

of the rules and OFPAs. Finally, these rules would also be amended to include the term "Market Surveillance officer" to conform to the current Exchange staff structure.

#### *Deployment of the Automated Opening System*

The Exchange will deploy the automated opening system on an issue-by-issue basis. The Exchange anticipates that at least 10 issues will be deployed on the system within four weeks from the date of approval of the rules relating to the system by the Commission, and that the system will be deployed for all options traded on the Exchange within twelve weeks of such approval.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>22</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>23</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and the national market system, and, in general, to protect investors and the public interest, by establishing rules for an automated opening system, thereby increasing the number of option orders handled electronically on the Exchange.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>24</sup>

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others*

Written comments were neither solicited nor received.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2005-25 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-Phlx-2005-25. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2005-25 and should be submitted on or before October 13, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>25</sup>

**Jonathan G. Katz,**  
*Secretary.*

[FR Doc. 05-18899 Filed 9-21-05; 8:45 am]

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#### **SMALL BUSINESS ADMINISTRATION**

#### **Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest**

Notice is hereby given that Harbert Mezzanine Partners SBIC II, L.P. ("Applicant"), One Riverchase Parkway South, Birmingham, AL 35244, an SBIC Applicant under the Small Business Investment Act of 1958, as amended ("the Act"), in connection with the financing of a small concern, has sought an exemption under section 312 of the Act and section 107.730, Financials which Constitute Conflicts of Interest, of the Small Business Administration ("SBA") rules and regulations (13 CFR 107.730 (2004)). Harbert Mezzanine Partners SBIC II, L.P. proposes to provide financing in the form of subordinated debt and Series B convertible preferred stock to Optical Experts Manufacturing, Inc. ("OEM"), 8500 Tyron Street, Charlotte, NC 28273. The proceeds will be used to finance the recapitalization of OEM.

This investment requires an exemption from the prohibitions in 13 CFR 107.730, Conflicts of Interest, because OEM is an Associate of the Applicant by virtue of the greater than 10 percent ownership interest held by Harbinger Mezzanine Partners, L.P. ("Harbinger").

Notice is hereby given that any interested person may submit written comments on the transaction to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

**Jaime Guzman-Fournier,**

*Associate Administrator for Investment.*

[FR Doc. 05-18888 Filed 9-21-05; 8:45 am]

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#### **SMALL BUSINESS ADMINISTRATION**

#### **Audit and Financial Management Advisory (AFMAC)**

#### **Committee Meeting**

The U.S. Small Business Administration's Audit and Financial

<sup>25</sup> 17 CFR 200.30-3(a)(12).

<sup>22</sup> 15 U.S.C. 78f(b).

<sup>23</sup> 15 U.S.C. 78f(b)(5).

<sup>24</sup> Telephone conversation between Richard S. Rudolph, Vice President and Counsel, Phlx, and Terri L. Evans, Special Counsel, Division, Commission on September 14, 2005 (clarifying Phlx's statement on burden on competition).

Management Advisory Committee (AFMAC) will host a public meeting on Friday, September 23, 2005. The meeting will be take place at the U.S. Small Business Administration, 409 3rd Street, SW., Office of Chief Financial Officer Conference Room, 6th Floor, Washington, DC 20416. The AFMAC was established by the Administrator of the SBA to provide recommendation and advice regarding the Agency's financial management including the financial reporting process, systems of internal controls, audit process and process for monitoring compliance with relevant laws and regulations.

Anyone wishing to attend must contact Thomas Dumaresq in writing or by fax. Thomas Dumaresq, Chief Financial Officer, 409 3rd Street SW., Washington DC 20416, phone (202) 205-6506, fax: (202) 205-6869, e-mail: [thomas.dumaresq@sba.gov](mailto:thomas.dumaresq@sba.gov).

**Matthew K. Becker,**

*Committee Management Officer.*

[FR Doc. 05-18889 Filed 9-21-05; 8:45 am]

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## SOCIAL SECURITY ADMINISTRATION

### **Social Security Acquiescence Ruling 05-1(9); Gillett-Netting v. Barnhart; Application of State Law and the Social Security Act in Determining Eligibility for a Child Conceived By Artificial Means After an Insured Individual's Death—Title II of the Social Security Act**

**AGENCY:** Social Security Administration.

**ACTION:** Notice of Social Security Acquiescence Ruling.

**SUMMARY:** In accordance with 20 CFR 402.35(b)(2), the Commissioner of Social Security gives notice of Social Security Acquiescence Ruling 05-1(9).

**EFFECTIVE DATE:** September 22, 2005.

**FOR FURTHER INFORMATION CONTACT:** Karen Aviles, Office of the General Counsel, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235-6401, (410) 965-3457, or TTY (800) 966-5609.

**SUPPLEMENTARY INFORMATION:** We are publishing this acquiescence ruling in accordance with 20 CFR 402.35(b)(2).

An acquiescence ruling explains how we will apply a holding in a decision of a United States Court of Appeals that we determine conflicts with our interpretation of a provision of the Social Security Act (Act) or regulations when the Government has decided not to seek further review of that decision or is unsuccessful on further review.

We will apply the holding of the court of appeals' decision as explained in this acquiescence ruling to claims at all levels of administrative review within the Ninth Circuit. This acquiescence ruling will apply to all determinations or decisions made on or after September 22, 2005. If we made a determination or decision on your application for benefits between June 9, 2004, the date of the court of appeals' decision, and September 22, 2005, the effective date of this acquiescence ruling, you may request application of the acquiescence ruling to the prior determination or decision. You must demonstrate, pursuant to 20 CFR 404.985(b)(2), that application of this acquiescence ruling could change our prior determination or decision in your claim.

Additionally, when we received this precedential court of appeals' decision and determined that an acquiescence ruling might be required, we began to identify those claims that were pending before us within the circuit that might be subject to readjudication should we decide to issue an acquiescence ruling. Because an acquiescence ruling is required, we will send a notice to those individuals whose claims may be affected by the acquiescence ruling. The notice will provide information about this ruling and the right to request readjudication under it. It is not necessary for an individual to receive a notice in order to request application of this acquiescence ruling to the prior determination or decision on his or her claim.

If this acquiescence ruling is later rescinded as obsolete, we will publish a notice in the **Federal Register** to that effect as provided for in 20 CFR 404.985(e). If we decide to relitigate the issue covered by this acquiescence ruling as provided for by 20 CFR 404.985(c), we will publish a notice in the **Federal Register** stating that we will apply our interpretation of the Act or regulations involved and explaining why we have decided to relitigate the issue.

(Catalog of Federal Domestic Assistance, Program Nos. 96.001 Social Security—Disability Insurance; 96.002 Social Security—Retirement Insurance; 96.004 Social Security—Survivors Insurance)

Dated: August 24, 2005.

**Jo Anne B. Barnhart,**  
*Commissioner of Social Security.*

### **Acquiescence Ruling 05-1(9)**

*Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), reh'g denied (9th Cir. Dec. 14, 2004)—Applicability of State Law and the Social Security Act in Determining Whether a Child Conceived

By Artificial Means after an Insured Person's Death is Eligible for Child's Insurance Benefits—Title II of the Social Security Act.

**Issues:** Whether a child conceived by artificial means after the death of the insured is a "child" for purposes of child's insurance benefits under section 202(d)(1) of the Social Security Act (Act) solely because he or she is the biological child of the insured. Whether such child can be deemed dependent on the deceased insured individual under section 202(d)(3) of the Act<sup>1</sup> because he is considered legitimate under State law.

**Statute/Regulation/Ruling Citation:** Sections 202(d)(3), 216(e) and (h) of the Social Security Act (42 U.S.C. 402(d)(3), 416(e) and (h)); 20 CFR 404.355.

**Circuit:** Ninth (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington).

*Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), reh'g denied (9th Cir. Dec. 14, 2004).

**Applicability of Ruling:** This ruling applies to determinations or decisions at all administrative levels, i.e., initial, reconsideration, Administrative Law Judge (ALJ) hearing, and Appeals Council.

**Description of Case:** On August 19, 1996, Rhonda Gillett-Netting filed applications for child's insurance benefits on behalf of her twin children as survivors of the insured, Robert Netting. The twins, born 18 months after the insured's death, were conceived through in-vitro fertilization using sperm that the insured had frozen and stored before he died. The Social Security Administration (Agency) denied the claims, finding that neither twin met the statutory definition of "child" and that neither twin was dependent on the father at the time of his death as required by the Act. The district court upheld the Agency's decision. After the district court denied the plaintiff's motion for reconsideration, Gillett-Netting filed an appeal with the Court of Appeals for the Ninth Circuit.

**Holding:** On appeal, the Ninth Circuit reversed the decision of the district court and held that the twins were entitled to benefits because, as the insured's biological children, they met

<sup>1</sup> Section 202(d)(3) provides, in pertinent part, that "A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection. \* \* \* [A] child deemed to be a child of a fully or currently insured individual pursuant to section 216(h)(2)(B) or section 216(h)(3) \* \* \* shall be deemed to be the legitimate child of such individual," and therefore presumptively dependent.