work-learning opportunities related to their educational or career goals. Finally, the school may use part of its CWS allocation to develop off-campus job opportunities for students, with an emphasis on community services jobs. During the 1988–89 school year, 672,692 full-time students earned an average of $930 and 44,363 part-time students earned an average of $883, for a total of over $650 million. When a JTPA participant accesses CWS for a job directly related to his or her education or training, this "work-based learning" is valuable preparation for achieving career goals.

6. *Necessary Action.* States are requested to review their policies in light of this information and, if necessary, to revise them, as appropriate, to reflect this policy guidance. Liaisons should ensure that PICs and SDAs are aware of the information and policy concerning Pell Grants set forth in the this TEGL. SDAs should adapt their procurement procedures and standard contract provisions to reflect SDA choices in designing and financing agreements with Pell institutions.

Contracting: Contracts, regardless of whether they are performance-based or tuition and fee reimbursable, should ensure that (among other requirements): (1) The contractor cannot bill or be paid twice for the same expenses, (2) costs paid for by JTPA and by the Pell entitlement are clearly identified, and (3) access is guaranteed to the JTPA participant's Pell records.

Monitoring: The SDA should carefully monitor all service provider agreements where Pell awards are involved. These reviews should be conducted at least once per Program Year and should include examination of the participant school's financial data, particularly an individual student's Pell records, sufficient to determine that contract specifications on the application of JTPA and Pell funds have been met.

(7) *Effective Date.* The effective date of the Department's interpretations and policy is the date of the final publication of this Guidance Letter. The States are expected to make adjustments to conform their policies to the above interpretations as soon as practicable and to apply them to all new participants and contracts.

(8) *Inquiries.* Direct questions regarding this TEGL to Bonnie Naradzay, Office of Employment and Training Programs, at (202) 535–0525.

Signed at Washington, DC this 24th day of December 1990.

Roberts T. Jones,

Assistant Secretary of Labor.

[FR Doc. 91–3 Filed 1–2–91; 8:45 am]

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Part III

Department of the Treasury

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 53

Firearms and Ammunition Excise Taxes; Final Rule

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 53

[T.D.-308]

Firearms and Ammunition Excise Taxes

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF) Treasury.

ACTION: Treasury decision, final rule.

SUMMARY: On November 5, 1990, the Secretary of the Treasury signed Treasury Order No. 120–03 (55 FR 47422, Nov. 13, 1990) which transferred the authority of the Commissioner, Internal Revenue Service (IRS), to administer the excise tax on firearms and ammunition imposed by 26 U.S.C. 4181 to the Director, ATF. This final rule establishes regulations to require firearms and ammunition excise tax returns, claims and related documents previously filed with the IRS to be filed with ATF. The Treasury decision will also transfer from IRS to ATF the functions associated with the deposit of such excise taxes. All domestic excise tax returns will be mailed to a special purpose post office box (lockbox) indicated on the return form, while Puerto Rican and Virgin Islands excise tax returns will be filed with the Chief, Puerto Rico Operations, ATF. All claims will be filed with the appropriate regional director (compliance).

EFFECTIVE DATE: January 1, 1991.

FOR FURTHER INFORMATION CONTACT: Robert Trainor, ATF Coordinator, Firearms and Explosives Operations Branch, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 189, Washington, DC 20044–0189, (202–789–3033).

SUPPLEMENTARY INFORMATION:

Background

On November 5, 1990, the Secretary of the Treasury signed Treasury Order No. 120–03, which transferred the authority of the Commissioner, IRS, to administer this excise tax to the Director, ATF. Paragraph 3 of the order gives the Director the authority to issue regulations for the purposes of carrying out the functions, powers, and duties delegated to him under the Treasury Order. Until the regulations become effective, the IRS will continue to administer and enforce the tax. This final rule publishes the applicable regulations of the IRS at 26 CFR part 48 in a new 27 CFR part 53. Minor technical and editorial changes to the regulations have also been made.

Pursuant to 26 U.S.C. 4181, a tax is imposed on the sale by the manufacturer, producer, or importer of pistols and revolvers, firearms (other than pistols and revolvers), and shells and cartridges. The tax is 10 percent of the sale price for pistols and revolvers, 11 percent for firearms (other than pistols and revolvers), and 11 percent for shells and cartridges.

Prior to December 19, 1989, 26 U.S.C. 6091, required all returns of tax, except for returns under Subtitle E (relating to alcohol, tobacco, and certain firearms) to be filed in an internal revenue district or at an internal revenue service center serving an internal revenue district. Public Law No. 101–239, 103 Stat. 2429 (December 19, 1989) amended 26 U.S.C. 6091(b)(6) to authorize regulations to specify other locations for the filing of tax returns under section 4181. This final rule provides that returns for firearms and ammunition excise tax shall be filed with ATF. The instructions on the return will include the address to which the return is to be mailed.

Executive Order 12291

In compliance with Executive Order 12291, 46 FR 13193 (1981), ATF has determined that this rule is not a "major rule" since the regulations established in this final rule merely make nonsubstantive technical corrections to previously published regulations of the IRS. Additionally, this rule is not a "major rule" since it will not result in:

(a) An annual effect on the economy of $100 million or more;

(b) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(c) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprise to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to a final regulatory flexibility analysis (5 U.S.C. 604) are not applicable to this final rule because the agency was not required to publish a general notice of proposed rulemaking under 5 U.S.C. 553 or any other law. A copy of this final rule has been submitted to the Administrator of the Small Business Administration for comment on the impact of such regulation on small business, pursuant to 26 U.S.C. 7805(f).

Administrative Procedure Act

This final rule merely reissues existing Internal Revenue Service regulations in Title 26, CFR, relating to firearms and ammunition excise taxes, to ATF regulations in Title 27, CFR, and makes minor technical and editorial changes. Accordingly, it is found to be unnecessary to issue this Treasury Decisions with notice and public procedure thereon under 5 U.S.C. 553(b) or subject to the effective date limitation of 5 U.S.C. 553(d).

Paperwork Reduction Act

All information collection/recordkeeping requirements imposed by this regulation have been submitted to the Office of Management and Budget for review in accordance with Public Law 96–511. Because these regulations reissue regulations of the IRS, OMB control numbers previously approved for the IRS are listed in § 53.187 of these regulations.

Regulatory and Forms Changes

The change in the location for filing firearms and ammunition excise tax returns, claims, and related documents required numerous regulatory changes. Taxpayers incurring tax under 26 U.S.C. 4181 who previously filed returns on IRS Form 720 will now use ATF Form 5300.26, Federal Firearms and Ammunition Excise Tax Return. (IRS Forms 720 and 8807 have been combined into a single ATF Form 5300.26 for purposes of the excise tax on firearms and ammunition.) Remittances not accompanying a return will be made using ATF Form 5300.27, Federal Firearms and Ammunition Excise Tax Deposit.

Drafting Information

The principal author of this document is Robert Trainor, ATF Coordinator, Firearms and Explosives Operations Branch, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects 27 CFR Part 53

Administrative practice and procedure, Arms and munitions, Authority delegations, Exports, Imports, Penalties, Reporting and recordkeeping requirements.

Authority and Issuance

Paragraph 1. Title 27 is amended by the addition of part 53 to read as follows:

PART 53—MANUFACTURERS EXCISE TAXES—FIREARMS AND AMMUNITION

Subpart A—Introduction

Sec.
53.1 Introduction.
53.2 Attachment of tax.
53.3 Exemption certificates.

Subpart B—Definitions

53.11 Meaning of terms.

Subpart C—Administrative and Miscellaneous Provisions

53.21 Forms prescribed.
53.22 Employer identification number.

Subparts D–F—[Reserved]

Subpart G—Tax Rates

53.61 Imposition and rates of tax.
53.62 Exemptions.
53.63 Other tax-free sales.

Subparts H–I—[Reserved]

Subpart J—Special Provisions Applicable to Manufacturers Taxes

53.91 Charges to be included in sale price.
53.92 Exclusions from sale price.
53.93 Other items relating to tax on sale price.
53.94 Constructive sale price; scope and application.
53.95 Constructive sale price; basic rules.
53.96 Constructive sale price; special rule for arm's length sales.
53.97 Constructive sale price; affiliated corporations.
53.98 Computation of tax on leases and installment sales.
53.99 Sales of installment accounts.
53.100 Exclusion of local advertising charges from sale price.
53.101 Limitation on aggregate of exclusions and price readjustments.
53.102 No exclusion or readjustment for other advertising charges or reimbursements.
53.103 Lease considered as sale.
53.104 Limitation on amount of tax applicable to certain leases.

Use by Manufacturer or Importer Considered Sale

53.111 Tax on use by manufacturer, producer, or importer.
53.112 Business or personal use of articles.
53.113 Events subsequent to taxable use of article.
53.114 Use in further manufacture.
53.115 Computation of tax.

Application of Tax in Case of Sales by Other Than Manufacturer or Importer

53.121 Sales of taxable articles by a person other than the manufacturer, producer, or importer.

Subpart K—Exemptions, Registration, Etc.

53.131 Tax-free sales; general rule.
53.132 Tax-free sale of articles to be used for, or resold for, further manufacture.
53.133 Tax-free sale of articles for export, or for resale by the purchaser to a second purchaser for export.
53.134 Tax-free sale of articles for use by the purchaser as supplies for vessels or aircraft.
53.135 Tax-free sale of articles to State and local governments for their exclusive use.
53.136 Tax-free sales of articles to nonprofit educational organizations.

53.137–53.139 [Reserved]

53.140 Registration.
53.141 Exceptions to the requirement for registration.
53.142 Revocation or suspension of registration.
53.143 Special rules relating to further manufacture.

Subpart L—Refunds and Other Administrative Provisions of Special Application to Manufacturers Taxes

53.151 Returns.
53.152 Final returns.
53.153 Time for filing returns.
53.154 Manner of filing returns.
53.155 Extension of time for filing returns.
53.156 Extension of time for paying tax shown on return.
53.157 Use of lockbox depositories.
53.161 Authority to make credits or refunds.
53.162 Abatements.

53.163–53.170 [Reserved]

53.171 Claims for credit or refund of overpayments of manufacturers taxes.
53.172 Credit or refund of manufacturers tax under chapter 32.
53.173 Price readjustments causing overpayments of manufacturers tax.
53.174 Determination of price readjustments.
53.175 Readjustment for local advertising charges.
53.176 Supporting evidence required in case of price readjustments.
53.177 Certain exportations, uses, sales, or resales causing overpayments of tax.
53.178 Exportations, uses, sales, and resales included.
53.179 Supporting evidence required in case of manufacturers tax involving exportations, uses, sales, or resales.
53.180 Tax-paid articles used for further manufacture and causing overpayments of tax.
53.181 Further manufacture included.
53.182 Supporting evidence required in case of tax-paid articles used for further manufacture.
53.183 Return of installment accounts causing overpayments of tax.
53.184 Refund to exporter or shipper.
53.185 Credit on returns.
53.186 Accounting procedures for like articles.
53.187 OMB control numbers.

Authority: 26 U.S.C. 4181, 4182, 4216–4219, 4221–4223, 4225, 6001, 6011, 6020, 6021, 6061, 6071, 6081, 6091, 6101–6104, 6109, 6151, 6155, 6161, 6301–6303, 6311, 6402, 6404, 6416.

Subpart A—Introduction

§ 53.1 Introduction.

The regulations in this part (part 53, subchapter C, chapter I, title 27, Code of Federal Regulations) are designated "Manufacturers Excise Taxes—Firearms and Ammunition." The regulations relate to the tax on the sale of firearms and ammunition imposed by section 4181 of the Internal Revenue Code of 1986, and to certain related administrative provisions of chapter 32, subchapter F, of the Code. Chapter 32, subchapter D of the Code imposes taxes on the sale or use by the manufacturer, producer, or importer of certain recreational equipment specified in that chapter. References in the regulations in this part to the "Internal Revenue Code" or the "Code" are references to the Internal Revenue Code of 1986 (United States Code of 1986), as amended, unless otherwise indicated. References to a section or other provision of law are references to a section or other provision of the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

§ 53.2 Attachment of tax.

(a) For purposes of this part, the manufacturers excise tax generally attaches when the title to the article sold passes from the manufacturer to a purchaser.

(b) When title passes is dependent upon the intention of the parties as gathered from the contract of sale and the attendant circumstances. In the absence of expressed intention, the legal rules of presumption followed in the jurisdiction where the sale is made govern in determining when title passes.

(c) In the case of a sale on credit, the tax attaches whether or not the purchase price is actually collected.

(d) Where a consignor (such as a manufacturer) consigns articles to a consignee (such as a dealer), retaining ownership in them until they are disposed of by the consignee, title does not pass, and the tax does not attach until sale by the consignee. Where the relationship between a manufacturer and a dealer is that of principal and agent, title does not pass, and the tax does not attach, until sale by the dealer.

(e) In the case of a lease, an installment sale, a conditional sale, or a chattel mortgage arrangement or similar arrangement creating a security interest, a proportionate part of the tax attaches to each payment. See section 4217 and §§ 53.103 and 53.104 for a limitation on the amount of tax payable on lease payments.

(f) In the case of use by the manufacturer, the tax attaches at the time the use begins.

§ 53.3 Exemption certificates.

Several sections of the regulations in this part, relating to sales exempt from

manufacturers excise tax, require the manufacturer to obtain an exemption certificate from the purchaser to substantiate the exempt character of the sale. Many of these sections also contain specimen forms of acceptable exemption certificates. However, any form of exemption certificate will be acceptable if it includes all the information required to be contained in such a certificate by the pertinent sections of the regulations in this part. If it contains all the required information, a form of exemption certificate that is processed by data processing equipment is acceptable.

Subpart B—Definitions

§ 53.11 Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words importing the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.

ATF officer. An officer or employee of the Bureau of Alcohol, Tobacco and Firearms (ATF) authorized to perform any function relating to the administration or enforcement of this part.

Calendar quarter. A period of 2 calendar months ending on March 31, June 30, September 30, or December 31.

Chapter 32. For purposes of this Part Chapter 32 means section 4881, Chapter 32, of the Internal Revenue Code of 1986, as amended.

Code. Internal Revenue Code of 1986, as amended.

Director. The Director, Bureau of Alcohol, Tobacco and Firearms, the Department of the Treasury, Washington, DC 20226.

Exportation. The severance of an article from the mass of things belonging within the United States with the intention of uniting it with the mass of things belonging within some foreign country or within a possession of the United States.

Exporter. The person named as shipper or consignor in the export bill of lading.

Firearms. Any portable weapons, such as rifles, carbines, machine guns, shotguns, or fowling pieces, from which a shot, bullet, or other projectile may be discharged by an explosive.

Importer. Any person who brings a taxable article into the United States from a source outside the United States, or who withdraws such an article from a customs bonded warehouse for sale or use in the United States. If the nominal importer of a taxable article is not its beneficial owner (for example, the nominal importer is a customs broker engaged by the beneficial owner), the beneficial owner is the "importer" of the article for purposes of chapter 32 of the Code and is liable for tax on his sale or use of the article in the United States. See section 4219 of the Code and 27 CFR 53.121 for the circumstances under which sales by persons other than the manufacturer or importer are subject to the manufacturers excise tax.

Manufacturer. Includes any person who produces a taxable article from scrap, salvage, or junk material, or from new or raw material, by processing, manipulating, or changing the form of an article or by combining or assembling two or more articles. The term also includes a "producer" and an "importer." Under certain circumstances, as where a person manufactures or produces a taxable article for another person who furnishes materials under an agreement whereby the person who furnished the materials retains title thereto and to the finished article, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knockdown condition is liable for the tax as a manufacturer. Whether the person who buys such component parts or accessories and assembles a taxable article from them will be liable for tax as a manufacturer of a taxable article will depend on the relative amount of labor, material, and overhead required to assemble the completed article and on whether the article is assembled for business or personal use.

Pistols. Small projectile firearms which have a short one-hand stock or butt at an angle to the line of bore and a short barrel or barrels, and which are designed, made, and intended to be aimed and fired from one hand. The term does not include gadget devices, guns altered or converted to resemble pistols, or small portable guns erroneously referred to as pistols, as, for example, Nazi belt buckle pistols, glove pistols, or one-hand stock guns firing fixed shotgun or fixed rifle ammunition.

Possession of the United States. Includes Guam, the Midway Islands, Palmyra, the Panama Canal Zone, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Wake Island.

Purchaser. Includes a lessee where the lessor is also the manufacturer of the article.

Region. A Bureau of Alcohol, Tobacco and Firearms Region.

Regional director (compliance). The principal ATF regional official responsible for administering regulations in this part.

Revolvers. Small projectile firearms of the pistol type, having a breech-loading chambered cylinder so arranged that the cocking of the hammer or movement of the trigger rotates it and brings the next cartridge in line with the barrel for firing.

Sale. An agreement whereby the seller transfers the property (that is, the title or the substantial incidents of ownership in goods) to the buyer for a consideration called the price, which may consist of money, services, or other things.

Secretary. The Secretary of the Treasury or his delegate.

Shells and cartridges. Include any article consisting of a projectile, explosive, and container that is designed, assembled, and ready for use without further manufacture in firearms, pistols or revolvers. A person who reloads used shell or cartridge casings is a manufacturer of shells or cartridges within the meaning of section 4181 if such reloaded shells or cartridges are sold by the reloader. However, the reloader is not a manufacturer of shells or cartridges if, in return for a fee and expenses, he reloads casings of shells or cartridges submitted by a customer and returns the reloaded shells or cartridges with the identical casings provided by the customer to that customer. Under such circumstances, the customer would be the manufacturer of the shells or cartridges and may be liable for tax on the sale of articles. See section 4218 of the Code and § 53.112.

Taxable article. Any article taxable under section 4181 of the Code.

Vendor. Includes a lessor where the lessor is also the manufacturer of the article.

Subpart C—Administrative and Miscellaneous Provisions

§ 53.21 Forms prescribed.

(a) The Director is authorized to prescribe all forms required by this part. All of the information called for in each form shall be furnished as indicated by the headings on the form and the instructions on or pertaining to the form. In addition, information called for in

each form shall be furnished as required by this part.

(b) "Public Use Forms" (ATF Publication 1322.1) is a numerical listing of forms issued or used by the Bureau of Alcohol, Tobacco and Firearms. This publication is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(c) Requests for forms should be mailed to the ATF Distribution Center, 7943 Angus Court, Springfield, Virginia 22153.

§ 53.22 Employer identification number.

(a) *Requirement of application.* (1) An application on Form SS–4 for an employer identification number shall be made by every person who makes a sale or use of an article with respect to which a tax is imposed by section 4181 of the Code, but who has not earlier been assigned an employer identification number or has not applied for one.The application and any supplementary statement accompanying it shall be prepared in accordance with the applicable form, instructions, and regulations and shall set forth fully and clearly the data therein called for. Form SS–4 may be obtained from any internal revenue district office, internal revenue service center or ATF regional office. The application shall be filed with the internal revenue officer designated in the instructions applicable to Form SS–4. The application shall be signed by:

(i) The individual if the person is an individual;

(ii) The president, vice-president, or other principal officer, if the person is a corporation;

(iii) A responsible and duly authorized member or officer having knowledge of its affairs, if the person is a partnership or other unincorporated organization; or

(iv) The fiduciary, if the person is a trust or estate.

An employer identification number will be assigned to the person in due course upon the basis of information reported on the application required under this section.

(2) *Time for filing Form SS–4.* The application for an employer identification number shall be filed no later than the seventh day after the date of the first sale or use of an article with respect to which a tax is imposed by chapter 32 of the Code. However, the application should be filed far enough in advance of the first required use of such number to permit issuance of the number in time for compliance with such requirement.

(b) *Use of employer identification number.* The employer identification number assigned to a person liable for a tax imposed by chapter 32 of the Code shall be shown on any return, statement, or other document submitted to ATF by the person.

Subparts D–F—[Reserved]

Subpart G—Tax Rates

§ 53.61 Imposition and rates of tax.

(a) *Imposition of tax.* Section 4181 of the Code imposes a tax on the sale of the following articles by the manufacturer, producer, or importer thereof:

(1) Pistols;

(2) Revolvers;

(3) Firearms (other than pistols and revolvers); and

(4) Shells and cartridges.

(b) *Parts or accessories.* No tax is imposed by section 4181 of the Code on the sale of parts or accessories of firearms, pistols, revolvers, shells, and cartridges when sold separately, or when sold with a complete firearm. Thus, no tax attaches to the sale of telescopic mounts, rubber recoil pads, rifle sights, and similar parts for firearms when sold separately, or when sold with complete firearms for use as spare parts or accessories. The tax does attach, however, to sales of completed firearms, pistols, revolvers, or to sales of such articles which, although in a knockdown condition, are complete as to all component parts.

(c) *Rates of tax.* Tax is imposed on the sale of the articles specified in section 4181 of the Code at the rates indicated below.

	Percent
(1) Pistols	10
(2) Revolvers	10
(3) Firearms (other than pistols and revolvers)	11
(4) Shells and cartridges	11

(d) *Computation of tax.* The tax is computed by applying to the price for which the article is sold the applicable rate. For definition of the term "price" see section 4216 of the Code and the regulations contained in Subpart J of this part.

(e) *Liability for tax.* The tax imposed by section 4181 of the Code is payable by the manufacturer, producer, or importer making the sale.

§ 53.62 Exemptions.

(a) *Firearms subject to the National Firearms Act.* Section 4182(a) provides that the tax imposed by section 4181 of the Code shall not attach to the sale of any firearms on which the tax imposed by section 5811 of the Code (relating to tax on the transfer of machine guns, short-barreled firearms, and other weapons) has been paid. Any manufacturer, producer, or importer claiming such an exemption from the tax imposed by section 4181 of the Code must maintain such records and be prepared to produce such evidence as will establish the right to the exemption.

(b) *Sales to Defense Department or to U.S. Coast Guard*—(1) *Military department.* Section 4182(b) of the Code provides that the tax imposed by section 4181 of the Code shall not attach to the sale of firearms, pistols, revolvers, shells, or cartridges that are purchased with funds appropriated for a military department of the United States. For this purpose, the term "military department" means the Department of the Army, the Department of the Navy, and Department of the Air Force. Included in the Department of the Navy are naval aviation and the Marine Corps.

(2) *Coast Guard.* Section 655, title 14, U.S.C., provides that no tax on the sale or transfer of firearms, pistols, revolvers, shells, or cartridges may be imposed on such articles when bought with funds appropriated for the United States Coast Guard.

(3) *Supporting evidence.* Any manufacturer, producer, or importer claiming an exemption from the tax imposed by section 4181 of the Code by reason of section 4182(b) of the Code must maintain such records and be prepared to produce such evidence as will establish the right to the exemption. Generally, clearly identified orders or contracts of a military department signed by an authorized officer of the military department will be sufficient to establish the right to the exemption. In the absence of such orders or contracts, a statement, signed by an authorized officer of a military department or the Coast Guard, that the prescribed articles were purchased with funds appropriated for that military department or the Coast Guard will constitute satisfactory evidence of the right to an exemption.

§ 53.63 Other tax-free sales.

For provisions relating to tax-free sales of firearms and ammunition see:

(a) Section 4221 and 27 CFR 53.131, "Tax-free sales; general rule".

(b) Section 4223 and 27 CFR 53.132, "Tax-free sale of articles to be used for, or resold for, further manufacture".

(c) Section 4222 and 27 CFR 53.140, "Registration".

Subparts H–I—[Reserved]

Subpart J—Special Provisions Applicable to Manufacturers Taxes

§ 53.91 Charges to be included in sale price.

(a) *In general.* The "price" for which an article is sold includes the total consideration paid for the article, whether that consideration is in the form of money, services, or other things. However, for purposes of the taxes imposed under chapter 32 of the Code, certain collateral charges made in connection with the sale of a taxable article must be included in the taxable sale price, whereas others may be excluded. Any charge which is required by a manufacturer, producer, or importer to be paid as a condition of its sale of a taxable article and which is not attributable to an expense falling within one of the exclusions provided in section 4216 of the Code or the regulations thereunder is includable in the taxable sale price. It is immaterial for this purpose that the charge may be paid to a person other than the manufacturer, producer, or importer, or that it may be separately billed to the purchaser as a charge earmarked for expenses incurred or to be incurred in his behalf, such as charges for demonstration or display of the article, for sales promotion programs, or otherwise. With respect to the rules relating to exclusion of charges for local advertising of a manufacturer's products, see section 4216(e) of the Code and § 53.100. In the case of sales on credit, a carrying, finance, or service charge is excludable from the sale price if it is reasonably related to the costs of carrying the deferred portion of the sale price (such as interest on the deferred portion of the sale price, expenses of bookkeeping necessary to keep the records of such sales, and expenses of correspondence and other communication in connection with collection).

(b) *Tools and dies.* Separate charges for tools and dies used in the manufacture or production of a taxable article are to be included, in whole or in part, in the sale price on which the tax is based. It is immaterial whether the charges for such items are billed in a lump sum or are amortized or allocated to each of the taxable articles. If, at the termination of a contract to manufacture taxable articles, the tools and dies used in production pass to the purchaser, only the amount of depreciation of the tools and dies incurred in production, computed on a "production output" basis, should be included in the sale price. If the purchaser furnishes the tools and dies, the amount of the cost thereof, to the extent that such cost has been depreciated in the production of the taxable articles (computed on a "production output" basis), shall be included in determining the sale price of the articles for purposes of computing the tax.

(c) *Charges for warranty.* A charge for a warranty of an article which the manufacturer, producer, or importer requires the purchaser to pay in order to obtain the article shall be included in the sale price of the article on which the tax is computed. On the other hand, a charge for a warranty of a taxable article paid at the purchaser's option shall not be included in the sale price for purposes of computing tax thereon.

(d) *Charges for coverings, containers, and packing.* Any charge by the manufacturer, producer, or importer for coverings and containers of whatever nature used to pack an article for shipment shall be included as part of the sale price for the purpose of computing the tax, whether or not the charges are identified as such on the invoice or are billed separately. Even though there is an agreement that the manufacturer, producer, or importer will repay all or a portion of the charge for the coverings or containers upon the return thereof, the full charge nevertheless shall be included in the sale price. It is immaterial whether the charge made at the time of sale is more or less than the actual value of the covering or container. See § 53.173(b)(4) for provisions relating to the claiming of a credit or refund in the case of a price readjustment due to the return or repossession of a covering or container. Packing charges are to be included in the sale price whether the charges cover normal packing or special packing services, such as for extra protection of the article or for odd-lot quantities. This rule shall apply whether the packing services are initiated by the manufacturer, producer, or importer or are furnished at the request of the purchaser and whether the packing is performed by the manufacturer, producer, or importer or by another person at his request. If the purchaser supplies packing materials, the fair market value of such materials must be included in the tax base when computing tax liability on the sale of the article.

(e) *Taxable and nontaxable articles sold as a unit.* Where a taxable article and a nontaxable article are sold by the manufacturer as a unit, the tax attaches to that portion of the manufacturer's sale price of the unit which is properly allocable to the taxable article. Normally, the taxable portion of such a unit may be determined by applying to the manufacturer's sale price of the unit the ration which the manufacturer's separate sale price of the taxable article bears to the sum of the sale prices of both the taxable and nontaxable articles, if such articles are sold separately by the manufacturer. Where the articles (or either one of them) are not sold separately by the manufacturer and do not have established sale prices, the taxable portion is to be determined from a comparison of the actual costs of the articles to the manufacturer. Thus, if the cost of the taxable article represents four-fifths of the total cost of the complete unit, the tax applies to four-fifths of the price charged by the manufacturer for the unit.

§ 53.92 Exclusions from sale price.

(a) *Tax.*—(1) *Tax not part of taxable sale price.* The tax imposed by chapter 32 of the Code on the sale of an article is not part of the taxable sale price of the article. Thus, if a manufacturer computes the tax on a sale price which is determined without regard to the tax, and it charges the proper tax as a separate item, the amount of tax so charged does not become a part of the taxable sale price and no tax is due on the tax so charged. Where no separate charge is made as tax, it will be presumed that the price charged to the purchaser for the article includes the proper tax, and the proper percentage of such price will be allocated to the tax.

(2) *Computation of tax.* If an article subject to tax at the rate of 10 percent is sold for $100 and an additional item of $10 is billed as tax, $100 is the taxable selling price and $10 is the amount of tax due thereon. However, if the article is sold for $100 with no separate billing or indication of the amount of the tax, it will be presumed that the tax is included in the $100, and a computation will be necessary to determine what portion of the total amount represents the sale price of the article and what portion represents the tax. The computation is as follows:

$$\text{Taxable sale price} = \frac{\text{sale price including tax}}{100 + \text{rate of tax}}$$

Thus, if the tax rate is 10 percent and the sale price including tax is $100, the taxable sale price is $90.91 (that is, $100 divided by (100+10)), and the tax is 10 percent of $90.91, or $9.09.

(b) *Transportation, delivery, insurance, or installation charges.* (1)

Charges incurred pursuant to sale. Charges for transportation, delivery, insurance, installation, and other expenses actually incurred in connection with the delivery of an article to a purchaser pursuant to a bona fide sale shall be excluded from the sale price in computing the tax. Such charges include all items of transportation, delivery, insurance, installation, and similar expense incurred after shipment to a customer begins, in response to the customer's order, pursuant to a bona fide sale. However, costs of such nature incurred by a manufacturer, producer, or importer in transporting, in the normal course of business and for its benefit and convenience, articles from a factory or port of entry to a warehouse or other facility (regardless of the location of such warehouse or facility) are not considered as being incurred in connection with the delivery of an article to a purchaser pursuant to a bona fide sale, and charges therefor cannot be excluded from the sale price in computing tax liability. Similarly, an allowance granted by a manufacturer as reimbursement for expenses incurred by the purchaser in shipping used articles to the manufacturer for credit against the purchase price of taxable articles shall not be excluded from the sale price when computing tax due on the sale of the taxable articles. In any event, no charge may be excluded from the sale price unless the conditions set forth in paragraph (b)(2) of this section are complied with. Said conditions are prescribed under the authority granted the Secretary in section 4216(a) of the Code.

(2) *Only actual expenses to be excluded.* Where a separate charge is made for transportation or other expenses incurred in connection with the delivery of an article to the purchaser pursuant to a bona fide sale, there shall be excluded in arriving at the sale price subject to tax only that portion of the charge which represents the actual expenses incurred for the transportation or other excludable expenses. Where a separate charge is less than the actual expense, the difference is presumed to be included in the billed price. Such difference, together with the separate charge, shall be excluded in arriving at the sale price on which the tax is computed. Similarly, where no separate charge is made but the manufacturer, producer, or importer incurs an expense of the type to which this paragraph has application, the amount of such expense actually incurred shall be excluded from the sale price on which the tax is computed. Where transportation expense is incurred in conjunction with a shipment composed of both taxable and nontaxable articles, only the portion of the expense allocable to the taxable articles shall be excludable. In general, unless the taxpayer establishes to the satisfaction of the regional director that another method reasonably apportions such freight expense between taxable and nontaxable articles, such expense should be apportioned on the basis of the relative weights (or, if available, the relative published tariff rates) applicable to the taxable and nontaxable articles. Where it is not feasible to apportion such expense on the basis of relative weights or tariff rates, the expense shall be apportioned on another reasonable basis; for example, in the case of a shipment including both taxable and nontaxable articles which are subject to the same tariff rate, it may be appropriate to apportion the transportation expense on the basis of the relative sale prices. A charge for insurance in connection with the delivery of an article to a purchaser is considered to represent an expense actually incurred only to the extent that an amount equivalent to such charge is paid or payable by the manufacturer to a person authorized to assume such insurance risk.

(3) *Transportation, delivery, or installation services performed by manufacturer.* For purposes of computing the taxable sale price of articles, it is immaterial whether the transportation, delivery, or other services of the type to which this paragraph has application are performed by a common carrier or independent agency for or on behalf of the manufacturer, producer, or importer, or are performed by the manufacturer, producer, or importer with the use of its own vehicles or other facilities. Thus, where a manufacturer, producer, or importer performs the transportation, delivery, or other services with its equipment, tools, employees, etc., the cost of such services allocable to the sale of the taxable article shall be excluded. In determining whether an expense is an excludable transportation or delivery expense, only those expenses incurred by reason of the fact that the purchaser accepts delivery at some point other than the manufacturer's place of business shall be considered excludable transportation or delivery expenses. All expenses incurred in placing an article packed, ready for shipment on the loading dock at the manufacturer's factory are not excludable transportation or delivery expenses. An allowance granted by the manufacturer, producer, or importer to the purchaser for transportation, delivery, or other expenses incurred or to be incurred by the purchaser in connection with the sale shall be excluded in computing the taxable sale price, if charges for similar expenses would be excludable if incurred by the manufacturer.

(4) *Records in support of exclusion.* Every manufacturer, producer, or importer making sales of taxable articles shall keep records which will disclose the amount of transportation, delivery, insurance, installation or other expense actually incurred by it in connection with the delivery of a taxable article to a purchaser pursuant to a bona fide sale.

(c) *Other charges.* A charge or expense not within the scope of paragraph (a) or (b) of this section, whether or not separately stated, may not be excluded in computing the taxable sale price unless it can be shown by adequate records that the charge or expense is not properly included as a manufacturing or selling expense or is in no way incidental to placing the article in condition packed ready for shipment. Commissions to manufacturers' agents, or allowances, payments, or adjustments made to, and for the benefit of, persons other than the purchaser may not be excluded or deducted, under any condition, in computing the sale price upon which the tax is computed.

§ 53.93 Other items relating to tax on sale price.

(a) *Exchanges.* If, in connection with the sale of an article subject to a tax imposed under chapter 32 of the Code on the price for which sold, a manufacturer receives from its vendee another article in exchange, the tax on the manufacturer's sale shall be computed on the basis of the amount allowed for the article received from the vendee, plus any additional amount charged the vendee.

(b) *Replacements under warranty.* If an article, subject to a tax imposed under chapter 32 of the Code on the price for which sold, is returned to the manufacturer by reason of the failure of the article under a warranty as to its quality or service, and a new article is given by the manufacturer, free, or at a reduced price, the tax on the new article shall be computed on the actual amount, if any, to be paid to the manufacturer for the new article. See § 53.134(b)(2) for the circumstances under which the allowance made by the manufacturer, producer, or importer upon the return of the first article constitutes a price readjustment of the sale price of the first article and the extent, if any, to which a

credit may be allowed, or refund made, of the tax paid by the manufacturer, producer, or importer on the sale of the first article.

(c) *Readjustments in sale price.* Readjustment in sale price (such as allowable discounts, rebates, bonuses, etc.) cannot be anticipated. The tax must be based upon the original price unless the readjustments have actually been made prior to the close of the period for which the tax upon the sale is returned. However, if the price upon which the tax was computed is subsequently readjusted, credit may be taken against the tax due on a subsequent return or a claim for refund filed as provided by section 6416(b)(1) of the Code and §§ 53.174–53.176.

§ 53.94 Constructive sale price; scope and application.

(a) *In general.* Section 4216(b) of the Code pertains to those taxes imposed under chapter 32 of the Code that are based on the price for which an article is sold, and contains the provisions for constructing a tax base other than the actual sale price of the article, under certain defined conditions.

(b) *Specific applications.* (1) Section 4216(b)(1) of the Code applies to:

(i) Arm's-length sales at retail or on consignment, other than those sales at retail and to retailers to which section 4216(b)(2) of the Code and § 53.96 apply; and

(ii) Sales otherwise than at arm's length, and at less than fair market price.

(2) Section 4216(b)(2) of the Code applies generally to arm's-length sales of an article at retail or to retailers, or both, where the manufacturer also sells the same article to wholesale distributors.

(3) Section 4216(b)(3) of the Code provides a formula for determining a constructive sale price for sales of taxable articles between members of an affiliated group of corporations (as "affiliated group" is defined in section 1504(a) of the Code) in those instances where the purchasing corporation regularly resells to retailers but does not regularly resell to wholesale distributors, and except for situations where section 4216(b)(4) of the Code applies.

(4) Section 4216(b)(4) of the Code provides a special method for computing a constructive sale price for sales of taxable articles between affiliated corporations where the purchasing corporation sells only to retailers, and the normal method of selling within the industry is for manufacturers to sell to wholesale distributors.

(c) *Definitions.* For purposes of section 4216(b) of the Code and §§ 53.94–53.97 and unless otherwise indicated:

(1) *Sale at retail.* A "sale at retail," or a "retail sale", is a sale of an article to a purchaser who intends to use or lease the article rather than resell it. The fact that articles are sold in wholesale lots, or at wholesale prices, will not change the character of such sales as "sales at retail" if the purchaser is not engaged in the business of reselling such articles, and acquires them for the purpose of using them rather than reselling them.

(2) *Retail dealers.* A "retail dealer", or "retailer", is a person engaged in the business of selling articles at retail.

(3) *Wholesale distributor.* The term "wholesale distributor" means a person engaged in the business of selling articles to persons engaged in the business of reselling such articles.

§ 53.95 Constructive sale price; basic rules.

(a) *In general.* Section 4216(b)(1) of the Code sets forth the conditions that require the Secretary to construct a sale price on which to compute a tax imposed under chapter 32 of the Code on the price for which an article is sold. The section requires a constructive sale price to be established where a taxable article is:

(1) Sold at retail;

(2) Sold while on consignment; or,

(3) Sold otherwise than through an arm's-length transaction at less than fair market price.

(b) *Sales at retail.* Section 4216(b)(1)(A) of the Code relates to the determination of a constructive sale price for sales of taxable articles sold at arm's-length and at retail. In the case of such sales, the constructive sale price is the highest price for which such articles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary. If the constructive sale price is less than the actual sale price, the constructive sale price shall be used as the tax base. If the constructive sale price is not less than the actual sale price, the actual sale price shall be considered as not less than fair market, and shall be used as the tax base. In determining the highest price for which articles are sold by manufacturers to wholesale distributors, there must be taken into consideration the normal industry practices with respect to inclusions and exclusions under section 4216(a) of the Code. However, once a constructive sale price has been determined by the Secretary, no further adjustment of such price shall be made. The provisions of section 4216(b)(1)(A) of the Code and this paragraph shall not apply in those instances where the provisions of section 4216(b)(2) of the Code and § 53.96 apply.

(c) *Sales on consignment.* As in the case of sales at retail, the constructive sale price for sales on consignment shall be the price for which such articles are sold, in the ordinary course for trade, by manufacturers or producers thereof, as determined by the Secretary. For purposes of section 4216(b)(1)(B) of the Code and this paragraph, an article is considered to be sold on consignment if it is sold while it is on consignment to a person which has the right to sell, and does sell, such article in its own name, but never receives title to the article from the manufacturer. Ordinarily, the constructive sale price of an article sold on consignment is the net price received by the manufacturer from the consignee. The provisions of section 4216(b)(1)(B) of the Code and this paragraph shall not apply if the provisions of section 4216(b)(2) of the Code and § 53.96 apply.

(d) *Sales not at arm's-length.* For purposes of section 4216(b)(1)(C) of the Code and this paragraph, a sale is considered to be made under circumstances otherwise than at "arm's-length" if:

(1) One of the parties is controlled (in law or in fact) by the other, or there is common control, whether or not such control is actually exercised to influence the sale price, or

(2) The sale is made pursuant to special arrangements between a manufacturer and a purchaser.

In case of an article sold otherwise than at arm's-length, and at less than fair market price, the constructive sale price shall be the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary. Once such a constructive sale price has been determined, no further adjustment of such price shall be made. See sections 4216(b) (3) and (4) of the Code, and § 53.97, for specific methods for determining constructive sale prices for intercompany sales under certain defined conditions.

§ 53.96 Constructive sale price; special rule for arm's-length sales.

(a) *In general.* Section 4216(b)(2) of the Code provides a special rule under which a manufacturer shall determine a constructive sale price for this sales of taxable articles at retail, and to retail dealers, under conditions. The rule is applicable where:

(1) The manufacturer regularly sells such articles at retail, or to retailers, or both, as the case may be,

(2) The manufacturer also regularly sells such articles to one or more wholesale distributors in arm's-length transactions, and the manufacturer establishes that its prices in such cases are determined without regard to any benefit to be derived under section 4216(b)(2) of the Code, and

(3) The transactions are arm's-length transactions. A manufacturer meeting the foregoing requirements shall base its tax liability for sales at retail and sales to retailers on the lower of its actual sale price or the highest price for which it sells the same articles under the same conditions to wholesale distributors.

(b) *Definitions.* For purposes of section 4216(b)(2) of the Code and this section:

(1) *Actual sale price.* "Actual sale price" means the actual selling price for an article determined in the same manner as sale price is determined for a taxable sale. Accordingly, such price must reflect the inclusions and exclusions set forth in section 4216(a) of the Code, and any price adjustments described in section 6416(b)(1) of the Code.

(2) *Highest price to wholesale distributors.* The "highest price" charged wholesale distributors for an article by a manufacturer, producer, or importer thereof, is the highest price at which the manufacturer, producer, or importer sells the article to wholesale distributors, determined without regard to quantity. Such price shall be determined in the same manner as sale price is determined for a taxable sale with respect to the inclusions and exclusions under section 4216(a) of the Code; however, since the price is to be a "highest" price, no further adjustment may be made for price readjustments under section 6416(b)(1) of the Code.

(3) *Regular sales.* An article is considered to be sold "regularly" at retail or to retailers if sales are made at retail or to retailers periodically and recurringly as a regular part of the seller's business. If a seller makes only isolated or casual sales of an article at retail or to retailers, it is not considered to be selling "regularly" at retail or to retailers. Similarly, a manufacturer is considered to be making regular sales of an article to one or more distributors if it sells the article to at least one distributor periodically and recurringly as a regular part of its business.

(4) *Normal method of sales in industry.* In the absence of a showing to the Director of a more appropriate manner of determining the normal method of sales within an industry which is practical in application, the normal method of sales within an industry shall be regarded as not being at retail or to retailers, or both, if the industry dollar volume of sales which are at retail or to retailers, or both, is less than half the total industry dollar volume of sales at all levels of distribution by manufacturers, producers, or importers, including sales to other manufacturers, producers, or importers.

§ 53.97 Constructive sale price; affiliated corporations.

(a) *In general.* Sections 4216(b) (3) and (4) of the Code establish procedures for determining a constructive sale price under section 4217(b)(1)(C) of the Code for sales between corporations that are members of the same "affiliated group", as that term is defined in section 1504(a) of the Code.

(b) *Sales to which section 4216(b)(3) of the Code applies.* Section 4216(b)(3) of the Code provides a procedure for determining a constructive sale price under section 4216(b)(1)(C) of the Code in those instances where:

(1) A manufacturer, producer or importer regularly sells a taxable article to a wholesale distributor which is a member of the same affiliated group as the manufacturer, producers or importer, and

(2) The wholesale distributor regularly sells such article to one or more independent retailers, but does not regularly sell to wholesale distributors. Under such circumstances the constructive sale price for the article shall be an amount equal to 90 percent of the lowest price for which the distributor regularly sells the article in arm's-length transactions to such independent retailers. Once the constructive sale price has been determined, no adjustment shall be made for inclusions or exclusions under section 4216(a) of the Code or price readjustments under section 6416(b)(1) of the Code. If both sections 4216(b)(3) and 4216(b)(4) of the Code apply with respect to the sale of an article, the constructive sale price for such article shall be the lower of the prices computed under sections 4216(b)(3) and 4216(b)(4).

(c) *Sales to which section 4216(b)(4) of the Code applies.* Section 4216(b)(4) of the Code provides a procedure for determining a constructive sale price under section 4216(b)(1)(C) of the Code in those instance where:

(1) A manufacturer, producer, or importer regularly sells (except for tax-free sales) a taxable article only to a wholesale distributor which is a member of the same affiliated group as the manufacturer, producer, or importer,

(2) The distributor regularly sells (except for tax-free sales) such article only to retail dealers, and

(3) The normal method of sales for such articles within the industry is to sell such articles in arm's-length transactions to wholesale distributors. Under section 4216(b)(4) of the Code, the constructive sale price of such article shall be the median price at which the distributor, at the time of the sale by the manufacturer, resells the article to retail dealers, reduced by a percentage of such price equal to the percentage which:

(i) The difference between the median price for which comparable articles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers of producers thereof, and the median price at which such wholesale distributors in arm's-length transactions sell such comparable articles to retailers, is of

(ii) The median price at which such wholesale distributors in arm's-length transactions sell such comparable articles to retailers. For purposes of this paragraph, the "median price" for which an article is sold at a particular level of distribution is the price midway between the highest and lowest prices charged vendees at the particular level of distribution. Where only one price is charged at a level of distribution, "median price" is equivalent to "actual price". All sale prices referred to in paragraphs (c) and (d) of this section are prices that must reflect the inclusions and exclusions set forth in section 4216(a) of the Code. However, once a constructive sale price has been determined under these paragraphs, no further adjustment of such price is allowed.

(d) *Application of section 4216(b)(4) of the Code.* The application of section 4216(b)(4) of the Code and paragraph (c) of this section may be illustrated by the following example:

Example. M, a corporation engaged in the manufacture of article X, sold 100 of such articles at $10.00 per article to a wholesale distributor N, a corporation engaged in the business of selling X articles to independent retail dealers. N is a member of the same affiliated group of corporations as M. M sells X articles only to N. The normal method of manufacturers' sales of X articles in the industry is to sell to independent wholesale distributors. N corporation sells X articles to retailers for $15.00 each. The price for which comparable X articles are sold to wholesale distributors in the ordinary course of trade by manufacturers thereof is $12.00 per article. Wholesale distributors sell X articles to retailers in the ordinary course of trade for $16.00 per article. Under the foregoing facts

the constructive sale price determined under section 4216(b)(4) of the Code and this paragraph is $11.25, computed as follows:

$$\$15.00-(\$15.00\times\frac{\$16.00}{(\$16.00)}-\$12.00)=\$11.25$$

(e) *Determination of "lowest price".* In addition to other considerations, in determining a "lowest price" for purposes of sections 4216(b) (1) and (3) of the Code and § 53.97, such price shall be determined:

(1) Without requiring that a given percentage of sales be made at that price (provided that the volume of sales made at that price is great enough to indicate that those sales have not been engaged in primarily to establish a lower tax base), and

(2) Without including any charge for a fixed amount that the purchaser has an unconditional right to recover on the basis of a contractual arrangement existing at the time of sale.

(f) *Definitions.* For purposes of this section and paragraphs (3) and (4) of section 4216(b) of the Code, the term "regularly sells" has the same meaning as that accorded the term "regular sales" in § 53.96(b)(3), and the term "normal method of sales in the industry" has the same meaning as accorded that term in § 53.96(b)(4).

§ 53.98 Computation of tax on leases and installment sales.

(a) *Leases.* When a taxable article is leased by a manufacturer, producer, or importer, liability for tax is incurred, except as provided by section 4217(b) of the Code and § 53.104, on each payment made with respect to such lease. Tax is payable on each lease payment as long as the article is leased by the manufacturer, producer, or importer. The tax payable with respect to each lease payment is a percentage of each payment based on the rate of tax, if any, in effect on the date the lease payment is due. If the article is subsequently sold by the manufacturer, producer, or importer, the tax applies also to such sale, without regard to the tax paid when the article was leased. For definition of the term "lease", see § 53.103.

(b) *Installment sales.* When a taxable article is sold under an installment payment contract with title reserved in the seller, or under a conditional sale contract, chattel mortgage arrangement or other arrangement creating a security interest with payments to be made in installments, tax shall be computed and paid on each payment made by the purchaser. The tax payable with each payment is a percentage of each payment based on the rate of tax, if any, in effect on the date the payment is due. The part of each payment that is subject to tax is that portion of the payment equal to the percentage of the total portion of the payment equal to the percentage of the total charge for the article that is subject to tax. For example, if the total charge for the article is $1,000, and of the total amount charged only 90 percent thereof, or $900, is subject to tax by reason of exclusions, then only 90 percent of the installment payment is subject to tax. If the tax base is a constructive sale price computed under section 4216(b) of the Code that is less than the actual sale price of the article, the portion of each payment subject to tax is the percentage of such payment equal to the percentage that the constructive sale price bears to the actual sale price. For example, if an article is sold at retail for $100, and the constructive sale price for such an article computed under the provisions of section 4216(b)(1)(A) of the Code is $75, the percentage which the constructive sale price bears to the actual sale price is 75 percent. Accordingly, only 75 percent of each installment payment is subject to tax.

(c) *Sales on credit.* Where articles are sold on credit under conditions other than those specified in paragraph (b) of this section, the entire tax shall be reported and paid with the return covering the period in which the sale is made, even though the price may not be paid to the manufacturer, producer, or importer until a later date, or not paid at all.

§ 53.99 Sales of installment accounts.

(a) *In general.* Except as provided in paragraph (d) of this section, in case of a sale or other disposition by a manufacturer, producer, or importer of an installment account of the type specified in section 4216(c) of the Code, the tax shall not apply to subsequent installment payments on such account. Instead, there shall be paid an amount equal to the difference between the tax previously paid on such installment account and the total tax computed by applying:

(1) To each installment due before the sale of the installment account, the rate of tax applicable at the time payment thereof was due, and

(2) To each installment, the time for payment of which has not arrived, the rate of tax which, under the provisions of chapter 32 of the Code as in effect on the date of the sale of the installment account, is (or is to be) in effect on the date such installment is due. However, see paragraph (b) of this section if the sale is made in a bankruptcy or insolvency proceeding. The tax due under this paragraph shall be included in the return for the period in which the account is sold.

(b) *Sale in bankruptcy or insolvency proceeding.* In the case of a sale of an installment account of a manufacturer, producer, or importer pursuant to the order of, or subject to the approval of, a court of competent jurisdiction in a bankruptcy or insolvency proceeding, the amount of tax due shall be computed and paid as provided in paragraph (a) of this section but shall not exceed the amount of tax computed by multiplying:

(1) The proportionate share of the amount for which such accounts are sold which is allocable to each unpaid installment payment, by

(2) The rate of tax which, under the provisions of chapter 32 of the Code as in effect on the date of the sale of the installment account, is (or is to be) in effect on the date such payment is due.

(c) *Collection of installment accounts on behalf of the manufacturer.* Where a manufacturer, producer, or importer retains title to an installment account but turns it over to another person for collection on a fee basis, no sale of such account (or other disposition as contemplated in section 4216(d) of the Code) has been made. The tax shall continue to be paid as provided by section 4216(c) of the Code.

(d) *Returned installment accounts.* Where an installment account which has been sold or otherwise disposed of is returned to the manufacturer, producer, or importer who sold it under an agreement under which the account was sold, and credit or refund has been allowed under section 6416(b)(5) of the Code and § 53.183, the manufacturer, producer, or importer shall pay tax as provided by section 4216(c) of the Code and § 53.98 on any subsequent payments made on such returned installment

account until such time as there shall have been paid the total tax liability with respect to the account as computed under paragraph (a) of this section.

(e) *Limitation.* The sum of the amounts payable under this section and § 53.98 or an installment account shall not exceed the total amount of tax which would be payable if such installment account had not been sold or otherwise disposed of (computed as provided in subsection (c)).

§ 53.100 Exclusion of local advertising charges from sale price.

(a) *In general.* Section 4216(e) of the Code deals with the treatment to be accorded charges made by a manufacturer for, and reimbursements by a manufacturer or expenditures in connection with the advertising of certain articles subject to excise tax under chapter 32 of the Code. Section 4216(e) of the Code provides an exclusion (which is in addition to the exclusions provided by section 4216(a) of the Code and § 53.92) in respect of charges for local advertising, as defined in paragraph (b) of this section, for purposes of determining the price for which an article is sold. See paragraph (c) of this section. The exclusion provided by section 4216(e) of the Code and paragraph (c) of this section has application only if the advertising is broadcast over a radio or television station, appears in a newspaper or magazine, or is displayed by means of an outdoor advertising sign or poster. Section 4216(e) of the Code also provides an overall limitation in respect of the sum of the amount of the exclusions from price as charges for local advertising and the amount of the readjustments authorized under section 6416(b)(1) of the Code (relating to credits or refunds for price readjustments) in respect of reimbursements by a manufacturer of expenditures for local advertising. See § 53.101. For provisions prohibiting exclusion from price or readjustment of price in respect of charges for, and reimbursements of expenditures for, advertising other than local advertising, see § 53.102.

(b) *Definition of local advertising.*— (1) *In general.* For purposes of the regulations under sections 4216(e) and 6416(b)(1) of the Code (§§ 53.100–53.102 and 53.173–53.176), the term "local advertising" means advertising which relates to an article with respect to which tax is imposed under chapter 32 of the Code on the price for which sold and which:

(i) Is initiated or obtained by the purchaser or any subsequent vendee,

(ii) Names the article for which the price is determinable under section 4216 and states the location at which such article may be purchased at retail, and

(iii) Is broadcast over a radio station or television station, appears in a newspaper or magazine, or is displayed by means of an outdoor advertising sign or poster.

(2) *Initiating or obtaining advertising.* For purposes of paragraph (b)(1) of this section, the advertising must be initiated or obtained by one or more of the persons in the chain of distribution of the article (wholesale distributor, jobber, dealer, etc.) who purchased the article for resale. For purposes of this subparagraph, the manufacturer is not considered to be one of the persons in the chain of distribution of the article. In general, advertising of an article is considered to be initiated or obtained by one or more persons in the chain of distribution of the article if any such person:

(i) Takes an active part in the actual planning and development, or in the arrangements or negotiations leading to the development, of the form and content of the advertising, or

(ii) Contracts for the placement of the advertising.

The participation of the manufacturer of the article in the planning, development, or placement of the advertising is immaterial provided the advertising is in fact initiated or obtained by one or more persons in the chain of distribution of the article. Furthermore, it is immaterial whether or not the advertising is subject to the approval of the manufacturer of the article. However, if no person in the chain of distribution of the article takes an active part in the actual planning and development, or in the arrangements or negotiations leading to the development, of the form and content of the advertising, but, rather, all such planning, development, arrangements, and negotiations are accomplished by the manufacturer of the article, then such manufacturer is considered to have initiated the advertising, and if he also contracts for the placement of the advertising, such advertising does not qualify as "local advertising".

(3) *Identification of article and sales location.* To meet the requirements of paragraph (b)(1) of this section, the advertising must identify the article for which the price is determinable under section 4216 of the Code and give the location or locations at which the article may be purchased at retail. All products taxable at the same rate under the same section of chapter 32 of the Code shall be considered to be an "article" for purposes of the preceding sentence. No specific method or means of identification is prescribed. The identification of the article may be made through the use of the name of the manufacturer or the use of an established trade-mark, such as a seal, picture, letter or letters, etc., or a combination thereof. The advertising must identify the particular retail establishment or establishments at which the article may be purchased at retail but need not specify the location of any such establishment in terms of the number by which the premises are designated or the name of the street on which the retail premises are situated. However, the location of the retail premises must be described sufficiently, as, for example, by reference to a particular named shopping area or shopping center, to enable customers to find the retail establishment.

(4) *Determination of costs of local advertising.* Where an advertisement identifies more than one article, and all such articles are not taxable, or are not taxable at the same rate under the same section of chapter 32 of the Code, a reasonable allocation of the cost of the advertisement must be made among:

(i) Articles taxable at the same rate under the same section of the Code, and

(ii) Articles which are not taxable under chapter 32 of the Code.

For example, in the case of a single page newspaper or magazine advertisement, an allocation of costs reflecting the lineage or space devoted to the specified categories will be considered to reflect a reasonable allocation of the cost of advertising the different articles. As a general rule, only the cost of the "spot" portion identifying the retail establishment is considered "local advertising" in the case of national television or radio programs.

(5) *Meaning of "newspaper".* The term "newspaper", as used in paragraph (b)(1) of this section, is limited to those publications which are commonly understood to be newspapers and which are printed and distributed periodically at daily, weekly, or other short intervals for the dissemination of news of a general character and of a general interest. The term does not include handbills, circulars, flyers, or the like, unless printed and distributed as a part of a publication which constitutes a newspaper within the meaning of this subparagraph. Neither does the term include any publication which is issued to supply information on certain subjects of interest to particular groups unless such publication otherwise qualifies as a newspaper within the meaning of this subparagraph. For purposes of this subparagraph, advertising is not considered to be news

of a general character and of a general interest.

(6) *Meaning of "magazine".* The term "magazine", as used in paragraph (b)(1) of this section, is limited to those publications which are:

(i) Commonly understood to be magazines,

(ii) Printed and distributed periodically at least twice a year, and

(iii) Published for the dissemination of information of a general nature or of special interest to particular groups.

(iv) The term does not include handbills, circulars, flyers or the like, unless printed and distributed as a part of a publication which constitutes a magazine within the meaning of this subparagraph. For purposes of this subparagraph, advertising is not considered to be information of a general nature or information of special interest to particular groups within the contemplation of paragraph (b)(6)(iii) of this section.

(7) *Meaning of "outdoor advertising sign or poster".* The term "outdoor advertising sign or poster", as used in paragraph (b)(1) of this section, means a sign or poster displaying advertising matter, which is located outside of a roofed enclosure. This term includes both signs or posters on billboards, whether placed on or affixed to land, buildings, or other structures, and those which are displayed on or attached to moving objects, provided the signs or posters are located outside of a roofed enclosure. The term "roofed enclosure" means a roof structure which is enclosed on more than one-half of its sides by walls, fences, or other barriers.

(c) *Exclusion*—(1) *Conditions and limitations.* A charge for local advertising which is required by a manufacturer to be paid as a condition to his sale of an article is not a part of the taxable price of the article, to the extent that such charge meets each of the following conditions and limitations:

(i) Such charge does not exceed 5 percent of the difference between:

(A) An amount which would constitute the taxable price of the article (computed at the time of the sale of the article) if no part of any charge for local advertising were excludable in computing taxable price, and

(B) The amount of any separate charge for local advertising, whatever the amount of such charge may be,

(ii) Such charge is specifically shown as a separate charge for local advertising on the invoice or statement covering the sale of the article.

(iii) Such charge is billed by the manufacturer with the intention on his part of repaying the amount of the charge to the person purchasing the article from him, or to any person who subsequently purchases the article for resale, in reimbursement of costs incurred for local advertising of such article or some other article or articles taxable at the same rate under the same section of the Code. In the absence of evidence to the contrary, the fact of such intention will be assumed in all cases where the manufacturer and his vendees are parties to an advertising plan which calls for such repayments, or the manufacturer can otherwise establish that the vendees to whom he bills such charges understand and expect that such repayments will be made.

(2) *When exclusion ceases to apply.* To the extent that charges for local advertising meet the conditions and limitations stated in paragraph (c)(1) of this section, such charge is excludable in computing the taxable price of the article in respect of which the charge was made. However, the exclusion will cease to apply in respect of any part of such charge which the manufacturer fails to repay before May 1 of the calendar year following the calendar year in which the article was sold, to the person who purchased the article from him, or to some other person who subsequently purchases the article for resale, in reimbursement of costs incurred for local advertising of such article or some other article or articles taxable at the same rate under the same section of the Code. If, before such May 1, any part of the charge so excluded has not been so repaid, the manufacturer becomes liable for tax on such May 1 in the same manner as if an article taxable under such section of the Code had been sold by him on such May 1 at a taxable price equivalent to that part of the charge not so repaid. However, see paragraph (b)(2) of § 53.175, relating to price readjustments in cases where local advertising charges are not repaid before such May 1 but are subsequently paid over by the manufacturer to his vendees in reimbursement of costs for local advertising. For provisions relating to the method of determining whether a payment by a manufacturer is or is not attributable to an excluded local advertising charge, see paragraph (b)(3) of § 53.101. In any case where the payment is determined to be attributable to such a charge, the date of the sale in connection with which the charge was made shall be determined on a first-in-first-out basis in respect of the vendee to whom the charge was billed by the manufacturer.

§ 53.101 Limitation on aggregate of exclusions and price readjustments.

(a) *In general.* The sum of the amount excluded from taxable price in respect of charges for local advertising, as provided in section 4216(e)(1) of the Code and § 53.100, plus the amount of the readjustments for which credits or refunds may be claimed in respect of local advertising, as provided in section 6416(b)(1) of the Code and § 53.175, is subject to an overall 5 percent limitation. This limitation applies to each manufacturer, as of the close of each calendar quarter, in respect of all articles taxable under the same section of chapter 32 of the Code which were sold by such manufacturer in such quarter (and the preceding quarter or quarters, if any, in the calendar year).

(b) *Computation of overall 5 percent limitation.*—(1) *In general.* The limitation prescribed by section 4216(e)(2) of the Code (the "overall 5 percent limitation" referred to in paragraph (a) of this section) as to the total of the exclusions from price and readjustments of price which may be claimed for local advertising in respect of all articles taxable under the same section of Chapter 32 of the Code shall be computed as of the close of each calendar quarter of the calendar year. The overall 5 percent limitation is 5 percent of the difference between:

(i) The amount which would constitute the total taxable price (computed at the time of sale) of all articles taxable under the same section of chapter 32 of the Code sold by the manufacturer during the elapsed calendar quarters of the calendar year, if no part of any charge for local advertising were excludable in computing taxable price, and

(ii) The total of all amounts billed as separate charges for local advertising of such articles (whatever the amount of any single charge of the total of all charges).

(iii) In making the computations under paragraphs (b)(1) (i) and (ii) of this section, credits or refunds under section 6416(b) of the Code of tax paid on the sale of any such articles are to be disregarded and articles sold tax-free by the manufacturer are to be excluded. The amount by which the overall 5 percent limitation computed as of the close of a particular calendar quarter in respect of articles taxable under the same section of chapter 32 of the Code exceeds the sum of the charges for local advertising excluded in computing the taxable price and the amount of reimbursements for local advertising of such articles made during the elapsed calendar quarters of the calendar year, in respect of which credit or refund has been claimed, represents the unused portion of the overall 5 percent limitation. Such unused portion is the

maximum amount of reimbursements for local advertising in respect of which credit or refund may be claimed at the close of the particular calendar quarter, subject to the applicable conditions and limitations governing the right to claim a credit or refund in respect of local advertising (see § 53.175). The unused portion of the overall 5 percent limitation as of the close of the fourth calendar quarter of a calendar year in respect of which credit or refund may not be claimed as of the close of such quarter must be disregarded in computing the overall 5 percent limitation for any subsequent calendar quarter. Moreover, the amount of any reimbursements for local advertising made by a manufacturer in a calendar year which is in excess of the amount of such reimbursements in respect of which credit or refund may be claimed, within the overall limitation, as of the close of the calendar year, may not subsequently serve as the basis for a credit or refund.

(2) *Alternative method of computation in certain cases.* If during the portion of the calendar year ending with the date as of which the overall 5 percent limitation is being computed the amount of the local advertising charge separately billed by the manufacturer has not, in respect of any sale of any articles taxable under the same section of chapter 32 of the Code, exceeded the amount excludable pursuant to § 53.100 in computing taxable price, the overall 5 percent limitation as of the close of a particular calendar quarter in respect of articles taxable under such section is 5 percent of the total taxable price (computed at the time of the sale) of all such articles sold taxpaid during the calendar year.

(3) *Allocation of amounts paid in reimbursement of expenditures for local advertising.* If a manufacturer makes contributions to a local advertising program in connection with which he makes excludable local advertising charges, it is necessary that reimbursements by the manufacturer for local advertising be attributed to the charges for local advertising, to the manufacturer's contributions, or allocated between them. Whether an amount paid by a manufacturer in reimbursement of expenses for local advertising is or is not a repayment of a local advertising charge which was excluded from taxable price under section 4216(e)(1) of the Code and § 53.100, shall be determined on the basis of an allocation made under the agreement between the manufacturer and his vendee (or any subsequent vendee).

(c) *Examples.* The application of paragraphs (a) and (b) of this section may be illustrated by the following examples:

Example (1). During the first and second calendar quarters of the year, a manufacturer makes sales of articles taxable under section 4181 of his distributors. The total charges of such sales, exclusive of the tax, transportation charges, delivery charges, or other charges which are excludable, pursuant to section 4216(a) of the Code, in computing taxable price, are as follows:

First Quarter:	
Articles taxable under Section 4181	$100,000
Local advertising charges	3,000
Total Charges	103,000
Second Quarter:	
Articles taxable under Section 4181	$150,000
Local advertising charges	4,000
Total Charges	154,000

Assume further that the manufacturer contributes to the advertising plan and that the manufacturer pays $5,500 and $1,000 during the first and second calendar quarters of the year, respectively, to his distributors in reimbursement of expenses incurred by them for local advertising of the articles purchased from the manufacturer.

Computation as of close of first calendar quarter:	
1. Amount which would constitute total taxable price (computed at time of sale) if no part of any charge for local advertising were excludable in computing taxable price	$103,000
2. Amounts billed as separate charges for local advertising	−3,000
3. Difference	100,000
4. Overall 5 percent limitation (5 percent of item 3)	$5,000
5. Amount excluded in computing taxable price	−3,000
6. Unused portion of limitation	2,000
7. Allocation, pursuant to agreement, of $5,500 paid to distributors:	
Charges for local advertising	$3,000
Contributions by manufacturer	$2,500

Readjustment may be claimed in respect of that portion of the total amount repaid to the distributors which is allocated to the manufacturer's contribution ($2,500) to the extent that such portion does not exceed the unused portion of the overall 5 percent limitation ($2,000). Accordingly, as of the close of the first calendar quarter the manufacturer may claim credit or refund in respect of a readjustment of price in the amount of $2,000.

Computation as of close of second calendar quarter:	
1. Amount which would constitute total taxable price (computed at time of sale) if no part of any charge for local advertising were excludable in computing taxable price ($103,000+$154,000)	$257,000
2. Amounts billed as separate charges for local advertising ($3,000+$4,000)	−7,000
3. Difference	250,000
4. Overall 5 percent limitation (5 percent of item 3)	$12,500
5. Amount excluded in computing taxable price ($3,000+$4,000) plus readjustment claimed at end of first calendar quarter ($2,000)	−9,000
6. Unused portion of limitation	3,500
7. Allocation, pursuant to agreement, of $6,500 ($5,500+$1,000) paid to distributors:	
Charges for local advertising	$3,500
Contributions by manufacturer	$3,000

Although the total reimbursements for local advertising expenses attributable to contributions by the manufacturer ($3,000) does not exceed the unused portion of the overall 5 percent limitation ($3,500), the manufacturer, having taken, at the close of the first calendar quarter, a price readjustment in the amount of $2,000 in respect to his contributions, is entitled at the close of the second calendar quarter to claim credit or refund in respect of a price readjustment in the amount of $1,000 ($3,000−$2,000).

Example (2). During the first calendar quarter of the year, a manufacturer sold articles taxable under section 4181 to his distributors at a total charge of $106,000, exclusive of the tax, transportation charges, delivery charges, or other charges which are excludable, pursuant to section 4216(a) of the Code, in computing taxable price. This total charge of $106,000 was billed as follows:

Total Charge:	
Articles taxable under Section 4181	$100,000
Local advertising charges	6,000
Total charges	106,000

Assume further that the manufacturer contributes to the advertising plan and that the manufacturer pays $3,000 during the first

calendar quarter of the year to his distributors in reimbursement of expenses incurred by them for local advertising of the articles purchased from the manufacturer.

Computation as of close of first calendar quarter:	
1. Amount which would constitute total taxable price (computed at time of sale) if no part of any charge for local advertising were excludable in computing taxable price	$106,000
2. Amounts billed as separate charges for local advertising	−6,000
d. Difference	100,000
4. Overall 5 percent limitation (5 percent of item 3)	5,000
5. Amount excluded in computing taxable price (see paragraph (c) of § 53.100	−5,000
6. Unused portion of limitation	0
7. Allocation, pursuant to agreement, of $3,000 paid to distributors:	
Charges for local advertising	2,000
Contributions by manufacturer	1,000

Credit or refund may not be claimed in respect of that portion of the total amount repaid to the distributors ($3,000) which is allocated to the manufacturer's contribution ($1,000) since the amount excluded in computing taxable price is equal to the overall 5 percent limitation.

§ 53.102 No exclusion or readjustment for other advertising charges or reimbursements.

(a) *Exclusions from price.* No exclusion in computing the taxable price of any article sold by the manufacturer may be allowed in respect of any charge for advertising if, and to the extent that, such charge:

(1) Is for advertising which does not qualify as local advertising within the meaning of section 4216(e)(4) of the Code and paragraphs (a) and (b) of § 53.100, or

(2) Does not satisfy all of the conditions and limitations stated in section 4216(e)(1) of the Code and paragraph (c) of § 53.100.

(b) *Readjustment of price.* No credit or refund under section 6416(b)(1) of the Code may be allowed in respect of any amount which was included in the taxable price of an article sold by the manufacturer and which was later paid by him to his vendee in reimbursement of costs incurred for advertising, if, and to the extent that, the amount so paid:

(1) Is for advertising which does not qualify as local advertising within the meaning of section 4216(e)(4) of the Code and paragraph (b) of § 53.100, or

(2) Is not within the limitation provided in section 4216(e)(2) of the Code, as computed in accordance with § 53.101, as of the close of the calendar quarter in which the amount is so paid over or as of the close of any subsequent calendar quarter in the same calendar year. See, however, § 53.175, relating to determinations of price readjustments in cases where local advertising charges excluded from taxable price in one calendar year become taxable as of May 1 of the following calendar year.

§ 52.103 Lease considered as sale.

For purposes of chapter 32 of the Code, the lease of an article by a manufacturer, producer, or importer shall be considered a sale of the article. The term "lease" means a contract or agreement, written or verbal, which gives the lessee and exclusive, continuous right to the possession or use of a particular article for a period of time. The term includes any renewal or extension of a lease or any subsequent lease of the article.

§ 53.104 Limitation on amount of tax applicable to certain leases.

(a) *Conditions for eligibility.* Section 4217(b) of the Code provides for a limitation on the amount of tax that shall apply to the lease, any renewal, or further lease, of an article which, if sold, would be subject to tax on the basis of sale price. Such limitation on the amount of the tax applies with respect to the lease of an article only if, at the time of making the lease, the lessor is engaged in the business of selling in arm's length transactions the same type and model of article. In case of a lease to which section 4217(b) of the Code does not apply, tax shall be computed and paid as provided in section 4216(c) of the Code and paragraph (a) of § 53.98.

(b) *Lessor engaged in business of selling.* The lessor will be regarded as being engaged in the business of selling in arm's length transactions the same type and model of an article as the one being leased if it periodically and recurringly makes bona fide offers for sale of such articles in the regular course of operation of its business, which offers if accepted would constitute sales at arm's length. Whether the offers are bona fide shall be determined on the basis of the facts in each case, such as sales actually made, the nature of the advertising, sales literature, and other means used to effectuate sales. It is not necessary that the offers for sale be made to the same class of purchasers as those to whom the article is being leased.

(c) *Same type and model of article.* To qualify as the "same type and model of article", the article offered for sale must be an unused article essentially the same in size, design, and function as the article being leased. Slight differences in appearance or accessories will not render articles dissimilar which are identical in all other respects.

(d) *Basis for tax.*—(1) *Tax payable until total tax in paid.* In case of a lease of an article to which section 4217(b) of the Code applies, tax shall be paid on each lease payment in an amount computed by applying to such lease payment a percentage equal to the rate of tax in effect on the date of the lease payment. Such tax payments shall continue to be made under such lease, or any subsequent lease of the article, until the cumulative total of the tax payments equals the total tax. Lease payments made thereafter with respect to that article shall not be subject to tax. For definition of the term "total tax," see paragraph (e) of this section.

(2) *Changes in tax rates.* If the rate of tax is increased or decreased during a lease period, the new rate shall apply to the lease payments made on and after the date of the change, but the amount of the total tax shall remain the same.

(e) *Total tax.* For purposes of this section, the term "total tax" means the amount of tax, computed at the rate in effect on the date of the first lease of the article to which section 4217(b) of the Code applies, which would be due on the constructive sale price of the article as determined under section 4216(b) of the Code and § 53.95, as if the article had been sold by a manufacturer at retail on such date.

(f) *Sale of article before total tax becomes payable.* If the lessor sells the article before the total tax has become payable, the tax payable on the sale shall be the lesser of the following amounts:

(1) The difference between:

(i) The total tax, and

(ii) The aggregate tax applicable to lease payments already received; or

(2) A tax computed, at the rate in effect on the date of the sale, on the price for which the article is sold. For purposes of (f)(2) of this section, the provisions of section 4216(b) of the Code for determining a constructive sale price shall not apply if the sale is at arm's length. If the sale is not at arm's length, the tax referred to in (f)(2) of this section shall be computed on a constructive sale price as provided in § 53.95.

(g) *Sale of article after total tax has become payable.* If the lessor sells an article after the total tax has become payable, the tax imposed under chapter

32 of the Code shall not apply to such sale.

Use by Manufacturer or Importer Considered Sale

§ 53.111 Tax by use by manufacturer, producer, or importer.

(a) *In general.* Section 4218 of the Code imposes tax in respect of certain uses of articles by the actual manufacturer, producer, or importer thereof. This section also applies in respect of the use of articles by any other person who, pursuant to a provision of chapter 32 of the Code, is considered to be, or is treated as, the manufacturer or producer of the articles. See, for example, section 4223 of the Code relating to articles purchased tax free for use in further manufacture.

(b) *Taxable articles in general.*—(1) *Application of tax.* If the manufacturer, producer, or importer of an article taxable under chapter 32 of the Code uses the article for any purpose other than that indicated in paragraph (b) (3) of this section, he shall be liable for tax with respect to the use of such article in the same manner as if the article were sold by him.

(2) *Taxable use in manufacturer of nontaxable articles.*—(i) *In general.* In the case of an article to which paragraph (b)(1) of this section applies, tax attaches when the manufacturer, producer, or importer of the articles uses it as material in the manufacture or production of, or as a component part of, another article which is not taxable under chapter 32 of the Code, regardless of the disposition made of such other article. (See paragraph (c) of § 53.115 for computation of tax on such use.)

(ii) *Types of use in manufacture of nontaxable articles.* Taxable use may consist of the incorporation of a taxable article into a nontaxable article. Taxable use may also result from the combining of a taxable article (or the components thereof) with a nontaxable article (or the components of a nontaxable article) resulting in a combination end article which itself is not taxable. Although the taxable article may not be a completely separable unit, within the contemplation of the law a taxable article has been produced and incorporated in the combination end article.

(3) *Nontxable use in manufacturer of taxable articles.* The tax on the use of an article to which paragraph (b)(1) of this section has application shall not apply if the article is used by the manufacturer, producer, or importer thereof as material in the manufacturer or production of, or as a component part of, another article taxable under chapter 32 of the Code to be manfactured or produced by him. It is immaterial what disposition is made of such other article.

(c) *Use after lease.* If the manufacturer, producer, or importer of a taxable article leases such article and thereafter uses the article, he incurs liability for tax on such use as provided in these regulations to the same extent as if the article were sold after being leased. See section 4217 of the Code and the regulations thereunder in this subpart for application and computation of tax in case of leased articles.

(d) *Time of application of tax.* In the case of a taxable use of an article by the manufacturer, producer, or importer thereof, the tax attaches at the time such use begins. If tax applies by reason of the sale of an article by the manufacturer, producer, or importer thereof on or in connection with his sale of another article, the tax attaches at the time of the sale of such other article.

(e) *Exemptions because of other statutory provisions.* Tax does not apply on the use of an article by the manufacturer, producer, or importer thereof if under the applicable provisions of the Code the sale of the article for a similar use would not be subject to tax. Also, tax need not be paid with respect to the use of an article by the manufacturer, producer, or importer thereof if such use would qualify, under the provisions of section 6416(b) of the Code, for credit or refund of the tax paid.

§ 53.112 Business or personal use of articles.

(a) *Business use.* Section 4218 of the Code applies to the use by a person, in the operation of any business in which he is engaged, of a taxable article which has been manufactured, produced, or imported by him or his agent.

(b) *Personal use.* The tax on use of a taxable article does not attach in cases where an individual incidentially manufacturers, produces, or imports a taxable article for his personal use or causes a taxable article to be manufactured, produced, or imported for his personal use.

§ 53.113 Events subsequent to taxable use of article.

Liability for tax incurred on the use of an article is not extinguished or reduced because of any subsequent sale or lease of the article even if such sale or lease would have been exempt if the article had been so sold or leased prior to use. If a manufacturer, producer, or importer of an article incurs liability for tax on his use thereof, and thereafter sells or leases the article in a transaction which otherwise would be subject to tax, liability for tax is not incurred on sale or lease.

§ 53.114 Use in further manufacture.

For purposes of section 4218 and § 53.111, an article is used as material in the manufacture or production of, or as a component part of, another article, if it is incorporated in, or is a part or accessory of, the other article. In addition, an article is considered to be used as material in the manufacturer of another article if it is partly or entirely consumed in testing such other article; for example, shells or cartridges used in testing new firearms. Similarly, if an article is partly or wholly consumed in quality testing a production run of like articles, such article is also considered to have been used as material in the manufacture of another article. However, if a taxable article that has been used tax free and only partly consumed in testing is later sold, or put to a taxable use by the manufacturer, tax attaches to such sale or use. An article that is consumed in the manufacturing process other than in testing, so that it is not a physical part of the manufactured article, is not used as material in the manufacture or production of, such other article.

§ 53.115 Computation of tax.

(a) *Tax based on price.* Tax liability incurred on the use of an article shall be computed on the price at which such or similar articles are sold in the ordinary course of trade by manufacturers, producers, or importers thereof and in the absence of special arrangements. For additional provisions applicable in computing the tax in the case of the use of an article by a manufacturer and producer who purchased the article free of tax under section 4221(a)(1) of the Code for use by him in further manufacturer, see section 4223(b) of the Code and the regulations thereunder (§ 53.143).

(b) *Articles regularly sold by manufacturer.* If the manufacturer, producer, or importer of an article regularly sells such articles at wholesale in arm's length transactions, tax liability on his use of any such article shall be computed on his lowest established wholesale price for such articles in effect at the time of the taxable use. In establishing such price, there shall be included and excluded, as applicable, the charges and readjustments specified in sections 4216(a) and 6416(b)(1) of the Code, as in effect at the time tax liability on the use of the article is incurred, and the regulations thereunder contained in this subpart and subpart L (§§ 53.91–53.94 and 53.173–53.176). If the

manufacturer, producer, or importer of an article does not regularly sell such articles at wholesale in arm's length transactions, a constructive price on which the use tax shall be computed will be determined by the Director. This price will be established after considering the selling practices and price structures of manfacturers, producers, and importers of similar articles.

(c) *Articles governed by section 4218(a) used in manufacture of nontaxable combination articles.* If the manufacturer, producer, or importer of an article to which section 4218(a) of the Code applies does not regularly sell such article separately but uses it as material in the manufacture or production of, or as a component part of, a nontaxable combination article consisting of a taxable and nontaxable article, liability for tax on his use shall be computed on the constructive price of the taxable article at the time of use. To determine the constructive price of the taxable article in such case, the combination article is considered to be composed of:

(1) Parts used exclusively in the functioning of the taxable article in the combination;

(2) Parts used exclusively in the functioning of the nontaxable article in the combination, and

(3) Parts, called common parts, which serve a dual function in connection with the parts in both paragraphs (c) (1) and (2) of the section.

The ratio which the cost of the parts in paragraph (c)(1) of this section bears to the sum of the cost of such parts and the parts in paragraph (c)(2) of this section is applied to the lowest established wholesale price for which like combination articles are at the time of the taxable use being sold by the manufacturer or producer in the ordinary course of trade. The resulting amount is the constructive sale price for the taxable article on which tax is to be computed. The cost of the common parts is allocable to the parts in paragraphs (c) (1) and (2) of this section in the same ratio, and, therefore, need not be taken into account in the computation since the inclusion and allocation of the cost of such parts in the determination would not result in a different ratio. In determining the lowest establishment wholesale price for the combination article, there shall be included and excluded, as applicable, the charges and readjustments specified in sections 4216(a) and 6416(b)(1) of the Code, as in effect at the time tax liability on the use of the taxable article is incurred, and the regulations thereunder contained in this subpart and Subpart L of this part (§§ 53.91–53.94 and §§ 53.173–53.176). The tax applicable to the use of the article for which a constructive sale price has been computed is not affected by any charges or readjustments of the price for which the nontaxable combination article is sold, whether by reason of the return or repossession of the nontaxable article or its covering or container, or by a bona fide discount, rebate, allowance, or other factor.

Application of Tax in Case of Sales by Other Than Manufacturer or Importer

§ 53.121 Sales of taxable articles by a person other than the manufacturer, producer, or importer.

(a) *General rule.* If the title to, or ownership of, an article taxable under chapter 32 of the Code is transferred from the manufacturer, producer, or importer thereof, and, under the law, no tax attaches to such transfer, the subsequent sale, lease, or use of such article by the transferee is subject to tax to the same extent and manner as if such transferee were the manufacturer, producer, or importer of the article. The following examples illustrate this rule:

(1) The surviving spouse, child or children, executors or administrators, or other legal representatives, as the case may be, of a deceased manufacturer, producer, or importer of taxable articles, incur liability for tax on all such articles sold by them.

(2) A receiver or trustee in bankruptcy who under a court order conducts or liquidates the business of a manufacturer, producer, or importer of taxable articles, incurs liability for tax on all taxable articles sold by him, regardless of whether the articles were manufactured, produced, or imported before or after he took charge of the business.

(3) An assignee for the benefit of creditors of a manufacturer, producer, or importer incurs liability for tax with respect to all taxable articles sold by him as such assignee.

(4) If one or more member of a partnership withdraw, or if new partners are admitted, the new partnership so constituted incurs liability for tax on all taxable articles sold by it regardless of when such articles were manufactured, produced, or imported.

(5) A person who acquires title to taxable articles as a result of default of the manufacturer, producer, or importer pursuant to an agreement under the terms of which the articles were pledged as collateral incurs liability for tax with respect to his sale of the articles so acquired.

(6) A person who succeeds to the business of a manufacturer, producer, or importer of taxable articles, such as:

(i) A corporation which results from a consolidation, merger, or reorganization;

(ii) A corporation which acquires the business of an individual or partnership; or

(iii) A stockholder in a corporation who, after its dissolution, continues the business;

incurs liability for the tax on all taxable articles sold by such person. However, where a manufacturer, producer, or importer sells only his assets, rather than ownership of his business, he incurs liability for tax on the sale of any taxable articles included in such assets.

(b) *Transfer of title to damaged articles.* If title to a damaged taxable article is transferred by the manufacturer, producer, or importer thereof to a carrier or insurance company in adjustment of a damage claim, such transfer is not considered a taxable sale of the article. If the article is usable, even though damaged, the carrier or insurance company incurs liability for tax on its sale, lease, or use of the article. Where the article has been damaged to the extent that its only value is as scrap, and it is not restored to usable condition, sale thereof by the carrier or insurance company is not subject to tax.

Subpart K—Exemptions, Registration, etc.

§ 53.131 Tax-free sales; general rule.

(a) *In general.* Section 4221(a) of the Code sets forth the following exempt purposes for which an article subject to tax under chapter 32 of the Code may be sold tax-free by the manufacturer, producer, or importer:

(1) For use by the purchaser for further manufacture, or for resale by the purchaser to a second purchaser for use by such second purchaser in further manufacture,

(2) For export, or for resale by the purchaser to a second purchaser for export,

(3) For use by the purchaser as supplies for vessels or aircraft,

(4) To a State or local government for the exclusive use of a State or local government, and

(5) To a nonprofit educational organization for its exclusive use.

Section 4221(a) of the Code applies only in those cases where the exportation or use referred to is to occur before any other use, and where the seller, first purchaser, and second purchaser, as may be appropriate, have registered as required under section 4222 of the Code

and paragraph (a) of § 53.140. See paragraphs (c) and (d) of this section for provisions relating to evidence required in support of tax-free sales. See § 53.141 for exceptions to the requirement for registration.Where tax is paid on the sale of an article, but the article is used or resold for use for an exempt purpose, a claim for credit or refund may be filed in accordance with and to the extent provided in sections 6402(a) and 6416 of the Code, and the regulations thereunder (§§ 53.161 and 53.171–53.186).

(b) *Manufacturer relieved of liability in certain cases.*—(1) *General rule.* Under the provisions of section 4221(c) of the Code, if an article subject to tax under Chapter 32 of the Code is sold free of tax by the manufacturer of the article for an exempt purpose referred to in section 4221(c) of the Code and paragraph (b)(2) of this section, the manufacturer shall be relieved of any tax liability under chapter 32 of the Code with respect to such sale if the manufacturer in good faith accepts a proper certification by the purchaser that the article or articles will be used by the purchaser in the stated exempt manner. See paragraph (b)(2) of this section for a list of the exempt purposes referred to in section 4221(c) of the Code.

(2) *Situations wherein section 4221(c) of the Code is applicable.* The following are situations wherein section 4221(c) of the Code is applicable with respect to sales made tax free on the assumption that one of the following sections of the Code provides exemption for such sales:

(i) Section 4221(a)(1) of the Code, to the extent that it relates to sales for further manufacture by a first purchaser (see § 53.132),

(ii) Section 4221(a)(3) of the Code, relating to supplies for vessels and aircraft (see § 53.134),

(iii) Section 4221(a)(4) of the Code, relating to sales to State or local governments (see § 53.135),

(iv) Section 4221(a)(5) of the Code, relating to sales to nonprofit educational organizations (see § 53.136).

(3) *Situations wherein section 4221(c) of the Code is not applicable.* The relief from liability for the payment of tax provided by section 4221(c) of the Code is not applicable with respect to sales made tax free on the assumption that one of the following sections of the Code provides exemption for such sales:

(i) Section 4221(a)(1) of the Code, to the extent that it relates to sales for resale to a second purchaser for use by the second purchaser in further manufacture (see § 53.132),

(ii) Section 4221(a)(2) of the Code, relating to sales for export (see § 53.133).

(4) *Duty of seller to ascertain validity of tax-free sale.* If the manufacturer at the time of its sale has reason to believe that the article sold by it is not intended for the exempt purpose indicated by the purchaser, or that the purchaser has failed to register as required, the manufacturer is not considered to have accepted certification from the purchaser in good faith, and is not relieved from liability under the provisions of section 4221(c) of the Code.

(5) *Information to be furnished to purchaser.* A manufacturer selling articles free of tax under this section shall indicate to the purchaser that:

(i) Certain articles normally subject to tax are being sold tax free, and

(ii) The purchaser is obtaining those articles tax free for an exempt purpose under an exemption certificate or its equivalent.

(6) The manufacturer may transmit this information by any convenient means, such as coding of sales invoices, provided that the information is presented with sufficient particularity so that the purchaser is informed that he has obtained the articles tax free and:

(i) The purchaser can compute and remit the tax due if an article sold tax free for further manufacture is diverted to a taxable use,

(ii) The manufacturer can remit the tax due with respect to an article purchased tax free for resale for use in further manufacture or for export if, within the 6-month period described in § 53.132(c) or § 53.133(c), the manufacturer does not receive proof that the article has been exported or resold for use in further manufacturer, or

(iii) The purchaser can notify the manufacturer if an article otherwise purchased tax free is diverted to a taxable use.

(c) *Evidence required in support of tax-free sales*—(1) *Purchasers required to be registered.* Every purchaser who is required to be registered (see § 53.140) shall furnish to the seller, as evidence in support of each tax-free sale made by the seller to such purchaser, the exempt purpose for which the article or articles are being purchased and the registration number of the purchaser. Such information must be in writing and may be noted on the purchase order or other document furnished by the purchaser to the seller in connection with each sale.

(2) *Purchasers not required to be registered.* For the evidence which purchasers not required to register must furnish to the seller in support of each tax-free sale made by the seller to such purchasers, see paragraph (b) of § 53.133 for sales or resales to a foreign purchaser for export, paragraph (d) of § 53.134 for sales of supplies to vessels or aircraft, paragraph (c) of § 53.135 for sales to State and local governments, and paragraph (c) of § 53.141 for sales and purchases by the United States.

§ 53.132 Tax-free sale of articles to be used for, or resold for, further manufacture.

(a) *Further manufacture*—(1) *In general.* Under prescribed conditions, an article subject to tax under Chapter 32 of the Code may be sold tax free by the manufacturer, pursuant to section 4221(a)(1) of the Code, for use by the purchaser in further manufacture, or for resale by the purchaser to a second purchaser for use by the second purchaser in further manufacture. See section 4221(d) (6) of the Code and paragraph (b) of this section for the circumstances under which an article is considered to have been sold for use in further manufacture. See section 6416(b)(3) of the Code and § 53.180 for the circumstances under which credit or refund is available when tax-paid articles are used in further manufacture.

(2) *Proof of resale for use in further manufacture.* See section 4221(b)(1) of the Code and paragraph (c) of this section for provisions under which the exemption provided in section 4221(a)(1) of the Code shall cease to apply in the case of an article sold by the manufacturer to a purchaser for resale to a second purchaser for use in further manufacture unless the manufacturer receives timely proof of resale for further manufacture.

(b) *Circumstances under which an article is considered to have been sold for use in further manufacture.* (1) For purposes of the exemption from the manufacturers excise tax provided by section 4221(a)(1) of the Code, an article shall be treated as sold for use in further manufacture if the article is sold for use by the purchaser as material in the manufacture or production of, or as a component part of, another article taxable under chapter 32 of the Code;

(2) An article is used as material in the manufacture or production of, or as a component of, another article if it is incorporated in, or is a part or accessory of, the other article when the other article is sold by the manufacturer. In addition, an article is considered to be used as material in the manufacture of another article if it is consumed in whole or in part in testing such other article; for example, shells or cartridges that are used by the manufacturer of firearms to test new firearms. However, an article that is consumed in the manufacturing process other than in testing, so that it is not a physical part of the manufactured article, is not

considered to have been used as material in the manufacture of, or as a component part of, another article.

(c) *Proof of resale for further manufacture*—(1) *Cessation of exemption.* The exemption provided in section 4221(a)(1) of the Code and described in paragraph (a) of this section in respect of an article sold by the manufacturer to a purchaser for resale to a second purchaser for use by the second purchaser in further manufacture shall cease to apply on the first day following the close of the 6-month period which begins on the date of the sale of such article by the manufacturer, or the date of shipment of the article by the manufacturer, whichever is earlier, unless, within such 6-month period, the manufacturer receives proof, in the form prescribed by paragraph (c)(2) of this section, that the article was actually resold by the purchaser to a second purchaser for such use. If, on the first day following the close of the 6-month period, such proof has not been received, the manufacturer shall become liable for tax at that time at the rate in effect when the sale was made but otherwise in the same manner as if the article had been sold by it on such first day at a taxable price equivalent to that at which the article was actually sold. If the manufacturer later obtains such proof, it may file a claim for refund or credit of this tax. The payment of this tax by the manufacturer is not considered an overpayment by the subsequent manufacturer or producer for which the subsequent manufacturer or producer is entitled to a credit or refund under section 6416(b)(3) of the Code. See section 4221(d)(6) of the Code and paragraph (b) of this section for the circumstances under which an article is considered to have been sold for use in further manufacture.

(2) *Proof of resale.*—(i) *Certificate of purchaser.* The proof of resale to be received by the manufacturer, as required under section 4221(b)(1) of the Code, may consist of either a copy of the invoice of the manufacturer's vendee directed to his purchaser which discloses the certificate of registry number held by each party or a statement described below. In the case of an invoice of manufacturer's vendee, it must appear from such invoice (or by statement attached thereto) that the article was in fact resold for use in further manufacture. In lieu of such an invoice, proof of resale may consist of a statement, executed and signed by the manufacturer's vendee. Such statement shall be in substantially the following form:

Statement of Manufacturer's Vendee

(To support tax-free sales of taxable articles to a purchaser for resale to a second purchaser for use in further manufacture (section 4221(a)(1) of the Internal Revenue Code).)

(Date _____, 19____.

The undersigned, or the _____ (Name of manufacturer's vendee if other than undersigned), of which I am _____ (Title), holds certificate of registry No. _____ issued by the ATF Regional Director at _____.

The article or articles specified below or on the reverse side hereof were purchased tax free by me, or by _____ (Name of manufacturer's vendee if other than undersigned), on _____ (Date) and were thereafter resold to a purchaser who holds certificate of registry No. _____, issued by the ATF Regional Director at _____, for use by it as material in the manufacture or production of, or as a component part or parts of, an article or articles taxable under Chapter 32 of the Internal Revenue Code, for use by it as material in the manufacture or production of, or as a component part or parts of, any article or articles.

The undersigned, or _____ (Name of manufacturer's vendee other than undersigned), has in my/its possession proof of tax-free resale of such article or articles in the form of related purchase orders and sales invoices, and proof of tax-free resale will be retained by me or _____ (Name of manufacturer's vendee if other than undersigned), for at least 3 years from the date of this statement, and will be made readily available for inspection by ATF officers during such 3-year period.

I have not previously executed a statement in respect of such certificate of resale, and I understand that the fraudulent use of this statement may subject me and all parties making such fraudulent use of this statement to all applicable criminal penalties under the Internal Revenue Code.

_____

(Signature)

_____

(Address)

(ii) *Period covered.* Any statement executed and signed by the manufacturer's vendee, as provided in paragraph (c)(2)(i) of this section, may be executed with respect to any one or more articles purchased tax free from a manufacturer and resold for use in further manufacture within the 6-month period prescribed in section 4221(a)(1) of the Code and paragraph (c)(1) of this section. Such statement (or other prescribed proof of resale) must be retained for inspection by the regional director as provided in section 6001 of the Code.

§ 53.133 Tax-free sale of articles for export, or for resale by the purchaser to a second purchaser for export.

(a) *In general.* (1) An article subject to tax under chapter 32 of the Code may be sold tax free by the manufacturer, pursuant to section 4221(a)(2) of the Code and this section, for export, or for resale by the purchaser to a second purchaser for export. See § 53.11 for the meaning of the term "exportation". An article may be sold tax free by the manufacturer under the provisions of this section only if the person to whom the manufacturer sells the article intends either to export the article or to resell it to a person who intends to export it. An article may not be sold tax free under the provisions of this section by a manufacturer to a purchaser for resale to a second purchaser which does not intend to export the article itself but plans to resell it to a third purchaser for export. See section 6416(b)(2)(A) of the Code and § 53.177 for the circumstances under which credit or refund of tax is available where tax-paid articles are exported from the United States.

(2) If an article, otherwise taxable under chapter 32 of the Code:

(i) Is sold tax free by the manufacturer pursuant to section 4221(a)(2) of the Code and this section, and

(ii) Is returned subsequently to the United States in an unused and undamaged condition,

then the importer is liable for the tax imposed by chapter 32 of the Code on the subsequent sale or use of the article in the United States.

(b) *Sales or resales to a foreign purchaser for export.* In the case of sales or resales to a foreign purchaser for export, if the first or the second purchaser is located in a foreign country or possession of the United States, such purchaser is not required to register as provided in section 4222(a) of the Code and § 53.140. To establish the right to sell articles tax free for export to a purchaser who is not registered and who is located in a foreign country or a possession of the United States, the manufacturer must obtain from such producer at the time title to the article passes or at the time of shipment, whichever is earlier, either:

(1) A written order or contract of sale showing that the manufacturer is to ship the article to a foreign destination; or

(2) Where delivery by the manufacturer is to be made within the United States, a statement from the purchaser showing:

(i) That the article is purchased either to fill existing or future orders for delivery to a foreign destination or for resale to another person engaged in the business of exporting who will export the article, and

(ii) That such article will be transported to its foreign destination in due course prior to use or further manufacture and prior to any resale except for export. See section 4221(b) of the Code and paragraphs (c) and (d) of this section for requirements as to timely proof of exportation and cessation of the exemption for export unless the evidence to show actual exportation has been received by the manufacturer.

(c) *Cessation of exemption.* The exemption provided in section 4221(a)(2) of the Code and paragraph (a) of this section for an article sold by the manufacturer for export or for resale by the purchaser to a second purchaser for export shall cease to apply on the first day following the close of the 6-month period which begins on the date of the sale of the article by the manufacturer, or the date of shipment of the article by the manufacturer, whichever is earlier, unless within the 6-month period the manufacturer receives proof, in the form prescribed by paragraph (d) of this section, that the article was actually exported. If, on the first day following the close of the 6-month period, the proof has not been received, the manufacturer shall become liable for tax at that time at the rate in effect when the sale was made but otherwise in the same manner as if the article had been sold by it on such first day at a taxable price equivalent to that at which the article was actually sold.

(d) *Proof of exportation.* (1) Exportation may be evidenced by:

(i) A copy of the export bill of lading issued by the delivering carrier,

(ii) A certificate by the agent or representative of the export carrier showing actual exportation of the article,

(iii) A certificate of landing signed by a customs officer of the foreign country to which the article is exported,

(iv) Where the foreign country has no customs administration, a statement of the foreign consignee showing receipt of the article, or

(v) Where a department or agency of the United States Government is unable to furnish any one of the foregoing four types of proof of exportation, a statement or certification on the department or agency stationery, executed by an authorized officer, that the listed or identified articles have, in fact, been exported.

(2) In any case where the manufacturer is not the exporter, the manufacturer must have in its possession a statement from the vendee to whom the manufacturer sold the article stating that the article was in fact exported in due course by the vendee or was sold to another person who in due course exported the article. The statement must state what evidence is available to establish that the article was in fact exported in due course prior to use or further manufacture and prior to resale in the United States other than for export. Such evidence must be that described in paragraph (d)(1) of this section, and the statement must show where such evidence is readily available for inspection by ATF officers, and should be in substantially the following form:

Statement of Manufacturer's Vendee

(To support tax-free sales of taxable articles to a purchaser for export or for resale to a second purchaser for export (section 4221(a)(2) of the Internal Revenue Code).)

The undersigned, or the _____ (Name of manufacturer's vendee if other than undersigned) of which I am _____ (Title) holds certificate of registry No. _____, issued by the ATF Regional Director at _____.

The article or articles specified below or on the reverse side hereof were purchased tax free by me or by _____ (Name of manufacturer's vendee if other than undersigned) on _____ (Date), and were thereafter exported.

The undersigned or _____ (Name of manufacturer's vendee if other than undersigned) has in my/its possession proof of exportation in respect of such article or articles. The evidence of export available is _____ and is located at _____ (If other than address below). Such proof of exportation will be retained by _____ (Name of manufacturer's vendee) for at least 3 years from the date of this statement and will be made readily available for inspection by ATF officers.

I have not previously executed a statement in respect of the article or articles covered by this statement, and I understand that the fraudulent use of this statement will subject me and all parties making such fraudulent use of this statement to all applicable criminal penalties under the Internal Revenue Code.

_____
(Signature)

_____
(Address)

_____
(Date)

(3) The statement executed and signed by the manufacturer's vendee, as provided in paragraph (d)(2) of this section, may be executed with respect to any one or more articles purchased tax free from a manufacturer and exported within the 6-month period prescribed in section 4221(b)(2) of the Code and paragraph (c) of this section. Such statement shall be kept for inspection by the regional director as provided in section 6001 of the Code.

§ 53.134 Tax-free sale of articles for use by the purchaser as supplies for vessels or aircraft.

(a) *Supplies for vessels or aircraft.*— (1) *In general.* An article subject to tax under chapter 32 of the Code may be sold tax free by the manufacturer, pursuant to section 4221(a)(3) of the Code and this section, for use by the purchaser as supplies for vessels or aircraft. See paragraph (b) of this section for the meaning of the term "supplies for vessels or aircraft." An article may be sold tax free under the provisions of this section only in those cases where the sale of an article by the manufacturer is made directly to the owner, officer, charterer, or authorized agent of a vessel or aircraft for use as supplies for the vessel or aircraft. No sale may be made tax free to a dealer for resale for use as supplies for vessels or aircraft, even though it is known at the time of sale by the manufacturer that the article will be so resold. See section 6416(b)(2)(B) of the Code and paragraph (c) of § 53.178 for circumstances under which credit or refund of tax is available where tax-paid articles are used, or sold for use, as supplies for vessels or aircraft. An article may not be sold tax free under the provisions of this section by the manufacturer to passengers or members of the crew of a vessel or aircraft.

(2) *Civil aircraft of foreign registry.* In the case of any article sold by the manufacturer for use by the purchaser as supplies for civil aircraft of foreign registry employed in foreign trade or in trade between the United States and any of its possessions, the provisions of this paragraph apply only if the reciprocity requirements of section 4221(e)(1) of the Code are met. See paragraph (c) of this section.

(b) *Meaning of terms.*— (1) *Supplies for vessels or aircraft.* The term "supplies for vessels or aircraft" means fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or vessels actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions.

(2) *Fuel supplies, ships' stores, and legitimate equipment.* The terms "fuel

supplies", "ships' stores", and "legitimate equipment" include all articles, materials, supplies, and equipment necessary for the navigation, propulsion, and upkeep of vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or vessels actually engaged in foreign trade or in trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions, even though such vessels may make intermediate stops in the United States. The term does not include supplies for vessels engaged in trade:

(i) Between domestic ports in the Atlantic Ocean and the Gulf of Mexico,

(ii) Between domestic ports on the Pacific Ocean,

(iii) Between domestic ports on the Great Lakes, or

(iv) On the inland waterways of the United States.

(3) *Sea stores.* The term "sea stores" includes any article purchased for use or consumption by the passengers or crew, or both, of a vessel during its voyage.

(4) *Vessel.* The term "vessel" includes:

(i) Every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water,

(ii) Civil aircraft registered in the United States and employed in foreign trade or in trade between the United States and any of its possessions, and

(iii) Civil aircraft registered in a foreign country and employed in foreign trade or trade between the U.S. and its possessions.

(5) *Vessels of war of the United States or of any foreign nation.* The term "vessels of war of the United States or of any foreign nation" includes:

(i) Every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water and constituting equipment of the armed forces (including the U.S. Coast Guard and U.S. National Guard) of the United States or of a foreign nation, and

(ii) Aircraft owned by the United States or by any foreign nation and constituting equipment of the armed forces thereof.

(iii) For purposes of this section, vessels or aircraft owned by armed forces are not considered to be equipment of such armed forces while on lease or loan to an organization that is not part of the armed forces.

(6) *Vessels used in fisheries or whaling business.* The exemption provided by section 4221(a)(3) of the Code and paragraph (a) of this section in the case of articles sold for the prescribed use on vessels employed in the fisheries or whaling business is limited to articles sold by the manufacturer for such use on vessels while employed, and to the extent employed, exclusively in the fisheries or in the whaling business. For purposes of this section, vessels engaged in sport fishing are not considered to be employed in the fisheries business.

(7) *Civil aircraft.* The exemption provided by section 4221(a)(3) of the Code and paragraph (a) of this section relating to supplies for vessels or aircraft, with respect to civil aircraft, extends only to civil aircraft when employed in foreign trade, or in trade between the United States and any of its possessions. Sales of supplies to civil aircraft when engaged in trade between the Atlantic and the Pacific ports of the United States are not exempt from the tax imposed under chapter 32 of the Code. See section 4221(e)(1) of the Code and paragraph (c) of this section for requirement of reciprocal exemption in the case of a civil aircraft registered in a foreign country.

(8) *Trade.* The term "trade" includes the transportation of persons or property for hire and the making of the necessary preparations for such transportation. The term "trade" also includes the transportation of property on a vessel or aircraft owned or chartered by the owner of the property in connection with the purchase, sale, or exchange of the property in a commercial business operation. However, a vessel owned or chartered by a company and used in the transportation of personnel or property of such company to or from its business properties located in a foreign country, or in a possession of the United States, is not engaged in "trade".

(c) *Reciprocity required in the case of civil aircraft.* The exemption provided by section 4221(a)(3) of the Code and paragraph (a) of this section with respect to the sales of supplies for civil aircraft registered in a foreign country is further limited in that the privilege of exemption may be granted only if the Secretary of Commerce advises the Secretary of the Treasury that the foreign country allows, or will allow, substantially the same reciprocal privileges. If a foreign country discontinues the allowance of such substantially reciprocal exemption, the exemption allowed by the United States will not apply after the Secretary of the Treasury is notified by the Secretary of Commerce of the discontinuance of the exemption allowed by the foreign country.

(d) *Evidence required to establish.*— (1) *In general.* The exemption provided in section 4221(a)(3) of the Code and paragraph (a) of this section for articles sold for use by the purchaser as supplies for vessels or aircraft applies only:

(i) If both the manufacturer and purchaser are registered under the provisions of section 4222 of the Code, or

(ii) The purchaser or both the manufacturer and the purchaser are not registered but have satisfied the provisions of paragraph (d)(2) of this section.

See paragraph (c) of § 53.131 for the evidence required to establish exemption where the purchaser is registered pursuant to section 4222 of the Code and § 53.140.

(2) *Exemption certificates for use in support of tax-free sales of supplies for vessels and aircraft.* (i) In order to establish exemption from tax under section 4221(a)(3) of the Code in those instances where the purchaser or both the manufacturer and purchaser are not registered under section 4222 of the Code, the manufacturer must obtain (prior to or at the time of the sale) from the owner, charterer, or authorized agent of the vessel or aircraft and retain in the manufacturer's possession a properly executed exemption certificate in the form prescribed by paragraph (d)(2)(iii) of this section. If articles are sold tax-free for use as supplies for civil aircraft employed in foreign trade or in trade between the United States and any of its possessions, the exemption certificate must show the name of the country in which the aircraft is registered.

(ii) Where only occasional sales of articles are made to a purchaser for use as supplies for vessels or aircraft, a separate exemption certificate shall be furnished for each order. However, where sales are regularly or frequently made to a purchaser for such exempt use, a certificate covering all orders for a specified period not to exceed 12 calendar quarters will be acceptable. Such certificates and proper records of invoices, orders, etc., relative to tax-free sales must be kept for inspection by the regional director as provided in section 6001 of the Code.

(iii) Acceptable form of exemption certificate. The following form of exemption certificate will be acceptable for the purposes of this section and must be adhered to in substance:

Exemption Certification

(For use by purchasers of articles for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on certain vessels or aircraft (sections 4221 and 4222 of the Internal Revenue Code).)

(Date) ___ _____, 19____.

I, the undersigned purchaser, hereby certify that I am the _____ (Owner, charterer, or authorized agent) of _____ (Name of company and vessel) and that (check applicable type of certificate):

☐ The article or articles specified in the accompanying order, or on the reverse side hereof, (or)

☐ All orders placed by the purchaser for the period commencing (Date) _____ and ending (Date) _____ (period not to exceed 12 calendar quarters), will be used only for fuel supplies, ships' stores, sea stores, or legitimate equipment on a vessel belonging to one of the following classes of vessels to which section 4221 of the Internal Revenue Code applies (check class to which vessel belongs):

☐ (1) Vessels engaged in foreign trade.

☐ (2) Vessels engaged in trade between the Atlantic and Pacific ports of the United States.

☐ (3) Vessels engaged in trade between the United States and any of its possessions.

☐ (4) Vessels employed in the fisheries or whaling business.

☐ (5) Vessels of war of the United States or a foreign nation.

If the articles are purchased for use on civil aircraft engaged in trade as specified in (1) or (3) above, state the name of the country in which the aircraft is registered:

I understand that if the articles are used for any purpose other than as stated in this certificate, or are resold or otherwise disposed of, I must report such fact to the manufacturer. I understand that this certificate may not be used in purchasing articles tax free for use as supplies, etc., on pleasure vessels, or on any type of aircraft except: (i) Civil aircraft employed in foreign trade or trade between the United States and any of its possessions, and (ii) Aircraft owned by the United States or any foreign country and constituting a part of the armed forces thereof.

I understand that the fraudulent use of this certificate to secure exemption will subject me and all parties making such fraudulent use of this certificate to all applicable criminal penalties under the Internal Revenue Code. I also understand that I must be prepared to establish by satisfactory evidence the purpose for which the article was used.

(Signature)

(Address)

§ 53.135 Tax-free sale of articles to State and local governments for their exclusive use.

(a) *In general.* An article subject to tax under Chapter 32 of the Code may be sold tax free by the manufacturer, pursuant to section 4221(a)(4) of the code and this section, to a State or local government for the exclusive use of such State or local government. See paragraph (b) of this section for the meaning of the term "State or local government". An article may be sold tax free by the manufacturer under this paragraph only in those cases where the sale is made directly to a State or local government for its exclusive use. Accordingly, no sale may be made tax free to a dealer for resale to a State or local government for its exclusive use, even though it is known at the time of sale by the manufacturer that the article will be so resold. A sale of an article to a State or local government for resale is not considered to be a sale for the "exclusive use" of the State or local government, within the meaning of section 4221(a)(4) of the Code, and, therefore, such sales may not be made tax free. Such sales are not exempt regardless of whether the resales are made to government employees, or the fact that the article is an item of equipment the employee is required to possess in carrying out his duties. For example, pistols or revolvers may not be sold tax free to a State or local government for resale to its police officers. See section 6416(b)(2)(C) of the Code, and paragraph (d) of § 53.178, for the circumstances under which credit or refund of tax is available where tax-paid articles are sold for the exclusive use of a State or local government.

(b) *State or local government.* The term "State or local government" includes any State, the District of Columbia, and any political subdivision of any of the foregoing. *See,* section 7871(a)(2)(B) of the Code and 26 CFR 305.7701–1 et seq., which provide that an Indian tribal government shall be treated as a State for purposes of exemption from an excise tax imposed by chapter 32. Section 7871(b) of the Code provides that the exemption from tax applies only if the transaction involves the exercise of an essential governmental function of the Indian tribal government.

(c) *Evidence required in support of tax-free sales to State or local governments.* (1) In the case of a State or local government which is registered (see § 53.141 for provisions under which a State or local government may register if it so desires), the provisions of paragraph (c) of § 53.131 have application as to the evidence required in support of tax-free sales. If a State or local government is not registered, the evidence required in support of a tax-free sale to the State or local government shall, except as provided in paragraph (c)(2) of this section, consist of a certificate, executed and signed by an officer or employee authorized by the State or local government to execute and sign the certificate. If it is impracticable to furnish a separate certificate for each order or contract because of a frequency of purchases, a certificate covering all orders between given dates (such period not to exceed 12 calendar quarters) will be acceptable. The certificates and proper records of invoices, orders, etc., relative to tax-free sales must be retained by the manufacturer as provided in section 6001 of the Code. The certificate shall be in substantially the following form:

Exemption Certification

(For use by States and local governments (section 4221(a)(4) of the Internal Revenue Code).)

(Date) _____, 19____.

I, hereby certify that I am _____ (Title of Officer) of _____ (State or local government) that I am authorized to execute this certificate; and that (check applicable type of certificate):

☐ The article or articles specified in the accompanying order, or on the reverse side hereof, (or)

☐ All orders placed by the purchaser for the period commencing _____ (Date) and ending _____ (Date) (period not to exceed 12 calendar quarters), are, or will be, purchased from _____ (Name of manufacturer) for the exclusive use of _____ (Governmental unit) of _____ (State or local government).

I understand that the exemption from tax in the case of sales of articles under this exemption certificate to a State, etc., is limited to the sale of articles purchased for its exclusive use. I understand that fraudulent use of this certificate for the purpose of securing this exemption will subject me and all parties making such fraudulent use of this certificate to all applicable criminal penalties under the Internal Revenue Code.

(Signature)

(Address)

(2) A purchase order, provided that all of the information required by paragraph (c)(1) of this section is included therein, is acceptable in lieu of a separate exemption certificate.

(d) *Resale of articles purchased tax free by a State or local government.* If articles purchased tax free for the exclusive use of a State or local government (whether on the basis of a registration number or an exemption certificate) are, prior to use by the State or local government, resold under circumstances that do not amount to an exclusive use by the State or local government (such as pistols or revolvers that are resold by a police department to its police officers), the parties responsible in the State or local government are required to inform the manufacturer, producer, or importer from whom the articles were purchased that they were disposed of in a manner that did not amount to an exclusive use by the State or local government. A willful failure to supply the

manufacturer, producer, or importer with the information required by this subparagraph will subject responsible parties to the penalties provided by section 7203 of the Code.

§ 53.136 Tax-free sales of articles to nonprofit educational organizations.

(a) *In general.* An article subject to tax under chapter 32 of the Code may be sold tax free by the manufacturer, pursuant to section 4221(a)(5) of the Code and this section, to a nonprofit educational organization for its exclusive use. See paragraph (b) of this section for the meaning of the term "nonprofit educational organization". An article may be sold tax free by the manufacturer under this paragraph only in those cases where the sale of an article by the manufacturer is made directly to a nonprofit educational organization for its exclusive use. Accordingly, no sale may be made tax free to a dealer for resale to a nonprofit educational organization for its exclusive use even though it is known at the time of sale by the manufacturer that the article will be so resold. See section 6416(b)(2)(D) of the Code, and paragraph (e) of § 53.178, for the circumstances under which credit or refund of tax is available where tax-paid articles are sold for the exclusive use of a nonprofit educational organization.

(b) *Nonprofit educational organization.* The term "nonprofit educational organization" means an organization described in section 170(b)(1)(A)(ii) of the Code that is exempt from income tax under section 501(a) of the Code. Section 170(b)(1)(A)(ii) describes an "educational organization" as one that normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on. The term also includes a school operated as an activity of an organization described in section 501(c)(3) of the Code which is exempt from income tax under section 501(a) of the Code, provided the primary function of such school is the presentation of formal instruction and provided such school normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.

(c) *Evidence required in support of tax-free sales to nonprofit educational organizations.* Every nonprofit educational organization purchasing tax free under section 4221(a)(5) of the Code must furnish the following information to the seller:

(1) The tax exempt purpose for which the article or articles are being purchased, and

(2) Its registration number, and the regional director's office that issued the registration number. Such information must be in writing and may be noted on the purchase order or other document furnished by the purchaser to the seller in connection with each sale "except that a single notification containing the information described in this paragraph may cover all sales by the seller to the purchaser made during a designated period not to exceed 12 successive calendar quarters.". See paragraph (c) of § 53.131 for the evidence required to establish exemption.

§§ 53.137—53.139 [Reserved]

§ 53.140 Registration.

(a) *General rule.* Except as provided in § 53.141, tax-free sales under section 4221 of the Code may be made only if the manufacturer, first purchaser, and second purchaser, as the case may be, have registered as required by this section. To secure a Certificate of Registry, the applicant must furnish the information required in paragraph (b) of this section.

(b) *Information to be submitted.* Except as provided in § 53.141, any person who is eligible to sell or purchase articles free of a tax imposed by section 4181 of the Code and who has not registered with the Commissioner of the Internal Revenue Service prior to January 1, 1991 or with ATF in accordance with the provisions of this section shall, prior to making a tax-free sale or purchase, file ATF Form 5300.28, in duplicate, executed in accordance with the instructions contained on the reverse of ATF Form 5300.28. This form shall be filed with the regional director of ATF for the region in which the principal place of business of the applicant is located (or the applicant has no principal place of business in the United States, with the Director, ATF). Copies of the ATF Form 5300.28 may be obtained from any regional office. The person who receives an approved Certificate of Registry shall be considered to be registered for purposes of selling or purchasing articles tax free as provided in this section. In the case of a nonprofit educational organization, information shall be furnished showing that the organization is an educational organization described in section 170(b)(1)(A)(ii) of the Code that is exempt from income tax under section 501(a) of the Code, or is a school operated as an activity of an organization described in section 501(c)(3) that is exempt from income tax under section 501(a).

(c) *Evidence required in support of tax-free sales.* See § 53.131(c)(1) for evidence required in support of tax-free sales to purchasers who are required to be registered.

(d) *Failure to register.* If either the seller or purchaser is not registered as required by this section of the regulations, tax-free sales may not be made, except as indicated in § 53.141.

(e) *Cross references.* (1) For exceptions to the requirement for registration, see section 4222(b) of the Code and § 53.141.

(2) For revocation or suspension of registration, see § 53.142.

§ 53.141 Exceptions to the requirement for registration.

(a) *State and local governments.* (1) A State or local government purchasing articles direct from the manufacturer for its exclusive use may, but is not required to, register as provided in § 53.140. To establish the right to sell articles tax free to a State or local government that is not registered, the manufacturer must obtain from an authorized official of the State or local government and retain in the manufacturer's possession either a properly executed exemption certificate, or a purchase order that contains the same information required to be furnished in an exemption certificate. See § 53.135(c) for the information necessary to substantiate a tax-free sale under such circumstances.

(2) Each State requesting registration will be assigned one Certificate of Registry. The registration number shown on this certificate may be used by all agencies, boards, and commissions of the State that are authorized by the State to make purchases for the exclusive use of the State. However, the registration number assigned to a State may not be used by any political subdivision of that State, such as a county or municipality. Each political subdivision of a State desiring to obtain a Certificate of Registry must obtain a separate registration number.

(b) *Sales or resales to foreign purchasers for export.* Persons whose principal place of business is not within the United States may, but are not required to, register in order to purchase articles tax free for export. To establish the right to sell articles tax free for export to a purchaser who is not registered and who is located in a foreign country or a possession of the United States, the manufacturer must

obtain the evidence required by § 53.133(b).

(c) *United States.* The registration requirements of the regulations in this part do not apply to purchases and sales by the United States or any of its agencies or instrumentalities. The evidence required in support of such tax-free purchases and sales is a notation on the purchase order or other document furnished to the seller clearly indicating that the article or articles are being purchased tax free as authorized by chapter 32 of the Code.

(d) *Supplies for vessels and aircraft.* An article subject to an excise tax imposed by chapter 32 of the Code may be sold tax free by the manufacturer under the provisions of § 53.134 for use by the purchaser as supplies for a vessel or aircraft if both the manufacturer and the purchaser are registered under the provisions of § 53.140.

§ 53.142 Revocation or suspension of registration.

(a) The regional director is authorized to revoke or temporarily suspend, upon written notice, the registration of any person and the right of such person to sell or purchase articles tax free under section 4221 of the Code in any case in which he finds that:

(1) The registrant is not a bona fide manufacturer, or a purchaser reselling direct to manufacturers or exporters;

(2) The registrant is for some other reason not eligible under these regulations to retain a Certificate of Registry; or

(3) The registrant has used his registration to avoid payment of the tax imposed by section 4181 of the Code, or to postpone or interfere in any manner with the collection of such tax;

(4) Such revocation or suspension is necessary to protect the revenue; or

(5) The registrant failed to comply with the requirements of paragraph (c) of § 53.140, relating to the evidence required to support a tax-free sale.

(b) The revocation or suspension of registration is in addition to any other penalty that may apply under the law for any act or failure to act.

§ 53.143 Special rules relating to further manufacture.

(a) *Purchasing manufacturer to be treated as the manufacturer.* For purposes of Chapter 32 of the Code, a manufacturer or producer to whom an article is sold or resold tax free under section 4221(a)(1) of the Code for use by it in further manufacture shall be treated as the manufacturer or producer of such article. If a manufacturer who purchases an article tax free for further manufacture does not use the article for further manufacture, the sale of the article by it, or its use of the article other than in further manufacture, shall, for purposes of the taxes imposed by chapter 32 of the Code, be treated as a sale or use of the article by the manufacturer thereof. See paragraphs (b) and (c) of this section for determination of taxable sale price where an article purchased tax free for further manufacture is resold, or used other than in further manufacture.

(b) *Computation of tax.* Except as provided in paragraph (c) of this section, the tax liability referred to in paragraph (a) of this section shall be based on the price for which the article was sold by the purchasing manufacturer, or, where the manufacturer uses the article for a purpose other than that for which it was purchased, the tax shall be based on the price at which such or similar articles are sold, in the ordinary course of trade, by manufacturers, producers, or importers thereof. See section 4218(e) of the Code and § 53.115.

(c) *Election.* (1) Instead of computing the tax as described under paragraph (b) of this section, the purchasing manufacturer who has incurred liability for tax on its sale or use of an article as provided by paragraph (a) of this section may compute the tax incurred under chapter 32 of the Code by using as the tax base either the price for which the article was sold to it by the first purchaser, if any, or the price for which such article was sold by the actual manufacturer, producer, or importer of such article. The purchasing manufacturer must have in its possession information upon which to substantiate such basis for tax. For purposes of this paragraph, the price for which the article was sold by the actual manufacturer or by the first purchaser shall be determined as provided in section 4216 of the Code and §§ 53.91–53.102. However, such price shall not be adjusted for any discount, rebate, allowance, return, or repossession of a container or covering, or otherwise.

(2) The election under this paragraph shall be in the form of a statement attached to the return reporting the tax applicable to the sale or use of the article which gave rise to such tax liability. Such election, once made, may not be revoked.

Subpart L—Refunds and Other Administrative Provisions of Special Application to Manufacturers Taxes

§ 53.151 Returns.

(a) *In general.* (1) Liability for tax imposed under chapter 32 of the Code shall be reported on ATF Form 5300.26, Federal Firearms and Ammunition Excise Tax Return. Except as provided in paragraph (b) of this section, a return on Form 5300.26 shall be filed for a period of one calendar quarter.

(2) Every person required to make a return on ATF Form 5300.26 shall make a return for each calendar quarter (whether or not liability was incurred for any tax reportable on the return for the return period) until the person has filed a final return in accordance with § 53.152.

(3) Every person not required to make a return on ATF Form 5300.26 for the return period ended March 31, 1991, shall make a return for the first calendar quarter thereafter in which he incurs liability for tax imposed under Chapter 32 of the Code, and shall make a return for each subsequent calendar quarter, month, or semimonthly period until the person has filed a final return in accordance with § 53.152.

(4) Each return required under the regulations in this part, together with any prescribed copies, records, or supporting data, shall be completed in accordance with the applicable forms, instructions, and regulations.

(b) *Monthly and semimonthly returns.*—(1) *Requirement.*, If the regional director determines that any taxpayer who is required to deposit taxes under the provisions of § 53.157 has failed to make deposits of those taxes, the taxpayer shall be required, if so notified in writing by the regional director, to file a monthly or semimonthly return on ATF Form 5300.26. Every person so notified by the regional director shall file a return for the calendar month or semimonthly period (as defined in § 53.157(d)) in which the notice is received and for each calendar month or semimonthly period thereafter until the person has filed a final return in accordance with § 53.152 or is required to file returns on the basis of a different return period pursuant to notification as provided in paragraph (b)(2) of this section.

(2) *Change of requirement.* The regional director may require the taxpayer, by notice in writing, to file a quarterly or monthly return, if the taxpayer has been filing returns for a semimonthly period, or may require the taxpayer to file a quarterly or semimonthly return, if the taxpayer has been filing monthly returns.

(3) *Return for period change takes effect.* (i) If a taxpayer who has been filing quarterly returns receives notice to file a monthly or semimonthly return, or a taxpayer who has been filing monthly returns receives notice to file a semimonthly return, the first return required pursuant to the notice shall be

filed for the month or semimonthly period in which the notice is received and all months or semimonthly periods which are not includable in an earlier period for which the taxpayer is required to file a return.

(ii) If a taxpayer who has been filing monthly or semimonthly returns receives notice to file a quarterly return, the last month or semimonthly period for which a return shall be filed is the last month or semimonthly period of the calendar quarter in which the notice is received.

(iii) If a taxpayer who has been filing semimonthly returns receives notice to file a monthly return, the last semimonthly period for which a return shall be made is the last semimonthly period of the month in which the notice is received.

§ 53.152 Final returns.

(a) *In general.* Any person who is required to make a return on ATF Form 5300.26 pursuant to § 53.151, and who in any return period ceases operations in respect of which the person is required to make a return on the form, shall make the return for that period as a final return. Each return made as a final return shall be marked "Final Return" by the person filing the return. A person who has only temporarily ceased to incur liability for tax required to be reported on ATF Form 5300.26 because of temporary or seasonal suspension of business or for other reasons, shall not make a final return but shall continue to file returns.

(b) *Statement to accompany final return.* Each final return shall have attached a statement showing the address at which the records required by the regulations in this part will be kept, the name of the person keeping the records, and, if the business of the taxpayer has been sold or otherwise transferred to another person, the name and address of that person and the date on which the sale or transfer took place. If no sale or transfer occurred or if the taxpayer does not know the name of the person to whom the business was sold or transferred, that fact should be included in the statement.

(c) *Signature authorization.* An individual's signature on a return, statement, or other document made by or for a corporation or a partnership shall be prima facie evidence that the individual is authorized to sign the return, statement, or other document.

§ 53.153 Time for filing returns.

(a) *Quarterly returns.* Each return required to be made under § 53.151(a)(2) for a return period of not less than one calendar quarter shall be filed on or before the last day of the first calendar month following the close of the period for which it is made. However, a return may be filed on or before the 10th day of the second calendar month following the close of the period if timely deposits under section 6302(c) of the Code and § 53.157 have been made in full payment of the taxes due for the period. For purposes of the preceding sentence, a deposit which is not required by regulations in respect of the return period may be made on or before the last day of the first calendar month following the close of the period.

(b) *Monthly and semimonthly returns.* (1) *Monthly returns.* Each return required to be made under § 53.151(b) for a monthly period shall be filed not later than the 15th day of the month following the close of the period for which it is made.

(2) *Semimonthly returns.* Each return required to be made under § 53.151(b) for a semimonthly period shall be filed not later than the 10th day of the semimonthly period following the close of the period for which it is made.

(c) *Last day for filing.* If the due date falls on a Saturday, Sunday, or legal holiday, the return and remittance shall be due on the next succeeding day which is not a Saturday, Sunday, or legal holiday. For purposes of this section, "legal holiday" is defined by section 7503 of the Code and 26 CFR 301.7503(b).

(d) *Late filing.* The taxpayer is subject to a penalty for failure to file a return or to pay tax within the prescribed time as imposed by section 6651 of the Code, if the return and remittance are not filed before the close of business on the prescribed last day of filing. For additions to the tax in the case of failure to file a return within the prescribed time, see 27 CFR 70.96.

§ 53.154 Manner of filing returns.

(a) Each return on ATF Form 5300.26 shall be filed with ATF, in accordance with the instructions on the form.

(b) When the taxpayer sends the return on ATF Form 5300.26 by U.S. Mail, the official postmark of the U.S. Postal Service stamped on the cover in which the return was mailed shall be considered the date of delivery of the remittance. When the postmark on the cover is illegible, the burden of proving when the postmark was made will be on the taxpayer. When the taxpayer sends the return with or without remittance by registered mail or by certified mail, the date of registry or the date of the postmark on the sender's receipt of certified mail, as the case may be, shall be treated as the date of delivery of the return and, if accompanied, of the remittance.

§ 53.155 Extension of time for filing returns.

(a) *In general.* Ordinarily, no extension of time will be granted for filing any return statement or other document required with respect to the taxes impose by chapter 32, because the information required for the filing of those documents is under normal circumstances readily available. However, if because of temporary conditions beyond the taxpayer's control, a taxpayer believes an extension of time for filing is justified, the taxpayer may apply to the regional director for an extension. An extension of time for filing a return does not operate to extend the time for payment of the tax or any part of the tax unless so specified in the extension. For extensions of time for payment of the tax, see § 53.156.

(b) *Application for extension of time.* The application for an extension of time for filing the return shall be addressed to the regional director with whom the return is to be filed and must contain a full recital of the causes for the delay. It should be made on or before the due date of the return, and failure to do so many indicate negligence and constitute sufficient cause for denial. It should, where possible, be made sufficiently early to permit consideration of the matter and reply before what otherwise would be the due date of the return.

(c) *Filing the return.* If an extension of time for filing the return is granted, a return shall be filed before the expiration of the period of extension.

§ 53.156 Extension of time for paying tax shown on return.

(a) *In general.* (1) Ordinarily, no extensions of time will be granted for payment of any tax imposed by Chapter 32 of the Code, and shown or required to be shown on any return. However, if because of temporary conditions beyond the taxpayer's control a taxpayer believes an extension of time for payment is justified, the taxpayer may apply to the regional director for an extension. The period of an extension shall not be in excess of 6 months from the date fixed for payment of the tax, except that if the taxpayer is abroad the period of the extension may be in excess of 6 months.

(2) The granting of an extension of time for filing a return does not operate to extend the time for the payment of the tax or any part of the tax unless so specified in the extension. See § 53.155.

(b) *Undue hardship required for extension.* An extension of the time for payment shall be granted only upon a satisfactory showing that payment on the due date of the amount with respect to which the extension is desired will result in an undue hardship. The extension will not be granted upon a general statement of hardship. The term "undue hardship" means more than an inconvenience to the taxpayer. It must appear that substantial financial loss, for example, loss due to the sale of property at a sacrifice price, will result to the taxpayer from making payment on the due date of the amount with respect to which the extension is desired. If a market exists, the sale of property at the current market price is not ordinarily considered as resulting in an undue hardship.

(c) *Application for extension.* An application for an extension of time for payment of the tax shown or required to be shown on any return shall be made on ATF Form 5300.29, Application for Extension of Time for Payment of Tax, and shall be accompanied by evidence showing the undue hardship that would result to the taxpayer if the extension were refused. The application shall also be accompanied by a statement of the assets and liabilities of the taxpayer and an itemized statement showing all receipts and disbursements for each of the 3 months immediately preceding the due date of the amount to which the application relates. The application, with supporting documents, must be filed on or before the date prescribed for payment of the amount with respect to which the extension is desired, with the regional director shown on the form. The application will be examined, and within 30 days, if possible, will be denied, granted, or tentatively granted subject to certain conditions of which the taxpayer will be notified. If an additional extension is desired, the request for it must be made on or before the expiration of the period for which the prior extension is granted.

(d) *Payment pursuant to extension.* If an extension of time for payment is granted, the payment shall be made on or before the expiration of the period of the extension without the necessity of notice and demand. The granting of an extension of time for payment of the tax does not relieve the taxpayer from liability for the payment of interest on the tax during the period of the extension. See section 6601 of the Code and 6 CFR 301.6601–1.

§ 53.157 Use of lockbox depositaries.

(a) *Monthly deposits.* Except as provided in paragraph (b) of this section, if for any calendar month (other than the last month of a calendar quarter) any person required to file a quarterly excise tax return on ATF Form 5300.26 has a total liability under this part of more than $100 for all excise taxes reportable on that form, the amount of liability for taxes shall be deposited by the person with the lockbox financial institution on or before the last day of the month following the calendar month.

(b) *Semimonthly deposits.* (1) If any person required to file an excise return on ATF Form 5300.26 for any calendar quarter has a total liability under this part of more than $2,000 for all excise taxes reportable on that form for any calendar month in the preceding calendar quarter, the amount of that liability for taxes under this part for any semimonthly period (as defined in paragraph (d)(1) of this section) in the succeeding calendar quarter shall be deposited by the person with the lockbox financial institution on or before the depositary date (as defined in paragraph (d)(2) of this section) applicable to the semimonthly period.

(2) A person will be considered to have complied with the requirements of paragraph (b)(1) of this section for a semimonthly period of—

(i)(A) The person's deposit for the semimonthly period is not less than 90 percent of the total amount of the excise taxes reportable by the person on ATF Form 5300.26 for the period, and

(B) If the semimonthly period occurs in a calendar month other than the last month in a calendar quarter, the person deposits any underpayment for the month by the 9th day of the second month following the calendar month; or

(ii)(A) The person's deposit for each semimonthly period in the calendar month is not less than 45 percent of the total amount of the excise taxes reportable by the person on ATF Form 5300.26 for the month, and

(B) If such month is other than the last month in a calendar quarter, the person deposits any underpayment for such month by the 9th day of the second month following the calendar month; or

(iii)(A) The person's deposit for each semimonthly period in the calendar month is not less than 50 percent of the total amount of the excise taxes reportable by the person on ATF Form 5300.26 for the second preceding calendar month, and

(B) If such month is other than the last month in a calendar quarter, the person deposits any underpayment for such month by the 9th day of the second month following the calendar month; or

(iv)(A) The requirements of paragraph (b)(2) (i)(A), (ii)(A), or (iii)(A) of this section are satisfied for the first semimonthly period of a calendar month after December 1990,

(B) If the person's deposit for the second semimonthly period of the calendar month is, when added to the deposit for the first semimonthly period, not less than 90 percent of the total amount of the excise taxes reportable by the person on ATF Form 5300.26 for the calendar month, and

(C) If the semimonthly periods occur in a calendar month other than the last month in a calendar quarter, the person deposits any underpayment for the month by the 9th day of the second month following the calendar month.

(3)(i) Paragraph (b)(2) (ii) and (iii) of this section shall not apply to any person who normally incurs in the first semimonthly period in each calendar month more than 75 percent of the person's total excise tax liability under this part for the month.

(ii) Persons who make their deposits in accordance with paragraph (b)(2) (ii), (iii), or (iv) of this section will find it unnecessary to keep their books and records on a semimonthly basis.

(c) *Deposit of certain excess undeposited amounts.* Notwithstanding paragraphs (a) and (b) of this section, if any person required to file an excise tax return on ATF Form 5300.26 for any calendar quarter beginning after December 31, 1990, has a total liability under this part for all excise taxes reportable on the form for the calendar quarter which exceeds by more than $100 the total amount of taxes deposited by the person pursuant to paragraph (a) or (b) of this section for the calendar quarter, the person shall, on or before the last day of the calendar month following the calendar quarter for which the return is required to be filed, deposit with the lockbox financial institution the full amount by which the person's liability for all excise taxes reportable on the form for that calendar quarter exceeds the amount of excise taxes previously deposited by the person for that calendar quarter.

(d) *Definitions*—(1) *Semimonthly period.* The term "semimonthly period" means the first 15 days of a calendar month or the portion of a calendar month following the 15th day of that month.

(2) *Depositary date.* The term "depositary date" means, in the case of deposits for semimonthly periods beginning after December 31, 1990, the 9th day of the semimonthly period following the semimonthly period for which the taxes are reportable.

(3) *Lockbox financial institution.* The term "lockbox financial institution" means the financial institution

designated as a depository for the payment of excise taxes on ATF Form 5300.27, Federal Firearms and Ammunition Excise Tax Deposit form.

(e) *Depositary forms and procedures*—(1) *In general.* Each remittance of amounts required to be deposited for periods beginning after December 31, 1990 shall be accompanied by an ATF Form 5300.27, Federal Firearms and Ammunition Excise Tax Deposit form, or ATF Form 5300.26, Federal Firearms and Ammunition Excise Tax Return, which shall be prepared in accordance with the applicable instructions. The remittance, together with the appropriate form shall be forwarded to the lockbox financial institution designated as a depositary for Federal taxes. The timeliness of the deposit will be determined by the date it is received (or is deemed received under section 7502(e) and 26 CFR 301.7502–1) by the lockbox financial institution or ATF officer designated on the ATF Form 5300.27 or ATF Form 5300.26 accompanying the deposit. Amounts deposited pursuant to this paragraph shall be considered to be paid on the last day prescribed for filing the return in respect of the tax (determined without regard to any extension of time for filing the returns), or at the time deposited, whichever is later.

(2) *Number of remittances.* A person required by this section to make deposits may make one or more remittances with respect to the amount required to be deposited. An amount of tax which is not otherwise required by this section to be deposited may, nevertheless, be deposited if the person liable for the tax so desires.

(3) *Information required.* Each person making deposits pursuant to this section shall report on the return for the period with respect to which the deposits are made information regarding the deposits in accordance with the instructions applicable to the return and pay (or deposits by the due date of the return) the balance, if any, of the taxes due for the period.

(4) *Procurement of prescribed forms.* Copies of the Federal Firearms and Ammunition Excise Tax Deposit form will be furnished, so far as possible, to persons required to make deposits under this section. Such a person will not be excused from making a deposit, however, by the fact that no form has been furnished. A person not supplied with the form is required to apply for it in ample time to make the required deposits within the time prescribed, supplying with the application the person's name, employer identification number, address, and the taxable period to which the deposits will relate. Copies of the Federal Firearms and Ammunition Excise Tax Deposit form may be obtained by applying for them with the regional director.

(f) *Nonapplication to certain taxes.* This section does not apply to taxes for:

(1) Any month or semimonthly period in which the taxpayer receives notice from the regional director pursuant to § 53.151(b) to file ATF Form 5300.26 or

(2) Any subsequent month or semimonthly period for which a return on ATF Form 5300.26 is required.

§ 53.161 Authority to make credits or refunds.

For provisions relating to credits and refunds of certain taxes on sales and services see section 6416 of the Code and §§ 53.171–53.186. For regulations under section 6402 of the Code of general application in respect of credits or refunds, see 27 CFR 70.122, 70.123, and 70.124 (Procedure and Administration).

§ 53.162 Abatements.

For regulations under section 6404 of the Code of general application in respect of abatements of assessments to tax, see 27 CFR 70.125 (Procedure and Administration).

§§53.163–53.170 [Reserved]

§ 53.171 Claims for credit or refund of overpayments of manufacturers taxes.

Any claims for credit or refund of an overpayment of a tax imposed by chapter 32 of the Code shall be made in accordance with the applicable provisions of this subpart and the applicable provisions of 27 CFR 70.123 (Procedure and Administration). A claim on ATF Form 2635 (5620.8) is not required in the case of a claim for credit, but the amount of the credit shall be claimed by entering that amount as a credit on a return of tax under this subpart filed by the person making the claim. In this regard, see § 53.185.

§ 53.172 Credit or refund of manufacturers tax under Chapter 32.

(a) *Overpayment not described in section 6416(b)(2) of the Code.*—(1) *Claims included.* This paragraph applies only to claims for credit or refund of an overpayment of manufacturers tax imposed by Chapter 32. It does not apply, however, to a claim for credit or refund on any overpayment described in paragraph (b) of this section which arises by reason of the application of section 6416(b)(2) of the Code.

(2) *Supporting evidence required.* No credit or refund of any overpayment to which this paragraph (a) applies shall be allowed unless the person who paid the tax submits with the claim a written consent of the ultimate purchaser to the allowance of the credit or refund, or submits with the claim a statement, supported by sufficient available evidence, asserting that:

(i) The person has neither included the tax in the price of the article with respect to which it was imposed nor collected the amount of the tax from a vendee, and identifying the nature of the evidence available to establish these facts, or

(ii) The person has repaid the amount of the tax to the ultimate purchaser of the article.

(3) *Ultimate purchaser.*—(i) *General rule.* The term "ultimate purchaser", as used in paragraph (a)(2) of this section, means the person who purchased the article for consumption, or for use in the manufacture of other articles and not for resale in the form in which purchased.

(ii) *Special rule under section 6416(a)(3).*—(A) *Conditions to be met.* If tax under chapter 32 of the Code is paid in respect of an article and the Director determines that the article is not subject to tax under chapter 32, that term "ultimate purchaser", as used in paragraph (a)(2) of this section, includes any wholesaler, jobber, distributor, or retailer who, on the 15th day after the date of the determination, holds for sale any such article with respect to which tax has been paid, if the claim for credit or refund of the overpayment in respect of the articles held for sale by the wholesaler, jobber, distributor, or retailer is filed on or before the date on which the person who paid the tax is required to file a return for the period ending with the first calendar quarter which begins more than 60 days after the date of the determination by the Director.

(B) *Supporting statement.* A claim for credit or refund of an overpayment of tax in respect of an article as to which a wholesaler, jobber, distributor, or retailer is the ultimate purchaser, as provided in this paragraph (a)(3)(ii), must be supported by a statement that the person filing the claim has a statement, by each wholesaler, jobber, distributor, or retailer whose articles are covered by the claim, showing total inventory, by model number and quantity, of all such articles purchases tax-paid and held for sale as of 12:01 a.m. of the 15th day after the date of the determination by the Director that the article is not subject to tax under chapter 32 of the Code.

(C) *Inventory requirement.* The inventory shall not include any such article, title to which, or possession of which, has previously been transferred to any person for purposes of

consumption unless the entire purchase price was repaid to the person or credited to the person's account and the sale was rescinded or any such article purchased by the wholesaler, jobber, distributor, or retailer as a component part of, or on or in connection with, another article. An article in transit at the first moment of the 15th day after the date of the determination is regarded as being held by the person to whom it was shipped, except tht if title to the article does not pass until delivered to the person the article is deemed to be held by the shipper.

(b) *Overpayments described in section 6416(b)(2) of the Code.* (1) *Claims included.* This paragraph applies only to claims for credit or refund of amounts paid as tax under chapter 32 of the Code that are determined to be overpayments by reason of section 6416(b)(2) of the Code (relating to tax payments in respect of certain uses, sales, or resales of a taxable article).

(2) *Supporting evidence required.* No credit or refund of an overpayment to which this paragraph (b) applies shall be allowed unless the person who paid the tax submits with the claim a statement, supported by sufficient available evidence, asserting that:

(i) The person neither included the tax in the price of the article with respect to which it was imposed nor collected the amount of the tax from a vendee, and identifying the nature of the evidence available to establish these facts, or

(ii) The person repaid, or agreed to repay, the amount of the tax to the ultimate vendor of the article, or

(iii) The person has secured, and will submit upon request of the Regional Director, the written consent of the ultimate vendor to the allowance of the credit or refund.

(3) *Ultimate vendor.—General rule.* The term "ultimate vendor", as used in paragraph (b)(2) of this section, means the seller making the sale which gives rise to the overpayment or which last precedes the exportation or use which has given rise to the overpayment.

(c) *Overpayments not included.* This section does not apply to any overpayment determined under section 6416(b)(1) of the Code (relating to price readjustments), section 6416(b)(3)(A) of the Code (relating to certain cases in which refund or credit is allowable to the manufacturer who uses, in the further manufacture of a second article, a taxable article purchased by the manufacturer taxpaid), or section 6416(b)(5) of the Code (relating to the return to the seller of certain installment accounts which the seller had previously sold). In this regard, see §§ 53.173, 53.180, and 53.183.

§ 53.173 Price readjustments causing overpayments of manufacturers tax.

In the case of any payment of tax under chapter 32 of the Code that is determined to be an overpayment by reason of a price readjustment within the meaning of section 6416(b)(1) of the Code and § 53.174 or § 53.175, the person who paid the tax may file a claim for refund of the overpayment or may claim credit for the overpayment on any return of tax under this subpart which the person subsequently files. Price readjustments may not be anticipated. However, if the readjustment has actually been made before the return is filed for the period in which the sale was made, the tax to be reported in respect of the sale may, at the election of the taxpayer, be based either:

(a) On the price as so readjusted, or

(b) On the original sale price and a credit or refund claimed in respect of the price readjustment.

A price readjustment will be deemed to have been made at the time when the amount of the readjustment has been refunded to the vendor or the vendor has been informed that the vendor's account has been credited with the amount. No interest shall be paid on any credit or refund allowed under this section. For provisions relating to the evidence required in support of a claim for credit or refund, see 27 CFR 70.123 (Procedure and Administration), 53.172(a)(2), and 53.176. For provisions authorizing the taking of a credit in lieu of filing a claim for refund, see section 6416(d) of the Code and § 53.185.

§ 53.174 Determination of price readjustments.

(a) *In general.—*(1) *Rules of usual application.—*(i) *Amount treated as overpayment.* If the tax imposed by chapter 32 of the Code has been paid and thereafter the price of the article on which the tax was based is readjusted, that part of the tax which is proportionate to the part of the price which is repaid or credited to the purchaser is considered to be an overpayment. A readjustment of price to the purchaser may occur by reason of:

(A) The return of the article,

(B) The repossession of the article,

(C) The return or repossession of the covering or container of the article, or

(D) A bona fide discount, rebate, or allowance against the price at which the article was sold.

(ii) *Requirements of price readjustment.* A price readjustment will not be deemed to have been made unless the person who paid the tax either:

(A) Repays part or all of the purchase price in cash to the vendee,

(B) Credits the vendee's account for part or all of the purchase price, or

(C) Directly or indirectly reimburses a third party for part or all of the purchase price for the direct benefit of the vendee.

In addition, to be deemed a price readjustment, the payment or credit must be contractually or economically related to the taxable sale that the payment or credit purports to adjust. Thus, commissions or bonuses paid to a manufacturer's own agents or salesperson for selling the manufacturer's taxable products are not price readjustments for purposes of this section, since those commissions or bonuses are not paid or credited either to the manufacturer's vendee or to a third party for the vendee's benefit. On the other hand, a bonus paid by the manufacturer to a dealer's salesperson for negotiating the sale of a taxable article previously sold to the dealer by the manufacturer is considered to be a readjustment of the price on the original sale of the taxable article, regardless of whether the payment to the salesperson is made directly by the manufacturer or to the salesperson through the dealer. In such a case, the payment is related to the sale of a taxable article and is made for the benefit of the dealer because it is made to the dealer's salesperson to encourage the sale of a product owned by the dealer. Similarly, payments or credits made by a manufacturer to a vendee as reimbursement of interest expense incurred by the vendee in connection with a so-called "free flooring" arrangement for the purchase of taxable articles is a price readjustment, regardless of whether the payment or credit is made directly to the vendee or to the vendee's creditor on behalf of the vendee.

(iii) *Limitation on credit or refund.* The credit or refund allowable by reason of a price readjustment in respect of the sale of a taxable article may not exceed an amount which bears the same ratio to the total tax originally due and payable on the article as the amount of the tax-included readjustment bears to the original tax-included sale price of the article.

(2) *Rules of special application.—*(i) *Constructive sale price.* If, in the case of a taxable sale, the tax imposed by chapter 32 of the Code is based on a constructive sale price determined under any paragraph of section 4216(b) of the Code and §§ 53.94–53.97, as determined without reference to section 4218 of the Code, then any price readjustment made with respect to the sale may be taken into account under this section only to the extent that the price readjustment reduces the actual

sale price of the article below the constructive sale price.

Examples:

(A) A manufacturer sells a taxable article at retail for $110 tax included. Under section 4216(b)(1) of the Code the constructive sale price (tax included) of the article is determined to be $93. Thereafter, the manufacturer grants an allowance of $10 to the purchaser, which reduces the actual selling price (tax included) to $100. Since the readjustment price exceeds the amount of the constructive sale price, this readjustment is not recognized as a price readjustment under this section.

(B) Subsequently, the manufacturer extends to the purchaser an additional price allowance of $10, thereby reducing the actual sale price to $90. Since the actual sale price is now $3 less than the constructive sale price of $93, the manufacturer has overpaid by the amount of tax attributable to the $3. Assuming the tax rate involved is 10 percent, and the prices involved are tax-included, the overpayment of tax would be $0.27, determined as follows:

$$\frac{\text{tax rate}}{100+\text{tax rate}} \times \text{tax-included readjustment} = \text{tax overpayment}$$

$((10/110)\times\$3=\$0.27)$

(ii) *Price determined under section 4223(b)(2) of the Code.* If a manufacturer (within the meaning of section 4223(a) of the Code) to whom an article is sold or resold free of tax in accordance with the provisions of section 4221(a)(1) of the Code for use in further manufacture diverts the article to a taxable use or sells it in a taxable sale, and pursuant to the provisions of section 4223(b)(2) of the Code computes the tax liability in respect of the use or sale on the price for which the article was sold to the manufacturer or on the price at which the article was sold by the actual manufacturer, a reduction of the price on which the tax was based does not result in an overpayment within the meaning of section 6416(b)(1) of the Code of this section. Moreover, if a manufacturer purchases an article tax free and computes the tax in respect of a subsequent sale of the article pursuant to the provisions of section 4223(b)(2) of the Code, an overpayment does not arise by reason of readjustment of the price for which the article was sold by the manufacturer except where the readjustment results from the return or repossession of the article by the manufacturer, and all of the purchase price is refunded by the manufacturer. See, however, paragraph (b)(4) of this section as to repurchased articles.

(b) *Return of an article.*—(1) *Price readjustment.* If a taxable article is returned to the manufacturer who paid the tax imposed by Chapter 32 of the Code on the sale of the article, a price readjustment giving rise to an overpayment results:

(i) If the article is returned before use, and all of the purchase price is repaid to the vendee or credited to the vendee's account, or

(ii) If the article is returned under an express or implied warranty as to quality or service, and all or a part of the purchase price is repaid to the vendee or credited to the vendee's account, or

(iii) If title is still in the seller, as, for example, in the case of certain installment sales contracts, and all or a part of the purchase price is repaid to the vendee or credited to the vendee's account.

(2) *Return of purchase price.* For purposes of paragraph (b)(1) of this section, if all of the purchase price of an article has been returned to the vendee, except for an amount retained by the manufacturer pursuant to contract as reimbursement of expense incurred in connection with the sale (such as a handling or restocking charge), all of the purchase price is considered to have been returned to the vendee.

(3) *Taxability of subsequent sale or use.* If, under any of the conditions described in paragraph (b)(1) of this section, an article is returned to the manufacturer who paid the tax and all of the purchase price is returned to the vendee, the sale is considered to have been rescinded. Any subsequent sale or use of the article by the manufacturer will be considered to be an original sale or use of the article by the manufacturer which is subject to tax under Chapter 32 of the Code unless otherwise exempt. If under any such condition an article is returned to the manufacturer who paid the tax and only part of the purchase price is returned to the vendee, a subsequent sale of the article by the manufacturer will be subject to tax to the extent that the sale price exceeds the adjusted sale price of the first taxable sale.

(4) *Treatment of other transactions as repurchases.* Except as provided in paragraph (b)(1) of this section, a price readjustment will not result when a taxable article is returned to the manufacturer who paid the tax on the sale of the article, even though all or a part of the purchase price is repaid to the vendee or credited to the vendee's account, since such a transaction will be considered to be a repurchase of the article by the manufacturer.

(c) *Repossession of an article.* If a taxable article is repossessed by the manufacturer who paid the tax imposed by chapter 32 of the Code on the sale of the article, and all or a part of the purchase price is repaid to the vendee or credited to the vendee's account, a price readjustment giving rise to an overpayment will result. However, if the manufacturer later resells the repossessed article for a price in excess of the original adjusted sale price, the manufacturer will be liable for tax under chapter 32 of the Code to the extent that the resale price exceeds the original adjusted sale price.

(d) *Return or repossession of covering or container.* If the covering or container of a taxable article is returned to, or repossessed by the manufacturer who paid the tax imposed by chapter 32 of the Code on the sale of the article, and all or a portion of the purchase price is repaid to the vendee or credited to the vendee's account by reason of the return or repossession of the covering or container, a price adjustment giving rise to an overpayment will result. If a taxable article is considered to have been repurchased, as provided in paragraph (b)(4) of this section, and the covering or container accompanies the taxable article as part of the transaction, the covering or container will also be considered to have been repurchased.

(e) *Bona fide discounts, rebates, or allowances.*—(1) *In general.* Except as provided in § 53.175 (relating to readjustments in respect of local advertising), the basic consideration in determining, for purposes of this section, whether a bona fide discount, rebate, or allowance has been made is whether the price actually by, or charged against, the purchaser has in fact been reduced by subsequent transactions between the parties. Generally, the price will be considered to have been readjusted by reason of a bona fide discount, rebate, or allowance, only if the manufacturer who made the taxable sale repays a part of the purchase price in cash to the vendee, or credits the vendee's account, or directly or indirectly reimburses a third party for part or all of the purchase

price for the direct benefit of the vendee, in consideration of factors which, if taken into account at the time of the original transaction, would have resulted at that time in a lower sale price. For example, a price readjustment will be considered to have been made when a bona fide discount, rebate, or allowance is given in consideration of such factors as prompt payment, quantity buying over a specified period, the vendee's inventory of an article when new models are introduced, or a general price reduction affecting articles held in stock by the vendee as of a certain date. On the other hand, repayments made to the vendee do not effectuate price readjustments if given in consideration of circumstances under which the vendee has incurred, or is required to incur, an expense which, if treated as a separate item in the original transaction, would have been incudable in the price of the article for purposes of computing the tax.

Examples. The provisions of paragraph (e)(1) of this section may be illustrated by the following examples:

Example (1). B, a manufacturer of shotguns, bills its distributors in a specified amount per shotgun purchased by them. Thereafter, B issues to each distributor a credit memorandum in the amount of X dollars for each demonstration by the distributor of the shotguns at a sporting goods exhibition. The credit which B allows the distributor for demonstration of B's product does not effect a readjustment of price.

Example (2). C, a manufacturer of firearms, bills its dealers in a specified amount per firearm purchased by them. Thereafter, C remits to the dealer X dollars of the original sale price for each firearm sold by the dealer. An additional amount of Y dollars is paid to the dealer upon a showing by the dealer that the dealer has paid Y dollars to the salesperson who made the sale. In this case, the X dollars paid to the dealer by C constitutes a bona fide discount, rebate, or allowance since payment of such amount is in the nature of a price reduction. In addition, the Y dollars paid to the dealer in reimbursement for the amount paid by the dealer to the salesperson who made the sale, also constitutes a bona fide discount, rebate, or allowance.

(2) *Inability to collect price.* A charge-off of an amount outstanding in an open account, due to inability to collect, is not a bona fide discount, rebate, or allowance and does not, in and of itself, give rise to a price readjustment within the meaning of this section.

(3) *Loss or damage in transit.* If title to an article has passed to the vendee, the subsequent loss, damage, or destruction of the article while in the possession of a carrier for delivery to the vendee does not, in and of itself, affect the price at which the article was sold. However, if the article was sold under a contract providing that, if the article was lost, damaged, or destroyed in transit, title would revert to the vendor and the vendor would reimburse the vendee in full for the sale price, then the original sale is considered to have been rescinded. The vendor is entitled to credit or refund of the tax paid upon reimbursement of the full tax-included sale price to the vendee.

§ 53.175 Readjustment for local advertising charges.

(a) *In general.* If a manufacturer has paid the tax imposed by chapter 32 of the Code on the price of any article sold by the manufacturer and thereafter has repaid a portion of the price to the purchaser or any subsequent vendee in reimbursement of expenses for local advertising of the article or any other article sold by the manufacturer which is taxable at the same rate under the same section of chapter 32 of the Code, the reimbursement will be considered a price readjustment constituting an overpayment which the manufacturer may claim as a credit or refund. The amount of the reimbursement may not, however, exceed the limitation provided by section 4216(e)(2) of the Code and § 53.101, determined as of the close of the calendar quarter in which the reimbursement is made or as of the close of any subsequent calendar quarter of the same calendar year in which it is made. The term "local advertising," as used in this section, has the same meaning as prescribed by section 4216(e)(4) of the Code and includes generally, advertising which is broadcast over a radio station or television station, or appears in a newspaper or magazine, or is displayed by means of an outdoor advertising sign or poster.

(b) *Local advertising charges excluded from taxable price in one year but repaid in following year.*—(1) *Determination of price readjustments for year in which charge is repaid.* If the tax imposed by chapter 32 of the Code was paid with respect to local advertising charges that were excluded in computing the taxable price of an article sold in any calendar year but are not repaid to the manufacturer's purchaser or any subsequent vendee before May 1 of the following calendar year, the subsequent repayment of those charges by the manufacturer in reimbursement of expenses for local advertising will be considered a price readjustment constituting an overpayment which the manufacturer may claim as a credit or refund. The amount of the reimbursement may not, however, exceed the limitation provided by section 4216(e)(2) of the Code and § 53.101, determined as of the close of the calendar quarter in which the reimbursement is made or as of the close of any subsequent calendar quarter of the same calendar year in which it is made.

(2) *Redetermination of price readjustments for year in which charge was made.* If the tax imposed by chapter 32 of the Code was paid with respect to local advertising charges that were excluded in computing the taxable price of an article sold in any calendar year but are not repaid to the manufacturer's purchaser or any subsequent vendor before May 1 of the following calendar year, the manufacturer may make a redetermination, in respect of the calendar year in which the charge was made, of the price readjustments constituting an overpayment which the manufacturer may claim as a credit or refund. This redetermination may be made by excluding the local advertising charges made in the calendar year that became taxable as of May 1 of the following calendar year.

§ 53.176 Supporting evidence required in case of price readjustments.

No credit or refund of an overpayment arising by reason of a price readjustment described in § 53.174 or § 53.175 shall be allowed unless the manufacturer who paid the tax submits a statement, supported by sufficient available evidence:

(a) Describing the circumstances which gave rise to the price readjustment,

(b) Identifying the article in respect of which the price readjustment was allowed,

(c) Showing the price at which the article was sold, the amount of tax paid in respect of the article, and the date on which the tax was paid,

(d) Giving the name and address of the purchaser to whom the article was sold, and

(e) Showing the amount repaid to the purchaser or credited to the purchaser's account.

§ 53.177 Certain exportations, uses, sales, or resales causing overpayments of tax.

In the case of any payment of tax under chapter 32 of the Code that is determined to be an overpayment by reason of certain exportations, uses, sales, or resales described in section 6416(b)(2) of the Code and § 53.178, the person who paid the tax may file a claim for refund of the overpayment or, in the case of overpayments under chapter 32 of the Code, may claim credit for the overpayment on any return of tax under this subpart which the person

subsequently files. However, under the circumstances described in section 6416(c) of the Code and § 53.184, the overpayments under chapter 32 may be refunded to an exporter or shipper. No interest shall be paid on any credit or refund allowed under this section. For provisions relating to the evidence required in support of a claim for credit or refund under this section, see 27 CFR 70.123 (Procedure and Administration) and 53.179. For provisions authorizing the taking of a credit in lieu of filing a claim for refund, see section 6416(d) of the Code and § 53.185.

§ 53.178 Exportations, uses, sales, and resales included.

(a) *In general.* The payment of tax imposed by chapter 32 of the Code on the sale of any article, will be considered to be an overpayment by reason of any exportation, use, sale, or resale described in any one of paragraphs (b) to (e), inclusive, of this section. This section applies only in those cases where the exportation, use, sale, or resale (or any combination thereof) referred to in any one or more of these paragraphs occurs before any other use. If any article is sold or resold for a use described in any one of these paragraphs and is not in fact so used, the paragraph is treated in all respects as inapplicable.

(b) *Exportation of tax-paid articles.* A payment of tax under chapter 32 of the Code on the sale of any article will be considered to be an overpayment under section 6416(b)(2)(A) of the Code if the article is by any person exported to a foreign country or shipped to a possession of the United States. It is immaterial for purposes of this paragraph, whether the person who made the taxable sale had knowledge at the time of the sale that the article was being purchased for export to a foreign country or shipment to a possession of the United States. See § 53.184 for the circumstances under which a claim for refund by reason of the exportation of an article may be claimed by the exporter or shipper, rather than by the person who paid the tax. For definition of the term "possession of the United States", see § 53.11.

(c) *Supplies for vessels or aircraft.* A payment of tax under chapter 32 of the Code on the sale of any article, will be considered to be an overpayment under section 6416(b)(2)(B) of the Code if the article is used by any person, or is sold by any person for use by the purchaser, as supplies for vessels or aircraft. The term "supplies for vessels or aircraft", as used in this paragraph, has the same meaning as when used in sections 4221(a)(3), 4221(d)(3), and 4221(e)(1) of the Code, and the regulations thereunder (§ 53.134(b)(1)).

(d) *Use by State or local government.* A payment of tax under chapter 32 of the Code on the sale of any article will be considered to be an overpayment under section 6416(b)(2)(C) of the Code if the article is sold by any person to a State, any political subdivision thereof, or the District of Columbia for the exclusive use of a State, any political subdivision thereof, or the District of Columbia. For provisions relating to tax-free sales to a State, any political subdivision thereof, or the District of Columbia, see section 4221(a)(4) of the Code and § 53.131.

(e) *Use by nonprofit educational organization.* A payment of tax under chapter 32 of the Code on the sale of any article will be considered to be an overpayment under section 6416(b)(2)(D) of the Code if the article is sold by any person to a nonprofit educational organization for its exclusive use. The term "nonprofit educational organization", as used in this paragraph (e), has the same meaning as when used in section 4221 (a)(5) or (d)(5) of the Code, whichever applies, and the regulations under § 53.136.

§ 53.179 Supporting evidence required in case of manufacturers tax involving exportations, uses, sales, or resales.

(a) *Evidence to be submitted by claimant.* No claim for credit or refund of an overpayment, within the meaning of section 6416(b)(2) of the Code and § 53.178, of tax under chapter 32 of the Code shall be allowed unless the person who paid the tax submits with the claim the evidence required by § 53.172(b)(2) and a statement, supported by sufficient available evidence:

(1) Showing the amount claimed in respect of each category of exportations, uses, sales, or resales on which the claim is based and which give rise to a right of credit or refund under section 6416(b)(2) of the Code and § 53.177,

(2) Identifying the article, both as to nature and quantity, in respect of which credit or refund is claimed,

(3) Showing the amount of tax paid in respect of the article or articles and the dates of payment, and

(4) Indicating that the person claiming a credit or refund possesses evidence (as set forth in paragraph (b)(1) of this section) that the article has been exported, or has been used, sold, or resold in a manner or for a purpose which gives rise to an overpayment within the meaning of section 6416(b)(2) of the Code and § 53.178.

(b) *Evidence required to be in possession of claimant*—(1) *Evidence required under paragraph (a)(4)*—(i) *In general.* The evidence required to be retained by the person who paid the tax, as provided in paragraph (a)(4) of this section, must, in the case of an article exported, consist of proof of exportation in the form prescribed in § 53.133 or must, in the case of other articles sold tax-paid by that person, consist of a certificate, executed and signed by the ultimate purchaser of the article, in the form prescribed in paragraph (b)(1)(ii) of this section. However, if the article to which the claim relates has passed through a chain of sales from the person who paid the tax to the ultimate purchaser, the evidence required to be retained by the person who paid the tax may consist of a certificate, executed and signed by the ultimate vendor of the article, in the form provided in paragraph (b)(1)(iii) of this section, rather than the proof of exportation itself or the certificate of the ultimate purchaser.

(ii) *Certificate of ultimate purchaser.* (A) The certificate executed and signed by the ultimate purchaser of the article to which the claim relates must identify the article, both as to nature and quantity; show the address of the ultimate purchaser of the article, and the name and address of the ultimate vendor of the article; and describe the use actually made of the article in sufficient detail to establish that credit or refund is due, except that the use to be made of the article must be described in lieu of actual use if the claim is made by reason of the sale or resale of an article for a specified use which gives rise to the overpayment.

(B) If the certificate sets forth the use to be made of any article, rather than its actual use, it must show that the ultimate purchaser has agreed to notify the claimant if the article is not in fact used as specified in the certificate.

(C) The certificate must also contain a statement that the ultimate purchaser understands that the ultimate purchaser and any other party may, for fraudulent use of the certificate, be subject to all applicable criminal penalties under the Internal Revenue Code.

(D) A purchase order will be acceptable in lieu of a separate certificate of the ultimate purchaser if it contains all the information required by this paragraph.

(iii) *Certificate of ultimate vendor.* Any certificate executed and signed by an ultimate vendor as evidence to be retained by the person who paid the tax, as provided in paragraph (a)(4) of this section, may be executed with respect to any one or more overpayments by the person which arose under section 6416(b)(2) and § 53.178 by reason of

exportations, uses, sales or resales, occurring within any period of not more than 12 consecutive calendar quarters, the beginning and ending dates of which are specified in the certificate. The certificate must be in substantially the following form:

Statement of Ultimate Vendor

(For use in claiming credit or refund of overpayment determined under section 6416(b)(2) of the Internal Revenue Code.)

The undersigned or the

_____

(Name of ultimate vendor if other than undersigned) of which the undersigned is (Title), is the ultimate vendor of the article specified below or on the reverse side hereof.

The article was purchased by the ultimate vendor tax-paid and was thereafter exported, used, sold, or resold (as indicated below or on the reverse side hereof).

The ultimate vendor possesses

_____

(Proof of exportation in respect of the article, or a certificate as to use executed by the ultimate purchaser of the article)

The _____

(Proof of exportation or certificate)

(1) is retained by the ultimate vendor, (2) will, upon request, be forwarded to

_____

(Name of person who paid tax)

at any time within 3 years from the date of this statement for use by that person to establish that credit or refund is due in respect of the article, and (3) will otherwise be held by the ultimate vendor for the required 3-year period.

According to the best knowledge and belief of the undersigned, no statement in respect of the

_____

(Proof of exportation or certificate)

has previously been executed, and the undersigned understands that the fraudulent use of this statement may subject the undersigned or any other party making such fraudulent use to all applicable criminal penalties under the Internal Revenue Code.

_____

(Signature)

_____

(Address)

_____

(Date)

Vendor's invoice	Articles	Date of resale	Quantity	Exported or use made or to be made (specify)

(2) *Repayment or consent of ultimate vendor.* If the person claiming credit or refund or an overpayment to which this section applies has repaid, or agreed to repay, the amount of the overpayment to the ultimate vendor or if the ultimate vendor consents to the allowance of the credit or refund, a statement to that effect, signed by the ultimate vendor, must be shown on, or made a part of, the supporting evidence required under this section to be retained by the person claiming the credit or refund. In this regard, see § 53.172(b)(2).

§ 53.180 Tax-paid articles used for further manufacture and causing overpayments of tax.

In the case of any payment of tax under chapter 32 of the Code that is determined to be an overpayment under section 6416(b)(3) of the Code and § 53.181 by reason of the sale of an article, directly or indirectly, by the manufacturer of the article to a subsequent manufacturer who uses the article in further manufacture of a second article or who sells the article with, or as a part of, the second article manufactured or produced by the subsequent manufacturer, the subsequent manufacturer may file claim for refund of the overpayment or may claim credit for the overpayment on any return of tax under this subpart subsequently filed. No interest shall be paid on any credit or refund allowed under this section. For provisions relating to the evidence required in support of a claim for credit or refund, see 27 CFR § 70.123 (Procedure and Administration), 53.172 and 53.182. For provisions authorizing the taking of a credit in lieu of filing a claim for refund, see section 6416(d) of the Code and § 53.185.

§ 53.181 Further manufacture included.

(a) *In general.* The payment of tax imposed by chapter 32 of the Code on the sale of any article by a manufacturer of the article will be considered to be an overpayment by reason of any use in further manufacture, or sale as part of a second manufactured article, described in paragraph (b) of this section. This section applies in those cases where the exportation, use, or sale (or any combination of those activities) referred to in this paragraph occurs before any other use.

(b) *Use of tax-paid articles in further manufacture described in section 6416(b)(3)(A) of the Code.* A payment of tax under chapter 32 of the Code on the sale of any article, directly or indirectly, by the manufacturer of the article to a subsequent manufacturer will be considered to be an overpayment under section 6416(b)(3)(A) of the Code if the article is used by the subsequent manufacturer as material in the manufacture of production of, or as a component part of, a second article manufactured or produced by the subsequent manufacturer which is taxable under chapter 32 of the Code. For this purpose it is immaterial whether the second article is sold or otherwise disposed of, or if sold, whether the sale is a taxable sale. Any article to which this paragraph applies which would have been used in the manufacture or production of a second article, except for the fact that it was broken or rendered useless in the process of manufacturing or producing the second article, will be considered to have been used as a component part of the second article.

§ 53.182 Supporting evidence required in case of tax-paid articles used for further manufacture.

(a) *Evidence to be submitted by claimant.* No claim for credit or refund of an overpayment, within the meaning of section 6416(b)(3) of the Code and § 53.181 shall be allowed unless the subsequent manufacturer submits with the claim the evidence required by § 53.132 and a statement, supported by sufficient available evidence:

(1) Showing the amount claimed in respect of each category of exportations, uses, or sales on which the claim is based and which give rise to a right of credit or refund under section 6416(b)(3) of the Code and § 53.180,

(2) Showing the name and address of the manufacturer, producer, or importer of the article in respect of which credit or refund is claimed,

(3) Identifying the article, both as to nature and quantity, in respect of which credit or refund is claimed,

(4) Showing the amount of tax paid in respect of the article by the manufacturer or producer of the article and the date of payment.

(5) Indicating that the article was used by the claimant as material in the manufacture or production of, or as a component part of, a second article manufactured or produced by the manufacturer or was sold on or in connection with, or with the sale of, a second article manufactured or produced by the manufacturer, and

(6) Identifying the second article, both as to nature and quantity.

(b) *Evidence required to be in possession of claimant.*—(1) *Certificate or ultimate purchaser of second article.* The certificate executed and signed by the ultimate purchaser of the second article must contain the same information as that required in § 53.179(b)(1)(ii), except that the information must be furnished in respect of the second article, rather than the article to which the claim relates.

(2) *Certificate of ultimate vendor of second article.* Any certificate executed and signed by an ultimate vendor as evidence to be retained by the person claiming credit or refund must be executed in the same form and manner as that provided in § 53.179(b)(2)(iii).

(3) *Repayment or consent of ultimate vendor.* If the person claiming credit or refund of an overpayment to which this section applies has repaid, or agreed to repay, the amount of the overpayment to the ultimate vendor or if the ultimate vendor consents to the allowance of the credit or refund, a statement to that effect, signed by the ultimate vendor, must be shown on, or made a part of, the evidence required to be retained by the person claiming the credit or refund. In this regard, see § 53.172(b)(2).

§ 53.183 Return of installment accounts causing overpayments of tax.

(a) *In general.* In the case of any payment of tax under section 4216(d)(1) of the Code in respect of the sale of any installment account that is determined to be an overpayment under section 6416(b)(5) of the Code and paragraph (b) of this section upon return of the installment account, the person who paid the tax may file a claim for refund of the overpayment or may claim credit for the overpayment on any return of tax under this subpart which that person subsequently files. No interest shall be paid on any credit or refund allowed under this section. For provisions relating to the evidence required in support of a claim for credit or refund under this section, see 27 CFR 70.123 (Procedure and Administration) and paragraph (c) of this section. For provisions authorizing the taking of a credit in lieu of filing a claim for refund, see section 6416(d) of the Code and § 53.185.

(b) *Overpayment of tax allocable to repaid consideration.* The payment of tax imposed by section 4216(d)(1) of the Code on the sale of an installment account by the manufacturer will be considered to be an overpayment under section 6416(b)(5) of the Code to the extent of the tax allocable to any consideration repaid or credited to the purchaser of the installment account upon the return of the account to the manufacturer pursuant to the agreement under which the account originally was sold, if the readjustment of the consideration occurs pursuant to the provisions of the agreement. The tax allocable to the repaid or credited consideration is the amount which bears the same ratio to the total tax paid under section 4216(d)(1) of the Code with respect to the installment account as the amount of consideration repaid or credited to the purchaser bears to the total consideration for which the account was sold. This paragraph (b) does not apply where an installment account is originally sold pursuant to the order of, or subject to the approval of, a court of competent jurisdiction in a bankruptcy or insolvency proceeding.

(c) *Evidence to be submitted by claimant.* No claim for credit or refund of an overpayment, within the meaning of section 6416(b)(5) of the Code and paragraph (b) of this section, of tax under section 4216(d)(1) of the Code shall be allowed unless the person who paid the tax submits with the claim a statement, supported by sufficient available evidence, indicating:

(1) The name and address of the person to whom the installment account was sold,

(2) The amount of tax due under section 4216(d)(1) of the Code by reason of the sale of the installment account, the amount of the tax paid under section 4216(d)(1) with respect to the sale, and the date of payment,

(3) The amount for which the installment account was sold,

(4) The amount which was repaid or credited to the purchaser of the account by reason of the return of the account to the person claiming the credit or refund, and

(5)(i) The fact that the amount repaid or credited to the purchaser of the account was so repaid or credited pursuant to the agreement under which the account was sold, and

(ii) The fact that the account was returned to the manufacturer pursuant to that agreement.

§ 53.184 Refund to exporter or shipper.

(a) *In general.* Any payment of tax imposed by chapter 32 of the Code that is determined to be an overpayment within the meaning of section 6416(b)(2)(A) of the Code and §§ 53.178 and 53.179, by reason of the exportation of any article may be refunded to the exporter or shipper of the article pursuant to section 6416(c) of the Code, if:

(1) The exporter or shipper files a claim for refund of the overpayment, and

(2) The person who paid the tax waives the right to claim credit or refund of the tax.

No interest shall be paid on any refund allowed under this section. For provisions relating to the evidence required in support of a claim under this paragraph, see 27 CFR 70.123 (Procedure and Administration) and paragraph (b) of this section.

(b) *Supporting evidence required.* No claim for refund of any overpayment of tax to which this section applies shall be allowed unless the exporter or shipper submits with that claim proof of exportation in the form prescribed by § 53.133, and a statement, signed by the person who paid the tax, showing:

(1) That the person who paid the tax waives the right to claim credit or refund of the tax, and

(2) The amount of tax paid on the sale of the article and the date of payment.

§ 53.185 Credit on returns.

Any person entitled to claim refund of any overpayment of tax imposed by chapter 32 of the Code may, in lieu of claiming refund of the overpayment, claim credit for the overpayment on any return of tax under this subpart subsequently filed. Any such credit claimed on a return must be supported by the evidence prescribed in the applicable regulations in this subpart and 27 CFR 70.123 (Procedure and Administration).

§ 53.186 Accounting procedures for like articles.

(a) *Identification of manufacturer.* In applying section 6416 of the Code and the regulations thereunder, a person who has purchased like articles from various manufacturers may determine the particular manufacturer from whom that person purchased any one of those articles by a first-in, first-out (FIFO) method, by a last-in, first-out (LIFO) method, or by any other consistent method approved by the regional director. For the first year for which a person makes a determination under this section, the person may adopt any one of the following methods without securing prior approval by the regional director.

(1) FIFO method.

(2) LIFO method.

(3) Any method by which the actual manufacturer of the article is in fact identified.

(4) Any other method of determining the manufacturer of a particular article must be approved by the regional director before its adoption. After any method for identifying the manufacturer has been properly adopted, it may not be changed without first securing the consent of the regional director.

(b) *Determining amount of tax paid.* In applying section 6416 and §§ 53.171–53.186, if the identity of the manufacturer of any article has been determined by a person pursuant to a method prescribed in paragraph (a) of this section, that manufacturer of the article must determine the tax paid

under Chapter 32 of the Code with respect to that article consistently with the method used in identifying the manufacturer.

§ 53.167 OMB control numbers.

(a) *Purpose.* This section collects and displays the control numbers assigned to collections of information in this part by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980. ATF intends that this section comply with the requirements of §§ 1320.12, 1320.13, and 1320.14 of 5 CFR part 1320 (OMB regulations implementing the Paperwork Reduction Act), for the display of control numbers assigned by OMB to collections of information in the regulations in this part.

(b) *Display.*

27 CFR part 53 section number	OMB control number(s)
§ 53.1	1545–0723
§ 53.3	1545–0685
§ 53.11	1545–0723
§ 53.92	1545–0023
§ 53.93	1545–0023
§ 53.99	1545–0023
§ 53.131	1545–0023
§ 53.132	1545–0023
§ 53.133	1545–0023
§ 53.134	1545–0023
§ 53.136	1545–0023
§ 53.140	1545–0023
§ 53.141	1545–0023
§ 53.142	1545–0023
§ 53.143	1545–0023
§ 53.151	1545–0023, 1545–0723
§ 53.152	1545–0723
§ 53.153	1545–0257, 1545–0723
§ 53.155	1545–0723
§ 53.157	1545–0257
§ 53.171	1545–0023, 1545–0723
§ 53.172	1545–0723
§ 53.173	1545–0723
§ 53.174	1545–0723
§ 53.175	1545–0723
§ 53.176	1545–0723
§ 53.177	1545–0723
§ 53.178	1545–0723
§ 53.179	1545–0723
§ 53.180	1545–0723
§ 53.181	1545–0723
§ 53.182	1545–0723
§ 53.183	1545–0723
§ 53.184	1545–0023, 1545–0723
§ 53.185	1545–0023, 1545–0723
§ 53.186	1545–0723

Dated: November 23, 1990.

Stephen E. Higgins,

Director.

Approved: December 17, 1990.

John W. Mangels,

Acting Assistant Secretary (Enforcement).

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Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Part 170

Establishment and Discontinuance Criteria for Airport Traffic Control Tower Facilities; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 170

[Docket No. 26425]

RIN 2120-AC98

Establishment and Discontinuance Criteria for Airport Traffic Control Tower Facilities

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment prescribes benefit-cost based criteria for establishment and discontinuance of visual flight rules (VFR) airport traffic control tower facilities. The FAA uses these criteria to assess the benefits and costs associated with establishing or decommissioning an airport traffic control tower as a part of its mission to maximize safety and efficiency throughout the airport and airway system consistent with available resources. This regulation implements the requirements of recent legislation requiring the publication of criteria for navigational aids and airport traffic control towers. The tower criteria prescribed by this rule will be followed by criteria for other navigational aids as they are developed and revised.

EFFECTIVE DATE: February 4, 1991.

FOR FURTHER INFORMATION CONTACT: Mr. Evan Soffer, Office of Aviation Policy and Plans, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591; telephone (202) 267-3286.

SUPPLEMENTARY INFORMATION:

Background

The FAA has the responsibility to establish or discontinue airport traffic control towers through the national airspace system when activity levels and safety considerations merit such action. Criteria for the installation of towers have historically been developed by the FAA and its predecessor organization, approved internally within the organization, and published since 1951. Current criteria, including the general qualifications necessary to become a candidate site for establishment or discontinuance of VFR airport traffic control towers, are published in "Airway Planning Standard Number One—Terminal Air Navigation Facilities and Air Traffic Control Services" (FAA Order No. 7031.2C) and detailed in " Establishment and Discontinuance Criteria for Airport Traffic Control Towers." (Report No. FAA-APO-83-2). Decisions to establish and operate airport traffic control towers have been and will continue to be based on benefits exceeding costs of such actions. The Airport and Airway Safety and Capacity Expansion Act of 1987, Public Law 100-223, section 308 (49 U.S.C. 1348), mandated that these criteria be revised and, for the first time, promulgated through Federal administrative regulation.

History

Criteria to establish airport traffic control towers have evolved over time. Initially applied in 1951, a minimum number of operations was required to qualify as a tower candidate. From 1951 through 1974, FAA established minimum qualifying levels of 24,000 annual itinerant operations at air carrier airports, and 50,000 annual itinerant operations at general aviation airports. Differential levels of operations were established under the theory that, at air carrier airports, a greater mix of traffic with a wider range of performance characteristics created a greater potential for accidents.

In 1975, the criteria were revised to incorporate benefit-cost analysis. To qualify for establishment of a tower, the ratio of benefits to costs had to equal or exceed one.

$$\frac{\text{Benefits}}{\text{Costs}} \geq 1$$

Forming the basis of current criteria, the 1975 criteria considered collision and other accident risk, reduction in flying time, mix of aircraft types, percent of passengers injured, and percent of aircraft damaged.

Criteria for discontinuing tower services have been employed since 1956. In 1977, the first economic-based discontinuance criteria were detailed in a draft report, "An Analysis of Continued Operation of Selected Airport Traffic Control Towers." The report provided a comprehensive benefit-cost approach to assess the merits of the continued funding of towers. Locations were identified as candidates for discontinuance whenever benefits from continued tower operation were less than operating and maintenance costs over a 15-year forecast period.

In 1983, the FAA revised the economic analysis for VFR airport traffic control towers and the corresponding establishment and discontinuance criteria. These criteria will remain in effect until the effective date of the rule contained herein.

Current Criteria

The criteria in effect today are divided into two phases. Phase I criteria were constructed as a simplified screening device to manually identify potential candidates for future benefit-cost analysis. They are in the form of a ratio test based on one year's activity for three consecutive one-year reporting periods. A site becomes a candidate for Phase II establishment analysis if the ratio sum of the following formula equals or exceeds 1:

AC		AT		GAI		GAL		MI		ML	
38,000	+	90,000	+	160,000	+	280,000	+	48,000	+	90,000	1>

A site becomes a candidate for Phase II discontinuance analysis if the ratio sum of the following formula is less than 1:

AC		AT		GAI		GAL		MI		ML	
15,000	+	40,000	+	75,000	+	125,000	+	20,000	+	35,000	1<

where:

AC = Air carrier operations
AT = Air taxi operations
GAI = General aviation itinerant operations
GAL = General aviation local operations
MI = Military itinerant operations
ML = Military local operations

The formula considers activity by user class and differentiates by aircraft size by evaluating air carrier and commuter activity, which are defined in part by aircraft size, in separate classes. Phase II criteria compare the present value of tower benefits with the present value of tower costs over a 15-year period. If the tower meets the initial benefit-cost screening for either establishment or discontinuance, then a site-specific analysis is performed.

The 1983 methodology to calculate benefits and costs for establishment and discontinuance criteria is still in effect today (see Report No. FAA-APO-83-2). Site-specific activity forecasts are used to estimate the benefits resulting from prevented aircraft collisions, from other prevented accidents, and from reduced flying time. Considered in the benefit analysis is the mix of aircraft types—air carrier, air taxi, general aviation, and military—and levels of local and itinerant traffic operating within the terminal area. Also considered are the number of enplaned passengers and crew members who might be fatally or nonfatally injured in a collision or other type of tower-preventable accident. Dollar values are assigned to prevented fatalities, injuries, reduced aircraft operating costs, and time savings for passengers to provide a common basis for comparing benefits and costs.

Recurring tower costs include annual costs of staffing, maintenance, equipment, supplies, and leased services. Establishment costs include nonrecurring investment costs, such as facilities, equipment, and operational startup. Tower discontinuance criteria use the same annual costs as establishment criteria. Discontinuance criteria also consider the costs of closing the tower.

Revised Criteria

As in past criteria, the revised criteria for VFR airport traffic control tower establishment require that candidate airports have life cycle benefits that exceed life-cycle costs.

$$\frac{\text{Present Discounted Value of Benefits}}{\text{Present Discounted Value of Costs}} > 1$$

Criteria for airport control tower discontinuance specify that the present value of benefits derived from continued tower operation compared to the present value cost of continued operation are less than one.

$$\frac{\text{Present Discounted Value of Benefits}}{\text{Present Discounted Value of Costs}} < 1$$

In compliance with Public Law 100–223, the FAA revised the establishment and discontinuance criteria for airport traffic control towers, the procedures to calculate benefits and costs, and the results when the criteria are applied to airports using current forecasts of activity (see Report No. FAA–APO–90–7, "Establishment and Discontinuance Criteria for Airport Traffic Control Towers"). The revised criteria methodology eliminate Phase I criteria, update accident rates, and update economic values used to calculate benefits. In addition, the statute requires that the criteria eliminate qualification distinctions based on aircraft size.

Distinctions according to classes of aircraft are eliminated in two ways. First, by eliminating Phase I criteria, the distinction based on aircraft size is removed ("air carrier" and "commuter" service is defined in part by aircraft size). Second, the methodology to calculate benefits contains no reference to aircraft size. Only three functional user groups are used in the benefit-cost calculation: scheduled commercial, nonscheduled commercial, and noncommercial. These user groups have been constructed to reflect differences in the nature of public transport in today's deregulated environment, operating requirements, and sources of data considered helpful in obtaining accurate estimates of potential tower benefits.

The elimination of Phase I criteria reduces confusion regarding the meaning of the formula result. Because of improved automation and the widespread availability of computer equipment, the need no longer exists for the preliminary screening provided by Phase I criteria. Detailed Phase II benefit-cost analysis can now be accomplished quickly and accurately.

Benefit-cost analyses of potential airport traffic control towers are based on two types of benefits (safety and efficiency) and two types of costs (annual and investment). Safety benefits derive from avoiding accidents and their associated fatalities, injuries and property damage. Efficiency benefits derive from the reduction in flying time—saving time of aircraft occupants and reducing variable operating costs of aircraft. Investment costs include the initial costs associated with installing and staffing a new tower. Annual costs are comprised of staffing costs for operation, maintenance, leased communications, and administrative overhead. Discontinuance criteria substitute decommissioning costs for investment costs.

Explicit values assigned to passenger time, life, injuries, aircraft replacement and restoration, and aircraft operating costs provide a basis for comparing benefits to costs across airports. Economic benefits are based on airport-specific aviation activity projected in the FAA's annual Terminal Area Forecasts. Benefits and costs are estimated for a 15-year life cycle and are discounted to their present value using a 10 percent discount rate as directed by the Office of Management and Budget.

How the Criteria Apply

The FAA uses the benefit-cost criteria to determine the eligibility of sites for establishment or discontinuance of VFR airport traffic control tower facilities. A site is eligible for the establishment of a facility or service when the ratio of the benefits to the costs of establishment equals or exceeds 1.0. A facility or service may be discontinued if the benefits expected to be realized over the remainder of its life cycle fall below its recurring operation, maintenance, and decommissioning costs. Additional factors, such as terrain, weather, operational requirements, or national security, may also be considered in the evaluation of sites as candidates for establishment or decommissioning.

Meeting the economic criteria is usually a necessary condition for facility establishment. However, meeting the criteria is not a guarantee that a tower will be established.

Criteria Results

All nonmilitary airports in the Terminal Area Forecasts were evaluated with the current and revised benefit-cost computer programs for establishment or discontinuance of an airport traffic control tower. Since the FAA issued the notice of proposed rulemaking (NPRM) for establishment and discontinuance criteria for VFR airport traffic control towers (54 FR 22698; May 25, 1989), it has finalized a separate and independent update of various standardized economic values used in FAA investment and regulatory analyses. In addition, aviation activity projections provided by the FAA's Terminal Area Forecasts data base have been updated since the issuance of the NPRM. The criteria and underlying benefit-cost analysis on which this rule is based have been changed to account for differences between the revised draft and final economic values. The FAA

believes that the resulting criteria will promote the efficient use of resources while satisfying air traffic control requirements.

Because of the changes, the results outlined below are different than those in the NPRM, resulting in four fewer establishment sites and five additional discontinuance sites. Approximately 3,500 nontowered airports, along with 20 FAA contract towered airports, 43 nonfederal contract towered airports, and 23 airports with decommissioned or temporarily closed towers were considered for tower establishment. Of these sites, 29 had benefit-cost ratios of 1.0 or greater and could be processed as candidates for tower establishment on a site-specific basis. An additional 400 airports have FAA control towers and were considered for discontinuance. Of the VFR towered airports, 31 had benefit-cost ratios less than 1 and could be evaluated for discontinuance on a site-specific basis.

Need for the Regulation

This rule is promulgated under the authority of Pub. L. 100–223 which requires the promulgation of regulations to establish criteria for the installation of airport control tower facilities and other navigational aids. The promulgation of this rule satisfies the requirement for airport traffic control tower criteria. Criteria for other navigational aids will be promulgated through future rulemakings as they are developed and revised.

Discussion of Comments

Introduction

Twenty-four parties responded to the NPRM. The comments were categorized as follows: concurrence without comment, site-specific concern over the proposed discontinuance criteria, applicability to contract towers, identification of and credit for all benefits, definitional problems, and other comments. The FAA has considered all the comments and has amended the rule and the underlying benefit-cost analysis, where appropriate.

Concurrence Without Comment

Three commenters concurred with the provisions of the proposed rule without further comment. These commenters included the Aircraft Owners and Pilots Association (AOPA), the Air Transport Association of America (ATA), and the Air Line Pilots Association (ALPA).

Site-Specific Concern over the Proposed Discontinuance Criteria

The most frequent comment pertained to site-specific concerns over the proposed discontinuance criteria. Of the 12 parties that so commented, 10 parties commented specifically on the Joplin Municipal Airport (Joplin, MO), including local officials of Joplin and surrounding communities, the Chamber of Commerce, the airport manager, a fixed-base operator, and a reservation travel service company. The two remaining parties were the airport director of Owensboro-Daviess County Regional Airport (Owensboro, KY) and the Director of Transportation of Jefferson City, MO.

Most of the parties expressing concern over Joplin Municipal vis-a-vis the discontinuance criteria stated that "the FAA plans to close air traffic control towers at smaller airports using arbitrary numbers" and that "such action will jeopardize the growth of business and economic development in the communities served by smaller airports."

In response, the FAA has no general policy or plans to close any specific tower or group of towers. The primary purpose of towers is to enhance the safety of aircraft operations. The FAA believes that the revised criteria will maximize safety for the aviation system as a whole, consistent with the finite resources available to provide air traffic control services. Tower operations will be continued where benefits are demonstrated as outweighing the costs.

The discontinuance criteria require an economic comparison of the safety and efficiency benefits with the net costs of continued tower operation (where net costs include operations and maintenance costs reduced by the termination costs associated with decommissioning or discontinuance). At sites where the benefits fall short of the costs, it is economically sensible to consider termination of tower services and divert these resources to other sites with greater accident prevention and efficiency benefit potential. Conversely, if the benefits outweigh the costs, continued operation of the tower is the preferred action.

While meeting the discontinuance criteria qualifies a site as a discontinuance candidate, decisions to actually discontinue a tower are made on a case-by-case basis. Before a final decision to discontinue a tower is made, the candidate site is subjected to close and highly detailed scrutiny, not only on the basic benefit algorithms within the benefit-cost analysis, but also on the basis of site-peculiar nonquantifiable factors and considerations.

Applicability to Contract Towers

Six parties, including the American Association of Airport Executives (AAAE), the Director of Transportation of Jefferson City (MO), and the airport managers of Enid Woodring Municipal, Paducah, Cuyahoga County, and Flagstaff Pulliam airports, commented on the uniqueness of contract towers vis-a-vis FAA-funded and -operated towers. The recurring theme in this comment category pertained to the lower cost structures of contract towers relative to the cost structure presented in the underlying benefit-cost report. In addition, the Director of Transportation of Jefferson City requested consideration of the FAA in funding his non-Federal tower and the manager of Twin Cities Airport/Ross Field (Benton Harbor, MI) requested that his tower be reopened.

In response, the illustrative costs presented in the benefit-cost analysis report (Report No. FAA-APO-90-7) are based on average costs for FAA-funded and -operated towers. The rule itself permits the use of site-specific costs. Hence, notwithstanding the cost illustration, tower costs will differ from case-to-case and are accommodated in the evaluation process. When sites are reviewed and evaluated as candidates for establishment or discontinuance in actual practice and application, site-specific cost data are used in the benefit-cost analysis performed. The cost data would be either actual/estimated FAA costs or the actual/estimated contract costs, as appropriate, and tailored to the extent possible to the site being evaluated.

The objective of the FAA's Contract Tower Program is to continue providing air traffic control (ATC) services at airports with low activity VFR control towers in the most economical manner. This will permit the FAA to make better use of its limited resources, to maintain an efficient network of control towers, and to provide effective and safe service in a cost effective manner. Construction of an airport traffic control tower (ATCT) structure is beyond the scope of the FAA's Contract Tower Program since the contracts are only for the provision of ATC services. The FAA plans to contract for the operation of its Level I VFR control towers as long as continued operation is cost beneficial under a contract operation. Site-specific data, including actual or projected contract costs, are and will be used in each benefit-cost analysis to determine if the ATCT meets criteria for continued

operation (i.e., above the discontinuance criteria) or if an ATCT that had been previously closed should be reopened.

The Contract Tower program also includes a process for the review and consideration of an airport with an operating non-Federal control tower if it meets the criteria for continued operation (i.e., above discontinuance criteria using actual or projected contract costs). Airports that do not have an operating non-Federal ATCT or a control tower structure available for occupancy that meets building standards would not be considered for inclusion in this program. As noted above, construction of an ATCT structure is beyond the scope of the FAA's Contract Tower Program since the contracts are only for the provision of ATC services.

Identification of and Credit for all Benefits

Three parties suggested that not all benefits are addressed by the underlying benefit-cost analysis. In response, and in addition to responses to specific comment outlined below, it should be noted that the rule itself doesn't specify the exact form of the benefits analysis. The benefit-cost analysis is illustrative and may include other benefit categories on a site-by-site basis.

The general manager of Mizzou Aviation Company, a fixed-based operator serving Joplin Municipal Airport, stated that the criteria do not seem to consider growth factors which can be immediate and phenomenal. This commenter also felt that air traffic occurring when the tower is closed had not been considered. In response, this commenter apparently overlooked the fact that the benefit-cost analysis program supporting the tower criteria can and should consider the forecast traffic activity for each and every year of the tower's life cycle. Also, the analysis does account for air traffic activity occurring when the tower is closed.

Among other comments discussed separately below, the airport manager of Paducah Airport Corporation (Paducah, KY) and the airport director of Owensboro-Daviess County Regional Airport (Owensboro, KY) stated that they were unable to determine whether any benefit recognition is given for firefighting, rescue and medical treatment supplies used as the result of an aircraft accident, and Aircraft Rescue and Fire Fighting (ARFF) response to an aircraft accident where there is a control tower to guide ARFF crews to the accident site. In response, although not directly apparent from the recommended benefit-cost approach, averted ARFF expenses are embodied and amortized within the value per life saved used by the analysis in quantifying the value of averted fatalities. ARFF response time, however, is not included in the quantified benefit methodology due to expected variability from site-to-site (e.g., presence of UNICOM, fixed-base operators, population density, etc.). In practice, these benefits may be expressly estimated on a site-specific basis or treated as a nonquantified benefit and acknowledged as such.

Both the Paducah airport manager and the Owensboro-Daviess airport director also commented that the FAA has not made benefit allowances for the value of lives and property when an off-airport accident occurs. In response, lives lost on the ground in tower-preventable accidents (i.e., other than aircraft occupants) are accounted for by virtue of drawing on the National Transportation Safety Board Data Base which distinguishes between aircraft occupants and other persons. Damage to property other than aircraft is not expressly quantified (due to extreme variability), but rather included with other "nonquantified" benefits and recognized as such.

In addition, the Owensboro-Daviess airport director states that: (1) It is not clear if military aircraft costs and values are included in the noncommercial functional category; and (2) there is no value placed on the effects of aviation liability insurance premiums. In response to (1), military aircraft operations are included in the noncommercial functional user category. In response to (2), aviation liability insurance premiums are, in effect, already captured in the benefits methodology by virtue of accounting for expected economic losses of destroyed and damaged aircraft (i.e., aggregate pooled insurance premiums simply represent the expected losses to be incurred by the parties insured, ignoring insurance company administrative expenses and profit margins). To further expressly add liability premiums would, therefore, constitute double counting.

In addition to the ARFF and off-airport loss comments, the Paducah airport director had other comments and questions in the category of benefit accountability. He commented that it is unclear what weight nonquantitative factors will bear as compared to quantitative analysis vis-a-vis evaluation of one site against another (e.g., will one airport's runway threshold's line-of-sight problems be evaluated in the same manner as another's; or what weight will heavily populated property located immediately off the end of a runway have on the level of benefits). He also felt that savings generated by towers in the sequencing of aircraft (which preclude the necessity of flying a traffic pattern) were not accounted for.

In response, nonquantitative factors by nature do not lend themselves to being quantified for across-the-board application. However, because the in-depth benefit-cost analyses are performed at a central location (FAA, Washington Headquarters), treatment of qualitative considerations is relatively consistent from case-to-case. The benefits generated by towers in minimizing or reducing overflights and traffic pattern flying are addressed in detail in the benefit-cost analysis guide.

Definitional Problems

Definitional problems were cited by the AAAE, the Regional Airline Association (RAA), and the airport manager of Paducah Airport Corporation.

The AAAE recommended a clarification in the Definitions Section of the rule (subpart A § 170.3). To avoid later confusion, the AAAE recommended that the definition of "scheduled commercial service" be changed to read "the carriage by aircraft in air commerce under parts 121 and 135 of persons or property for compensation or hire based on published flight schedules." In response, the FAA has accepted this definitional comment and has made the corresponding change in the final rule, also including the addition of part 127.

The RAA asked that if the point of the NPRM was to establish criteria for tower establishment or disestablishment using the three categories of scheduled commercial, nonscheduled commercial, and noncommercial, why are "air carrier," "commuter air carrier," "commuter/air taxi operations," and "air taxi" included in the Definitions Section? In response, the FAA has accepted this comment and deleted the questioned references.

The Paducah airport manager noted that the underlying benefit-cost analysis report states that, at towered airports, data are available on operations classified as scheduled commercial, nonscheduled commercial, and noncommercial traffic. The airport manager pointed out that FAA traffic recording procedures require identification by air carrier, air taxi, itinerant general aviation, itinerant military, local civil, and local military operations. In response, the functional categories of scheduled commercial, nonscheduled commercial, and

noncommercial traffic have been constructed and adopted by the revised tower criteria to reflect differences in the nature of public transport in today's deregulated environment, operating requirements, and sources of data considered helpful in obtaining accurate estimates of potential tower benefits. They are not inconsistent, however, with current traffic activity counting and recording procedures. Scheduled commercial operations encompass air carrier and air commuter operations; nonscheduled commercial operations encompass nonscheduled air taxi operations; and noncommercial operations encompass general aviation and military operations.

The Paducah airport manager cited formula references to "the number of user class 'i' aircraft." He concluded that the inference is that the FAA will use broad classes of aircraft data or values which may have no relationship to site-specific flight operations. Use of "averaged" user aircraft classes defeats the purpose of the benefit-cost calculation. In response, while section 308 of the Airport and Airway Safety and Capacity Expansion Act prohibits the FAA from differentiating between user classes based on aircraft size, it does permit consideration of passengers served. As such, site-specific estimates of passengers per aircraft operation are considered in development and application of the criteria.

The Paducah airport manager also indicated that there is a definition gap in applicability for part 121 aircraft with fewer than 60 seats, unless such operators are placed in the "air carrier" category. He contended that, regardless of the type and size of aircraft and regardless of whether the service is certified and operated under part 121 or 135, any scheduled passenger service operation should be considered and classified as an air carrier operation. In response, Part 121 aircraft with less than 60 seats are classified and counted within the scheduled commercial category. Section 308 of the Airport and Airway Safety and Capacity Expansion Act prohibits the FAA from differentiating between user classes based on aircraft size. The illustrative benefit-cost analysis includes all parts 121, 127 and 135 operations within the scheduled commercial service functional category. Therefore, this comment is embodied in the recommended benefit-cost analysis procedure.

The Paducah airport manager further stated that lumping military operations with general aviation activity (in the noncommercial traffic category) creates a problem because of differences in their respective sophistication and values. In response, the FAA acknowledges that, as a whole, a military aircraft is significantly different from an average general aviation aircraft. However, military traffic at actual and potential towered civil airports, toward which the criteria are aimed, is not representative of the overall military fleet, but rather is skewed toward smaller aircraft such as trainers, small transports, and rotorcraft.

Other Comments

The RAA believed that the procedures in the underlying benefit-cost report should be spelled out in the published regulations. In response, the benefit-cost analysis is purely illustrative and not hard and fast. Benefit parameters such as forecast activity, value per life saved, costs of injuries, etc., will change over time and the analysis needs to be flexible enough to accommodate unique site benefits. Further, the tower criteria being promulgated under this rule are the first of a number of facilities and equipment establishment and discontinuance criteria which will eventually make up the new part 170. It is not feasible or reasonable to include the underlying benefit-cost analyses in the Federal Aviation Regulations. Therefore, the FAA will cite the underlying benefit-cost procedures by reference only and make them available on request.

The airport manager of the Enid Woodring Municipal Airport, while acknowledging that the new criteria are a significant improvement over the previous criteria, stated that the "numbers are still unrealistically high * * * for tower candidate airports struggling to reach the magic criteria which will enable them to qualify for a Federal tower." In response, the establishment criteria, among other requirements, are based on an objective economic comparison of benefits and costs to assure that there are net positive benefits from tower establishment or discontinuance.

The Owensboro-Daviess County airport director had several miscellaneous comments. He stated that "there is a strong indication that the entire program is being developed as a means of meeting an end result relating to the Department budgetary concerns." In response, the FAA disagrees with this statement. The criteria are based on an objective assessment of tower benefits and costs and the generally accepted principles of benefit-cost analysis. The criteria are developed completely independent of the budgeting process. The criteria are intended to be a decisionmaking tool and include other considerations in addition to the benefit-cost assessment.

The Owensboro-Daviess airport director also felt that there must be some way of making the evaluation process simpler and that benefit-cost analysis programs involving aviation safety should be outweighed by practicality. In response, the FAA has found benefit-cost analysis to be a useful aid in the investment decisionmaking process, far outweighing the complexities inherent in their development. Once developed, cost benefit analysis programs are easy to apply since they are microcomputer based and capable of accommodating endless sensitivity (or "what-if") analyses.

Regulatory Evaluation Summary

The promulgation of this regulation is expected to have only minimal impact, if any, on the public. Since the new criteria are not expected to result in a significant change in the number of towers being established or discontinued, there is no new cost to the FAA resulting from the application of the revised criteria. As with current criteria, costs to establish an air traffic control tower are not incurred until a site-specific benefit-cost analysis is completed and the resulting benefit-cost ratio equals or exceeds 1. Under this initial screening where benefit-cost ratios are computed using national average costs, 29 sites are identified to be analyzed on a site-specific basis. This compares to a total 32 sites using existing criteria with accident rates and economic values which have not been updated.

The application of the revised criteria is part of the normal procedures in analyzing potential ATCT sites and the current rule further formalizes these procedures. The benefit of this rule is to inform the public of the benefit-cost criteria used by the FAA for the allocation of resources for establishment of air traffic control towers and further assure adequate consideration of the safety and efficiency effects of potential traffic control towers. Since this action has not identifiable cost impact to the public and has a positive, although unquantifiable benefit, a detailed regulatory evaluation is unnecessary.

Regulatory Flexibility Determination

This rule provides a guide for internal FAA management in the establishment and discontinuance of air traffic control towers; for this reason and for the reasons discussed under "Regulatory Evaluation Summary" above, it is certified that this rule will not have a

significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Federalism Implications

The regulation outlined herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this regulation does not have Federalism implications warranting the preparation of a Federalism Assessment.

Conclusion

For the reasons discussed above, the FAA certifies that this rule will not have significant economic impact, positive or negative, on a substantial number of small entities, and a regulatory flexibility analysis is not required. In addition, and for the same reasons, the proposal is not major under Executive Order 12291 and is not significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). Since the rule will impose no additional administrative cost on the FAA, the estimated benefits are expected to exceed the estimated costs of implementation.

List of Subjects in 14 CFR Part 170

Air traffic control.

The Amendment

In consideration of the foregoing, the FAA is adding part 170 to chapter I of the Code of Federal Regulations to read as follows:

PART 170—ESTABLISHMENT AND DISCONTINUANCE CRITERIA FOR AIR TRAFFIC CONTROL SERVICES AND NAVIGATIONAL FACILITIES

Subpart A—General

Sec.

170.1 Scope.
170.3 Definitions.

Subpart B—Airport Traffic Control Tower

170.11 Scope.
170.13 Airport Traffic Control Tower (ATCT) Establishment Criteria.
170.15 ATCT Discontinuance Criteria.

Authority: 49 U.S.C. 1343, 1346, 1348, 1354(a), 1355, 1401, 12421, 1422 through 1430, 1472(c), 1502, and 1522; 49 U.S.C. 106(g).

Subpart A—General

§ 170.1 Scope.

This subpart sets forth establishment and discontinuance criteria for navigation aids operated and maintained by the United States.

§ 170.3 Definitions.

For purposes of this subpart—

Air navigation facility (NAVAID) means any facility used, available for use, or designated for use in the aid of air navigation. Included are landing areas; lights; signaling, radio direction-finding, or radio or other electronic communication; and any other structure or mechanism having a similar purpose of guiding or controlling flight or the landing or takeoff of aircraft.

Air traffic clearance means an authorization by air traffic control for an aircraft to proceed under specified traffic conditions within controlled airspace for the purpose of preventing collision between known aircraft.

Air traffic control (ATC) means a service that promotes the safe, orderly, and expeditious flow of air traffic, including airport, approach, departure, and en route air traffic control.

Air traffic controller means a person authorized to provide air traffic service, specifically en route and terminal control personnel.

Aircraft operations means the airborne movement of aircraft in controlled or noncontrolled airport terminal areas, and counts at en route fixes or other points where counts can be made. There are two types of operations: local and itinerant.

(1) *Local operations* mean operations performed by aircraft which:

(i) Operate in the local traffic pattern or within sight of the airport;

(ii) Are known to be departing for, or arriving from flight in local practice areas located within a 20-mile radius of the airport; or

(iii) Execute simulated instrument approaches or low passes at the airport.

(2) *Itinerant operations* mean all aircraft operations other than local operations.

Airport traffic control tower means a terminal facility, which through the use of air/ground communications, visual signaling, and other devices, provides ATC services to airborne aircraft operating in the vicinity of an airport and to aircraft operating on the airport area.

Alternate airport means an airport, specified on a flight plan, to which a flight may proceed when a landing at the point of first intended landing becomes inadvisable.

Approach means the flightpath established by the FAA to be used by aircraft landing on a runway.

Approach control facility means a terminal air traffic control facility providing approach control service.

Arrival means any aircraft arriving at an airport.

Benefit-cost ratio means the quotient of the discounted life cycle benefits of an air traffic control service or navigation aid facility (i.e., ATCT) divided by the discounted life cycle costs.

Ceiling means the vertical distance between the ground or water and the lowest layer of clouds or obscuring phenomena that is reported as "broken," "overcast," or "obstruction."

Control Tower—See Airport Traffic Control Tower.

Criteria means the standards used by the FAA for the determination of establishment or discontinuance of a service or facility at an airport.

Departure means any aircraft taking off from an airport.

Discontinuance means the withdrawal of a service and/or facility from an airport.

Establishment means the provision of a service or facility at a candidate airport.

Instrument approach means a series of predetermined maneuvers for the orderly transfer of an aircraft under instrument flight conditions from the beginning of the initial approach to a landing, or to a point from which a landing may be made visually. It is prescribed and approved for a specific airport by competent authority.

Instrument flight rules (IFR) means rules governing the procedures for conducting flight under instrument meteorological conditions (IMC) instrument flight.

Instrument landing system (ILS) means an instrument landing system whereby the pilot guides his approach to a runway solely by reference to instruments in the cockpit. In some instances, the signals received from the ground can be fed into the automatic pilot for automatically controlled approaches.

Instrument meteorological conditions (IMC) means weather conditions below the minimums prescribed for flight under Visual Flight Rules (VFR).

Instrument operation means an aircraft operation in accordance with an IFT flight plan or an operation where IFR separation between aircraft is provided by a terminal control facility or air route traffic control center (ARTCC).

Life cycle benefits means the value of services provided to aviation users over the life span of a facility or service.

Life cycle costs means the value of research and development costs, investment costs, operation costs, maintenance costs, and termination costs over the life span of a facility or service.

LORAN-C means an electronic navigational system by which hyperbolic lines of position are determined by measuring differences in

time of reception of synchronized pulse signals from two fixed transmitters.

Maintenance costs means the costs incurred in servicing and maintaining a facility after establishment.

Mean sea level (MSL) means the base commonly used in measuring altitudes.

Microwave landing system (MLS) means a landing system which enables equipped aircraft to make curved and closely spaced approaches to properly instrumented airports.

Noncommercial traffic means all aircraft operations that are conducted free of compensation.

Nonprecision approach procedure means an FAA standard for approaching an IFR runway where no electronic glide slope is available.

Nonscheduled commercial service means the carriage by aircraft in air commerce of persons or property for compensation or hire that are not operated in regularly scheduled service such as charter flights.

Present value (PV) means the value of a stream of future benefits or costs that are discounted to the present.

PVB or *BPV* means the discounted value of life cycle benefits.

PVC or *CPV* means the discounted value of life cycle benefits.

PVCM or *CMPV* means the discounted value of operations and maintenance costs less termination costs over a facility's remaining life cycle.

Runway means a defined rectangular area on a land airport prepared for the landing and takeoff of aircraft along its length.

Runway visual range means an instrumentally derived value based on standard calibrations that represent the horizontal distance a pilot will see down the runway from the approach end.

Scheduled commercial service means the carriage by aircraft in air commerce under Parts 121, 127, and 135 of persons or property for compensation or hire based on published flight schedules.

Separation means the spacing of aircraft in flight and while landing and taking off to achieve their safe and orderly movement.

Takeoff clearance means authorization by an airport traffic control tower for an aircraft to take off.

Tower cab means an ATC facility located at an airport. Controllers at these facilities direct ground traffic, takeoffs, and landings.

Traffic advisories means advisories issued to alert pilots to other known or observed air traffic which may be in such proximity to the position or intended route of flight of their aircraft to warrant attention.

Traffic pattern means the flow of aircraft operating on and in the vicinity of an airport during specified wind conditions as established by appropriate authority.

VFR traffic means aircraft operated solely in accordance with Visual Flight Rules.

Visual flight rules (VFR) means rules that govern the procedures for conducting flight under visual conditions. The term "VFR" is also used in the United States to indicate weather conditions that are equal to or greater than minimum VFR requirements. In addition, "VFR" is used by pilots and controllers to indicate the type of flight plan.

Visual meteorological conditions (VMC) means meteorological conditions expressed in terms of visibility, distance from clouds, and ceiling equal to or better than specified minima.

Subpart B—Airport Traffic Control Towers

§ 170.11 Scope.

This subpart sets forth establishment and discontinuance criteria for Airport Traffic Control Towers.

§ 170.13 Airport Traffic Control Tower (ATCT) Establishment Criteria.

(a) The following criteria along with general facility establishment standards must be met before an airport can qualify for an ATCT:

(1) The airport, whether publicly or privately owned, must be open to and available for use by the public as defined in the Airport and Airway Improvement Act of 1982;

(2) The airport must be recognized by and contained within the National Plan of Integrated Airport Systems;

(3) The airport owners/authorities must have entered into appropriate assurances and covenants to guarantee that the airport will continue in operation for a long enough period to permit the amortization of the ATCT investment;

(4) The FAA must be furnished appropriate land without cost for construction of the ATCT; and

(5) The airport must meet the benefit-cost ratio criteria specified herein utilizing three consecutive FAA annual counts and projections of future traffic during the expected life of the tower facility. (An FAA annual count is a fiscal year or a calendar year activity summary. Where actual traffic counts are unavailable or not recorded, adequately documented FAA estimates of the scheduled and nonscheduled activity may be used.)

(b) An airport meets the establishment criteria when it satisfies paragraphs (a)(1) through (a)(5) of this section and its benefit-cost ratio equals or exceeds one. As defined in § 170.3 of this part, the benefit-cost ratio is the ratio of the present value of the ATCT life cycle benefits (BPV) to the present value of ATCT life cycle costs (CPV).

$$BPV/CPV \geq 1.0$$

(c) The satisfaction of all the criteria listed in this section does not guarantee that the airport will receive an ATCT.

§ 170.15 ATCT Discontinuance Criteria.

An ATCT will be subject to discontinuance when the continued operation and maintenance costs less termination costs (CMPV) of the ATCT exceed the present value of its remaining life-cycle benefits (BPV):

$$BPV/CMPV < 1.0$$

Issued in Washington, DC on December 26, 1990.

James B. Busey,

Administrator.

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