

primary vessel owning entity and that we should not and could not restrict transfers of ownership in entities that are farther up the ownership chain. The commenter objected to our proposal for the following reasons: (1) That the plain language of section 213(g) provides that the treaty exemption will be lost only if there is a transfer of interest in the primary vessel owning entity; (2) that section 213(g) provides that the treaty exemption will be lost if there is a transfer of "any" interest in the vessel owner; (3) that the proposed rule would adopt an insupportable interpretation of the words "foreign individual or entity;" (4) that the 2001 amendment to section 213(g) does not provide support for proposed paragraph 356.53(g)(3)(ii); and (5) that MARAD proposes to take inconsistent positions in evaluating the percentage of "foreign ownership" under 46 U.S.C. 12102(c) and AFA section 213(g).

We disagree with the commenter regarding our authority to regulate transfers of ownership beyond the first tier of vessel ownership. The increase in U.S. citizen ownership and control of fishing industry vessels that is mandated by the AFA was intended to increase the U.S. citizen ownership and control of fishing industry vessels and to address a loophole that was created in 1987 by the Commercial Fishing Industry Vessel Anti Reflagging Act of 1987 ("Anti-Reflagging Act"), Pub. L. 100-239. The Anti-Reflagging Act raised the U.S. citizen ownership and control requirement for fishing industry vessels from a "documentation citizen" standard to a "controlling interest" standard. However, section 7(b) of the Anti-Reflagging Act provided a savings clause for the owners of vessels that were documented with a fishery endorsement prior to the passage of the Anti-Reflagging Act. The savings clause allowed the vessel owner to continue to document a particular vessel with a fishery endorsement if the vessel had been documented with a fishery endorsement prior to the passage of the Act. This grandfather provision was subsequently determined in *Southeast Shipyard Ass'n v. United States*, 979 F.2d 1541 (D.C. Cir. 1992), to run with the vessel rather than the vessel owner. Therefore, the increased U.S. ownership and control in these vessels could not be assured as U.S. entities continued to buy into the grandfathered vessels over time because a grandfathered vessel could always be sold back to an entity that could be wholly owned by non-citizens, provided that the entity qualified as a documentation citizen.

Section 204 of the AFA repealed the ownership savings clause of the Anti-

Reflagging Act and required vessel owners to comply with the new 75 percent U.S. citizen ownership and control standard imposed by the AFA. Vessel owners and mortgagees are exempted from complying with the new requirements of the AFA if the requirements are inconsistent with the provisions of an international investment agreement to which the United States is a party. However, the exemption provided for in section 213(g) is limited in several ways. First, the exemption is limited to the ownership or mortgage interest of a particular owner or mortgagee with respect to a particular vessel, and it applies only to the extent of the inconsistency with the international agreement. Secondly, the exemption will be lost if any ownership interest in the vessel owner is transferred to or otherwise acquired by a foreign individual or entity or if the percentage of foreign ownership in the vessel is increased after July 24, 2001, the effective date of section 213(g), as amended.

The purpose of the exemption under section 213(g) is twofold. First, the exemption for specific vessels ensures that the AFA cannot be deemed unenforceable in its entirety because it is in conflict with U.S. obligations under an international investment agreement. Secondly, it provides an exemption for the owners and mortgagees of vessels that do not meet the new ownership and control requirements, provided that when any interest is sold or transferred, it is sold or transferred to U.S. citizens so that, over time the U.S. citizen ownership and control of the vessel comes into compliance with the requirements of the AFA.

The commenter states that the plain language of section 213(g) provides that the treaty exemption will be lost only if there is a transfer of an interest in the primary vessel owning entity. Furthermore, the commenter asserts that section 213(g) does not provide statutory authority for MARAD to regulate transfers of ownership interest above the first tier of vessel ownership. We disagree with the commenter.

Section 213(g) refers to the "vessel owner" and in no way specifically addresses the primary vessel owner or limits our authority to govern transfers of ownership at various levels of the ownership structure. The term "owner" as used in the context of the AFA implicitly applies to the complete ownership structure and therefore covers the owners at each tier. The fact that section 213(g) does not explicitly refer to the owner "at each tier and in

the aggregate" as is done in 46 U.S.C. 12102(c) does not mean that we are prohibited from looking beyond the first tier owner in evaluating the ownership structure of a vessel subject to a section 213(g) exemption. Acceptance of the commenter's interpretation that the term "owner" applies only to the first tier vessel owner would allow a vessel owner to easily circumvent the restrictions in section 213(g) on transfers of interest to foreign individuals or entities by simply having a tiered ownership structure and selling an interest in the vessel ownership structure above the first tier. For example, a vessel that is subject to a 213(g) exemption and that was grandfathered under the Anti-Reflagging Act could be owned by a U.S. corporation that is wholly owned by a foreign entity, provided that the U.S. corporation qualifies as a documentation citizen. Under the commenter's interpretation, all or part of the interest in the non-citizen parent of the documentation citizen could be freely transferred to another non-citizen entity because the non-citizen parent is not the primary vessel owner. The restrictions on transfers of sale in section 213(g) were designed to ensure that any transfers of ownership in a vessel subject to a section 213(g) exemption would be to U.S. citizens until such time as the entire ownership structure came into compliance with the new ownership and control requirements of the AFA. The commenter's interpretation would completely frustrate this intended result.

The commenter also argues that the proposed regulation would adopt an insupportable interpretation of the words "foreign individual or entity." Section 213(g) provides that the exemption will be lost if there is a transfer of an ownership interest in the vessel owner "to a foreign individual or entity." The commenter suggests that our proposed regulations essentially substitute the term non-citizen for the terms "foreign individual or entity" and that this cannot be supported by the statute. The commenter states that a corporation or partnership formed under the laws of the United States does not become a "foreign * * * entity" because more than 25 percent of the ownership of the entity is owned by persons who do not meet the AFA test of citizenship. Therefore, the commenter suggests that we are incorrect in determining that a transfer of an ownership interest in a vessel to an entity that does not qualify as a U.S. citizen under the AFA should be treated