

paragraph 356.21(a) to clarify that the approval of standard loan and mortgage covenants is available for entities that are not eligible to hold a preferred mortgage directly and that do not otherwise qualify as a commercial lender or lender syndicate.

Finally, we amended paragraph (d) by deleting the penalty imposed on the owner of a fishing industry vessel if a lender uses loan or mortgage covenants that were not approved by the Citizenship Approval Officer. Instead, we have added language to indicate that the Citizenship Approval Officer may determine that the transaction results in an impermissible transfer of control to a non-citizen and that therefore, the arrangement does not satisfy the requirements to qualify as a preferred mortgage. Furthermore, the lender will lose its general approval and will be required to obtain approval of its loan and mortgage covenants on a case-by-case basis in the future.

#### Section 356.23 Restrictive Loan Covenants Approved for Use by Lenders

Section 356.23 has been amended by deleting the term "non-citizen lender" in the title and the body of the section and substituting the term "lenders" in its place. As noted above, the amendments to the AFA have created a class of lenders that may or may not qualify as U.S. citizens, but who are nevertheless eligible to hold a preferred mortgage directly and to exercise restrictive loan and mortgage covenants without requiring approval from MARAD. Accordingly, the term "lender" has been substituted for "non-citizen lender" throughout the section because the approval of these restrictive loan covenants is not required for all "non-citizen lenders" but rather only for those who do not meet the requirements to hold a preferred mortgage directly.

Several commenters noted that as proposed in the NPRM, the amendments to paragraph 356.23(a) could be interpreted to require MARAD review of loan or mortgage covenants where a commercial lender or lender syndicate is using a mortgage trustee to hold the preferred mortgage for its benefit. We have therefore amended paragraph 356.23(a) to clarify that this section is intended to apply to lenders that are not otherwise exempt from MARAD review of their loan or mortgage covenants pursuant to paragraph 356.19(d).

#### Section 356.25 Operation of Fishing Industry Vessels by Mortgagees

Paragraph 356.25(c) provides that a mortgagee that is not eligible to own a fishing industry vessel may operate the vessel for a non-commercial purpose to

the extent necessary for the immediate safety of the vessel or for repairs, drydocking or berthing changes; provided, that the vessel is operated under the command of a citizen of the United States and for no longer than 15 calendar days. One commenter suggested that there is no need for an iron-clad 15 day limit and that the regulations should be amended to allow a non-citizen mortgage trustee to operate a vessel for longer than 15 days if the Citizenship Approval Officer grants approval. There is no need to amend paragraph 356.25(c) because paragraph 356.25(b) already provides leeway for the Citizenship Approval Officer to grant written authorization for operation of a vessel beyond what is specifically allowed in paragraph 356.25(c). Paragraph 356.25(b) states that, except as provided in paragraph 356.25(c), the vessel may not be operated for any purpose without the prior written approval of the Citizenship Approval Officer. Therefore, if a mortgagee that is not eligible to own a fishing industry vessel wishes to operate such a vessel for the purposes enumerated in 356.25(c) for a period in excess of 15 days, it may do so with written authorization of the Citizenship Approval Officer.

#### Section 356.27 Mortgage Trustee Requirements

The mortgage trustee requirements were amended to delete references to a requirement that the mortgage trustee demonstrate that it qualifies as a U.S. citizen because mortgage trustees are no longer required to qualify as a U.S. citizen if they otherwise meet one of the requirements of 46 U.S.C. 31322(a)(4)(A)–(E). Where references to proving citizenship were included in § 356.27, we have substituted a requirement that the mortgage trustee supply the appropriate information to demonstrate that it complies with the requirements of 46 CFR 356.19(b)(1)–(5) to be eligible to hold a preferred mortgage on fishing industry vessels.

A new paragraph (4) was also added to the trustee application which requires the mortgage trustee to agree to furnish the Citizenship Approval Officer with copies of the trust agreement as well as any other issuance, assignment or transfer of an interest related to the transaction if the beneficiary under the trust arrangement is not a commercial lender, a lender syndicate or an entity eligible to hold a preferred mortgage under 46 CFR 356.19(a)(1)–(5). This submission is necessary so that the Citizenship Approval Officer can make a determination that the trust

arrangement does not result in an impermissible transfer of control.

Several commenters noted that some entities may be reluctant to qualify as a mortgage trustee because of the risk of liability that is imposed by paragraph (d) of the mortgage trustee application, which states that a mortgage trustee "shall not assume any fiduciary duty in favor of non-citizen beneficiaries that is in conflict with any restrictions as requirements of the regulation." The commenters suggested that paragraph (d) be deleted. However, paragraph 356.27(e) provides for review by the Citizenship Approval Officer of the form of trust agreement to be used, and the Citizenship Approval Officer will review and approve the loan and mortgage documents where the beneficiary is not a commercial lender, a lender syndicate or an entity otherwise qualified to hold a preferred mortgage. This review should limit the liability exposure of a mortgage trustee; therefore, we have decided to retain paragraph (d) in the mortgage trustee application.

One commenter suggested that the requirement in paragraphs 356.27(c)(3) and (g) to submit a copy of the mortgage trustee's articles of incorporation and bylaws should be deleted as there is no need to examine these documents unless the mortgage trustee is seeking to qualify as a U.S. citizen. The requirement for a mortgage trustee that is seeking to qualify as a U.S. citizen to submit its articles of incorporation and bylaws is addressed by reference to the need to comply with § 356.19; therefore, we have deleted paragraph 356.27(c)(3) and paragraphs (a)(2) and (a)(3)(ii) of the mortgage trustee application in § 356.27(g).

Several commenters remarked that the beneficiaries under a trust agreement have the most to lose if a mortgage trustee fails to continue to qualify as a mortgage trustee. Consequently, the beneficiaries should be notified of the mortgage trustee's failure to qualify. We agree with the commenters and have added a new paragraph (a)(3)(iv) to the mortgage trustee application at § 356.27(g). The new paragraph requires mortgage trustees to provide the identity and address of all beneficiaries for which it is acting as mortgage trustee, so that the Citizenship Approval Officer can notify the beneficiaries if the mortgage trustee fails to qualify under the regulations.

Finally, one commenter suggested that the proposed requirements of § 356.27 serve no apparent purpose and that the requirements of the statute should be self executing. The commenter stated that there should be