

DEPARTMENT OF TRANSPORTATION**Maritime Administration****46 CFR Part 356****[Docket No. MARAD-99-5609]****RIN 2133-AB38****Eligibility of U.S.-Flag Vessels of 100 Feet or Greater In Registered Length to Obtain a Fishery Endorsement to the Vessel's Documentation****AGENCY:** Maritime Administration, Department of Transportation.**ACTION:** Notice of proposed rulemaking ("NPRM").

SUMMARY: The Maritime Administration ("MARAD, we, our, or us") is soliciting public comments on implementation of the new U.S. citizenship requirements set forth in the American Fisheries Act of 1998 ("AFA"), Title II, Division C, Public Law 105-277, for vessels of 100 feet or greater in registered length for which a fishery endorsement to the vessel's documentation is sought.

The NPRM implements new statutory requirements of the AFA by raising the U.S. ownership and control standards for U.S.-flag fishing vessels of 100 feet or greater in registered length that are operating in U.S. waters, by eliminating exemptions for fishing vessels that can not meet current citizenship standards, by phasing out of operation many of the largest fishing vessels, and by establishing new criteria to be eligible to hold a preferred mortgage on such vessels. The regulations set out which transactions are permissible, which transactions will require prior approval, and which transactions are impermissible and, to the extent practicable, minimize disruptions to the commercial fishing industry, to the traditional financing arrangements of such industry, and to the opportunity to form fishery cooperatives.

DATES: You should submit your comments early enough to ensure that Docket Management receives them not later than February 22, 2000. In order to meet the statutory deadline for publishing final rules in the **Federal Register** by April 1, 2000, we are using a shortened 45 day comment period. However, comments on the information collection requirements of the NPRM will be accepted until March 6, 2000. In addition, public meetings at which oral and written comments may be presented have been scheduled for the dates and locations listed under **SUPPLEMENTARY INFORMATION**.

ADDRESSES: Comments should refer to docket number MARAD-99-5609.

Written comments may be submitted by mail to the Docket Clerk, U.S. DOT Dockets, Room PL-401, Department of Transportation, 400 7th St., S.W., Washington, D.C. 20590-0001. You may also send comments electronically via the Internet at <http://smses.dot.gov/submit/>. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at <http://dms.dot.gov>.

FOR FURTHER INFORMATION CONTACT: John T. Marquez, Jr. of the Office of Chief Counsel at (202) 366-5320. You may send mail to John T. Marquez, Jr., Maritime Administration, Office of Chief Counsel, Room 7228, MAR-222, 400 Seventh St., S.W., Washington, D.C., 20590-0001, or you may send e-mail to John.Marquez@marad.dot.gov.

SUPPLEMENTARY INFORMATION:**Will There Be Public Meetings on the NPRM?**

Public meetings have been scheduled for the following dates and locations:

1. January 25, 2000, 9:30 a.m. to 3 p.m.—South Auditorium, Jackson Federal Building, 915 Second Avenue, Seattle, WA;
2. January 27, 2000, 9:30 a.m. to 3 p.m.—Assembly Room, Z.J. Loussac Library, 3600 Denali St., Anchorage, AK; and,
3. January 31, 2000, 9:30 a.m. to 3 p.m.—Room 6200, Nassif Building, 400 7th Street, S.W., Washington, DC.

Meeting facilities have been arranged for the entire day to ensure that all interested parties have an opportunity to comment on the NPRM. However, if there is not sufficient interest to necessitate an afternoon session, the public meetings will be adjourned after all participants have had an opportunity to comment in the morning. Accordingly, interested parties are advised to attend in the morning since the meeting will be adjourned after the conclusion of presentations and will not be reconvened in the afternoon if all parties present in the morning have had an opportunity to comment.

If you would like to provide oral comments at one of the public meetings, all that is required is that you be present and offer your comments. In order for us to have an idea of the level of participation that can be expected at these meetings, we request, but do not require, that you notify us at least five working days prior to the meeting that

you plan to attend. You may notify John T. Marquez, Jr. by phone at (202) 366-5320, by fax at (202) 366-7485, or by e-mail at John.Marquez@marad.dot.gov.

Who May File Comments?

Anyone may file written comments about proposals made in any rulemaking document that requests public comments, including any state government agency, any political subdivision of a State, or any interested person.

How Do I Prepare and Submit Comments?

Your comments must be written in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this NPRM in your comments.

We encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments. Please submit two copies of your comments, including the attachments, to Docket Management at the address given above under **ADDRESSES**. If possible, one copy should be in an unbound format to facilitate copying and electronic filing.

In addition to comments on the proposed rule, we specifically request that you address in your comments whether the information collection in this proposal is necessary for the agency to properly perform its functions and will have practical utility, the accuracy of the burden estimates, ways to minimize this burden, and ways to enhance quality, utility, and clarity of the information to be collected.

How Can I Be Sure That My Comments Were Received?

If you want Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail. If you send comments by e-mail, you will receive a message by e-mail confirming receipt of your comments. Your e-mail address should be noted with your comments.

Is Information That I Submit to MARAD Made Available to the Public?

When you submit information to us as part of this NPRM, during any rulemaking proceeding, or for any other reason, we may make that information publicly available unless you ask that we keep the information confidential. If you wish to submit any information

under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, Maritime Administration, at the address given above under **FOR FURTHER INFORMATION CONTACT**. You should mark "CONFIDENTIAL" on each page of the original document that you would like to keep confidential.

In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES**. When you send comments containing information claimed to be confidential business information, you should also include a cover letter setting forth with specificity the basis for any such claim (for example, it is exempt from mandatory public disclosure under the Freedom of Information Act, 5 U.S.C. 552).

We will decide whether or not to treat your information as confidential. You will be notified in writing of our decision to grant or deny confidentiality before the information is publicly disclosed and you will be given an opportunity to respond.

How Can I Read the Comments Submitted by Other People?

You may read the comments received by Docket Management at the address and during the hours provided above under **ADDRESSES**.

Comments may also be viewed on the Internet. To read the comments on the Internet, take the following steps: Go to the Docket Management System ("DMS") Web page of the Department of Transportation (<http://dms.dot.gov/>). On that page, click on "search." On the next page (<http://dms.dot.gov/search/>), type in the four-digit docket number shown on the first page of this document. The docket number for this NPRM is 5609. After typing the docket number, click on "search." On the next page, which contains docket summary information for the docket you selected, click on the desired comments. You may download the comments.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Accordingly, we recommend that you periodically check the Docket for new material.

Background

The AFA imposes new citizenship requirements for the owners of vessels of 100 feet or greater in registered length for which a fishery endorsement to the

vessel's documentation is sought. The AFA, among other things:

(1) Raises, with some exceptions, the U.S. citizen ownership and control standards for U.S.-flag Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels operating in U.S. waters from a controlling interest to a 75 percent interest requirement as set forth in § 2(c) of the Shipping Act, 1916, as amended ("1916 Act");

(2) Sets forth certain criteria for purposes of determining whether "control" of the owner of Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels is vested in Citizens of the United States;

(3) Requires state or federally chartered financial institutions to comply with the Controlling Interest (51%) requirements of § 2(b) of the 1916 Act in order to hold a preferred mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel of 100 feet or more in registered length;

(4) Requires preferred mortgagees of vessels of 100 feet or more in registered length that are not state or federally chartered financial institutions to comply with the requirements of § 2(c) of the 1916 Act which provides that 75% of the interest in the entity must be owned and controlled by Citizens of the United States, or use an approved Mortgage Trustee that complies with the citizenship requirements of § 2(c) of the 1916 Act and other requirements of the AFA;

(5) Prohibits certain foreign-built factory trawlers from participating in the fisheries of the United States; and,

(6) Prohibits, with some exceptions, vessels above 165 feet or 750 gross tons or with engines of 3,000 horsepower or more from obtaining a fishery endorsement to the vessel's documentation.

We are required by § 203(c) of the AFA to "rigorously" scrutinize any transfers of ownership and control over Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels and to pay particular attention to leases, charters, financings, mortgages, and other arrangements to determine if they constitute an impermissible conveyance of control to persons not eligible to own a vessel with a fishery endorsement. These regulations are to set out which transactions are permissible, which transactions will require prior approval, and which transactions are impermissible. Pursuant to § 203(b) of the AFA, these regulations will also "to the extent practicable, minimize disruptions to the commercial fishing industry, to the traditional financing arrangements of such industry, and to

the opportunity to form fishery cooperatives."

We are required to promulgate final regulations by April 1, 2000, regarding the U.S. citizenship requirements for ownership and control of vessels, unless otherwise exempted, that are 100 feet or greater in registered length and for which the owner wishes to obtain a fishery endorsement to the vessel's documentation. The regulations will become effective on October 1, 2001. Until the final regulations are published, we may not, pursuant to § 203(b) of the AFA, issue letter rulings or interim interpretations as to the effect of the AFA on Fishing Vessels.

We published an Advance Notice of Proposed Rulemaking ("ANPRM") in the **Federal Register**, 64 FR 24311 (May 6, 1999), to solicit comments from the public and held five public hearings. We have received and evaluated the comments and are now publishing this NPRM with a request for comments from the public, as well as providing notice of upcoming public meetings.

Public Comments on the ANPRM

As the first step in this rulemaking process, we issued an ANPRM entitled Eligibility of U.S.-Flag Vessels of 100 Feet or Greater To Obtain Commercial Fisheries Documents, 64 FR 24311 (May 6, 1999). The ANPRM provided an explanation of the changes in the law and requested comments, suggestions, and information from the public relating to the development of regulations necessary to implement the new statutory requirements to obtain a fishery endorsement for a documented vessel of 100 feet or greater in registered length. In response to this request, we received 19 written comments. In addition, we held five public meetings in Seattle, WA, Anchorage, AK, Boston, MA, New Orleans, LA, and Washington, DC, and met with several interested parties who requested meetings with us. The written comments, transcripts of the public meetings, and memoranda summarizing the meetings with interested parties are available for review in the rulemaking docket. Following is a summary of those comments and our response.

Several commenters requested that we provide clear guidance to the fishing industry in the regulations regarding the ownership and control requirements and that we articulate those fundamental elements of control and types of agreements with Non-Citizens that are either acceptable or impermissible. One commenter stated, however, that we should not attempt to issue regulations which define in advance all transactions which could

theoretically violate the statutory standards. The commenter suggested that we should simply recite the statutory standards and make the AFA prohibitions specific through case-by-case application.

We agree with the commenters that the industry needs clear guidance regarding how United States Citizen ownership and control will be determined. For example, in §§ 356.3–11 of the NPRM, we have defined the requirements for ownership and control by Citizens of the United States, spelled out the requirements for filing an Affidavit of United States Citizenship, identified the methods for demonstrating ownership, and established factors that we will evaluate for purposes of determining whether impermissible control over a vessel or vessel-owning entity has been transferred to a Non-Citizen. In many cases, control may be the most difficult aspect of demonstrating citizenship. Accordingly, we have set forth factors that will be deemed an impermissible transfer of control to a Non-Citizen and therefore prohibited. We have also identified certain criteria that, while not prohibited by themselves, may be deemed an impermissible transfer of control to a Non-Citizen if other indicia of control are also present in the transaction. Certain types of agreements such as loans, mortgages, charters, sales agreements, and management agreements are specifically addressed in the NPRM; however, the factors of foreign control could conceivably apply to any agreement between a Citizen of the United States and a Non-Citizen. Finally, while the NPRM does identify certain parameters and criteria that we will use in determining ownership and control by Citizens of the United States, we note that the lists of criteria are not exhaustive and that, depending on the facts involved, evaluations may be made on a case-by-case basis.

We received many comments relating to the regulation of financing agreements and mortgages. Commenters noted typical loan covenants that a lender may impose on the borrower in order to protect its interest which may involve some degree of control over the vessel's owner and the vessel. Accordingly, commenters were particularly concerned that a lack of certainty regarding allowable covenants or overly restrictive requirements could deter foreign lenders from participating in the fishing industry. Such uncertainty could potentially limit sources of financing for vessel owners.

Commenters suggested different approaches regarding how we should regulate the financing of vessels. The

majority of commenters suggested that we approve, in advance, certain typical loan covenants used by all lenders who are not affiliated with the vessel owner. This would minimize disruptions to the commercial fishing industry and to the traditional financing arrangements of the industry. However, several commenters expressed concern that if MARAD published a list of loan covenants that are permissible, it would still leave open the question whether other restrictive provisions of a loan package would, in the aggregate, create an impermissible degree of control by Non-Citizens.

One commenter recommended drafting a "safe harbor" provision that achieves certainty by turning on the identity of the lender involved, thus allowing lenders that are financial institutions to make loans without having the regulations deal with specific loan covenants. The commenter noted ramifications for a lender that strays in controlling a borrower including: (1) Being sued by its borrower for any lost profits, and (2) being deemed a vessel operator and potentially becoming subject to strict liability for violations under CERCLA, the Oil Pollution Act, and various state environmental pollution laws.

Another commenter suggested that we should focus on differentiating between lenders on the basis of their loan portfolios and whether more than 50% of the lender's portfolio is in the fishing industry. For such lenders, the commenter suggested that we should require a signed affidavit by an officer of the lender stating that 51% of the lender's outstanding shares are owned by U.S. citizens as a documentation requirement during the issuance of a preferred ship mortgage. We should then place these lenders on a list of lenders presumed to be U.S. citizen lenders, thus creating an irrebuttable presumption that the lender meets applicable U.S. citizenship requirements. The commenter continued by stating that all standard categories of covenant provisions should be approved of in advance for all conventional lending institutions that are not directly affiliated with a vessel owner and that are not a fishing company.

One commenter put a slightly different spin on the above approach and suggested that we grant a blanket lender exemption to domestic and foreign banks who are (1) publicly traded, (2) under the supervision of national or state banking authorities, (3) not affiliated with the vessel owner, and (4) in the case of foreign banks only, who make use of an approved Mortgage

Trustee. According to the commenter, such an exemption should allow the lender to include in the financing documents any covenant which it is able to negotiate with the vessel owner.

We agree that certainty is needed in the financing sector in order to provide a stable financing regime and to ensure that ample financing exists for vessel owners. Accordingly, we have proposed in § 356.23 a list of loan covenants that are expressly authorized. In addition, we are proposing in § 356.21 to give general approval to the standard loan and mortgage agreements of Non-Citizen Lenders that are using an approved Mortgage Trustee, provided that they meet certain criteria. A Non-Citizen Lender would be permitted to submit its standard loan provisions to us for approval. Once these standard loan covenants are approved, the lender would be able to enter into loan agreements without obtaining approval from us on a transactional basis. If the lender later wishes to use additional covenants that were not included in the general approval, it must submit those covenants to us for approval. Failure to receive such approval would void the general approval.

With respect to the use by Non-Citizen Lenders of an approved Mortgage Trustee, referred to in the ANPRM as a Westhampton Trustee, several commenters asserted that Congress intended that we resurrect our prior regulations for trustees to enable a Non-Citizen Lender to secure its loan with a Preferred Mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel. One commenter stated that he did not believe Congress intended any further regulation of those mortgages and that any state or federally regulated U.S. bank, whether U.S. or foreign owned, should be eligible to serve as a Trustee.

We agree that the regulations found in 46 CFR Part 221 should serve as a model for the NPRM and have patterned our proposed regulations in §§ 356.27–37 after the old "Westhampton Trustee" regulations. However, we note that the AFA is quite specific about the requirements to be a qualified Trustee (referred to as a "Mortgage Trustee" in the NPRM) and does not provide flexibility to allow a state or federally regulated U.S. bank that does not meet the Controlling Interest requirements of § 2(b) of the 1916 Act, 46 App. U.S.C. 802(b), or any other foreign entity, to be a Mortgage Trustee.

A number of commenters focused on management agreements, exclusive sales or marketing agreements, and other arrangements that may be considered normal in the day-to-day operations in

the fishing industry, but that may be viewed by us as conveying impermissible control to a Non-Citizen. One commenter suggested that we should limit our regulation of the 75% ownership and control requirement to Persons or entities that have the right to replace or limit the actions of the chief executive officer, a majority of the board of directors, any general partner or any person serving in a management capacity of the entity which owns the vessel. Several commenters suggested that exclusive sales agreements and management contracts are common place in the fishing industry and are entered into on a daily basis. Consequently, the commenters contended that requiring prior approval or case-by-case review of such traditional agreements or review of companies that do not own fishing vessels to determine their citizenship would pose an unreasonable burden on the industry and would not be a workable business practice.

One commenter noted that if all officers and stockholders of the companies involved are United States Citizens and are not controlled by foreign citizens, it should not be necessary for us to scrutinize management or charter agreements between the United States Citizen owned and controlled companies. The commenter contended that scrutiny of management and operating companies should be focused on whether (1) a catcher vessel's logistics, maintenance, or personnel hiring operations are controlled by a shore plant or mothership that is owned or controlled by Non-Citizens, (2) the catcher vessel is obligated to sell its harvest to a foreign owned or controlled processing plant, or (3) short-term loan agreements convey management prerogatives to a Non-Citizen Lender.

Another commenter noted that enforcement of AFA regulations which preclude the participation of Non-Citizens in the operation of its companies would erode its ability to compete in international markets and may ultimately result in the demise of its industry sector. The commenter indicated that many management companies rely on foreign advisors to perform many of their functions of providing support in engineering, repair and maintenance, crew hiring, claims management, strategic planning, accounting, cash management, banking relationships, insurance management, marketing, product traffic management, credit management, quality control, production management, record keeping and reporting, and government relations.

Several commenters contended that we should not preclude using contracts for the purchase of all or a significant portion of a vessel's catch as security for financing various transactions relating to a specific vessel. Typical long-term contracts for the sale of all or a large portion of the vessel's catch were suggested by the commenter to generally involve a mutually beneficial agreement between the vessel owner and the processor or purchaser of the vessel's catch, and do not give the purchaser any control over the actual operation of the vessel or the vessel owner. According to the commenter, preclusion of these types of sales agreements would: (1) Deny fishing vessel owners access to traditional sources for marketing their catch; (2) prejudice U.S. processors and purchasers who happen to be non-section 2 citizens in favor of processors who happen to be section 2 citizens; and, (3) make the formation of fishery cooperatives in the pollock fishery virtually impossible as the majority of pollock processors and purchasers are non-section 2 citizens. The commenter emphasized that nothing in the AFA attempts to distinguish the sale of a vessel's catch to a foreign processor or to prohibit a foreign processor from purchasing the catch of U.S. fishing vessels.

We generally agree with the commenters that case-by-case review of management contracts, charters or exclusive or long-term sales or marketing contracts would pose an unreasonable burden. Therefore, we propose in § 356.41 and § 356.43 to allow owners or bareboat charterers of vessels to enter into exclusive sales agreements with Non-Citizens without prior approval from us, provided that these agreements meet certain criteria. For example, the agreements cannot contain provisions that would transfer control over the vessel or vessel-owning entity to a Non-Citizen, including the ability to control the hiring, management, and disciplining of crew, and the ability to direct the vessel's operations and harvesting activities. Similarly, management agreements that are solely administrative in nature and do not convey control over the vessel's owner or the vessel to a Non-Citizen are permitted. The owner or bareboat charterer would be required to identify and provide a summary of the terms of management agreements within 30 days of execution and to certify to the Citizenship Approval Officer that the agreement does not convey control over the vessel or vessel-owning entity to a Non-Citizen.

Long-term or exclusive sales or marketing contracts are authorized in

the proposed rule, provided that they do not convey control over the vessel or vessel owner to a Non-Citizen. Section 356.43 sets out certain provisions that are expressly authorized for use in long-term or exclusive sales or marketing agreements that might otherwise be construed to convey control over the vessel or vessel owner to a Non-Citizen. If an owner or bareboat charterer wishes to enter into a long-term or exclusive sales or marketing agreement that contains other provisions, the owner or charterer must first obtain approval from the Citizenship Approval Officer that such provisions do not convey control to a Non-Citizen.

With respect to charters, we agree that a review of all charters would be impractical and overly burdensome. Therefore, we propose in § 356.39 to allow time charters and voyage charters to Non-Citizens of Fish Processing Vessels and Fish Tender Vessels, provided that the vessel is not used for harvesting. The time charter or voyage charter must be a true time charter or voyage charter and may not include provisions that would transfer control to the charterer, such as the right to hire or discipline the crew. We will not require review of charter agreements prior to execution. However, we propose to require a copy of the charter to be submitted within 30 days of execution in order to confirm that the charter is not a bareboat charter and that there is not an impermissible transfer of control. Time charters and voyage charters of Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels used to harvest fish are prohibited. Bareboat charters to Non-Citizens are also prohibited because a bareboat charter, by definition, results in a transfer of control to the charterer. Any charter to a Citizen of the United States is allowed and review of the charter will not be required. However, because a bareboat charterer will have possession and control of the vessel, the charterer must demonstrate that it is a Citizen of the United States.

A number of commenters also noted that loans to owners of Fishing Vessels may be made by Non-Citizens who have a contractual relationship with the owner. These loans may be for vessel construction and modification, as well as for working capital to fund the vessel's operation and the transportation and sale of the vessel's catch. Many times these loans are based on a contractual relationship that a vessel owner or bareboat charterer has with a fish processor, such as an exclusive sales agreement or some other agreement. On occasion, a lender may receive a preferred ship mortgage as

security for the financing. The commenters suggested that these loans are traditional financing arrangements and thus should not be regulated by us. We recognize that such financing arrangements may be commonplace in the fishing industry and wish to minimize our involvement, to the extent practicable. Therefore, we propose in § 356.45 to allow vessel owners and bareboat charterers who have an exclusive or long-term sales or marketing agreement with a Non-Citizen to enter into an agreement with the Non-Citizen for an advance of funds. This approval is conditioned on the requirements that the funds must be used for working capital, the agreement may not contain provisions that would give the Non-Citizen control over the vessel, vessel owner, or bareboat charterer, and the amount of the advancement cannot exceed the annual value of the contract. The regulations do not permit a Non-Citizen with whom a vessel owner or bareboat charterer is conducting business to loan money to the vessel owner or bareboat charterer where the loan is for capital improvements to a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel. Such financing from Non-Citizens with whom the owner or bareboat charterer has an ongoing relationship would convey an impermissible degree of control to the Non-Citizen. Accordingly, consistent with our past practice in other programs, such financing for capital improvements must be obtained from an unrelated third party.

A commenter representing fishery cooperatives stated that the AFA's ownership and control requirements have no relevance to the establishment and operation of cooperatives of the catcher/processor sector for pollock and Pacific whiting fisheries. Other commenters suggested that: (1) MARAD should not interfere with a Non-Citizen agreement with the pollock cooperatives, (2) MARAD should not establish disparate treatment of Non-Citizen processors and Citizen processors, and (3) the AFA does not require such treatment because it is concerned with vessel ownership and control and not processing or purchasing.

We do not propose to specifically regulate or interfere with the formation of fishery cooperatives. However, an owner or bareboat charterer is prohibited from entering into any agreement that conveys control over the vessel, vessel-owning entity, or bareboat charterer to a Non-Citizen. Consequently, a fishery cooperative agreement cannot contain terms that

would convey control to a Non-Citizen such as the right to select the management company for a vessel, to hire or discipline crew, or to direct the harvesting operations of a vessel. If an owner or bareboat charterer enters into an agreement that conveys control over the vessel, vessel-owning entity, or bareboat charterer, the Citizenship Approval Officer may determine that the owner is not eligible to document the vessel with a fishery endorsement.

Several commenters noted that § 213(g) of the AFA provides that if provisions of the AFA or the regulations are inconsistent with the obligations of existing international treaties or agreements, the regulations will not apply to vessel owners or mortgagees that are nationals of the country with which we have an agreement. The commenters pointed out that they believe that the Treaty of Friendship, Commerce and Navigation between the Republic of Korea and the United States of America, which was signed on November 28, 1956, and entered into force on November 7, 1957, and the Treaty and Protocol between the United States of America and Japan Regarding Friendship, Commerce and Navigation, which was signed on April 2, 1953, and entered into force on October 30, 1953, are in conflict with the ownership and mortgage provisions of the AFA. The commenters contend that the regulations should not apply to vessels owned by nationals of Japan and Korea by virtue of § 213(g) of the AFA. Accordingly, they request that we identify which international treaties we deem to be inconsistent with the provisions of the AFA. Because the exemption applies only to the particular owner or Mortgagee of a specific vessel, we propose in § 356.53 to establish a procedural mechanism whereby owners and Mortgagees of Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels can petition us for a decision that they are exempt from the provisions of the proposed rule. The owner of a vessel that may be exempt due to an existing Treaty is not required to sell its ownership interest in order to be in compliance with the United States Citizen ownership and control requirements of the AFA. However, if the owner sells part of its ownership interest to another foreign entity the exemption no longer applies. In addition, if the owner sells part of its interest to another entity, the requirements of the AFA apply to the new owner.

One commenter noted that the new provisions of 46 U.S.C. 12102(c)(6), created by § 202(a) of the AFA, will prohibit certain larger vessels from

being eligible for a fishery endorsement unless they meet certain conditions. These conditions include, among other things, that a certificate of documentation was issued to the vessel with a fishery endorsement that was effective on September 25, 1997, and that in the event of the invalidation of the fishery endorsement after the date of the enactment of the AFA, application is made for a new fishery endorsement within 15 business days. The commenter noted that there are many "technical violations" that could cause a vessel's documentation to lapse. For example, if the vessel owner fails to notify the Coast Guard of a change in the vessel's home port or if a change in ownership has occurred, the documentation status of the vessel is invalid, and therefore the fishery endorsement is invalid. If the owner does not apply to redocument the vessel within 15 business days it could permanently lose its right to participate in the fishing industry. The commenter explained that some violations invalidate a vessel's documentation for some purposes but not for others, such as for purposes of a Preferred Mortgage. The commenter suggested that we take a similar approach for these larger vessels and identify the specific violations that would cause a vessel to lose its fishery endorsement.

Violations that would render a vessel's documentation, and therefore its fishery endorsement, invalid are outlined in the Coast Guard's regulations at 46 CFR Part 67. We do not intend for the 15-day period to act as a permanent bar to a vessel's eligibility for a fishery endorsement where the owner did not have written notice that the fishery endorsement was invalidated and on what grounds. Accordingly, we will provide notice to the vessel owner of a violation of the requirements of part 356 that would cause a vessel owner to lose the fishery endorsement to a vessel's documentation. The ultimate determination as to when a violation of the Coast Guard regulations has occurred and rendered the vessel's documentation and fishery endorsement invalid remains with the Coast Guard; however, for purposes of this NPRM the 15-day period will not begin to run until written notice has been received by the vessel owner.

Discussion of Proposed Rule

The AFA requires us to promulgate regulations implementing the new United States citizenship and control requirements for certain vessels of 100 feet or greater in registered length. In order for a vessel of 100 feet or greater in registered length to be eligible for a

fishery endorsement, 75% of the interest in the owner, at each tier of ownership and in the aggregate, must be owned and controlled by Citizens of the United States. The AFA also specifies criteria for mortgagees to be eligible to hold a Preferred Mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel, prescribes requirements for Non-Citizen Lenders to use an approved Mortgage Trustee to hold a Preferred Mortgage, and prohibits Charters of Fishing Vessels to Non-Citizens where the vessel is used to harvest fishery resources. In determining whether a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel is controlled by Citizens of the United States, we are required to rigorously scrutinize contracts and agreements that could result in a conveyance of impermissible control over the vessel or vessel-owning entity to a Non-Citizen. Accordingly, the NPRM addresses not only the requirements for an entity to be eligible to own a vessel with a fishery endorsement, but also requirements that must be met by Preferred Mortgagees, Mortgage Trustees, Non-Citizen Lenders, management companies, charterers, and other entities that engage in contractual or other arrangements with the owner of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel and that could result in a transfer of control to a Non-Citizen.

Ownership

In order for an owner of a vessel of 100 feet or greater in registered length to be eligible to obtain a fishery endorsement to the vessel's documentation, it must demonstrate that: (1) 75% of the interest in the entity that owns the vessel is owned by Citizens of the United States, and (2) 75% of the control of the entity that owns the vessel is owned by and vested in Citizens of the United States. Evidence of United States Citizen ownership of a vessel-owning entity is demonstrated through the filing of an Affidavit of United States Citizenship as provided for in § 356.5. The Affidavit of U.S. Citizenship requires the owner to provide relevant information to demonstrate that it qualifies as a Citizen of the United States within the meaning of 46 U.S.C. 12102(c), § 2(c) of the 1916 Act, 46 App. U.S.C. 802(c), and 46 CFR 356.3. The form of this Affidavit is substantially the same as the one set forth at 46 CFR Part 355, which is used by applicants and others who must be Citizens of the United States in order to qualify for various programs administered by MARAD.

There are two methods that an entity required to file an Affidavit of U.S.

citizenship can use to demonstrate that it is owned by Citizens of the United States. The two methods, direct proof and fair inference, are described in § 356.7 and have been used since the 1940's as a means of establishing citizenship. The direct proof method is used for individuals or entities that have 30 or fewer stockholders, partners, or members. Under the direct proof method, the owner of a vessel or any other entity that is required to demonstrate its citizenship must provide evidence of the citizenship of stockholders, partners and members owning at least 75% of the interest. The amount of interest, including the number of shares and the percentage, that is owned by each stockholder, partner or member must be provided. In addition, the entity must provide citizenship information for officers and directors of a corporation or the equivalent persons in a partnership, Limited Liability Company, or other entity.

The fair inference method provided for in § 356.7(c) stems from the case *Collier Advertising Service, Inc. v. Hudson River Day Line*, 14 F. Supp. 335 (S.D.N.Y. 1936). The fair inference method is intended to be used by corporations that are publicly traded or that have more than 30 stockholders. This method was recognized by the court in the *Collier* case as a means for a publicly traded corporation to establish its U.S. citizenship within the meaning of § 2 of the 1916 Act without verifying the actual citizenship of each stockholder. The fair inference method allows a company to "infer" United States Citizenship based on a certain percentage of the stock in each class being held by persons with a registered U.S. address. Owners of Vessels, Mortgage Trustees, and bareboat charterers must comply with the requirement that 75% of the interest in the entity is owned by Citizens of the United States. Using the fair inference method, they would have to demonstrate that 95% or more of the stock for each class is held by stockholders with a registered U.S. address in order to infer that 75% of the interest in the corporation is owned by Citizens of the United States. Mortgagees of vessels that must meet the Controlling Interest requirements of § 2(b) of the 1916 Act, 46 App. U.S.C. § 802(b), would be required to demonstrate that 65% or more of the stock for each class of stock is held by stockholders that have a registered U.S. address in order to infer that at least 51% of the interest in the corporation is owned by Citizens of the United States.

The stockholder-address information can be supplied through the stock books and records of the corporation. In addition to the citizenship of certain officers and directors of the corporation, owners of 5% or more of the stock in each class must be specifically identified and their citizenship must be established.

The AFA requires that 75% of the interest in a vessel owner "at each tier and in the aggregate" be owned and controlled by Citizens of the United States. Therefore, the owner must submit a composite Affidavit of United States Citizenship demonstrating United States citizenship for all entities that are being relied upon to establish the required percentage of U.S. ownership and control, including entities at subsequent tiers, such as parent corporations.

We have construed the phrase "in the aggregate" to mean that a particular Non-Citizen may not own or control more than 25% of the vessel or vessel-owning entity through its combined ownership at multiple tiers. We recognize that this term could be interpreted much more restrictively to prohibit total foreign interest in the vessel or vessel-owning entity by all owners from exceeding 25%. However, we believe that such a restrictive reading would limit the participation in the fishing industry of publicly traded companies and the ability of vessel owners to obtain equity participation from other entities that are Citizens of the United States, but which may have some minor foreign ownership.

In order for an owner of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel to qualify for a fishery endorsement by the effective date of the new ownership requirements of the AFA, an Affidavit of United States Citizenship must be submitted to the Citizenship Approval Officer no later than June 1, 2001. An owner may get a letter ruling from the Citizenship Approval Officer prior to June 1, 2001, by filing an Affidavit of United States Citizenship at any time after October 1, 2000, accompanied by the other applicable documentation required to demonstrate U.S. citizenship. An owner that receives a letter ruling will be required to notify the Citizenship Approval Officer of any changes before October 1, 2001, and to submit a certification to the Citizenship Approval Officer within 10 days prior to October 1, 2001, stating that the information in the Affidavit of United States Citizenship remains true and accurate, or if any information has changed, a description of the changes.

Control

As noted above, control is also a factor in our determinations regarding whether an entity is a Citizen of the United States or meets the Controlling Interest requirements of § 2(b) of the 1916 Act. Control is a difficult term to define because control can be exerted over a vessel or vessel-owning entity through a wide variety of typical financing and operational arrangements in the fishing industry to which a Non-Citizen may be a party. For example, where a Non-Citizen owns 25% of the interest in a vessel or vessel-owning entity, and the other 75% is owned by Citizens of the United States, control could still be conveyed to the Non-Citizen through rights granted in the Articles of Incorporation, By-Laws, or other comparable organizing or operating documents. Similarly, other contractual arrangements with Non-Citizens, such as mortgage and financing agreements, management agreements, and exclusive or long-term sales or marketing agreements, can potentially result in a conveyance of control to Non-Citizens.

We are required to determine whether control has been transferred to a Non-Citizen in several contexts. In the case of an owner of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel, 75% of the control over the vessel and the vessel-owning entity must be owned by and vested in Citizens of the United States. In the case of a Mortgagee that holds a Preferred Mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel, the Mortgagee must comply with the 75% ownership and control requirement unless it is a state or federally chartered financial institution, in which case it must comply with the Controlling Interest criteria that generally require at least 51% of the ownership and control to be vested in Citizens of the United States. In the case of a Mortgage Trustee that is holding a mortgage on a Fishing Vessel for the benefit of a Non-Citizen Lender, 75% of the control over the Fishing Vessel must be vested in Citizens of the United States.

The AFA sets forth certain factors that are to be deemed control. Section 356.11 spells out these elements of control, as well as other criteria that we consider in making our determination as to whether there has been an impermissible transfer of control to a Non-Citizen. Paragraph (a) lists indicia of control that would be considered impermissible. Paragraph (b) lists other indicia of control that we may consider, but that may not be deemed impermissible by themselves. While we

have attempted to list indicia of control that we may consider permissible or impermissible, the list is not all inclusive, and in many cases control will be determined on a case-by-case basis.

Mortgages

Mortgages are one of the key agreements in which control over a vessel could potentially be conveyed to a Non-Citizen. Section 203(b) of the AFA dictates that a Preferred Mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel of 100 feet or more in registered length can only be held by: (1) A person eligible to own a vessel with a fishery endorsement under 46 U.S.C. 12102(c); (2) a state or federally chartered financial institution that satisfies the Controlling Interest criteria of § 2(b) of the Shipping Act, 1916, 46 App. U.S.C. 802(b); or (3) a Mortgage Trustee that complies with the requirements of 46 U.S.C. 12102(c)(4), § 2(c) of the 1916 Act, 46 App. U.S.C. 802(c), and §§ 356.27–37 of this proposal.

A Preferred Mortgage is the primary instrument in the maritime industry for lenders to secure a vessel as collateral. In order for a lender to be given “preferred status” for its mortgage, it must meet the requisite citizenship requirements and otherwise qualify to hold a preferred mortgage filed with the Coast Guard. If a lender is deemed to be qualified to hold a preferred mortgage, a mortgage filed with the Coast Guard will be given a preferred status which entitles the Mortgagee’s security interest to a priority over certain types of liens against the vessel.

In order to provide some certainty for lenders so that they will know what loan covenants will be allowed, we have proposed in § 356.23 to authorize Non-Citizen Lenders to use certain restrictive loan covenants that we have determined do not convey impermissible control. In addition, we propose to allow Non-Citizen Lenders that will be using a Mortgage Trustee to get general approval of their standard loan documents and covenants. If the lender limits its loan agreements to those covenants for which it has received general approval, it will not be required to obtain transactional approval from us for its loans. However, use of restrictive loan covenants that have not been approved by the Citizenship Approval Officer will render the general approval void. This could result in a loss of the owner’s eligibility to document the vessel with a fishery endorsement.

Mortgage Trustees

Section 202 of the AFA also revives in principle what was commonly referred to as a Westhampton Trust arrangement. Under this trust arrangement, a Non-Citizen Lender that is not eligible to hold a Preferred Mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel may still receive a Preferred Mortgage if it uses an approved trustee, referred to in the NPRM as a Mortgage Trustee, to hold the Preferred Mortgage and the debt instrument. The criteria for an entity to qualify as a Mortgage Trustee are spelled out in § 356.27 of the NPRM and require that the entity:

- (1) Qualify as a Citizen of the United States eligible to own a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel;
- (2) Be organized as a corporation and doing business under the laws of the United States or of a State;
- (3) Be authorized under the laws of the United States or of the State under which it is organized to exercise corporate trust powers;
- (4) Be subject to supervision or examination by an official of the United States Government, or of a State;
- (5) Have a combined capital and surplus (as stated in its most recent published report of condition) of at least \$3,000,000; and
- (6) Meet any other requirements prescribed by the Maritime Administrator.

To become a qualified Mortgage Trustee, an entity must submit an application to the Citizenship Approval Officer accompanied by an Affidavit of United States Citizenship and other required documentation to demonstrate that it is a Citizen of the United States. Once approved, the Mortgage Trustee is required to advise the Citizenship Approval Officer of any changes to its citizenship information as they occur throughout the year. The Mortgage Trustee must also submit, on an annual basis, an Affidavit of United States Citizenship, a current version of its Articles of Incorporation and Bylaws, a copy of its most recent published report of condition, and a list of the vessels and lenders for which it is acting as Mortgage Trustee.

Charters

Section 202(a) of the AFA amends 46 U.S.C. 12102(c) by adding a new paragraph (c) that specifically prohibits charters to Non-Citizens of Fishing Vessel, Fish Processing Vessel, and Fish Tender Vessels that are used for fishing. The prohibition on charters to Non-Citizens is, however, limited to charters

of vessels used for fishing or harvesting of fishery resources.

The position of a bareboat charterer is quite different from that of a time charterer. It has long been recognized in the law of admiralty that a bareboat charterer is to be treated as the owner of the vessel, generally called the owner pro hac vice. Therefore, a bareboat charter to a Non-Citizen would result in an impermissible transfer of control over the vessel. A time or voyage charterer has use of the vessel; however, the charterer merely rents cargo space. Under a typical time or voyage charter, the owner of the vessel retains possession of and maintains the vessel, employs and pays the crew and is responsible for the expenses of running the vessel. The charterer pays for bunkers, pilots, tugs wharfage, and other port charges arising at the places to which he directs the vessel, but he would not be considered to have impermissible control over the vessel.

Accordingly, we propose in § 356.45 to permit time charters and voyage charters of Fish Processing Vessels and Fish Tender Vessels to Non-Citizens for purposes other than the harvesting fish or fishery resources. However, because charters of Fish Processing Vessels and Fish Tender Vessels to Non-Citizens must still comply with the requirement that impermissible control over the vessel not be conveyed to a Non-Citizen, we propose to require submission of time charters and voyage charters to Non-Citizens within 30 days of execution to confirm that there is not an impermissible transfer of control. Bareboat charters of Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels to Non-Citizens for any use are prohibited because a bareboat charter by its very nature results in a transfer of possession and control over the vessel.

Management Agreements

Section 203(c) of the AFA requires us to scrutinize any agreements that may convey control over a Fishing Vessel, Fish Processing Vessel, Fish Tender Vessel, or the vessel's owner to a Non-Citizen. We realize that owners and bareboat charterers may enter into a variety of management agreements to provide different services for the vessel without transferring control over the vessel or vessel-owning entity to a Non-Citizen. In order to permit owners and bareboat charterers of Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels to conduct business in a timely fashion and with a reasonable degree of certainty, we propose in § 356.41 to allow them to enter into certain management contracts and

agreements without prior approval from us. Such contracts must be solely advisory in nature and may not convey impermissible control over the vessel or the owner of the vessel. Accordingly, we expressly authorize management contracts in which the management company solely provides for marketing, technical services, quality control assurance, and other ministerial services that do not involve the actual operation of the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel and do not convey any right to the management company to control the operation of the vessel or the vessel owner. However, an owner or bareboat charterer of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel is prohibited from entering into management contracts with Non-Citizens that would effectively convey control over the vessel to the Non-Citizen management company by allowing the Non-Citizen management company to discipline or replace the crew or the master, direct the operations of the vessel or to effectively gain control by any other means over the operation and management of the vessel or vessel owner. The owner or bareboat charterer is required to provide a description of any management agreements into which it has entered and to provide a written declaration and warranty that the management agreement is a technical services type agreement authorized by us and does not contain provisions that transfer control over the vessel or the vessel owner to a Non-Citizen.

Exclusive or Long-Term Sales or Marketing Agreements

Long-term or exclusive sales or marketing contracts for all or a portion of the catch of a Fishing Vessel or Fish Processing Vessel are currently entered into between Non-Citizens and owners or bareboat charterers of the vessels. These contracts may potentially provide a mechanism under which control over a vessel or vessel-owning entity could be transferred to a Non-Citizen. Section 203(c) of the AFA requires that we scrutinize such agreements to ensure that there is not an impermissible transfer of control to a Non-Citizen. Commenters have suggested that these contracts are common place in the fishing industry and generally do not convey any rights to the buyer or marketer to control the vessel or vessel-owning entity and that too much regulation by us would be overly burdensome and would prevent owners from entering into necessary sales and marketing agreements in a timely manner. Accordingly, we are proposing in § 356.43 to allow owners and

bareboat charterers to enter into such agreements or contracts with Non-Citizens, without requiring our prior approval, if the contract does not contain provisions that convey control over the vessel or vessel-owning entity to the Non-Citizen. Section 356.43(b) specifically lists provisions which may be included in such agreements that are expressly authorized and that will not be deemed an impermissible transfer of control. If an owner or bareboat charterer wishes to enter into such an agreement that contains provisions other than those listed in subparagraph 356.43(b), it must obtain the approval of the Citizenship Approval Officer prior to entering into the agreement.

Financing Arrangements Other Than Vessel Mortgages

Financing of Fishing Vessel, Fish Processing Vessel, and Fish Tender Vessel operations is not limited to the mortgage of the vessel. We recognize that owners and bareboat charterers may enter into other financing arrangements for working capital or to finance improvements to such vessels. Section 203(c) of the AFA requires that we scrutinize financing arrangements that could potentially convey control over a Fishing Vessel, Fish Processing Vessel, Fish Tender Vessel, or a vessel-owning entity to a Non-Citizen. We do not consider an advance of funds by a purchaser to whom fish has been sold but not yet delivered, or by a consignee to whom fish has been delivered for sale under a consignment agreement but has not yet been sold, to constitute an impermissible transfer of control and do not restrict such transactions. We will, however, regulate certain other financing arrangements, and propose in § 356.45 to allow owners and bareboat charterers of Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels to enter into financing arrangements that are not secured by a mortgage on the vessel, such as an advance of funds owed under a long-term or exclusive sales contract that is consistent with § 356.43, provided that the Non-Citizen Lender is not granted any rights whatsoever to control the ownership, operation, management, or harvesting activities of the vessel or its owner. The owner or bareboat charterer must submit a description of the financing agreement to the Citizenship Approval Officer within 30 days of execution, accompanied by a declaration and warranty signed by the owner or bareboat charterer that the contract or agreement does not contain any covenants that convey control over the vessel, vessel owner, or bareboat charterer to a Non-Citizen. The owner is

not authorized in this section or elsewhere in the NPRM to enter into a financing arrangement for a capital improvement of the vessel with a related Non-Citizen. An owner may only obtain financing of capital improvements on the vessel through financing from an unrelated third party.

Exemptions for Certain Vessels

Section 202(a) of the AFA creates a new paragraph (6) in § 12102(c) of Title 46 United States Code. The amended 46 U.S.C. 12102(c)(6) prevents large Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels from entering U.S. fisheries, including former U.S.-flag vessels that have reflagged in recent years to fish in waters outside of the U.S. exclusive economic zone. Section 356.47 implements the requirement that, unless otherwise exempted, a vessel is not eligible for a fishery endorsement to its documentation if: (1) it is greater than 165 feet in registered length, (2) is more than 750 gross registered tons, or (3) possesses an engine or engines capable of producing a total of more than 3,000 shaft horsepower.

A Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel that meets the above criteria will still be eligible for a fishery endorsement if: (1) a certificate of documentation was issued for the vessel and endorsed with a fishery endorsement that was effective on September 25, 1997, (2) the vessel is not placed under foreign registry after October 6, 1998, (3) in the event of the invalidation of the fishery endorsement after October 6, 1998, application is made for a new fishery endorsement within fifteen (15) business days of such invalidation, or (4) the vessel is engaged exclusively in the menhaden fishery in the geographic region governed by the South Atlantic Fisheries Council or the Gulf of Mexico Fisheries Council.

With regard to the third requirement, Part 356 identifies ways in which a vessel owner may be deemed ineligible to document a vessel with a fishery endorsement because of excessive ownership or control of the vessel or vessel owner by a Non-Citizen. If we determine that these regulations have been violated and that the owner is no longer eligible to document the vessel, the owner will be notified by us in writing that it has 15 days to cure the problem or that it will no longer be eligible to document the vessel with a fishery endorsement. Other reasons for which a vessel's documentation will be invalidated, thus causing the fishery endorsement to be invalid, are found in the Coast Guard regulations at 46 CFR Part 67. We do not believe that failure

to apply to redocument the vessel within the 15-day period is intended to act as a permanent bar to the vessel being documented with a fishery endorsement where the owner did not receive written notice that the vessel's documentation, and therefore the fishery endorsement, was invalidated. The Coast Guard is the appropriate agency to determine whether a violation of its regulations has caused the fishery endorsement to be invalid thus triggering the 15-day period for the owner to reapply. However, the 15-day period will not begin to run until the owner has received written notice of the violation.

International Agreements

Section 213(g) of the AFA provides that where there is a conflict between an international agreement or treaty and the provisions of the AFA, the provisions of the AFA that are in conflict with the international agreement will not apply to specific vessels covered by the agreement. The NPRM establishes a procedural mechanism by which an owner or Mortgagee can petition for an exemption from the requirements of the NPRM if it believes that there is a conflict between the AFA and an international agreement to which a particular vessel is subject.

Violation of Harvesting or Processing Caps

Section 210(e)(3) of the AFA requires MARAD, upon the request of the North Pacific Fishery Council or the Secretary of Commerce, to review any allegation that an individual or entity has exceeded the percentage of its harvesting or processing cap as provided for in § 203(e)(1) or (2) of the AFA. Section 356.55 of the NPRM sets forth a process whereby the Citizenship Approval Officer, upon such a request, will review the allegations and submit a decision to the North Pacific Fishery Council and the Secretary of Commerce.

Plain Language

This NPRM is one of our first rulemaking documents to be published under the new plain language directive. We welcome any comments and suggestions on the use and effectiveness of plain language techniques in this document or other suggestions to improve our use of plain language in future rulemakings.

Rulemaking Analysis and Notices

Executive Order 12866 (Regulatory Planning and Review)

This proposed rule is a significant regulatory action under § 3(f) of Executive Order 12866 and was

reviewed by the Office of Management and Budget. The rule is not economically significant under § 3(f)(1) of the Executive Order. However, the rule is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034) because of significant public and congressional interest.

This NPRM proposes regulations pursuant to the AFA. The AFA raises the U.S. citizen ownership and control requirements for U.S.-flag Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels operating in U.S. waters from 51% to 75%. The AFA also eliminates exemptions for vessels that cannot meet current citizenship standards and phases out of operation many of the largest vessels. Section 203 of the AFA requires that we promulgate regulations that: (1) prohibit impermissible transfers of ownership or control, (2) identify transactions that will require our prior approval, and (3) identify transactions that will not require our prior approval. To the extent practicable, the regulations are required to minimize disruptions to the commercial fishing industry, to the traditional financing arrangements of such industry, and to the formation of fishery cooperatives. The statutory changes are intended to give U.S. interests a priority in the harvest of U.S. fishery resources. The regulations are required to be issued in final form by April 1, 2000, and will become effective on October 1, 2001.

The new statutory requirement that 75% of the ownership and control of an entity owning a documented vessel of 100 feet or greater in registered length be vested in Citizens of the United States in order for the vessel to be eligible for a fishery endorsement is expected to impact a relatively small segment of the fishing industry. There are over 36,000 vessels that currently have a fishery endorsement. Based on information from the Coast Guard Vessel Documentation Center, we believe that less than 550 of these vessels are 100 feet or greater in registered length and thus subject to these proposed regulations. These approximately 550 vessels are owned by roughly 400 different entities. We estimate that less than 6% of the nearly 550 vessels are currently owned by entities that do not meet the 75% ownership requirement and that may be required to increase the level of United States Citizen participation in their ownership structure so as to comply with the requirements of the AFA.

The AFA also requires that 75% of the control over a vessel or vessel-owning entity be vested in Citizens of the

United States. Therefore, owners that comply with the ownership requirements may still be impacted by this NPRM if they have entered into contracts or agreements that would convey impermissible control to Non-Citizens. Agreements that convey impermissible control over a vessel or vessel-owning entity are prohibited by the AFA. However, we have attempted in this rulemaking to minimize the review of certain contracts and agreements so as not to unduly interfere with the operation of Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels.

Some lenders financing Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels could also be impacted by this NPRM if they do not meet the requisite United States Citizenship requirements to hold a Preferred Mortgage on such vessels. A Non-Citizen Lender that does not qualify to hold a Preferred Mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel in its own right may receive a Preferred Mortgage through the use of an approved Mortgage Trustee that qualifies as a Citizen of the United States. It has been our experience that the use of a Mortgage Trustee imposes minimal cost and burden compared to the overall benefits of receiving a Preferred Mortgage or security for a loan. Therefore, while the Non-Citizen Lender may incur some cost associated with using a qualified Mortgage Trustee to hold the Preferred Mortgage, the burden will be minimal; the Non-Citizen lender will not be prohibited from financing Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels; and, minimal costs should be passed on to vessel owners.

We do not have estimates of the total cost of the requirements of the statute or this NPRM at this time because little cost information was submitted by the industry in response to the ANPRM. The preliminary regulatory analysis reflects the comments that were received in response to the ANPRM.

Discussion of Alternatives

The AFA specifically requires that we issue regulations that set out the requirements for owners of vessels to file, on an annual basis, a statement of citizenship setting forth all relevant facts regarding vessel ownership and control that are necessary to demonstrate compliance with § 2(c) of the Shipping Act of 1916, 46 App. U.S.C. 802(c), and with 46 U.S.C. 12102(c). Section 203(b) of the AFA requires that the regulations conform, to the extent practicable, with our regulations establishing the form of

citizenship affidavit set forth in 46 CFR part 355, as in effect on September 25, 1997. The form of the statement is also required to be written in a manner that will allow the owner of each vessel to satisfy any annual renewal requirements for a certificate of documentation. Section 203(c) requires transfers of ownership and control of vessels after October 1, 2001, to be rigorously scrutinized for violations of the ownership and control requirements, with particular attention given to leases, charters, mortgages, financing, contracts for the purchase over time of all or substantially all of a Fishing Vessel's catch, and other arrangements that may convey control over the management, sales, financing, or other operations of an entity. In contrast to the specific requirement of § 203(c) that we rigorously scrutinize certain transactions, is the more general mandate of § 203(b) that the regulations, to the extent practicable, minimize disruptions of the commercial fishing industry, to the traditional financing arrangements of such industry, and to the opportunity to form fishery cooperatives.

We have considered various alternatives to implement the AFA and the impact of these alternatives on the regulated community and on small business entities in the fishing industry. Although the AFA grants broad authority to us to regulate transactions related to the ownership and control of Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels, we have attempted to promulgate requirements that pose the least possible burden on the regulated public, while still providing us with the information necessary to implement our responsibilities under the AFA.

The requirements in the NPRM for an entity owning a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel to provide evidence of United States citizenship are modeled after our existing regulations in 46 CFR part 355. However, the AFA specifically requires that 75% of the interest in an entity be owned and controlled by Citizens of the United States "at each tier of ownership in such entity and in the aggregate." In interpreting the new requirement that 75% of the interest be owned and controlled "in the aggregate" by Citizens of the United States, we considered two alternatives. The phrase could be given a very strict construction to prohibit more than 25% of the ownership structure from being owned or controlled by Non-Citizens. However, such an interpretation would make it very difficult for publicly traded companies to participate in the fishing

industry or for companies to enter into partnering arrangements. For example, a publicly traded company could not enter into a partnership with a Non-Citizen to own a Fishing Vessel whereby the Non-Citizen would own 25% of the vessel unless 100% of the publicly traded company was owned by Citizens of the United States. Under such an arrangement the purchase of one share of stock in the publicly traded company by a Non-Citizen could render the owners of the vessel ineligible to obtain a fishery endorsement to the vessels documentation.

We believe that a more reasonable alternative is to require that no more than 25% of the interest in a vessel owner must be owned "in the aggregate" by a particular Non-Citizen. This requirement, which is set forth in § 356.11, would eliminate control of a vessel owned by a particular Non-Citizen while at the same time permitting more foreign investment in the fishing industry thus increasing the options for vessel owners to raise capital.

We have also reviewed alternatives with respect to the approval and oversight of mortgages and Mortgage Trustees. While § 203(c) of the AFA requires us to rigorously scrutinize mortgages and financing agreements, we do not believe that it will be necessary to require transactional approval of each financing and mortgage transaction. Accordingly, we propose to allow Non-Citizens, who are in the business of financing vessels, to obtain general approval of their standard loan agreement, provided that the standard loan covenants are acceptable to us. Section 356.21 allows a Non-Citizen Lender to get general approval for its standard loan documents if it does not include covenants that would convey impermissible control to the Non-Citizen. Once a Non-Citizen Lender has received approval for its standard loan agreements, it may enter into loans for Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels without having to obtain the approval of the Citizenship Approval Officer for each loan agreement. The general approval should reduce the paperwork required for lenders and owners, provide certainty regarding the loan covenants that will be considered permissible, streamline the process for financing Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels, and increase the range of financing options for vessel owners, including small business entities.

A Non-Citizen Lender is required to use an approved Mortgage Trustee in order to hold a Preferred Mortgage on

the vessel. As with the above general approval for Non-Citizen Lenders, a Mortgage Trustee may obtain approval from the Citizenship Approval Officer on an annual basis to act as a Mortgage Trustee and will not be required to obtain transactional approval. The Mortgage Trustee will be required to simply provide an annual certification in the form of an Affidavit of United States Citizenship to demonstrate that it is still a Citizen of the United States, a current copy of its Articles of Incorporation and Bylaws, a copy of its most recent published report of condition, and a list of the vessels and lenders for which it is acting as Mortgage Trustee. The freedom for Mortgage Trustees to enter into agreements without being required to get transactional approval will minimize the burden of using a Mortgage Trustee, will provide certainty for vessel owners and foreign lenders regarding qualified Mortgage Trustees, and will simplify the process for owners to obtain foreign-financing.

We have also sought to minimize regulation of those vessel charters that the AFA allows. The AFA allows charters of Fish Processing Vessels and Fish Tender Vessels to Citizens and time charters and voyage charters to Non-Citizens of Fish Processing and Fish Tender Vessels that are not used for fishing, provided that such charters to Non-Citizens comply with the requirement that there not be an impermissible transfer of ownership and control to a Non-Citizen. While we considered requiring that all charters to Non-Citizens be submitted to us for review before being executed in order to ensure that there is not an impermissible transfer of control, we believe that it will impose less of a burden on vessel owners and charterers to authorize time charters and voyage charters to Non-Citizens without our prior approval. This is consistent with our present practice concerning non-fishing vessels. Our approval is conditioned upon the requirement that the charter agreement not include provisions that would convey an impermissible transfer of ownership or control to the Non-Citizen charterer and that a copy of the charter be sent to us within 30 days after execution to confirm that the charter is not in fact a demise of the vessel.

With regard to long-term or exclusive contracts for the sale of all or a significant portion of a vessel's catch, we again considered requiring that these agreements be approved on a transactional basis. However, because we do not wish to impose requirements on owners of Fishing Vessels that will

interfere with their ability to enter into such agreements in a timely manner, we have elected to authorize such standard agreements, provided that they do not convey impermissible control to a Non-Citizen. We have determined that certain standard provisions do not convey impermissible control to Non-Citizens and may be included in these agreements. The NPRM will thus permit owners and bareboat charterers of Fishing Vessels to enter into these agreements with Non-Citizens in a timely manner without imposing additional costs or time consuming regulatory requirements.

Finally, with respect to management agreements, rather than requiring approval of each agreement to determine whether there is an impermissible transfer of ownership or control over the vessel to a Non-Citizen, we opted to establish a set of criteria for such agreements and to generally approve certain management agreements, provided that they are for technical and administrative services and are advisory in nature.

Federalism

We analyzed this rulemaking in accordance with the principles and criteria contained in E.O. 13132 ("Federalism") and have determined that it does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. The regulations have no substantial effects on the States, or on the current Federal-State relationship, or on the current distribution of power and responsibilities among the various local officials. Therefore, consultation with State and local officials was not necessary.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires us to consider whether our proposals will have a significant economic impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under § 3 of the Small Business Act (15 U.S.C. 632). We believe that the cost of complying with these proposed regulations would be minimal. Therefore, MARAD certifies that this proposed rule will not have a significant impact on a substantial number of small businesses.

In our effort to determine whether there are a substantial number of small entities that may be impacted by this proposed rule, we issued an ANPRM

entitled Eligibility of U.S.-Flag Vessels of 100 Feet or Greater to Obtain Fisheries Documents, 64 FR 24311 (May 6, 1999), and requested input from the public regarding the potential economic impact of the new citizenship and control requirements of the AFA. We specifically requested information regarding: (1) any unique issues within the fishing industry regarding the ownership, operation, management, control, financing, or mortgaging of Fishing Vessels; and, (2) costs relating to the new citizenship and control requirements that would likely be incurred by vessel owners, operators, lending institutions, Mortgagees, and other participants in the fishing industry. We conducted five public meetings during the sixty day comment period to obtain oral and written comments from the public. Although the comments in response to the ANPRM provided us with some valuable information, we only received three comments from entities that identified themselves as small entities, and we did not receive specific information regarding the economic impact to small entities that may result from this rulemaking.

This notice of proposed rulemaking may reasonably be expected to affect small businesses or entities that currently own documented Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels, that have financed such vessels or that are engaging in the fisheries of the United States with such vessels. The Small Business Administration defines businesses within the fishing industry that have annual receipts of \$3 million or less as small businesses, 13 CFR 121.201. While we recognize that a number of vessel owners may be classified under the Small Business Administration regulations as small entities, at the present time we do not know whether this proposed rulemaking will have a significant economic impact on a substantial number of small entities. We estimate that of the nearly 33,000 vessels that have a fishery endorsement, less than 550 are 100 feet or greater in registered length and thus subject to this proposed rule. We further estimate that there are approximately 400 vessel owners within this group of 550; however, we have not been able to determine which owners might be classified as small businesses.

We estimate that less than 6 percent of the 550 vessels potentially subject to this proposed rule have less than the 75% United States Citizen ownership required by the AFA. It is possible that some of these vessel owners, who otherwise meet the 75% United States

citizen ownership requirement, may still be impacted by the proposed rule if the vessel is mortgaged to an entity that does not qualify to hold a Preferred Mortgage on the vessel or if the owner does not meet the requirement that control over 75% of the interest in the entity owning the vessel be vested in Citizens of the United States. However, even if the mortgage on the vessel is held by a lender that does not qualify, the lender will still be able to secure a Preferred Mortgage on the vessel through the use of an approved Mortgage Trustee. Based on our 30 years of experience using Mortgage Trustees in other programs, the use of a Mortgage Trustee imposes minimal cost and burden compared to the overall benefit of receiving a Preferred Mortgage as security for a loan. The use of a Mortgage Trustee will allow the Non-Citizen Lender to continue to receive a First Preferred Mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel. Therefore, the new citizenship requirements for Mortgagees will have minimal economic impact.

In our regulatory analysis, we considered a variety of alternatives in order to find ways to minimize the regulatory burden on the affected public, specifically on small business entities, and to foster the ability of vessel owners to obtain financing for their vessels. A discussion of these alternatives is contained under the above section marked "Executive Order 12866 (Regulatory Planning and Review)".

If you believe that this rulemaking will have a significant economic impact on your business, please submit a comment (see **ADDRESSES**) explaining in what way and to what degree this proposal will economically affect your business. In addition, if you think that your business qualifies as a small entity, and that further rulemaking will have a significant economic impact on your business, please submit a comment explaining how your business qualifies as a small entity, how this rulemaking may economically affect your business, and whether you are aware of other small entities that are similarly situated.

Environmental Impact Statement

We have analyzed this NPRM for purposes of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and have concluded that under the categorical exclusions provision in section 4.05 of Maritime Administrative Order ("MAO") 600-1, "Procedures for Considering Environmental Impacts," 50 FR 11606 (March 22, 1985), the preparation of an Environmental

Assessment, and an Environmental Impact Statement, or a Finding of No Significant Impact for this rulemaking is not required. This rulemaking involves administrative and procedural regulations which clearly have no environmental impact.

Paperwork Reduction Act

This NPRM establishes a new requirement for the collection of information. The Office of Management and Budget ("OMB") will be requested to review and approve the information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). We request that commenters address in their comments whether the information collection in this proposal is necessary for the agency to properly perform its functions and will have practical utility, the accuracy of the burden estimates, ways to minimize this burden, and ways to enhance quality, utility, and clarity of the information to be collected.

In accordance with the Paperwork Reduction Act, this notice announces MARAD's intentions to request approval for three years of the subject information collection to allow processing of applications to determine the eligibility of owners of vessels of 100 feet or greater in registered length to obtain a fishery endorsement to the vessel's documentation, to determine the eligibility of lending institutions to hold a Preferred Mortgage on a Fishing Vessel, a Fish Processing Vessel, or a Fish Tender Vessel of 100 feet or greater in registered length and to determine the eligibility of Mortgage Trustees to hold a Preferred Mortgage on such vessels for the benefit of a Non-Citizen Lender. Copies of this request may be obtained from the Office of Chief Counsel at the address given above under **ADDRESSES**.

Title of Collection: [Eligibility of U.S.-Flag Vessels of 100 Feet or Greater In Registered Length to Obtain a Fishery Endorsement to the Vessel's Documentation] 46 CFR Part 356.

Type of Request: New request for information.

OMB Control Number:

Form Number: None.

Expiration Date of Approval: Three years following approval by OMB.

Summary of the Collection of Information: Owners of vessels of 100 feet or greater in registered length who wish to obtain a fishery endorsement to the vessel's documentation will be required to file an Affidavit of United States Citizenship demonstrating that they comply with the requirements of § 2(c) of the 1916 Act, 46 App. U.S.C. 802(c) and with the requirements of 46

U.S.C. 12102(c). Other documentation to be submitted with the Affidavit includes a copy of the Articles of Incorporation, Bylaws or other comparable documents, a description of any management agreements entered into with Non-Citizens, a certification that any management contracts with Non-Citizens do not convey control in a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel to a Non-Citizen, and a copy of any time charters or voyage charters with Non-Citizens.

Mortgagees who plan to finance vessels of 100 feet or greater in registered length that have a fishery endorsement or for which a fishery endorsement to the vessel's documentation is sought must submit an Affidavit of United States Citizenship to demonstrate that they comply with the United States Citizen ownership and control requirements of § 2(c) of the 1916 Act, 46 App. U.S.C. § 802(c), or in the case of a state or federally chartered financial institution, the Controlling Interest requirements of Section 2(b) of the 1916 Act. If a Mortgagee does not comply with the U.S. citizen ownership and control requirements set forth above and is deemed a Non-Citizen, it must use a Mortgage Trustee that qualifies as a Citizen of the United States to hold the Preferred Mortgage for the benefit of the Non-Citizen Lender. The Mortgage Trustee must file an application for approval as a Mortgage Trustee that includes an Affidavit of United States Citizenship demonstrating compliance with the United States Citizen ownership and control requirements of § 2(c) of the 1916 Act. In addition to the Affidavit of United States Citizenship, corporations and other entities must submit documents which demonstrate that the entity is organized and existing under the laws of the United States, such as Articles of Incorporation and Bylaws, or other comparable documents. Annually, owners of vessels, mortgagees and applicable mortgage trustees must submit prescribed citizenship information to MARAD's Citizenship Approval Officer.

A Person(s) alleged to have exceeded the authorized harvesting or processing caps provided for in § 210(e)(1) or (2) of the AFA will be required to submit to the Citizenship Approval Officer any information deemed relevant in determining whether such Person(s) have exceeded the cap.

Need and Use of the Information: The information collection will be used to verify statutory compliance with the United States Citizen ownership and control requirements under § 2(b) and § 2(c) of the 1916 Act and 46 U.S.C. 12102(c) for owners, charterers,

Mortgagees, and Mortgage Trustees of vessels of 100 feet or greater in registered length for which a fishery endorsement to the vessel's documentation is being sought. Section 203(c) of the AFA requires that we "rigorously scrutinize" transfers of ownership and control of vessels subject to 46 U.S.C. 12102(c) and that we pay particular attention to leases, charters, mortgages, financing and similar arrangements that may result in a transfer of control over an entity that owns a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel. Without the information it would be impossible to know whether the vessels and vessel-owning entities are owned and controlled by Citizens of the United States as required by the AFA.

The information collected from Mortgagees and Mortgage Trustees will be used to verify that they qualify as United States Citizens as required by the AFA. A Mortgagee of Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels must either be a Citizen of the United States that complies with section 2(c) of the 1916 Act, or a state or federally chartered financial institution that complies with the Controlling Interest requirements of § 2(b) of the 1916 Act. A Mortgage Trustee, holding a mortgage for an entity that does not qualify as a Mortgagee under these requirements, must be a Citizen of the United States that meets the requirements of 46 U.S.C. 12102(c) and § 2(c) of the 1916 Act, 46 App. U.S.C. 802(c), and that is eligible to own a vessel with a fishery endorsement. Without the information it would be impossible to know whether the Mortgagees and Mortgage Trustees of these vessels are Citizens of the United States as required by the AFA.

The information collected from Person(s) alleged to have exceeded the percentage caps for harvesting or processing as provided in § 203(e)(1) or (2) of the AFA will be used to make a determination whether the Person(s) has violated section § 210(e) of the AFA.

Description of Respondents: Owners, Bareboat Charterers, Mortgagees, and Mortgage Trustees of vessels of 100 feet or greater in registered length for which a fishery endorsement to the Vessel's documentation is being sought. Person(s) alleged to have exceeded their percentage cap for harvesting or processing as provided in § 210(e)(1) or (2) of the AFA.

Annual Responses: Responses will be required on an occasional and an annual basis. Updates will be required during the year if there are changes to the ownership or financing of the vessel. There are approximately 550 vessels

and 400 vessel owners that are subject to this regulation. Approximately 450 responses are expected from owners and bareboat charterers and less than 50 responses are expected from Mortgagees and Mortgage Trustees. We estimate that one request per year might be received alleging that Person(s) have exceeded their harvesting or processing caps.

Annual Burden: 1000 hours.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose an unfunded mandate under the Unfunded Mandates Reform Act of 1995. It would not result in costs of \$100 million or more, in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector. This proposed rule is the least burdensome alternative that achieves the objective of the rule.

Impact on Business Processes and Computer Systems

Many computers that use two digits to keep track of dates will, on January 1, 2000, recognize "double zero" not as 2000 but as 1900. This glitch, the Year 2000 problem, could cause computers to stop running or to start generating erroneous data. The Year 2000 problem poses a threat to the global economy in which Americans live and work. With the help of the President's Council on Year 2000 Conversion, Federal agencies are reaching out to increase awareness of the problem and to offer support. We do not want to impose new requirements that would mandate business process changes when the resources necessary to implement those requirements would otherwise be applied to the Year 2000 problem. Because this NPRM would not affect the ability of organizations to respond to the Year 2000 problem, we do not intend to delay the effectiveness of the proposed requirements in this NPRM.

List of Subjects in 46 CFR Part 356

Citizenship, Fishery endorsement, Fishing vessels, Mortgages, Mortgage trustee, Penalties, Preferred mortgages.

Accordingly, we propose to add a new 46 CFR Part 356 to read as follows:

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

Subpart A—General Provisions

Sec.

- 356.1 Purpose.
- 356.3 Definitions.

Subpart B—Ownership and Control

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Subpart C—Requirements for Vessel Owners

- 356.13 Information required to be submitted by vessel owners.
- 356.15 Filing of Affidavit of U.S. Citizenship.
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- 356.19 Requirements to hold a Preferred Mortgage.
- 356.21 General approval of Non-Citizen lender's standard loan or mortgage agreements.
- 356.23 Restrictive loan covenants approved for use by Non-Citizen lenders.
- 356.25 Operation of Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels by Mortgagees.

Subpart E—Mortgage Trustees

- 356.27 Mortgage Trustee requirements.
- 356.31 Maintenance of Mortgage Trustee approval.
- 356.37 Operation of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel by a Mortgage Trustee.

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

- 356.39 Charters.
- 356.41 Management agreements.
- 356.43 Long-term or exclusive sales and/or marketing contracts.
- 356.45 Advance of funds.

Subpart G—Special Requirements for Certain Vessels

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

Subpart H—International Agreements

- 356.53 Conflicts with International Agreements.

Subpart I—Review of Harvesting and Processing Compliance

- 356.55 Review of compliance with harvesting and processing quotas.

Authority: 46 App. U.S.C. 12102; Public Law 105-277, Division C, Title II, Subtitle I, section 203 (46 App. U.S.C. 12102 note), section 210(e), and section 213(g), 112 Stat. 2681; 46 CFR section 1.66.

Subpart A—General Provisions

§ 356.1 Purpose.

Part 356 implements U.S. Citizenship requirements of the American Fisheries Act of 1998, as amended, Title II, Division C, Pub. L. 105-277, for owners, Mortgage Trustees, and Mortgagees of

vessels of 100 feet or greater in registered length that have a fishery endorsement to the vessel's documentation or where a fishery endorsement to the vessel's documentation is being sought. This part also addresses ancillary matters of charters, management agreements, exclusive sales or marketing contracts, conflicts with international agreements, determinations regarding violations of harvesting or processing limits, and exceptions for certain vessels, vessel owners and Mortgagees from the general requirements of the rule.

§ 356.3 Definitions.

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

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

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

(c) *Charter* means any agreement or commitment by which the possession or services of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel are secured for a period of time, or for one or more voyages, whether or not a bareboat charter of the vessel. A long-term or exclusive contract for the sale of all or a portion of a Fishing Vessel's catch is not considered a Charter.

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

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

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

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

(iii) No arrangement may exist, whether through contract or any

understanding, that would allow more than 25% of the voting power of the entity to be exercised, directly or indirectly, in behalf of any Non-Citizen; and

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

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

(i) In the case of a corporation:

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

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

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

(iii) In the case of an association:

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

(B) The chief executive officer, by whatever title, and the chairman of the board of directors (or equivalent committee or body) and all officers authorized to act in their absence or disability are Citizens of the United States; and,

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

(iv) In the case of a joint venture:

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

(B) Each coventurer is a Citizen of the United States;

(v) In the case of a Trust that owns a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel:

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

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

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

(vi) In the case of a mortgage Trust:

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

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

(C) The Mortgage Trustee is authorized to act on behalf of Non-Citizen beneficiaries pursuant to § 356.5.

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

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

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

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

(f) *Controlling Interest:*

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

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

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

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

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

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

(i) In the case of a corporation:

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

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

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

(iii) In the case of an association:

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

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

(iv) In the case of a joint venture:

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

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

(v) In the case of a mortgage trust:

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

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

(C) The Mortgage Trustee is authorized to act on behalf of Non-Citizen beneficiaries pursuant § 356.5;

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

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

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

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

(h) *Fish Processing Vessel* means a vessel of 100 feet or greater in registered length that has or for which the owner

is seeking a fishery endorsement to the vessel's documentation and that commercially prepares fish or fish products other than by gutting, decapitating, gilling, skinning, shucking, icing, freezing, or brine chilling;

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

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

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

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

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

- (1) Is organized and doing business under the laws of the United States or of a State;
- (2) Is a Citizen of the United States;
- (3) Is authorized under those laws to exercise corporate trust powers;
- (4) Is subject to supervision or examination by an official of the United States Government, or of a State;
- (5) Has a combined capital and surplus (as stated in its most recent published report of condition) of at least \$3,000,000; and
- (6) Meets any other requirements prescribed by the Citizenship Approval Officer.

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

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

(p) *Person* includes individuals, corporations, partnerships, joint

ventures, associations, limited liability companies, Trusts, and other entities existing under or authorized by the laws of the United States or of a State or, unless the context indicates otherwise, of any foreign country.

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

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

(2) A state or federally chartered financial institution that satisfies the Controlling Interest criteria of section 2(b) of the 1916 Act (46 App. U.S.C. 802(b)) and paragraph (f) of this section; or

(3) A person that complies with the provisions of section 12102(c)(4) of title 46, United States Code.

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

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

(t) *Trust* means:

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

(2) In the case of a mortgage trust, a trust that is domiciled in and existing under the laws of the United States, or of a State, of which the Mortgage Trustee is a Citizen of the United States and for which the Mortgage Trustee is authorized to act on behalf of Non-Citizen beneficiaries pursuant to §§ 356.27–356.37.

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

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

Subpart B—Ownership and Control**§ 356.5 Affidavit of U.S. Citizenship.**

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

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

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

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

State of _____ County of _____ SS:
I, _____, (Name) of _____,
(Residence address) being duly sworn,
depose and say:

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

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

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

Name

Title

Date and Place of Birth

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

4. Information as to stock, where Corporation has 30 or more stockholders:²

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

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

² Strike inapplicable paragraph 4.

the per centum figure must not be less than 65 per centum for a state or federally chartered financial institution holding a Preferred Mortgage, or not less than 95 per centum for an entity that is demonstrating ownership in a vessel for which a fishery endorsement is sought or a Mortgage Trustee. These per centum figures apply to corporate stockholders as well as to the primary corporation.] (The same statement should be made with reference to each class of stock, if there is more than one class.) or

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

Name of Stockholder

Number of shares owned (each class)

Percentage of shares owned (each class)

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

5. That 75% of the interest in (each) said Corporation, as established by the³ information hereinbefore set forth, is owned by Citizens of the United States; that the title to 75% of the stock of (each) of the stock of (each) said Corporation is vested in Citizens of the United States free from any trust or fiduciary obligation in favor of any person not a Citizen of the United States; that such proportion of the voting power of (each) said Corporation is vested in Citizens of the United States; that through no contract or understanding is it so arranged that more than 25% the voting power of (each) said Corporation may be exercised, directly or indirectly, in behalf of any person who is not a Citizen of the United States; and that by no means whatsoever, is any interest in said Corporation in excess of 25% conferred upon or permitted to be exercised by any person who is not a Citizen of the United States; and

Note: For state or federally chartered financial institutions acting as Mortgagees, the Controlling Interest language, which is set forth below, is applicable.

5. That the Controlling Interest in (each) said Corporation, as established by the information hereinbefore set forth, is owned by Citizens of the United States; that the title to a majority of the stock of (each) said

³ Strike inapplicable Paragraph 5.

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

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

(Name and title of affiant)

(Signature of affiant)

Date

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

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

(f) The same criteria should be observed in obtaining information to be furnished for stockholders named (direct ownership of required percentage of shares of stock of each class) in the Affidavit as those observed for the owner of the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel. If, on the other hand, the "fair inference rule" is applied with respect to stock ownership as outlined in 46 CFR 356.7(c), the extent of U.S. Citizen ownership of stock should be ascertained in the requisite percentage (65 percent for state or federally chartered financial institutions and 95 percent for Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel owners, bareboat charterers, trustees, as well as entities owning 5 percent or more of the stock of owners, bareboat charterers. Any entity that must establish its U.S. citizenship has to submit proof of U.S. citizenship of any five percent stockholder of each class of stock in order that the veracity of the statutory statements made in the Affidavit (paragraph 5) may be relied upon by MARAD.

(g) It shall be incumbent upon the parties filing affidavits under this part to notify the Citizenship Approval Officer

in writing within 30 calendar days of any changes in information last furnished with respect to the officers, directors, and stockholders, including 5 percent or more stockholders of the issued and outstanding stock of each class, together with information concerning their citizenship status. If other than a corporation, comparable information must be filed by other entities owning Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels, including any entity whose ownership interest is being relied upon to establish 75 percent ownership by Citizens of the United States.

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

§ 356.7 Methods of establishing ownership by United States Citizens.

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

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

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

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

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

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

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

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

(ii) At least 65% of the stock (each class) of the corporation be held by Persons having a registered U.S. address in order to infer at least 51% ownership by U.S. Citizens in the case of a state or federally chartered financial institution acting as a Mortgagee; and,

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

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

§ 356.9 Tiered ownership structures.

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

(1) A Non-Citizen that owns or controls a 25% stake in the ownership entity of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel at the first tier may not have any interest whatsoever in any entity that is being relied upon to establish the required 75% U.S. Citizen ownership;

(2) A Non-Citizen that owns or controls less than a 25% stake at the first tier may participate in the ownership and control of other entities that are being relied upon to establish the required 75% U.S. Citizen ownership and control at the first tier. However, that Non-Citizen's total ownership and control of the entity owning a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel may not exceed 25% in the aggregate as computed by MARAD; and,

(3) Where a Non-Citizen owns or controls 25% of the interest in the entity owning a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel at the first tier and is thus precluded from owning or controlling any interest in an entity being relied upon to establish the required 75% U.S. Citizen ownership and control, other unrelated Non-Citizens may still participate in the ownership structure at subsequent tiers; provided, that their interest does not exceed 25% in the aggregate and that each entity meets the 75% U.S. ownership and control requirement.

(b) The Citizenship Approval Officer may determine that an ownership structure with a large number of tiers

does not qualify as a Citizen of the United States if through excessive tier structures, Non-Citizen participation is deemed to dilute the U.S. ownership and control of the entity owning a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel to an unacceptable level.

§ 356.11 Impermissible control by a Non-Citizen.

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

(1) Has the right to direct the business of the entity which owns the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel;

(2) Has the right to limit the actions of or replace the chief executive officer, a majority of the board of directors, any general partner or any person serving in a management capacity of the entity which owns the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel;

(3) Has the right to direct the transfer, operation, or manning of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel;

(4) Has the right to unduly restrict the day to day business activities and management policies of the entity owning a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel through loan covenants or other means;

(5) Has the right to derive through a minority shareholder a disproportionate amount of the economic benefits from the ownership and operation of the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel;

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

(7) Has the right to cause the sale of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel, other than through approved loan covenants where there is a Preferred Mortgage on the vessel;

(8) Absorbs all of the costs and normal business risks associated with ownership and operation of the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel;

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

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

Processing Vessel, or Fish Tender Vessel.

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

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

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

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

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

(5) If a Non-Citizen absorbs many of the costs and normal business risks associated with ownership and operation of the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel;

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

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

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

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

(d) If we have a concern regarding control by a Non-Citizen, we will notify the entity of the concern and work with the entity toward a satisfactory resolution. Resolution of any control issues may result in a request by us for additional information to clarify the

intent of the provision or to amend or delete the provision in question.

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

Subpart C—Requirements for Vessel Owners

§ 356.13 Information required to be submitted by vessel owners.

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

(1) An Affidavit of U.S. Citizenship. This affidavit, set out in § 356.5, must contain all required facts, at all tiers of ownership, needed for determining the citizenship of the owner of the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel.

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

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

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

(5) Any loan agreements or other financing documents applicable to a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel where the lender

has not been granted approval from the Citizenship Approval Officer pursuant to § 356.21 to enter into loans without transactional approval from MARAD;

(6) A description of any operating and/or management agreements entered into by the owner or bareboat charterer of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel accompanied by a representation and warranty that the agreement does not contain any provisions that convey control over the vessel or vessel-owning entity to a Non-Citizen;

(7) Identification of any sales, purchase or marketing agreements, including the parties to those agreements, that relate to the sale or purchase of all or a significant portion of a vessel's catch and copies of such agreements if the agreement contains provisions that could convey control to a Non-Citizen other than those expressly authorized in § 356.43;

(8) Any stockholder's agreement, voting trust agreements, or any other pooling agreements, including any proxy appointment, relating to the ownership of all classes of stock, whether voting or non-voting of the owner of the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel, including any parent corporation or other stockholder whose stock is being relied upon to establish 75 percent U.S. Citizen ownership;

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

(10) Any documents relating to a merger, consolidation, liquidation or dissolution of the owner of the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel, including any parent corporation; and

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

(b) In the event the owner or bareboat charterer of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel

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

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

(a) Between October 1, 2000, and June 1, 2001, the owner of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel may obtain a letter ruling from the Citizenship Approval Officer prior to the effective date of the regulations that the owner is a U.S. Citizen eligible to own a vessel with a fishery endorsement. The owner must submit to the Citizenship Approval Officer a request for a letter ruling that includes an Affidavit of U.S. Citizenship and all other documentation required by § 356.13. The Citizenship Approval Officer will issue a letter ruling within 120 days of receiving all applicable documents.

(b) An owner that receives a letter ruling pursuant to paragraph (a) of this section must submit, within 10 business days prior to October 1, 2001, a certification that the information contained in the Affidavit of U.S. Citizenship and in documents submitted in support of the request for a letter ruling remains true and accurate. If changes in the information have occurred between the time of the request for the letter ruling and the time of the certification, the owner must notify the Citizenship Approval Officer of those changes as required by § 356.5 and § 356.17. The owner is still required to inform the Citizenship Approval Officer of any changes as they occur as required by § 356.17 and not merely at the time of the certification.

(c) An owner of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel that does not request a letter ruling prior to June 1, 2001, and who wishes to be eligible to obtain a fishery endorsement on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel on October 1, 2001, must submit the required Affidavit of U.S. Citizenship and all other documentation required by § 356.13 to the Citizenship Approval Officer no later than June 1, 2001. If a completed Affidavit of U.S. Citizenship and all required documentation is not submitted by June 1, 2001, the owner may not be considered eligible to own

a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel on October 1, 2001, and the Vessel may be prohibited from operating in the fisheries of the United States until an eligibility determination is made by the Citizenship Approval Officer.

(d) New owners of Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels after October 1, 2001, must file the Affidavit of U.S. Citizenship and other required documentation with the Citizenship Approval Officer in order for the Citizenship Approval Officer to make a determination as to whether the owner is eligible for a fishery endorsement to the vessel's documentation.

§ 356.17 Annual requirements for vessel owners.

(a) An owner of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel must submit a certification in the form of an Affidavit of United States Citizenship to the Citizenship Approval Officer on an annual basis as provided in paragraph (b) of this section. This annual certification requirement does not excuse the owner from the requirements of § 356.5 to notify the Citizenship Approval Officer throughout the year when changes in the citizenship information occur.

(b) For owners that hold annual meetings, the annual certification must be filed within 30 calendar days of the annual meeting. For owners that do not hold an annual meeting, the annual filing date will be the date of the original filing of the Affidavit of U.S. Citizenship with the Citizenship Approval Officer.

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

Subpart D—Mortgages

§ 356.19 Requirements to hold a Preferred Mortgage.

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

- (1) A Citizen of the United States;
- (2) A state or federally chartered financial institution that complies with the Controlling Interest requirements of section 2(b) of the 1916 Act, 46 App. U.S.C. 802(b); or

(3) A Mortgage Trustee that qualifies as a Citizen of the United States and that has satisfied the requirements of §§ 356.27–356.31.

(b) The Mortgagee must file an Affidavit of United States Citizenship demonstrating that it complies with the citizenship requirements that correspond to the provisions of paragraph (a) of this section under which the Mortgagee qualifies.

(c) In addition to the Affidavit of U.S. Citizenship, a certified copy of the Articles of Incorporation and Bylaws, or other comparable corporate documents must be submitted to the Citizenship Approval Officer.

(d) A Preferred Mortgagee must provide an annual certification to the Citizenship Approval Officer in the form of an Affidavit of United States Citizenship evidencing its continued status as a Citizen of the United States or, if a state or federally chartered financial institution, that it complies with the Controlling Interest requirements of section 2(b) of the 1916 Act, 46 App. U.S.C. 802(b), during the period that it holds a Preferred Mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel. The certification must be submitted within 30 days of the one year anniversary of the original filing.

§ 356.21 General approval of Non-Citizen lender's standard loan or mortgage agreements.

(a) A Non-Citizen Lender that is a financial institution engaged in the business of financing Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels may apply to the Citizenship Approval Officer for general approval of its standard loan and mortgage agreements for such vessels. In order to obtain general approval for its standard loan and mortgage agreements, a Non-Citizen Lender using an approved Mortgage Trustee must submit to the Citizenship Approval Officer:

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

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

(b) A Non-Citizen Lender that receives general approval may enter into loans and mortgages on Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels without prior approval from us of each individual loan or mortgage; provided, that the loan or mortgage conforms to the standard agreement approved by the Citizenship Approval

Officer and does not include any other covenants that have not been approved by the Citizenship Approval Officer.

(c) The Non-Citizen Lender must provide an annual certification to the Citizenship Approval Officer certifying that all loans and mortgages on Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels entered into under this general approval conform to the standard agreement approved by us and do not contain covenants that were not reviewed and approved by the Citizenship Approval Officer. The certification must be submitted within 30 days of the one year anniversary of the previous approval.

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

(e) A Non-Citizen Lender that has received general approval for its lending program and that uses covenants in a loan or mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel that have not been approved by the Citizenship Approval Officer or that files a false certification with the Citizenship Approval Officer will be subject to loss of its general approval and civil and criminal penalties pursuant to 18 U.S.C. § 1001. In addition, the Citizenship Approval Officer may determine that there has been an impermissible transfer of control to a Non-Citizen and the vessel owner is not eligible to document the vessel with a fishery endorsement.

§ 356.23 Restrictive loan covenants approved for use by non-citizen lenders.

(a) We approve the following standard loan covenants which may restrict the activities of the borrower without the lender's consent and which may be included in loan agreements or other documents, between an owner of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel and an unrelated Non-Citizen Lender that is using an approved Mortgage Trustee to hold the mortgage and debt instrument for the benefit of the Non-Citizen Lender, so long as the lender's consent is not unreasonably withheld:

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

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

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

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

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

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

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

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

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

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

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

§ 356.25 Operation of fishing vessels, fish processing vessels, or fish tender vessels by mortgagees.

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

(b) A Mortgagee not eligible to own a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel cannot operate, or cause operation of, the vessel in the fisheries of the United States. Except as provided in paragraph (c) of this section, the vessel may not be operated for any purpose without the prior written approval of the Citizenship Approval Officer.

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

(d) A Mortgagee that is holding a Preferred Mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel but that is not eligible to own a Fishing Vessel, Fish Processing Vessel,

or Fish Tender Vessel may take possession of the vessel in the event of default by the mortgagor other than by foreclosure pursuant to 46 U.S.C. 31329, if provided for in the mortgage or a related financing document. However, the vessel may not be operated, or caused to be operated in commerce, except as provided in paragraph (c) of this section or with the approval of the Citizenship Approval Officer.

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

Subpart E—Mortgage Trustees

§ 356.27 Mortgage trustee requirements.

(a) A lender who does not qualify as a Citizen of the United States or is not a state or federally chartered financial institution that meets the Controlling Interest requirements of section 2(b) of the 1916 Act and § 356.3(f) can obtain a Preferred Mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel by using an approved Mortgage Trustee to hold the mortgage and the debt instrument that the mortgage is securing.

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

(1) Qualify as a Citizen of the United States eligible to own a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel;

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

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

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

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

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

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

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

(2) An Affidavit of U.S. Citizenship setting forth the required information necessary to determine that the applicant qualifies as a Citizen of the United States;

(3) A certified copy of the Articles of Incorporation and Bylaws, or other comparable documents;

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

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

(d) Any right set forth in a mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel cannot be issued, assigned, or transferred to a person who is not eligible to be a Mortgagee without the approval of the Citizenship Approval Officer.

(e) Mortgage Trustees approved by the Citizenship Approval Officer must not assume any fiduciary obligations in favor of Non-Citizen lenders that are in conflict with the U.S. Citizen ownership and control requirements set forth in the AFA, without the approval of the Citizenship Approval Officer.

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

(g) An application to be approved as a Mortgage Trustee should include the following: The undersigned (the "Mortgage Trustee") hereby applies for approval as Mortgage Trustee pursuant to 46 U.S.C. 12102(c)(4) and the Regulation (46 CFR part 356), prescribed by the Maritime Administration ("MARAD"). All terms used in this application have the meaning given in the Regulation.

In support of this application, the Mortgage Trustee certifies to and agrees with MARAD as hereinafter set forth:

The Mortgage Trustee certifies:

(a) That it is acting or proposing to act as Mortgage Trustee on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessels

documented, or to be documented under the U.S. registry;

(b) That it—

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

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

(3) Is a Citizen of the United States eligible to own a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel within the meaning of 46 U.S.C. 12102(c) and section 2(c) of the 1916 Act, as amended, (46 App. U.S.C. 802(c)) and is eligible to own a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel;

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

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

The Mortgage Trustee agrees:

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

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

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

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

(iii) Is a Citizen of the United States;

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

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

(2) notify the Citizenship Approval Officer in writing, of any changes in its name, address, officers, directors, stockholders, articles of incorporation or bylaws as such changes occur;

(3) furnish to the Citizenship Approval Officer on an annual basis:

(i) an Affidavit of U.S. Citizenship demonstrating compliance with the U.S. citizenship requirements of the AFA;

(ii) a current copy of the Articles of Incorporation and Bylaws, or other comparable corporate documents;

(iii) a copy of the most recent published report of condition of the Mortgage Trustee; and,

(iv) a list of the Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels and the respective lenders for which it is acting as Mortgage Trustee.

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

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

(b) That it will not issue, assign, or in any manner transfer to a person not eligible to

own a documented vessel, any right under a mortgage of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel, or operate such vessel without the approval of the Citizenship Approval Officer; except that it may operate the vessel to the extent necessary for the immediate safety of the vessel, for its direct return to the United States or for its movement within the United States for repairs, drydocking or berthing changes, but only under the command of a Citizen of the United States for a period not to exceed 15 calendar days;

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

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

This application is made in order to induce the Maritime Administration to grant approval of the undersigned as Mortgage Trustee pursuant to 46 App. U.S.C. 802(c) and 46 U.S.C. 12102(c) and the Regulation, and may be relied on by the Citizenship Approval Officer for such purposes. False statements in this application may subject the applicant to fine or imprisonment, or both, as provided for violation of the proscriptions contained in 18 U.S.C. 286, 287, and 1001.

Dated this ____ day of ____, 20____.

ATTEST:

MORTGAGE TRUSTEE'S NAME & ADDRESS

(Print or type name below)

(SEAL)

By: _____
(Print or type name below)

TITLE

§ 356.31 Maintenance of Mortgage Trustee approval.

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

(1) An Affidavit of U.S. Citizenship demonstrating compliance with the U.S. citizenship requirements of the AFA;

(2) A current copy of the Articles of Incorporation and Bylaws, or other comparable corporate documents;

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

(4) A list of the Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels and the respective lenders for which it is acting as Mortgage Trustee.

(b) The Mortgage Trustee must file the documents required in paragraph (a) of this section within thirty (30) days of the annual stockholder's meeting of the Mortgage Trustee, or if no annual meeting is held, then the filing must be within thirty (30) days of the anniversary date of the original Affidavit of U.S. Citizenship filed with MARAD.

(c) If at any time the Mortgage Trustee fails to meet the statutory requirements set forth in the AFA, the Mortgage Trustee must notify the Citizenship Approval Officer of such failure to qualify as a Mortgage Trustee not later than twenty (20) days after the event causing such failure. We will publish in the **Federal Register** a disapproval notice and will so notify the U.S. Coast Guard and the Mortgage Trustee of such disapproval by providing them a copy of the disapproval notice. Within thirty (30) days of such publication in the **Federal Register**, the disapproved Mortgage Trustee must transfer its fiduciary responsibilities to a successor Mortgage Trustee, approved by the Citizenship Approval Officer.

§ 356.37 Operation of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel by a Mortgage Trustee.

An approved Mortgage Trustee cannot operate a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel without the approval of the Citizenship Approval Officer, except where non-commercial operation is necessary for the immediate safety of the vessel and the vessel is operated under the command of a Citizen of the United States for a period of no more than 15 calendar days.

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

§ 356.39 Charters.

(a) Charters to Citizens of the United States:

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

(2) Time charters, voyage charters and other charter arrangements that do not

constitute a bareboat charter of the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel may be entered into with Citizens of the United States. The charterer must submit an Affidavit of U.S. Citizenship to the Citizenship Approval Officer within 30 days of execution of the charter.

(b) Charters to Non-Citizens:

(1) Bareboat or demise charters to Non-Citizens of Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessels, including Fish Tender Vessels and Fish Processing Vessels, are prohibited.

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

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

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

(d) Any violation of this section will render the vessel's fishery endorsement immediately invalid.

§ 356.41 Management agreements.

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

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

operation of the vessel or vessel-owning entity.

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

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

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

(d) The Citizenship Approval Officer may request a copy of any management agreement to determine if it contains provisions that convey control over the vessel or vessel-owning entity to a Non-Citizen.

§ 356.43 Long-term or exclusive sales and/or marketing contracts.

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

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

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

(2) Specify that the services of the vessel are being employed for catching and supplying a specific type of fish to off loading points designated by the purchaser;

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

(4) Specify refrigeration criteria;

(5) Provide that the owner or bareboat charterer has to comply with fishing

schedules that specify the maximum age of fish to be delivered and a method to coordinate delivery to the purchaser;

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

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

(8) Provide for the purchaser to furnish off loading crew, but no vessel crew members.

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

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

§ 356.45 Advance of funds.

(a) A Non-Citizen may advance funds to the owner or bareboat charterer of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel where the basis of the advancement is an agreement between the Non-Citizen and the vessel owner or bareboat charterer to sell all or a portion of the vessel's catch to the Non-Citizen if:

(1) The funds are used for working capital and not for capital expenditures on the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel;

(2) The amount of the advancement does not exceed the annual value of the sales contract;

(3) The Non-Citizen is not granted any rights whatsoever to control the operation, management and harvesting activities of the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel;

(4) The owner or bareboat charterer submits to the Citizenship Approval Officer within 30 days of execution a description of the arrangement and a certification and warranty that the agreement or contract with the Non-Citizen does not convey control over the

vessel, the vessel owner or bareboat charterer in any manner whatsoever; and,

(5) No security interest in the vessel is conveyed as collateral for the advance of funds.

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

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

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

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

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

Subpart G—Special Requirements for Certain Vessels

§ 356.47 Special requirements for large vessels.

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

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

(2) It is more than 750 gross registered tons; or

(3) It possesses an engine or engines capable of producing a total of more than 3,000 shaft horsepower.

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

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

(2) The vessel is not placed under foreign registry after October 6, 1998;

(3) In the event of the invalidation of the fishery endorsement after October 6, 1998, application is made for a new fishery endorsement within fifteen (15) business days of such invalidation; or

(4) The Vessel is engaged exclusively in the menhaden fishery in the geographic region governed by the South Atlantic Fisheries Council or the Gulf of Mexico Fisheries Council.

(c) A vessel that is prohibited from receiving a fishery endorsement under paragraph (a) of this section will be eligible if the owner of such vessel demonstrates to MARAD that the regional fishery management council of jurisdiction established under section 302(a)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. section 1852(a)(1)) has recommended after October 6, 1998, and the Secretary of Commerce has approved, conservation and management measures in accordance with the American Fisheries Act of 1998, Title II, Division C, Pub. L. 105-277, to allow such vessel to be used in fisheries under such council's authority.

§ 356.49 Penalties.

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

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

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

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

§ 356.51 Exemptions for specific vessels.

(a) Vessels listed in paragraph (b) of this section are exempt from the requirements of section 12102(c) of Title 46, United States Code, and this part, until such time after October 1, 2001, as more than 50 percent of the interest owned and controlled in the vessel changes; provided, that the vessel maintains eligibility for a fishery endorsement under the federal law that was in effect on October 1, 1998.

(b) The following vessels are exempt from the requirements of 46 U.S.C. 12102(c):

(1) EXCELLENCE (United States official number 296779);

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

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

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

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

(c) The NORTHERN VOYAGER and NORTHERN TRAVELER must be used in a fishery under the authority of a regional fishery management council other than the New England Fishery Management Council or Mid-Atlantic Fishery Management Council established, respectively, under subparagraphs (A) and (B) of section 302(a)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)(A) and (B)).

(d) The EXCELLENCE, GOLDEN ALASKA, and OCEAN PHOENIX may not be used to Harvest fish.

(e) The following Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels are exempt from the ownership and Mortgage requirements of the AFA and part 356:

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

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

(f) Owners of vessels exempt from the requirements of the AFA and part 356 by paragraphs (b) and (e) of this section must still comply with the requirements for a fishery endorsement under the federal law that was in effect on October 1, 1998. The owners must also submit to the Citizenship Approval Officer on an annual basis an Affidavit of United States Citizenship in accordance with § 356.15 demonstrating that they comply with the Controlling Interest requirements of the section 2(b) of the 1916 Act. In addition:

(1) The owners of the Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels listed in paragraph (b) of this section that are exempt from the new requirements of 46 U.S.C. section 12102(c) must specifically outline the current ownership structure, any changes in the ownership structure that

have occurred since the filing of the last Affidavit, and a chronology of all changes that have occurred since October 6, 1998; and,

(2) The owners of Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels exempted under paragraph (e) of this section must note on the Affidavit that the owner is claiming an exemption from the requirements of part 356 pursuant to § 356.51(e).

Subpart H—International Agreements

§ 356.53 Conflicts with international agreements.

(a) If the owner or Mortgagee of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel believes that there is a conflict between 46 CFR part 356 and any international treaty or agreement to which the United States is a party on October 1, 2001, and to which the United States is currently a party, the owner or Mortgagee may petition the Citizenship Approval Officer for a ruling that all or part of the requirements of part 356 do not apply to that particular owner or particular Mortgagee with respect to a specific vessel; *provided*, the petitioner had an ownership interest in the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel, or a mortgage on the vessel in the case of a Mortgagee, on October 1, 2001, and is covered by the international agreement. Petitions may be filed prior to October 1, 2001 by owners or Mortgagees with respect to international treaties or agreements in effect at the time of the petition which are not scheduled to expire prior to October 1, 2001.

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

(1) Evidence of the ownership structure of the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel as of October 1, 2001, (or on the date of the petition for petitions filed prior to October 1, 2001), and any subsequent changes to the ownership structure of the vessel;

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

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

(4) A certification in all petitions filed on or after October 1, 2001, that no interest in the vessel-owning entity has been transferred to a Non-Citizen after September 30, 2001; and,

(5) For all petitions filed prior to October 1, 2001, a certification that the owner intends to transfer no interest in

the vessel-owning entity to a Non-citizen for the succeeding year.

(c) A separate petition must be filed for each Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel unless the Citizenship Approval Officer authorizes consolidated filing. Petitions should include two copies of all materials and should be sent to the following address: Maritime Administration, Office of Chief Counsel, Citizenship Approval Officer, Room 7228, 400 7th Street, S.W., Washington, DC 20590.

(d) Upon receipt of a complete petition, the Citizenship Approval Officer will review the petition to determine whether the international agreement and the requirements of Part 356 are in conflict. To the extent that it is determined that an international agreement covering the petitioner is in conflict with the requirements of part 356, and 46 U.S.C. 12102(c) will not be applied to the petitioner with respect to the specific vessel. The petitioner will be required to comply with the documentation requirements as in effect on October 5, 1998, prior to passage of the AFA.

(e) The owner of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel that is determined through the petition process to be exempt from all or part of the requirements of part 356 must submit evidence of its ownership structure to the Citizenship Approval Officer on an annual basis. The owner must specifically set forth:

- (1) Its current ownership structure;
- (2) The identity of all Non-Citizen owners and the percentage owned,
- (3) Any changes in the ownership structure that have occurred since the filing of the last Affidavit; and,
- (4) A certification that no interest in the vessel was transferred to a Non-Citizen after September 30, 2001.

(f) The provisions of part 356 shall apply:

- (1) To all owners and Mortgagees of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel who acquired an interest in the vessel after October 1, 2001; and

(2) To the owner of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel on October 1, 2001, if any ownership interest in that owner is transferred to or otherwise acquired by a Non-Citizen after such date.

Subpart I—Review of Harvesting and Processing Compliance

§ 356.55 Review of compliance with harvesting and processing quotas.

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

(b) The Citizenship Approval Officer will require a Person(s) alleged to have exceeded the cap to submit any information that is deemed relevant in determining whether such Person(s) have exceeded the cap.

(c) The Citizenship Approval Officer will make a finding as soon as practicable and will submit it to the North Pacific Fishery Council and the Secretary of Commerce.

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

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

entity's percentage of direct interest in an intermediate entity is multiplied by the intermediate entity's percentage of direct or indirect interest in the pollock harvesting or processing entity.

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

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

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

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

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

(e) If the Citizenship Approval Officer determines that a Person has violated § 210(e) of the AFA, the Person is entitled to notice and an opportunity for a hearing before the Secretary of Commerce in accordance with section 554 of title 5, United States Code.

(f) Violations of section 210(e) of the AFA will be considered the commission of an act prohibited by section 307 of the Magnuson-Stevens Fisheries Act, 16 U.S.C. section 1857, and may subject the individual to:

- (1) Civil penalties;
- (2) Permit sanctions applicable under section 308 of the AFA; and
- (3) Forfeiture to the Secretary of Commerce of any fish harvested or processed during the commission of such act.

Dated: December 27, 1999.

By Order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

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