

§ 356.11

46 CFR Ch. II (10–1–01 Edition)

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