DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 19, 24, 111, 113, 143, 162, 163, 178 and 181

[T.D. 98–56]

RIN 1515–AB77

Recordkeeping Requirements

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with some changes, proposed amendments to the Customs Regulations to reflect changes to the Customs laws regarding recordkeeping requirements, examination of records and witnesses, regulatory audit procedures, and judicial enforcement contained in the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act. The final regulatory texts include detailed provisions regarding what records must be maintained, who must maintain them, and how they must be maintained and made available for examination by Customs. The final regulations also provide for electronic or other alternate methods for storage of records, set forth penalties for failure to maintain or produce certain records, and establish a voluntary recordkeeping compliance program as an alternative to penalties.

EFFECTIVE DATE: July 16, 1998.

FOR FURTHER INFORMATION CONTACT: For questions relating to recordkeeping in general and the voluntary Recordkeeping Compliance Program, call Stan Hodziewich, Regulatory Audit Division, Washington, D.C. (202–927–0999), or Howard Spencer, Regulatory Audit Division, Atlanta Branch (770–994–2273, Ext.158).

For questions relating to the Appendix ((a)(1)(A) list) and its underlying documents and other entry records, call Jerry Laderberg, Office of Regulations and Rulings (202–927–2269).

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, the President signed into law the North American Free Trade Agreement Implementation Act (the ''NAFTA Implementation Act''), Public Law 103–182, 107 Stat. 2057. Title VI thereof contained provisions pertaining to Customs Modernization and thus is commonly referred to as the Customs Modernization Act or ''Mod Act''. Sections 614, 615 and 616 within the Mod Act amended sections 508, 509 and 510 of the Tariff Act of 1930, as amended (19 U.S.C. 1508, 1509 and 1510) which pertain to recordkeeping requirements applicable to importers and others. In addition, within Title II of the NAFTA Implementation Act, entitled ''Customs Provisions'', section 205 amended sections 508 and 509 of the Tariff Act of 1930 to include recordkeeping requirements for exportations to Canada and Mexico for purposes of the United States-Canada Free Trade Agreement and the NAFTA.

Before its amendment by the Mod Act, section 508 of the Tariff Act of 1930 limited recordkeeping requirements to any owner, importer, consignee, or agent thereof who imported, or knowingly caused to be imported any merchandise into the Customs territory of the United States. Section 614 of the Mod Act amended these requirements and expanded the parties subject to Customs recordkeeping requirements to include parties who file an entry or declaration, transport or store merchandise carried or held under bond, file drawback claims, or cause an importation, or transportation or storage of merchandise carried or held under bond. Section 614 of the Mod Act further amended section 508 of the Tariff Act of 1930 to clarify that all parties who must keep records for Customs purposes are subject to recordkeeping requirements. In addition, in order to reflect the current electronic environment in which both Customs and the importing and exporting community operate, section 614 of the Mod Act expanded the concept of ''records'' set forth in section 508 of the Tariff Act of 1930 to include information and data maintained in the form of electronically generated or machine readable data.

The Mod Act amended various provisions of the Customs laws to grant to Customs authority not to require the presentation of certain documentation or information at time of entry; these amendments were intended to permit a reduction of the documentation and information requirements at time of entry, thereby facilitating the entry process. However, in exchange for not requiring presentation of documents at the time of entry, and in order to not jeopardize the ability of Customs to obtain those records at a later date, section 615 of the Mod Act amended section 509 of the Tariff Act of 1930: (1) to authorize Customs to examine, or to require the production of, *inter alia*, any records which are required by law for the entry of merchandise, whether or not Customs required their presentation at the time of entry; (2) to provide for the imposition of substantial administrative penalties for a failure to comply, within a reasonable time, with a demand for production of such entry records; and (3) to require Customs to identify and make available to the importing community, by publication, a list of all such entry records or information (referred to as the ''(a)(1)(A) list'' based on the paragraph within 19 U.S.C. 1509 which specifically concerns such records). Thus, the Mod Act amendments resulted in a statutory distinction between those business, financial or other records that pertain to activities listed in section 508 of the Tariff Act of 1930 and are maintained in the normal course of business and those that are required for the entry of merchandise and are required to be identified in the ''(a)(1)(A) list'' and as to which penalties may apply for a failure to produce if demanded by Customs. In addition, section 615 of the Mod Act amended section 509 of the Tariff Act of 1930: (1) to set forth procedures applicable to regulatory audits conducted by Customs; and (2) to provide for a voluntary recordkeeping compliance program under which program participants might be eligible for alternatives to penalties for a failure to produce demanded entry records and information.

Section 205 of the Mod Act amended section 508 of the Tariff Act of 1930, *inter alia*, to provide (1) that any person who completes and signs a NAFTA Certificate of Origin for a good for which preferential treatment is claimed under the NAFTA shall make, keep, and render for examination and inspection all records relating to the origin of the good (including the Certificate or copies thereof) and the associated records and (2) that such records shall be retained for at least 5 years from the date of signature of the NAFTA Certificate of Origin. Section 205 of the Mod Act also made a conforming amendment to section 509 of the Tariff Act of 1930 regarding persons to whom a summons may be issued, involving the addition of a reference to persons who exported merchandise, or knowingly caused merchandise to be exported, to a NAFTA country or to Canada during such time as the United States-Canada Free Trade Agreement is in force. Section 616 of the Mod Act amended section 510 of the Tariff Act of 1930 by adding the assessment of a monetary penalty as a sanction that may be applied by a U.S. district court if a person does not comply with a summons issued by Customs under section 509 of the Tariff Act of 1930.

On April 23, 1997, Customs published in the **Federal Register** (62 FR 19704) a notice setting forth proposed

amendments to the Customs Regulations to implement the changes to the statutory recordkeeping provisions effected by the NAFTA Implementation Act as summarized above. Customs stated in that notice of proposed rulemaking that a new, separate part within the Customs Regulations, dealing solely with recordkeeping and related requirements, would be the appropriate approach. Accordingly, the notice proposed to add a new Part 163 (19 CFR Part 163) entitled ''Recordkeeping'' which would contain the recordkeeping and related provisions previously set forth in Part 162 of the Customs Regulations (19 CFR Part 162) and would also reflect the amendments to sections 508, 509 and 510 of the Tariff Act of 1930 effected by sections 205, 614, 615 and 616 of the NAFTA Implementation Act. In addition, that notice: (1) set forth, as an appendix to proposed new Part 163, the (a)(1)(A) list that had been previously published in the Customs Bulletin on January 3, 1996, as T.D. 96–1 and in the **Federal Register** on July 15, 1996, at 61 FR 36956; and (2) included proposed conforming or collateral amendments to various provisions within Parts 24, 111, 143 and 162 of the Customs Regulations (19 CFR Parts 24, 111, 143 and 162). The notice of proposed rulemaking made provision for the submission of public comments on the proposed regulatory changes for consideration before adoption of those changes as a final rule, and the prescribed public comment period closed on June 23, 1997. A correction document pertaining to the April 23, 1997, notice of proposed rulemaking was published in the **Federal Register** on May 5, 1997 (62 FR 24374).

Discussion of Comments

Twenty-three commenters responded to the solicitation of comments in the April 23, 1997, notice of proposed rulemaking referred to above. The comments submitted are summarized and responded to below.

Treatment of Express Consignment Carriers

Comment: Two commenters complained that the proposed regulations do not adequately reflect, nor address, the unique role that express consignment carriers play in the import process. These commenters noted that express consignment carriers, as nominal consignees, have the right under 19 U.S.C. 1484 to designate a customs broker to make entry of merchandise and that, in order to deliver an integrated service, they frequently designate their own brokerages which make entry in their own names; thus, express consignment carriers play multiple roles with regard to customs processing as a carrier, broker, and importer of record, and they also operate as transporters and storers of merchandise carried or held under bond. The proposed regulations, on the other hand, simply list together all of the different parties required to make, keep, and produce records without making any clear distinction between those parties with reference to the roles they play in the import process (for example, the distinction between an express consignment carrier and the actual importer or consignee). Thus, under the proposed regulations an express consignment carrier would be required to make, keep, and produce records for each of its import-related activities, including, as nominal consignee, every document that accompanies a shipment and is identified in the (a)(1)(A) list as being necessary for the entry of merchandise. The commenters further asserted that the burden imposed by the regulatory proposals is accentuated in the case of express consignment carriers by virtue of the very large volume of shipments that they handle.

In addition to the above general comments regarding the unique nature of the express consignment industry, these two commenters made the following specific recommendations or observations:

1. In order to avoid redundancy and unnecessary burdens in the recordkeeping requirements, separate and distinct recordkeeping requirements should be established for express consignment carriers and that those requirements should appear in Part 128 of the Customs Regulations (19 CFR Part 128) which sets forth requirements and procedures for the clearance of imported merchandise carried by express consignment operators and carriers. These commenters suggested that there is precedent for this approach in that separate sections dealing with recordkeeping responsibilities appear in the Part 111 regulations governing customs brokers.

2. In order to avoid rendering meaningless the benefits provided under current Part 128 and also to reflect what records are in fact kept in the ordinary course of business, express consignment carriers should only be required to keep and produce, as (a)(1)(A) records, those records presently prescribed for entry purposes in Part 128: for letter and document shipments (express consignment carrier acts as carrier), the summary manifest or manifest; for shipments that may be entered free of duty under 19 U.S.C. 1321 and 19 CFR 10.151 (express consignment carrier acts as carrier/broker), the manifest; for shipments covered by an informal entry (express consignment carrier acts as broker), the manifest or Customs Form 3461 and the invoice and Customs Form 7501 or, if a consolidated informal entry, the manifest and consolidated Customs Form 7501; and for shipments covered by a formal entry (express consignment carrier acts as broker), the manifest or Customs Form 3461 and the invoice and Customs Form 7501, together with a power of attorney if entry is made in the name of the express consignment carrier's customer and certain records required for the entry of specific categories of merchandise. All other records pertaining to a particular import (for example, air waybills, commercial invoices) should be kept and produced by the recipient of the shipment, that is, the actual importer.

3. Requiring the retention of more than the records mentioned at point 2 above in the case of express consignment carriers neither makes economic sense nor provides an enforcement benefit to Customs because (1) while the value of an express consignment shipment is not typically very high, the retention of additional records would be extremely costly to the express consignment carrier given the volume of shipments involved and (2) compliance assessment (including document review) for express consignment shipments is performed either at the time of entry by on-site Customs inspectors at express carrier facilities or, particularly in the case of informal entries where enforcement risks are minimal, not at all.

4. While express consignment carriers generally maintain the consolidated Customs Form 7501 for informal entries, Customs might consider eliminating this requirement since the document contains very little information other than totals on duties and number of entries.

5. It should be clarified up front that the monetary penalties provided for in 19 U.S.C. 1509(g) and in proposed § 163.6(b) are inapplicable to express consignment carriers because the documentation or information that the express consignment industry should be required to maintain will be presented at the time of entry. In support of this position, it was pointed out that, in House Report No. 361, 103d Congress, 1st Session (1993), it was noted that those penalties should not be imposed where the ''information demanded has been presented to and retained by the Customs Service at the time of entry.''

Moreover, with reference to the role that express consignment carriers often play as customs brokers, it was pointed out that the same House Report recognized that while customs brokers may be recordkeepers under section 1509 and may act as importers of record in certain cases, ''their status as 'brokers'' does not change because of this and failure to maintain the records as specified in section 615 should not automatically subject them to penalties set forth in subsection (g)''; rather, the House Report indicated that Customs should proceed against customs brokers for recordkeeping violations under 19 U.S.C. 1641 and only under section 1509(g) in exceptional circumstances such as where there is ''an egregious, flagrant or willful violation of the requirements of section 1509, or when there is a pattern or practice of abuse occurring over a sustained period of time, also in willful disregard of those recordkeeping requirements.''

Customs response: Customs disagrees with the implication of the above general comments, that is, that express couriers should be excepted from these recordkeeping regulatory requirements. While it is true that express couriers not only act as carriers but also at times as brokers and consignees, the fact remains that these separate functions constitute activities that trigger recordkeeping responsibilities under section 508(a). Customs does not believe that, merely because express couriers act in these varied roles, they are so unique that special recordkeeping requirements should apply to them. Moreover, Customs notes that express couriers do not always exercise unique control because some express companies have multiple brokers.

1. For the reasons stated above in response to the general comments, Customs disagrees that separate recordkeeping requirements should be created for express couriers.

2. Customs disagrees with the suggestion that the Part 163 texts would have the effect of rendering meaningless the benefits provided by Part 128. The scope and benefits of Part 128 go far beyond recordkeeping requirements. Moreover, the Part 163 texts of necessity reflect recordkeeping requirements that apply to express couriers for all roles that couriers play in international transactions. The parties listed in proposed § 163.2(a) as being required to maintain records are specifically required by § 163.3 to maintain ''(a)(1)(A)'' records, that is, those records required for entry. Since each import transaction/entry is unique and may require different (a)(1)(A) documents depending upon a number of factors, it would be impossible to limit the (a)(1)(A) records for each party listed in § 163.2(a). This is especially true for express couriers whose role may change from transaction to transaction.

However, in the light of the points made by these commenters, Customs has reconsidered this matter and now believes that, for purposes of prescribing a minimum period during which records must be retained, there is a valid basis for making an exception to the normal rule in the following cases: (1) Where an informal entry is filed by a customs broker appointed by a consignee who is not the owner or purchaser of the imported merchandise; and (2) where the records either relate to bona fide gifts and other articles admitted free of duty and tax under 19 U.S.C. 1321(a)(2) and §§ 10.151–10.153 of the Customs Regulations or consist of carriers' records pertaining to manifested cargo that is exempt from entry under the Customs Regulations (for example, records, diagrams and data covered by General Note 16(c) of the Harmonized Tariff Schedule of the United States (HTSUS), and undeliverable articles described in General Note 16(e), HTSUS, which are exempt from entry under § 141.4(b)(1) of the Customs Regulations). In such cases, Customs believes that a 2-year record retention period (rather than the normal 5-year period) is appropriate because compliance measurement most often takes place at the time of importation or entry (and rarely, if ever, more than two years thereafter) and because, in the case of informal entries filed by customs brokers at the behest of consignees, the most important records (that is, the entry records) would still have to be maintained and made available to Customs by the broker for the normal 5-year period. Accordingly, § 163.4(b), which lists exceptions to the 5-year record retention rule, has been modified as set forth below by the addition of two new subparagraphs (3) and (4) to reflect these considerations.

3. Customs disagrees with this statement. Given the concerns of Customs regarding misdeliveries within the express courier industry, Customs deems the information on even informal entries crucial for post-audit and compliance measurement purposes at least during the 2-year period that might apply to an express courier under the modified § 163.4(b) text as discussed above in the point 2 comment response. The modified § 163.4(b) text, together with the provision for alternative storage of records in § 163.5, serve in part to address the issue of the burden of maintaining a large volume of documents.

4. Customs disagrees for the reasons stated in the point 3 response above.

5. Customs agrees, and proposed § 163.6(b)(4)(iii) made clear, that where (a)(1)(A) documents are presented to and retained by Customs, no recordkeeping penalties will be issued. The position of Customs is that recordkeeping violations by customs brokers will be handled either under 19 U.S.C. 1641 and Part 111 of the Customs Regulations or under 19 U.S.C. 1509(g) and Part 163 of the Customs Regulations, depending on the nature and circumstances of the violation.

Section 111.21(b)—Applicability of Part 163 to Customs Brokers

Comment: One commenter took issue with proposed new paragraph (b) of § 111.21 which provides that a customs broker shall comply with the provisions of Part 163 when maintaining records that reflect on his transactions as a broker. This commenter stated that the regulatory text is too broad, and could give rise to uncertainty on the part of Customs and a broker when an audit is being performed, because it does not differentiate between the different functions and responsibilities of brokers. While conceding that a broker acting as importer of record would assume the recordkeeping responsibilities of Part 163, this commenter argued that § 111.21(b) should be limited to brokers acting in that capacity and should not apply to other broker functions authorized under 19 U.S.C. 1641.

Customs response: Customs disagrees. The requirements and procedures governing the retention and subsequent production of records under sections 508 and 509 are contained in Part 163, and proposed new § 111.21(b) was included to reflect this fact. Thus, the ''provisions'' referred to in § 111.21(b) clearly would apply to customs brokers whether they act solely as an agent on behalf of the importer of record or list themselves as the importer of record or file a drawback claim on behalf of the importer or transport goods on behalf of the importer or carry on any activity of a broker authorized under 19 U.S.C. 1641 and which is also described in section 508(a) and in § 163.1(a).

Customs notes that present § 111.21 (the text of which was redesignated as paragraph (a) in the proposed regulatory amendments) requires a broker to keep ''records of account reflecting all his financial transactions as a broker''; this provision has always been intended to include, among other things, financial records pertaining to client accounts (billing records, payment of Customs duty refunds to clients where the broker

was importer of record, etc.) which, even if they are not records required to be maintained under section 508, are nevertheless records that pertain to the conduct of ''customs business'' as that term is defined in section 1641. For purposes of consistency and in order to clarify the broad scope of amended § 111.21 as regards the maintenance of records, the following changes have been included in the final regulatory amendments set forth below: (1) The proposed amendment to the definition of ''records'' in § 111.1 (which involved a simple cross-reference change) has been replaced by an amendment setting forth a new definition text which refers to ''documents, data and information referred to in, and required to be made or maintained under, this part and any other records, as defined in § 163.1(a) of this chapter, that are required to be maintained by a broker under part 163 of this chapter''; and (2) the text of new § 111.21(b) has been modified to refer to the provisions of ''this part and part 163 of this chapter''.

Again with reference to newly designated § 111.21(a), Customs further notes that the second sentence thereof requires a broker to maintain, among other things, ''a copy of each entry made by him with all supporting records, except those documents he is required to file with Customs''; this simply reflects a requirement imposed on a broker by sections 508 and 509, whether the broker is acting as importer of record or as an agent for the importer of record. In view of the addition of paragraph (b) of § 111.21 which refers to Part 163, and consistent with the specific coverage of sections 508 and 509 with regard to records pertaining to the entry process, Customs believes that the regulatory provisions of Part 163 should control in this context. Accordingly, the amendments to § 111.21 have been modified as set forth below to include the removal of these words from the second sentence of newly designated paragraph (a).

Section 111.21(c)—Designation of Recordkeeping Officer and Backup

Comment: Six comments were received on proposed new paragraph (c) of § 111.21 which requires a customs broker to designate a knowledgeable company employee to be the broker's recordkeeping officer as well as a back-up recordkeeping officer. The points made by these commenters were as follows:

1. One commenter supported the proposed regulatory provision as being in accord with the Customs principle of ''People, Processes and Partnership'' by creating a primary point of contact. This commenter, however, suggested that the word ''manager'' be used in place of ''officer'' in the regulatory text so that a broker could designate a non-corporate officer to handle these responsibilities.

2. Four commenters argued that the provision should be eliminated entirely on the grounds that it is unnecessary and overly intrusive. These commenters pointed out that, contrary to the case of a regular importer, a customs broker is already required under Part 111 of the regulations to have on record with Customs an individually licensed broker who is responsible for the supervision and control of the broker's customs business (including recordkeeping requirements). In addition, brokers are different from importers in that a broker can be penalized (by monetary fines or by suspension or revocation of its license) under the broker statute and regulations for a failure to meet its recordkeeping responsibilities, whereas after certification an importer would merely have its privilege suspended or terminated. Moreover, brokers are licensed and thus should be aware of their obligations regarding recordkeeping, and the appointment of recordkeeping officers would not in itself ensure greater compliance. It should be sufficient for a broker, if necessary, to simply provide a contact name to Customs when needed, without prescribing in the regulations how a broker should organize its business.

3. One commenter suggested that, rather than requiring an express designation of a recordkeeping officer, the licensed qualifying officer of the broker should automatically serve as the recordkeeping officer unless the broker makes an alternative designation. This commenter also recommended that the requirement of a back-up recordkeeping officer be eliminated for small brokers having less than 25 employees.

Customs response: While Customs does not agree that the regulatory provision at issue should be eliminated entirely, Customs is in substantial agreement with the above comments regarding the sufficiency of a mere recordkeeping contact (and without a required back-up) within the brokerage, because Customs requires only the existence of a designated individual responsible for recordkeeping compliance in the case of the Recordkeeping Compliance Program. Section 111.21(c) as set forth below has been modified accordingly. In addition, in the revised text the word ''entry'', which was used in the proposed text, has been replaced by ''customs business'' to reflect the broad scope of § 111.21 as discussed above in the comment response regarding § 111.21(b).

Section 111.22—Additional Record of Transactions

Comment: A commenter supported the proposed amendment to § 111.22 which would transfer, from the port director to the Field Director of Regulatory Audit responsible for the geographical area in which the broker's designated recordkeeping officer is located, the authority to exempt a broker from the recordkeeping requirement set forth in that section. This commenter opined that this proposed change recognizes changing industry trends and should shorten approval times and improve lines of communication between brokers and Customs.

Customs response: While the changes to § 111.21(c) discussed in the comment response immediately above would appear to affect the wording of the proposed changes to § 111.22, Customs has reconsidered the need for § 111.22 as a whole. In light of the fact that numerous requests for exemptions from the requirements of this section are granted yearly by Customs, and since approval authority has been granted to Regulatory Audit which utilizes a new audit approach, Customs believes that § 111.22, and the recordkeeping burden imposed thereby, are no longer necessary. Accordingly, the final regulatory amendments set forth below include the removal of § 111.22 in its entirety.

Section 111.23(a)(1)—Consolidation of Records

Comment: Four comments were received on the proposed revision of § 111.23(a)(1) which would permit the consolidation of records with the approval of the Field Director of Regulatory Audit responsible for the geographical area in which the broker's designated recordkeeping officer is located. Two of the commenters stated their agreement with the general principle of allowing the consolidation of records. However, all four commenters made the following complaints or suggestions with regard to the proposed regulatory text:

1. There should be no provision for review and approval by the local Field Director of Regulatory Audit; all that should be required is that the Field Director of Regulatory Audit be notified of the storage location. Moreover, the proposed regulatory text could lead to inconsistent treatment of requests since the text allows for the rejection of a request without requiring a reason or justification. Accordingly, the proposed text should be modified (1) to set forth

the reasonable requirements for consolidation that the broker must meet, (2) to provide for a certification from the broker that it meets those requirements, and (3) to provide for issuance of an acknowledgment from the Field Director of Regulatory Audit to the broker showing receipt of the consolidation plan.

2. A broker should only be required to notify Customs of consolidation of records, and such notification should be provided to Customs Headquarters rather than to a field office. The approach taken in the Federal Maritime Commission regulations in 15 CFR 762.5 should be followed.

3. While one commenter read the proposed text as permitting consolidation of records in multiple locations, another commenter recommended that the text specifically provide that brokers can consolidate records in one or more (regional) locations.

4. The regulatory text should provide that, where electronic data storage or imaging is being used, the term ''consolidate'' covers a computer system that may have a distributed database.

5. Brokerage firms having multiple district permits could possibly have, if required, a recordkeeping officer located in a different geographic area than its home district where its licensed qualifying officer is located, thus creating confusion over authorities and responsibilities.

6. The regulatory text should specifically provide that for brokers for which multiple district permits have been issued, only one application and approval to consolidate records would be required for use in all permitted districts.

Customs response: 1 and 2. While Customs has reconsidered the proposed provision and agrees with the commenters both that brokers need only notify Customs in advance of the decision to consolidate their records and that such notification should go to a single, centralized location, Customs does not agree that such notification should go to Customs Headquarters. Rather, Customs believes that the Miami regulatory audit field office is the appropriate location for submission of the written notice of consolidation because the Miami office houses the field audit specialist on recordkeeping requirements and also houses the staff that will be responsible for creating Customs-wide recordkeeping information data bases and entering the data therein. The proposed regulatory text in question (redesignated in this document as paragraph (b)(2) of § 111.23 as discussed below) has been modified accordingly.

Based on the agreement of Customs to dispense with the proposed requirement for Customs approval of consolidation of records, and in view of the changes to the Part 111 proposed amendments already discussed above, the § 111.23 amendments as set forth below incorporate some other changes not reflected in the amendments as originally proposed. The following points are noted in this regard: (1) In paragraph (a)(1), reference is simply made to ''records'' (the meaning of which should be clear from the new definition thereof in § 111.1), the reference to Customs approval and the last sentence regarding appeal of a denial of approval have been removed, reference is made to consolidation at ''one or more'' locations (to clarify that the intent was not to restrict consolidation to one location, so that a broker could, for example, opt to keep all entry records at one location and all client financial account records at another location), and the reference to the geographical location of the broker's recordkeeping officer has been removed in favor of a simple reference at the end of the text to the subparagraph which sets forth the notification procedures (formerly paragraph (e)); (2) proposed new paragraph (b) has been omitted (because it adds nothing that is not already stated in new § 111.21(b) and because the reference in the proposed text to only Part 163 failed to reflect that some records required to be maintained under the Part 111 texts are not records covered by Part 163) and, consequently, former paragraph (e) has been redesignated as (b) (rather than as (c)); (3) within newly designated paragraph (b), the word ''financial'' has been removed from subparagraphs (1) and (2)(ii) and the word ''accounting'' has been removed from the first sentence of subparagraph (2)(i) in order to reflect that consolidation applies to all records (that is, those required under Part 111 and those required to be maintained under Part 163), and new language regarding where notice of consolidation is to be given, as discussed above, has been included in the introductory text of subparagraph (2); (4) former paragraph (b) has been removed (because it will not be replaced by a new paragraph (b) text as originally proposed and, as with the other paragraphs removed from this section, is superseded by the Part 163 texts); and (5) paragraph (f) (which was inadvertently not redesignated or otherwise mentioned in the proposed § 111.23 amendments) has been removed because its substance is adequately covered by other provisions within § 111.23 and Part 163.

3. Customs agrees, and the modified § 111.23(a)(1) text, as discussed above and set forth below, now makes this clear.

4. Customs disagrees. The issue raised by this comment in effect concerns alternate methods for storage of records and is adequately and more properly addressed in § 163.6.

5. While Customs agrees with this commenter's observation, it is essentially rendered moot by the changes to §§ 111.21 and 111.23 as discussed above and set forth below.

6. The substance of this comment has been addressed by the regulatory text changes discussed above and set forth below.

Section 143.35—Procedure for Electronic Entry Summary

Comment: With regard to the proposed revision of § 143.35 which provides that documentation submitted before being requested by Customs will not be accepted or retained by Customs, a commenter requested that the regulatory text be modified to provide that any such documents will be promptly returned to the filer.

Customs response: Customs disagrees with the requested change. Documents submitted before being requested by Customs will not be accepted by Customs, thus obviating the need to return them.

Section 143.36(c)—Retention and Submission of Invoice

Comment: Two comments were received on the proposed changes to § 143.36(c) which would provide (1) that the invoice is to be retained by the filer unless requested by Customs and (2) that Customs will not accept or retain an invoice submitted by a filer before a request is made by Customs.

One commenter claimed that the refusal of Customs to accept and retain the invoice will impose an unreasonable burden on broker-filers in cases where the broker knows that the entry summary may later be used in connection with a drawback entry. This commenter stated that it already has been overwhelmed in some cases when Customs requested copies of entry summaries and related documents for paperless entries because a drawback claim was later filed by the importer or exporter, pointing out that the request from Customs usually is not for a single entry summary but rather for dozens at a time. This commenter therefore suggested that a broker should be allowed the option of filing such

documents at the time of entry summary while its files are at hand, rather than be forced to assume the time and expense of retrieving documents from a storage location.

The second commenter argued that, where Customs refuses to accept and retain an invoice filed without a request for it having been made, the regulatory text should provide for a prompt return of the document to the filer.

Customs response: Customs disagrees. As regards the first comment, section 615 of the Mod Act and the subsequent proposed recordkeeping regulations were written in order to reduce the burden of filing other documents with the entry or entry summary because Customs frequently did not need the documents to process the entry or entry summary. The decision of whether Customs needs the documentation either at or after the time of entry is a decision best left to Customs. If the broker knows that certain entry summaries and supporting documentation will be used for a subsequent claim for drawback, the broker could maintain those records separately and thus forego any time or expense for future retrieval. The substance of the second comment has been addressed above in the comment response regarding § 143.35.

Section 143.37(a)—Retention of Records

Comment: With regard to the reference to records that must be retained by a broker, a commenter requested clarification on whether or not a Customs electronic response to a broker transmission must be maintained.

Customs response: Since a Customs electronic response to a broker transmission is not one of the documents or data elements covered by sections 508 and 509 and by the definition of ''records'' in § 163.1(a), there is no regulatory requirement that such electronic responses be maintained; however, a prudent broker might want to retain them for other purposes.

Also with regard to § 143.37, as a result of a further internal review of the proposed regulatory amendments to paragraphs (c) and (d), Customs has concluded that these two paragraphs should be removed rather than merely amended as proposed. As regards paragraph (c), which concerns consolidation of electronic entry records, the issue of consolidated records is specifically covered for brokers in amended § 111.23(a) because that provision also sets forth a basic standard for where records are to be maintained in the absence of consolidation; however, in the case of other entry filers, consolidation of records lacks a regulatory context because the regulations have never prescribed (and the proposed new Part 163 texts did not mention) a basic records location standard to which consolidation would have reference. Thus, the removal of paragraph (c) would allow Parts 111 and 163 to control and would have the added benefit of avoiding an unnecessary distinction between electronic entry records (for which consolidation was specifically mentioned under the proposed texts) and other records (for which no consolidation standards were proposed). As regards paragraph (d), which concerns the condition in which supporting documentation must be retained, Customs notes that the substance of this provision is also the subject of proposed § 163.5; thus, in view of the cross-reference to Part 163 in amended § 143.37(a), paragraph (d) no longer serves any necessary or useful purpose. Accordingly, the regulatory amendments set forth below include the removal of paragraphs (c) and (d) of § 143.37.

In addition, also based on a further internal review, Customs has determined that present § 143.38, which concerns the retrievability of supporting documentation regarding electronic transactions (and which was not affected by the proposed regulatory amendments), duplicates, or is inconsistent with, the new Part 163 provisions. Since Customs believes that the Part 163 provisions should control, the regulatory amendments set forth below also include the removal of this section.

Section 143.39—Penalties

Comment: Four comments were received on the proposed revision of § 143.39 which refers to brokers and importers unable to produce documents requested by Customs within a reasonable time and provides that such brokers will be subject to penalties pursuant to Parts 111 and/or 163 and that such importers will be subject to penalties pursuant to Part 163. The points made by these commenters were as follows:

1. One commenter argued that the maximum period for production of records is much too short for large companies with centralized payment offices and that, thus, it is unreasonable to penalize an importer for a failure to produce documents within a ''reasonable time''. Noting that there are currently no administrative penalties for failure to keep and produce required records for examination, this commenter complained that, under the proposed rule, recordkeepers that fail to comply could find themselves held in contempt by a district court, subject to monetary penalties fixed by the court, and could be prohibited from importing until they comply.

2. One commenter argued that brokers should not be liable for penalties under both Part 111 and Part 163 because this could represent double liability for one error. This commenter suggested limiting liability for brokers to Part 111 which subjects a broker to the greatest potential liability, that is, loss of its license.

3. One commenter stated that since broker records are retained by a broker only because of the requirements of Part 111, brokers should be subject to penalties only under Part 111 (and not under Part 163) unless the broker is also the importer of record or unless the broker is a certified recordkeeping agent for one or more of its clients. Similarly, another commenter requested clarification on its assumption that penalties under Part 163 would apply to a broker only when the broker acts as importer of record and that penalties under Part 111 would apply in all other cases.

Customs response: 1. Customs has extensively modified proposed § 163.6(a), as discussed below in connection with the comments received on that provision, and the regulatory text, as so modified, addresses the substance of this comment.

2 and 3. Customs agrees with these comments only in regard to the issue of double liability: Whether a broker on a Customs transaction was acting as the importer of record or only as an agent for the importer of record, if disciplinary action (including the assessment of monetary penalties) under 19 U.S.C. 1641 and Part 111 of the Customs Regulations is taken against the broker for a recordkeeping violation, no additional penalties under 19 U.S.C. 1509(g) and Part 163 of the Customs Regulations can be assessed; this is made clear by the text of proposed § 163.6(b)(5)(ii) (redesignated as § 163.6(b)(4)(ii)) as set forth below. On the other hand, whenever a broker engages in an activity (such as filing an entry as importer of record or as an agent for the importer of record) that triggers the record maintenance and production requirements of 19 U.S.C. 1508 and 1509 and Part 163 of the Customs Regulations, Customs may, in response to a recordkeeping violation by that broker and depending on the nature and circumstances of the violation, opt for imposition of a section 509/Part 163

penalty in lieu of taking disciplinary action under section 641/Part 111.

Based on a further internal Customs review of the proposed regulatory amendments, the following clarifying changes have been included in the text of revised § 143.39 as set forth below: (1) in paragraph (a) and paragraph (b), the word ''documents'' has been replaced by ''records'' for purposes of terminology consistency vis-a-vis Parts 111 and 163, and the words ''within a reasonable time'' have been removed in light of the changes made to the record production requirements of § 163.6(a) as discussed below; and (2) in paragraph (a), reference is made to ''disciplinary action or'' penalties, and reference is made to part 111 ''or'' part 163 (rather than ''and/or'', for the reason stated in the points 2 and 3 comment response immediately above).

Section 163.1(a)—Definition of ''Records''

Comment: In the definitions of ''records'' and ''activities'' it should be specified that records either are, or need not be, kept for imports where no entry or record of importation needs to be filed by a customs broker. This should be clarified for informal entries, importations of merchandise under $250 where no entry is required, all forms of in-bond entries and the like. Without such clarification the importing community will not know whether those documents fit under the definition.

Customs response: Customs disagrees. The meanings of the terms ''records'' and ''activities'' are quite specific and, in the case of the latter, are provided by statute. Whether or not a particular importation is subject to formal entry or informal entry, or is exempt from entry, the transaction would still fall within the scope of either an ''importation'' or the requiring of a ''declaration'' and therefore there must be records, documents or data associated with that importation or declaration and they must be maintained. In all cases, the activities described in the comment (informal entry, exemption from entry, and movement under bond) are all subject to the recordkeeping requirements. The sole exception would be for declarations made by arriving travelers as provided for in proposed § 163.2(g) (redesignated as § 163.2(e) as set forth below).

Comment: In the introductory text of proposed § 163.1(a), Customs has included the words ''directly or indirectly'' although the concept of ''indirectly'' pertaining to an activity is nowhere specified in the statute itself. Thus, this is a ''stretch'' not sanctioned by law.

Customs response: Customs agrees that these words should be removed from the text. Section 163.1(a) as set forth below has been modified accordingly.

Comment: With regard to subparagraph (1)(ii) of the proposed definition, which refers to shipments carried under bond, a commenter noted that, under the anticipated remote location filing program, goods will move to designated examination sites under the importer's bond and it is likely that carriers will not be aware that such movements are under bond and thereby potentially be in violation. This commenter stated that clarity is needed regarding what constitutes ''under bond'' and suggested doing this either by simply referring to 19 CFR Part 18 or by exemption in the case of movements covered by the bond provisions set forth in 19 CFR 113.62, because a carrier should not be required to be aware of or be required to keep records related to goods moving to a designated examination site under the remote location filing program.

Customs response: There are no regulations in place concerning remote entry filing, and creation of special language in this provision in anticipation of possible future regulations under the entry procedure therefore would be inappropriate. If and when such provisions are created which may cause a conflict or confusion with the recordkeeping provisions, amendments can be made at that time.

Comment: With regard to subparagraph (2) of the proposed definition, which sets forth examples of information which are considered records, a commenter took issue with the reference to ''computer programs necessary to retrieve information in a usable form''. This commenter asserted that under no circumstances should Customs seek to obtain from an importer or other affected party the source or object code or any other program information that would permit Customs, as contrasted with the affected party, to retrieve data independent of production by the affected party. Customs has the right to ask for the production of records and, if the records are not produced, Customs may take such steps as are within the scope of 19 U.S.C. 1509 to obtain production.

Customs response: The requirement in question is not new but rather has been in the Customs Regulations since 1979 when Part 162 was first adopted. The inclusion of language to cover computer programs was intended to ensure that recordkeepers who store documents/information electronically would also maintain the programming necessary to retrieve the documents/information in a format which could be read by Customs. The substantive interest of Customs lies not in the programming *per se* but rather in the data stored with the use of that programming. Without this requirement, it could be argued that the submission to Customs of corrupted or encrypted data, or data produced by obsolete programs, would satisfy the statutory and regulatory record maintenance and production requirements.

Based on a further internal Customs review of the proposed definition of ''records'', the text of § 163.1(a) as set forth below has been modified to incorporate some changes in addition to the change discussed above. Aside from minor editorial-type wording changes, these changes are as follows:

a. The proposed introductory text has been designated as subparagraph (1), subparagraph (2) of the proposed text (examples) has been moved into the text of new subparagraph (1), and subparagraph (1) of the proposed text (activities) has been redesignated as subparagraph (2). These organizational changes will improve the clarity of the text by placing the examples next to the part of the text to which they directly relate.

b. The word ''Further'' has been removed from the beginning of the second sentence of the definition in order to avoid any appearance that what is mentioned in that sentence is in addition to, rather than within the scope of, the first sentence (in other words, what is mentioned in the second sentence is subject to the basic first sentence ''normally kept in the ordinary course of business'' standard which reflects a basic requirement of section 508(a)).

c. The words ''electronically stored or transmitted information or data'' have been added to the examples in the text in order to (1) ensure coverage of what is referred to in section 509(g)(1) and (2) facilitate removal of all references to ''information'' elsewhere in the Part 163 texts (*e.g.*, in the term ''records/information'' used in § 163.5 and in referring to demanded ''information'' in § 163.6) when the regulatory text clearly is attempting to address ''records.'' With regard to the second point, Customs now recognizes that the proposed texts had the improper effect of introducing an undefined term (''information''), or of joining that undefined term with a defined term (''records'') by means of a slash (thereby creating another undefined term ''records/information''), into substantive text, thereby creating

potential confusion regarding the coverage of the regulatory texts and frustrating the purpose behind the adoption of the regulatory definition of ''records'' (which was to bring together in one all-inclusive definition all the different statutory terms and contexts that are subject to the maintenance and production requirements of sections 508 and 509). Accordingly, in addition to the above-described addition to the definition of ''records,'' the Part 163 texts as set forth below have been modified by removing all references to ''/information'' and by replacing all references to ''information'' by the term ''records'' wherever the context clearly relates to records as defined in § 163.1(a).

d. Subparagraph (iv) in the list of activities has been modified to refer to the ''completion and signature of a NAFTA Certificate of Origin'' (rather than only to ''any exportation to a NAFTA country'') in order to conform to the terms of the statute (section 508(b)(2)(A)). A similar conforming change has been made to the text of § 163.2(c) as set forth below.

e. In subparagraph (v) within the list of activities, a reference to ''duties'' has been added to ensure consistency with the statutory (section 509) and regulatory (§ 163.6) record examination authority, and the text has been rearranged for purposes of clarity.

Section 163.1(d)—Definition of ''Certified Recordkeeper''

Comment: Three comments were received on the proposed § 163.1(d) definition as it relates to customs brokers. The points made by these commenters were as follows:

1. One commenter requested confirmation of its understanding that the ''agent'' referred to as a certified recordkeeper would be a broker acting as importer of record and would not apply when entry is made in the name of the actual importer.

2. Another commenter proposed, as in the case of § 111.21(c) discussed above, that the certified recordkeeper automatically be the licensed qualifying officer of a broker unless the broker makes an alternate designation.

3. The third commenter took issue with that portion of the § 163.1(d) definition that provides that a customs broker ''may be a certified recordkeeper's agent in its own name and on its own account for records required by § 111.21 without client participation.'' This commenter asserted that: (1) The purpose of § 111.21 is to ensure that the broker will maintain records which support the entry and that such records are available to Customs officials; (2) until the passage of the ''Mod Act'' provisions allowing electronic entries and entry summaries, relevant importer documents were routinely submitted to Customs and the broker did not have to retain copies; (3) with paperless entries, the importer is required to maintain those documents required for release of a shipment (the ''(a)(1)(A) list'') and, to the extent that these documents are not submitted with the entry, they must also be retained by the broker; and (4) the failure of a broker to submit the paper entry documents is solely a violation of 19 U.S.C. 1641, punishable either by monetary fine or by license suspension or termination. This commenter further stated that, in contrast, the purpose of participation in the ''certified recordkeeper'' program under proposed § 163.14 is the avoidance or reduction of penalties under 19 U.S.C. 1509 for failure to produce (a)(1)(A) documents when requested by Customs. Since § 111.21 is unrelated to the provisions for maintaining the (a)(1)(A) records, for which brokers may be liable for penalties under section 1641, there is no reason for a broker to seek certification, as an ''agent'' or otherwise, for § 111.21 records unless it is the intention of Customs to grant the same relief to brokers in connection with a section 1641 violation (*i.e.,* avoidance of a section 1641 penalty). Accordingly, this commenter requested that the provision at issue be deleted from the § 163.1(d) text.

Customs response:

1. This commenter is generally correct regarding its understanding of the intent of the proposed regulatory text.

2. Since it is the brokerage firm that is a recordkeeper and that would be certified, Customs sees no point in referring to a certified recordkeeper as an individual holding a license or someone designated by the broker. Notwithstanding the designation of a recordkeeping contact under amended § 111.21(c) as discussed above and set forth below, Customs would still hold the firm responsible.

3. Customs does not agree with all of the statements in this comment, in particular as regards the relationship between the broker statute/regulations and sections 508/509/Part 163. Section 111.21, as discussed above and as set forth in part below, clearly has reference, *inter alia,* to records required to be maintained and produced under sections 508 and 509 and Part 163; therefore, a failure to comply with § 111.21 as it relates to Part 163 record maintenance requirements could result in penalties under section 509/Part 163 (in which case, as stated above, disciplinary action under section 641/Part 111 could not be taken). A broker can be a certified recordkeeper in his own name and on his own account and as such might be able to obtain relief from section 509/Part 163 penalties; however a broker's status as a certified recordkeeper would afford no basis for relief if Customs opted for disciplinary action under section 641/Part 111 in lieu of penalty action under section 509/Part 163.

In view of the uncertainty reflected in the above comments regarding the role of agents/brokers as certified recordkeepers, and based on a further internal review of the proposed text, Customs believes that the proposed text should be changed to simply parallel the statute (section 509(f)) as regards participation in the Recordkeeping Compliance Program. Accordingly, the proposed definition of ''certified recordkeeper'' in § 163.1(d) has been modified, as set forth below, by removing the last two sentences and by revising the remaining first sentence to refer simply to a person who is required to keep records under the Customs Regulations and who is a participant in the Recordkeeping Compliance Program (the section within Part 163 dealing with eligibility for that Program identifies the eligible participants specifically as persons described in § 163.2(a), that is, persons required to keep records under section 508(a)). Thus, under the statute and under the regulatory texts as set forth below, the eligibility of brokers and other persons to apply to become certified recordkeepers is simply a function of their obligation (based on their activities either as a principal or as an agent) to maintain records under section 508(a).

Comment: A commenter referred to ISO9000 which was described as an internationally recognized system that by definition is a minimum system requirement which helps ensure items are provided in accordance with good management practice and which includes documentation of the system, control of documents and both internal and external auditing. In order to achieve the benefits of a certified, audited recordkeeping program without asking importers to expose more information than they feel comfortable, this commenter recommended that importers who become registered to the ISO9000 standard be considered automatically a ''certified recordkeeper''.

Customs response: Customs disagrees. While the ISO9000 standard is a rigorous one, it certainly applies to a number of areas other than recordkeeping. The fact that an importer

meets those standards is a factor, and admittedly a significant factor, to be considered in the certification process under the Recordkeeping Compliance Program, but it cannot and should not be the sole criterion.

Section 163.1(e)—Definition of ''Certified Recordkeeper's Agent''

Comment: Customs should consider either expanding the proposed definition of a certified recordkeeper's agent (that is, beyond an importer of record or a customs broker) or creating a new class of agent (an Independent Certified Recordkeepers Agent, or ICRA) to include only those who utilize alternative storage methods, such as CD ROM and optical disk, to maintain records. The ICRA would essentially be a specialized service bureau that scans paper documents, appropriately indexes and permanently stores the scanned images on CD ROM or optical disk; the ICRA would be independently certified by Customs but such certification would be limited in scope to certification of alternative recordkeeping methods as provided for in proposed § 163.5(b) and would not relieve the primary recordkeeper from certification requirements set forth in proposed § 163.14. The ICRA would ''team up'' with a certified recordkeeper to provide the conversion, indexing, storage and retrieval portion of the overall certification program. This commenter argued that adding a provision for an ICRA would result in the following benefits for Customs and the importing community: (1) It would expedite the certification process for Customs and the party wishing to become a certified recordkeeper who uses alternative storage methods because the ICRA would have established standards regarding conversion techniques, the system of storage to be used and the security safeguards to prevent alteration of the stored images, and thus Customs would only have to review the ICRA standards once; (2) it would make it easier and more convenient for a primary recordkeeper to become a certified recordkeeper and thus would encourage more recordkeepers to become certified; (3) by independently certifying an ICRA, the proposed § 163.5(c)(3) standard for alternative record storage (*i.e.*, vendor specifications/documentation and benchmark data regarding the storage medium) would already have been made available to Customs and would be the same for each certified recordkeeper that the ICRA represents; (4) it would automatically provide for segregation of duties between those responsible for maintaining and producing the original records and those responsible for the transfer process, as required in proposed § 163.5(c)(9); and (5) it would expedite the quarterly internal sampling-exception-reporting/testing required by proposed § 163.5(c)(10) because the ICRA would perform the testing and file the necessary reports on behalf of each certified recordkeeper it represents, using standardized procedures and reporting which would facilitate the Customs review process.

Customs response: Customs does not agree with this suggestion. As pointed out above in the discussion of the definition of ''certified recordkeeper'', Customs may certify under section 509(f) only persons who are required to keep records under section 508(a); thus, Customs has no authority to certify persons who do not have a recordkeeping responsibility under the applicable Customs laws and regulations, and it was never intended that such persons would be covered by the ''certified recordkeeper's agent'' definition. In this light and in view of the modified text of the definition of ''certified recordkeeper'' as discussed above and set forth below, Customs has reconsidered this matter and no longer believes that it is necessary or appropriate either to retain the definition of ''certified recordkeeper's agent'' or to include any references to a certified recordkeeper's agent in the operative provisions dealing with the Recordkeeping Compliance Program. The Part 163 texts as set forth below have been modified accordingly.

Section 163.1(f)—Definition of ''Compliance Assessment''

Comment: A commenter suggested that the last sentence of this proposed definition be made a part of proposed § 163.1(c) (definition of ''audit''), because the § 163.1(f) definition both states what a compliance assessment is and then goes on to note that a compliance assessment can be expanded into a ''detailed audit''.

Customs response: This suggestion should not be adopted. The last sentence of the proposed ''compliance assessment'' definition was considered necessary in that specific context in order to indicate that there is a distinction between compliance assessment procedures and more detailed ''audit'' (as defined in paragraph (c)) procedures.

However, based on this comment and as a result of a further internal review of the proposed regulatory texts, Customs no longer believes that a compliance assessment should be specifically defined as the first phase of an audit. Customs notes in this regard that (1) in many cases compliance assessments are concluded without the need to expand the inquiry into a detailed audit and (2) in some cases an audit may be initiated without having been preceded by a compliance assessment. Accordingly, the definition of ''compliance assessment'' (redesignated below as paragraph (e) of § 163.1) has been revised to more precisely describe a compliance assessment as a type of importer audit and to more succinctly describe the procedures and purposes of a compliance assessment.

Comment: A commenter took issue with the statement in this proposed definition that in the compliance phase of an audit Customs will review ''* * * internal controls, operations, and procedures to ensure compliance. * * *'' While a review of an importer's systems (*i.e.*, controls, operations and procedures) may be a reasonable way for Customs to test for accuracy of records and may be appropriate in some circumstances, this commenter stated that it was aware of no provision of law requiring an importer to subject its ''systems'', as distinguished from its required records, to Customs scrutiny, noting in particular that 19 U.S.C. 1508 merely identifies those records which an importer shall make, keep, and render for examination and that 19 U.S.C. 1509 merely sets forth rules for the examination of such records. This commenter stated that the proposed definition should be amended accordingly and suggested, as a minimum, the addition of the words ''and may, in appropriate circumstances, review'' before the words ''internal controls, operations, and procedures''.

Customs response: Notwithstanding the revision of the proposed definition of ''compliance assessment'' as discussed above, Customs disagrees with the basic premise of this comment. A compliance assessment is designed to test exactly those areas referred to by this commenter. It should be noted that records and recordkeeping systems are a part of compliance, not its sole purpose. In this regard, see the second sentence of § 163.0 which spells out the various purposes of compliance assessments, audits and other inquiries.

While considering the above issues regarding the definitions of ''audit'' and ''compliance assessment'', Customs noted that whereas the statute (section 509) makes the basic distinction between an ''investigation'' and an ''inquiry'', the proposed § 163.1 definitions did not address this distinction. It is clear that, in the

context of section 509, the broad term ''inquiry'' is intended to cover any request for information by a Customs officer that does not constitute an investigation (and thus would encompass, for example, compliance assessment and other audit procedures and more informal procedures such as requests for information made by telephone or on Customs Form 28). In order to address this point, § 163.1 has been modified as set forth below by the addition of a new paragraph (g) definition of ''inquiry'', and additional editorial changes have been made elsewhere in the Part 163 texts as set forth below to conform those texts to the principle reflected in this new definition.

Section 163.1(h)—Definition of ''Original Records'' and ''Original Information''

Comment: Ten comments were received on the concept of ''original'' records and information, in some cases not only with reference to the definition in proposed § 163.1(h) but also with reference to the basic requirement in proposed § 163.5(a) that records be retained in their original formats. The points made by these commenters were as follows:

1. One commenter referred specifically to the first sentence of the § 163.1(h) definition which mentions ''paper documents or electronic data retained in the condition they were received by the party responsible for maintaining records pursuant to 19 U.S.C. 1508.'' This commenter complained that this requirement as it reads is open-ended and suggests that all original records and original information received by an importer are covered, whether or not the record or information is one normally kept in the ordinary course of business or is one required to be maintained by statute or is identified as one listed on the (a)(1)(A) list. This commenter argued that the recordkeeping statute does not require maintenance of every piece of paper or electronic data received by an importer and that, therefore, original records and electronic data should be limited in the regulatory text to such records and electronic data received and normally kept in the ordinary course of the importer's business and such records and electronic data that are required to be maintained by statutory fiat or that are included on the (a)(1)(A) list.

2. Three commenters complained that the proposed definition does not adequately distinguish between documents and data and thus does not accurately reflect the way that companies do business, particularly with regard to how they receive and process electronic information. One of these commenters pointed out that some importers receive shipment data from the foreign seller in a proprietary electronic data interface (EDI) format as enormous strings of raw data in a preliminary record layout form which, as such, is not used for commercial purposes and is not transmitted as such to a customs broker for filing with Customs; this raw EDI data must undergo system edits to test its reliability, and only after the data has been processed through the importer's system (and thus is no longer raw data) can it be used for commercial and entry purposes. Thus, although the entry information transmitted to Customs would not match the original record layout data as transmitted by the foreign seller, the information transmitted to Customs is the most accurate information and, from a practical and legal standpoint, it is ''original'' data for purposes of conducting business and making the proper declarations to Customs. Another commenter stated that when paper documents are involved, often they are a result of data acquired through a chain of computer activities (purchase order, pick lists, invoice, shipping data, etc.); the regulatory texts, by not including a reference to ''electronic documentation'', place too much emphasis on the original paper and the retention thereof, where, in fact, the information should be the focus. Moreover, imaging is increasingly becoming a standard for preservation of data because it facilitates workflow and storage management (particularly for large customs brokers and importers who handle large volumes of paper), and thus paper documents are routinely scanned into a computer upon receipt and facsimile transmissions are received directly into the image system without making ''hard copies'' unless requested by Customs. The third commenter noted that an importer or other required recordkeeper probably will not receive records only in a single format but rather will receive them in more than one format, such as an EDIFACT electronic invoice, a facsimile transmission of the same invoice, a carbon copy air waybill, and an original hard copy truck bill of lading for delivery; while under the proposed rule the importer would be maintaining these records in at least two formats, it would be more realistic for the importer to be able to keep them all in hard copy or all electronically, instead of in a combination of methods based on how they were received, without having to obtain specific approval from Customs so long as certain basic requirements are met. In addition to these observations, the commenters made the following specific suggestions:

a. The recordkeeping requirements and definition at issue should be revised to allow importers' systems data, as described above, to be considered as ''original''. This could be done by adopting the standard in Rule 1001 of the Federal Rules of Evidence which states that ''[i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original'.''

b. The regulations should recognize that, in addition to photocopies and facsimile, a printout of an image from a computer may be considered an original in satisfying all Customs requirements.

c. The first sentence of § 163.1(h) should be amended to read ''[t]he terms 'original records' or 'original information' mean paper documents or electronic documentation or data retained in the condition they were received * * *''.

d. In the first sentence of § 163.1(h), ''and/or'' should be used in place of ''or'' between the terms ''paper documents'' and ''electronic data''.

3. Four commenters stated that the fifth sentence in the § 163.1(h) definition may create some confusion with regard to maintaining multi-part or carbon copy (multiple impression) forms (for example, delivery orders or bills of lading), photocopies and facsimile copies. One of these commenters noted that, in the case of multi-part or carbon copy forms, the originals are often separated and information or notations are placed on one copy only or only on the top copy, thus raising the question of which copy is the true original copy; this commenter stated that the regulations should be more specific as to what constitutes an original record. Another commenter noted that whereas an original hard copy record may, for example, be submitted to a bank and the importer, broker or other person may only have a copy, the importer, broker or other person would be considered to have an ''original'' record within the definition so long as the copy is ''retained in the condition received * * *''; this commenter questioned whether the definition was necessary, suggesting that it would be as easy to revise proposed § 163.5(a) to require the party responsible for maintaining records pursuant to 19 U.S.C. 1508 to retain the record in the condition received unless an alternative method was approved

under § 163.5(b). The third and fourth commenters suggested that the reference in the definition to copies and multi-part forms should be clarified since the record/information received as a copy is acceptable under the definition; one of these commenters also questioned whether the fifth sentence was necessary if the importer is obligated to retain the record in the condition received, and both commenters believed that the reference to ''a certified copy'' in the sixth sentence of the definition should be clarified as to who would be the certifier, one commenter suggesting that it would have to be the importer because of what is stated in the next sentence.

4. With reference to the overall effect of proposed § 163.1(h) and 163.5 and in particular the requirement of obtaining Customs approval before converting records to another format for storage and retrieval, a commenter requested clarification as to whether the regulatory texts mean that every system that an importer may use to maintain records (microfiche, CD–ROM, etc.) must be approved in advance by Customs when such systems are part of a company's normal course of business. This commenter further questioned whether Customs has the staffing necessary to certify these systems for importers.

5. A commenter referred to the provision in proposed § 163.1(h) that electronically received data will be considered the original record even though it is converted to paper upon request by Customs. This commenter stated that it expects to obtain authority to convert paper documents into an electronic storage medium, and reasonably soon thereafter, to be allowed to destroy the original paper documents. This commenter suggested that § 163.1(h) should include provision for exemption which may be granted under § 163.5; under the exemption, such a converted document may, upon the request of Customs, be certified to be a true copy of the original record or document.

Customs response:

1. Customs disagrees. Proposed § 163.1(h) was merely intended to define what is meant by the term ''original records/information''. Which records or information are to be maintained is properly the subject of other provisions of Part 163.

2. The raw EDIFACT feed is original information from which other forms of the data are created; putting it in a readable form is acceptable. Customs agrees that it is the information that is the focus of the Part 163 retention and production provisions, provided that the information in question falls within the § 163.1(a) definition of ''records'' (see the above discussion of the changes made to that definition and the below discussion of the changes to the definition at issue here). Although alternate storage is the subject of § 163.5 and is discussed below in that context, Customs notes that where originals are in different formats and importers wish to use a single format for storage, the alternative storage provisions of § 163.5 are intended to accommodate that. The following are the Customs responses to the specific suggestions of these commenters:

a. Customs disagrees. The standard cited from Federal Rules of Evidence provides a very limited guideline which would not qualify as a proper definition encompassing a wide variety of situations. Customs believes that the approach in the proposed definition is sufficient to cover advances in technology.

b. Customs agrees in part. Photocopies and facsimiles, if originally received in that format, would be considered to be original documents. A computer printout, however, is a secondary source or copy because the electronic data stored in the computer is the original data. While not considered as an original, the printout may in fact satisfy Customs requirements for production of the record since it would qualify as a ''facsimile paper format'' or possibly as a ''hardcopy spreadsheet''.

c. The substance of this comment has already been addressed above.

d. This comment is obviated by the changes made to the proposed definition as discussed below.

3. Customs disagrees generally with the comments. In the case of a multi-part form or document, the first copy where the initial impression occurs could be considered the ''original'' and the subsequent carbon copies could be considered ''copies''. Recognizing that other entities such as carriers or banks may remove and keep the ''original'' (top) copy, the proposed regulatory text provided for the acceptability of a carbon copy form, a facsimile copy and a photocopy in lieu of the original (top copy) page, thus rendering moot the question of which copy is the ''original''. The provisions regarding alternative storage methods (§ 163.5) are not the proper context for dealing with this issue. Moreover, the phrase in the first sentence ''retained in the condition they were received'' does not answer the question and obviate the need for the sentence regarding multi-part forms because the importer could be the person who created the form to begin with or who received the form from a third party and removed a copy and then forwarded the form; in those cases, the ''original'' form issue is not addressed by the words ''condition . . . received''. With regard to the last two sentences of the proposed definition, Customs believes that, in view of the overall subject matter of Part 163 which is the maintenance and production of records, it should be sufficiently clear that the person who would certify the copy can only be the person who has the statutory and regulatory responsibility for maintaining and producing the record (and who thus knows what happened to the ''original'').

4. The concerns of this commenter are addressed in the changes which have been made to proposed § 163.5 as discussed below in connection with the comments received on that section.

5. Customs disagrees with this suggestion. Substantive requirements regarding storage methods are set forth in § 163.5 and thus are inappropriate for this definitional provision.

In consideration of the comments received and based on a further review of the regulatory text, Customs has determined that some changes should be made to the definition as proposed. In addition to some minor, editorial changes, the text of the § 161.1(h) definition as set forth below incorporates the following changes:

a. The defined term has been changed to read simply ''original'', for four reasons. First, the term defined in the proposed text was not used as such in the text of the proposed provision to which it had the most direct relevance (that is, § 163.5(a) which used the words ''original formats''). Second, inclusion of the word ''records'' in the defined term is unnecessary and inappropriate because ''records'' has already been defined (and thus cannot have a new meaning here). Third, use of the word ''information'', thereby implying something different from ''records'', is inappropriate for the reasons stated above at the end of the comment discussion concerning § 163.1(a). Finally, based on the proposed definition and the proposed Part 163 texts as a whole, it seems clear that the proposed definition was in essence merely trying to establish the concept of ''original''.

b. As a companion to the change in the term that is defined, the proposed first sentence of the definition has been modified to refer to the specific context in which the defined term is used within Part 163 (that is, in the context of maintenance of records). In addition, this text, as modified, refers to records that are in the condition in which they were ''made or'' received, because

section 508 refers to the making and keeping of records and some records that are required to be kept by section 508 and Part 163 are made (rather than merely received) by the person required to keep them (compare this textual change to the change to the introductory text of § 163.2(a) discussed below at the end of the Customs responses to the comments on that section). Finally, the first sentence of the proposed definition has been changed into an introductory text and, except as otherwise stated in point c immediately below, the remaining text of the proposed definition has been set forth as a list of four subparagraph exemplars of original records covered by the general definition in the introductory text.

c. The third sentence in the proposed text (regarding when original electronic information or paper documents must be provided to Customs) and a portion of the language in the sixth sentence of the proposed text (that is, regarding the assessment of penalties) have been omitted from the modified definition because they are not appropriate for a definitional text and merely repeat what is more appropriately covered in § 163.6.

d. In the first exemplar of the modified definition text (which corresponds to the second sentence of the proposed text), a reference to ''other electronic records'' has been included to clarify that electronic information may be used to develop not only paper documents but also other records set forth and maintained in an electronic format.

e. Finally, in the fourth exemplar of the modified definition text (which corresponds to the last two sentences of the proposed text), provision is made for submission of a signed certifying statement only if required by Customs (rather than in all cases covered by that exemplar).

Section 163.1(k)—Definition of ''Third-Party Recordkeeper''

Comment: With regard to accountants as third-party recordkeepers, a commenter contended that the definition should state that accountants are not empowered to conduct ''customs business'' as statutorily defined.

Customs response: Customs disagrees. The regulatory text in question (redesignated below as § 163.1(l)) merely provides a definition of a third party recordkeeper in the context of Part 163 which concerns recordkeeping. The concept of ''customs business,'' and the rules regarding who may engage in customs business, are established under the customs broker statute and regulations (19 U.S.C. 1641 and 19 CFR Part 111) and are not relevant to these recordkeeping regulations.

With regard to the § 163.1 definitions, an internal Customs review of the proposed regulatory texts disclosed that the terms ''party'' and ''person'' were used throughout the proposed Part 163 texts without the appearance of any clear rationale for using one term or the other in a given context (except as regards references to a ''third party recordkeeper'' which is a statutory expression), and it is noted that sections 508 and 509 are similarly inconsistent in the use of these terms. In order to avoid the impression that a different meaning is intended when one term is used and not the other, and because Customs does not believe that any such difference in meaning was intended in the applicable statutory provisions, Customs has modified the Part 163 texts as set forth below (1) by adding a new definition of ''party/person'' as § 163.1(i) and (2) by using the term ''person'' throughout the Part 163 texts except where the expression ''third party recordkeeper'' appears. The new definition is similar to what is found in other parts of the Customs Regulations (see, for example, 19 CFR 177.1(c)) except that ''natural person'' is used in place of ''individual'' because that term is used in the Part 163 service of summons provisions.

Section 163.2—Parties Required To Maintain Records

Comment: Two commenters complained about the absence from this proposed section of any specific mention of recordkeeping requirements for express consignment operators and couriers who operate under Part 128 of the regulations. One of these commenters stated that there are unique situations under Part 128 that should be addressed, especially regarding manifest entries and consolidated informal entries. The other commenter, noting the large number of shipments carried by express consignment courier companies and the fact that they or their agents act as importer of record, suggested the addition of a new paragraph (f) to § 163.2 to read as follows: ''(f) *Recordkeeping required for express consignment operators and carriers.* Each courier, express consignment operator or carrier shall maintain records of all documents, entries and clearances associated with international import shipments in accordance with 163 of this chapter.''

Customs response: Customs does not agree that the suggested new text is necessary. As in the case of the underlying statute, the proposed text of § 163.2 adequately covers the activities of express consignment operators and couriers.

Section 163.2(a)—General Recordkeeping Obligation

Comment: Five comments were received on proposed § 163.2(a) which sets forth the basic categories of persons required to make and keep records and render them for examination and inspection. The points made by these commenters were as follows:

1. The proposed regulatory text expands the recordkeeping requirement to include those who cause an importation, anyone who files an entry or declaration, drawback claimants, customs bonded carriers and cartmen, bonded warehouse proprietors, and foreign trade zone operators. Importers must also keep all information and documents required by law for the entry of merchandise. The proposed rule would require many importers that do not receive and retain all entry documents in their business process to set up recordkeeping systems to capture and retain those documents. This places an undue hardship on many importers.

2. A commenter complained that Customs proposes that persons who ''knowingly cause merchandise to be imported'' will be subject to recordkeeping requirements and that Customs includes within this group persons who ''control the terms and conditions of the importation'' and persons who supplied the importer with ''technical data, molds, equipment, other production assistance, material, components, or parts * * * with knowledge that they will be used in the manufacture or production of the imported merchandise.'' This commenter stated that this proposal will result in some companies being required to maintain documents which normally would be discarded in the ordinary course of business. The commenter referred specifically to companies that have established so-called L/C ''direct import'' programs under which a U.S. company's foreign vendor sells merchandise directly to the company's domestic customer (for example, a retailer or mass merchandiser) which acts as importer of record and as such assumes responsibility for customs duty payments and entry requirements, and under which the U.S. company may be responsible for designing imported merchandise, providing equipment used in the production process, or supplying the foreign vendors with materials, components or parts; these L/C programs benefit all concerned by reducing costs to the U.S. customers and the ultimate consumers, and they allow the mass merchandiser, which is more

knowledgeable regarding Customs rules and regulations (including the need to maintain records and thus obtain any relevant documents from the U.S. company that may be necessary), to assume responsibility for Customs requirements by acting as importer of record. This commenter argued that ''legal'' responsibility to maintain records should rest with the importer of record and that a non-importing party should not be required to maintain a second set of such records which constitutes an unnecessary burden on the public without enhancing the ability of Customs to effectively administer the laws it is charged with enforcing. Accordingly this commenter urged Customs to modify the proposed regulations to provide that persons who do not themselves act as importers of record will not be subjected to recordkeeping requirements merely because they may knowingly cause merchandise to be imported. Alternatively, this commenter requested that the regulations be clarified to provide that: (1) persons who do not act as importers of record are not required to make, keep and render for examination and inspection any records which they do not otherwise maintain in the ordinary course of business; and (2) Part 163 does not impose on a party which does not itself act as importer of record any requirements to maintain any records which the party does not otherwise maintain in the ordinary course of business for reasons not relating to customs laws and regulations.

3. By mentioning an ''entry filer'' (subparagraph (1)) and an ''agent'' (subparagraph (2)), proposed § 163.2(a) requires that, where a customs broker acts as importer of record, both the actual importer and the broker are required to maintain all records, including those specified in the (a)(1)(A) list. If this reading is correct, the proposed regulation will have a chilling effect on when a broker will choose to act as the importer of record (currently, that decision is made based on convenience to the importer and because of the need to expedite the release of the goods).

4. In subparagraph (1), the term ''entry filer'' should be replaced by ''customs broker'' because the only filers are customs brokers and importers handling their own transactions and importers are already specifically mentioned. In this context ''entry filer'' is confusing.

5. A customs broker serving as importer of record will almost never be in possession of all of the records defined in proposed § 163.1(a), because the broker will not have caused the importation or subsequent uses of imported goods. A broker when also serving as importer of record should only be required to maintain records which support the entry/entry summary declarations.

Customs response:

1. Customs disagrees. The proposed regulatory text merely reflects the relevant statutory provisions as amended by the Mod Act. Moreover, Customs notes that the provision for recordkeeping by importers, including maintenance of entry records, is not new but rather was in existence prior to the Mod Act changes (19 U.S.C. 1508 and 19 CFR Part 162, Subpart A).

2. Customs disagrees with the basic complaint of this commenter. Customs did not create the language ''knowingly causes the importation.'' That language comes directly from the statute (section 508(a)(1)(B)) as modified by the Mod Act, and Customs does not have authority to promulgate regulations that are inconsistent with the statutory requirements. Customs is not able to respond to the example of the ''L/C direct import program'' because the paucity of information regarding the role of the U.S. firm makes it impossible to determine whether or not it ''knowingly caused the importation.'' Customs also disagrees with the two specific suggested clarifications because the first one is already provided for in the Part 163 texts and the second one would be in direct opposition to the statute.

3. Customs agrees with the commenter's reading of these provisions. As regards the alleged effect on a broker's decision whether to act as importer of record, Customs notes that such a decision is merely one of the business decisions that each broker must make when conducting customs business.

4. Customs disagrees. The term ''entry filer'' reflects the statutory language. The fact that a party could be mentioned twice (for example, an owner/purchaser is usually the importer) is not the issue here. Customs does not have authority to promulgate regulations that are inconsistent with the statutory requirements.

5. Customs disagrees. When a customs broker is listed as the importer of record, the broker is responsible for all the records listed in § 163.1(a) along with any additional duties or taxes determined to be due and any other requirements placed on the party shown as the importer of record.

Based on a further internal review of the proposed texts, Customs has determined that the introductory text of § 163.2(a) should only reflect the requirement to maintain (rather than also ''make'') records for the following reasons: (1) Maintenance of records is the thrust of § 163.2 as a whole; and (2) while it is true that section 508 reflects an obligation to ''make'' records, that obligation is reflected throughout the Customs Regulations according to the specific substantive context to which the records relate (for example, basic entry record requirements are prescribed in Parts 141–143, and drawback record requirements are prescribed in Part 191) and thus does not have to be, nor should be, reflected in the more general Part 163 texts.

Section 163.2(b)—Exclusion of Domestic Transactions

Comment: The words ''who does not knowingly cause merchandise to be imported'' should be eliminated from the introductory text of this proposed section, because often a person in a domestic transaction is aware that the goods ordered from an importer have been, or will be, imported but the buyer's purchase and sale is domestic and is not connected directly or indirectly with the import transaction; such a domestic buyer should not be required to maintain records on the import transaction just because he knows that the goods are imported. With this suggested change, a person ordering merchandise from an importer in a domestic transaction, whether or not that person knows that the goods are to be imported, will not be required to maintain records unless the person controls the import transaction or is involved with the production of the goods by furnishing assists.

Customs response: Customs disagrees. The regulatory language in question reflects the statute, and Customs does not have authority to promulgate regulations that are inconsistent with the statutory requirements. Further, the regulatory text gives two examples which clearly demonstrate that the domestic buyer who simply knows that the goods are imported is not, by that fact alone, encompassed within the concept of knowingly causing merchandise to be imported.

Based on a further internal review of the proposed § 163.2(b) text, Customs has discovered that the text (which was based on present § 162.1b(b)), included in the introductory text the addition of the word ''who'' before the words ''does not knowingly * * *''; the addition of this word, from a grammatical standpoint and with reference to the rest of the text, had the unintended effect of creating a new class of persons required to maintain records that was not listed in the general provisions of § 163.2(a).

The wording of introductory text of § 163.2(b) as set forth below has been appropriately modified to correct this and clarify that the provision specifically relates to the class of persons listed in § 163.2(a)(1)(ii).

Section 163.2(d)—Recordkeeping Required for Customs Brokers

Comment: Irrespective of whether the broker acts as the importer of record, the (a)(1)(A) recordkeeper under section 1509 is always the actual importer, and that statutory provision is worded so that Customs may always require the importer to produce the (a)(1)(A) records. Accordingly, § 163.2(d) should reflect that, when the broker acts as the importer of record, the broker is only subject to the provisions of section 1509(g) relating to assessment of additional duties, but is never liable for ''penalties'' for failure to produce the (a)(1)(A) records.

Customs response: Customs disagrees and notes that the substance of this comment has been addressed above in the Customs response to the comments on § 143.39.

Based on a further internal review of proposed § 163.2, Customs now believes that paragraph (e) (which concerned recordkeeping required for parties filing drawback claims) and paragraph (f) (which concerned recordkeeping required for other activities) are not needed. Customs notes in this regard that these two paragraphs merely repeat what has already been provided for in the § 163.1(a) definition of ''records'' and in paragraph (a) of § 163.2. Accordingly, these two paragraphs have been removed from the text of § 163.2 as set forth below and proposed paragraph (g) has been redesignated below as paragraph (e).

Section 163.2(g)—Recordkeeping Required for Travelers

Comment: A commenter claimed that this proposed section sets up a bifurcated recordkeeping requirement that almost no returning traveler will know exists and that flies in the face of the mandate to make regulations truly meaningful: a traveler does not have to maintain records either before entering or while physically within a Customs facility, but the traveler would have to keep records for merchandise acquired abroad that exceeds the personal exemption or the flat rate of duty. This commenter asked whether a traveler could not make a declaration that all merchandise acquired abroad was within the personal exemption and flat rate, pay no duty, and then take the position that no recordkeeping obligation existed. The commenter noted that while it is probably best that returning travelers be required to produce records of all purchases abroad, once they clear the Customs facility (even after having made a misdeclaration of value while having on their persons records showing the true value of the purchases) there is little likelihood that Customs will catch up with them.

Customs response: Customs disagrees. This provision is not radically different from existing provisions or practices. Customs may or may not ask for supporting documentation (purchase receipts or invoices) at the time the declaration is made. After clearance, Customs in the vast majority of cases would have no further interest in the declaration and, consequently, in the supporting documentation. In other words, any questions are usually resolved at the time of presentation or declaration as Customs normally does not go back and review declarations. The net effect of proposed § 163.2(g) (redesignated below as § 163.2(e)) was to provide that for most travelers bringing in non-commercial merchandise valued at no more than $1,400 (that is, the $400 personal exemption amount for returning residents plus $1,000 to which the flat rate of duty applies) per traveler, no supporting documents will be required to be maintained; for commercial importations or declarations over $1,400, supporting documents must be maintained. It should be noted that application of the personal exemption and flat rate of duty dollar limits (and thus application of the recordkeeping exemption) is a function of the actual value of the imported merchandise and thus does not, as a matter of law, depend solely on what value the traveler chooses to declare to Customs.

Section 163.3—Entry Records

Comment: Four commenters made observations on proposed § 163.3 which sets forth general requirements regarding the production of records required by law or regulation for the entry of merchandise (the ''(a)(1)(A)'' list). The points made by these commenters were as follows:

1. One commenter approved of the language giving general time standards for the production of documents but expressed concern that local Customs offices would focus on the table under § 163.6, to the exclusion of the § 163.3 legal guidelines. This commenter therefore stated that the § 163.3 language should be moved to § 163.6 where it is more appropriate.

2. One commenter noted that, because under § 163.2(a) recordkeepers include companies that do not act as importers of record but that knowingly caused merchandise to be imported, § 163.3 could be interpreted to mean that persons other than importers of record are required to maintain (a)(1)(A) records. Given the substantial penalties which may be imposed for a failure to produce those records on demand, and given the fact that those penalties were only intended to apply to importers of record who no longer will be required to submit certain specified information to Customs at the time of entry, this commenter requested that Customs modify the regulations to expressly provide that responsibility for producing (a)(1)(A) list records is limited to the importer of record who is responsible for filing (or expressly authorizing the filing of) a Customs Form 7501 (entry summary) and commercial invoice with Customs at the time of entry.

3. Two commenters objected to the requirement to retain copies of records when the records have been given to Customs. One of these commenters referred specifically to cases in which the records are returned by Customs, stating that this places an unreasonable burden of proof on the party to whom the records are allegedly returned because there would otherwise be no proof of such return and/or receipt. The other commenter stated that customs brokers should not be required to maintain any record that has already been tendered to Customs, and this commenter further asserted that this requirement is contradicted by § 163.6(b)(4)(iii).

Customs response: 1. Customs does not agree that Customs personnel would overlook, and thus fail to apply, a clear regulatory standard, and it is noted that the § 163.3 guidelines referred to by this commenter were also reflected in the proposed § 163.6(a) text. However, on further reflection, Customs believes that it is not necessary to state in § 163.3 the general standard by which entry records must be produced because § 163.6 is more appropriate for that purpose. Accordingly, § 163.3 as set forth below has been modified by removing all statements regarding the manner in which entry records should be produced and by adding a simple reference to the production of entry records ''in accordance with § 163.6(a)''.

2. Customs disagrees. Each party specified in section 1508(a) is individually required to ''* * * make, keep, and render for examination and inspection records * * *'' that pertain to an activity described in section 508(a) and that are normally kept in the ordinary course of business; thus, under

the terms of the statute, the fact that one party mentioned in the statute is subject to a particular recordkeeping requirement cannot have the effect of precluding application of that recordkeeping requirement to another party covered by the statute. Since the (a)(1)(A) records referred to by this commenter are entry records and thus are covered by the statute, adoption of this commenter's suggested change to § 163.3 would represent an improper limitation of the statutory terms.

3. Customs disagrees with the first comment. The purpose of the statutory and regulatory changes is to reduce the number of documents/information filed at time of entry so that Customs would request and retain only those documents that are needed. All other documents should therefore be retained by the responsible party. Customs may simply review a document and return it to the responsible party. That party must maintain the document/information in the event Customs returns to the entry or issue. Customs also disagrees that proposed § 163.6(b)(4)(iii) contradicts § 163.3 because the former section involves a different regulatory context (that is, the liability for penalties).

Section 163.4—Record Retention Period

Comment: A commenter stated that the general 5-year record retention period requirement set forth in proposed paragraph (a), on its face, would require that any importer, person involved in the import transaction, or person supplying technical assistance to the manufacturer maintain every piece of paper, every fax and every E-mail or voice-mail communication for a period of 5 years from entry, notwithstanding that in the ordinary course of business the particular record would normally be destroyed immediately upon receipt. On the assumption that Customs did not intend to impose such an onerous requirement on the importing community in contravention of its obligation to impose a minimum burden on the public it is serving, this commenter requested that Customs confirm that: (1) the only records which must be maintained are those records which the company usually maintains in the ordinary course of business; and (2) the Customs recordkeeping requirements do not impose upon a person an obligation to maintain faxes, E-mail or voice-mail communications which are normally discarded after receipt or upon completion of a transaction and which do not constitute normal business records otherwise required to be maintained for commercial purposes.

Customs response: While Customs agrees that the only records that are required to be maintained under section 508(a) are those that are normally kept in the ordinary course of business, Customs disagrees with the other statements of this commenter. Section 163.4 does not set forth a new requirement: While the parties listed in § 163.2 represent an expansion over those listed in the present regulation (19 CFR 162.1(b)) as a result of changes made to section 508 by the Mod Act, the parties mentioned by the commenter have since 1978 been required to maintain records for five years. As regards the second point on which confirmation was requested, Customs notes that the proposed definition of ''records'' in § 163.1(a) included a reference to ''information pertaining directly or indirectly to any information element set forth in a collection of information required by the Tariff Act of 1930, as amended, in connection with any activity listed in paragraph (a)(1) of this section.'' Clearly, this could include faxes, E-Mail and similar records, depending on prevailing business requirements and practices, because the nexus between a particular record and the requirement to maintain it is the activity to which the record relates: If the record pertains to an activity specified in section 508(a) and is normally kept in the ordinary course of business, it must be maintained for the applicable period specified in the statute and regulations.

The observations made by this commenter demonstrate the need for a clear statement of the position of Customs regarding the relationship between sections 508(a) and 509 and the meaning of the statutory expression ''normally kept in the ordinary course of business'', in particular as concerns ''(a)(1)(A)'' records. Section 508(a) requires making and keeping and rendering for examination and inspection those records that pertain to specified activities and that are normally kept in the ordinary course of business. Section 509 on the other hand sets forth specific standards for the examination of records by Customs, including special rules under paragraph (a)(1)(A) for records that are required by law or regulation for the entry of merchandise (the so-called ''(a)(1)(A)'' records, also referred to in the Part 163 texts as ''entry'' records). Central to the operation of section 509 is the assumption that the records to be produced under that section have been made and maintained in accordance with section 508(a) (in other words, if a record, including an (a)(1)(A) record, is not required to be made and maintained, there can be no requirement to produce it under section 509). Thus, whereas not all section 508(a) records are (a)(1)(A) records, all (a)(1)(A) records are covered by section 508(a).

As regards (a)(1)(A) records, it is the position of Customs that they meet the two essential tests that define the coverage of section 508(a), that is, they pertain to an activity specified in the statute and they are normally kept in the ordinary course of business. As regards the first test, the fact that they relate to the entry process clearly means that they pertain to the actions of an owner, importer, consignee, importer of record, entry filer, or other party who imports, or knowingly causes the importation of, merchandise into the customs territory of the United States, as provided in section 508(a)(1)(A) and (B). With regard to the second test, the fact that a record is required by law or regulation for the entry of merchandise means that it is, by definition, normally kept in the ordinary course of business (in other words, the legal requirement for the existence of the record is sufficient to meet the statutory test); if this were not the case, no record that is prescribed by a provision of the Customs Regulations would have to be maintained under section 508(a) or produced under section 509 unless the person identified in section 508(a) chose of his own volition to maintain it for business purposes, and this would render any such regulatory requirement essentially unenforceable and thus useless. Thus, contrary to the position implicit in this commenter's assertions, what constitutes a record ''normally kept in the ordinary course of business'' is not exclusively a function of what a businessman may choose to create and maintain.

Comment: A commenter suggested that Customs should consider different (*i.e.*, shorter) record retention periods for express consignment carrier shipments (for example, letter and document shipments, shipments that may be entered free of duty under 19 U.S.C. 1321, and shipments covered by an informal entry). This commenter argued that in such cases, where the cost of record retention is high due to the large number of shipments and enforcement or compliance measurement normally is performed at the time of entry, there is little justification for lengthy record retention periods.

Customs response: The substance of this comment has been addressed in significant part by the addition of new subparagraphs (3) and (4) to the § 163.4(b) text as discussed above in the

Customs responses to the comments regarding the treatment of express consignment carriers.

Comment: With regard to the proposed paragraph (b)(1) exception to the 5-year rule in the case of drawback claims, a commenter referred to the May 5, 1997, correction document which clarified the Background section of the April 23, 1997, notice of proposed rulemaking with regard to the (maximum) length of time that drawback records could have to be maintained under the proposed regulatory text, that is, ''a period of about eleven years from the date of importation''. Noting that the correction document assumed a payment under the accelerated payment program, this commenter asserted that the retention period in fact could be considerably longer when the accelerated payment program is not used because payment in such cases is made at the time of liquidation of the drawback claim and there is no deadline imposed on Customs for the liquidation of drawback claims (the commenter alleged that there have been many instances in which Customs liquidated a drawback claim more than five years after the claim date). Assuming that manufactured goods are exported five years after importation of the drawback merchandise and a drawback claim is filed three years after export, liquidation may take place ten to twelve years after importation, thus creating a record retention period of from thirteen to fifteen years. This commenter further asserted that the recently published proposed revision of the drawback regulations would impose new, stringent requirements for the accelerated payment ''privilege'', thus leading to increased record retention periods because a larger percentage of drawback claimants will receive payment at the time of liquidation.

Customs response: The published statement was correct under the stated facts. However, the commenter is also correct that if a claimant is not paid under the accelerated payment program and liquidation is delayed, the recordkeeping period is necessarily extended.

Comment: With regard to the proposed paragraph (b)(2) exception to the 5-year rule in the case of packing lists, two commenters stated that there should be no requirement to retain a packing list for any period of time. These commenters argued that a packing list is a temporary, transition document that has no use, and thus is discarded, once the shipment is unloaded or released.

Customs response: Customs disagrees. Customs finds packing lists to be very useful in performing examinations of cargo, in verifying invoice data, and in verifying inventory receipts.

Based on a further internal review of the proposed regulatory texts, the words ''whichever is later'' have been added at the end of the first part of the § 163.4(b)(2) text as set forth below in order to remove a possible ambiguity in determining the applicable 60-day period for retention of packing lists following a release or conditional release period.

Section 163.5(a)—Original Format Record Storage

Comment: Four comments were received on proposed § 163.5(a) which provides for the maintenance of all required records in the original formats unless alternative storage methods have been approved by Customs. The points made by these commenters were as follows:

1. It is unclear from the proposed text whether or not electronic ABI records serve the same purpose as the hardcopy Customs forms. If stored electronically, this commenter asked whether the trade would be required to produce the information in the format of the current hardcopy records (*i.e.*, Customs Form 3461, 7501) or whether the electronic data would suffice. This commenter stated its desire to store the records in the electronic ABI formats and to eliminate the requirement to store paper records, suggesting that for audit purposes the electronic data could easily be linked to its accounts payable records through the entry number.

2. The term ''original formats'' in this section is too limiting and unmanageable because it does not comport with modern business practices. If the normal course of business is to take paper documents and scan them directly into a computer image system, then, practically, once there are assurances that the image meets Customs standards, the paper should be allowed to be discarded.

3. A commenter suggested that the text of the section be revised to read simply as follows: ''All parties listed in § 163.2 must maintain all records required by law and regulation for the required retention periods. The records must be capable of being retrieved on request or demand by Customs.'' This commenter argued that this shortened version states the basic requirement of the law and also eliminates reference to prior approval of the recordkeeping program (the latter point is addressed more fully in the § 163.5(b) comment discussion below).

4. There should be no requirement for Government approval of alternative storage methods.

Customs response:

1. Customs agrees that the electronic data would suffice. Clearly, the ABI data could qualify as ''original'' records. The definition of ''original'' in § 163.1(g) as discussed above and as set forth below includes ''electronic information which was used to develop paper documents''.

2. Customs does not believe the proposed reference to ''original formats'' would be limiting, and it is further noted that use of alternative storage methods would allow for discarding the original paper documents. In consideration of the decision to define ''original'' in § 163.1(h) rather than ''original records/information'' as discussed above, the first sentence of § 163.5(a), as set forth below, has been modified by replacing the words ''in the original formats'' by ''as original records'' as regards how records generally are to be maintained.

3. Customs agrees with the basic principle reflected in this comment and therefore, on further reflection, has concluded that the requirement for advance approval of alternative storage methods is unnecessarily onerous and thus should be eliminated. Accordingly, § 163.5(a), as set forth below, has been modified by removing the words ''approved in writing by the director of the regulatory audit field office who has responsibility for the geographical area in which the designated requestor's recordkeeping officer resides'' and adding in their place the words ''adopted in accordance with paragraph (b) of this section''. See also the related changes to the text of § 163.5(b) noted below in the Customs response to the comments on that section.

4. Customs agrees. The substance of this comment has been addressed in the comment response immediately above.

Section 163.5(b)—Alternative Storage Method Approval

Comment: Five comments were received on proposed § 163.5(b) which sets forth the procedures for approval by Customs of alternative methods (formats) for storing records. One of these commenters supported the proposed text, stating that the approval process is sound and will allow the trade to employ consistent procedures for the entire recordkeeping system and will eliminate port-to-port differences and will reduce the cycle time for approval and implementation of alternative storage methods. The other four commenters made the following negative comments or suggestions regarding the proposed text:

1. The requirement for written authorization from Customs to maintain records and information in alternative formats is contrary to the Mod Act which in section 614 amended 19 U.S.C. 1508(a) to allow importers to maintain records in electronically generated or machine readable data formats, and this was a self-implementing amendment. Thus, the Mod Act amendment gives the option to engage in electronic recordkeeping as an unencumbered right, not as a ''privilege'' as stated in proposed § 163.5(i). While Customs may audit or review the electronic recordkeeping systems of an importer to determine compliance, it may not make review a prerequisite to the establishment of an electronic recordkeeping system.

2. The last sentence should be reworded to read as follows: ''If the applicable director of the regulatory audit field office needs additional information on the alternative method of storage, or disapproves of the method proposed, he or she will contact the requesting party within 30 calendar days of receipt; if not, the request is deemed approved.'' The reason for this suggested change is that the regulations as proposed could cause hundreds or thousands of parties to contact regulatory audit seeking approval of their proposed methods and, given the standards in proposed § 163.5(c), such requests could be voluminous. In order to ease the burden on Customs and the importing public, Customs needs to adopt a set of standards and guidelines and then allow parties subject to recordkeeping requirements to establish programs that meet those standards and guidelines, and acceptance of the proposed method would be assumed unless some information is missing or there are serious flaws in the proposal. This commenter argued that this approach is consistent with ''informed compliance'' in that Customs would provide the information and set the standards and recordkeepers would have to establish programs to comply. In addition, Customs can periodically check to ensure that the recordkeeper is continuing to follow the standards, with authority to impose sanctions or hold the recordkeeper to a corrective action plan if the standards are not being followed.

3. In the case of customs brokers, the requirement for ''approval'' is unnecessary. A more enlightened and reasonable approach can be found in the Department of Commerce regulations at 15 C.F.R. 762.5 which requires neither notice to, nor advance approval by, the Department of Commerce but rather sets forth the requirements for which compliance is expected, and the same should be true for Customs. If a broker cannot produce the ''original'' or a ''copy'' of a document, which it is required to maintain under § 111.21, it is in violation of 19 U.S.C. 1641 and is subject to a penalty. The fact that a broker received permission from Customs to make copies using a particular method will not aid the broker when it cannot produce a requested record.

4. There should be provision for grandfathering-in existing programs for alternative record storage methods that meet the standards of these regulations.

Customs response: Customs does not entirely agree with the comment made at point 1 above. In order to capture or encompass all possible records, section 508(a) had to refer to ''electronically generated or machine readable data'' along with other possible documents and information. This does not *per se* constitute an approval of those formats, nor does it constitute express authority to alter original paper documents, records or information into such formats; it is merely a recognition of existing data technology rather than an expression of an unencumbered right regarding records maintenance methodology. However, as stated above in connection with § 163.5(a), Customs does agree that, as a general principle, advance review and approval by Customs should not be a prerequisite of alternative storage methods. In order to accommodate this principle and also enhance the clarity of the proposed text, § 163.5, as set forth below, reflects the following modifications in structure and content:

a. It is noted that, with the exception of paragraph (a) which sets forth the basic rule regarding maintenance of original records, the text of proposed § 163.5 (that is, paragraphs (b) through (j)) related entirely to alternative records storage which operates as an exception to the paragraph (a) rule. In order to more clearly reflect the relationship between these provisions, § 163.5 has been reorganized into two paragraphs, with paragraph (a) corresponding to proposed paragraph (a) and with paragraph (b) entitled ''alternative method of storage'' and covering the remainder of proposed § 163.5 but with a number of additional substantive changes as noted below.

b. Paragraph (b)(1) corresponds to proposed paragraph (b) and thus sets forth general provisions regarding alternative storage methods. The modified text, except in the case of records required to be maintained as original records under laws and regulations administered by other Federal government agencies (which requirements may not be obviated by the Customs Regulations), (1) allows use of an alternative method for records storage so long as the recordkeeper provides written notification thereof to the Miami regulatory audit field office (Customs believes that a single, centralized location should be used for this purpose and that it should be the Miami office, for the same reasons stated above as regards notification of consolidation of broker records under § 111.23) at least 30 calendar days before implementation of the alternative method, (2) provides that the written notice must identify the type of alternative storage method to be used and must state that the alternative storage method complies with the standards of paragraph (b)(2), and (3) provides for an exception to alternative storage under certain circumstances if Customs at any time instructs the recordkeeper in writing that records described therein must be maintained as original records (this exception is necessary, for example, to ensure consistency in the form, identification and custody of records and could be applied whenever the records are relevant to an ongoing inquiry or investigation or administrative or judicial proceeding). Thus, there is no longer any reference to a formal request and approval process, and the reference to the location of a recordkeeping officer has been eliminated (see the changes reflected in new paragraph (b)(2) as discussed below in connection with the comments on proposed § 163.5(c)).

c. As a consequence of the removal of the request/approval process and based on a further internal review of the proposed texts, Customs believes that it is neither necessary nor appropriate to retain the following paragraphs of proposed § 163.5: (1) proposed paragraph (e), which concerned retrievability of records and is adequately covered by § 163.6; (2) proposed paragraph (g), which concerned notification of noncompliance with the agreed-upon alternative storage method and is no longer necessary since there will be no such specific agreement between Customs and the recordkeeper; (3) proposed paragraph (i), which concerned revocation of the alternative storage method privilege and thus is no longer relevant; and (4) proposed paragraph (j), which concerned appeal procedures for denial or revocation of the alternative storage method privilege and thus also is no longer relevant. As a result of the removal of these four proposed paragraphs and the

reorganization of § 163.5 as discussed above, proposed paragraphs (f) and (h) have been redesignated as paragraphs (b)(3) and (b)(4) and, for purposes of consistency with the notice procedures under modified paragraph (b)(1) as discussed above, the new paragraph (b)(3) text as set forth below has been modified to provide that notice of changes to alternative recordkeeping procedures must be given to the Director of the Miami regulatory audit field office. In addition, as a consequence of the removal of the request/approval process, newly designated paragraph (b)(4) has been modified as set forth below by the removal of all references to requesting, granting and revoking alternative storage method privileges. See also the below discussion of the comments on proposed § 163.5(c) for the treatment in this document of proposed paragraphs (c) and (d). Finally, a new paragraph (b)(5) has been added to provide that Customs may instruct a recordkeeper in writing to discontinue its use of an alternative storage method if the recordkeeper fails to comply with the conditions and requirements for alternative storage set forth in § 163.5 (this new paragraph is addressed in more detail below in the comment discussion regarding proposed § 163.5(i)).

The substance of the comments made in points 2, 3, and 4 above have been addressed by the changes described above.

Section 163.5(c)—Standards for Alternative Storage Methods

Comment: Seven commenters made general observations regarding the approach of proposed § 163.5(c) which provides examples of commonly used methods for storage of records, sets forth a general rule regarding what storage methods will satisfy Customs requirements, and prescribes minimum standards that Customs will consider in evaluating proposals for alternative storage methods. The points made by these commenters were as follows:

1. One commenter stated that the examples of storage methods in the first sentence of the introductory text of the section should be expanded to include disc access storage devices (DASD) used for the capture and storage of electronic transmissions, image storage devices such as CD ROM juke boxes, voice recordings and full motion video in computerized files.

2. One commenter stated that the § 163.5(c) standards are too intrusive in that they impose on private industry new sets of procedures regarding business records. This commenter argued that since companies regularly undergo independent financial audits that test business record integrity and because the Mod Act was not intended to hinge industry efficiencies on the good graces of Customs, importers should not need Customs approval to use alternative storage techniques for records kept in the ordinary course of business.

3. Four commenters objected to the minimum standards that Customs will use to evaluate alternative storage proposals, arguing that the proposed regulatory standards are too detailed and burdensome, are not achievable by the great majority of importers and thus will discourage use of alternative storage methods, are difficult to understand and follow, and will lead Customs to micro manage the recordkeeping programs of importing parties. Three of these commenters further questioned whether Customs would have the resources necessary to manage such alternative recordkeeping standards, and two of these commenters also noted that Customs has permitted alternative methods or storage in the past without imposing ''minimum standards'' and without major problems arising therefrom. In order to address these problems, one of the four commenters specifically recommended removal of the last sentence of the introductory text of the section and removal of subparagraphs (1) through (12) and inclusion of the substance of subparagraph (13) as a second unnumbered paragraph, arguing that the resulting text would represent a concise summary of the recordkeeping program requirements for which no further detail is required.

4. One commenter argued, with specific reference to customs brokers, that some of the ''minimum standards'' (*i.e.*, subparagraph (9) regarding segregation of duties and subparagraph (11) regarding continuing surveillance over the medium transfer system), while well suited to the handling and storage of ''top secret'' documents, are largely inapplicable to a broker's customs records.

Customs response:

1. Customs disagrees. The specific storage methods listed are intended to be illustrative rather exhaustive; therefore, Customs sees no reason to add to that list. However, language has been added to the first sentence of the text (redesignated as paragraph (b)(2) as set forth below as part of the structural changes to § 163.5 discussed above in connection with the comments regarding proposed § 163.5(b)) to clarify that the listed items are not all-inclusive.

2. Customs disagrees, except as regards the issue of needing Customs approval as already discussed above in connection with proposed § 163.5(b). It is noted that alternative storage is voluntary and not a requirement. Furthermore, alternative storage is concerned with only those records involving Customs matters and accordingly does not impose any additional burden on business as regards other records.

3. Based on these comments and the comments below regarding individual standards for alternative storage methods (proposed paragraphs (c)(1)–(13)), and as a result of further internal review of the proposed paragraph (c) text, Customs has determined that a number of additional changes should be made to the text of proposed paragraph (c) of § 163.5. These changes, as reflected in the text of redesignated paragraph (b)(2) set forth below, are as follows:

a. In the last sentence of the introductory text of the paragraph, the reference to minimum standards that will be considered by Customs in evaluating proposals for alternative storage methods has been replaced by a reference to standards that must be applied by recordkeepers when using alternative storage methods, in order to reflect the decision discussed above to do away with the requirement for advance review and approval by Customs.

b. In order to simplify the procedures to be followed by, and thus reduce the burden on, recordkeepers who choose to use alternative storage methods, and in other cases in order to reduce the complexity of the text where the proposed text in effect added nothing of substance to the basic obligation to maintain records and make them available to Customs, the following provisions that were contained in proposed paragraph (c) have been entirely eliminated from new paragraph (b)(2) as set forth below: Subparagraph (1), which concerned recordkeeping officer designation; subparagraph (4), which concerned documentation of data retention and transfer procedures; subparagraph (5), which referred to a data transfer audit trail; subparagraph (6), which provided for the integrity and nonerasability of the storage medium; subparagraph (7), which concerned the maintenance of papers regarding the transfer process; subparagraph (9), which concerned internal control systems covering persons responsible for maintaining, producing or transferring records; subparagraph (11), which concerned medium transfer system surveillance and availability of

internal review files; and subparagraph (12), which concerned procedures for preventing the destruction of hard copy records.

c. Proposed paragraphs (c)(2) and (c)(3) have been combined and redesignated as paragraph (b)(2)(i), and the new text no longer contains the proposed provisions concerning documentation of the electronic media used and life cycle and disposition procedures, certification regarding documents required by other agencies, and showing that the medium to which the transfer will occur is reliable. In addition, in the provision regarding having in place operational and written procedures ''to ensure that the imaging and/or other media storage process preserves the integrity, readability, and security of the original records'', the words ''the information contained in'' have been added before ''the original records'' in order to clarify that in an alternative storage context the standard relates to what is alternatively stored.

d. Proposed paragraph (c)(8) has been redesignated as paragraph (b)(2)(ii) and the text has been modified to simply provide for an effective labeling, naming, filing, and indexing system (thus, the references to permitting easy retrieval in a timely manner and to where the finding aids must be located have been eliminated).

e. Proposed paragraph (c)(10) has been divided into two new paragraphs (b)(2)(iii) and (b)(2)(iv) which incorporate the following changes to the proposed paragraph (c)(10) text: (1) in new paragraph (b)(2)(iii), the requirement for maintenance of all original records for a minimum of one year after the date of transfer has been replaced by a requirement for maintenance of entry records (except packing lists which, under § 163.4(b)(2), do not have to be retained in any format beyond 60 calendar days) in their original formats for 120 calendar days, with the start of the 120-day period determined in the same manner as in the case of that 60-day packing list retention period; and (2) new paragraph (b)(2)(iv) merely provides that an internal testing of the system must be performed on a yearly basis (thus, the new text eliminates the quarterly testing standard and the prohibition against destruction of original records after one year in the absence of proof of accurate transfer of records).

f. Proposed paragraph (c)(13) has been redesignated as paragraph (b)(2)(v) and the text has been modified by removing the reference to parties who requested and were granted permission to use alternative storage methods.

g. Finally, proposed paragraph (d) has been moved into paragraph (b) as paragraph (b)(2)(vi) and the text has been modified as follows: (1) the reference to parties who requested and were granted permission to use alternative storage methods has been eliminated; and (2) the requirement for retaining and keeping available two copies of the records on approved media at different locations has been replaced by a requirement for retaining and keeping available one working copy and one back-up copy stored in a secure location.

4. The changes to the proposed texts discussed under point 3 above effectively address the substance of this comment.

Section 163.5(c)(1)—Recordkeeping Officer and Back-Up Officer

Comment: The requirement to designate a recordkeeping officer and a back-up officer should not apply to customs brokers who are licensed and thus should be aware of their obligations regarding recordkeeping.

Customs response: The substance of this comment has been addressed by the changes made to proposed § 163.5(c) as discussed above.

Section 163.5(c)(2)—Operational and Written Procedures

Comment: A commenter stated that the purpose and intent of the second sentence of this proposed section is unclear, asking in this regard whether it is intended to require that other agency documents required for Customs purposes be stored using the same procedures, or whether it is intended to require that every recordkeeper in every department of a corporation keep records using exactly the same software, hardware and procedures. This commenter argued that if the latter is the intent, the requirement is unreasonable and will prevent any corporation of significant size from using an alternative storage process.

Customs response: The substance of this comment has been addressed by the changes made to proposed § 163.5(c) as discussed above.

Section 163.5(c)(6)—Integrity of the Storage Medium

Comment: A commenter noted that during the life cycle of a document management program, documents and data hopefully will evolve as time passes from on-line to near-line and ultimately to tape storage, and current documents and data will be kept on-line for quick access. This commenter stated that proposed § 163.5(c)(6) seems to provide that hard-drive disk space cannot be reused when documents or data are moved to tape storage and that, if so, the requirement is unacceptable and unnecessary. This commenter questioned why Customs cares what happens to the medium if the recordkeeper has a process in place to ensure that the documents or data are not destroyed, discarded or written over.

Customs response: The substance of this comment has been addressed by the changes made to proposed § 163.5(c) as discussed above.

Section 163.5(c)(10)—One-Year Retention of Original Records

Comment: Ten comments were submitted on proposed § 163.5(c)(10) which provides that all original records be maintained for a minimum of one year after the date of transfer, that internal sampling-exception-reporting/testing of accuracy and readability must be performed on a quarterly basis, and that no original records will be destroyed after a year unless there is acceptable proof that the records are being accurately transferred. The comments concerned primarily the 1-year retention requirement and all commenters were opposed to the requirement which they felt was excessively long, commercially unrealistic, unnecessary, burdensome, costly, redundant and unreasonable and thus should be removed. The following additional arguments were made by these commenters in opposition to the proposed provision:

1. If a failure to comply with recordkeeping requirements should arise, Customs and the courts can impose penalties for failure to maintain or produce records, and these avenues would seem to provide Customs with more than adequate protection.

2. If the internal sampling-exception-reporting/testing of accuracy and readability are performed, the records should be eligible for destruction immediately after capture or at most after a 30-day retention period.

3. It is not possible to comply with this provision as written. Almost all forms of media can be destroyed. The requirements for alternative media should be no more restrictive than for the media being copied (paper).

4. There will always be, at a minimum, at least three copies of the records available to Customs: the first copy will be records stored by the alternative storage medium; the second copy will be the back up of the alternative storage system; and the third copy will be the copy maintained by the broker. Thus, there is no value in requiring the importer to maintain the

hard copy version of the records when alternative storage media are employed.

5. The requirement to test accuracy and readability on a quarterly basis will also be burdensome to the trade. If the approved system is reliable, a year-end check will suffice.

6. The guidelines and standards presented in § 163.5 provide stringent procedures for alternate storage methods in order to meet the expectations of Customs, and those guidelines and standards should be sufficient so as to obviate the redundant requirement of maintaining the original records, the cost of which would be (for this one commenter) approximately $32,000 per year. Therefore, § 163.5(c)(10) should be revised to read as follows: ''Upon receiving written approval for alternate storage methods by the director of the regulatory audit field office, original documents are not required to be maintained once the transfer process has been successfully completed. Quarterly sampling, exception reporting and testing of accuracy and readability must be performed and documented.''

7. There should be no requirement to maintain paper documents in addition to electronic records because: (1) section 637 of the Mod Act states that electronic transmission of data must be certified by the importer of record as to its accuracy and truth and thus each certified transmission is as binding, and has the same force and effect, as a signed paper document; (2) the proposed section assumes that paper documents are the basis for all business transactions, but this is not the case; and (3) if the purpose of maintaining hard copies is to ensure that the electronic records are backed up, there are already sufficient back-up procedures in that under § 163.5(c)(13) there must be a capability to make hard copies and under § 163.5(d) two copies of the records must be maintained in two separate locations.

8. If an electronic image of an invoice is satisfactory for Customs purposes 366 days after the transfer from paper, then it should be acceptable even one day after transfer.

9. If the purpose of the 1-year document retention requirement is to permit quarterly testing and sampling, the requirement is inappropriate. In a professionally managed imaging process, documents are checked for quality more frequently than once a quarter. Typically, one out of ten documents is checked for quality during the scanning process so that, if a quality problem exists, no more than ten documents need to be rescanned.

10. If the regulatory provision at issue cannot be deleted in its entirety, it should at least be modified to permit the destruction of paper documents sooner for those importers who exceed the quarterly quality testing standard.

Customs response: The concerns reflected in these comments have been largely addressed by the changes made to proposed § 163.5(c) as discussed above.

Section 163.5(d)—Retention of Approved Media Records

Comment: Three commenters objected to proposed § 163.5(d) which provides that parties who were granted permission to use alternative storage methods shall retain and keep available two copies of the records/information on approved media at different locations. One of these commenters stated that the requirement is too intrusive, another commenter questioned the need to retain two copies in a paperless environment, and the third commenter alleged that the proposed provision is so burdensome that it will discourage customs brokers from electing to use alternative storage methods.

Customs response: The changes to the text of proposed § 163.5(d) (redesignated as § 163.5(b)(2)(vi) as set forth below) that are discussed above in connection with § 163.5(c) include removal of the requirement to retain copies at different locations. As regards the requirement to retain two copies, Customs believes that retention of a working copy and a back-up thereof is essential and consistent with prudent business practice.

Section 163.5(e)—Retrievability of Records

Comment: One comment was received in regard to that portion of proposed § 163.5(e) that provides that a ''certified hardcopy'' may be used when information is received and stored electronically for Customs requests for information. This commenter argued that this requirement is unreasonable because electronically-stored data is now printed out in hard copy from mainframe systems every day for Customs without certification being required, noting that Customs will have the same remedies it now has (i.e., penalties, rate advances, investigations) if the hard copy provided to Customs is incorrect. The commenter also complained that the regulations do not set forth the certification process and objected that any such process will add to the expense of producing hard copies.

Customs response: The elimination of proposed § 163.5(e), as discussed above in connection with the comments on § 163.5(b), effectively addresses this comment.

Comment: Three commenters objected to the last sentence of proposed § 163.5(e) that provides that records shall be kept of the frequency and to whom copies of the records were given. The points made by these commenters were as follows:

1. The provision could be interpreted to mean that a separate tracking and measuring system must be maintained. Typically, a customs broker receives numerous and multiple requests for records from the importer and/or Customs, and some requests are as simple as asking for a copy of the import invoice to enable the importer to place the broker's bill in line for payment. To maintain a separate tracking system outside of an entry summary notation system for this type of request is onerous and not economically justifiable and is an unnecessary level of detail.

2. The reason or rationale for this requirement should be explained. There is no such requirement for paper documents and, clearly, it would be extremely burdensome and costly to the recordkeeper with no apparent benefit to Customs or anyone else.

3. The requirement does not seem to have any usefulness to any parties and would be excessively burdensome, particularly on customs brokers operating from multiple locations. Customs should only be interested in obtaining the documents it seeks in a timely manner. A confidentiality requirement in the case of brokers already exists in § 111.24.

Customs response: Again, the elimination of proposed § 163.5(e) effectively addresses these comments.

Section 163.5(f)—Changes to Alternate Storage Procedures

Comment: It is unreasonable to require the approval of Customs before making any changes to the alternative recordkeeping procedures, and Customs will end up micro managing every one of these programs without having the requisite resources for doing this. Significant changes should be reported to Customs but, while it might be preferable to report the changes before implementation, realistically there will be times when this will not occur (what will happen when an importer must make a change to ensure continued compliance, but Customs cannot respond in a timely manner?). In the past, Customs tried to impose the same type of procedure in the Foreign Trade Zone Procedure Manual and found that it could not review and approve changes in a timely or effective manner; as a result, the requirement was changed to provide that the zone operator keep an

up-to-date manual available for Customs review. This is a more practical and realistic approach.

Customs response: Customs agrees with regard to the issue of advance Customs approval of changes, for the same reason that Customs has agreed that initial advance approval of the use of alternative recordkeeping methods is not necessary. However, as in the case of an initial decision to use alternative storage methods, Customs believes that advance notice to Customs is necessary when a change in alternative storage procedures is made. Accordingly, the proposed regulatory text (redesignated in this document as § 163.5(b)(3) as discussed above) has been modified to require written notification of the change at least 30 calendar days before implementation of the change.

Section 163.5(g)—Notification of Noncompliance

Comment: Five comments were received on proposed § 163.5(g) which provides that written notification of noncompliance with the agreed upon alternative storage methods must be made to Customs within 10 business days and that the notification must detail what corrective action will take place. The points made by these commenters were as follows:

1. This regulation makes little sense in light of the fact that proposed § 163.5(f) will prove to be unworkable (*viz*. the above comment on that section). Customs will be unable to approve every change to these programs, and the burden on even the most diligent recordkeeper will be wholly out of proportion to the benefit to be derived by Customs. Customs and importers only are interested in the failure to produce documents or data requested by Customs, and the mission of Customs is to protect the revenue and ensure compliance with the laws enacted by Congress. The proposed regulation creates an unnecessarily stringent requirement which will likely result in unnecessary disputes over whether notification was required in certain situations and which will simply result in a waste of the resources of importers and Customs without a counterbalancing benefit to either side.

2. The absolute requirement of notification to Customs regarding noncompliance gives rise to the concern that Customs is conceivably requiring self-incrimination for criminal violations.

3. The 10-day requirement for notification to Customs is unnecessarily short because, regardless of the time period specified for notification, none of the newly generated records will be destroyed since original records are to be maintained for at least one year under proposed § 163.5(c)(10). Since it may take much longer than ten days to find out the scope of the problem and to determine what corrective action to take, thirty (30) days would be a more appropriate time period.

4. Two commenters stated that the required notification period should run from the ''date of discovery'' by the recordkeeper.

Customs response: The elimination of proposed § 163.5(g), as discussed above in connection with the comments on § 163.5(b), effectively addresses these comments.

Section 163.5(i)—Revocation of Privilege To Maintain Alternative Records

Comment: Two comments were received on proposed § 163.5(i) which provides for revocation of the privilege to use alternative storage methods for failure to meet regulatory conditions and requirements, states that the revocation is effective on the date of issuance of the written notice of revocation and shall remain in effect pending any appeal, and in the last sentence provides that revocation requires the party immediately to begin to maintain original records and subjects the party to penalties under § 163.6 for failure to do so. The points made by these commenters were as follows:

1. Taking a recordkeeper off the alternative method of storage pending appeal is too restrictive and gives too much authority to a field officer (the applicable regulatory audit field office director). Customs should decide on a case-by-case basis whether the recordkeeper should be taken off the program pending appeal and the decision to do so should be made at Customs Headquarters, because often these are nationwide programs involving tremendous investment.

2. With regard to the last sentence of the proposed text, proposed § 163.5(c)(10) already requires the maintenance of (original) records. Since the effect of revocation will be to deny a party the right to destroy records in favor of the alternative method of storage, the last sentence should be revised to read as follows: ''Revocation requires the party immediately to cease to destroy original records and will subject such person to penalties provided for in § 163.6 for failure to do so.''

Customs response: While the elimination of proposed paragraph (i) of § 163.5, as discussed above, renders moot some of the specific points made by these commenters, Customs believes that there must be provision for preventing a recordkeeper from continuing to use alternative storage procedures when the recordkeeper has failed to comply with the regulatory standards for alternative storage, because those regulatory standards have ongoing, rather than only initial, relevance; new paragraph (b)(5) of § 163.5 as mentioned above was added for this specific purpose. The new paragraph (b)(5) text uses the word ''may'' in order to ensure that written instructions to discontinue alternative storage are issued on a case-by-case basis. However, Customs remains of the view that any appropriate Customs office should have authority to make the determination as to whether such an instruction is necessary, similar to the procedure reflected in the modified paragraph (b)(1) text discussed above and set forth below. The new text does not set forth an appeal procedure but rather refers to the availability of a more direct and expeditious procedure (that is, the recordkeeper may give to Customs the 30-day notification of [re-]initiation of alternative storage under paragraph (b)(1) once the noncompliance situation has been rectified). As regards the last comment, Customs believes that neither the proposed text nor the replacement text suggested by the commenter is necessary.

Section 163.6(a)(1)—Production of Entry Records

Comment: Ten commenters made observations on proposed § 163.6(a)(1) which provides for written, oral, or electronic requests by Customs for entry records, requires a written follow-up to an oral request, provides for timely production of such records taking into consideration the number, type and age of the item, sets forth a table containing guidelines as to the maximum time Customs expects to wait for the records (maximum period in business days, with reference to the age of the entry/entry summary), and provides for the recordkeeper to notify Customs if the recordkeeper believes that he will not be able to meet the applicable production time period. All of the commenters were concerned with the effect of the time limits on a recordkeeper's ability to properly comply with a Customs request for records. The various specific points made by these commenters were as follows:

1. While the time periods specified in the table for producing records might be suitable in the case of requests for single records or small numbers of records, a large volume of records would require

more time to produce; thus, the time periods set forth in the table, which are tied to the date of the entry/entry summary, are not suitable when large numbers of records are involved. One commenter suggested that large requests will increase as Customs moves toward an audit basis of review and gave, as an example, a request for all files for a specific product over a period of several years, which could involve generating a program to search for particular files and printing a list of those files and identifying them with entry numbers and file numbers and then going to several locations to pull the information, possibly involving hundreds of files.

2. Although the timetable set forth in the table is characterized in the regulatory text as ''general guidelines'', experience shows that this table would be treated by Customs field officers as a mandatory and inflexible rule.

3. In the case of an entry/entry summary not more than one month old, the 5-day period for producing a record is not enough time because in the case of mailed written requests the postal delivery/receipt process will consume most or all of that time. Also, the proposed regulatory text is unclear as to whether the requested records must be merely sent to, or be actually received by, Customs within the 5-day period.

4. Where a request is made orally, the text should state (1) that the oral request ''must'' (rather than ''will'') be followed by a written request and (2) that the time period for producing the record runs from the date of the written request as is the current practice with Customs Forms 28 and 29.

5. Customs brokers in many instances receive requests for records covering a year or more without reference to particular entry numbers (*e.g.*, a request for copies of all entries filed by an importer during a particular time period), and brokers may also receive requests from several Customs sources at the same time. Thus, guidelines are needed to grant brokers substantially more time than the periods set forth in the proposed regulation.

In addition, the following specific recommendations were made by some of these commenters to address the general points made above:

a. The fourth sentence of the text and the table should be removed.

b. A uniform production date of 30 days should be established for all documents except where extenuating circumstances require a shorter or longer period.

c. The word ''maximum'' in the second column of the table should be changed to read ''suggested''.

d. The word ''maximum'' in the second column of the table should be changed to read ''normal''.

e. The word ''maximum'' in the fourth sentence of the text and in the second column of the table should be changed to read ''expected''.

f. Increase the 5-day period in the table to ten days.

g. If the 5-day period in the table is to be retained, it should run from the date a properly addressed request is received, and a minimum of three days should be added to effect a response to a request delivered by mail.

Customs response: 1. Customs agrees with the substance of this comment and therefore has modified the proposed text (redesignated in this document as paragraph (a) of § 163.6 as a result of the removal of proposed paragraph (a)(2) as discussed below) as follows: (1) by removing the table at the end; (2) by specifying in the text a general 30-day maximum period for the production of the records unless Customs prescribes a shorter period when the records are needed in connection with a determination regarding the release or admissibility of merchandise; and (3) by replacing the last sentence (regarding written notice of an inability to meet the record production deadline) with a text setting forth a procedure whereby a recordkeeper may make a written or electronic request for approval of an additional period of time to produce the entry records if the recordkeeper encounters a problem in timely complying with the demand, which Customs would either approve or deny based on the circumstances of the individual case. It should be noted that in a case involving an admissibility or release issue, a failure to produce the records within the period set by Customs may result in a refusal by Customs to release the merchandise (or issuance of a demand for return to Customs custody if release has taken place). Moreover, it should be noted that, under the modified text, the mere act of submitting a request to Customs for additional time to produce entry records would preclude the imposition of monetary penalties or other lawful sanctions for failure to comply with the original demand only if the request for additional time is approved by Customs. Finally, the word ''demand'' has been inserted in place of ''request'' throughout the paragraph (a) text in order to align on the terminology used in the statute in the case of entry records.

Customs believes that the general 30-day response time, coupled with the opportunity to obtain additional time to produce the entry records if such additional time is warranted by the circumstances, provides a more appropriate framework for the flexible approach that Congress had in mind when the section 509 amendments were enacted, in particular as regards the requirement in section 509(a)(1)(A) to produce an entry record ''within a reasonable time after demand for its production is made, taking into consideration the number, type, and age of the item demanded.'' In this regard, Customs notes the following statement contained in the relevant legislative history (H. Rep. 103–361, 103d Cong., 1st Sess., at 116):

> The Committee believes that the statute is relatively clear on how factors such as ''number, type, and age of the item demanded'' will impact on the obligation to produce. A single request for a single page document associated with a six-month old entry should be produced within a matter of days. In contrast, the production of 50 commercial invoices from an equal number of entries that were filed more than two years preceding the date of the demand obviously will take longer to produce, and may take as much as two to four weeks, depending on whether the records had to be retrieved from storage and the method of storage. Again, if the Informed Compliance Program works as the Committee intends, the Customs Service and the importing public should be able to develop document production schedules that do not impact adversely on the current business at hand, but at the same time permit the Customs Service to verify the accuracy of information directly related to one or more import transactions.

It is expected that, as a result of experience gained while working with the trade in applying the modified § 163.1(a) text discussed above and set forth below, Customs will be able to develop more detailed guidelines for inclusion in an appropriate informed compliance publication to further assist the public in this area.

2 and 3. The elimination of the table and the adoption of the 30-day period, as discussed above, effectively addresses these comments.

4. Customs agrees with the first point and has replaced ''will'' by ''shall'' to clarify the mandatory nature of the text. Customs disagrees with the second point because the date of initial communication of the demand (whether oral or otherwise) should control. In addition, the text has been modified to permit an ''electronic'' demand as a follow-up to an oral demand.

5. Customs believes that the concerns reflected in this comment have been addressed by the revised text as discussed above and set forth below.

Finally, Customs believes that the changes to the text discussed above and reflected below effectively address the

specific recommendations made by these commenters.

Section 163.6(a)(2)—Previously Requested Records

Comment: Four comments were received on proposed § 163.6(a)(2) which concerns requests for records that include records previously requested and provided to Customs and which requires that a recordkeeper provide specific information regarding the record previously requested and provided. The points made by these commenters were as follows:

1. The word ''entry'' must be added to the text to modify the words ''record'' and ''records''.

2. The regulatory text should make clear that entry records previously filed with Customs, irrespective of whether they were specifically requested, are exempt from the new production request.

3. One commenter stated that the text needs to be restructured because, although it requires the recordkeeper to provide a copy of the Customs notice letter pertaining to the previous request, the beginning of the text does not specify that the request by Customs must be in writing. Three commenters argued that this provision places an unnecessary burden on importers (including the need to review all requests to see if a particular requested record had been previously provided) and that the recordkeeper should not be required to ensure that Customs coordinates effectively by providing Customs with a copy of the letter which originally requested the record or the date it was provided to Customs: the name and address of the Customs officer to whom the record was provided should suffice.

Customs response: 1 and 3. Based on the comments received and as a result of further internal review of the proposed texts, Customs agrees that paragraph (a)(2) of proposed § 163.6 is overly burdensome and should be removed, and § 163.6 as set forth below has been modified accordingly. Thus, the textual changes suggested by these commenters have been rendered moot by the removal of the paragraph.

2. Notwithstanding the removal of proposed paragraph (a)(2) as discussed above, Customs must emphasize its disagreement with the statement of this commenter. Entry records previously filed but returned by Customs to the broker/importer are not exempt from the production requirement. Moreover, whereas penalties under section 509(g) for a failure to produce demanded entry records may be avoided if the records were presented to and retained by Customs at the time of entry or were submitted to Customs in response to an earlier demand, the avoidance of penalties does not affect the basic statutory requirement to produce demanded entry records and Customs has other enforcement tools that may be used in cases where section 509(g) penalties are not applicable.

Section 163.6(b)—Penalties for Failure To Maintain or Produce Entry Records

Comment: Three commenters submitted observations on this proposed section. The points made by these commenters were as follows:

1. The word ''entry'' should modify the word ''record'' throughout the text since that is the term of reference, and the reference to ''paragraph (b)(2)'' in paragraph (b)(1) should read ''paragraph (b)(4)''.

2. The final regulations should confirm (1) that (a)(1)(A) list records are the only documents whose nonproduction can result in § 163.6 penalties, (2) that importers of record (or designated recordkeepers) are the only persons required to maintain (a)(1)(A) list documents, and (3) that importers of record (or designated recordkeepers) are the only persons who can be subjected to § 163.6 penalties.

3. Sliding scale guidelines are needed in this area. For example, if a document is insignificant and satisfactory information can be provided by other means to satisfy the production requirement, there should be no penalty.

4. There is a danger that Customs officers will construe this proposed section as a license to assess the maximum penalties specified by law whenever (a)(1)(A) list documents are not produced within the time periods specified in § 163.6(a), including in instances in which a failure to comply with a lawful request for documents resulted from non-negligent inadvertence, including a failure on the part of Customs to notify the person in the company primarily responsible for recordkeeping and to impress upon the company the importance of the request. In order to avoid these problems, before a penalty is assessed Customs should establish clearly defined procedures ensuring that the demand for documents was properly made and received and that the company recognizes the severe consequences of noncompliance; these guidelines should be codified in the regulations, and if Customs does not follow the specified procedures it should be precluded from penalizing a company for failure to produce records in a timely manner. In addition, the regulations should provide that any penalties assessed will be mitigated to nominal amounts, as specified in the regulations, if the records are provided to Customs during the course of the penalty proceeding; it is critical for Customs to distinguish situations in which the information was not maintained from situations in which the required information was maintained but for one reason or another not presented to Customs in a timely manner, similar to the way that Customs has published guidelines for mitigating ''late filing'' penalties.

5. With regard to proposed paragraph (b)(2) which permits reliquidation and denial of special (column 1) rate of duty status for an entry liquidated within two years of a demand for a record that was not properly produced, one commenter requested that this provision be removed and made the following specific observations in this regard: (1) the proposed text must be consistent with NAFTA claims since denial of NAFTA status requires the United States to adhere to the NAFTA Agreement and NAFTA regulations, and Customs recordkeeping requirements clearly cannot override U.S. international obligations; and (2) the (a)(1)(A) list includes ''GSP declaration (plus supporting documentation)'' but without defining the supporting documentation so that Customs has total discretion as to the nature of documents necessary to support GSP claims, and thus Customs has effectively rendered meaningless the liquidation of entries of merchandise at the special GSP duty rate.

6. Also with regard to proposed paragraph (b)(2), a commenter referred to a situation in which an entry was liquidated as entered and the entered classification did not involve a column 1 special rate of duty and, after a demanded record is produced, Customs finds a misclassification of the goods; this commenter asked whether Customs could reliquidate the entry for the change in classification.

7. With regard to proposed subparagraph (b)(4)(iv), it is too restrictive to provide an exemption from these heavy penalties for just the first willful violation because in some cases there can be multiple violations arising out of one general negligent act. In addition, provision should be made for the volume of records required to be kept, with more room for error being given to very large firms with multiple locations. Moreover, there should be a time limit allowing renewal of exempt status, such as allowing one mistake every year or every two years depending on the size of the recordkeeper.

Customs response: 1. Customs agrees. The word ''entry'' has been added throughout § 163.6(b) and elsewhere in the Part 163 texts as set forth below wherever the context clearly relates to entry records, and the erroneous reference to paragraph ''(b)(2)'' has been corrected.

2. Customs disagrees with the suggested changes. The regulations already provide for penalties *only* for nonproduction of entry records. Importers of record are not the only parties required to maintain and produce entry records, nor are they the only parties who may be subject to § 163.6 penalties. Customs does not have the authority to promulgate regulations that are inconsistent with the statutory requirements.

3. Customs disagrees. The ''sliding scale guidelines'' are more appropriate to mitigation guidelines. As regards the example provided, it was reflected in proposed § 163.6(b)(4)(ii) (§ 163.6(b)(3)(ii) as set forth below) as one of the bases for avoidance of penalties.

4. The reason for the substantial statutory penalties is to impress upon recordkeepers the importance of maintaining and producing records and speaks more eloquently to the issue than any narrative attempt by Customs. Customs Headquarters will exercise tight control over the imposition of recordkeeping penalties and, until Customs gains some experience in administering this penalty provision, no such penalty will be issued without prior Headquarters review and approval. Customs is preparing mitigation guidelines to cover recordkeeping penalties; however, Customs does not have authority to promulgate regulations that are inconsistent with the basic statutory requirements to maintain entry records and produce them pursuant to a demand from Customs. Finally, the changes to § 163.6(a) discussed above will eliminate much of the source of the concerns reflected in this comment.

5. Customs agrees that regulations, standing alone, cannot override U.S. international obligations, but Customs does not agree that these recordkeeping regulations override the NAFTA and the regulations thereunder in any respect. Moreover, even if there were a conflict between the NAFTA and the Part 163 provisions, the latter would prevail to the extent that they reflect the requirements of sections 508 and 509 (see 19 U.S.C. 3312(a)). As regards the GSP, the Customs requirements regarding evidence to support a claim for free entry under the GSP are contained in §§ 10.171–10.178 of the Customs Regulations and continue in effect. Neither the Part 163 regulatory texts nor the (a)(1)(A) list would have the effect of amending or superseding those regulations. The (a)(1)(A) list is merely a convenient summary list of existing entry requirements.

6. Since the record in the example was produced, the provisions of § 163.6(b)(2) would not apply. As to whether Customs could reliquidate the entry to correct the classification error, it would depend on whether the liquidation was final. If it was, the government could only collect increased duties pursuant to 19 U.S.C. 1592(d) and only if a violation of 19 U.S.C. 1592(a) was involved.

7. Customs does not agree that the subparagraph is too restrictive, and it is noted in this regard that the regulatory text reflects the terms of the statute (section 509(g)(7)(A)). Nor does Customs believe that a graduated scale should be made for the volume of records required to be kept by large firms with multiple locations. It is noted that the statute (section 509(a)(1)(B)) provides that a person ''may be subject to penalty under subsection (g)'' if the person fails to comply with a demand for entry records. The statute and the legislative history relating thereto make it clear that imposition of penalties for failure to comply with a demand for entry records is discretionary with Customs, not mandatory.

In addition to the changes discussed above, the following changes have been made to the text of § 163.6(b) as set forth below:

a. Paragraphs (2) and (3) have been merged into one paragraph (2), with proposed paragraph (2) set forth as subparagraph (2)(i) and titled ''general'' and proposed paragraph (3) set forth as subparagraph (2)(ii) and titled ''exception,'' and proposed paragraphs (4)–(7) have consequently been redesignated as paragraphs (3)–(6).

b. In redesignated subparagraph (3)(iv), which concerns avoidance of penalties by persons who participate in the Recordkeeping Compliance Program, a reference to being ''generally in compliance with * * * that program'' has been added to reflect the terms of the statute (section 509(g)(7)(A)(ii)).

c. Redesignated paragraph (6) has been redrafted to more closely reflect the terms of the statute (section 509(g)(6)) as regards the relationship between the imposition of penalties and the issuance of a summons and in order to avoid the impression given by the proposed text that the issuance of a summons is in the nature of a sanction.

Section 163.6(c)(2)—Notice of Examination of Records

Comment: This proposed section states that the notice of intent to examine records may be provided ''electronically, orally or in writing''. However, when notice is provided orally, provision must be made for the oral request to be followed by a written request.

Customs response: Customs does not agree with this suggestion in the case of non-entry records because the need to examine specific records under § 163.6(c)(2) could arise during the course of an on-site inquiry, compliance assessment, audit or investigation, in which case the requirement for a written follow-up notice would be impractical. However, Customs agrees with the suggestion insofar as entry records are concerned because there is no basis under the statute for making a distinction in this regard between entry records demanded under paragraph (a) and entry records examined under paragraph (c) (see the below discussion of the changes that Customs has made to the text of § 163.6(c)(2)).

Based on a further internal review of the proposed text, Customs has made the following substantive changes to the text of § 163.6(c)(2) as set forth below:

a. A reference to ''entry or other'' records has been added to clarify that, consistent with the statutory provision on which § 163.6(c) is based (that is, section 509(a)), the examination of records applies equally to entry records.

b. The words '', statements, declarations, or other documents'' have been removed after the word ''records'' because they are covered by the § 163.1(a) definition of ''records'' and thus are redundant.

c. The word ''reasonable'' has been added as a modifier of ''notice'' in order to reflect a basic standard contained in the statute (that is, section 509(a)(1)).

d. A new sentence has been added at the end to clarify that the notice and production procedures under paragraph (a), and the penalties or other actions under paragraph (b) for failure to produce, apply to the examination of entry records under this provision.

Section 163.10(e)—Stay of Summons

Comment: The proposed text did not explain the process by which an owner, importer, etc., would issue a stay of a summons. The procedure should be described in detail so that the affected persons will know how to issue such a stay.

Customs response: The procedures whereby an owner, importer, etc. would issue a stay of compliance with a

summons were clearly set forth in paragraph (c) of proposed § 163.10 (which has been redesignated as § 163.8 as discussed below). In order to clarify the application of the regulatory texts, the paragraph (e) text as set forth below has been modified by the addition of a reference to issuance of a stay ''in accordance with paragraph (c) of this section''.

Based on a further internal review of the summons and related provisions of proposed §§ 163.7–163.12, Customs has determined that the following changes should be made to the proposed texts:

a. Although proposed §§ 163.7–163.9 followed the 3-section approach of present Part 162, Customs now believes that it would be preferable to combine these three sections into one section for the following reasons: (1) The three sections all deal with various aspects of essentially one subject, that is, the basic procedures regarding the issuance and execution of a summons; and (2) a single-section approach will assist in drawing the necessary distinction between these normal procedures and the special procedures for third-party recordkeepers covered by the next section. Accordingly, the three proposed sections have been redesignated in the Part 163 texts set forth below as § 163.7, with proposed § 163.7 covered by paragraph (a), proposed § 163.8 covered by paragraph (b), and proposed § 163.9 covered by paragraph (c). In addition, because paragraph (b) of proposed § 163.7 (which concerns the transcript of testimony under oath) was clearly out-of-place (context), it has been moved to the end of new § 163.7 as paragraph (d). As a consequence of the adoption of the one-section approach for proposed §§ 163.7–163.9, the remaining sections of Part 163 (that is, §§ 163.10–163.15) have been redesignated below as §§ 163.8–163.13.

b. In paragraph (a) of new § 163.7: (1) The first sentence of the introductory text has been modified by the addition of a reference to issuance of a summons requiring a person ''within a reasonable period of time to appear before the appropriate Customs officer,'' in order to more closely reflect the terms of the corresponding statutory provision (section 509(a)(2)); and (2) in subparagraph (2), the words ''Canada or Mexico pursuant to the North American Free Trade Agreement Implementation Act (19 U.S.C. 3301(4)'' have been replaced by ''a NAFTA country as defined in 19 U.S.C. 3301(4),'' again in order to more closely track the corresponding statutory provision (section 509(a)(2)(A)(ii)).

c. In paragraph (b) of new § 163.7, subparagraph (1)(ii) has been modified by the addition of a reference to the address ''within the customs territory of the United States,'' in order to reflect the terms of the statute (section 509(a)(2)).

d. The text of paragraph (a) of redesignated § 163.8 (third-party recordkeeper summons) has been modified to refer to testimony relating to ''records pertaining'' to transactions of a person, in order to reflect the terms of the statute (section 509(d)(1)(B) and (d)(2)(B)).

e. In paragraph (e) of redesignated § 163.8, the three references to the taking of testimony have been removed because the statute (section 509(d)(6)) mentions (that is, precludes) only the examination of records in this context.

f. In the introductory text of paragraph (f)(3) of redesignated § 163.8, a reference has been added to ''the stay of compliance provisions of paragraph (c),'' because the judicial determination exception in the statute (section 509(d)(7)) is not limited to the notice provisions.

g. In redesignated § 163.9 (enforcement of summons), a sentence has been added at the end to state that a person who is entitled to notice under § 163.8(a) shall have the right to intervene in the enforcement proceeding. This new sentence reflects the terms of section 509(d)(5)(A) and, by being limited to a person entitled to notice, also reflects the exception contained in section 509(d)(7).

Section 163.13—Regulatory Audit Procedures

Comment: Three comments were submitted in regard to this proposed section. One commenter specifically stated its support for proposed paragraph (a)(9) which requires Customs auditors to send a copy of the formal written audit report to the person audited within 30 days following completion of the audit. The other two commenters expressed disappointment with the overall content of proposed § 163.13 and made the following points with regard to what they felt was missing from, and thus should be added to, the proposed text:

1. The proposed text sets forth only vague procedures to be followed by auditors, sets few time limits regarding the conduct of an audit, and provides for no direct consequences (sanctions) on the audit or the auditor for failing to adhere to the procedures or time limits that are provided. Thus, in effect, the proposed section does little more than repeat the provisions of 19 U.S.C. 1509(b).

2. For the new importer or an importer that has never been subjected to a regulatory audit, the proposed text fails to explain the purpose of a regulatory audit and does not distinguish between a compliance assessment and a full audit.

3. The proposed text does not specify what information will be required and does not outline the rights and obligations of the parties.

Customs response: 1. Customs disagrees and believes the regulatory provisions appropriately serve the intended purpose.

2 and 3. Customs believes that the Part 163 texts as set forth below (in particular, the definitions of ''audit'' and ''compliance assessment'' in §§ 163.1(c) and (e), the provisions regarding the examination of records in § 163.6, and the provisions of this section which has been redesignated as § 163.11 as discussed above) provide adequate basic guidance regarding these issues. Moreover, to the extent that more detailed guidance is required, other published agency guidelines and procedures are, or will be, made available (for example, cat kits, standard operating procedures, and audit manuals).

In the light of the modified definition of ''compliance assessment'' as discussed above (in which a compliance assessment is described as a type of importer audit but is no longer described as the first phase of an audit), and based on a further internal review of the proposed regulatory text, a number of changes have been incorporated in redesignated § 163.11 as set forth below. The majority of these changes are based on the view of Customs that, notwithstanding the fact that the term ''audit'' technically encompasses a compliance assessment, and consistent with current Customs practice, the statutory procedures applicable to full audits (that is, notice and time estimates, entry and closing conferences, and preparing and providing a copy of a formal written report) should be reflected specifically and succinctly in the regulations as applying equally to compliance assessments which are often performed independently of other audit procedures. The changes in question are as follows:

a. The section title has been modified to read ''compliance assessment and other audit procedures'', and throughout the section text each separate reference to an ''audit'' or to a ''compliance assessment'' has been replaced by a reference to a ''compliance assessment or other audit.''

b. The words ''which does not include a quantity verification for a customs bonded warehouse or general purpose

foreign trade zone or an inquiry,'' which are definitional in nature, have been removed from the introductory text of paragraph (a), and equivalent phraseology has been included in the definition of ''audit'' in § 163.1(c) but without any reference to an ''inquiry'' (see the above discussion regarding the addition of a new definition covering this term).

c. Although subparagraphs (a)(1) (regarding notice and time estimates), (a)(2) (regarding the entry conference) and (a)(3) (regarding additional time) remain essentially the same except for the textual change (use of the expression ''compliance assessment or other audit'') discussed above, the remainder of proposed paragraph (a) has been reorganized into three subparagraphs (a)(4) through (a)(6) in order to avoid repetitive text and otherwise simplify the text and in order to make clear the equal applicability of the subject procedures to all audit procedures (including compliance assessments). New subparagraph (a)(4) covers closing conferences, new subparagraph (a)(5) concerns the preparation of reports, and new subparagraph (a)(6) concerns sending a copy of the report.

d. The order of proposed paragraphs (b) (exceptions) and (c) (petitions regarding failure to hold a closing conference) has been reversed because the exceptions include, and thus should follow, the petition provision.

e. The reference in proposed paragraph (b) to paragraphs ''(a)(4) through (a)(6) and (a)(8) through (a)(9) and (c)'' has been modified in the paragraph (c) text of § 163.11 set forth below to read ''(a)(5), (a)(6) and (b)'' in order to properly reflect the exceptions in the statute (section 509(b)(5), which refers to paragraphs (3) and (4) but not to paragraph (2) which concerns entry and closing conferences) and in order to reflect the simplified paragraph (a) structure discussed above.

Section 163.14—Recordkeeping Compliance Program

Comment: Six commenters made the following points regarding this proposed section:

1. Customs does not have the resources necessary to grant the number of requests to become certified recordkeepers that will come in under the program. Customs may wish to allow customs brokers (the only persons licensed and regulated by Customs) to handle these requests and audit parties participating in the program. Customs could then audit the customs brokers' processes in providing these suggested services.

2. There is no concrete benefit for companies to enter into the certification program. A blanket waiver from all penalties (except perhaps those resulting from the intentional destruction of records) would be a more meaningful inducement for companies to enter the program. If a participant fails to meet the level of service required by the certification program, the participant would be given a warning notice or have its certification revoked.

3. One commenter stated that while the Recordkeeping Compliance Program concept is good, the proposed benefits are less than what would be expected for the time and effort to establish and maintain such a program because the proposed text appears to grant one violation whereby mitigation would be considered, and thereafter suspension or removal of participation would result and without further consideration for mitigation of monetary penalties; even a ''three strikes and out'' law appears to be less severe on violators. Based on similar reasoning, another commenter recommended that the following new sentence be added after the first sentence of paragraph (b) of this proposed section: ''The participant is also eligible for reduction or cancellation of any liquidated damages assessments or penalties arising under 19 U.S.C. 1592 or 1641 for failure to produce certain records.''

4. The Recordkeeping Compliance Program must be limited to (a)(1)(A) entry records because the *quid pro quo* of the program is the avoidance of penalties for failure to produce demanded entry records; thus, the program should not apply to records kept in the ordinary course of business. In this regard, some of the program requirements take on a radically burdensome character when applied to ordinary business records. For example, proposed paragraph (a)(3)(iv) requires the participant to have procedures in place regarding the preparation and maintenance of required records and the production of such records to Customs. Thousands of hours would be required for a Fortune 500 company to comply with this requirement because of the extensive nature of its financial accounting recordkeeping systems.

5. Proposed paragraph (a)(3)(vi) should be revised to read as follows: ''(vi) Have a record maintenance procedure which complies with the requirements of Customs and other federal agencies whose regulations apply to the import transactions.'' This change will simplify the text and also recognizes that an importer may be subject to other related regulatory recordkeeping requirements.

6. Two commenters criticized proposed paragraph (a)(3)(vii) which requires program participants to disclose to Customs variances to, and violations of, the program requirements and to take corrective action when notified by Customs of any such variances or violations. One commenter complained that it creates the potential for self-incrimination and eliminates the voluntary nature of prior disclosures of violations pursuant to the civil penalty statute; this commenter argued that acceptable procedures should merely require that the recordkeeper consult with legal counsel and take remedial steps that may include Customs notification. The other commenter stated that the recordkeeper should be allowed a reasonable time after discovery to correct the error before reporting to Customs; the recordkeeper would still be obliged to report the error to Customs and Customs may still take appropriate action if not satisfied with the corrective action taken by the recordkeeper.

7. The Recordkeeping Compliance Handbook referred to in this proposed section should be part of the regulatory text or should be posted on the Customs Internet web site.

Customs response: 1. Customs disagrees. Customs has adequate resources to process applications for the Recordkeeping Compliance Program. Moreover, since Customs will be performing the investigations and compliance assessments, audits and other inquiries, it is only appropriate that Customs retain the approval authority for this program and not delegate it to private concerns.

2. Customs disagrees. The regulatory text provides for issuance of a notice in lieu of a penalty for the first violation, and Customs considers this to be a reasonably concrete benefit. A blanket waiver would not be feasible and would be unwarranted since the statute (section 509(g)(7)(A)) specifically provides for an alternative to penalties only if the violation is not a repeat or willful violation.

3. Customs disagrees. The proposed text did not limit mitigation under 19 U.S.C. 1618 to the first violation. Moreover, the regulatory text permits, but does not mandate, removal from the program. The suggested additional sentence would be inappropriate since it goes beyond the authority conferred on Customs by the statute.

Based on a further review of the proposed regulatory text, Customs has concluded that it is redundant, and thus unnecessary, to refer to penalty mitigation in this regulatory context because the opportunity for mitigation

is in theory available to any person under section 509(g)(5) and 19 U.S.C. 1618 without regard to whether the person is a participant in the Recordkeeping Compliance Program; the text of the opening paragraph of proposed § 163.14 (redesignated below as § 163.12 as discussed above) has been modified accordingly. In addition, a new sentence has been added at the end of that opening paragraph to clarify that participation in the Recordkeeping Compliance Program has no limiting effect on the authority of Customs to use other legal means (summons, court order, etc.) to compel a participant to produce records.

4. Customs agrees that a recordkeeper's *quid pro quo* for participating in the Recordkeeping Compliance Program (that is, having an alternative to a penalty for failure to produce a demanded record) only has reference to entry ((a)(1)(A) list) records, and appropriate references to ''entry'' records have been added to the text of redesignated § 163.12 to clarify this point. However, this does not mean that a recordkeeper's responsibilities or obligations under the Recordkeeping Compliance Program relate only to ''entry records.'' In this regard, the importing community is reminded of the requirement to make, keep, and render for examination and inspection business, financial and other records (including, but not limited to, statements, declarations, documents and electronically generated data) which pertain to any activity specified in the statute (section 508(a) and (b)) and in the regulations (§ 163.1(a)(2)); both the statute (section 509(f)(2)(A)–(F)) and the implementing regulations (§ 163.12(b)(3)(i)–(vi)) set forth Recordkeeping Compliance Program certification criteria involving recordkeeping standards that clearly relate to records in this broad sense rather than only in the narrower context of ''entry records.'' Thus, whereas a failure to properly maintain and produce a particular record will not always constitute a violation giving rise to a potential liability for section 509(g) penalties, such a failure nevertheless would always be relevant to the issue of whether a recordkeeper may participate in the Recordkeeping Compliance Program.

5. Customs does not believe that it is necessary or appropriate to refer to the requirements of other government agencies in this context.

6. Customs disagrees. The reporting of recordkeeping violations under the Recordkeeping Compliance Program does not affect the voluntary nature of prior disclosures. The regulatory text in question merely reflects the terms of the statute (section 509(f)(2)(F)).

7. Customs does not agree that the Recordkeeping Compliance Handbook (which is merely for guidance purposes) should be included within the regulatory texts. However, the Handbook will be posted to the Customs internet web site (www.customs.ustreas.gov) and will be available through the Customs Electronic Bulletin Board (703–921–6155).

Based on a further internal review of the proposed regulatory texts and as a result of other changes made to the proposed texts as discussed above, Customs has determined that a number of additional changes should be made to the Recordkeeping Compliance Program provisions of redesignated § 163.12 and proposed § 163.15 (redesignated as § 163.13 as discussed above). These changes, reflected in the texts set forth in this document, are as follows:

a. As a consequence of the changes to the definition of ''certified recordkeeper'' and the removal of the definition of ''certified recordkeeper's agent'', all references to agents of certified recordkeepers, and all textual discussions of such agents, have been removed.

b. As a consequence of the removal from § 163.5 of the requirement for Customs approval of alternate storage methods, all references to ''approved'' alternate storage methods have been replaced by references to ''adopted'' alternate storage methods.

c. In redesignated § 163.12, the following organizational changes have been made: (1) The introductory text has been designated as paragraph (a) and proposed paragraph (a) has been redesignated as (b); (2) proposed paragraph (b), which concerned benefits of participation, has been redesignated as paragraph (d) and has been reheaded ''alternatives to penalties''; (3) the discussion of the Customs Recordkeeping Compliance Handbook has been moved from paragraph (c) to paragraph (b)(2) since it relates to application procedures, and the paragraph (c) heading has been modified to refer to application ''review''; and (4) in redesignated paragraph (b)(3), which concerns certification requirements, the first listed requirement (proposed subparagraph (i) concerning compliance with the Customs Recordkeeping Compliance Handbook) has been moved into the introductory text and the remaining listed requirements have been renumbered accordingly.

d. In redesignated § 163.12(b)(1), the reference ''§ 163.2(a) and (c)'' has been changed to read ''§ 163.2(a)'' to conform to the statute (section 509(f)(1)) which, in identifying who may participate in the program, refers only to ''parties listed in section 508(a).'' The recordkeepers described in § 163.2(c) (preparers and signers of NAFTA Certificates of Origin) are mentioned in section 509(b) and thus are outside the scope of the statutory (and, thus, regulatory) provisions in question. In addition, the second sentence of the proposed text (regarding the voluntary nature of program participation) has been removed because it repeats what has already been said in the preceding paragraph.

e. In redesignated § 163.12(b)(3), all references to an ''agreement'' between Customs and the participant have been removed because no separate agreements will exist.

f. The texts of redesignated §§ 163.12(c)(1) and (c)(2) have been modified to clarify that the Miami regulatory audit field office will also be responsible for reviewing and approving the application and issuing the certification.

g. In redesignated § 163.12(d)(1), the following changes have been made: (1) The first sentence of the text as proposed (proposed § 163.14(b)(1)) has been eliminated because the benefits of the program have already been stated earlier; (2) in the first sentence of the text below, a proviso has been added regarding general compliance with the procedures and requirements of the program in order to reflect the terms of the statute (section 509(g)(7)(A)(ii); and (3) in the last sentence regarding the application of sanctions, the references to ''no attempt to correct deficiencies'' and to ''a failure to exercise reasonable care'' have been removed, and a reference to removal of certification ''until corrective action satisfactory to Customs is taken'' has been added at the end in order to reflect the terms of the statute (section 509(g)(7)(A)).

h. In redesignated § 163.12(d), a new subparagraph (3) has been added to reflect the requirement in the statute (section 509(g)(7)(C)) that a program participant who has received a notice of violation must notify Customs within a reasonable time regarding the steps that have been taken to prevent a recurrence of the violation.

i. In addition to the changes noted above, redesignated § 163.13 as set forth below has been extensively modified (1) by providing for ''removal'' of certification in place of ''suspension'' or ''revocation'' of certification, (2) by adding a new paragraph (b) text to set forth specific grounds and procedures for denial of an application for

certification which were missing from the text as proposed, (3) by revising the list of grounds upon which a certification removal action may be based to conform to other changes made to the proposed texts by this document and to reflect more closely the standards that are applied in other regulatory contexts involving the removal of privileges previously granted by Customs, and (4) by joining the denial appeal provisions with the removal appeal procedures in paragraph (d) and adding a 30-day appeal period for removal appeals to align on the appeal period prescribed for denial appeals. Thus, under the modified § 163.13 text, paragraph (a) consists of a general statement referring to certification denial and removal actions, paragraph (b) sets forth certification denial procedures, paragraph (c) concerns certification removal, and paragraph (d) concerns the appeal of certification denial and removal. Finally, the texts in new paragraphs (b) and (c) have been modified to specify that both initial application/certification denials and initial certification removal actions are taken by the Director of the Miami regulatory audit field office, and the text of new subparagraph (c)(3), which concerns the effect of removal actions, has been modified to limit the circumstances in which a removal action will take effect upon issuance of the notice (thus, in most cases the action will be effective only after the appeal procedure has been concluded).

Appendix to Part 163

Although several comments were received with regard to the (a)(1)(A) list which was set forth in the Appendix to proposed new Part 163, Customs believes that such comments should be dealt with not in this document but rather in connection with the overall review of the (a)(1)(A) list referred to in the notice published in the **Federal Register** on December 24, 1996 (61 FR 67872). Accordingly, the Appendix to Part 163 as set forth below reflects the (a)(1)(A) list as previously published except for two changes thereto which are necessary in order to reflect amendments to the Customs Regulations that were adopted after initial publication of the (a)(1)(A) list. These changes involve the following: (1) Replacement of the listings for §§ 7.8(a) and 7.8(b) by a listing for § 7.3(f), in order to reflect the revision and redesignation of former § 7.8 effected by T.D. 97–75 (published in the **Federal Register** on September 3, 1997, 62 FR 46433); and (2) the addition of a listing for § 12.140 which was added by T.D. 97–9 (published in the **Federal Register** on February 26, 1997, 62 FR 8620) and which requires the submission of specific new information in connection with the entry of certain softwood lumber products from Canada.

Additional Changes to the Regulations

In addition to the changes to the proposed regulatory texts identified and discussed above in connection with the public comments, Customs has made numerous editorial, nonsubstantive changes to the proposed texts (in most cases involving wording, punctuation or structure) in order to enhance the clarity, readability and application of the regulatory texts. Furthermore, following publication of the proposed regulatory texts, Customs discovered that a number of other changes to other provisions of the Customs Regulations, that are necessary in order to ensure conformity with the new Part 163 provisions, were inadvertently omitted from the published proposals. These additional conforming regulatory changes have therefore been included in this final rule document and are summarized below:

Part 19

On April 3, 1997, a final rule amending Part 19 of the Customs Regulations (19 CFR Part 19) in regard to duty-free stores was published in the **Federal Register** (62 FR 15831). The final texts included a revision of § 19.4 which, in paragraph (b)(4)(i)(B), sets forth a requirement to retain all records ''defined in § 162.1(a),'' which section is being removed by this document in favor of the definition in new § 163.1(a); accordingly, this document corrects that paragraph (b)(4)(i)(B) section reference to read ''§ 163.1(a).'' In addition, the new § 19.4 text sets forth, in paragraph (b)(5), rules regarding record retention in lieu of originals (including provisions regarding Customs approval of alternative storage methods); since the new Part 163 provisions (which have general application and thus clearly apply to duty-free store operators) include, in § 163.5, rules regarding alternative record storage, and in order to ensure regulatory consistency, this document replaces that paragraph (b)(5) text with a shorter text that refers to the § 163.5 provisions.

Part 113

Section 113.62(j) of the Customs Regulations (19 CFR 113.62(j)) sets forth the text of an agreement to comply with electronic entry filing requirements provided for in Part 143, as one of the conditions of the basic importation and entry bond. Subparagraphs (2) and (3) thereof refer to the retention of supporting documents and the production thereof, but the language therein is not entirely consistent with the new Part 163 provisions. In the light of the changes to the Part 143 texts set forth in this document (which include an appropriate cross-reference regarding the applicability of the Part 163 provisions), this document revises the § 113.62(j) text to eliminate the subparagraph (2) and (3) provisions, thereby avoiding any possible inconsistency with the Part 143 and Part 163 texts.

Part 181

In § 181.12 of the Customs Regulations (19 CFR 181.12) which concerns the maintenance and availability of NAFTA export records: (1) In the introductory text of paragraph (a)(1), a specific reference to maintenance of the Certificate of Origin (or a copy thereof) has been added to more accurately reflect the scope of the corresponding statutory provisions (sections 508(b) and (c)); and (2) in paragraph (b)(1), the reference to ''§ 162.1d'' has been changed to read ''part 163'' to reflect adoption of new Part 163. In addition, in § 181.13 of the Customs Regulations (19 CFR 181.13) a sentence has been added at the end to clarify that penalties may be imposed pursuant to 19 U.S.C. 1508(e) for a failure to retain NAFTA export records. Finally, in § 181.22(a) of the Customs Regulations (19 CFR 181.22(a)), the reference in the last sentence to records as specified in ''§ 162.1a(a)'' has been changed to read ''§ 163.1(a)'' to reflect the location of the definition of ''records'' in the new Part 163 texts.

Conclusion

Accordingly, based on the comments received and the analysis of those comments as set forth above, and after further review of this matter, Customs believes that the proposed regulatory amendments should be adopted as a final rule with certain changes thereto as discussed above and as set forth below. This document also includes an appropriate update of the list of information collection approvals contained in § 178.2 of the Customs Regulations (19 CFR 178.2).

Executive Order 12866

This document does not meet the criteria for a ''significant regulatory action'' as specified in E.O. 12866.

Regulatory Flexibility Act

Insofar as the regulatory amendments closely follow legislative direction, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601

et seq.), it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Paperwork Reduction Act

The collection of information contained in this final rule has been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1515–0214. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The collection of information in this final rule is in Part 163. Although other parts of the Customs Regulations are being amended, all information required by these amendments is contained or identified in Part 163. This information is to be maintained in the form of records which are necessary to ensure that the Customs Service will be able to effectively administer the laws it is charged with enforcing while, at the same time, imposing a minimum burden on the public it is serving. Respondents or recordkeepers are already required by statute or regulation to maintain the vast majority of the information covered in this proposed regulation. The likely respondents or recordkeepers are business organizations including importers, exporters and manufacturers.

The estimated average annual burden associated with the collection of information in this final rule is 117.2 hours per respondent or recordkeeper. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the U.S. Customs Service, Information Services Group, Office of Finance, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229, and to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

Drafting Information

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects

19 CFR Part 19

Customs duties and inspection, Imports, Exports, Reporting and recordkeeping requirements, Warehouses.

19 CFR Part 24

Accounting, Customs duties and inspection, Reporting and recordkeeping requirements, Harbors, Taxes.

19 CFR Part 111

Administrative practice and procedures, Customs duties and inspection, Brokers, Reporting and recordkeeping requirements, Penalties.

19 CFR Part 113

Bonds, Customs duties and inspection, Imports, Reporting and recordkeeping requirements, Surety bonds.

19 CFR Part 143

Customs duties and inspection, Reporting and recordkeeping requirements.

19 CFR Part 162

Administrative practice and procedure, Customs duties and inspection, Recordkeeping and reporting requirements, Trade agreements.

19 CFR Part 163

Administrative practice and procedure, Customs duties and inspection, Exports, Imports, Recordkeeping and reporting requirements.

19 CFR Part 178

Administrative practice and procedure, Recordkeeping and reporting requirements.

19 CFR Part 181

Canada, Customs duties and inspection, Exports, Imports, Mexico, Recordkeeping and reporting requirements, Trade agreements (North American Free Trade Agreement).

Amendments to the Regulations

Accordingly, for the reasons stated in the preamble, Chapter I of Title 19, Code of Federal Regulations (19 CFR Chapter I) is amended by amending Parts 19, 24, 111, 113, 143, 162, 178 and 181 and by adding a new Part 163 to read as follows:

PART 19—CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN

1. The authority citation for Part 19 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624.

* * * * *

2. In § 19.4, paragraph (b)(4)(i)(B) is amended by removing the reference ''§ 162.1(a)'' and adding, in its place, the reference ''§ 163.1(a)'' and paragraph (b)(5) is revised to read as follows:

§ 19.4 Customs and proprietor responsibility and supervision over warehouses.

* * * * *

(b) * * *

(5) *Record retention in lieu of originals.* A warehouse proprietor may, in accordance with § 163.5 of this chapter, utilize alternative storage methods in lieu of maintaining records in their original formats.

* * * * *

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for Part 24 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624; 31 U.S.C. 9701.

* * * * *

§ 24.22 [Amended]

2. Section 24.22(d)(5) is amended by removing the phrase ''shall be maintained for a period of 3 years'' and adding, in its place, the phrase ''shall be maintained in the United States for a period of 5 years''.

3. Section 24.22(g)(6) is amended by removing the phrase ''shall be maintained for a period of 2 years'' and adding, in its place, the phrase ''shall be maintained in the United States for a period of 5 years''.

PART 111—CUSTOMS BROKERS

1. The authority citation for Part 111 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624, 1641.

* * * * *

2. In § 111.1, the definition of ''Records'' is revised to read as follows:

§ 111.1 Definitions.

* * * * *

Records. ''Records'' means documents, data and information referred to in, and required to be made or maintained under, this part and any other records, as defined in § 163.1(a) of this chapter, that are required to be maintained by a broker under part 163 of this chapter.

* * * * *

3. Section 111.21 is amended by designating the existing paragraph as paragraph (a), by removing from the second sentence of newly designated paragraph (a) the words ''a copy of each entry made by him with all supporting records, except those documents he is required to file with Customs, and'', and by adding new paragraphs (b) and (c) to read as follows:

§ 111.21 Record of transactions.

(a) * * *

(b) Each broker shall comply with the provisions of this part and part 163 of this chapter when maintaining records that reflect on his transactions as a broker.

(c) Each broker shall designate a knowledgeable company employee to be the contact for Customs for broker-wide customs business and financial recordkeeping requirements.

§ 111.22 [Removed and reserved]

4. Section 111.22 is removed and reserved.

5. Section 111.23 is amended by revising paragraph (a)(1) to read as follows, by removing paragraphs (b), (c), (d) and (f), by redesignating paragraph (e) as paragraph (b), in newly redesignated paragraph (b) by removing the word ''centralized'' each time it appears and adding, in its place, the word ''consolidated'', in newly redesignated paragraphs (b)(1) and (b)(2)(ii) by removing the word ''financial'', in the introductory text of newly designated paragraph (b)(2) by removing the words ''Office of Field Operations, Headquarters'' [sic] and adding, in their place, the words ''Director, Regulatory Audit Division, U.S. Customs Service, 909 S.E. First Avenue, Miami, Florida 33131'', and in the first sentence of newly redesignated paragraph (b)(2)(i) by removing the word ''accounting'':

§ 111.23 Retention of records.

(a) *Place and period of retention*—(1) *Place.* Records shall be retained by a broker in accordance with the provisions of this part and part 163 of this chapter within the broker district that covers the Customs port to which they relate unless the broker chooses to consolidate records at one or more other locations, and provides advance notice of such consolidation to Customs, in accordance with paragraph (b) of this section.

* * * * *

PART 113—CUSTOMS BONDS

1. The authority citation for Part 113 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

* * * * *

2. Section 113.62(j) is revised to read as follows:

§ 113.62 Basic importation and entry bond conditions.

* * * * *

(j) *Agreement to comply with electronic entry filing requirements.* If the principal is qualified to utilize electronic entry filing as provided for in part 143, subpart D, of this chapter, the principal agrees to comply with all conditions set forth in that subpart and to send and accept electronic transmissions without the necessity of paper copies.

* * * * *

PART 143—SPECIAL ENTRY PROCEDURES

1. The authority citation for Part 143 continues to read as follows:

Authority: 19 U.S.C. 66, 1481, 1484, 1498, 1624.

§ 143.32 [Amended]

2. In § 143.32, paragraph (n) is amended by removing the reference ''§ 162.1a(a)'' and adding, in its place, the reference ''part 163''.

3. Section 143.35 is revised to read as follows:

§ 143.35 Procedure for electronic entry summary.

In order to obtain entry summary processing electronically, the filer will submit certified entry summary data electronically through ABI. Data will be validated and, if the transmission is found error-free, will be accepted. If it is determined through selectivity criteria and review of data that documentation is required for further processing of the entry summary, Customs will so notify the filer. Documentation submitted before being requested by Customs will not be accepted or retained by Customs. The entry summary will be scheduled for liquidation once payment is made under statement processing (see § 24.25 of this chapter).

4. In § 143.36, the first sentence of paragraph (a) and the introductory text of paragraph (c) are revised to read as follows:

§ 143.36 Form of immediate delivery, entry and entry summary.

(a) *Electronic form of data.* If Customs determines that the immediate delivery, entry or entry summary data is satisfactory under §§ 143.34 and 143.35, the electronic form of the immediate delivery, entry or entry summary through ABI shall be deemed to satisfy all filing requirements under this part.

* * *

* * * * *

(c) *Submission of invoice.* The invoice will be retained by the filer unless requested by Customs. If the invoice is submitted by the filer before a request is made by Customs, it will not be accepted or retained by Customs. When Customs requests presentation of the invoice, invoice data must be submitted in one of the following forms:

* * * * *

5. In § 143.37, paragraphs (c) and (d) are removed and paragraph (a) is revised to read as follows:

§ 143.37 Retention of records.

(a) *Record maintenance requirements.* All records received or generated by a broker or importer must be maintained in accordance with part 163 of this chapter.

* * * * *

§ 143.38 [Removed and Reserved]

6. Section 143.38 is removed and reserved.

7. Section 143.39 is revised to read as follows:

§ 143.39 Penalties.

(a) *Brokers.* Brokers unable to produce records requested by Customs under this chapter will be subject to disciplinary action or penalties pursuant to part 111 or part 163 of this chapter.

(b) *Importers.* Importers unable to produce records requested by Customs under this chapter will be subject to penalties pursuant to part 163 of this chapter.

PART 162—INSPECTION, SEARCH, AND SEIZURE

1. The authority citation for Part 162 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624.

* * * * *

2. The heading of Part 162 is revised to read as set forth above.

3. Section 162.0 is revised to read as follows:

§ 162.0 Scope.

This part contains provisions for the inspection, examination, and search of persons, vessels, aircraft, vehicles, and merchandise involved in importation, for the seizure of property, and for the forfeiture and sale of seized property. It also contains provisions for Customs enforcement of the controlled substances laws. Provisions relating to petitions for remission or mitigation of fines, penalties, and forfeitures incurred are contained in part 171 of this chapter.

4. In Subpart A, the Subpart heading is revised to read as follows:

Subpart A—Inspection, Examination, and Search

5. In Subpart A, §§ 162.1a through 162.1i are removed.

1. Part 163 is added to read as follows:

PART 163—RECORDKEEPING

Sec.
163.0 Scope.
163.1 Definitions.
163.2 Persons required to maintain records.
163.3 Entry records.
163.4 Record retention period.
163.5 Methods for storage of records.
163.6 Production and examination of entry and other records and witnesses; penalties.
163.7 Summons.
163.8 Third-party recordkeeper summons.
163.9 Enforcement of summons.
163.10 Failure to comply with court order; penalties.
163.11 Compliance assessment and other audit procedures.
163.12 Recordkeeping Compliance Program.
163.13 Denial and removal of program certification; appeal procedures.

Appendix to Part 163—Interim (a)(1)(A) List

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1484, 1508, 1509, 1510, 1624.

§ 163.0 Scope.

This part sets forth the recordkeeping requirements and procedures governing the maintenance, production, inspection, and examination of records. It also sets forth the procedures governing the examination of persons in connection with any investigation or compliance assessment, audit or other inquiry conducted for the purposes of ascertaining the correctness of any entry, for determining the liability of any person for duties, fees and taxes due or that may be due, for determining liability for fines, penalties and forfeitures, or for ensuring compliance with the laws and regulations administered or enforced by Customs. Additional provisions concerning records maintenance and examination applicable to U.S. importers, exporters, and producers under the United States-Canada Free Trade Agreement and the North American Free Trade Agreement are contained in parts 10 and 181 of this chapter, respectively.

§ 163.1 Definitions.

When used in this part, the following terms shall have the meaning indicated:

(a) *Records*—(1) *In general.* The term ''records'' means any information made or normally kept in the ordinary course of business that pertains to any activity listed in paragraph (a)(2) of this section. The term includes any information required for the entry of merchandise (the (a)(1)(A) list) and other information pertaining to, or from which is derived, any information element set forth in a collection of information required by the Tariff Act of 1930, as amended, in connection with any activity listed in paragraph (a)(2) of this section. The term includes, but is not limited to, the following: Statements; declarations; documents; electronically generated or machine readable data; electronically stored or transmitted information or data; books; papers; correspondence; accounts; financial accounting data; technical data; computer programs necessary to retrieve information in a usable form; and entry records (contained in the (a)(1)(A) list).

(2) *Activities.* The following are activities for purposes of paragraph (a)(1) of this section:

(i) Any importation, declaration or entry;

(ii) The transportation or storage of merchandise carried or held under bond into or from the customs territory of the United States;

(iii) The filing of a drawback claim;

(iv) The completion and signature of a NAFTA Certificate of Origin pursuant to § 181.11(b) of this chapter;

(v) The collection, or payment to Customs, of duties, fees and taxes; or

(vi) Any other activity required to be undertaken pursuant to the laws or regulations administered by Customs.

(b) *(a)(1)(A) list.* See the definition of ''entry records''.

(c) *Audit.* ''Audit'' means a Customs regulatory audit verification of information contained in records required to be maintained and produced by persons listed in § 163.2 or pursuant to other applicable laws and regulations administered by Customs but does not include a quantity verification for a customs bonded warehouse or general purpose foreign trade zone. The purpose of an audit is to determine that information submitted or required is accurate, complete and in accordance with laws and regulations administered by Customs.

(d) *Certified recordkeeper.* A ''certified recordkeeper'' is a person who is required to keep records under this chapter and who is a participant in the Recordkeeping Compliance Program provided for in § 163.12.

(e) *Compliance assessment.* A ''compliance assessment'' is a type of importer audit performed by a Customs Compliance Assessment Team which uses various audit techniques, including statistical testing of import and financial transactions, to assess the importer's compliance level in trade areas, to determine the adequacy of the importer's internal controls over its customs operations, and to determine the importer's rates of compliance.

(f) *Entry records/(a)(1)(A) list.* The terms ''entry records'' and ''(a)(1)(A) list'' refer to records required by law or regulation for the entry of merchandise (whether or not Customs required their presentation at the time of entry). The (a)(1)(A) list is contained in the Appendix to this part.

(g) *Inquiry.* An ''inquiry'' is any formal or informal procedure, other than an investigation, through which a request for information is made by a Customs officer.

(h) *Original.* The term ''original'', when used in the context of maintenance of records, has reference to records that are in the condition in which they were made or received by the person responsible for maintaining the records pursuant to 19 U.S.C. 1508 and the provisions of this chapter, including records consisting of the following:

(1) Electronic information which was used to develop other electronic records or paper documents;

(2) Electronic information which is in a readable format such as a facsimile paper format or an electronic or hardcopy spreadsheet;

(3) In the case of a paper record that is part of a multi-part form where all parts of the form are made by the same impression, one of the carbon-copy parts or a facsimile copy or photocopy of one of the parts; and

(4) A copy of a record that was provided to another government agency which retained it, provided that, if required by Customs, a signed statement accompanies the copy certifying it to be a true copy of the record provided to the other government agency.

(i) *Party/person.* The terms ''party'' and ''person'' refer to a natural person, corporation, partnership, association, or other entity or group.

(j) *Summons.* ''Summons'' means any summons issued under this part that requires the production of records or the giving of testimony, or both.

(k) *Technical data.* ''Technical data'' are records which include diagrams and other data with regard to a business or an engineering or exploration operation, whether conducted inside or outside the United States, and whether on paper, cards, photographs, blueprints, tapes, microfiche, film, or other media or in electronic or magnetic storage.

(l) *Third-party recordkeeper.* ''Third-party recordkeeper'' means any attorney, any accountant or any customs

broker other than a customs broker who is the importer of record on an entry.

§ 163.2 Persons required to maintain records.

(a) *General.* Except as otherwise provided in paragraph (b) or (e) of this section, the following persons shall maintain records and shall render such records for examination and inspection by Customs:

(1) An owner, importer, consignee, importer of record, entry filer, or other person who:

(i) Imports merchandise into the customs territory of the United States, files a drawback claim, or transports or stores merchandise carried or held under bond, or

(ii) Knowingly causes the importation or transportation or storage of merchandise carried or held under bond into or from the customs territory of the United States;

(2) An agent of any person described in paragraph (a)(1) of this section; or

(3) A person whose activities require the filing of a declaration or entry, or both.

(b) *Domestic transactions.* For purposes of paragraph (a)(1)(ii) of this section, a person who orders merchandise from an importer in a domestic transaction knowingly causes merchandise to be imported only if:

(1) The terms and conditions of the importation are controlled by the person placing the order with the importer (for example, the importer is not an independent contractor but rather is the agent of the person placing the order: Whereas a consumer who purchases an imported automobile from a domestic dealer would not be required to maintain records, a transit authority that prepared detailed specifications from which imported subway cars or busses were manufactured would be required to maintain records); or

(2) Technical data, molds, equipment, other production assistance, material, components, or parts are furnished by the person placing the order with the importer with knowledge that they will be used in the manufacture or production of the imported merchandise.

(c) *Recordkeeping required for certain exporters.* Any person who exports goods to Canada or Mexico for which a Certificate of Origin was completed and signed pursuant to the North American Free Trade Agreement must also maintain records in accordance with part 181 of this chapter.

(d) *Recordkeeping required for customs brokers.* Each customs broker must also make and maintain records and make such records available in accordance with part 111 of this chapter.

(e) *Recordkeeping not required for certain travelers.* After having physically cleared the Customs facility, a traveler who made a baggage or oral declaration upon arrival in the United States will not be required to maintain supporting records regarding non-commercial merchandise acquired abroad which falls within the traveler's personal exemptions or which is covered by a flat rate of duty.

§ 163.3 Entry records.

Any person described in § 163.2(a) with reference to an import transaction shall be prepared to produce or transmit to Customs, in accordance with § 163.6(a), any entry records which may be demanded by Customs. If entry records submitted to Customs not pursuant to a demand are returned by Customs, or if production of entry records at the time of entry is waived by Customs, such person shall continue to maintain those entry records in accordance with this part. Entry records which are normally kept in the ordinary course of business must be maintained by such person in accordance with this part whether or not copies thereof are retained by Customs.

§ 163.4 Record retention period.

(a) *General.* Except as otherwise provided in paragraph (b) of this section, any record required to be made, kept, and rendered for examination and inspection by Customs under § 163.2 or any other provision of this chapter shall be kept for 5 years from the date of entry, if the record relates to an entry, or 5 years from the date of the activity which required creation of the record.

(b) *Exceptions.* (1) Any record relating to a drawback claim shall be kept until the third anniversary of the date of payment of the claim.

(2) Packing lists shall be retained for a period of 60 calendar days from the end of the release or conditional release period, whichever is later, or, if a demand for return to Customs custody has been issued, for a period of 60 calendar days either from the date the goods are redelivered or from the date specified in the demand as the latest redelivery date if redelivery has not taken place.

(3) A consignee who is not the owner or purchaser and who appoints a customs broker shall keep a record pertaining to merchandise covered by an informal entry for 2 years from the date of the informal entry.

(4) Records pertaining to articles that are admitted free of duty and tax pursuant to 19 U.S.C. 1321(a)(2) and §§ 10.151 through 10.153 of this chapter, and carriers' records pertaining to manifested cargo that is exempt from entry under the provisions of this chapter, shall be kept for 2 years from the date of the entry or other activity which required creation of the record.

(5) If another provision of this chapter sets forth a retention period for a specific type of record that differs from the period that would apply under this section, that other provision controls.

§ 163.5 Methods for storage of records.

(a) *Original records.* All persons listed in § 163.2 shall maintain all records required by law and regulation for the required retention periods and as original records, whether paper or electronic, unless alternative storage methods have been adopted in accordance with paragraph (b) of this section. The records, whether in their original format or under an alternative storage method, must be capable of being retrieved upon lawful request or demand by Customs.

(b) *Alternative method of storage*—(1) *General.* Any of the persons listed in § 163.2 may maintain any records, other than records required to be maintained as original records under laws and regulations administered by other Federal government agencies, in an alternative format, provided that the person gives advance written notification of such alternative storage method to the Director, Regulatory Audit Division, U.S. Customs Service, 909 S.E. First Avenue, Miami, Florida 33131, and provided further that the Director of the Miami regulatory audit field office does not instruct the person in writing as provided herein that certain described records may not be maintained in an alternative format. The written notice to the Director of the Miami regulatory audit field office must be provided at least 30 calendar days before implementation of the alternative storage method, must identify the type of alternative storage method to be used, and must state that the alternative storage method complies with the standards set forth in paragraph (b)(2) of this section. If an alternative storage method covers records that pertain to goods under Customs seizure or detention or that relate to a matter that is currently the subject of an inquiry or investigation or administrative or court proceeding, the appropriate Customs office may instruct the person in writing that those records must be maintained as original records and therefore may not be converted to an alternative format until specific written authorization is received from that Customs office. A written instruction to a person under

this paragraph may be issued during the 30-day advance notice period prescribed in this section or at any time thereafter, must describe the records in question with reasonable specificity but need not identify the underlying basis for the instruction, and shall not preclude application of the planned alternative storage method to other records not described therein.

(2) *Standards for alternative storage methods.* Methods commonly used in standard business practice for storage of records include, but are not limited to, machine readable data, CD ROM, and microfiche. Methods that are in compliance with generally accepted business standards will generally satisfy Customs requirements, provided that the method used allows for retrieval of records requested within a reasonable time after the request and provided that adequate provisions exist to prevent alteration, destruction, or deterioration of the records. The following standards must be applied by recordkeepers when using alternative storage methods:

(i) Operational and written procedures are in place to ensure that the imaging and/or other media storage process preserves the integrity, readability, and security of the information contained in the original records. The procedures must include a standardized retrieval process for such records. Vendor specifications/documentation and benchmark data must be available for Customs review;

(ii) There is an effective labeling, naming, filing, and indexing system;

(iii) Except in the case of packing lists (see § 163.4(b)(2)), entry records must be maintained in their original formats for a period of 120 calendar days from the end of the release or conditional release period, whichever is later, or, if a demand for return to Customs custody has been issued, for a period of 120 calendar days either from the date the goods are redelivered or from the date specified in the demand as the latest redelivery date if redelivery has not taken place;

(iv) An internal testing of the system must be performed on a yearly basis;

(v) The recordkeeper must have the capability to make, and must bear the cost of, hard-copy reproductions of alternatively stored records that are required by Customs for audit, inquiry, investigation, or inspection of such records; and

(vi) The recordkeeper shall retain and keep available one working copy and one back-up copy of the records stored in a secure location for the required periods as provided in § 163.4.

(3) *Changes to alternative storage procedures.* No changes to alternative recordkeeping procedures may be made without first notifying the Director of the Miami regulatory audit field office. The notification must be in writing and must be provided to the director at least 30 calendar days before implementation of the change.

(4) *Penalties.* All persons listed in § 163.2 who use alternative storage methods for records and who fail to maintain or produce the records in accordance with this part shall be subject to penalties pursuant to § 163.6 for entry records or sanctions pursuant to §§ 163.9 and 163.10 for other records.

(5) *Failure to comply with alternative storage requirements.* If a person listed in § 163.2 uses an alternative storage method for records that is not in compliance with the conditions and requirements of this section, the appropriate Customs office may instruct the person in writing to discontinue use of the alternative storage method. The instruction shall take effect upon receipt thereof and shall remain in effect until the noncompliance has been rectified and alternative storage has recommenced in accordance with the procedures set forth in paragraph (b)(1) of this section.

§ 163.6 Production and examination of entry and other records and witnesses; penalties.

(a) *Production of entry records.* Pursuant to written, oral, or electronic notice, any Customs officer may require the production of entry records by any person listed in § 163.2(a) who is required under this part to maintain such records, even if the entry records were required at the time of entry. Any oral demand for entry records shall be followed by a written or electronic demand. The entry records shall be produced within 30 calendar days of receipt of the demand or within any shorter period as Customs may prescribe when the entry records are required in connection with a determination regarding the admissibility or release of merchandise. Should any person from whom Customs has demanded entry records encounter a problem in timely complying with the demand, such person may submit a written or electronic request to Customs for approval of a specific additional period of time in which to produce the records; the request must be received by Customs before the applicable due date for production of the records and must include an explanation of the circumstances giving rise to the request. Customs will promptly advise the requesting person electronically or in writing either that the request is denied or that the requested additional time period, or such shorter period as Customs may deem appropriate, is approved. The mere fact that a request for additional time to produce demanded entry records was submitted under this section shall not by itself preclude the imposition of a monetary penalty or other sanction under this part for failure to timely produce the records, but no such penalty or other sanction will be imposed if the request is approved and the records are produced before expiration of that additional period of time.

(b) *Failure to produce entry records*—(1) *Monetary penalties applicable.* The following penalties may be imposed if a person fails to comply with a lawful demand for the production of an entry record and is not excused from a penalty pursuant to paragraph (b)(3) of this section:

(i) If the failure to comply is a result of the willful failure of the person to maintain, store, or retrieve the demanded record, such person shall be subject to a penalty, for each release of merchandise, not to exceed $100,000, or an amount equal to 75 percent of the appraised value of the merchandise, whichever amount is less; or

(ii) If the failure to comply is a result of negligence of the person in maintaining, storing, or retrieving the demanded record, such person shall be subject to a penalty, for each release of merchandise, not to exceed $10,000, or an amount equal to 40 percent of the appraised value of the merchandise, whichever amount is less.

(2) *Additional actions*—(i) *General.* In addition to any penalty imposed under paragraph (b)(1) of this section, and except as otherwise provided in paragraph (b)(2)(ii) of this section, if the demanded entry record relates to the eligibility of merchandise for a column 1 special rate of duty in the Harmonized Tariff Schedule of the United States (HTSUS), the entry of such merchandise:

(A) If unliquidated, shall be liquidated at the applicable HTSUS column 1 general rate of duty; or

(B) If liquidated within the 2-year period preceding the date of the demand, shall be reliquidated, notwithstanding the time limitation in 19 U.S.C. 1514 or 1520, at the applicable HTSUS column 1 general rate of duty.

(ii) *Exception.* Any liquidation or reliquidation under paragraph (b)(2)(i)(A) or (b)(2)(ii)(B) of this section shall be at the applicable HTSUS column 2 rate of duty if Customs demonstrates that the merchandise should be dutiable at such rate.

(3) *Avoidance of penalties.* No penalty may be assessed under paragraph (b)(1)

of this section if the person who fails to comply with a lawful demand for entry records can show:

(i) That the loss of the demanded record was the result of an act of God or other natural casualty or disaster beyond the fault of such person or an agent of the person;

(ii) On the basis of other evidence satisfactory to Customs, that the demand was substantially complied with;

(iii) That the record demanded was presented to and retained by Customs at the time of entry or submitted in response to an earlier demand; or

(iv) That he has been certified as a participant in the Recordkeeping Compliance Program (see § 163.12), that he is generally in compliance with the appropriate procedures and requirements of that program, and that the violation in question is his first violation and was a non-willful violation.

(4) *Penalties not exclusive.* Any penalty imposed under paragraph (b)(1) of this section shall be in addition to any other penalty provided by law except for:

(i) A penalty imposed under 19 U.S.C. 1592 for a material omission of any information contained in the demanded record; or

(ii) Disciplinary action taken under 19 U.S.C. 1641.

(5) *Remission or mitigation of penalties.* A penalty imposed under this section may be remitted or mitigated under 19 U.S.C. 1618.

(6) *Customs summons.* The assessment of a penalty under this section shall not limit or preclude the issuance or enforcement of a summons under this part.

(c) *Examination of entry and other records*—(1) *Reasons for examination.* Customs may initiate an investigation or compliance assessment, audit or other inquiry for the purpose of:

(i) Ascertaining the correctness of any entry, determining the liability of any person for duties, taxes and fees due or duties, taxes and fees which may be due, or determining the liability of any person for fines, penalties and forfeitures; or

(ii) Ensuring compliance with the laws and regulations administered or enforced by Customs.

(2) *Availability of records.* During the course of any investigation or compliance assessment, audit or other inquiry, any Customs officer, during normal business hours, and to the extent possible at a time mutually convenient to the parties, may examine, or cause to be examined, any relevant entry or other records by providing the person responsible for such records with reasonable written, oral or electronic notice that describes the records with reasonable specificity. The examination of entry records shall be subject to the notice and production procedures set forth in paragraph (a) of this section, and a failure to produce entry records may result in the imposition of penalties or the taking of other action as provided in paragraph (b) of this section.

(3) *Examination notice not exclusive.* In addition to, or in lieu of, issuance of an examination notice under paragraph (c)(2) of this section, Customs may issue a summons pursuant to § 163.7, and seek its enforcement pursuant to §§ 163.9 and 163.10, to compel the production of any records required to be maintained and produced under this chapter.

§ 163.7 Summons.

(a) *Who may be served.* During the course of any investigation or compliance assessment, audit or other inquiry initiated for the reasons set forth in § 163.6(c), the Commissioner of Customs or his designee, but no designee of the Commissioner below the rank of port director, field director of regulatory audit or special agent in charge, may issue a summons requiring a person within a reasonable period of time to appear before the appropriate Customs officer and to produce records or give relevant testimony under oath or both. Such a summons may be issued to any person who:

(1) Imported, or knowingly caused to be imported, merchandise into the customs territory of the United States;

(2) Exported merchandise, or knowingly caused merchandise to be exported, to a NAFTA country as defined in 19 U.S.C. 3301(4) (see also part 181 of this chapter) or to Canada during such time as the United States-Canada Free Trade Agreement is in force with respect to, and the United States applies that Agreement to, Canada;

(3) Transported or stored merchandise that was or is carried or held under customs bond, or knowingly caused such transportation or storage;

(4) Filed a declaration, entry, or drawback claim with Customs;

(5) Is an officer, employee, or agent of any person described in paragraph (a)(1) through (a)(4) of this section;

(6) Has possession, custody or care of records relating to an importation or other activity described in paragraph (a)(1) through (a)(4) of this section; or

(7) Customs may deem proper.

(b) *Contents of summons*—(1) *Appearance of person.* Any summons issued under this section to compel the appearance of a person shall state:

(i) The name, title, and telephone number of the Customs officer before whom the appearance shall take place;

(ii) The address within the customs territory of the United States where the person shall appear, not to exceed 100 miles from the place where the summons was served;

(iii) The time of appearance; and

(iv) The name, address, and telephone number of the Customs officer issuing the summons.

(2) *Production of records.* If a summons issued under this section requires the production of records, the summons shall set forth the information specified in paragraph (b)(1) of this section and shall also describe the records in question with reasonable specificity.

(c) *Service of summons*—(1) *Who may serve.* Any Customs officer is authorized to serve a summons issued under this section if designated in the summons to serve it.

(2) *Method of service*—(i) *Natural person.* Service upon a natural person shall be made by personal delivery.

(ii) *Corporation, partnership, association.* Service shall be made upon a domestic or foreign corporation, or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivery to an officer, managing or general agent, or any other agent authorized by appointment or law to receive service of process.

(3) *Certificate of service.* On the hearing of an application for the enforcement of a summons, the certificate of service signed by the person serving the summons is prima facie evidence of the facts it states.

(d) *Transcript of testimony under oath.* Testimony of any person taken pursuant to a summons may be taken under oath and when so taken shall be transcribed or otherwise recorded. When testimony is transcribed or otherwise recorded, a copy shall be made available on request to the witness unless for good cause shown the issuing officer determines under 5 U.S.C. 555 that a copy should not be provided. In that event, the witness shall be limited to inspection of the official transcript of the testimony. The testimony or transcript may be in the form of a written statement under oath provided by the person examined at the request of the Customs officer.

§ 163.8 Third-party recordkeeper summons.

(a) *Notice required.* Except as otherwise provided in paragraph (f) of this section, if a summons issued under § 163.7 to a third-party recordkeeper

requires the production of, or the giving of testimony relating to, records pertaining to transactions of any person, other than the person summoned, who is identified in the description of the records contained in the summons, then notice of the summons shall be provided to the person so identified in the summons.

(b) *Time of notice.* The notice of service of summons required by paragraph (a) of this section should be provided by the issuing officer immediately after service of summons is obtained under § 163.7(c), but in no event shall notice be given less than 10 business days before the date set in the summons for the production of records or the giving of testimony.

(c) *Contents of notice.* The issuing officer shall ensure that any notice issued under this section includes a copy of the summons and provides the following information:

(1) That compliance with the summons may be stayed if written direction not to comply with the summons is given by the person receiving notice to the person summoned;

(2) That a copy of any such direction to not comply and a copy of the summons shall be sent by registered or certified mail to the person summoned and to the Customs officer who issued the summons; and

(3) That the actions under paragraphs (c)(1) and (c)(2) of this section shall be accomplished not later than the day before the day fixed in the summons as the day upon which the records are to be examined or the testimony is to be given.

(d) *Service of notice.* The Customs officer who issues the summons shall serve the notice required by paragraph (a) of this section in the same manner as is prescribed in § 163.7(c)(2) for the service of a summons, or by certified or registered mail to the last known address of the person entitled to notice.

(e) *Examination of records precluded.* If notice is required by this section, no record may be examined before the date fixed in the summons as the date to produce the records. If the person entitled to notice under paragraph (a) of this section issues a stay of compliance with the summons in accordance with paragraph (c) of this section, no examination of records shall take place except with the consent of the person staying compliance or pursuant to an order issued by a U.S. district court.

(f) *Exceptions to notice and stay of summons provisions*—(1) *Personal liability for duties, fees, or taxes.* The notice provisions of paragraph (a) of this section shall not apply to any summons served on the person, or on any officer or employee of the person, with respect to whose liability for duties, fees, or taxes the summons is issued.

(2) *Verification of existence of records.* The notice provisions of paragraph (a) of this section shall not apply to any summons issued to determine whether or not records of transactions of an identified person have been made or kept.

(3) *Judicial determination.* The notice provisions of paragraph (a) of this section and the stay of compliance provisions of paragraph (c) of this section shall not apply with respect to a summons described in paragraph (a) of this section if a U.S. district court determines, upon petition by the issuing Customs officer, that reasonable cause exists to believe that the giving of notice may lead to an attempt:

(i) To conceal, destroy, or alter relevant records;

(ii) To prevent the communication of information from other persons through intimidation, bribery, or collusion; or

(iii) To flee to avoid prosecution, testifying, or production of records.

§ 163.9 Enforcement of summons.

Whenever a person does not comply with a Customs summons, the issuing officer may request the appropriate U.S. attorney to seek an order requiring compliance from the U.S. district court for the district in which the person is found or resides or is doing business. A person who is entitled to notice under § 163.8(a) shall have a right to intervene in any such enforcement proceeding.

§ 163.10 Failure to comply with court order; penalties.

(a) *Monetary penalties.* The U.S. district court for any judicial district in which a person served with a Customs summons is found or resides or is doing business may order such person to comply with the summons. Upon the failure of a person to obey a court order to comply with a Customs summons, the court may find such person in contempt and may assess a monetary penalty.

(b) *Importations prohibited.* If a person fails to comply with a court order to comply with a Customs summons and is adjudged guilty of contempt, the Commissioner of Customs, with the approval of the Secretary of the Treasury, for so long as that person remains in contempt:

(1) May prohibit importation of merchandise by that person, directly or indirectly, or for that person's account; and

(2) May withhold delivery of merchandise imported by that person, directly or indirectly, or for that person's account.

(c) *Sale of merchandise.* If any person remains in contempt for more than 1 year after the Commissioner issues instructions to withhold delivery under paragraph (b)(2) of this section, the merchandise shall be considered abandoned and shall be sold at public auction or otherwise disposed of in accordance with subpart E of part 162 of this chapter.

§ 163.11 Compliance assessment and other audit procedures.

(a) *Conduct of a Customs compliance assessment or other audit.* In conducting a compliance assessment or other audit, the Customs auditors, except as otherwise provided in paragraph (c) of this section, shall:

(1) Provide notice, telephonically and in writing, to the person who is to be the subject of the compliance assessment or other audit, in advance of the compliance assessment or other audit and with a reasonable estimate of the time to be required for the compliance assessment or other audit;

(2) Inform the person who is to be the subject of the compliance assessment or other audit, in writing and before commencing the compliance assessment or other audit, of his right to an entry conference at which time the objectives and records requirements of the compliance assessment or other audit will be explained and the estimated termination date will be set;

(3) Provide a further estimate of any additional time for the compliance assessment or other audit if, in the course of the compliance assessment or other audit, it becomes apparent that additional time will be required;

(4) Schedule a closing conference upon completion of the compliance assessment or other audit on-site work to explain the preliminary results of the compliance assessment or other audit;

(5) Complete a formal written compliance assessment or other audit report within 90 calendar days following the closing conference referred to in paragraph (a)(4) of this section, unless the Director, Regulatory Audit Division, at Customs Headquarters provides written notice to the person who was the subject of the compliance assessment or other audit of the reason for any delay and the anticipated completion date; and

(6) After application of any exemption contained in 5 U.S.C. 552, send a copy of the formal written compliance assessment or other audit report to the person who was the subject of the compliance assessment or other audit

within 30 calendar days following completion of the report.

(b) *Petition procedures for failure to conduct closing conference.* Except as otherwise provided in paragraph (c) of this section, if the estimated or actual termination date for a compliance assessment or other audit passes without a Customs auditor providing a closing conference to explain the results of the compliance assessment or other audit, the person who was the subject of the compliance assessment or other audit may petition in writing for such a conference to the Director, Regulatory Audit Division, U.S. Customs Service, Washington, DC 20229. Upon receipt of such a request, the Director shall provide for such a conference to be held within 15 calendar days after the date of receipt.

(c) *Exception to procedures.* Paragraphs (a)(5), (a)(6) and (b) of this section shall not apply after Customs commences a formal investigation with respect to the issue involved.

§ 163.12 Recordkeeping Compliance Program.

(a) *General.* The Recordkeeping Compliance Program is a voluntary Customs program under which certified recordkeepers may be eligible for alternatives to penalties (see paragraph (d) of this section) that might be assessed under § 163.6 for failure to produce a demanded entry record. However, even where a certified recordkeeper is eligible for an alternative to a penalty, participation in the Recordkeeping Compliance Program has no limiting effect on the authority of Customs to use a summons, court order or other legal process to compel the production of records by that certified recordkeeper.

(b) *Certification procedures*—(1) *Who may apply.* Any person described in § 163.2(a) who is required to maintain and produce entry records under this part may apply to participate in the Recordkeeping Compliance Program.

(2) *Where to apply.* An application for certification to participate in the Recordkeeping Compliance Program shall be submitted to the Director, Regulatory Audit Division, U.S. Customs Service, 909 S.E. First Avenue, Miami, Florida 33131. The application shall be submitted in accordance with the guidelines contained in the Customs Recordkeeping Compliance Handbook which may be obtained by downloading it from the Customs Electronic Bulletin Board (703–921–6155) or by writing to the Recordkeeping Compliance Program, Regulatory Audit Division, Office of Strategic Trade, U.S. Customs Service, 909 S.E. First Avenue, Suite 710, Miami, Florida 33131.

(3) *Certification requirements.* A recordkeeper may be certified as a participant in the Recordkeeping Compliance Program after meeting the general recordkeeping requirements established under this section or after negotiating an alternative program suited to the needs of the recordkeeper and Customs. To be certified, a recordkeeper must be in compliance with Customs laws and regulations. Customs will take into account the size and nature of the importing business and the volume of imports and Customs workload constraints prior to granting certification. In order to be certified, a recordkeeper must meet the applicable requirements set forth in the Customs Recordkeeping Compliance Handbook and must be able to demonstrate that it:

(i) Understands the legal requirements for recordkeeping, including the nature of the records required to be maintained and produced and the time periods relating thereto;

(ii) Has in place procedures to explain the recordkeeping requirements to those employees who are involved in the preparation, maintenance and production of required records;

(iii) Has in place procedures regarding the preparation and maintenance of required records, and the production of such records to Customs;

(iv) Has designated a dependable individual or individuals to be responsible for recordkeeping compliance under the program and whose duties include maintaining familiarity with the recordkeeping requirements of Customs;

(v) Has a record maintenance procedure acceptable to Customs for original records or has an alternative records maintenance procedure adopted in accordance with § 163.5(b); and

(vi) Has procedures for notifying Customs of any occurrence of a variance from, or violation of, the requirements of the Recordkeeping Compliance Program or negotiated alternative program, as well as procedures for taking corrective action when notified by Customs of violations or problems regarding such program. For purposes of this paragraph, the term ''variance'' means a deviation from the Recordkeeping Compliance Program that does not involve a failure to maintain or produce records or a failure to meet the requirements set forth in this section. For purposes of this paragraph, the term ''violation'' means a deviation from the Recordkeeping Compliance Program that involves a failure to maintain or produce records or a failure to meet the requirements set forth in this section.

(c) *Application review and approval and certification process*—(1) *Review of applications.* The Miami regulatory audit field office will process the application and will coordinate and consult, as may be necessary, with the appropriate Customs Headquarters and field officials. The Miami regulatory audit field office will review and verify the information contained in the application and may initiate an on-site verification prior to approval and certification. If an on-site visit is warranted, the Miami regulatory audit field office shall inform the applicant. If additional information is necessary to process the application, the applicant shall be notified. Customs requests for information not submitted with the application or for additional explanation of details will cause a delay in the application approval and certification of applicants and may result in the suspension of the application approval and certification process until the requested information is received by Customs.

(2) *Approval and certification.* If, upon review, Customs determines that the application should be approved and that certification should be granted, the Director of the Miami regulatory audit field office shall issue the certification with all the applicable conditions stated therein.

(d) *Alternatives to penalties*—(1) *General.* If a certified participant in the Recordkeeping Compliance Program does not produce a demanded entry record for a specific release or provide the information contained in the demanded entry record by acceptable alternate means, Customs shall, in lieu of a monetary penalty provided for in § 163.6(b), issue a written notice of violation to the person as described in paragraph (d)(2) of this section, provided that the certified participant is generally in compliance with the procedures and requirements of the program and provided that the violation was not a willful violation and was not a repeat violation. A willful failure to produce demanded entry records or repeated failures to produce demanded entry records may result in the issuance of penalties under § 163.6(b) and removal of certification under the program (see § 163.13) until corrective action satisfactory to Customs is taken.

(2) *Contents of notice.* A notice of violation issued to a participant in the Recordkeeping Compliance Program for failure to produce a demanded entry record or information contained therein shall:

(i) State that the recordkeeper has violated the recordkeeping requirements;

(ii) Identify the record or information which was demanded and not produced;

(iii) Warn the recordkeeper that future failures to produce demanded entry records or information contained therein may result in the imposition of monetary penalties and could result in the removal of the recordkeeper from the Recordkeeping Compliance Program.

(3) *Response to notice.* Within a reasonable time after receiving written notice under paragraph (d)(1) of this section, the recordkeeper shall notify Customs of the steps it has taken to prevent a recurrence of the violation.

§ 163.13 Denial and removal of program certification; appeal procedures.

(a) *General.* Customs may take, and applicants and participants may appeal and obtain administrative review of, the following decisions regarding the Recordkeeping Compliance Program provided for in § 163.12:

(1) Denial of certification for program participation in accordance with paragraph (b) of this section; and

(2) Removal of certification for program participation in accordance with paragraph (c) of this section.

(b) *Denial of certification for program participation*—(1) *Grounds for denial.* Customs may deny an application for certification for participation in the Recordkeeping Compliance Program for any of the following reasons:

(i) The applicant fails to meet the requirements set forth in § 163.12(b)(3);

(ii) A circumstance involving the applicant arises that would justify initiation of a certification removal action under paragraph (c) of this section; or

(iii) In the judgment of Customs, the applicant appears not to be in compliance with Customs laws and regulations.

(2) *Denial procedure.* If the Director of the Miami regulatory audit field office determines that an application submitted under § 163.12 should not be approved and that certification for participation in the Recordkeeping Compliance Program should not be granted, the Director shall issue a written notice of denial to the applicant. The notice of denial shall set forth the reasons for the denial and shall advise the applicant of its right to file an appeal of the denial in accordance with paragraph (d) of this section.

(c) *Certification removal*—(1) *Grounds for removal.* The certification for participation in the Recordkeeping Compliance Program by a certified recordkeeper may be removed when any of the following conditions are discovered:

(i) The certification privilege was obtained through fraud or mistake of fact;

(ii) The program participant no longer has a valid bond;

(iii) The program participant fails on a recurring basis to provide entry records when demanded by Customs;

(iv) The program participant willfully refuses to produce a demanded or requested record;

(v) The program participant is no longer in compliance with the Customs laws and regulations, including the requirements set forth in § 163.12(b)(3); or

(vi) The program participant is convicted of any felony or has committed acts which would constitute a misdemeanor or felony involving theft, smuggling, or any theft-connected crime.

(2) *Removal procedure.* If Customs determines that the certification of a program participant should be removed, the Director of the Miami regulatory audit field office shall serve the program participant with written notice of the removal. Such notice shall inform the program participant of the grounds for the removal and shall advise the program participant of its right to file an appeal of the removal in accordance with paragraph (d) of this section.

(3) *Effect of removal.* The removal of certification shall be effective immediately in cases of willfulness on the part of the program participant or when required by public health, interest, or safety. In all other cases, the removal of certification shall be effective when the program participant has received notice under paragraph (c)(2) of this section and either no appeal has been filed within the time limit prescribed in paragraph (d)(2) of this section or all appeal procedures thereunder have been concluded by a decision that upholds the removal action. Removal of certification may subject the affected person to penalties.

(d) *Appeal of certification denial or removal*—(1) *Appeal of certification denial.* A person may challenge a denial of an application for certification for participation in the Recordkeeping Compliance Program by filing a written appeal with the Director, Regulatory Audit Division, U.S. Customs Service, Washington, DC 20229. The appeal must be received by the Director, Regulatory Audit Division, within 30 calendar days after issuance of the notice of denial. The Director, Regulatory Audit Division, will review the appeal and will respond with a written decision within 30 calendar days after receipt of the appeal unless circumstances require a delay in issuance of the decision. If the decision cannot be issued within the 30-day period, the Director, Regulatory Audit Division, will advise the appellant of the reasons for the delay and of any further actions which will be carried out to complete the appeal review and of the anticipated date for issuance of the appeal decision.

(2) *Appeal of certification removal.* A certified recordkeeper who has received a Customs notice of removal of certification for participation in the Recordkeeping Compliance Program may challenge the removal by filing a written appeal with the Director, Regulatory Audit Division, U.S. Customs Service, Washington, DC 20229. The appeal must be received by the Director, Regulatory Audit Division, within 30 calendar days after issuance of the notice of removal. The Director, Regulatory Audit Division, shall consider the allegations upon which the removal was based and the responses made thereto by the appellant and shall render a written decision on the appeal within 30 calendar days after receipt of the appeal.

Appendix to Part 163—Interim (a)(1)(A) List

List of Records Required for the Entry of Merchandise

General Information

(1) Section 508 of the Tariff Act of 1930, as amended (19 U.S.C. 1508), sets forth the general recordkeeping requirements for Customs-related activities. Section 509 of the Tariff Act of 1930, as amended (19 U.S.C. 1509) sets forth the procedures for the production and examination of those records (which includes, but is not limited to, any statement, declaration, document, or electronically generated or machine readable data).

(2) Section 509(a)(1)(A) of the Tariff Act of 1930, as amended by title VI of Public Law 103–182, commonly referred to as the Customs Modernization Act (19 U.S.C. 1509(a)(1)(A)), requires the production, within a reasonable time after demand by the Customs Service is made (taking into consideration the number, type and age of the item demanded) if ''such record is required by law or regulation for the entry of the merchandise (whether or not the Customs Service required its presentation at the time of entry).'' Section 509(e) of the Tariff Act of 1930, as amended by Public Law 103–182 (19 U.S.C. 1509(e)) requires the Customs Service to identify and publish a list of the records and entry information that is required to be maintained and produced under subsection (a)(1)(A) of section 509 (19 U.S.C. 1509(a)(1)(A)). This list is commonly referred to as ''the (a)(1)(A) list.''

(3) The Customs Service has tried to identify all the presently required entry

information or records on the following list. However, as automated programs and new procedures are introduced, these may change. In addition, errors and omissions to the list may be discovered upon further review by Customs officials or the trade. Pursuant to section 509(g), the failure to produce listed records or information upon reasonable demand may result in penalty action or liquidation or reliquidation at a higher rate than entered. A recordkeeping penalty may not be assessed if the listed information or records are transmitted to and retained by Customs.

(4) *Other recordkeeping requirements:* The importing community and Customs officials are reminded that the (a)(1)(A) list only pertains to records or information required for the entry of merchandise. An owner, importer, consignee, importer of record, entry filer, or other party who imports merchandise, files a drawback claim or transports or stores bonded merchandise, any agent of the foregoing, or any person whose activities require them to file a declaration or entry, is also required to make, keep and render for examination and inspection records (including, but not limited to, statements, declarations, documents and electronically generated or machine readable data) which pertain to any such activity or the information contained in the records required by the Tariff Act in connection with any such activity, and are normally kept in the ordinary course of business. While these records are not subject to administrative penalties, they are subject to examination and/or summons by Customs officers. Failure to comply could result in the imposition of significant judicially imposed penalties and denial of import privileges.

(5) The following list does not replace entry requirements, but is merely provided for information and reference. In the case of the list conflicting with regulatory or statutory requirements, the latter will govern.

List of Records and Information Required for the Entry of Merchandise

The following records (which include, but are not limited to, any statement, declaration, document, or electronically generated or machine readable data) are required by law or regulation for the entry of merchandise and are required to be maintained and produced to Customs upon reasonable demand (whether or not Customs required their presentation at the time of entry). Information may be submitted to Customs at the time of entry in a Customs authorized electronic or paper format. Not every entry of merchandise requires all of the following information. Only those records or information applicable to the entry requirements for the merchandise in question will be required/mandatory. The list may be amended as Customs reviews its requirements and continues to implement the Customs Modernization Act. When a record or information is filed with and retained by Customs, the record is not subject to recordkeeping penalties, although the underlying backup or supporting information from which it is obtained may also be subject to the general record retention regulations and examination or summons pursuant to 19 U.S.C. 1508 and 1509. (All references, unless otherwise indicated, are to the current edition of title 19, Code of Federal Regulations, as amended by subsequent Federal Register documents.)

I. *General list of records required for most entries. Information shown with an asterisk (*) is usually on the appropriate form and filed with and retained by Customs:*

§§ 141.11 through 141.15 Evidence of right to make entry (airway bill/bill of lading or *carrier certificate, etc.) when goods are imported on a common carrier
§ 141.19 * Declaration of entry (usually contained on the entry summary or warehouse entry)
§ 141.32 Power of attorney (when required by regulations)
§ 141.54 Consolidated shipments authority to make entry (if this procedure is utilized)
§ 142.3 Packing list (where appropriate)
§ 142.4 Bond information (except if 10.101 or 142.4(c) applies)
Parts 4, 18, 122, 123 * Vessel, Vehicle or Air Manifest (filed by the carrier)

II. *The following records or information are required by § 141.61 on Customs Form (CF) 3461 or CF 7533 or the regulations cited. Information shown with an asterisk (*) is contained on the appropriate form and/or otherwise filed with and retained by Customs:*

§§ 142.3, 142.3a * Entry Number
* Entry Type Code
* Elected Entry Date
* Port Code
§ 142.4 * Bond information
§§ 141.61, 142.3a * Broker/Importer Filer Number
§§ 141.61, 142.3 * Ultimate Consignee Name and Number/street address of premises to be delivered
§ 141.61 * Importer of Record Number
* Country of Origin
§ 141.11 * IT/BL/AWB Number and Code
* Arrival Date
§ 141.61 * Carrier Code
* Voyage/Flight/Trip
* Vessel Code/Name
* Manufacturer ID Number (for AD/CVD must be actual mfr.)
* Location of Goods-Code(s)/Name(s)
* U.S. Port of Unlading
* General Order Number (only when required by the regulations)
§ 142.6 * Description of Merchandise
§ 142.6 * HTSUSA Number
§ 142.6 * Manifest Quantity
* Total Value
* Signature of Applicant

III. *In addition to the information listed above, the following records or items of information are required by law and regulation for the entry of merchandise and are presently required to be produced by the importer of record at the time the Customs Form 7501 is filed:*

§ 141.61 * Entry Summary Date
§ 141.61 * Entry Date
§ 142.3 * Bond Number, Bond Type Code and Surety code
§ 142.3 * Ultimate Consignee Address
§ 141.61 * Importer of Record Name and Address
§ 141.61 * Exporting Country and Date Exported
* I.T. (In-bond) Entry Date (for IT Entries only)
* Mode of Transportation (MOT Code)
§ 141.61 * Importing Carrier Name
§ 141.82 Conveyance Name/Number
* Foreign Port of Lading
* Import Date and Line Numbers
* Reference Number
* HTSUS Number
§ 141.61 * Identification number for merchandise subject to Anti-dumping or Countervailing duty order (ADA/CVD Case Number)
§ 141.61 * Gross Weight
* Manifest Quantity
§ 141.61 * Net Quantity in HTSUSA Units
§ 141.61 * Entered Value, Charges, and Relationship
§ 141.61 * Applicable HTSUSA Rate, ADA/CVD Rate, I.R.C. Rate, and/or Visa Number, Duty, I.R. Tax, and Fees (e.g. HMF, MPF, Cotton)
§ 141.61 Non-Dutiable Charges
§ 141.61 * Signature of Declarant, Title, and Date
* Textile Category Number
§ 141.83, 141.86 Invoice information which includes, e.g., date, number, merchandise (commercial product) description, quantities, values, unit price, trade terms, part, model, style, marks and numbers, name and address of foreign party responsible for invoicing, kind of currency
Terms of Sale
Shipping Quantities
Shipping Units of Measurements
Manifest Description of Goods
Foreign Trade Zone Designation and Status Designation (if applicable)
Indication of Eligibility for Special Access Program (9802/GSP/CBI)
§ 141.89 CF 5523
Part 141 Corrected Commercial Invoice
141.86 (e) Packing List
177.8 * Binding Ruling Identification Number (or a copy of the ruling)
§ 10.102 Duty Free Entry Certificate (9808.00.30009 HTS)
§ 10.108 Lease Statement

IV. *Documents/records or information required for entry of special categories of merchandise (the listed documents or information is only required for merchandise entered [or required to be entered] in accordance with the provisions of the sections of 19 CFR [the Customs Regulations] listed). These are in addition to any documents/records or information required by other agencies in their regulations for the entry of merchandise:*

§ 4.14 CF 226 Information for vessel repairs, parts and equipment
§ 7.3(f) CF 3229 Origin certificate for insular possessions Shipper's and importer's declaration for insular possessions
Part 10 Documents required for entry of articles exported and returned:
§§ 10.1 through 10.6 Foreign shipper's declaration or master's certificate, declaration for free entry by owner, importer or consignee
§ 10.7 Certificate from foreign shipper for reusable containers

§ 10.8 Declaration of person performing alterations or repairs
Declaration for non-conforming merchandise
§ 10.9 Declaration of processing
§ 10.24 Declaration by assembler Endorsement by importer
§§ 10.31, 10.35 Documents required for Temporary Importations Under Bond:
Information required, Bond or Carnet
§ 10.36 Lists for samples, professional equipment, theatrical effects
Documents required for Instruments of International Traffic:
§ 10.41 Application, Bond or TIR carnet

Note: additional 19 U.S.C. 1508 records: see § 10.41b(e)

§ 10.43 Documents required for exempt organizations
§ 10.46 Request from head of agency for 9808.00.10 or 9808.00.20 HTSUS treatment
Documents required for works of art
§ 10.48 Declaration of artist, seller or shipper, curator, etc.
§§ 10.49, 10.52 Declaration by institution
§ 10.53 Declaration by importer
USFWS Form 3–177, if appropriate
§§ 10.59, 10.63 Documents/CF 5125 for withdrawal of ship supplies
§§ 10.66, 10.67 Declarations for articles exported and returned
§§ 10.68, 10.69 Documents for commercial samples, tools, theatrical effects
§§ 10.70, 10.71 Purebred breeding certificate
§ 10.84 Automotive Products certificate
§ 10.90 Master records and metal matrices: detailed statement of cost of production
§ 10.98 Declarations for copper fluxing material
§ 10.99 Declaration of non-beverage ethyl alcohol, ATF permit
§§ 10.101 through 10.102 Stipulation for government shipments and/or certification for government duty-free entries, etc.
§ 10.107 Report for rescue and relief equipment
15 CFR part 301 Requirements for entry of scientific and educational apparatus
§ 10.121 Certificate from USIA for visual/auditory materials
§ 10.134 Declaration of actual use (When classification involves actual use)
§ 10.138 End Use Certificate
§§ 10.171 through 10.178 Documents, etc. required for entries of GSP merchandise, GSP Declaration (plus supporting documentation)
§ 10.174 Evidence of direct shipment
§ 10.179 Certificate of importer of crude petroleum
§ 10.180 Certificate of fresh, chilled or frozen beef
§ 10.183 Civil aircraft parts/simulator documentation and certifications
§§ 10.191 through 10.198 Documents, etc. required for entries of CBI merchandise, CBI declaration of origin (plus supporting information)
§ 10.194 Evidence of direct shipment
†[§ 10.306 Evidence of direct shipment for CFTA]
†[§ 10.307 Documents, etc. required for entries under CFTA Certificate of origin of CF 353]

[†CFTA provisions are suspended while NAFTA remains in effect. See part 181]

§ 12.6 European Community cheese affidavit
§ 12.7 HHS permit for milk or cream importation
§ 12.11 Notice of arrival for plant and plant products
§ 12.17 APHIS Permit animal viruses, serums and toxins
§ 12.21 HHS license for viruses, toxins, antitoxins, etc. for treatment of man
§ 12.23 Notice of claimed investigational exemption for a new drug
§§ 12.26 through 12.31 Necessary permits from APHIS, FWS & foreign government certificates when required by the applicable regulation
§ 12.33 Chop list, proforma invoice and release permit from HHS
§ 12.34 Certificate of match inspection and importer's declaration
§ 12.43 Certificate of origin/declarations for goods made by forced labor, etc.
§ 12.61 Shipper's declaration, official certificate for seal and otter skins
§§ 12.73, 12.80 Motor vehicle declarations
§ 12.85 Boat declarations (CG–5096) and USCG exemption
§ 12.91 FDA form 2877 and required declarations for electronics products
§ 12.99 Declarations for switchblade knives
§§ 12.104 through 12.104i Cultural property declarations, statements and certificates of origin
§ 12.105 through 12.109 Pre-Columbian monumental and architectural sculpture and murals
Certificate of legal exportation
Evidence of exemption
§ 12.110 Pesticides, etc. notice of arrival
§§ 12.118 through 12.127 Toxic substances: TSCA statements
§ 12.130 Textiles & textile products
Single country declaration
Multiple country declaration
VISA
§ 12.132 NAFTA textile requirements
§ 12.140 Province of first manufacture, export permit number and fee status of softwood lumber from Canada
§ 54.5 Declaration by importer of use of certain metal articles
§ 54.6(a) Re-Melting Certificate
Part 114 Carnets (serves as entry and bond document where applicable)
Part 115 Container certificate of approval
Part 128 Express consignments
§ 128.21 * Manifests with required information (filed by carrier)
§ 132.23 Acknowledgment of delivery for mailed items subject to quota
§ 133.21(b)(6) Consent from trademark or trade name holder to import otherwise restricted goods
§§ 134.25, 134.36 Certificate of marking; notice to repacker
§ 141.88 Computed value information
§ 141.89 Additional invoice information required for certain classes of merchandise including, but not limited to:
Textile Entries: Quota charge Statement, if applicable including Style Number, Article Number and Product
Steel Entries: Ordering specifications, including but not limited to, all applicable industry standards and mill certificates, including but not limited to, chemical composition.
§ 143.13 Documents required for appraisement entries Bills, statements of costs of production Value declaration
§ 143.23 Informal entry: commercial invoice plus declaration
§ 144.12 Warehouse entry information
§ 145.11 Customs Declaration for Mail, Invoice
§ 145.12 Mail entry information (CF 3419 is completed by Customs but formal entry may be required.)
Part 148 Supporting documents for personal importations
Part 151, subpart B Scale Weight
Part 151, subpart B Sugar imports sampling/lab information (Chemical Analysis)
Part 151, subpart C Petroleum imports sampling/lab information Out turn Report 24. to 25.—Reserved
Part 151, subpart E Wool and Hair invoice information, additional documents
Part 151, subpart F Cotton invoice information, additional documents
§ 181.22 NAFTA Certificate of origin and supporting records
19 U.S.C. 1356k Coffee Form O (currently suspended)

Other Federal and State Agency Documents

State and Local Government Records
Other Federal Agency Records (See 19 CFR part 12, 19 U.S.C. 1484, 1499)
Licenses, Authorizations, Permits

Foreign Trade Zones

§ 146.32 Supporting documents to CF 214

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1624; 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by adding a new listing to the table in numerical order to read as follows:

§ 178.2 Listing of OMB control numbers.

19 CFR section	Description	OMB control No.
* * *	* * *	*
Part 163	General recordkeeping and record production requirements	1515–0214
* * *	* * *	*

PART 181—NORTH AMERICAN FREE TRADE AGREEMENT

1. The authority citation for Part 181 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624, 3314.

§ 181.12 [Amended]

2. In § 181.12, the introductory text of paragraph (a)(1) is amended by removing the words ''all records'' and adding, in their place, the words ''the Certificate (or a copy thereof) and all other records'', and paragraph (b)(1) is amended by removing the reference ''§ 162.1d'' and adding, in its place, the reference ''part 163''.

3. In § 181.13, a new sentence is added at the end to read as follows:

§ 181.13 Failure to comply with requirements.

* * * Such measures may include the imposition of penalties pursuant to 19 U.S.C. 1508(e) for failure to retain records required to be maintained under § 181.12.

§ 181.22 [Amended]

4. In § 181.22, the second sentence of paragraph (a) is amended by removing the reference ''§ 162.1a(a)'' and adding, in its place, the reference ''§ 163.1(a)''.

Approved: May 26, 1998.

Samuel H. Banks,

Acting Commissioner of Customs.

John P. Simpson,

Deputy Assistant Secretary of the Treasury.

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