

Request for Committee Action

Proposed Amendments to 46 CFR Part 67 Regarding the Citizenship of Corporate Entities
and the

Publication of Vessel Documentation and Citizenship Determinations

Report of the Marine Financing Committee's Task Force on Citizenship Issues

January 29, 2016

Following discussion at the spring 2014 meeting of the Marine Financing Committee, a task force was formed to consider proposals for amendment of the Coast Guard's citizenship regulations at 46 CFR Part 67 to more explicitly address the citizenship of entities such as nonprofit corporations, charitable endowments, mutual funds and defined benefit plans. During the course of its discussions, the task force also addressed a concern that the Coast Guard's rulings on the application of the vessel documentation and citizenship rules to particular circumstances are not generally available to other affected parties or the public.

Attached for review and approval by the members of the Committees on Marine Financing and Fisheries are the task force's proposals for amendments to Part 67 to address these issues. These proposals, with minor editorial revisions, were previously submitted to both Committees for review and discussion at the Spring 2015 and Fall 2015 meetings of the Association. With approval by each of the Committees, these proposals will be submitted to the Board of the Association for approval and submission to the Coast Guard in connection with its pending rulemaking on 46 CFR Part 67.

If accepted by the Coast Guard, the proposed amendments to Part 67 will be subject to the formal public notice and comment rulemaking procedures of the Administrative Procedure Act.

Respectfully submitted,

Marine Financing Committee Task Force on Citizenship Issues

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Proposed Amendments to 46 C.F.R. Part 67 Regarding Citizenship of Corporate Entities

§67.39 Corporation.

(a) For the purpose of obtaining a registry or a recreational endorsement, a corporation meets citizenship requirements if:

- (1) It is incorporated under the laws of the United States or of a State;
- (2) Its chief executive officer, by whatever title, is a citizen;
- (3) Its chairman of the board of directors is a citizen; and
- (4) No more of its directors are non-citizens than a minority of the number necessary to constitute a quorum.

(b) For the purpose of obtaining a fishery endorsement, a corporation meets citizenship requirements if:

- (1) It meets all the requirements of paragraph (a) of this section; and
- (2) At least 75 percent of the stock interest in the corporation, at each tier of the corporation and in the aggregate, is owned by citizens.

(c) For the purpose of obtaining a coastwise endorsement a corporation meets citizenship requirements if:

- (1) It meets the requirements of paragraph (a) of this section and at least 75 percent of the stock interest in the corporation is owned by citizens; or
- (2) It meets the requirements of §68.60 or §68.105 of this chapter.

(d) A corporation which does not meet the stock interest requirement of paragraph (c) of this section may qualify for limited coastwise trading privileges by meeting the requirements of part 68 of this chapter.

(e) For the purpose of obtaining a coastwise or a fishery endorsement a corporation with more than 30 stockholders meets citizenship requirements if:

- (1) It meets the requirements of paragraph (a) of this section,
- (2) It is an investment company registered under the Investment Company Act of 1940, as amended, and

(3) The power to vote or direct the voting of the shares and the power to dispose or direct the disposition of the shares are directed:

(A) By a citizen;

(B) By a board or committee meeting the requirements of paragraph (a)(3) and (4) of this section; or

(C) By one or more investment managers appointed and subject to supervision by a person or persons meeting the requirements of paragraph (e)(3)(A) or (B) of this section.

(f) For the purpose of obtaining a coastwise endorsement or a fishery endorsement, a corporation without capital stock, including an endowment fund qualified under Section 501(c) and a charitable trust qualified under Section 4947(a)(1) of the Internal Revenue Code, meets citizenship requirements if it meets the requirements of paragraph (a) of this section.

(g) For the purpose of obtaining a coastwise endorsement or a fishery endorsement, a defined benefit plan subject to the Employee Retirement and Income Security Act of 1974 (29 U.S.C. § 1001 et seq.) meets citizenship requirements if:

(1) The assets of the plan are held in trust by a directed trustee; or

(2) The assets of the plan are managed by an investment advisor registered under the Investment Advisers Act of 1940, as amended; and

(3) The power to vote or direct the voting of the shares and the power to dispose or direct the disposition of the shares is directed:

(A) By a citizen;

(B) By a board or committee meeting the requirements of paragraph (a)(3) and (4) of this section; or

(C) By one or more investment managers appointed by and subject to supervision of a person or persons meeting the requirements of paragraph (g)(2)(A) or (B) of this section.

§67.41 Governmental entity.

A governmental entity is a citizen for the purpose of obtaining a vessel document if it is an entity of the Federal Government of the United States or of the government of a State as defined in § 67.3. A governmental pension plan established or maintained for its employees by the Government of the United States or political subdivision thereof, or by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, is a governmental entity for this purpose.

Explanation of Proposed Amendments Regarding Citizenship of Corporate Entities

Proposed Amendments to 46 CFR 67.39:

1. Investment Companies.

“An investment company registered under the Investment Company Act of 1940, as amended” is a U.S. mutual fund marketed and sold exclusively within the United States. The investment returns of such funds are subject to U.S. federal income tax laws. Because U.S. mutual funds are marketed and sold exclusively in the United States and foreign investors have significant tax disincentives to participation in such mutual funds, it is appropriate to infer that at least 75% of their shares are held by U.S. citizens for purposes of determining their eligibility for coastwise and fishery endorsements.

2. Non-Stock Corporations

Nonprofit corporations without capital stock have traditionally been treated by the Coast Guard as citizens for vessel documentation purposes, if they meet the requirements of 46 CFR 67.39(a). The proposed amendment would codify existing practice.

3. Defined Benefit Pension Plans

Private defined benefit pension plans are “corporate” entities under ERISA. 29 USC § 1132(d)(1) (“An employee benefit plan may sue or be sued under this subchapter as an entity”). Although ERISA plans are not expressly referenced or described in the vessel documentation statutes, they share that status with non-stock nonprofit corporations formed under U.S. law whose citizenship the Coast Guard has traditionally determined with reference to the citizenship of their controlling officers and directors. Like non-stock nonprofit entities, ERISA defined benefit plans are corporate entities without owners. Participants and beneficiaries of such plans do not own plan assets. Where the members of the managing board or committee and the responsible administrative officers of an ERISA defined benefit pension plan meet the citizenship requirements applicable to corporations (*see* 46 CFR 67.39(a)), these plans should be considered U.S. citizens for all vessel documentation purposes.

While ERISA requires that legal title to the assets of a defined benefit plan must be held by a trustee for the benefit of the plan, a “directed trustee” holding defined benefit plan assets exercises no control over plan investments and exercises none of the substantive rights of an “owner” of plan investments. Under ERISA, such a trust is merely a custodian of plan assets and, as such, an instrument of the plan and is not a separate actor whose citizenship is relevant for vessel documentation purposes.

Proposed Amendment to 46 CFR 67.41:

Governmental Defined Benefit Plans

Governmental employee benefit pension plans are not subject to ERISA and so would not be covered by the proposed amendment to 46 CFR 67.39. However, governmental plans, as defined at 29 USC 1002(32), established or maintained for its employees by the Government of the United States or political subdivision thereof, or by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, are properly viewed as governmental entities for vessel documentation purposes. The proposed amendment to 46 CFR 67.41 would merely make this clear.

Proposed New Rule Governing Vessel Documentation and Citizenship Determinations

§ 67._____. Vessel documentation and citizenship determinations.

- (a) *General.* Any interested party may request a U.S. vessel documentation or U.S. citizenship determination from the U.S. Coast Guard in accordance with this section. A U.S. vessel documentation or U.S. citizenship determination may only be requested with respect to a prospective transaction and may not be issued with respect to any completed transaction.
- (b) *Who may request a determination.* Only an interested party or an authorized agent of an interested party may request a determination in accordance with this section.
- (c) *Definitions.* (1) An “authorized agent” is a person expressly authorized by a principal to act on its behalf. A determination request submitted by an attorney or other person acting as an agent must include a statement describing the authority under which the determination request is made.
- (2) A “determination” is a written statement issued in accordance with this section by the National Vessel Documentation Center on behalf of the U.S. Coast Guard which applies U.S. vessel documentation and U.S. citizenship laws to a specific set of facts.
- (3) A “determination request” is a request submitted in accordance with this section by an interested party or authorized agent seeking a U.S. vessel documentation or U.S. citizenship determination with respect to a particular transaction or issue to be issued by the U.S. Coast Guard.
- (4) An “interested party” is a person who has a direct and demonstrable interest in the question or questions presented in the determination request such as a vessel owner, operator, mortgagee or similar person.
- (5) “U.S. vessel documentation and U.S. citizenship laws” means any statute or regulation governing the documentation of vessels by the U.S. Coast Guard and the qualification of any person as a citizen of the United States under any statute or regulation to own or operate a U.S. documented vessel, in the foreign, domestic or other trade, or have any interest in such a vessel.
- (d) *Submission of a determination request.* A determination request may be in the form of a letter addressed to the Director, National Vessel Documentation Center, and must contain a complete statement of all relevant facts relating to the determination request. The determination request must contain sufficient detail to permit the proper application of U.S. vessel documentation and U.S. citizenship laws to the proposed transaction. If the question or questions presented in the determination request relate to matters set forth in any contract, agreement or other document, a copy of the document must be submitted with the determination request.

- (e) *Requests for additional information.* The U.S. Coast Guard may request further information, documents or clarifications from the interested party to assist it in the issuance of a determination. The failure of an interested party to provide such information, documents or clarifications may be a basis for the U.S. Coast Guard treating a determination request as nonconforming.
- (f) *Privileged or confidential information.* Information which is claimed to constitute trade secrets or privileged or confidential commercial or financial information regarding the business transactions of private parties the disclosure of which would cause substantial harm to the competitive position of the person making the request (or of another interested party) must be identified clearly. The reasons such information should not be disclosed, including, where applicable, the reasons the disclosure of the information would prejudice the competitive position of the person making the request (or of another interested party) must also be set forth.
- (g) *Requests for immediate consideration.* The U.S. Coast Guard will normally process determination requests in the order they are received and as expeditiously as possible. However, a request that a particular matter be given consideration ahead of its regular order, if made in writing at the time the request is submitted, or subsequent thereto, and showing a clear need for such treatment, will be given consideration as the particular circumstances warrant and permit.
- (h) *Nonconforming request for determination.* A person submitting a request for a determination that does not comply with all of the provisions of this section will be so notified in writing, and the requirements that have not been met shall be pointed out. Such person shall be given a period of thirty days from the date of the notice (or such longer period as the notice may provide) to supply any additional information that is requested or otherwise conform the determination request to the requirements referred to in the notice. Any determination request that is not brought into compliance with the provisions of this section within the period of time allowed may be administratively closed without prejudice to the resubmission of a determination request in conformance with this section.
- (i) *Change in status of transaction.* Each interested party submitting a determination request shall immediately advise the Director, National Vessel Documentation Center, in writing of any change in the status of the transaction for which a determination is sought.
- (j) *Effect of determinations.* A determination issued by the U.S. Coast Guard under this section represents the official position of the U.S. Coast Guard with respect to the particular transaction or issue described therein and is binding on the U.S. Coast Guard until modified or revoked.
- (k) *Modification or revocation of determinations.* A determination issued by the U.S. Coast Guard under this section may be modified or revoked at the discretion of the U.S. Coast Guard in the event of a subsequent change in applicable statute or regulation or upon the

subsequent issuance of an interpretive statement by the U.S. Coast Guard of general applicability following notice to the public. Any interested party which has received a determination shall be entitled to rely on such determination until such time as it has been modified or revoked in accordance with this section. In the event a determination is modified or revoked due to promulgation of a regulation by the U.S. Coast Guard or the issuance of an interpretive statement by the U.S. Coast Guard of general applicability, the U.S. Coast Guard shall grant all affected interested parties a reasonable time to comply with such regulation or interpretation prior to the effectiveness of such regulation or interpretive statement.

- (l) *Termination of determinations.* The U.S. Coast Guard has the discretion, following provision of notice to any interested party, to terminate a determination if it finds that the determination was based on materially incomplete or misleading information provided by the interested party.

- (m) *Publication of determinations.* Within 90 days after the issuance of a determination, the U.S. Coast Guard shall publish the determination on its web site and otherwise make it publicly available. The U.S. Coast Guard shall redact and not publish information in the determination that constitutes trade secrets or privileged or confidential commercial or financial information that would cause substantial harm to an interested party if released to the public. The U.S. Coast Guard shall provide any interested party, prior to the publication of a determination, the opportunity to object to the inclusion of any information in the determination to be published on the basis that such information constitutes trade secrets or privileged or confidential commercial or financial information.

- (n) *Situations where no determination shall be issued.* No determination shall be issued in any instance in which it appears to the U.S. Coast Guard in its discretion contrary to the sound administration of the U.S. vessel documentation and U.S. citizenship laws including where the determination relates to pending litigation.

Explanation of Proposed New Rule

Uncertainty concerning the application of U.S. documentation and citizenship laws can inhibit investment in U.S. vessels. The Coast Guard has maintained an informal practice of responding to requests for determinations concerning the application of such laws. That process, however, is not supported by regulation, is offered purely as a matter of agency discretion, and does not produce public decisions which would be useful for the guidance of other affected parties or the public.

In a closely analogous area, Customs and Border Protection routinely issues determinations regarding the application of the Jones Act and related laws to particular factual situations. Those determinations are issued pursuant to a long-standing regulation (19 C.F.R. Part 177) and are published and made available on the Customs Rulings Online Search System (CROSS) available at <http://rulings.cbp.gov>.

The proposed Coast Guard regulation governing vessel documentation and citizenship determinations is patterned on the CBP regulation. As is the case with the CBP regulation, requests are entirely voluntary and the proposed regulation reserves ample discretion to the Coast Guard to seek additional information and not to issue a determination when, in its discretion, it believes that the purposes of the applicable laws will not be served. Moreover, again as in the CBP regulation, there is a system for preserving confidential business information that tracks the exceptions from disclosure in the Freedom of Information Act. By all appearances, the CBP process has worked well in balancing commercial confidences with the right of the public to know the interpretive boundaries of the applicable laws.

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