

Investing in the U.S. Markets: Strategies and Structures for Foreign Investors

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Please note:

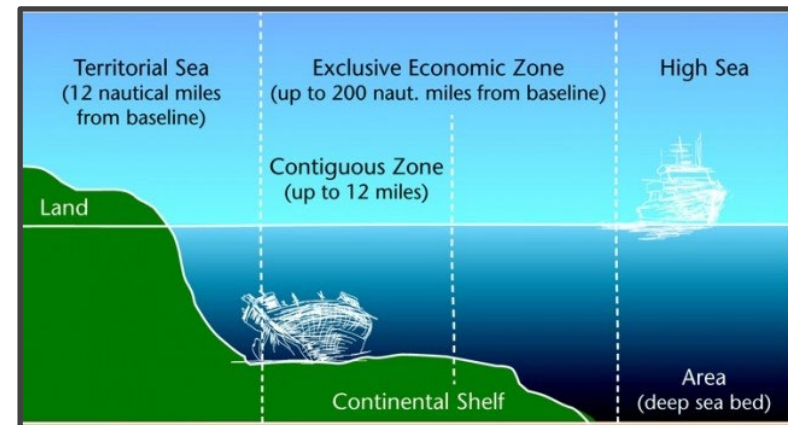
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Overview

- The Jones Act: Back to the Basics
- Equity Investment Strategies for Foreign Citizens
 - Popular Structures
 - Ownership v. Control
 - Public Company Complications
- Financing Alternatives for Foreign Citizens

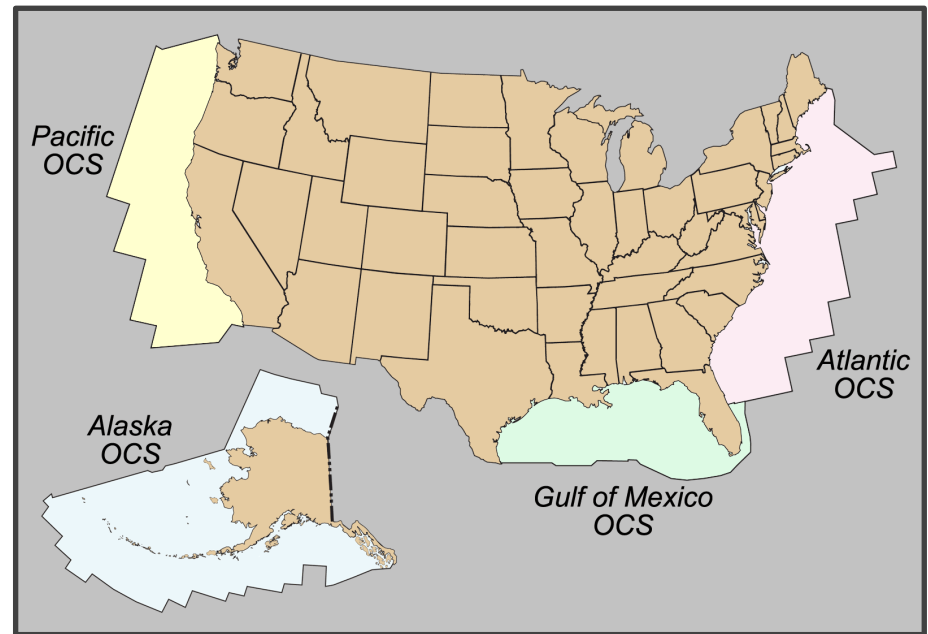
The Jones Act: Back to the Basics

- Unlike open registry jurisdictions, the U.S. is a closed registry with cabotage laws that generally restrict foreign citizens from owning, managing, and/or operating vessels in the coastwise trade.
- The coastwise trade is the transportation of merchandise and/or people between points in the U.S.
- The coastwise laws generally apply to points in the territorial sea, which is defined as the belt, three nautical miles wide, seaward of the territorial sea baseline, and to points located in internal waters, landward of the territorial sea baseline.



The Jones Act: Back to the Basics

- Pursuant to OCSLA, the Jones Act is extended to mobile drilling rigs, drilling platforms, certain anchored or moored vessels, and other devices which are attached to the seabed of the Outer Continental Shelf for the purpose of exploring for, developing, or producing resources, including non-mineral energy resources.



The Jones Act: Back to the Basics

- The U.S. Customs and Border Protection (CBP) and U.S. Maritime Administration (MARAD) are tasked with administering and enforcing the Jones Act.
 - CBP enforces the coastwise trade laws, investigates violations of coastwise trade laws, and has the authority to assess and adjudicate civil penalty claims.
 - MARAD has a wide range of responsibilities, including approval of the sale of any U.S. documented vessel to a foreign purchaser.
 - The U.S. Coast Guard's National Vessel Documentation Center administers the vessel registry and requires annual attestations of U.S. citizenship.
- Penalties for violations of the Jones Act can include:
 - Monetary fines
 - Forfeiture of merchandise
 - Loss of coastwise trading privileges
 - Vessel forfeiture
 - Imprisonment

The Jones Act: Back to the Basics

- For a vessel to be qualified to engage in the coastwise trade, the Jones Act requires the vessel to be:
 - U.S. built and/or rebuilt
 - Crewed by U.S. citizens
 - Documented in the U.S.
 - At least 75% owned **and** controlled by U.S. citizens



Equity Participation

- Citizenship requirements vary depending on the type of entity. For a corporation, it must:
 - Be incorporated in the U.S. (e.g., Delaware);
 - Have a President/CEO and Board Chairman who are U.S. citizens, as well as all other officers authorized to act in the absence or disability of the Board Chairman and President/CEO;
 - Have no more than a minority of the Board of Directors who are non-citizens; and
 - Have at least 75% of the equity owned and controlled by U.S. citizens (who must similarly qualify as U.S. citizens under the Jones Act).
- **The citizenship test must be satisfied at each tier up through and including the parent company.**

Equity Participation

- But ownership is only part of the analysis. Control is also relevant and must be considered.
- What does “control” mean?
 - The right to direct the day-to-day business of the entity that owns the vessels.
 - The right to limit the actions of or to replace the CEO, the majority of the Board, any general partner, or any person serving in a management capacity of the entity that owns the vessels.
 - The right to direct the transfer, operation, or manning of the vessels.
 - The right to otherwise exercise authority over the business of the entity that owns the vessels.

Equity Participation and Other Options

- Structuring Options for Foreign Citizens
 - Minority Investment: Foreign investment is permissible up to 25%.
 - Tiering: Under certain circumstances and subject to certain limitations, ownership can be aggregated across multiple tiers to allow for aggregated economic benefit.
 - Non-Voting Warrants: The U.S. Coast Guard has generally approved the use of warrants as an investment vehicle for foreign citizens, subject to certain voting and control limitations and a prohibition on receiving dividends or distributions.
 - Time Charters: Time charters to foreign citizens are generally permitted if operational control is not transferred.
 - Joint Ventures: JVs have become more prevalent, particularly in the offshore wind space.

Equity Participation

- Joint Venture Considerations
 - Structure, Governance, and Minority Investor Protections
 - Scope of JV – *i.e.*, Project Specific or Long Term
 - Defined Roles
 - Vessel Ownership and Management Responsibilities
 - Equity Split
- Compliance Options
 - CBP Ruling Letter
 - NVDC Approval



Equity Participation

- Real World Examples
 - **CREST Wind** – Crowley-Esvagt JV
 - Crowley (U.S.) will manage and crew an SOV for the Dominion Energy wind farm project, while Esvagt (Denmark) will provide designs, construction and crew training, and related support.
 - **American Offshore Services** – JV with Northern Offshore Services
 - A U.S. entity will operate CTVs servicing wind farms on the East Coast, with N.O.S. (Sweden) providing technical and commercial management services and vessel designs.



Equity Participation

- Under the modern system for trading securities of public companies, there are limitations to effectively tracking the citizenship of stockholders.
 - Most shares are held in “street name” and beneficial ownership information is often difficult to obtain.
- MARAD’s “Fair Inference” Rule can provide some relief.
 - If at least 95% of the shares of each class or series of stock are shown to be owned by persons with registered addresses within the U.S., the entity may rely on that information to prove that ownership of at least 75% of the equity in that entity is vested in U.S. citizens.
 - If a person owns 5% or more of a class or series of stock, then that person’s citizenship must be proven separately.

Financing Options

- Debt Financing

- Lender can be foreign (provided no impermissible control in debt documents)

- Lease Financing

- The foreign lessor exemption of 46 U.S.C. § 12119 allows U.S. flag vessels to be owned by foreign leasing companies and endorsed with a coastwise endorsement.
 - Requirements are:
 - The vessel must be eligible for a coastwise endorsement
 - Bareboat charterer must be a Jones Act qualified entity
 - Owner may be a foreign entity under certain requirements but cannot be an affiliate of the bareboat charterer or have any affiliate that owns or operates vessels
 - Bareboat charter must be long term – three (3) years or more

Contact Information



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