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Vessel Documentation: Lease Financing for Vessels Engaged in the Coastwise Trade; Final Rule and Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 67

[USCG–2001–8825]

RIN 1625–AA28 (Formerly RIN 2115–AG08)

Vessel Documentation: Lease Financing for Vessels Engaged in the Coastwise Trade

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard amends its regulations on the documentation of vessels engaged in the coastwise trade. These amendments respond to statutory changes that eliminate certain barriers for U.S.-vessel operators seeking foreign financing by lease. These amendments specify the information needed to determine the eligibility of a vessel financed in this manner for a coastwise endorsement. To address certain issues raised by the comments to this rulemaking but not proposed in this rulemaking, we are publishing a separate notice of proposed rulemaking found elsewhere in this issue of the **Federal Register**.

DATES: This final rule is effective on February 4, 2004, except for §§ 67.147 and 67.179, which contain information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Coast Guard will publish a document in the **Federal Register** announcing the effective date of those sections.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2001–8825 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, room PL–401, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call Patricia Williams, Deputy Director, National Vessel Documentation Center, Coast Guard, telephone 304–271–2506. If you have questions on viewing the docket, call Andrea M. Jenkins, Program Manager, Docket Operations, telephone 202–366–0271.

SUPPLEMENTARY INFORMATION:

Related Rulemaking

A separate, but related rulemaking entitled ''Vessel Documentation: Lease Financing for Vessels Engaged in the Coastwise Trade; Second Rulemaking'' (USCG–2003–14472, RIN 1625–AA63) appears elsewhere in this issue of the **Federal Register**. It concerns the question of whether we should prohibit or restrict the chartering back, whether by time charter, voyage charter, space charter, or contract of affreightment, of a lease-financed vessel to the vessel's owner, the parent of the owner, or a subsidiary or affiliate of the parent. If restrictions should be imposed, what criteria should be applied in charter-back situations?

Also, the separate rulemaking raises the question of whether we should seek the assistance of a third party with expertise in reviewing charters for compliance with the law, such as the Maritime Administration (MARAD) or an independent third party. (MARAD is currently reviewing its policy of general approval of time charters (67 FR 50406) and has agreed to consider this issue.)

In addition, the separate rulemaking will seek comments regarding the issue of providing a time limit for the grandfather provisions in § 67.20(b) through (e), which allows endorsements issued under the lease-financing provisions before the date of publication of this final rule to continue in effect (subject to certain specified exceptions).

Though these subjects were discussed in many of the comments received to the present rulemaking (USCG–2001–8825), we feel that we need additional public input specifically focused on these subjects and on our proposed changes in the separate rulemaking.

Regulatory History

On May 2, 2001, we published a notice of proposed rulemaking (NPRM) entitled ''Vessel Documentation: Lease-Financing for Vessels Engaged in the Coastwise Trade'' in the **Federal Register** (66 FR 21902). On June 29, 2001, we published a notice extending the comment period from July 2, 2001, to September 4, 2001 (66 FR 34603). On December 14, 2001, we published a notice reopening the comment period until January 28, 2002, and announcing that we were contemplating publishing a supplemental notice of proposed rulemaking (SNPRM) (66 FR 64784). On August 9, 2002, we published an SNPRM with a comment period closing on October 8, 2002. We received over 100 letters commenting on the NPRM and SNPRM.

We received numerous requests for one or more public meetings. After considering these requests and the comments received, we decided that public meetings would not benefit this rulemaking project because of the depth and thoroughness of the comments and the tremendous help they provided. We believed that public meetings would not provide new information that would assist us in writing the final rule. In addition, public meetings would delay the issuance of a final rule, which is contrary to the expressed desire of many of the commenters. However, we do plan to hold a public meeting on the separate rulemaking discussed in the ''Related Rulemaking'' section of this preamble.

At the request of industry representatives, several *ex parte* meetings were held with senior Coast Guard officials. Memoranda of those meetings were entered into the docket. (*See* **ADDRESSES.**)

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective in less than 30 days after publication in the **Federal Register**. Without regulations in place, many commenters contended that they would be uncertain of the Coast Guard's policy for processing applications during that 30-day period. Making these regulations effective as soon as possible relieves the burden of uncertainty on applicants.

Background and Purpose

In 1996, Congress amended the vessel documentation laws to promote lease financing of vessels engaged in the coastwise trade (section 1113(d) of Pub. L. 104–324, the Coast Guard Authorization Act of 1996; 46 U.S.C. 12106(e)) (''the 1996 Act''). Lease financing has become a very common way to finance capital assets in the maritime industry. Under lease financing, ownership of the vessel is in the name of the lessor, with a demise charter to the charterer of the vessel. (A ''demise charter,'' also known as a ''bareboat charter,'' is an agreement in which the charterer assumes the responsibility for operating, crewing, and maintaining the vessel as if the charterer owned it.) Many vessel operators choose to acquire or build vessels through lease financing, instead of the traditional mortgage financing, because of possible cost benefits. But, until the 1996 Act, operators were prevented from obtaining this financing from companies that are less than 75 percent U.S. owned because the leasing company had to be a U.S. citizen under section 2 of the Shipping Act, 1916, (46 U.S.C. app. 802), which requires at least 75 percent U.S. ownership. This

situation severely restricted the sources of available capital.

Under section 1113(d) of the 1996 Act, Congress eliminated this technical impediment to vessel financing by adding a new paragraph (e) to 46 U.S.C. 12106. Under 46 U.S.C. 12106(e), Congress authorized the Secretary of Transportation (since delegated to the Commandant of the Coast Guard) to issue coastwise endorsements if (1) the vessel is eligible for documentation; (2) the vessel's owner, the parent of the owner, or subsidiary of the parent of the owner is primarily engaged in leasing or other financing transactions; (3) the vessel is under a demise charter to a person certifying that the person is a U.S. citizen eligible to engage in coastwise trade under section 2 of the Shipping Act, 1916; and (4) the demise charter is for at least 3 years (or less under § 67.20(a)(11)).

According to the legislative history for the 1996 Act (*See* House Conference Report No. 104–854; Pub. L. 104–324; 1996 U.S. Code Congressional and Administrative News, p. 4323.) (''Conference Report''), Congress intended to broaden the sources of capital for owners of U.S. vessels engaged in the coastwise trade by creating new lease-financing options. At the same time, the Conference Report states that Congress did not intend to undermine the basic principle of U.S. maritime law that vessels operated in domestic trades must be built in shipyards in the United States and be operated and controlled by U.S. citizens, which is vital to U.S. military and economic security. In that report, Congress also directed the Coast Guard to establish the necessary regulations to administer 46 U.S.C. 12106(e), including the filing of demise charters for vessels issued a coastwise endorsement under that provision. We discuss our authority and need to resort to legislative history, of which the Conference Report is a part, in the section entitled ''Interpreting the statute'' under ''General Comments'' in this preamble.

List of Changes to the SNPRM

This is a list of the changes that we have made to the supplemental notice of proposed rulemaking (SNPRM) published on August 9, 2002. You may find an additional discussion of these changes in the ''Discussion of Comments'' section later in this preamble.

This rulemaking project proved to be somewhat unusual in the field of rulemaking, because most of the comments received dealt with conceptual approaches to interpreting the 1996 Act and the degree and direction of statutory implementation required, rather than with specific regulatory provisions. Therefore, in responding to comments in the manner we consider most appropriate and fair under the circumstances, we have incorporated changes in this final rule that, though not specifically requested by a comment, are in character with the original scheme as set forth in the NPRM and SNPRM and are a logical outgrowth of our proposals. Because of the lengthy comment periods, some 7½ months, and the issuance of an SNPRM before going to a final rule, we feel that we have provided a high degree of exposure for the issues at hand and an ample opportunity for the parties affected to develop evidence in the record.

A list of the changes, in order of their appearance in the regulatory text, follows:

1. The word ''affiliate,'' as used in the new definition of the word ''group'' described below, is defined in § 67.3 to mean a ''person'' (defined to include a corporation, partnership, *etc.,* as well as an individual) that is less than 50 percent owned or controlled by another person. The intent is to include within the ''group'' not only the owner, parent of the owner, and ''subsidiaries'' (which are defined in § 67.3 as being at least 50 percent owned by another) of the parent, but also those persons (*i.e.*, affiliates) that are less than 50 percent owned or controlled by the parent. For example, we would include in the aggregate revenue test provisions in §§ 67.20(a)(2), 67.147(a)(1)(v), 67.167(c)(10)(iv), and 67.179(a)(1)(v) all entities in the ''group,'' not just the owner, parent, and the parent's subsidiaries.

2. In § 67.3, the word ''group'' is defined. It replaces the phrase ''the person that owns a vessel, the parent of that person, and all subsidiaries of the parent of that person,'' which was used many times throughout the SNPRM. In the definition of ''group,'' we added ''affiliates'' of the parent. This definition of ''group,'' as used in the Conference Report, contemplates today's business environment, where few corporate entities stand alone with no relationship to one another.

3. The term ''operation or management of vessels'' as used throughout §§ 67.20, 67.147, 67.167, and 67.179 is now defined in § 67.3. It is defined to include all activities related to the use of vessels to provide services. The definition is needed to identify those business activities of an entity or group that are relevant in determining whether a person may qualify as a vessel owner under 46 U.S.C. 12106(e). A broad definition of this term is consistent with Congressional intent and preserves the effectiveness of the control test and the majority of aggregate revenues test. The term does not include activities directly associated with making financial investments in vessels or the receipt of earnings derived from those investments. Thus, lease-financing activities and other purely financial investments are excluded. It also does not include businesses that provide services to vessels, such as fueling and ship chandling. A broad definition of the term ''operation or management of vessels'' to include any and all activities related to the use of vessels to provide services is supported by several comments and is a logical outgrowth of the discussion of this term in the NPRM and the SNPRM.

4. In § 67.3, we have added two new sentences in the definition of the word ''parent'' to make it clear that ''parent'' includes all parents in the owner's chain of ownership to the ultimate parent.

5. In § 67.3, the term ''primarily engaged in leasing or other financing transactions'' is re-defined to include only transactions that have a financing component and exclude transactions that only include ''leasing.'' The law was enacted to promote ''lease financing'' not ''leasing.'' The Conference Report, at page 130, states that the overall purpose of the lease-financing provisions is to eliminate technical impediments to using various techniques for financing vessels operating in the domestic trade. Thus, the clear intent of Congress was to create a vehicle for vessel financing, not an alternative means of vessel ownership. See the discussion of our responsibilities under the Jones Act in the ''Interpreting the statute'' section under ''General Comments'' in this preamble.

In 46 U.S.C. chapter 121, Congress entrusted the Coast Guard with the responsibility of administering the vessel-documentation laws consistently with the Jones Act, 46 U.S.C. app. 802 and 808 and 46 U.S.C. 12106. Accordingly, it is our responsibility to implement the lease-financing provisions in such a way as to be consistent with the Jones Act, with its prior effect on the documentation laws, and with the intent of Congress.

Furthermore, the Conference Report, at pages 131 and 132, states that banks, leasing companies, or other financial institutions qualify as owners. This statement evinces Congress's intent to prevent the statute from being used as a loophole to avoid coastwise

citizenship requirements. The purpose is to prevent the use of specially created ''leasing-company'' subsidiaries that merely take title to existing vessels, with no financing involved, for the sole purpose of leasing them. Thus, the acquisition of a vessel must have some element of financing involved. An intra-group, book-to-book transfer without any financing involved will not suffice.

6. A definition of the word ''sub-charter'' is added to § 67.3 to indicate that sub-charters include all types of charters and contracts for the use of the vessel subsidiary to a demise charter, including but not limited to those denominated as ''demise charters,'' ''time charters,'' ''voyage charters,'' and other subordinate contracts, however denominated, for the use of the vessel. The purpose for this definition is to ensure that all charters and contracts for the use of the vessel are filed with the Coast Guard so that they may be made available for examination by the Coast Guard and third parties. This is necessary because sub-charters or contracts have the potential of giving a non-citizen an unacceptable amount of control over vessels operating in the coastwise trade. For example, simply styling a charter as a ''time charter'' or ''voyage charter'' does not ensure that the charter will not transfer an unacceptable amount of control from the demise charterer.

7. In §§ 67.20(a)(2), 67.147(a)(1)(viii), and 67.179(a)(1)(ix), we added the words ''the vessel was financed with lease financing.'' These additional words help ensure that the acquisition of a vessel must have some element of financing involved. An intra-group, book-to-book transfer without any financing involved will not suffice.

8. Section 67.20(a)(5) is changed by adding, after the words ''the person that owns the vessel,'' the words ''the parent of the person that owns the vessel'' and ''group of which the person that owns the vessel is a member.'' This change also excludes, from qualifying for a coastwise endorsement under lease financing, ownership arrangements where the parent of the owner of the vessel and the group of which the owner is a member are primarily engaged in the direct operation or management of vessels.

As the Conference Report at page 131 notes, ownership must be primarily a financial investment in the vessel without the ability and intent to control the vessel's operations and that the operation of the vessel must not be by a person not primarily engaged in the direct operation or management of vessels. Taken together, these phrases suggest that a requirement that the owner, the parent of the owner, or the group of which the owner is a member must not be primarily engaged in the direct operation or management of vessels is a permissible restriction on who can qualify as a lease-financing owner. Therefore, for example, a foreign group that gets more than 50 percent of its revenue from the direct operation or management of vessels would be barred from setting up a U.S. subsidiary for the purpose of being an owner under lease financing.

9. In § 67.20(a)(6), the words ''directly or indirectly'' are added before the word ''control.'' The words are added in recognition of the fact that vessels may also be controlled indirectly through devices such as side agreements between parties involved in the vessel's ownership and charter. Allowing indirect control of the vessels through side agreements or similar devices would be inconsistent with the purpose of the lease-financing provision. That provision was not intended to implicitly repeal the Jones Act protections afforded to a U.S. citizen eligible to engage in coastwise trade under section 2 of the Shipping Act, 1916 (section 2 citizen) any more than is necessary to further the goal of making more capital available for the owners of U.S. vessels.

10. The ''aggregate revenues'' test in §§ 67.20(a)(7), 67.147(a)(1)(v), 67.167(c)(10)(iv), and 67.179(a)(1)(v) for use in determining eligibility for a coastwise endorsement is changed from applying just to the group of which the owner is a member (*i.e.*, the vessel owner, the parent of the owner, and all subsidiaries of the parent). It now applies to each of the following taken separately: the owner, the owner's parent, and the owner's group. This permits foreign banks, lease-financing companies, or other financial institutions to qualify as owners of U.S.-flag vessels under lease financing even if they have vessel owning and operating subsidiaries or affiliates, but prevents qualification of companies in which the primary business of the owner, the owner's parent, or the group of which the owner is a member, is vessel ownership or operation.

11. In §§ 67.20(a)(8), 67.147(a)(1)(vi), 67.167(c)(10)(v), and 67.179(a)(1)(vi) concerning the operation or management of commercial, foreign-flag vessels, the word ''group,'' as newly defined in § 67.3 with its inclusion of ''affiliates'' of the parent, replaces the words ''the group that includes the person that owns the vessel, the parent of that person, and all subsidiaries of the parent of that person.'' This test is extended to apply to the vessel owner and the owner's parent, as well as the group. Thus, we clarify that the lease-financing owner must have only a financial investment interest in the vessel and may not be involved in operating vessels. Additionally, because of the possibility for a foreign parent that is actually involved in the operation or management of foreign vessels to exercise ''control'' of the vessel's operations, we have included the words ''parent of the owner'' in this part of the test.

12. The grandfather provision in § 67.20(b) has one change. The date before which an endorsement must be issued to be eligible for the grandfather provision is changed from the effective date of this final rule to the date of publication of this rule, which is 30 days sooner. The purpose of the grandfather provision is to protect existing business arrangements. Changing the date by which vessels must be documented under this section from the effective date of the rule to the date of publication prevents the establishment of new business arrangements during that 30-day period that would be prohibited by this rule.

New paragraph (c) is added to provide a grandfather provision for newly constructed vessels built in reliance upon a letter ruling from the Coast Guard before the date of publication of this final rule.

Also, new paragraphs (d) and (e) are added to apply to barges that are not required to be documented under 46 U.S.C. 12110(b). These new paragraphs are similar to paragraphs (b) and (c) discussed above but are needed because the existing documentation regulations handle undocumented barges somewhat differently from other vessels.

13. In §§ 67.147(a)(1) and 67.179(a)(1) concerning the individual required to certify the certification submitted with an application, the term ''officer'' was used. As suggested by several comments, this term alone, which is based on the corporate model, does not accommodate the many different types of business entities that qualify as owners and the different titles by which individuals authorized to provide the certification are known. We expect the authorized individual to be on a level at least equivalent to an officer in a corporation, a partner in a partnership, or a member of the board of managers in a limited liability company. Therefore, these sections have been amended to address these differences.

14. One comment to § 67.147(a)(2) in the NPRM, on submitting a copy of the charter as part of an application for an endorsement, asked that we delete the requirement that the charter provide that the charterer is deemed to be the

owner *pro hac vice* for the term of the charter. It suggested that practitioners generally understand that a demise charter does convey to the charterer the full possession, control, and command of a vessel and that the provision is therefore surplusage.

We made the suggested deletion in the SNPRM. However, upon reconsideration, we have reinserted that provision in the final rule. It is clear from the legislative history that Congress intended the charterer to be the owner *pro hac vice* for the term of the charter. The fact that the words ''*pro hac vice*'' may not be reflective of common charter practice is added reason for their inclusion in any charter submitted under the lease-financing exception.

15. In §§ 67.147(d)(1) and 67.179(d)(1), changes are made that would lessen the paperwork burden. The SNPRM would require copies of sub-charters to be filed with the Director, National Vessel Documentation Center. In the final rule, we also require that amendments to sub-charters be similarly filed. However, we added that they both need to be filed only when requested to do so by the Director.

16. In §§ 67.147(d) and 67.179(d), the word ''demise'' is removed and the term ''sub-charter'' (as newly defined in § 67.3) is added. The word ''demise'' is eliminated because the Coast Guard believes that it is necessary to make all charter and other contractual arrangements for the use of the vessel available for examination by the public and for review by the Secretary as needed. This is necessary to ensure that an unacceptable amount of control over the vessel's operation is not transferred from the demise charterer in contravention of the requirement that the demise charterer be the owner *pro hac vice* during the charter period. Also, we have aligned §§ 67.147(d)(2) and 67.179(d)(2) with the above changes.

17. In §§ 67.147(e) and 67.179(e) concerning penalties for false certification, the words ''and 18 U.S.C. 1001'' are added following ''subject to penalty under 46 U.S.C. 12122.'' We added the additional criminal provision concerning knowingly false or fraudulent statements to emphasize the importance of the accuracy of the certifications to the integrity of the Coast Guard's implementation of the lease-financing law.

Discussion of the Comments

In this section, we discuss the comments both to the NPRM and SNPRM. They are grouped into two parts: ''General Comments'' and ''Comments to Specific Sections.'' The ''General Comments'' section addresses comments, such as comments on interpreting the 1996 Act, that are not specific to a particular proposed provision. The section on ''Comments to Specific Sections'' is organized in numerical order by regulatory section.

Many of the comments to the NPRM were rendered moot by changes in the SNPRM. We limited discussion of them in the preamble to avoid confusing the reader.

Certain provisions in the NPRM and SNPRM were repeated, almost verbatim, in several sections throughout the proposed rule. For example, in the NPRM, the aggregate revenue provision in § 67.20(a)(4) (eligibility for endorsement) is also found in §§ 67.147(a)(1)(iv) (applications for vessels), 67.167(c)(1)(iv) (exchange of certificates), and 67.179(a)(1)(iv) (applications for barges) of the NPRM. We found that comments to one section were generally applicable to other, similar sections.

Comments submitted to this rulemaking, but that now relate to the subjects addressed in the separate rulemaking referenced in the ''Related Rulemaking'' section of this preamble, such as concerns over the potential abuse of the chartering element in the lease-financing provisions, have also been considered under that separate rulemaking.

I. General Comments

1. *Interpreting the statute.* (a) Virtually all of the commmenters fall, in varying degrees, within two broad groups. One group argues for a literal application of the statute. They urge that the statute is not ambiguous. They contend that the Coast Guard's proposals in the NPRM and SNPRM are based on an erroneous interpretation of the statute and amount to legislating that goes far beyond permissible implementation. According to these comments, no resort to the legislative history is permissible in implementing the statute. They urge that Congress's intention as expressed by the plain language of the statute will be frustrated unless the Coast Guard's regulations are limited to the literal requirements in the statute. These comments argue that the statute, by vesting control of the vessel in the demise charterer, which must be a section-2 citizen under 46 U.S.C. app. 802, Congress provided sufficient protection of the Jones Act principles.

We disagree. Primarily as a result of 6 years of experience with the law, we believe the result of such a literal interpretation could eviscerate the principles that Congress enunciated in the cabotage restrictions contained in the Jones Act and might even effectuate an implicit repeal of that statute. The Jones Act principles referred to here include the cabotage principles embodied in 46 U.S.C. app. 883 (the Jones Act), 46 U.S.C. app. 802, and 46 U.S.C. 12106.

The second broad group of commenters recognize that the lease-financing law opened the Jones Act trade to lease-financing companies, but argue for a narrow application of the statute. According to these comments, the lease-financing law was intended to be a narrow exception to the Jones Act; it was not intended to repeal that Act. They argue that the lease-financing law should be read very narrowly so as to protect those traditionally engaged in the Jones Act trade. They rely on statements in the Conference Report, as well as on the principle that implicit repeal of statutes is not favored. According to them, the only proper interpretation is to apply the lease-financing law with a view toward opening the Jones Act to foreign owners only to the extent necessary to ensure that those persons who have relied on it in structuring their business models are not subject to undue foreign competition. The term ''foreign owners,'' as used here, means persons who qualify to own a U.S. vessel, but are not eligible to engage in the coastwise trade.

As stated above, we do not agree that the statute should be applied so literally that the result would be a wholesale, yet implicit, repeal of the Jones Act protections for domestic shipping. Because of the rich history of the Jones Act, the protections it has traditionally extended to American citizens, and the lack of any indication in either the statute or the legislative history in favor of an intended repeal of the Jones Act, we reject the conclusion of those who construe the law so as to accomplish such a repeal. Instead, we conclude that the lease-financing provisions were intended to accomplish a narrow relaxation of the restrictions formerly applicable to owners who desired to engage in lease financing, as opposed to mortgage financing, of vessels. Furthermore, we believe that, when implementing the statute through regulations, as Congress directed us to do, Congress sought to apply the lease-financing provisions as consistently as possible with the existing provisions of the Jones Act. Otherwise, there would have been no need for the Conference Report to state on page 130 that it was the Conferees' intention not to undermine a basic principle of U.S. maritime law that vessels operated in

domestic trades must be operated and controlled by American (*i.e.*, section-2) citizens, which is vital to United States military and economic security.

Congress entrusted the Coast Guard with the responsibility, under 46 U.S.C. chapter 121, to administer the vessel documentation laws consistently with the Jones Act, 46 U.S.C. app. 802, 808, and 883 and 46 U.S.C. 12106. The Coast Guard has had this role continuously since 1967. We have historically implemented the vessel-documentation law with due regard to the important cabotage principles embodied in the Jones Act. We have endeavored in the past, as we do now, to carry out the cabotage principles that are the essence of the Jones Act as expressed by Congress in the Act itself and its legislative history, as well as in the lease-financing amendment and its legislative history.

Thus, we have relied on the legislative history of not only the lease-financing law, but also of the Jones Act itself. In that regard, we are aware of the Congressional purpose of that Act, as explained on the floor of the House at the time of discussions on who could be a U.S. citizen for purposes of owning and operating a vessel in the U.S. coastwise trade. That purpose was expressed by Congressman Saunders, as follows:

> The amendment [to section 2 of the Shipping Act] intends to make it impossible for any arrangement to be effected by which such a corporation, partnership or association shall be a citizen of the United States when the real control of same is in the hands of aliens. We have sought to make the language so sweeping and comprehensive that no lawyer, however ingenious, would be able to work out any device under this section to keep the letter, while breaking the spirit of the law. See 56 Cong. Rec. 8029 (June 19, 1918).

Congress required the Secretary of Transportation to implement the lease-financing law with regulations. Consistent with prior practice since 1967, that responsibility has been delegated to us. We believe that in order to carry out Congress's intent in implementing the lease-financing law, we must be mindful of all legitimate sources from which that intent may be gleaned. In fact, for us to ignore the Jones Act or its rich history would be contrary to our responsibility.

On the other hand, we recognize that the principal purpose of the lease-financing provisions is to increase the sources of capital.

(b) In determining whether the statute should be applied literally, it is clear that some of the statute's critical terms are not self-defining. For example, the term ''primarily engaged in leasing or other financing transactions'' is not clear. It is not clear on its face whether the clause ''primarily engaged'' means that the entity so engaged derives a majority of its revenue from that activity; that the entity devotes a majority of its resources to that activity; or, in the case of multiple entities in a group (which is probably typical), that one of those entities derives more revenue or devotes more resources than any of the others, but not necessarily a majority of the group's revenue or resources.

Similarly, it is not clear on the face of the statute whether Congress intended to authorize special-purpose leasing companies engaged in leasing vessels only to qualify if they have no financing component to the transaction or whether it intended financing to be an essential component of that activity (as we provide in this final rule). Therefore, a resort to the legislative history, particularly the Conference Report, to interpret the ambiguous terms of the statute is appropriate to determine the intent of Congress as to who may qualify for this newly created, lease-financing exception to the Jones Act and how the Coast Guard should implement the statute.

We note that the Conference Report does not answer all the questions that must be answered in order to implement the statutory language. For example, while both the statute and the Conference Report are clear that control of the vessel receiving a coastwise endorsement must be placed in a U.S. citizen, the statute and Conference Report are silent as to whether the Coast Guard is to implement this requirement by prohibiting agreements between the owner and the demise charterer with respect to operating the vessel, other than the demise charter itself. This is one of the subjects addressed in the separate rulemaking (*See* the ''Related Rulemaking'' section in this preamble.).

2. *Charters.* Many comments concerned the potential abuse of the required transfer of control from the owner to the charterer by the use of charter deemed ''demise'' in name only and of sub-charters that they believe to be inconsistent with the intent of Congress.

(a) A number of comments suggest that the proposed rules would have a detrimental effect on the integrity of the Jones Act, as well as on U.S. military and economic security, because the proposals could allow significant portions of the U.S.-flag coastwise fleet to fall under foreign control.

We agree with the premise of these comments. Thus, our final rule makes foreign capital available to U.S.-flag operators, while at the same time keeps coastwise shipping out of the control of foreign operators. In the separate NPRM (*See* the ''Related Rulemaking section of this preamble.), we are proposing various alternatives to deal with the time-chartering back of the vessel from the demise charterer to, for example, an affiliate of the owner.

(b) Many of the comments we received in response to both the NPRM and the SNPRM question not only the proposed rules, but also the policy established by the Coast Guard to implement the lease-financing provisions of the 1996 Act. In general, the comments indicate that we may have created an unintended loophole that is effectively allowing the foreign control of vessels operating in Jones Act protected trades.

See our response in paragraph (a) above.

(c) One comment states that proposed § 67.20(a)(6) in the SNPRM should be rewritten so controlling vessel operations and revenues by means of a time charter back to a member of the group that includes a foreign vessel operator would disqualify eligibility, because, as the comment asserts, such an arrangement is a scheme for control and not for investment. The comment adds that § 67.20(a)(9) should broaden the definition of control, so that the time-charter-back scheme would be recognized for what it is—a control scheme.

See the response in paragraph (a) above.

(d) Eleven comments express support for the Jones Act and for broadening sources of financing for vessels in the domestic trade, while upholding the U.S.-ownership requirement of the Jones Act.

See the response in paragraph (a) above.

(e) Ten comments express support for preserving the basic principles of the Jones Act, because it is the basis of our investments and provides many economic, security, and environmental benefits to our nation.

See the response in paragraph (a) above.

(f) Two comments express support for the Jones Act because they see no need for foreign financing in the industry.

Insofar as these comments contend that there was no need for foreign financing for U.S. vessels, we disagree that Congress did not authorize foreign financing of U.S. vessels. Indeed, that was an expressed purpose of the law as stated in the Conference Report. On the other hand, we agree that Congress also did not intend any more of a relaxation

of the Jones Act than was necessary to effectuate the purposes of the lease-financing provision. It sought to preserve control of the operation and management of lease-financed vessels in the hands of section 2 citizens by means of requiring a long-term demise charter to such a citizen. The final rule and the separate NPRM (*See* the ''Related Rulemaking'' section of this preamble.) attempt to strike the appropriate balance to effectuate that Congressional intent.

(g) Ten comments state that some foreign entities are not abiding by the intent of Congress in 46 U.S.C. 12106(e) and have used this provision as a loophole to avoid coastwise citizenship requirements. They ask that this loophole be eliminated in the regulations.

We agree with the contention that Congress did not intend a wholesale repeal of the Jones Act with the lease-financing amendments. Instead, it intended a narrow relaxation of the ownership requirements of that law to allow a broadening of the capital market available to U.S. operators, while preserving control of the vessel in the hands of a U.S. citizen. The final rule, together with the proposals in the separate rulemaking (*See* the ''Related Rulemaking'' section in this preamble.), are designed to preserve the Jones-Act protections completely, while allowing lease-financing owners to own vessels in coastwise trade.

(h) Three comments stated that the proposed regulations should focus on ensuring that the demise charter meets the intent of the coastwise protection laws.

We agree that one of the key inquiries is whether control of the vessel is vested in the demise charterer unaffected by any agreement, including a side agreement outside of the demise charter itself, an understanding between the owner or any entity exercising control over the owner and the demise charterer, or otherwise, that would vest control of the vessel in the owner or a member of the owner's group. We do not necessarily agree that the demise charterer should be able to time charter the vessel to anyone of the charterer's choosing without restriction. If, for example, the demise charterer time charters the vessel back to the owner or a member of the owner's group, there is a potential loss of control of the vessel by the demise charterer to an entity that we believe Congress did not intend to have any control over the vessel. A number of comments have termed this as the ''time-charter-back'' issue. We have proposed to deal with that issue in the separate NPRM (*See* the ''Related Rulemaking'' section in this preamble.) for the reasons stated in the preambles to this rule and to the NPRM.

(i) Nine commenters stated that the lease-financing law has protected the control of coastwise-eligible vessels by U.S. citizens due to the requirement that coastwise vessels be demise chartered to an entity qualified to engage in the coastwise trade.

We disagree with the comments that contend that the law is clear and unambiguous on how to preserve control by section-2 U.S. citizens over vessels lease financed by foreigners. We also disagree that the so-called additional requirements in our regulations are unnecessary, counter-productive, or both in fulfilling the Congressional intent by threatening the sources of financing. See our reasons stated in the ''General Comments'' and ''Comments to Specific Sections'' sections of this preamble in response to comments raising similar issues. We have not addressed the additional requirements of the existing documentation law, such as the requirement that the vessels be U.S.-built, because this requirement did not originate with the 1996 Act.

(j) Six comments support using the lease-financing provision to justify self-financing of vessels used in domestic commerce primarily to carry proprietary cargo. One comment approves of transactions similar to those used by quasi-Bowater organizations.

These issues are discussed in the preamble to the separate NPRM. (*See* the ''Related Rulemaking'' section of this preamble.)

(k) One comment recommends that the term ''coastwise-qualified U.S. citizen'' be used and defined as a citizen that must be independent of, and not controlled (by contract, fiduciary relationship, or otherwise) by, the non-citizen owner or any member of the owner's group. According to the comment, this would preclude U.S. citizens from agreeing to act as straw men for aliens.

We believe that this issue is already adequately covered in 46 CFR part 67, subpart C, and that no additional definition is needed.

(l) To ensure that our rule does not undermine the Jones Act, one comment recommends that we require the non-citizen applicant to be licensed as a banking institution in the United States under U.S. banking laws and that we require the non-citizen applicant to prove that it has been a bona fide financial institution for not less than 10 years.

We can find no legal support for this suggestion and, therefore, have not adopted it.

(m) One comment states that, to protect U.S. national and economic security, the rule should include a ''catch-all'' provision that prohibits placing effective control of U.S.-flag vessels engaged in the coastwise trade in the hands of an alien.

We believe that the concern expressed in this comment is adequately addressed in existing documentation regulations (46 CFR part 67, subpart C), as amended by this final rule, and in the proposals in the separate NPRM. (*See* the ''Related Rulemaking'' section of this preamble.)

(n) One comment states that proposed § 67.20(a)(6) and (a)(9) in the SNPRM should be rewritten to prohibit the operator of a foreign vessel from time chartering the vessel back to a member of the vessel owner's group; because, as the comment asserts, such an arrangement would be a scheme for control and not for investment.

This matter is discussed in the separate NPRM. (*See* the ''Related Rulemaking'' section of this preamble.)

3. *Perceived ''taking of private property'' issue.* Several comments contend that the NPRM and SNPRM will accomplish a ''taking'' of private property without just compensation in violation of the 5th amendment to the U.S. Constitution and of international law. This is discussed in the ''Taking of Private Property'' section of this preamble.

4. *Grandfather provision (§ 67.20(b)).* (a) Several comments objected to any grandfather provision. They argue that, once the rulemaking is final, all lease-financing owners should comply with the final rules.

We believe that the likely result of such a position would be that the holders of endorsements, who received them in good faith reliance on the policy of the Coast Guard at the time, would have to re-structure, at perhaps some financial expense and with little time to plan for such a restructuring, when the document is renewed.

(b) Comments, principally from those who have received coastwise endorsements under lease financing issued between 1996 and 2002, argue that the proposed grandfather provision is too restrictive. They urge us to adopt a rule that would validate, for future use, the particular types of financial transaction or arrangement under which documents were issued before the final rule was published. In other words, any new vessel owner that chose to use a previously used type of transaction or arrangement in the future would be able to do so. In their view, a grandfather provision that just covers the vessel that received the document, as opposed to

the vessel owner or to the type of transaction or arrangement, is too restrictive and amounts to little effective relief from the changed requirements of this rule.

On one hand, we believe that to require those vessel owners who relied on our prior practice and policy to comply immediately (or at the first renewal of the document) with the new rules would unnecessarily penalize them. On the other hand, we do not believe that the owners of vessels that already have a lease-financing endorsement or that intend to apply for such an endorsement in the future should be entitled to unlimited renewals based on the prior policies and practices of the Coast Guard. The purpose of the grandfather provision is to provide reasonable relief for investments and business arrangements made in reliance on the standard in effect when they were made. Furthermore, allowing owners that already have an endorsement to expand their businesses in a manner not available to others would make those owners and vessels attractive vehicles for further foreign investment in domestic trade, thus contravening the basic tenets of the Jones Act.

In order to properly address the issue of limiting the grandfather provisions and to obtain guidance from those affected by the grandfather provision, we have proposed a time limit to the grandfather provision in the new, separate rulemaking (*See* the ''Related Rulemaking'' section in this preamble.). The grandfather provision in § 67.20(b) of the SNPRM remains unchanged at this time.

5. *Foreign tax and investment regimes.* Two comments raised questions concerning tax and investment regimes in foreign countries either favoring or disfavoring foreign competition by U.S. interests.

The lease-financing law does not allow the Coast Guard to deny foreign entities the right to engage in lease financing based on whether and to what extent they are granted tax benefits or subsidies by foreign countries. If a foreign entity complies with the lease-financing law and these implementing regulations, we cannot prevent it from engaging in lease financing. As explained elsewhere in this preamble, the lease-financing law accomplished a limited amendment to the Jones Act to increase the amount of foreign capital available to U.S.-vessel owners and operators, while at the same time preserving the time-honored principle that complete control of a vessel in the coastwise trade must be in the hands of a U.S. citizen. Thus, the lease-financing law allows certain foreign banks, leasing companies, and other financial institutions to engage in the lease financing of vessels and, if these regulations are observed, to obtain a coastwise endorsement, even if they have a vessel-operating subsidiary. The law does not condition the entrance into the U.S. lease-financing market on whether and to what extent foreign interests grant tax benefits and subsidies to foreign vessel operators.

6. *Foreign energy companies.* One comment contends that the proposed regulations may effectively permit foreign-owned energy companies to enter the business of owning U.S.-flag vessels and allow those vessels, through arrangements with charterers, to carry their own proprietary cargoes.

Foreign-owned energy companies are not prohibited by the statute from engaging in lease-financing transactions, if they comply with the requirements of the law and the implementing regulations. The subject of carriage of proprietary or non-proprietary cargoes by vessels financed by foreign-owned energy companies will be addressed in the separate rulemaking (*See* the ''Related Rulemaking'' section in this preamble.) under the charter-back issue.

7. *Consultation with MARAD.* One comment requests that we enlist the services of the U.S. Maritime Administration (MARAD) to review the applications and charters, do background checks, and have the power to require additional supporting data from the applicant.

Although this final rule does not address the use of MARAD's services, the Coast Guard has worked closely with that agency in the development of this final rule. In addition, in the separate rulemaking (*See* the ''Related Rulemaking'' section in this preamble.), we will ask for comments specifically on the benefits which might be derived from such an arrangement and how the arrangement should be implemented.

8. *Requests for quick completion of this rulemaking.* Nineteen comments urged that the Coast Guard proceed as quickly as possible to a final rule. They contend that Coast Guard policy has allowed undue foreign entry into Jones Act trade and that the continued lack of a final rule invites further incursions.

As discussed in the ''Regulatory History'' section of this preamble, these comments factored into our decision to postpone holding a public meeting until the second rulemaking. (*See* the ''Related Rulemaking'' section in this preamble.)

9. *Requests for public meetings.* Numerous comments asked for one or more public meetings on the rulemaking.

This is discussed in the ''Regulatory History'' section of this preamble.

10. *Moratorium on processing applications for endorsements.* Several comments suggested that our current policy on lease financing is a threat to the Jones-Act industry and recommended a moratorium on the processing of applications for coastwise endorsements under the lease-financing provisions.

We do not believe that a moratorium is legally supportable. Some applications have already been approved under the provisions of 46 U.S.C. 12106(e). There is nothing in either the statute or legislative history that provides a basis for imposing a moratorium on lease-financing applications. Even if there were, by setting forth the requirements to participate in lease financing, publication of this final rule would eliminate the need for a moratorium.

11. *Favorable comments.* We received comments favoring this or that proposal, especially to the changes in the SNPRM. For example, one comment supported the SNPRM as written because it strikes the proper balance by encouraging financing for U.S. coastwise vessel assets, while retaining operating control over those assets with fully qualified coastwise entities, and because it is an appropriate exercise of the Coast Guard's regulatory authority.

II. Comments to Specific Sections

Section 67.3, Definitions

1. One comment recommends that we define the term ''operation or management of vessels'' to identify those business activities of an owner or group that are relevant in determining whether a person may qualify as a vessel owner.

Based on the suggested wording in comment letter number 30 in the docket to this rulemaking (*See* **ADDRESSES**), we have added such a definition in § 67.3.

2. One comment recommends that we define the term ''demise charter'' in the regulation so that it cannot be confused with a time charter or a hybrid of the two. The comment contends that time charters are often mislabeled as demise charters.

This concern of mislabeling is remedied, in part, by the addition of a definition of the term ''sub-charter'' in § 67.3, which is defined to include all types of charters. See the new use of the term ''sub-charter'' as it appears in §§ 67.147(d) and 67.179(d) in this final rule.

3. Several comments objected to the definition of ''primarily engaged in

leasing or other financing activities'' in § 67.3 of the NPRM being restricted to banks or institutions that were engaged in banking. They objected to our reliance on the language of the Conference Report that banks, leasing companies, or other financial institutions would qualify. Some of the comments assert that this phrase is vague in that it is unclear whether the qualifying entity is limited to one that only provides ''banking'' services.

We agree and made changes to the SNPRM. The final rule further clarifies that the financial institution that may qualify is not limited to a bank, although such an institution would qualify. It includes other entities that are primarily engaged in financing activities, including lease financing. In addition to Federal- or State-chartered banks, the term would include, but not be limited to, vendor financing credit companies, industrial commercial finance companies, and leasing companies, provided that there is an element of financing involved in the transaction.

Section 67.20, Coastwise Endorsement for a Vessel Under a Demise Charter

1. To ensure that our rule on lease financing does not undermine the Jones Act, one comment recommends that we require the non-citizen applicant to be licensed as a banking institution in the United States under U.S. banking laws and to prove that it has been a bona fide financial institution for not less than 10 years.

We disagree that the non-citizen applicant must be a licensed banking institution. Neither the statute nor the Conference Report indicates that the applicant must be a banking institution. Other financial institutions, such as insurance companies or pension plans, might qualify. However, we believe that there must be a vessel-financing component in the transaction. Therefore, we revised the definition of the term ''primarily engaged in leasing or other financing transactions'' in § 67.3 to include only transactions with a financing component and to exclude special-purpose leasing companies. There is no basis for limiting lease-financing entities only to banks or for requiring the financial institution to be in business for 10 years. To do so would severely limit the funds available for lease financing.

2. One comment to § 67.20(a)(4) of the NPRM on the ''majority of the aggregate revenues'' test stated that Congress, in the Conference Report, did not intend that this test allow up to 49 percent of the aggregate revenues to be derived from vessel operation or management or up to 49 percent of person's or group's activities to have nothing to do with leasing, banking, or similar financing transactions, but to have everything to do, up to 49 percent, with foreign vessel operations and still be allowed under 46 U.S.C. 12106(e). The comment contends that these broad loopholes undermine a level playing field and will result in a degradation of the U.S. fleet.

We believe that the Conference Report strongly supports the requirement that ownership of the vessel be primarily a financial investment and not be by a person primarily engaged in the direct operation of vessels. However, the Conference Report did not define the words ''primarily engaged'' and did not specify where to draw the line between primarily engaged and not primarily engaged. These rules implement the statute as we believe Congress intended. They protect the Jones Act principles while allowing foreign owners to qualify even if they have a vessel owning and operating affiliate. The Conference Report indicates that the owner should qualify under the law so long as the majority of the aggregate revenues of the owner, its parent (as defined herein to include all parents in the owner's chain of ownership to the ultimate parent) and the group are not derived from the operation or management of vessels. We believe that inclusion of the owner, the owner's parent, and the owner's group in the aggregate revenues test is consistent with the law and the legislative history. Using the aggregate revenue test in this way is one measure, although not necessarily the only measure, of determining whether the owner, the owner's parent, or the owner's group is primarily engaged in vessel operation or management.

3. One comment on § 67.20(a)(8) of the SNPRM on the operation or management of commercial foreign-flag vessels suggested that routinely prepared and published documents or reports should serve as satisfactory, conclusive proof of the primary business of the group. These documents for a publicly traded company or group might include, without limitation, reports filed with the Securities and Exchange Commission, routine audit reports, or annual reports distributed to shareholders.

We intend to rely primarily on the certifications of the applicant because the applicant is best able to know whether the entire group is primarily engaged in the operation and management of commercial foreign-flag vessels. However, we reserve the right to investigate further when circumstances warrant. In that regard, we may use all available sources of information, including publicly available reports filed with public bodies such as the Securities and Exchange Commission, routine audit reports, and reports distributed to shareholders. As discussed in the separate NPRM (*See* the ''Related Rulemaking'' section of this preamble.), we may also require that an independent auditor having expertise in marine financing and operations certify that the applicant's operations conform to the requirements of the applicable regulations.

Section 67.147, Application Procedure: Coastwise Endorsement for a Vessel Under a Demise Charter

1. One comment to § 67.147(a)(1) stated that the owner should not have to submit an affidavit because the lease-financing law does not require it.

We believe that the use of certifications is a cost-effective way for the vessel owner to establish that it is qualified for a coastwise endorsement under the lease-financing provisions. While the Director of the National Vessel Documentation Center may request that the owner submit additional documentation supporting the certification, for many owners, the certification will be all that is required. We believe that it is less burdensome to provide a certification rather than to submit various documents to show that the owner is qualified. Also, the owner is the person most qualified to determine whether the owner and group meet the ''primarily engaged in operation or management of vessels'' test. We may obtain information from publicly available sources or rely upon the advice of an independent auditor as explained in the separate NPRM (*See* the ''Related Rulemaking'' section of this preamble).

To the extent this comment is based on the argument that the lease-financing law is clear on its face and there is no place in the implementing regulations for considering the Conference Report in interpreting the law, we disagree. *See* the discussion in the ''General Comments'' section that articulates our reasons for considering the Conference Report and other sources of Congressional intent in order to properly implement the law.

2. Ten comments oppose § 67.147(a)(1)(i) in the NPRM, which would require the owner to certify that it is a bank, leasing company, or other financial entity. It should have referenced the owner, the parent of the owner, or a subsidiary of a parent of the owner, as in 46 U.S.C. 12106(e).

We agree with these comments to the NPRM. Section 67.147(a)(1)(i) in the SNPRM was revised accordingly.

3. One commenter stated that proposed § 67.147(a)(1)(ii) and (a)(1)(iv) in the NPRM (§ 67.147(a)(1)(iii), (iv), and (vi) in the SNPRM) find no support in the language of the statute.

We disagree. To the extent that this comment contends that the language of the statute is clear and unambiguous in setting forth what we may require in implementing regulations, see our discussion on this subject in the ''General Comments'' section of this preamble. We believe that one must refer to the Conference Report to properly implement this statute. The provisions addressed by this comment come from the Conference Report and reflect Congressional intent.

4. One comment to the NPRM stated that § 67.147(a)(1)(iv) on the aggregate revenues test and § 67.147(a)(1)(v) on the operation or management of foreign-flag vessels both refer to the owner, parent, or subsidiary of the parent and that this varies from the Conference Report.

In § 67.147(a)(1)(v) and (a)(1)(vi) of the SNPRM, we changed the ''or'' to ''and.'' In the final rule, we apply the aggregate revenues test to each of the following taken separately: the owner, the parent of the owner, and the owner's group. We agree that the aggregate revenue test should be applied only to the owner, the owner's parent, and the group of which the owner is a part and not to each entity within the group of which the owner is a part. Similarly, in the final rule, we apply the operation and management test to the owner, the parent, and to the owner's group as a whole, but not to each entity within the group. We believe, based on the Conference Report statement to this effect, that Congress intended that an owner could qualify if one of the affiliates of the owner's group was engaged in the operation or management of vessels, provided that the aggregate revenues of the group as a whole, as well as the owner and the owner's parent, were not derived from vessel operation or management.

Assessment

Due to substantial public interest, this rule is classified as a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review. The Office of Management and Budget has reviewed it under that Order. It requires an assessment of potential costs and benefits under section 6(a)(3) of that Order. It is ''significant'' under the regulatory policies and procedures of the Department of Homeland Security. The Assessment in the docket for the SNPRM is unchanged for the final rule.

There are no mandatory costs associated with this rulemaking. Vessel owners that choose to take advantage of the lease-financing option would incur costs imposed by this rule that include preparing and submitting the required documents. Those costs vary from applicant to applicant.

This rule requires vessel and barge owners and charterers opting to take advantage of the lease-financing provisions in 46 U.S.C. 12106(e) to submit certain documents to the Coast Guard's National Vessel Documentation Center (NDVC). According to our data, 87 business entities have applied under the lease-financing provisions since the passage of the 1996 Act. We estimate that the number of entities opting to do the same in the future will be about 35 annually. We estimate that it would take about 12 hours to prepare the affidavits and make the submissions. Using an average estimated rate of $167 per hour, the total cost per application is $2004. The annual cost is expected to be $70,140 ($2004 × 35). The 10-year present value, 2003–2012, is approximately $540,000.

Congress intended to broaden the sources of capital for owners of U.S. vessels engaged in the coastwise trade by creating new lease-financing options. This rule removes the technical impediments to using various techniques for financing vessels operating in the domestic trade by increasing the sources of capital available to vessel owners.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

This rule will affect vessel owners and charterers who choose to take advantage of the lease-financing option. This option reduces the burden on owners by increasing vessel-financing options that would be acceptable for vessel documentation, enabling vessel owners to obtain the cheapest financing available. Companies tend to choose lease financing only if they expect its costs to be offset by increased profits. Under this rule, to take advantage of the lease-financing option, both the vessel owner and vessel charterer must submit affidavits and a copy of their charter or sub-charter to the NVDC. The estimated cost of preparing and submitting this material will be minimal.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking. The NPRM and SNPRM provided small businesses, organizations, and governmental jurisdictions with a Coast Guard contact to handle questions concerning this rule's provisions.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Sections 67.147 and 67.179 amend the collection-of-information requirements for vessel owners and charterers applying to engage in the coastwise trade under the lease-financing provisions of 46 U.S.C. 12106(e). The Coast Guard needs this information to determine whether an entity meets the statutory requirements. These provisions will require modifying the burden in the previously approved collection under OMB Control Number 2115–0110 (now 1625–0027). No comments were received relating to the collection-of-information requirements as presented in the NPRM or SNPRM.

As required by 44 U.S.C. 3507(d), we submitted a copy of this rule to the Office of Management and Budget (OMB) for its review of the collection of information. The section numbers are §§ 67.147 and 67.179, and the corresponding approval number from OMB is OMB Control Number 1625–0027 (formerly 2115–0110). OMB has not yet completed its review of, or approved the changes to, this collection. Therefore, §§ 67.147 and 67.179 in this rule will not become effective until

approved by OMB. We will publish a document in the **Federal Register** announcing OMB's approval and effective date of those sections.

You are not required to respond to a collection of information unless it displays a currently valid OMB control number.

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Several commenters contend that the proposals in the NPRM and the SNPRM would accomplish a taking of private property without just compensation in violation of the 5th amendment to the U.S. Constitution and international law. They argue that they have invested millions of dollars in lease-financing transactions in reliance on the Coast Guard's assurances that their transactions would be approved by the Coast Guard. Although the comments do not set forth the specifics of their claims of takings, the comments do appear to assert that the Coast Guard created a property right in the transactions engaged in by the commenters when it approved their applications and that the proposals in the NPRM and SNPRM, to the extent that they differ materially from past policies, would diminish the value of that property right, thus resulting in a compensable taking.

We disagree that the regulations accomplish such a taking. The courts have recognized two types of takings in the context of regulatory actions by Federal agencies. The first is a regulatory taking, and the second is a categorical taking. The rules with respect to each type were recently set forth in *Maritrans Inc.* v. *United States* (No. 96–483 C, Dec. 21, 2001; 51 Fed. Cl. 277; 2001 U.S. Claims Lexis 263; 53 ERC (BNA) 1989; 2002 AMC 419). Briefly, the court stated, with respect to both types of takings, that a mere diminution, however serious, is insufficient to demonstrate a taking (Slip op. at p. 5). According to the U.S. Supreme Court, legislation readjusting rights and burdens is not unlawful solely because it upsets settled expectations (*Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 15–16 (1976)). The commenters have not asserted that the vessels they are operating under lease-financing coastwise endorsements will become valueless as a result of this rulemaking. They have asserted that they may, in the future, have to restructure or divest their investment or adjust their expectations as to how much longer and under what circumstances they can continue to so operate them. However, these claims are insufficient to establish a compensable taking under the Constitution or under international law.

The commenters further contend they have a compensable claim under the Restatement of the Foreign Relations Law of the United States, section 712. These claims are governed by section 713(2) of the Restatement. Section 713(2)(a) allows parties to pursue remedies provided by international agreement. Here, commenters suggest that the Charter of Economic Rights and Duties of States applies. Yet, the Charter only governs state action nationalizing, expropriating, or transferring private property. The Charter does not apply here because the regulations will not accomplish any of these actions. Other subsections of section 713 of the Restatement are equally inapplicable on their face.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order, although it is considered a ''significant regulatory action'' under Executive Order 12866. We expect that this rulemaking will not have a significant adverse effect on the supply, distribution, or use of energy, including a shortfall in supply, price increases, and increased use of foreign supplies. The Administrator of the Office of Information and Regulatory Affairs has not designated this rulemaking as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have considered the environmental impact of this rule and concluded that, under figure 2–1, paragraph (34)(d), of Commandant Instruction M16475.lD, this rule is categorically excluded from further environmental documentation. This rulemaking is administrative in nature and identifies the information necessary to apply for a coastwise endorsement under 46 U.S.C. 12106(e). A ''Categorical Exclusion Determination'' is available in the docket where indicated under **ADDRESSES.**

List of Subjects in 46 CFR Part 67

Reporting and recordkeeping requirements, Vessels.

■ For the reasons discussed in the preamble, the Coast Guard amends 46 CFR part 67 as follows:

PART 67—DOCUMENTATION OF VESSELS

■ 1. The authority citation for part 67 is revised to read as follows:

Authority: 14 U.S.C. 664; 31 U.S.C. 9701; 42 U.S.C. 9118; 46 U.S.C. 2103, 2107, 2110, 12106, 12120, 12122; 46 U.S.C. app. 876; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 67.3, revise the definition for the term ''person''; and add, in alphabetical order, definitions for the terms ''affiliate,'' ''group,'' ''operation or management of vessels,'' ''parent,'' ''primarily engaged in leasing or other financing transactions,'' ''sub-charter,'' and ''subsidiary'' to read as follows:

§ 67.3 Definitions.

* * * * *

Affiliate means a person that is less than 50 percent owned or controlled by another person.

* * * * *

Group means the person that owns a vessel, the parent of that person, and all subsidiaries and affiliates of the parent of that person.

* * * * *

Operation or management of vessels means all activities related to the use of vessels to provide services. These activities include ship agency; ship brokerage; activities performed by a vessel operator or demise charterer in exercising direction and control of a vessel, such as crewing, victualing, storing, and maintaining the vessel and ensuring its safe navigation; and activities associated with controlling the use and employment of the vessel under a time charter or other use agreement. It does not include activities directly associated with making financial investments in vessels or the receipt of earnings derived from these investments.

Parent means any person that directly or indirectly owns or controls at least 50 percent of another person. If an owner's parent is directly or indirectly controlled at least 50 percent by another person, that person is also a parent of the owner. Therefore, an owner may have multiple parents.

Person means an individual; corporation; partnership; limited liability partnership; limited liability company; association; joint venture; trust arrangement; and the government of the United States, a State, or a political subdivision of the United States or a State; and includes a trustee, beneficiary, receiver, or similar representative of any of them.

Primarily engaged in leasing or other financing transactions means lease financing, in which more than 50 percent of the aggregate revenue of a person is derived from banking, investing, lease financing, or other similar transactions.

* * * * *

Sub-charter means all types of charters or other contracts for the use of a vessel that are subordinate to a charter. The term includes, but is not limited to, a demise charter, a time charter, a voyage charter, a space charter, and a contract of affreightment.

Subsidiary means a person at least 50 percent of which is directly or indirectly owned or controlled by another person.

* * * * *

■ 3. Add § 67.20 to read as follows:

§ 67.20 Coastwise endorsement for a vessel under a demise charter.

(a) Except as under paragraphs (b) through (e) of this section, to be eligible for a coastwise endorsement under 46 U.S.C. 12106(e) and to operate in coastwise trade under 46 U.S.C. 12106(e) and 12110(b), a vessel under a demise charter must meet the following:

(1) The vessel is eligible for documentation under 46 U.S.C. 12102.

(2) The vessel is eligible for a coastwise endorsement under § 67.19(c), has not lost coastwise eligibility under § 67.19(d), and was financed with lease financing.

(3) The person that owns the vessel, the parent of that person, or a subsidiary of the parent of that person is primarily engaged in leasing or other financing transactions.

(4) The person that owns the vessel is organized under the laws of the United States or of a State.

(5) None of the following is primarily engaged in the direct operation or management of vessels:

(i) The person that owns the vessel.

(ii) The parent of the person that owns the vessel.

(iii) The group of which the person that owns the vessel is a member.

(6) The ownership of the vessel is primarily a financial investment without the ability and intent to directly or indirectly control the vessel's operations by a person not primarily engaged in the direct operation or management of vessels.

(7) The majority of the aggregate revenues of each of the following is not derived from the operation or management of vessels:

(i) The person that owns the vessel.

(ii) The parent of the person that owns the vessel.

(iii) The group of which the person that owns the vessel is a member.

(8) None of the following is primarily engaged in the operation or management of commercial, foreign-flag vessels used for the carriage of cargo for parties unrelated to the vessel's owner or charterer:

(i) The person that owns the vessel.

(ii) The parent of the person that owns the vessel.

(iii) The group of which the person that owns the vessel is a member.

(9) The person that owns the vessel has transferred to a qualified U.S. citizen under 46 U.S.C. app. 802 full possession, control, and command of the U.S.-built vessel through a demise charter in which the demise charterer is considered the owner *pro hac vice* during the term of the charter.

(10) The charterer must certify to the Director, National Vessel Documentation Center, that the charterer is a citizen of the United States for engaging in the coastwise trade under 46 U.S.C. app. 802.

(11) The demise charter is for a period of at least 3 years, unless a shorter period is authorized by the Director, National Vessel Documentation Center, under circumstances such as—

(i) When the vessel's remaining life would not support a charter of 3 years; or

(ii) To preserve the use or possession of the vessel.

(b) A vessel under a demise charter that was eligible for, and received, a document with a coastwise endorsement under § 67.19 and 46 U.S.C. 12106(e) before February 4, 2004, may continue to operate under that endorsement on and after that date and may renew the document and endorsement if the certificate of documentation is not subject to—

(1) Exchange under § 67.167(b)(1) through (b)(3);

(2) Deletion under § 67.171(a)(1) through (a)(6); or

(3) Cancellation under § 67.173.

(c) A vessel under a demise charter that was constructed under a building contract that was entered into before February 4, 2004, in reliance on a letter ruling from the Coast Guard issued before February 4, 2004, is eligible for documentation with a coastwise endorsement under § 67.19 and 46 U.S.C. 12106(e). The vessel may continue to operate under that endorsement and may renew the document and endorsement if the certificate of documentation is not subject to—

(1) Exchange under § 67.167(b)(1) through (b)(3);

(2) Deletion under § 67.171(a)(1) through (a)(6); or

(3) Cancellation under § 67.173.

(d) A barge deemed eligible under 46 U.S.C. 12106(e) and 12110(b) to operate in coastwise trade before February 4, 2004, may continue to operate in that trade after that date unless—

(1) The ownership of the barge changes in whole or in part;

(2) The general partners of a partnership owning the barge change by addition, deletion, or substitution;

(3) The State of incorporation of any corporate owner of the barge changes;

(4) The barge is placed under foreign flag;

(5) Any owner of the barge ceases to be a citizen within the meaning of subpart C of this part; or

(6) The barge ceases to be capable of transportation by water.

(e) A barge under a demise charter that was constructed under a building contract that was entered into before February 4, 2004, in reliance on a letter ruling from the Coast Guard issued before February 4, 2004, is eligible to operate in coastwise trade under 46 U.S.C. 12106(e) and 12110(b). The barge may continue to operate in coastwise trade unless—

(1) The ownership of the barge changes in whole or in part;

(2) The general partners of a partnership owning the barge change by addition, deletion, or substitution;

(3) The State of incorporation of any corporate owner of the barge changes;

(4) The barge is placed under foreign flag;

(5) Any owner of the barge ceases to be a citizen within the meaning of subpart C of this part; or

(6) The barge ceases to be capable of transportation by water.

(f) To apply for a coastwise endorsement for a vessel under a demise charter, see § 67.147 and, for a barge, see § 67.179.

§ 67.35 [Amended]

■ 4. In § 67.35, at the end of paragraph (c), add the words ''or the vessel qualifies under § 67.20''.

■ 5. In § 67.36, revise paragraphs (c)(1) and (c)(2) to read as follows:

§ 67.36 Trust.

* * * * *

(c) * * *

(1) It meets the requirements of paragraph (a) of this section and at least 75 percent of the equity interest in the trust is owned by citizens; or

(2) It meets the requirements of § 67.20.

■ 6. In § 67.39, revise paragraphs (c)(1) and (c)(2) to read as follows:

§ 67.39 Corporation.

* * * * *

(c) * * *

(1) It meets the requirements of paragraph (a) of this section and at least 75 percent of the stock interest in the corporation is owned by citizens; or

(2) It meets the requirements of § 67.20.

* * * * *

■ 7. Add § 67.147 to read as follows:

§ 67.147 Application procedure: Coastwise endorsement for a vessel under a demise charter.

(a) In addition to the items under § 67.141, the person that owns the vessel (other than a barge under § 67.179) and that seeks a coastwise endorsement under § 67.20 must submit the following to the National Vessel Documentation Center:

(1) A certification in the form of an affidavit and, if requested by the Director, National Vessel Documentation Center, supporting documentation establishing the following facts with respect to the transaction from an individual who is authorized to provide certification on behalf of the person that owns the vessel and who is an officer in a corporation, a partner in a partnership, a member of the board of managers in a limited liability company, or their equivalent. The certificate must certify the following:

(i) That the person that owns the vessel, the parent of that person, or a subsidiary of a parent of that person is primarily engaged in leasing or other financing transactions.

(ii) That the person that owns the vessel is organized under the laws of the United States or a State.

(iii) That none of the following is primarily engaged in the direct operation or management of vessels:

(A) The person that owns the vessel.

(B) The parent of the person that owns the vessel.

(C) The group of which the person that owns the vessel is a member.

(iv) That ownership of the vessel is primarily a financial investment without the ability and intent to directly or indirectly control the vessel's operations by a person not primarily engaged in the direct operation or management of vessels.

(v) That the majority of the aggregate revenues of each of the following is not derived from the operation or management of vessels:

(A) The person that owns the vessel.

(B) The parent of the person that owns the vessel.

(C) The group of which the person that owns the vessel is a member.

(vi) That none of the following is primarily engaged in the operation or management of commercial, foreign-flag vessels used for the carriage of cargo for parties unrelated to the vessel's owner or charterer:

(A) The person that owns the vessel.

(B) The parent of the person that owns the vessel.

(C) The group of which the person that owns the vessel is a member.

(vii) That the person that owns the vessel has transferred to a qualified United States citizen under 46 U.S.C. app. 802 full possession, control, and command of the U.S.-built vessel through a demise charter in which the demise charterer is considered the owner *pro hac vice* during the term of the charter.

(viii) That the vessel is financed with lease financing.

(2) A copy of the charter, which must provide that the charterer is deemed to be the owner *pro hac vice* for the term of the charter.

(b) The charterer must submit the following to the National Vessel Documentation Center:

(1) A certificate certifying that the charterer is a citizen of the United States for the purpose of engaging in the coastwise trade under 46 U.S.C. app. 802.

(2) Detailed citizenship information in the format of form CG–1258, Application for Documentation, section G, citizenship. The citizenship information may be attached to the form CG–1258 that is submitted under § 67.141 and must be signed by, or on behalf of, the charterer.

(c) Whenever a charter under paragraph (a) of this section is amended, the vessel owner must file a copy of the amendment with the Director, National Vessel Documentation Center, within 10 days after the effective date of the amendment.

(d) Whenever the charterer of a vessel under paragraph (a) of this section enters into a sub-charter with another person for the use of the vessel—

(1) The charterer must file a copy of the sub-charter and amendments to the sub-charter with the Director, National Vessel Documentation Center, within 10 days after the effective date of the sub-charter if requested to do so by the Director; and

(2) If the sub-charter is a demise charter, the sub-charterer must provide detailed citizenship information in the format of form CG–1258, Application for Documentation, section G, citizenship.

(e) A person that submits a false certification under this section is subject to penalty under 46 U.S.C. 12122 and 18 U.S.C. 1001.

■ 8. In § 67.167, in paragraph (c)(8), remove the last ''or''; in paragraph (c)(9), remove the period and add, in its place, a semicolon; and add paragraphs (c)(10) and (c)(11) to read as follows:

§ 67.167 Requirement for exchange of Certificate of Documentation.

* * * * *

(c) * * *

(10) For a vessel with a coastwise endorsement under 46 U.S.C. 12106(e), except for a vessel with a coastwise endorsement under 46 U.S.C. 12106(e) that was in effect before February 4, 2004—

(i) The demise charter expires or is transferred to another charterer;

(ii) The citizenship of the charterer or sub-charterer changes to the extent that they are no longer qualified for a coastwise endorsement;

(iii) Neither the person that owns the vessel, nor the parent of that person, nor any subsidiary of the parent of that person is primarily engaged in leasing or other financing transactions;

(iv) The majority of the aggregate revenues of at least one of the following is derived from the operation or management of vessels:

(A) The person that owns the vessel.

(B) The parent of the person that owns the vessel.

(C) The group of which the person that owns the vessel is a member; or

(v) At least one of the following is primarily engaged in the operation or management of commercial, foreign-flag vessels used for the carriage of cargo for parties unrelated to the vessel's owner or charterer:

(A) The person that owns the vessel.

(B) The parent of the person that owns the vessel.

(C) The group of which the person that owns the vessel is a member; or

(11) For a vessel with a coastwise endorsement under 46 U.S.C. 12106(e) that was in effect before February 4, 2004—

(i) The demise charter expires or is transferred to another charterer;

(ii) The citizenship of the charterer or sub-charterer changes to the extent that they are no longer qualified for a coastwise endorsement; or

(iii) Neither the person that owns the vessel, nor the parent of that person, nor a subsidiary of the parent of that person is primarily engaged in leasing or other financing transactions.

* * * * *

■ 9. Add § 67.179 to subpart M to read as follows:

§ 67.179 Application procedure: Coastwise operation of a barge under a demise charter.

(a) The person that owns a barge qualified to engage in coastwise trade under the lease-financing provisions of 46 U.S.C. 12106(e) must submit the following to the National Vessel Documentation Center:

(1) A certification, in the form of an affidavit and, if requested by the Director, National Vessel Documentation Center, supporting documentation establishing the following facts with respect to the transaction from an individual who is authorized to provide certification on behalf of the person that owns the barge and who is an officer in a corporation, a partner in a partnership, a member of the board of managers in a limited liability company, or their equivalent. The certificate must certify the following:

(i) That the person that owns the barge, the parent of that person, or a subsidiary of the parent of that person is primarily engaged in leasing or other financing transactions.

(ii) That the person that owns the barge is organized under the laws of the United States or a State.

(iii) That none of the following is primarily engaged in the direct operation or management of vessels:

(A) The person that owns the barge.

(B) The parent of the person that owns the barge.

(C) The group of which the person that owns the barge is a member.

(iv) That ownership of the barge is primarily a financial investment without the ability and intent to directly or indirectly control the barge's operations by a person not primarily engaged in the direct operation or management of the barge.

(v) That the majority of the aggregate revenues of each of the following is not derived from the operation or management of vessels:

(A) The person that owns the barge.

(B) The parent of the person that owns the barge.

(C) The group of which the person that owns the barge is a member.

(vi) That none of the following is primarily engaged in the operation or management of commercial, foreign-flag vessels used for the carriage of cargo for parties unrelated to the vessel's owner or charterer:

(A) The person that owns the barge.

(B) The parent of the person that owns the barge.

(C) The group of which the person that owns the barge is a member.

(vii) That the person that owns the barge has transferred to a qualified United States citizen under 46 U.S.C. app. 802 full possession, control, and command of the U.S.-built barge through a demise charter in which the demise charterer is considered the owner *pro hac vice* for the term of the charter.

(viii) That the barge is qualified to engage in the coastwise trade and that it is owned by a person eligible to own vessels documented under 46 U.S.C. 12102(e).

(ix) That the barge is financed with lease financing.

(2) A copy of the charter, which must provide that the charterer is deemed to be the owner *pro hac vice* for the term of the charter.

(b) The charterer must submit the following to the National Vessel Documentation Center:

(1) A certificate certifying that the charterer is a citizen of the United States for engaging in the coastwise trade under 46 U.S.C. app. 802.

(2) Detailed citizenship information in the format of form CG–1258, Application for Documentation, section G, citizenship. The citizenship information must be signed by, or on behalf of, the charterer.

(c) Whenever a charter under paragraph (a) of this section is amended, the barge owner must file a copy of the amendment with the Director, National Vessel Documentation Center, within 10 days after the effective date of the amendment.

(d) Whenever the charterer of a barge under paragraph (a) of this section enters into a sub-charter with another person for the use of the barge—

(1) The charterer must file a copy of the sub-charter and amendments to the sub-charter with the Director, National Vessel Documentation Center, within 10 days after the effective date of the sub-charter if requested to do so by the Director; and

(2) If the sub-charter is a demise charter, the sub-charterer must provide detailed citizenship information in the format of form CG–1258, Application for Documentation, section G, citizenship.

(e) A person that submits a false certification under this section is subject to penalty under 46 U.S.C. 12122 and 18 U.S.C. 1001.

Dated: January 29, 2004.

Thomas H. Collins,

Admiral, Coast Guard, Commandant.

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