

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Administrative & Civil Law Notes

The Changing Definition of Unit Prices: Another Blow to the Government's Efforts to Keep the Public Informed?

On 30 September 1997, "the Civilian Agency Acquisition Council and the Defense Acquisitions Regulations Council issued a final rule revising Part 15¹ of the FAR [Federal Acquisition Regulation]."² Among other changes, the pertinent revisions affected FAR sections 15.503(b)(1) and 15.506(d)(2), which govern post-award notification of unsuccessful offerors and the required content of post-award debriefings for unsuccessful offerors, respectively. The 1997 FAR revisions specifically added "unit prices" to the list of information that must be disclosed following the award of a government contract.³

The revisions appeared to send a clear message to the contracting community: for contracts solicited on or after 1 January 1998,⁴ "unit prices of each award are to be disclosed to unsuccessful offerors during the post award notice and, most

importantly, are also to be made publicly available upon request."⁵ While the Department of Defense (DOD) previously required agencies to provide submitters with notice of an agency's intent to disclose a contract's future year pricing, the change to the FAR removed "any confusion about unit prices; they are not proprietary information after contract award, and accordingly, cannot be withheld from disclosure under the FOIA by exemption (b)(4)."⁶ The United States Court of Appeals for the District of Columbia's decision in *McDonnell Douglas v. NASA*,⁷ however, provided the government with the opportunity to reassess its interpretations of the FAR's revisions.

In *McDonnell Douglas* the court agreed with the parties that the law required the release of the total contract price, but was less than charitable toward the government's posture on the disclosure of specific line-item price information. Before analyzing the facts of the case, the court chided the Department of Justice (DOJ) for instructing agencies to treat "most" contractor submitted information as "required,"⁸ thereby warranting analysis and disposition under the *National Parks* test⁹ rather than

1. U.S. DEP'T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, NEW DECISION RULE ADOPTED FOR UNIT PRICES, XVIII FOIA UPDATE 4, at 1 (Fall 1997) [hereinafter XVIII FOIA UPDATE 4]. The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council are the joint proponents of the FAR. *Id.*

2. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION pt. 15 (June 1997) [hereinafter FAR].

3. 48 C.F.R. § 15.503(b)(1)(iv) (LEXIS 2001).

(b) Postaward Notice. (1) [W]ithin 3 days after the date of contract award, the contracting officer shall provide written notification to each offeror whose proposal was in the competitive range but was not selected for award. The notice shall include . . .

(iv) The items, quantities and any stated unit prices of each award. If the number or other factors makes listing any stated unit price impracticable at that time, only the total current price need be furnished in the notice. However, the items, quantities, and any stated unit prices of each award shall be made publicly available, upon request. . . .

Id. Section 15.506, which governs the content of postaward debriefings, was also amended to include a reference to "unit prices": "(d) At a minimum, the debriefing information shall include . . . (2) The overall evaluated cost or price (including unit prices), and technical rating, if applicable, of the successful offeror and the debriefed offeror." *Id.* § 15.506(d)(2).

4. 1 January 1998 was the effective date of the 1997 FAR rewrite. *Id.*

5. XVIII FOIA UPDATE 4, *supra* note 1, at 1.

6. Memorandum, Office of the Assistant Sec'y of Def., subject: Release of Unit Prices in Awarded Contracts (8 Feb. 1998), available at <http://www.defenselink.mil/pubs/foi/unitprices.pdf>, at 3. This memorandum requires contracting officers to provide submitter notice in the case of contracts solicited before 1 January 1998; however, "submitter notification is not required for the release of unit prices or other items indicated in the change" to the FAR for any contract solicited after the effective date of the changes. *Id.*

7. *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303 (D.C. Cir. 1999).

8. *Id.* at 306. The court did not discuss whether this "policy" contravened legislation requiring publication and public notice for all policies affecting government procurements. See 41 U.S.C.S. § 418b (LEXIS 2001).

9. *Nat'l Parks Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In *National Parks*, the court outlined a test to determine whether information submitted to the government merited protection as "confidential" commercial or financial information under FOIA Exemption 4, 5 U.S.C.S. § 552(b)(4) (LEXIS 2001). The *National Parks* test, which consists of two disjunctive prongs, provides Exemption 4 protection to information the disclosure of which would impair the government's future ability to obtain necessary information or cause substantial harm to the competitive position of the submitter. *Nat'l Parks Ass'n*, 498 F.2d at 770.

the *Critical Mass* test.¹⁰ The court then summarily accepted McDonnell Douglas's assertions that disclosure of line-item prices would "permit its commercial customers to bargain down ('ratchet down') its prices more effectively, and it would help . . . competitors to underbid it."¹¹ While the court broached the question of whether independent legal authority may exist to support disclosure of line-item prices, it noted that the government did not "claim that it or NASA has any" such authority.¹²

Nonetheless, the DOJ's post-*McDonnell Douglas* position was clear: "[s]uch 'legal authority' can be found in the FAR."¹³ Viewing the *McDonnell Douglas* decision as a "case-specific, record-specific" holding, the DOJ did not advocate a change to the government's commitment to disclose unit prices.¹⁴ Instead, DOJ's 24 February 2000 guidance proposed two separate analytical frameworks: one for contracts affected by the 1997 FAR revisions, and another for all other contracts. "For all contracts subject to the revised FAR Part 15, agencies should rely upon the FAR as mandatory authority to disclose unit prices. In such cases . . . no submitter notice"¹⁵ is necessary.

"For any contracts not subject to the revised FAR provision . . . [a]gencies should analyze . . . as they have always done, looking to see whether in fact it is likely that a competitor could ascertain from the unit prices any proprietary information (such as profit, or actual costs, etc.) that would permit underbidding."¹⁶ The DOJ did not believe that *McDonnell Douglas* altered the definition of competitive harm outlined in *CNA Finance Corp. v. Donovan*¹⁷ or the requirement for competitive harm outlined in *National Parks*.¹⁸

Thereafter, the DOD Directorate for Freedom of Information and Security Review (DFISR) reiterated its commitment to the release of unit price information and asserted that *McDonnell Douglas* "has no effect on the change to the FAR . . . DoD policy has not changed as a result of this decision."¹⁹ Despite the court's ruling in *McDonnell Douglas*, the government continued to view the FAR's disclosure provisions as independent authority to release contractors' unit prices.²⁰ Numerous prior decisions defending agency mandates to disclose unit prices appeared to fortify the DOJ and DOD positions.²¹ In short, because it had long been established that the disclosure of

10. *Critical Mass Energy Project v. Nat'l Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993). The *Critical Mass* court established an alternative to the *National Parks* test for information voluntarily provided by submitters to the government. The only material concern of the *Critical Mass* test is whether the voluntarily submitted information is customarily made available to the public. If the submitter would not customarily share the information with a competitor, the information may be withheld under FOIA Exemption 4. *Id.* at 872.

11. *McDonnell Douglas*, 180 F.3d at 306. McDonnell Douglas believed disclosure "would allow competitors to calculate its actual costs with a high degree of precision." *Id.*

12. *Id.* The court's opinion includes no indication that the government even hinted that the FAR provided the questioned legal authority. *See id.* This seems curious given that the case was argued on 6 May 1999, more than sixteen months after the 1997 FAR revisions became effective.

13. U.S. DEP'T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, JUSTICE DEPARTMENT GUIDE TO THE FREEDOM OF INFORMATION ACT 217 (2000) [hereinafter FOIA GUIDE].

14. Memorandum, Dep't of Justice, Office of Info. and Privacy, subject: Unit Price FOIA Officers Conference (24 Feb. 2000) [hereinafter Unit Price FOIA Officers Conference Memorandum], available at <http://www.defenselink.mil/pubs/foi/unitprices.pdf>. The Justice Department advised agencies that the *McDonnell Douglas* decision articulated a new interpretation of the *National Parks*'—substantial competitive harm analysis, focusing on "other sort[s] of economic harm" rather than "competitive" harm. *Id.*

15. *Id.* para. 5a.

16. *Id.* para. 5b.

17. *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987). "This criterion has been interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury." *Id.* at 1152 (citing *Gulf & W. Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979); *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976)).

18. Unit Price FOIA Officers Conference Memorandum, *supra* note 14, para. 5.

19. Memorandum, DOD DFISR, subject: DOD Policy Concerning Release of Unit Prices Under the FOIA (3 Mar. 2000) [hereinafter DOD Policy Concerning Release of Unit Prices Under the FOIA], available at <http://www.defenselink.mil/pubs/foi/unitprices.pdf>.

20. Because protection under FOIA Exemption 4 "is vitiated if the information is publicly available elsewhere, all unit prices of successful offerors that are required to be disclosed under the FAR should not be considered to fall under Exemption 4." FOIA GUIDE, *supra* note 13, at 218 (citing XVIII FOIA UPDATE, 4, *supra* note 1, at 1; U.S. DEP'T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, V FOIA UPDATE 4, at 4 (Fall 1984); U.S. DEP'T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, VII FOIA UPDATE 1, at 6 (Winter 1986)).

21. *See, e.g.*, *Pac. Architects & Eng's, Inc. v. U.S. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1999) ("unit price rates" may be disclosed as they are made up of a number of fluctuating variables); *Acumenics Research & Tech. v. U.S. Dep't of Justice*, 843 F.2d 800, 808 (4th Cir. 1988) (too many unascertainable variables in the unit price calculation to warrant protection); *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (disclosure of unit prices required, including component and configuration prices).

“prices charged the Government is a cost of doing business with the government,”²² the government viewed *McDonnell Douglas* as an anomaly.

A year later, the District Court for the District of Columbia’s decision in *Mallinckrodt v. West*²³ shook the government’s “unit price” posture again. In *Mallinckrodt*, the court dissected the government’s conclusion that all contractor submissions were “required”²⁴ and examined the government’s characterization of “unit price.” The court distinguished items that a contractor “must” submit from those that the contractor “should” submit,²⁵ concluding that it was inappropriate for the government to include voluntarily submitted “rebates and incentives” within a contract’s “unit price.”²⁶ The court’s conclusion, which did little to clarify the definition of “unit price,” was another blow to the government’s effort to disclose contract prices.

The government was still evaluating how to respond to *Mallinckrodt* when it was stung again in the most recent “unit price” case. On 7 September 2001, the District Court for the District of Columbia issued its ruling in the consolidated cases of *MCI Worldcom, Inc. v. General Services Administration and Sprint Communications Co. v. General Services Administra-*

tion.²⁷ In late April 2000, after learning that a competitor had requested their “confidential” data, MCI Worldcom and Sprint filed actions to enjoin the General Services Administration (GSA) from disclosing their price information.²⁸ The plaintiffs’ concern was the government’s decision to release all of the “B-Tables”²⁹ plaintiffs had submitted in their successful bids for two multi-year long distance telecommunications contracts. The court found that the government’s decision to release the information was “arbitrary and capricious because it violate[d] applicable statutes, regulations and case law”³⁰ and granted the plaintiffs’ motions.

First, the court evaluated whether the B-Tables were “unit prices.” The government, relying “exclusively” on the language of FAR sections 15.503 and 15.506, “interpreted the FAR to require disclosure of Plaintiffs’ B-Tables.”³¹ The court recognized that neither the FAR nor case law provided a standard definition of “unit price.”³² Even under the definition proffered by the government,³³ however, the court held that “Plaintiffs’ B-Tables do not constitute unit price information.”³⁴ Furthermore, the court determined that the agency’s very characterization of the B-Tables as “unit prices” was categorically wrong.³⁵ The B-Tables, which “specify millions of pricing elements and

22. *Racal-Milgo Gov’t Sys. v. Small Bus. Admin.*, 559 F. Supp. 2d 4, 6 (D.D.C. 1981).

23. *Mallinckrodt v. West*, 140 F. Supp. 2d 1 (D.D.C. 2000).

24. Hence, triggering the application of the *National Parks* test, *supra* note 9, to any “confidentiality” determination, should one be necessary. *See also supra* notes 9-11 and accompanying text.

25. *Mallinckrodt*, 140 F. Supp. 2d at 13 (citing *McDonnell Douglas v. NASA*, 180 F.3d 303, 306 (D.C. Cir. 1999)) (outlining the court’s disfavor of the government’s efforts to characterize all contractor submissions as required).

26. *Id.* at 11.

27. *MCI Worldcom, Inc. v. Gen. Servs. Admin., Sprint Communications Co. v. Gen. Servs. Admin.*, Nos. 00-914 and 00-915, consolidated slip op. (D.D.C. Sept. 7, 2001) [hereinafter *MCI Worldcom v. GSA*].

28. *Id.* at 2.

29. “B-Tables” are detailed pricing schedules which are comprised of

complex matrices in computer data base format that contain detailed line-item pricing information. In particular, the B-Tables contain a “break-down” of the price of every call, transmission or service into its component parts. There are separate B-Tables for each of the eight years of the FTS2001 Contracts, and together the B-Tables total tens of thousands of pages of pricing data for all services and features to be provided to the Government under the FTS2001 Contracts.

Id. at 3 (citation omitted).

30. *Id.* at 20-21.

31. *Id.* at 8.

32. *Id.* at 8 (citing *Acumentics Research & Tech. v. U.S. Dep’t of Justice*, 843 F.2d 800, 802 n.1 (4th Cir. 1988); *United States for Use and Benefit of Sanford v. Cont. Cas. Co.*, 293 F. Supp. 816, 822 (N.D. Miss 1968)).

33. *Id.* at 9. The GSA advocated “a definition of unit price that is ‘the amount of public funds the government pays for its goods and services.’” *Id.* Because the *Mallinckrodt* court had recently posited that a “unit price is the amount of public funds the government must pay for goods and services, *Mallinckrodt v. West*, 140 F. Supp. 2d 1, 11 (D.D.C. 2000), it was logical for the GSA to urge the adoption of a nearly identical definition.

34. *Id.* at 9.

pricing components that make up the individual calls or transmissions sold to the government,”³⁶ are primarily line-item pricing information. Consequently, the court held that “line-item pricing information similar to that at issue here is exactly the type of information that constitutes ‘confidential commercial or financial information,’ and is not disclosable in response to a FOIA request.”³⁷ The court “conclude[d] that Plaintiffs’ B-Tables contain confidential information falling within FOIA Exemption 4 and therefore is protected from disclosure under the Trade Secrets Act.”³⁸

The court added that “[e]ven assuming *arguendo* that the B-Tables do contain ‘unit price’ information, no reasonable reading of FAR §§ 15.503 and 15.506 would permit their disclosure.”³⁹ Although the government asserted that the 1997 FAR revisions “mandated” disclosure of the information,⁴⁰ the court reported that the GSA’s interpretation of the FAR merited no more than minimal deference.⁴¹ Moreover, the court ruled that the GSA’s reading of the FAR was far too narrow, focusing “exclusively on those portions . . . that require ‘unit price’ information to be disclosed” and ignoring “the fact that both FAR provisions also expressly prohibit the use of information that is

confidential, trade secret, or otherwise exempt under FOIA Exemption 4.”⁴² Instead, the court reasoned, the focus should return to the “underlying statute authorizing the FAR, namely the Federal Property and Administrative Services Act,”⁴³ because the FAR “may not be interpreted in a way that contravenes this statutory prohibition on disclosure.”⁴⁴

The court also highlighted other shortcomings it perceived in the government’s case. First, the court discussed the government’s arbitrary and capricious departure from its position “in another case involving nearly identical pricing information, [where the] GSA argued and prevailed on the theory that Sprint’s B-Table did *not* constitute ‘unit prices.’”⁴⁵ Next, the court asserted that the government acted arbitrarily⁴⁶ by failing to follow its own FOIA regulations,⁴⁷ which require submitter notice.⁴⁸ Finally, the court noted the unexplained change in the government’s disclosure policy.⁴⁹ The government “acknowledged that its decision to release all pricing data for *future* years differed from its previous long-standing policy and practice of disclosing only *current*-year prices.”⁵⁰ Given the government’s “failure to explain its reversal, the court concluded that

35. *Id.* at 11. Indeed, the information contained in the B-Tables more closely resembles “cost-breakdowns,” which are specifically prohibited from disclosure by every FAR provision relied upon by GSA. *Id.* at 9 (citing FAR, *supra* note 2, § 15.503(b)(1)(v) (LEXIS 2001)).

36. *Id.* at 9 (citing FAR, *supra* note 2, § 15.503(b)(1)(v)).

37. *Id.* at 15 (citing *McDonnell Douglas v. NASA*, 180 F.3d 303, 306 (D.C. Cir. 1999)).

GSA ignores the fact that both FAR provisions also expressly prohibit the release of information that is confidential, trade secret, or otherwise exempt under FOIA Exemption 4. *See also* 48 C.F.R. § 15.503(b)(v) (“In no event shall an offeror’s cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.”); 48 C.F.R. § 15.506 (“the debriefing shall not reveal any information . . . exempt from release under the Freedom of Information Act, 5 U.S.C. § 552, including trade secrets; . . . and . . . (3) commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information . . .”).

Id. at 12.

38. *Id.*

39. *Id.* at 11.

40. *Id.* at 5.

41. *Id.* at 6. Agencies’ interpretations of their own regulations are entitled to considerable deference, but the FAR “is not written or prepared by GSA, but rather is a joint product of several agencies.” *Id.*

42. *Id.* at 12. The court returned to the “pricing composition” theme outlined in *Mallinckrodt* and declared that “the unmistakable meaning of FAR §§ 15.503 and 15.506 is that unit price information may be disclosed, but only insofar as it does not consist of trade secrets, confidential business information, or is otherwise exempt from disclosure under the FOIA, Exemption 4.” *Id.* at 13.

43. *Id.* at 12 (citing 41 U.S.C. § 253b (2000), *as amended* by the Federal Acquisition Streamlining Act of 1994 (FASA), 41 U.S.C. § 253b(e)(3)).

44. *Id.* at 12, 13 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1975)).

45. *MCI Worldcom v. GSA*, *supra* note 27, at 10 (citing *Cohen, Dunn & Sinclair, P.C. v. Gen. Servs. Admin.*, No. 92-0057-A, 1992 U.S. Dist. LEXIS 21730 (E.D. Va. Sept. 10, 1992)).

46. *Id.* at 19.

its decision to disclose Plaintiffs' B-Tables was arbitrary and capricious."⁵¹

It is too early to determine whether the one-two-three punch of *McDonnell Douglas–Mallinckrodt–MCI Worldcom* has ended the government's effort to disclose all unit prices. What is certain is that the *MCI Worldcom* decision will change the manner in which DOD contracting officials manage FOIA requests for unit prices and unit price information.

The DOJ has not yet discussed its position on unit price disclosure. Nonetheless, the DOD DFISR promptly issued a policy change on 28 September 2001.⁵² The *MCI Worldcom* decision "has resulted in a change in the guidance concerning the release of unit prices issued by this Directorate on March 3, 2000."⁵³ The message advises that "submitter notification, in accordance with Executive Order 12,600, should be made whenever an agency receives a FOIA request for documents that contain unit prices. Accordingly, depending upon submit-

ter's response, the release of unit prices should be made on a case-by-case basis."⁵⁴ This new policy apparently impacts all requests for unit price information, regardless of the contract type. While this new approach may be appropriate for cases like *MCI Worldcom*, in which complex unit price information exists, the policy also seems to apply to far simpler single-price, single-object procurements.

The case-by-case analysis advocated in DOD's 28 September 2001 policy may be the safest and best approach to the disclosure of unit prices. This policy appears to permit the continued distinction between the types of potential economic harms alleged by submitters. For example, in cases where there is a clear "showing of actual competition and a likelihood of substantial competitive injury,"⁵⁵ the agency can rely upon the competitive harm prong of the *National Parks* test⁵⁶ to withhold unit prices. On the other hand, in cases where the potential economic injury flows from the affirmative use of proprietary information by someone other than a competitor, the agency

47. The GSA's FOIA procedures are outlined in 41 C.F.R. § 105-60.405 (LEXIS 2001).

(d) Procedural requirements -- consultation with the submitter. (1) If GSA receives a FOIA request for potentially confidential commercial information, it will notify the submitter immediately by telephone and invite an opinion whether disclosure will or will not cause substantial competitive harm.

....

(3) If the submitter indicates an objection to disclosure GSA will give the submitter seven workdays from receipt of the letter to provide GSA with a detailed written explanation of how disclosure of any specified portion of the records would be competitively harmful.

....

(6) GSA will review the reasons for nondisclosure before independently deciding whether the information must be released or should be withheld. If GSA decides to release the requested information, it will provide the submitter with a written statement explaining why his or her objections are not sustained. The letter to the submitter will contain a copy of the material to be disclosed or will offer the submitter an opportunity to review the material in none of GSA's offices. If GSA decides not to release the material, it will notify the submitter orally or in writing.

Id.

48. Agencies frequently receive FOIA requests for previously submitted commercial information that may be considered "confidential" by the submitter. Executive Order 12,600 requires all executive branch departments and agencies to establish and publish "predisclosure notification procedures which will assist agencies in developing adequate administrative records." FOIA GUIDE, *supra* note 13, at 652 (citing 3 C.F.R. § 235 (1988)). Under these procedures, agencies are generally required to notify submitters of the potential disclosure of "confidential" information. The agency must consider the submitter's response before the agency determines whether release is appropriate. This process is commonly referred to as "submitter notice." Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (July 23, 1987), *reprinted in* U.S. DEP'T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, VIII FOIA UPDATE 2, at 2-3 (Summer 1987); *see also* 3 C.F.R. § 235 (1988), *reprinted in* 5 U.S.C. § 552 (1994). The FOIA procedures for individual agencies are generally published in the Code of Federal Regulations.

49. *MCI Worldcom v. GSA*, *supra* note 27, at 19.

50. *Id.* at 4. The contracts also included clauses providing that the government's disclosures were limited to current year contract prices. *Id.* at 19 n.2.

51. *Id.* at 19.

52. E-mail from Jim Hogan, Deputy Chief, DOD DFISR, to Barbara Thompson, Marine Corps, et al., subject: FOIA Requests for Unit Prices (Sept. 28, 2001, 08:27 EST) [hereinafter DOD DFISR Interim Guidance] (on file with author).

53. *Id.* (citing DOD Policy Concerning Release of Unit Prices Under the FOIA, *supra* note 19).

54. *Id.*

55. *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987).

56. *See supra* note 9.

could continue to follow the DOJ's 24 February 2000 guidance.⁵⁷ Even in the absence of clear competitive harm, however, compliance with the submitter notice requirements of Executive Order 12,600⁵⁸ appears prudent.

It appears that the *McDonnell Douglas* court's tacit approval of the "ratcheting-down" concept⁵⁹ may have laid the foundation for a new methodology to withhold unit price information under Exemption 4. Contrary to DOJ's earlier belief that *McDonnell Douglas* did not affect the competitive harm prong of the *National Parks*⁶⁰ test,⁶¹ the District of Columbia District Court's recognition of this "ratcheting-down" concept in *MCI Worldcom*⁶² appears to be a step in that direction.⁶³

The impact of *MCI Worldcom* is yet uncertain. It is certain, however, that DOJ will carefully evaluate whether it will appeal the *MCI Worldcom* decision.⁶⁴ Given the *McDonnell Douglas–Mallinkrodt–MCI Worldcom* decisions, it is even more certain that Congress will closely review the perceived broadening of Exemption 4 to include potential economic injury from someone other than a competitor. Major Tuckey.

New Interim Rules Implement the Expanded K Visas for Spouses of U.S. Citizens and Their Children

The Immigration and Naturalization Service (INS), on 14 August 2001, finally published interim rules⁶⁵ implementing section 1103 of the Legal Immigration Family Equity (LIFE) Act enacted by Congress on 21 December 2000.⁶⁶ Section 1103 created a new immigration classification for alien⁶⁷ spouses of U.S. citizens and their children,⁶⁸ allowing them to enter the United States on a nonimmigrant K visa.⁶⁹ Legal assistance attorneys, especially those practicing overseas, should take particular note of this new visa classification, as it allows a service member's alien spouse and children to travel to the United States without waiting for an immigrant visa.⁷⁰

Before the LIFE Act, a service member who married a non-U.S. citizen overseas had to petition for an immigrant visa to allow the alien spouse and any children to enter the United States. The alien spouse "frequently [waited for as long as a] year for the [INS] to approve the initial petition and the Department of State to issue the immigrant visa."⁷¹ This led to extended separations of military families when the service member transferred to the United States before the alien spouse received an immigrant visa.⁷²

57. See Unit Price FOIA Officers Conference Memorandum, *supra* note 14; see also *supra* notes 14-18 and accompanying text.

58. Exec. Order 12,600, 52 Fed. Reg. 23,781 (July 23, 1987).

59. *McDonnell Douglas v. NASA*, 180 F.3d 303, 306 (D.C. Cir. 1999).

60. See *supra* note 9.

61. See Unit Price FOIA Officers Conference Memorandum, *supra* note 14.

62. *MCI Worldcom v. GSA*, *supra* note 27, at 17-18.

63. The courts could determine that a submitter is indirectly disadvantaged *vis-à-vis* its competitors any time the submitter's commercial customers "leverage" disclosed "unit price information" to lower the submitter's commercial rates. The case law's requirement for "both a showing of actual competition and a likelihood of substantial competitive injury," *CNA Fin. Corp.*, 830 F.2d 1132, 1152 (D.C. Cir. 1987), may be satisfied whenever a submitter is "required" to disclose information that may be used to the submitter's detriment.

64. According to the DOD DIFSR's interim guidance, the DOJ's Office of Information and Privacy "will issue further guidance concerning the release of unit prices" once it determines whether the government will appeal the *MCI Worldcom* court's decision. DOD DFISR Interim Guidance, *supra* note 52.

65. See 66 Fed. Reg. 42,587 (Aug. 14, 2001) (to be codified at 8 C.F.R. pts. 212, 214, 245, 248, and 274a).

66. Pub. L. No. 106-553, 114 Stat. 2762 (2000) (codified at 8 U.S.C. §§ 1101(a)(15)(K), 1255, 1184, 1186a (2000)).

67. As defined in 8 U.S.C. § 1101(a)(3), the term "alien" means "any person not a citizen or national of the United States."

68. Children must be under twenty-one years of age and unmarried to meet the definition of "child." See *id.* § 1101(b)(1).

69. This nonimmigrant classification status is known as the "K visa" because it is found at subsection 101(15)(K) of the Immigration and Naturalization Act, codified at 8 U.S.C. § 1101(a)(15)(K).

70. See 66 Fed. Reg. at 42,587, para. I.A.

71. *Id.*

72. See *id.*

The LIFE Act expanded the K visa nonimmigrant status to address family separations. The K visa originally allowed the fiancée of a U.S. citizen and the minor children of the fiancée to enter the United States in a nonimmigrant status solely for the purpose of concluding a valid marriage with the U.S. citizen within ninety days after entry.⁷³ The LIFE Act extended the K visa nonimmigrant status to alien spouses and their children, thus expediting their entry into the United States.

To take advantage of the new K visa, the service member citizen must first file a Petition for Alien Relative, Form I-130, with the INS on the alien spouse's behalf to begin the immigration process.⁷⁴ The service member must also file a Form I-129F, Petition for Alien Fiancée, to obtain a nonimmigrant K visa for the spouse and children.⁷⁵ Generally, both applications require a fee.⁷⁶ Once the INS approves the I-129F petition, they inform the American consulate in the country where the marriage took place.⁷⁷ The alien spouse must then apply for a nonimmigrant K visa in that country.⁷⁸ If legal assistance attorneys are involved in the visa process early, they should ensure that the service member client is aware that if the marriage occurs overseas, the alien spouse must apply for the nonimmigrant K visa in the country where the marriage took place. This requirement could prove onerous to those couples who marry in a different country than the country they are living in.

After the alien spouse and children obtain their K visa, they may enter the United States for two years.⁷⁹ Aliens admitted to the United States as nonimmigrant K visa holders are autho-

riized to work once they have an approved Form I-765, Application for Employment Authorization.⁸⁰

Legal assistance attorneys who have clients applying for a K visa must inform them that, once the alien spouse and children enter the United States, they should immediately apply to adjust their status to that of permanent resident alien. Alien spouses may apply for permanent resident status by filing a Form I-485, Application for Adjustment to Permanent Residence, with the INS.⁸¹ Those who have been married for less than twenty-four months when they enter the United States may only be granted conditional permanent resident status.⁸² Legal assistance attorneys need to remind their clients that the spouse who receives conditional permanent resident status must apply for removal of the conditional status "within the ninety-day period immediately preceding the second anniversary of the date on which the alien obtained conditional permanent residence."⁸³ Absent good cause, failure to apply for removal of the condition in a timely manner will result in the automatic termination of the alien's lawful status in the United States.⁸⁴

The immigration process can be complicated. Legal assistance attorneys need to be familiar with immigration processing requirements to assist service members who marry non-U.S. citizens overseas. In particular, the legal assistance attorney must understand the new LIFE Act amendments that expedite the process by which a service member's alien spouse and children may enter the United States. Consequently, legal assistance attorneys, particularly overseas, should take the initiative

73. 8 U.S.C. § 1101(a)(15)(K)(i).

74. 66 Fed. Reg. at 42,588, para. II.A. A Petition for Alien Relative, Form I-130, requests the INS to classify the alien spouse as an immediate relative for immigration purposes. 8 C.F.R. § 204.1 (LEXIS 2001).

75. Before implementation of the LIFE Act rules, "K" nonimmigrants were designated as "K-1" for the fiancée of a U.S. citizen, and "K-2" for their children. For consistency, the INS decided not to change the original classification designations. Therefore, U.S. citizen spouses and children are designated as "K-3" and "K-4," respectively. See 66 Fed. Reg. at 42,588, para. I.C. Applications for K-3/K-4 status must be sent to Immigration and Naturalization Service, P.O. Box 7218, Chicago, IL 60680-7218. The Form I-129F is a temporary solution. The INS plans to design a new form; however, because LIFE is already in effect and a process was needed to implement it immediately, the INS is using Form I-129F until further notice. Applicants are cautioned not to fill out section (B)(18) and (B)(19) of the form. See *id.* at 42,589, para. II.B.

76. Form I-130 requires a fee of \$110 and Form I-129F requires a fee of \$95. Immigration judges may waive the fees of any case under their jurisdiction if the alien can substantiate that he is unable to pay the prescribed fee. 8 C.F.R. § 103.7(b)-(c).

77. 66 Fed. Reg. at 42,589, para. II.B.

78. 8 U.S.C. § 1184(p)(2). To obtain the K visa, the alien spouse must file a Nonimmigrant Visa Application, Form OF-156. 22 C.F.R. § 41.103 (LEXIS 2001). The spouse must also submit a Form I-693, Medical Examination, when the spouse appears at the consulate to apply for the K visa from the State Department. *Id.* § 41.108.

79. Or, in the case of a child, until they reach their twenty-first birthday, whichever is shorter. See 66 Fed. Reg. at 42,589, para. II.C (to be codified at 8 C.F.R. § 214.2(k)(8)).

80. 8 C.F.R. § 274a.12(a)(6). The Application for Employment, Form I-765, must be accompanied by a \$100 fee, unless waived by the immigration judge. *Id.* § 103.7(b).

81. *Id.* § 214.2(k)(6)(ii); see *id.* § 103.7(b) for fee schedules.

82. 8 U.S.C. § 1186a.

83. 8 C.F.R. § 216.4(a).

84. *Id.* § 216.2(a)(6).

and “get the word out” to service members that they need to seek advice early in the process. Ideally, service members should seek counsel before the marriage takes place to ensure smooth processing of the myriad documents required to allow the alien spouse and children to travel to the United States and obtain permanent resident status. Lieutenant Colonel Stahl.

Environmental Law Note

The Environmental Assessment as a “Concise Public Document”

Military environmental law attorneys face the challenge of ensuring that military programs and operations comply with the National Environmental Policy Act of 1969 (NEPA).⁸⁵ One of the most difficult aspects of NEPA compliance is choosing the appropriate level of environmental analysis for a particular sit-

uation. The NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) for major federal actions “significantly affecting the quality of the human environment.”⁸⁶ *Army Regulation 200-2* provides guidance on conditions requiring an EIS⁸⁷ and actions normally requiring an EIS.⁸⁸ In addition, the Regulations of the Council on Environmental Quality (CEQ) implementing NEPA⁸⁹ recognize the use of categorical exclusions⁹⁰ which require neither an Environmental Assessment (EA)⁹¹ or an EIS. *Army Regulation 200-2* provides the requirements for the use of categorical exclusions,⁹² including a list of the categorical exclusions available and screening criteria that must be met before their use.⁹³

A significant challenge arises for military environmental law practitioners in situations where a categorical exclusion is clearly not applicable and the agency proposal is not squarely within the category of actions normally requiring an EIS. The textbook solution to such a situation is to prepare an EA⁹⁴ to

85. 42 U.S.C. §§ 4321-4370 (2000).

86. *Id.* § 4332.

[A]ll agencies of the Federal Government shall (C) include in every recommendation or report on proposals for legislation and any other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on - (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be eliminated, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

87. U.S. DEP’T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS para. 6-1 (23 Dec. 1988) [hereinafter AR 200-2].

88. *Id.* para. 6-3.

89. 40 C.F.R. §§ 1500-1508 (LEXIS 2001).

90. Categorical exclusion is defined as follows:

“Categorical Exclusion” means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment or an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

Id. § 1508.4.

91. Environmental Assessment is defined as follows:

“Environmental Assessment”:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency’s compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(e), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

Id. § 1508.9.

92. *See* AR 200-2, *supra* note 87, paras. 4.0-4.

93. *Id.* app. A.

make a threshold determination. If the EA concludes that the proposal constitutes a “major federal action significantly affecting the human environment,”⁹⁵ an EIS is prepared. If the EA concludes that the threshold for an EIS has not been met, a Finding of No Significant Impact (FNSI)⁹⁶ is issued, and no further analysis under NEPA is required.

The use of an EA as described above seems straightforward; but, in practice the process is not always so simple. Environmental assessments can be costly and are quite often performed by private firms under contract with Department of Defense agencies. In addition, recent experience shows that EAs sometimes are extremely lengthy documents that take months to prepare.⁹⁷ These factors could potentially lead to the overly creative use of categorical exclusions to avoid preparation of an EA. In addition, the sheer volume of an extremely lengthy EA could lead some to conclude that an EIS was likely the appropriate level of analysis for the action.⁹⁸ Litigation over the FNSI following a lengthy EA could lead to the agency having to produce an EIS, causing further delay in the implementation of the federal action proposed. In either case, the prospect of a lengthy EA may not serve the interests of the agency in its efforts to comply with NEPA.

While the length of an EA is not the determining factor as to its legal sufficiency, a look at initial guidance from the CEQ about EAs is instructive. While the NEPA statute does not define or discuss EAs, the CEQ regulations define an EA as “a concise public document.”⁹⁹ Question 36a of the CEQ’s *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations* is particularly informative on the question of the length of EAs, stating:

94. See *supra* note 91 (definition of Environmental Assessment).

95. 42 U.S.C. § 4332 (2000).

96. Finding of No Significant Impact is defined as follows:

“Finding of No Significant Impact” means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

40 C.F.R. § 1508.3.

97. The foregoing is based upon the experience of the author in his prior duty assignment as an environmental attorney with the U.S. Army Environmental Law Division, where one of his primary responsibilities was the review of Army NEPA analyses. One EA reviewed by the author was over 300 pages long.

98. Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026 (Mar. 23, 1981) [hereinafter NEPA’s Forty Most Asked Questions], available at <http://ceq.eh.doe.gov/nepa/regs/40/40p3.htm>. Question 36b reads:

Under what circumstances is a lengthy EA appropriate? A. Agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 and where it is extremely difficult to determine whether the proposal could have significant environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed.

Id. at 18,037.

99. 40 C.F.R. § 1508.9.

100. NEPA’s Forty Most Asked Questions, *supra* note 98, at 18,037.

Since the EA is a concise document, it should not contain long descriptions or detailed data which the agency may have gathered. Rather, it should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. Section 1508.9(b).

While the regulations do not contain page limits for EA’s, the Council has generally advised agencies to keep the length of EAs to not more than 10-15 pages.¹⁰⁰

Thorough and professional environmental analyses are critical to federal agency compliance with NEPA. “Thorough and professional,” however, does not have to equate to “long and expensive” in all cases. There appears to be room for the increased use of shorter EAs that the agency potentially could produce in-house. For the reasons set out above, environmental law practitioners should look carefully at the length of the EAs they review. From both the legal and practical standpoint, in some cases less could be more. Lieutenant Colonel Tozzi.

Tax Law Notes

Update for 2001 Federal Income Tax Returns

On 2 June 2001, President George W. Bush signed a \$1.35 trillion tax cut.¹⁰¹ The law, known as the Economic Growth and

Tax Relief Reconciliation Act of 2001 (EGTRRA), purports to reduce tax rates, repeal the estate tax, provide marriage penalty relief, expand education incentives, increase the child tax credit, and provide pension relief. The catch is that it will take eleven years to realize the full effect of the tax cuts, because the majority of the provisions will be phased in over the next ten years (2001 through 2010). Then, to comply with budgetary restraints, the entire package of tax cuts goes away in 2011.¹⁰² This “sunset” provision essentially returns the tax laws to their pre-2 June 2001 state.¹⁰³

This article provides a brief update of tax changes that are important for taxpayers in the military community. Its goal is to inform legal assistance attorneys of updates in tax numerology and changes for the upcoming tax season. Some of these changes arise from the EGTRRA, and some were scheduled to take effect based on existing law.

Key Changes for 2001

EGTRRA Changes

Tax Rates Reduced

All regular income tax rates, except for the 15% rate, were reduced in 2001 by one-half of one percent.¹⁰⁴ These rates for 2001 are now 27.5%, 30.5%, 35.5%, and 39.1% and are reflected in the current tax tables.¹⁰⁵ These rates will be reduced by an additional one-half of one percent per year through the year 2006.¹⁰⁶

The Act created a new 10% regular income tax bracket for the portion of taxable income currently taxed at 15%.¹⁰⁷ It is effective for taxable years that begin after 31 December 2000.¹⁰⁸ The 10% rate bracket applies to the first \$6000 of taxable income for single individuals (\$7000 for 2008 and thereafter), \$10,000 of taxable income for heads of households, and \$12,000 for married couples filing joint returns (\$14,000 for 2008 and thereafter).¹⁰⁹

Rate Reduction Credit

For 2001 only, the 10% income tax rate bracket is implemented through a rate-reduction credit of 5% (the difference between the 15% rate and the 10% rate) of the amount of income that would otherwise be eligible for the new 10% rate.¹¹⁰ The 2001 tax tables and schedules, therefore, do not reflect the 10% rate. The maximum credit will be \$300 for a single individual, \$500 for a head of household, and \$600 for a married couple filing a joint return.¹¹¹ Many taxpayers received a Department of the Treasury check for an advance rate-reduction credit.¹¹² The advance payment was based on tax data from 2000.¹¹³

Those who did not receive a rebate check, or received one for less than the full amount, can take the rate-reduction credit when filing the 2001 tax return.¹¹⁴ The credit is calculated on a worksheet in the instructions to the Forms 1040, 1040A, and 1040EZ. Calculating the credit requires the taxpayer to take into account any advance rebate check received.¹¹⁵ If the taxpayer received a rebate check, the amount of the advanced pay-

101. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, 115 Stat. 38 (codified in scattered sections of I.R.C. (LEXIS 2001)) [hereinafter EGTRRA].

102. *Id.* § 901.

103. MATTHEW BENDER & COMPANY, INC., EXPLANATION OF THE PROVISIONS OF H.R. 1836, THE ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001 (June 6, 2001).

104. I.R.C. § 1(i)(2) (LEXIS 2001) (codifying EGTRRA § 101(a)(i)(2)).

105. *Id.* § 1.

106. *Id.* § 1(i)(2) (codifying EGTRRA § 101(a)(i)(2)).

107. *Id.* § 1(i)(1) (codifying EGTRRA § 101(a)(i)(1)).

108. *Id.* § 1(i)(1)(A) (codifying EGTRRA § 101(a)(i)(1)(A)).

109. *Id.* § 1(i)(1)(B) (codifying EGTRRA § 101(a)(i)(1)(B)).

110. *Id.* § 6428 (codifying EGTRRA § 6428). The benefit of the 10% bracket, however, is extended to dependents. A worksheet is in the instructions to Form 1040 for this purpose. I.R.S. Form 1040, Instructions, at 33 (2001).

111. I.R.C. § 6428(b) (codifying EGTRRA § 6428(b)).

112. *Id.* § 6428(e) (codifying EGTRRA § 6428(e)).

113. *Id.* § 6428(e)(1) (codifying EGTRRA § 6428(e)(1)).

114. I.R.S. Form 1040, Instructions (2001).

ment reduces the potential credit. If the advance payment is equal to the maximum credits, the taxpayer will not be able to claim the credit. If the advance payment received is less than the amount the taxpayer is entitled to, he can offset that amount by the advance payment, and claim the excess. If the advance payment exceeds the credit to which the taxpayer is entitled, he does not need to return the excess advance payment nor include the excess amount in income.¹¹⁶

Larger Child Tax Credit

Taxpayers with a “qualifying child” may take a child tax credit.¹¹⁷ The EGTRRA gradually increases the child tax credit per child to \$1000 over ten years. For calendar years 2001-2004, the credit is \$600.¹¹⁸ The child tax credit is made refundable (whether or not the taxpayer pays any federal income tax) to the extent of 10% of the taxpayer’s earned income in excess of \$10,000 for calendar years 2001-2004.¹¹⁹ Families with three or more children are allowed a refundable credit for the amount the taxpayer’s social security taxes exceed his earned income credit (the existing-law rule) if that amount is greater than the refundable credit based on the taxpayer’s earned income in excess of \$10,000.¹²⁰ The refundable portion of the child tax credit does not constitute income. It also is not treated as resources for determining eligibility for any federal, state, or local program financed with federal funds, or for the amount or nature of benefits or assistance under any such program.¹²¹

Lower Capital Gains Rates: Qualified Five-Year Gain

For tax years that begin after 31 December 2000, a gain from the sale or exchange of property held for more than five years that would otherwise be taxed at the 10% rate will be taxed at an 8% rate.¹²² Gain from the sale or exchange of property held for more than five years, for which the holding period begins after 31 December 2000, which would otherwise be taxed at a 20% rate will be taxed at an 18% rate.¹²³ The holding period of any property acquired pursuant to the exercise of an option (or other right or obligation to acquire the property) includes the period such option (or other right or obligation) was held.¹²⁴ Therefore, the sale or exchange of property acquired after 2000, by exercising an option acquired before 2001, would not qualify for the 18% rate.

The 8% rate applies to post-2000 gains on qualifying assets held for more than five years, regardless of when the holding period began.¹²⁵ Thus, some 2001 gain is automatically taxed at 8%. The 18% rate, however, will not be available for a gain realized before 2006, because that rate requires the five-year holding period to start after 2000.¹²⁶ Thus, if a taxpayer sells property before 2006, the gain on the sale will be taxed at 8% to the extent it would otherwise be taxed at a rate below 25% (if it were ordinary income), and the balance of the gain will be taxed at 20%.

115. I.R.C. § 6428(d)(1) (codifying EGTRRA § 6428(d)(1)).

116. I.R.S. Form 1040, Instructions, at 36 (2001).

117. A qualifying child is a child, descendant, stepchild, or eligible foster child who is a U.S. citizen, for whom the taxpayer may claim a dependency exemption, and who is less than seventeen years old on the last day of the tax year. I.R.C. § 24.

118. *Id.* § 24(a)(2) (codifying EGTRRA § 201(a)). For calendar years 2005-2008, the credit is \$700; for calendar year 2009, the credit is \$800; and for calendar year 2010 and later years, the credit is \$1000. *Id.*

119. *Id.* § 24(d) (codifying EGTRRA § 201(c)). The percentage is increased to fifteen percent for calendar years 2005 and thereafter. The \$10,000 amount is indexed for inflation beginning in 2002. *Id.*

120. *Id.* § 24(d)(1)(B)(ii) (codifying EGTRRA § 201(c)).

121. EGTRRA, *supra* note 101, § 203.

122. I.R.C. § 1(h)(2)(A).

123. *Id.* § 1(h)(2)(B).

124. *Id.*

125. *Id.* § 1(h)(2)(A).

126. *Id.* § 1(h)(2)(B).

Deemed Sale-and-Repurchase Election

A non-corporate taxpayer may elect to treat any readily tradable stock or any other capital asset or property used in the trade or business (as defined in section 1231(b) of the Internal Revenue Code (IRC) of 1986), held by the taxpayer on 1 January 2001 (and not sold before 2 January 2001), as having been sold on 2 January 2001 for an amount equal to its closing market price or fair market value on 2 January 2001, and as having been reacquired on that date for an amount equal to the closing market price.¹²⁷ The election does not apply to assets disposed of in a transaction in which a gain or a loss is recognized before the close of a one-year period beginning on the date that the asset would have been treated as sold under the election.¹²⁸ Any gain recognized as a result of the election is recognized notwithstanding any other provision, and any loss resulting from the election is not allowed for any tax year. Once made, the deemed-sale-and-repurchase election is irrevocable.¹²⁹

The election is made by: (1) reporting the deemed sale(s) on the timely filed return (including extensions) for the tax year that includes the deemed-sale date (calendar year taxpayers make the election on their 2001 tax returns), and (2) attaching a statement declaring that an election is being made under section 311 of the Taxpayer Relief Act of 1997 and specifying the assets for which the election applies. If the taxpayer timely filed his tax return without making the election for any asset, he can still make the election by filing an amended return within six months of the due date of the return (excluding extensions). "Election Under Section 311 of the Taxpayer Relief Act of 1997" should be written at the top of the amended return. In other words, calendar-year taxpayers may make the deemed sale-and-repurchase election as late as 15 October 2002.¹³⁰

The above rules for property held for more than five years do not apply to collectibles gains, un-recaptured section 1250 gains, and section 1202 gains.¹³¹ Additionally, it is not possible to effect a deemed election to qualify the property and then exclude the gain under IRC section 121.¹³²

Individual Retirement Arrangements (IRAs)

The phase-out limitations increase again for 2001, potentially making it easier for more service members to make deductible contributions to a traditional IRA.¹³³ The phase-out limits for IRA deduction increase this year for employees covered by qualified retirement plans.¹³⁴ Because service members are active participants and have coverage by a pension or retirement plan, deductible IRA contributions are subject to limitations.¹³⁵ The adjusted gross income (AGI) limits are gradually increasing over the next several years. For 2001, married filing jointly, the phase-out begins at \$53,000 and tops out at \$63,000. In 2007 and thereafter the maximum range will be from \$80,000 to \$100,000. For single filers (including head of household), the phase-out begins at \$33,000 and ends at \$43,000. In 2005 and thereafter the maximum range will be from \$50,000 to \$60,000. For married filing separately, the limit remains \$10,000.¹³⁶

The EGTRRA increases the maximum annual dollar contribution limit for IRA contributions from \$2000 to \$3000 for 2002-2004, \$4000 for 2005-2007, and \$5000 for 2008.¹³⁷ After 2008, the limit is adjusted annually for inflation in \$500 increments.¹³⁸ Individuals fifty years of age and older can make additional catch-up IRA contributions. The otherwise maximum contribution limit (before application of the AGI phase-out limits) for these individuals is increased by \$500 for 2002-2005, and \$1000 for 2006 and thereafter.¹³⁹

127. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 311(e).

128. *Id.* § 311(e)(1)(A)-(B), as amended by Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, § 314(c).

129. *Id.* § 311(e).

130. COMMERCE CLEARING HOUSE, 2002 U.S. MASTER TAX GUIDE ¶ 1736 (2001).

131. I.R.C. § 1(h)(9) (LEXIS 2001).

132. Rev. Rul. 2001-57, 2001-46 I.R.B. 488.

133. I.R.C. § 219(g). For more information on IRAs in general, see I.R.S. Pub. 590, Individual Retirement Arrangements (IRAs) (2000); ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 269, FEDERAL TAX INFORMATION SERIES (Dec. 2000) [hereinafter JA 269].

134. Rev. Proc. 99-42, 1999-2 C.B. 568.

135. I.R.C. § 219(g); I.R.S. Notice 87-16; Morales-Caban v. Commissioner, 66 T.C.M. (CCH) 995 (1993).

136. I.R.C. § 219(g)(2)(A)(ii).

137. *Id.* § 219(b)(5)(A) (codifying EGTRRA § 601(a)).

138. *Id.* § 219(c).

The student loan interest deduction continues to increase in value to the military taxpayer. For 2001, taxpayers can deduct up to \$2500 of student loan interest.¹⁴⁰ The student loan interest deduction is taken as an adjustment to income; taxpayers do not have to itemize to qualify for this deduction.¹⁴¹ The deduction declines, however, for couples with an AGI of \$60,000 to \$75,000. For single taxpayers, the deduction decreases with an AGI of \$40,000 to \$55,000.¹⁴²

Currently, student loan interest deductions are limited to the interest paid during the first sixty months in which interest is required to be paid on an educational loan.¹⁴³ Beginning with tax year 2002, the EGTRRA repeals the limit on the number of months during which interest paid on a qualified education loan is deductible. Further, EGTRRA increases the income phase-out ranges for eligibility for the deduction to \$50,000 through \$65,000 for single taxpayers and to \$100,000 through \$130,000 for married taxpayers filing joint returns. These income phase-out ranges will be adjusted annually for inflation after 2002.¹⁴⁴

*Earned Income Credit (EIC)*¹⁴⁵

The refundable EIC is available to certain low-income individuals who have earned income, meet adjusted gross income thresholds, and do not have more than a certain amount of disqualified income.¹⁴⁶ Beginning in 2001, the EIC is denied if the aggregate amount of disqualified income exceeds \$2450 (\$2400 in 2000).¹⁴⁷

The biggest change on the tax forms for 2001 is the addition of a line to claim the rate-reduction credit.¹⁴⁸ Form 1040A adds line 30 and Form 1040 adds line 47, and treats the rate-reduction credit as it would any other non-refundable credit. Form 1040EZ adds line 7, and treats any rate reduction credit due as an addition to the credits, payments, and tax—essentially treating any rate-reduction credit due as an additional withholding or a refundable credit.

Additionally, all three forms include a space near the end of the return to appoint a “Third Party Designee.” A taxpayer should complete this if he wishes to allow a friend, family member, or any other person to discuss his 2001 tax return with the IRS.¹⁴⁹

Mailing Locations for Tax Returns

Some taxpayers will mail their tax returns to a different IRS Service Center this year because the IRS changed the filing location for several areas. Taxpayers should mail their tax returns to the address on the envelope they received with their tax package, or they should determine the proper mailing address in the Form 1040 Instruction Booklet. Lieutenant Colonel Parker.

139. *Id.* § 219(b)(5)(B).

140. *Id.* § 221(b)(1).

141. *Id.* § 62(a)(17).

142. *Id.* § 221(b)(1)(B).

143. *Id.* § 221(d); Prop. Reg. § 1.221-1(e)(1).

144. I.R.C. § 221 (codifying EGTRRA § 412). For more information on the student loan interest deduction, see Major Richard Rousseau, TJAGSA Practice Notes, *Internal Revenue Service Restructuring and Reform Act of 1998*, ARMY LAW., Nov. 1998, at 44-45; Major Richard Rousseau, TJAGSA Notes, *Update for 1999 Federal Income Tax Returns*, ARMY LAW., Dec. 1999, at 30.

145. I.R.C. § 32. For more information, see I.R.S. Pub. 596, Earned Income Credit (2000).

146. I.R.C. § 32(a), (i). Disqualified income includes capital gain net income and net passive income in addition to interest, dividends, tax-exempt interest, and non-business rents or royalties. *Id.*

147. *Id.* § 32(j)(1); Rev. Proc. 99-42, 1999-2 C.B. 568.

148. See *supra* notes 110-16 and accompanying text.

149. I.R.S. Form 1040, Instructions, at 53 (2001).

2001 Numerology

Tax Rates¹⁵⁰

The 2001 tax rates by filing status are:

Married Filing Jointly and Qualifying Widow(er):

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$1 - 45,200	15% ¹⁵¹
45,200 - 109,250	27.5%
109,250 - 166,500	30.5%
166,500 - 297,350	35.5%
over 297,350	39.1%

Single:

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$1 - 27,050	15%
27,050 - 65,550	27.5%
65,550 - 136,750	30.5%
136,750 - 297,350	35.5%
over 297,350	39.1%

Head of Household:

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$0 - 36,250	15%
36,250 - 93,650	27.5%
93,650 - 151,650	30.5%
151,650 - 297,350	35.5%
over 267,350	39.1%

Married Filing Separately:

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$1 - 22,600	15%
22,600 - 54,625	27.5%
54,625 - 83,250	30.5%
83,250 - 148,675	35.5%
over 148,675	39.1%

150. I.R.C. § 1.

151. A 10% rate bracket, which would otherwise apply, is not in effect for 2001. It is made inapplicable for any tax year to which I.R.C. section 6428 applies (that is, the 2001 rate-reduction credit and the advanced refund of that credit). *Id.* § 1(i)(1)(A)(i), (D). Thus, for 2001, the rate-reduction credit applies in lieu of the 10% tax rate bracket for 2001. For 2002 and later years, a 10% tax rate bracket applies. *Id.* § 1(i)(1)(A)(i). There is no 10% tax rate bracket for trusts and estates as there is for individuals. *See id.*

Estates and Trusts

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$1 - 1800	15%
1800 - 4250	27.5%
4250 - 6500	30.5%
6500 - 8900	35.5%
over 8900	39.1%

Standard Deduction

Married Filing Jointly or Qualifying Widow(er) – 2001: \$7600 (\$7350 in 2000; \$7850 projected for 2002).

Single – 2001: \$4550 (\$4400 in 2000; \$4700 projected for 2002).

Head of Household – 2001: \$6650 (\$6450 in 2000; \$6900 projected for 2002).

Married Filing Separately – 2001: \$3800 (\$3675 in 2000; \$3925 projected for 2002).

Reduction of Itemized Deductions

Otherwise allowable itemized deductions are reduced if AGI exceeds:

Married Filing Separately: \$66,475.

All other returns: \$132,950.

Personal Exemptions

Higher personal exemption deduction – 2001: \$2900 (up from \$2800 in 2000; \$3000 projected for 2002).

2001 Phase-Out Amounts for Personal Exemptions:

<u>Taxpayer</u>	<u>Begins After</u>
Married Filing Jointly	\$199,450
Single	\$132,950
Head of Household	\$166,200
Married Filing Separately	\$ 99,725

*Foreign Earned Income Exclusion*¹⁵²

Higher exclusion for 2001: \$78,000 (was \$76,000 in 2000; will be \$80,000 in 2002 and thereafter).¹⁵³

152. *Id.* § 911. For more information on the Foreign Earned Income Exclusion, see I.R.S. Pub. 54, Tax Guide for U.S. Citizens and Resident Aliens Abroad (2000); I.R.S. Pub. 516, Tax Information for U.S. Government Civilian Employees Stationed Abroad (2000); I.R.S. Pub. 593, Income Tax Benefits for Citizens Who Go Overseas; JA 269, *supra* note 133, at 64-70.

153. I.R.C. § 911(b).

Earned Income Credit

Number of Children	Maximum Amount of the Credit	Earned Income Amount	Threshold Phase-Out Amount	Completed Phase-Out Amount
1	\$2428	\$7100	\$13,100	\$28,281
2	\$4008	\$10,000	\$13,100	\$32,121
None	\$364	\$4750	\$5950	\$10,710

Auto Standard Mileage Allowances

If a taxpayer can use an automobile for business, medical, charity, or moving purposes, the taxpayer is allowed a standard mileage deduction rate. For 2001, the rates are:

Business: 34.5 cents per mile.

Charity: 14 center per mile.

Medical or Moving: 10 cents per mile.

Lieutenant Colonel Parker.