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**United States
Coast Guard**



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Washington, D.C. 20593-0001
Staff Symbol: G-CC
Phone: (202) 366-4280

DEPARTMENT OF TRANSPORTATION

U.S. COAST GUARD

STATEMENT OF CAPTAIN JAMES M. MACDONALD, USCG

ON CITIZENSHIP ISSUES

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON MERCHANT MARINE

COMMITTEE ON MERCHANT MARINE AND FISHERIES

22 JUNE 1989

BIOGRAPHICAL SKETCH

CAPTAIN JAMES M. MACDONALD

Captain James M. MacDonald has been Division Chief of the Coast Guard Merchant Vessel Inspection and Documentation Division at Coast Guard Headquarters since 12 August 1988.

Following his graduation from the Coast Guard Academy in 1968, Captain MacDonald's early assignments included duty aboard the Polar Ice Breaker EDISTO and as Coast Guard Liaison Officer and Instructor at the Naval Damage Control Training Center at Philadelphia.

Captain MacDonald has served as Executive Officer of MIO Kobe, Japan from 1981 to 1982; as Chief, Inspection Department and Executive Officer of MSO Honolulu, Hawaii from 1982 to 1985; as Chief Commercial Vessel Safety Branch Fourteenth Coast Guard District from 1985 to 1986 and as Commanding Officer of Coast Guard Section Marianas from 1986 to 1988.

Other assignments include Assistant Marine Environmental Protection Branch Chief in the Twelfth District and Marine Inspection at Marine Inspection Office, Los Angeles-Long Beach.

In addition to his Bachelor of Science Degree in Engineering from the Coast Guard Academy, Captain MacDonald holds a Master of Science Degree in Management from Rensselaer Polytechnic Institute, Troy, New York.

Captain MacDonald's decorations include the Meritorious Service Medal, two Coast Guard Commendation Medals, two Coast Guard Achievement Medals, the Navy Achievement Medal and two Coast Guard Meritorious Unit Commendations.

Captain MacDonald is married to the former Jean L. Kehoe of Shrewsbury, Massachusetts, a Connecticut College graduate. They have two sons, Jason and Greg.

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STATEMENT OF CAPTAIN JAMES M. MACDONALD, USCG
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HOUSE OF REPRESENTATIVES

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THANK YOU VERY MUCH AND GOOD MORNING, MR. CHAIRMAN.

MY NAME IS CAPTAIN JAMES MACDONALD. I AM CHIEF OF THE MERCHANT VESSEL INSPECTION AND DOCUMENTATION DIVISION OF THE U.S. COAST GUARD. I AM ACCOMPANIED THIS MORNING BY MR. THOMAS L. WILLIS, CHIEF OF THE VESSEL DOCUMENTATION BRANCH.

I APPRECIATE THE OPPORTUNITY TO ADDRESS THIS COMMITTEE ON THE ISSUE OF CITIZENSHIP AS IT RELATES TO VESSEL DOCUMENTATION MATTERS.

STATUTORY DEFINITIONS OF CITIZENSHIP ARE FOUND IN SECTION 2 OF THE SHIPPING ACT OF 1916, AND IN CHAPTER 121 OF TITLE 46 OF THE U.S. CODE. IN ADDITION, THE BOWATERS AMENDMENT PROVIDES FOR A SPECIALIZED FORM OF CORPORATE CITIZENSHIP.

BOWATERS CITIZENSHIP WAS THE SUBJECT OF AN EARLIER HEARING, AND IS NOT DISCUSSED IN MY REMARKS THIS MORNING. INSTEAD I WILL CONCENTRATE ON THE OTHER STATUTES AND SUGGEST

SOME AREAS WHERE CLARIFICATION WOULD ASSIST THE COAST GUARD IN DISCHARGING ITS DUTIES IN A MANNER CONSISTENT WITH THE INTENT OF CONGRESS.

CITIZENSHIP ISSUES IN THE DOCUMENTATION STATUTES AND THE SHIPPING ACT ARE CLOSELY RELATED. THEREFORE, IT IS HELPFUL TO LOOK AT HOW DIFFERENT ENTITIES ARE TREATED UNDER EACH SECTION OF LAW, AND SOME OF THE PROBLEMS THAT HAVE EVOLVED RELATIVE TO THOSE ENTITIES.

A CORPORATION MAY BE DEEMED A CITIZEN FOR DOCUMENTATION PURPOSES IF IT IS ORGANIZED UNDER A LAW OF A STATE OR THE UNITED STATES, HAS A U.S. CITIZEN AS ITS PRESIDENT OR OTHER CHIEF EXECUTIVE OFFICER, HAS A U.S. CITIZEN AS CHAIRMAN OF THE BOARD OF DIRECTORS, AND NO MORE THAN A MINORITY OF THE NUMBER OF DIRECTORS NECESSARY TO CONSTITUTE A QUORUM ARE NON-CITIZENS. WITHOUT MEETING ANY ADDITIONAL TESTS, SUCH CORPORATIONS MAY DOCUMENT VESSELS WITH REGISTRY OR RECREATIONAL ENDORSEMENTS. WHILE THIS SEEMS RELATIVELY SIMPLE, THERE ARE TWO AREAS FOR POTENTIAL CLARIFICATION. THE FIRST IS THE MATTER OF THE CITIZENSHIP OF THE PRESIDENT OR OTHER CHIEF EXECUTIVE OFFICER. THE COAST GUARD INTERPRETS THE REQUIREMENT REGARDING THE CITIZENSHIP OF THE CHIEF EXECUTIVE OFFICER TO MEAN THAT IF A CORPORATION HAS ONE INDIVIDUAL AS PRESIDENT AND ANOTHER AS ITS CHIEF EXECUTIVE OFFICER, BOTH MUST BE CITIZENS. THAT VIEW HAS BEEN CHALLENGED ON SEVERAL OCCASIONS.

A SECOND AREA OF CONCERN IS SO-CALLED "CLOSE CORPORATIONS." SUCH CORPORATIONS, WHICH ARE TYPICALLY SMALL BUSINESSES ENGAGED IN FISHING OR CHARTER BOAT OPERATIONS, OFTEN DO NOT HAVE THE ATTRIBUTES WHICH THE COAST GUARD MUST EXAMINE IN ORDER TO DETERMINE IF THEY ARE ELIGIBLE TO DOCUMENT VESSELS. FOR EXAMPLE, THE STATUTES UNDER WHICH THEY ARE ORGANIZED USUALLY DO NOT REQUIRE A CHIEF EXECUTIVE OFFICER OR BOARD OF DIRECTORS. ALL BUSINESS IS TRANSACTED BY THE STOCKHOLDERS. IN ORDER TO DOCUMENT VESSELS, HOWEVER, THOSE SAME CORPORATIONS OFTEN MUST AMEND THEIR BY-LAWS AND ELECT BOARDS AND A CHIEF EXECUTIVE OFFICER, EVEN IF ALL OF THE STOCK IS OWNED BY A SINGLE INDIVIDUAL WHO IS A CITIZEN OF THE UNITED STATES.

CORPORATIONS SEEKING TO DOCUMENT VESSELS FOR THE FISHERIES, COASTWISE OR GREAT LAKES TRADES FACE ADDITIONAL CITIZENSHIP TESTS CONCERNING STOCK OWNERSHIP. FOR THE FISHERIES, THE CONTROLLING INTEREST IN THE CORPORATION, WHICH IS DEFINED IN TERMS OF OWNERSHIP OF VOTING STOCK, MUST BE VESTED IN INDIVIDUAL CITIZENS OF THE UNITED STATES. WHEN THE STOCK IS OWNED IN WHOLE OR IN PART BY OTHER CORPORATIONS, THE CONTROLLING INTEREST IN THOSE CORPORATIONS, IN THE AGGREGATE, MUST BE OWNED BY INDIVIDUALS WHO ARE CITIZENS OF THE UNITED STATES. ON ITS SURFACE THIS WOULD SEEM TO MEAN THAT THE ONLY STOCK WITH WHICH THE COAST GUARD SHOULD BE CONCERNED IS VOTING

STOCK. THE PROBLEM WITH THAT INTERPRETATION LIES IN THE FACT THAT THE STATUTE ALSO REQUIRES THE COAST GUARD TO APPLY THE TESTS OF SECTION 2(B) OF THE SHIPPING ACT WHEN MEASURING CONTROL. IN SECTION 2(B) CONTROLLING INTEREST IS NOT DEEMED TO BE HELD BY U.S. CITIZENS IF A MAJORITY OF THE STOCK IS NOT VESTED IN CITIZENS OF THE UNITED STATES FREE FROM ANY FIDUCIARY OBLIGATION IN FAVOR OF A PERSON NOT A CITIZEN OF THE UNITED STATES. THEREFORE, A MAJORITY OF ALL OF THE STOCK IN A CORPORATION MUST BE OWNED BY CITIZENS OF THE UNITED STATES, NOT MERELY A MAJORITY OF THE VOTING STOCK. THE DOCKET ON REGULATIONS TO IMPLEMENT THESE CONTROLLING INTEREST REQUIREMENTS FOR THE FISHERIES IS STILL OPEN, AND HAS BEEN QUITE CONTROVERSIAL.

ANOTHER AREA OF DIFFICULTY IS ENCOUNTERED WHEN NON-PROFIT CORPORATIONS APPLY TO DOCUMENT VESSELS FOR COASTWISE TRADE. MANY STATES PROHIBIT NON-PROFIT CORPORATIONS FROM ISSUING STOCK. THEREFORE, THE COAST GUARD MUST LOOK TO OTHER CRITERIA TO DETERMINE IF THE CORPORATION MAY DOCUMENT THE VESSEL. FOR EXAMPLE, IN STATES WHERE NON-PROFIT CORPORATIONS HAVE MEMBERS WHO HAVE THE SAME RIGHTS AND DUTIES AS STOCKHOLDERS, WE HAVE REQUIRED 75 PERCENT OF THE MEMBERS TO BE CITIZENS OF THE UNITED STATES.

FURTHER QUESTIONS ARISE REGARDING MULTI-LEVEL OWNERSHIP STRUCTURES, IN WHICH THE STOCK OF A VESSEL OWNING CORPORATION IS OWNED BY ANOTHER CORPORATION OR CORPORATIONS. THE COAST GUARD HAS CONSISTENTLY REQUIRED EACH ENTITY AT ANY LEVEL, WHICH ULTIMATELY HELPS TO MEET THE STOCK OWNERSHIP REQUIREMENTS OF THE VESSEL OWNING ENTITY, TO QUALIFY FOR THE TRADE FOR WHICH DOCUMENTATION IS SOUGHT. LIKE THE AGGREGATION REQUIREMENT, THIS PRACTICE IS INTENDED TO ENSURE AMERICAN CONTROL AT EACH LEVEL OF A MULTI-LEVEL VESSEL OWNING ENTITY. THIS PRACTICE EFFECTIVELY ENSURES AMERICAN CONTROL OF SUCH MULTI-LEVEL ORGANIZATIONS AS A PRACTICAL MATTER, AND WE APPLY IT TO STOCK OWNERSHIP REQUIREMENTS FOR BOTH COASTWISE AND FISHERIES LICENSES. THE RELATIVELY NEW AGGREGATION TEST, FOUND IN THE ANTI-REFLAGGING ACT, HAS CLOUDED THE ISSUE BY CREATING A TEST WHICH, ARGUABLY, IS REDUNDANT WITH THIS PRACTICE, BUT WHICH APPLIES ONLY TO DOCUMENTATION FOR THE FISHERIES.

PROBLEMS ARE ALSO FOUND IN REGARD TO JOINT VENTURES AND TRUST ARRANGEMENTS. A STRICT READING OF THE SECTION 12102 WOULD PROHIBIT THE COAST GUARD FROM DOCUMENTING VESSELS FOR SUCH ENTITIES NOT COMPOSED SOLELY OF NATURAL PERSONS. A SIMILAR RESTRICTION WOULD APPEAR TO APPLY TO GENERAL PARTNERS OF PARTNERSHIPS. REFUSING TO DOCUMENT VESSELS FOR SUCH CORPORATIONS AND REVOKING EXISTING DOCUMENTS WOULD WREAK HAVOC ON THE MARINE INDUSTRY.

IMPLEMENTATION OF THE CONTROLLING INTEREST REQUIREMENT FOR PARTNERSHIPS ENTAILED A LENGTHY RULEMAKING PROCESS WHICH, ALTHOUGH COMPLETED, REMAINS CONTROVERSIAL.

ISSUES OF STATUTORY INTERPRETATION ASIDE, THERE ARE ADDITIONAL PROBLEMS WITH REGARD TO ACTUAL CONTROL. FOR EXAMPLE, THE COAST GUARD IS USUALLY NOT PRIVY TO FINANCING, VESSEL MANAGEMENT, AND CHARTER ARRANGEMENTS WHEREBY CONTROL MAY BE VESTED IN NON-CITIZENS. CHANGES IN BUSINESS PRACTICE OVER THE YEARS HAVE ALSO AFFECTED THE ABILITY OF THE COAST GUARD TO MEASURE U.S. CONTROL OF VESSEL OWNING ENTITIES. FOR EXAMPLE, LEASE-PURCHASE ARRANGEMENTS ARE NOT UNCOMMON TODAY. IN SUCH ARRANGEMENTS, VARYING DEGREES OF CONTROL MAY BE EXERCISED BY THE POTENTIAL PURCHASER. BECAUSE THE DOCUMENTATION STATUTES SPEAK ONLY TO OWNERSHIP IN PRAESENTI, THE COAST GUARD HAS NO AUTHORITY TO INQUIRE INTO THE CITIZENSHIP OF THE LESSEE.

COMPLEX CHARTER ARRANGEMENTS HAVE LED TO SERIOUS QUESTIONS. IT IS POSSIBLE FOR THE INCIDENTS OF CONTROL EXERCISED BY A CHARTERER TO RISE TO A POINT WHERE THE CHARTERER MAY BE DEEMED TO BE AN OWNER PRO HAC VICE. THE INVESTIGATION OF ONE CASE INVOLVING A CHARTER TO A PERSON WHICH WAS NOT A SECTION 2 CITIZEN INVOLVED MANY WEEKS OF STAFF WORK, AND INVOLVED ANALYSIS OF MANY THOUSANDS OF PAGES OF DOCUMENTS. WHERE SECTION 9 APPROVAL IS REQUIRED FOR A CHARTER, THE COAST GUARD DEFERS, OF COURSE, TO THE MARITIME ADMINISTRATION. IT IS

POSSIBLE, HOWEVER, FOR A COASTWISE QUALIFIED OWNER TO CHARTER A VESSEL TO A CITIZEN CORPORATION IN WHICH MORE THAN 50 PERCENT OF THE STOCK IS OWNED BY CITIZENS, BUT WHICH IS NOT COASTWISE QUALIFIED. IN SUCH A CIRCUMSTANCE, NO APPROVAL IS REQUIRED FOR THE CHARTER.

DESPITE THE FACT THAT OUR RESOURCES ARE LIMITED, THE COAST GUARD ATTEMPTS TO ACT UPON ALL CREDIBLE ALLEGATIONS THAT INELIGIBLE PERSONS HAVE DOCUMENTED VESSELS FOR A PARTICULAR TRADE. WE SHALL CONTINUE TO DO SO.

THERE ARE A NUMBER OF AREAS WHERE EXISTING LAW COULD BE CLARIFIED. THE COAST GUARD WILL BE HAPPY TO WORK WITH YOUR STAFF AND WILL PROVIDE DRAFTING ASSISTANCE WHEN APPROPRIATE.

MR. CHAIRMAN, THIS CONCLUDES MY PREPARED REMARKS. I SHALL BE HAPPY TO ANSWER ANY QUESTIONS YOU OR OTHER MEMBERS OF THE COMMITTEE MAY WISH TO ASK.