws of the State of \_\_\_\_\_ (hereinafter called the "Corporation"), with offices at \_\_\_\_\_, (Business address) in evidence of which incorporation a certified copy of the Articles or Certificate of Incorporation (or Association) is filed herewith (or has been filed) together with a certified copy of the corporate Bylaws. [Evidence of continuing U.S. citizenship status, including amendments to said Articles or Certificate and Bylaws, should be filed within 45 days of the annual documentation renewal date for vessel owners. Other parties required to provide evidence of U.S. citizenship status must file within 30 days after the annual meeting of the stockholders or annually, within 30 days after the original affidavit if there has been no meeting of the stockholders prior to that time.];

2. That I am authorized by and in behalf of the Corporation to execute and deliver this Affidavit of U.S. Citizenship;

3. That the names of the Chief Executive Officer, by whatever title, the Chairman of the Board of Directors, all Vice Presidents or other individuals who are authorized to act in the absence or disability of the Chief Executive Officer or Chairman of the Board of Directors, and the Directors of the Corporation are as follows:<sup>1</sup>

Table with 2 columns: Name, Title. Row: Date and Place of Birth.

(The foregoing list should include the officers, whether or not they are also directors, and all directors, whether or not they are also officers.) Each of said individuals is a Citizen of the United States by virtue of birth in the United States, birth abroad of U.S. citizen parents, by naturalization, by naturalization during minority through the naturalization of a parent, by marriage (if a woman) to a U.S. citizen prior to September 22, 1922, or as otherwise authorized by law, except (give name and nationality of all Non-Citizen officers and directors, if any). The By-laws of the Corporation provide that \_\_\_\_\_ (Number) of the directors are necessary to constitute a quorum; therefore, the Non-Citizen directors named represent no more than a minority of the number necessary to constitute a quorum.

<sup>1</sup>Offices that are currently vacant should be noted when listing Officers and Directors in the Affidavit.

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4. Information as to stock, where Corporation has 30 or more stockholders:

That I have access to the stock books and records of the Corporation; that said stock books and records have been examined and disclose (a) that, as of \_\_\_\_\_, (Date) the Corporation had issued and outstanding \_\_\_\_\_ (Number) shares of \_\_\_\_\_, (Class) the only class of stock of the Corporation issued and outstanding [if such is the case], owned of record by \_\_\_\_\_ (Number) stockholders, said number of stockholders representing the ownership of the entire issued and outstanding stock of the Corporation, and (b) that no stockholder owned of record as of said date five per centum (5%) or more of the issued and outstanding stock of the Corporation of any class. [If different classes of stock exist, give the same information for each class issued and outstanding, showing the monetary value and voting rights per share in each class. If there is an exception to the statement in clause (b), the name, address, and citizenship of the stockholder and the amount and class of stock owned should be stated and the required citizenship information on such stockholder must be submitted.] That the registered addresses of \_\_\_\_\_ owners of record of \_\_\_\_\_ shares of the issued and outstanding \_\_\_\_\_ (Class)

stock of the Corporation are shown on the stock books and records of the Corporation as being within the United States, said \_\_\_\_\_ shares being \_\_\_\_\_ per centum \_\_\_\_\_ (%) of the total number of shares of said stock (each class). [The exact figure as disclosed by the stock books of the corporation must be given and the per centum figure must not be less than 65 per centum for a corporation that must satisfy the controlling interest requirements of section 2(b) of the Shipping Act, 1916, 46 App. U.S.C. §802(b), or not less than 95 per centum for an entity that is demonstrating ownership in a vessel for which a fishery endorsement is sought. These per centum figures apply to corporate stockholders as well as to the primary corporation.] (The same statement should be made with reference to each class of stock, if there is more than one class.)

or

[NOTE: An entity that has less than 30 stockholders should use the following alternate paragraph (4) and strike the inapplicable paragraph (4).]

4. Information as to stock, where Corporation has less than 30 stockholders: That the information as to stock ownership, upon which the Corporation relies to establish that 75% of the stock ownership is vested in Citizens of the United States, is as follows:

Name of stockholder	Date and place of birth	Number of shares owned (each class)	Percentage of shares owned (each class)

and that each of said individual stockholders is a Citizen of the United States by virtue of birth in the United States, birth abroad of U.S. citizen parents, by naturalization during minority through the naturalization of a parent, by marriage (if a woman) to a U.S. citizen prior to September 22, 1922, or as otherwise authorized by law. NOTE: If a corporate stockholder, give information with respect to State of incorporation, the names of the officers, directors, and stockholders and the appropriate percentage of shares held, with statement that they are all U.S. citizens. Nominee holders of record of 5% or more of any class of stock and the beneficial owners thereof should be named and their U.S. citizenship information submitted to MARAD.

5. That 75% of the interest in (each) said Corporation, as established by the information hereinbefore set forth, is owned by Citizens of the United States; that the title to 75% of the stock of (each) class of the stock of (each) said Corporation is vested in Citizens of the United States free from any trust or fiduciary obligation in favor of any person not a Citizen of the United States; that such proportion of the voting power of (each) said

Corporation is vested in Citizens of the United States; that through no contract or understanding is it so arranged that more than 25% the voting power of (each) said Corporation may be exercised, directly or indirectly, in behalf of any person who is not a Citizen of the United States; and that by no means whatsoever, is any interest in said Corporation in excess of 25% conferred upon or permitted to be exercised by any person who is not a Citizen of the United States; and

or

[NOTE: An entity that is required to comply with the controlling interest requirements of section 2(b) of the Shipping Act, 1916, 46 App. U.S.C. §802(b), should use the following alternate paragraph (5) and strike the inapplicable paragraph (5).]

5. That the Controlling Interest in (each) said Corporation, as established by the information hereinbefore set forth, is owned by Citizens of the United States; that the title to a majority of the stock of (each) said Corporation is vested in Citizens of the United States free from any trust or fiduciary obligation in favor of any person not a Citizen of

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the United States; that such proportion of the voting power of (each) said Corporation is vested in Citizens of the United States; that through no contract or understanding is it so arranged that the majority of the voting power of (each) said Corporation may be exercised, directly or indirectly, in behalf of any person who is not a Citizen of the United States; and that by no means whatsoever, is control of (each) said Corporation conferred upon or permitted to be exercised by any person who is not a Citizen of the United States; and

6. That the affiant has submitted all of the necessary documentation required under 46 CFR §356.13 in connection with this Affidavit of U.S. Citizenship for the vessels herein identified.

Vessel Name	Official Number
1. ....	
2. ....	

[NOTE: Paragraph 6 should be included in the Affidavit of U.S. Citizenship submitted by an entity that owns a Fishing Industry Vessel.]

7. That affiant has carefully examined this affidavit and asserts that all of the statements and representations contained therein are true to the best of his knowledge, information, and belief.

\_\_\_\_\_  
 (Name and title of affiant)

\_\_\_\_\_  
 (Signature of affiant)

\_\_\_\_\_  
 Date

Penalty for False Statement: A fine or imprisonment, or both, are provided for violation of the proscriptions contained in 18 U.S.C. §1001 (see also, 18 U.S.C. §§286, 287).

(e) The format for an Affidavit of United States Citizenship, modified appropriately for limited liability companies, partnerships, etc., will be available from the Citizenship Approval Officer and on MARAD's internet web site at <http://www.marad.dot.gov>.

(f) The same criteria should be observed in obtaining information to be furnished for stockholders named (direct ownership of required percentage of shares of stock of each class) in the Affidavit as those observed for the owner of the Fishing Industry Vessel. If, on the other hand, the "fair inference rule" is applied with respect to stock ownership as outlined in §356.7(c), the extent of U.S. Citizen ownership of stock should be ascertained in the requisite percentage

(65 % for state or federally chartered financial institutions and 95 % for Fishing Industry Vessel owners, bareboat charterers, trustees, as well as entities owning 5% or more of the stock of such entities). Any entity that must establish its U.S. citizenship has to submit proof of U.S. citizenship of any five percent stockholder of each class of stock in order that the veracity of the statutory statements made in the Affidavit (paragraph 5) may be relied upon by MARAD.

(g) It shall be incumbent upon the parties filing affidavits under this part to notify the Citizenship Approval Officer in writing within 30 calendar days of any changes in information last furnished with respect to the officers, directors, and stockholders, including 5 percent or more stockholders of the issued and outstanding stock of each class, together with information concerning their citizenship status. If other than a corporation, comparable information must be filed by other entities owning Fishing Industry Vessel, including any entity whose ownership interest is being relied upon to establish 75% ownership by Citizens of the United States.

(h) If additional material is determined to be essential to clarify or support the evidence of U.S. citizenship, such material shall be furnished by the owner of the Fishing Industry Vessel upon request by the Citizenship Approval Officer.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5577, Feb. 4, 2003]

**§ 356.7 Methods of establishing ownership by United States Citizens.**

(a) An entity may demonstrate that the interest in the entity (75% for Citizens of the United States or 51% for entities meeting the Controlling Interest requirements) is owned by Citizens of the United States either by direct proof or through the fair inference method depending on the size of the entity.

(b) The "direct proof" method is used for closely held companies that have 30 or fewer stockholders. Under the direct proof method, the following information must be set forth in paragraph four of the Affidavit of U.S. Citizenship:

(1) The identity of the holders of stock or other equitable interests;

(2) The amount of stock or interest that each stockholder owns;

(3) A representation as to the citizenship of the stockholder; and

(4) If the stockholder is a corporation or other entity, the names and citizenship of officers, directors, stockholders, etc. must be set out in the Affidavit of U.S. Citizenship.

(c) The "fair inference method" is used by corporations whose stock is publicly traded (more than 30 stockholders). Use of the fair inference method requires that:

(1)(i) At least 95% of the stock (each class) of the corporation be held by Persons having a registered U.S. address in order to infer at least 75% ownership by U.S. Citizens, or

(ii) At least 65% of the stock (each class) of the corporation be held by Persons having a registered U.S. address in order to infer at least 51% ownership by U.S. Citizens; and

(2) Disclosure be made in the Affidavit of U.S. Citizenship of the names and citizenship of any stockholders who holds five percent or more of the corporation's stock (including all classes of stock, voting and non-voting), officers, and directors.

(d) If the owner of a Fishing Industry Vessel is consecutively owned by several "parent" corporations, the facts revealing the stock ownership of each entity must be set forth in the Affidavit of U.S. Citizenship.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5579, Feb. 4, 2003]

**§ 356.9 Tiered ownership structures.**

Non-Citizens may not own or control, either directly through the first tier of ownership or in the aggregate through an interest in other entities at various tiers, more than 25% of the interest in an entity which owns a Fishing Industry Vessel. The prohibition against Non-Citizens owning or controlling more than 25%, in the aggregate, of the interest in an entity that owns a Fishing Industry Vessel means, for example, that:

(a) Non-Citizens that own or control a 25% stake in the ownership entity of a Fishing Industry Vessel at the first tier may not have any interest whatsoever

in any entity that is being relied upon to establish the required 75% U.S. Citizen ownership; and

(b) Non-Citizens that own or control less than a 25% stake at the first tier may participate in the ownership and control of other entities that are being relied upon to establish the required 75% U.S. Citizen ownership and control at the first tier. However, the total ownership and control by Non-Citizens of the entity owning a Fishing Industry Vessel may not exceed 25% in the aggregate as computed by MARAD.

**§ 356.11 Impermissible control by a Non-Citizen.**

(a) An impermissible transfer of control will be deemed to exist where a Non-Citizen, whether by agreement, contract, influence, or any other means whatsoever:

(1) Has the right to direct the business of the entity which owns the Fishing Industry Vessel. The right to "direct the business of the entity" does not include the right to simply participate in the direction of the business activities of an entity which owns a Fishing Industry Vessel;

(2) Has the right in the ordinary course of business to limit the actions of or replace the chief executive officer, a majority of the board of directors, any general partner or any person serving in a management capacity of the entity which owns the Fishing Industry Vessel. Standard rights of minority shareholders to restrict the actions of the entity are permitted provided they are unrelated to day-to-day business activities. These rights include provisions to require the consent of the minority shareholder to sell all or substantially all of the assets, to enter into a different business, to contract with the majority investors or their affiliates or to guarantee the obligations of majority investors or their affiliates;

(3) Has the right to direct the transfer, operation, or manning of a Fishing Industry Vessel. The right to "direct the transfer, operation, or manning" of such vessels does not include the right to simply participate in the direction of the transfer, operation, and manning of such vessels;

(4) Has the right to restrict unduly the day-to-day business activities and management policies of the entity owning a Fishing Industry Vessel through loan covenants other than those approved for use by the Citizenship Approval Officer or other means;

(5) Has the right to derive, through a minority shareholder and in favor of a Non-Citizen, a significantly disproportionate amount of the economic benefit from the ownership and operation of the Fishing Industry Vessel;

(6) Has the right to control the management of or to be a controlling factor in the entity owning a Fishing Industry Vessel ;

(7) Has the right to cause the sale of a Fishing Industry Vessel other than:

(i) By an entity that is eligible to hold a Preferred Mortgage on the vessel pursuant to §356.19(a)(2) through (a)(5);

(ii) By an approved Mortgage Trustee that is exercising loan and mortgage covenants on behalf of a beneficiary that qualifies as a Commercial Lender, a Lender Syndicate or an entity eligible to hold a Preferred Mortgage under §356.19(a)(2) through (a)(5);

(iii) By an approved Mortgage Trustee that is exercising loan or mortgage covenants for a beneficiary that is not qualified to hold a Preferred Mortgage, provided that the loan or mortgage covenants have been approved by the Citizenship Approval Officer; or

(iv) Where it is necessary in order to allow a Non-Citizen to dissolve its interest in the entity;

(8) Absorbs all of the costs and normal business risks associated with ownership and operation of the Fishing Industry Vessel;

(9) Has the responsibility for the procurement of insurance on the Fishing Industry Vessel, or assumes any liability in excess of insurance coverage; or,

(10) Has the ability through any other means whatsoever to control the entity that owns a Fishing Industry Vessel.

(b) In addition to the actions in paragraph (a) of this section that are considered absolute indicia of control, we will consider other factors which, in combination with other elements of Non-Citizen involvement, may be deemed impermissible control. The fol-

lowing factors may be considered indicia of control:

(1) If a Non-Citizen minority stockholder takes the leading role in establishing an entity that will own a Fishing Industry Vessel;

(2) If a Non-Citizen has the right to preclude the owner of a Fishing Industry Vessel from engaging in other business activities;

(3) If a Non-Citizen and owner use the same law firm, accounting firm, etc.;

(4) If a Non-Citizen and owner share the same office space, phones, administrative support, etc.;

(5) If a Non-Citizen absorbs considerable costs and normal business risks associated with ownership and operation of the Fishing Industry Vessel;

(6) If a Non-Citizen provides the start up capital for the owner or bareboat charterer on less than an arm's-length basis;

(7) If a Non-Citizen time charterer has the general right to inspect the books and records of the owner, bareboat charterer, or time charterer of a Fish Processing Vessel or Fish Tender Vessel;

(8) If the owner or bareboat charterer uses the same insurance agent, law firm, accounting firm, or broker of any Non-Citizen with whom the owner or a bareboat charterer has entered into a mortgage, long-term or exclusive sales or marketing agreement, unsecured loan agreement, or management agreement; or

(9) If a Non-Citizen has the right to control, whether through sale, lease or other method, the fishing quota, fishing rights or processing rights allocated to a vessel or vessel-owning entity.

(c) In most cases, any single factor listed in paragraph (b) of this section will not be sufficient to deem an entity a Non-Citizen. However, a combination of several factors listed in paragraph (b) of this section may increase our concern as to whether the entity complies with the U.S. Citizen ownership and control provisions of the AFA and any single factor listed in paragraph (b) of this section may be the basis for a request from us for further information.

(d) If we have a concern regarding a Non-Citizen, we will notify the entity



of the concern and work with the entity toward a satisfactory resolution, provided there is no verifiable evidence of fraud. Resolution of any control issues may result in a request by us for additional information to clarify the intent of the provision or to amend or delete the provision in question.

(e) Information that is specifically required to be submitted for our consideration is set out in §356.13. However, in determining whether an entity has control over a Fishing Industry Vessel, we may review any contract or agreement that may, by any means whatsoever, result in a transfer of control to a Non-Citizen.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5579, Feb. 4, 2003]

### Subpart C—Requirements for Vessel Owners

#### §356.13 Information required to be submitted by vessel owners.

(a) In order to be eligible to document a Fishing Industry Vessel with a fishery endorsement, the entity that owns the vessel must submit documentation to demonstrate that 75 percent (75%) of the interest in such entity is owned and controlled by Citizens of the United States. Unless otherwise exempted, the following documents must be submitted to the Citizenship Approval Officer in support of a request for a determination of U.S. Citizenship:

(1) An Affidavit of U.S. Citizenship. This affidavit, set out in §356.15, must contain all required facts, at all tiers of ownership, needed for determining the citizenship of the owner of the Fishing Industry Vessel.

(2) A certified copy of the Articles of Incorporation and Bylaws of the owner of the Fishing Industry Vessel, and any parent corporation, must be submitted. The certification must be by the Secretary of State in which the corporation is incorporated or by the Secretary of the corporation. For entities other than corporations, comparable certified documents must be submitted. For example, for a limited liability company, a copy of the Certificate of Formation filed with a State must be submitted, along with a certified copy of the Limited Liability Company Operating Agreement;

(3) An Affidavit of U.S. Citizenship for each charterer of a Fishing Industry Vessel, with the exception of time or voyage charterers of Fish Processing Vessels and Fish Tender Vessels permitted under §356.39(b)(2);

(4) A copy of any time charter or voyage charter to a Non-Citizen of a Fish Tender Vessel or Fish Processing Vessel;

(5) Any loan agreements or other financing documents applicable to a Fishing Industry Vessel where the lender has not been approved by MARAD to hold a Preferred Mortgage on Fishing Industry Vessels, excepting financing documents that are exempted from review pursuant to §356.19(d) and loan documents that have received general approval from the Citizenship Approval Officer pursuant to §356.21 for use with an approved Mortgage Trustee.

(6) A description of any operating and/or management agreements entered into between the owner or bareboat charterer of a Fishing Industry Vessel and an entity that has not been determined by MARAD to be a U.S. Citizen, accompanied by a representation and warranty that the agreement does not contain any provisions that convey control over the vessel or vessel-owning entity to a Non-Citizen;

(7) Copies of any sales or purchase agreements that relate to the sale or purchase of all or a significant portion of a vessel's catch where the agreement is with an entity that has not been determined by MARAD to be a U.S. Citizen and the agreement contains provisions that could convey control to a Non-Citizen other than those expressly authorized in §356.43. Agreements that only contain provisions expressly authorized in §356.43 do not have to be submitted; however, the agreements and the parties to the agreements must be identified;

(8) Any stockholder's agreement, voting trust agreements, or any other pooling agreements, including any proxy appointment, relating to the ownership of all classes of stock, whether voting or non-voting of the owner of the Fishing Industry Vessel, including any parent corporation or other stockholder whose stock is being

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relied upon to establish 75 percent U.S. Citizen ownership;

(9) Any agreements relating to an option to buy or sell stock or other comparable equity interest in the owner of the Fishing Industry Vessel, or Fish Tender Vessel, or any agreement that restricts the sale of such stock or equity interests in the owner of the Fishing Industry Vessel, including any parent corporation or other stockholder whose stock is being relied upon to establish 75 percent U.S. Citizen ownership;

(10) Any documents relating to a merger, consolidation, liquidation or dissolution of the owner of the Fishing Industry Vessel, including any parent corporation where all of the parties have not been determined by the Citizenship Approval Officer to be U.S. Citizens;

(11) Disclosure of any interlocking directors or other officials by and between the owner of a Fishing Industry Vessel (including any parent corporation) and any Non-Citizen minority stockholder of the owner and any parent corporation. This requirement is also applicable to any lender, purchaser of fish catch, or other entity that is a Non-Citizen;

(12) Any contract or agreement that purports to sell, lease or otherwise transfer to a Non-Citizen the fishing rights, a fishing quota, a processing quota or any other right allocated to a vessel owner, bareboat charterer, or a particular Fishing Industry Vessel; and

(13) A copy of the Large Vessel Certification required by § 356.47.

(b) In the event the owner or bareboat charterer of a Fishing Industry Vessel enters into any agreement reflected in any of the documents set forth in paragraph (a) of this section after the submission of the Affidavit of U.S. Citizenship, the owner or bareboat charterer must notify the Citizenship Approval Officer within 30 calendar days. Failure to notify the Citizenship Approval Officer of such agreements within the prescribed time may result in the vessel owner being deemed ineligible to document the vessel with a fishery endorsement.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5579, Feb. 4, 2003]

**§ 356.15 Filing of affidavit of U.S. Citizenship.**

(a) New owners of Fishing Industry Vessel after October 1, 2001, must file the Affidavit of U.S. Citizenship and other required documentation with the Citizenship Approval Officer in order for the Citizenship Approval Officer to make a determination whether the owner is eligible to own a vessel with a fishery endorsement to the vessel's documentation. A vessel may not receive a fishery endorsement to its documentation or operate in the fisheries of the United States before this determination has been made.

(b) If the Citizenship Approval Officer believes that there is a defect in the Affidavit of U.S. Citizenship or the supporting documentation, the applicant will be notified and will be given an opportunity to work with the Citizenship Approval Officer to resolve the matter before a determination is made whether the applicant qualifies as a U.S. Citizen.

(c) A vessel owner that has a valid fishery endorsement prior to October 1, 2001, must obtain a citizenship determination from the Citizenship Approval Officer no later than October 1, 2001, which states that the owner is a U.S. Citizen eligible to own a vessel with a fishery endorsement. If the owner obtains the required determination from the Citizenship Approval Officer, the fishery endorsement will remain valid and will be subject to renewal at the time of its next regularly scheduled annual filing to document the vessel with the Coast Guard, at which point the owner will be required to obtain an annual ruling from the MARAD's Citizenship Approval Officer that it is still a U.S. Citizen. If a vessel owner that owns a vessel with a valid fishery endorsement prior to October 1, 2001, does not obtain the required determination from the Citizenship Approval Officer by October 1, 2001, the vessel's fishery endorsement may be deemed invalid. In order to obtain a new fishery endorsement, the vessel owner will be required to obtain a citizenship determination from the Citizenship Approval Officer and to apply to the U.S. Coast Guard for a new fishery endorsement.

(d) The owner of a Fishing Industry Vessel or a prospective owner of such a vessel may request a letter ruling from the Citizenship Approval Officer in order to determine whether the owner under a proposed ownership structure will qualify as a U.S. Citizen that is eligible to document the vessel with a fishery endorsement. A complete request for a letter ruling must be accompanied by an Affidavit of U.S. Citizenship and all other documentation required by “ 356.13. The Citizenship Approval Officer will issue a letter ruling based on the ownership structure that is proposed; however, the Citizenship Approval Officer reserves the right to reverse the determination if any of the elements of the ownership structure, contractual arrangements, or other material relationships are altered when the vessel owner submits the executed Affidavits and supporting documentation.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5579, Feb. 4, 2003]

**§ 356.17 Annual requirements for vessel owners.**

(a) An owner of a Fishing Industry Vessel must submit a certification in the form of an Affidavit of United States Citizenship to the Citizenship Approval Officer on an annual basis as provided in paragraph (b) of this section. The vessel owner does not have to submit duplicate copies of documents that have already been submitted and that have not changed, provided a copy is still retained by us. This annual certification requirement does not excuse the owner from the requirements of § 356.5 to notify the Citizenship Approval Officer throughout the year when changes in the citizenship information occur.

(b) The annual certification required by paragraph (a) of this section must be filed at least 45 days prior to the renewal date for the vessel's documentation and fishery endorsement. Where multiple Fishing Industry Vessels are owned by the same entity or by entities that ultimately have common ownership, an Affidavit of U.S. Citizenship and supporting documentation may be filed for all of the vessels in conjunction with the first vessel documentation renewal during each cal-

endar year. Any information or supporting documentation unique to a particular vessel that would normally be required to be submitted under § 356.13 or any other provision of this part 356 such as charters, management agreements, loans or financing agreements, sales, purchase or marketing agreements, or exemptions claimed under this part must be submitted with the annual filing for that vessel if the documents are not already on file with the Citizenship Approval Officer.

(c) Failure to file the annual certification in a timely manner may result in the expiration of the vessel's fishery endorsement, which will prohibit the vessel from operating in the fisheries of the United States.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5579, Feb. 4, 2003]

**Subpart D—Mortgages**

**§ 356.19 Requirements to hold a Preferred Mortgage.**

(a) In order for a Mortgagee to be eligible to obtain a Preferred Mortgage on a Fishing Industry Vessel, it must be:

- (1) A Citizen of the United States;
- (2) A state or federally chartered financial institution that is insured by the Federal Deposit Insurance Corporation;
- (3) A farm credit lender established under title 12, chapter 23, of the United States Code (12 U.S.C. 2001 *et seq.*);
- (4) A commercial fishing and agriculture bank established pursuant to State law;
- (5) A Commercial Lender organized under the laws of the United States or of a State and eligible to own a vessel under 46 U.S.C. 12102(a); or
- (6) A Mortgage Trustee that complies with the requirements of 46 U.S.C. 31322(f) and 46 CFR 356.27 through 356.37.

(b) A Mortgagee must demonstrate to the Citizenship Approval Officer that it satisfies one of the requirements set forth in paragraph (a) of this section before it will be qualified to obtain a Preferred Mortgage on a Fishing Industry Vessel after April 1, 2003. A Mortgagee that has an existing Preferred Mortgage on a Fishing Industry Vessel prior to April 1, 2003, will be required to demonstrate that it satisfies one of

the requirements set forth in paragraph (a) of this section before the vessel's next certificate of documentation renewal date after April 1, 2003. Failure to submit the required information may result in the loss of the preferred status for the mortgage. A sample format that may be used to submit the required information for Mortgagees, Commercial Lenders and Lender Syndicates is available on the MARAD website at <http://www.marad.dot.gov/afa.html>. The required information that must be submitted in order to make such a demonstration for each category in paragraph (a) is as follows:

(1) If a Mortgagee plans to qualify as a United States Citizen under paragraph (a)(1) of this section, the Mortgagee must file an Affidavit of United States Citizenship demonstrating that it complies with the citizenship requirements of 46 U.S.C. 12102(c) and section 2(c) of the 1916 Act, which require that 75% of the ownership and control in the Mortgagee be vested in U.S. Citizens at each tier and in the aggregate. In addition to the Affidavit of U.S. Citizenship, a certified copy of the Articles of Incorporation and Bylaws, or other comparable corporate documents must be submitted to the Citizenship Approval Officer.

(2) A state or federally chartered financial institution must provide a certification that indicates whether it is a state chartered or federally chartered financial institution and that certifies that it is insured by the Federal Deposit Insurance Corporation ("FDIC"). The certification must include the FDIC Certification Number assigned to the institution.

(3) A farm credit lender must provide a certification indicating that it qualifies as a farm credit lender established under title 12, chapter 23, of the United States Code (12 U.S.C. 2001 *et seq.*);

(4) A commercial fishing and agriculture bank must provide a certification indicating that it has been lawfully established as a commercial fishing and agriculture bank pursuant to State law and that it is in good standing;

(5) A Commercial Lender that seeks to be qualified to hold a Preferred Mortgage directly or through a Mortgage Trustee must provide evidence

that it is engaged primarily in the business of lending and other financing transactions and a certification that it has a loan portfolio in excess of \$100 million, of which no more than 50 percent of the dollar amount of the loan portfolio consists of loans to borrowers in the commercial fishing industry. The certification must include information regarding the approximate size of the loan portfolio and the percentage of the portfolio that consists of loans to borrowers in the commercial fishing industry. A Commercial Lender that seeks to be qualified to hold a Preferred Mortgage directly must also submit an Affidavit of U.S. Citizenship to the Citizenship Approval Officer to demonstrate that it qualifies as one of the following:

(i) An individual who is a citizen of the United States;

(ii) An association, trust, joint venture, or other entity—

(A) All of whose members are citizens of the United States; and

(B) That is capable of holding title to a vessel under the laws of the United States or of a State;

(iii) A partnership whose general partners are citizens of the United States, and the controlling interest in the partnership is owned by citizens of the United States;

(iv) A corporation established under the laws of the United States or of a State, whose chief executive officer, by whatever title, and chairman of its board of directors are citizens of the United States and no more of its directors are Non-citizens than a minority of the number necessary to constitute a quorum;

(v) The United States Government; or

(vi) The government of a State.

(6) A Mortgage Trustee must submit the Mortgage Trustee Application and other documents required in § 356.27. If the beneficiary under the trust arrangement has not demonstrated to the Citizenship Approval Officer that it qualifies as a Commercial Lender, a Lender Syndicate or an entity eligible to hold a preferred mortgage under paragraphs (a)(1) through (5) of this section, the Mortgage Trustee must

submit to the Citizenship Approval Officer copies of the trust agreement, security agreement, loan documents, preferred mortgage, and any issuance, assignment or transfer of interest so that a determination can be made as to whether any of the arrangements results in an impermissible transfer of control of the vessel to a person not eligible to own a vessel with a fishery endorsement under 46 U.S.C. 12102(c).

(c) A Mortgagee is required to provide the certification required by paragraph (b) of this section to the Citizenship Approval Officer on an annual basis during the time in which it holds a preferred mortgage on a Fishing Industry Vessel. The annual certification must be submitted at least 30 calendar days prior to the annual anniversary date of the original approval. The Citizenship Approval Officer will notify a Mortgagee if the Mortgagee fails to submit the required annual certification. If the Mortgagee does not provide the certification within 30 calendar days of the mailing date of the delinquency notice, the mortgage will no longer qualify as a Preferred Mortgage.

(d) The following entities may exercise rights under loan or mortgage covenants with respect to a Fishing Industry Vessel without obtaining MARAD approval:

(1) An entity that is deemed qualified to hold a Preferred Mortgage under paragraphs (a)(1) through (5) of this section and that has submitted the appropriate certification to the Citizenship Approval Officer under paragraph (b) of this section; and

(2) An approved Mortgage Trustee that is holding a Preferred Mortgage for a beneficiary that is qualified to hold a Preferred Mortgage under paragraphs (a)(1) through (a)(5) of this section or for a beneficiary that qualifies as a Commercial Lender or a Lender Syndicate and that has made an appropriate certification to the Citizenship Approval Officer that it meets the requirements of either §356.3(g) or §356.3(n).

(e) An entity that holds a Preferred Mortgage on a Fishing Industry Vessel or that is using a Mortgage Trustee to hold a Preferred Mortgage for its benefit may request a letter ruling from

the Citizenship Approval Officer in order to determine whether a mortgage or mortgage trust arrangement is in compliance with the regulations in this part. The Citizenship Approval Officer reserves the right to reverse any advice given under a letter ruling if any of the elements of the proposed loan or mortgage are materially altered or if the entity requesting the letter ruling has failed to fully disclose all relevant information.

[68 FR 5579, Feb. 4, 2003]

**§ 356.21 General approval of standard loan or mortgage agreements.**

(a) A lender that is engaged in the business of financing Fishing Industry Vessels and that is not a Commercial Lender or Lender Syndicate using a Mortgage Trustee to hold a Preferred Mortgage for its benefit or an entity that is otherwise qualified to hold a Preferred Mortgage on Fishing Industry Vessels pursuant to §356.19(a)(2) through (a)(5), may apply to the Citizenship Approval Officer for general approval of its standard loan and mortgage agreements for such vessels. In order to obtain general approval for its standard loan and mortgage agreements, a lender using an approved Mortgage Trustee must submit to the Citizenship Approval Officer:

(1) A copy of its standard loan or mortgage agreement for Fishing Industry Vessel, including all covenants that may be included in the loan or mortgage agreement; and,

(2) A certification that it will not use covenants or restrictions in the loan or mortgage agreement outside of those approved by the Citizenship Approval Officer without obtaining the prior approval of the Citizenship Approval Officer.

(b) A lender that receives general approval may enter into loans and mortgages on Fishing Industry Vessel without prior approval from us of each individual loan or mortgage; *provided*, that the loan or mortgage conforms to the standard agreement approved by the Citizenship Approval Officer and does not include any other covenants that have not been approved by the Citizenship Approval Officer.

(c) The lender must provide an annual certification to the Citizenship

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Approval Officer certifying that all loans and mortgages on Fishing Industry Vessel entered into under this general approval conform to the standard agreement approved by us and do not contain deviations from the standard agreement or covenants that were not reviewed and approved by the Citizenship Approval Officer. The certification must be submitted at least 30 calendar days prior to the annual anniversary date of the previous approval.

(d) If the lender wishes to use covenants that were not approved pursuant to this section, it must submit the new covenants to the Citizenship Approval Officer for approval.

(e) A lender that has received general approval for its lending program and that uses covenants in a loan or mortgage on a Fishing Industry Vessel that have not been approved by the Citizenship Approval Officer will be subject to loss of its general approval and the Citizenship Approval Officer may review and approve all of the lender's mortgage and loan covenants on a case-by-case basis. The Citizenship Approval Officer may also determine that the arrangement results in an impermissible transfer of control to a Non-Citizen and therefore does not meet the requirements to qualify as a Preferred Mortgage. If the lender knowingly files a false certification with the Citizenship Approval Officer or has used covenants in a loan or mortgage on a Fishing Industry Vessel that are materially different from the approved covenants, it may also be subject to civil and criminal penalties pursuant to 18 U.S.C. 1001.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5581, Feb. 4, 2003]

**§ 356.23 Restrictive loan covenants approved for use by lenders.**

(a) We approve the following standard loan covenants, which may restrict the activities of the borrower without the lender's consent and which may be included in loan agreements or other documents between an owner of a Fishing Industry Vessel and an unrelated lender that is using an approved Mortgage Trustee to hold the mortgage and debt instrument for the benefit of the lender and that is not exempted under § 356.19(d) from MARAD review of its

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loan and mortgage covenants, so long as the lender's consent is not unreasonably withheld:

(1) Borrower cannot sell part or all of its assets;

(2) Borrower cannot merge, consolidate, reorganize, dissolve, or liquidate;

(3) Borrower cannot undertake new borrowing or contingent liabilities;

(4) Borrower cannot insure, guaranty or become otherwise liable for debt obligations of any other entity, Person, etc.;

(5) Borrower cannot Charter or lease a vessel that is collateral for the loan;

(6) Borrower cannot incur liens, except any permitted liens that may be set forth in the loan or other financing documents;

(7) Borrower must limit its investments to marketable investments guaranteed by the United States or a State, or commercial paper with the highest rating of a generally recognized rating service;

(8) Borrower cannot make structural alterations or any other major alteration to the vessel;

(9) Borrower, if in arrears in its debt obligations to the lender, cannot make dividend payments on its capital stock; and,

(10) Borrower, if in arrears in its debt obligations to the lender, cannot make excessive contributions to pension plans, make payment of employee bonuses, or make excessive contributions to stock option plans, or provide other major fringe benefits in terms of dollar amount to its employees, officers, and directors, such as loans, etc.

(b) The mortgage may not include covenants that allow the Mortgagee to operate the vessel except as provided for in § 356.25.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5581, Feb. 4, 2003]

**§ 356.25 Operation of Fishing Industry Vessel Mortgagees.**

(a) A Mortgagee that has demonstrated to MARAD that it qualifies as a Citizen of the United States and is eligible to own a vessel with a fishery endorsement may operate a Fishing Industry Vessel.

(b) A Mortgagee not eligible to own a Fishing Industry Vessel cannot operate or cause operation of, the vessel in the

fisheries of the United States. Except as provided in paragraph (c) of this section, the vessel may not be operated for any purpose without the prior written approval of the Citizenship Approval Officer.

(c) A Mortgagee not eligible to own a Fishing Industry Vessel may operate the vessel for a non-commercial purpose to the extent necessary for the immediate safety of the vessel or for repairs, drydocking or berthing changes; provided, that the vessel is operated under the command of a Citizen of the United States and for no longer than 15 calendar days.

(d) A Mortgagee that is holding a Preferred Mortgage on a Fishing Industry Vessel but that is not eligible to own a Fishing Industry Vessel may take possession of the vessel in the event of default by the mortgagor other than by foreclosure pursuant to 46 U.S.C. 31329, if provided for in the mortgage or a related financing document. However, the vessel may not be operated, or caused to be operated in commerce, except as provided in paragraph (c) of this section or with the approval of the Citizenship Approval Officer.

(e) A Non-Citizen Lender that has brought a civil action in rem for enforcement of a Preferred Mortgage lien on a Citizen-owned Fishing Industry Vessel pursuant to 46 U.S.C. 31325(b)(1) may petition the court pursuant to 46 U.S.C. 31325(e)(1) for appointment of a receiver, and, if the receiver is a Person eligible to own a Fishing Industry Vessel, to authorize the receiver to operate the mortgaged vessel pursuant to terms and conditions consistent with this part 356. If the receiver is not a Citizen of the United States that meets the requirements of section 2(c) of the 1916 Act, 46 App. U.S.C. 802(c), and 46 U.S.C. 12102(c), the vessel may not be operated in the fisheries of the United States.

### Subpart E—Mortgage Trustees

#### § 356.27 Mortgage Trustee requirements.

(a) A lender who is not qualified under § 356.19(a)(1) through (5) to hold a Preferred Mortgage directly on a Fishing Industry Vessel may use a qualified

Mortgage Trustee to hold, for the benefit of the lender, the Preferred Mortgage and the debt instrument for which the Preferred Mortgage is providing security.

(b) In order to qualify as an approved Mortgage Trustee, the Mortgage Trustee must:

(1) Be eligible to hold a Preferred Mortgage on a Fishing Industry Vessel under § 356.19(a)(1) through (a)(5);

(2) Be organized as a corporation and doing business under the laws of the United States or of a State;

(3) Be authorized under the laws of the United States or of the State under which it is organized to exercise corporate trust powers;

(4) Be subject to supervision or examination by an official of the United States Government, or of a State;

(5) Have a combined capital and surplus (as stated in its most recent published report of condition) of at least \$3,000,000; and

(6) Meet any other requirements prescribed by the Citizenship Approval Officer.

(c) The Mortgage Trustee must submit to the Citizenship Approval Officer the following documentation in order to be an approved Mortgage Trustee:

(1) An application for approval as a Mortgage Trustee as set out in paragraph (g) of this section;

(2) The appropriate certification and documentation required under § 356.19(b)(1) through (5) to demonstrate that it is qualified to hold a Preferred Mortgage on Fishing Industry Vessels;

(3) A copy of the most recent published report of condition of the Mortgage Trustee; and,

(4) A certification that the Mortgage Trustee is authorized under the laws of the United States or of a State to exercise corporate trust powers and is subject to supervision or examination by an official of the United States or of a State;

(5) A certification that the Mortgage Trustee is authorized under the laws of the United States or of a State to exercise corporate trust powers and is subject to supervision or examination by an official of the United States or of a State;

(d) Any right set forth in a mortgage on a Fishing Industry Vessel cannot be

issued, assigned, or transferred to a person who is not eligible to be a Mortgagee without the approval of the Citizenship Approval Officer.

(e) Mortgage Trustees approved by the Citizenship Approval Officer must not assume any fiduciary obligations in favor of Non-Citizen Lenders that are in conflict with the U.S. Citizen ownership and control requirements set forth in the AFA, without the approval of the Citizenship Approval Officer. An approved Mortgage Trustee may request that the Citizenship Approval Officer pre-approve a trust agreement form to ensure that the fiduciary duties assumed by the Mortgage Trustee in favor of a Non-Citizen Lender are consistent with the ownership and control requirements of this part and the AFA.

(f) We will periodically publish a list of Approved Mortgage Trustees in the FEDERAL REGISTER, but current information as to the status of any particular Mortgage Trustee must be obtained from the Citizenship Approval Officer.

(g) An application to be approved as a Mortgage Trustee should include the following:

The undersigned (the "Mortgage Trustee") hereby applies for approval as Mortgage Trustee pursuant to 46 U.S.C. 31322(f) and the Regulation (46 CFR part 356), prescribed by the Maritime Administration ("MARAD"). All terms used in this application have the meaning given in the Regulation. In support of this application, the Mortgage Trustee certifies to and agrees with MARAD as hereinafter set forth:

The Mortgage Trustee certifies:

(a) That it is acting or proposing to act as Mortgage Trustee on a Fishing Industry Vessel documented, or to be documented under the U.S. registry;

(b) That it—

(1) Is organized as a corporation under the laws of the United States or of a State and is doing business in the United States;

(2) Is authorized under those laws to exercise corporate trust powers;

(3) Is qualified to hold a Preferred Mortgage on Fishing Industry Vessels pursuant to 46 CFR 356.19(a);

(4) Is subject to supervision or examination by an official of the United States Government or a State; and

(5) Has a combined capital and surplus of at least \$3,000,000 as set forth in its most recent published report of condition, a copy of which, dated \_\_\_\_\_, is attached.

The Mortgage Trustee agrees:

(a) That it will, so long as it shall continue to be on the List of Approved Mortgage Trustees referred to in the Regulation:

(1) Notify the Citizenship Approval Officer in writing, within 20 days, if it shall cease to be a corporation which:

(i) Is organized under the laws of the United States or of a State, and is doing business under the laws of the United States or of a State;

(ii) Is authorized under those laws to exercise corporate trust powers;

(iii) Is qualified under 46 CFR. 356.19(a) to hold a Preferred Mortgage on Fishing Industry Vessels;

(iv) Is subject to supervision or examination by an authority of the U.S. Government or of a State; and

(v) Has a combined capital and surplus (as set forth in its most recent published report of condition) of at least \$3,000,000.

(2) Furnish to the Citizenship Approval Officer on an annual basis:

(i) The appropriate certification and documentation required under §356.19(b)(1)–(5) to demonstrate that it is qualified to hold a Preferred Mortgage on Fishing Industry Vessels;

(ii) A copy of the most recent published report of condition of the Mortgage Trustee;

(iii) A list of the Fishing Industry Vessels for which it is acting as Mortgage Trustee; and,

(iv) The identity and address of all beneficiaries for which it is acting as a Mortgage Trustee.

(3) Furnish to the Citizenship Approval Officer copies of each Trust Agreement as well as any other issuance, assignment or transfer of an interest related to each transaction where the beneficiary under a trust arrangement is not a Commercial Lender, a Lender Syndicate or an entity that is eligible to hold a Preferred Mortgage under 46 CFR 356.19(a)(1)–(5);

(4) Furnish to the Citizenship Approval Officer any further relevant and material information concerning its qualifications as Mortgage Trustee under which it is acting or proposing to act as Mortgage Trustee, as the Citizenship Approval Officer may from time to time request; and,

(5) Permit representatives of the Maritime Administration, upon request, to examine its books and records relating to the matters referred to herein;

(b) That it will not issue, assign, or in any manner transfer to a person not eligible to own a documented vessel, any right under a mortgage of a Fishing Industry Vessel, or operate such vessel without the approval of the Citizenship Approval Officer; except that it may operate the vessel to the extent necessary for the immediate safety of the vessel, for its direct return to the United States or for its movement within the United States



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for repairs, drydocking or berthing changes, but only under the command of a Citizen of the United States for a period not to exceed 15 calendar days;

(c) That after a responsible official of such Mortgage Trustee obtains knowledge of a foreclosure proceeding, including a proceeding in a foreign jurisdiction, that involves a documented Fishing Industry Vessel on which it holds a mortgage pursuant to approval under the Regulation and to which 46 App. U.S.C. 802(c), 46 U.S.C. 31322(a)(4) or 46 U.S.C. 12102(c) is applicable, it shall promptly notify the Citizenship Approval Officer with respect thereto, and shall ensure that the court or other tribunal has proper notice of those provisions; and

(d) That it shall not assume any fiduciary obligation in favor of Non-Citizen beneficiaries that is in conflict with any restrictions or requirements of the Regulation.

This application is made in order to induce the Maritime Administration to grant approval of the undersigned as Mortgage Trustee pursuant to 46 U.S.C. 31322 and the Regulation, and may be relied on by the Citizenship Approval Officer for such purposes. False statements in this application may subject the applicant to fine or imprisonment, or both, as provided for violation of the prescriptions contained in 18 U.S.C. 286, 287, and 1001.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

ATTEST:

\_\_\_\_\_  
(Print or type name below)

(SEAL)

MORTGAGE TRUSTEE'S NAME & ADDRESS

By:

\_\_\_\_\_  
(Print or type name below)

TITLE

[65 FR 44877, July 19, 2000, as amended at 68 FR 5581, Feb. 4, 2003]

**§ 356.31 Maintenance of Mortgage Trustee approval.**

(a) A Mortgage Trustee that holds a Preferred Mortgage on a Fishing Industry Vessel must submit the following information to the Citizenship Approval Officer during each calendar year that it is acting as a Mortgage Trustee:

(1) The appropriate certification and documentation required under §356.19(b)(1) through (b)(5) to demonstrate that it is qualified to hold a Preferred Mortgage on Fishing Industry Vessels;

(2) A copy of the most recent published report of condition of the Mortgage Trustee;

(3) A list of the Fishing Industry Vessels for which it is acting as Mortgage Trustee; and

(4) The identity and address of all beneficiaries for which it is acting as a Mortgage Trustee.

(b) The Mortgage Trustee must file the documents required in paragraph (a) of this section within 30 calendar days prior to the anniversary date of the original approval from the Citizenship Approval Officer.

(c) If at any time the Mortgage Trustee fails to meet the statutory requirements set forth in the AFA, the Mortgage Trustee must notify the Citizenship Approval Officer of such failure to qualify as a Mortgage Trustee not later than 20 calendar days after the event causing such failure. Upon learning that a Mortgage Trustee fails to meet the statutory or regulatory requirements to qualify as a Mortgage Trustee, we will publish a disapproval notice in the FEDERAL REGISTER and will notify the U.S. Coast Guard, the Mortgage Trustee, and the beneficiary of each Preferred Mortgage of such disapproval by providing them a copy of the disapproval notice. The notice to beneficiaries will be provided by standard U.S. mail to the address supplied to the Citizenship Approval Officer by the Mortgage Trustee. Within 30 calendar days of publication in the FEDERAL REGISTER of the disapproval notice, the disapproved Mortgage Trustee must either transfer its fiduciary responsibilities to a successor Mortgage Trustee that has been approved by the Citizenship Approval Officer or cure the defect in its approval. The preferred status of the mortgage will be maintained during the 30 day period following publication of the notice in the FEDERAL REGISTER and pending transfer of the Mortgage Trustee's fiduciary responsibilities to a successor Mortgage Trustee or cure of the defect.

[68 FR 5582, Feb. 4, 2003]

**§ 356.37 Operation of a Fishing Industry Vessel by a Mortgage Trustee.**

An approved Mortgage Trustee cannot operate a Fishing Industry Vessel without the approval of the Citizenship

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Approval Officer, except where non-commercial operation is necessary for the immediate safety of the vessel, or for repairs, drydocking or berthing changes; provided, that the vessel is operated under the command of a Citizen of the United States for a period of no more than 15 calendar days.

[68 FR 5582, Feb. 4, 2003]

**Subpart F—Charters, Management Agreements and Exclusive or Long-Term Contracts**

**§ 356.39 Charters.**

(a) Charters to Citizens of the United States:

(1) Bareboat charters may be entered into with Citizens of the United States subject to approval by the Citizenship Approval Officer that the charterer is a Citizen of the United States. The bareboat charterer of Fishing Industry Vessel must submit an Affidavit of U.S. Citizenship to the Citizenship Approval Officer for review and approval prior to entering into such charter.

(2) Time charters, voyage charters and other charter arrangements that do not constitute a bareboat charter of the Fishing Industry Vessel may be entered into with Citizens of the United States. The charterer must submit an Affidavit of U.S. Citizenship to the Citizenship Approval Officer within 30 calendar days of execution of the charter.

(b) Charters to Non-Citizens:

(1) Bareboat or demise charters to Non-Citizens of Fishing Industry Vessel for use in the United States are prohibited. Bareboat charters to Non-Citizens of Fish Processing Vessels and Fish Tender Vessels for use solely outside of the United States are permitted.

(2) Time charters, voyage charters and other charters that are not a demise of the vessel may be entered into with Non-Citizens for the charter of dedicated Fish Tender Vessels and Fish Processing Vessels that are not engaged in the Harvesting of fish or fishery resources. A copy of the charter must be submitted to the Citizenship Approval Officer prior to being executed in order for the Citizenship Ap-

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proval officer to verify that the charter is not in fact a demise of the vessel.

(3) Time charters, voyage charters and other charters of Fishing Industry Vessels to Non-Citizens are prohibited if the Fishing Industry Vessel will be used to Harvest fish or fishery resources.

(c) We reserve the right to request a copy of any time charter, voyage charter, contract of affreightment or other Charter of a Fishing Industry Vessel in order to confirm that the Charter is not a bareboat charter of the Fishing Industry Vessel.

(d) Any violation of this section will render the vessel's fishery endorsement immediately invalid upon notification from the Citizenship Approval Officer.

**§ 356.41 Management agreements.**

(a) An owner or bareboat charterer of a Fishing Industry Vessel may enter into a management agreement with a Non-Citizen in which the management company provides marketing services, consulting services or other services that are ministerial in nature and do not convey control of the vessel to the Non-Citizen.

(b) An owner or bareboat charterer of a Fishing Industry Vessel may not enter into a management agreement that allows the Non-Citizen to appoint, discipline or replace the crew or the master, direct the operations of the vessel or to otherwise effectively gain control over the management and operation of the vessel or vessel-owning entity.

(c) The owner or bareboat charterer must file with the Citizenship Approval Officer a description of any management agreement entered into with a Non-Citizen. The description must be submitted within 30 days of the execution and must include:

(1) A description of the agreement with a summary of the terms and conditions, and,

(2) A representation and warranty that the agreement does not contain any provisions that convey control over the vessel or vessel-owning entity to a Non-Citizen.

(d) The Citizenship Approval Officer may request a copy of any management agreement to determine if it contains provisions that convey control

over the vessel or vessel-owning entity to a Non-Citizen.

**§ 356.43 Long-term or exclusive sales contracts.**

(a) An owner or bareboat charterer of a Fishing Industry Vessel may enter into an agreement or contract with a Non-Citizen for the sale of all or a significant portion of its catch where the contract or agreement is solely for the purpose of employment of certain vessels on an exclusive basis for a specified period of time. Such contracts or agreements will not require our prior approval; provided, that the contract or agreement does not convey control over the owner or bareboat charterer of the vessel or the vessel's operation, management and harvesting activities.

(b) Provisions of a long-term or exclusive contract or agreement for the sale of all or a significant portion of a vessel's catch entered into pursuant to paragraph (a) of this section that are not considered to convey impermissible control to a Non-Citizen and do not require our approval include provisions that:

(1) Specify that the owner or bareboat charterer agrees to sell and purchaser agrees to procure, on a preferential basis, a certain quantity of fish caught by a vessel owner or bareboat charterer on a specific vessel;

(2) Specify that the vessel owner or charterer is responsible for supplying a specific type of fish to off-loading points designated by the purchaser;

(3) Provide for the replacement by the vessel owner of vessels covered by the contract or agreement in the event of loss or damage;

(4) Specify refrigeration criteria;

(5) Provide that the owner or bareboat charterer has to comply with fishing schedules that specify the maximum age of fish to be delivered and a method to coordinate delivery to the purchaser;

(6) Provide for methods of calculating price per pound or other price schedules and a schedule for payment for delivered fish;

(7) Provide for an arbitration mechanism in the event of dispute; and

(8) Provide for the purchaser to furnish off-loading crew and/or processing

or quality control technicians but no other vessel crew members.

(c) An owner or bareboat charterer of a Fishing Industry Vessel must obtain the approval of the Citizenship Approval Officer prior to entering into any agreement or contract with a Non-Citizen for the sale of all or a significant portion of a vessel's catch if the agreement or contract contains provisions that in any way convey to the purchaser of the vessel's catch control over the operation, management or harvesting activities of the vessel, vessel owner, or bareboat charterer other than as provided for in paragraph (b) of this section.

(d) An owner or bareboat charterer must submit, with its Affidavit of United States Citizenship and annually thereafter, a list of any long-term or exclusive sales agreements to which it is a party and the principal parties to those agreements. If requested, a copy of such agreements must be provided to the Citizenship Approval Officer.

**§ 356.45 Advance of funds.**

(a) A Non-Citizen may advance funds to the owner or bareboat charterer of a Fishing Industry Vessel:

(1) As provisional payment for products delivered for consignment sales, but not yet sold; or

(2) Where the basis of the advancement is an agreement between the Non-Citizen and the vessel owner or bareboat charterer to sell all or a portion of the vessel's catch to the Non-Citizen and the agreement meets the following conditions:

(i) The amount of the advancement does not exceed the annual value of the sales contract, measured as the value of the product to be supplied to the processor;

(ii) The Non-Citizen is not granted any rights whatsoever to control the operation, management and harvesting activities of the Fishing Industry Vessel other than as provided for in § 356.43;

(iii) The owner or bareboat charterer submits to the Citizenship Approval Officer within 30 days of execution a description of the arrangement and a certification and warranty that the agreement or contract with the Non-Citizen

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does not convey control over the vessel, the vessel owner or bareboat charterer in any manner whatsoever other than as provided for in §356.43; and,

(iv) No security interest in the vessel is conveyed as collateral for the advance of funds, unless a qualified Mortgage Trustee is used to hold the debt instrument for the benefit of the Non-Citizen.

(b) An owner or bareboat charterer may enter into an unsecured letter of credit or promissory note with a U.S. branch of a Non-Citizen Lender if:

(1) The Non-Citizen Lender is not affiliated with any party with whom the owner or bareboat charter has entered into a mortgage, long-term or exclusive sales or purchase agreement, or other similar contract;

(2) The Non-Citizen Lender is not granted any rights whatsoever to control the owner or the operation, management and harvesting activities of the Fishing Industry Vessel; and,

(3) The owner or bareboat charterer submits to the Citizenship Approval Officer within 30 days of execution a description of the arrangement and a certification and warranty that the agreement or contract with the Non-Citizen Lender does not convey control over the vessel, the vessel owner or bareboat charter in any manner whatsoever.

(c) The Citizenship Approval Officer may request a copy of any agreement for an advance of funds or letter of credit in order to determine if it contains an impermissible conveyance of control to a Non-Citizen.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5582, Feb. 4, 2003]

**Subpart G—Special Requirements for Certain Vessels**

**§ 356.47 Special requirements for large vessels.**

(a) Unless exempted in paragraph (b), (c) or (d) of this section, a vessel is not eligible for a fishery endorsement under 46 U.S.C. 12108 if:

(1) It is greater than 165 feet in registered length;

(2) It is more than 750 gross registered tons (as measured pursuant to 46 U.S.C. Chapter 145) or 1900 gross reg-

istered tons (as measured pursuant to 46 U.S.C. Chapter 143); or

(3) It possesses a main propulsion engine or engines rated to produce a total of more than 3,000 shaft horsepower; such limitation shall not include auxiliary engines for hydraulic power, electrical generation, bow or stern thrusters, or similar purposes.

(b) A vessel that meets one or more of the conditions in paragraph (a) of this section may still be eligible for a fishery endorsement if:

(1) A certificate of documentation was issued for the vessel and endorsed with a fishery endorsement that was effective on September 25, 1997;

(2) The vessel is not placed under foreign registry after October 21, 1998; and,

(3) In the event of the invalidation of the fishery endorsement after October 21, 1998, application is made for a new fishery endorsement within 15 business days of the receipt of written notification from MARAD or the Coast Guard identifying the reason for such invalidation. The fishery endorsement of a Fishing Industry Vessel that meets the criteria of paragraph (a) of this section is not deemed to be invalid for purposes of complying with this paragraph (a)(3), if the vessel is purchased pursuant to 46 U.S.C. 31329 by a Mortgagee that is not eligible to own a vessel with a fishery endorsement, provided that the Mortgagee is eligible to hold a preferred mortgage on such vessel at the time of the purchase;

(c) A vessel that is prohibited from receiving a fishery endorsement under paragraph (a) of this section will be eligible if the owner of such vessel demonstrates to MARAD that the regional fishery management council of jurisdiction established under section 302(a)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)) has recommended after October 21, 1998, and the Secretary of Commerce has approved, conservation and management measures in accordance with the American Fisheries Act of 1998, Title II, Division C, Public Law 105–277, to allow such vessel to be used in fisheries under such council's authority.

(d) A vessel that meets one or more of the conditions in paragraph (a) of

this section may still be eligible for a fishery endorsement if the vessel is engaged exclusively in the menhaden fishery in the geographic region governed by the South Atlantic Fisheries Council or the Gulf of Mexico Fisheries Council.

(e) The owner of a vessel that meets any of the criteria in paragraph (a) of this section is required to submit a certification each year in conjunction with its Affidavit of U.S. Citizenship in order to document that the vessel is eligible for documentation with a fishery endorsement. The certification should indicate that the vessel meets the criteria of paragraph (a) of this section; however, it is eligible to be documented with a fishery endorsement because it complies with the requirements of either paragraph (b), (c), or (d) of this section. A sample form for the certification is available on the MARAD Web site at <http://www.marad.dot.gov/afa.html> or may be obtained by contacting the Citizenship Approval Officer.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5582, Feb. 4, 2003]

#### § 356.49 Penalties.

If the owner or the representative or agent of the owner has knowingly falsified or concealed a material fact or knowingly made a false statement or representation with respect to the eligibility of the vessel under 46 U.S.C. 12102(c), in applying for or applying to renew the vessel's fishery endorsement, the following penalties may apply:

(a) The vessel's fishery endorsement may be revoked;

(b) A fine of up to \$100,000 may be assessed against the vessel owner for each day in which such vessel has engaged in fishing (as such term is defined in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802)) within the exclusive economic zone of the United States; and

(c) The owner, representative or agent may be subject to additional fines, penalties or both for violation of the proscriptions of 18 U.S.C. 286, 287, and 1001.

#### § 356.51 Exemptions for specific vessels.

(a) The following vessels are exempt from the requirements of 46 U.S.C. 12102(c) as amended by the AFA until such time after October 1, 2001, as 50% of the interest owned and controlled in the vessel changes; *provided*, the vessel maintains eligibility for a fishery endorsement under the federal law that was in effect prior to the enactment of the AFA:

(1) EXCELLENCE (United States official number 967502);

(2) GOLDEN ALASKA (United States official number 651041);

(3) OCEAN PHOENIX (United States official number 296779);

(4) NORTHERN TRAVELER (United States official number 635986); and

(5) NORTHERN VOYAGER (United States official number 637398) or a replacement for the NORTHERN VOYAGER that complies with paragraphs 2, 5, and 6 of section 208(g) of the AFA.

(b) The NORTHERN VOYAGER (United States official number 637398) and NORTHERN TRAVELER (United States official number 635986) will forfeit the exemption under paragraph (a) of this section if the vessel is used in a fishery under the authority of a regional fishery management council other than the New England Fishery Management Council or Mid-Atlantic Fishery Management Council established, respectively, under subparagraphs (A) and (B) of section 302(a)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)(A) and (B)).

(c) The EXCELLENCE (United States official number 967502), GOLDEN ALASKA (United States official number 651041), and OCEAN PHOENIX (United States official number 296779) will forfeit their exemption under paragraph (a) of this section if the vessel is used to Harvest fish.

(d) Owners of vessels that are exempt from the new ownership and control requirements of the AFA and this part 356 pursuant to paragraph (a) of this section must still comply with the requirements for a fishery endorsement under the federal law that was in effect on October 21, 1998. The owners must submit to the Citizenship Approval Officer on an annual basis:

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(1) An Affidavit of United States Citizenship in accordance with § 356.15 demonstrating that they comply with the Controlling Interest requirements of section 2(b) of the 1916 Act. The Affidavit must note that the owner is claiming an exemption from the requirements of this part 356 pursuant to paragraph (e) of this section; and

(2) A description of the current ownership structure, a list of any changes in the ownership structure that have occurred since the filing of the last Affidavit, and a chronology of all changes in the ownership structure that have occurred since October 21, 1998.

(e) The following Fishing Industry Vessels are exempt from the new ownership and control standards under the AFA and this part 356 for vessel owners and Mortgagees:

(1) Fishing Industry Vessels engaged in fisheries in the exclusive economic zone under the authority of the Western Pacific Fishery Management Council established under section 302(a)(1)(H) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)(H)); and

(2) Purse seine vessels when they are engaged in tuna fishing in the Pacific Ocean outside the exclusive economic zone of the United States or pursuant to the South Pacific Regional Fisheries Treaty.

(f) Fishing Industry Vessels that are claiming the exemption provided for in paragraph (e) of this section must certify to the Citizenship Approval Officer that the vessel is exempt from the ownership and control requirements of this part 356 pursuant to the exemption in paragraph (e) of this section. The vessel owner will be required to follow the U.S. Coast Guard's procedures for documenting a vessel with a fishery endorsement, as in effect prior to the passage of the AFA. The vessel owner must also notify the Coast Guard's National Vessel Documentation Center that it is claiming an exemption from the ownership and control requirements of this part 356 pursuant to paragraph (e) of this section.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5583, Feb. 4, 2003]

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**Subpart H—International Agreements**

**§ 356.53 Conflicts with international agreements.**

(a) If the owner or Mortgagee of a Fishing Industry Vessel believes that there is a conflict between the AFA or 46 CFR part 356 and any international treaty or agreement to which the United States is a party on July 24, 2001, and to which the United States is currently a party, the owner or Mortgagee may petition the Chief Counsel of the Maritime Administration at any time after July 19, 2000 to request a ruling that all or part of the requirements of this part 356 do not apply to that particular owner or particular Mortgagee with respect to a specific vessel; provided, the petitioner had an ownership interest in the Fishing Industry Vessel, or a mortgage on the vessel in the case of a Mortgagee, on July 24, 2001, and is covered by the international agreement.

(b) A petition for exemption from the requirements of this part 356 must include:

(1) Evidence of the ownership structure, or mortgage structure in the case of a Mortgagee, of the Fishing Industry Vessel as of July 24, 2001 (or on the date of the petition, for petitions filed prior to July 24, 2001), and any subsequent changes to the ownership structure, or mortgage structure in the case of a Mortgagee, of the vessel;

(2) A copy of the provisions of the international agreement or treaty which the owner or mortgagee believes are in conflict with the regulations in this part 356;

(3) A detailed description of how the provisions of the international agreement or treaty and the regulations in this part 356 are in conflict; and

(4) A certification in all petitions filed on or after July 24, 2001, that no interest in the vessel-owning entity has been transferred to a Non-Citizen after July 24, 2001.

(c) A separate petition must be filed for each Fishing Industry Vessel for which the vessel owner or a Mortgagee is requesting an exemption unless the Chief Counsel authorizes consolidated filing. Petitions should include two copies of all materials and should be

sent to the following address: Maritime Administration, Chief Counsel, Room 7228, 400 7th Street, SW., Washington, DC 20590.

(d) Upon receipt of a complete petition, the Chief Counsel may publish a notice in the FEDERAL REGISTER requesting public comment if the petition presents unique issues that have not been addressed in previous determinations. The FEDERAL REGISTER notice will include the petitioner's descriptions regarding how the AFA and this part 356 are in conflict with a particular investment treaty or agreement, but it will not include proprietary or confidential information about the petitioner. The Chief Counsel, in consultation with other departments and agencies within the Federal Government that have responsibility or expertise related to the interpretation or application of international investment agreements (*e.g.*, the Department of State, United States Trade Representative, Department of Treasury, etc.), will review the petition and the public comments, if any, to determine whether the international agreement and the requirements of the AFA and this part 356 are in conflict and, absent any extenuating circumstances, will render a decision within 120 days of the receipt of a fully completed petition. If MARAD's Chief Counsel determines after the receipt of a fully completed petition that there are extenuating circumstances that will preclude a decision from being rendered on the petition within 120 days, the petitioner will be notified around the 90th day and provided with an estimated date on which a decision will be rendered.

(e) To the extent that it is determined that an international agreement covering the petitioner is in conflict with the requirements of this part 356, the AFA, 46 U.S.C. 31322(a), 46 U.S.C. 12102(c), and this part 356 will not be applied to the petitioner with respect to the specific vessel. If the petitioner is a vessel owner, it will be required to comply with the documentation requirements as in effect prior to passage of the AFA on October 21, 1998. If the petitioner is a Mortgagee, it will be subject to requirements of 46 U.S.C. 31322(a) as in effect prior to passage of the AFA with regard to the mortgage

on the particular vessel covered by the petition. Decisions of the Chief Counsel may be appealed to the Maritime Administrator within 15 business days of issuance.

(f) The owner of a Fishing Industry Vessel that is determined through the petition process to be exempt from all or part of the requirements of this part 356 must submit evidence of its ownership structure to the Chief Counsel on an annual basis. The owner must specifically set forth:

(1) The Vessel's current ownership structure;

(2) The identity of all Non-Citizen owners and the percentage owned;

(3) Any changes in the ownership structure that have occurred since the filing of the last Affidavit; and,

(4) A certification that no interest in the vessel was transferred to a Non-Citizen after July 24, 2001.

(g) The provisions of this part 356 shall apply:

(1) To all owners and Mortgagees of a Fishing Industry Vessel who acquired an interest in the vessel after July 24, 2001; and

(2) To the owner of a Fishing Industry Vessel on July 24, 2001, if any ownership interest in that owner is transferred to or otherwise acquired by a Non-Citizen or if the percentage of foreign ownership in the vessel is increased after such date.

(3) An ownership interest is deemed to be transferred under this paragraph (g) if:

(i) There is a transfer of direct ownership interest in the primary vessel owning entity. If the primary vessel owning entity is wholly owned by another entity, the parent entity will be considered the primary vessel owning entity; or

(ii) There is a transfer of indirect ownership at any tier.

(4) A transfer of interest in a vessel owner does not include:

(i) Transfers of disparately held shares of a vessel-owning entity if it is a publicly traded company and the total of the shares transferred in a particular transaction equals less than 5% of the shares in that class. An interest in a vessel owning entity that exceeds 5% of the shares in a class can not be sold to the same Non-Citizen through

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multiple transactions involving less than 5% of the shares of that class of stock in order to maintain the exemption for the vessel owner; or

(ii) Transfers pursuant to a divorce or death.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5583, Feb. 4, 2003]

**Subpart I—Review of Harvesting and Processing Compliance**

**§ 356.55 Review of compliance with harvesting and processing quotas.**

(a) Upon the request of either the North Pacific Fishery Management Council (“NPFMC”) or the Secretary of Commerce, the Chief Counsel will review any allegation that an individual or entity has exceeded the allowable percentage for harvesting or processing pollock as provided for in section 210(e)(1) or (2) of the AFA.

(b) Following a request for MARAD review under paragraph (a) of this section, the NPFMC and the Secretary of Commerce (through the National Oceanic and Atmospheric Administration and the National Marine Fisheries Service) will transmit to MARAD any relevant information in their possession including, but not limited to:

(1) The identity of the parties alleged to have exceeded the excessive share caps;

(2) The relevant harvesting or processing data (the amount harvested or processed by particular parties);

(3) Any information that would be helpful in determining if the parties are related;

(4) Any information regarding the ownership structure of the parties, including:

(i) Articles of incorporation;

(ii) Bylaws;

(iii) Identity of shareholders and the percentage owned;

(iv) Any contracts or agreements that would demonstrate ownership or control of one party by another allegedly related party; and

(v) Any other evidence that would demonstrate ownership or control of one party by another allegedly related party.

(c) If MARAD determines during the course of its review that additional information is required from the parties

alleged to have exceeded the excessive share cap, the Chief Counsel will advise the Secretary of Commerce and/or the NPFMC what information is required. The Secretary and/or the NPFMC will request that specific parties submit the required information to MARAD.

(d) The Chief Counsel will make a finding as soon as practicable and will submit it to the Secretary of Commerce and the NPFMC.

(e) For purposes of this section, if 10% or more of the interest in an entity is owned or controlled either directly or indirectly by another individual or entity, the two entities will be considered the same entity for purposes of applying the harvesting and processing caps.

(1) For purposes of this section, an entity will be deemed to have an ownership interest in a pollock harvesting or processing entity if it either owns a percentage of the pollock harvesting or processing entity directly or if ownership can be traced through intermediate entities to the pollock harvesting or processing entity. To determine the percentage of ownership interest that an entity has in a pollock harvesting or processing entity where the ownership interest passes through one or more intermediate entities, the entity’s percentage of direct interest in an intermediate entity is multiplied by the intermediate entity’s percentage of direct or indirect interest in the pollock harvesting or processing entity.

(2) For purposes of this section, an entity will be deemed to exercise 10% or greater control over a pollock harvesting or processing entity if:

(i) It has the right to direct the business of the pollock harvesting or processing entity;

(ii) It has the right to appoint members to the management team of the pollock harvesting or processing entity such as the directors of a corporation or is a general partner or joint venturer in a harvesting or processing entity;

(iii) It has the right to direct the business of an entity that directly or indirectly owns or controls 10% of a harvesting or processing entity; or

(iv) It owns 50% or more of an entity that owns or controls 10 percent of a



pollock harvesting or processing entity.

(f) If the Secretary of Commerce determines that there is enough evidence to pursue an enforcement action for violation of the harvesting or processing caps contained in section 210(e) of the AFA, the Person against whom an enforcement action is taken is entitled to notice and an opportunity for a hearing before the Secretary of Commerce in accordance with 5 U.S.C. 554.

## PART 370—CLAIMS

### Subpart A—Processing of Time-Barred Claims

Sec.

370.1 Definitions.

370.2 General policy.

### Subpart A—Processing of Time-Barred Claims

#### § 370.1 Definitions.

(a) *Time-barred claim* means a claim against the Government, for which the statutory period for filing suit has expired.

(b) *Contract* includes every agreement or contract entered into by the Maritime Administrator and/or Maritime Subsidy Board, the Director National Shipping Authority or their delegatee.

(Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114)

[G.O. 102, 34 FR 6928, Apr. 25, 1969]

#### § 370.2 General policy.

(a) Time-barred claims shall be rejected, except as follows:

(1) A time-barred claim which could be asserted in court by way of set-off against a claim in favor of the United States arising out of the same contract may be considered in an overall settlement where settlement will result in a net payment to the United States, provided claimant releases the United States from all claims arising from or in any way connected with said contract.

(2) Time-barred claims in favor of friendly foreign governments shall not be rejected solely because they are time-barred. However, should any such government adopt the practice of as-

serting the statute of limitations as a defense against claims of the United States, the time-barred claims of that government shall be rejected.

(3) Time-barred claims arising under Second Seamen's War Risk insurance (or similar earlier types of crew insurance) where the policy was issued or the risks were assumed by the Maritime Administration (or its predecessors), shall not be rejected where the beneficiaries were precluded from receiving the proceeds of the policy by reason of regulations or orders of the U.S. Government (i) by reason of the beneficiary being physically or mentally unable to present the claim, (ii) by the beneficiaries being unaware of their entitlement to the proceeds in question, or (iii) where the claim is not "stale" under general principles of equity.

(b) For the purpose of a claim by a General Agent under General Agency Agreements set forth in 32A CFR AGE-1 for reimbursement by the Maritime Administration on account of a timely payment made to a third party within a period of limitations running from the date the claim of the third party accrued, the period of limitations applicable to the General Agent shall run from the date of such payment. In all other cases involving claims arising under General Agency Agreements, including third-party claims, the policy provided in paragraph (a) of this section shall apply.

(c) Consideration of any claim governed by applicable regulations in this chapter II, including without limitation parts 272, 292, and 205 of this chapter, shall be controlled by the time limitations expressly provided for with respect to the submission of such claims.

(Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114)

[G.O. 102, 34 FR 6928, Apr. 25, 1969]

## PART 380—PROCEDURES

### Subpart A—Filing of Applications Under Section 805(a), 1936 Act

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380.1 Purpose.

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### Subpart B—Application for Designation of Vessels as American Great Lakes Vessels

- 380.10 Purpose.  
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- 380.20 Purpose.  
380.21 Reproduction.  
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### Subpart D [Reserved]

### Subpart E—Compulsory Disclosure

- 380.40 Subpoenas, other compulsory processes and requests.

## Subpart A—Filing of Applications Under Section 805(a), 1936 Act

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114.

SOURCE: General Order 86, Rev., 33 FR 810, Jan. 23, 1968, unless otherwise noted.

### § 380.1 Purpose.

To prescribe procedure to be followed for filing applications submitted to the Maritime Subsidy Board/Maritime Administration pursuant to the provisions of section 805(a), Merchant Marine Act, 1936, as amended.

### § 380.2 Filing applications.

(a) An applicant under section 805(a) shall file his application (16 copies, including three originals) with the Secretary, Maritime Subsidy Board/Maritime Administration at least 15 days in advance of the effective date of the action proposed in the application.

(b) The application shall concisely and clearly reflect:

(1) Whether the applicant holds an operating-differential subsidy contract under title VI of the Act, or has applied for such type contract, or

(2) Whether the applicant has a Government-owned vessel on charter under title VII of the Act or has applied for

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the charter of a Government-owned vessel thereunder;

(3) The action for which approval of the Maritime Subsidy Board/Maritime Administration is sought, stated in terms of a request for permission to, directly or indirectly, own, operate, or charter a vessel(s) in the domestic intercoastal or coastwise service, or to own a pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel(s) in the domestic intercoastal or coastwise service; and

(4) Whether the operator of the vessel to be engaged in the domestic trade is a citizen of the United States as required by and within the meaning of section 2 of the Shipping Act, 1916.

### § 380.3 Processing of application.

All applications under section 805(a) shall be referred to the Chief, Office of Government Aid, Maritime Administration, for consideration and such further action as may be appropriate.

### § 380.4 Notices; statements from interested parties and arrangements for hearing.

(a) A notice shall be published in the FEDERAL REGISTER which shall:

(1) Identify and abstract the subject of the application.

(2) Provide that interested parties may inspect the proposed application in the Office of Government Aid, Maritime Administration.

(3) Provide for a specific date by which parties having any interest (within the meaning of section 805(a)) in such application and desiring to be heard on issues pertinent to section 805(a) shall petition to intervene, or submit a written statement with reference to the application addressed to the Secretary, Maritime Subsidy Board/Maritime Administration.

(4) Provide that if no petitions for leave to intervene are received within the specified time, the Maritime Subsidy Board/Maritime Administration will take such action as may be deemed appropriate.

(5) Provide that in the event petitions are received from parties with standing to be heard on the application, a hearing will be held on a date specified in the notice.

(6) Indicate that the purpose of the hearing will be to receive evidence under section 805(a) relative to whether the proposed operation (i) could result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or (ii) would be prejudicial to the objects and policy of the Act relative to domestic trade operations.

**§ 380.5 Exception to procedure.**

The Maritime Subsidy Board or the Maritime Administrator may dispense with the publication of notice when not inconsistent with applicable laws.

**Subpart B—Application for Designation of Vessels as American Great Lakes Vessels**

AUTHORITY: Sec. 204(b), Merchant Marine Act, 1936, as amended, (46 app. U.S.C. 1114(b)); Subtitle B, Pub. L. 101-624; 49 CFR 1.66.

SOURCE: 56 FR 3980, Feb. 1, 1991, unless otherwise noted.

**§ 380.10 Purpose.**

The purpose of this subpart is to prescribe the requirements for the submission of applications for designation of vessels as American Great Lakes vessels, subject to the conditions imposed by section 1522 of Pub. L. 101-624 (November 28, 1990).

**§ 380.11 Designation of American Great Lakes Vessels.**

The Secretary shall designate a vessel as an American Great Lakes vessel if—

(a) The vessel is documented under the laws of the United States;

(b)(1) The vessel is not more than 6 years old, and not less than 1 year old, on the effective date of the designation; or

(2) The vessel is not more than 11 years old, and not less than 1 year old, on the effective date of the designation, and the Secretary determines that suitable vessels are not available for providing the type of service for which the vessel will be used after designation;

(c) The vessel has not been previously designated as an American Great Lakes vessel; and

(d) The person who will be the owner of the vessel at the time of such designation agrees to enter into an agreement with the Secretary which provides that if the Secretary determines that the vessel is necessary to the defense of the United States, the United States Government shall have, during the 120-day period following the date of any revocation of such designation an exclusive right to purchase the vessel for a price equal to—

(1) The approximate world market value of the vessel; or

(2) The cost of the vessel to the owner less an amount representing reasonable depreciation of the vessel, whichever is greater.

**§ 380.12 Application requirements.**

(a) *Submission.* An application for designation of one or more vessels as an American Great Lakes vessel shall be filed with the Secretary, Maritime Administration, Department of Transportation, 400 Seventh St. SW., Room 7300, Washington, DC 20590, at least 60 days prior to the date when the owner wishes to commence operation of one or more vessels with such designation. The application shall state with specificity that the vessel complies with the requirements of § 380.11.

(b) *Fee.* Each application shall be accompanied by a fee of \$50 per vessel. Payment shall be made by cashier's check, certified check, or money order, payable to "Maritime Administration."

(c) *Unavailability of suitable vessels.* Where the owner requests that the Secretary make a determination that would allow the designation of one or more vessels that would be over 6 years of age, but less than 11 years of age, on the effective date of designation, the owner shall include with the application all relevant and material information from which the Secretary may determine that suitable vessels will not be available for the type of service in which the vessel(s) will be used after designation.

**Subpart C—Records Retention Schedule**

AUTHORITY: Secs. 204, 207, 49 Stat. 1987, as amended, 1988, as amended; 46 U.S.C. 1114, 1117; sec. 801, 49 Stat. 2011, 46 U.S.C. 1211.

**§ 380.20 Purpose.**

The purpose of this subpart is to prescribe the procedure to be followed by contractors for the retention and disposal of books, records, and accounts created and maintained by them under construction or operating-differential subsidy contracts with the Maritime Administration/Maritime Subsidy Board (hereinafter referred to as the “Administration”). The minimum retention periods prescribed herein govern only the Administration’s requirements for the preservation of the hereinafter specified books, records, and accounts. The failure to describe a particular book, record, or account shall not exempt a contractor from retaining the particular book, record, or account, unless expressly so authorized by the Administration.

(Sec. 204(b), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)); Pub. L. 97-31 (August 6, 1981); 49 CFR 1.66 (46 FR 47458, Sept. 28, 1981))

[48 FR 45560, Oct. 6, 1983]

**§ 380.21 Reproduction.**

(a) The records described in §380.24 may be microfilmed or otherwise reproduced in lieu of their retention in original form: *Provided*, That such reproductions shall not be made prior to completion of the audit of such records by the Administration.

(b) The following standards are established for reproduction processes:

(1) *Microfilm*. The film stock used in making photographic or microphotographic copies shall comply with Interim Federal Standard No. 125 covering photographic film and processed photographic film. The microfilm shall be regularly inspected for aging in accordance with Handbook 96, entitled, “Inspection of Processed Photographic Record Films for Aging Blemishes”, published by the U.S. Department of Commerce, National Bureau of Standards. If blemishes are detected, a dupli-

cate copy of the roll or print shall be made immediately.

(2) *Photocopy*. Electrostatic or wet processes only.

(Sec. 204(b), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)); Pub. L. 97-31 (August 6, 1981); 49 CFR 1.66 (46 FR 47458, Sept. 28, 1981))

[G.O. 101, 30 FR 12356, Sept. 28, 1965, as amended at 48 FR 45560, Oct. 6, 1983]

**§ 380.22 Responsibility.**

(a) Notwithstanding the minimum retention periods hereinafter set forth, it shall be the sole responsibility of any party subject to the provisions of this subpart to retain such books, records, and accounts:

(1) For the periods specifically provided by any statutory, regulatory, and contractual requirements of the Administration, or

(2) Pertaining to or related to matters in litigation, to matters which knowingly may become involved in litigation, to unsettled claims of whatsoever nature, and to all unsettled matters specifically reserved by the parties at the time of any final accounting as may be required under statute, contract and/or agreement.

(b) With respect to books, records, and accounts which, subject to the provision of paragraph (a) of this section, are to be disposed of upon the expiration of the minimum retention period prescribed herein, there shall be filed with the Records Officer, Maritime Administration, Washington, DC, 20590, a written notification, at least thirty (30) days prior to the contemplated, disposal requesting permission to dispose of records. MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable. The request shall be in such form that the books, records, and accounts can be readily identified. Within thirty (30) days after receipt of such notification the Records Officer shall grant approval for disposal, or advise the necessity for continued retention of all or any specified portion thereof. Failure of the Record Officer to reply within the thirty (30) days period following receipt by the Administration of such request shall constitute approval.

(c) Applications for special authority to dispose of certain books, records, and accounts prior to the expiration of prescribed minimum retention periods, and any inquiries as to the interpretation or applicability of this subpart to specific items shall be submitted to the Records Officer, Maritime Administration. MARAD will accept written or electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable. The applicant shall describe in detail the items to be disposed of and explain why continued retention is unnecessary.

[G.O. 101, 30 FR 12356, Sept. 28, 1965, as amended at 68 FR 62538, Nov. 5, 2003; 69 FR 61452, Oct. 19, 2004]

#### § 380.23 Supervision of records.

(a) Contractors and others subject to the provisions of this subpart shall designate, through formal action, the official company position by title, the incumbent of which shall be responsible for supervision of its document retention and disposal program. Immediately upon designation of the position, a copy of the formal action and name of the incumbent shall be filed with the Records Officer, Maritime Administration. MARAD will accept written or electronic options (such as facsimile and Internet) for transmission of required information, if practicable.

(b) The person in charge of the retention and disposal program shall maintain a record of all books, records, and accounts held in storage, and in such form that the items and their location are readily identifiable. A copy of the written, or by electronic options (such as facsimile and Internet), if practicable, notification requesting permission to dispose of any books, records, and accounts, and the original approval from the Administration, as required in § 380.22(b), together with a statement showing date, place and method of disposal will suffice as a record of such disposed items. These retention and disposal records shall be available at all times for inspection by Administration officials and auditors.

[69 FR 61452, Oct. 19, 2004]

#### § 380.24 Schedule of retention periods and description of records.

(a) The following records shall be retained for not less than two (2) years after final release agreement or settlement agreement is completed between the Administration and contractors under operating-differential subsidy contracts:

(1) Official company or corporate records such as certificates or articles of incorporation, minute books, stock ledgers, bond registers, merger or acquisition records, patents and copyrights;

(2) Financial statements and reports such as annual reports to stockholders and audit reports by independent public accountants;

(3) Insurance records such as policies, underwriters' audit reports, indemnity bonds, salvage data, and claim files;

(4) Contracts, agreements, franchises, licenses, etc., such as subsidy, charter, ship construction, and pooling agreements;

(5) Vessel operating records such as log books, surveys, position reports, and vessel itineraries;

(6) Voyage account items such as manifests, bills of lading, master's accounts, ship's payrolls;

(7) Underlying traffic records pertaining to tariffs, dray tickets, pooling agreements, passenger reports, freight and passenger conference records.

(b) The following records shall be retained for three (3) years after final audit and/or approval by the Administration:

(1) Ship construction or reconversion records such as bids, plans, progress payments, and construction-differential subsidy data;

(2) Canceled checks;

(3) Miscellaneous documents and work papers such as correspondence, operating and construction-differential subsidy rate data, subsidy adjustments pursuant to 46 CFR part 276 and approvals pursuant to Article II-10(c) of operating-differential subsidy contracts;

(4) Any document generated under the provisions of the Shipping Act, 1916;

(5) Books of account such as general and subsidiary ledgers, journals, cash books, and check registers;

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(6) Personnel records and supplementary records such as union agreements.

(c) Reports prepared by Federal, State, Local, or foreign governments pertaining to any documents referred to in this §380.24, shall be retained for the same period as prescribed herein for the retention of the documents to which they apply.

(d) If identical copies of the same document serve more than one purpose, only the original copy is required to be retained.

(Approved by the Office of Management and Budget under control number 2133-0501)

(Sec. 204(b), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)); Pub. L. 97-31 (August 6, 1981); 49 CFR 1.66 (46 FR 47458, Sept. 28, 1981))

[48 FR 45560, Oct. 6, 1983]

### Subpart D [Reserved]

## Subpart E—Compulsory Disclosure

### § 380.40 Subpoenas, other compulsory processes and requests.

In any case where it is sought by subpoena, order, or other compulsory process or other demand of a court or other authority to require the production or disclosure of any record in the files of the Maritime Administration or other information acquired by an officer or employee of the Maritime Administration as a part of the performance of his official duties or because of his official status, the matter shall be immediately referred for determination, through the Secretary of the Maritime Administration and Maritime Subsidy Board, to the Maritime Administrator, Department of Transportation.

[G.O. 112, 36 FR 21816, Nov. 16, 1971]

## PART 381—CARGO PREFERENCE— U.S.-FLAG VESSELS

Sec.

381.1 Purpose.

381.2 Definitions.

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381.4 Fair and reasonable participation.

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381.8 Subsidized vessel participation.

381.9 Available U.S.-flag service.

AUTHORITY: 46 App. U.S.C. 1101, 1114(b), 1122(d) and 1241; 49 CFR 1.66.

SOURCE: General Order 103, 36 FR 6894, Apr. 10, 1971, unless otherwise noted.

### § 381.1 Purpose.

The purpose of this part 381 is to prescribe regulations to be followed by all departments and agencies having responsibility under the Cargo Preference Act of 1954, section 901(b) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1241(b)), in the administration of their programs with respect to that Act, and to provide a uniform system for the collection of data on the administration of such programs for use in preparing the annual reports to Congress required by that Act.

### § 381.2 Definitions.

(a) *Cargo Preference Act of 1954* means section 901(b) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1241(b)).

(b) *Cargoes subject to the Cargo Preference Act of 1954*, include equipment, material or commodities:

(1) Procured, contracted for or otherwise obtained within or outside the United States for the account of the United States;

(2) Furnished within or outside the United States to or for the account of any foreign nation without provision for reimbursement;

(3) Furnished within or outside the United States for the account of any foreign nation in connection with which the United States advances funds or credits or guarantees the convertability of foreign currencies.

(4) Procured, contracted for, or otherwise obtained within or outside of the United States with advance of funds, loans or guaranties made by or on behalf of the United States.

(c) *Department or agency having responsibility under the Cargo Preference Act of 1954* means any department or agency of the Federal Government, administering a program that involves the transportation on ocean vessels of cargoes subject to the Cargo Preference Act of 1954. At present, these agencies include:

(1) Department of State.

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- (2) Department of Agriculture.
- (3) Department of Defense.
- (4) Post Office Department.
- (5) General Services Administration.
- (6) Export-Import Bank of the United States.
- (7) National Aeronautics and Space Administration.
- (8) Inter-American Development Bank.
- (9) U.S. Information Agency.
- (10) Department of Interior.
- (11) Department of Commerce.
- (12) Department of Treasury.
- (13) Department of Health, Education, and Welfare.
- (14) Department of Housing and Urban Development.
- (15) Department of Transportation.
- (16) Atomic Energy Commission.
- (17) Tennessee Valley Authority.
- (18) Veterans Administration.
- (19) Smithsonian Institution.
- (20) Library of Congress.

(d) *Liner parcel* means any cargo, dry or liquid, normally carried under berth terms by common carriers in ocean trades.

(Reorganization Plans No. 21 of 1950 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840) as amended by Pub. L. 91-469 (84 Stat. 1036) and Department of Commerce Organization Order 10-8 (38 FR 19707, July 23, 1973))

[G.O. 103, 36 FR 6894, Apr. 10, 1971, as amended by Amdt. 1, 36 FR 10739, June 2, 1971; 36 FR 19367, Oct. 5, 1971; 42 FR 57126; Nov. 1, 1977]

### § 381.3 Reporting information and procedure.

(a) *Reports of cargo preference shipments.* Each department or agency subject to the Cargo Preference Act of 1954, except the Department of Defense for which separate regulations will be issued, shall furnish to the Office of National Cargo and Compliance, Maritime Administration, U.S. Department of Transportation, Washington, DC 20590, within 20 working days of the date of loading for shipments originating in the United States or within 30 working days for shipments originating outside the United States, the following information concerning each shipment of preference cargo:

(1) Identification of the sponsoring U.S. Government agency or department;

(2) Name of vessel;

- (3) Vessel flag of registry;
- (4) Date of loading;
- (5) Port of loading;
- (6) Port of final discharge;
- (7) Commodity description;
- (8) Gross weight in pounds;
- (9) Total ocean freight revenue in U.S. dollars.

(b) *Format of reports.* The information listed in paragraph (a) of this section shall be furnished to the Maritime Administration in a format prepared by the reporting department or agency and approved by the Maritime Administrator, Department of Transportation as suitable for the purpose of carrying out his responsibility under section 901(b)(2) of the Merchant Marine Act, 1936, as amended, pursuant to the authority delegated to him thereunder by the Secretary of Transportation under section 3 of Department Organization Order 10-8, 36 FR 1223. Where obtainable, a properly notated and legible copy of the ocean bill of lading in English will suffice. Reporting formats shall be submitted for approval by April 30, 1971.

(c) *Shipments made subject to the Act.* In those instances where a shipment has been made that was not known to be subject to the Cargo Preference Act of 1954 when it was made, but subsequent events cause it to be subject to that Act, the agency taking the action that caused the shipment to be subject to the Act shall furnish to the Office of National Cargo and Compliance the information listed in paragraph (a) of this section in the approved reporting form.

[General Order 103, 36 FR 6894, Apr. 10, 1971, as amended at 57 FR 13047, Apr. 15, 1992]

### § 381.4 Fair and reasonable participation.

In order to insure a fair and reasonable participation by U.S.-flag commercial vessels in liner parcel cargoes subject to the Cargo Preference Act of 1954, as required by that Act, the head of each department or agency having responsibility under that Act shall prescribe regulations or formal staff instructions providing for the cargo mix of liner parcel cargoes transported on ocean vessels to be divided between privately owned U.S.-flag vessels and foreign-flag vessels in such a manner as to

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yield to the U.S.-flag vessels freight revenue per long ton at least equal to the freight revenue per long ton afforded the foreign-flag vessels participating in the same grant, loan, or purchase transaction. A copy of the regulations or staff instructions prescribed by each department or agency shall be furnished to the Secretary, Maritime Administration, no later than June 30, 1971, for approval.

[G.O. 103, Amdt. 1, 36 FR 10739, June 2, 1971]

### § 381.5 Fix American-flag tonnage first.

Each department or agency having responsibility under the Cargo Preference Act of 1954 shall cause each full shipload of cargo subject to said act to be fixed on U.S.-flag vessels prior to any fixture on foreign-flag vessels for at least that portion of all preference cargoes required by that Act and the Food Security Act of 1985 to be shipped on U.S.-flag vessels, computed by purchase authorization or other quantitative unit satisfactory to the agency involved and the Maritime Administration, except where such department or agency determines, with the concurrence of the Maritime Administration, that (a) U.S.-flag vessels are not available at fair and reasonable rates for U.S.-flag commercial vessels, or (b) that there is a substantially valid reason for fixing foreign-flag vessels first.

[G.O. 103, Amdt. 2, 36 FR 19254, Oct. 1, 1971, as amended at 57 FR 13047, Apr. 15, 1992]

### § 381.6 Informal grievance procedure.

(a) Whenever any person has a question, problem, complaint, grievance, or controversy pertaining to the terms and conditions of any tenders, charter party terms, or other matter involving the administration of the Cargo Preference Act of 1954, such person may request the Maritime Administration to afford him an opportunity to discuss the matter informally with representatives of the Maritime Administration and, if other U.S. Government agencies or foreign missions, embassies, or agencies acting on behalf of a foreign government are involved with them or persons authorized to speak for them.

(b) In such cases, a request may be made by telephone or letter to the Chief, Office of Market Development,

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Maritime Administration, Washington, DC 20590, (202) 366-4610. When such a request has been received, the Maritime Administrator, Department of Transportation or his designated representative will promptly consider the matter on its merits and provide assistance if possible. If the matter cannot be resolved satisfactorily by the Maritime Administration, the Maritime Administrator, Department of Transportation or his designated representative will then arrange for a meeting at a time and place satisfactory to all interested parties so that the matter may be freely discussed and resolved.

(c) At such meetings, the Maritime Administrator, Department of Transportation or his designated representative may request any U.S. Government agency, foreign mission, embassy, or agency acting on behalf of a foreign government, or others having an interest in the matter to attend such a conference, or to send representatives authorized to speak for them. All such meetings and conferences will be conducted in an informal manner.

[G.O. 103, Amdt. 3, 37 FR 3641, Feb. 18, 1972, as amended at 57 FR 13047, Apr. 15, 1992]

### § 381.7 Federal Grant, Guaranty, Loan and Advance of Funds Agreements.

In order to insure a fair and reasonable participation by privately owned United States-flag commercial vessels in transporting cargoes which are subject to the Cargo Preference Act of 1954 and which are generated by U.S. Government Grant, Guaranty, Loan and/or Advance of Funds Programs, the head of each affected department or agency shall require appropriate clauses to be inserted in those Grant, Guaranty, Loan and/or Advance of Funds Agreements and all third party contracts executed between the borrower/grantee and other parties, where the possibility exists for ocean transportation of items procured, contracted for or otherwise obtained by or on behalf of the grantee, borrower, or any of their contractors or subcontractors. The clauses required by this part shall provide that at least 50 percent of the freight revenue and tonnage of cargo generated by the U.S. Government Grant, Guaranty, Loan or Advance of Funds be transported on privately owned United



States-flag commercial vessels. These clauses shall also require that all parties provide to the Maritime Administration the necessary shipment information as set forth in § 381.3. A copy of the appropriate clauses required by this part shall be submitted by each affected agency or department to the Secretary, Maritime Administration, for approval no later than 30 days after the effective date of this part. The following are suggested acceptable clauses with respect to the use of United States-flag vessels to be incorporated in the Grant, Guaranty, Loan and/or Advance of Funds Agreements as well as contracts and subcontracts resulting therefrom:

(a) *Agreement Clauses.* "Use of United States-flag vessels:

"(1) Pursuant to Pub. L. 664 (43 U.S.C. 1241(b)) at least 50 percent of any equipment, materials or commodities procured, contracted for or otherwise obtained with funds granted, guaranteed, loaned, or advanced by the U.S. Government under this agreement, and which may be transported by ocean vessel, shall be transported on privately owned United States-flag commercial vessels, if available.

"(2) Within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, 'on-board' commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (a)(1) of this section shall be furnished to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590."

(b) *Contractor and Subcontractor Clauses.* "Use of United States-flag vessels: The contractor agrees—

"(1) To utilize privately owned United States-flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this contract, to the

extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels.

"(2) To furnish within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, 'on-board' commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (b) (1) of this section to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590.

"(3) To insert the substance of the provisions of this clause in all subcontracts issued pursuant to this contract."

(Reorganization Plans No. 21 of 1950 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840) as amended by Pub. L. 91-469 (84 Stat. 1036) and Department of Commerce Organization Order 10-8 (38 FR 19707, July 23, 1973))

[42 FR 57126, Nov. 1, 1977]

### § 381.8 Subsidized vessel participation.

(a) For the purpose of approving subsidized U.S.-flag liner and bulk vessels competing for the carriage of dry bulk preference cargoes, each department or agency having responsibility under the Cargo Preference Act of 1954 (46 U.S.C. 1214(b)), shall evaluate bids received from the operators of such vessels in the manner described in this section.

(b) When a subsidized vessel operator is the apparent low U.S.-flag responsive bidder for a dry bulk preference cargo, the responsible department or agency shall evaluate the subsidized operator's bid by:

(1) Requesting from MARAD an amount for the operating-differential subsidy (ODS) likely to be paid for the carriage of such cargo expressed as a cost per ton for performing the voyage by the apparent low responsive subsidized bidders;

(2) Deriving "augmented bids" for the subsidized operators by adding the ODS amount to each subsidized operator's bid;

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(3) Comparing the augmented bids of the subsidized operators and the bids of unsubsidized operators to determine the apparent low responsive bidder;

(4) Requesting from MARAD a fair and reasonable guideline rate for the apparent low responsive bidder which shall be based on MARAD's calculation of anticipated costs (less ODS in the case of a subsidized vessel) for the voyage plus a reasonable amount for profit for the voyage; and

(5) Determining whether the subsidized operator's unaugmented bid or the unsubsidized operator's bid, whichever was determined to be the lowest responsive bid pursuant to paragraph (b)(3) of this section, is at or below the fair and reasonable guideline rate.

(c) If the amount of dry bulk cargo to be shipped is changed at any time prior to award, the department or agency shall request that MARAD provide new ODS amounts applicable to the carriage. The department or agency shall redetermine the augmented bids before determining the lowest responsive bid and requesting from MARAD a revised fair and reasonable guideline rate in accordance with the provisions of paragraph (b) of this section.

(d) Whenever a bid is submitted for a U.S.-flag vessel for the transportation of dry bulk preference cargo, the responsible department or agency shall only approve bids that apply to an individual vessel, and may not accept combined bids submitted for more than one vessel. If two or more vessels are offered, separate bids shall be submitted for each vessel. A bidder may submit a conditional lower bid for each vessel to be effective only if more than one vessel is contracted to carry the cargo.

(e) The requirements of this section shall apply only to those departments or agencies that directly pay or finance all or part of U.S.-flag ocean freight transportation costs for the carriage of dry bulk preference cargoes, in accordance with this part.

(f) The requirements of this section shall not apply to foreign aid consisting of direct cash transfer payments under specific agreements between departments or agencies and the recipient country with respect to the utilization of U.S.-flag vessels for

transportation of commodities purchased with such funds.

[53 FR 24272, June 28, 1988]

#### § 381.9 Available U.S.-flag service.

For purposes of shipping bulk agricultural commodities under programs administered by sponsoring Federal agencies from U.S. Great Lakes ports during the 1996-2000 Great Lakes shipping seasons, if direct all-U.S.-flag service, at fair and reasonable rates, is not available at U.S. Great Lakes ports, a joint service involving a foreign-flag vessel(s) carrying cargo no farther than a Canadian port(s) or other point(s) on the Gulf of St. Lawrence, with transshipment via a U.S.-flag privately-owned commercial vessel to the ultimate foreign destination, will be deemed to comply with the requirement of "available" commercial U.S.-flag service under the Cargo Preference Act of 1954. Shipper agencies considering bids resulting in the lowest landed cost of transportation based on U.S.-flag rates and service shall include within the comparison of U.S.-flag rates and service, for shipments originating in U.S. Great Lakes ports, through rates (if offered) to a Canadian port or other point on the Gulf of St. Lawrence and a U.S.-flag leg for the remainder of the voyage. The "fair and reasonable" rate for this mixed service will be determined by considering the U.S.-flag component under the existing regulations at 46 CFR Part 382 or 383, as appropriate, and incorporating the cost for the foreign-flag component into the U.S.-flag "fair and reasonable" rate in the same way as the cost of foreign-flag vessels used to lighten U.S.-flag vessels in the recipient country's territorial waters. Alternatively, the supplier of the commodity may offer the Cargo FOB Canadian transshipment point, and MARAD will determine fair and reasonable rates accordingly.

[61 FR 24897, May 17, 1996]

**PART 382—DETERMINATION OF FAIR AND REASONABLE RATES FOR THE CARRIAGE OF BULK AND PACKAGED PREFERENCE CARGOES ON U.S.-FLAG COMMERCIAL VESSELS**

Sec.

382.1 Scope.

382.2 Data submission.

382.3 Determination of fair and reasonable rates.

382.4 Waivers.

AUTHORITY: 46 App. U.S.C. 1114, 1241(b); 49 CFR 1.66.

SOURCE: 63 FR 3828, Jan. 27, 1998, unless otherwise noted.

**§ 382.1 Scope.**

The regulations in this part prescribe the type of information that shall be submitted to the Maritime Administration (MARAD) by operators interested in carrying bulk and packaged preference cargoes, and the method for calculating fair and reasonable rates for the carriage of dry (including packaged) and liquid bulk preference cargoes on U.S.-flag commercial vessels, except vessels engaged in liner trades, which is defined as service provided on an advertised schedule, giving relatively frequent sailings between specific U.S. ports or ranges and designated foreign ports or ranges.

**§ 382.2 Data submission.**

(a) *General.* The operators shall submit information, described in paragraphs (b) and (c) of this section, to the Director, Office of Costs and Rates, Maritime Administration, Washington, DC 20590. To the extent a vessel is time chartered, the operator shall also submit operating expenses for that vessel. All submissions shall be certified by the operators. A further review based on the independent CPA performing an engagement consistent with professional standards, i.e., an attestation engagement, is recommended. Submissions are subject to verification, at MARAD's discretion, by the Office of the Inspector General, Department of Transportation. MARAD's calculations of the fair and reasonable rates for U.S.-flag vessels shall be performed on the basis of cost data provided by the

U.S.-flag vessel operator, as specified herein. If a vessel operator fails to submit the required cost data, MARAD will not construct the guideline rate for the affected vessel, which may result in such vessel not being approved by the sponsoring Federal agency.

(b) *Required vessel information.* The following information shall be submitted not later than April 30, 1998, for calendar year 1997 and shall be updated not later than April 30 for each subsequent calendar year. In instances where a vessel has not previously participated in the carriage of cargoes described in § 382.1, the information shall be submitted not later than the same date as the offer for carriage of such cargoes is submitted to the sponsoring Federal agency, and/or its program participant, and/or its agent and/or program's agent, or freight forwarder.

- (1) Vessel name and official number.
- (2) Vessel DWT (summer) in metric tons.
- (3) Date built, rebuilt and/or purchased.
- (4) Normal operating speed.
- (5) Daily fuel consumption at normal operating speed, in metric tons (U.S. gallons for tugs) and by type of fuel.
- (6) Daily fuel consumption in port while pumping and standing, in metric tons (U.S. gallons for tugs) and by type of fuel.
- (7) Total capitalized vessel costs (list and date capitalized improvements separately), and applicable interest rates for indebtedness (where capital leases are involved, the operator shall report the imputed capitalized cost and imputed interest rate).
- (8) Operating cost information, to be submitted in the format stipulated in 46 CFR 232.1, on Form MA-172, Schedule 310. Operators are encouraged to provide operating cost information for similar vessels that the operator considers substitutable within a category, as defined in § 382.3(a)(1), in the aggregate on a single schedule. Information shall be applicable to the most recently completed calendar year.
- (9) Number of vessel operating days pertaining to data reported in paragraph (b)(8) of this section for the year ending December 31. For purposes of this part, an operating day means any day on which a vessel or tug/barge unit

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is in a seaworthy condition, fully manned, and either in operation or standing ready to begin pending operations.

(c) *Required port and cargo handling information.* The port and cargo handling costs listed in this paragraph shall be provided semiannually for each cargo preference voyage terminated during the period. The report shall identify the vessel, cargo and tonnage, and round-trip voyage itinerary including dates of arrival and departure at port or ports of loading and discharge. The semiannual periods and the information to be submitted are as follows:

Period	Due date
April 1–September 30 .....	January 1.
October 1–March 31 .....	July 1.

(1) *Port expenses.* Total expenses or fees, by port, for pilots, tugs, line handlers, wharfage, port charges, fresh water, lighthouse dues, quarantine service, customs charges, shifting expenses, and any other appropriate port expense.

(2) *Cargo expense.* Separately list expenses or fees for stevedores, elevators, equipment, and any other appropriate expenses.

(3) *Extra cargo expenses.* Separately list expenses or fees for vacuators and/or cranes, lightering (indicate tons moved and cost per ton), grain-to-grain cleaning of holds or tanks, and any other appropriate expenses.

(4) *Canal expenses.* Total expenses or fees for agents, tolls (light or loaded), tugs, pilots, lock tenders and boats, and any other appropriate expenses. Indicate waiting time and time of passage.

(d) *Other requirements.* Unless otherwise provided, operators shall use generally accepted accounting principles and MARAD's regulations at 46 CFR part 232, Uniform Financial Reporting Requirements, for guidance in submitting cost data. Notwithstanding the general provisions in 46 CFR 232.2(c) for MARAD program participants, each operator shall submit cost data in the format that conforms with the accounting practices reflected in the operator's trial balance and, if audited statements are prepared, the audited

financial statements. Data requirements stipulated in paragraph (b) of this section that are not included under those reporting instructions shall be submitted in a similar format. If the operator has already submitted to MARAD, for other purposes, any data required under paragraph (b) of this section, its submission need not be duplicated to satisfy the requirements of this part.

(e) *Presumption of confidentiality.* MARAD will initially presume that the material submitted in accordance with the requirements of this part is privileged or confidential within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4). In the event of a subsequent request for any portion of that data under the FOIA, MARAD will inform the submitter of such request and allow the submitter the opportunity to comment. The submitter shall claim or reiterate its claim of confidentiality at that time by memorandum or letter, stating the basis for such assertions of exemption from disclosure. The Freedom of Information Act Officer, or the Chief Counsel of MARAD, will inform the submitter of the intention to disclose any information claimed to be confidential, after the initial FOIA request, or after any appeal of MARAD's initial decision, respectively.

(Approved by the Office of Management and Budget under control number 2133-0514)

**§ 382.3 Determination of fair and reasonable rate.**

Fair and reasonable rates for the carriage of preference cargoes on U.S.-flag commercial vessels shall be determined as follows:

(a) *Operating cost component—(1) General.* An operating cost component for each category, based on average operating costs of participating vessels within a vessel size category, shall be determined, at least twice yearly, on the basis of operating cost data for the calendar year immediately preceding the current year that has been submitted in accordance with § 382.2. The operating cost component shall include all operating cost categories, as specified in 46 CFR 232.5, Form MA-172, Schedule 310, Operating Expenses. For purposes of these regulations, charter

hire expenses are not considered operating costs. MARAD shall index such data yearly to the current period, utilizing the escalation factors for wage and non-wage costs used in escalating operating subsidy costs for the same period.

(2) *Fuel.* Fuel costs within each category shall be determined based on the average actual fuel consumptions, at sea and in port, and current fuel prices in effect at the time of the preference cargo voyage(s).

(3) *Vessel categories.* Vessels shall be placed in categories by deadweight capacities (DWT), as follows:

Group I—under 10,000 DWT  
Group II—10,000—19,999 DWT  
Group III—20,000—34,999 DWT  
Group IV—35,000 DWT and over.

(b) *Capital Component*—(1) *General.* An average capital cost component for each category shall be constructed, at least twice yearly, consisting of vessel depreciation, interest, and return on equity.

(2) *Items included.* The capital cost component shall include:

(i) *Depreciation.* The owners' capitalized vessel costs, including capitalized improvements, shall be depreciated on a straight-line basis over a 20-year economic life, except vessels purchased or reconstructed when their age was greater than 10 years old. To the extent vessels are chartered or leased, the operator shall submit the capitalized cost of the vessel owner and imputed interest rate. If these items are not furnished, MARAD will construct these amounts. When vessels more than 10 years old are acquired, a depreciation period of 10 years shall be used. Capitalized improvements made to vessels more than 10 years old shall be depreciated over a 10-year period. When vessels more than 10 years old are reconstructed, MARAD will determine the depreciation period.

(ii) *Interest.* The cost of debt shall be determined by applying each vessel owner's actual interest rates to the outstanding vessel indebtedness. MARAD shall assume that original vessel indebtedness is 75 percent of the owners' capitalized vessel costs, including capitalized improvements, and that annual principal payments are made in equal installments over the economic

life of the vessels as determined in accordance with paragraph (b)(2)(i) of this section. Where an operator uses a variable interest rate, the operator's actual interest rate at the time of calculation of the average capital cost component shall be used. The ten-year Treasury bill (T-bill) rate plus one percent on the first business day of the year or the first business day on or after July 1 shall be used for operators without vessel debt and when the actual rate is unavailable.

(iii) *Return on equity.* The rate of return on equity shall be computed in the same manner as described in paragraph (b)(3) of this section. For the purpose of determining equity, it shall be assumed that the vessel's constructed net book value, less outstanding constructed principal, is equity. The constructed net book values shall equal the owners' capitalized cost minus accumulated straight-line depreciation.

(3) *Return on working capital.* For each voyage a return on working capital shall be included as a voyage related capital cost element, and thus not part of the averaged costs. Working capital shall equal the dollar amount necessary to cover 100 percent of the averaged operating costs and estimated voyage costs for the voyage. The rate of return shall be based on an average of the most recent return of stockholders' equity for a cross section of transportation companies, including maritime companies.

(4) *New vessel allowance.* Newly constructed vessels and vessels acquired during or before their fifth year of age will receive an additional allowance for acquisition capital as part of the capital cost element. For the first year following construction or acquisition by the operator, a daily amount equal to ten percent of capitalized acquisition costs, divided by 300 operating days, shall be included. This amount shall be reduced by one percent of capitalized acquisition costs each subsequent year. No allowance shall be included after the tenth year following construction.

(5) *Voyage component.* The annual average depreciation, interest, and return on equity for vessels in each category shall be divided by 300 vessel operating

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days to yield the daily cost factors. Total voyage days shall be applied to the daily cost factors and totaled with the return on working capital and new vessel allowance for the voyage to determine the daily capital cost component.

(c) *Port and cargo handling cost component.* MARAD shall calculate an estimate of all port and cargo handling costs on the basis of the reported cargo tender terms. The port and cargo handling cost component shall be based on vessels in the category and the most current information available verified by information submitted in accordance with §382.2(c), or as otherwise determined by MARAD, such as by analysis of independent data obtained from chartering agencies.

(d) *Brokerage and overhead component.* An allowance for broker's commission and overhead expenses of 8.5 percent shall be added to the sum of the operating cost component, the capital cost component, and the port and cargo handling cost component.

(e) *Determination of voyage days.* The following assumptions shall be made in determining the number of preference cargo voyage days:

(1) The voyage shall be round-trip with the return in ballast to a port or port range selected by MARAD as the most appropriate, unless the vessel is scrapped or sold after discharge of the preference cargo and does not return to the United States as a U.S.-flag vessel. In this event, only voyage days from the load port to the discharge port, including time allowed to discharge, shall be included.

(2) Cargo is loaded and discharged as per cargo tender terms interpreted in accordance with the "International Rules For the Interpretation of Trade Terms" (INCOTERMS) published by the International Chamber of Commerce.

(3) Total loading and discharge time includes the addition of a factor to account for delays and days not worked.

(4) One extra port day is included at each anticipated bunkering port.

(5) An allowance shall be included for canal transits, when appropriate.

(6) Transit time shall be based on the average speed of vessels in the category. When calculating the vessels'

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average speed, individual vessel speeds will be reduced by five percent for self-propelled vessels and ten percent for tugs/barges to account for weather conditions.

(f) *Determination of cargo carried.* The amount of cargo tonnage used to calculate the rate shall be based on the tender offer or charter party terms. In instances when separate parcels of preference cargo are booked or considered for booking on the same vessel, whether under a single program or different programs, a guideline rate shall be provided based on the combined voyage.

(g) *Total rate.* The guideline rate shall be the total of the operating cost component, the capital cost component, the port and cargo handling cost component, and the broker's commission and overhead component. The fair and reasonable rate can be expressed as total voyage revenue or be divided by the amount of cargo to be carried, as prescribed in paragraph (f) of this section, and expressed as cost per ton, whichever MARAD deems most appropriate.

**§ 382.4 Waivers.**

In special circumstances and for good cause shown, the procedures prescribed in this part may be waived in keeping with the circumstances of the present, so long as the procedures adopted are consistent with the Act and with the intent of this part.

**PART 383 [RESERVED]**

**PART 385—RESEARCH AND DEVELOPMENT GRANT AND COOPERATIVE AGREEMENTS REGULATIONS**

**GENERAL**

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**REGULATION SYSTEM**

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### DEFINITION OF TERMS

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- 385.21 Definitions.

### GENERAL POLICIES

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- 385.32 Selection of award instrument.
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- 385.34 Responsibility for issuing solicitations for proposals or applications.
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- 385.36 Public notice of availability of assistance awards.
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- 385.38 Joint funding.
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- 385.40 Disputes.

### CRITERIA FOR AWARD

- 385.50 Scope.
- 385.51 Criteria: Projects.
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### FORMS OF AGREEMENT

- 385.60 Scope.
- 385.61 Grant and cooperative agreements: Special provisions.
- 385.62 Grant and cooperative agreements: Standard general provisions.

AUTHORITY: Sec. 204(b), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)); Reorganization Plans No. 21 of 1950 (64 Stat. 1273), and No. 7 of 1961 (75 Stat. 840), as amended by Pub. L. 91-469 (84 Stat. 1036); Department of Commerce Organization Order 10-8 (36 FR 19707, July 23, 1973); and Secretary's Circular 30 (Nov. 5, 1979).

SOURCE: 45 FR 66168, Oct. 6, 1980, unless otherwise noted.

### GENERAL

#### § 385.1 Scope.

This part sets forth information about the Maritime Administration (MarAd) assistance regulations: Their purpose, authority, applicability, issuance, arrangement, implementation, and exception procedure; definitions of terms; and general MarAd assistance policies.

### REGULATION SYSTEM

#### § 385.2 Scope.

Sections 385.2 through 385.9 set forth introductory information pertaining to the MarAd assistance regulations:

Their purpose, authority, applicability, exclusions, issuance, arrangement, publication, and exceptions.

#### § 385.3 Purpose.

Sections 385.2 through 385.9 establish the MarAd assistance regulations which codify, implement, and publish uniform assistance policies and selected procedures applicable to MarAd and recipients of MarAd assistance awards. The MarAd assistance regulations do not, in and of themselves, provide authority for the use of assistance instruments nor the making of assistance awards where statutory authority has not been otherwise provided. Generic authority to award grants and cooperative agreements is provided in Pub. L. 95-224, the Federal Grant and Cooperative Agreement Act of 1977. The assistance regulations are distinct from the Federal and MarAd and Department of Transportation procurement regulations.

#### § 385.4 Authority.

The MarAd assistance regulations are issued pursuant to section 204(b) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)), and pursuant to delegation of authority by the Secretary of Transportation to the Maritime Administrator, Department of Transportation.

#### § 385.5 Applicability.

The MarAd assistance regulations apply to all MarAd research and development programs which will result in assistance awards, and to all recipients eligible for MarAd assistance awards such as state and local governments, institutions of higher education, hospitals, other nonprofit organizations, individuals, profitmaking organizations, and foreign organizations. The provisions of this part govern the award and administration of all such financial assistance matters, including resolutions and guidelines issued by MarAd except:

- (a) As otherwise required by statute; and,
- (b) As otherwise provided by specific program regulations.

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### § 385.6 Exclusions.

Excluded from this part are requirements pertaining to procurement contracts subject to the Federal Property and Administrative Services Act of 1949 and the Federal and MarAd procurement regulations, interagency agreements, memorandums of understanding and programs or projects which directly disseminate technical information, or provide consultation, technical service, information, and data counseling to recipients without the use of an assistance instrument. Also excluded is the sale, lease, license, or other authorization to use Federal property, when such use is not incidental to the purpose of stimulation or support.

### § 385.7 Issuance.

The MarAd assistance regulations are issued in the Code of Federal Regulations as Part 385, Chapter II, of Title 46, Shipping, after publication in the FEDERAL REGISTER. Copies of the MarAd assistance regulations in the FEDERAL REGISTER and Code of Federal Regulations may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402.

### § 385.8 Arrangement.

(a) *General Plan.* The general format, numbering system, and nomenclature used in this part conform with FEDERAL REGISTER standards.

(b) *Citation.* The MarAd assistance regulations will be cited in accordance with FEDERAL REGISTER standards. Thus, this paragraph, when referred to within divisions of the MarAd assistance regulations, should be cited as “§385.8(b).” When this section is referred to formally in other documents outside of this part, it should be cited as “46 CFR 385.8(b).”

(c) *Implementation.* Instructions and procedures needed by MarAd to internally implement this part will be contained in a separate MarAd Financial Assistance Manual, which will be available to the public upon request.

### § 385.9 Exceptions, deviations, or waivers.

Requests for exceptions, deviations, or waivers from the requirements of

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this part, unless exceptions are required by program legislation or program regulations, shall be submitted to the Grants Officer. Exceptions may be approved by the Grants Officer on matters within the scope of his authority, or obtained by said Grants Officer from higher authority within the Department of Transportation or from the Office of Management and Budget when required by law or other applicable Federal requirement.

### DEFINITION OF TERMS

#### § 385.20 Scope.

Only those definitions needed to understand this part will be defined. Generally, terms defined elsewhere in statutes, OMB circulars, and other Federal requirements will not be restated. Special attention is directed to the definitions in the Standard General Provisions of MarAd’s grant and cooperative agreements (See §385.62).

#### § 385.21 Definitions.

(a) *Assistance* is where the principal purpose of the relationship is the transfer of money, property, services or anything of value to a recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute rather than of acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government.

(b) *Assistance instrument* is a general term which identifies a class of instruments used to award assistance. These instruments include grant and cooperative agreements, as defined in §385.32 (c) and (d) of this part.

(c) *Act* means the Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95–224).

(d) *MarAd* means the Maritime Administration within the Department of Transportation.

(e) *Secretary* means the Secretary of Transportation.

(f) *Maritime Administrator* means the Maritime Administrator, Department of Transportation to whom the Secretary has delegated authority to administer within MarAd the provisions of the Act.



(g) *Grants Officer* means the primary delegate of the Maritime Administrator responsible for administration of grants and cooperative agreements for research and development within MarAd.

(h) *Awards Officer* means the principal executive subordinate to the Grants Officer responsible for the day-to-day administration of grants and cooperative agreements for research and development.

#### GENERAL POLICIES

##### § 385.31 Scope.

Sections 385.31 through 385.62 set forth the regulations applicable to all assistance instruments as defined herein.

##### § 385.32 Selection of award instrument.

(a) *General.* This section provides guidance on the appropriate use of award instruments consistent with the Act and the supplementary interpretative guidelines required by section 9 of the Act, which were published by the OMB in the FEDERAL REGISTER of August 18, 1978 (41 FR 36860), and are incorporated by reference herein. This section applies to all program and individual transactions where the choice of award instruments is within the administrative discretion of MarAd and is not otherwise prescribed or limited by law. A variety of award instruments is available as the means for defining the terms and conditions and the nature of the relationship between MarAd and eligible recipients. The award instruments are intended to be different in purpose, application, content, and nature. When properly employed, they create different relationships between the parties. Because of these differences, the decision to use a particular instrument must be made deliberately. The determination of whether a program, to be implemented through individual transactions, is principally one of acquisition or assistance will be made by the Grants Officer. MarAd generally will employ the cooperative agreement form of assistance instrument but will employ the grant form where deemed appropriate.

(b) *Procurement contract.* A procurement contract shall be used as the legal instrument to reflect a relationship between the Federal Government and a state or local government or other recipient whenever (1) the principal purpose of the instrument is the acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; or (2) whenever MarAd determines in a specific instance that the use of a type of procurement contract is appropriate.

(c) *Grant agreement.* A type of grant agreement shall be used as the legal instrument to reflect a relationship between the Federal Government and a state or local government or other recipient whenever the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the state or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and no substantial involvement is anticipated between MarAd, acting for the Federal Government, and the state or local government or other recipient during performance of the contemplated activity.

(d) *Cooperative agreement.* A type of cooperative agreement shall be used as the legal instrument to reflect a relationship between the Federal Government and a state or local government or other recipient whenever the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the state or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and substantial involvement is anticipated between MarAd, acting for the Federal Government, and the state or local government or other recipient during performance of the contemplated activity.

**§ 385.33 Unsolicited applications and proposals for financial assistance awards.**

(a) *Policy.* Although it is MarAd policy to solicit applications and proposals for assistance awards where possible, MarAd also values obtaining innovative ideas, methods, and approaches in maritime transportation areas offered by the public through unsolicited applications and proposals. It is the policy of the Government to foster and encourage the submission of unsolicited proposals. This § 385.33 is designed to encourage the submission of unsolicited proposals relating to MarAd's mission and to eliminate restraints which discourage the generation and acceptance of innovative ideas through unsolicited proposals.

(b) *Scope.* This section applies to unsolicited proposals being considered for support through an assistance instrument. This section does not apply when a procurement contract is the appropriate award instrument in accordance with § 385.32(b).

(c) *Definition of unsolicited proposal.* The term *unsolicited proposal* means a written offer to perform a proposed task or effort, initiated and submitted to MarAd by a prospective recipient (offeror) without solicitation by MarAd, and with the objective of obtaining an award. The term may include both requests for support of a new project and requests for additional support of a previously funded project (renewals).

(d) *Advance consultation.* Organizations or individuals who are interested in submitting an unsolicited proposal are encouraged, before expending extensive effort in preparing a detailed unsolicited proposal or submitting any proprietary information to the Government, to make preliminary inquiries of MarAd program staff as to the general interest in the type of project contemplated. Prior contact with agency technical personnel is permissible and is encouraged, with the limited objectives of conveying to the prospective recipient an understanding of the agency mission and interest relative to the type of project contemplated. The project officer shall not indicate or imply in discussions with the potential proposer that a proposal will result in

an award. Nothing is to be suggested to encourage or authorize the potential proposer to perform any work at MarAd expense in anticipation of support or an award. If there have been prior discussions with a particular MarAd program office, a statement of this fact should be stated on the face of the proposal.

(e) *Guides.* Guides for preparing the content of unsolicited proposals are available from the Awards Officer (M-900), Maritime Administration, U.S. Department of Transportation, Washington, DC 20590. Notwithstanding these guides, state and local governments may submit unsolicited applications or proposals using the application forms authorized by OMB Circular No. A-102, Attachment M.

(f) *Submission point.* All unsolicited proposals for new or renewals of financial assistance awards shall be submitted to Awards Officer (M-900), Maritime Administration, U.S. Department of Transportation, Washington, DC 20590.

(g) *Receipt and review.* (1) Receipt of unsolicited proposals will be acknowledged promptly by the Awards Officer and then forwarded expeditiously to potentially interested program offices for comment. Each unsolicited proposal that is circulated for a comprehensive evaluation shall have a legend attached or imprinted on it by the Awards Officer, identifying it as an unsolicited proposal and stating that it shall be used only for purposes of evaluation.

(2) The responsible program officials shall evaluate the proposal fairly and objectively using the criteria in §§ 385.50 through 385.52.

(3) An unsolicited proposal may include data which the proposer does not want disclosed for purposes other than the evaluation of the proposal. In such case, the proposer should mark each page containing such data with the words "Proprietary Data—Restricted Use" at the top of the page. In the event that an unsolicited proposal, in whole or in part, indicates that the proposer wishes to impose restrictions on the use or disclosure of the data contained in the proposal, MarAd personnel handling the proposal will take care to ensure that the information in

the proposal is not disclosed outside of MarAd. The Awards Officer has responsibility for ensuring that proposal reviewers are free of any direct affiliation with the individual(s) or institution submitting the proposal. MarAd policy on the use of information contained in proposals is to use such information only for evaluation purposes, except to the extent such information is generally available to the public, is already the property of the Government, or is available to the Government without restriction. Accordingly, if a proposal contains information the proposer wishes to protect, the proposer shall mark the cover page of the proposal with the following Notice:

NOTICE: The data contained in pages \_\_\_ of this proposal have been submitted in confidence and contain trade secrets and/or privileged or confidential commercial or financial information, and such data shall be used or disclosed only for evaluation purposes: *Provided*, That if this proposer receives an award as a result of or in connection with the submission of this proposal the Government shall have the right to use or disclose the data herein to the extent provided in the award. This restriction does not limit the Government's right to use or disclose data obtained without restriction from any source, including the proposer.

MarAd shall ensure that all copies of the proposal carry the above Notice, and that it is not disclosed outside MarAd, except with the consent of the proposer.

(h) *Criteria* for acceptance of an unsolicited proposal are those listed in §§ 385.50 through 385.52. If an unsolicited proposal fails to meet any of the criteria, the proposer will be notified by the Awards Officer in accordance with paragraph (j) of this section.

(i) *Funding determination*. The responsibility for deciding funding availability rests solely with the Grants Officer and will not be considered by the proposal reviewers.

(j) *Nonsupport of proposal*. If the proposal does not offer sufficient technical merit or program value; is not relevant to the accomplishment of a public purpose authorized by MarAd program legislation; or if funds are not available; the proposal will be returned to the proposer, if the proposer so requests. The Awards Officer shall prepare a letter to the proposer which sets forth the

basis for rejection of the unsolicited proposal or application.

(k) *Support of proposal*. There is no prescribed format for the program documentation necessary to justify providing assistance. The minimum requirements are that: there be a reasonable basis for acceptance based on the criteria set forth in §§ 385.50 through 385.52; the rationale for providing support be written, and approvals be obtained as required by MarAd; and, that a copy of the documentation be included in the assistance instrument award file. The rationale for providing assistance may be included in documents required for project approval.

**§ 385.34 Responsibility for issuing solicitations for proposals or applications.**

(a) It is MarAd policy to favor solicitation of proposals or applications, where discretionary assistance awards are available, in preference to relying on unsolicited proposals, in order to maximize opportunities for open participation by the public in MarAd assistance awards.

(b) The Awards Officer shall be responsible for issuing solicitations, announcements, or the like, which call for the submission of proposals and applications by a certain due date which, if favorably acted upon by MarAd, may result in assistance awards.

**§ 385.35 Program opportunity notices.**

(a) A program opportunity notice can be used to stimulate the flow of unsolicited proposals or applications when the program objectives cannot be defined sufficiently to prepare a program solicitation.

(b) The program opportunity notice will contain the following, at a minimum:

(1) A number assigned for control and reference purposes;

(2) A brief description of the broad, general technical program or areas needing investigation (generally 50 words or less);

(3) A statement of the principal program objective in possibly funding unsolicited proposals as either:

(i) The acquisition of concepts, property, or services for the direct benefit or use of the Federal Government; or

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(ii) The transfer of money, property, or services to a recipient for support or stimulation authorized by Federal statute;

(4) A statement about how unsolicited proposals will be evaluated and accepted:

(i) If the principal program objective is to accomplish a public purpose of support or stimulation, the criteria in §§ 385.50 through 385.52 shall be applied;

(ii) If the principal program objective is the acquisition of concepts, property, or services for the direct benefit or use of the Federal Government (i.e., procurement), the policy regarding evaluation and acceptance of unsolicited proposals in 41 CFR 9–4.9 shall apply;

(5) Restrictions, if any, as to who may submit proposals;

(6) A contact where additional information may be obtained;

(7) An expiration date which identifies when the program opportunity notice will no longer be current. This date shall not be used as a required common due date for submission of proposals;

(8) A statement that MarAd reserves the right to support or not support, in whole or in part, any or all proposals received;

(9) A statement that MarAd assumes no responsibility for any costs associated with specific proposal preparation if no award is made; but that if an award is made, MarAd will pay its allocable share of bid and proposal expenses as provided for in applicable Federal cost principles;

(10) A statement that proposals submitted pursuant to the notice shall be mailed to the Awards Officer (M-900), Maritime Administration, Room 4885, U.S. Department of Transportation, Washington, DC 20590.

(11) A reference that detailed information concerning assistance policy and procedures is contained in these assistance regulations, 46 CFR part 385;

(12) As much information as possible as to how proposals and applications will be evaluated;

(13) Policies and procedures for patents, data, and copyrights. Proposers have the right to request in advance of or within thirty (30) days after the effective date of award a waiver of all or

any part of the United States rights in subject inventions.

(c) The program opportunity notice shall be in a format that best reflects the needs of the specific program, for example, letter, booklet, bulletin, or other documents.

(d) The program opportunity notice shall be distributed widely. It may be distributed to industry associations, including small business associations; schools, colleges, and universities; appropriate professional and scientific journals; state, local, and regional governmental organizations; the Commerce Business Daily; other MarAd offices; and individuals and organizations who request copies on a one-time basis.

(e) The submission of innovative methods, approaches or ideas will not be restricted to those problems or technical areas published in the program opportunity notice. Alternatives will be eligible for consideration.

**§ 385.36 Public notice of availability of assistance awards.**

(a) In order to maximize involvement of prospective recipients in MarAd assistance programs, it is MarAd's policy, wherever possible, to provide timely notice to the public as to the availability of assistance awards.

(b) Early notice regarding legislated grant or other assistance programs will be provided by MarAd to the Office of Management and Budget for publication in the Catalog of Federal Domestic Assistance pursuant to Office of Management and Budget Circular No. A-89. When legislated assistance programs or program objectives which are to be implemented through assistance instruments reach the point where applications or proposals need to be obtained, timely notice of such solicitations will be published in the FEDERAL REGISTER, Commerce Business Daily, trade and professional journals which are widely circulated to state and local governments, and news media, as appropriate to communicate with potentially interested applicants.

(c) When a MarAd assistance project involves making assistance available through prime recipients to subrecipients, such as through states to local governments, prime recipients should

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provide timely advance notice to subrecipients as to the availability of such assistance, and provide a reasonable time period for subrecipients to prepare applications and secure prerequisite local approvals.

### **§ 385.37 Requirement for unrestricted solicitations for discretionary assistance awards.**

(a) *Policy.* It is MarAd policy to maximize the opportunity for prospective recipients to be considered for assistance awards where eligibility is not prescribed by law. Therefore, when eligibility is not prescribed by law or a final program regulation, and when discretionary assistance awards are selected to accomplish a program objective, applications or proposals will be obtained, wherever practicable, by issuance of a written solicitation. When MarAd initiates the solicitation of applications or proposals, eligibility to be considered for discretionary awards will not be restricted by MarAd to one category of recipients or to a single recipient without adequate basis.

(b) *Justification of restricted eligibility.* Where program legislation explicitly restricts eligibility, e.g., to state governments, no justification is required. When program regulations restrict eligibility beyond the restrictions required by the program legislation, the basis for the restriction shall be set forth in the program rulemaking.

41 CFR 9-3.805-51 shall be used as a guide in preparing the "justification for restricting eligibility." The reasons offered will be evaluated for consistency with the policy in paragraph (a) of this section, MarAd's overall mission, and the objective of maintaining an open and fair system of making assistance awards.

(c) *Approvals.* Justifications of restricted eligibility will be signed by the Grants Officer and will be reviewed by Office of General Counsel for legal sufficiency prior to issuance of the restricted solicitation. The signed justification will be filed in official award file.

### **§ 385.38 Joint funding.**

(a) Pursuant to section 10(c) of the Act, MarAd is authorized to participate

in joint funded projects with other Federal agencies in any funding relationship which will serve the best interest of all of the participating agencies' program. Such joint funding project may include more than one type of assistance relationship, e.g., some components of project may be funded by grants and other components of the project may be funded by cooperative agreements.

(b) It is MarAd's positive policy, further, to encourage cost-sharing on the part of applicants for financial assistance. The willingness of applicants to cost-share is a primary factor in making, or not making, an assistance award.

### **§ 385.39 Socio-economic and environmental policies.**

A number of socio-economic and environmental policies of the Federal Government are incorporated into the standard general provisions of the grant agreement and cooperative agreements, and are identified as explicit criteria in §§ 385.51 and 385.52.

### **§ 385.40 Disputes.**

Procedures for resolution of disputes between a recipient and MarAd appear in the standard general provisions of the grant and cooperative agreements referenced in § 385.62, of this part.

#### CRITERIA FOR AWARD

### **§ 385.50 Scope.**

Sections 385.51 and 385.52 set forth the criteria to be used by MarAd in evaluating all projects and all potential recipients prior to award of a grant or cooperative agreement.

### **§ 385.51 Criteria: Projects.**

The criteria to be used by MarAd in evaluating all projects prior to award of a grant or cooperative agreement are as follows:

(a) In terms of the accomplishment of a public purpose—

(1) The potential contribution which the proposed work is expected to make to the MarAd assistance mission;

(2) The economic, environmental, and societal significance which a successful demonstration or project may have for

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the nation, and in particular the national merchant marine program;

(3) The relationship of the proposal to:

(i) The public need for the potential results of the research, development, or demonstration effort, and whether it is unlikely that similar results would be achieved in a timely manner in the absence of Federal assistance;

(ii) Whether the potential opportunities for non-Federal interests to recapture the investment in the undertaking through the normal commercial utilization of proprietary knowledge appear inadequate to encourage timely results;

(iii) The extent of the problems treated and whether the objectives sought by the undertaking are national, widespread, or regional in their significance;

(iv) The extent of opportunities to induce non-Federal support of the undertaking;

(v) The degree of risk of loss of the investment inherent in the research, and the availability of risk capital to the non-Federal entities which might otherwise engage in the field of the research so as to further timely development of the technology; and,

(vi) The availability of appropriations to MarAd.

(b) In terms of the particular objectives of the project, whether the project has:

(1) High technical merit which promises or represents an innovative idea, method, or approach;

(2) Program value not previously recognized or pursued by MarAd; and,

(3) A reasonable degree of probability of achieving the stated objectives.

### § 385.52 Criteria: Applicant.

The criteria to be used by MarAd in evaluating all applicants prior to award of a grant or cooperative agreement are as follows:

(a) The qualifications, capabilities, resources (both financial and technical) and experience of the applicant;

(b) The facilities or techniques which the proposer possesses and offers which are considered to be integral factors for achieving the objectives of the proposal;

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(c) The qualifications, capabilities, and experiences of the proposed investigator, team leader, or key personnel, who are considered to be critical in achieving the objectives of the proposal;

(d) The precision and detail with which the applicant states its plan to further the formally adopted socio-economic and environmental policies of the United States e.g., the encouragement of minority business enterprises); and,

(e) The extent to which the applicant will share the total estimated cost of the project.

### FORMS OF AGREEMENTS

#### § 385.60 Scope.

Sections 385.61 through 385.62 describe the form and content of the two parts which comprise a grant agreement or a cooperative agreement which will be executed by MarAd and a recipient of financial assistance.

#### § 385.61 Grant and cooperative agreements: Special provisions.

(a) MarAd has adopted two format matrices, one for grant agreements and one for cooperative agreements, to accommodate the variables inherent in undertaking a project with a particular recipient. These variables include, for example, identity of the recipient, scope of work, schedule of performance and obligations assumed by both parties.

(b) The format matrices are available on request from the Awards Officer, and a copy of each is included in the information kit provided to all potential recipients of financial assistance.<sup>1</sup>

(c) MarAd will adapt the appropriate format matrix to the extent deemed necessary when drafting the particular agreement to be executed by MarAd and a recipient of financial assistance for a specific project.

#### § 385.62 Grant and cooperative agreements: Standard general provisions.

(a) MarAd has adopted two standard general provisions which apply to

<sup>1</sup>An informational copy of both format matrices accompany this regulation as filed in the Office of the Federal Register.

grant and cooperative agreements, respectively, and said provisions are hereby incorporated by reference into these regulations.<sup>2</sup>

(b) MarAd reserves the right to amend or to render inapplicable any portion of the particular standard general provisions required for any particular grant or cooperative agreement: *Provided*, That such modification shall be accomplished only by means of an explicit statement in the special provisions executed by MarAd and a particular recipient.

**PART 386—REGULATIONS GOVERNING PUBLIC BUILDINGS AND GROUNDS AT THE UNITED STATES MERCHANT MARINE ACADEMY**

Sec.

386.1 Hours of admission to property.

386.3 Preservation of property.

386.5 Conformity with signs and posted regulations.

386.7 Disturbances.

386.9 Gambling.

386.11 Alcoholic beverages and controlled substances.

386.13 Soliciting, vending, and debt collection.

386.15 Distribution of handbills.

386.17 Photographs for news, advertising, or commercial purposes.

386.19 Dogs and other animals.

386.21 Vehicular and pedestrian traffic.

386.23 Weapons and explosives.

386.25 Enforcement, penalties and other laws.

AUTHORITY: 40 U.S.C. 318; 32 FR 11969 (August 18, 1967), Pub. L. 97-31 (95 Stat. 151, August 6, 1981); 49 CFR 1.66.

SOURCE: 52 FR 21534, June 8, 1987, unless otherwise noted.

**§ 386.1 Hours of admission to property.**

Academy property shall be closed to the public during other than normal working hours, as well as during Regimental leave periods and indoctrination training for the fourth class year. The closing of property shall not apply where the Superintendent has approved the after normal working hours use of buildings or athletic facilities for authorized activities. During normal working hours, property shall be closed

<sup>2</sup>A copy of both such incorporated provisions accompany this regulation and are on file in the Office of the Federal Register.

to the public only when situations require this action to ensure the orderly conduct of Academy business. The Superintendent, or a designated representative of the Superintendent, shall make the decision to close all or any areas of Academy property. This action shall be coordinated with the Head, Department of Public Safety and Security (Security), of the Academy. When property, or a portion thereof, is closed to the public, admission to the property, or to any area thereof, shall be restricted to authorized persons, who shall register with Security personnel upon entry to the property. When requested, any person shall display Government or other identifying credentials to Security personnel when entering, leaving, or while on Academy property.

**§ 386.3 Preservation of property.**

Prohibited actions against property on the Academy grounds are improper disposal of rubbish; theft of or damage to property; throwing articles from an Academy building; and climbing on statues, fountains or any part of a building.

**§ 386.5 Conformity with signs and posted regulations.**

Persons in and on Academy property shall, at all times, comply with official signs and posted regulations of a prohibitional, instructional or directional nature, and shall also comply with the directions of Academy special police and other authorized officials. These regulations shall be enforced by uniformed special police and other designated security personnel.

**§ 386.7 Disturbances.**

Any loitering, disorderly conduct or other conduct on Academy property which creates loud or unusual noise or a nuisance which unreasonably obstructs the use of any area, including entrances, foyers, lobbies, corridors, offices, elevators, stairways, or parking lots; or impedes or disrupts the performance of official duties by Government employees or Midshipmen activities is prohibited.

## **§ 386.9**

### **§ 386.9 Gambling.**

Unless permitted by Executive or Department of Transportation Order, participating in games of chance for money or other consideration, or in the operation of gambling devices, or the conduct of a lottery or a pool, or the selling or purchasing of numbers tickets, is prohibited on Academy property.

### **§ 386.11 Alcoholic beverages and controlled substances.**

Operation of a motor vehicle on Academy property while intoxicated, under criteria set forth in the statutes of the State of New York, is prohibited. The consumption or possession by any person on Academy property of alcoholic beverages, narcotic drugs, hallucinogens, marijuana, barbiturates, amphetamines or any other substances controlled under the laws of the State of New York or the United States is prohibited. These prohibitions shall not apply in cases where drugs are being used as prescribed for a patient by a licensed physician. The prohibition against possession and consumption of alcoholic beverages shall not apply when possessed or consumed by staff or resident officers in private residences, or when the Superintendent, or a designee of the Superintendent, has granted an exemption in writing for an appropriate reason.

### **§ 386.13 Soliciting, vending, and debt collection.**

Soliciting aims, or commercial soliciting and vending of all kinds, displaying or distributing commercial advertising, or collecting private debts is prohibited on Academy property. This prohibition does not apply to national or local drives for funds for charitable purposes, welfare, health, or other purposes as authorized by the "Manual on Fund Raising Within the Federal Service," issued by the U.S. Office of Personnel Management under Executive Order 10927 of March 18, 1961, and sponsored or approved by the Superintendent; and to commercial lessees and contractors authorized to sell goods or services.

### **§ 386.15 Distribution of handbills.**

The distribution of materials such as pamphlets, handbills and flyers, and

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the displaying of placards or posting of materials on bulletin boards or elsewhere in or on Academy property shall be coordinated with the Head, Department of Public Safety and Security, of the Academy so as not to impede Academy employees in the performance of their duties or Midshipmen activities.

### **§ 386.17 Photographs for news, advertising, or commercial purposes.**

Such photographs for news, advertising or commercial purposes may be taken on Academy premises only with the written consent of the Office of External Affairs at the Academy. Except where national security regulations apply or a Federal Court Order or rule prohibits, photographs for news purposes may be taken in entrances, lobbies, foyers or corridors, or in auditoriums in which public meetings are being held. Photographs for advertising and commercial purposes may be taken only with the written permission of and in locations specified by the Office of External Affairs.

### **§ 386.19 Dogs and other animals.**

Persons are prohibited from bringing dogs and other animals on to the Academy premises, except for authorized purposes and except for seeing eye or other guide dogs, or pets approved in writing by the Superintendent or a designee of the Superintendent.

### **§ 386.21 Vehicular and pedestrian traffic.**

Operators of all vehicles on Academy property shall drive in a careful and safe manner at all times and shall comply with the signals and directions of Academy special police, Security personnel or other authorized individuals, and all posted traffic signs and with restrictions indicated by marked traffic areas. The following acts are prohibited on Academy property: the blocking with vehicles of entrances, driveways, walks, loading platforms or fire hydrants; parking without a permit, except in emergencies; parking in unauthorized locations or in locations reserved for other persons, or parking contrary to the direction of posted signs or marked traffic areas, including yellow curbs. Vehicles parked in violation of the foregoing shall be subject to



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the issuance of a Traffic Violation Notice and/or removal of the vehicle at the owner's risk and expense. The Superintendent may issue and post other specific traffic directives as may be required, applicable to drivers and pedestrians. When so issued and posted, such directives shall have the same force and effect as if made a part hereof. Proof that a motor vehicle was in violation of these regulations or such directives shall be evidence that the registered owner was responsible for the violation.

### § 386.23 Weapons and explosives.

No person shall carry or possess firearms, other dangerous or deadly weapons or parts thereof, explosives or items intended to be used to fabricate an explosive or incendiary device, or parts thereof, either openly or concealed, while on Academy property, except for official purposes specifically authorized in writing by the Superintendent or a designee of the Superintendent.

### § 386.25 Enforcement, penalties and other laws.

Whoever shall be found guilty of violating any regulations in this part while in or on Academy property is subject to a fine of not more than \$50 or imprisonment of not more than 30 days, or both (40 U.S.C. 318c). Nothing in these regulations shall be construed to abrogate any other Federal laws or regulations or any State and local laws and regulations applicable to any area in which the property is situated. These regulations shall be posted prominently throughout the Academy. Penalties for their violation shall be incorporated in the Schedule of Fines for Petty Offenses established by order of the United States District Court for the Eastern District of New York.

## PART 387—UTILIZATION AND DISPOSAL OF SURPLUS FEDERAL REAL PROPERTY FOR DEVELOPMENT OR OPERATION OF A PORT FACILITY

Sec.

387.1 Scope.

387.2 Definitions.

387.3 Notice of availability of surplus property.

387.4 Applications.

387.5 Surplus property assignment recommendation.

387.6 Terms, reservations, restrictions, and conditions of conveyance.

AUTHORITY: Pub. L. 103-160, 107 stat. 1933 (40 U.S.C. 484 (q)).

SOURCE: 60 FR 42467, Aug. 16, 1995; 60 FR 43720, Aug. 23, 1995, unless otherwise noted.

### § 387.1 Scope.

This part is applicable to Surplus Property that is recommended by the Secretary as being needed for the development or operation of a Port Facility and is appropriate for being assigned to, or that has been assigned to the Secretary for conveyance as provided for in Public Law 103-160 and 40 U.S.C. 471 *et seq.*

### § 387.2 Definitions.

(a) *Act* means the Federal Property and Administrative Services Act of 1949 as amended, 40 U.S.C. 471 *et seq.*, and 41 CFR 101-47. Terms defined in the Act and not defined in this section have the meanings given to them in the Act.

(b) *Applicant* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, or any political subdivision, municipality, or instrumentality thereof, that has submitted an application to the Secretary to obtain surplus Federal property.

(c) *Disposal Agency* means the executive agency of the Government which has authority to assign property to the Secretary for conveyance for development or operation of a port facility.

(d) *Grantee* means the Applicant to which surplus Federal property is conveyed.

(e) *Grantor* means the Secretary.

(f) *Port Facility* means any structure and improved property, including services connected therewith, whether located on the waterfront or inland, which is used or intended for use in developing, transferring, or assisting maritime commerce and water dependent industries, including, but not limited to, piers, wharves, yards, docks,

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berths, aprons, equipment used to load and discharge cargo and passengers from vessels, dry and cold storage spaces, terminal and warehouse buildings, bulk and liquid storage terminals, tank farms, multimodal transfer terminals, transshipment and receiving stations, marinas, foreign trade zones, shipyards, industrial property, fishing and aquaculture structures, mixed use waterfront complexes, connecting channels and port landside transportation access routes.

(g) *Secretary* means the Secretary of Transportation acting by and through the Maritime Administrator, Maritime Administration by delegation of authority.

(h) *Surplus Property* means Federal real and related personal property duly determined to be unneeded by a Federal agency which may be conveyed to an Applicant for use in the development or operation of a port facility.

### § 387.3 Notice of availability of surplus property.

The Disposal Agency shall publish notices of availability of excess and surplus Federal real and personal property. The Secretary will advise eligible public port agencies, in an appropriate manner, of the availability of Surplus Property that is deemed to have port facility potential. Potential Applicants shall notify the Secretary, in writing, of a desire to acquire surplus Federal property before the expiration of the notice period specified in the Notice of Surplus Property—Government Property.

### § 387.4 Applications.

Application forms for conveyance of Surplus Property can be obtained from the Maritime Administration, Division of Ports, 400 Seventh Street, SW, Washington, DC 20590. The applicant shall identify on the application form the requested property, agree to the terms/conditions of the conveyance and shall also submit a Port Facility Redevelopment Plan (PFRP) which details the plan of use for the property and the associated economic development plan.

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### § 387.5 Surplus property assignment recommendation.

Before any assignment recommendation is submitted to the Disposal Agency by the Secretary the following conditions shall be met:

(a) The Secretary has received and approved an application for the property.

(b) The Applicant is able, willing, and authorized to assume immediate possession of the property and pay administrative expenses incidental to the conveyance (application preparation, documentation, legal and land transfer costs).

(c) The Secretary, after consultation with the Secretary of Labor, has determined that the property to be conveyed is located in an area of serious economic disruption.

(d) The Secretary, after consultation with the Secretary of Commerce, approves the PFRP as part of a necessary economic development program.

(e) The Secretary determines that the application complies with the provisions of the National Environmental Policy Act of 1969 as prepared by the Disposal Agency.

### § 387.6 Terms, reservations, restrictions, and conditions of conveyance.

(a) Conveyances of property shall be on forms approved by, and available from the Secretary, and shall include such terms, reservations, restrictions and conditions set forth in this part and such other terms, reservations, restrictions and conditions as the Secretary may deem appropriate or necessary.

(b) Property shall be conveyed by a quitclaim deed or deeds on an "as is, where is" basis without any warranty, expressed or implied.

(c) Property shall be used and maintained in perpetuity for the purpose for which it was conveyed, and that if the property ceases to be used or maintained for that purpose, all or any portion of the property shall, in its then existing condition, at the option of the Government, revert to the Government.

(d) The entire Port Facility, including all structures, improvements, facilities and equipment in which the deed conveys any interest shall be

maintained at all times in safe and serviceable condition, to assure its efficient operation and use, provided, however, that such maintenance shall be required as to structures, improvements, facilities and equipment only during the useful life thereof, as determined by the Grantor.

(e) No property conveyed shall be mortgaged or otherwise disposed of, or rights or interest granted by the Grantee without the prior written consent of the Grantor. However, the Grantor will only review leases of five years or more to determine the interest granted therein.

(f) Property conveyed for a Port Facility shall be used and maintained for the use and benefit of the public on fair and reasonable terms, without discrimination.

(g) The Grantee shall, insofar as it is within its powers and to the extent reasonable, adequately protect the water and land access to the Port Facility.

(h) The Grantee shall operate and maintain in a safe and serviceable condition, as deemed reasonably necessary by Grantor, the port and all facilities thereon and connected therewith which are necessary to service the maritime users of the Port Facility and will not permit any activity thereon which would interfere with its use as a Port Facility.

(i) The Port Facility is subject to the provisions of Title 46 Code of Federal Regulations (CFR) Part 340.

(j) The Grantee shall furnish the Grantor such financial, operational and annual utilization reports as may be required.

(k) Where construction or major renovation is not required or proposed, the Port Facility shall be placed into use within twelve (12) months from the date of this conveyance. Where construction or major renovation is contemplated at the time of conveyance, the property shall be placed in service according to the redevelopment timetable approved by the Grantor in the PFRP.

(l) The Grantee shall not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform or comply with any or all of the terms, reserva-

tions, restrictions and conditions set forth in the application and the deed.

(m) The Grantee shall keep up to date at all times a Port Facility layout map of the property described herein showing:

(1) the boundaries of the Port Facility and all proposed additions thereto, and

(2) the location of all existing and proposed port facilities and structures, including all proposed extensions and reductions of existing port facilities.

(n) In the event that any of the terms, reservations, restrictions and conditions are not met, observed, or complied with by the Grantee, the title, right of possession and all other rights conveyed by the deed to the Grantee, or any portion thereof, shall, at the option of the Grantor revert to the Government, in its then existing condition sixty (60) days following the date upon which demand to this effect is made in writing by Grantor or its successor in function, unless within said sixty (60) days such default or violation shall have been cured and all such terms, reservations, restrictions and conditions shall have been met, observed, or complied with, in which event said reversion shall not occur.

(o) The deed will contain a severability clause dealing with the terms, reservations, restrictions and conditions of conveyance.

(p) The Grantee shall remain at all times a State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, or any political subdivision, municipality, or instrumentality thereof.

(q) The Grantee shall comply at all times with all applicable provisions of law, including, the Water Resources Development Act of 1990.

(r) The Grantee shall not modify, amend or otherwise change its approved PFRP without the prior written consent of Grantor and shall implement the PFRP as approved by the Grantor.

(s) The Government under Section 120 (h)(3) of the Comprehensive, Environmental Response, Compensation

and Liability Act of 1980, as amended, warrants that:

(1) all remedial action necessary to protect human health and the environment with respect to any hazardous substance on the property has been taken before the date of the conveyance, and

(2) any additional remedial action found to be necessary after the date of the conveyance shall be conducted by the Government.

(t) The Government reserves the right of access to any and all portions of the property for purposes of environmental investigation, remediation or other corrective action and compliance inspection purposes.

(u) The Grantee shall agree that in the event, the Grantor exercises its option to revert all right, title, and interest in and to any portion of the property to the Government, or Grantee voluntarily returns title to the property in lieu of a reverter, the Grantee shall provide protection to, and maintenance of the property at all times until such time as the title is actually reverted or returned to and accepted by the Government. Such protection and maintenance shall, at a minimum, conform to the standards prescribed in regulations implementing the Act.

(v) The Grantor expressly reserves from the conveyance:

- (1) oil, gas and mineral rights,
- (2) improvements without land,
- (3) military chapels, and

(4) property disposed of pursuant to 204 (c) of the Act.

(w) The Government reserves all right, title, and interest in and to all property of whatsoever nature not specifically conveyed, together with right of removal thereof from the Port Facility within one (1) year from the date of the deed.

(x) The Grantee shall agree to maintain any portion of the property identified as "historical" in accordance with recommended approaches in the Secretary of Interior Standards for Historic Property at 16 U.S.C. 461-470w-6.

(y) Prior to the use of any property by children under seven (7) years of age, the Grantee shall remove all lead-based paint hazards and all potential lead-based paint hazards in accordance

with applicable lead-based paint laws and regulations.

(z) The Grantee agrees that any construction or alteration is prohibited unless a determination of no hazard to air navigation is issued by the Federal Aviation Administration.

(aa) The Grantee shall agree that in its use and occupancy of the Port Facility it shall comply with all laws relating to asbestos.

(bb) All construction on any portion of the property identified as "wetlands" as determined by the appropriate District of the Army Corps of Engineers shall comply with Department of the Army Wetland Construction Restrictions contained in Title 33 CFR, Parts 320 through 330.

(cc) The Grantee shall agree to maintain, indemnify and hold harmless the Grantor and the Government from any and all claims, demands, costs or judgments for damages to persons or property that may arise from the use of the property by the Grantee, guests, employees and lessees.

(dd) The Grantor, on written request from the Grantee, may grant release from any of the terms, reservations, restrictions and conditions contained in the deed, or the Grantor may release the Grantee from any terms, restrictions, reservations or conditions if the Grantor determines that the property so conveyed no longer serves the purpose for which it was conveyed.

(ee) The Grantor shall make reforms, corrections or amendments to the deed if necessary to correct such deed or to conform such deed to the requirements of applicable law.

## PART 388—ADMINISTRATIVE WAIVERS OF THE COASTWISE TRADE LAWS

### Sec.

- 388.1 Purpose.
- 388.2 Definitions.
- 388.3 Application and fee.
- 388.4 Criteria for grant of a waiver.
- 388.5 Criteria for revocation of a waiver.
- 388.6 Process.

AUTHORITY: 46 App. U.S.C. 1114(b); Pub. L. 105-383, 112 Stat. 3445 (46 U.S.C. 12106 note); 49 CFR 1.66.

SOURCE: 69 FR 51772, Aug. 23, 2004, unless otherwise noted.

**§ 388.1 Purpose.**

This part prescribes regulations implementing the provisions of Title V of Public Law 105-383 (112 Stat. 3445), which grants the Secretary authority to review and approve applications for waiver of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more, built or rebuilt outside the United States, and grants authority for revocation of those waivers.

**§ 388.2 Definitions.**

For the purposes of this part:

(a) *Administrator* means the Maritime Administrator.

(b) *Coastwise Trade Laws* include:

(1) The Coastwise Endorsement Provision of the Vessel Documentation Laws, (46 U.S.C. 12106);

(2) The Passenger Services Act, section 8 of the Act of June 19, 1886 (46 App. U.S.C. 289); and

(3) The Jones Act, section 27 of the Merchant Marine Act, 1920 (46 App. U.S.C. 883).

(c) *Eligible Vessel* means a vessel of five or more tons that is either a small passenger vessel or an uninspected passenger vessel that—

(1) Was not built in the United States and is at least 3 years of age; or

(2) If rebuilt, was rebuilt outside the United States at least 3 years before the certificate of documentation with appropriate endorsement if granted, would become effective.

(d) *MARAD* means the Maritime Administration, U.S. Department of Transportation.

(e) *Secretary* means the Secretary of Transportation.

(f) The terms *small passenger vessel*, *uninspected passenger vessel* and *passenger for hire* have the meaning given such terms by 46 U.S.C. 2101.

(g) *Fraud* means the intentional misrepresentation of a material fact or facts.

**§ 388.3 Application and fee.**

(a) An owner of a vessel may choose either of two methods to apply for an administrative waiver of the coastwise trade laws of the United States for an eligible vessel to carry no more than twelve passengers for hire.

(1) The application form contained on MARAD's Web site at <http://www.marad.dot.gov> may be submitted electronically with credit card or Automated Clearinghouse (ACH) payment of the \$500 application fee.

(2) Alternatively, applicants may send written applications to Small Vessel Waiver Applications, Office of Ports and Domestic Shipping, MAR-830, Room 7201, 400 7th St., SW., Washington, DC 20590. Written applications need not be in any particular format, but must be signed, be accompanied by a check for \$500 made out to the order of "Maritime Administration", and contain the following information:

(i) Name of vessel and owner for which waiver is requested and the vessel's official number.

(ii) Size, capacity and tonnage of vessel (state whether tonnage is measured pursuant to 46 U.S.C. 14502, or otherwise, and if otherwise, how measured).

(iii) Intended use for vessel, including geographic region of intended operation and trade.

(iv) Date and place of construction and (if applicable) rebuilding. (If applicant is unable to document the origin of the vessel, foreign construction will be assumed).

(v) Name, address, and telephone number of the vessel owner.

(vi) A statement on the impact this waiver will have on other commercial passenger vessel operators, including a statement describing the operations of existing operators.

(vii) A statement on the impact this waiver will have on U.S. shipyards.

(viii) A statement that the applicant represents that the foregoing information is true to the best of the applicant's knowledge.

(b) MARAD may ask additional questions of the applicant as part of the application review.

[69 FR 51772, Aug. 23, 2004, as amended at 70 FR 66797, Nov. 3, 2005]

**§ 388.4 Criteria for grant of a waiver.**

(a) *General Criteria.* (1) A waiver of the foreign build and/or foreign rebuild prohibition in the coastwise trade laws will be granted for an eligible vessel only if we determine that the employment of the vessel in the coastwise trade will not unduly adversely affect—

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(i) United States vessel builders; or  
(ii) The coastwise trade business of any person who employs vessels built in the United States in that business.

(2) The determination of “unduly adverse affect” on a coastwise operator or a U.S. vessel builder may not be limited to operators or builders of vessels carrying 12 or fewer passengers.

(3) We may evaluate the expected impact of the proposed waiver on the basis of the information received from all sources, including public comment, internal investigation and analysis, and any other sources of information deemed appropriate.

(b) *Impact on U.S. vessel builders.* We may use the following criteria to determine the effect on U.S. vessel builders: Whether a potentially affected U.S. vessel builder has a history of construction of similar vessels, or can demonstrate the capability and capacity and the fact it has taken definite steps to offer to build a similar vessel, for use in the same geographic region of the United States, as the proposed vessel of the applicant.

(c) *Impact on coastwise trade business.* We may use the following criteria to determine the effect on existing operators of U.S.-built vessels in coastwise trade:

(1) Whether the proposed vessel of the applicant and a vessel of an existing operator (or the vessel of an operator that can demonstrate it has taken definite steps to begin operation) would provide similar commercial service and would operate in the same geographic area.

(2) The number of similar vessels operating or proposed to operate in the same market with the same or similar itinerary, relative to the size of the market. For example, a single vessel may have a small impact on a large market.

(d) *Advance notice and approval needed for changes.* When we approve a waiver application, we will notify the applicant that no substantial change in the employment of the vessel in the coastwise trade may be made without prior notice to MARAD. In general, a substantial change in operating area will require a new waiver application.

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### § 388.5 Criteria for revocation of a waiver.

We shall revoke a waiver previously granted under this part if we determine, after notice and opportunity for a hearing, that fraud was involved in any part of the waiver application.

### § 388.6 Process.

(a) *Initial process.* (1) We will review each application for completeness as received. We will notify the applicant if additional information is necessary or if the application does not meet the initial eligibility requirements for waiver. All applications will be available for public inspection electronically in the Department of Transportation Docket at <http://dot.dms.gov>.

(2) Applications being processed on the merits will be noticed in the FEDERAL REGISTER. Interested parties will be given an opportunity to comment on whether introduction of any proposed vessel would adversely affect them. In the absence of duly filed objections to an application, and in the absence of unduly adverse impact on vessel builders or businesses employing U.S.-built vessels otherwise discovered by us, we will conclude that there will be no adverse effect. If an objection to an application is received, additional information may be sought from the objector. The applicant will be given a sufficient amount of time to respond. The Director, Office of Ports and Domestic Shipping, will then either make a decision based on the written submissions and all available information or, on MARAD’s motion or at the applicant’s request, hold a hearing on the application and make a decision based on the hearing record. The decision will be communicated to the applicant, commenters and the United States Coast Guard in writing and placed in the docket. If MARAD grants a waiver, the applicant must thereafter contact the Coast Guard to obtain the necessary documentation for domestic operation. MARAD’s waiver does not satisfy other requirements of the Coast Guard for documentation. The waiver, if approved, will be assigned to the vessel.

(b) *Revocation.* We may, upon the request of a U.S. builder or a coastwise trade business of a person who employs

U.S.-built vessels or upon our own initiative propose to revoke a waiver granted under this part, on the basis that the waiver was obtained through fraud. The grantee of the waiver in question will be notified directly by mail, and a notice will be published in the FEDERAL REGISTER. The original docket of the application will be reopened. We may request additional information from the applicant granted the waiver or from any respondent to the notice. The Director, Office of Ports and Domestic Shipping, will then either make a decision based on the written submissions and all available information or, on MARAD's motion or at the applicant's request, hold a hearing on the proposed revocation and make a decision based on the hearing record. The decision will be communicated in writing to: the applicant granted the waiver, the requestor (if any), each respondent to the proposed revocation notice, the Coast Guard, and placed in the docket. If MARAD revokes a waiver, the Coast Guard, automatically and without further proceedings, shall revoke the vessel's coastwise endorsement.

(c) *Review of determinations.* (1) The decisions by the Director, Office of Ports and Domestic Shipping, to grant a waiver, deny a waiver, or revoke a waiver will not be final until time for discretionary review by the Administrator has expired. Each decision to grant, deny, or revoke a waiver will be made in writing and a copy of the written decision will be provided to each applicant and other parties to the decision. Applicants, persons who requested revocation of a waiver, and persons who submitted comments in response to a FEDERAL REGISTER notice may petition the Administrator to review a decision by the Director, Office of Ports and Domestic Shipping, to grant a waiver, deny a waiver, or revoke a waiver within five (5) business days after such decision is filed in the docket. Each petition for review should state the petitioner's standing and the reasons review is being sought, clearly pointing out alleged errors of fact or misapplied points of law. Within five (5) business days of submission of a petition for review, the applicant, and other persons with standing, may re-

quest that the Administrator not review a decision by the Director, Office of Ports and Domestic Shipping, to grant, deny, or revoke a waiver. Such petitions and responses must either be sent by facsimile to the Secretary, Maritime Administration, at (202) 366-9206 or filed electronically in the appropriate DOT docket at <http://dms.dot.gov>. The Administrator will decide whether to review within five (5) business days following the last day for submission of a request that the Administrator not take review. If the Administrator undertakes review, the decision by the Director, Office of Ports and Domestic Shipping, is stayed until final disposition. In the event the Administrator decides to undertake review, a decision will be made based on the written submissions and all available information. As a matter of discretion, the Administrator or designated representative may hold a hearing on the proposed action and make a decision based on the hearing record. The decision will be communicated in writing to the interested parties and the Coast Guard. In the review process, the decision of the Maritime Administrator is the final disposition. In the absence of any petition for review, the determination by the Director, Office of Ports and Domestic Shipping, becomes final on the sixth business day after the decision. The Secretary, MARAD, may extend any of the time limits, but only for good cause shown.

(2) Such petitions and responses must either be sent by facsimile to the Secretary, Maritime Administration, at (202) 366-9206 or filed electronically in the appropriate DOT docket at <http://dms.dot.gov>. The Administrator will decide whether to review within five (5) business days following the last day for submission of a request that the Administrator not take review. If the Administrator takes review, the decision by the Director, Office of Ports and Domestic Shipping, is stayed until final disposition. In the event the Administrator decides to take review, a decision will be made based on the written

submissions and all available information. As a matter of discretion, the Administrator or designated representative may hold a hearing on the proposed action and make a decision based on the hearing record. The decision will be communicated in writing to the interested parties and the Coast Guard. In the review process, the decision of the Maritime Administrator is the final disposition. In the absence of any petition for review, the determination by the Director, Office of Ports and Domestic Shipping, becomes final on the sixth business day after the decision. The Secretary, MARAD, may extend any of the time limits, but only for good cause shown.

## PART 389—DETERMINATION OF AVAILABILITY OF COASTWISE-QUALIFIED LAUNCH BARGES

Sec.

- 389.1 Purpose.
- 389.2 Definitions.
- 389.3 Registration.
- 389.4 Application and fee.
- 389.5 Review; issuance of determinations.

AUTHORITY: 49 U.S.C. 322(a); 46 U.S.C. 55102; 46 U.S.C. 55108; Public Law 108–293, 118 Stat 1028; 49 CFR 1.66.

SOURCE: 73 FR 30787, May 29, 2008, unless otherwise noted.

### § 389.1 Purpose.

This part prescribes regulations implementing the provisions of section 417 of Public Law 108–293, which grants the Secretary of Transportation, acting through the Maritime Administration, the authority to review and approve applications for determinations of availability of coastwise-qualified launch barges. Owners or operators of proposed platform jackets may submit information regarding a specific platform jacket transport, placement and/or launch project, following the procedures set forth in this regulation, in order for us to determine whether a suitable coastwise-qualified barge is available for the project. If we determine a suitable coastwise-qualified launch barge is not available, then a non-coastwise qualified foreign-built launch barge may be used.

### § 389.2 Definitions.

For the purposes of this Part:

“*Administrator*” means the Maritime Administrator.

“*Coastwise-qualified Vessel*” means a vessel that has been issued a certificate of documentation with a coastwise endorsement under 46 U.S.C. 12112.

Coastwise Trade Laws include:

- (1) The Coastwise Endorsement Provision of the Vessel Documentation Laws, (46 U.S.C. 12112);
- (2) The Passenger Services Act, section 8 of the Act of June 19, 1886 (46 U.S.C. 55103);
- (3) The Jones Act, section 27 of the Merchant Marine Act, 1920 (46 U.S.C. 55102); and
- (4) Section 2(c) of the Shipping Act of 1916 (46 U.S.C. 50501).

“*Launch barge*” means a vessel that is technically capable of transporting and, if needed, launching or installing an offshore drilling or production platform jacket in a timely manner.

“*Foreign launch barge*”, for the purpose of this rule, means a non-coastwise-qualified launch barge that was built before December 31, 2000, and has a launch capacity of 12,000 long tons or more.

A “*long ton*” equals 2,240 pounds.

“*Platform Jacket*” refers to a single physical component and includes any type of offshore exploration, development, or production structure or component thereof, including platform jackets, tension leg or SPAR platform superstructures (including the deck, drilling rig and support utilities, and supporting structure), hull (including vertical legs and connecting pontoons or vertical cylinder), tower and base sections of a platform jacket, jacket structures, and deck modules (known as “*topsides*”).

“*Secretary*” means the Secretary of the Maritime Administration, who will route the correspondence to the proper office within the Maritime Administration for handling.

“*Classed as a launch barge by a recognized classification society*” means that the vessel holds a current classification document to be used as a launch barge by at least one of the following classification societies: American Bureau of Shipping (ABS), Bureau Veritas (BV), Lloyd’s Register (LR), Germanischer



Lloyd (GL), Det Norske Veritas (DNV), or Nippon Kaiji Kyokai (NK).

“*Applicant*” means the offshore development company as identified to the Minerals Management Service (MMS) in their Development Production Plan (DPP) or Development Operations Coordination Document (DOCD), who has applied to the Maritime Administration (MARAD) for a waiver.

### § 389.3 Registration

In order to provide timely notification and to identify the potential participants to each other so they may examine how they can best work together to maximize the use of coastwise-qualified launch barges, we will require early notification as outlined in this section.

(a) In January of each calendar year, the Maritime Administration will publish a notice in the FEDERAL REGISTER requesting that owners or operators or potential owners or operators of coastwise-qualified launch barges notify us of:

(1) Their interest in participating in the transportation and, if needed, the launching or installation of offshore platform jackets; and,

(2) Provide us with contact information for their company; and,

(3) Provide specifications of any currently owned or operated coastwise-qualified launch barges or plans to construct same.

(b) When current or potential owners or operators of any type of offshore exploration, development, or production structure expect to need the use of a launch barge they must notify the Maritime Administration. Such notification must be the earlier of either:

(1) The filing of their Development and Production Plan (DPP) or Development Operations Coordination Document (DOCD) with the Minerals Management Service as required by 30 CFR 250.201; or

(2) Not later than twenty-one (21) months before the proposed date of using a launch barge.

(c) The early notification information to be provided to the Maritime Administration by the platform owner or operator shall include:

(1) A summary of technical details of the platform jacket that will need to

be transported and, if needed, launched or installed; and,

(2) The projected physical requirements for a suitable launch barge to be used in this project; and,

(3) The projected time period and load and launching sites for the launch barge operation; and,

(4) Full contact information for the company and the individuals having decision-making authority with respect to the utilization of the launch barge and the transportation and, if needed, the launching or installation of the platform jacket.

(d) The information in paragraphs (a), (b), and (c) of this section must be submitted either electronically to *cargo.marad@dot.gov* or delivered to the Secretary, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Any information that is business confidential must be so noted and accompanied by a justification.

(e) We will publish a list of potential coastwise-qualified launch barge owners/operators on our Web site at *http://marad.dot.gov*. We will publish a summary of the early notification information in paragraph (c) of this section on the website and also disseminate it to the registered potential coastwise-qualified launch barge owners/operators.

### § 389.4 Application and fee.

(a) When, after surveying the market and discussing the platform project with potential coastwise-qualified launch barge owners/operators, it appears that coastwise-qualified vessels will not be available, the platform jacket owner/operator may apply to the Maritime Administration for a determination of non-availability and request to use a foreign launch barge.

(1) The fully complete application must be submitted to the Secretary, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590 at least 120 days prior to the proposed launch barge operations date.

(2) We reserve the right to waive or reduce or extend the time requirements based upon our evaluation of any national emergency or other situation.

(b) Applications must contain the information set forth in paragraphs (c)

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and (d) of this section and be accompanied by a statement signed by an officer of the company containing the following language:

“This application is made for the purpose of inducing the United States of America to grant a determination of non-availability of a coastwise-qualified launch barge as set forth in 46 U.S.C. 55108. I have carefully examined the application and all documents submitted and, to the best of my knowledge, information and belief, the statements and representatives contained in said application and related documents are full, complete, accurate and true. Further, I agree to pay any fees that result from the work required by this application.

Signature: \_\_\_\_\_  
Name (typed): \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

(c) The applicant must submit a non-refundable check in the amount of \$500 (Five Hundred Dollars) made payable to the Maritime Administration, which is a minimum fee and represents a deposit against any costs to the Government for processing the application. The applicant must also submit a signed statement (see paragraph (b) of this section) that they agree to pay all such additional costs that will be invoiced by the Government. Government costs will be billed for actual staff hours at applicable hourly rates plus overhead, administrative and other relevant costs.

(d) *Required Transport and Launch Project Information.*

(1) Applications must include a general description of the transport, placement and/or launch project, including:

- (i) A description of the platform jacket structure with launching weight, center of gravity, major dimensions, and a general arrangement plan,
- (ii) The projected loading date and site,
- (iii) The projected launching date and site,
- (iv) The names of the potential coastwise-qualified launch barges’ owners/operators contacted and their response regarding suitability and availability, and
- (v) The technical merits and availability studies for the coastwise-qualified launch barges considered.

(2) Characteristics of the applicant’s desired foreign launch barge, including,

at a minimum, the following information:

- (i) Name of the vessel,
- (ii) Registered owner of the vessel,
- (iii) Physical dimensions, deadweight capacity in long tons, ballasting capacities and arrangements, and launch capacity in long tons, and arrangements,
- (iv) Documentation showing classification as a launch barge by one of the following classification societies: American Bureau of Shipping (ABS), Bureau Veritas (BV), Lloyd’s Register (LR), Germanischer Lloyd (GL), Det Norske Veritas (DNV), or Nippon Kaiji Kyokai (NK).

(v) Date and place of construction of the foreign launch barge and (if applicable) rebuilding. If applicant is unable to document the origin of the vessel, foreign construction will be assumed.

(vi) Name, address, and telephone number of the foreign launch barge owner.

(3) The signed statement that the applicant represents that the foregoing information is true to the best of the applicant’s knowledge, as required by paragraph (b) of this section and the \$500 deposit fee.

(e) We may require additional information from the applicant as part of the review process. The application will not be considered complete until we have received all relevant information.

**§ 389.5 Review; issuance of determinations.**

(a) The Maritime Administration will review each application for completeness including evidence of prior notification and payment of application fee. Applications will not be processed until deemed complete. We will notify the applicant if additional information is necessary. We encourage the submission of applications well in advance of project dates in order to allow sufficient time for review under this part.

(b) We will review the information required by § 389.4. When the application is deemed complete, we will publish a notice in the FEDERAL REGISTER describing the project and platform jacket involved, advising that all relevant information reasonably needed to assess the transportation and launching requirements will be made

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available to interested parties upon request. The notice will request that information on the availability of coastwise-qualified launch barges be submitted within thirty (30) days after the publication date. We will also notify the coastwise-qualified owners/operators who have registered with us as per § 389.3.

(c) The Maritime Administration will review any submittals whereby an owner or operator of a coastwise-qualified launch barge asserts they are available and we will facilitate discussions between the offeror and the platform jacket owner/operator. If the parties are unable to reach agreement, we will make a determination regarding availability.

(d) If needed, the Maritime Administration's technical personnel will review the data required in § 389.4. The data must be complete and current. Any data submitted will not be returned to the applicant and will be retained by us on file for a period of time. The Maritime Administration review will not substitute for the review and approval by either a major classification society (ABS, BV, LR, GL, DNV, NK) or the U.S. Coast Guard. The Maritime Administration review will not verify the accuracy or correctness of the applicant's engineering proposal;

rather, it will only pertain to the general reasonableness and soundness of the technical approach.

(e) The Maritime Administration will deny the application if:

(1) We find the applicant did not comply with the requirements in § 389.3 or § 389.4; or,

(2) We determine a suitable coastwise-qualified launch barge is reasonably available.

(f) The Maritime Administration will issue a determination of non-availability if we determine that no suitable coastwise-qualified vessel is reasonably available.

(g) Our determination will be issued within ninety (90) days from the date the application notice was published in the FEDERAL REGISTER.

(g) Our determination of non-availability will expire one-hundred and twenty (120) days after the date of issuance, unless we provide an extension for good cause.

Maritime Administration determinations in this regard should NOT be interpreted as a change setting new federal maritime precedents. The Maritime Administration continues to support the Jones Act, the Passenger Vessel Services Act, and other federal U.S.-flag requirements.