DEPARTMENT OF TRANSPORTATION

Maritime Administration

46 CFR Part 298

[Docket No. R–154]

RIN 2133–AB14

Obligation Guarantees—Program Administration

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Final rule.

SUMMARY: The Maritime Administration (''MARAD'') is issuing this final rule which amends certain provisions of the existing regulations implementing Title XI of the Merchant Marine Act, 1936, as amended (''Act''). This rule is intended to improve administration of the Title XI program. MARAD administers financial assistance under Title XI of the Act in the form of obligation guarantees for all types of vessel construction and shipyard modernization and improvement, except for fishing vessels. The part of the Title XI program related to fishing vessels is administered by the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce, (''NOAA''), pursuant to NOAA regulations, which appear at 50 CFR part 253.

EFFECTIVE DATE: This final rule is effective on May 9, 1996.

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SUPPLEMENTARY INFORMATION: Title XI of the Act, 46 App. U.S.C. 1271 *et seq.*, authorizes the Secretary of Transportation (''Secretary'') to provide guarantees of debt (''obligation guarantees'') issued for the purpose of financing or refinancing the construction, reconstruction or reconditioning of vessels in United States shipyards for U.S. citizen owners. Applications for obligation guarantees are made to MARAD acting under authority delegated by the Secretary to the Maritime Administrator (''Administrator''). Prior to execution of a guarantee, MARAD must, among other things, make a determination of economic soundness of the project, and the financial and operating capability of the applicant. Prior to amendment by Public Law 103–160, guarantees could be issued only for debt issued by United States citizens. The Title XI program enables applicants to obtain long-term financing on terms and conditions and at interest rates comparable to those available to large financially sound corporations. Funds secured by the obligation guarantees are borrowed in the private sector.

Background

On November 30, 1993, the ''National Defense Authorization Act for Fiscal Year 1994'' (''Authorization Act''), Pub. L. 103–160, was enacted. Subtitle D of Title XIII of the Authorization Act, cited as the ''National Shipbuilding and Shipyard Conversion Act of 1993'' (''Shipbuilding Act''), expanded the Title XI program by authorizing the Secretary to guarantee obligations issued to finance the construction, reconstruction, or reconditioning of eligible export vessels and for shipyard modernization and improvement. The Shipbuilding Act establishes ''a National Shipbuilding Initiative (NSI) program to be carried out to support the industrial base for national security objectives by assisting in the reestablishment of the United States shipbuilding industry as a self-sufficient internationally competitive industry.''

On March 31, 1994, MARAD published in the Federal Register an interim final rule, effective on publication, which amended its regulations implementing Title XI in order to carry out the provisions of Subtitle D of Public Law 103–160, expanding the authorization for obligation guarantees to finance the construction, reconstruction, and reconditioning of eligible export vessels and shipyard modernization and improvement. A final rule was published on September 16, 1994. The final rule stated that MARAD would publish at a later date a separate notice of proposed rulemaking to improve administration of the entire Title XI program.

MARAD initiated a review of the administration of its Title XI program regulations with the objective of implementing President Clinton's ongoing Regulatory Reform Initiative and to reaffirm and implement the principles of Executive Order 12866—Regulatory Planning and Review (September 30, 1993). This rulemaking significantly shortens the time for processing applications for guarantees and reduces the economic burden on applicants in complying with MARAD requirements for the submission of information. Accordingly, it is expected to encourage the construction, reconstruction and/or reconditioning of vessels in United States shipyards and the modernization and improvement of general shipyard facilities located in the United States.

NPRM

MARAD published a notice of proposed rulemaking (NPRM) on April 26, 1995, in the Federal Register (60 FR 20592) and is now issuing this final rule concerning program administration. This rule reflects consideration of all comments received in response to the NPRM and the interim final rule. Consideration has been given in the final rule to all concerns addressed relative to the Title XI program.

In the interim final rule issued to implement the expanded authorization in Public Law 103–160 for issuing Obligation Guarantees, MARAD requested and received public comments on two additional issues, applicable to the entire Title XI program, namely: (1) The issuance by the Secretary of a Letter of Interest prior to an applicant's submission of a complete application and the subsequent issuance, if any, of a Letter Commitment, and (2) the establishment of a deadline, such as 60 days, by which the Secretary would act on a Title XI application considered complete by the Secretary. In the final rule of September 16, 1994, MARAD determined that these two issues would be addressed in the subsequent NPRM concerning program administration because they apply to both the export and domestic programs. The reason is that this would allow MARAD to consider the issues for both the domestic and export programs at the same time. MARAD advised that commenters need not resubmit their views on Letters of Interest and the 60 day processing period in response to the new NPRM. The discussion of the rulemaking text below differentiates between comments received in response to the interim final rule and the NPRM on these two specific areas.

These regulations do not require more extensive paperwork or reporting requirements than exist under the present Title XI regulations. Exemptions provided herein should substantially lessen the aggregate reporting burden.

In order to alleviate a potential source of confusion in the discussion of the regulations by section, when one particular section pertains to more than one issue, the discussion and MARAD's subsequent response is divided into individual issues related to the content of that section.

Discussion of Rulemaking Text

The discussion that follows summarizes the comments submitted to MARAD by 23 commenters on the NPRM and the commenters on the

interim final rule, notes where changes have been made to the Title XI regulations and the rationale therefor, and, where relevant, states why particular recommendations/suggestions have not been adopted. It is noted that where the first letter of one or more words is capitalized, that term is defined in § 298.2. In addition to soliciting comments on specific amendments to the Title XI regulations proposed in the NPRM, MARAD solicited industry and other public comments on three additional issues in general. The first issue is the retention in § 298.13 of the waiver requirement for foreign components and services to be included in Actual Cost. MARAD expressed concern about the potential adverse effect of eliminating the waiver requirement on the U.S. supplier base, which MARAD recognizes as critical to the national defense and economy. MARAD stated that it is attempting to create an environment where both the shipbuilding and ship supply industries have the opportunity to be competitive based on fair pricing, quality, and timeliness. All comments received in this area are in the discussion of § 298.13.

The second issue on which MARAD solicited public comments is construction period financing. As the Secretary may approve Guarantees with respect to obligations to be issued for the applicable period of construction, reconstruction, or reconditioning, MARAD invited comments on available forms of security, in addition to surety bonds, that could protect MARAD's interests as a lender, how progress should be monitored, what new procedures/methodologies should be developed to improve the previously utilized progress payment system, and if payment of interest on the obligations should be made on a more frequent basis (i.e., weekly, monthly or quarterly) than that outlined in § 298.22, *Amortization of Obligations*. In addition, comments were solicited as to how the Title XI applicant will verify/certify to MARAD that certain costs have been paid prior to disbursement of Title XI funds from the escrow account, for example, the use of an agent on MARAD's behalf to verify that certain costs have been paid. All comments received in this area are discussed in § 298.21 below.

Finally, MARAD also requested comments concerning the standard application Form MA–163 referenced in § 298.3, *Applications*, and the required documentation outlined in subpart D of this part 298. All comments received in these areas are discussed under § 298.3 or subpart D of this part.

Discussion of Regulations by Section.

Note: Paragraph references are as designated or redesignated in the notice of proposed rulemaking.

Section 298.2 Definitions

(b), Actual Cost. One commenter suggested the inclusion of Guarantee Fees as an item in the definition of Actual Cost.

MARAD Response: The present definition of ''Actual Cost'' refers to § 298.21(b) which is being amended in the final rule to clearly state that ''Guarantee Fees determined in accordance with the provisions of section 1104(e) of the Act shall be included in the items of Actual Cost.'' Hence, adoption of the NPRM as a final rule will effectively accomplish the commenter's suggestion without the necessity to change the definition of Actual Cost.

(f), Depreciated Actual Cost. One commenter suggested the inclusion of Guarantee Fees as an item in the definition of Depreciated Actual Cost.

MARAD Response: The same response as to the preceding comment applies.

(l) Guarantee Fee. One commenter suggested deletion of the reference to interest accrual on the Guarantee Fee.

MARAD Response: The definition of ''Guarantee Fee'' does not include a reference to interest accrual and, therefore, is not being amended.

(o) Letter of Interest. While no commenter suggested a change to the proposed definition of a Letter of Interest, comments were received regarding the Letter of Interest concept and content.

MARAD Response: MARAD's response to the comments are outlined below in the discussion regarding § 298.3(f). In view of the fact that MARAD is deleting § 298.3(f) in its entirety, this definition will not be included in the Title XI regulations.

(y) Related Party. One commenter suggested that the definition of Related Party should be revised to be consistent with the existing definition in generally accepted accounting principles (GAAP).

MARAD Response: The intent behind replacing the terms ''Affiliate'' and ''Affiliated'' with the term ''Related Party'' was to be consistent with a terminology change in GAAP as promulgated by the Financial Accounting Standards Board of the American Institute of Certified Public Accountants. Although the commenter has provided the present GAAP definition for Related Party, MARAD has determined that it would be inappropriate to incorporate the precise GAAP definition as it exists today in the Title XI regulations due to the frequent modifications to GAAP definitions. It should be noted, however, that MARAD's regulations are to be construed in a manner consistent with GAAP, unless the regulations expressly deviate from GAAP.

(cc) Vessel. The definition of Vessel was not modified in the NPRM. However, three of the four commenters supported MARAD's announcement of a change in policy to expressly include passenger vessels engaged in commercial common carriage, in particular ferries, as eligible for the Title XI program. One commenter also was in favor of an expansion of Title XI financing to the ''cruise to nowhere'' segment and gaming vessels, as the commenter believes that the passenger vessel segment of the U.S. flag merchant marine will make the most gains in the next decade. One commenter does not believe that the change in policy on passenger vessels should include ferries and/or gambling vessels on U.S. rivers because use of scarce Title XI resources for these vessels would not promote the Act's objective of ocean-going vessels or vessels capable of serving as a military auxiliary.

MARAD Response: MARAD does not believe that a regulatory change to this definition is necessary. It is MARAD's position that the expansion of Title XI financing in the passenger vessel market generally will aid in the development and maintenance of an adequate and well-balanced U.S. merchant marine and will promote U.S. commerce. As to the concern expressed about MARAD's scarce Title XI resources, MARAD retains informal discretion under the Act and formal discretion under § 298.3(e) (priorities), in appropriate circumstances, to limit allocation of its Title XI resources to ensure optimal use of MARAD's appropriated funds in terms of promoting the objectives of the Act.

Section 298.3 Applications

Section 298.3 (a). This section specifies the format for submitting and amending applications for Title XI financing. As mentioned above, MARAD specifically solicited comments on the current standard application Form MA 163 and any proposed amendments to the form and standard documentation, particularly with regard to export vessels and shipyard modernization.

One commenter stated that inadequate time was given to review and comment on the application form; however, as a general comment, the form needs to be revised to be consistent with the recent changes in law for

shipyard modernization and Eligible Export Vessels. Another commenter stated that the application form is overly complicated and greatly increases transaction costs and discourages applicants. The commenter suggested the establishment of an advisory committee composed of representatives from MARAD, the maritime bar, investment and commercial banking industry, shipbuilding industry and the shipowning and operating industry to review and assist in revisions.

A final commenter believes that the administration of the program will be improved by including a list of all documents required to be submitted with an application, i.e., any demise charters, time charters in excess of six months, contracts of affreightment, drilling contracts or other contractual arrangements (§ 298.3) and legal opinions ensuring the enforceability of the mortgage or security interest for Eligible Export Vessels (§ 298.31(a) (2) and (3)).

MARAD Response: In view of the time required to determine appropriate changes and to obtain approval from the Office of Management and Budget for a revised form, MARAD has decided to defer consideration of this matter in order to avoid delay in promulgating this rule. MARAD supports the suggestion that a non-Governmental authority establish a working group composed of representatives from MARAD, the maritime bar, investment and commercial banking industry, shipbuilding industry and the shipowning and operating industry to review and assist in revisions to the form.

MARAD agrees with the comment that the administration of the Title XI program will be improved by including with the application form a list of all documents required to be submitted with the application. MARAD will prepare such a list of documents, which list shall be provided with the standard application form.

In addition, MARAD has determined that the document required to be filed with the Secretary of the Senate and the Clerk of the House of Representatives by the Lobbying Disclosure Act of 1995, Pub. L. 104–65, must be filed as part of a formal Title XI application, together with the declaration required to be filed by 31 U.S.C. 1352. MARAD will still require similar forms at Closing. Finally, as part of the application process MARAD may request that the applicant submit information to assist MARAD in the preparation of a National Environmental Policy Act analysis.

The instructions regarding the filing of a Title XI application on Form MA–163 require that 12 complete sets (of which three must be duly executed and certified by the applicant), including schedules and exhibits as required, must be filed with MARAD. MARAD has reviewed its internal requirements for processing applications and has reduced the required number of application sets to ten. Only two of the sets must be duly executed and certified by the applicant. In addition, MARAD has examined the possibility of allowing Title XI applicants to submit their Title XI applications on computer disk to be accompanied by two hard sets of the application duly executed and certified by the applicant. Upon request a list of the computer software which can be utilized for disk submission of the application will be made available by the Office of Ship Financing.

Section 298.3(b)(1). In response to the 1994 interim final rule, most commenters thought that the 60-day processing period for completed applications was reasonable, appropriate, and adequate. Some commenters suggested a shorter period of 30 days as conforming more closely to purported international commercial norms. Some shipyards were concerned that the 60-day turnaround is noncompetitive in the international market because a ''complete'' application may in itself take more than 60 days to draft. They suggested that guidelines would be necessary to define the procedures for submitting a complete application. Some suggested that, for a pre-approved ship design, MARAD should be able to issue Letter Commitments within 30 days, and further suggested that MARAD review its application requirements to ensure that it is not requiring burdensome information. One commenter suggested that a deadline for processing completed applications is an unnecessary requirement.

The April 1995 NPRM reiterated the 60 day guideline and also proposed a 15-day deadline, after notification by MARAD, by which an applicant must correct deficiencies in the application or face possible termination of the application. In response to the NPRM, most commenters supported MARAD's efforts to shorten the time for processing guarantee applications. Several commenters suggested that to be world competitive, a 60-day turnaround, from when the application is submitted to the Closing, is necessary. Some commenters were concerned about the proposed reduced amount of time the applicant has to correct deficiencies in the application. One stated that placing a 15-day limit on correcting deficiencies would place an undue hardship on the applicant as well as make it impossible to meet the deadline where deficiencies involve engineering or architectural items and, therefore, suggested a minimum of 60 days to correct deficiencies. One commenter noted that the requirement makes no distinction as to the nature, complexity, or availability of the requested information.

Several commenters suggested that termination of an application should occur only when it is the applicant's failure to complete the application that results in inaction and that failure to supply the deficient information should result in suspension of the application process, rather than termination. Several commenters stated that if an application is resubmitted, no new filing fee should be assessed unless the application is for a substantially different project. Finally, one commenter indicated that having to start over will actually result in prejudice to MARAD's consideration of a subsequent application.

MARAD Response: Prior to the issuance of the NPRM, this section indicated that the period between the filing of the application and the anticipated date by which a Letter Commitment is issued was six months and that the period for completing an application and the Secretary taking action on a completed application is within one year. The NPRM proposed significant modifications to the Title XI regulations in this section in order to provide for expeditious processing of each Title XI application, resulting in lower administrative costs and a more timely response to the applicant.

The 60-day processing period for completed applications is a general guideline for processing Title XI applications. If possible, MARAD will process completed Title XI applications on a more expedited basis than 60 days in order to enable applicants to more quickly respond to market opportunities.

As to some shipyard concerns regarding the drafting of a ''complete'' application, the time that it takes to draft a Title XI application is not factored into the 60-day processing period. MARAD is on public record as encouraging Title XI applicants to have at least one pre-application meeting with MARAD personnel to, among other things, determine what essential pieces of information about the applicant and its proposal must be included in the application. As each application is project specific, the information necessary for submitting a complete application for a given project will be discussed at the pre-application meeting(s). If applicants follow MARAD's suggestion to have pre-

application meetings, the application drafting time should be significantly reduced.

The suggestion that MARAD issue a Letter Commitment in the case of pre-approved ship designs within 30 days is rejected because MARAD still has to review the application for economic soundness and review of a company's financial position. In most cases, this could not be completed in the proposed 30-day period. With regard to the suggestion that MARAD review its application requirements to ensure that it is not requiring burdensome information, MARAD is undertaking this review.

Finally, one commenter's suggestion that a deadline for processing completed applications is an unnecessary requirement is rejected because MARAD believes that it is critical to an orderly and expeditious process to have a specific indication as to the period for such process.

Several commenters expressed concerns about the reduced amount of time (from the previous period of nine months) the applicant has to correct deficiencies in the application. In response, MARAD notes that failure by the applicant to correct deficiencies within 15 days does not result in automatic termination of the application. The regulation provides that the *Secretary* may terminate processing of the application without prejudice. MARAD thus has the flexibility to extend the deadline, if appropriate, taking into consideration the nature, complexity, or availability of the requested information.

MARAD does not believe it necessary to amend the language in this paragraph to provide that, in lieu of terminating an application without prejudice, MARAD may elect to suspend processing of an application for any number of contingencies. MARAD may use its discretion to do whatever is appropriate in processing applications.

The position of several commenters that, if an application is terminated, no new filing fee should be assessed unless a subsequent application is for a substantially different project, is justifiable and is being adopted.

In view of the foregoing, MARAD sees no reason to change the present wording of § 298.3(b)(1), with the exception of one item. The paragraph is being amended to clarify that if an application is terminated by MARAD without prejudice, no new filing fee will be assessed for a subsequent application for a similar project that is filed within one year of the termination date. If a subsequent application is for a substantially different project as determined by MARAD on a case-by-case basis a new filing fee will be assessed.

Section 298.3(c). The NPRM proposed requiring each Title XI application to be accompanied by a filing fee in the amount of one quarter of the investigation fee amount, calculated pursuant to the formula outlined in § 298.15, but in no event less than $1,000.

Several commenters do not support raising the $1,000 filing fee, arguing that preparing a Title XI application shows seriousness. Other commenters object to raising the filing fee to the amount proposed in the NPRM, but believe a modest fee increase is appropriate. One commenter believes that a multiple vessel application should not result in a substantially greater fee than a single vessel application of the same type because the amount of analysis involved is not significantly more. Therefore, the commenter believes that the filing fee should be capped at $25,000 to discourage frivolous applications. Another commenter supports capping the filing fee at a maximum of $10,000. A $10,000 non-refundable maximum filing fee will ensure the seriousness of the applicant and provides the government with a substantial and immediate contribution toward the cost of processing the application. At the same time, the commenter states that a $10,000 cap will not result in applicants undertaking substantial economic risk simply to file an application.

One commenter states that the proposed filing fee increase would act as a major disincentive to program participation by portions of the maritime community the program is designed to serve, bearing most heavily on those least able to afford its terms. The increased fee would create a severe disincentive and is not only onerous in the extreme for any large project but also discriminatory against larger projects which tend to bring greater benefits to the country. Such a fee level, in the case of large projects, bears no relationship to a greater cost to MARAD of processing a given application up to the point of approval and receipt of the investigation fee.

Another commenter believes that if the proposed NPRM modifications are adopted, either the Letter of Interest procedure will in effect become the application procedure, with prospective applicants submitting applications complete in all respects (except for signatures and payment of the application fee) or the number of Title XI applications will decline dramatically. The commenter states that MARAD cannot adequately review a Title XI application in a ten-day time frame set out for Letters of Interest, and many applicants, particularly for Eligible Export Vessels, will not pay thousands of dollars to find out if MARAD might approve their application.

MARAD Response: MARAD has reconsidered its proposed amendment and has decided to further amend this paragraph by requiring each Title XI application to be accompanied by a filing fee in the amount of $5,000. Since the filing fee is deducted from the investigation fee, which is paid at the end of the application process, there will be no net increase in cost to the applicant. However, the increase in the initial filing fee will enable the Government to recover more of its administrative costs for application processing at the beginning of the application period. The instructions for filing Form MA–163 will be modified to reflect the increased fee.

Section 298.3(f). In response to the 1994 interim final rule, almost all of the 28 commenters responded favorably to the proposal that the Secretary exercise discretion to issue a Letter of Interest prior to the applicant's submission of a complete application. Commenters noted that the procedure could be particularly useful if the shipbuilder could use the document as a marketing document to compete effectively against foreign yards. Some suggested that if MARAD were also to preapprove ship designs, Letters of Interest would be very effective indicators of MARAD's interest in a proposed financing. One commenter suggested that Letters of Interest could be used by applicants to forecast the cost of a transaction and the expertise that will be needed to complete a proposed transaction.

Commenters proposed that requests for Letters of Interest should contain information about (1) the type and design of the Vessel to be financed and its intended trade, (2) the approximate cost of the Vessel and its proposed builder, (3) the amount of the requested Guarantee, (4) recent financial information on the prospective shipowner or bareboat charterer, (5) a description of the collateral to secure the Secretary's Guarantee, and (6) identification of the country in which the Vessel would be owned and documented. A commenter recommended that there be no charge or fee for the issuance of a Letter of Interest, that the letter be issued prior to the filing of an application, and that the letter be issued within ten days of the request.

Several commenters raised two concerns about Letters of Interest. First,

they argued that requests for such letters must be treated confidentially because a request for a letter may come during the negotiating process and the subject shipyard would not want its competitors to be aware of the negotiations or potential prices. A second concern raised was that the formalization of a Letter of Interest procedure could slow down the expeditious approval by MARAD of loan guarantee applications by effectively duplicating the formal application process. It was suggested by one commenter that MARAD could substitute preapplication meetings for the Letter of Interest. Additional concern was expressed that the conditions contained in the Letter of Interest should not be deemed by the agency to be binding if the applicant later demonstrates that it can meet alternative, but equivalent conditions.

MARAD Response: MARAD noted in its comments above to § 298.2(o) its deletion of the Letter of Interest definition. Initially, MARAD intended its Letters of Interest to parallel those of the Export-Import Bank of the United States. However, MARAD has, with the passage of time, significantly diluted the content of its Letter of Interest to the point where the letter is in the nature of a letter of eligibility. MARAD found it necessary to amend the letters because, in certain instances, they had been held forth to outside institutions as representing some sort of commitment to a project by MARAD. Currently, the letters describe only the general eligibility of a project and advise that, as such, they do not and should not be construed as approval of the project by MARAD or the terms that would be applicable to the project. The letters state that approval of any project would be based on MARAD's determination that the project meets all statutory, regulatory and financial requirements. The letters further state that, although a project may be deemed eligible for Title XI financing, issuance of the letter does not give any assurances that MARAD would be interested in proceeding with, or that funds would be available for, the type of project should an application be filed. Therefore, MARAD believes that to continue to call these letters ''Letters of Interest'' is inaccurate. MARAD will continue to issue letters of eligibility to indicate the general eligibility of a project for Title XI financing. However, it will no longer issue any document referred to as a Letter of Interest. MARAD believes that the letter of eligibility concept does not have to be formalized in the Title XI regulations and, therefore, paragraph (f) is being deleted in its entirety.

MARAD does not agree with the commenters' concern that letters of eligibility be treated on a confidential basis. As a general matter, all letters of eligibility including all formal actions taken by MARAD, including the issuance of a letter of eligibility, must be disclosed to the public. However, if the request for a letter of eligibility, including attachments thereto, contains information which the submitter considers to be trade secrets or commercial or financial information and privileged or confidential, or otherwise exempt from disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. 552), the submitter shall assert a claim of exemption at the time of filing a letter of eligibility request. The same requirement shall apply to any amendment to the request. The procedures outlined in paragraph (d) of this section shall apply with respect to the assertion and review of FOIA exemption claims. Due to the nature of a request for a letter of eligibility, MARAD does not agree with the comment that the letter of eligibility procedure would slow down the expeditious approval by MARAD of Title XI applications. Finally, MARAD believes to be unfounded the comment that MARAD could substitute pre-application meetings for the letter of eligibility as the two concepts are unrelated. The purpose of a pre-application meeting is to exchange information and the purpose of a letter of eligibility is to identify the general eligibility of a project.

Section 298.10 Citizenship.

This section sets forth the citizenship requirements for Title XI applicants and certain other parties that must establish U.S. citizenship prior to acquiring a legal or beneficial interest in a Vessel financed under Title XI of the Act. The exceptions to this requirement are Eligible Export Vessels and General Shipyard Facilities.

Section 298.10(a). MARAD received four comments on this issue. One commenter merely pointed out a typographical mistake. The other three commenters supported the elimination of the citizenship requirement for all Title XI financed U.S.-flag vessels and stated that the only requirement should be the vessel documentation requirements administered by the U.S. Coast Guard. One of the three commenters, with known foreign involvement, is interested in converting semi-submersible drilling rigs into floating production systems (FPS) for use in the oil and gas industry in the Gulf of Mexico area. Therefore, their view is that Title XI financing should be available to ''transnational ship-owning corporations.'' Another commenter supported the elimination of the citizenship requirement because their desire is ''to see that the potential beneficiaries of the Title XI program are as broad as possible * * *'' A comment from a law firm stated that sections 1103(a) and 1104(a)(1) were amended by the Shipbuilding Act to eliminate Section 2 citizenship requirements for Title XI financed U.S.-flag vessels and that MARAD is misreading the U.S. citizenship requirements set forth in the defined term ''vessel'' at section 1101(b). Their view is that the U.S. citizenship requirement in this section is not all inclusive and applies only to certain types of vessels. One of the four commenters also stated that the citizenship of a preferred mortgagee is ''immaterial'' and MARAD should not be concerned with the citizenship of third party mortgagees.

MARAD Response: The U.S. ownership requirement for U.S.-flag vessels financed with Title XI has been consistently required throughout the life of the Title XI program. It was required for the predecessor federal ship mortgage insurance program, 52 Stat. 969 (See H.R. Rep. No. 2168, 75th. Cong., 3d Sess. 29), retained in the Federal Ship Loan Guarantee Program, enacted in 1972, 60 Stat. 909, and left unchanged by enactment of the Shipbuilding Act in which Title XI loan Guarantees were extended to Eligible Export Vessels, which could be owned by either U.S. citizens or non-U.S. citizens, but retained the limiting definition of vessels for non-export purposes. Therefore, by law, U.S.-flag Vessels receiving Title XI financing must be owned by U.S. citizens.

With respect to the comment regarding citizenship of mortgagees, MARAD does not require, under the Title XI financing program, evidence of the mortgagee's U.S. citizenship. MARAD only requires confirmation that the mortgagee complies with the statutory requirements established for mortgagees. Accordingly, MARAD will not amend the regulation.

Section 298.11 Vessel requirements

Section 298.11(a). Concerning paragraph (a), *United States Construction,* one commenter suggested that the structure of creating three separate classes of Vessels is confusing and unnecessary. To the extent a higher standard is required for operation in the coastwise trade, it should be sufficient simply to say that the Vessel shall be built to whatever standard is necessary

to entitle it to be eligible for such trade. There should be no distinction between U.S.-flag and Eligible Export Vessels. The standard for U.S. shipyard involvement for Eligible Export Vessels is the standard which should apply to all Vessels subject to specific trade requirements. The commenter therefore recommends that for all Vessels MARAD adopt the definition in § 298.11(a)(3), which provides that the Vessel is considered to be of U.S. construction if assembled in a United States shipyard. A second commenter states that since the Organization for Economic Cooperation and Development Shipbuilding Agreement recognizes the U.S. right to maintain the Jones Act, it is appropriate for the rule to make a distinction between Jones Act and non-Jones Act Vessels so that any prospective change to the guarantee period will not apply to Jones Act Vessels.

MARAD Response: Upon further review, MARAD agrees with one of the commenters that the creation of three separate categories of Vessels is unnecessary. As the proposed categories were squarely in line with the standards enunciated by the United States Coast Guard, MARAD believes it is appropriate instead to amend paragraph (a) of the regulation to simply state that for U.S.-flag Vessels, the Vessels shall be built to whatever standard is necessary to enable them to be eligible for their specific trade requirement. Accordingly, the regulation is being amended to provide that a Vessel, including an Eligible Export Vessel, financed by an Obligation Guarantee is considered to be of United States construction if the Vessel is assembled in a shipyard geographically located in the United States. In addition, § 298.32(a)(6) is being amended to reflect the above.

Section 298.11(c). Concerning paragraph (c), *Class, condition and operation,* two commenters supported MARAD's proposed amendment regarding Quality Systems Certificate Scheme (QSCS) issued by qualified International Association of Classification

Societies (IACS) members as meeting acceptable standards for such a society to participate in the Eligible Export Vessel program.

MARAD Response: By requiring solely ISO–9000 registration, the current Title XI regulations do not allow members of IACS who are QSCS qualified members that are not ISO–9000 registered to participate in the Title XI Eligible Export Vessel program. Initially, there was a thought that merely agreeing to a QSCS standard would screen out marginally qualified classification societies. However, requiring the ISO–9000 standard would currently screen out the American Bureau of Shipping and other highly qualified classification societies whose inspection and classification activities are recognized worldwide. Paragraph (c) has been amended to permit QSCS qualified IACS members who have been recognized by the United States Coast Guard as meeting acceptable standards for such a society to participate in the Eligible Export Vessel program. That recognition shall include, at a minimum, recognition that the society meets the requirements of IMO Resolution A.739(18).

Section 298.11(e). Concerning paragraph (e), *Metric Usage,* one commenter states that it is not clear what is meant in the regulation by the statement that the ''preferred system'' is the metric system. If some preference is to be given to application of the metric system, the consequences of such preference should be spelled out.

MARAD Response: DOT Order 1020.1D ''Department of Transportation Transition to the Metric System'' established Departmental policy for transition to the metric system in accordance with the Metric Conversion Act of 1975, as amended by Section 5164 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100–418 (Omnibus Act). Section 5164 of the Omnibus Act declares that it is the policy of the United States to designate the metric system of measurement as the preferred system of weights and measures for U.S. trade and commerce. Section 5164(b)(2) requires each Federal agency to use the metric system of measurement in its procurement, grants, or other business-related activities. Therefore, the Title XI regulations have been amended to indicate that the preferred system of measurement and weights for vessels and advanced and modern shipbuilding technology is the metric system as a matter of policy. However, no preference/priority is given to processing applications where the metric system of weights and measures is utilized. The priorities given to Title XI applications are outlined in § 298.3(e) and select criteria for evaluating Title XI applications is set forth in § 298.17.

Section 298.12 Applicant and Operator's Qualifications

Section 298.12(b)(2). This section outlines identifying information required to be submitted if the applicant is a partnership, joint venture, association, or unincorporated company.

MARAD Response: Although no comments were received regarding the change to this paragraph as outlined in the NPRM, MARAD has decided to add a new paragraph (b)(2)(vi) requiring the submission of information regarding financial, management and/or equity transactions which could have a significant impact on the ability of the applicant to meet the Title XI requirements.

Section 298.12(f)(1). One commenter stated it is unclear which individuals need to be named in this section which requires that the background of ''all senior supervisory personnel'' be submitted. To the extent that advanced shipbuilding technology is the subject of the application, it should be sufficient to submit the background of the people who will be directly responsible for the installation or operation of the facility or method. Additionally, one commenter suggested that the word ''personnel'' should be stricken from the proposed insert—''by all senior supervisory''—because the word ''personnel'' already follows each place that the phrase is inserted.

MARAD Response: MARAD agrees that the word ''personnel'' should be stricken from the proposed amendment to that paragraph. MARAD sees no reason to change the present wording of paragraph (f)(1) regarding the background of all senior supervisory personnel for Advanced Shipbuilding Technology. It is a sufficiently clear standard to apply to particular circumstances.

Section 298.13 Financial Requirements

Section 298.13(a)(2)(i). One issue on which MARAD solicited public comments in the NPRM is the retention in section 298.13 of the waiver requirement for foreign components and services to be included in Actual Cost, which waiver shall not be granted for foreign components of the hull and superstructure. MARAD indicated its concern about the potential adverse effect on the U.S. supplier base, which MARAD recognizes as critical to the national defense and economy. In the NPRM, MARAD stated that it is attempting to create an environment where both the shipbuilding and ship supply industries have the opportunity to be competitive based on fair pricing, quality, and timeliness.

A broad spectrum of comments were received on this issue. Some commenters supported the retention of the current waiver requirement for foreign components and services. One commenter submits that the retention of the waiver provision is the most

prudent path for applicants to follow and outweighs any speculative adverse impact that retention of the waiver might have on the U.S. supplier base. There are instances in which a foreign component or service is necessary for the construction, reconstruction, or conversion of a vessel, and the applicant should not be penalized in such instances. Additionally, the commenter states that removal of the waiver might place a U.S. supplier who competes with foreign suppliers in a position to demand what might amount to monopolistic prices; the supplier who normally competes in the world market would be given dominant market power if the applicant were required to purchase supplies from such a U.S. supplier in order to obtain financing for the cost of such supplies. The commenter states that removal of the waiver provision has the potential to hinder, rather than enhance, the creation of a competitive domestic ship supply industry based on fair pricing, quality and timeliness. In addition, the commenter submits that it should be made clear that, in addition to the hull and superstructure, each additional foreign component or service for which a waiver is not granted, and thus which is not included in Actual Cost, can be regarded as owner-furnished equipment that may be used in satisfying the applicant's equity requirements. Finally, that commenter proposes adding the following underscored language to § 298.13(a)(2)(1): ''Although excluded from Actual Cost, foreign components of the hull and superstructure *and other foreign components and foreign services for which a waiver has not been granted* can be regarded as owner-furnished equipment that may be used in satisfying the applicant's equity requirements * * *.''

Another commenter states that the term ''component'' should be defined in order to eliminate the possibility that raw materials, such as steel, might be considered to be a component and required to be of U.S. origin. It is important to retain the ability to waive the requirement for U.S. components, MARAD needs the flexibility and it is too hard to predict technological changes that may be beneficial to a vessel that may be obtained only through a foreign source or to compensate for shortages in the U.S. supply of components affecting delivery schedules. Another commenter notes that the regulations are not specific as to what items are to be considered as components of the ''hull and superstructure.''

Other commenters supported the introduction of a more restrictive waiver requirement by recommending that waivers ''ordinarily be granted only where the applicant has demonstrated that the item involved: (a) Is not manufactured by a U.S. domestic source, or if a service, is not available from such a source; (b) is not available from a U.S. domestic source in a timely fashion; or (c) is not available from a U.S. domestic source at a competitive price.'' Along the same line, another commenter states that the regulations need to be amended to provide for standards and procedures for granting waivers, such that applicants will be required to demonstrate in a clear and convincing way that no U.S. product is available and that sufficient and effective steps have been taken to search the U.S. industrial base.

Finally, some commenters opposed the requirement for a foreign component waiver for non-hull and superstructure items. One commenter states that the requirement to seek a waiver for each of a myriad of items would be a crippling obstacle to achieving competitiveness and the NPRM gives no indication as to grounds for a waiver. The commenter states that protection of the U.S. supplier base will not promote competition. Where U.S. suppliers are capable and cost-competitive, the commenter expects U.S. suppliers to be used. However, the commenter supports the requirement that only hull and superstructure components fabricated in the U.S. should be included in Actual Cost and that no waiver should be granted. The commenter does not believe that inclusion of foreign hull and superstructure components should disqualify the entire vessel from Title XI financing and does not see any significant benefit to allowing foreign hull and superstructure components to be included as part of the equity contribution. Finally, the commenter states that it is unclear in the example given in the NPRM how foreign hull and superstructure components will be considered as part of the equity contribution. Nonetheless, the regulations should specifically state that large items of foreign hull and superstructure components excluded from actual cost may be financed externally, such as in a foreign jurisdiction that is willing to provide export financing.

Another commenter opposing the requirement for a foreign component waiver for non-hull and superstructure items states that restrictions on the use and financing of foreign equipment will severely limit U.S. shipyards' ability to become globally competitive. The commenter adds that it is not reasonable to assume that these restrictions will result in the domestic manufacture of items. U.S. yards need to have the same access to the global supplier base as do other yards so that they can obtain the low prices and technologically advanced designs necessary to secure orders. Restricting U.S. shipyards from procuring foreign source machinery, equipment, or hull and superstructure material which has been manufactured in a foreign facility is not the way to make them competitive on the international market.

Another commenter respects MARAD's good faith desire to try to protect U.S. suppliers, but opposes the actual cost disqualification for all foreign components and services. The commenter states that the NPRM's articulated policy goal is contrary to the spirit of GATT, to the policy of the President and the USTR, and to Congressional intent. In order to get export shipbuilding orders, there must be freedom to respond to the commercial dictates of international customers. The commenter adds that U.S. suppliers are done no favors by adopting protectionist principles which can prevent U.S. shipyards from obtaining export orders. The commenter states that a ''Buy America'' program should not be adopted until choice availability and price parity from within the domestic U.S. is fully equal to that internationally available. If the above arguments are rejected, the commenter argues that the hull and superstructure metals components are the only items for which no waiver should be granted.

A final commenter adds that exclusion of foreign components of the hull and superstructure and a waiver for other foreign components or services is redundant in the case of coastwise-eligible U.S.-flag Vessels since other U.S. laws require that such Vessels be built in the United States (which term includes fabrication of all *major* components of the hull and superstructure in the U.S.). The commenter states that the regulations omit the word *major* thereby arguably setting up an even higher standard than that required to document Vessels under the U.S. flag for coastwise trade. The commenter recommends that MARAD limit its requirements under Title XI in the case of non-coastwise U.S.-flag Vessels and foreign-flag Vessels to assembly in a shipyard in the United States. The commenter states that MARAD should encourage U.S. shipyards to compete internationally and not limit its own program in a way that makes it less attractive than competing programs being offered by foreign countries. In addition, the commenter states that the waiver

requirement is totally unwarranted in light of earlier removal of the ''Buy America'' requirements. Placing additional requirements of this type is the kind of unnecessary government regulation that the Administration promised to eliminate in its October 1993 shipbuilding initiative report.

MARAD Response: MARAD reiterates its concern about the potential adverse effect on the U.S. supplier base of elimination of the waiver requirement for foreign components and services to be included in the Actual Cost determination. MARAD is attempting to create an environment where both the shipbuilding and ship supply industries have the opportunity to be competitive based on fair pricing, quality and timeliness. In view of the foregoing comments, MARAD has decided to retain the waiver requirement and to establish a standard for granting a waiver. The standard would be the certification by the applicant, to be reviewed by MARAD, that a foreign item or service is not available in the U.S. on a timely or price-competitive basis, or is not of sufficient quality. Paragraph (a)(2)(i) is being modified accordingly.

In addition, MARAD agrees with one of the commenters that the omission of the word ''*major*'' from defining the components of the hull and superstructure which must be fabricated in the U.S. establishes a higher standard than that required to document vessels under the U.S. flag for coastwise trade. Accordingly, the appropriate clarification is being made to paragraph (a)(2)(i).

Section 298.13(a)(4). One commenter states that provision should be made to accept financial information provided in the normal accounting system used by the applicant, provided that it is an accepted accounting system in the applicant's country of origin and further, provided that the applicant submits some reconciliation of the major differences between the accounting system employed and GAAP. The commenter adds that the Securities and Exchange Commission accepts this approach. One other commenter recommends that if U.S. GAAP is to be required of all applicants or other entities significantly involved with the financing, that requirement should be reflected in the regulations.

MARAD Response: MARAD recognizes that a requirement to meet U.S. generally accepted accounting standards may be unduly burdensome in the case of Eligible Export Vessels. Accordingly, in the interim final rule published in the Federal Register on March 31, 1994, MARAD amended § 298.42 of the Title XI regulations to provide that, in the case of such vessels, the company accounts shall be audited at least annually and the Secretary *may* require that the financial statements be in accordance with generally accepted accounting principles by accountants, as otherwise described in § 298.42, or certified by independent public accountants licensed to practice by the regulatory authority or other political subdivision of a foreign country, provided such accountants are satisfactory to the Secretary. In order to be consistent with § 298.42, MARAD agrees that provision should be made for MARAD to accept financial information from Eligible Export Vessel applicants provided in the normal accounting system used by the applicant, provided that it is an accepted accounting system in the applicant's country of origin and, further, provided that the applicant provides a reconciliation of the major differences between the accounting system employed and GAAP. This approach would parallel that accepted by the Securities and Exchange Commission. MARAD has added new language to this paragraph to accommodate the commenter's concerns and to make this paragraph consistent with § 298.42.

Section 298.13(b). This paragraph sets forth financial definitions for §§ 298.13, 298.35 and 298.42 of the Title XI regulations. One commenter is confused as to how the NPRM amended this section to be consistent with 46 CFR part 232, as no proposed amendments to part 232 could be found. The commenter added that, for the definitions of working capital, equity and long-term debt, the NPRM deleted references to GAAP, which revisions are not supported by the commenter.

MARAD Response: The commenter appears to have misinterpreted the proposed amendment to this section of the Title XI regulations. The NPRM amended certain paragraphs of this section to make them consistent with 46 CFR § 232, which was most recently amended by MARAD with the publication of a notice in the Federal Register on December 9, 1993. There is no indication in the discussion section of the NPRM that amendments to part 232 were also being proposed, which is the reason the commenter could not find any proposed amendments to part 232.

With regard to the commenter's statement that the NPRM deleted references to GAAP in the definitions of working capital, equity and long-term debt, it is important to note that 46 CFR § 232.2(a), which is separate from the Title XI regulations, requires that all contractors shall conform their accounting policies to GAAP (promulgated by the Financial Accounting Standards Board of the American Institute of Certified Public Accountants). Although the NPRM deletes references to GAAP in these Title XI regulations, working capital, equity and long-term debt definitions must conform to GAAP as such terms are defined in 46 CFR 232.2(a). Hence, MARAD sees no reason to change the present wording of paragraph (b).

Sections 298.13 (d) and (e). These sections outline the primary and special requirements required at the Closing. Comments were received from only one commenter on these paragraphs. The commenter states that the maximum debt to equity rate of 2:1 is unrealistic and should be revised upwards. The commenter considers the ratio unrealistic because a company could have a large asset requisition and yet still be strong enough to pay back its loan. Furthermore, since banks allow a ratio of 3:1 in certain cases, MARAD regulations are more burdensome. In addition, the commenter states that the working capital ratio is obsolete and should be replaced by a cash flow ratio for asset-based companies. A minimum ratio of 1.25:1 is recommended by the commenter in keeping with current banking requirements.

MARAD Response: MARAD does not agree that a debt to equity ratio of 2:1 and a positive working capital ratio are either unrealistic or obsolete standards, and is not amending these requirements. However, MARAD recognizes that these standards may not be appropriate in certain cases and does not apply them in every case. Financial requirements are determined on a case-by-case basis and are dependent upon numerous financial and economic factors. Pursuant to paragraph (h) of this section, the Secretary may waive or modify the financial terms or requirements otherwise applicable under this section, upon determining that there is adequate security for the Guarantees. Should an applicant have sufficient financial resources to justify a different ratio, the Secretary already has the authority to modify the financial requirements.

Section 298.14 Economic Soundness

Section 298.14. One commenter stated that in evaluating the income stream for a one vessel project, MARAD should consider the assets of the entire company which back up the loan, including other vessels' income. In addition, loans should provide for repayment without the imposition of pre-payment penalties kicking in.

MARAD Response: Paragraph (a)(1)(iii) of this section states that in making a finding of economic soundness MARAD shall consider all relevant factors, including, but not limited to, the projected revenues and expenses associated with employment of the vessel. Whether the project is a one Vessel project or a multi-Vessel project, MARAD believes that it is only reasonable to require that the projected cash flow and net income of the project support the Title XI debt service requirements. Therefore, MARAD declines to amend the requirement.

As to the comment that loans should provide for repayment without pre-payment penalties kicking in, payment terms, conditions, and penalties, if any, are determined prior to the issuance of the Obligations and are subject to negotiation. For MARAD to require that no pre-payment penalties will kick in if a loan should be prepaid is inappropriate and MARAD sees no reason to take such a position as the issue of pre-payment penalties must be negotiated between the Obligor and the Obligee(s).

Although no comments were specifically received regarding paragraphs (b)(3) and (b)(4), MARAD has re-evaluated this requirement and has determined that the IRR calculation is not necessary and is deleting the appropriate paragraphs. The IRR calculation regulation was originally intended to provide specific, clear procedures that would produce more accurate and complete information for selecting successful applicants. However, on August 6, 1992, MARAD issued a final rule which shifted the burden for computation of the IRR from the applicant to MARAD.

This section already outlines relevant factors that are considered by MARAD in making the economic soundness finding for a project. MARAD can make an economic soundness finding for a particular project based on the revenue, cost data, cash flows and other data already required to be submitted by all applicants. In view of the foregoing, the IRR calculation is not necessary to make a finding of economic soundness.

Section 298.18 Financing Advanced or Modern Shipbuilding Technology

Section 298.18(a). This paragraph states that the Secretary will approve Guarantees to finance Advanced or Modern Shipbuilding Technology only upon a finding by the Secretary that the Guarantees will aid in the transition from naval shipbuilding to commercial ship construction for domestic and export sales, encourage shipyard modernization, and support increased productivity.

MARAD Response: Although no comments were received on this paragraph, MARAD has reevaluated the requirement for this finding as part of its overall concern to reduce regulatory burden. This finding is not a statutory requirement; it was incorporated in the Title XI regulations on March 31, 1994, with the publication of the interim final rule which became final on September 16, 1994. Subtitle D of the Authorization Act includes a similar requirement for eligible export vessels which does not apply to shipyard modernization and improvement.

In view of the fact that: (1) There is no statutory requirement for the Secretary to include the provision in paragraph (a) of this section; (2) Section 298.17 of the regulations already provides that, in evaluating project applications, the Secretary shall also consider whether, in the case of an Eligible Shipyard, the application provides for the capability of the shipyard to engage in naval vessel construction in time of war or national emergency; (3) paragraph (b) of this section states that the Secretary shall not approve applications for Advanced or Modern Shipbuilding Technology which, after taking into consideration certain factors, would preclude approval of another application which would result in a more desirable use of appropriated funds; and (4) § 298.3(e) states that priority will be given to applications from General Shipyard Facilities that have engaged in naval Vessel construction and that have pilot programs for shipyard modernization and Vessel construction, with respect to funds appropriated to the Secretary of Defense, it is now MARAD's position that General Shipyard Facilities applying for Guarantees to finance Advanced or Modern Shipbuilding Technology need not satisfy a mandatory requirement as to prior naval shipbuilding. The language in the paragraph is being amended accordingly.

Section 298.20 Term, Redemption and Interest Rate.

Section 298.20. One commenter stated that where charter rates are very low, financial assistance could be provided to an operator such as an extension of the Title XI maturity from 20 years to 25 years or a moratorium of the principal payments for a certain period of time to enable an owner to keep a ship out of lay-up.

MARAD Response: This section outlines Obligation criteria with respect to term limitations, required redemptions and interest rate. Title XI Obligations shall not have a maturity which exceeds the anticipated physical and economic life of the asset being financed and, with respect to vessels, no more than twenty-five years from certain dates. MARAD already has the authority to defer principal payments, if warranted. Further, to protect, preserve or improve the collateral held as security by MARAD to secure Title XI debt, § 298.28 provides MARAD discretion to make, or commit to make, an advance or payment of funds for Vessel-related expenses or fees.

Section 298.21 Limits

Section 298.21(c). One commenter supports inclusion of Guarantee Fees as an item of Actual Cost in addition to certain broker commissions and underwriting fees for export vessels.

MARAD Response: MARAD agrees with the comment that if Guarantee Fees are to be paid up front and are eligible to be financed with Title XI, then Guarantee Fees should be included as an item of Actual Cost. No further changes to paragraph (c) are necessary. With regard to broker commissions and underwriting fees for Eligible Export Vessels, paragraph (c)(4) does not allow ''fees, commissions or charges for granting or arranging for financing'', and paragraph (c)(6) does not allow ''underwriting or trustee's fees'' to be included in Actual Cost. Recognizing the importance that the payment of commissions plays in the export market, MARAD will allow commissions to be included in the foreign equipment and services amount of the Actual Cost of the project, provided: (1) A majority of the work done by the parties receiving the commissions is in the form of design and engineering work, and (2) the commissions represent a small amount of the total contract price. As the commissions represent a portion of the total shipyard contract price, therefore, there is no need to amend paragraphs (c)(4) and (c)(6). A new sentence is being added to paragraph (b) which states that commissions may be included in the amount of the Actual Cost of a project, subject to the foregoing provisions.

Section 298.21(d). As mentioned previously in the preamble, the NPRM solicited public comments regarding the guarantee of construction period financing, as authorized by the Title XI regulations. MARAD specifically invited comments on available forms of security, in addition to surety bonds, that could protect MARAD's interests as a lender, how progress should be monitored, what new procedures/ methodologies should be developed to

improve the progress payment system, and if payment of interest on the obligations should be made on a more frequent basis (i.e., weekly, monthly or quarterly) than that outlined in § 298.22, *Amortization of Obligations.* In addition, MARAD solicited comments on how the Title XI applicant will verify/certify to MARAD that certain costs have been paid prior to disbursement of Title XI funds from the escrow account, including, for example, the use of an agent on MARAD's behalf to verify that certain costs have been paid.

On the payment of interest issue, one commenter states that the question of whether interest should be paid more frequently has no bearing on construction risk. A requirement for more frequent payment than would be required after delivery would make issuance of long-term bonds during the construction period more awkward. Another commenter adds that interest during the construction period should be paid semi-annually. Finally, one commenter recommended that interest be collected monthly in arrears.

On the agent issue, one commenter states that the use of an agent is an unnecessary complication. Actual Cost is readily determined by inspection of invoice payments. The issue is really whether progress payment criteria established in the contract have been met. The commenter adds that MARAD should adopt a system with only four or five progress payments that are keyed to readily ascertained events, such as keel laying or start of fabrication. MARAD should avoid any elaborate audit procedures for costs incurred by the shipyard since the cost basis for the project is a fixed price. A second commenter states that the use of an agent by MARAD for certification of completion and payment of costs is similar to the ''privatization'' going on in many agencies and departments today and supports the concept. A final commenter adds that progress could be monitored by an approved agent and the shipyard and owner should have flexibility to develop procedures/methodologies. The commenter adds that the applicant could verify/certify certain costs paid prior to disbursement using an agent on behalf of MARAD.

Finally, one commenter suggests that the words ''or Advanced Shipbuilding Technology or Modern Shipbuilding Technology'' should not be inserted as proposed in § 298.21(d) because they are already in the current regulations.

MARAD Response: MARAD disagrees with the comment that the words ''or Advanced Shipbuilding Technology or Modern Shipbuilding Technology'' should not be inserted in § 298.21(d) because the words are already in the current regulations. Although § 298.21 (b) has already been amended to reflect the expansion of the Title XI program for financing Advanced Shipbuilding Technology and/or Modern Shipbuilding Technology, it is necessary that the applicant submit to MARAD documents substantiating all claimed costs eligible under that section prior to payment from the Escrow Fund or Construction Fund and prior to the final Actual Cost determination for the Advanced Shipbuilding Technology and/or Modern Shipbuilding Technology.

On the payment of interest issue, MARAD agrees that the frequency of making interest payments has no bearing on construction risk, and a requirement for a more frequent payment than would be required after delivery would make issuance of long-term bonds during the construction period more difficult. In view of the foregoing, MARAD does not believe that interest on Obligations should be paid on a more frequent basis than that outlined in § 298.22, which, in most cases, is semi-annually.

On the agent issue, MARAD disagrees with the comment that the use of an agent is an unnecessary complication. Provided that the methodology for substantiation of Actual Cost is determined prior to the establishment of an Escrow Fund or Construction Fund, using an agent on behalf of MARAD to verify/certify certain costs paid prior to disbursement can improve the administration of the Title XI program. MARAD believes that it is important to maintain flexibility in the procedures/methodologies for agent certification, and therefore declines to adopt by regulation a progress payment schedule based on specified milestones as such a payment schedule keyed to definitive events is already permissible.

Hence, MARAD will not amend the text of paragraph (d) as proposed in the NPRM.

Section 298.28 Advances

Concerning paragraph (a), one commenter suggested that the fourth sentence should be removed because the net result of the proposed inserts and deletions render the fourth sentence meaningless.

MARAD Response: MARAD agrees and the fourth sentence is being deleted.

Section 298.32 Required Provisions in Documentation

Section 298.32 (b). Pursuant to this section, the Obligor shall assign certain rights and shall covenant certain items as required by the Secretary.

Paragraph (b)(4) requires covenants relating to the annual filing of satisfactory evidence of continuing U.S. citizenship, in accordance with 46 CFR part 355, with the exception of Eligible Export Vessels and shipyards with Advanced or Modern Shipbuilding Technology projects. One commenter states that this requirement is inappropriate for those classes of Vessels which must be documented under the laws of the U.S. but are not required by Section 1101(b) of the Act to be owned by Section 2 citizens. Since, the Coast Guard is the agency charged with enforcing the documentation laws of the U.S. and its regulations at 46 CFR 67.163 require an annual report of eligibility for such documentation from the owners of all documented Vessels, the commenter writes that no useful purpose is served by requiring owners of cargo and passenger Vessels, tugs and towboats and barges and dredges to file affidavits pursuant to Part 355.

MARAD Response: Until the Act is further amended, MARAD will retain the regulation regarding the filing of affidavits pursuant to 46 CFR part 355.

Paragraph (b)(6) requires covenants to maintain marine and war risk hull and machinery insurance on the Vessel in an amount equal to 110 percent of the outstanding Obligations or up to the full commercial value of the Vessel, whichever is greater. One commenter recommends that making the required insurance co-extensive with the Guarantee amount (as MARAD only guarantees up to 87½ percent of the Actual Cost of the Vessel) would ensure that MARAD is ''made whole'' in the event of a disaster, while not creating an unnecessary financial burden for the owners. In addition, the commenter recommends that war risk coverage should not be required for vessels operating in U.S. waters.

MARAD Response: War risk insurance covers other perils besides war, such as strikes, riots and civil commotions. MARAD has not required war risk insurance for inland Vessels, Great Lakes Vessels, or Vessels operating solely in the intercoastal waterway because they are in a protected environment from risks of war. Vessels operating in domestic coastal trades and Jones Act offshore trades, including Puerto Rico and Hawaii, are required to have war risk insurance because these vessels are often out of protected U.S. territorial waters and in international waters, where they might encounter a hostile vessel or plane. For example, in the

early 1960s a U.S.-flag vessel, the FLORIDIAN was attacked by a Cuban fighter plane in international waters off the coast of Florida. Another U.S.-flag vessel, operating in the U.S. coastwise trade during that timeframe, the MARINE SULFUR QUEEN, vanished without a trace or established cause somewhere off the Florida coast on a voyage from the U.S. Gulf Coast to the U.S. East Coast. In addition, there is the possibility of minor regional flare ups where there might be the possibility of extending hostilities into international waters where U.S.-flag vessels are transiting. Accordingly, MARAD has only agreed to waive the war risk insurance requirement for vessels operating solely on or in inland protected waters. Finally, war risk insurance is relatively inexpensive, with coverage for a $10 million vessel costing $2,500 per year.

With regard to the comments received on the covenants to maintain marine and war risk hull and machinery insurance on the Vessel in an amount equal to 110 percent of the outstanding Obligations or up to the full commercial value of the Vessel, whichever is greater, MARAD has considered the commenter's request to reduce the amount of coverage to equal the outstanding Obligations on a Vessel. In view of the fact that: (1) Any payoff by MARAD pursuant to its Guarantee would include interest accruals on the outstanding Obligations, and (2) the potential for a dispute with other parties over the insurance proceeds is reduced if the Vessel is insured in an amount equal to 110 percent of the outstanding Obligations or up to the full commercial value of the Vessel, whichever is greater, MARAD does not agree with the commenter that the amount of insurance coverage should equal the amount of the outstanding Obligations. Hence, MARAD sees no reason to change the present wording of paragraph (b).

Section 298.33 Escrow Fund

Section 298.33 One commenter states that, in the requirement that a satisfactory certification as to the percentage of completion of the Vessel be made in conjunction with distributions from the Escrow Fund, the upfront payment of the Guarantee Fee as an item of Actual Cost needs to be factored into the percentage of completion.

MARAD Response: Paragraph (e) of this section outlines the necessary requirements for disbursing funds from the Escrow Fund. As the upfront Guarantee Fee will be included in the Actual Cost of a project and will be factored into the percentage of completion determination referenced in subparagraph (3), MARAD is not amending the present wording of this section.

Section 298.35 Reserve Fund and Financial Agreement

Section 298.35. The purpose of this section is to outline the requirements in a Title XI Reserve Fund and Financial Agreement (RFFA), which a company must enter into at the first Closing at which Obligations are issued. As mentioned previously, MARAD specifically solicited comments in the NPRM on any proposed amendments to the standard documentation, particularly with regard to Eligible Export Vessels and shipyard modernization.

Several commenters stated that inadequate time was given to review and comment on the RFFA; a reduction in all documentation, not just the RFFA, is badly needed but is too complex an issue to be dealt with now. The Title XI documentation is overly complicated and greatly increases transaction costs and discourages applicants according to these commenters. As a general comment, the documentation needs to be revised to be consistent with the recent changes in law for shipyard modernization and Eligible Export Vessels. One commenter suggests the establishment of an advisory committee composed of representatives from MARAD, the maritime bar, investment and commercial banking industry, shipbuilding industry and the shipowning and operating industry to review and assist in documentation revisions.

MARAD Response: As noted in § 298.3(a) above, MARAD has decided to defer consideration of this matter in order to avoid delay in issuance of this rule. MARAD supports the suggestion that a forum be established by a non-Governmental authority composed of representatives from MARAD, the maritime bar, investment and commercial banking industry, shipbuilding industry and the shipowning and operating industry to review and assist in revisions to the Title XI documents.

Section 298.36 Annual Guarantee Fee

Section 298.36. Most commenters oppose the lump sum prepayment of the annual Guarantee Fee, especially without the right of reimbursement in the event of prepayment. If the non-refundable-if-prepaid aspect were removed, then some of the commenters would support the lump sum payment of the annual Guarantee Fee. One commenter opposes the increase and prepayment of the Guarantee Fee unless it results in an increase in guarantee authority, as is provided in a current legislative proposal. Several commenters believe that the lump sum payment of the Guarantee Fee would force an applicant to incur increased project costs beyond those which would otherwise be due, making it more economical to build in other countries and resulting in MARAD and the applicant forfeiting currently existing program flexibility. One commenter states that the annual nature of the fee allows MARAD a second look at project exposure and provides an incentive for the prepayment of principal, as a means of reducing the applicant's real project financing costs. The commenter concludes by stating that the proposed change appears to be clearly outside the scope of the Title XI program.

Another commenter stated that there is no indication as to the discount rate to be used in calculating the present value of the lump sum Guarantee Fee. The commenter proposes that a discount rate equal to the coupon rate (expected to be carried for the guaranteed bonds issued for the project) be applied to calculate the guarantee fee due at the time of the date of the security agreement. The commenter adds that it should be made clear that no additional Guarantee Fee is required in the event of a refinancing.

Finally, a commenter argues that the calculation of the annual Guarantee Fee schedule should be based on the company's overall rating, i.e., whether the company is governed by the Section 12 or Section 13 covenants of its Title XI Reserve Fund and Financial Agreement, rather than a debt to equity ratio. The commenter recommends a 50 basis points fee for Section 13 governed companies and a 75 basis points fee for Section 12 governed companies.

MARAD Response: Section 1104(A)(e) of the Act, 46 App. U.S.C. 1274, provides that the Secretary is authorized to fix the Guarantee Fee for an Obligation and that all fees shall be computed and shall be payable to the Secretary under such regulations as prescribed by the Secretary. MARAD has exercised its authority to require the lump sum payment of the annual Guarantee Fee, especially without the right of reimbursement in the event of prepayment, to ensure that the Government will retain the full amount of the Guarantee Fee should the Obligations be retired prior to maturity, i.e., if a default occurs on the Obligations or the Obligations are prepaid. The regulatory change which indicates a modification in agency policy is within the scope of the Title

XI program. In addition, the lump sum Guarantee Fee payment would create an incentive for applicants to enhance the financial structure of their transactions in order to merit eligibility for the lowest possible Guarantee Fee rate, and therefore, reduce the risk associated with the project.

Contrary to the comments of one party, the lump sum payment of the annual Guarantee Fee would not result in an increase in the Title XI guarantee authority. The lump sum payment was part of a legislative proposal previously submitted to Congress which increased the Guarantee Fees charged for a Commitment. As the language increasing the Guarantee Fees charged has been deleted from the legislation, the lump sum payment of the Guarantee Fee will not lower the subsidy rate MARAD is required to calculate according to the Credit Reform Act of 1990. Therefore, the commenter is incorrect in stating that receipt of the guarantee fee up front will result in an increase of the amount of available Title XI funding without increasing appropriations.

The belief of several commenters that the lump sum payment of the Guarantee Fee would force an applicant to incur increased project costs beyond those which would otherwise be due is not true. It is estimated that the following amounts are similar: (1) The full payment of the first year's annual Guarantee Fee at the Closing as required prior to this final rule, and (2) the equity portion, or a minimum of 12½ percent of the lump sum payment being financed. With these similarities, the lump sum payment of the Guarantee Fee, and the potential of financing up to a maximum of 87½ percent of this amount, it is incorrect to assume the lump sum payment of the Guarantee Fee would force an applicant to incur increased project costs beyond those which would otherwise be due.

The comment that there is no indication in the NPRM as to the discount rate to be used in calculating the present value of the lump sum Guarantee Fee is also incorrect. The NPRM revised paragraph (e) of this section and stated, among other things, that in ''determining the amount of the Guarantee Fee to be paid, MARAD will use a discount rate based on information contained in the Department of Commerce's Economic Bulletin Board quarterly rates.'' MARAD agrees with the comment that where bonds are issued in more than one series, the Guarantee Fee should be payable only to the extent of the total amount of obligations issued. The third sentence of the paragraph is deleted to coordinate the payment of the fee with § 298.36(b), which sets forth the method of calculating the fee.

Finally, MARAD disagrees with the comment that the calculation of the annual Guarantee Fee schedule should be based on the company's overall rating, i.e., whether the company is governed by the Section 12 or Section 13 covenants of its Title XI Reserve Fund and Financial Agreement, rather than a debt to equity ratio. The extent to which a company is leveraged is a reasonable basis for assessing risk insofar as determining the appropriate guarantee fee. In addition, the commenter proposes a fee range of ½ percent to ¾ percent; but this does not take into account the full Guarantee Fee range outlined in the statute of ¼ percent to ½ percent for undelivered vessels and ½ percent to 1 percent for delivered vessels.

Section 298.40 Defaults

Paragraphs (b) and (d) of *§ 298.40,* Defaults, provide that if a demand for payment of the Guarantees is made, the Secretary shall make payment of the unpaid principal amount of Obligations and unpaid interest accrued and accruing thereon up to, but not including, the date of payment. One commenter suggested that the mandatory requirement for MARAD to pay off 100% of the outstanding debt in the case of a defaulting owner should be changed to provide an option for an assumption of the Obligations rather than an early payoff.

MARAD Response: In view of the fact that the Act provides that in the event of a default, the Secretary may assume the Obligor's rights and duties under the Title XI Obligation and agreements and may make any payments in default, MARAD is modifying paragraphs (b) and (d) accordingly.

Other Comments

In addition to the above comments received in response to the NPRM, several commenters provided comments which are not within the scope of this rulemaking. One commenter suggested that: (1) MARAD should consider making the Depository Trust Company (DTC) eligible as a Depository (there would be more competition and therefore better interest rates), (2) MARAD should be more adaptable to new financing techniques as they arise, and (3) Title XI Closings should take place at regional offices rather than in Washington. One other commenter expressed opposition to proposed legislation which increases the Guarantee Fee 50 percent.

MARAD Response: Any proposed legislation is not within the scope of this rulemaking. As to the other comments, MARAD has the flexibility under its existing regulations to consider a DTC as a Depository, to adapt to new financing techniques, and to allow Closings at regional offices if appropriate. As a result, no change in Section 298 is necessary.

The NPRM proposed removing and reserving § 298.25, financing repayment of construction-differential subsidy. Section 298.25 is removed but has not been reserved. As a result, § 298.26 through 298.28 have been redesignated sections 298.25 through 298.27.

In addition to the above, minor administrative changes have been made to §§ 298.3(e), 298.13(e)(1)(i), 298.13(e)(1)(i)(A), 298.14(a)(2)(i)(B), 298.14(a)(2)(iii)(G), 298.14(b)(1)(ii), and 298.32(a)(3).′

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and Other Requirements of Law

This rulemaking has been reviewed under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and it has been determined that this is not an economically significant regulatory action. However, since this rule would further the implementation of the National Shipbuilding Initiative program established under Subtitle D of Title XIII, Pub. L. 103–160, to support the industrial base and national security objectives by assisting in the reestablishment of a United States shipbuilding industry as a self-sufficient internationally competitive industry, and is of great interest to the U.S. maritime industry, it has been determined to be a significant rule under the Department's Regulatory Policies and Procedures. Accordingly, it is considered to be a significant regulatory action under E.O. 12866 and has been reviewed by the Office of Management and Budget. Because the economic impact should be minimal, further regulatory evaluation is not necessary. These amendments are intended only to simplify and clarify the procedural requirements for obtaining Guarantees, principally to expedite the process for MARAD's review of applications. Its purpose is to encourage the construction of ships in U.S. shipyards both for the domestic and the Eligible Export Vessel programs and the modernization and improvement of U.S. general shipyard facilities.

MARAD is publishing this final rule to carry out the Secretary's

responsibilities under Title XI and to improve program administration.

Federalism

MARAD has analyzed this rulemaking in accordance with the principles and criteria contained in Executive Order 12612 and has determined that these regulations do not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

MARAD certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

Environmental Assessment

MARAD has considered the environmental impact of this rulemaking and has concluded that an environmental impact statement is not required under the National Environmental Policy Act of 1969.

Paperwork Reduction Act

This rulemaking contains reporting requirements that have previously been approved by the Office of Management and Budget (Approval No. 2133–0018). Use of the present Maritime Administration Title XI Obligation Guarantees form will be continued pending revision and issuance of new forms, which must be approved by the Office of Management and Budget.

List of Subjects in 46 CFR Part 298

Loan programs-Transportation, Maritime carriers, and Mortgages.

Accordingly, 46 CFR part 298 is revised as follows:

PART 298—OBLIGATION GUARANTEES

Authority: 46 App. U.S.C. 1114(b), 1271 *et seq.*; 49 CFR 1.66.

Subpart A—Introduction

§ 298.1 Purpose.

This part prescribes regulations implementing the provisions of Title XI of the Merchant Marine Act, 1936, as amended, governing Federal ship financing assistance (46 App. U.S.C. 1271 *et seq.*).

§ 298.2 Definitions.

For the purpose of this part:

(a) *Act* means the Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1101 through 1294).

(b) *Actual Cost of a Vessel or Advanced or Modern Shipbuilding Technology* means, as of any specified date, the aggregate, as determined by the Secretary, of all amounts paid by or for the account of the Obligor on or before that date and all amounts which the Obligor is then obligated to pay from time to time thereafter, for the construction, reconstruction or reconditioning of such Vessel or Advanced or Modern Shipbuilding Technology (described in § 298.21(b)).

(c) *Advanced Shipbuilding Technology* means:

(1) Numerically controlled machine tools, robots, automated process control equipment, computerized flexible manufacturing systems, associated computer software, and other technology for improving shipbuilding and related industrial production which advance the state-of-the-art; and

(2) Novel techniques and processes designed to improve shipbuilding quality, productivity, and practice, and to promote sustainable development, including engineering design, quality assurance, concurrent engineering, continuous process production technology, energy efficiency, waste minimization, design for recyclability or parts reuse, inventory management, upgraded worker skills, and communications with customers and suppliers.

(d) *Closing* means a meeting of various participants or their representatives in a Title XI financing, at which a commitment to issue Guarantees is executed, or at which all or part of the Obligations are authenticated and issued and the proceeds are made available for a purpose set forth in section 1104(a) of the Act, or at which a Vessel is delivered and a Mortgage is executed as security to the Secretary.

(e) *Depository* means a bank or other financial institution organized and doing business under the laws of the United States, any State or territory thereof, the District of Columbia or the Commonwealth of Puerto Rico that is authorized under such laws to exercise corporate trust powers, is a member of the Federal Deposit Insurance Corporation, and accepts deposits for purposes of implementing the program authorized by Title XI of the Act; but in the case of an Eligible Export Vessel can also mean, with the specific approval of the Secretary, foreign branches, but not the foreign subsidiaries, of such United States financial institutions.

(f) *Depreciated Actual Cost of a Vessel or Advanced or Modern Shipbuilding Technology* means the Actual Cost of the Vessel or Advanced or Modern Shipbuilding Technology, as defined in paragraph (b) of this section (less a residual value of 2½ percent of United States shipyard construction cost or, in the case of Advanced or Modern Shipbuilding Technology, a residual value as appropriate), depreciated on a straightline basis over the useful life of the Vessel or Advanced or Modern Shipbuilding Technology as determined by the Secretary, not to exceed twenty-five years from the date the Vessel or Advanced or Modern Shipbuilding Technology was delivered by the shipbuilder or manufacturer or, if the Vessel or Advanced or Modern Shipbuilding Technology has been reconstructed or reconditioned, the Actual Cost of the Vessel or Advanced or Modern Shipbuilding Technology depreciated on a straightline basis from the date the Vessel or Advanced or Modern Shipbuilding Technology was

delivered by the shipbuilder or manufacturer to the date of such reconstruction or reconditioning, on the basis of the original useful life of the Vessel or Advanced or Modern Shipbuilding Technology, and from the date of said reconstruction or reconditioning on a straightline basis and on the basis of a useful life of the Vessel or Advanced or Modern Shipbuilding Technology determined by the Secretary, plus all amounts paid or obligated to be paid for the reconstruction or reconditioning, depreciated on a straightline basis and on the basis of a useful life of the Vessel or Advanced or Modern Shipbuilding Technology determined by the Secretary.

(g) *Documentation* means all or part of the agreements relating to an entire Title XI financing which must be furnished to the Secretary, irrespective of whether the Secretary is a party to each agreement.

(h) *Eligible Export Vessel* means a Vessel constructed, reconstructed, or reconditioned in the United States for use in world-wide trade which will, upon delivery or redelivery, be placed under or continued to be documented under the laws of a country other than the United States.

(i) *Eligible Shipyard* means a private shipyard located in the United States.

(j) *General Shipyard Facility* means:

(1) For operations on land, any structure or appurtenance thereto designed for the construction, repair, rehabilitation, refurbishment, or rebuilding of any Vessel, including graving docks, building ways, ship lifts, wharves and pier cranes; the land necessary for any structures or appurtenances; and equipment necessary for the performance of any function referred to in this paragraph; and

(2) For operations other than on land, any Vessel, floating drydock, or barge built in the United States, within the meaning of § 298.11(a), and used for, or a type that is usually used for, activities referred to in paragraph (k) of this section.

(k) *Guarantee* means the contractual commitment of the United States of America, represented by the Secretary, endorsed on each Obligation, to make payment to the Obligee or an agent, upon demand, of the unpaid interest on, and the unpaid balance of the principal of such Obligation, including interest accruing between the date of default (described in § 298.40 of this part) and the date of payment.

(l) *Guarantee Fee* means the annual fee payable to the Secretary in consideration for the continuing Guarantees.

(m) *Indenture Trustee* means a bank with corporate trust powers, or a trust company, with a combined capital and surplus of at least $3,000,000, which is located in and organized and doing business under the laws of the United States, any State or territory thereof, the District of Columbia or the Commonwealth of Puerto Rico, which has duties under the terms of a Trust Indenture, entered into with the Obligor, providing for the issuance and registration of the ownership and transfer of Obligations, the disbursement of funds held in trust by the Indenture Trustee for the redemption and payment of interest and principal with respect to Obligations, demands by the Indenture Trustee for payment under the Guarantees in the event of default and the remittance of payments received to the Obligees. Pursuant to a specific authorization of the Secretary, the Indenture Trustee may also authenticate the Guarantees.

(n) *Letter Commitment* means a letter from the Secretary to an applicant for Guarantees, setting forth specific determinations made by the Secretary with respect to the applicant's proposed project, as required by the Act and regulations of this part, and stating the Secretary's commitment to execute Guarantees, subject to compliance by the applicant with any conditions specified therein.

(o) *Maritime Administration* means that agency created within the Department of Transportation by Reorganization Plan No. 21 of 1950 (64 Stat. 1273), amended by Reorganization Plan No. 7 of 1961 (75 Stat. 840), as amended by Pub. L. 91–469 (84 Stat. 1036).

(p) *Modern Shipbuilding Technology* means a technology to be introduced into the shipyard that is comprised of the best available proven technology, techniques, and processes appropriate to advancing the state-of-the-art of the applicant shipyard, or exceeds the best available processes of American shipbuilding, and that will enhance its productivity and make it more competitive internationally.

(q) *Mortgage* means a first Preferred Mortgage on any Vessel or a first mortgage with respect to Advanced Shipbuilding Technology or with respect to Modern Shipbuilding Technology.

(r) *Obligation* means any note, bond, debenture, or other evidence of indebtedness, as defined in section 1101(c) of the Act, issued for one of the purposes specified in section 1104(a) of the Act.

(s) *Obligee* means the holder of an Obligation.

(t) *Obligor* means any party primarily liable for payment of principal of or interest on any Obligation.

(u) *Paying Agent* means any Person appointed by the Obligor to pay the principal of or interest on the Obligations on behalf of the Obligor.

(v) *Person* means any individual, estate, foundation, corporation, partnership, limited partnership, joint venture, association, joint-stock company, trust, unincorporated organization or other acceptable legal business entity, government, or any agency or political subdivision thereof.

(w) *Preferred Mortgage* means:

(1) In the case of a mortgage on a Vessel documented under United States law, whenever made, a mortgage that—

(i) Includes the whole of a Vessel;

(ii) Is filed in substantial compliance with 46 U.S.C. 31321;

(iii) Covers a documented Vessel or a Vessel for which an application for documentation has been filed that is in substantial compliance with the requirements of 46 U.S.C. Ch. 121 and the regulations prescribed under that Chapter by the United States Coast Guard; and

(iv) Has as the mortgagee—

(A) A State;

(B) The United States Government;

(C) A Federally insured depository institution, unless disapproved by the Secretary for that Vessel;

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

(E) A Person qualifying as a citizen of the United States pursuant to a provision of 46 App. U.S.C. 802; or

(F) A Person approved by the Secretary pursuant to regulations at 46 CFR 221.23(d); and

(2) In the case of a mortgage on an Eligible Export Vessel, whenever made, a mortgage that—

(i) Constitutes a mortgage that is established as security on an Eligible Export Vessel under the laws of a foreign country;

(ii) Was executed under the laws of that foreign country and under which laws the ownership of the Vessel is documented;

(iii) Is registered under the laws of that foreign country in a public register at the port of registry of the Vessel or at a central office;

(iv) Otherwise satisfies the requirements of 46 U.S.C. 31301(6)(B) to constitute a Preferred Mortgage; and

(v) Has the Secretary as the mortgagee, or such other mortgagee as is permitted by the applicable foreign law and approved by the Secretary.

(x) *Related Party* means as that term is defined by generally accepted

accounting principles outlined in paragraph 24 of Statement of Financial Accounting Standards No. 57, *Related Party Disclosures.*

(y) *Secretary* means the Secretary of Transportation, acting by and through the Maritime Administrator, Department of Transportation, the Maritime Administrator or any official of the Maritime Administration to whom is duly delegated the authority, from time to time, to perform the functions of the Secretary of Transportation or the Maritime Administrator, Department of Transportation.

(z) *Secretary's Note* means a promissory note from the Obligor to the Secretary in an amount equal to the aggregate amount of the Obligations, which is issued simultaneously with the Guarantees.

(aa) *Security Agreement* means the primary contract between the Obligor and the Secretary, providing for the transfer to the Secretary by the Obligor of all right, title and interest of the Obligor in certain described property (including rights under contracts in existence or to be entered into), and containing other provisions relating to representations and responsibilities of the Obligor to the Secretary as security for the issuance of Guarantees.

(bb) *Vessel* means all types of vessels, whether in existence or under construction, including passenger, cargo and combination passenger-cargo carrying vessels, tankers, towboats, barges and dredges which are or will be documented under the laws of the United States, floating drydocks which have a capacity of at least thirty-five thousand or more lifting tons and a beam of one hundred and twenty-five feet or more between the wing walls and oceanographic research or instruction or pollution treatment, abatement or control vessels, which are owned by citizens of the United States; except that an Eligible Export Vessel shall not be documented under the laws of the United States.

§ 298.3 Applications.

(a) *Content and amendment.* Each application for a commitment to execute Guarantees shall be made on Form MA 163 to the Secretary, Maritime Administration, U.S. Department of Transportation, Washington, DC 20590, and be certified in the manner prescribed on said form. All required information, including copies of any demise charters, time charters in excess of six months, contracts of affreightment, drilling contracts or other contractual arrangements with respect to the Vessel or Vessels, shall be presented on the form or in exhibits and schedules submitted with the application. In addition, the Declaration of Lobbying form as required by 31 U.S.C. 1352 shall be filed with the initial application, as part of the formal submission. Each exhibit and schedule shall contain a statement, on the first page thereof, clearly identifying the document as an attachment to an application for Obligation Guarantees, stating the name of the applicant and the date of the application. Any amendment of data contained in the application filed shall be marked ''Amendment,'' and shall contain a statement on the first page thereof, clearly identifying the document as an amendment to an application for Obligation Guarantees, stating the name of the applicant and the date of application. The certification required on Form MA 163 shall be affixed to each amendment.

(b)(1) *Time requirements for application.* Each application shall be submitted to the Secretary at least four months prior to the anticipated date by which the applicant requires a Letter Commitment. The Secretary may consider applications with less notice prior to the anticipated date by which the applicant requires a Letter Commitment, upon written documentation that extenuating circumstances exist. During the first 15 calendar day period after submission, the Secretary will perform a preliminary review of the application for adequacy and completeness. If the application is found to be incomplete, or if additional data is required, the Secretary will notify the applicant promptly in writing and the applicant will have 15 calendar days to correct deficiencies from the date of each request for additional information. If the applicant has not corrected the deficiencies, or made substantial progress toward correcting them, within this 15 calendar day period, then the Secretary may terminate the processing of the application without prejudice. Once the Title XI application is considered complete by the Secretary, the Secretary will act on the application within a period of 60 calendar days, unless for good cause the Secretary deems it necessary to extend such period. If an application is not completed by the applicant and acted upon by the Secretary within four months from the submission date, unless such time period is extended by the Secretary, the Secretary will notify the applicant in writing that processing of the application is terminated and that the applicant may reapply at a later date. If an application is terminated by MARAD without prejudice, no new filing fee will be assessed for a subsequent application for a similar project that is filed within one year of the termination date. If a subsequent application is for a substantially different project as determined by MARAD on a case-by-case basis a new filing fee will be assessed.

(2) *Time requirements for documentation.* An applicant to whom a Letter Commitment has been issued shall submit four sets of the documentation to the Secretary for review. The documentation shall be submitted to the Secretary for review at least six weeks prior to the anticipated closing to afford the Secretary time to complete an adequate review of the documentation. The applicant shall utilize the standard form of documentation which will be provided by the Secretary.

(3) *Processing applications.* In processing applications, the Secretary shall consider the different degrees of risk involved with different applications.

(4) *Additional assurances.* For those applications not involving well established firms with strong financial qualifications and strong market shares, seeking financing guarantees for replacement vessels in an established market, in which projected demand exceeds supply, the Secretary may require additional assurances prior to approval, such as firm charter commitments, parent company guarantees, greater equity participation, private financing participation, security interest on other property and similar arrangements.

(c) *Filing Fee.* Each application must be accompanied by a filing fee in the amount of $5,000, which will be non-refundable, irrespective of whether the Secretary subsequently issues a Letter Commitment.

(d) *Confidential Information.* If the application, including attachments thereto, contains information which the applicant considers to be trade secrets or commercial or financial information and privileged or confidential, or otherwise exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552), the applicant shall assert a claim of exemption at the time of application. The same requirement shall apply to any amendment to the application. If no claim of exemption is made when the application or amendment is filed, the Maritime Administration shall not oppose any request subsequently made for disclosure, pursuant to the Freedom of Information Act (FOIA), of any information contained in the

application. The following procedures shall apply with respect to the assertion and review of FOIA exemption claims:

(1) Form and bases for claim. Any claim of exemption shall be made in a memorandum or letter contained in a sealed envelope marked ''Confidential Information,'' addressed to the Secretary, Maritime Administration, and shall be subscribed by the applicant, or with respect to a corporate applicant, by a responsible corporate officer of the applicant. The applicant shall specifically and separately designate each part of the application, including attachments or amendments thereto, to which exemption from disclosure is claimed by noting ''Confidential Information'' thereon, and shall place each page in the sealed envelope. The applicant shall state in the memorandum or letter the bases, in detail, for each assertion of exemption, including but not limited to statutory and decisional authority.

(2) The Secretary, Maritime Administration, shall make a determination as to any claim of exemption at the time a request is made for the information pursuant to the Freedom of Information Act. If the Secretary, Maritime Administration makes a determination unfavorable to the applicant as to any item of information in the application or amendment, the applicant will be advised that the Maritime Administration will not honor the request for confidentiality at the time of any request for production of information made pursuant to the Freedom of Information Act by third parties.

(e) *Priority.* The Maritime Administration shall give priority for processing applications to vessels capable of serving as a naval and military auxiliary in time of war or national emergency, and requests for financing construction of equipment or vessels less than one year old as opposed to the financing of existing equipment or vessels that are one year old or older. Any applications involving the purchase of vessels currently financed under Title XI will also receive priority consideration for purposes of processing the assumption of the obligations as will applications from those willing to take guarantees for less than the normal term for that class of vessel. In regard to shipyards, priority will be given to applications from General Shipyard Facilities that have engaged in naval Vessel construction and that have pilot projects for shipyard modernization and Vessel construction, with respect only to funds appropriated to the Secretary of Defense, pursuant to provision of section 1359(a) of Pub. L. 103–160, 107 Stat. 1547. With regard to Eligible Export Vessels, the Secretary may not issue a commitment to guarantee Obligations for an Eligible Export Vessel unless the Secretary determines, in the sole discretion of the Secretary, that the issuance of a commitment to guarantee obligations for an Eligible Export Vessel will result in the denial of an economically sound application to issue a commitment to guarantee Obligations for vessels documented under the laws of the United States operating in the domestic or foreign commerce of the United States, after considering:

(1) The status of pending applications for commitments to guarantee obligations for vessels documented under the laws of the United States and operating or to be operated in the domestic or foreign commerce of the United States;

(2) The economic soundness of the applications referred to in paragraph (e)(1) of this section; and

(3) The amount of guarantee authority available.

(Approved by the Office of Management and Budget under control number 2133–0018)

Subpart B—Eligibility

§ 298.10 Citizenship.

(a) *Applicability.* Prior to acquiring a legal or beneficial interest in a Vessel financed under Title XI of the Act, except as provided in paragraph (e) of this section, the applicant and any other Person (including, but not limited to shipowners and, if applicable, owner trustees, equity participants and bareboat charterers) shall establish their United States citizenship within the meaning of Section 2 of the Shipping Act, 1916, as amended, (''1916 Act'') (46 App. U.S.C. 802) and MARAD's regulation at 46 CFR 221.3(c). All persons holding a Preferred Mortgage on the Vessel who do not qualify as citizens of the United States shall submit on the date of the Closing evidence that they qualify for the MARAD approval granted pursuant to 46 CFR 221.23, or that they have received approval pursuant to 46 CFR 221.25. The Secretary will not approve an application providing for ownership of such Vessel by, or bareboat chartering of such Vessel to, a non-U.S. citizen. Citizenship may also be required of any Person who is deemed by the Secretary to be an operator of the Vessel or who has authority to direct the operation of the Vessel on behalf of the shipowner. Certain chartering arrangements, including time chartering and contracts of affreightment, have been given general approval by the Secretary pursuant to Sections 9, 37, and 41 of the 1916 Act. See part 221 of title 46 for more details on these approvals and other approvals granted concerning chartering and mortgaging of U.S. documented Vessels.

(b) *Prior to Letter Commitment.* The applicant and any Person identified in paragraph (a) of this section, who is required to establish United States citizenship shall, prior to the issuance of the Letter Commitment, establish United States citizenship in form and manner prescribed in 46 CFR part 355.

(c) *After Letter Commitment.* Any Person who has become identified with the project, for a reason indicated in paragraph (a) of this section, and who has not previously established United States citizenship within the prior twelve calendar months, promptly shall establish its United States citizenship in the form and manner prescribed in 46 CFR part 355.

(d) *Supplemental proof.* Unless otherwise waived by the Secretary for good cause, at least 10 days prior to every Closing, all Persons identified with the project who have previously established United States citizenship in accordance with paragraphs (a) and (c) of this section shall submit pro forma Supplemental Affidavits of Citizenship which have previously been approved as to form and substance by the Secretary, and on the date of such Closing such Persons shall submit to the Secretary three executed copies of such Supplemental Affidavits of Citizenship evidencing the continuing United States citizenship of such Persons bearing the date of such Closing.

(e) *Exemption.* With regard to Eligible Export Vessels and Eligible Shipyards, the applicant and any other Person, (including, but not limited to settlors, owner trustees, owner participants and bareboat charterers) shall be exempted from complying with the provisions of paragraphs (a) through (d) of this section.

§ 298.11 Vessel requirements.

Each Vessel to be constructed, reconstructed or reconditioned and financed by issuance of Guarantees shall meet the following criteria:

(a) *United States Construction.* A Vessel, including an Eligible Export Vessel, financed by an Obligation Guarantee is considered to be of United States construction if the Vessel is assembled in a shipyard geographically located within the United States. A U.S.-flag Vessel must meet the applicable United States Coast Guard requirements. An Eligible Export Vessel must meet the applicable laws, rules,

and regulations of its country of documentation, all applicable treaties, conventions on international agreements to which that country is a signatory, and the laws of the ports it serves. An Eligible Export Vessel shall be constructed in accordance with the requirements of the International Maritime Organization.

(b) *Actual Cost.* The applicant's estimated Actual Cost as described in § 298.21(b), must be approved by the Secretary for the construction, reconstruction, reconditioning of a Vessel as a condition for issuance of the Letter Commitment. The Secretary may require the applicant to have the shipyard that has contracted to build the vessel to submit additional technical data, backup cost details, and other evidence if the Secretary has insufficient data. The estimated cost of the Vessel may include escalation for the anticipated construction period of the Vessel, as described in § 298.21(e).

(c) *Class condition and operation.* The Vessel shall be constructed, maintained, and operated so as to meet the highest classification, certification, rating, and inspection standards for Vessels of the same age and type imposed by the American Bureau of Shipping (ABS), or other such standards as may be approved by the United States Coast Guard, or in the case of an Eligible Export Vessel, such standards as may be imposed by a member of the International Association of Classification Societies (IACS) classification societies to be ISO 9000 series registered or Quality Systems Certificate Scheme qualified IACS members who have been recognized by the United States Coast Guard as meeting acceptable standards with such recognition including, at a minimum, that the society meets the requirements of IMO Resolution A.739(18) with appropriate certificates required at delivery, so long as the home country of that IACS member accords equal reciprocity, as determined by the Secretary, to United States classification societies. A Vessel, except an Eligible Export Vessel, shall comply with all applicable laws, rules, and regulations as to condition and operation, including, but not limited to, those administered by the United States Coast Guard, Environmental Protection Agency, Federal Communications Commission, Public Health Service, or their respective successor agencies, and all applicable treaties and conventions to which the United States is a signatory, including, but not limited to, the International Convention for Safety of Life at Sea. An Eligible Export Vessel shall be documented in a country that is party to the International Convention for Safety of Life at Sea, or other treaty, convention, or international agreement governing vessel inspection to which the United States is a signatory, and shall comply with the applicable laws, rules, and regulations of its country of documentation, all applicable treaties, conventions on international agreements to which that country is a signatory, and the laws of the ports it serves. An Eligible Export Vessel shall be constructed in accordance with the requirements of the International Maritime Organization.

(d) *Reconstruction or reconditioning.* Repairs necessary for the Vessel to meet the classification standards approved by the Secretary, or any regulatory body, or because of previous inadequate maintenance and repair, shall not constitute reconstruction or reconditioning within the meaning of this paragraph. An applicant for Guarantees secured by a Vessel to be reconstructed or reconditioned shall make the Vessel available at a time and place acceptable to the Secretary for a condition survey to be conducted by representatives of the Secretary. The applicant shall pay the cost of the condition survey. The scope and extent of the condition survey shall not be less effective than that required by the last ABS special survey completed (if the Vessel is classified), next due or overdue, whichever date is nearest in accordance with the Vessel's age. The Vessel shall meet the standard of the survey necessary for retention of class (if the Vessel is classified), and the operating records of the Vessel shall reflect normal operation of the Vessel's main propulsion and other machinery and equipment, consistent with accepted commercial experience and practice.

(e) *Metric Usage.* The preferred system of measurement and weights for Vessels and Advanced and Modern Shipbuilding Technology shall be the metric system.

§ 298.12 Applicant and operator's qualifications.

(a) *Operator's qualifications.* No Letter Commitment shall be issued by the Secretary without a prior determination that the applicant, bareboat charterer, or other Person identified in the application as the operator of the Vessel, possesses the necessary experience, ability and other qualifications to properly operate and maintain the Vessel or Vessels which serve as security for the Guarantees, and otherwise to comply with all requirements of this part.

(b) *Identity and ownership of applicant.* In order to assess the likelihood that the project will be successful, the Secretary needs information about the applicant and the proposed project. To permit this assessment, each applicant shall provide the following information in its application for Title XI guarantees.

(1) *Incorporated companies.* If the applicant is an incorporated company, it shall submit the following identifying information:

(i) Exact name of applicant and tax identification number of a U.S. corporation, or if appropriate, international identification number of the applicant;

(ii) State or country in which incorporated and date of incorporation; and

(iii) Address of principal executive offices and of important branch offices, if any.

(2) *Partnerships, joint-ventures, associations, unincorporated companies.* If the applicant is a partnership, joint-venture, association, or unincorporated company, it shall submit the following identifying information:

(i) Name of partnership, association, or unincorporated company, and tax identification number, or if appropriate, international identification number of applicant;

(ii) Business address;

(iii) Date of organization;

(iv) Name of partners (general and special) of the partnership or trustee and holders of beneficial interest in the association or company;

(v) Certified copy of Partnership or Joint Venture Agreement, as amended; and

(vi) A detailed statement regarding financial, management and/or equity transactions which could have a significant impact on the ability of the applicant to meet the requirements placed on the applicant under its financing.

(3) *Other entities.* For any entity that does not fit the descriptions in paragraphs (b)(1) through (b)(3) of this section, MARAD will specify the information that the entity shall submit regarding its identity and ownership.

(c) *Applicants: Business and affiliations.* The applicant shall include:

(1) A brief description of the principal business activities during the past 5 years of applicant and of any predecessor of the applicant. If any change in the principal business activities is presently contemplated (whether in connection with the work to be financed by the guarantees applied for, or otherwise), applicant shall give a

brief statement of the nature and circumstances thereof;

(2) A list of all companies or persons (hereinafter referred to as related companies) that directly or indirectly, through one or more intermediaries, control, are controlled by, or are under common control with, the applicant. Also indicate the nature of the business transacted by each, the relationships between the companies named, and the nature and extent of the control. This information may be furnished in the form of a chart. Specify whether any related companies have previously applied for or received any Title XI assistance;

(3) A statement of whether or not during the past 5 years the applicant, or any predecessor or related company, has been in bankruptcy or in reorganization under the Federal Bankruptcy Act or in any other insolvency or reorganization proceedings under either domestic or foreign statutes, and whether or not any substantial property of the applicant or a predecessor or related company has been acquired in any such proceedings or has been subject to foreclosure or receivership during such period, and details of all such occurrences; and

(4) A statement of whether or not the applicant or any predecessor or related company is now, or during the past 5 years has been, in default under any agreement or undertaking:

(i) With others, the United States or a country other than the United States; or

(ii) Guaranteed or insured by the United States or a country other than the United States.

(d) *Management of applicant.* The applicant shall include:

(1) A brief description of the principal business activities during the past 5 years of each director and each principal executive officer of the applicant; and

(2) The name and address of each organization engaged in business activities related to those carried on or to be carried on by the applicant with which any person named in answer to paragraph (d)(1) of this section has any present business connection, the name of each such person and, briefly, the nature of such connection.

(e) *Applicant's property and activity.* The applicant shall provide:

(1) A brief description of the general character and location of the principal properties of the applicant employed in its business, other than vessels, describing encumbrances, if any;

(2) A statement with respect to each vessel owned by the applicant, or operated by it under charter, stating name, gross tonnage, net tonnage, deadweight tonnage, age, type, speed, registry, cargo capacity and number and type of cargo units (container, trailer, etc.); and

(3) A summary statement which addresses the services, routes, or line (including ports served) on which the applicant operates any of the vessels owned or chartered by it. Also, a schedule and tonnage of cargo carried by the applicant during the two preceding years, the units carried (containers, barges, passengers, etc.) and the cargo capacity utilization factor experienced.

(f) *Operating ability.* (1) In the case of an applicant for a vessel financing Guarantee, the applicant shall submit a detailed statement showing its ability to successfully operate the Vessel(s), including name, education, background of, and licenses held by all senior supervisory personnel concerned with the physical operation of the ships owned by the applicant or proposed for construction. If not now an operator of Vessel(s), the applicant shall indicate a proposed organizational structure of key operating personnel or the name of the proposed operating agent. If now the owner and/or operator of ships, the applicant shall furnish data as to union affiliations and existing contracts necessary to the management and operation of the Vessel(s) covering such items as bunkers, repairs, stores and stevedoring, and names of companies (domestic and foreign) for which the company acts as agent. If a company other than the applicant is designated to operate the Vessel(s), then the above information shall be provided for that company, together with a copy of the proposed operating agreement(s).

(2) In the case of an Eligible Shipyard which is an applicant for a Guarantee for Advanced or Modern Shipbuilding Technology, a detailed statement shall be submitted evidencing its ability to successfully construct/reconstruct vessel(s), including name, education, background of, and licenses, if any, held by all senior supervisory personnel in the shipyard concerned with the physical operation of the shipyard, union affiliations and existing contracts necessary to the management and operation of the shipyard.

§ 298.13 Financial requirements.

(a)(1) *In general.* To be eligible for guarantees, the applicant and/or the parent organization (when applicable), and any other participants in the project having a significant financial or contractual relationship with the applicant shall submit information, respectively, on their financial condition. This information shall be submitted at the time of the application and supplemented as subsequently required by the Secretary. In addition, the applicant shall submit information satisfactory to the Secretary that financial resources are available to support the project which is the subject of the Title XI application.

(2) *Cost of the project.* Applicant shall submit the following cost information with respect to the project:

(i) In the case of an applicant for Vessel financing Guarantees, a detailed statement of the estimated Actual Cost of construction, reconstruction or reconditioning of the Vessel(s) including those items which would normally be capitalized as Vessel construction costs. Net interest during construction is the total estimated construction period interest on non-equity funds less estimated earnings from the escrow fund, if such fund is to be established prior to Vessel(s) delivery. Each item of foreign components and services shall be excluded from Actual Cost, unless a waiver is specifically granted for the item, which waiver shall not be granted for major foreign components of the hull and superstructure. The standard for granting a waiver is certification by the applicant, to be reviewed by the Secretary, that a foreign item or service is not available in the United States on a timely or price-competitive basis, or is not of sufficient quality. Although excluded from Actual Cost, foreign components of the hull and superstructure can be regarded as owner-furnished equipment that may be used in satisfying the applicant's equity requirements imposed by paragraph (a)(3) of this section. An illustration of how the cost of foreign components of the hull and superstructure may be used to satisfy an applicant's equity requirements is outlined below. If any of the costs have been incurred by written contracts such as the shipyard contract, management or operating agreement, signed copies should be forwarded with the application. The applicant may be required to have the contracting shipyard submit back-up cost details and technical data. This information shall be submitted in the format as prescribed by the Title XI application procedures.

ILLUSTRATION—COST OF FOREIGN COMPONENTS SATISFYING EQUITY REQUIREMENTS.

Assuming that the total project cost is $100 million, of which the cost of major foreign components in the hull and superstructure total $20 million, and that the Title XI applicant has requested financing for 87½ percent of the cost of the project, the following is a demonstration of how the value of the major foreign components in the

hull and superstructure may be used in meeting the equity requirements of § 298.13 (a)(3):

Cost of Foreign Components Excluded from Actual Cost

Cost of Project ..... $100.0 million
Cost of Major Foreign Components in Hull and Superstructure ..... $20.0 million
Total Actual Cost of Project..... $80.0 million
Required Equity (12½ percent)..... $10.0 million
Total Project Cost Financed w/Title XI (87½ percent).....$70.0 million

The $10 million in required equity may be satisfied by the owner's contribution of the foreign components of hull and superstructure to the project.

(ii) In the case of Advanced or Modern Shipbuilding Technology, a detailed statement of the actual cost of such technology, including those items which would normally be capitalizable. If any of the costs have been incurred by written contracts, signed copies shall be forwarded with the application. The applicant may be required to have manufacturers submit back-up cost details and technical data. This information shall be submitted in the format prescribed by the Title XI application procedures.

(iii) A detailed statement showing the actual cost of any shore facilities, cargo containers, etc., required to be purchased in conjunction with the project.

(iv) A detailed statement showing any other costs associated with the project which were not included in paragraphs (a)(2) (i) through (iii) of this section, such as: Legal and accounting fees, printing costs, guarantee fees, vessel insurance, underwriting fees, fee to a Related Party, etc.

(v) If the project involves refinancing, the exhibit entitled Request for Actual Cost Approval and Reimbursement, its summary sheet and supplemental schedules shall be submitted at the time of filing the application.

(3) *Financing.* The applicant shall describe, in detail, how the costs of the project (sums referred to in paragraph (a)(2) of this section) are to be funded and the timing of such funding. The applicant shall include any vessel trade-ins, related or third party financings, etc. The applicant shall also provide the proposed terms and conditions of all private funding, from both equity and debt sources and clearly identify all parties involved. If the applicant intends to utilize co-financing (involving a blend of Title XI and private financing for the debt portion), the terms and conditions of such financing shall be subject to approval by the Secretary. The applicant shall demonstrate with financial statements that at least 12½ percent of the construction or reconstruction costs of the Vessel(s) or the cost of the Advanced Shipbuilding Technology or Modern Shipbuilding Technology will be in the form of equity and not additional debt, except to the extent allowed by paragraph (g) of this section. The applicant shall disclose all of the Vessel(s), Advanced Shipbuilding Technology or Modern Shipbuilding Technology financing in the format prescribed by the Title XI application procedures. If the applicant uses co-financing (involving a blend of Title XI and private financing for the debt portion of the project), the ability of the co-financiers to exercise their rights against collateral shared with the Secretary for any transaction shall be subject to the approval of the Secretary.

(4) *Financial Information.* The applicant shall submit the following additional financial statements with respect to both the proposed Title XI project and the overall operations of the applicant, prepared in accordance with 46 CFR part 232 and including notes to explain the basis used for arriving at the figures (in the case of Eligible Export Vessels, the Secretary may accept financial information provided in the normal accounting system used by the applicant provided that it is an accepted accounting system in the applicant's country of origin and, further, provided that the applicant provides a reconciliation of the major differences between the accounting system employed and U.S. generally accepted accounting principles):

(i) The three most recent audited financial statements of the applicant, its parent, if any, and other significant participants. If the applicant is a new entity or is to be funded from or guaranteed by external source(s), it shall provide the audited financial statements of the funding source(s);

(ii) A pro forma balance sheet of the applicant as of the estimated date of execution of the Guarantees reflecting the assumption of the Title XI Obligations;

(iii) A schedule of amortization of all existing debt (Title XI or otherwise) of the applicant for the period in which the Guarantees are to be outstanding; and

(iv) A Sources and Uses Statement for the first full year of operations and the following five years, including a clear source of funding for the payment of all debt when due.

(b) *Financial definitions.* For the purpose of this section and §§ 298.35 and 298.42 of this part:

(1) *Company* means any Person subject to financial requirements imposed under paragraphs (d) and (e) of this section and paragraphs (b) and (c) of § 298.35, as well as the reporting requirements imposed by § 298.42.

(2) *Working Capital* means the difference between current assets and current liabilities, adjusted as follows:

(i) Current assets shall exclude:

(A) Amounts in or required to be set aside in any Title XI Reserve Fund, pursuant to § 298.35(e) or Capital Construction Fund Security Amount prescribed by § 298.35(f), (excluding that portion of such fund which is available for the payment of current liabilities) that is being maintained pursuant to an agreement covering a Vessel owned or leased by the company, or in another similar fund required under any other mortgage, indenture or other agreement to which the company is a party; and

(B) Any receivables from a Related Party or from any stockholder, director, officer or employee (or their family) of the company or of a Related Party other than current receivables arising out of the ordinary course of business and not outstanding for more than 60 days.

(ii) Current liabilities shall include the current portion of charter hire and other lease obligations not already included as a current liability.

(3) *Equity (net worth)* shall be exclusive of:

(i) Any receivables from a Related Party or from any stockholder, director, officer or employee (or their family) of the company or of a Related Party other than current receivables arising out of the ordinary course of business and not outstanding for more than 60 days, and

(ii) Any increment resulting from the reappraisal of assets.

(4) *Long Term Debt* shall exclude the balance of Escrow Fund deposits attributable to the principal of Obligations sold, where deposits are required in accordance with § 298.33. However, there shall be included any guarantee or other liability for the debt of any other Person.

(5) *Capitalizable Cost* means the aggregate of the Actual Cost of the Vessel or Advanced or Modern Shipbuilding Technology and those other items which customarily would be capitalized as Vessel costs or Advanced or Modern Shipbuilding Technology costs under generally accepted accounting principles and those other items which customarily would be capitalized as Vessel costs under generally accepted accounting principles.

(6) *Depreciated Capitalizable Cost* means the Capitalizable Cost of a Vessel or Advanced or Modern Shipbuilding Technology, depreciated on a straight

line basis over the same useful life as determined by the Secretary for Actual Cost, and depreciated as required by § 298.21(g).

(c) *Applicability.* The financial resources shall be adequate to meet the Equity requirements in the project and existing Working Capital requirements, as set forth in paragraphs (d) and (e) of this section.

(1) The various financial requirements shall be met by the owner of the Vessel or Vessels or Advanced or Modern Shipbuilding Technology to be security to the Secretary for the Guarantees, except that if the owner is not the operator, the overall financial requirements shall be allocated among the owner, the operator and other parties as determined by the Secretary.

(2) The Company shall satisfy the applicable financial requirements, in addition to any other financial requirements already imposed or which may be imposed upon it in connection with other Vessels financed under the Title XI program or in connection with other Advanced or Modern Shipbuilding Technology financed under the Title XI program.

(3) A determination as to whether the Company has satisfied all financial requirements shall be based on the assumption that the projected financing has been completed. Accordingly, a pro forma balance sheet shall be submitted at the time of the application, reflecting any adjustment made pursuant to paragraph (d)(1)(i) of this section, and a revised pro forma balance sheet, reflecting the completion of the projected financing, shall be submitted at least five business days before the first Closing at which the Obligations are issued.

(d) *Primary financial requirements at Closing.* Where the primary minimum financing requirements at Closing are satisfied, the financial convenants in § 298.35(b) are applicable. Primary financial requirements can apply to one or more Companies, and are determined as follows:

(1) *Owner as operator.* Where the owner is to be the Vessel operator, minimum requirements at Closing usually are as follows:

(i) *Working Capital.* The Company's Working Capital shall not be less than one dollar. This Working Capital requirement is based on the premise that the Company engages in a service-type activity with only normal Vessel inventory. If Working Capital includes other inventory, in addition to such normal Vessel inventory, the Secretary may adjust the requirement as considered appropriate. Also, if the Secretary determines that the Company's Working Capital includes amounts receivable that it reasonably could not expect to collect within one year, the Secretary may make adjustments to the Working Capital requirements.

(ii) *Equity (net worth).* The Company's Equity shall be the greater of:

(A) 50 percent of its Long Term Debt or

(B) 90 percent of its Equity as shown on the last audited balance sheet, dated not earlier than six months before the date of issuance of the Letter Commitment.

(2) *Lessee or charterer as operator.* Where a lessee or charterer is to be the Vessel operator, minimum requirements at Closing usually are as follows:

(i) *Working Capital.* The operator's Working Capital requirement shall be the same as that which would have otherwise been imposed on the owner as operator under paragraph (d)(1)(i) of this section and based on the same premise stated therein.

(ii) *Long Term Debt.* The operator's Long Term Debt shall not be greater than twice its Equity.

(iii) *Equity (net worth).* Different Equity requirements shall be imposed on the owner and operator of the Vessel, respectively, as follows:

(A) The owner's Equity shall at least be equal to the difference between the Capitalizable Cost or Depreciated Capitalizable Cost of the Vessel (whichever is applicable) and the total amount of the Guarantees.

(B) The operator's Equity shall be the same as that which would have otherwise been required of the owner as operator under paragraph (d)(1)(ii) of this section.

(3) *Owner as General Shipyard Facility.* Where the owner of Advanced or Modern Shipbuilding Technology is a General Shipyard Facility, minimum requirements at Closing will be the same as those set forth in paragraph (d)(1) of this section for an owner as operator.

(e) *Special financial requirements at closing.* If the proposed project involves a leverage lessor, parent company or ''hell or high water'' charterer committed to financing the debt service for the term of the Guarantees and who meets the primary financial requirement at closing, then with respect to the applicant, the eligibility for Guarantees may be based upon satisfaction of special financial requirements, in which the financial covenants imposed and the requirements for maintenance of a Title XI Reserve Fund shall be as provided for in § 298.35(c) of this part. Special financial requirements are as follows:

(1) Owner as operator. Where the owner is the Vessel operator, the special requirements at Closing are as follows:

(i) *Working Capital.* The Company's Working Capital, which may be adjusted by the Secretary in accordance with the provisions set forth in paragraph (d)(1)(i) of this section, shall be an amount at least equal to the sum of the following:

(A) The first year's debt service relating to the Vessel to be financed upon delivery (redelivery in the case of a reconstructed or reconditioned Vessel), or the first year's debt service relating to the Vessel to be financed or refinanced after delivery. With respect to a reconstructed or reconditioned Vessel, the estimated Capitalizable Cost or Depreciated Capitalizable Cost, whichever is applicable (depending upon when financing occurs), shall be that related only to the cost of work performed in the reconstruction or reconditioning;

(B) One year's premium for vessel insurance including Hull, Machinery, Protection and Indemnity, and War Risk coverage; and

(C) One year's Guarantee Fee.

(ii) *Equity (net worth).* The Company's Equity shall be at least equal to 90 percent of the Equity as shown on the last audited balance sheet dated not earlier than six months before the issuance of the Letter Commitment, but not less than the sum of the following:

(A) The difference between:

(*1*) The estimated Capitalizable Cost of a new Vessel to be financed upon delivery, the estimated Capitalizable Cost of the work to be performed in reconstructing or reconditioning a Vessel, the Depreciated Capitalizable Cost of an existing Vessel to be refinanced or the Depreciated Capitalizable Cost of a new Vessel to be financed after delivery, and

(*2*) The amount of the Guarantees; and

(B) The amount of Working Capital as determined in accordance with the provisions of paragraph (e)(1)(i) of this section.

(2) *Lessee or charterer as operator.* Where the lessee or charterer is the Vessel operator, the special financial requirements at Closing are as follows:

(i) *Working Capital.* The Company shall have Working Capital in an amount determined in accordance with the provisions of paragraph (e)(1)(i) of this section, applicable as if the owner were the operator.

(ii) *Equity (net worth).* Different Equity requirements shall be imposed on the operator and the owner, respectively as follows:

(A) The operator shall have Equity at least equal to 90 percent of the Equity

shown on the last audited balance sheet dated not earlier than six months before the issuance of the Letter Commitment, but no less than its Working Capital requirement.

(B) The owner shall have Equity in an amount determined in accordance with the provisions of paragraph (e)(1)(ii)(A) of this section.

(3) *Owner as General Shipyard Facility.* Where the owner of Advanced or Modern Shipbuilding Technology is a General Shipyard Facility, special financial requirements at Closing will be the same as those outlined in paragraph (e)(1) of this section for an owner as operator insofar as they apply to such technology.

(f) *Adjustments to financial requirements at Closing.* If the owner, although not operating a Vessel, assumes any of the operating responsibilities, the Secretary may adjust the respective Working Capital and Equity requirements of the owner and operator, otherwise applicable under paragraphs (d) and (e) of this section, by increasing the requirements of the owner and decreasing those of the operator by the same amount.

(g) *Subordinated debt considered to be Equity.* With the consent of the Secretary, part of the Equity requirements applicable under paragraphs (a)(3), (d) and (e) of this section may be satisfied by debt, fully subordinated as to the payment of principal and interest on the Secretary's Note and any claims secured as provided for in the Security Agreement or the Mortgage. Repayment of subordinated debt may be made only from funds available for payment of dividends or for other distributions, in accordance with requirements of the Reserve Fund and Financial Agreement (described in § 298.35 of this part). Such subordinated debt shall not be secured by any interest in property that is security for Guarantees or mortgage insurance under Title XI, unless the Obligor and the lender enter into a written agreement, satisfactory to the Secretary, providing, among other things, that if any Title XI financing or advance by the Secretary to the Obligor shall occur in the future, such security interest of the lender shall become subordinated to any indebtedness incurred by the Obligor and to any security interest obtained by the Secretary in that property or other property, with respect to the subsequent indebtedness.

(h) *Modified requirements.* The Secretary may waive or modify the financial terms or requirements otherwise applicable under §§ 298.13, 298.35 and 298.42, upon determining that there is adequate security for the Guarantees. The Secretary may impose similar financial requirements on any Person providing other security for the Guarantees.

§ 298.14 Economic soundness.

(a) *Economic Evaluation.* No Letter Commitment for guarantees shall be given by the Secretary without a finding that the proposed project, with respect to which the Vessel(s) or Advanced or Modern Shipbuilding Technology to be financed or refinanced under Title XI, will be economically sound.

(1) *Basic feasibility factors.* In making the economic soundness findings the Secretary shall consider all relevant factors, including, but not limited to:

(i) The need in the particular segment of the maritime industry for new or additional capacity, including any impact on existing equipment for which a guarantee under this title is in effect;

(ii) The market potential for the employment of the Vessel or utilization of the Advanced Shipbuilding Technology or Modern Shipbuilding Technology of a General Shipyard Facility over the life of the guarantee;

(iii) Projected revenues and expenses associated with employment of the Vessel or utilization of the Advanced Shipbuilding Technology or Modern Shipbuilding Technology of a General Shipyard Facility;

(iv) Any charters, contracts of affreightment, transportation agreements, or similar agreements or undertakings relevant to the employment of the Vessel or utilization of the Advanced Shipbuilding Technology or Modern Shipbuilding Technology of a General Shipyard Facility;

(v) For inland waterways, the need for technical improvements including but not limited to increased fuel efficiency, or improved safety; and

(vi) Other relevant criteria.

(2) *Project Feasibility.* The applicant shall state in detail the purpose for the obligations to be guaranteed and shall supplement the application by exhibits deemed to be necessary. The applicant shall submit the following information to demonstrate the economic feasibility of the project over the Guarantee period.

(i) *Relevant market.* A written narrative of the market (or potential market) for the project including full details on the following, as applicable:

(A) Nature and amount of cargo/passengers available for carriage and applicant's projected share (provide also the number of units; i.e., containers, trailers, etc.);

(B) Services or routes in which the Vessel(s) will be employed, including an itinerary of ports served, with the arrival and departure times, sea time, port time, hours working or idle in port, off hire days and reserve or contingency time, proposed number of annual sailings and number of annual working days for the Vessel(s) or, with respect to Advanced or Modern Shipbuilding Technology, how the equipment will be employed;

(C) Suitability of the Vessel(s) or Advanced or Modern Shipbuilding Technology for their anticipated use;

(D) Significant factors influencing the applicant's expectations for the future market for the Vessel(s) or Advanced or Modern Shipbuilding Technology, for example, competition, government regulations, alternative uses, and charter rates; and

(E) Particulars of any charters, contracts of affreightment, transportation agreements, etc. The narrative should be supplemented by providing copies of any marketing studies and/or supporting information (for instance, existing or proposed charters, contracts of affreightment, transportation agreements, and letters of intent from prospective customers).

(F) The potential for purchasing existing equipment of a reasonable condition and age from another source, including information regarding—

(*1*) Market assessment concerning the availability and cost of existing equipment that may be an alternative to new construction or the new technology;

(*2*) The cost of modification, reconditioning or reconstruction of existing equipment to make it suitable for intended use; and

(*3*) Descriptions of any bids or offers which the company had made to purchase existing equipment, especially Vessels which currently are financed with Title XI Obligations including date of offer, Vessels and amount of offer.

(ii) *Revenues.* A detailed statement of the revenues expected to be earned from the project based upon the information in paragraph (a)(2) of this section. The revenues shall be based on a realistic estimate of the Vessel(s) or the new technology utilization rate at a breakeven rate for the project. A justification for the utilization rate shall be supplied and should indicate the number of days per year allowed for maintenance, drydocking, inspection, etc.

(iii) *Expenses.* A detailed statement of estimated daily vessel expense or expenses associated with Advanced or Modern Shipbuilding Technology, including the following (where applicable):

(A) Wages, including staffing (submit itemized staffing schedule and wages, identifying the seamen's unions involved), and aggregated as to straight time, overtime and fringe benefits;

(B) Subsistence cost (indicate cost per person per day);

(C) Fuel cost (specify purchase ports), including estimated fuel consumption at design speed loaded and in port;

(D) Cost of stores, supplies and equipment, segregated as to Deck, Engine and Stewards Departments;

(E) Maintenance and repair cost at midlife of ship (specify in years) segregated as to voyage repairs, special surveys, drydocking and tailshaft removal, annual survey and structural renewals;

(F) Insurance costs, Hull and Machinery, Protection and Indemnity, War Risk and other (an insurance broker's estimate based upon current premium rates, if available, is considered preferable); and

(G) Other expenses directly allocable to the asset (indicate items included).

(iv) *Estimated voyage expense:* These items shall include:

(A) Port expense segregated by port as to agency fees, wharfage and dockage and other port expenses;

(B) Cargo expense, segregated as to stevedoring and other cargo expense (show average cost per ton for loading and discharging for each port or geographic area);

(C) Brokerage expense, segregated as to freight and passenger; and

(D) Other voyage expense segregated as to canal tolls and other expense (indicate items included).

(v) *Owner's expenses annually.* These expenses shall be segregated as to:

(A) Interest and amortized principal on mortgage indebtedness;

(B) Estimated government Guarantee Fee; and

(C) Salaries and other administrative expenses (indicate basis of allocations).

(b) *Objective Criteria.* The Secretary shall make a finding of economic soundness with respect to each proposed project based on an assessment of the entire project. In order to be considered for approval, a project must meet the following criteria as determined by the Secretary:

(1) The projected long-term demand (equal to length of financing being requested) for the particular Vessel(s) or new technology to be financed must exceed the supply of similar Vessels or new technology in the applicable markets, based on the Secretary's assessment of existing equipment, similar Vessels or new technology under construction and the projected need for new equipment in that particular segment of the maritime industry. Such an assessment shall be determined by the Secretary's analysis of the following three elements:

(i) Conformity of the company's projections with supply and demand analyses prepared by the Maritime Administration;

(ii) Availability of charters, letters of intent, outstanding contractual commitments, contracts of affreightment, transportation agreements or similar agreements or undertakings; and

(iii) The applicant's existing market share compared with the market share necessary to meet projected revenues.

(2) A projected cash flow and net income, supported by the findings of paragraph (b)(1) of this section, that is sufficient to meet the projected Title XI debt service requirements and any other debt obligations of the company.

§ 298.15 Investigation fee.

(a) *In general.* Prior to the issuance of the Letter Commitment the applicant shall pay an Investigation Fee, computed as hereinafter provided, to the Secretary in the amount stated in the Letter Commitment. This fee is imposed to pay for the investigation of the project described in the application and the participants in the project, the appraisal of properties offered as security, Vessel inspection during construction, reconstruction or reconditioning (where applicable) and other administrative expenses. If, for any reason, the Secretary shall subsequently disapprove the application, one-half of the Investigation Fees shall be due and payable.

(b) *Base Fee.* The investigation fee shall be one-half of one percent on obligations to be issued up to and including $10,000,000 and ⅛ of one percent on all obligations to be issued in excess of $10,000,000. The $1,000 filing fee previously paid upon filing the original application (described in § 298.3 of this part) shall be credited against the investigation fee.

§ 298.16 Substitution of participants.

(a) Application may be made to the Maritime Administration for permission to substitute participants to a Mortgage and/or Security Agreement in a financing that is receiving assistance authorized by Title XI of the Act, both prior and subsequent to amendment by Pub. L. 92–507. A non-refundable fee shall be imposed, payable at the time of application. This fee shall be in addition to the Annual Guarantee Fee or annual premium charge for Mortgage insurance, whichever is applicable.

(b) A $3,000 fee shall be required to defray all costs of processing and reviewing a joint application by a mortgagor and/or Obligor and a proposed transferee of a Vessel or Advanced or Modern Shipbuilding Technology, which is security for Title XI debt, if the proposed transferee is to assume the Mortgage and/or the Security Agreement.

§ 298.17 Evaluation of applications.

(a) In evaluating project applications, the Secretary shall also consider whether the application provides for:

(1) The capability of the Vessel(s) serving as a naval and military auxiliary in time of war or national emergency.

(2) The financing of the Vessel(s) within one year after delivery.

(3) The acquisition of Vessel(s) currently financed under Title XI by assumption of the total obligation(s).

(4) The Guarantees extend for less than the normal term for that class of vessel.

(5) In the case of an Eligible Shipyard, the capability of the shipyard to engage in naval vessel construction in time of war or national emergency.

(6) In the case of Advanced or Modern Shipbuilding Technology, the Guarantees extend for less than the technological life of the asset.

(b) In determining the amount of equity which must be provided by the applicant, the Secretary shall consider, among other things, the following:

(1) The financial strength of the company;

(2) Adequacy of collateral; and

(3) The term of the Guarantees.

§ 298.18 Financing Advanced or Modern Shipbuilding Technology.

(a) *Initial criteria.* The Secretary may approve Guarantees issued to finance Advanced or Modern Shipbuilding Technology at a General Shipyard Facility. The Secretary will approve such Guarantees after consideration of the following factors: whether the Guarantees will aid in the transition from naval shipbuilding to commercial ship construction for domestic and export sales, will encourage shipyard modernization, and/or will support increased productivity. The applicant shall provide a detailed statement with the Guarantee application which will provide the basis for such consideration by the Secretary.

(b) *Other conditions.* Applications for loan guarantees under this section shall not be approved unless the Secretary determines that the following requirements have been met:

(1) The term for such Guarantees will not exceed the reasonable economic

useful life of the collective assets which comprise this technology, as determined by the Secretary;

(2) There is sufficient collateral to secure the Guarantee; and

(3) Approval of the application will not preclude approval of any other pending application for Advanced or Modern Shipbuilding Technology Guarantees which, in the sole opinion of the Secretary, would result in a more desirable use of appropriated funds. The Secretary's opinion will take into consideration such factors as the types of vessels which will be built by the shipyard, the productivity increases which will be achieved, the geographic location of the shipyard, the long-term viability of the shipyard, the soundness of the financial transaction, any financial impact on other Title XI transactions, and the furtherance of the goals of the Shipbuilding Act.

§ 298.19 Financing Eligible Export Vessels.

(a) *Transmittal to Secretary of Defense.* Upon receiving an application for a loan Guarantee for an Eligible Export Vessel, the Secretary shall promptly provide to the Secretary of Defense notice of the receipt of the application. During the 30-day period beginning on the date on which the Secretary of Defense receives such notice, the Secretary of Defense may disapprove the loan guarantee based on the assessment of the Secretary of Defense of the potential use of the Vessel in a manner that may cause harm to United States national security interests. The Secretary of Defense may not disapprove a loan Guarantee under this section solely on the basis of the type of vessel to be constructed with the loan Guarantee. The authority of the Secretary of Defense to disapprove a loan Guarantee under this section may not be delegated to any official other than a civilian officer of the Department of Defense appointed by the President, by and with the advice and consent of the Senate. The Secretary of Transportation may not make a loan guarantee disapproved by the Secretary of Defense.

(b) *Determinations by the Secretary.* (1) If the loan Guarantee commitment cost of any such Vessel is made available from funds transferred from the Secretary of Defense pursuant to section 108 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103–160, 107 Stat. 1547), the Vessel must be of at least 5,000 gross tons and found by the Secretary to be commercially marketable on the international market. Vessels of less than 5,000 gross tons can receive Guarantees with funds appropriated to the Department of Transportation.

(2) Such Guarantees shall not be approved unless:

(i) The Secretary finds that the construction, reconstruction or reconditioning of the Vessel will aid in the transition of United States shipyards to commercial activities or will preserve shipbuilding assets that would be essential in time of war or national emergency; and

(ii) The owner of the Vessel agrees with the Secretary that the Vessel shall not be transferred to any country designated by the Secretary of Defense as a country whose interests are hostile to the interests of the United States.

(3) The Secretary may approve Guarantees issued to finance Eligible Export Vessels. Such Guarantee shall not be approved unless the Secretary determines that the countries in which the shipowner, its charterers, guarantors, or other financial interests supporting the transaction, if any, have their chief executive offices or have located a substantial portion of their assets, present an acceptable financial or legal risk to MARAD's collateral interests. The Secretary's determination shall be based on confidential risk assessments provided by the Export-Import Bank of the United States and country risk analyses provided by the Inter-Agency Country Risk Assessment System and shall take into account any other factors related to the loan guarantee transaction deemed pertinent by the Secretary.

Subpart C—Guarantees

§ 298.20 Term, redemptions and interest rate.

(a) *In general.* To be eligible for Guarantees, Obligations shall have a maturity date satisfactory to the Secretary, not exceeding the anticipated physical and economic life of the Vessel or Vessels or Advanced or Modern Shipbuilding Technology. Such maturity date may be less than but in no event more than:

(1) Twenty-five years from the date of delivery from the shipbuilder of a single new Vessel which is to be security for Guarantees;

(2) Twenty-five years from the date of delivery from the shipyard of the last of multiple Vessels which are to be security for the Guarantees;

(3) The later of twenty-five years from the date of original delivery of a reconstructed or reconditioned Vessel which is to be security for the Guarantees, or at the expiration of the remaining useful life of the Vessel, as determined by the Secretary; and

(4) The technological life of the Advanced or Modern Shipbuilding Technology.

(b) *Required redemptions.* Where multiple Vessels or multiple Advanced Shipbuilding Technology or Modern Shipbuilding Technology assets are to be used as security for the Guarantees, as set forth in paragraph (a) of this section, the Secretary may require payments of principal prior to maturity (redemptions) with respect to all related Obligations, as may be deemed necessary to maintain adequate security for the Guarantees.

(c) *Interest rate.* The interest rate of each Obligation must be determined by the Secretary to be reasonable, taking into account the range of interest rates prevailing in the private market for similar loans and the risks assumed by the Secretary.

§ 298.21 Limits.

(a) *Actual Cost basis.* The amount of Obligations to be issued shall be satisfactory to the Secretary based upon the economic soundness of the transaction. Such amount may be less than but in no event more than 75 percent or 87½ percent, whichever is applicable under the provisions of section 1104A(b)(2) or section 1104B(b)(2) of the Act, of the Actual Cost of the Vessel or Vessels or Advanced Shipbuilding Technology or Modern Shipbuilding Technology asset(s). If minimum horsepower of the main engine is a requirement for Guarantees up to 87½ percent of the Actual Cost, the standard with respect to such horsepower shall be continuous rated horsepower. Where existing debt is being refinanced, pursuant to section 1103A(a)(5) of the Act, the amount of new Obligations issued in respect to such existing debt may not exceed the lesser of:

(1) The amount of outstanding debt being refinanced (whether or not receiving assistance under Title XI); or

(2) Seventy-five or 87½ percent whichever is applicable, of the Depreciated Actual Cost of the Vessel or Advanced Shipbuilding Technology or Modern Shipbuilding Technology with respect to which the new Obligations are being issued.

(b) *Actual Cost items.* Actual Cost is comprised essentially of those items which would customarily be capitalized as Vessel or Advanced Shipbuilding Technology or Modern Shipbuilding Technology construction costs such as designing, engineering, constructing (including performance bond premiums approved by the Secretary), inspecting, outfitting and equipping. There shall be included those cost items usually

specified in Vessel or Advanced Shipbuilding Technology or Modern Shipbuilding Technology construction contracts, e.g., changes and extras, cost of owner furnished equipment, shoreside spare parts and commitment fees and interest on the Obligations or other borrowings during the construction period (excluding interest paid on subordinated debt considered to be Equity, and incurred during the construction period), and less income realized from investment of Escrow Fund deposits during the construction period. Recognizing the importance that the payment of commissions plays in the export market, commissions (which represent a portion of the total shipyard contract price) may be included in the foreign equipment and services amount of the Actual Cost of an export project, provided:

A majority of the work done by the parties receiving the commissions is in the form of design and engineering work, and

The commissions represent a small amount of the total contract price. In addition, Guarantee Fees determined in accordance with the provisions of section 1104(e) of the Act shall be included in the items of Actual Cost. In approving Actual Cost the Secretary will consider all pertinent factors.

(c) *Items excludible from Actual Cost.* Actual Cost shall not include any other costs such as the following:

(1) Legal fees or expenses;

(2) Accounting fees or expenses;

(3) Commitment fees or interest other than those specifically allowed;

(4) Fees, commissions or charges for granting or arranging for financing;

(5) Fees or charges for preparing, printing and filing an application for Title XI Guarantees and supporting documents, for services rendered to obtain approval of the application and for preparing, printing and processing documents relating to the application for Guarantees;

(6) Underwriting or trustee's fees;

(7) Federal documentary tax stamps;

(8) Investigation Fee determined in accordance with section 1104(f) of the Act and § 298.15 of this part;

(9) Predelivery Vessel operating expenses, Vessel insurance premiums and other items which may not be properly capitalized by the owner as costs of the Vessel under generally accepted accounting principles;

(10) The cost of the condition survey required by § 298.11(d) of this part and all work necessary to meet the standards set forth therein;

(11) The cost to the Shipowner of a Vessel which is to be reconstructed or reconditioned, e.g., cost of acquisition or repair work;

(12) Generally not include any amount payable to the shipyard for early delivery of the Vessel;

(13) Generally not include any amount payable to the manufacturer of the Advanced Shipbuilding Technology or Modern Shipbuilding Technology for early delivery of the equipment to the General Shipyard Facility;

(14) Predelivery Advanced Shipbuilding Technology or Modern Shipbuilding Technology expenses which may not be properly capitalized by the General Shipyard Facility as costs of the technology under Generally Accepted Accounting Principles; and

(15) The cost of major foreign components and other foreign components for which there is no waiver and their assembly when comprising any part of the hull and superstructure of a Vessel.

(d) *Substantiation of Actual Cost.* Prior to payment from the Escrow Fund or Construction Fund (described in §§ 298.33 and 298.34 of this part), and prior to the final Actual Cost determination for each Vessel or Advanced Shipbuilding Technology or Modern Shipbuilding Technology, the applicant shall submit to the Secretary documents substantiating all claimed costs eligible under § 298.21(b) or, alternatively, appropriate certification of such costs by an agent approved by the Secretary. These documents may include but need not be limited to copies of invoices, change orders, subcontracts, and where required by the Secretary, statements from independent certified or independent licensed public accountants that the costs for which payment or reimbursement is sought were actually paid or are payable with respect to the construction of a Vessel or Advanced Shipbuilding Technology or Modern Shipbuilding Technology. These documents must be summarized, indexed and arranged according to cost categories, pursuant to directions contained in forms prescribed by the Secretary.

(e) *Escalation as part of Actual Cost.* Escalation clauses in construction contracts shall be subject to approval by the Secretary. After a review of the base contract price and the escalation clauses, the Secretary shall, in order to estimate the Actual Cost amount to be stated in the Letter Commitment, add to the approved base contract price the amount of estimated escalation as approved by the Secretary. The Secretary must subsequently approve the amount of escalation claimed by the applicant as Actual Cost.

(f) *Moneys received in respect of construction.* If the Obligor or any Person acting in behalf of the Obligor shall from time to time receive moneys due in respect to construction of a Vessel or Advanced Shipbuilding Technology or Modern Shipbuilding Technology (described in the Security Agreement) from the shipbuilder, guarantors, sureties or other Persons, the Obligor shall give written notice of such fact to the Secretary. So long as the Guarantees have not been paid by the Secretary, the Obligor or other recipient shall promptly make deposit of these moneys in a Depository with a written notice that the Depository shall hold such moneys on deposit until it receives written instructions from the Secretary as to their disposition. The Secretary shall determine the extent to which Actual Cost is to be reduced with respect to these moneys. In no event shall Actual Cost be reduced with respect to payments by the shipyard to a Vessel or Advanced Shipbuilding Technology or Modern Shipbuilding Technology owner of liquidated damages for late delivery of the Vessel or Advanced Shipbuilding Technology or Modern Shipbuilding Technology. If the Secretary shall have paid the Guarantees, the Obligor or other recipient shall promptly pay these moneys including any liquidated damages to the Secretary for deposit into the Federal Ship Financing Fund.

(g) *Depreciated Actual Cost.* After a Vessel or Advanced Shipbuilding Technology or Modern Shipbuilding Technology has been delivered or redelivered (in the case of reconstruction or reconditioning), the limitation on the amount of Guarantees shall be 75 or 87½ percent, whichever is applicable, of the Depreciated Actual Cost of the Vessel or Advanced Shipbuilding Technology or Modern Shipbuilding Technology.

§ 298.22 Amortization of Obligations.

Generally after Vessel or Advanced Shipbuilding Technology or Modern Shipbuilding Technology delivery, and until maturity of the Obligations, the Obligor shall be required by provision of the Trust Indenture or other part of the Documentation to make periodic payment of interest on and principal of the Obligations. Usually, the payment of principal (amortization) shall be made semi-annually, but in no event, less frequently than on an annual basis, and in either case shall be in equal parts (straightline basis), unless the Secretary consents to the periodic payment of a constant aggregate amount, comprised of both interest and principal components which are variable in

amount (level debt basis). No other proposed method of amortization will be allowed which would reduce the amount of periodic amortization below that determined under the straightline or level debt basis at any time prior to maturity of the Obligations, except where:

(a) The Obligor can demonstrate to the satisfaction of the Secretary that there will be adequate funds to discharge the Obligations at maturity;

(b) The Obligor establishes a fund acceptable to the Secretary in which the Obligor deposits an equal annual amount necessary to redeem the outstanding Obligations at maturity; or

(c) With regard to Eligible Export Vessels, in accordance with such other terms as the Secretary determines to be more favorable and to be compatible with export credit terms offered by foreign governments for the sale of vessels built in foreign shipyards.

§ 298.23 Refinancing.

The Secretary may approve guarantees with respect to Obligations to be secured by one or more Vessels or Advanced or Modern Shipbuilding Technology and issued to refinance existing debt, whether or not covered by mortgage insurance or Guarantees, so long as the existing debt has been issued for one of the purposes set forth in Sections 1104(a) (1) through (4) of the Act. Section 1104(a)(1) of the Act requires that, if the existing indebtedness was incurred more than one year after the delivery or redelivery of the related Vessel or Advanced or Modern Shipbuilding Technology, the proceeds of such Obligations shall be applied to the construction, reconstruction or reconditioning of other Vessels or Advanced or Modern Shipbuilding Technology or for facilities or equipment pertaining to marine operation (described in § 298.24 of this part). The Secretary may permit the refinancing of existing debt but only if any security lien on the Vessel(s) or Advanced or Modern Shipbuilding Technology is discharged immediately prior to the placing of any Mortgage thereon by the Secretary. The applicant shall satisfy all the eligibility requirements set forth in subpart B of this part, including economic soundness, as may be necessary. Refinancing of Title XI debt only shall be permitted for Advanced or Modern Shipbuilding Technology.

§ 298.24 Financing facilities and equipment related to marine operations.

The Secretary may approve Guarantees secured by one or more Vessels and issued to finance the construction, reconstruction, or reconditioning of facilities or equipment pertaining to marine operations. Such facilities or equipment shall be of a specialized nature, used principally for servicing vessels and in handling waterborne cargo in the close proximity of the berthing area, excluding over-the-road equipment (other than chassis and containers), permanent or semipermanent structures and real estate.

§ 298.25 Excess interest or other consideration.

The Secretary shall not execute Guarantees if any agreement in the Documentation directly or indirectly provides for:

(a) The payment to an Obligee of interest, or other compensation for services which have not been performed, in a manner that such compensation or payment is being provided as interest in excess of the rate approved by the Secretary; or

(b) Grants of security to an Obligee in addition to the Guarantees.

§ 298.26 Lease payments.

If payment of principal and interest on Obligations would in any way be dependent upon the lease or charter hire payments for a Vessel or Advanced Shipbuilding Technology or Modern Shipbuilding Technology that is security for the Obligations, the amount and conditions of lease or charter payments shall be subject to the Secretary's approval.

§ 298.27 Advances.

(a) *In general.* In accordance with the provisions of section 207 and Title XI of the Act, the Secretary shall have the discretion to make or commit to make an advance or payment of funds to, or on behalf of the owner, or operator or directly to any other person or entity for items, including, but not limited to, principal, interest, insurance and other vessel-related expenses or fees. Such advances or payments shall be made only to protect, preserve or improve the collateral held as security by the Secretary to secure Title XI debt. The applicant making the request for an advance shall demonstrate (with market and cash flow analysis and other projections) that its problems are of a short term duration (less than two years); with the help of an advance(s), the applicant would be assisted over its temporary difficulties; and there is adequate collateral for the advance.

(b) *Filing requirements.* Any company that desires to request an advance or other payment, or a commitment to make an advance or other payment from the Secretary for the purposes stated in § 298.27 of this part, shall apply for such assistance as far in advance as is reasonably possible. A request for an advance for principal and interest payments shall be received by the Secretary at least 30 days prior to the initial payment date. A request for an advance of insurance payments shall be received by the Secretary at least 30 days prior to a renewal or termination date. The Secretary may consider requests for assistance with less notice, upon written documentation of extenuating circumstances. Any requests for assistance must be accompanied by supporting data with respect to the need for the advance, that financing assistance has been sought from other sources, that the company is taking and has taken measures to alleviate its situation, financial projections, proposed term of the repayment, current and projected market conditions, information on other available collateral, liens and other creditor information, and any other information which may be requested by the Secretary.

Subpart D—Documentation

§ 298.30 Nature and content of Obligations.

An Obligation, whether issued in the form of a note, bond of any type, or other debt instrument, when engraved, printed or lithographed on a single sheet of paper shall include on its face the name of the Obligor, the principal sum, the rate of interest, the date of maturity, and the Guarantee of the United States, authenticated by the Indenture Trustee. If the Obligation is typewritten, printed or reproduced by other means on several pages of paper, the Guarantee of the United States and the authentication certificate of the Indenture Trustee may appear at the end of the typewritten Obligation. The instrument which is evidence of indebtedness shall also contain all information necessary to apprise the Obligees of their rights and responsibilities with respect thereto, including, but not limited to, time and manner for payment of principal and interest, redemptions, default procedure and notification (in case of registered Obligations) of sale or other transfer of the instruments.

§ 298.31 Mortgage.

(a) *In general.* (1) Under normal circumstances, a Guarantee shall not be endorsed on any Obligation until the Secretary receives satisfactory evidence of a Mortgage in one or more Vessels or a Mortgage or other security interest in

the Advanced Shipbuilding Technology or Modern Shipbuilding Technology (the ''Technologies''), in favor of the Secretary. During construction of a new Vessel or any of the Technologies, a security interest may be perfected by a filing under the Uniform Commercial Code.

(2) In order to ensure that the Secretary's Mortgages or other security interests are valid and enforceable, the Secretary shall require that the Obligor obtain legal opinions, in form and substance satisfactory to the Secretary, from independent, outside legal counsel satisfactory to the Secretary, including foreign independent outside legal Counsel with respect to Eligible Export Vessels, which opinions shall state, among other things, that the Mortgage or other security interest(s) are valid and enforceable:

(i) In the country in which the Vessel is documented (or, in the case of a security interest, in jurisdictions acceptable to the Secretary);

(ii) In the United States; and

(iii) For vessels operating on specified trade routes, in the country or countries involved in this service, unless the Secretary determines that those destinations are too numerous, in which case, the Secretary will instead require an opinion of foreign validity and enforceability in the Vessel's primary port of operation.

(3) In the case where a Mortgage or security interest on the financed assets may not be available or enforceable, the Secretary shall require alternative forms of security.

(4) The Security Agreement shall provide that upon delivery of a new Vessel or upon final installation of the Technologies, or at the time Guarantees are issued with respect to an existing Vessel or the Technologies, a Mortgage on the Vessel and a Mortgage or other security interest on the Technologies shall be executed in favor of the Secretary, unless the Secretary determines that a Mortgage or a security interest is not required in accordance with the preceding sentence.

(5) The Mortgage shall be filed with the United States Coast Guard at the Vessel's port of record, or with the proper foreign authorities with respect to an Eligible Export Vessel, and with respect to assets of a General Shipyard Facility a Mortgage and security interest shall be filed with the proper authorities within the appropriate state and shall be delivered to the Secretary after being recorded.

(b) *Mortgage secured by multiple Vessels.* When two or more Vessels are to be security for Guarantees, the Security Agreement may provide that one Mortgage relating to all the Vessels (Fleet Mortgage) shall be executed, perfected and delivered to the Secretary by the Obligor. If the Fleet Mortgage relates to undelivered Vessels, the Fleet Mortgage shall be executed upon delivery of the first vessel. At the time of each subsequent Vessel delivery, the Obligor shall execute a supplement to the Fleet Mortgage which makes that Vessel subject to the Secretary's Mortgage lien. The Fleet Mortgage shall provide that payment by the Obligor of the entire amount of Obligations covered or to be covered by Guarantees shall be required to discharge the Fleet Mortgage, regardless of the amount of the Secretary's Note or Notes issued and outstanding at the time of execution and delivery of the Fleet Mortgage or the number of Vessels covered by the Fleet Mortgage. The discharge date of the Fleet Mortgage shall be the maturity date of the Secretary's Note. The Secretary may require, as authorized by section 1104(c)(2) of the Act, such payments of principal prior to maturity (redemptions), with respect to all related Obligations, as deemed necessary to maintain adequate security for the Guarantees. Each Fleet Mortgage shall provide that in the event of constructive total loss, requisition of title or sale of any Vessel covered by the Fleet Mortgage, indebtedness represented by the Obligations shall be paid, unless the Secretary shall otherwise determine that there remains adequate security for the Guarantees, and the Vessel shall be discharged from the Mortgage lien.

(c) *Adequacy of collateral.* Under normal circumstances, a First Preferred Mortgage on the Vessel(s) or Advanced or Modern Shipbuilding Technology will be adequate security for the Guarantees. If, however, the Secretary determines that the Mortgage on the Vessel(s) or Advanced or Modern Shipbuilding Technology is not sufficient to provide adequate security, the Secretary, as a condition to approving the Letter Commitment or processing the application may require additional collateral, such as a mortgage(s) on other vessel(s) or Advanced or Modern Shipbuilding Technology or on other assets, special escrow funds, pledges of stock, charters, contracts, notes, letters of credit, accounts receivable assignments, and guarantees.

§ 298.32 Required provisions in documentation.

(a) *Performance under shipyard and related contracts.* Generally, shipyard and related contracts shall contain provisions for:

(1) Furnishing by the shipyard or manufacturer of the Advanced Shipbuilding Technology or Modern Shipbuilding Technology of satisfactory insurance and a satisfactory performance bond where Obligations are issued during the construction period, except that if the shipyard or manufacturer of the Advanced Shipbuilding Technology or Modern Shipbuilding Technology demonstrates to the satisfaction of the Secretary that it has sufficient financial resources and operational capacity to complete the project, posting of a bond will not be required;

(2) Allowing access to the Vessel or Advanced or Modern Shipbuilding Technology, as well as all related work projects being performed by the contractor and subcontractors, to a representative of the Secretary, at all reasonable times, to inspect performance of the work and to observe trials and other tests for the purpose of determining that the Vessel or Advanced or Modern Shipbuilding Technology is being constructed, reconstructed or reconditioned in accordance with contract plans and specifications approved by the Secretary;

(3) Submitting to the Secretary, upon request, one set of shipyard plans, in form and substance satisfactory to the Secretary, for the Vessel or Advanced or Modern Shipbuilding Technology as built;

(4) Making periodic payments for the work in accordance with an agreed schedule, submitted by the shipyard in a form acceptable to the Secretary, based on percentage of completion, after such percentage and satisfactory performance are certified by the Obligor, shipyard and a representative of the Secretary as to each payment;

(5) Prohibiting the use of proceeds from the sale of Obligations for the payment of work performed outside the shipyard, unless the Secretary consents in writing to such use; and

(6) Requiring that all components of the hull and superstructure of a U.S.-documented Vessel and an Eligible Export Vessel shall be assembled in the United States. If obligations will not be issued during the period of construction of a Vessel, shipyard-related contracts shall generally include the provisions specified in paragraphs (a)(2) and (a)(3) of this section and this paragraph (a)(6).

(b) *Assignments and general covenants from Obligor to Secretary.* The Obligor shall assign rights and shall covenant with the Secretary, as required by the Secretary, including, but not limited to, the following:

(1) Assignment of all or part of the right, title and interest under the construction contract and related contracts, except those rights expressly reserved therein by the Obligor relating to such things as patent infringement and liquidated damages;

(2) Assignment of rights to receive all moneys which from time to time become due with respect to Vessel or Advanced or Modern Shipbuilding Technology construction;

(3) Assignment, where applicable, of all or a part of the bareboat charter, time charter, contracts of affreightment or other agreements relating to the use of the Vessel or Advanced or Modern Shipbuilding Technology and all hire payable to the Obligor, and delivery to the Secretary of required consents by appropriate parties to any such assignments;

(4) Covenants relating to the annual filing of satisfactory evidence of continuing United States citizenship, in accordance with 46 CFR part 355, with the exception of Eligible Export Vessels and shipyards with Advanced or Modern Shipbuilding Technology projects; warranty of Vessel or Advanced or Modern Shipbuilding Technology title free from all liens other than those specifically excepted; maintaining United States documentation of the Vessel or documentation under the laws of a country other than the United States with regard to an Eligible Export Vessel; compliance with the provisions of 46 U.S.C. 31301–31343, except that Eligible Export Vessels shall comply with the definition of a ''preferred mortgage'' in 46 U.S.C. 31301(6)(B), requiring, among other things, that the Mortgage shall comply with the mortgage laws of the foreign country where the Vessel is documented and shall have been registered under those laws in a public register; Notice of Mortgage, payment of all taxes (except if being contested in good faith); annual financial statements audited by independent certified or independent licensed public accountant.

(5) Covenants to keep records of construction costs paid by or for the Obligor's account and to furnish the Secretary with a detailed statement of those costs, distinguishing between:

(i) Items paid or obligated to be paid, attested to by independent certified public accountants unless otherwise verified by the Secretary; and

(ii) Costs of American and foreign materials (including services) in the hull and superstructure.

(6) Covenants to maintain Marine and War Risk Hull and Machinery insurance on the Vessel or Eligible Export Vessel in an amount equal to 110% of the outstanding Obligations or up to the full commercial value of the Vessel or Eligible Export Vessel, whichever is greater; Marine and War Risk Protection and Indemnity insurance; Interim War Risk Binders for Hull and Machinery, and Protection and Indemnity coverages underwritten by the Maritime Administration as authorized by Title XII of the Act; and such additional insurance as may be required by the Secretary. All insurance required to be maintained shall be placed with the United States Government and American and/or British (and/or other foreign, if permitted by the Secretary by prior written notice) insurance companies, underwriters' associations or underwriting funds approved by the Secretary through marine insurance brokers and/or underwriting agents approved by the Secretary. All insurance required to be maintained shall be placed under the latest (at the time of issue) forms of American Institute of Marine Underwriters policies approved by the Secretary and/or under such other forms of policies which the Secretary may approve in writing and/or policies issued by or for the Maritime Administration insuring the Vessel or Eligible Export Vessel against the usual risks provided for under such forms, including such amounts of increase value other forms of ''total loss only'' insurance permitted by the Hull and Machinery insurance policies;

(7) Collateralize other debt due to the Secretary under other Title XI financings;

(8) Covenants to maintain shipyard insurance on the Advanced Shipbuilding Technology or Modern Shipbuilding Technology in an amount equal to 110% of the outstanding Obligations or up to the full commercial value of the technology, whichever is greater, and such additional insurance as may be required by the Secretary; and

(9) Covenants to maintain additional types of insurance as may be required by the Secretary with respect to Eligible Export Vessels, i.e. political risk insurance, to cover such items as the political, financial, and/or economic risk in a foreign country.

§ 298.33 Escrow fund.

(a) *Circumstances requiring deposits.* The Obligor may be required to establish a fund with the Secretary (Escrow Fund) in accordance with section 1108(a) of the Act and the Security Agreement. The deposit with the Secretary shall be in cash or Federal Reserve Bank funds.

(b) *Principal Deposit-Single Vessel or Advanced or Modern Shipbuilding Technology.* If a single Vessel or Advanced or Modern Shipbuilding Technology is security for the Guarantees, the deposit of principal shall be calculated by subtracting from the aggregate principal amount of the Obligations sold, 75 or 87½ percent (whichever is applicable under section 1104(b)(2) of the Act) of the amount of Actual Cost or Depreciated Actual Cost determined by the Secretary to have been paid, as of the date of the deposit, by or for the account of the Obligor for construction, reconstruction or reconditioning of the Vessel or Advanced or Modern Shipbuilding Technology. In the event that Obligations are issued and sold on a date subsequent to the initial issuance and sale of Obligations, a deposit shall be calculated in the same manner as for the first sale of Obligations.

(c) *Principal deposit—multiple Vessels or Advanced or Modern Shipbuilding Technology.* If multiple Vessels or Advanced or Modern Shipbuilding Technology are security for the Guarantees, with the Secretary's approval, the Obligor may calculate the aggregate deposit of principal amount in the Escrow Fund by computing on an individual Vessel or Advanced or Modern Shipbuilding Technology basis by prorating the proceeds of the sale of Obligations, within the meaning of the proviso in section 1108(a) of the Act, based on the ratio of the Vessel's Actual Cost or Depreciated Actual Cost, to the total Actual Cost and Depreciated Actual Cost of all Vessels or Advanced or Modern Shipbuilding Technology which are security for the Guarantees less 75 or 87½ percent (whichever is applicable under section 1104(b)(2) of the Act) of the amount of Actual Cost or Depreciated Actual Cost determined by the Secretary to have been paid, as of the date of deposit, by or for the account of the Obligor for the construction, reconstruction or reconditioning of the Vessel or Advanced or Modern Shipbuilding Technology for which the deposit is being computed or by allocating portions of the proceeds (up to 75 or 87½ percent, whichever is applicable under section 1104(b) of the Act) from the sale of the Obligations to specific Vessels or Advanced or Modern Shipbuilding Technology and computing the deposit based on the Actual Cost or Depreciated Actual Cost of such Vessels or Advanced or Modern Shipbuilding Technology paid, as of the date of deposit, by or for the account of the Obligor. In the event that Obligations are issued and sold on a

date subsequent to the initial issuance and sale of Obligations, a deposit shall be calculated in the same manner as for the first sale of Obligations. The foregoing allocations are for the purpose of calculating the deposits only and are not applicable or controlling with respect to disbursements from the Escrow Fund.

(d) *Interest deposit.* Interest on the aggregate principal amount deposited pursuant to paragraphs (b) and (c) of this section, shall be computed at the same rate borne by the Obligations, for one interest payment period, unless the Secretary shall find the existence of adequate consideration or accept other consideration in lieu of the interest deposit. If the Obligations issued and sold bear more than one rate of interest, the amount of interest required to be deposited shall be based upon the weighted average of such interest rates. The calculation of the amount of interest to be deposited shall take into account the principal and interest, if any, remaining on deposit in the Escrow Fund.

(e) *Disbursements prior to Termination Date.* Unless the Guarantees shall become payable prior to the Termination Date (described in paragraph (h) of this section) of the Escrow Fund, the Secretary shall, subject to the satisfaction of any applicable conditions contained in the Security Agreement, and within a reasonable time after written request from the Obligor, make disbursements from the fund directly to the Indenture Trustee or any Paying Agent for the payment of interest on the Obligations, for periods prior to Vessel or Advanced or Modern Shipbuilding Technology delivery or redelivery, and to the shipbuilder, the Obligor or to any other Person entitled thereto, with respect to costs included in Actual Cost. Also, the Secretary may disburse to the Obligor, upon request made at least 10 business days prior to, and no later than 30 days after the date on which the payment of interest on the Obligations is due, any excess, as determined by the Secretary, of required interest on deposit in the Escrow Fund on the date of disbursement. However, no payment or reimbursement shall be made from the Escrow Fund to any Person until:

(1) The Construction Fund (described in § 298.34 of this part), where provided for in the Security Agreement, has been exhausted;

(2) At least 12½ or 25 percent (whichever is applicable) of the Actual Cost or Depreciated Actual Cost of the Vessel or Advanced or Modern Shipbuilding Technology for which the disbursement is requested has been paid by or for the account of the Obligor from sources other than the proceeds of the Obligations, except that where the Obligor is required to pay in 25 percent of the Actual Cost or Depreciated Actual Cost, and demonstrates to the Secretary's satisfaction the ability to pay in such 25 percent, after the Obligor has paid the first 12½ percent of the Actual Cost or Depreciated Actual Cost, the Obligor may be permitted to withdraw moneys from the Escrow Fund, for payment of the next 37½ percent of such Actual Cost or Depreciated Actual Cost, and withdraw the remainder of the Escrow Fund moneys after paying in the next 12½ percent of Actual Cost or Depreciated Actual Cost; and

(3) The Secretary has approved the Actual Cost items and has determined that the amounts for which reimbursement is requested have been paid and that there has been satisfactory certification as to the percentage of completion of the Vessel or Vessels or Advanced or Modern Shipbuilding Technology, at least equal to that amount of Actual Cost paid, except where the Secretary has specifically consented to an alternative procedure.

(f) *Where Guarantees become payable.* If, prior to the Termination Date of the Escrow Fund, the Guarantees shall become payable by the Secretary, all amounts in the Escrow Fund at such time (including interest and realized income which have not yet been paid to the Obligor) shall be paid into the Federal Ship Financing Fund, created by section 1102 of the Act, and be credited against any amounts due or to become due to the Secretary from the Obligor with respect to all Guarantees, and to the extent not so required, be paid to the Obligor.

(g) *Requisition of title, termination of construction contract or total loss of Vessel or Advanced or Modern Shipbuilding Technology.* In the event of requisition of title to or seizure or forfeiture of the Vessel or Advanced or Modern Shipbuilding Technology, termination of the construction contract (unless the Obligor and the Secretary elect to have the Vessel or Advanced or Modern Shipbuilding Technology completed) or the construction-differential subsidy contract (where applicable), or the actual or constructive total loss of the Vessel or Advanced or Modern Shipbuilding Technology, all moneys remaining on deposit in the Escrow Fund may be disbursed by the Secretary for any of the following purposes:

(1) Redemption or payment of Obligations and accrued interest thereon to the date of redemption or payment, in accordance with the applicable provisions of the Documentation relating to such redemption or payment, where there is no existing default;

(2) Payment to the Obligor, if all outstanding Obligations are retired and paid other than by payment of the Guarantees, and all amounts payable to the Secretary and secured by the Mortgage have been paid; and

(3) Payment in accordance with the priorities set forth in § 298.41 of this part, if a default has occurred and if the Secretary shall have paid the Guarantees.

(h) *Disbursement upon Termination Date.* The Escrow Fund shall terminate on a date agreed upon by the Obligor and the Secretary as set forth in the Security Agreement (Termination Date). If on such Termination Date the full amount of Actual Cost of the Vessel or Advanced or Modern Shipbuilding Technology has not been paid by or for the account of the Obligor, or is not then due and payable, the Obligor and the Secretary may extend the Termination Date by agreement. When the Secretary makes a final determination of Actual Cost at the written request of the Obligor, or at the instance of the Secretary if the Termination Date has occurred without such a request, the Termination Date shall be deemed to be the date of such final determination of Actual Cost. If payments under the Guarantees have not become due prior to the Termination Date, then on or immediately after said Termination Date, any balance in the Escrow Fund shall be disbursed by the Secretary in the following manner:

(1) Where the principal amount of the Obligations issued less the principal amount of Obligations which have been retired or paid on or before such Termination Date, and not availed of as a credit against any mandatory redemptions otherwise required to be made on or before such Termination Date, shall be in excess of 75 or 87½ percent (whichever is applicable) of the Actual Cost or Depreciated Actual Cost of the Vessel or Advanced or Modern Shipbuilding Technology as finally determined by the Secretary as of the Termination Date, the Secretary shall pay such excess to the Indenture Trustee in accordance with the provisions of the Documentation relating to such payment. A written notice from the Secretary and the Obligor shall accompany such payment, stating the Termination Date and directing the Indenture Trustee to redeem an equal amount of Obligations;

(2) From the balance remaining after the deduction of the principal amount of the Obligations to be redeemed, an amount equal to interest accrued to the

date fixed for redemption of the principal amount of Obligations to be redeemed shall be simultaneously paid from the Escrow Fund by the Secretary to the Indenture Trustee to be applied to the payment of interest to the date to be fixed for redemption. In the event the balance remaining in the Escrow Fund, after giving effect to paragraph (h)(1) of this section, is insufficient to pay the interest accrued to the date fixed for redemption, such balance shall be paid from the Escrow Fund to the Indenture Trustee and the Obligor shall simultaneously deposit with the Indenture Trustee an amount equal to the difference between the balance being paid to the Indenture Trustee from the Escrow Fund and the total amount required for the payment of accrued interest; and

(3) Any balance of the Escrow Fund shall be paid to the Obligor.

(i) *Investment and liquidation of the Escrow Fund.* The Secretary may invest and reinvest deposits to the Escrow Fund in securities which are obligations of the United States and with maturities such that sufficient cash will be reasonably available to the Escrow Fund as required to make periodic authorized disbursements. The Secretary shall deposit the Escrow Fund into a special Treasury Department account with instructions, pursuant to an agreement with the Obligor, for the investment, reinvestment and liquidation of the Escrow Fund.

(j) *Income Earned on the Escrow Fund.* If the Guarantees shall not have become due, after receiving notice that the Treasury Department has deposited income earned on the Escrow Fund into the special account, the Secretary shall direct the payment of such income to the Obligor. Income shall include the excess of the cash received from the sale of securities or the payment of securities at maturity (less any losses from the sale of securities not made up by payments by the Obligor pursuant to provisions of the Security Agreement) over the cost thereof, and interest received with respect to the securities.

(k) *Redeposit.* If, at any time, the Secretary shall have determined that there has been an improper disbursement from the Escrow Fund, the Secretary shall give written notice to the Obligor of the amount improperly disbursed, the amount to be redeposited into the Escrow Fund on account thereof and the reasons for such determination. The Obligor shall thereafter promptly redeposit such amount into the Escrow Fund.

§ 298.34 Construction fund.

(a) *Deposit.* Where the Security Agreement provides for an Escrow Fund deposit, usually a provision shall also be included therein for establishing Construction Fund deposits. Under the terms of this provision, at the time of each sale of Obligations the Obligor shall deposit with a Depository, in a special account subject to the joint control of the Obligor and the Secretary, cash equal to the principal amount of the Obligations issued at such time less the sum of the aggregate principal amount then required to be in the Escrow Fund and the amount in excess of 12½ or 25 percent of Actual Cost or Depreciated Actual Cost, as applicable (whichever is payable under § 298.33(e) of this part) which the Secretary determines has been paid by or for the account of the Obligor. The balance of the proceeds from the sale of the Obligations, after depositing the amounts required to be deposited in the Escrow Fund and/or the Construction Fund, shall be retained by the Obligor.

(b) *Withdrawals.* The Secretary shall, subject to the satisfaction of any applicable conditions contained in the Security Agreement, periodically approve disbursements from the Construction Fund directly to the Indenture Trustee or any Paying Agent for the payment of interest on the Obligations, for periods prior to Vessel or Advanced or Modern Shipbuilding Technology delivery, and to the shipbuilder, the Obligor, or to any other Person entitled thereto with respect to costs included in Actual Cost. The Secretary shall not authorize any disbursement from the Construction Fund unless payments have been made by or for the account of the Obligor from sources other than the Obligations, in accordance with the requirements of paragraphs (e) (2) and (3) of § 298.33.

(c) *Redeposit.* If, at any time, the Secretary shall have determined that there has been an improper disbursement from the Construction Fund, the Secretary shall give written notice to the Obligor of the amount improperly disbursed, the amount to be redeposited into the Construction Fund on account thereof and the reasons for such determination. The Obligor shall thereafter promptly redeposit such amount into the Construction Fund.

§ 298.35 Reserve Fund and Financial Agreement.

(a) *Purpose.* In order to provide further security to the Secretary and to insure payment of the interest and principal due on the Obligations, the Company shall be required to enter into a Title XI Reserve Fund and Financial Agreement (Agreement) at the first Closing at which Obligations are issued. The Secretary may waive or modify provisions of the Agreement based on an evaluation of the aggregate security for the Guarantees.

(b) *Financial Covenants for Companies meeting primary financial requirements.* Covenants shall be imposed on the Company which is subject to compliance with the primary financial requirements at Closing, set forth in § 298.13(d), as follows:

(1) *Continuous covenants.* So long as Guarantees are in effect the Company shall not, without the prior written consent of the Secretary, undertake any actions prohibited by the Documentation, which actions include but are not limited to those of the following nature:

(i) Enter into a service, management or operating agreement with respect to a Vessel or Advanced or Modern Shipbuilding Technology financed with the assistance of Title XI Guarantees;

(ii) Sell, transfer or demise charter the Vessel or transfer the Vessel to a Related Party under any form of charter or contract,

(iii) Sell or transfer a substantial part of its assets, enter into a merger or consolidation, engage in new business activities not directly connected with marine operations or guarantee (or otherwise be liable for) debts of other Persons.

(iv) Pay any dividend except as may be permitted by paragraph (b)(1)(iv) (A) or (B) of this section. If the Company is party to an operating-differential subsidy contract, the payment of dividends is subject to the provisions of § 298.35(g).

(v) Sell, transfer, or lease any Modern or Advanced Shipbuilding Technology financed with the assistance of Title XI guarantees or transfer such technology to a Related Party under any form of contract.

(A) From retained earnings in an amount specified in paragraph (b)(1)(iv)(C) of this section providing that the year in which the dividend is paid there is no operating loss in the current fiscal year to the date of the payment of the dividend and

(*1*) There was no operating loss in the immediate preceding three fiscal years, or

(*2*) There was a one year operating loss during the immediate preceding three fiscal years and

(*i*) Such loss was not in the immediate preceding fiscal year, and

(*ii*) There was positive net income for the three year period.

(B) If dividends are not payable under paragraph (b)(1)(iv)(A) of this section, a

dividend can be paid in an amount equal to the total operating net income for the immediate preceding three fiscal year period provided that

(*1*) There were no two successive years of losses,

(*2*) In the year in which the dividend is paid there is no operating loss in such fiscal year to the date of payment of the dividend, and

(*3*) The dividend paid would not exceed an amount specified in paragraph (b)(1)(iv)(C) of this section.

(C) Dividends may be paid from earnings of prior years in an aggregate amount equal to:

(*1*) 40 percent of the Company's total net income after tax for each of the prior years, less any dividends that were paid in such years; or

(*2*) The aggregate of the Company's total net income after tax for such prior years, providing that after the payment of such dividend, the Company's long term debt does not exceed its net worth. In computing net income extraordinary gains, such as gains from the sale of assets, etc., shall be excluded.

(2) *Additional Covenants which may become applicable.* If the Company shall at any time no longer satisfy the primary financial requirements, or such condition would occur after giving effect to any of the proposed transactions set forth below, the Company shall not, without the prior written consent of the Secretary, undertake any actions prohibited by the Documentation, which actions include but are not limited to those of the following nature:

(i) Withdraw or redeem capital, covert capital into debt, make distributions, or pay any dividends, provided, however, if the Company is subject to an operating-differential subsidy contract, the dividend restriction shall be governed by § 298.35(g);

(ii) Make loans, advances, investments in or repayments of existing debts to a Related Party, stockholders, officers or directors;

(iii) Incur indebtedness or become subject to any liens (except if necessary in the ordinary course of existing business); acquire fixed assets or become liable (directly or indirectly) under charters or leases (having a term of six months or more) for the payment of charter hire or rent on all such charters or leases which have annual payments aggregating in excess of an amount specified by the Secretary in the Agreement;

(iv) Pay salaries in excess of amounts specified in the Agreement, pay subordinated indebtedness or make loans; or

(v) Invest in securities other than those that qualify as eligible investments under the Agreement.

(c) *Financial Covenants for Companies meeting the special financial requirements.* Covenants shall be imposed on the Company which is subject to the special financial requirements at Closing, set forth in § 298.13(e), as follows:

(1) *Continuous covenants.* So long as the Guarantees are in effect the Company shall not, without the prior written consent of the Secretary, undertake any actions, prohibited by the Documentation, which actions include but are not limited to those of the following nature.

(i) Enter into a service, management or operating agreement for a Vessel or Advanced or Modern Shipbuilding Technology financed with the assistance of Title XI Guarantees;

(ii) Sell, transfer or demise charter the Vessel or transfer the Vessel to a Related Party under any form of Charter or Contract.

(iii) Sell or transfer a substantial part of its assets, enter into a merger or consolidation, engage in any new business activities not directly connected with marine operations or guarantee (or otherwise become liable for) debts of other Persons;

(iv) Incur indebtedness or become subject to any liens (except if necessary in the ordinary course of existing business); acquire fixed assets or become liable (directly or indirectly) under charters or leases (having a term of six months or more) for the payment of charter hire or rent on all such charters or leases which have annual payments aggregating in excess of an amount specified for the Secretary in the Agreement;

(v) Make any loans or invest in any securities other than Eligible Investments for Title XI Reserve Fund;

(vi) Pay any subordinated indebtedness other than in accordance with a subordination agreement approved by the Secretary; or

(vii) Sell, transfer, or lease any Advanced or Modern Shipbuilding Technology financed with the assistance of Title XI guarantees or transfer such technology to a Related Party under any form of contract.

(2) *Additional covenants which may become applicable.* If the Company shall at any time no longer satisfy the special financial requirement (after including the annual financial liability relating to the Obligations as a current liability in computing Working Capital), or such condition would occur after giving effect to any proposed transaction set forth below, the Company shall not, without the prior written consent of the Secretary, undertake any actions prohibited by the Documentation, which actions include but are not limited to those of the following nature:

(i) Withdraw or redeem capital, convert capital into debt, make distributions, or pay any dividend, provided however, if the Company is subject to an operating-differential subsidy contract, the dividend restriction shall be governed by § 298.35(g);

(ii) Make loans, advances, investments or prepayments of existing debts to a Related Party, stockholders, officers or directors, or invest in the securities of any Related Party; or

(iii) Pay salaries in excess of amounts specified in the Agreement.

(3) Covenants where Company's financial condition improves to meet primary financial requirements. Whenever the Company, based on a review of its financial position, determines that it meets the primary financial requirements set forth in § 298.13(d), it may inform the Secretary of this fact, and submit such financial statements and all additional information which the Secretary shall consider necessary to verify compliance with such financial requirements. With the consent of the Secretary, the Company may elect thereafter to be subject to covenants applicable to a Company which had satisfied the primary financial requirements at Closing.

(d) *Title XI Reserve Fund Net Income.* The Agreement shall provide that within 105 days after the end of its accounting year, the Company shall compute its net income attributable to the operation of one or more Vessels that were constructed, reconstructed, reconditioned or refinanced with Title XI financing assistance (Title XI Reserve Fund Net Income). The computation utilizes a ratio expressed as a percentage, and applies this percentage to the Company's total net income after taxes. The numerator of the ratio shall be the total original capitalized cost of all Company Vessels (whether leased or owned) which were constructed, reconstructed, reconditioned or refinanced with the assistance of Guarantees. The denominator shall be the total original capitalized cost of all the Company's fixed assets. In the case of Advanced or Modern Shipbuilding Technology, the Agreement shall provide that within 105 days after the end of its accounting year, the Company shall submit its audited financial statements showing its net cash flow in a manner acceptable to the Secretary, in lieu of any other computation of Reserve

Fund Net Income specified herein for Vessels. The net income after taxes, computed in accordance with generally accepted accounting principles, shall be adjusted as follows:

(1) The depreciation expense applicable to the accounting year shall be added back.

(2) There shall be subtracted:

(i) An amount equal to the principal amount of debt required to be paid or redeemed, and actually paid or redeemed by the Company (other than from the Title XI Reserve Fund) during the year; and

(ii) The principal amount of Obligations retired or paid (as defined in the Security Agreement), prepaid or redeemed, in excess of the required redemptions or payments which may be used by the Company as a credit against future required redemptions or other required payments with respect to the Obligations.

(e) *Deposits.* Unless the Company, as of the close of its accounting year, was subject to and in compliance with the primary financial requirements set forth in § 298.13(d), the Company shall make one or more deposits to a special joint depository account with the Secretary (the Title XI Reserve Fund) to be established pursuant to an agreement in writing (Depository Agreement) at the time the first deposit is required to be made. The amount of deposit as to any year, or period less than a full year, where applicable, shall be determined as follows:

(1) If the Company is the owner of the Vessel or Advanced or Modern Shipbuilding Technology, an amount (pro rated for a period of less than a full year) that is equal to 10 percent of the Company's aggregate original equity investment in the Vessel or Vessels or Advanced or Modern Shipbuilding Technology shall be deducted from Title XI Reserve Fund Net Income.

(2) Fifty percent of the Title XI Reserve Fund Net Income adjusted where applicable, in accordance with paragraph (e)(1) of this section shall be deposited into the Title XI Reserve Fund.

(3) There shall also be deposited any additional amounts that may be required, pursuant to provisions of the Security Agreement or any other agreement in the documentation to which the Company is a party.

(4) Irrespective of the Company's deposit requirement, as stated in preceding paragraphs (e) (1) through (3) of this section, the Company shall not be required to make any deposits into the Title XI Reserve Fund if any of the following events shall have occurred:

(i) The Company shall have discharged the Obligations and related Secretary's Note and shall have paid other sums secured under the Security Agreement and Preferred Mortgage;

(ii) All Guarantees with respect to outstanding Obligations shall have terminated pursuant to the provisions of the Security Agreements, other than by reason of payment of the Guarantees; or

(iii) The amount in the Title XI Reserve Fund, (including any securities at market value), is equal to, or in excess of 50 percent of the principal amount of outstanding Obligations.

(5) In the case of Advanced or Modern Shipbuilding Technology, unless the shipyard as of the close of its accounting year was subject to and in compliance with the primary financial requirements, the shipyard shall make a deposit at two percent of its net cash flow, as defined by GAAP, and as shown on its audited financial statements.

(f) *Fund in lieu of Title XI Reserve Fund.* If the Company has established a Capital Construction Fund (CCF), pursuant to section 607 of the Act, whether interim or permanent, at any time when a deposit would otherwise be required to be made into the Title XI Reserve Fund, and the Company elects to make such deposits to the CCF, the Company shall enter into an agreement, satisfactory to the Secretary, providing that all such deposits of assets therein shall be security (CCF Security Amount) to the United States in lieu of the Title XI Reserve Fund. The deposit requirements of the Title XI Reserve Fund and Financial Agreement shall be deemed satisfied by deposits of equal amounts in the CCF, and withdrawal of the CCF Security Amount shall be subject to the Secretary's prior written consent. If, for any reason, the CCF terminates prior to the payment of the Obligations, the Secretary's Note and all other amounts due under or secured by the Security Agreement or Mortgage, the CCF Security Amount shall be deposited or redeposited in the Title XI Reserve Fund.

(g) *Dividend restrictions applicable to companies who are parties to an operating-differential subsidy contract.* [Reserved]

§ 298.36 Annual Guarantee Fee.

(a) *Rates in general.* For annual periods, beginning with the date of the Security Agreement and prior to the delivery date of a Vessel or Advanced or Modern Shipbuilding Technology, the Secretary shall charge the Obligor an annual fee (Guarantee Fee) at a rate of not less than ¼ of 1 percent and not more than ½ of 1 percent of the excess of the average principal amount of the Obligations estimated to be outstanding during the annual period covered by said Guarantee Fee over the average principal amount, if any, on deposit in the Escrow Fund during said annual period (Average Principal Amount of Obligations Outstanding). For annual periods beginning with the delivery date of a Vessel or Advanced or Modern Shipbuilding Technology, the Guarantee Fee shall be imposed at an annual rate of not less than ½ of 1 percent and not more than 1 percent of the Average Principal Amount of Obligations Outstanding during the annual period covered by the Guarantee Fee. The Obligor shall be responsible for payment of the Guarantee Fee.

(b) *Rate calculation.* The Guarantee Fee rate generally shall vary inversely with the ratio of Equity to Long Term Debt of the Person considered by the Secretary to be the primary source of credit in the transaction (Credit Source), e.g., the long term time charterer (where the charter hire represents the source of payment of interest and principal with respect to the Obligations), the guarantor of the Obligations, Obligor or the bareboat charterer. Where the ratio of Equity to Long Term Debt (Variable Rate) is used, the Secretary may make such adjustments to the computation of Equity and Long Term Debt considered necessary to reflect more accurately the financial condition of the Credit Source. The determination of Equity and Long Term Debt shall be based on information contained in forms or statements on file with the Secretary prior to the date on which the Guarantee Fee is to be paid. With the consent of the Secretary, there shall be included in equity, but excluded from Long Term Debt, any subordinated indebtedness representing loans to the credit source, evidence of which has been delivered to the Secretary. The Secretary may establish a fixed rate or other method of calculation of the Guarantee Fee, upon an evaluation of the aggregate security for the Guarantees.

(c) *Variable Rate prior to Vessel or Advanced or Modern Shipbuilding Technology delivery.* For annual periods beginning prior to the delivery date of a Vessel or Advanced or Modern Shipbuilding Technology being constructed, reconstructed, or reconditioned, the Guarantee Fee shall be determined as follows:

(1) If the Equity is less than 15 percent of the Long Term Debt, the annual Guarantee Fee rate shall be ½ of 1 percent of the Average Principal Amount of Obligations Outstanding during the annual period covered by the Guarantee Fee.

(2) If the Equity is at least 15 percent of the Long Term Debt, but less than the Long Term Debt, the annual Guarantee Fee rate shall be ⅜ of 1 percent of the Average Principal Amount of Obligations Outstanding during the annual period covered by the Guarantee Fee.

(3) If the Equity is equal to or exceeds the Long Term Debt, the annual Guarantee Fee rate shall be ¼ of 1 percent of the Average Principal Amount of Obligations Outstanding during the annual period covered by the Guarantee Fee.

(d) *Variable Rate after Vessel or Advanced or Modern Shipbuilding Technology delivery.* For annual periods beginning on or after the Vessel or Advanced or Modern Shipbuilding Technology delivery date, the Guarantee Fee shall be determined as follows:

(1) If the Equity is less than 15 percent of the Long Term Debt, the annual Guarantee Fee rate shall be 1 percent of the Average Principal Amount of Obligations Outstanding during the annual period covered by the Guarantee Fee.

(2) If the Equity is at least 15 percent of the Long Term Debt but less than 60 percent of the Long Term Debt, the annual Guarantee Fee rate shall be ¾ of 1 percent of the Average Principal Amount of Obligations Outstanding during the annual period covered by the Guarantee Fee.

(3) If the Equity is at least 60 percent of the Long Term Debt, but less than the Long Term Debt, the annual Guarantee Fee rate shall be ⅝ of 1 percent of the Average Principal Amount of Obligations Outstanding during the annual period covered by the Guarantee Fee.

(4) If the Equity shall equal or exceed the Long Term Debt, the Guarantee Fee rate shall be ½ of 1 percent of the Average Principal Amount of Obligations Outstanding during the annual period covered by the Guarantee Fee.

(e) *Payment of Guarantee Fee.* The Guarantee Fee covering the full period of the stated maturity of the Obligations commencing with the date of the Security Agreement shall be paid to the Secretary concurrently with the execution and delivery of said Agreement. The project's entire Guarantee Fee payment shall be made by the Obligor to the Secretary in an amount equal to the sum of the present value of the separate products obtained by applying the Guarantee Fee rate to the projected amount of the Obligations Outstanding for each year of the stated maturity of the Obligations. In calculating the present value used in determining the amount of the Guarantee Fee to be paid, MARAD will use a discount rate based on information contained in the Department of Commerce's Economic Bulletin Board quarterly rates. Under no circumstances will the Secretary refund the Guarantee Fee to the Obligor. A Guarantee Fee paid pursuant to this section may be included in Actual Cost and is eligible to be financed.

(f) *Proration of Guarantee Fee.* The Guarantee Fee shall be prorated where a Vessel delivery is scheduled to occur during the annual period with respect to which payment of said Guarantee Fee is being made, as follows:

(1) *Undelivered Vessel.* If the Guarantee Fee relates to an undelivered Vessel, the predelivery rate is applicable to the Average Principal Amount of Obligations Outstanding for the period from the date of the Security Agreement to the delivery date, and the delivered Vessel rate is applicable for the balance of the annual period in which the delivery occurs.

(2) *Multiple Vessels.* If the Guarantee Fee relates to more than one Vessel, the amount of outstanding Obligations shall be allocated to each Vessel in the manner prescribed in § 298.33(d), and an amount shall be determined for each Vessel by using the rate that is applicable under paragraph (c) or (d) of this section and the proration as set forth above. The Guarantee Fee shall be the aggregate of the amounts calculated for each Vessel.

§ 298.37 Examination and audit.

The Secretary shall have the right to examine and audit the books, records (including original logs, cargo manifests and similar records) and books of account, which pertain directly to the project, of the Obligor, bareboat charterer, time charterer or any other Person who has control of or a financial interest in a Vessel or Advanced or Modern Shipbuilding Technology, as well as records of a Related Party and domestic agents connected with such Persons, and shall have full, free and complete access thereto at all reasonable times. Also, the Secretary shall have full, free and complete access at all reasonable times to each Vessel or Advanced or Modern Shipbuilding Technology with respect to which Guarantees or an insurance contract is in force. When a Vessel is in port or undergoing repairs, the Secretary may make photostatic or other copies of any books, records and other relevant documents or papers being examined or audited. Adequate office space and other facilities reasonably required by any representatives of the Secretary engaged in an examination, audit or inspection shall be furnished without charge by the Person in control of the premises where the examination or audit is being conducted.

§ 298.38 Partnership agreements.

Partnership agreements shall be in form and substance satisfactory to the Secretary prior to any Guarantee closing, especially relating, but not limited to, four basis areas:

(a) Duration of the partnership,

(b) adequate partnership funding requirements and mechanisms,

(c) dissolution of the partnership and the withdrawal of a general partner and

(d) the termination, amendment, or other modification of the partnership agreement without the prior written consent of the Secretary.

§ 298.39 Exemptions.

The Secretary may exempt an applicant from any requirement of this Part not required by law, in exceptional cases, on written findings that:

(a) The case materially involves factors not considered in the promulgation of this part;

(b) (1) a national emergency makes it necessary to approve the exemption or

(2) the financial liability of the United States will be substantially relieved;

(c) the exemption will not substantially affect effective regulation of the Title XI program, consistent with the objectives of this part; and

(d) exemption will not be unjustly discriminatory. In the case of Eligible Export Vessels, the Secretary may also exempt an applicant from any requirement of this part not required by law if the Secretary makes a written determination that such exemption would assist in creating financing terms that would be compatible with export credit terms for the sale of vessels built in shipyards other than those in the United States.

Subpart E—Defaults and Remedies, Reporting Requirements, Applicability of Regulations

§ 298.40 Defaults.

(a) *In General.* Provisions concerning the existence and declaration of a default and demand for payment of the Obligations (described in paragraphs (b) and (c) of this section) shall be included in the Security Agreement and in other parts of the Documentation.

(b) *Payment Default.* In the case of any default in the payment of principal or interest with respect to the Obligations (provided that the Secretary shall not have, upon such terms as may be provided in the Obligation or related

agreements, prior to that demand, assumed the obligor's rights and duties under the Obligation and agreements and shall have made any payments in default), the following procedures shall be applicable:

(1) No demand shall be made for payment under the Guarantees unless the default shall have continued for 30 days (Payment Default).

(2) After the expiration of said 30-day period, demand for payment of all amounts due under the Guarantees must be made no later than 60 days thereafter.

(3) After demand for payment is made by or on behalf of the Obligees, the Secretary shall make payment under the Guarantees, except if the Secretary determines that a Payment Default has not occurred or that such Payment Default has been remedied prior to demand being made.

(c) *Security Default.* If a default occurs under the Security Agreement which is other than a Payment Default (Security Default), the Secretary, as provided in section 1105(b) of the Act, shall have the sole discretion to declare such default a Security Default and may notify the Obligee or agent of the Obligee of such Security Default, stating that demand for payment under the Guarantees must be made no later than 60 days after the date of such notification.

(d) *Payment of Guarantees.* If demand for payment of the Guarantees is made, the Secretary shall, no later than 30 days after the date of such demand (provided that the Secretary shall not have, upon such terms as may be provided in the Obligations or related agreements, prior to that demand, assumed the Obligor's rights and duties under the Obligation and agreements and shall have made any payments in default), make payment to the Obligees, Indenture Trustee or any other agent of the unpaid principal amount of Obligations and unpaid interest accrued and accruing thereon up to, but not including, the date of payment.

§ 298.41 Remedies after default.

(a) *In general.* Provisions governing remedies after a default, which relate to rights and duties of the Obligor, the Secretary and other Persons (where appropriate), shall be included in the Security Agreement or in other parts of the Documentation.

(b) *Action by Secretary.* After a default has occurred and is continuing and before making payment required under the Guarantees, the Secretary may take the Vessel or Advanced or Modern Shipbuilding Technology and hold, lease, charter, operate or use the Vessel or Advanced or Modern Shipbuilding Technology, accounting only for the net profits to the Obligor. After making payment required under the Guarantees, the Secretary may initiate or otherwise participate in legal proceedings of every type, or take any other action considered appropriate, to protect rights and interests granted to the Secretary by sections 1105(c), 1105(e) and 1108(b) of the Act, the Security Agreement or other applicable provisions of law and of the Documentation.

(c) *Security proceeds to Secretary.* The Secretary's interest in proceeds realized from the disposition of or collection with respect to security granted to the Secretary in consideration for the Guarantees (except all proceeds from the sale, requisition, charter or other disposition of property purchased by the Secretary at a foreclosure or other public sale, which proceeds shall belong to and vest exclusively in the Secretary), shall be an amount equal to, but not in excess of, the sum of (in order of priority of application of the proceeds):

(1) Guarantee Fees, if any, due the Secretary under the Security Agreements;

(2) All moneys due and unpaid and secured by the Mortgage or Security Agreement;

(3) All advances, including interest thereon, by the Secretary, pursuant to the Security Agreement and all reasonable charges and expenses of the Secretary;

(4) The accrued and unpaid interest on the Secretary's Note;

(5) The accrued and unpaid balance of the principal of the Secretary's Note; and

(6) To the extent of any collaterization by the Obligor of other debt due to the Secretary from the Obligor under other Title XI financings, such other Title XI debt.

(d) *Security proceeds to Obligor.* The Obligor shall be entitled to the proceeds from the sale or other disposition of security, described in paragraph (c) of this section, if and to the extent that the proceeds realized are in excess of the amounts described in paragraphs (c) (1) through (6) of this section.

§ 298.42 Reporting requirements—financial statements.

The financial statements of the Company shall be audited at least annually, in accordance with generally accepted auditing standards, by independent certified public accountants licensed to practice by the regulatory authority of a State or other political subdivision of the United States or, licensed public accountants licensed to practice by the regulatory authority or other political subdivision of the United States on or before December 31, 1970. In the case of Eligible Export Vessels, the accounts of the Company shall be audited at least annually, and the Secretary may require that the financial statements be in accordance with generally accepted accounting principles, by accountants as described in the first sentence of this section or by independent public accountants licensed to practice by the regulatory authority or other political subdivision of a foreign country, provided such accountants are satisfactory to the Secretary. The accountants performing such audits may be the regular auditors of the Company.

(a) *Reports of Company and other Persons.* Except as otherwise required by the Secretary, the Company shall file a semiannual financial report and an annual financial report, prepared in accordance with generally accepted accounting principles, with the Maritime Administration as specified in the Documentation. Included shall be the balance sheet and a statement of paid-in-capital and retained earnings at the close of the required reporting period, a statement of income for the period and any other statement that the Secretary shall consider necessary to accurately reflect the Company's financial condition and the results of its operations. By letter to the Company, the Secretary shall specify the form required for reporting and the number of copies to be submitted. The Secretary may, by notice to the Company, also require the Company to submit financial statements of any other Person, directly or indirectly participating in the project, if the financial condition of that Person affects the Secretary's security for the Guarantees. The required financial report for the annual period shall be due within 105 days after the close of each fiscal year of the Company, commencing with the first fiscal year ending after the date of the Security Agreement. The required semiannual report shall be due within 105 days after each semiannual period, commencing with the first semiannual period ending after the date of the Security Agreement. The annual report shall be accompanied by the public accountant's report based on an audit of the company's financial statements. An audit by the public accountants of the financial statements contained in the company's semiannual report may be required by the Secretary. Certification of the semiannual report by the accountants may be required by the Secretary. Where independent certification is not required, a responsible corporate officer shall attach a certification that such report is based

on the accounting records and, to the best of that officer's knowledge and belief, is accurate and complete.

(b) *Leveraged lease financing.* If the method of financing involved is a leveraged lease financing, or a trust is the owner of the Vessels, the requirements for annual and semiannual accounting reports of the Obligor may be modified accordingly by the Secretary.

(c) The Company shall furnish, along with its semi-annual report, a letter of confirmation issued by its insurance underwriter(s) or broker(s) that the Company has paid premiums on insurance applicable to the preservation, protection and operation of the asset, which information shall state the term for which the insurance is in force.

§ 298.43 Applicability of the regulations.

The regulations in this part shall be in effect as to all Letter Commitments, commitments to guarantee Obligations and Guarantees of Obligations made, issued or entered into after the effective date hereof pursuant to section 1104(a) of the Act, and all mortgages and loans covered thereby. These regulations supersede those issued under part 298 of this title (43 FR 60912) as of the effective date hereof, but shall not affect any Letter Commitments, commitment for Guarantees, Guarantees or contracts of insurance in existence on the effective date of these regulations. The regulations in this part may be amended, but said amendments shall have no effect upon any existing Letter Commitments, guarantees, insurance contracts, commitments for Guarantees or Documentation.

Subpart F—Administration [Reserved]

Dated: May 2, 1996.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

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