

Signed: April 29, 1999.

**John W. Magaw,**

*Director.*

[FR Doc. 99-11366 Filed 5-5-99; 8:45 am]

BILLING CODE 4810-31-P

## 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 To Obtain Commercial Fisheries Documents

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The Maritime Administration (MARAD, we, our, or us) is soliciting public comments on the new U.S. citizenship requirements set forth in the American Fisheries Act of 1998 (AFA), P.L. 105-277, for vessels of 100 registered feet or greater. The AFA seeks to raise the U.S. ownership and control standards for U.S.-flag fishing vessels operating in U.S. waters, to eliminate exemptions for vessels that can not meet current citizenship standards, and to help phase out of operation many of the largest fishing vessels. These statutory changes are intended to give U.S. interests a priority in the harvest of U.S. fishery resources. We are required to promulgate final regulations by April 1, 2000, regarding the citizenship requirements for ownership and control of vessels of 100 registered feet or more that have or are seeking a fishery endorsement to their documentation. The regulations will become effective on October 1, 2001.

Section 203 of the AFA specifically requires that the regulations: prohibit impermissible transfers of ownership or control; identify transactions that will require prior MARAD approval; and identify transactions that will not require prior MARAD 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.

We are seeking public comments related to our implementation of the AFA. Your comment is welcome on the questions included in this ANPRM following the section "What information are we requesting?" or on any aspect of our implementation of the AFA.

**DATES:** You should submit your written comments early enough to ensure that we receive them no later than July 1, 1999. In addition, public meetings at which oral and written comments may be presented have been scheduled for the dates and locations listed in **SUPPLEMENTARY INFORMATION.**

**ADDRESSES:** Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted by mail to the Docket Clerk, U.S. DOT Dockets, Room PL-401, Department of Transportation, 400 7th St., S.W., Washington, DC 20590-0001 or by e-mail to John T. Marquez, Jr. at "John.Marquez@marad.dot.gov". All comments will become part of this docket and will be available for inspection and copying at the above address between 10 am and 5 pm, E.T., Monday through Friday, except Federal Holidays. An electronic version of this document is available on the World Wide Web at <http://dms.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:** John T. Marquez, Jr. of the Office of Chief Counsel. You may contact him by phone at (202) 366-5320, by fax at (202) 366-7485, by e-mail at "John.Marquez@marad.dot.gov", or you may send mail to John T. Marquez, Jr., Maritime Administration, Office of Chief Counsel, Room 7228, MAR-222, 400 Seventh St., S.W., Washington, D.C. 20590-0001.

#### SUPPLEMENTARY INFORMATION:

##### Public Hearing Dates and Locations

1. May 18, 1999, 9:00 a.m. to 5:00 p.m.—South Auditorium, Jackson Federal Building, 915 Second Avenue, Seattle, WA;

2. May 20, 1999, 9:00 a.m. to 5:00 p.m.—Assembly Room, Z.J. Loussac Library, 3600 Denali St., Anchorage, AK;

3. June 9, 1999, 7:00 p.m. to 10:00 p.m.—Holiday Inn—Logan Airport, 225 McClellan Highway, Boston, MA;

4. June 17, 1999, 9:00 a.m. to 1:00 p.m.—Suite 1830, Crescent City Room, World Trade Center, 2 Canal Street, New Orleans, LA; and

5. June 23, 1999, 9:00 a.m. to 1:00 p.m.—Room 6200, Nassif Building, 400 7th Street S.W., Washington, D.C.

#### Comments

##### How Will We Issue Rules To Implement The AFA?

We will be using informal rulemaking procedures under the Administrative Procedure Act (5 U.S.C. 553) to promulgate regulations implementing the AFA. The process of promulgating these regulations will include the issuance of the following documents:

- (1) An advance notice of proposed rulemaking (ANPRM).
- (2) A notice of proposed rulemaking (NPRM).
- (3) A final rule.

##### What is an ANPRM?

An ANPRM tells the public that we are considering an area for rulemaking and requests written comments on the appropriate scope of the rulemaking or on specific topics. This ANPRM does not include the text of a potential regulation.

##### What is a NPRM?

A NPRM proposes our specific regulatory changes for public comment and contains supporting information. It generally includes proposed regulatory text.

##### What is a Final Rule?

A final rule sets out new regulatory requirements and their effective date. A final rule will also identify issues raised by commenters in response to the notice of proposed rulemaking and give the agency's response.

##### Who May File Comments?

Anyone may file written comments about proposals made in any rulemaking document that requests public comments, including any State government agency, any political subdivision of a State, and any interested person invited by us to participate in the rulemaking process.

##### How do I Prepare and Submit Comments?

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

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

##### How can I be Sure that My Comments Were Received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket

Management will return the postcard by mail. If you send comments by e-mail, you will receive a message by e-mail confirming receipt of your comments. Your e-mail address should be noted with your comments.

#### *What Takes Place at a Public Meeting?*

We have scheduled public meetings in five cities during the sixty day comment period to this ANPRM. Meeting locations and times are provided above under **DATES**. A public meeting is a nonadversarial, fact-finding proceeding conducted by a MARAD representative. Generally, public meetings are announced in the **Federal Register**. Interested persons are invited to attend and to present their views to the agency on specific issues. There are no formal pleadings and no adverse parties, and any regulation issued afterward is not necessarily based exclusively on the record of the meeting. A record of oral comments will be made at the public meeting; however, commenters are also requested to provide their comments to us in writing at the meeting. A copy of all written and oral comments made at the public meeting will be filed in the docket. Sections 556 and 557 of the Administrative Procedure Act (5 U.S.C. 556 and 557) do not apply to public meetings under this part.

#### *How can I Participate at a Public Meeting?*

If you would like to speak at one of the public meetings, you should notify John T. Marquez, Jr. at least five (5) working days before the scheduled meeting. You may notify him by phone at (202) 366-5320, by fax at (202) 366-7485 or by e-mail at "John.Marquez@marad.dot.gov". Your notification should include your name, address, phone number, fax number, e-mail address and the party that you represent. If you plan to attend the public meeting in Washington, DC, you must notify us in advance in order to be admitted to the building. Only one oral presentation per company or group should be presented.

#### *Is Information that I Submit to MARAD Made Available to the Public?*

When you submit information to us as part of this ANPRM, during any rulemaking proceeding, or for any other reason, we may make that information publicly available unless you ask that we keep the information confidential. If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential

business information, to the Chief Counsel, Maritime Administration, at the address given above under **FOR FURTHER INFORMATION CONTACT**. You should mark "CONFIDENTIAL" on each page of the original document that you would like to keep confidential.

In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES**. When you send comments containing information claimed to be confidential business information, you should also include a cover letter setting forth with specificity the basis for any such claim (for example, it is exempt from mandatory public disclosure under the Freedom of Information Act, 5 U.S.C. 552; it is information collected by officials of the United States in the course of their employment duties that is exempt from disclosure pursuant to 18 U.S.C. 1905).

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

#### *Will the Agency Consider Late Comments?*

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date.

#### *How can I Read the Comments Submitted by Other People?*

You may read the comments received by Docket Management at the address given above under **ADDRESSES**. The hours of the Docket Room are indicated above in the same location. Comments may also be viewed on the Internet. To read the comments on the Internet, take the following steps: Go to the Docket Management System (DMS) Web page of the Department of Transportation (<http://dms.dot.gov/>). On that page, click on "search." On the next page (<http://dms.dot.gov/search/>), type in the four-digit docket number shown at the beginning of this document. Example: If the docket number were "MARAD-1999-1234," you would type "1234." After typing the docket number, click on "search." On the next page, which contains docket summary information for the docket you selected, click on the desired comments. You may download the comments.

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

#### **Background**

##### *What are the New Requirements for a Fishery Endorsement Under the American Fisheries Act (AFA)?*

Documentation of vessels under federal law is a type of national registration which, among other things, serves to establish a vessel's eligibility to engage in a specified trade such as the fisheries of the United States. This is done through an endorsement on the vessel's Certificate of Documentation. In order to obtain a fishery endorsement for a documented vessel, the owner of a vessel must comply with the requirements set out in sections 12102 and 12108 of Title 46, United States Code.

The AFA was passed as part of the Omnibus and Emergency Appropriations Act for FY 1999, PL 105-277, on October 6, 1998. The AFA imposes a 75% U.S. citizen ownership and control requirement for owners of vessels of 100 registered feet or more who are engaging in the U.S. fisheries or wish to enter such trade. We are required to scrutinize transfers of ownership and control of such vessels, such as leases, charters, mortgages, financings, and other arrangements that might convey impermissible control over the management, sales, financing or other operation of a vessel or vessel owning entity. This review will include the examination of debt instruments which might convey impermissible control to a non-U.S. citizen and determinations as to whether trustees who hold mortgages on vessels for the benefit of non-U.S. citizens are qualified under the criteria set forth in the AFA. We are seeking public comment in these areas along with suggestions as to whether the defined term for "control" and "controlled" set forth in Section 2(c) of the Shipping Act of 1916 (1916 Act), 46 App. U.S.C. 802(c), should be expanded to include other indications of control. All comments will be considered in the preparation of a rulemaking to implement the requirements of the AFA applicable to MARAD.

For vessels measuring 100 registered feet or greater, the owner is required by subsection 203(c) of the AFA to file an annual statement of citizenship with us setting forth all elements of ownership and control necessary to demonstrate

compliance with the requirements of 46 U.S.C. 12102(c). In implementing this section, we are directed to promulgate regulations that follow, to the extent practicable, the requirements of 46 CFR Part 355, as in effect on September 25, 1997, including the prescribed form of citizenship affidavit. The regulations at 46 CFR Part 355 set forth MARAD's requirements for determining citizenship under section 2 of the 1916 Act and can be summarized as follows:

- The entity must be organized and existing under the laws of the United States.
- The names and date and place of birth of corporate officers and directors must be disclosed, along with an affirmative statement that such officers and directors are citizens of the United States by virtue of birth in the United States, naturalization, or as otherwise authorized by law. The president or other chief executive officer, chairman of the board, and all officers authorized to act in the absence or disability of such persons must be U.S. citizens, and no more of its directors than a minority of the number necessary to constitute a quorum can be non-U.S. citizens.

For other types of entities, such as limited liability companies, associations, etc., citizenship requirements are imposed on persons who have similar functions as officers and directors of a corporation.

- There are two methods of establishing that 75% of the stock of a corporation is owned by U.S. citizens. They are:

(1) Direct Proof. For corporations with thirty (30) or fewer stockholders, the name of each stockholder and the number and percentage of shares of stock held by that individual must be given, along with a statement that he/she is a citizen of the United States by virtue of birth in the United States, naturalization, or as otherwise authorized by law. If the stockholder is not a citizen of the United States, then the country of which he/she is a citizen must be provided.

(2) "Fair Inference." If the stock of the corporation is publicly traded, U.S. citizenship can be established by using the addresses of the stockholders; i.e. relying on corporate books and records at least 95% of the stock must be held by persons having registered U.S. addresses in order to "infer" that at least 75 percent (75%) of the stock is owned by U.S. citizens. This method of proof of U.S. citizenship for corporations, whose stock is publicly traded, dates back to 1936 and is based on a court case, *Collier Advertising Service, Inc. v. Hudson River Day Line*, 14 F. Supp. 335 (S.D.N.Y. 1936). In addition, the

citizenship of all stockholders owning of record or beneficially five percent (5%) or more of the stock must be established.

#### Old Standard

Prior to the passage of the AFA, owners of vessels engaged in the fisheries of the United States were required to meet the vessel documentation requirements set forth at 46 U.S.C. 2102. These vessel documentation requirements and fishery endorsement requirements are set forth below:

- an individual was required to be a citizen of the United States;
- an association, trust, joint venture, or other entity was required to have members all of which were citizens of the United States;
- a partnership was required to have general partners that were citizens of the United States and the controlling interest in the partnership was required to be owned by citizens of the United States; and
- a corporation was required (1) to be established under the laws of the United States; (2) to have a president or other chief executive officer and chairman of its board of directors who were citizens of the United States; and (3) to have no more noncitizen directors than a minority of the number necessary to constitute a quorum. In addition, if a corporation, seeking a fishery endorsement, was owned by other corporations, in whole or in part, the controlling interest in these corporations in the aggregate had to be owned by citizens of the United States.

#### New Ownership and Control Requirements

Subsection 202(a) of the AFA amended the vessel documentation statute by increasing the U.S. citizen ownership and control requirement from a majority (at least 51 percent) to at least 75 percent ownership and control for all vessels, including fish tender vessels and floating processors, seeking a fishery endorsement or renewal of such endorsement. The effective date of this new U.S. citizen ownership requirement is October 1, 2001.

Subsection 202(a) also provides that, when considering whether a vessel owner qualifies for a fishery endorsement, the U.S. citizenship requirements of section 2(c) of the 1916 Act apply to entities other than corporations, such as limited liability companies, partnerships, joint ventures, and other types of entities. The statutory language of section 2(c) of the 1916 Act, which we are to apply when

determining the citizenship status of entities either seeking a fishery endorsement or renewing such endorsement is as follows:

Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding, it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

The citizenship requirements of section 2(c) apply at each tier of ownership; therefore, any person or entity whose interest is being relied upon to establish the required 75 percent U.S. citizen ownership and control, including any parent corporation, partnership or other entity, must also comply with the U.S. citizenship requirements of section 2(c). In addition, the AFA requires that the 75 percent citizenship requirement be applied in the aggregate. A literal interpretation of the requirement to apply the 75 percent citizenship requirement both at each tier and "in the aggregate" would mean that a non-section 2 citizen could not have an ownership or control interest of more than 25 percent in a vessel or vessel owning entity by any means. For example, a non-section 2 citizen may own up to 25 percent of the interest in the primary corporation that owns a vessel with a fishery endorsement. However, that same non-section 2 participant would not be allowed to have any interest in a parent corporation or any other entities at any tier that may have an ownership interest in the 75 percent of the primary corporation owned by section 2 citizens.

The AFA also sets forth certain standards that will be applied by us in determining "control" or "controlled" for purposes of section 12102(c) of title 46, United States Code, and the language of section 2(c) of the 1916 Act. Specifically, the AFA states that the terms "control" or "controlled" shall include:

- the right to direct the business of the entity which owns the vessel;
- the right to limit the actions of or replace the chief executive officer, a majority of the board of directors, any

general partner, or any person serving in a management capacity of the entity which owns the vessel; or

- the right to direct the transfer, operation or manning of a vessel with a fishery endorsement.

However, the terms "control" or "controlled" shall not include the right to simply participate in the above activities or the use by a mortgagee of loan covenants approved by the Secretary. Determining "control" often involves the review and analysis of a specific set of facts in a given transaction and goes beyond the mere form of a transaction. For example, a non-section 2 citizen's equity investment in an entity in excess of its ownership interest might be deemed "control"; a non-section 2 citizen's leading role in setting up a U.S. company for purposes of engaging in the U.S. fisheries might be an indication of control; interlocking corporate officers/directors and shareholders between a U.S. citizen entity and a non-section 2 citizen entity might be deemed impermissible control; or passing the overall economic benefit from the transaction to non-U.S. citizens might be deemed impermissible control. In this ANPRM, we are seeking comments on the elements of "control" that should be considered in determining U.S. citizenship for purposes of qualifying for a fishery endorsement.

### Leasing and Chartering

A very significant new standard imposed under 202(a)(3) of the AFA is that vessels with a fishery endorsement cannot be leased or chartered to an individual who is not a citizen of the United States or to an entity that is not eligible to own a vessel with a fishery endorsement. If such vessels are chartered or leased to non-section 2 citizens, the fishery endorsement is immediately invalid upon use as a fishing vessel.

### Mortgages and Financing

The AFA sets forth the eligibility requirements for lenders who wish to obtain a preferred mortgage as security for their loan. A lender will be eligible for a preferred mortgage if: (a) The lender is in compliance with the U.S. citizenship requirements needed for a fishery endorsement; (b) the lender is a state or federally chartered financial institution that complies with the "controlling interest" requirements of section 2(b) of the 1916 Act, including, among other things, 51% U.S. citizen ownership and control; or (c) the lender uses a section 2 citizen trustee to hold the mortgage.

The use of a section 2 citizen trustee to hold the mortgage is one of long-standing in the maritime industry and resulted from a court case, *Chemical Bank New York Trust Company v. Steamship Westhampton*, 358 F.2d 574 (4th Cir. 1965). The court held that the mortgage on the ship WESTHAMPTON, although given to a section 2 citizen trustee, was not entitled to preferred status because the bond which was secured by the mortgage was an interest in a vessel under section 37 of the 1916 Act, and the issuance of the bond to a non-section 2 citizen holder had not been approved by MARAD. We have authority under sections 9 and 37 of the 1916 Act to approve of certain transfers of interest in section 2 citizen-owned vessels to non-section 2 citizens. Within months of the court's decision in *Westhampton*, the Congress enacted legislation whereby the issuance, assignment or transfer to non-section 2 citizens of notes, bonds, or other evidence of indebtedness, secured by a mortgage on a U.S. vessel, was acceptable so long as the trustee holding the mortgage had our approval. The so-called "Westhampton trustee" statute was repealed by the Congress in 1996. However, the "Westhampton trustee" concept has been incorporated in the AFA and will permit foreign financing in the U.S. fishing industry.

The purpose of the trustee holding the mortgage is to prohibit the non-section 2 citizen lender from exercising prohibited types of control over the vessel or its owner. Non-section 2 citizen lenders may have certain rights conveyed to them in loan documents through negative financial loan covenants. However, use of such covenants may require our approval and such approval will be dependent upon whether elements of "control" over the vessel owner or the vessel are being transferred to the non-section 2 citizen lender. Pursuant to this ANPRM, we are interested in soliciting comments from the public on what restrictions should be imposed on foreign lenders. For example, should we give blanket approval for a trustee to operate a vessel temporarily without our consent for reasons related to safety, repairs, drydocking or other circumstances?

### Specific Vessels

Subsection 202(a)(5) of the Act further amends 46 U.S.C. 12102(c), by adding a new paragraph (5) that exempts the following vessels from the 75 percent standard, provided the owners of the vessels continue to comply with the fishery endorsement law in effect on October 1, 1998: (1) vessels engaged in fisheries under the authority of the

Western Pacific Fishery Management Council; and (2) purse seine vessels engaged in tuna fishing in the Pacific Ocean outside the exclusive economic zone or pursuant to the South Pacific Regional Fisheries Treaty. Fishery endorsements issued by the Secretary for these vessels would be valid only in those specific fisheries and the vessels would not be eligible to receive a fishery endorsement to participate in other fisheries unless the owner complied with the 75 percent standard.

A new paragraph at 46 U.S.C. 12102(c)(6) prevents new large fishing vessels from entering U.S. fisheries, including former U.S.-flag fishing vessels that have reflagged in recent years to fish in waters outside the U.S. exclusive economic zone. Specifically, it prohibits the issuance of fishery endorsements to vessels greater than 165 feet in registered length, or of more than 750 gross registered tons, or that have an engine or engines capable of producing a total of more than 3,000 shaft horsepower. Two exceptions are permitted:

(1) (i) the vessel had a valid fishery endorsement on September 25, 1997;

(ii) the vessel is not placed under foreign registry after October 6, 1998, the date of the enactment of the AFA; and

(iii) in the event the vessel's fishery endorsement is allowed to lapse or is invalidated after October 6, 1998, an application for a new fishery endorsement is submitted to the Secretary of Transportation (Secretary) within 15 business days; or

(2) the owner of the vessel demonstrates to the Secretary that a regional fishery management council has recommended and the Secretary of Commerce has approved specific measures after the date of the enactment of the AFA to allow the vessel to be used in fisheries under that council's authority. The regional councils have the authority and are encouraged to submit for approval to the Secretary of Commerce measures to prohibit vessels that receive a fishery endorsement under section 12102(c)(6) from receiving any permit that would allow the vessel to participate in fisheries under their authority, so that a vessel cannot receive a fishery endorsement through measures recommended by one council, then enter the fisheries under the authority of another council.

Subsection 203(g) of the AFA provides limited exemptions from the new U.S.-control and ownership requirements in 46 U.S.C. 12102(c) for the owners of five vessels (the EXCELLENCE, GOLDEN ALASKA, OCEAN PHOENIX, NORTHERN

TRAVELER, and NORTHERN VOYAGER) under certain conditions. The exemption applies only to the present owners, and the subsection not only requires all subsequent owners to comply with the 75 percent standard, but requires even the present owners to comply if more than 50 percent of the interest owned and controlled in that owner changes after October 1, 2001. The exemption also automatically terminates with respect to the NORTHERN TRAVELER or NORTHERN VOYAGER if the vessel is used in a fishery other than one under the jurisdiction of the New England or Mid-Atlantic fishery management councils, and automatically terminates with respect to the EXCELLENCE, GOLDEN ALASKA, or OCEAN PHOENIX if the vessel is used to harvest fish.

### Penalties

Subsection 203(e) of the AFA provides that the Secretary shall revoke the fishery endorsement of any vessel subject to 46 U.S.C. 12102(c), as amended by subtitle I of the AFA, whose owner does not meet the 75% ownership requirement or otherwise fails to comply with 46 U.S.C. 12102(c).

Subsection 203(f) of the AFA expands the penalties under 46 U.S.C. 12122 (a) and (b), and makes the owner of a documented vessel for which a fishery endorsement has been issued liable to the United States Government for a civil penalty of up to \$100,000 for each day in which such vessel has engaged in fishing within the exclusive economic zone of the United States, if the owner or the representative or agent of the owner 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, such fishery endorsement. This subsection increases the penalties for fishery endorsement violations and is intended to discourage willful noncompliance with the new requirements.

### Fishery Cooperatives

Generally, subsection 210(e)(1) of the AFA prohibits any individual or entity from harvesting more than 17.5% of the pollock in the Bering Sea and Aleutian Islands (BSAI) directed pollock fishery to ensure competition. Subsection 210(e)(2) directs the North Pacific Council to establish an excessive share cap for the processing of pollock in the BSAI directed pollock fishery. At the request of the North Pacific Council or the Secretary of Commerce, an individual who is believed to have exceeded the harvesting or processing caps in either 210(e) (1) or (2), may be

required pursuant to subsection 210(e)(3) to submit such information to the Administrator of MARAD as the Administrator deems appropriate to allow the Administrator to determine whether such individual or entity has exceeded either such percentage. The Administrator shall make a finding as soon as practicable upon such request and shall submit such finding to the North Pacific Council and the Secretary of Commerce.

### International Agreements

Subsection 213(g) of the AFA specifies that in the event the new U.S. ownership and control requirements or preferred mortgage requirements of subtitle I of the Act are deemed to be inconsistent with an existing international agreement relating to foreign investment with respect to a specific owner or mortgagee on October 1, 2001 of a vessel with a fishery endorsement, that the provision shall not apply to that specific owner or mortgagee with respect to that particular vessel to the extent of the inconsistency. Subsection (g) does not exempt any subsequent owner or mortgagee of the vessel, and is therefore not an exemption that "runs with the vessel." In addition, the exemption in subsection (g) ceases to apply even to the owner on October 1, 2001 of the vessel if any ownership interest in that owner is transferred to or acquired by a foreign individual or entity after October 1, 2001.

### What Information are We Requesting?

We are requesting comments, suggestions and information relating to the changes in the statutory requirements to obtain a fishery endorsement for a documented vessel of 100 feet or greater in registered length and the regulations necessary to implement those requirements. Comments are requested specifically on the questions presented below and on any other aspect that the commenter believes would be helpful to us in drafting regulations to implement the AFA. Unless specifically stated otherwise, when used in the following questions the term "vessel" refers to vessels of 100 registered feet or more that have or are seeking a fishery endorsement.

### Questions

#### I. Financing and Mortgages

We will be reviewing financing transactions involving non-section 2 lending institutions to determine whether covenants in these loan documents convey, either directly or indirectly, control over the vessel or

vessel owner. We recognize that certain loan covenants are not indicative of control by a non-citizen lender over a section 2 citizen vessel owner as previously discussed. However, we are seeking input regarding the typical covenants found in loan documents involving fishing vessels that may be unique from those found in other commercial vessel financing arrangements.

1. What are examples of conventional covenants found in typical loan documents involving the financing of fishing vessels?

2. Are there mortgage covenants used in traditional fishing vessel financing arrangements concerning the use, operation, or control of the vessel, whether actual or contingent, that could be considered to give the lender or mortgagee control over the vessel, such as the ability to remove or replace the master of the vessel?

3. Are there standard mortgage covenants that we should approve of in advance for use, such as the ability to restrict the vessel owner from incurring additional debt without the lender's approval, the ability to restrict the vessel owner from selling assets without the lender's approval, etc?

4. Are there mortgage covenants that should require our approval on a case-by-case basis prior to use?

5. Should loan agreements and other agreements between section 2 citizen owners of fishing vessels and foreign lenders be permitted to take effect prior to our approval?

6. Foreign lenders may obtain preferred mortgages on fishing vessels greater than 100 registered feet provided they use a trustee arrangement (commonly referred to as the "Westhampton Trustee"). We have long-standing experience in connection with the Westhampton Trustee and, prior to its elimination by Congress along with other requirements relating to mortgagees, we had regulations found at 46 CFR part 221 (1997) governing the use of Westhampton Trustees. The AFA revives the use of the Westhampton Trustee for fishing vessels. Should we adopt similar requirements under the AFA to those contained in our earlier regulations for trustees/mortgagees? Are there other requirements that should be added?

7. To what extent are vessels financed by fish processors or through entities other than traditional lending institutions? Do such financing arrangements contain covenants that differ from covenants used by traditional lending institutions?

8. Should we preclude an entity that has a contract for the purchase of all or

a significant portion of a vessel's catch from financing the purchase, reconstruction, or any other transaction relating to the vessel?

## II. Management and Control

The AFA directs us to scrutinize leases, charters, and similar arrangements for purposes of determining whether impermissible control "over the management, sales, financing, or other operations of an entity" is being conveyed to non-section 2 citizens. In addition, we are specifically required under the AFA to review contracts involving the purchase over extended periods of time of all, or substantially all, of the living marine resources harvested by a fishing vessel.

1. Are vessel management companies frequently used in the U.S. fisheries? If so, what is their role; i.e., duties and responsibilities.

2. What is the role and responsibility of a sales manager in the fishing industry? Should a vessel be eligible for a fishery endorsement if the sales manager is not a 75 percent owned and controlled U.S. citizen?

3. What types of long-term contracts for sale of all or a large portion of the catch from a vessel are used in the fishing industry? Do such contracts have covenants that give the purchaser of the vessel's catch control over the operation of the vessel or the vessel's owner?

4. Should a section 2 citizen vessel owner be precluded from entering into an exclusive sales contract, providing for the sale of all or a significant portion of its catch, with a non-section 2 citizen entity? If allowed, should the terms of these contracts be restricted in any way?

5. We have consistently construed the ability by a non-section 2 citizen to discipline, remove or replace the master of a vessel as an indication of control over the vessel, and the granting of such right to a non-section 2 citizen as prohibited. Are there unique circumstances unknown to MARAD which should be considered prior to adopting a similar requirement for U.S. documented vessels with a fishery endorsement?

6. Should every contract or business arrangement that the vessel owner enters into with a non-section 2 citizen require our prior approval? If not, what contracts or other business arrangements should? Should it matter whether the business arrangement affects the operation of the vessel, or is it enough if it affects the overall operation of the fishing business?

7. Should section 2 citizen owners of such fishing vessels be required to submit the contracts or business arrangements for advance approval prior

to entering into the transaction? If not, should there be a time imposed for submission for approval after entering into such transactions; i.e. within thirty (30) days or some lesser period?

8. The AFA requires that 75 percent of the interest in an entity that owns a vessel with a fishery endorsement be owned and controlled by section 2 citizens at each tier and in the aggregate. If the phrase "in the aggregate" is determined to preclude a non-section 2 citizen from having a combined interest from its total participation at every tier of more than 25%, what impact will that have on vessel owners, mortgagees, lenders, managers, etc. . . . ?

## III. Fishery Cooperatives

We are seeking information that will help us to evaluate how fishery cooperatives should be considered in the context of determining the U.S. citizenship of vessel owners, especially the role of non-section 2 citizen participants in fishery cooperatives. Responses to the following questions will assist in developing our regulations.

1. Who can become a member of a fishery cooperative? How are fishery cooperatives managed? Does a member receive a "membership interest" in the fishery cooperative and does each member have one vote or are there circumstances whereby a member might have more than one vote on matters requiring a vote by the members?

2. What role do shoreside processors play in fishery cooperatives?

3. Should a non-section 2 citizen be prohibited from becoming a member of a fishery cooperative?

4. If a fishery cooperative enters into any agreement with non-section 2(c) citizens, should that agreement be subject to our approval prior to entering into the agreement or within thirty (30) days of entering into the agreement?

5. What types of regulatory requirements related to the ownership and control of a vessel or vessel owning entity would impede or facilitate the ability of parties to enter into fishery cooperatives?

## IV. General and Procedural

In addition to the questions set forth above, there are a number of areas in which input from the fishing industry would be beneficial in developing our regulations. They are as follows:

1. What regulatory requirements, within the framework of the AFA, should we adopt to protect the limited fishery resources and ensure that qualified U.S. citizens primarily benefit?

2. Subsection 210(e)(2) of the AFA directs the North Pacific Council to

establish an excessive share cap for the processing of pollock in the directed pollock fishery. At the request of the North Pacific Council or the Secretary of Commerce, an individual who is believed to have exceeded the harvesting or processing caps in either 210(e) (1) or (2), may be required pursuant to subsection 210(e)(3) to submit such information to the Administrator of MARAD as the Administrator deems appropriate to allow the Administrator to determine whether such individual or entity has exceeded either percentage. Should we establish set procedures to address charges that a party has exceeded the excessive share cap or should findings be made on an ad hoc basis?

3. What procedure should we have for findings under the requirements of the AFA that the vessel owner does not qualify as a citizen for purposes of obtaining a fishery endorsement?

4. Are there any known conflicts or possible violation of international treaty agreements created by the imposition of the section 2(c) citizenship requirements on owners of U.S. documented vessels with a fishery endorsement, trustees, and mortgagees?

5. Are there any unique issues within the fishing industry or particular fisheries relating to the ownership, operation, management, control, financing, or mortgaging of fishing vessels of which we should be aware in promulgating rules to implement the AFA?

6. What costs related to the implementation of the new citizenship and control requirements for vessels of 100 feet or greater mandated by the AFA are likely to be incurred by vessel owners, operators and managers, lending institutions, mortgagees, and other participants in the fishing industry?

### Other Issues

This request for comments concerning the desirability of rulemaking is not limited to the foregoing. We are also seeking comments and/or suggestions concerning other issues that should be addressed in regulations implementing the requirements of the AFA for which MARAD is responsible.

### Plain Language

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

**Rulemaking Analysis and Notices***Executive Order 12866 (Regulatory Planning and Review)*

Any rule that is promulgated may be considered an economically significant regulatory action under section 3(f) of E.O. 12866; therefore, this rule has been reviewed by OMB. The rule also is considered significant under DOT Policies and Procedures. We cannot estimate at this time whether this rulemaking will be economically significant because we have not published a specific proposal. A preliminary regulatory evaluation will be prepared that reflects the comments to this ANPRM.

*Federalism*

We have analyzed this ANPRM in accordance with the principles and criteria contained in Executive Order 12612 and have determined that any rule that might be subsequently promulgated would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

*Regulatory Flexibility Act*

Prior to commencing further rulemaking, the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires us to consider whether our proposals will have a significant impact on a 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).

Any regulations developed pursuant to this advance notice of proposed rulemaking may reasonably be expected to affect the following small entities: small businesses and individual U.S. citizens currently owning documented

fishing industry vessels; individuals and small businesses seeking to sell or mortgage documented fishing industry vessels; small businesses seeking to document fishing industry vessels in the future; and lending institutions engaging in fishing industry vessel financing.

At the present time, we cannot state that any further rulemaking in this area will not have a significant economic impact on a substantial number of small entities. If you believe that this rulemaking will have a significant economic impact on your business, please submit a comment (see **ADDRESSES**) explaining in what way and to what degree this proposal will economically affect your business. If you think that your business qualifies as a small entity, and that further rulemaking will have a significant economic impact on your business, please submit a comment explaining why you think your business qualifies as a small entity and how this rulemaking may economically affect your business. In addition, we welcome comments from anyone in the general public who believes that these regulations may impact small business entities.

*Environmental Impact Statement*

Any rule that is subsequently promulgated is not expected to significantly affect the environment; therefore, an Environmental Impact Statement is not likely to be required under the National Environmental Policy Act of 1969. When regulations are proposed, an appropriate determination will be available in the docket for inspection or copying where indicated under **ADDRESSES**.

*Paperwork Reduction Act*

We cannot yet estimate the paperwork burden which may result from any further rulemaking on this issue, but it is expected that comments received on this advance notice of proposed rulemaking will assist the agency in estimating the potential paperwork burden, as required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). If you have comments on the potential information collection burden, please submit a comment (see **ADDRESSES**) explaining your concerns. If new recordkeeping requirements result from future proposed rulemaking, we will submit those recordkeeping requirements to the Office of Management and Budget for review.

*Unfunded Mandates Reform Act*

This proposed rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$100 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objectives of the rule.

*International Trade Impact Assessment*

The final rule that will result from this rulemaking is not expected to contain standards-related activities that create unnecessary obstacles to the foreign commerce of the United States. If you believe that this rulemaking will have international trade impacts, we welcome your comments.

By order of the Maritime Administrator.

Dated: April 30, 1999.

**Joel C. Richard,**

*Secretary.*

[FR Doc. 99-11259 Filed 5-5-99; 8:45 am]

BILLING CODE 4910-81-P