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Office of Chief Counsel
U.S. Maritime Administration
1200 New Jersey Avenue SE
Washington, D.C. 20590-0001

Re: Docket No. MARAD-2019-0069
“How Best to Evidence Corporate Citizenship: Policy and Regulatory Review”

Ladies and Gentlemen:

Thank you for the opportunity to comment on the U.S. Maritime Administration’s May 1, 2019 Advance Notice of Proposed Rulemaking concerning “How Best to Evidence Corporate Citizenship: Policy and Regulatory Review.”

The following comments are submitted on behalf of The Maritime Law Association of the United States (MLA). The MLA is a nationwide bar association founded in 1899 and incorporated in 1993. It has a current membership of about 2600 attorneys, members of the judiciary, law professors and others who have made important contributions to maritime law. These comments were prepared by the MLA’s standing committee on Marine Financing chaired by Michael Timpone of New York. The Marine Financing Committee includes a number of attorneys who are regularly involved in advising clients on evidencing citizenship before MARAD and the U.S. Coast Guard. The Committee’s working group, chaired by Constantine Papavizas, included members William Baldwin,

John Broders, Mark Buhler, John Casperson, Greg Chase, Marjorie Krumholz, Mark Lowe, Utsav Mathur, Greg Mendenhall and Jovi Tenev.

The MLA welcomes the opportunity to comment on the evidence required to satisfy U.S. citizenship requirements which are an important component of many MARAD-administered programs. As our comments note, the current MARAD regulations at 46 CFR part 355 have not been substantially modified since 1970. *See* 35 Fed. Reg. 11,558 (July 18, 1970).

Since 1970, the world of corporate ownership has changed dramatically, particularly with regard to public companies. For example, the issuance of paper stock certificates by the issuer with ownership and transfers recorded on the books of the issuer, the predominant model for public companies in 1970, has disappeared and been replaced by “netted settlement arrangements and accounting entries on the books of a multi-tiered pyramid of securities intermediaries.”¹

Today, the single largest shareholder in most U.S. public companies is the Depository Trust Company (DTC) which holds securities registered in the name of “Cede & Co.” – “Cede” being short for “certificate depository.” Cede & Co. owns those securities for the benefit of DTC “participants,” which are the many brokerage firms, banks and other financial institutions which advise their customers and arrange for the purchase of securities. Shares so owned are referred to as being owned in “street name” in that they appear on DTC’s records in the names of the many Wall Street banks, brokers and other firms. DTC’s participants maintain account holder records showing security owners under street name registration. The account holders can be pooled investments invested under professional management, such as mutual funds and unit investment trusts. Thus, under this predominant indirect ownership system, there are multiple securities custodians between the securities issuer and the ultimate beneficial owners.

In connection with these developments, the Securities and Exchange Commission (SEC) and the securities industry adopted rules which generally preserve shareholder privacy. The SEC rejected a direct communications system wherein issuers could communicate directly with the ultimate beneficial owners in lieu of a system which permits shareholders to opt out of such communications. Beneficial owners who opt out are considered “objecting beneficial owners” or OBOs and those not so objecting are considered “nonobjecting beneficial owners or NOBOs. Issuers can communicate with OBOs only via brokers and have no legal mechanism to ascertain even the names of such beneficial owners.

Because certain issuers, such as airlines, broadcasters and certain U.S. maritime companies, are required to establish U.S. citizenship, DTC adopted in 1988 a system to assist such issuers in assessing the citizenship of their ultimate beneficial owners. DTC

¹ Prefatory Note, Revised Art. 8 (1994), U.C.C.

established the segregated account system referred to as the “Segregation Account System 100” or “Seg-100.” Seg-100 is a special account maintained at DTC for each issuer that has notified DTC that it is subject to citizenship restrictions. DTC then notifies its participants of the restrictions and its participants are required to assess the citizenship of their account holders. The holdings of beneficial owners who do not qualify as U.S. citizens are placed in the Seg-100 account. An issuer can obtain a tally of Seg-100 account holdings from DTC on a periodic basis.

None of the foregoing and other aspects of the current public company securities trading system in the United States is taken into account by the MARAD citizenship rules or the MARAD citizenship affidavit – both of which generally assume that an issuer need review only its own stock registry and make reasonable inquiries to ascertain its citizenship compliance.

The MARAD regulations employ the inference first set forth in *Collier Advertising Service, Inc. v. Hudson River Day Line*, 14 Fed. Supp. 335 (1936). Those regulations provide that companies owned at least 65 percent by persons with U.S. addresses are presumed to satisfy the controlling interest citizenship equity test and companies owned at least 95 percent by persons with U.S. addresses are presumed to satisfy the 75 percent citizenship equity test. 46 C.F.R. 355.3. However, that case and the MARAD regulations assume that an affiant can determine such addresses from an examination of the “books and records” of the corporation – which is no longer the case because of the changes that have occurred in stock ownership since 1970.

The U.S. Coast Guard faced similar issues when it conducted an investigation of the citizenship of Trico Marine Services, Inc. from 2009 to 2011. Ultimately, after receiving extensive public comment from the affected U.S.-flag industry, the Coast Guard issued a notice on November 26, 2012, 77 Fed. Reg. 70,452, which provided guidance to the industry on citizenship compliance. Among other things, the Coast Guard acknowledged the role that the Seg-100 system, monitoring SEC filings, use of protective provisions in articles and bylaws, communications with NOBOs, analyses of registered stockholders and other measures can play in public company citizenship compliance.

In its November 2012 notice, the Coast Guard further indicated that it “recognizes that in the modern, complex, multi-faceted, and dynamic securities market no single measure or combination of measures may always provide direct proof of the citizenship of every shareholder.” And that “the choice of compliance measures is best left up to the individual company as each one is best positioned to evaluate initially and on an on-going basis the totality of its circumstances.” The Coast Guard concluded that an “active system of monitoring stock ownership” utilizing some mix of the available methods of assessment was a “sufficient basis” to execute the Application for Initial Issue, Exchange, or Replacement of Certificate of Documentation under oath to seek a coastwise endorsement. Finally, the Coast Guard acknowledged that “access to legitimate capital markets” is “essential to the maintenance of a strong and vibrant coastwise shipping industry.”

As MARAD reviews its regulations to make compliance more efficient and assured, the Financing Committee respectfully suggests that MARAD focus on the following –

1) Overall simplification –

- a. Consider eliminating the inclusion of birth dates and places of birth on the citizenship affidavit. Given that the affiant is already certifying to the citizenship of the officers and directions, that certification should be sufficient verification.
- b. Consider permitting the filing of streamlined certifications for follow-on affidavits when there has been no material change to the earlier affidavit rather than having each affidavit repeat all the currently required information.

2) Public company compliance –

The Financing Committee recommends that MARAD revise its regulations to take into account the current state of public stock ownership and other factors affecting the ability of any public company or pooled investment vehicle such as a mutual fund to prove its U.S. citizenship. As the Coast Guard recognized in its public guidance issued in November 2012, the U.S-flag industry should not be impeded from having access to the public capital markets. The present regulations should be revised to facilitate such access to capital while at the same time maintaining the rigor of the citizenship requirements. The following are suggestions for such improvements to be addressed in a Notice of Proposed Rulemaking.

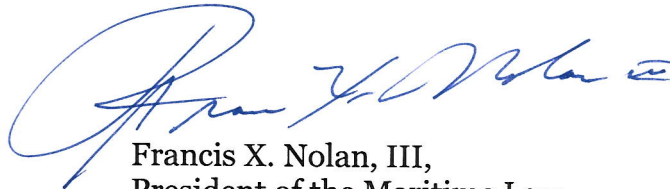
- a. MARAD should consider coordinating with the Coast Guard to provide the affected industry guidance that is practical and adequately implements the intent of U.S. maritime citizenship laws. The Coast Guard November 2012 guidance is a good start in that regard and consideration should be given to converting that guidance into a regulation that both agencies promulgate.
- b. Further improvements might be considered with respect to the fair inference rule including relaxing the percentages and making it clear that address lists made available by financial intermediaries can be relied upon.
- c. Other federal agencies, such as the Federal Aviation Administration and the Federal Communications Commission have adopted practical methods of establishing citizenship. The FCC, for example, has accepted sampling techniques as viable methods of assessing address location for

purposes of establishing U.S. citizenship. MARAD should review such practical methods and adopt any that are consistent with maritime citizenship laws.

- d. MARAD should consider coordinating with the SEC and DTC to improve the Seg-100 system so as to make it an even more reliable indicator of the citizenship of stock owners. The Seg-100 system was adopted by DTC pursuant to the Securities Exchange Act of 1934's permission to self-regulatory agencies such as DTC to promulgate their own procedures. Changes to the system could be adopted in the same manner via public notice and comment as the adoption of the original system.
- e. MARAD should also consider, in coordination with the Coast Guard, adopting a process by which companies can present their citizenship compliance plans for approval by the two agencies and, if acting on the basis of those plans, have the benefit of a presumption that they satisfy the applicable citizenship standard and the benefit of a grace period to come back into compliance if the maximum permissible non-citizen ownership threshold is exceeded due to market trading.

Thank you again for the opportunity to comment on improving the mechanisms for establishing U.S. maritime citizenship. We look forward to working with MARAD as it develops a Notice of Proposed Rulemaking.

Very truly yours,



Francis X. Nolan, III,
President of the Maritime Law
Association of the United States