



# Federal Register

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**Wednesday,  
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## **Part II**

# **Department of Transportation**

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**Maritime Administration**

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**46 CFR Part 356**

**Fishery Endorsement; Eligibility of U.S.-  
Flag Vessels of 100 Feet or Greater; Final  
Rule**

**DEPARTMENT OF TRANSPORTATION****Maritime Administration****46 CFR Part 356**

[Docket No. MARAD-99-5609]

RIN 2133-AB38

**Eligibility of U.S.-Flag Vessels of 100 Feet or Greater in Registered Length To Obtain a Fishery Endorsement to the Vessel's Documentation****AGENCY:** Maritime Administration, Transportation.**ACTION:** Final rule.

**SUMMARY:** The Maritime Administration ("MARAD," "we," "our," or "us") is publishing this final rule implementing the new U.S. citizenship requirements set forth in the American Fisheries Act of 1998 ("AFA") for vessels of 100 feet or greater in registered length for which a fishery endorsement to the vessel's documentation is sought.

The rule implements new statutory requirements of the AFA by raising the U.S. ownership and control requirements for U.S.-flag fishing vessels of 100 feet or greater in registered length that are operating in U.S. waters, by eliminating exemptions for fishing vessels that cannot meet current citizenship standards, by phasing out of operation many of the largest fishing vessels, and by establishing new criteria to be eligible to hold a preferred mortgage on vessels of 100 feet or greater with a fishery endorsement to the vessel's documentation. The regulations set out which transactions are permissible, which transactions will require prior approval, and which transactions are impermissible and, to the extent practicable, minimize disruptions to the commercial fishing industry, to the traditional financing arrangements of such industry, and to the opportunity to form fishery cooperatives. Pursuant to 5 U.S.C. 553(d)(3), this final rule will become effective immediately upon the date of publication. The immediate effective date is necessary to provide extra time before the compliance date for vessel owners and mortgagees to request letter rulings from MARAD regarding their citizenship status and potential waivers from the rule by virtue of a conflict with an international agreement or treaty.

**DATES:** *Effective Date:* July 19, 2000.

*Compliance Date:* Vessel owners and Mortgagees are required to comply with the new citizenship requirements by October 1, 2001, in order to obtain a fishery endorsement to the vessel's

documentation. The rule requires owners to submit an Affidavit of U.S. Citizenship by June 1, 2001, so that MARAD can make render citizenship decisions by the compliance date.

**ADDRESSES:** The complete file for this rule is available for inspection with the Docket Clerk, U.S. DOT Dockets, Room PL-401, Department of Transportation, 400 7th St., SW., Washington, DC 20590-0001, between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. You may also view the comments submitted to the docket via the Internet at <http://dms.dot.gov> by using the search function and entering the docket number 5609.

**FOR FURTHER INFORMATION CONTACT:** John T. Marquez, Jr. of the Office of Chief Counsel at (202) 366-5320. You may send mail to John T. Marquez, Jr., Maritime Administration, Office of Chief Counsel, Room 7228, MAR-222, 400 7th St., SW, Washington, DC, 20590-0001, or you may contact him by e-mail at [John.Marquez@marad.dot.gov](mailto:John.Marquez@marad.dot.gov).

**SUPPLEMENTARY INFORMATION:****Background**

The AFA imposes new citizenship requirements for the owners of vessels of 100 feet or greater in registered length for which a fishery endorsement to the vessel's documentation is sought. The AFA, among other things:

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

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

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

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

Mortgage Trustee that complies with the citizenship requirements of 2(c) of the 1916 Act and other requirements of the AFA;

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

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

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

The rule provides procedures for owners, Mortgagees, Mortgage Trustees, and charterers to request letter rulings regarding citizenship status and for Owners and Mortgagees to request letter rulings regarding exemptions from the regulations as a result of conflicts between the regulations and an international treaty or law upon publication of the rule in the **Federal Register**. However, the new ownership and control standards, including the 75% ownership and control requirement, will not become effective until October 1, 2001.

**Prior Federal Action**

As the first step in this rulemaking process, we issued an Advance Notice of Proposed Rulemaking (ANPRM) entitled Eligibility of U.S.-Flag Vessels of 100 Feet or Greater To Obtain Commercial Fisheries Documents, 64 FR 24311 (May 6, 1999). The ANPRM provided an explanation of the changes in the law and requested comments, suggestions, and information from the public relating to the development of regulations necessary to implement the new statutory requirements to obtain a fishery endorsement for a documented vessel of 100 feet or greater in registered length. Based on the comments that we received in response to the ANPRM, we

issued a Notice of Proposed Rulemaking (NPRM) entitled Eligibility of U.S.-Flag Vessels of 100 Feet or Greater In Registered Length to Obtain a Fishery Endorsement to the Vessel's Documentation Commercial Fisheries Documents, 65 FR 645 (January 5, 2000).

The NPRM set forth a proposed rule to implement the new statutory requirements to obtain a fishery endorsement for a documented vessel of 100 feet or greater in registered length. In response to the NPRM, we received approximately 20 written comments. In addition, we held three public meetings in Seattle, WA, Anchorage, AK, and Washington, DC, and met with one interested party who requested a meeting with us. The written comments, transcripts of the public meetings, and a memorandum summarizing a meeting with an interested party are available for review in the rulemaking docket. Following is a summary of those comments and our response.

### Comments on the Proposed Rule

#### Subpart A—General Provisions

##### Section 356.3 Definitions

Several commenters noted that a state or federally chartered financial institution that meets the controlling interest requirements of 2(b) of the 1916 Act would be deemed a Non-Citizen under the definitions of "Citizen of the United States" in § 356.3(d), "Non-Citizen" in § 356.3(n), and "Non-Citizen Lender" in § 356.3(o). Accordingly, the commenters state that the benefit accorded to state or federally chartered financial institution under 202 of the AFA to be eligible to hold a Preferred Mortgage on a Fishing Vessel, Fish Tender Vessel or Fish Processing Vessel would be rendered without meaning. The commenters suggested that the rule should clarify in § 356.19 or in one of the definitions in § 356.3 that a state or federally chartered financial institution is considered to be a U.S. Citizen when functioning as a Preferred Mortgagee with respect to a Fishing Vessel, Fish Processing Vessel or Fish Tender Vessel.

We agree that the rule should be clarified with regard to the citizenship status of state or federally chartered financial institutions that meet the controlling interest requirements of 2(b) of the 1916 Act and that are acting as Preferred Mortgagees. Accordingly, the definitions of "Controlling Interest" and "Non-Citizen Lender" in § 356.3 have been amended to indicate that a state or federally chartered financial institution that meets the controlling interest requirements is considered a Citizen of the United States for purposes of Subpart D of the regulation.

One commenter reasoned that it is commercially impractical to expect parties to wonder whether a bona fide limited liability company will be treated by the Maritime Administration as a general partnership for AFA purposes under proposed § 356.3(d)(2)(vii) or § 356.3(f)(2)(vi). The commenter noted that every state, or almost every state, now has a limited liability company statute and that MARAD should provide certainty in the rule regarding the citizenship status of limited liability companies ("LLCs") by concluding that it will accept the status of these entities as determined by state law or by specifying which state limited liability company statutes create, for AFA purposes, general partnerships.

This rule marks the first time that we have set out in a regulation how we plan to deal with LLCs in the context of determining U.S. Citizenship. Because LLCs can vary greatly in their structure, we feel that it is important to reserve some flexibility for ourselves in this area. Furthermore, we do not believe that it makes sense to list every state limited liability company statute that could potentially present a problem as these statutes can easily be amended over time. Therefore, the final rule will follow our proposal in the NPRM that an LLC that is deemed to be a general partnership will be treated as such, and we will evaluate each LLC citizenship application individually.

The same commenter also stated that the definitions of Citizen of the United States and Controlling Interest in §§ 356.3(d)(2)(i)(a) and 356.3(f)(2)(i)(a) were unnecessarily broad because they state that all officers authorized to act in the absence of the chief executive officer and chairman of a corporation must be citizens, whereas the relevant statutes refer only to the citizenship of chairmen, presidents and chief executive officers. The commenter suggested that the relevant statutes identify chairmen, presidents and chief executive officers as the officers who must be U.S. Citizens and that MARAD should allow a Non-Citizen Vice President or Non-Citizen Vice Chairman unless a vacancy that temporarily places such a person in the senior position of responsibility is left unfilled with the intent of evading the law. The commenter proposed that the rule should allow a vacancy in the offices of chairman, president or chief executive officer that is filled with a Citizen of the United States before the earlier of the next required filing date for an annual meeting or the next actual meeting of directors for which a notice of meeting has not already been set at the time at which the vacancy occurs.

We disagree with the commenter's assertion that 2 of the 1916 Act limits our citizenship analysis to the citizenship of chairmen, presidents and chief executive officers or restricts us from taking into consideration the rights of a Non-Citizen to act in the absence of the chief executive officer or chairman of a corporation. Moreover, this analysis is consistent with our past practice of determining citizenship under 2 of the 1916 Act. Accordingly, we do not plan to amend the final rule.

Several commenters also noted that we had used the terms "affiliated" and "unrelated" in the rule, but that the terms were not defined. Accordingly, we have added definitions for the terms "Affiliate or Affiliated" and "Related Party" to § 356.3 and have renumbered the section accordingly.

#### Subpart B—Ownership and Control

##### Section 356.7 Methods of Establishing United States Ownership

One commenter stated that the fair inference rule is outdated and does not take into consideration the sweeping changes that have occurred in the way that shares of publicly traded companies are held since the establishment of the fair inference method in 1936. In particular, the commenter stated that because the vast majority of shares in corporations are held today by brokerage houses in "street" name for beneficial owners, the stock ownership records of corporations do not provide information as to the beneficial owners. In addition, the commenter noted that many shares are held for the benefit of pension trusts or mutual funds, the true beneficial owners of which change frequently and are not discernible from any available records. Accordingly, the commenter proposed that a different rule be adopted for use by publicly traded corporations with some minimum number of shareholders (perhaps keyed to the reporting requirements of the Securities Exchange Act of 1934) pursuant to which it may be inferred that shares held in street name or similar manner are held by U.S. Citizens if the record holder has a U.S. address unless the party claiming U.S. citizenship for the corporation has actual notice to the contrary. Under the commenter's proposal, the shares held by greater than 5% beneficial owners, who are obligated to file with the Securities Exchange Commission would be treated as owned by their actual beneficial owners as reflected on the pertinent forms and all other shares would be deemed held by and in the domicile of the record holder, absent

actual knowledge or information to the contrary.

We disagree with the commenter's assertion that the information required for entities to demonstrate the citizenship of beneficial owners under the fair inference rule is not available to corporations because stocks today are widely held in "street" name by brokerages. Although the citizenship information for beneficial owners where the stock is held by a brokerage company or other entity may not be part of the corporation's stock records, it is readily available from the brokerage company, trust, pension plan, or other entity that is holding the stock for the benefit of the true owner. In fact, a corporation or other entity proving its citizenship is required to obtain from any brokerage firm, trust, pension plan, or other entity that is holding stock for the benefit of other persons, confirmation as to how many shares are held for the benefit of holders with a U.S. address and whether any shareholders hold more than 5% of the outstanding shares of a class of stock. We regularly deal with large publicly traded companies that are required to demonstrate their citizenship for other MARAD programs using the fair inference method, and we have not found it to be a problem for corporations or other entities to obtain this information.

#### Section 356.9 Tiered Ownership Structures

Section 202 of the AFA requires that 75% of the interest in an entity that owns or controls a vessel eligible for a fishery endorsement under 46 U.S.C. 12108 be held by Citizens of the United States "at each tier of ownership of such entity and in the aggregate." In the NPRM, we proposed to interpret the phrase "in the aggregate" to mean that no individual Non-Citizen may own or control more than 25% of the interest in a vessel or vessel-owning entity. In the NPRM, we stated that our belief was that a restrictive interpretation of the phrase "in the aggregate" would limit the ability of companies to have tiered ownership and would limit their ability to raise capital through equity participation.

There were three different comments relating to MARAD's interpretation of "in the aggregate" under proposed § 356.9. One commenter supported MARAD's interpretation and noted that it is both workable and appropriate where publicly traded companies and complex ownership structures are involved. The commenter noted that there is virtually no possibility that varied, disparate and unrelated Non-

Citizen interests throughout a complex ownership structure could come together to control the entity or its vessels and that the reservation of authority to reject excessive tiering arrangements provides a safeguard against abuse of the flexibility in the proposed provisions. Further, the commenter highlighted that there is well established precedent for a similar mechanism, the fair inference rule. The commenter agreed that a restrictive interpretation of "in the aggregate" would not only significantly complicate the process, but would also likely be disruptive to the industry and could reduce the availability of conventional financing.

Two commenters opposed MARAD's interpretation of "in the aggregate" as overly broad and stated that it does not reflect the basic intent of the AFA to insure at least 75% U.S. ownership and control of fishing vessels "at each tier and in the aggregate." The first commenter stated that the proposed rule could be interpreted to allow 25% ownership by three different Non-Citizens at three ownership tiers which would result in an aggregate Non-Citizen ownership in excess of 50%. The commenter reasoned that such ownership structures run contrary to the intent of the AFA; therefore, MARAD should use a more restrictive interpretation of the ownership and control standards.

The second commenter opposed to MARAD's interpretation of "in the aggregate" noted that even if MARAD's concern that an overly restrictive reading of "in the aggregate" would result in limiting the ability of owners to obtain equity participation in their companies, Congress had already decided the issue otherwise. The commenter stated that there is nothing in the AFA that limits the "aggregation" to each particular Non-citizen and that such an interpretation would turn the statutory requirement on its head by permitting Non-U.S. Citizens to own more than 25% in the aggregate of the equity interest in a vessel, with the result that less than 75% of the interest in an entity in the aggregate will be owned and controlled by U.S. Citizens. The commenter asserts that this interpretation contradicts the plain language of the statute and cannot be a "reasonable" interpretation of the law. The commenter further states that the final rule, including the definitions and the Affidavit of U.S. Citizenship, must comply with the Congressional requirement that at least 75% of the interest in a vessel seeking a fishery endorsement be owned and controlled by U.S. Citizens, at each tier of

ownership and in the aggregate. This means that no more than 25% of such interest may be held "in the aggregate" by either a particular foreign citizen or any combination of foreign citizens.

Upon further consideration, we agree that the plain language of the statute leaves little room for flexibility of interpretation in the regulation and that the phrase "in the aggregate" precludes more than 25% Non-Citizen ownership whether for an individual or several entities if taking into account all tiers. As a matter of clarification, we do not conclude that this interpretation prohibits use of the fair inference method to determine citizenship of publicly traded companies, *i.e.*, 95% U.S. Citizen addresses establishes a fair inference of 75% U.S. ownership, provided that there is not clear evidence of more than 25% ownership and control by a Non-Citizen. For example if a U.S. Citizen owns 80% of a vessel-owning entity and a Non-Citizen owns 20% of the vessel-owning entity, we would permit the U.S. Citizen to demonstrate its citizenship using the fair inference rule and demonstrating that 95% of the addresses of shareholders are U.S. addresses. However, if a U.S. Citizen owns 75% of a vessel-owning entity and a Non-Citizen owns 25% of the vessel-owning entity, the U.S. Citizen could not use the fair inference method to demonstrate that it is a U.S. Citizen unless it could demonstrate 100% U.S. Citizen addresses as the Non-Citizen ownership already amounts to 25% and does not provide for any leeway for additional Non-Citizen participation. Accordingly, the interpretation of "in the aggregate" proposed in the NPRM will be so modified in the final rule.

This interpretation eliminates the need to caution against unlimited tiering because MARAD will deem it to be excessive foreign ownership and control if the sum of the ownership and control in Non-Citizens through subsequent tiering is in excess of 25% as computed by MARAD. As a practical matter, there will be very limited opportunities for any tiering involving Non-Citizen ownership and control.

#### Section 356.11(a)—Absolute Indicia of Control

Several commenters provided comments on the various indicia of control. One commenter noted that, as a general matter, the AFA (46 U.S.C. 12102(c)(2)(B)) expressly authorized Non-Citizens simply to participate in certain activities that would otherwise be deemed control; however, this language is not included in the rule. We agree with the commenter that certain

limited rights of participation that may limit the authority of directors and possibly additional personnel aboard the vessel were statutorily intended. We have added language to § 356.11(a)(1) and (3) to indicate that a Non-Citizen has the right simply to participate in certain activities.

One commenter noted that every partnership and shareholder agreement involving minority investors typically includes limitations in favor of the minority investors on "the actions of \* \* \* the chief executive officer, a majority of the board of directors, any general partner or any person serving in a management capacity of the entity which owns the fishing industry vessel." Such agreements typically prohibit the majority investors and the management they control from selling all or substantially all of the assets of the entity without the consent of the minority investors, from going into a different business, and from entering into contracts with or guaranteeing the obligations of the majority investors or their affiliates without the consent of the minority investors. The commenter noted that none of these restrictions permit the Non-Citizen to intrude into the day-to-day operations of the vessel or the vessel owner. Furthermore, the commenter stated that measures that restrict the actions of the management, board of directors, general partner, etc., are inconsistent with the types of restrictive loan covenants approved in § 356.23(a). For example, the commenter stated that § 356.23(a)(1) authorizes mortgage loan covenants that prohibit the borrower from selling part or all of its assets; however, these covenants would be deemed impermissible under § 356.11(a)(2). The commenter suggested that § 356.11(a)(2) should provide that these and similar restrictions are not deemed impermissible control. We agree with commenter that certain rights of minority shareholders that do not deal with day-to-day activities should be authorized and have amended § 356.11(a)(2) to make clear that certain standard minority shareholder rights are permitted.

The same commenter suggested that § 356.11(a)(2) is inconsistent with § 356.11(a)(4), which states that it is impermissible control if a Non-Citizen has the right to unduly restrict the day-to-day activities and management policies through loan covenants or other means. We do not believe that these provisions are inconsistent. However, § 356.11(a)(4) has been amended to make clear that the limitation on the ability of a Non-Citizen to unduly restrict the day-to-day activities and management policies through loan

covenants applies to covenants other than those approved for use by the Citizenship Approval Officer.

The commenter also indicated that § 356.11(a)(2) is inconsistent with § 356.11(b)(2) which states that the authority to preclude the owner from engaging in other business activities is just one factor that *may*, in conjunction with other factors, lead to a finding of impermissible control by a Non-Citizen. We intend for the two sections to be distinguishable and for § 356.11(a)(2) to address the right of a Non-Citizen to participate in day-to-day business activities conducted in the ordinary course of business. Section 356.11(a)(2) has been amended accordingly to distinguish it from § 356.11(b)(2).

Four commenters pointed out that traditional arrangements in the fishing industry could be technically read to confer a "disproportionate" benefit on the Non-Citizen. The commenters claimed that limited disproportion in economic benefits in the range of 1-5% are common in the fishing industry, and are not a meaningful indicia of control. Accordingly, the commenters suggested that § 356.11(a)(5), which defines as an absolute indicia of control the right to derive through a minority shareholder a "disproportionate" share of the economic benefits from the ownership or operation of a vessel, is overly vague. The commenters recommended that § 356.11(a)(5) be moved to subsection (b) and defined as a possible indicia of control, thus giving the agency discretion to determine on a case-by-case basis if disproportionate economic benefit is conferred upon Non-Citizens. In the alternative, the commenters suggested that some measure of materiality be added to § 356.11(a)(5) by requiring that the disproportion be "substantial," "considerable," "significant," or "material." We agree with the latter suggestion and have amended § 356.11(a)(5) to indicate that ability of a Non-Citizen to derive a "significantly disproportionate" share of the economic benefit will be deemed impermissible control.

One commenter further suggested that § 356.11(a)(5) be tightened to clearly state that the disproportionate benefit be in favor of the Non-Citizen in order to result in a loss of Citizenship. Otherwise an arrangement where the Non-Citizen owns 24% of the interest but derives 10% of the economic benefit would result in the automatic loss of U.S. citizenship. We agree with this comment and have amended § 356.11(a)(5) accordingly.

One commenter argued that the language of § 356.11(a)(6), which indicates that impermissible control

will be found where a Non-Citizen has the right to be or is "a controlling factor" in the entity, is too vague. The commenter explained that a Non-Citizen who is a 20% shareholder and has one fifth of the votes would be a deciding factor if the other four Citizens are split. We disagree with the assertion that the term "controlling factor" is too vague. This provision is intended to address more direct involvement by a Non-Citizen; therefore, we do not consider the ability of a Non-Citizen to act as a tie breaker where the Citizen owners are deadlocked to be a "controlling factor."

Section 356.11(a)(7), which prohibits a Non-Citizen shareholder or limited partner from having the right to cause the sale of the vessel, was thought to be overly restrictive by one commenter. The commenter stated that most shareholder agreements and partnership agreements contain provisions for terminating the association of the investors. The usual mechanism for terminating the relationship between investors is for one to buy out the other(s). Because there is no market for a minority interest in a closely held company and a Non-Citizen is prevented from buying out the interest of the U.S. Citizens, the commenter recommended that a Non-Citizen minority shareholder should have the ability to force the sale of the vessel to a qualified third party. We agree that minority shareholders should have the ability to exit the arrangement, but we do not believe that a Non-Citizen should have the ability to force the sale of the assets in other situations. Accordingly, we have amended § 356.11(a)(7) to make clear that in the event of the dissolution of the arrangement the Non-Citizen may require the sale of its interest in the vessel.

The deletion of § 356.11(a)(9) was suggested by one commenter who believed that responsibility of a Non-Citizen for the procurement of insurance on a Fishing Vessel is completely unrelated to control of the vessel or vessel owner. We disagree with the commenter. The responsibility for procuring insurance on a vessel is generally the responsibility of the vessel owner or a bareboat charterer who steps into the shoes of a vessel owner. It is a definitive control responsibility because it determines disposition of loss proceeds as well as forward condition and likelihood of recovering loss proceeds. Therefore, it is an element of ownership that will be deemed impermissible control if it is the responsibility of a Non-Citizen.

Section 356.11(a)(10) states that it will be considered an absolute indicia of control if a Non-Citizen "[h]as the

ability through any other means whatsoever to control the entity that owns a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel." Several commenters stated that it was inappropriate to include as an absolute indicia of control what appears to be a "catch all" provision. The commenters submitted that while other factors of contractual arrangement may accurately be considered "indicia" of control (as described in § 356.11(b)), § 356.11(a) should only include specific descriptions of impermissible transfers of control and thus § 356.11(a)(10) should be deleted. Because every instance of control cannot be identified in the rule, we disagree with the commenter and believe that a flexible provision such as § 356.11(a)(10) is needed in the final rule. Further the provision is firmly rooted in statute (see, 46 App. U.S.C. 802).

#### Section 356.11(b) Discretionary Indicia of Control

One commenter suggested that the undefined term "foreign involvement" used in the first sentence of § 356.11(b) should be changed to the defined term "Non-Citizen" in order to avoid confusion. We agree with the commenter and have amended § 356.11(b) to use the term "Non-Citizen."

Section 356.11(b)(5) states that one factor to be considered in determining whether impermissible control by a Non-Citizen is present is whether a Non-Citizen absorbs "many of the costs and normal business risks of the ownership and operation of a vessel." One commenter suggested that the term "many" could make it difficult to interpret this provision and, therefore, suggested that the term "many" should be replaced with "most" to clarify that only an inequity of cost and risk may suggest impermissible control. We agree with the commenter that the language should be clarified and have amended § 356.11(b)(5) to replace the phrase "many of" with "considerable."

Section 356.11(b)(6) states that if a Non-Citizen provides start up capital for an owner or bareboat charterer on "less than an arm's length basis," this may be deemed impermissible. Two commenters remarked that the provision should only apply to "prospective" start up capital arrangements as to do otherwise would penalize parties who entered into arrangements that complied with the law prior to the AFA. While we understand the commenters' concern, this is only one factor to be considered and weighed, and it will not necessarily constitute control. Therefore, we intend

to apply § 356.11(b)(6) to all citizenship determinations.

Section 356.11(b)(7) states that if a Non-Citizen has the general right to inspect the books and records of the owner or bareboat charter, this may be deemed impermissible control. Three commenters noted that under state and common law, the right to inspect the books and records of a company at a proper time and for a proper purpose has long been basic among rights of minority partners and shareholders. The commenters explained that this right has been essential to prevent abuse and fraud by the majority partner or shareholder upon the minority and is more indicative of a lack of control. The commenters recommended that this provision be deleted. Section 356.11(b)(7) was intended to implement MARAD's long standing policy that one indicia of control to be considered is whether a Non-Citizen time charterer has the right to inspect the books of an owner or a bareboat charterer. Consequently, 356.11(b)(7) has been amended so that it restricts the right of a time charterer, and not all Non-Citizen minority shareholders, to examine the books of an owner, bareboat charterer, or time charterer.

Several commenters stated MARAD should not consider the use of the same legal representation, accounting firms, etc., as an indicia of control in § 356.11(b)(8). The commenters explained that many fishermen in Seattle use the same law firms, accounting firms, etc., because these firms have experience in the fishing industry and understand the idiosyncrasies of the fishing industry. We inadvertently failed to include the use of law firms and accounting firms by participants in the fishing industry and have so amended the provision. However, it is only one factor to be considered in the full context of each particular situation, and is not an absolute indicia of control.

Two commenters noted that the right to control a vessel's co-op allocation share is the practical equivalent of control over the vessel. One of the commenters pointed out that the owners of several fishing boats have sold or leased the pollock co-op share allocations corresponding to certain vessels for the year 2000 pollock season and, as a result, the vessels are tied up at the dock, not operating in any fishery. Both commenters explained that if the co-op share allocated to a vessel is sold or leased, the co-op share holder can prevent the vessel from participating in the pollock fishery for the next five years, which is the duration of the fishing allocation under subtitle II of the

AFA. Accordingly, the commenters stressed that Non-Citizen ownership or control over a Fishing Vessel's fishing privileges, whether in the form of the sale or lease of co-op allocation shares or some other fishing privilege reserved exclusively for that vessel under any future fishery management regime, must be prohibited by MARAD's regulations as an impermissible transfer of control to a Non-Citizen. One commenter also suggested that such a transfer should be considered as the equivalent of a prohibited time or voyage charter of a Fishing Vessel. We received no other comments on this issue either at the NPRM or ANPRM stage. We agree with the commenters that control over a vessel's co-op share or fishing rights by a Non-Citizen is an element of control that should be considered; therefore, we have added a new § 356.11(b)(9) to include control over the fishing quota or fishing rights allocated to a vessel or vessel owner as an indicia of control to be considered.

One commenter stated that § 356.11(d) should indicate that MARAD will not seek to revoke a vessel's fishery endorsement or impose penalties for violation of the Non-Citizen control restrictions until the agency has notified the vessel owner of its concerns and sought to resolve the matter by agreement. The commenter argued that the rule should provide a process for working out any problems that the agency has with previously executed agreements and provide for a reasonable time for owners to cure the problem. The commenter believed that such an approach would ensure that owners do not seek advance rulings from MARAD in every case. In addition, the commenter asserted that the rules should include basic principles of due process and the right to an adjudicative hearing. The commenter suggested that the rule should state that a fishery endorsement will not become invalid for violation of the Non-Citizen ownership or control restrictions until formally revoked and that before MARAD can formally request that the Coast Guard revoke a fishery endorsement, it must give the owner written notice and an opportunity for a formal adjudicative hearing.

We agree with the commenter that prior to the imposition of penalties or the revocation of a vessel's fishery endorsement, we should attempt to notify the vessel owner and work out any problems, assuming no involvement of fraud. In fact, that is precisely the intent of § 356.11(d). To the extent possible and consistent with our long-standing practice in making citizenship determinations for other programs, we

intend to work through any issues related to citizenship determinations under the AFA. However, we do not agree that it is necessary to prescribe any additional process for working through such issues or to establish a formal adjudicative hearing process for such determinations.

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

##### Section 356.13 Information Required To Be Submitted by Vessel Owners

A commenter recommended that MARAD should limit the documentation to be submitted in support of a citizenship determination to those documents and agreements involving transactions with Non-Citizens. Specifically, the commenter noted that § 356.13(a)(5) requires vessel owners to submit loan agreements and other financing documents applicable to a fishing industry vessel even when the loan is with a U.S.-Citizen Bank. We agree with the commenter and have amended § 356.13(a)(5) to require the submission of loan agreements and financing documents where the lender has not been approved by MARAD as a U.S. Citizen, except for standard loan agreements from Non-Citizen Lenders where the Non-Citizen Lender has been granted approval from the Citizenship Approval Officer pursuant to § 356.21 to enter into such standard loans without transactional approval from MARAD.

The commenter also noted that § 356.13(a)(6) applies to management agreements with both U.S. Citizens and Non-Citizens, and suggested that information related to management agreements should only be required where the agreement is with a Non-Citizen. We have amended § 356.13(a)(6) to clarify that information related to operating and management agreements is only required where the agreement is between the owner or bareboat charterer and an entity that has not been determined by MARAD to be a U.S. Citizen.

One commenter suggested that § 356.13(a)(7) should only require information on exclusive sales agreements where the agreement is with or for the benefit of a Non-Citizen as opposed to all exclusive sales agreements. We agree that information regarding agreements with U.S. Citizens should not be required. Therefore, we have amended § 356.13(a)(7) to state that copies of any sales, purchase, or marketing agreements that relate to the sale or purchase of all or a significant portion of a vessel's catch must only be submitted where the agreement is with an entity that has not been determined

by MARAD to be a U.S. Citizen and the agreement contains provisions that could convey control to a Non-Citizen other than those provisions expressly authorized in § 356.43. For agreements that only contain the provisions expressly authorized in § 356.43, the owner or bareboat charterer is still required to identify the agreements and the parties to the agreement, but copies of the agreements are not required to be submitted.

The commenter also noted that §§ 356.13(a)(8) and (9) would require submission of stockholders' agreements, voting trust agreements, pooling agreements, proxy appointments, options to buy or sell stock or other comparable equity interests and agreements that restrict the sale of such stock or equity interests for the vessel owner and for any entity whose interest is being relied upon to establish 75% U.S. Citizen ownership, without regard to whether a Non-Citizen is a party to such agreements or receives any rights or benefits thereunder. The commenter stated that such information should only be required where the agreements or contracts are with a Non-Citizen or where a Non-Citizen receives rights or benefits. It is important for MARAD to be able to identify the true owners of an entity for which it is making a Citizenship determination. Accordingly, we disagree with the commenter's suggestion and will continue to require the information identified in §§ 356.13(a)(8) and (9).

The commenter suggested that § 356.13(a)(10) should only require documents relating to a merger, consolidation, liquidation, or dissolution of the vessel owner or any parent corporation where a Non-Citizen is involved in or affected by the transaction or will benefit from the transaction. We agree that where the parties involved have already been determined by MARAD to be U.S. Citizens the information required by § 356.13(a)(10) is not necessary. However, because the transactions identified in § 356.13(a)(10) involve significant changes to the ownership structure of an entity that can have major implications to its citizenship status, this information will continue to be required for parties that have not been deemed to be U.S. Citizens by MARAD.

As noted in the discussion under § 356.11(b), we agree with one commenter's suggestion that agreements to sell, lease, or otherwise transfer to a Non-Citizen a fishing quota, fishing right, processing quota, or any other right allocated to a vessel or vessel owner is an element that should be

considered in determining whether impermissible control has been conveyed to a Non-Citizen. Accordingly, we have added a new § 356.13(a)(12) to require that such agreements or contracts be submitted to the Citizenship Approval Officer.

##### Section 356.15 Filing of Affidavit of U.S. Citizenship

We received a number of comments regarding the timing and ongoing availability of letter rulings. Several commenters requested that entities be allowed to request letter rulings under § 356.15 regarding their citizenship status as soon as the rules become final as opposed to being forced to wait until October 1, 2000. The commenters explained that delaying the time for accepting letter requests to October 1, 2000, has the effect of shortening the time period that Congress intended to give vessel owners, mortgagees, and others with a stake in the fishing industry to adjust to the new requirements. One commenter noted that in some cases, lenders have required that owners obtain their citizenship status by December 31, 2000. We agree with the commenters and have amended § 356.15(a) to indicate that we will begin accepting requests for letter rulings as soon as the final rules are published in the **Federal Register**. Parties can request an advance letter ruling up to June 1, 2001; however, owners will still be required to submit their citizenship information no later than June 1, 2001, to ensure that we have enough time to make a citizenship determination before the rules go into effect on October 1, 2001. In addition, the time period for submission of the required certification indicating that the information submitted in support of a letter ruling remains true and accurate has been amended to require submission of the certification between September 10, 2001 and September 20, 2001, in order to provide time for the Citizenship Approval Officer to review the certifications prior to October 1, 2001.

Several commenters requested that the rule expressly state that letter rulings will be available after October 1, 2001. We do not currently plan to issue letter rulings after October 1, 2001 because letter rulings necessarily involve hypothetical transactions and can absorb an inordinate amount of time and resources.

A couple of commenters stated that the 120-day time period in § 356.15(a) for MARAD to respond to a request for a letter ruling is too long. The commenters suggested shortening the time period to 60 days or 30 days after

the submission of any supplemental material, whichever is longer. We plan to respond to letter ruling requests as expeditiously as possible; however, we feel that given the uncertainty regarding the number of letter ruling requests that we may receive and the level of difficulty that each one will present, the 120-day time period is reasonable.

One commenter noted that § 356.15(c) requires vessel owners to submit an Affidavit and supporting documentation by June 1, 2001, so that MARAD can issue a citizenship determination by October 1, 2001; however, the rule is unclear as to whether the existing fishery endorsements will expire on October 1, 2001, thus requiring a new fishery endorsement to be obtained prior to October 1, 2001; whether existing fishery endorsements will be subject to revocation if the required affidavit and supporting documentation are not submitted; or whether the requirements of § 356.15(c) apply only to owners seeking new fishery endorsements on or after October 1, 2001. The commenter stated that if the intent of the rules is that all existing fishery endorsements will expire on October 1, 2001, unless MARAD reviews and approves them in advance, the rules should provide for adequate notice and an opportunity for a formal hearing before a vessel loses its fishery endorsement.

We agree with the commenter that the intent of § 356.15(c) should be clarified. We have added a new § 356.15(d) to make clear that a fishery endorsement for a vessel of 100 feet or greater in registered length will not be valid after October 1, 2001, unless the Citizenship Approval Officer has determined that the owner is eligible to own a vessel with a fishery endorsement. If the Citizenship Approval Officer determines that the owner is eligible to own a vessel with a fishery endorsement, the vessel's fishery endorsement will continue to be valid and will not be required to be renewed until its normal expiration. If the Citizenship Approval Officer determines that the owner is not eligible to own a vessel with a fishery endorsement, the endorsement will be deemed invalid as of October 1, 2001. In order to obtain a new fishery endorsement, the owner must demonstrate to the Citizenship Approval Officer that it is eligible to own a vessel with a fishery endorsement and apply to the Coast Guard for a new fishery endorsement.

The same commenter suggested that the rule should clearly state that MARAD will notify the owner of any defects in its Affidavit or related filings

and give the owner an opportunity to cure the defect before any action is taken against the vessel's fishery endorsement. The commenter also stated that the rules should provide for adequate notice and an opportunity for a formal hearing before a vessel loses its fishery endorsement. We agree with the commenter that the rule should make clear that we will generally notify the applicant of any defects in its citizenship information and provide an opportunity to cure those defects. In fact, § 356.11(d) states that we will notify an owner if we have concerns regarding its citizenship status and that we will work with them to reach a satisfactory resolution, provided there is no verifiable evidence of fraud.

One commenter suggested that proposed § 356.15(d) should be clarified to indicate whether a "new owner" can document a vessel with a fishery endorsement (or operate it in the fisheries) before MARAD has made an affirmative determination that the new owner is eligible for a fishery endorsement. The commenter stated that if MARAD's involvement is required in every sale before an owner can operate the vessel, the purchase and sale of fishing vessels could be greatly complicated and delayed. According to the commenter, it would be a major mistake for MARAD to delay the purchase and transfer of every vessel. Given that most of these transactions take place between U.S. citizens with no foreign involvement, the commenter felt that it is likely that the cost of MARAD's involvement and the burdens placed on the industry will vastly exceed any benefits. Accordingly, the commenter urged that, at a minimum, MARAD provide for expedited approval of a fishery endorsement if the Citizenship Approval Officer has previously determined that a purchaser is eligible to own a vessel with a fishery endorsement and the purchaser certifies that no change has occurred since that determination was made or since the most recent filing of its Citizenship Affidavit. The commenter suggested that MARAD should be required to act within 15 days where the buyer has previously been approved by MARAD as a U.S. Citizen, and in all other cases there should be a deadline for action of 60 days. In addition, the commenter stated that MARAD should permit advance determinations to minimize disruptions of vessel sales.

We agree with the commenter that proposed § 356.15(d) (now § 356.15(e)) could be clarified to indicate that a vessel may not be documented with a fishery endorsement until the Citizenship Approval Officer has made

a determination that the vessel owner is eligible to document a vessel with a fishery endorsement or operated in the fisheries of the United States until a fishery endorsement has in fact been issued by the Coast Guard. However, we do not agree that it will be necessary to provide for an expedited approval process where the vessel buyer has already been approved by the Citizenship Approval Officer as a Citizen of the United States. Such approvals should naturally be turned around very quickly if there are no significant changes. Similarly, we do not believe that it is necessary to create a deadline for action with regard to a sale that involves parties whose citizenship has not been previously reviewed by the Citizenship Approval Officer. We would expect to respond to these applications in a timely and expeditious manner; however, without knowing the parties involved or the particulars of each transaction and how complicated the citizenship analysis will be, we are reluctant to establish a deadline for action by the Citizenship Approval Officer at this time.

#### Section 356.17 Annual Requirements for Vessel Owners

One commenter stated that § 356.17 should clearly state that a vessel owner submitting its annual Affidavit need not include all the documentary material or information anticipated in its first submission if to do so would be repetitive of information already submitted to MARAD. We agree that the information should not have to be resubmitted unless the Citizenship Approval Officer requests copies of specific documents and have amended § 356.17 to incorporate the comment.

In order to simplify the renewal process and to coordinate better with the Coast Guard, we have decided on our own initiative to amend § 356.17(b) so that the date for the annual citizenship submission is tied to the renewal date for the vessel's documentation and fishery endorsement rather than the stockholder's meeting. Otherwise, owners would be forced to re-document each vessel so that the expiration of the fishery endorsement and the citizenship approval coincide. Owners of multiple vessels with different documentation dates are only required to file an Affidavit of U.S. Citizenship and supporting documentation in conjunction with the first vessel renewal during each calendar year. In order to avoid requiring an owner of multiple vessels to submit a separate Affidavit of U.S. Citizenship and supporting documentation in conjunction with the



annual renewal of the fishery endorsement for each vessel, the rule allows the owner to rely on the Affidavit of U.S. Citizenship and supporting documentation submitted with the first vessel that is subject to renewal in a given calendar year. For every other vessel for which the owner has to demonstrate that it is a Citizen eligible to own a vessel with a fishery endorsement, the owner must submit a certification to the Citizenship Approval Officer at least 45 days prior to the renewal date for the vessel's fishery endorsement stating that the Affidavit of U.S. Citizenship and supporting documentation already on file with Citizenship Approval Officer for the first renewal in that calendar year of a fishery endorsement for a vessel or 100 feet or greater in registered length continues to be true and accurate. Any information or supporting documentation unique to a particular vessel that would normally be required to be submitted under § 356.13 or any other provision of Part 356 such as charters, management agreements, loans or financing agreements, long-term agreements for the sale of a vessels catch, or exemptions claimed under the rule must be submitted with the annual filing for that vessel if the documents are not already on file with the Citizenship Approval Officer.

#### *Subpart D—Mortgages*

##### Section 356.19 Requirements To Hold a Preferred Mortgage

Several commenters noted that state or federally chartered financial institutions meeting the controlling interest requirements of section 2(b) of the 1916 Act are deemed eligible under section 202 of the AFA to hold a preferred mortgage on a Fishing Vessel. However, the commenters stated that this benefit, which is conferred upon state or federally chartered financial institutions through § 356.19, is vitiated by the definition of Non-Citizen in proposed § 356.3(n), which includes any entity that does not meet the 75% U.S. Citizen ownership and control standard, including a state or federally chartered financial institution that meets the controlling interest standard. The commenters recommended that either the definition section be amended or that § 356.19 be amended to state specifically that for purposes of Subpart D of the regulations these lenders are considered U.S. Citizens as though they met the 75% ownership standard. We agree with the commenters and have added a new subsection 356.3(g)(3) to clarify under the definition of "Controlling Interest" that a state or

federally chartered financial institution is considered a Citizen of the United States for purposes of Subpart D of this Part for all purposes other than operation of the vessel pursuant to § 356.25. Similar language was also added to the definition of "Non-Citizen Lender" at § 356.3(p).

##### Section 356.21 General Approval for Non-Citizen Lender's Standard Loan or Mortgage Agreements

Several commenters suggested that § 356.21(a) should be clarified to make clear that general approval of loan documents is not limited to "financial institutions engaged in the business of financing fishing vessels." They contend that this language should only be descriptive and not limiting, otherwise, it could restrict sources of financing. The commenters recommended that pre-approval of loan documents be available to all Non-Citizen Lenders seeking to lend to the owner of a U.S. fishing industry vessel through a Mortgage Trustee. In addition, one of the commenters recommended that any Non-Citizen whose business includes making loans to vessel owners should be able to obtain prior approval.

The language used in § 356.21(a) is intended to be limiting and to apply to financial institutions that are engaged in the business of financing fishing vessels. We want to provide an avenue through the rule for financing institutions to get approval of their standard loan and mortgage packages to minimize the burden of the rule and to provide certainty for traditional financial institutions regarding the covenants that can be used. However, we are concerned about loans from other Non-Citizen entities that may have additional dealings with the vessel owner or bareboat charter that when considered together with the loan may result in excessive control by the Non-Citizen. Accordingly, we believe that it is necessary to examine the loan agreements between vessel owners and Non-Citizens other than financial institutions engaged in the business of financing fishing vessels on more of a case-by-case basis and that general approval of loan agreements should not be granted to other Non-Citizens.

A couple of commenters noted that § 356.21(e) imposes stiff penalties on owners as well as lenders when the lender strays from the pre-approved documents. In addition to the loss of the vessel's fishery endorsement, this subsection subjects lenders to civil and criminal penalties. The commenters suggest that the loss of economic value of the capital should be sufficient. The commenters felt that criminal liability

resulting from some minor variance in the loan documents was excessive and that it would likely deter lenders from lending or encourage them to get every loan approved to avoid the potential liability. The commenters recommend that the civil and criminal penalties be deleted or that, at a minimum, the regulations set a materiality benchmark for variations.

The civil and criminal penalties included in § 356.21(e) were intended to discourage willful misconduct and material fraud and were not intended to result in overly harsh penalties for essentially harmless mistakes. We agree with the commenters that some measure of materiality would be an improvement to this subsection, and we have amended § 356.21(e) to indicate that the penalties apply where there has been material fraud or the lender has knowingly violated this subsection.

##### Section 356.23 Restrictive Loan Covenants Approved for Use by Non-Citizens

Although § 356.23 provides a general conceptual framework for restrictive loan covenants that would be permissible, several commenters noted that loan covenants may vary from one transaction to the next. Because it will be crucial during the final negotiations of a transaction to know whether covenants will pass muster, the commenters stated that it would be helpful for the rule to provide for a quick response time, such as 15 business days, to confirm that similar provisions fall within the general approval authority or are similarly approved. We understand the need for a quick response time during the final stages of negotiations and in response to questions related to the regulation in general, and we will endeavor to provide quick responses. However, without knowing how complicated the transactions or questions put forth to us will be or what the workload to implement these rules will be at any given point in time, we feel that we must evaluate each question on a case-by-case basis and that we can not include a set time frame in the regulation at this point.

One commenter noted that § 356.23(a) provides a list of approved covenants for use by a Non-Citizen Lender that is "unrelated" to the vessel owner. The commenter suggested that the term "unrelated" should be deleted so that the approved covenants could be used by related parties as well as unrelated parties or, at a minimum, that it should be defined so that owners do not have to seek prior approval for every loan where they may have some other

business dealing with the Non-Citizen Lender. In addition, the commenter stated that § 356.23 should provide that Non-Citizen Lenders who use the covenants approved in this section do not have to obtain prior MARAD approval before entering into the mortgage. As with § 356.45, the commenter suggested that the owner should only have to submit a description of the loan within 30 days.

We do not agree to the extension of approved covenants to related parties. The predicate of a list of approved restrictive loan covenants is that there are no other relationships between the lender and the vessel owner. The restrictive loan covenants in conjunction with other relationships between related parties may result in impermissible control. Therefore, we have not extended the coverage of approved covenants to related parties, and we have added a definition of "Related Parties" to § 356.3 to provide additional clarification.

#### *Subpart E Mortgage Trustees*

##### Section 356.27 Mortgage Trustee Requirements

Section 356.27(b)(6) contains a "catch all" requirement which states that Mortgage Trustees must "meet any other requirements prescribed by the Citizenship Approval Officer." Several commenters noted that while this is consistent with MARAD's discretion under the AFA, it creates continued uncertainty regarding the Mortgage Trustee requirements and could discourage potential Mortgage Trustees who may be considering engaging in the business. The commenters noted that MARAD always has the right to amend the rule at a later date if other conditions need to be included and, therefore, suggested that the "catch all" requirement of § 356.27(b)(6) be deleted in order to provide certainty regarding the Mortgage Trustee provisions.

Although MARAD has the authority to promulgate a new regulation to respond to any unforeseen circumstances that could arise related to Mortgage Trustees, promulgating a new rule is a cumbersome, time consuming approach. We believe that the "catch all" requirement § 356.27(b)(6) provides a reasonable way to handle any unforeseen issues and that it would not serve as a significant deterrent to U.S.-Citizen financial institutions to act as Mortgage Trustees.

A couple of commenters stated that they believed § 356.27(e) presents a problem by creating a conflict between the fiduciary duties that the Mortgage Trustee has to the Non-Citizen Lender

and the requirement of the regulations that the Mortgage Trustee not assume any fiduciary duty in favor of a Non-Citizen Lender that is in conflict with the U.S. Citizen ownership and control provisions of the AFA. State and common law requirements subject trustees to a fiduciary duty in favor of the beneficiary—in this case, the Non-Citizen Lender. Therefore, the commenters suggest that a financial institution may be wary of litigation and unlikely to place itself in this conflict and face the possible civil and criminal penalties of § 356.27(g). The commenters recommend that MARAD modify the section to provide that a Mortgage Trustee that utilizes a trust agreement form that is pre-approved by MARAD will be deemed not to be in conflict with the U.S. Citizen ownership and control requirements. We agree with the commenter and have amended § 356.27(e) to provide for requests for pre-approval of trust documents to the Citizenship Approval Officer if the Mortgage Trustee desires additional assurance that the agreement is consistent with the requirements of Part 356 and the AFA.

##### Section 356.31 Maintenance of Mortgage Trustee Approval

A couple of commenters recommended that § 356.31 be amended to make clear that if a Mortgage Trustee loses its qualification and the Non-Citizen Lender is forced to find a new Mortgage Trustee, the preferred status of the mortgage will be preserved during the 30-day transition period. We agree with the comment and have amended § 356.31(c) to implement the commenters' suggestion.

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

##### Section 356.39 Charters

One commenter suggested that MARAD should not accept as a valid practice in the fishing industry so-called "service agreements," in which a contract is made between a party and a vessel owner to have certain services (for example delivery of 100 tons of pollock) performed without specifying which vessel or for what time period. The commenter stated that such agreements have been used in marine transportation to avoid charter limitations. Accordingly, the commenter suggested that MARAD should review all agreements involving Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels and Non-Citizens, to ensure that:

(1) The owner retains management and operation of the vessel, deciding when to fish, what species to catch, and where and when to deliver the catch;

(2) A Non-Citizen, whether a processor or another entity, may not hire the vessel for any period of time or for any voyage as such an arrangement would be a prohibited time or voyage charter. The commenter intimated that a foreign-owned processor, for example, could not contract with a fishing vessel for a season or for a year, since that would be the equivalent of a time charter; and

(3) A bareboat charter is indeed a bareboat charter and not a time charter.

The commenter stated that MARAD should examine all agreements to determine who has the right to hire the crew, who has the obligation to pay expenses and insurance, and who is liable to third parties. For a Fishing Vessel used to harvest fish, the commenter stated that if a Non-Citizen has any of these rights or obligations the agreement should be prohibited.

We agree with the commenter that provisions in various agreements must be regulated to limit the transfer of control over a vessel or vessel-owning entity to Non-Citizens. Accordingly, we feel that a well-grounded approach is to define provisions that are deemed acceptable and others that are deemed prohibited and to require a copy of the charters to be submitted to the Citizenship Approval Officer to ensure that time charters are indeed time charters and that impermissible control is not transferred to a Non-Citizen. However, we do not agree with the commenter that any agreement with a Non-Citizen processor, which for instance sets a delivery schedule for fish to be delivered for processing should be deemed a time charter and prohibited. Certain provisions will be necessary in any such agreements to allow parties to coordinate their operations without determining that coordination equates to control by a Non-Citizen. We discuss management agreements and long-term sales agreements in greater detail under § 356.41 and § 356.43 respectively.

One commenter stated that § 356.39(a)(1), which requires a bareboat charterer to submit an Affidavit of U.S. Citizenship to MARAD for review and approval prior to entering into such charter, is inconsistent with the requirements of the regulations unless MARAD plans to require pre-approval before the sale of each vessel. If so, the commenter suggested that MARAD should minimize the disruption of transactions by permitting a charterer to get an advance determination from the Citizenship Approval Officer that it is a

U.S. Citizen. The commenter also suggested that a vessel owner should be protected if it enters into a voyage or time charter with a person who has been determined by the Citizenship Approval Officer to be a U.S. Citizen. We intend to require approval of a bareboat charterer's citizenship before the parties may enter into the charter. However, an owner may enter into a bareboat charter without prior MARAD approval if the charterer has already been approved by the Citizenship Approval Officer as a U.S. Citizen. Accordingly, we would make a citizenship determination for an entity before it entered into a bareboat charter, minimizing the disruption to transactions between U.S. Citizens. In addition, the owner would be free to rely on the certification of the charterer that it was deemed by the Citizenship Approval Officer within the last year to be a U.S. Citizen where the owner did not otherwise have reason to know that the charterer no longer qualified as a U.S. Citizen.

One commenter noted that § 356.39(b)(1) contains typographical errors. The terms "Fishing Vessel" and "Fish Processing Vessel" should be plural and the words "including Fish Tender Vessels and Fish Processing Vessels" should be deleted. We agree and have made the technical corrections to § 356.39(b)(1).

The same commenter stated that § 356.39(b)(2) should not require prior approval by MARAD of time and voyage charters of Fish Processing and Fish Tender Vessels to charterers who are Non-Citizens. The commenter asserted that the differences between a bareboat charter and time charter are readily apparent and the penalty, loss of the fishery endorsement, is sufficiently severe to keep people honest. Accordingly, the commenter suggested that such charters should be allowed to be submitted to MARAD within 30 days of execution as in § 356.39(a)(2) for charters to U.S. Citizens.

We do not agree with the commenter that MARAD review of the time and voyage charters to Non-Citizens is unnecessary. In order to ensure that an owner has not entered into a prohibited charter with a Non-Citizen, we must know whether the parties to the charter are U.S. citizens and into what type of charter the parties have entered. Because any charter of a Fishing Vessel to a Non-Citizen for the purposes of harvesting fish is prohibited, we must confirm that all charterers of Fishing Vessels are U.S. Citizens. Accordingly, we have required in § 356.39(a)(2) that a charterer claiming to be a U.S. Citizen submit an Affidavit of U.S. Citizenship. However, in § 356.39(b)(2) we are

authorizing time and voyage charters of Fish Processing Vessels and Fish Tender Vessels to Non-Citizens. Because a bareboat charterer steps into the shoes of the owner and is considered the owner *pro hac vice*, we believe that it is necessary to ensure that a charter with a Non-Citizen is indeed a time charter or voyage charter to ensure that such impermissible control is not transferred to a Non-Citizen. Therefore, we will continue to require the approval of time and voyage charters to Non-Citizens prior to their execution. As we gain more experience over time with the participants and charters in the fishing industry, we may revisit whether it is necessary to pre-approve time and voyage charters to Non-Citizens.

The commenter also noted that § 356.39(b)(2), which authorizes time or voyage charters to Non-Citizens of dedicated Fish Processing or Fish Tender Vessels, should be clarified to make clear that the vessel only needs to be "dedicated" as a fish harvesting or fish processing vessel during the period that it is on charter. The commenter stated that there is no policy reason for prohibiting a Fishing Vessel from being utilized as a Fish Tender Vessel or Fish Processing Vessel on a charter to a Non-Citizen when it is not being used as a Fishing Vessel. We agree that the ultimate use of the vessel should determine whether or not it can be chartered under a time or voyage charter to a Non-Citizen. However, we disagree with the commenter's suggestion to allow Fishing Vessels to be chartered to Non-Citizens for use as Fish Processing Vessels and Fish Tender Vessels when not being used to harvest fish because it would be too difficult to track and police time and voyage charters of Fishing Vessels to Non-Citizens. If an owner wishes to time charter or voyage charter a Fishing Vessel for use as a Fish Processing Vessels or Fish Tender Vessel in order to fully utilize its vessel, it still has the option of chartering to a U.S. Citizen.

One commenter suggested that § 356.39 should allow bareboat charters of Fish Tender Vessels or Fish Processing Vessels to Non-Citizens for operation outside of the United States. The commenter noted that this would be perfectly legal and, unlike Fishing Vessels for which there is a rationale to avoid operation outside of the United States, there is not a rationale for preventing what would be a logical use of the vessel outside of the United States. Furthermore, the commenter stated that there is no statutory authority to immediately invalidate the fishery endorsement of a Fish Tender Vessel or Fish Processing Vessel. We

agree with the commenter that the same compelling reasons for limiting the use of Fishing Vessels outside of the United States do not exist for the charter of Fish Processing Vessels and Fish Tender Vessels. Accordingly, § 356.39(b)(1) has been amended to allow bareboat charters of Fish Processing Vessels or Fish Tender Vessels to Non-Citizens for use outside of the United States.

One commenter noted that the rule should make clear that a Non-Citizen time charterer of a Fish Processing Vessel may hire, supervise, manage and direct the processing workers employed in the processing operations of the vessel without rendering the charter a bareboat charter. The commenter urged that the term "crew" be defined as limited to navigational and deck crew where restrictions on Non-Citizen control of the vessel's crew are described. We agree with the commenter that the term "crew" is intended to apply to the navigational and deck crew. Personnel that are solely involved in processing the catch may be hired and managed by a Non-Citizen time charterer, provided that they are engaged solely in the processing of the vessel's catch and are in no way responsible for or authorized to control the navigation, fish harvesting activities, or general operation of the vessel.

Two commenters provided suggestions on § 356.39(d). One commenter suggested that the section is unnecessary and should be deleted because it is clear that a violation of the rules could lead to a loss of the fishery endorsement. The commenter did not believe that it was necessary to restate the penalty here while the rule is silent elsewhere. At a minimum, the commenter thought that the provision should be amended to indicate that the fishery endorsement will be lost only if the vessel is chartered to a Non-Citizen and used for harvesting fish. The commenter stated that loss of the fishery endorsement for a violation of this section for a reason other than using the vessel for harvesting fish goes beyond the requirements of the AFA. The second commenter did not oppose the specification in § 356.39(d) of the penalty for violating this section; however, the commenter thought it should provide for notice to the charterer if it was determined that there was a violation. We disagree with the first commenter's assertion that a loss of the fishery endorsement for a violation of the chartering restrictions goes beyond the scope of the AFA. If a charterer is deemed to have violated the chartering provisions, we would deem there to be an impermissible transfer of control to a Non-Citizen, which would

mean that the vessel owner is not eligible to own a vessel with a fishery endorsement. Accordingly, we do not plan to delete § 356.39(d) from the rule. However, we agree with the second commenter that the owner should be notified if the Citizenship Approval Officer determines that there has been a violation of § 356.39 and that the fishery endorsement is, therefore, being revoked.

#### Section 356.41 Management Agreements

Several commenters suggested that § 356.41(b) be amended to authorize quality control activities, management of fish processors and other non-navigational crew as elements of a management agreement with a Non-Citizen. Similarly, the commenters suggested that for time or voyage charters to Non-Citizens of Fish Processing Vessels and Fish Tender Vessels that are not used for harvesting fish, the Non-Citizen time charterer or voyage charterer should be permitted to hire, supervise, manage and direct the processing workers employed in the processing operations of the vessel without violating the Non-Citizen control provisions of the rule. The commenters noted that such quality control personnel are critical to maintain quality assurance of surimi and other processed products. Accordingly, the commenters urged that the term "crew" be defined as limited to navigational and deck crew and that the term "operation of the vessel" should be defined to exclude processing activities.

We agree with the commenters that control of employees who are engaged solely in the processing operations of a vessel, including quality control personnel, is distinguishable from control over crew responsible for the navigation and general operation of the vessel. Accordingly, we will not consider the term "crew" to include any employees who are engaged solely in the processing of the fish and who are in no way responsible for or authorized to control the navigation, fish harvesting activities, or general operation of the vessel.

#### Section 356.43 Long-Term or Exclusive Sales and/or Marketing Contracts

Several commenters stated that the AFA does not grant authority to MARAD to regulate long-term marketing arrangements or exclusive sales contracts of processed products. Even if MARAD did conclude that it had such authority, the commenters urged that the rule include elements of long-term

sales contracts that are permissible and that reference to approval of long-term marketing arrangements be dropped. We agree with the commenters that the regulation of long-term marketing arrangements of a vessel's catch is unnecessarily broad and should be dropped from § 356.43. However, we do not agree that the requirement of section 203(c)(2) of the AFA that MARAD review contracts or agreements with Non-Citizens related to the sale of all, or substantially all, of the living marine resources harvested by a fishing vessel was intended to apply only to the sale of whole fish. Catcher/processors that sell all or substantially all of the living marine resources harvested by that vessel after performing some level of processing on the catch are still subject to control through such agreements by Non-Citizens. Accordingly, even if the living marine resources harvested by a vessel have been processed in some way, long-term contracts for the sale of those products that account for all or a significant portion of the vessel's catch are still covered by this regulation.

One of the commenters who supported the approval of long-term or exclusive sales agreements without prior approval elaborated on the above comment by pointing out that the provisions in the regulation focus on harvesting vessels delivering to shoreside processors and do not address factory trawlers. The commenter stated that factory trawler agreements include additional contractual elements such as species and product type, expected quantities to be purchased, quality standards, conditions for consignment, responsibility for various costs of sales, terms and methods of payments, shipping instructions, and the possible engagement of a buyer's representative or technician. However, the commenter did not provide specific suggestions regarding contractual provisions that should be approved and no other information relating to standard provisions for such agreements with factory trawlers was submitted. Therefore, the final rule has not been amended and any additional terms that are specific to agreements with factory trawlers will have to be approved by the Citizenship Approval Officer.

One commenter suggested that § 356.43(b)(8) should be revised to allow the Non-Citizen purchaser also to provide processing or quality control technicians. We agree with this comment, provided the quality control technician or processing technician does not have the ability to control navigation, operation, or harvesting activities of the vessel.

One commenter opposed our approach in § 356.43 and stated that the rule should not allow exclusive sales or marketing contracts for all or a significant portion of a vessel's catch without prior review and approval in any case involving a Non-Citizen. The commenter stated that, as proposed, the regulations would allow a Non-Citizen to enter into an arrangement with a Fishing Vessel that is indistinguishable from a prohibited time or voyage charter. For example, the commenter pointed out that § 356.43(a) would permit "the employment of certain vessels on an exclusive basis for a certain period of time," while § 356.43(b)(2) would permit the contract to specify the type of fish to be caught and the place at which the fish is to be delivered. The commenter stated that these provisions are identical to the requirements of a time or voyage charter and that the effort to "minimize disruptions to the fishing industry" should not be translated into loopholes to the express limitations of the AFA. Therefore, the commenter recommended that § 356.43 be revised to require that all contracts with a Non-Citizen for the sale of all or a significant portion of a Fishing Vessel's catch be submitted for approval prior to implementation, and that the rule prohibit any such contract if it permits the Non-Citizen to control the time, location, operation, or nature of the fishing activities.

We believe that a long-term sales contract is distinguishable from a charter of the vessel and that certain provisions related to the timing and scheduling of deliveries are a necessary requirement for any processor to conduct an efficient operation and to avoid bottlenecks. These contracts may specifically provide that the purchaser has the right of first refusal to purchase all or a certain portion of an owner's or bareboat charterer's catch and/or that the owner or charterer agrees to sell all production of its vessels or a portion of the production of its vessels to the processor at fair market value.

#### Section 356.45 Advance of Funds

One commenter suggested we make clear in § 356.45(a)(1) that it addresses both funds advanced for products prior to delivery of the product to the buyer and provisional payments for product already delivered for consignment sales, but not yet sold. We agree that an advance of funds should also be allowed for provisional payments from a Non-Citizen for product already delivered for consignment but not yet sold.

Several commenters stated that § 356.45(a)(1) should not restrict the

advancement of funds to working capital expenditures or restrict the use of funds in any way. Rather, the commenters suggested that MARAD should focus on permissible and prohibited security, collateral, and other obligations by the vessel owner to the Non-Citizen in exchange for the advancement. The commenters stated that the inquiry should be whether the advance of funds is for a bona fide need of the vessel or would otherwise improve the operation of the vessel or its access to fish. Further, the commenters explained that the decision is often artificial or uncertain regarding whether the funds are used for capitalized improvements, so this requirement does not further the purposes of the AFA. Therefore, the commenters suggested that no restriction should be placed on an unsecured, uncollateralized advancement of sales proceeds. The commenters stated that the use of an unsecured advancement of funds for capital improvements to a Fishing Vessel should not be deemed evidence of a transfer of control to a Non-Citizen.

Another commenter elaborated on the advancement of funds and noted that such loans from processors to vessel owners are common in the fishing industry. The commenter explained that often these loans from fish processors to vessel owners are necessary because the vessel owner does not have enough collateral to provide security for the loan. In almost every situation, there is no unencumbered security available, and the processor is asked to take a junior credit position. The borrower is generally required to commit to the delivery of fish to the processor on a right of first refusal basis for a period of time or at least until the loan has been paid off; and to grant security for the loan including a preferred ship mortgage in the vessel. According to the commenter, Non-Citizen owned processors would be placed at a competitive disadvantage if they could not make such loans or had to wait 30, 60, or 90 days for MARAD to approve a transaction.

Likewise, another commenter stated that the requirement in § 356.45(a)(5) that advances of funds not be secured with an interest in the vessel is not appropriate as such a requirement would disrupt the standard practice in the fishing industry. Moreover, the commenter pointed out that even if a Non-Citizen processor did not require a preferred mortgage, an advance of funds for the purpose of procuring goods or services for the vessel (*i.e.*, necessities) likely gives rise to a lien on the vessel whether or not a mortgage is granted.

We agree with the commenters that an advancement of funds should not be limited on the basis of whether those funds are used for working capital or capitalized improvements to the vessel because dollars are not readily traceable. A more appropriate consideration is what type of security is granted for the loan. Accordingly, we have amended the rule by striking the requirement that an advance of funds from a Non-Citizen can only be used for working capital. Although we recognize that loans from Non-Citizen processors secured by a preferred mortgage on the vessel may have been widely utilized in the past, the parties that can hold a preferred mortgage on a vessel are specifically delineated in section 202 of the AFA. A Non-Citizen is specifically prohibited from holding a preferred mortgage on a vessel.

Several commenters requested that we clarify whether a Non-Citizen processor can obtain a preferred mortgage through a Mortgage Trustee as security for a loan to a vessel owner. We do believe that such a security interest in the vessel conveys too much control to a Non-Citizen when considered in conjunction with other leverage that it may have over a vessel owner or charterer through a long term sales contract. Therefore, advancements of funds from Non-Citizen processors will not be permitted where the security for the loan is a security interest in the vessel. If a Non-Citizen processor wishes to lend money to a vessel owner or charterer it may only do so if the loan is unsecured or if the security for the loan is based on a sales agreement for the sale of a percentage of the catch from the vessel owner's vessels.

One commenter stated that § 356.45(a)(3) should not prohibit an advance of funds on the basis of a sales agreement if the agreement provides "any right whatsoever to control the operation, management, and harvesting activities" of a vessel. Instead, it should permit an advance of funds on the basis of a sales agreement which contains the terms approved in proposed § 356.43(b). The commenter asserted that § 356.43(b) clearly contemplates some degree of control over the management and harvesting activities of a vessel by a Non-Citizen and that it does not make sense to authorize these terms in one section and negate their use in another. We agree with the commenter and have amended § 356.45 to clarify that the limitations on the ability of the Non-Citizen to control the operation and harvesting activities of the vessel are limited to those actions not explicitly authorized by § 356.43.

One commenter requested that § 356.45(a)(2) be clarified to indicate what is meant by "the annual value of the sales contract" or why such a standard makes sense as a limit for the amount of the advance. We have amended the rule to clarify that the "annual value of the sales contract" refers to the total sums paid by the processor under the supply contract.

A commenter noted that § 356.45(b) provides a safe harbor for loans that are not secured by a sales or marketing agreement. The commenter stated that the reference to a Non-Citizen Lender with a "U.S. branch" suggests that proposed § 356.45(b) was intended to provide a safe harbor for Non-Citizen financial institutions. However, the language of the section is not so limited and the commenter asserts that there is no reason why the provision should be limited to a financial institution with a U.S. branch. The commenter suggests that the practical result of excluding processors from the safe harbor provisions of § 356.43 and § 356.45 will be to require case-by-case approval of all financial arrangements between Non-Citizen processors and vessel owners. The commenter claims that this will severely burden such arrangements and leave vessel owners with few alternatives to obtain necessary financing for operating costs, repairs or capital improvements. Therefore, the commenter requests that "U.S. branch" be deleted from the provision to make clear that it is available to any Non-Citizen. We do intend to allow Non-Citizens other than financial institutions to enter into unsecured loans with vessel owners. However, the rule restricts the allowance of unsecured loans to a parties with a "U.S. branch" to assure that the foreign entity is subject to service of process in the United States.

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

##### **Section 356.47 Special Requirements for Large Vessels**

There were only a few comments related to the special requirements for larger vessels contained in § 356.47. Two commenters requested that the rule be amended to state that for purposes of 46 U.S.C. 12102(c)(6)(A)(iii) a vessel exceeding the length, tonnage, and horsepower threshold cannot be rendered ineligible for a fishery endorsement by reason of the failure to file an application for a new fishery endorsement within 15 business days after an event causing the endorsement to become invalid unless the owner failed to file such an application after

having received written notice that the fishery endorsement was invalidated and a complete statement as to the grounds for such invalidation. The commenters noted that this concept was discussed in the preamble of the NPRM but was not actually included in the rule. We agree with the comment and have amended § 356.47 accordingly.

Another commenter claimed that the 15 business-day time period to respond to an invalidated endorsement is too short under any circumstances to respond. The commenter pointed out that senior personnel in the fishing industry are often away from their desks for extended periods of time during the fishing season, and notice of this kind could easily be overlooked, without fault of the company, for longer than 15 business-days. In addition, in cases where the invalidation of a fishery endorsement was due to an impermissible change in Non-Citizen ownership, or failure of a Non-Citizen owner or Mortgagee to qualify for or retain a treaty exemption, the proposed 15 business-day cure period is entirely too short and would result in a fire sale of the vessel. We understand the commenter's concern; however, the 15 business-day time period is a statutory requirement and MARAD does not have discretion to provide for a longer period of time.

One commenter stated that while the requirement in § 356.47(a)(3) that a vessel possess an engine or engines "capable of producing a total of more than 3,000 shaft horsepower" is consistent with the language of the statute, it is overly broad and could be misinterpreted. The commenter suggested that the intent of the statute was to limit the power of the vessel's propulsion engines, but that the term "shaft horsepower" does not necessarily refer to the output at the vessel's propeller shafts and could be interpreted to include all engines aboard the vessel including auxiliaries for hydraulics, electrical equipment, etc.

In addition, the commenter noted that use of the term "capable of" to describe the horsepower produced by the engines is overly broad as the term could refer to the maximum possible horsepower rating rather than the horsepower that the engine produces in its actual service rate. For example, the commenter noted that a Caterpillar 3516 marine diesel engine would be rated at 3,000 horsepower at 1,925 rpm for fast passenger vessels and patrol craft, but would only be rated at 1,200 horsepower at 900 rpm when "A" rated for continuous duty operation. Therefore, a new fishing vessel with two 3516's in continuous duty operation

would have a combined output of 2,400 horsepower, well within the limits of the law and regulation. However, under the proposed regulation the vessel could be interpreted as having engines "capable of producing a total of" 6,000 horsepower, nearly double the threshold of the regulations.

We agree with the commenter that the AFA was intended to limit the propulsion horsepower of the vessel's engines as they are rated for their intended use. Accordingly, we have amended § 356.47(a)(3) to clarify that rule applies to the rated horsepower and does not include other auxiliary engines.

#### Section 356.51 Exemptions for Specific Vessels

One commenter pointed out that there was a technical error in § 356.51(c) and that it should read that the NORTHERN VOYAGER and NORTHERN TRAVELER must be used in a fishery governed by the authority of either the New England Fishery Management Council or the Mid-Atlantic Fishery Council rather than a fishery other than one governed by one of these fishery councils. The technical correction was made to the final rule.

One commenter noted that pursuant to the newly enacted 46 U.S.C. 12102(c)(5), the new citizenship regime does not apply at all to some of the Western Pacific fisheries. The commenter stated that it expected the Coast Guard to implement two fishery endorsements, one applicable generally under the AFA and one limited to service in the relevant Pacific fisheries. The commenter suggested that the regulations deal with these vessels either in a scope provision that serves as a gloss on all of part 356, or at least at the places where phrases like "eligible for a fishery endorsement" or the like are used.

We recognize that these vessels are exempt from the new citizenship requirements and have already addressed this in the proposed rule. Section 356.51(e) (now section 356.51(d)) exempts Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels engaged in fisheries in the exclusive economic zone under the authority of the Western Pacific Fishery Management Council established under section 302(a)(1)(H) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)(H)) from compliance with the new citizenship standards and Mortgagee requirements established by the AFA and part 356. In order to obtain a fishery endorsement, the vessel owner is still required to demonstrate in an

Affidavit of U.S. Citizenship that it complies with the ownership and control requirements in effect prior to the passage of the AFA and to note on its Affidavit of U.S. Citizenship that it is claiming an exemption pursuant to this subpart, so that we can appropriately notify the Coast Guard if the vessel owner qualifies for a fishery endorsement.

#### Subpart H—International Agreements

##### Section 356.53 Conflicts With International Agreements

We received a number of comments related to section 356.53 and the process to exempt vessel owners and Mortgagees from the requirements of the rule where there is deemed to be a conflict between the requirements of the rule and an international agreement or treaty to which the United States is a party. Several commenters noted that they believed that there was indeed a conflict between the requirements of the AFA and the Treaty of Friendship, Commerce, and Navigation ("FCN") between the United States and Japan and the FCN between the United States and Korea. These commenters stated that harming Japanese interests violates the AFA's provisions requiring that MARAD "minimize disruptions to the commercial fishing industry, to the traditional financing arrangements of such industry, and to the opportunity to form fishery cooperatives."

The commenters noted that Article V of the U.S.-Japan FCN prohibits "unreasonable measures that would impair the legally acquired rights or interests" of Japanese nationals or companies. These commenters stated that the regulations and the AFA are in conflict with the U.S.-Japan FCN because the law fails to provide for "prompt payment and compensation" for what amounts to a taking. The commenters further explained that failure of the rule to address the treaty issue has placed relationships with Japanese owned entities in the fishing industry in unnecessary jeopardy and is likely to have a significant adverse economic effect on the U.S. fishing industry as this uncertainty may cause Japanese interests to sell rather than wait for the final rule or determination by MARAD.

Several commenters asserted that the final rule should acknowledge that the rules and the U.S.-Japan FCN are inconsistent and that it should state that any owner or Mortgagee that makes the required factual showing that it is covered by the U.S.-Japan FCN will be exempted from the final rule. The commenters also stated that the

proposed rule ignores the affirmative obligation of the United States to rule on the applicability of the U.S.-Japan FCN, and thus attempts to shift the burden to the Japanese investors and lenders to assert the conflict on an individual, case-by-case basis. The commenters stated that all Japanese companies would not be assured of an exemption from the requirements of the AFA due to the procedural review mechanism, which would require a private company to provide interpretations of the FCN, a matter which they asserted is the obligation of the U.S. Government.

In contrast, one commenter stated that a liberal interpretation of the investment treaties with Japan and Korea would eliminate the intended effect of the new ownership requirements in the nation's largest fishery. The commenter stated that Congress could not have intended such a result inasmuch as all of the treaties were given advice and consent of the Senate and were thus known to Congress. Nevertheless, the commenter pointed out that the Conference Report states that "[w]hile Congress does not believe that any of the requirements of the American Fisheries Act violate any international agreements relating to foreign investment to which the United States is a party, subsection [213](g) is included as a precaution." Furthermore, the commenter stated that the FCN treaties were general in nature and were negotiated for the purpose of granting most-favored-nation trading status to the other nations with respect to tariffs.

The commenter noted that the U.S. has consistently exempted vessel ownership statutes from multilateral agreements dealing with trade and investment. The final act establishing the World Trade Organization, signed on April 15, 1994, adopted a series of additional understandings, one of which made it clear that the new WTO provisions did not apply to national legislation restricting vessel ownership and use within a nation's territorial sea or exclusive economic zone. In addition, the commenter stated that the North American Free Trade Agreement (NAFTA) contains a reservation in Annex II dealing with water transportation which states that the U.S. reserved the right to adopt any new measure or maintain any existing measure covering investments, ownership, control and operation of vessels engaged in fishing in the U.S. territorial sea or exclusive economic zone. Among the statutes identified in the Act are the Commercial Fishing Industry Vessel Anti-Reflagging Act, which established majority U.S. ownership and control requirements for all fishing industry vessels. The

commenter asserted that the United States clearly must have believed that it could apply existing and new requirements to nationals of Canada and Mexico.

In any event, the commenter noted that the Anti-Reflagging Act contained requirements that all fishing vessels be majority owned and controlled by U.S. Citizens. Even if the U.S.-Korea and U.S.-Japan FCN treaties are stretched to cover fishing industry investment, the commenter suggested that any investment made after January 11, 1988, must now comply with the majority ownership and control requirements implemented by the Anti-Reflagging Act, regardless of any previous grandfathering that may have applied to a specific vessel under section 7(b) of that Act. By repealing section 7(b) in 204 of the AFA, the commenter stated that Congress eliminated the exemption provided to vessels and clearly intended that all Non-Citizen investment in the U.S. fishing industry must meet the majority ownership requirements after January 11, 1988.

The final rule promulgates a process under which a vessel owner or Mortgagee may petition MARAD for a determination that there is a conflict between the requirements of the final rule and an international agreement and that the vessel owner or Mortgagee is therefore exempt from the requirements of the rule. We do not agree with the comments that it is an affirmative duty of the United States Government to pronounce its interpretation of the treaties in the rule or that it would be a hardship on private sector companies to advance an argument as to why they believe they should be exempt from the requirements of the rule. Therefore, we intend to maintain our process in the final rule for making determinations regarding the exemption of certain vessel owners and Mortgagees on the grounds that there is a conflict with an international agreement or treaty and the AFA as implemented in the rule.

Several commenters noted that the proposed rule implicitly invites submission of petitions any time after issuance of the rule in final form, but fails to state this explicitly. The commenters urged that the rule explicitly state that the petitions will be received as soon as the rule becomes final. We agree and have amended the final rule accordingly.

In addition, several commenters noted that there is no time schedule for review of petitions by MARAD. The commenters pointed out that a time frame is included for analogous situations in the rule, such as citizenship determinations under

§ 356.15(a) and suggested that we include a time frame for decision-making related to exemptions under § 356.53. The suggested time frames ranged from 45 days to 120 days. The commenters stated that failure to provide a prompt response to an exemption petition will have the effect of a denial, since uncertainty can have the same adverse effect as a definitive requirement to divest. We agree with the commenters that a time frame for MARAD decision should be included in the rule, and we have amended § 356.53 to indicate that absent any extenuating circumstances, a decision will be rendered within 120 days of the receipt of a fully completed petition. After consulting with the federal agencies who have responsibility for interpreting investment treaties, we have concluded that under most circumstances we should be able to render a decision within the 120 day time frame. However, because we do not know how many petitions we may receive, how many investment agreements we may be required to address simultaneously, or what other unforeseen circumstances may be presented, it is possible that the work load at a given point in time or other extenuating circumstances could prevent us from rendering a decision within 120 days. We recognize the importance of obtaining a decision on a petition in a timely manner and of knowing when that decision will be rendered; therefore, if the Chief Counsel concludes that it will not be possible to render a decision within the 120 day time frame, the petitioner will be notified around the 90th day after the completed petition is received that a decision will not be rendered within 120 days. The Chief Counsel will advise the petitioner at the time of that notification of the date on which MARAD expects to render a decision.

Other commenters suggested that any petitions should be subject to publication in the **Federal Register** with an opportunity for the public to comment given the precedential value of these decisions. We agree with the commenters and have amended the rule to include a requirement that each application be noticed in the **Federal Register** with an opportunity for comment. The **Federal Register** notice will include the petitioner's description regarding how the AFA and Part 356 are in conflict with a particular investment treaty or agreement, but it will not include proprietary or confidential information about the petitioner. The Chief Counsel, in consultation with other departments and agencies within

the Federal Government that have responsibility or expertise related to the interpretation or application of international investment agreements (e.g., the Department of State, United States Trade Representative, Department of Treasury, etc.), will review the petition and the public comments to determine whether the international agreement and the requirements of the AFA and Part 356 are in conflict.

Several commenters noted that information in §§ 356.53(b), (d), and (e) only addresses owners of vessels and would be either inappropriate or irrelevant for a foreign mortgagee. They pointed out that the rule does not describe the information that a foreign mortgagee must submit. We agree with the comments and have amended § 356.53(b), (d) and (e) to address the particular information that must be submitted by a Non-Citizen mortgagee. It should be noted that § 356.53(d) has been divided and the second part has been renumbered as § 356.53(e). Subsection (e) and (f) have been renumbered as (f) and (g) respectively.

A number of commenters stated that the rule should recognize that the owner of a vessel may be seeking an exemption from any of the control provisions of the AFA and should clearly state that an owner that is deemed to be exempt does not have to abide by the control provisions in its dealings with Non-Citizens since the owner is now outside the scope of the rule. The commenters stated that the rule should be clarified to anticipate petitions for exemption from the "control" provisions with respect to other types of business arrangements (such as exclusive sales contracts) incidental to a mortgage. Further, the commenters stated that the rule should make clear that anyone that has an ownership interest may utilize the petition process, e.g., a minority shareholder with a direct or indirect interest. We agree with the commenters that a minority shareholder should be allowed to petition for an exemption.

One commenter offered a technical correction to § 356.53(d) of the NPRM, pointing out that the language should include a reference to a conflict with 46 U.S.C. 31322(a). We agree with the commenter and have amended § 356.53(d).

One commenter noted that § 356.53(d) should also include a statement that the pre-AFA documentation requirements included a prohibition on control by a foreign national. Those issues are not addressed in this rule and will be considered when acting on requests under § 356.53.

One commenter noted that the rule does not provide for an opportunity for

comment or appeal if the agency rules against a petition for exemption. Accordingly, the new § 356.53(e) will allow for an appeal to the Maritime Administrator within 15 business-days of the issuance of a decision by the Chief Counsel.

Section 356.53(f)(2) of the NPRM states that an exemption under § 356.53 is terminated "if any ownership interest in [the owner of a fishing industry vessel] is transferred to or otherwise acquired by a Non-Citizen after [October 1, 2001]." Several commenters felt that it was clear from the AFA, and should be made explicit in the regulations, that the term "owner" in this provision relates only to the U.S. vessel-owning company and not to the mere change of one share of the foreign investor, which may be publicly traded. The commenters supported their argument by noting that the balance of stock shares of a Non-Citizen investor, which by definition is not relied upon for citizen ownership or control requirement, is of no concern under the AFA. The commenters recommend that the rule clarify that such an exemption-ending ownership change refers only to an equity shift in the U.S. vessel-owning company, not any parent foreign companies, which, for example, may be publicly traded on foreign markets.

We agree with the commenters and have made clear in § 356.53(g)(2) of the final rule that an ownership interest is deemed to be transferred under this subsection when there is a transfer of interest in the primary vessel-owning entity. The amendments further clarify that we will not consider a transfer of interest in the primary vessel-owning entity to take place where: (1) The primary vessel-owning entity is a publicly traded company and the transfer is of disparately held shares totaling less than 5% of the shares in that class; (2) the transfer is of shares in a parent company of the primary vessel-owning entity and the transfer does not result in a transfer of the parent company to another Non-Citizen; or (3) the transfer is pursuant to a divorce or death. However, an interest in a vessel owning entity that exceeds 5% of the shares in a class can not be sold to the same Non-Citizen through multiple transactions involving less than 5% of the shares of that class of stock in order to maintain the exemption for the vessel owner.

We made one additional change to § 356.53 on our own initiative to require that a petition for an exemption be filed with the Chief Counsel of the Maritime Administration as opposed to the Citizenship Approval Officer. References in § 356.53 to the Citizenship

Approval Officer have therefore been changed to the Chief Counsel. In addition, we have clarified in § 356.53 that the Chief Counsel will make his decision in consultation with other departments and agencies within the Federal Government that have responsibility or expertise related to the interpretation or application of international investment agreements (e.g., the Department of State, United States Trade Representative, Department of Treasury, etc.).

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

##### Section 356.55 Review of Compliance With Harvesting and Processing Quotas.

One commenter noted that MARAD should suspend rulemaking under subpart I until the National Marine Fisheries Service ("NMFS") has promulgated a processing and excessive share regulation and should adopt whatever definition of "entity" is used in the fishery regulations. We determined that it is not necessary to suspend our rulemaking under Subpart I; however, we decided that a number of changes to § 356.55 are appropriate. Those changes include:

- Making the Chief Counsel of the Maritime Administration the appropriate official to make the necessary findings under § 356.55.
- Describing in § 356.55(b) the type of information that the Chief Counsel will request from the National Marine Fisheries Service or the North Pacific Fishery Management Council ("NPFMC").
- Clarifying in a new paragraph § 356.55(c) that any requests for information from the parties involved will be transmitted to the parties by the Chief Counsel through the Secretary of Commerce and/or the NPFMC.
- Redesignating paragraphs (c), (d), and (e) as (d), (e), and (f) respectively.
- Amending the newly designated paragraph (f) to clarify that it is within the Secretary of Commerce's discretion to determine either, on the basis of MARAD's finding or other evidence, if there is enough evidence to pursue an enforcement action for a violation of the harvesting or processing caps contained in § 210(e) of the AFA.
- Deleting former paragraph (f) relating to penalties. Penalties will be assessed by the National Oceanic and Atmospheric Administration.

#### **Rulemaking Analysis and Notices**

##### *Executive Order 12866 (Regulatory Planning and Review)*

This final rule is a significant regulatory action under section 3(f) of



Executive Order 12866 and was reviewed by the Office of Management and Budget. The rule is not economically significant under section 3(f)(1) of the Executive Order. The rule is significant under the Regulatory Policies and Procedures of the Department of Transportation, 44 FR 11034 (February 26, 1979), because of significant public and congressional interest.

This final rule establishes regulations pursuant to the AFA. The AFA raises the U.S. citizen ownership and control requirements for U.S.-flag Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels operating in U.S. waters from 51% to 75%. The AFA also eliminates exemptions for vessels that cannot meet current citizenship standards and phases out of operation many of the largest vessels. Section 203 of the AFA requires that we promulgate regulations that: (1) Prohibit impermissible transfers of ownership or control; (2) identify transactions that will require our prior approval; and (3) identify transactions that will not require our prior approval. To the extent practicable, the regulations are required to minimize disruptions to the commercial fishing industry, to the traditional financing arrangements of such industry, and to the formation of fishery cooperatives.

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

The AFA also requires that 75% of the control over a vessel or vessel-owning entity be vested in Citizens of the United States. Therefore, owners that comply with the ownership requirements may still be affected by this rule if they have entered into

contracts or agreements that would convey impermissible control to Non-Citizens. Agreements that convey impermissible control over a vessel or vessel-owning entity are prohibited by the AFA. However, we have attempted in this rulemaking to minimize the review of certain contracts and agreements so as not to interfere unduly with the operation of Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels.

Some lenders financing Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels could also be affected by this rule if they do not meet the requisite United States Citizenship requirements to hold a Preferred Mortgage on such vessels. A Non-Citizen Lender that does not qualify to hold a Preferred Mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel in its own right may receive a Preferred Mortgage through the use of an approved Mortgage Trustee that qualifies as a Citizen of the United States. It has been our experience that the use of a Mortgage Trustee imposes minimal cost and burden compared to the overall benefits of receiving a Preferred Mortgage or security for a loan. Therefore, while Non-Citizen Lenders may incur some cost associated with using a qualified Mortgage Trustee to hold the Preferred Mortgage, the burden will be minimal; Non-Citizen Lenders will not be prohibited from financing Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels; and, no more than minimal costs are likely to be passed on to vessel owners.

We do not have additional cost estimates regarding the total cost of the requirements of the statute or this rule because little cost information was submitted by the industry in response to the ANPRM and the NPRM and no one disputed the above assessment. The preliminary regulatory analysis reflects the comments that were received in response to the ANPRM and NPRM.

#### *Discussion of Alternatives*

The AFA specifically requires that we issue regulations that set out the requirements for owners of vessels to file, on an annual basis, a statement of citizenship setting forth all relevant facts regarding vessel ownership and control that are necessary to demonstrate compliance with 2(c) of the Shipping Act of 1916, 46 App. U.S.C. 802(c), and with 46 U.S.C. 12102(c). Section 203(b) of the AFA requires that the regulations conform, to the extent practicable, with our regulations establishing the form of citizenship affidavit set forth in 46 CFR part 355, as

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

The Affidavit of U.S. Citizenship required for an entity owning a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel to provide evidence of United States citizenship is modeled after our existing regulations in 46 CFR part 355. We have considered various alternatives to implement the AFA and the impact of these alternatives on the regulated community and on small business entities in the fishing industry. Although the AFA grants broad authority to us to regulate transactions related to the ownership and control of Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels, we have attempted to promulgate requirements that pose the least possible burden on the regulated public, while still providing us with the information necessary to implement our responsibilities under the AFA.

We have also reviewed alternatives with respect to the approval and oversight of mortgages and Mortgage Trustees. While 203(c) of the AFA requires us to rigorously scrutinize mortgages and financing agreements, we do not believe that it will be necessary to require transactional approval of each financing and mortgage transaction. Accordingly, we propose to allow Non-Citizens who are in the business of financing vessels to obtain general approval of their standard loan agreement, provided that the standard loan covenants are acceptable to us. Section 356.21 allows a Non-Citizen Lender to get general approval for its standard loan documents if it does not include covenants that would convey

impermissible control to the Non-Citizen. Once a Non-Citizen Lender has received approval for its standard loan agreements, it may enter into loans for Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels without having to obtain the approval of the Citizenship Approval Officer for each loan agreement. The general approval should reduce the paperwork required for lenders and owners, provide certainty regarding the loan covenants that will be considered permissible, streamline the process for financing Fishing Vessels, Fish Processing Vessels, and Fish Tender Vessels, and increase the range of financing options for vessel owners, including small business entities.

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

With regard to long-term or exclusive contracts for the sale of all or a significant portion of a vessel's catch, we again considered requiring that these agreements be approved on a transactional basis. However, because we do not wish to impose requirements on owners of Fishing Vessels that will interfere with their ability to enter into such agreements in a timely manner, we have elected to authorize such standard agreements, provided that they do not convey impermissible control to a Non-Citizen. We have determined that certain standard provisions do not convey impermissible control to Non-Citizens and may be included in these agreements. The NPRM will thus permit owners and bareboat charterers of

Fishing Vessels to enter into these agreements with Non-Citizens in a timely manner without imposing additional costs or time consuming regulatory requirements.

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

#### *Federalism*

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

#### *Regulatory Flexibility Act*

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

In our effort to determine whether there are a substantial number of small entities that may be affected by this rule, we issued an ANPRM entitled Eligibility of U.S.-Flag Vessels of 100 Feet or Greater to Obtain Fisheries Documents, 64 FR 24311 (May 6, 1999), and a NPRM entitled Eligibility of U.S.-Flag Vessels of 100 Feet or Greater in Registered Length To Obtain a Fishery Endorsement to the Vessel's Documentation, 65 FR 646 (January 5, 2000) and requested input from the public regarding the potential economic impact of the new citizenship and control requirements of the AFA. We specifically requested information regarding: (1) Any unique issues within

the fishing industry regarding the ownership, operation, management, control, financing, or mortgaging of Fishing Vessels; and (2) costs relating to the new citizenship and control requirements that would likely be incurred by vessel owners, operators, lending institutions, Mortgagees, and other participants in the fishing industry. We conducted five public meetings during the 60-day comment period for the ANPRM and three public meetings during the 45-day comment period for the NPRM to obtain oral and written comments from the public. Although the comments in response to the ANPRM and the NPRM provided us with some valuable information, we only received four comments from entities that identified themselves as small entities, and we did not receive specific information regarding the economic impact on small entities that may result from this rulemaking.

This rulemaking may reasonably be expected to affect small businesses or entities that currently own documented Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels, that have financed such vessels, or that are engaging in the fisheries of the United States with such vessels. The Small Business Administration defines businesses within the fishing industry that have annual receipts of \$3 million or less as small businesses, 13 CFR 121.201. While we recognize that a number of vessel owners may be classified under the Small Business Administration regulations as small entities, we have not received any comments indicating that the rulemaking will have a significant economic impact on small entities. We estimate that of the nearly 33,000 vessels that have a fishery endorsement, fewer than 550 are 100 feet or greater in registered length and thus subject to this final rule. We further estimate that there are approximately 400 vessel owners within this group of 550. Only one commenter responded to the NPRM that several of its members who are subject to the rule would be classified as small businesses; however, the commenter did not provide a specific number of small entities that would be subject to the rule or argue that the rule would result in a significant economic impact on a substantial number of small entities.

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

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

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

#### *Environmental Impact Statement*

We have analyzed this rule for purposes of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and have concluded that under the categorical exclusions provision in section 4.05 of Maritime Administrative Order 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.

#### *Paperwork Reduction Act*

This rulemaking establishes a new requirement for the collection of information. The Office of Management and Budget ("OMB") has reviewed and approved the information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501,

*et seq.*) and assigned OMB control number 2133-0530. Comments received on this information collection are discussed in the "Comments on the Proposed Rule" section of this notice of final rule.

#### *Unfunded Mandates Reform Act of 1995*

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

#### **Regulation Identifier Number**

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

#### **List of Subjects in 46 CFR Part 356**

Citizenship and naturalization, Fishery endorsement, Fishing vessels, Mortgages, Mortgage trustee, Penalties, Preferred mortgages, Reporting and recordkeeping requirements, Vessels.

Accordingly, we are adding a new 46 CFR part 356 to read as follows:

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

##### **Subpart A—General Provisions**

Sec.

- 356.1 Purpose.
- 356.3 Definitions.

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

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

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

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

##### **Subpart D—Mortgages**

- 356.19 Requirements to hold a Preferred Mortgage.

- 356.21 General approval of Non-Citizen Lender's standard loan or mortgage agreements.
- 356.23 Restrictive loan covenants approved for use by Non-Citizen Lenders.
- 356.25 Operation of Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels by Mortgagees.

##### **Subpart E—Mortgage Trustees**

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

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

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

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

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

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

- 356.53 Conflicts with international agreements.

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

- 356.55 Review of compliance with harvesting and processing quotas.

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

##### **Subpart A—General Provisions**

###### **§ 356.1 Purpose.**

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

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

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

### § 356.3 Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

(i) In the case of a corporation:

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

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

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

United States;

(iii) In the case of an association:

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

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

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

(iv) In the case of a joint venture:

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

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

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

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

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

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

(vi) In the case of a mortgage Trust:

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

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

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

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

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

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

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

(g) *Controlling Interest:*

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

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

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

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

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

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

(i) In the case of a corporation:

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

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

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

(iii) In the case of an association:

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

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

(iv) In the case of a joint venture:

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

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

(v) In the case of a mortgage trust:

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

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

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

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

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

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

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

of this part other than operation of the vessel pursuant to § 356.25.

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

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

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

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

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

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

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

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

(2) Is a Citizen of the United States;

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

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

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

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

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

(p) *Non-Citizen Lender* means a lender that does not qualify as a Citizen of the United States. A state or federally chartered financial institution that meets the requirements of § 356.3(g) is considered a Citizen of the United States for all purposes of subpart D of this part other than operation of the vessel pursuant to § 356.25.

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

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

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

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

(3) A person that complies with the provisions of 46 U.S.C. 12102(c)(4).

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

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

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

(v) *Trust* means:

(1) In the case of ownership of a Fishing Vessel, Fish Processing Vessel,

or Fish Tender Vessel, a trust that is domiciled in and existing under the laws of the United States or of a State, of which the Trustee is a Citizen of the United States, and 100% of the interest in the Trust is held for the benefit of a Citizen of the United States; or

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

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

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

**Subpart B—Ownership and Control**

**§ 356.5 Affidavit of U.S. Citizenship.**

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

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

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

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

State of \_\_\_\_\_ County of \_\_\_\_\_ Social Security Number: \_\_\_\_\_ I, \_\_\_\_\_, (Name) of \_\_\_\_\_, (Residence address) being duly sworn, depose and say:

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

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

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

Name	Title	Date and Place of Birth
_____	_____	_____

(The foregoing list should include the officers, whether or not they are also directors, and all directors, whether or not they are also officers.) Each of said individuals is a Citizen of the United States by virtue of birth in the United States, birth abroad of U.S. citizen parents, by naturalization, by naturalization during minority through the naturalization of a parent, by marriage (if a woman) to a U.S. citizen prior to September 22, 1922, or as otherwise authorized by law, except (give name and nationality of all Non-Citizen officers and directors, if any). The By-laws of the Corporation provide that \_\_\_\_\_ (Number) of the directors are necessary to

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

constitute a quorum; therefore, the Non-Citizen directors named represent no more than a minority of the number necessary to constitute a quorum.

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

That I have access to the stock books and records of the Corporation; that said stock books and records have been examined and disclose (a) that, as of \_\_\_\_\_, (Date) the Corporation had issued and outstanding \_\_\_\_\_ (Number) shares of \_\_\_\_\_, (Class) the only class of stock of the Corporation issued and outstanding [if such is the case], owned of record by \_\_\_\_\_ (Number) stockholders, said number of stockholders representing the ownership of the entire issued and outstanding stock of the Corporation, and (b) that no stockholder owned of record as of said date five per centum (5%) or more of the issued and outstanding stock of the Corporation of any class. [If different classes of stock exist, give the same information for each class issued and outstanding, showing the monetary value and voting rights per share in each class. If there is an exception to the statement in clause (b), the name, address, and citizenship of the stockholder and the amount and class of stock owned should be stated and the required citizenship information on such stockholder must be submitted.] That the registered addresses of \_\_\_\_\_ owners of record of \_\_\_\_\_ shares of the issued and outstanding \_\_\_\_\_ (Class) stock of the Corporation are shown on the stock books and records of the Corporation as being within the United States, said \_\_\_\_\_ shares being \_\_\_\_\_ per centum (\_\_\_\_%) of the total number of shares of said stock (each class). [The exact figure as disclosed by the stock books of the corporation must be given and the per centum figure must not be less than 65 per centum for a state or federally chartered financial institution holding a Preferred Mortgage, or not less than 95 per centum for an entity that is demonstrating ownership in a vessel for which a fishery endorsement is sought or a Mortgage Trustee. These per centum figures apply to corporate stockholders as well as to the primary corporation.] (The same statement should be made with reference to each class of stock, if there is more than one class.) or

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

_____	Name of Stockholder
_____	Number of shares owned (each class)
_____	Percentage of shares owned (each class)

<sup>2</sup> Strike inapplicable paragraph 4.

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

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

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

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

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

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

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

<sup>3</sup> Strike inappropriate Paragraph 5.

#### Date

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### § 356.9 Tiered ownership structures.

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

than 25%, in the aggregate, of the interest in an entity that owns a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel means, for example, that:

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

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

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

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

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

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

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

transfer, operation, and manning of such vessels;

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

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

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

(7) Has the right to cause the sale of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel, other than through approved loan covenants where there is a Preferred Mortgage on the vessel or where it is necessary in order to allow a Non-Citizen to dissolve its interest in the entity;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) If we have a concern regarding a Non-Citizen, we will notify the entity of the concern and work with the entity toward a satisfactory resolution, provided there is no verifiable evidence of fraud. Resolution of any control issues may result in a request by us for additional information to clarify the intent of the provision or to amend or delete the provision in question.

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



**Subpart C—Requirements for Vessel Owners****§ 356.13 Information required to be submitted by vessel owners.**

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

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

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

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

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

(5) Any loan agreements or other financing documents applicable to a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel where the lender has not been approved by MARAD as a U.S. Citizen, excepting standard loan agreements from Non-Citizen Lenders where the Non-Citizen Lender has been granted approval from the Citizenship Approval Officer pursuant to § 356.21 to enter into such loans without transactional approval from MARAD;

(6) A description of any operating and/or management agreements entered into between the owner or bareboat charterer of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel

and an entity that has not been determined by MARAD to be a U.S. Citizen, accompanied by a representation and warranty that the agreement does not contain any provisions that convey control over the vessel or vessel-owning entity to a Non-Citizen;

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

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

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

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

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

(12) Any contract or agreement that purports to sell, lease or otherwise

transfer to a Non-Citizen the fishing rights, a fishing quota, a processing quota or any other right allocated to a vessel owner, bareboat charterer, or a particular Fishing Vessel, Fish Processing Vessel or Fish Tender Vessel.

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

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

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

(b) An owner that receives a letter ruling pursuant to paragraph (a) of this section must submit a certification that the information contained in the Affidavit of U.S. Citizenship and in documents submitted in support of the request for a letter ruling remains true and accurate. The certification must be submitted no earlier than September 10, 2001 and no later than September 20, 2001. If changes in the information have occurred between the time of the request for the letter ruling and the time of the certification, the owner must notify the Citizenship Approval Officer of those changes as required by § 356.5 and § 356.17. The owner is still required to inform the Citizenship Approval Officer of any changes as they occur as required by § 356.17 and not merely at the time of the certification.

(c) An owner of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel that does not request a letter ruling prior to June 1, 2001, and who wishes to be eligible to obtain a fishery endorsement on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel on October 1, 2001, must submit the

required Affidavit of U.S. Citizenship and all other documentation required by § 356.13 to the Citizenship Approval Officer no later than June 1, 2001. If a completed Affidavit of U.S. Citizenship including all required documentation is not submitted by June 1, 2001, the Citizenship Approval Officer may not have sufficient time to make a citizenship determination and the Vessel may be prohibited from operating in the fisheries of the United States until an eligibility determination is made by the Citizenship Approval Officer.

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

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

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

made whether the applicant qualifies as a U.S. Citizen.

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

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

(b) The annual certification required by paragraph (a) of this section must be filed at least 45 days prior to the renewal date for the vessel's documentation and fishery endorsement. Owners of multiple vessels with different documentation renewal dates are only required to file an Affidavit of U.S. Citizenship and supporting documentation in conjunction with the first vessel renewal during each calendar year. To satisfy the citizenship approval requirements for the renewal of a fishery endorsement for another vessel in the same calendar year, the owner must submit a certification to the Citizenship Approval Officer at least 45 days prior to the renewal date for the vessel's fishery endorsement stating that the Affidavit of U.S. Citizenship and supporting documentation already on file with the Citizenship Approval Officer for the first renewal in that calendar year of a fishery endorsement for a vessel of 100 feet or greater in registered length belonging to that owner continues to be true and accurate. Any information or supporting documentation unique to a particular vessel that would normally be required to be submitted under § 356.13 or any other provision of this part 356 such as charters, management agreements, loans or financing agreements, sales, purchase or marketing agreements, or exemptions claimed under the rule must be submitted with the annual filing for that vessel if the documents are not already on file with the Citizenship Approval Officer.

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

**Subpart D—Mortgages**

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

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

- (1) A Citizen of the United States;
- (2) A state or federally chartered financial institution that complies with the Controlling Interest requirements of section 2(b) of the 1916 Act, 46 App. U.S.C. 802(b); or
- (3) A Mortgage Trustee that qualifies as a Citizen of the United States and that has satisfied the requirements of §§ 356.27 through 356.31.

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

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

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

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

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

- (1) A copy of its standard loan or mortgage agreement for Fishing Vessels, Fish Processing Vessels, and Fish

Tender Vessels, including all covenants that may be included in the loan or mortgage agreement; and,

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

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

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

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

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

**§ 356.23 Restrictive loan covenants approved for use by Non-Citizen Lenders.**

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

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

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

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

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

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

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

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

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

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

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

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

**§ 356.25 Operation of Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels by Mortgagees.**

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

Processing Vessel, or Fish Tender Vessel.

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

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

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

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

**Subpart E—Mortgage Trustees**

**§ 356.27 Mortgage Trustee requirements.**

(a) A lender who does not qualify as a Citizen of the United States or is not a state or federally chartered financial institution that meets the Controlling Interest requirements of section 2(b) of

the 1916 Act and Section 356.3(g) can obtain a Preferred Mortgage on a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel by using an approved Mortgage Trustee to hold the mortgage and the debt instrument that the mortgage is securing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Mortgage Trustees approved by the Citizenship Approval Officer must not assume any fiduciary obligations in favor of Non-Citizen Lenders that are in conflict with the U.S. Citizen ownership and control requirements set forth in the

AFA, without the approval of the Citizenship Approval Officer. An approved Mortgage Trustee may request that the Citizenship Approval Officer pre-approve a trust agreement form to ensure that the fiduciary duties assumed by the Mortgage Trustee in favor of a Non-Citizen Lender are consistent with the ownership and control requirements of this part and the AFA.

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

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

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

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

I. The Mortgage Trustee certifies:

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

(b) That it—

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

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

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

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

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

II. The Mortgage Trustee agrees:

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

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

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

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

(iii) Is a Citizen of the United States;

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

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

(2) Notify the Citizenship Approval Officer in writing, of any changes in its name, address, officers, directors, stockholders, articles of incorporation or bylaws within 30 calendar days of such changes;

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

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

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

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

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

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

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

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

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

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

III. This application is made in order to induce the Maritime Administration to grant approval of the undersigned as Mortgage Trustee pursuant to 46 App. U.S.C. 802(c) and 46 U.S.C. 12102(c) and the Regulation, and may be relied on by the Citizenship Approval Officer for such purposes. False statements in this application may subject

the applicant to fine or imprisonment, or both, as provided for violation of the proscriptions contained in 18 U.S.C. 286, 287, and 1001.

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

(Print or type name below)  
(SEAL)  
MORTGAGE TRUSTEE'S NAME & ADDRESS

By:  
(print or type name below)  
TITLE

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

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

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

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

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

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

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

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

transfer of the Mortgage Trustee's fiduciary responsibilities to a successor Mortgage Trustee.

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

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

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

**§ 356.39 Charters.**

(a) Charters to Citizens of the United States:

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

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

(b) Charters to Non-Citizens:

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

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

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

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

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

**§ 356.41 Management agreements.**

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

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

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

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

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

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

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

(a) An owner or bareboat charterer of a Fishing Vessel, Fish Processing Vessel,

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

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

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

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

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

(4) Specify refrigeration criteria;

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

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

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

(8) Provide for the purchaser to furnish off-loading crew and/or processing or quality control technicians but no other vessel crew members.

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

as provided for in paragraph (b) of this section.

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

#### § 356.45 Advance of funds.

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

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

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

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

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

(iii) The owner or bareboat charterer submits to the Citizenship Approval Officer within 30 days of execution a description of the arrangement and a certification and warranty that the agreement or contract with the Non-Citizen does not convey control over the vessel, the vessel owner or bareboat charterer in any manner whatsoever other than as provided for in § 356.43; and,

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

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

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

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

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

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

### Subpart G—Special Requirements for Certain Vessels

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

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

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

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

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

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

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

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

(3) In the event of the invalidation of the fishery endorsement after October 21, 1998, application is made for a new fishery endorsement within 15 business days of the receipt of written notification from MARAD or the Coast Guard identifying the reason for such invalidation;

(c) A vessel that is prohibited from receiving a fishery endorsement under paragraph (a) of this section will be eligible if the owner of such vessel demonstrates to MARAD that the regional fishery management council of jurisdiction established under section 302(a)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)) has recommended after October 21, 1998, and the Secretary of Commerce has approved, conservation and

management measures in accordance with the American Fisheries Act of 1998, Title II, Division C, Public Law 105-277, to allow such vessel to be used in fisheries under such council's authority.

(d) A vessel that meets one or more of the conditions in paragraph (a) of this section may still be eligible for a fishery endorsement if the vessel is engaged exclusively in the menhaden fishery in the geographic region governed by the South Atlantic Fisheries Council or the Gulf of Mexico Fisheries Council.

#### **§ 356.49 Penalties.**

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

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

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

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

#### **§ 356.51 Exemptions for specific vessels.**

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

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

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

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

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

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

(b) The NORTHERN VOYAGER (United States official number 637398) and NORTHERN TRAVELER (United

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

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

(d) The following Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels are exempt from the new ownership and control standards under the AFA and this part 356 for vessel owners and Mortgagees:

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

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

(e) Owners of vessels exempt from the new ownership and control requirements of the AFA and this part 356 by paragraph (a) or (d) of this section must still comply with the requirements for a fishery endorsement under the federal law that was in effect on October 20, 1998. The owners must also submit to the Citizenship Approval Officer on an annual basis an Affidavit of United States Citizenship in accordance with § 356.15 demonstrating that they comply with the Controlling Interest requirements of section 2(b) of the 1916 Act. In addition:

(1) The owners of the Fishing Vessels, Fish Processing Vessels, or Fish Tender Vessels listed in paragraph (a) of this section that are exempt from the new requirements of 46 U.S.C. 12102(c) must specifically outline the current ownership structure at the time of filing, any changes in the ownership structure that have occurred since the filing of the last Affidavit, and a chronology of all changes that have occurred since October 21, 1998; and,

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

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

#### **§ 356.53 Conflicts with international agreements.**

(a) If the owner or Mortgagee of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel believes that there is a conflict between the AFA or 46 CFR part 356 and any international treaty or agreement to which the United States is a party on October 1, 2001, and to which the United States is currently a party, the owner or Mortgagee may petition the Chief Counsel of the Maritime Administration at any time after July 19, 2000 to request a ruling that all or part of the requirements of this part 356 do not apply to that particular owner or particular Mortgagee with respect to a specific vessel; provided, the petitioner had an ownership interest in the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel, or a mortgage on the vessel in the case of a Mortgagee, on October 1, 2001, and is covered by the international agreement. Petitions may be filed prior to October 1, 2001 by owners or Mortgagees with respect to international treaties or agreements in effect at the time of the petition which are not scheduled to expire prior to October 1, 2001.

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

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

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

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

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

(5) For all petitions filed prior to October 1, 2001, a certification that the owner does not intend to transfer interest in the vessel-owning entity to a Non-citizen prior to October 1, 2001.

(c) A separate petition must be filed for each Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel for which the vessel owner or a Mortgagee is requesting an exemption unless the Chief Counsel authorizes consolidated filing. Petitions should include two copies of all materials and should be sent to the following address: Maritime Administration, Chief Counsel, Room 7228, 400 7th Street, SW., Washington, DC 20590.

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

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

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

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

(1) The Vessel's current ownership structure;

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

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

(4) A certification that no interest in the vessel was transferred to a Non-Citizen after September 30, 2001.

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

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

(2) To the owner of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel on October 1, 2001, if any ownership interest in that owner is transferred to or otherwise acquired by a Non-Citizen after such date. An ownership interest is deemed to be transferred under this section when there is a transfer of interest in the primary vessel-owning entity. A transfer of interest in the primary vessel-owning entity does not include:

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

(ii) Transfers of shares in a parent company that do not result in a transfer of the parent company to another Non-Citizen; or

(iii) Transfers pursuant to a divorce or death.

#### **Subpart I—REVIEW OF HARVESTING AND PROCESSING COMPLIANCE**

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

(a) Upon the request of either the North Pacific Fishery Management

Council ("NPFMC") or the Secretary of Commerce, the Chief Counsel will review any allegation that an individual or entity has exceeded the allowable percentage for harvesting or processing pollock as provided for in section 210(e)(1) or (2) of the AFA.

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

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

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

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

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

(i) Articles of incorporation;

(ii) Bylaws;

(iii) Identity of shareholders and the percentage owned;

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

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

(c) If MARAD determines during the course of its review that additional information is required from the parties alleged to have exceeded the excessive share cap, the Chief Counsel will advise the Secretary of Commerce and/or the NPFMC what information is required. The Secretary and/or the NPFMC will request that specific parties submit the required information to MARAD.

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

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

(1) For purposes of this section, an entity will be deemed to have an ownership interest in a pollock harvesting or processing entity if it either owns a percentage of the pollock harvesting or processing entity directly



or if ownership can be traced through intermediate entities to the pollock harvesting or processing entity. To determine the percentage of ownership interest that an entity has in a pollock harvesting or processing entity where the ownership interest passes through one or more intermediate entities, the entity's percentage of direct interest in an intermediate entity is multiplied by the intermediate entity's percentage of direct or indirect interest in the pollock harvesting or processing entity.

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

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

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

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

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

(f) If the Secretary of Commerce determines that there is enough

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

Dated: July 6, 2000.

By Order of the Maritime Administrator

**Joel C. Richard,**

*Secretary, Maritime Administration.*

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