

## EFFECTIVE DATE

Section effective Jan. 1, 1989, not to affect any civil action filed before that date, and, insofar as applicable to vessels for which an application for documentation has been filed, effective Jan. 1, 1990, with further provision for an instrument filed before Jan. 1, 1989, but not recorded before that date, and with other qualifications, see section 107 of Pub. L. 100-710, set out as a note under section 31301 of this title.

**§ 31322. Preferred mortgages**

(a) A preferred mortgage is a mortgage, whenever made, that—

(1) includes the whole of the vessel;

(2) is filed in substantial compliance with section 31321 of this title;

(3)(A) covers a documented vessel; or

(B) covers a vessel for which an application for documentation is filed that is in substantial compliance with the requirements of chapter 121 of this title and the regulations prescribed under that chapter; and

(4) with respect to a vessel with a fishery endorsement that is 100 feet or greater in registered length, has as the mortgagee—

(A) a person eligible to own a vessel with a fishery endorsement under section 12113(c) of this title;

(B) a state<sup>1</sup> or federally chartered financial institution that is insured by the Federal Deposit Insurance Corporation;

(C) a farm credit lender established under title 12, chapter 23 of the United States Code;

(D) a commercial fishing and agriculture bank established pursuant to State law;

(E) a commercial lender organized under the laws of the United States or of a State and eligible to own a vessel for purposes of documentation under section 12103 of this title; or

(F) a mortgage trustee under subsection (f) of this section.

(b) Any indebtedness secured by a preferred mortgage that is filed or recorded under this chapter, or that is subject to a mortgage, security agreement, or instruments granting a security interest that is deemed to be a preferred mortgage under subsection (d) of this section, may have any rate of interest to which the parties agree.

(c)(1) If a preferred mortgage includes more than one vessel or property that is not a vessel, the mortgage may provide for the separate discharge of each vessel and all property not a vessel by the payment of a part of the mortgage indebtedness.

(2) If a vessel covered by a preferred mortgage that includes more than one vessel or property that is not a vessel is to be sold on the order of a district court in a civil action in rem, and the mortgage does not provide for separate discharge as provided under paragraph (1) of this subsection—

(A) the mortgage constitutes a lien on that vessel in the full amount of the outstanding mortgage indebtedness; and

(B) an allocation of mortgage indebtedness for purposes of separate discharge may not be

made among the vessel and other property covered by the mortgage.

(d)(1) A mortgage, security agreement, or instrument granting a security interest perfected under State law covering the whole of a vessel titled in a State is deemed to be a preferred mortgage if—

(A) the Secretary certifies that the State titling system complies with the Secretary's guidelines for a titling system under section 13107(b)(8) of this title; and

(B) information on the vessel covered by the mortgage, security agreement, or instrument is made available to the Secretary under chapter 125 of this title.

(2) This subsection applies to mortgages, security agreements, or instruments covering vessels titled in a State after—

(A) the Secretary's certification under paragraph (1)(A) of this subsection; and

(B) the State begins making information available to the Secretary under chapter 125 of this title.

(3) A preferred mortgage under this subsection continues to be a preferred mortgage even if the vessel is no longer titled in the State where the mortgage, security agreement, or instrument granting a security interest became a preferred mortgage under this subsection.

(e) If a vessel is already covered by a preferred mortgage when an application for titling or documentation is filed—

(1) the status of the preferred mortgage covering the vessel to be titled in the State is determined by the law of the jurisdiction where the vessel is currently titled or documented; and

(2) the status of the preferred mortgage covering the vessel to be documented under chapter 121 is determined by subsection (a) of this section.

(f)(1) A mortgage trustee may hold in trust, for an individual or entity, an instrument or evidence of indebtedness, secured by a mortgage of the vessel to the mortgage trustee, provided that the mortgage trustee—

(A) is eligible to be a preferred mortgagee under subsection (a)(4), subparagraphs (A)–(E) of this section;

(B) is organized as a corporation, and is doing business, under the laws of the United States or of a State;

(C) is authorized under those laws to exercise corporate trust powers;

(D) is subject to supervision or examination by an official of the United States Government or a State;

(E) has a combined capital and surplus (as stated in its most recent published report of condition) of at least \$3,000,000; and

(F) meets any other requirements prescribed by the Secretary.

(2) If the beneficiary under the trust arrangement is not a commercial lender, a lender syndicate or eligible to be a preferred mortgagee under subsection (a)(4), subparagraphs (A)–(E) of this section, the Secretary must determine that the issuance, assignment, transfer, or trust arrangement does not result in an impermissible

<sup>1</sup> So in original. Probably should be capitalized.

transfer of control of the vessel to a person not eligible to own a vessel with a fishery endorsement under section 12113(c) of this title.

(3) A vessel with a fishery endorsement may be operated by a mortgage trustee only with the approval of the Secretary.

(4) A right under a mortgage of a vessel with a fishery endorsement may be issued, assigned, or transferred to a person not eligible to be a mortgagee of that vessel under this section only with the approval of the Secretary.

(5) The issuance, assignment, or transfer of an instrument or evidence of indebtedness contrary to this subsection is voidable by the Secretary.

(g) For purposes of this section a “commercial lender” means an entity primarily engaged in the business of lending and other financing transactions with a loan portfolio in excess of \$100,000,000, of which not more than 50 per centum in dollar amount consists of loans to borrowers in the commercial fishing industry, as certified to the Secretary by such lender.

(h) For purposes of this section a “lender syndicate” means an arrangement established for the combined extension of credit of not less than \$20,000,000 made up of four or more entities that each have a beneficial interest, held through an agent, under a trust arrangement established pursuant to subsection (f), no one of which may exercise powers thereunder without the concurrence of at least one other unaffiliated beneficiary.

(Pub. L. 100-710, title I, §102(c), Nov. 23, 1988, 102 Stat. 4743; Pub. L. 101-225, title III, §303(3), Dec. 12, 1989, 103 Stat. 1923; Pub. L. 104-324, title XI, §1113(a), Oct. 19, 1996, 110 Stat. 3970; Pub. L. 105-277, div. C, title II, §202(b), Oct. 21, 1998, 112 Stat. 2681-618; Pub. L. 105-383, title IV, §401(c)(1)-(4), Nov. 13, 1998, 112 Stat. 3425; Pub. L. 106-31, title III, §3027(a)(1), May 21, 1999, 113 Stat. 101; Pub. L. 107-20, title II, §2202(b), (c), July 24, 2001, 115 Stat. 168, 169; Pub. L. 109-304, §§15(29), 16(c)(7), Oct. 6, 2006, 120 Stat. 1704, 1706.)

HISTORICAL AND REVISION NOTES

Revised section	Source section (U.S. Code)
31322(a)(1) .....	46:922(a), (b)
31322(a)(2) .....	New
31322(b) .....	46:926(d)
31322(c)(1) .....	46:922(e)
31322(c)(2) .....	46:922(f)
31322(d), (e) .....	New

Section 31322 sets out the conditions that must be met for a mortgage to be considered a preferred mortgage, and the types of endorsements that the Secretary must make on any certificate of documentation of a vessel that is to be covered by a preferred mortgage.

Subsection (a)(1) makes many substantive changes to law. While a preferred mortgage must still include the whole of a vessel, this subsection eliminates the exception of certain vessels under 25 gross tons. It allows a vessel for which an application for documentation has been filed to have a preferred mortgage. It allows a mortgage to be a preferred mortgage from the time all four conditions are met, rather than from when the vessel is finally documented. Therefore, a mortgage will usually attain its preferred status when the application for documentation and the instrument have been filed. This subsection changes the requirement that all documented vessels have as a mortgagee a person that is a citizen of the United States, as defined in section 2 of the Shipping Act, 1916, and allows a State, the United States Government, a federally insured de-

pository institution, or any other person approved by the Secretary to be a mortgagee.

Subsection (a)(2) makes a substantive change to law exempting fishing, fish processing, and fish tender vessels, and vessels operated only for pleasure from the mortgagee restrictions, since these vessels do not have significant national defense use.

Subsection (b) permits a preferred mortgage to have any rate of interest that is agreeable to the parties to the mortgage. This subsection makes no substantive change to law.

Subsection (c)(1) applies to a mortgage that covers more than one vessel or additional property that is not a vessel. This subsection allows a preferred mortgage to include a separate discharge of the additional vessels and property.

Subsection (c)(2) applies when a preferred mortgage covers more than one vessel, does not provide for the separate discharge of a vessel, and is to be sold by court order. The amount of the mortgage indebtedness attributable to a vessel is that part of the indebtedness, increased by 20 percent, that the court determines approximates the value that the particular vessel bears to the value of all the vessels and property covered by the mortgage. In other words, the amount to be set by the court is the estimated value of the one vessel plus 20 percent of that value to assure sufficiency of collateral.

This section also makes a substantive change by eliminating the requirement that a vessel’s certificate of documentation be endorsed with information from the mortgage. This change is made since most of the information is out of date when examined, and since a mortgage must be carried on self-propelled vessels under section 31324(b). This section also eliminates the requirement for the inclusion of an affidavit of good faith. However, both criminal and civil penalties have been added [in section 31330] to help ensure that there is not fraud. This section also eliminates the requirement that a preferred mortgage include a separate discharge for additional property that is not a vessel, the requirement that the mortgage does not stipulate that the mortgagee waives the mortgage’s preferred status; and the requirement for clearing vessels with endorsed documents through Customs.

HOUSE FLOOR STATEMENT

Under section 31322(a)(2) a “vessel operated only for pleasure” is exempt from any restrictions on who can be a mortgagee. This standard is the same as used for the documentation of a recreational vessel under section 12109 of title 46. The Committee intends that vessels that have a recreational vessel license, or combined fisheries and recreational license, fall under this exemption. However, if the vessel has a Coastwise License, Great Lakes License, or Registry combined with a Recreational License, the vessel would not fall under this exemption.

Under subsection (c)(2), if a vessel covered by a preferred mortgage that includes more than one vessel or property that is not a vessel is to be sold on the order of a district court *in rem*, and there is not a separate discharge, then the mortgage constitutes a lien on that vessel in the full amount of the outstanding mortgage indebtedness, and an allocation of mortgage indebtedness for purposes of a separate discharge may not be made. This change is made to eliminate the formula that did not work and to allow the vessel to be sold free and clear, regardless of the amount of the sale.

Under subsection (d) of section 31322, a mortgage or other instrument representing financing of a vessel under State law that is made under applicable State law and covers the whole of a vessel titled in a State is deemed to be a preferred mortgage if two conditions are fulfilled. The first condition is that the Secretary must certify that the State in which the vessel is titled has a titling system that complies with the Secretary’s vessel titling guidelines established under section 13106(b)(8) of title 46. Congress mandated the promulgation of these guidelines in the Recreational Boating Safety Act of 1986, Public Law 99-626. The second condi-

tion is that the State in which the vessel is titled must make information available to the Secretary for the vessel identification system established under chapter 125 of title 46 (as enacted by this Act) on the vessel covered by the mortgage or other instrument. This status only applies to vessels titled in the State after those two conditions are met. The phrase “instrument representing financing of a vessel under State law” is used in addition to “mortgage” because State laws do not always use the term mortgage when referring to financing. It is intended, however, that the financing covered by this phrase would be the same as that covered by the concept of a mortgage under other Federal law.

Paragraph (2) of subsection (d) clarifies that mortgages or other financing instruments may obtain preferred status under subsection (d) if they cover vessels titled in a State after the Secretary certifies the compliance of the State’s titling system, and the State begins making vessel identification information available to the Secretary. Preferred mortgage status can only be attained when these two conditions are in effect. Mortgages or financing instruments made prior to that are not preferred and, if these two conditions cease to exist, new mortgages or financing instruments made after that time cannot attain preferred status.

The law of the titling State controls the making of the preferred mortgage or financing instrument under this subsection. No additional Federal recording requirements may be imposed for the mortgage or instrument to obtain preferred status under this subsection.

Paragraph (3) of this subsection ensures that a preferred mortgage under this subsection retains that status if the vessel covered by the mortgage later relinquishes its title. If the vessel is subsequently documented, the continuing validity of the mortgage is determined by section 31321(g) (as enacted by this Act).

Subsection (e) of section 31322 clarifies the validity of preferred mortgages made under subsection (d). In the case of a State titled vessel covered by a preferred mortgage for which a new titling application is filed, the validity of the mortgage is governed by the law of the titling State in which the mortgage became preferred. In the case of a documented vessel covered by a preferred mortgage for which an application for a State title is filed, or a State titled vessel covered by a preferred mortgage for which an application for documentation is filed, the validity of the preferred mortgage is governed by section 31322(a) of title 46 (as enacted by this Act).

Information on vessels with preferred mortgages made under State law will be available to creditors from the vessel identification system under chapter 125 of title 46 (as enacted by this Act).

#### AMENDMENTS

2006—Subsec. (a)(4)(A). Pub. L. 109-304, §15(29)(A), substituted “section 12113(c)” for “section 12102(c)”.

Subsec. (a)(4)(E). Pub. L. 109-304, §15(29)(B), substituted “for purposes of documentation under section 12103” for “under section 12102(a)”.

Subsec. (d)(1)(A). Pub. L. 109-304, §16(c)(7), substituted “section 13107(b)(8)” for “section 13106(b)(8)”.

Subsec. (f)(2). Pub. L. 109-304, §15(29)(C), substituted “section 12113(c)” for “section 12102(c)”.

2001—Subsec. (a)(4)(B) to (F). Pub. L. 107-20, §2202(b), added subpars. (B) to (F) and struck out former subpars. (B) and (C) which read as follows:

“(B) a state or federally chartered financial institution that satisfies the controlling interest criteria of section 2(b) of the Shipping Act, 1916 (46 U.S.C. 802(b));

“(C) a person that complies with the provisions of section 12102(c)(4) of this title.”

Subsecs. (f) to (h). Pub. L. 107-20, §2202(c), added subsecs. (f) to (h).

1999—Subsec. (a)(4). Pub. L. 106-31 made technical amendment to directory language of Pub. L. 105-277, §202(b). See 1998 Amendment note below.

1998—Subsec. (a)(4). Pub. L. 105-277, §202(b), as amended by Pub. L. 106-31, added par. (4).

Subsec. (b). Pub. L. 105-383, §401(c)(1), added subsec. (b) and struck out former subsec. (b) which read as fol-

lows: “A preferred mortgage filed or recorded under this chapter may have any rate of interest that the parties to the mortgage agree to.”

Subsec. (d)(1). Pub. L. 105-383, §401(c)(2), substituted “mortgage, security agreement, or instrument” for “mortgage or instrument” in introductory provisions and subpar. (B).

Subsec. (d)(2). Pub. L. 105-383, §401(c)(4), substituted “mortgages, security agreements, or instruments” for “mortgages or instruments” in introductory provisions.

Subsec. (d)(3). Pub. L. 105-383, §401(c)(3), added par. (3) and struck out former par. (3) which read as follows: “A preferred mortgage under this subsection continues to be a preferred mortgage if the vessel is no longer titled in the State where the mortgage was made.”

1996—Subsec. (a). Pub. L. 104-324 amended subsec. (a) generally. Prior to amendment, subsec. (a) consisted of 2 pars. with substantially similar provisions defining a preferred mortgage except that it included a mortgage with a State, the United States Government, a federally insured depository institution, or specified individual as mortgagee.

1989—Subsec. (a)(2). Pub. L. 101-225, §303(3)(A), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “Paragraph (1)(D) of this subsection does not apply to a vessel operated only as a fishing vessel, fish processing vessel, or a fish tender vessel (as defined in section 2101 of this title) or to a vessel operated only for pleasure.”

Subsec. (d)(1). Pub. L. 101-225, §303(3)(B), substituted “granting a security interest perfected under State law” for “representing financing of a vessel under State law that is made under applicable State law”.

Subsec. (e). Pub. L. 101-225, §303(3)(C), substituted “the status of the preferred mortgage” for “the validity of the preferred mortgage” in pars. (1) and (2).

#### EFFECTIVE DATE OF 2001 AMENDMENT

Pub. L. 107-20, title II, §2202(d), July 24, 2001, 115 Stat. 170, provided that: “Section 31322 of title 46, United States Code as amended in this section, and as amended by section 202(b) of the American Fisheries Act (Public Law 105-277, division C, title II) shall not take effect until April 1, 2003, nor shall the Secretary of Transportation, in determining whether a vessel owner complies with the requirements of section 12102(c) of title 46, United States Code [now 46 U.S.C. 12113(b)(2) to (d)], consider the citizenship status of a lender, in its capacity as a lender with respect to that vessel owner, until after April 1, 2003.”

#### EFFECTIVE DATE OF 1998 AMENDMENT

Pub. L. 105-277, div. C, title II, §203(a), Oct. 21, 1998, 112 Stat. 2681-619, provided that: “The amendments made by section 202 [amending this section and former section 12102 of this title] shall take effect on October 1, 2001.”

#### EFFECTIVE DATE

Section effective Jan. 1, 1989, not to affect any civil action filed before that date, and, insofar as applicable to vessels for which an application for documentation has been filed, effective Jan. 1, 1990, with other exceptions and qualifications, see section 107 of Pub. L. 100-710, set out as a note under section 31301 of this title.

### § 31323. Disclosing and incurring obligations before executing preferred mortgages

(a) On request of the mortgagee and before executing a preferred mortgage, the mortgagor shall disclose in writing to the mortgagee the existence of any obligation known to the mortgagor on the vessel to be mortgaged.

(b) After executing a preferred mortgage and before the mortgagee has had a reasonable time