

**DEPARTMENT OF HOMELAND SECURITY****Coast Guard****46 CFR Part 67**

[USCG-2003-14472]

RIN 1625-AA63

**DEPARTMENT OF TRANSPORTATION****Maritime Administration****46 CFR Part 221**

[Docket No. MARAD-2003-15171]

RIN 2133-AB51

**Vessel Documentation: Lease Financing for Vessels Engaged in the Coastwise Trade; Second Rulemaking****AGENCIES:** Coast Guard, DHS, and Maritime Administration, DOT.**ACTION:** Joint notice of proposed rulemaking.**SUMMARY:** This is a joint notice of proposed rulemaking by the Coast Guard and the Maritime Administration.

The Coast Guard proposes to amend its regulations on documentation, under the lease-financing provisions, of vessels engaged in the coastwise trade. One proposal addresses the issue of whether we should prohibit or restrict the chartering back (whether by time charter, voyage charter, space charter, contract of affreightment, or other contract for the use of a vessel) of a lease-financed vessel to the parent of the vessel owner or to a subsidiary or affiliate of the parent. A second proposal would establish a limit on the length of time that a coastwise endorsement issued before February 4, 2004, would run. The final subject concerns the question of whether applications for an endorsement under the lease-financing provisions should be reviewed and approved by an independent third party with expertise in vessel chartering. Though these subjects were discussed in many of the comments received to the previous Coast Guard rulemaking on lease financing, we feel that we need additional public input specifically focused on these subjects and on our proposed changes. These proposals would amend the final rule (USCG-2001-8825) on vessel documentation under lease financing found elsewhere in this issue of the **Federal Register**.

The Maritime Administration (MARAD) proposes to amend its regulations to require MARAD's approval of all transfers of the use of a

lease-financed vessel engaged in the coastwise trade back to the vessel's foreign owner, the parent of the owner, a subsidiary or affiliate of the parent, or an officer, director, or shareholder of one of them. In 1992, MARAD amended its regulations to grant general approval for time charters of U.S.-flag vessels to charterers that were not U.S. Citizens (non-citizens) and to eliminate MARAD's review of these time charters. The lease-financing provisions potentially allow a non-citizen to exert additional control over a vessel operated in the coastwise trade by becoming the owner of the vessel and time chartering the vessel back to itself or to a related entity through an intermediate U.S. Citizen bareboat charterer. MARAD's review of charter arrangements in the limited circumstances where the time charterer is related to the non-citizen vessel owner will ensure that U.S. Citizens maintain control over vessels operating in the coastwise trade.

**DATES:** Comments and related material must reach the Docket Management Facility on or before May 4, 2004. Comments sent to the Office of Management and Budget (OMB) on collection of information must reach OMB on or before May 4, 2004.

**ADDRESSES:** You may submit comments identified by Coast Guard docket number USCG-2003-14472 or MARAD Docket No. MARAD-2003-15171 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Web site:* <http://dms.dot.gov>.

(2) *Mail:* Docket Management Facility (USCG-2003-14472 or MARAD Docket No. MARAD-2003-15171), U.S. Department of Transportation, room PL-401, 400 Seventh Street SW., Washington, DC 20590-0001.

(3) *Fax:* 202-493-2251.

(4) *Delivery:* Room PL-401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

(5) Federal eRulemaking Portal: <http://www.regulations.gov>.

You must also mail comments on collection of information to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, ATTN: Desk Officer, U.S. Coast Guard.

**FOR FURTHER INFORMATION CONTACT:**

*Coast Guard:* If you have questions on the Coast Guard's proposed rule, call Patricia Williams, Deputy Director,

National Vessel Documentation Center, Coast Guard, telephone 304-271-2506.

*Maritime Administration:* If you have questions on the Maritime Administration's proposed rule, call John T. Marquez, Jr., Maritime Administration, telephone 202-366-5320.

*Docket Management Facility:* If you have questions on viewing or submitting material to the docket, call Andrea M. Jenkins, Program Manager, Docket Operations, telephone 202-366-0271.

**SUPPLEMENTARY INFORMATION:****Public Participation and Request for Comments**

We (the Coast Guard and the Maritime Administration, depending upon the context) encourage you to participate in this rulemaking by submitting comments and related material. All comments received will be posted, without change, to <http://dms.dot.gov> and will include any personal information you have provided. The Coast Guard has an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's "Privacy Act" paragraph below.

*Submitting comments:* If you submit a comment, please include your name and address, identify the docket number for this rulemaking (either USCG-2003-14472 or MARAD Docket No. MARAD-2003-15171), indicate the specific section of this document to which each comment applies, and give the reason for each comment. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

*Viewing comments and documents:*

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://dms.dot.gov> at any time and conduct a simple search using the docket number. You may also visit the Docket Management Facility in room PL-401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5

p.m., Monday through Friday, except Federal holidays.

*Privacy Act:* Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit <http://dms.dot.gov>.

### Public Meeting

The Coast Guard and MARAD plan to hold a joint public meeting on this rulemaking at a time and place to be given in a separate notice published in the **Federal Register**.

Though the Coast Guard did not believe that a public meeting would provide sufficient benefit to justify the delay in publishing its final rule under Coast Guard docket USCG-2001-8825 (which appears elsewhere in this issue of the **Federal Register**), we do believe that a public meeting on the issues raised in this notice will benefit the present rulemaking. At present, we plan only one public meeting, but you may submit a request for more than one to the Docket Management Facility at the address under **ADDRESSES** explaining why more than one would be beneficial. If we determine that more than one would aid this rulemaking, we will publish the dates of the meetings and their locations in the separate notice in the **Federal Register**.

### Related Rulemakings

*Coast Guard.* A separate but related Coast Guard final rule entitled "Vessel Documentation: Lease Financing for Vessels Engaged in the Coastwise Trade" (RIN 1625-AA28 (formerly RIN 2115-AG08), USCG-2001-8825) appears elsewhere in this issue of the **Federal Register**. The changes that the Coast Guard is proposing in this notice of proposed rulemaking, if adopted, would amend that final rule.

*Maritime Administration.* MARAD published a notice of policy review with request for comments entitled "General Approval of Time Charters" on August 2, 2002, in the **Federal Register** (67 FR 50406). The notice raises the question of whether MARAD's policy of granting general approval of time charters should be changed. The docket number for that project is Docket No. MARAD-2002-12842.

### Background and Purpose

*Coast Guard.* In 1996, Congress amended the vessel documentation laws

to allow 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 is 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 (owner), 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.

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, 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 U.S. and be operated and controlled by U.S. Citizens, which is vital to U.S. military and economic security.

The Coast Guard issued a final rule (USCG-2001-8825, published elsewhere in this issue of the **Federal Register**), which sets out requirements concerning eligibility, under lease financing, for a coastwise endorsement to a vessel's Certificate of Documentation and the procedure to apply for such an endorsement. Several of the comments to that rulemaking raised important questions which are worthy of consideration but ones on which we need further assistance from industry and the public. It is those questions that are the subjects of the Coast Guard's second rulemaking on lease financing of vessels in the coastwise trade.

*MARAD.* Section 9 of the Shipping Act of 1916, 46 App. U.S.C. 808, requires prior approval of the Secretary of Transportation (MARAD) for, among other things, the charter to non-citizens of documented vessels owned by citizens of the United States. Before 1989, MARAD's approval was required on a case-by-case basis for time charters of U.S.-flag vessels to non-citizens. However, as a result of substantial changes to the Ship Mortgage Act

(repealed in 46 App. U.S.C. 921) and amendments to section 9 of the Shipping Act, MARAD began a rulemaking in 1989 to amend its regulations at 46 CFR part 221, Regulated Transactions Involving Documented Vessels and other Maritime Interests. The rulemaking culminated in the publication of a final rule on June 3, 1992, 57 FR 23470, that liberalized the approval process under section 9 for certain transfers to non-citizens.

Part 221 as now written grants general approval of the sale, mortgage, lease, charter, etc. (but not transfer of registry or bareboat charter of vessels operating in coastwise trade) of citizen-owned vessels to a non-citizen, so long as the country is not at war, there is no Presidential declaration of national emergency invoking section 37 of the Shipping Act of 1916, and the non-citizen is not subject to the control of a county with whom trade is prohibited. The general approval of time charters to non-citizens was predicated on the fact that a time charterer merely rents cargo space on a vessel and does not assume substantially all of the benefits and risks incident to the ownership of the vessel or retain a property interest in the vessel. The U.S.-Citizen vessel owner or bareboat charterer retains possession of the vessel and maintains the vessel, employs and pays the crew, and is responsible for the expenses of running the vessel.

MARAD's regulation granting general approval was based on the assumption that the vessel would ultimately be operated and controlled by U.S. Citizens because only a U.S. Citizen could own or bareboat charter a vessel to be operated in the coastwise trade. The lease-financing provisions potentially allow a non-citizen to now become the owner of the vessel and, through an intermediate U.S.-Citizen bareboat charterer, to time charter the vessel back to itself or a related entity. This scenario was not contemplated by MARAD when it promulgated its regulation granting general approval of time charters to non-citizens. Because a non-citizen can exert greater control over the vessel by participating as both the vessel owner and time charterer, we believe that MARAD review of time charters in this limited circumstance is warranted under section 9(c)(1) of the Shipping Act of 1916, 46 U.S.C. App. 808(c)(1).

On August 2, 2002, MARAD published a request for comments in the **Federal Register**, 67 FR 50406, to determine whether our policy of granting general approval for time charters to non-citizens should be amended. The commenters overwhelmingly agreed that a return to

MARAD review of all time charters to non-citizens would not be a useful change. However, there was significant support for MARAD review of time charters in the limited circumstances where the time charterer is related to the non-citizen vessel owner and the vessel is to be operated in the coastwise trade.

We agree with the commenters that MARAD review of time charters is necessary where the time charterer is related to the non-citizen vessel owner in order to ensure that non-citizens are not able to exercise an excessive level of control over vessels operating in the coastwise trade. Accordingly, we propose to amend our regulations at 46 CFR 221.13 to require MARAD approval of time charters where the vessel has been documented pursuant to 46 U.S.C. 12016(e) and is time chartered back to an entity that is related to the non-citizen vessel owner.

#### Issues Addressed and Discussion of Proposed Changes—Coast Guard

The Coast Guard's proposed rule addresses the following subjects:

1. *To what extent and how should the Coast Guard prohibit or restrict the chartering back (whether by time charter, voyage charter, space charter, contract of affreightment, or other contract for the use of a vessel) of a lease-financed vessel to the owner, the parent, or to a subsidiary or affiliate of the parent?*

The proposed changes on this subject are in proposed § 67.20(a)(6) and (a)(9), either or both of which are proposed for adoption.

Congress stated that control of the lease-financed vessel holding a coastwise endorsement must be in the demise charterer. Because control of the vessel may be affected by a charter-back from the demise charterer to the owner, the owner's parent, or to a subsidiary or affiliate of the parent, we believe that the intent of Congress would be frustrated if charter-back arrangements were not prohibited or at least restricted. We present two amendments (§§ 67.20(a)(6) and 67.20(a)(9)) for restricting charters-back, either or both of which are proposed for adoption.

*Alternative 1 (§ 67.20(a)(6)).* The first alternative proposal would amend § 67.20(a)(6), which requires that the vessel owner not be primarily engaged in the direct operation or management of vessels. The proposed change would extend this limitation not just to the owner but also to the overall group of which that owner is a member. As defined in § 67.3, the word "group" includes the owner, the owner's parent, and all subsidiaries and affiliates of the parent. This provision would prohibit

the demise charterer from sub-chartering back to a member of the owner's group. We believe that a charter-back arrangement could be permissible under the statute if the charter-back arrangement is merely for the purpose of providing the legal framework under which the vessel will earn revenue for the demise charterer and if the demise charterer retains all aspects of control of the operation of the vessel, other than that which is directly involved in generating revenue. We recognize, however, that proposed § 67.20(a)(6) does not contain any criteria by which the Coast Guard is to make a determination as to whether the charter-back arrangement is limited to providing the legal basis and provisions for earning revenue or whether the arrangement transfers control over the vessel's operations or management to the sub-charterer. We hope that your comments to this NPRM and comments offered during the public meeting will provide us with an informed basis for making these determinations. If you believe that there is a more effective way to ensure that control of the vessel is not returned to the owner's group through a charter-back arrangement, please tell us.

*Alternative 2 (§ 67.20(a)(9)).* The second alternative proposal would amend § 67.20(a)(9), which requires that the demise charterer be a person considered to be the owner *pro hac vice* during the term of the charter. The proposed change would add that a demise charterer is not considered to be the owner *pro hac vice* when the vessel is subject to a sub-charter to a member of the group of which the vessel's owner is a member, except when the vessel is engaged in carrying cargo owned by the vessel's owner or by a member of the group of which the vessel's owner is a member and is not carrying cargo for any other entity. This proposal would effectively prevent the chartering-back to a member of the owner's group, unless the vessel is used solely for carrying proprietary cargo of a member of the group. We derived this proposal from some of the comments that urged such a restriction in order to effectuate the intent of Congress that the Jones Act not be undermined. Though many other comments opposed any restriction on chartering-back, we believe that Congress intended to adhere as closely as possible to Jones Act principles, as reflected in the Conference Report. Our proposal in § 67.20(a)(9) is similar in principle to the Bowaters amendment (46 U.S.C. app. 883-1), a limited exception to the Jones Act. Thus, in that regard, our proposal is consistent with

what Congress has authorized in the past as a limited exception to the Jones Act.

2. *Establish limitations on the grandfather rights under § 67.20(b) through (e).*

The grandfather provisions in § 67.20(b) and (c) of the Coast Guard's final rule (USCG-2001-8825), published elsewhere in this issue of the **Federal Register**, allow vessels (other than barges) with endorsements issued before the date of publication of that final rule to continue to operate (with certain specified exceptions) under that endorsement indefinitely. Paragraphs (d) and (e) of that final rule allow barges deemed eligible to operate in coastwise trade under 46 U.S.C. 12106(e) and 12110(b) to continue to operate (with certain specified exceptions) in the coastwise trade indefinitely. In order to bring these vessels and barges under the regulations within a reasonable time, yet be responsive to the economic interests of those who have made investments relying on the Coast Guard's initial interpretation of the lease-financing statute, we propose four changes.

First, § 67.20(b) would be amended to limit the term of the grandfather provision to 3 years after the publication date of the final rule under USCG-2001-8825 (which is the same date as the publication date of this NPRM) and allow it to be renewed annually during that time.

Second, § 67.20(c) would be amended to address the following situation. If the vessel was constructed under a building contract that was entered into before the date of publication of the final rule under USCG-2001-8825 (which is the same date as the publication date of this NPRM) in reliance on a letter ruling from the Coast Guard issued before that date, the vessel would be eligible for a coastwise endorsement and may continue to operate under that endorsement for 3 years after the initial issuance of that endorsement and may renew the document and endorsement during that 3-year period (if the certificate of documentation is not subject to the listed exceptions).

Third, § 67.20(d) would be amended to limit the term of the grandfather provision as it applies to undocumented barges operating under 46 U.S.C. 12102(e) and 12110(b) to 3 years after the publication date of the final rule under USCG-2001-8825 (which is the same date as the publication date of this NPRM).

Lastly, § 67.20(e) would be amended to limit the term of the grandfather provision as it applies to the operation of undocumented barges constructed in reliance upon a letter ruling from the

Coast Guard issued before the publication date of the final rule under USCG–2001–8825 (which is the same date as the publication date of this NPRM) to 3 years after initial entry into service.

We chose a 3-year period as a reasonable amount of time to provide owners with sufficient time to plan and effectuate whatever restructuring is necessary to comply with the regulations. Also, Congress specified, in the lease-financing statute, a term of 3 years (subject to certain exceptions) as the minimum duration of a “long-term” demise charter.

Several comments to the previous rulemaking (USCG–2001–8825) argue that no vessels should be grandfathered and that, once the final rule under USCG–2001–8825 is published, all vessels must comply with that rule. However, we feel that the likely result of such a position would be that the holders of endorsements received before the final rule was published in good faith reliance on the policy of the Coast Guard at that time would have little time to restructure, perhaps at considerable financial expense, before the document is due for annual renewal.

Other comments to USCG–2001–8825, mainly from those who received endorsements between 1996 and 2002, argue that the grandfather provision as it appears in § 67.20(b) of the final rule is too restrictive. They would like us to have adopted a rule that would allow the continued use of the same type of financial transactions or arrangements under which their endorsements were issued. Thus, an application for an endorsement in the future could be based on one of these transactions or arrangements. In their view, a grandfather provision should not just cover the particular vessel that received the endorsement. They argue that this amounts to too little effective relief from the requirements of the final rule.

We believe that to require those vessel owners that relied on our prior practice and policy to comply with USCG–2001–8825 upon the effective date would unnecessarily penalize them. At the same time, we do believe, where USCG–2001–8825 imposes additional or new obligations or restrictions on the issuance of endorsements under lease financing, that the prior holders should not be entitled either to unlimited renewals for the particular vessels or to continued use of the type of transaction or arrangement previously used. Instead, we are adopting a reasonable approach, providing business with a reasonable time to adjust to the new requirements consistent with Congressional language.

3. *Require that applications to the Coast Guard for an endorsement be audited by a third party.* The Coast Guard is considering requiring each applicant to provide, in addition to its own certifications under §§ 67.147 and 67.179, a certification from an independent auditor with expertise in the business of vessel financing and operations. That certification would provide additional assurance that the transaction in fact qualifies under the lease-financing statute and regulations. We recognize that this additional requirement would add time and cost to the process of preparing the application. We are particularly interested in obtaining comment on the following questions:

(a) Should an independent auditor be used?

(b) What are the minimum qualifications of an auditor?

(c) Who should select the auditor, the Coast Guard, another government agency, or the applicant?

(d) If the applicant selects the auditor, how should the Coast Guard ensure that the auditor is truly independent? Should the Coast Guard provide a list of approved auditors from which the applicant may choose?

(e) What standards does the auditor apply in deciding whether to examine the details of the proposed transaction beyond the face of the documents submitted?

(f) Would the added benefit provided by the certification by the independent auditor justify the extra time and cost of obtaining such a certification?

(g) Would such an audit be an inherently governmental function that should not be entrusted to an independent auditor?

(h) Should we increase our investigation and examination of applications for vessel documentation?

#### **Discussion of Proposed Changes: Maritime Administration**

MARAD proposes to amend its existing regulations in 46 CFR part 221, subpart B, on the approval of the sale, lease, charter, delivery, or any manner of transfer of an interest in or control of a U.S. documented vessel to a non-U.S. Citizen. Existing § 221.13(a) grants general approval of these transactions. The proposed change would require the approval of the Maritime Administrator when a vessel under 46 U.S.C. 12106(e) is involved and when the transfer is back to the vessel’s owner, a member of the owner’s group (*i.e.*, the owner, the parent of the owner, or a subsidiary or affiliate of the parent) or to an officer, director, or shareholder of the owner or a member of the owner’s group.

The general approval of certain transfers to non-citizens currently provided for in 46 CFR 221.13 was based on a statutory scheme in which a non-citizen could not be the owner and time charterer of a vessel. Prior to 1996, an owner of a vessel documented with a coastwise endorsement generally had to be a U.S. citizen. After passage of the Coast Guard Authorization Act of 1996, a vessel owner could be a non-citizen if the vessel was chartered under a demise charter to a U.S. citizen. Because 46 CFR 221.13 was not amended, the U.S.-citizen demise charterer of the vessel could still sub-charter the vessel to a non-citizen. If a non-citizen is permitted to own a vessel and to time charter the vessel back to itself or a related entity, it can potentially exert much greater control over the operation of the vessel. Accordingly, MARAD review of these transfers is warranted under 46 App. U.S.C. 808(c)(1).

If you believe that there is a more effective way to ensure that control of the vessel is not returned to the owner’s group, please provide comments. In addition, if you believe that the review or restriction of charter back arrangements in this limited circumstance will unduly restrict competition in the coastwise trade, we request that you provide comments.

#### **Assessment**

##### *Coast Guard*

Due to substantial public interest, the Coast Guard’s proposed rule is 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. A draft Assessment follows:

The grandfather provisions in § 67.20(b) through (e) would be revised to incorporate an appropriate time period after which the provision would no longer apply. The proposed rule would affect a small number of vessel owners and charterers whose coastwise endorsements were issued under the lease-financing provision since the passage of the Act in 1996.

Currently, there are 87 entities that have had their coastwise endorsements approved under the lease-financing option. We anticipate that at least two of these entities could be adversely affected by this proposed rule and could not, through the lease finance mechanism, charter back a vessel to an

entity related to the foreign owned entity that is financing the vessel. Under the proposed regulations, a vessel operator is not precluded from using lease financing as a mechanism for financing the vessel. The regulations would potentially restrict the operation of vessels that are documented under the lease-financing provisions to ensure that the vessels are properly chartered. The affected vessel owners are still free to engage in lease financing with an entity that qualifies as a U.S. citizen or a foreign owned entity that is not related to the time charterer of the vessel. Nevertheless, the vessel operator is not prohibited from using lease financing under the proposed regulations.

Although the proposed rule promulgates limitations to the grandfather provisions, it would allow companies to have a significant amount of time for planning and exploring other options. Based on this amount of time, we estimate the economic impact to be minimal. We encourage comments on this assessment, particularly those that clearly illustrate any specific negative economic impact of this proposed rulemaking.

#### *Maritime Administration*

Due to substantial public interest, MARAD's proposed rule is a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has reviewed it under that Order. It is "significant" under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979). A draft Assessment follows:

The proposed rule proposes to reinstate MARAD's review of transfers of control to non-citizens where the vessel has been documented by a non-citizen under the lease-financing provisions at 46 U.S.C. 12016(e) and the transfer is back to the non-citizen vessel owner or a related entity. When MARAD amended its regulations in 1992 to grant general approval for time charters of U.S.-flag vessels to charterers that were not U.S. Citizens, there was no opportunity for a non-citizen to be both the owner and charterer of a vessel engaged in coastwise trade. However, enactment of the lease-financing provisions inadvertently created that opportunity. Lease-financing provisions are intended to provide increased sources of capital for qualified owners engaged in coastwise trade. These provisions are not intended to allow increased ownership and control of

coastwise vessels by non-U.S. citizens. MARAD's review of charter arrangements in the limited circumstances where the time charterer is related to the non-citizen vessel owner will ensure that U.S. Citizens maintain control over vessels operating in the coastwise trade.

This proposed rulemaking modifies, but does not negate, financing opportunities available to some businesses engaged in coastwise trade. The rule continues to provide flexible financing structures and increased sources of capital to qualified U.S. entities that are entitled to engage in domestic trade. The corresponding costs and benefits of these changes in financing opportunities are not quantifiable at this time. Non-quantifiable benefits, however, are apparent. Effective enforcement of the Nation's cabotage laws has proven critical for several reasons. The cabotage laws help retain skilled merchant mariners, providing a strong U.S. merchant marine available to operate U.S. vessels in time of national emergency. In addition, these laws play a key role in preserving domestic capacity for shipbuilding and repair. Finally, in these days of heightened concerns about national security, it is evermore important to maintain transparency regarding vessel ownership and control.

Since 1996, only 87 entities have applied to document a vessel using the lease-financing provisions and, of those, only 30 have engaged in a charter back to the vessel owner or an entity related to the vessel owner. Accordingly, we expect the requirement for MARAD review to impact a very limited number of entities seeking to document a vessel with a coastwise endorsement. Furthermore, we believe that few, if any, of the 30 foreign-owned entities that own vessels documented under the lease-financing provisions that charter back to affiliates qualify as small businesses as defined by the Small Business Administration (see below).

#### **Small Entities**

##### *Coast Guard*

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), the Coast Guard has considered whether its proposed 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.

Currently, there are 87 entities that have had their coastwise endorsements approved under the lease-financing option. We anticipate that a minimal number of these entities could be adversely affected by this rule and would have to resort to using mortgage, rather than lease, financing.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment to the Coast Guard's docket at the Docket Management Facility. (See ADDRESSES.) In your comment, explain why you think it qualifies and how and to what degree this rule would economically affect it.

##### *Maritime Administration*

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), MARAD has considered whether its proposed 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.

Currently, there are 87 entities that have had their coastwise endorsements approved under the lease-financing option. We anticipate that a minimal number of these entities would be required to submit charters and other documents to MARAD for review, but only a subset of these entities would not be allowed to enter into time charters.

Therefore, MARAD certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment to the Coast Guard's docket at the Docket Management Facility. (See ADDRESSES.) In your comment, explain why you think it qualifies and how and to what degree this rule would economically affect it.

#### **Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), the Coast Guard and MARAD want

to assist small entities in understanding these proposed rules so that they can better evaluate their effects on them and can participate in these rulemakings. If the rules would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult Patricia Williams, Deputy Director, National Vessel Documentation Center (NVDC), Coast Guard, telephone 304-271-2506 or Rita Thomas, Small Business Specialist, Maritime Administration, telephone 202-366-5757.

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 or the Maritime Administration, call 1-888-REG-FAIR (1-888-734-3247).

#### Collection of Information

##### *Coast Guard*

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

##### *Maritime Administration*

This proposed rule would call for a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). As defined in 5 CFR 1320.3(c), "collection of information" comprises reporting, recordkeeping, monitoring, posting, labeling, and other, similar actions. The title and description of the information collections, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

The information collection requirements of the rule are addressed in the previously approved OMB collection titled "Request for Transfer of Ownership, Registry, and Flag, or Charter, Lease, or Mortgage of U.S. Citizen Owned Documented Vessels" (OMB 2133-0006).

*Title:* Request for Transfer of Ownership, Registry, and Flag, or

Charter, Lease, or Mortgage of U.S. Citizen Owned Documented Vessels

*Summary of the Collection of Information:* Persons operating documented vessels under a demise charter and using lease financing would be required to provide the information related to the identity of the vessel owner, bareboat charterer and time charterer as well as copies of the time charter.

*Need for Information:* The required information is needed in order for MARAD to make the required approvals under section 9 of the Shipping Act, 1916, 46 App. U.S.C. 802(c), regarding transfers of any interest or control of a documented vessel to persons that are not Citizens of the United States.

*Proposed Use of Information:* The information related to the identity of the vessel owner, bareboat charterer and time charterer as well as copies of the time charter would be used to ensure that there is not an impermissible transfer of control to non-citizens of U.S.-flag coastwise qualified vessels.

*Description of the Respondents:* Persons operating documented vessels under a demise charter and using lease financing.

*Number of Respondents:* We estimate that less than five new respondents/responses will be added annually to the already approved collection. For purposes of this rulemaking the estimate of five responses is used.

*Frequency of Response:* Whenever a vessel that is documented pursuant to 46 U.S.C. 12106(e) for operation in the coastwise trade is chartered back to the vessel owner or an entity related to the vessel owner. We estimate the additional response to be less than five per year.

*Burden of Response:* The burden per response as previously approved in OMB 2133-0006 is estimated to be approximately two hours.

*Estimate of Total Annual Burden:* \$213.60 annually.

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), we have submitted a copy of this proposed rule to the Office of Management and Budget (OMB) for its review of the collection of information.

We ask for public comment on the proposed collection of information to help us determine how useful the information is; whether it can help us perform our functions better; whether it is readily available elsewhere; how accurate our estimate of the burden of collection is; how valid our methods for determining burden are; how we can improve the quality, usefulness, and clarity of the information; and how we can minimize the burden of collection.

If you submit comments on the collection of information, submit them both to OMB and to the Docket Management Facility where indicated under **ADDRESSES**, by the date under **DATES**.

You need not respond to a collection of information unless it displays a currently valid control number from OMB. Before the requirements for this collection of information become effective, we will publish notice in the **Federal Register** of OMB's decision to approve, modify, or disapprove the collection.

#### 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. The Coast Guard and the Maritime Administration have analyzed these proposed rules under that Order and have determined that they do 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 these proposed rules would not result in such expenditures, both agencies do discuss the effects of their rules elsewhere in this preamble.

#### Taking of Private Property

These proposed rules would 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.

#### Civil Justice Reform

These proposed rules meet 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

Both agencies have analyzed these proposed rules under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. These rules are not economically significant rules and would not create

an environmental risk to health or risk to safety that may disproportionately affect children.

### Indian Tribal Governments

These proposed rules do not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because they would 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

The Coast Guard and the Maritime Administration have analyzed these proposed rules under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that they are not "significant energy actions" under that order, although the Coast Guard's proposed rule is considered a "significant regulatory action" under Executive Order 12866. We expect that these rulemakings will not have any 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 these rulemakings as significant energy actions. Therefore, they do not require a Statement of Energy Effects under Executive Order 13211.

We request your comments to assist us in identifying any likely significant adverse effects that these proposed rules may have on the supply, distribution, or use of energy. Submit your comments to the Docket Management Facility at the address under **ADDRESSES**.

### Environment

#### Coast Guard

The Coast Guard analyzed its proposed rule under Commandant Instruction M16475.ID, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and has concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(d), of the Instruction, from further environmental documentation. This proposed rulemaking is administrative in nature and concerns requirements for

application for a coastwise endorsement under 46 U.S.C. 12106(e). A draft "Environmental Analysis Check List" and a draft "Categorical Exclusion Determination" are available in the docket where indicated under **ADDRESSES**. Comments on this section will be considered before we make the final decision on whether this rule should be categorically excluded from further environmental review.

#### Maritime Administration

MARAD has analyzed this proposed rule for purposes of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has concluded that under the categorical exclusions provision in section 4.05 of Maritime Administrative Order 600–1, "Procedures for Considering Environmental Impacts," (50 FR 11606, March 22, 1985), the preparation of an Environmental Assessment and an Environmental Impact Statement, or a Finding of No Significant Impact for this rulemaking is not required. This rulemaking involves administrative and procedural regulations that clearly have no environmental impact.

### List of Subjects

#### 46 CFR Part 67

Reporting and recordkeeping requirements, Vessels.

#### 46 CFR Part 221

Maritime carriers, Reporting and recordkeeping requirements, Vessels.

### Coast Guard

#### 46 CFR Chapter I

For the reasons discussed in the preamble, the Coast Guard proposes to amend 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 § 67.20, revise paragraphs (a)(6), (a)(9), (b), (c), (d), and (e) to read as follows:

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

(a) \* \* \*

(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 or by a member of the group of which the owner is a member.

\* \* \* \* \*

(9) 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 a 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. For purposes of this section, a demise charterer is not considered to be the owner *pro hac vice* when the vessel is subject to a sub-charter to a member of the group of which the vessel's owner is a member, except when the vessel is engaged in carrying cargo owned by the vessel's owner or by a member of the group of which the vessel's owner is a member.

\* \* \* \* \*

(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 for 3 years after that date and may renew the document and endorsement during that period 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 for 3 years after the initial issuance of that endorsement and may renew the document and endorsement during that period 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 the coastwise trade before February 4, 2004, may continue to operate in that trade for 3 years 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 the coastwise trade under 46 U.S.C. 12106(e) and 12110(b). The barge may continue to operate in the coastwise trade for 3 years after its initial entry into service 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.

\* \* \* \* \*

Dated: January 29, 2004.

**Thomas H. Collins,**  
*Admiral, Coast Guard Commandant.*

**Maritime Administration**

*46 CFR Chapter II*

For the reasons discussed in the preamble, the Maritime Administration proposes to amend 46 CFR part 221 as follows:

**PART 221—REGULATED TRANSACTIONS INVOLVING DOCUMENTED VESSELS AND OTHER MARITIME INTERESTS**

1. The authority citation for part 221 continues to read as follows:

**Authority:** 46 App. U.S.C. 802, 803, 808, 835, 839, 841a, 1114(b), 1195, 46 U.S.C. chs.301 and 313; 49 U.S.C. 336; 49 CFR 1.66.

**§ 221.11 [Amended]**

2. In § 221.11(a) introductory text, after the words “United States Code,” add the words “as limited by § 221.13(c),”.

3. In § 221.13, in paragraph (a)(1)(iii), remove the period and add, in its place, “; and”; and add new paragraphs (a)(1)(iv) and (c) to read as follows:

**§ 221.13 General approval.**

- (a) \* \* \*
- (1) \* \* \*

(iv) As limited by paragraph (c) of this section for vessels documented with a coastwise endorsement pursuant to 46 U.S.C. 12106(e).

\* \* \* \* \*

(c) *Lease financing.* A Person operating, under a demise charter, a Vessel that is documented pursuant to 46 U.S.C. 12016(e) must obtain the approval of the Maritime Administrator required by 46 App. U.S.C. 808(c)(1) for the sale, lease, Charter, delivery, or any other manner of Transfer back to the vessel owner, a member of the owner’s group (as the word “group” is defined in 46 CFR 67.3), or an officer, director, or shareholder of the owner or a member of the owner’s group. As defined in 46 CFR 67.3, the word “group” includes the owner, the owner’s parent, and all subsidiaries and affiliates of the parent; and the word “affiliate” means a Person that is less than 50 percent owned or controlled by another Person.

By Order of the Maritime Administrator.

Dated: January 22, 2004.

**Joel C. Richard,**  
*Secretary, Maritime Administration.*

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