Internal Revenue
bulletin

Bulletin No. 2010-4
January 25, 2010

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

Rev. Rul. 2010–4, page 309.

Section 7216—Disclosure or use of information by preparers of returns. This ruling provides guidance on whether a tax return preparer is liable for criminal and civil penalties under sections 7216 and 6713 of the Code when the tax return preparer discloses or uses tax return information in certain circumstances in communicating with taxpayers and in certain other circumstances.

Rev. Rul. 2010–5, page 312.

Section 7216—Disclosure or use of information by preparers of returns. This ruling provides guidance on whether a tax return preparer is liable for criminal and civil penalties under sections 7216 and 6713 of the Code when the tax return preparer discloses or uses tax return information under certain circumstances in connection with professional liability insurance.

T.D. 9474, page 322.

Final regulations under 26 CFR Part 1 provide rules relating to the reduction in taxable income for housing displaced individuals under the Katrina Emergency Tax Relief Act of 2005 and the Heartland Disaster Tax Relief Act of 2008.

T.D. 9475, page 304.

Final regulations under section 368 of the Code provide guidance regarding the qualification of certain transactions as reorganizations described in section 368(a)(1)(D) where no stock and/or securities of the acquiring corporation is issued and distributed in the transaction.

T.D. 9478, page 315.
REG–131028–09, page 332.

Final, temporary, and proposed regulations under section 7216 of the Code provide rules relating to the disclosure and use of tax return information by tax return preparers. Notice 2009–13 obsoleted.

Notice 2010–11, page 326.

This notice extends the suspension of the applicability of section 163(e)(5) of the Code for certain applicable high yield discount obligations to December 31, 2010.

Notice 2010–12, page 326.

This notice extends the application of Notice 2008–91, which describes an elective exclusion from the definition of "obligation" for purposes of section 956(c) of the Code, to the last taxable year of the CFC that immediately follows the last taxable year of the CFC to which the regulations described in Notice 2008–91 could apply. This notice also extends the application of Rev. Proc. 2008–26, which applies to determine whether securities are "readily marketable" for purposes of section 956(c)(2)(J), for an additional year (2010).

(Continued on the next page)

Finding Lists begin on page ii.
Index for January begins on page iv.

Department of the Treasury
Internal Revenue Service

Notice 2010–13, page 327.
This notice provides procedures for corporations, electing small business corporations, and organizations required to file returns under section 6033 to request a waiver of the requirement to electronically file Form 1120, *U.S. Corporation Income Tax Return*; Form 1120–F, *U.S. Income Tax Return of a Foreign Corporation*; Form 1120S, *U.S. Income Tax Return for an S Corporation*; Form 990, Return of *Organization Exempt From Income Tax*; Form 990–PF, *Return of Private Foundation or Section 4947(a)(1) Nonexempt Charitable Trust Treated as a Private Foundation*; and returns, amended returns, and superseding returns in the Form 1120 and 990 series of returns when required by regulations and IRS publications. Notice 2005–88 superseded.

Rev. Proc. 2010–13, page 329.
This procedure requires taxpayers to report to the Service their groupings and regroupings of activities and the addition of specific activities within their existing groupings of activities for purposes of section 469 of the Code and section 1.469–4 of the Income Tax Regulations.

EMPLOYEE PLANS

Announcement 2010–3, page 333.
Automatic approval of changes in funding method for takeover plans and changes in pension valuation software. This announcement provides, for plan years beginning on or after January 1, 2009, automatic approval for certain changes in funding method with respect to single-employer defined benefit plans that result either from a change in the valuation software used to determine the liabilities for such plans or from a change in the enrolled actuary and the business organization providing actuarial services to the plan. This guidance is being provided in response to numerous requests from actuaries and plan sponsors, many of whom are continuing to modify their valuation software in order to implement the changes to the funding rules made by the Pension Protection Act of 2006, the Worker, Retiree, and Employer Recovery Act of 2008, and guidance regarding these legislative changes.

EXEMPT ORGANIZATIONS

Announcement 2010–1, page 333.
The IRS has revoked its determination that Call of the Wild Sportsmen, Inc., of Mt Airy, MD, qualifies as an organization described in sections 501(c)(3) and 170(c)(2) of the Code.

ADMINISTRATIVE

Rev. Rul. 2010–4, page 309.
Section 7216—Disclosure or use of information by preparers of returns. This ruling provides guidance on whether a tax return preparer is liable for criminal and civil penalties under sections 7216 and 6713 of the Code when the tax return preparer discloses or uses tax return information in certain circumstances in communicating with taxpayers and in certain other circumstances.

Rev. Rul. 2010–5, page 312.
Section 7216—Disclosure or use of information by preparers of returns. This ruling provides guidance on whether a tax return preparer is liable for criminal and civil penalties under sections 7216 and 6713 of the Code when the tax return preparer discloses or uses tax return information under certain circumstances in connection with professional liability insurance.

T.D. 9478, page 315.
REG–131028–09, page 332.
Final, temporary, and proposed regulations under section 7216 of the Code provide rules relating to the disclosure and use of tax return information by tax return preparers. Notice 2009–13 obsoleted.

The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are compiled semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 368.—Definitions Relating to Corporate Reorganizations

26 CFR 1.368–2: Definition of terms.

T.D. 9475

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Corporate Reorganizations; Distributions Under Sections 368(a)(1)(D) and 354(b)(1)(B)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations under section 368 of the Internal Revenue Code (Code). The regulations provide guidance regarding the qualification of certain transactions as reorganizations described in section 368(a)(1)(D) where no stock and/or securities of the acquiring corporation is issued and distributed in the transaction. This document also contains final regulations under section 358 that provide guidance regarding the determination of the basis of stock or securities in a reorganization described in section 368(a)(1)(D) where no stock and/or securities of the acquiring corporation is issued and distributed in the transaction. This document also contains final regulations under section 1502 that govern reorganizations described in section 368(a)(1)(D) involving members of a consolidated group. These regulations affect corporations engaging in such transactions and their shareholders.

DATES: *Effective Date:* These regulations are effective on December 18, 2009.

Applicability Date: For dates of applicability, see §1.368–2(l)(4)(i).

FOR FURTHER INFORMATION CONTACT: Bruce A. Decker, (202) 622–7790 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The Code provides general nonrecognition treatment for reorganizations specifically described in section 368(a). Section 368(a)(1)(D) describes as a reorganization a transfer by a corporation (transferor corporation) of all or a part of its assets to another corporation (transferee corporation) if, immediately after the transfer, the transferor corporation or one or more of its shareholders (including persons who were shareholders immediately before the transfer), or any combination thereof, is in control of the transferee corporation; but only if stock or securities of the controlled corporation are distributed in pursuance of a plan of reorganization in a transaction that qualifies under section 354, 355, or 356.

Section 354(a)(1) provides that no gain or loss shall be recognized if stock or securities in a corporation that is a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation that is a party to the reorganization. Section 354(b)(1)(B) provides that section 354(a)(1) shall not apply to an exchange in pursuance of a plan of reorganization described in section 368(a)(1)(D) unless the transferee corporation acquires substantially all of the assets of the transferor corporation, and the stock, securities, and other properties received by such transferor corporation, as well as the other properties of such transferor corporation, are distributed in pursuance of the plan of reorganization.

Further, section 356 provides that if section 354 or 355 would apply to an exchange but for the fact that the property received in the exchange consists not only of property permitted by section 354 or 355 without the recognition of gain or loss but also of other property or money, then the gain, if any, to the recipient shall be recognized, but not in excess of the amount of money and fair market value of such other property. Accordingly, in the case of an acquisitive transaction, there can only be a distribution to which section 354 or 356 applies where the target shareholder(s) receive at least some property permitted to be received by section 354.

On December 19, 2006, the IRS and Treasury Department published a notice of proposed rulemaking (REG–125632–06, 2007–1 C.B. 415) in the **Federal Register** (71 FR 75898) that included regulations under section 368 (the Temporary Regulations) providing guidance regarding whether the distribution requirement under sections 368(a)(1)(D) and 354(b)(1)(B) is satisfied if there is no actual distribution of stock and/or securities. The Temporary Regulations provide that the distribution requirement will be satisfied even though no stock and/or securities is actually issued in the transaction if the same person or persons own, directly or indirectly, all of the stock of the transferor and transferee corporations in identical proportions. In such cases, the transferee will be deemed to issue a nominal share of stock to the transferor in addition to the actual consideration exchanged for the transferor's assets. The nominal share is then deemed distributed by the transferor to its shareholders and, when appropriate, further transferred through chains of ownership to the extent necessary to reflect the actual ownership of the transferor and transferee corporations. The IRS and Treasury Department issued the Temporary Regulations in response to taxpayer requests regarding whether certain acquisitive transactions can qualify as reorganizations described in section 368(a)(1)(D) where no stock of the transferee corporation is issued and distributed in the transaction pending a broader study of issues related to acquisitive section 368(a)(1)(D) reorganizations in general. In the notice of proposed rulemaking, the IRS and Treasury Department requested comments on the Temporary Regulations as well as on several broader issues discussed below relating to acquisitive section 368(a)(1)(D) reorganizations.

On February 27, 2007, the IRS and Treasury Department published a clarifying amendment to the Temporary Regulations (REG–157834–06, 2007–1 C.B. 840) in the **Federal Register** (72 FR 9284–9285) providing that the deemed is-

suance of the nominal share of stock of the transferee corporation in a transaction otherwise described in section 368(a)(1)(D) does not apply if the transaction otherwise qualifies as a triangular reorganization described in §1.358–6(b)(2) or section 368(a)(1)(G) by reason of section 368(a)(2)(D).

No public hearing regarding the Temporary Regulations was requested or held. However, comments were received. After consideration of all of the comments, the Temporary Regulations are adopted as revised by this Treasury decision. The principal comments and changes are discussed in this preamble.

Explanation of Provisions

These final regulations retain the rules of the Temporary Regulations, but make certain modifications to the Temporary Regulations in response to comments received. The following paragraphs describe the most significant comments received and the extent to which they have been incorporated into these final regulations.

Meaningless Gesture Doctrine

Notwithstanding the requirement in section 368(a)(1)(D) that "stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354, 355, or 356", the IRS and the courts have not required the actual issuance and distribution of stock and/or securities of the transferee corporation in circumstances where the same person or persons own all the stock of the transferor corporation and the transferee corporation. In such circumstances, the IRS and the courts have viewed an issuance of stock by the transferee corporation to be a "meaningless gesture" not mandated by sections 368(a)(1)(D) and 354(b). See *James Armour, Inc. v. Commissioner*, 43 T.C. 295, 307 (1964); *Wilson v. Commissioner*, 46 T.C. 334 (1966); Rev. Rul. 70–240, 1970–1 C.B. 81. In the notice of proposed rulemaking, the IRS and Treasury Department requested comments on whether the meaningless gesture doctrine is inconsistent with the distribution requirement in sections 368(a)(1)(D) and 354(b)(1)(B), especially in situations in which the cash consideration received equals the full fair market value of the property transferred such that there is no missing consideration for which the nominal share of stock deemed received and distributed could substitute. See §601.601(d)(2)(ii).

Commentators noted that the doctrine is appropriate in the case where there is some excess in value of the assets transferred over the amount of cash received. In cases where the cash received is equal to the fair market value of the assets transferred, commentators agree that it is the proper approach because as a policy or administrative matter it is inappropriate to require a different outcome when the only factual difference is whether there is a nominal difference between the value of the assets and the cash consideration received. Commentators noted that deeming the distribution requirement to be satisfied in order to prevent an asset sale from being treated as a taxable exchange is not problematic enough to warrant a change from Rev. Rul. 70–240. Commentators have also suggested that the final regulations clarify that the rules apply to transactions regardless of whether the sum paid for the transferor's assets is exactly equal to their value.

The IRS and Treasury Department agree with the comments received regarding the meaningless gesture doctrine. Accordingly, these final regulations retain the rules of the Temporary Regulations which are based in part on the meaningless gesture doctrine. In addition, consistent with the IRS and Treasury Department's view of such transactions and in response to comments, the final regulations provide that if no consideration is received, or the value of the consideration received in the transaction is less than the fair market value of the transferor corporation's assets, the transferee corporation will be treated as issuing stock with a value equal to the excess of the fair market value of the transferor corporation's assets over the value of the consideration actually received in the transaction. The final regulations further provide that if the value of the consideration received in the transaction is equal to the fair market value of the transferor corporation's assets, the transferee corporation will be deemed to issue a nominal share (discussed in this preamble) of stock to the transferor corporation in addition to the actual consideration exchanged for the transferor corporation's assets.

Issuance of Nominal Share

As described in this preamble, if the same person or persons own, directly or indirectly, all of the stock of the transferor and transferee corporations in identical proportions in a transaction otherwise described in section 368(a)(1)(D), the transferee will be deemed to issue a nominal share of stock to the transferor in addition to the actual consideration exchanged for the transferor's assets. The nominal share is then deemed distributed by the transferor to its shareholders and, when appropriate, further transferred through the chains of ownership to the extent necessary to reflect the actual ownership of the transferor and transferee corporations.

Commentators have asked for clarification as to whether the deemed issuance of a nominal share has any tax significance beyond satisfying the distribution requirement of section 354(b)(1)(B). Commentators have suggested that instead of deeming a stock issuance in a purported section 368(a)(1)(D) reorganization, the final regulations should simply state that such transactions are deemed to be transactions described in section 356. Furthermore, commentators believe that if the transferor corporation owns stock of the transferee corporation before the reorganization and the transferor corporation distributes such transferee corporation stock (and no other stock) to its shareholders, the transaction would qualify under section 354(b)(1)(B) and therefore would qualify under section 368(a)(1)(D). Commentators believe the IRS and Treasury Department have the authority to reach that result without deeming a nominal share to be issued as this approach has been adopted elsewhere. See §1.368–2(d)(4) (a subsidiary liquidation not subject to section 332 can qualify as a section 368(a)(1)(C) reorganization by effectively treating old and cold subsidiary stock that the parent holds as exchanged for hypothetical parent voting stock issued in exchange for the subsidiary's assets). Commentators have suggested that if the final regulations retain the nominal share concept, then the final regulations should clarify that the nominal share has no significance other than to meet the distribution requirement of section 354(b)(1)(B).

The IRS and Treasury Department have carefully considered the comments regarding the nominal share concept and

believe that it is preferable to an approach that simply deems the statutory requirements satisfied because the nominal share also provides a useful mechanism with respect to stock basis consequences to the exchanging shareholder. As noted above, following the deemed issuance of the nominal share, it is deemed distributed by the transferor to its shareholders and, when appropriate, further transferred through the chains of ownership to the extent necessary to reflect the actual ownership of the transferor and transferee corporation (the final regulations provide similar treatment where, in a transaction involving no consideration or partial consideration, the transferee corporation is deemed to issue stock). Beyond satisfying section 354(b)(1)(B), the IRS and Treasury Department believe that the nominal share should be treated as nonrecognition property under section 358(a), and thus substituted basis property. Following basis adjustments (for example, under section 358 or §1.1502–32), the nominal share preserves remaining basis, if any, and facilitates future stock gain or loss recognition by the appropriate shareholder.

With respect to the comment regarding previously owned stock of the transferee by the transferor qualifying under section 354(b)(1)(B), this raises issues that are beyond the scope of this regulation project and therefore are not addressed in this document. Accordingly, the final regulations retain the rule that if the same person or persons own, directly or indirectly, all of the stock of the transferor and transferee corporations in identical proportions, the transferee will be deemed to issue a nominal share of stock to the transferor in addition to the actual consideration exchanged for the transferor's assets.

Basis Allocation

While the IRS and Treasury Department believe that all of the normal tax consequences occur from the issuance of a nominal share in a transaction described in these final regulations, commentators have noted that such consequences are unclear with respect to the allocation of basis in the shares of the stock or securities surrendered when the consideration received in the transaction consists solely of cash. While commentators believe that the basis in the shares of the stock or securities surrendered should be preserved in the basis of the stock of the transferee, the mechanics of achieving this result are unclear.

The regulations under §1.358–2(a)(2)(iii) address how basis is determined in the case of a reorganization in which no property is received or property (including property permitted by section 354 to be received without the recognition of gain or "other property" or money) with a fair market value less than that of the stock or securities surrendered is received in the transaction. The regulations treat the acquiring corporation as issuing an amount of stock equal to the fair market value of the stock surrendered, less any amount of consideration actually received by the exchanging shareholder in the form of stock, securities, other property, or money. The basis of that deemed issued stock is determined by reference to the basis of the shares surrendered in the reorganization, and adjusted as provided in the regulations. The shareholder's stock in the acquiring corporation is then treated as being recapitalized. In the recapitalization, the shareholder is treated as surrendering all of its shares of the acquiring corporation, including those shares owned immediately prior to the reorganization and those shares the shareholder is deemed to receive, in exchange for the shares that the shareholder actually holds immediately after the reorganization. The basis of the shares that the shareholder actually owns is determined under the rules that would have applied had the recapitalization actually occurred with respect to the shareholder's actual shares and the shares the shareholder is deemed to have received. However, these rules do not literally apply to a transaction involving solely other property or money because the rules address situations in which a shareholder of the target corporation receives no property or property with a fair market value less than that of the stock or securities the shareholder surrendered in the transaction.

The IRS and Treasury Department agree with the commentators that the basis in the shares of the stock surrendered should be preserved in the basis of the stock of the transferee in a transaction described in these final regulations. The IRS and Treasury Department also agree that current law does not adequately address the manner in which the basis in the shares of the stock or securities surrendered is preserved in the basis of the stock of the transferee. Accordingly, the regulations under §1.358–2(a)(2)(iii) are amended to provide that in the case of a reorganization in which the property received consists solely of non-qualifying property equal to the value of the assets transferred (as well as a nominal share described in these final regulations), the shareholder or security holder may designate the share of stock of the transferee to which the basis, if any, of the stock or securities surrendered will attach. The IRS and Treasury Department believe this approach is the most consistent with current law regarding basis determination as a similar result would occur under §1.358–2 if stock was actually issued in the transaction. Nonetheless, as part of its broader study of basis issues, the IRS and Treasury Department will re-examine these regulations and the rules may change upon completion of this broader study.

Application of Final Regulations to Consolidated Groups

In the notice to proposed rulemaking, the IRS and Treasury Department requested comments on whether the Temporary Regulations should apply when the parties to the reorganization are members of a consolidated group. Commentators have stated that the Temporary Regulations should apply because there is no reason to distinguish a consolidated group member's reorganization treatment from that of a member of a nonconsolidated affiliated group. Commentators have suggested that the consolidated return regulations should be coordinated with the Temporary Regulations. Specifically, §1.1502–13(f)(3) provides that, in the case of an acquisitive intercompany reorganization involving the receipt of money or other property (boot), boot is taken into account immediately after the reorganization in a separate transaction. *See* §1.1502–13(f)(7), *Example 3* (an intercompany reorganization with boot is treated as if the acquirer had issued only its stock in the reorganization, and the deemed shares were then redeemed by the acquirer in exchange for the boot). The effect of this rule is to remove the boot from section 356 (dividend within gain treatment) and treat it as received in

a redemption which is in turn taxed as a section 301 distribution.

Commentators have suggested that the nominal share concept under the Temporary Regulations is consistent with the deemed shares in *Example 3* under §1.1502–13(f)(7) as the nominal share fiction deems a transaction to qualify as a section 368 reorganization, and the shares deemed issued under the §1.1502–13(f)(3) fiction determine the consequences of the reorganization. Commentators have requested that an example be added to §1.1502–13 to illustrate the interaction of the Temporary Regulations and §1.1502–13(f)(3). Specifically, commentators have requested that the example clarify that the nominal share does not exist for any purpose other than to satisfy the distribution requirement of section 354(b)(1)(B). Therefore, §1.1502–13(f)(3) should apply in the same way to the post-reorganization deemed redemption of stock in exchange for the boot actually received (that is, as if the distributee did not own the nominal share). Commentators believe that any remaining stock basis or ELA in the deemed shares under the §1.1502–13(f)(3) fiction should shift to the member(s) that actually own stock in the transferee corporation under the principles of §1.302–2(c).

As discussed in this preamble, the IRS and Treasury Department believe that the nominal share has significance beyond satisfaction of the distribution requirement of section 354(b)(1)(B), most notably for purposes of determining stock basis consequences to the appropriate shareholder. In an all cash sale of assets between members of a consolidated group, the IRS and Treasury Department believe that giving significance to the nominal share for purposes beyond the distribution requirement is consistent with the fundamental premise underlying the intercompany transaction deferral system which is to preserve the location of gain or loss within a consolidated group. Therefore, if an all cash transaction described in these final regulations occurs between members of a consolidated group, the selling member (S) will be treated as receiving the nominal share and additional stock of the buying member (B) under §1.1502–13(f)(3), which it will distribute to its shareholder member (M) in liquidation. Immediately after the sale, the B stock (with the exception of the nominal share which is still held by M) received by M is treated as redeemed, and the redemption is treated under section 302(d) as a distribution to which section 301 applies. M's basis in the B stock will be reduced under §1.1502–32(b)(3)(v). Under the rules of §1.302–2(c), any remaining basis will attach to the nominal share. If applicable, the nominal share will be further transferred through chains of ownership to the extent necessary to reflect the actual ownership of B. An example has been added to §1.1502–13 to illustrate the interaction of these final regulations and the consolidated return regulations.

Additional Comments Received

The IRS and Treasury Department also requested comments on the extent, if any, to which the continuity of interest requirement should apply to a reorganization described in section 368(a)(1)(D) as well as the continued vitality of various liquidation-reincorporation authorities after the enactment of the Tax Reform Act of 1986, Public Law 99–514 (100 Stat. 2085 (1986)). Comments were received on these issues. The IRS and Treasury Department continue to study these issues as part of a broad study of reorganizations under section 368(a)(1)(D).

Additional Comments Requested

The IRS and Treasury Department request comments on the application of the final regulations to reorganizations involving foreign corporations or shareholders, including comments regarding: (1) whether any section 1248 amount attributable to the stock of the transferor corporation can be preserved in the nominal share deemed issued by the transferee corporation; (2) the manner in which earnings and profits (E&P) are (or should be) taken into account for purposes of section 902 when an exchanging shareholder recognizes gain under section 356(a) that is treated as a dividend under section 356(a)(2) from the E&P of the transferor and transferee corporations (including whether the E&P of the corporation is combined for this purpose or whether an ordering rule applies); (3) whether and how section 902 should apply when an exchanging shareholder does not actually own stock in the transferee corporation but the exchanging shareholder recognizes gain under section 356(a) that is treated as a dividend from the E&P of the transferee corporation (including whether a limitation similar to that of section 304(b)(5) is appropriate in such cases); (4) whether and how, under section 959, an exchanging shareholder should be able to access previously taxed E&P of a foreign transferor and/or transferee corporation before any non-previously taxed E&P of either corporation; and (5) whether and how section 897 applies if the transferor corporation is a United States real property holding corporation with at least one foreign shareholder.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations do not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations primarily affect affiliated groups of corporations that have elected to file consolidated returns, which tend to be larger businesses, and, moreover, that any burden on taxpayers is minimal. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Bruce A. Decker, Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805. * * *

Par. 2. Section 1.358–2 is amended by adding a sentence at the end of paragraph (a)(2)(iii) to read as follows:

§1.358–2 Allocation of basis among nonrecognition property.

(a) * * *

(2) * * *

(iii) * * * If a shareholder or security holder surrenders a share of stock or a security in a transaction under the terms of section 354 (or so much of section 356 as relates to section 354) in which such shareholder or security holder is deemed to receive a nominal share described in §1.368–2(l), such shareholder may, after adjusting the basis of the nominal share in accordance with the rules of this section and §1.358–1, designate the share of stock of the issuing corporation to which the basis, if any, of the nominal share will attach.

* * * * *

Par. 3. Section 1.368–2 is amended by revising paragraph (l) to read as follows:

§1.368–2 Definition of terms.

* * * * *

(l) *Certain transactions treated as reorganizations described in section 368(a)(1)(D)*—(1) *General rule*. In order to qualify as a reorganization under section 368(a)(1)(D), a corporation (transferor corporation) must transfer all or part of its assets to another corporation (transferee corporation) and immediately after the transfer the transferor corporation, or one or more of its shareholders (including persons who were shareholders immediately before the transfer), or any combination thereof, must be in control of the transferee corporation; but only if, in pursuance of the plan, stock or securities of the transferee are distributed in a transaction which qualifies under section 354, 355, or 356.

(2) *Distribution requirement*—(i) *In general*. For purposes of paragraph (l)(1) of this section, a transaction otherwise described in section 368(a)(1)(D) will be treated as satisfying the requirements of sections 368(a)(1)(D) and 354(b)(1)(B) notwithstanding that there is no actual issuance of stock and/or securities of the transferee corporation if the same person or persons own, directly or indirectly, all of the stock of the transferor and transferee corporations in identical proportions. In cases where no consideration is received or the value of the consideration received in the transaction is less than the fair market value of the transferor corporation's assets, the transferee corporation will be treated as issuing stock with a value equal to the excess of the fair market value of the transferor corporation's assets over the value of the consideration actually received in the transaction. In cases where the value of the consideration received in the transaction is equal to the fair market value of the transferor corporation's assets, the transferee corporation will be deemed to issue a nominal share of stock to the transferor corporation in addition to the actual consideration exchanged for the transferor corporation's assets. The nominal share of stock in the transferee corporation will then be deemed distributed by the transferor corporation to the shareholders of the transferor corporation, as part of the exchange for the stock of such shareholders. Where appropriate, the nominal share will be further transferred through chains of ownership to the extent necessary to reflect the actual ownership of the transferor and transferee corporations. Similar treatment to that of the preceding two sentences shall apply where the transferee corporation is treated as issuing stock with a value equal to the excess of the fair market value of the transferor corporation's assets over the value of the consideration actually received in the transaction.

(ii) *Attribution*. For purposes of paragraph (l)(2)(i) of this section, ownership of stock will be determined by applying the principles of section 318(a)(2) without regard to the 50 percent limitation in section 318(a)(2)(C). In addition, an individual and all members of his family described in section 318(a)(1) shall be treated as one individual.

(iii) *De minimis variations in ownership and certain stock not taken into account.* For purposes of paragraph (l)(2)(i) of this section, the same person or persons will be treated as owning, directly or indirectly, all of the stock of the transferor and transferee corporations in identical proportions notwithstanding the fact that there is a *de minimis* variation in shareholder identity or proportionality of ownership. Additionally, for purposes of paragraph (l)(2)(i) of this section, stock described in section 1504(a)(4) is not taken into account.

(iv) *Exception*. Paragraph (l)(2) of this section does not apply to a transaction otherwise described in §1.358–6(b)(2).

(3) *Examples*. The following examples illustrate the principles of paragraph (l) of this section. For purposes of these examples, each of A, B, C, and D is an individual, T is the acquired corporation, S is the acquiring corporation, P is the parent corporation, and each of S1, S2, S3, and S4 is a direct or indirect subsidiary of P. Further, all of the requirements of section 368(a)(1)(D) other than the requirement that stock or securities be distributed in a transaction to which section 354 or 356 applies are satisfied. The examples are as follows:

Example 1. A owns all the stock of T and S. The T stock has a fair market value of $100x. T sells all of its assets to S in exchange for $100x of cash and immediately liquidates. Because there is complete shareholder identity and proportionality of ownership in T and S, under paragraph (l)(2)(i) of this section, the requirements of sections 368(a)(1)(D) and 354(b)(1)(B) are treated as satisfied notwithstanding the fact that no S stock is issued. Pursuant to paragraph (l)(2)(i) of this section, S will be deemed to issue a nominal share of S stock to T in addition to the $100x of cash actually exchanged for the T assets, and T will be deemed to distribute all such consideration to A. The transaction qualifies as a reorganization described in section 368(a)(1)(D).

Example 2. The facts are the same as in *Example 1* except that C, A's son, owns all of the stock of S. Under paragraph (l)(2)(ii) of this section, A and C are treated as one individual. Accordingly, there is complete shareholder identity and proportionality of ownership in T and S. Therefore, under paragraph (l)(2)(i) of this section, the requirements of sections 368(a)(1)(D) and 354(b)(1)(B) are treated as satisfied notwithstanding the fact that no S stock is issued. Pursuant to paragraph (l)(2)(i) of this section, S will be deemed to issue a nominal share of S stock to T in addition to the $100x of cash actually exchanged for the T assets, and T will be deemed to distribute all such consideration to A. A will be deemed to transfer the nominal share of S stock to C. The transaction qualifies as a reorganization described in section 368(a)(1)(D).

Example 3. P owns all of the stock of S1 and S2. S1 owns all of the stock of S3, which owns all of the stock of T. S2 owns all of the stock of S4, which owns all of the stock of S. The T stock has a fair market value of $70x. T sells all of its assets to S in exchange for $70x of cash and immediately liquidates. Under paragraph (l)(2)(ii) of this section, there is indirect, complete shareholder identity and proportionality of ownership in T and S. Accordingly, the requirements of sections 368(a)(1)(D) and 354(b)(1)(B) are treated as satisfied notwithstanding the fact that no S stock is

issued. Pursuant to paragraph (l)(2)(i) of this section, S will be deemed to issue a nominal share of S stock to T in addition to the $70x of cash actually exchanged for the T assets, and T will be deemed to distribute all such consideration to S3. S3 will be deemed to distribute the nominal share of S stock to S1, which, in turn, will be deemed to distribute the nominal share of S stock to P. P will be deemed to transfer the nominal share of S stock to S2, which, in turn, will be deemed to transfer such share of S stock to S4. The transaction qualifies as a reorganization described in section 368(a)(1)(D).

Example 4. A, B, and C own 34%, 33%, and 33%, respectively, of the stock of T. The T stock has a fair market value of $100x. A, B, and C each own 33% of the stock of S. D owns the remaining 1% of the stock of S. T sells all of its assets to S in exchange for $100x of cash and immediately liquidates. For purposes of determining whether the distribution requirement of sections 368(a)(1)(D) and 354(b)(1)(B) is met, under paragraph (l)(2)(iii) of this section, D's ownership of a *de minimis* amount of stock of S is disregarded and the transaction is treated as if there is complete shareholder identity and proportionality of ownership in T and S. Because there is complete shareholder identity and proportionality of ownership in T and S, under paragraph (l)(2)(i) of this section, the requirements of sections 368(a)(1)(D) and 354(b)(1)(B) are treated as satisfied notwithstanding the fact that no S stock is issued. Pursuant to paragraph (l)(2)(i) of this section, S will be deemed to issue a nominal share of S stock to T in addition to the $100x of cash actually exchanged for the T assets, T will be deemed to distribute all such consideration to A, B, and C, and the nominal S stock will be deemed transferred among the S shareholders to the extent necessary to reflect their actual ownership of S. The transaction qualifies as a reorganization described in section 368(a)(1)(D).

Example 5. The facts are the same as in *Example 4* except that A, B, and C own 34%, 33%, and 33%, respectively, of the common stock of T and S. D owns preferred stock in S described in section 1504(a)(4). For purposes of determining whether the distribution requirement of sections 368(a)(1)(D) and 354(b)(1)(B) is met, under paragraph (l)(2)(iii) of this section, D's ownership of S stock described in section 1504(a)(4) is ignored and the transaction is treated as if there is complete shareholder identity and proportionality of ownership in T and S. Because there is complete shareholder identity and proportionality of ownership in T and S, under paragraph (l)(2)(i) of this section, the requirements of sections 368(a)(1)(D) and 354(b)(1)(B) are treated as satisfied notwithstanding the fact that no S stock is issued. Pursuant to paragraph (l)(2)(i) of this section, S will be deemed to issue a nominal share of S stock to T in addition to the $100x of cash actually exchanged for the T assets, and T will be deemed to distribute all such consideration to A, B, and C. The transaction qualifies as a reorganization described in section 368(a)(1)(D).

Example 6. A and B each own 50% of the stock of T. The T stock has a fair market value of $100x. B and C own 90% and 10%, respectively, of the stock of S. T sells all of its assets to S in exchange for $100x of cash and immediately liquidates. Because complete shareholder identity and proportionality of ownership in T and S does not exist, paragraph (l)(2)(i) of this section does not apply. The requirements of sections 368(a)(1)(D) and 354(b)(1)(B) are not satisfied, and the transaction does not qualify as a reorganization described in section 368(a)(1)(D).

(4) *Effective/applicability date.* (i) *In general.* This section applies to transactions occurring on or after December 18, 2009. For rules regarding transactions occurring before December 18, 2009, see section 1.368–2T(l) as contained in 26 CFR part 1.

(ii) *Transitional rule.* A taxpayer may apply the provisions of these regulations to transactions occurring before December 18, 2009. However, the transferor corporation, the transferee corporation, any direct or indirect transferee of transferred basis property from either of the foregoing, and any shareholder of the transferor or transferee corporation may not apply the provisions of these regulations unless all such taxpayers apply the provisions of the regulations.

§1.368–2T [Removed]

Par. 4. Section 1.368–2T is removed.

Par. 5. Section 1.1502–13 is amended by:

1. Revising the heading and entries for §1.1502–13(f)(7) in paragraph (a)(6)(ii).

2. Redesignating *Examples 4, 5, 6, 7,* and *8* as *Examples 5, 6, 7, 8,* and *9* respectively and adding a new *Example 4* to paragraph (f)(7)(i).

The revision and addition reads as follows:

§1.1502–13 Intercompany transactions.

(a) * * *
(6) * * *
(ii) * * *

Stock of members. (§1.1502–13(f)(7))

Example 1. Dividend exclusion and property distribution.

Example 2. Excess loss accounts.

Example 3. Intercompany reorganizations.

Example 4. All cash intercompany reorganization under section 368(a)(1)(D).

Example 5. Stock redemptions and distributions.

Example 6. Intercompany stock sale followed by section 332 liquidation.

Example 7. Intercompany stock sale followed by section 355 distribution.

* * * * *

(f) * * *
(7) * * *
(i) * * *

Example 4. All cash intercompany reorganization under section 368(a)(1)(D). (a) Facts. P owns all of the stock of M and B. M owns all of the stock of S with a basis of $25. On January 1 of Year 2, the fair market value of S's assets and its stock is $100, and S sells all of its assets to B for $100 cash and liquidates. The transaction qualifies as a reorganization described in section 368(a)(1)(D). Pursuant to §1.368–2(l), B will be deemed to issue a nominal share of B stock to S in addition to the $100 of cash actually exchanged for the S assets, and S will be deemed to distribute all of the consideration to M. M will be deemed to distribute the nominal share of B stock to P.

(b) *Treatment as a section 301 distribution.* The sale of S's assets to B is a transaction to which paragraph (f)(3) of this section applies. In addition to the nominal share issued by B to S under §1.368–2(l), S is treated as receiving additional B stock with a fair market value of $100 (in lieu of the $100) and, under section 358, a basis of $25 which S distributes to M in liquidation. Immediately after the sale, the B stock (with the exception of the nominal share which is still held by M) received by M is treated as redeemed for $100, and the redemption is treated under section 302(d) as a distribution to which section 301 applies. M's basis of $25 in the B stock is reduced under §1.1502–32(b)(3)(v), resulting in an excess loss account of $75 in the nominal share. (See §1.302–2(c)). M's deemed distribution of the nominal share of B stock to P under §1.368–2(l) will result in M generating an intercompany gain under section 311(b) of $75, to be subsequently taken into account under the matching and acceleration rules.

* * * * *

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

Approved December 14, 2009.

Michael Mundaca,
Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on December 17, 2009, 8:45 a.m., and published in the issue of the Federal Register for December 18, 2009, 74 F.R. 67053)

Section 7216.—Disclosure or Use of Information by Preparers of Returns

26 CFR: 301.7216–1: Penalty for disclosure or use of tax return information.
(Also § 6713; 301.7216–2.)

Section 7216—Disclosure or use of information by preparers of returns. This ruling provides guidance on whether a tax return preparer is liable for criminal

and civil penalties under sections 7216 and 6713 of the Code when the tax return preparer discloses or uses tax return information in certain circumstances in communicating with taxpayers and in certain other circumstances.

Rev. Rul. 2010–4

PURPOSE

This revenue ruling provides guidance on whether a tax return preparer is liable for criminal and civil penalties under Internal Revenue Code sections 7216 and 6713 when the tax return preparer discloses or uses tax return information under the circumstances described below.

ISSUES

(1) Is a tax return preparer liable for penalties under sections 7216 and 6713 when the tax return preparer uses tax return information to contact taxpayers to inform them of changes in tax law that could affect the taxpayers' income tax liability reported in tax returns previously prepared or processed by the tax return preparer?

(2) Is a tax return preparer, who is lawfully engaged in the practice of law or accountancy, liable for penalties under sections 7216 and 6713 when the tax return preparer uses tax return information of taxpayers whose tax returns the tax return preparer has prepared or processed to determine which taxpayers' future income tax return filing obligations may be affected by a prospective change in tax rule or regulation and to contact the potentially affected taxpayers for whom the tax return preparer reasonably expects to provide accounting services in the next year to notify them of the changed rule or regulation, explain how the change may affect them, and advise them with regard to actions they may take in response to the change?

(3) Is a tax return preparer liable for penalties under sections 7216 and 6713 when the tax return preparer discloses tax return information contained in the list permitted to be maintained by the tax return preparer under section 301.7216–2(n) to a third-party service provider that creates, publishes, or distributes, by mail or e-mail, newsletters, bulletins, or similar communications to taxpayers whose tax returns the tax return preparers have prepared or processed containing tax information and general business and economic information or analysis for educational purposes or for purposes of soliciting additional tax return preparation services for the tax return preparer?

FACTS

Tax Return Preparers A, B, C, D, and E prepared individual and corporate income tax returns for 2008 and several other past years and expect to prepare 2009 income tax returns in the upcoming 2010 filing season.

Prompted by legislation passed by the Congress in 2009 authorizing net operating losses for 2008 to be carried back up to five years, Tax Return Preparer A reviews income tax returns and other tax return information of taxpayers whose income tax returns A has prepared or processed, even if A has not been engaged to prepare the taxpayers' most recent returns, in order to determine which taxpayer clients may be able to benefit from the expanded carryback rules. Following this review, A contacts the affected taxpayers to inform them of the change, advise them with regard to whether an amended return or returns can be filed for years affected by the change, and offer A's tax return preparation services with regard to preparing and filing the amended returns. A then prepares and files amended returns for some of the taxpayers.

Also in 2009, the Internal Revenue Service issues a temporary regulation interpreting the manner that a tax credit is to be calculated in future tax years. Tax Return Preparer B, who is lawfully engaged in the practice of accountancy, is prompted by this temporary regulation to review the income tax returns of the taxpayers whose tax returns B has prepared or processed, even if B has not been engaged to prepare the taxpayers' most recent returns, to determine who among B's clients may be affected by the revised credit calculation for tax year 2009. Following this review, B contacts these taxpayers to notify them of the change, explain how it may affect them, and suggest actions that the taxpayers may take to properly report the credit on their 2009 returns. B only contacts those taxpayers for whom B reasonably expects to provide accounting services with respect to the 2009 tax year, including taxpayers for whom B prepared an income tax return in previous years and who have not specifically informed B that they do not wish to be contacted by B or will not be using B's income tax return preparation services in the upcoming filing season.

Tax Return Preparer C engages Third-party Service Provider X to publish both paper and electronic monthly newsletters containing educational tax information, tax tips, tax law updates, and direct solicitation for C's tax return preparation business. C discloses to X the names and mailing addresses of taxpayers whose tax returns C has prepared or processed who have not provided C with an email address, and X prints those addresses onto the paper newsletters it publishes for C. X provides C with the completed newsletters in paper and electronic format, and C then distributes them to C's tax return preparation clients, using a list that contains the tax return information authorized by § 301.7216–2(n), including taxpayer names, addresses and e-mail addresses.

Tax Return Preparer D has in the past periodically published and delivered to D's tax return preparation clients newsletters containing general educational tax information, tax tips, tax law updates, and direct solicitations for D's tax return preparation business. Due to growth experienced by D's tax return preparation business, D begins to outsource all aspects of this client communication activity to Third-party Service Provider X so that D may focus primarily on the business of tax return preparation. D discloses to X tax return information consisting solely of the names, addresses, and e-mail addresses of taxpayers whose income tax returns D has prepared or processed, and X then creates and distributes the newsletters to these taxpayers as directed by D.

Twice a month Tax Return Preparer E publishes her own newsletter containing general educational tax information, tax tips, tax law updates, and direct solicitations of E's tax return preparation business. After publication, E sends the newsletters to Third-Party Service Provider X, and X then distributes the newsletters to taxpayers whose income tax returns E has prepared or processed, as instructed by E. To allow X to distribute the newsletters, E provides X with the names, addresses, and e-mail addresses of E's tax return preparation clients.

Tax Return Preparers C, D, and E each have procedures in place that are consistent with good business practices and designed to maintain the confidentiality of the disclosed tax return information, and by following these procedures each concludes that X has sufficient data confidentiality procedures in place to protect the disclosed tax return information.

Third-party Service Provider X, located in the United States, is in the business of creating, publishing, and distributing newsletters, bulletins, advertisements, and similar communications. X does not provide substantive determinations or advice affecting the tax liability reported by taxpayers. X provides its services to tax professionals, including income tax return preparers. X creates, customizes, prints, and publishes newsletters containing general educational tax law updates it has aggregated from various sources, information on general filing requirements, general educational business or economic information and analysis, and tax compliance tips. X may also include in these communications any specific updates or solicitations submitted by its tax professional clients. X will also distribute these communications to taxpayers by mail or e-mail as directed by its clients.

LAW

Section 7216(a) establishes a criminal penalty that is applicable to tax return preparers who knowingly or recklessly disclose or use any information furnished to them for, or in connection with, the preparation of income tax returns for any purpose other than to prepare, or assist in preparing, any such returns.

Section 7216(b)(3) establishes an exception to the penalty for disclosures or uses of information which are permitted by regulations prescribed by the Secretary.

Section 6713(a) establishes a civil penalty that is applicable to tax return preparers who disclose or use any information furnished to them for, or in connection with, the preparation of tax returns for any purpose other than to prepare, or assist in preparing, any such returns.

Section 6713(b) provides that the rules of section 7216(b) shall apply for purposes of section 6713.

Section 301.7216–1(a) states that section 7216 imposes a criminal penalty for tax return preparers who "knowingly or recklessly disclose or use tax return information for a purpose other than preparing a tax return."

Section 301.7216–1(b)(1) defines "tax return" as any return, or amended return, of income tax imposed by chapter 1 of the Internal Revenue Code.

Section 301.7216–1(b)(2)(i)(B) defines "tax return preparer" for purposes of section 7216 and the regulations thereunder as including "[a]ny person who is engaged in the business of providing auxiliary services in connection with the preparation of tax returns...."

Section 301.7216–1(b)(2)(iii) provides that a person is engaged in the business of providing auxiliary services in connection with the preparation of tax returns if, in the course of the person's business, the person holds himself out to tax return preparers or to taxpayers as a person who performs auxiliary services, whether or not providing the auxiliary services is the person's sole business activity and whether or not the person charges a fee for the auxiliary services.

Section 301.7216–1(b)(3)(i) generally defines tax return information to mean "any information, including, but not limited to, a taxpayer's name, address, or identifying number, which is furnished in any form or manner for, or in connection with, the preparation of a tax return of the taxpayer."

Section 301.7216–2(d)(1) provides that a tax return preparer may disclose, without taxpayer consent, tax return information of a taxpayer to another tax return preparer located in the United States for the purpose of obtaining auxiliary services in connection with the preparation of any tax return, so long as the services provided are not substantive determinations or advice affecting the tax liability reported by taxpayers.

Section 301.7216–2(h)(1)(i) allows a tax return preparer who is lawfully engaged in the practice of law or accountancy to use tax return information for purposes of providing other legal or accounting services to the taxpayer consistent with applicable legal and ethical responsibilities.

Section 301.7216–2(n) allows a tax return preparer to compile and maintain a separate list containing certain information regarding taxpayers whose tax returns the tax return preparer has prepared or processed. This list may be used by the compiler solely to contact the taxpayers on the list for the purpose of providing tax information and general business or economic information or analysis for educational purposes, or soliciting additional tax return preparation services to such taxpayers. The list may not be used to solicit non-tax return preparation services to these taxpayers.

ANALYSIS

Issue 1. A change in the tax law that affects previously filed tax returns may require a tax return preparer to review taxpayer clients' income tax return information to determine which of those clients may be affected by the change. Taxpayers who engage a tax return preparer can reasonably expect that their tax return preparer will advise them regarding a change in tax law that affects them and whether the change supports the filing of amended returns or other actions by the taxpayer related to any affected returns. A tax return preparer who performs this type of review in response to a change in tax law will contact the affected taxpayers to advise the taxpayers about the change in tax law and on a course of action to be taken, and can use a variety of mechanisms to do so (including direct contact, newsletters, e-mail, and other forms of communication).

Section 7216 does not prohibit the use of tax return information when the use is for the purpose of preparing a "tax return," which is defined as "any return (or amended return) of income tax imposed by chapter 1 of the Internal Revenue Code." Section 301.7216–1(b)(1) specifically includes amended returns in the definition of tax return. Accordingly, A's use of client tax return information to identify affected taxpayers, inform them regarding the change in tax law, advise whether it would be appropriate for them to file amended income tax returns, and assist in the preparation and filing of any amended returns is permitted under section 7216, because those uses are for the purpose of preparing a tax return as defined in the regulations.

Issue 2. Section 301.7216–2(h)(1)(i) allows a tax return preparer who is lawfully engaged in the practice of law or accountancy to use tax return information "for

the purpose of providing other legal or accounting services to the taxpayer," consistent with applicable legal and ethical responsibilities. "Other legal or accounting services" that are consistent with applicable legal or ethical responsibilities can include advice related to current and future income tax compliance. Taxpayers who engage a tax return preparer lawfully engaged in the practice of law or accountancy can reasonably expect that the tax return preparer will advise them regarding changes in tax rules and regulations that might affect a tax return being prepared or future income tax return filing obligations.

Accordingly, B, who is lawfully engaged in the practice of accountancy, may use tax return information of taxpayers whose tax returns B has prepared or processed, regardless of whether B prepared or processed the most recent tax returns for a taxpayer, to determine whether the taxpayers may be affected by the temporary regulations issued by the Internal Revenue Service, and to contact the potentially affected taxpayers in order to explain the regulations and to advise them regarding their response to the regulations. B's use of tax return information is permitted by § 301.7216–2(h)(1)(i) because it is for the purpose of providing other accounting services to taxpayers. B does not, however, use the tax return information of those taxpayers who have specifically informed B that they do not wish to be contacted by B or will not be using B's income tax preparation services in the upcoming filing season.

Issue 3. Third-party service providers that create, publish, or distribute tax-focused newsletters, bulletins, or similar publication or communication services typically hold themselves out to tax return preparers and other tax professionals as persons who perform services that are auxiliary to tax return preparation. These service providers also may monitor current tax events and have access to a broad range of knowledgeable tax and business professionals; they are able to provide current and relevant information to a tax return preparer's clients while allowing the tax return preparer to focus on the business of tax return preparation.

X holds itself out as providing services that are auxiliary to tax return preparation. X's services are provided in connection with the preparation of tax returns by C, D, and E because the services are intended to offer additional tax information and tax preparation services to the preparers' clients. Section 301.7216–2(n) specifically allows a tax return preparer to offer such information and additional services to clients. Because it provides services in connection with the preparation of tax returns by C, D, and E, and because C, D, and E have procedures in place that are consistent with good business practices and designed to maintain the confidentiality of the disclosed tax return information and, by following these procedures, they concluded that X has sufficient data confidentiality procedures in place, X qualifies as both an auxiliary service provider and a tax return preparer under § 301.7216–1(b)(2)(i)(B).

C, D, and E may disclose to an auxiliary service provider, without taxpayer consent, tax return information to the extent necessary to obtain auxiliary services in connection with the preparation of any tax return under § 301.7216–2(d)(1), provided the service provider is located in the United States and the services provided are not substantive determinations or advice affecting the tax liability reported by taxpayers. X is located in the United States and does not provide substantive determinations or advice affecting the tax liability reported by taxpayers. As directed by C, D, and E, X may use the names and mailing or e-mail addresses disclosed to it to contact the taxpayers for the purpose of creating, publishing, or distributing newsletters, or similar bulletins or communications, containing tax information and general business or economic information and analysis for educational purposes. The newsletters may include tax law developments, information on filing requirements, and tax compliance tips, together with solicitations for additional tax return preparation services by C, D, or E, under § 301.7216–2(n). The disclosure to X does not constitute a transfer under § 301.7216–2(n) but rather a disclosure to an auxiliary service provider pursuant to § 301.7216–2(d)(1). X, however, is prohibited from the further use or disclosure of the tax return information provided to it by C, D, and E for purposes other than those related to the provision of the auxiliary services provided to C, D and E or as otherwise expressly permitted under sections 7216 and 6713.

HOLDINGS

(1) Tax Return Preparer A is not liable for penalties under sections 7216 and 6713 when A uses tax return information to contact taxpayer to inform them of a change in tax law that could affect the income tax liability on the taxpayers' returns that were previously prepared or processed by A.

(2) Tax Return Preparer B, who is lawfully engaged in the practice of accountancy, is not liable for penalties under sections 7216 and 6713 when B uses tax return information of taxpayers whose tax returns B has prepared or processed to determine who might be affected by the temporary regulation and to contact the potentially affected taxpayers for whom B reasonably expects to provide accounting services in the next year to notify them of the changed regulation, explain how the change may affect them, and advise them with regard to actions they may take in response to the change.

(3) Tax Return Preparers C, D, and E are not liable for penalties under sections 7216 and 6713 when they disclose tax return information limited to the information listed in § 301.7216–2(n) to Third-party Service Provider X, which holds itself out as providing services that include creation, publication, and distribution of newsletters, bulletins, or similar communications to taxpayers whose tax returns the tax return preparers have prepared or processed containing tax information and general business and economic information or analysis for educational purposes or for purposes of soliciting additional tax return preparation services for the tax return preparer.

DRAFTING INFORMATION

The principal author of this revenue ruling is Molly K. Donnelly of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue ruling, contact Ms. Donnelly at (202) 622–4940 (not a toll-free call).

Section 7216—Disclosure or use of information by preparers of returns. This ruling provides guidance on whether a tax return preparer is liable for criminal and civil penalties under sections 7216

and 6713 of the Code when the tax return preparer discloses or uses tax return information under certain circumstances in connection with professional liability insurance.

Rev. Rul. 2010–5

PURPOSE

This revenue ruling provides guidance on whether a tax return preparer is liable for criminal and civil penalties under Internal Revenue Code sections 7216 and 6713 when the preparer discloses tax return information under the circumstances described below.

ISSUES

(1) Is a tax return preparer liable for penalties under sections 7216 and 6713 when the preparer discloses to a professional liability insurance carrier tax return information required by the insurance carrier to obtain or maintain professional liability insurance coverage?

(2) Is a tax return preparer liable for penalties under sections 7216 and 6713 when the preparer discloses to the preparer's professional liability insurance carrier tax return information required by the insurance carrier to promptly and accurately report a claim or a potential claim against the tax return preparer, or to aid in the investigation of a claim or potential claim against the tax return preparer?

(3) Is a tax return preparer liable for penalties under sections 7216 and 6713 when the preparer discloses tax return information to the preparer's professional liability insurance carrier in order to secure legal representation under the terms of the insurance policy or to an unrelated attorney for the purpose of evaluating a claim or potential claim against the tax return preparer?

FACTS

Tax Return Preparer A prepared income tax returns during the 2009 filing season and expects to prepare income tax returns in the 2010 filing season. During 2010, A expects to disclose to insurance agents or other insurance company representatives tax return information required to obtain or maintain professional liability insurance coverage, including information necessary to obtain price quotes from the insurance companies. The disclosed information would include a list of client names and descriptions of the services A provided to those clients. A also expects to disclose to its professional liability insurance carrier tax return information required by the terms of the insurance policy to promptly and accurately report, and to aid in the investigation of, a claim or potential claim against A, including client names, descriptions of services A provided to the named clients, a description of the claim or potential claim of professional negligence, misconduct, or fraud, and, when necessary, copies of tax returns relevant to the claim or potential claim. Finally, A expects to disclose to its professional liability insurance carrier tax return information required by the terms of the insurance policy to obtain legal representation provided by the insurance carrier under the terms of the insurance policy related to a claim or potential claim of professional negligence, misconduct, or fraud, or to an unrelated attorney for the purpose of evaluating a claim or potential claim of professional negligence, misconduct, or fraud.

All of the professional liability insurance carriers contacted by A, including their agents and representatives, are located within the United States or its territories or possessions, and all hold themselves out as providing professional liability insurance with respect to potential claims arising in connection with the preparation of tax returns. None of the insurance carriers provide substantive determinations or advice affecting the tax liability reported by taxpayers or the preparation of tax returns. The professional liability insurance carrier that issued the policy purchased by A is one these insurance carriers.

LAW

Section 7216(a) establishes a criminal penalty that is applicable to tax return preparers who knowingly or recklessly disclose or use any information furnished to them for, or in connection with, the preparation of tax returns for any purpose other than to prepare, or assist in preparing, any such returns.

Section 7216(b)(3) establishes an exception to the penalty for disclosures or uses of information which are permitted by regulations prescribed by the Secretary.

Section 6713(a) establishes a civil penalty that is applicable to tax return preparers who disclose or use any information furnished to them for, or in connection with, the preparation of tax returns for any purpose other than to prepare, or assist in preparing, any such returns.

Section 6713(b) provides that the rules of section 7216(b) shall apply for purposes of section 6713.

Section 301.7216–1(a) states that section 7216 imposes a criminal penalty for tax return preparers who "knowingly or recklessly disclose or use tax return information for a purpose other than preparing a tax return."

Section 301.7216–1(b)(2)(i)(B) defines "tax return preparer" for purposes of section 7216 and the regulations thereunder as including "[a]ny person who is engaged in the business of providing auxiliary services in connection with the preparation of tax returns...."

Section 301.7216–1(b)(2)(iii) provides that a person is engaged in the business of providing auxiliary services in connection with the preparation of tax returns if, in the course of the person's business, the person holds himself out to tax return preparers or to taxpayers as a person who performs auxiliary services, whether or not providing the auxiliary services is the person's sole business activity and whether or not the person charges a fee for the auxiliary services.

Section 301.7216–2(d)(1) provides that a tax return preparer may disclose, without taxpayer consent, tax return information of a taxpayer to another tax return preparer located in the United States for the purpose of obtaining auxiliary services in connection with the preparation of any tax return, so long as the services provided are not substantive determinations or advice affecting the tax liability reported by taxpayers.

Section 301.7216–2(g) provides that a tax return preparer may disclose, without taxpayer consent, tax return information to an attorney for the purpose of securing legal advice.

ANALYSIS

Issue 1. Obtaining and Maintaining Professional Liability Insurance.

Insurance companies offer professional liability coverage to tax return preparers to insure against potential claims arising from the tax return preparers' negligence, misconduct, or fraud in connection with the preparation or processing of tax returns. A tax return preparer may obtain professional liability insurance coverage in order to protect itself from such claims of negligence, misconduct, or fraud. A professional liability insurance carrier provides auxiliary services in connection with the preparation of tax returns because it provides liability coverage for claims or potential claims that relate directly to the tax returns prepared or processed by the tax return preparers it insures. In the course of obtaining professional liability insurance, various insurance companies may routinely offer, and tax return preparers may routinely receive, price quotes for such coverage in the ordinary course of their tax return preparation businesses. The tax return information required to be disclosed to an insurance provider in order to obtain and maintain insurance coverage (including obtaining a price quote) might include a list of client names and descriptions of the services provided to those clients by the tax return preparer.

The professional liability insurance policy purchased by A is an auxiliary service provided in connection with the preparation of tax returns, and the insurance carriers are tax return preparers within the meaning of § 301.7216–1(b)(2)(i)(B) and (iii). Under § 301.7216–2(d)(1), A may disclose to these insurance carriers, without taxpayer consent, the tax return information required to obtain and maintain the auxiliary services provided by the insurance carriers, including the information necessary to obtain price quotes from various professional liability insurance carriers. Disclosure by a tax return preparer of tax return information beyond that necessary to obtain or maintain insurance coverage would constitute a violation of sections 7216 and 6713 and would result in the tax return preparer's liability for penalties under those sections. The insurance carriers who receive a list of client names or any other tax return information from A are prohibited from the further use or disclosure of the tax return information for purposes other than those related to the provision of the auxiliary services to A or as otherwise expressly permitted under sections 7216 and 6713.

Issue 2. Reporting and Investigating Claims.

Services provided by a professional liability insurance carrier include investigation and management of claims or potential claims arising in connection with the preparation of tax returns by the covered tax return preparer. In order to request coverage for a claim or potential claim, a tax return preparer is required to promptly and accurately report claims or potential claims to its professional liability insurance carrier. In order to properly evaluate all claims or potential claims, aid in claim investigation and management, and process the payment of valid claims, a professional liability insurance carrier may require the tax return preparer to disclose additional information, such as client names, descriptions of the services provided to the named clients containing tax return information, tax return information describing the circumstances of the claim or potential claim, and copies of tax returns relevant to a claim or potential claim. Disclosure of tax return information in connection with these communications is required to allow A to obtain the auxiliary services provided by its professional liability insurance carrier, and is permitted without taxpayer consent under § 301.7216–2(d)(1), provided the information is necessary in order to obtain those services. Disclosure by a tax return preparer of tax return information beyond that necessary to obtain the auxiliary services would constitute a violation of sections 7216 and 6713 and would result in the tax return preparer's liability for penalties under those sections.

Issue 3. Obtaining Legal Advice or Representation.

A typical benefit provided to a tax return preparer by the terms of a professional liability insurance policy issued in connection with the preparation of tax returns includes the selection and engagement, by the insurance carrier, of an attorney to represent the preparer during the pendency of a claim investigation or litigation related to a claim, with the cost of the attorney paid for by the insurance carrier. When A seeks to have the professional liability insurance carrier provide this legal representation under the terms of the professional liability insurance policy, A does so for the purpose of obtaining auxiliary services in connection with the preparation of a tax return and may disclose relevant tax return information, without taxpayer consent, to the insurance carrier as an auxiliary services provider under § 301.7216–2(d)(1). Disclosure by a tax return preparer of tax return information beyond the scope of the legal representation constitutes a violation of sections 7216 and 6713 and would result in the tax return preparer's liability for penalties under those sections. After the professional liability insurance carrier selects an attorney to represent A in relation to the claim or potential claim, A may disclose to that attorney tax return information related to the claim or potential claim without taxpayer consent under § 301.7216–2(g)(1).

When a tax return preparer seeks legal advice or representation in relation to any claim or potential claim of negligence, misconduct, or fraud from an attorney who is not a representative of the professional liability insurance carrier, the tax return preparer may disclose tax return information to that attorney without taxpayer consent under § 301.7216–2(g)(1).

HOLDINGS

(1) Tax Return Preparer A is not liable for penalties under sections 7216 and 6713 when A discloses to a professional liability insurance carrier tax return information required by the insurance carrier to obtain or maintain professional liability insurance coverage, including obtaining price quotes for such insurance coverage.

(2) Tax Return Preparer A is not liable for penalties under sections 7216 and 6713 when A discloses to A's professional liability insurance carrier tax return information relevant to a claim or potential claim of professional negligence, misconduct, or fraud that is required by the insurance carrier to promptly and accurately report the claim or potential claim against A or to aid in the investigation of that claim or potential claim.

(3) Tax Return Preparer A is not liable for penalties under sections 7216 and 6713 when A discloses to its professional liability insurance carrier tax return information required by the insurance carrier in order to secure legal representation relating to a professional liability claim, or tax return information relevant to a claim or potential claim of professional negligence, mis-

conduct, or fraud to the attorney selected by the insurance carrier or to an unrelated attorney for the purpose of evaluating a claim or potential claim against A.

DRAFTING INFORMATION

The principal author of this revenue ruling is Molly K. Donnelly of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue ruling, contact Ms. Donnelly at (202) 622–4940 (not a toll-free call).

---

26 CFR 301.7216–2: Permissible disclosures or uses without consent of the taxpayer.

T.D. 9478

DEPARTMENT OF TREASURY Internal Revenue Service 26 CFR Part 301

Amendments to the Section 7216 Regulations—Disclosure or Use of Information by Preparers of Returns

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations that provide rules relating to the disclosure and use of tax return information by tax return preparers. These regulations provide updated guidance affecting tax return preparers regarding the use of information related to lists for solicitation of tax return business; the disclosure or use of statistical compilations of data under section 7216 of the Internal Revenue Code (Code) by a tax return preparer in connection with, or in support of, a tax return preparer's tax return preparation business, including identification of additional limited circumstances when a tax return preparer who compiles statistical information may disclose the compilation without taxpayer consent, and the placement of additional restrictions on the content of the compilation that may be disclosed under those circumstances without taxpayer consent; and the disclosure or use of information for the purpose of performing conflict reviews. The text of these temporary regulations also serves as the text of the proposed regulations (REG–131028–09) set forth in the notice of proposed rulemaking on this subject in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective on January 4, 2010.

Applicability Date: For date of applicability, see §301.7216–2T(s).

FOR FURTHER INFORMATION CONTACT: Molly K. Donnelly, (202) 622–4940 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends 26 CFR part 301 to provide modified rules relating to the ability of a tax return preparer to use tax return information for the purposes of compiling, maintaining and using lists for solicitation of tax return business under §301.7216–2(n), disclose and use statistical compilations of data described in §301.7216–1(b)(3)(i)(B) under §301.7216–2(o), and disclose and use tax return information for the purpose of performing conflict reviews under §301.7216–2(p), without taxpayer consent. These three paragraphs are being modified to expand the ability of tax return preparers to disclose or use certain limited tax return information under specific and limited circumstances in a manner that is expected to benefit taxpayers, tax return preparers, and the general public, as more fully described in the Explanation of Provisions section of this preamble. One set of these modifications, those to §301.7216–2(o), is being made following the issuance of Notice 2009–13 and the receipt of comments submitted in response to that notice, while the modifications to the other two paragraphs are being made as a result of the Treasury Department's and the IRS's efforts to regularly review the effect of the recently issued final regulations on taxpayers and tax return preparers. In the accompanying and cross-referenced notice of proposed rulemaking, the Treasury Department and the IRS request comments on the proposed rules from all interested parties.

On January 7, 2008, the Treasury Department and the IRS issued final regulations under section 7216 (T.D. 9375, 2008–1 C.B. 344) (73 FR 1058) applicable to disclosures or uses of tax return information occurring on or after January 1, 2009. The final regulations replaced previously issued final regulations that remained applicable to disclosures or uses of tax return information occurring prior to January 1, 2009. The final regulations included §301.7216–1(b)(3)(i)(B) which, for disclosures and uses of tax return information occurring on or after January 1, 2009, provides that tax return information includes statistical compilations of tax return information. The final regulations included §301.7216–2(n), which provides that tax return preparers may use, without taxpayer consent, certain limited taxpayer contact information constituting tax return information for the purposes of compiling, maintaining, and using lists for the solicitation of tax return business, incorporating its predecessor, §301.7216–2(m), but providing a minor expansion of the contact information allowed to be used. The final regulations included the addition of new §301.7216–2(o), which describes the limited circumstances when a tax return preparer may use tax return information to produce statistical compilations, and when the preparer may use or disclose the produced statistical compilation without written consent. The final regulations included §301.7216–2(p), which provides that tax return preparers may disclose and use tax return information without taxpayer consent in the performance of quality or peer reviews, incorporating its predecessor, §301.7216–2(o), with only minor, non-technical adjustments.

The Treasury Department and the IRS subsequently issued Notice 2009–13, 2009–6 I.R.B. 447 (February 9, 2009), (see §601(d)(2)(ii)(*b*)), to provide interim guidance relating to the ability of a tax return preparer to disclose and use statistical compilations of anonymous tax return information in support of a tax return preparer's tax return preparation business. The notice provides guidance on the tax return information a tax return

preparer may use to compile anonymous statistical information, and on the circumstances when the tax return preparer may disclose the anonymous statistical information without taxpayer consent. Notice 2009–13 sets forth rules to be applied by the Treasury Department and the IRS during 2009 while they consider whether the interim guidance should be adopted by regulations or further modified, taking into account public comments submitted in response to the notice.

Written comments were received in response to the notice. All comments were considered and are available for public inspection upon request. This preamble summarizes the responsive comments received by the Treasury Department and the IRS.

These temporary regulations modify the rules under §§301.7216–2(n), 301.7216–2(o), and 301.7216–2(p), and supersede the interim guidance provided by Notice 2009–13.

Summary of Comments in Response to Notice 2009–13

1. *Purpose and use*.

One commentator recommended that the regulations specifically provide that all tax preparation firms may use tax return information to connect taxpayers to free government programs and services, provided they have obtained the consent of their clients. This comment was not adopted. Under the regulations in force, this use would be permitted because the tax return preparer obtained the consent of its clients. Consents must conform to the requirements of §301.7216–3 of the regulations and any other guidance issued pursuant to §301.7216–3.

2. *Disclosure requirements*.

Several commentators recommended that the prohibition on disclosing cells containing data from fewer than 25 tax returns be eliminated as long as the data is anonymous and free of all taxpayer-identifying information. Some commentators recommended that return preparers be able to disclose, without consent, all aggregate data that is stripped of personal identifying information, noting that volunteer tax preparation programs utilize aggregate data to demonstrate and track the tax preparation and financial service needs of their clients. Additional commentators recommended that the 25 tax return threshold be modified to allow for the disclosure of cells containing data from ten or more tax returns. These commentators indicated that removal of all taxpayer-identifying information provides sufficient taxpayer protection and implied that it may not be feasible for tax return preparers who operate small tax return preparation businesses to always produce a statistical compilation that meets the 25 tax return threshold. These recommendations were adopted in part, and the temporary regulations now permit the disclosure of cells containing data from ten or more tax returns.

3. *Research and public policy discussions*.

One commentator recommended that, for purposes of the guidance, the term "tax return preparation business" should include "bona fide research or public policy discussions (i) concerning state or federal taxation or (ii) utilizing data acquired during the tax return preparation process." The commentator was concerned that the interim guidance would inhibit tax return preparers from cooperating with scholars or sharing anonymous data with bona fide academic researchers studying consumer financial behavior because this topic arguably might not be viewed as supporting a tax return preparation business. This comment was considered and the temporary regulations now clarify that a tax return preparer is allowed to disclose an anonymous statistical compilation for bona fide research or public policy discussions concerning state or federal taxation or requiring data acquired during the tax return preparation process.

One commentator stated that government agencies' presentation of aggregated refund data and other statistical compilations in press releases, public presentations, reports, Web sites, or other electronic communications should automatically fall within the meaning of bona fide research and public policy discussions. This recommendation was not adopted because it would not be appropriate in this context to create particularized rules for government agencies, and inclusion of this specific circumstance in the exception might require the creation of an exhaustive list of the circumstances that would be considered bona fide research or public policy discussions. Instead, tax return preparers must determine on a case-by-case basis whether a disclosure is in support of bona fide research or public policy discussions.

4. *Sale of a statistical compilation*.

One commentator recommended that the regulations should allow for the disclosure of a statistical compilation in conjunction with the sale or disposition of a tax return preparation business only when the entire tax return preparation business is being sold or disposed. This recommendation was not adopted because circumstances can exist when a tax return preparer may in good faith sell or dispose of less than the preparer's entire tax return preparation business.

Explanation of Provisions

1. *§301.7216–2(n)*.

The Treasury Department and the IRS are amending the regulations under section 7216 to provide a limited expansion of the information tax return preparers may, without taxpayer consent, use and include in lists for solicitation of tax return business pursuant to §301.7216–2(n). The regulations also clarify that lists for solicitation of tax return business may not be used to solicit non-tax return preparation services. Finally, the regulations clarify the meanings of the phrases "tax information" and "in conjunction with the sale or other disposition of the compiler's tax return business" for purposes of the exception provided by §301.7216–2(n).

The current regulations allow a tax return preparer to compile and maintain a list for solicitation of tax return business consisting solely of the names, addresses, e-mail addresses, and phone numbers of taxpayers whose tax returns the preparer has prepared or processed. The current regulations allow a tax return preparer to use this list to contact the taxpayers on the list to offer "tax information or additional tax return preparation services to such taxpayers," and limit the transfer of the list to transfers occurring "in conjunction with the sale or other disposition of the compiler's tax return preparation business." Section 301.7216–2(n) in its current

form is identical to its form in prior versions of the regulations, with the exception that an additional type of information, e-mail addresses, was added to the short list of information allowed to be included in §301.7216–2(n) lists.

Upon further consideration, the Treasury Department and the IRS conclude that §301.7216–2(n) should be amended, in the form of temporary regulations, to provide additional flexibility to tax return preparers and benefits to taxpayers without compromising the rights of taxpayers to control the use or disclosure of their tax return information. These regulations expand the information that may be compiled and maintained in a list for solicitation of tax return business to include the taxpayer entity classification or type, including individual status, and taxpayer income tax return form number (for example, Form 1040, *"U.S. Individual Income Tax Return",* or Form 1120, *"U.S. Corporation Income Tax Return"*). Determining the information that may be used to provide targeted newsletters and marketing under §301.7216–2(n) requires balancing the benefits from taxpayers receiving the tax information most relevant to them against the ability of taxpayers to control the use of their tax return information. The Treasury Department and the IRS conclude that the current amendments made to §301.7216–2(n) strike the proper current balance between these competing interests, but also recognize that future information and needs may require permitting additional information to be included in the list maintained under §301.7216–2(n). Accordingly, the regulations are amended to allow the IRS to identify additional information that may be included in the list by issuing guidance to be published in the Internal Revenue Bulletin.

These regulations clarify the phrase "tax information" by replacing that phrase with the phrase "tax information and general business or economic information or analysis for educational purposes." It is contemplated that tax information includes explanations of current developments in tax law. The regulations also clarify that a list for solicitation of tax return business may not be used to solicit non-tax return preparation services.

The additions to the tax return information allowed to be compiled and maintained in §301.7216–2(n) lists, along with the clarification of the phrase "tax information," will provide additional flexibility to tax return preparers permitting them to more efficiently and effectively furnish relevant tax information and lawful solicitations to their taxpayer clients, and will benefit taxpayers by helping ensure that the taxpayers receive only information that may be useful to them and that specifically addresses tax issues relevant to them, thus improving taxpayer education and awareness and reducing the amount of needless information being received by taxpayers. By expressly prohibiting the use of these lists to solicit non-tax return preparation services, the regulation makes clear that the exception provided by §301.7216–2(n) is limited to solicitations of tax return preparation services only. The phrase "in conjunction with the sale or other disposition of the compiler's tax return preparation business" is clarified to include due diligence performed in contemplation of a sale or other disposition of a tax return preparation business. The regulations also clarify that tax return information made available to a potential purchaser for due diligence purposes constitutes a disclosure of that information and not a transfer of that information.

The Treasury Department and the IRS have also amended the regulations to clarify that a person who is a tax return preparer solely because he provides auxiliary services to another tax return preparer may not use the tax return information he receives from such other tax return preparer to compile and maintain for his own use a list of taxpayers under §301.7216–2(n). For example, a software company could in some cases market tax return preparation software to taxpayers directly and to tax return preparers. In connection with auxiliary services provided to tax return preparers, the software provider may receive information regarding the taxpayer clients of the tax return preparers. In such circumstances, the software provider could not use the tax return information it received from tax return preparers in the performance of auxiliary services to compile a list under §301.7216–2(n) to market its software directly to the clients of the tax return preparers.

In light of these considerations, the Treasury Department and the IRS, pursuant to these regulations, amend §301.7216–2(n) of the final regulations published on January 7, 2008, as described in this preamble.

2. *§301.7216–2(o).*

The Treasury Department and the IRS are amending the regulations under section 7216 to provide additional exceptions to the general rule that a tax return preparer may not disclose or use statistical compilations of tax return information without taxpayer consent. Section 301.7216–2(o) currently prohibits the disclosure of statistical compilations unless the disclosure is made in order to comply with financial accounting or regulatory reporting requirements or occurs in conjunction with the sale or other disposition of the compiler's tax return preparation business; therefore, under the current regulations, tax return preparers may not disclose statistical compilations for other purposes that may provide benefits to taxpayers generally or to the public as a whole.

Responding to public comments received in response to Notice 2009–13, the Treasury Department and the IRS conclude that §301.7216–2(o) should be amended, in the form of temporary regulations, to allow a tax return preparer to disclose statistical compilations of tax return information without taxpayer consent for additional limited purposes, with certain additional requirements.

While taxpayer consent regarding disclosure or use is a primary focus of the section 7216 regulations, the flexibility resulting from these temporary regulations will enable tax return preparers to disclose anonymous data for limited purposes that may provide benefit to both taxpayers in general and the public at large. Anonymous statistical data disclosed within the constraints provided by these temporary regulations can be used by tax return preparers for marketing purposes and to assist taxpayers in making informed choices about tax return preparers. The availability of anonymous statistical data can be useful from a public policy perspective, as the use and availability of such data can assist lawmakers, academics, non-profits, and other agencies in the facilitation of sound tax policy analysis and decisions. In addition, volunteer tax return preparers who provide free tax return preparation services to low- and moderate-income taxpayers and families would be able to demonstrate the im-

pact of their efforts in order to obtain and administer funding necessary for their continued operation.

One concern that has been expressed regarding the disclosure of statistical compilations of tax return information by tax return preparers is that incentives will be created that encourage maximization of credits or refunds at the expense of tax return accuracy. To address this concern, while the amendment provides additional limited exceptions to the requirement that taxpayer consent be obtained in order to disclose or use tax return information, the temporary regulations prohibit, in the context of marketing or advertising, the use or disclosure of statistical compilations, or a part thereof, that identify dollar amounts of refunds, credits, or deductions associated with tax returns, whether or not the data are statistical, averaged, aggregated, or anonymous. The IRS will continue to rely on all existing enforcement powers to address concerns regarding advertising and marketing claims by tax return preparers.

In light of these considerations, the Treasury Department and the IRS, pursuant to these regulations, amend §301.7216–2(o) of the final regulations published on January 7, 2008. The temporary regulations require that any disclosure of a statistical compilation, other than to satisfy reporting requirements or in conjunction with the disposition of a tax return business, be anonymous as to taxpayer identity, meaning that it must be in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Under these circumstances, the temporary regulations prohibit the disclosure of statistical compilations with cells containing data from fewer than ten tax returns. In addition to the disclosure exceptions set forth currently in §301.7216–2(o), the temporary regulations authorize the disclosure by a tax return preparer in conjunction with bona fide research or public policy discussions concerning state or federal taxation or requiring data acquired during the tax return preparation process, and to provide tax information to the public regarding tax return preparation services. The temporary regulations allow section 501(c) organizations whose program services include the free preparation of tax returns to disclose statistical compilations in order to comply with reporting requirements in connection with the receipt of grants or to facilitate the solicitation of grants. The temporary regulations also allow lawful recipients of statistical compilations to disclose or use such tax return information, subject to the provisions of §301.7216–2T(o). The temporary regulations continue to allow the disclosure of statistical compilations in order to comply with financial accounting or regulatory reporting requirements or in conjunction with the sale or other disposition of the compiler's tax return preparation business. Finally, the temporary regulations prohibit, in the context of marketing or advertising, use or disclosure of statistical compilations, or a part thereof, that identify dollar amounts of refunds, credits, or deductions associated with tax returns, or percentages relating thereto, whether or not the data are statistical, averaged, aggregated, or anonymous.

3. *§301.7216–2(p).*

The Treasury Department and the IRS are amending the regulations under section 7216 to clarify that tax return preparers may use and disclose tax return information to the extent necessary to accomplish a conflict of interest review undertaken to comply with the requirements established by any federal, state, or local law, agency, board, or commission, or by a professional association ethics committee or board, to identify, evaluate, and monitor actual or potential legal and ethical conflicts of interest that may arise when a tax return preparer or tax return preparation business is employed or acquired by another tax return preparer or tax return preparation business, or when a tax return preparer is considering engaging a new client.

Upon further consideration, the Treasury Department and the IRS conclude that §301.7216–2(p) should be amended, in the form of temporary regulations, to clarify that tax return preparers may use and disclose tax return information to the extent necessary to accomplish conflict reviews without compromising the rights of taxpayers to control the use or disclosure of their tax return information. Conflict reviews allow tax return preparers to fulfill legal and ethical requirements to identify and avoid client conflicts of interest. Conflict reviews also benefit taxpayers because these reviews provide taxpayers with the knowledge and comfort that their tax return preparers are acting in the taxpayers' best interests when providing tax return preparation services to them.

These regulations amend §301.7216–2(p) by adding an exception to the written consent rules to allow disclosures of tax return information by a tax return preparer without taxpayer consent for the purpose of conducting conflict reviews, but only to the extent necessary to accomplish the reviews. For example, if the tax return preparer only needs to disclose the names of taxpayers, and nothing more, to allow the conflict review to be completed, then the tax return preparer shall not disclose any tax return information other than the taxpayers' names.

The regulations describe conflict reviews to include reviews that are undertaken to comply with requirements established by any federal, state, or local law, agency, board or commission, or by a professional association ethics committee or board, to either identify, evaluate, and monitor actual or potential legal and ethical conflicts of interest that may arise when a tax return preparer is employed or acquired by another tax return preparer, or to identify, evaluate, and monitor actual or potential legal and ethical conflicts of interest that may arise when a tax return preparer is considering engaging a new client. The regulations contemplate that the information necessary to accomplish a conflict review shall be disclosed to and used by only those persons permitted to be involved in the conflict review as described in the applicable law or regulations or as authorized by the relevant agency, board, commission, or professional association. The regulations also contemplate that, in order for tax return preparers to fulfill the required conflict reviews, circumstances may require the preparer to disclose the information necessary to perform a conflict review outside of the United States or a territory or possession of the United States. If disclosure outside of the United States is required to conduct a conflict review, the disclosure is authorized by these regulations provided the disclosing and receiving tax return preparers have procedures in place that are consistent with good business practices and designed to maintain the confidentiality of the disclosed information. The regulations also include specific restric-

tions on the further use and disclosure of information disclosed under this exception.

In light of these considerations, the Treasury Department and the IRS, pursuant to these regulations, amend §301.7216–2(p) of the final regulations published on January 7, 2008, as described in this preamble.

4. *Conclusion*.

The Treasury Department and the IRS anticipate that allowing tax return preparers to disclose and use the limited tax return information and anonymous statistical compilations for the limited purposes previously cited should provide the taxpayer and the public the policy benefits discussed above. The Treasury Department and the IRS also conclude that the amendments to §§301.7216–2(n), 301.7216–2(o), and 301.7216–2(p) appropriately balance concerns regarding safeguarding of sensitive tax return information against the tax industry's need to evaluate and use or disclose tax return information. In a separate notice of proposed rulemaking published with these regulations, the Treasury Department and IRS invite comments on the proposed rules.

Effect on Other Documents

The following publication is obsolete on or after January 4, 2010: Notice 2009–13, 2009–6 I.R.B. 447.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations because they are excepted from the notice and comment requirements of section 553(b) and (c) of the Administrative Procedure Act by section 7805(e) of the Internal Revenue Code and under the interpretative rule and good cause exceptions provided by sections 553(b)(3)(A) and (B) of that Act. These regulations are necessary to provide tax return preparers and taxpayers with immediate guidance on the application of the section 7216 rules regarding permissible disclosures and uses without the consent of the taxpayer, disclosures and uses that are currently required and necessary to allow the ongoing and beneficial educational, informational, operational, and funding efforts of tax return preparers and taxpayers to prepare for the imminent tax filing season, and to allow tax return preparers to comply with all legal and ethical requirements placed upon them by relevant government or professional agencies, boards, commissions or committees. These regulations are intended to provide additional limited exceptions to, and relief from, the rules prohibiting disclosure of tax return information, including statistical compilations of tax return information and information necessary to accomplish conflict reviews, because these regulations provide tangible benefits to both taxpayers and tax return preparers and appropriately balance concerns regarding safeguarding of sensitive tax return information with appropriate disclosures and uses of that information. In addition, the regulations regarding §301.7216–2(o) have been publicly noticed and subject to comment through the publication of Notice 2009–13. For these reasons, good cause exists for dispensing with notice and public comment pursuant to section 553(b) and (c) of the Administrative Procedure Act (5 U.S.C. chapter 5). For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the cross-referenced notice of proposed rulemaking published in this issue of the Bulletin. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Molly K. Donnelly, Office of the Associate Chief Counsel (Procedure and Administration).

* * * * *

Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.7216–0 is amended by revising the entries for §301.7216–2, paragraphs (n), (o), and (p) to read as follows:

§301.7216–0 Table of contents.

* * * * *

§301.7216–2 Permissible disclosures or uses without consent of the taxpayer.

* * * * *

(n) [Reserved]. For further guidance, see entry for §301.7216–2T(n).

(o) [Reserved]. For further guidance, see entry for §301.7216–2T(o).

(p) [Reserved]. For further guidance, see entry for §301.7216–2T(p).

* * * * *

Par. 3. Section 301.7216–0T is added to read as follows:

§301.7216–0T Table of contents.

This section lists captions contained in §301.7216–2T.

§301.7216–2T Permissible disclosures or uses without consent of the taxpayer (temporary).

(a) through (m) [Reserved]. For further guidance, see entries for §301.7216–2(a) through (m).

(n) Lists for solicitation of tax return business.

(o) Producing statistical information in connection with tax return preparation business.

(p) Disclosure or use of information for quality, peer, or conflict reviews.

(q) through (r) [Reserved]. For further guidance, see entries for §301.7216–2(q) through (r).

(s) Effective/applicability date.

(t) Expiration date.

Par. 4. Section 301.7216–2 is amended by revising paragraphs (n), (o), and (p) to read as follows:

§301.7216–2 Permissible disclosures or uses without consent of the taxpayer.

* * * * *

(n) [Reserved]. For further guidance, see §301.7216–2T(n).

(o) [Reserved]. For further guidance, see §301.7216–2T(o).

(p) [Reserved]. For further guidance, see §301.7216–2T(p).

* * * * *

Par. 5. Section 301.7216–2T is added to read as follows:

§301.7216–2T Permissible disclosures or uses without consent of the taxpayer (temporary).

(a) through (m) [Reserved]. For further guidance, see §301.7216–2(a) through (m).

(n) *Lists for solicitation of tax return business.* (1) A tax return preparer, other than a person who is a tax return preparer solely because the person provides auxiliary services as defined in §301.7216–1(b)(2)(i)(B), may compile and maintain a separate list containing solely the names, addresses, e-mail addresses, phone numbers, taxpayer entity classification (including "individual" or the specific type of business entity), and income tax return form number of taxpayers whose tax returns the tax return preparer has prepared or processed. The Internal Revenue Service may issue guidance, by publication in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*)), describing other types of information that may be included in a list compiled and maintained pursuant to this paragraph. This list may be used by the compiler solely to contact the taxpayers on the list for the purpose of providing tax information and general business or economic information or analysis for educational purposes, or soliciting additional tax return preparation services. The list may not be used to solicit any service or product other than tax return preparation services. The compiler of the list may not transfer the taxpayer list, or any part thereof, to any other person unless the transfer takes place in conjunction with the sale or other disposition of the compiler's tax return preparation business. Due diligence conducted prior to a proposed sale of a compiler's tax return preparation business is in conjunction with the sale or other disposition of a compiler's tax return preparation business and will not constitute a transfer of the list if conducted pursuant to a written agreement that requires confidentiality of the tax return information disclosed and expressly prohibits the further use or disclosure of the tax return information for any purpose other than that related to the purchase of the tax return preparation business. The tax return information submitted for the purpose of due diligence as authorized in this paragraph is a disclosure of tax return information subject to the provisions of this section. A person who acquires a taxpayer list, or a part thereof, in conjunction with a sale or other disposition of a tax return preparation business is subject to the provisions of this paragraph with respect to the list. The term *list*, as used in this paragraph (n), includes any record or system whereby the names and addresses of taxpayers are retained. The provisions of this paragraph (n) also apply to the transfer of any records and related papers to which this paragraph (n) applies.

(2) *Examples.* The following examples illustrate this paragraph (n):

Example 1. Preparer A is a tax return preparer as defined by §301.7216–1(b)(2)(i)(A). Preparer A's office is located in southeast Pennsylvania, and Preparer A prepares federal and state income tax returns for taxpayers who live in Pennsylvania, New Jersey, Maryland, and Delaware. Preparer A maintains a list of taxpayer clients containing the information allowed by this paragraph (n). Preparer A provides quarterly state income tax information updates to his individual taxpayer clients by e-mail or U.S. Mail. To ensure that his clients only receive the information updates that are relevant to them, Preparer A uses his list to direct his outreach efforts towards clients by zip code and income tax return form number (Form 1040 and corresponding state income tax return form number). Preparer A may use the list information in this manner without taxpayer consent because he is providing tax information for educational or informational purposes and is targeting clients based solely upon tax return information that is authorized by this paragraph (n), by zip code, which is part of a taxpayer's address, and by income tax return form number. Preparer A also may deliver this information to his clients by e-mail or by U.S. Mail without taxpayer consent because those delivery methods use information authorized by this paragraph (n).

Example 2. Preparer B is a tax return preparer as defined by §301.7216–1(b)(2)(i)(A). Preparer B maintains a list of taxpayer clients containing the information allowed by this paragraph (n). Preparer B provides monthly federal income tax information updates in the form of a newsletter to all of her taxpayer clients by e-mail or U.S. Mail. When Preparer B hires a new employee, she announces each hire in the newsletter for the month that follows the hiring. Each announcement includes a photograph of the new employee, the employee's name, the employee's telephone number, a brief listing of the employee's qualifications, and a brief listing of the employee's employment responsibilities. Preparer B may use the tax return information described in this paragraph (n) in this manner without taxpayer consent because she is providing tax information for educational or informational purposes, to provide general federal income tax information updates. Preparer B may include the new employee announcements in the form described because this is considered tax information for educational or informational purposes, provided the announcements do not contain solicitations for non-tax return preparation services. Preparer B also may deliver this information to her clients by e-mail or by U.S. Mail without taxpayer consent because those delivery methods use information authorized by this paragraph (n).

(o) *Producing statistical information in connection with tax return preparation business.* (1) A tax return preparer may use tax return information, subject to the limitations specified in this paragraph (o), to produce a statistical compilation of data described in §301.7216–1(b)(3)(i)(B). The purpose and use or disclosure of the statistical compilation must relate directly to the internal management or support of the tax return preparer's tax return preparation business, or to bona fide research or public policy discussions concerning state or federal taxation or requiring data acquired during the tax return preparation process. A tax return preparer may not disclose the compilation, or any part thereof, to any other person unless disclosure of the statistical compilation is anonymous as to taxpayer identity, does not disclose cells containing data from fewer than ten tax returns, and is in direct support of the tax return preparer's tax return preparation business or of bona fide research or public policy discussions concerning state or federal taxation or requiring data acquired during the tax return preparation process. A statistical compilation is anonymous as to taxpayer identity if it is in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. For purposes of this paragraph, marketing and advertising is in direct support of the tax return preparer's tax return preparation business provided the marketing and advertising is not false, misleading, or unduly influential. This paragraph, however, does not authorize the use or disclosure in marketing or advertising of any statistical compilations, or part thereof, that identify dollar amounts of refunds, credits, or deductions asso-

ciated with tax returns, or percentages relating thereto, whether or not the data are statistical, averaged, aggregated, or anonymous. Disclosures made in support of fundraising activities conducted by Volunteer Return Preparation programs and other organizations described in section 501(c) of the Internal Revenue Code (Code) in direct support of their tax return preparation businesses are not marketing and advertising under this paragraph. A tax return preparer who produces a statistical compilation of data described in §301.7216–1(b)(3)(i)(B) may disclose the compilation in order to comply with financial accounting or regulatory reporting requirements whether or not the statistical compilation is anonymous as to taxpayer identity or discloses cells containing data from fewer than ten tax returns.

A tax return preparer may not sell or exchange for value a statistical compilation of data described in §301.7216–1(b)(3)(i)(B), in whole or in part, except in conjunction with the transfer of assets made pursuant to the sale or other disposition of the tax return preparer's tax return preparation business. The provisions of paragraph (n) of this section regarding the transfer of a taxpayer list also apply to the transfer of any statistical compilations of data to which this paragraph applies. A person who acquires a statistical compilation, or a part thereof, pursuant to the operation of this paragraph (o) or in conjunction with a sale or other disposition of a tax return preparation business, is subject to the provisions of this paragraph with respect to the compilation.

(2) *Examples*. The following examples illustrate this paragraph (o):

Example 1. Preparer A is a tax return preparer as defined by §301.7216–1(b)(2)(i)(A). In 2009, A used tax return information to produce a statistical compilation of data for both internal management purposes and to support A's tax return preparation business. The statistical compilation included a cell containing the information that A prepared 32 S corporation tax returns in 2009. In 2010, A decides to embark upon a new marketing campaign emphasizing its experience preparing small business tax returns. In the campaign, A discloses the cell containing the number of S corporation tax returns prepared in 2009. A's disclosure does not include any information that can be associated with or that can identify any specific taxpayers. A may disclose the anonymous statistical compilation without taxpayer consent.

Example 2. Preparer B is a tax return preparer as defined by §301.7216–1(b)(2)(i)(A). In 2010, in support of B's tax return preparation business, B wants to advertise that the average tax refund obtained for its clients in 2009 was $2,800. B may not disclose this information because it contains a statistical compilation reflecting average refund amounts.

Example 3. Preparer C is a tax return preparer as defined by §301.7216–1(b)(2)(i)(A) and is a Volunteer Income Tax Assistance program. In 2010, in support of C's tax return preparation business, C submits a grant application to a charitable foundation to fund C's operations providing free tax return preparation services to low- and moderate-income families. In support of C's request, C includes anonymous statistical data from cells containing data from ten or more tax returns showing that, in 2009, C provided services to 500 taxpayers, that 95 percent of the taxpayer population served by C received the Earned Income Tax Credit (EITC), and that the average amount of the EITC received was $3,300. Despite the fact that this information constitutes an average credit amount, C may disclose the information to the charitable foundation because disclosures made in support of fundraising activities conducted by Volunteer Income Tax Assistance programs and other organizations described in section 501(c) of the Code in direct support of their tax return preparation business are not considered marketing and advertising for purposes of §301.7216–2(o)(1).

Example 4. Preparer D is a tax return preparer as defined by §301.7216–1(b)(2)(i)(A). In December 2009, D produced an anonymous statistical compilation of tax return information obtained during the 2009 filing season. In 2010, D wants to disclose portions of the anonymous statistical compilation from cells containing data from ten or more tax returns in connection with the marketing of its financial advisory and asset planning services. D is required to receive taxpayer consent under §301.7216–3 before disclosing the tax return information contained in the anonymous statistical compilation because the disclosure is not being made in support of D's tax return preparation business.

(p) *Disclosure or use of information for quality, peer, or conflict reviews*. (1) The provisions of section 7216(a) and §301.7216–1 shall not apply to any disclosure for the purpose of a quality or peer review to the extent necessary to accomplish the review. A quality or peer review is a review that is undertaken to evaluate, monitor, and improve the quality and accuracy of a tax return preparer's tax preparation, accounting, or auditing services. A quality or peer review may be conducted only by attorneys, certified public accountants, enrolled agents, and enrolled actuaries who are eligible to practice before the Internal Revenue Service. See Department of the Treasury Circular 230, 31 CFR part 10. Tax return information may also be disclosed to persons who provide administrative or support services to an individual who is conducting a quality or peer review under this paragraph (p), but only to the extent necessary for the reviewer to conduct the review. Tax return information gathered in conducting a review may be used only for purposes of a review. No tax return information identifying a taxpayer may be disclosed in any evaluative reports or recommendations that may be accessible to any person other than the reviewer or the tax return preparer being reviewed. The tax return preparer being reviewed will maintain a record of the review including the information reviewed and the identity of the persons conducting the review. After completion of the review, no documents containing information that may identify any taxpayer by name or identification number may be retained by a reviewer or by the reviewer's administrative or support personnel.

(2) The provisions of section 7216(a) and §301.7216–1 shall not apply to any disclosure necessary to accomplish a conflict review. A conflict review is a review undertaken to comply with requirements established by any federal, state, or local law, agency, board or commission, or by a professional association ethics committee or board, to either identify, evaluate, and monitor actual or potential legal and ethical conflicts of interest that may arise when a tax return preparer is employed or acquired by another tax return preparer, or to identify, evaluate, and monitor actual or potential legal and ethical conflicts of interest that may arise when a tax return preparer is considering engaging a new client. Tax return information gathered in conducting a conflict review may be used only for purposes of a conflict review. No tax return information identifying a taxpayer may be disclosed in any evaluative reports or recommendations that may be accessible to any person other than those responsible for identifying, evaluating, and monitoring legal and ethical conflicts of interest. No tax return information identifying a taxpayer may be disclosed outside of the United States or a territory or possession of the United States unless the disclosing and receiving tax return preparers have procedures in place that are consistent with good business practices and designed to maintain the confidentiality of the disclosed return information.

(3) Any person (including administrative and support personnel) receiving tax return information in connection with a quality, peer, or conflict review is a tax return preparer for purposes of sections

7216(a) and 6713(a). Tax return information disclosed and used for purposes of a quality, peer, or conflict review shall not be used or disclosed for any other purpose.

(q) through (r) [Reserved]. For further guidance, see §301.7216–2(q) through (r).

(s) *Effective/applicability date*. This section applies to disclosures or uses of tax return information occurring on or after January 4, 2010.

(t) *Expiration date*. The applicability of this section expires on or before December 28, 2012.

Steven T. Miller,
Deputy Commissioner for Services and Enforcement.

Approved December 24, 2009.

Michael Mundaca,
Acting Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on December 29, 2009, 4:15 p.m., and published in the issue of the Federal Register for January 4, 2010, 75 F.R. 48)

Section 9300.—Reduction in Taxable Income for Housing Displaced Individuals

26 CFR 1.9300–1: Reduction in taxable income for housing displaced individuals.

T.D. 9474

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Reduction in Taxable Income for Housing Hurricane Katrina Displaced Individuals

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations relating to the reduction in taxable income under section 302 of the Katrina Emergency Tax Relief Act of 2005. The final regulations also reflect legislation under section 702 of the Heartland Disaster Tax Relief Act of 2008. The final regulations affect taxpayers who provide housing in their principal residences to individuals displaced by certain major disasters.

DATES: *Effective Date:* These regulations are effective on December 14, 2009.

Applicability Date: For date of applicability, see §1.9300–1(h).

FOR FURTHER INFORMATION CONTACT: Shareen S. Pflanz, 202–622–4920 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains final regulations that replace the temporary regulations in 26 CFR Part 1 relating to the reduction in taxable income for housing provided to displaced individuals under section 302 of the Katrina Emergency Tax Relief Act of 2005 (Public Law 109–73, 119 Stat. 2016) (KETRA). This document also applies these rules to individuals displaced in a Midwestern disaster area, as defined in section 702 of the Heartland Disaster Tax Relief Act of 2008 (Title VII of Division C of Public Law 110–343, 122 Stat. 3912) (HDTRA).

On December 12, 2006, temporary regulations (T.D. 9301, 2007–1 C.B. 244) were published in the **Federal Register** (71 FR 74467). A notice of proposed rulemaking (REG–152043–05, 2007–1 C.B. 263) cross-referencing the temporary regulations was also published in the **Federal Register** (71 FR 74482). No public hearing was requested or held. No written comments responding to the notice of proposed rulemaking were received. The proposed regulations are adopted as amended by this Treasury decision to implement section 702 of HDTRA.

Section 702 of HDTRA, enacted on October 3, 2008, applies section 302 of KETRA to the Midwestern disaster area. The Midwestern disaster area is the area for which the President declared (after May 19, 2008, and before August 1, 2008) a major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) (Stafford Act). The disaster occurred by reason of severe storms, tornados, or flooding in the states of Arkansas, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, and Wisconsin. The applicable disaster date for each state in the Midwestern disaster area is the date of the severe storm, tornado, or flooding giving rise to the Presidential declaration for that state. See **Federal Register** notices for each state at *www.FEMA.gov*. The reduction in taxable income for providing housing to a displaced individual in a Midwestern disaster area applies to taxable years beginning in 2008 or 2009.

Accordingly, the final regulations expand the scope of the temporary regulations to include taxpayers who provide housing in their principal residences to Midwestern disaster displaced individuals. The final regulations expand the definitions under §1.9300–1T(e) of the temporary regulations relating to Hurricane Katrina to include the Midwestern disaster area.

The final regulations also clarify that the limitations on the reduction in taxable income apply separately to the Hurricane Katrina disaster area and the Midwestern disaster area. Thus, for example, a taxpayer may reduce taxable income by up to $2,000 for providing housing to Midwestern disaster displaced individuals even though the taxpayer reduced taxable income for providing housing to one or more Hurricane Katrina displaced individuals.

The temporary regulations provided that the maximum dollar limitation for a married individual who files a separate income tax return is $1,000. The final regulations provide that the maximum dollar limitation is $2,000 for married taxpayers filing jointly or separately. Married taxpayers filing separate income tax returns may allocate the $2,000 between the returns.

The final regulations authorize the Commissioner to apply these rules in additional guidance of general applicability, see §601.601(d)(2) of the Internal Revenue Practice Regulations, if Congress extends relief under section 302 of KETRA to other disaster areas in the future.

Effective/Applicability Date

These regulations apply to taxable years ending after December 11, 2006. Taxpayers who, after filing their tax returns for

2006 or 2008 as married filing separately, want to apply the rule allowing them to allocate the $2,000 maximum limitation between them, may do so by filing amended returns if the period of limitations on credit or refund under section 6511 has not expired.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking that preceded these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Shareen S. Pflanz of the Office of the Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entry for §1.9300–1T to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.9300–1 is added to read as follows:

§1.9300–1 Reduction in taxable income for housing displaced individuals.

(a) *In general.* For a taxable year beginning in the applicable taxable year (as defined in paragraph (f)(1) of this section), a taxpayer who is a natural person may reduce taxable income by $500 for each displaced individual (as defined in paragraph (f)(2) of this section) to whom the taxpayer provides housing free of charge in, or on the site of, the taxpayer's principal residence for a period of at least 60 consecutive days. A taxpayer may claim the reduction in taxable income for any applicable taxable year in which a consecutive 60-day period ends. A taxpayer may not claim the reduction in taxable income unless the taxpayer includes the taxpayer identification number of the displaced individual on the taxpayer's income tax return.

(b) *Provision of housing*—(1) *Principal residence.* For purposes of this section, the term principal residence has the same meaning as in section 121 and the associated regulations. See §1.121–1(b)(1) and (b)(2).

(2) *Legal interest required.* A taxpayer is treated as providing housing for purposes of this section only if the taxpayer is an owner or lessee (including a co-owner or co-lessee) of the principal residence.

(3) *Compensation for providing housing.* No reduction in taxable income is allowed under this section to a taxpayer who receives rent or any reimbursement or compensation (whether in cash, services, or property) from any source for providing housing to the displaced individual. For this purpose, lodging, utilities, and other similar items are treated as housing, but telephone calls, food, clothing, transportation, and other similar items are not treated as housing.

(c) *Limitations*—(1) *Dollar limitation*—(i) *In general.* The reduction in taxable income under paragraph (a) of this section may not exceed the maximum dollar limitation, and must be reduced by the total amount of all reductions under this section for all prior taxable years (except as provided in paragraph (c)(5) of this section). The maximum dollar limitation is—

(A) $2,000 in the case of an unmarried individual; or

(B) $2,000 in the case of a husband and wife, whether the husband and wife file a joint income tax return or separate income tax returns; married taxpayers filing separate income tax returns may allocate this amount in $500 increments between their respective returns, provided that each spouse is otherwise eligible to claim that reduction in taxable income.

(ii) *Married individuals with separate principal residences.* The limitation in paragraph (c)(1)(i)(B) of this section applies whether or not the married individuals occupy the same principal residence. A person is treated as married for purposes of this section if the individual is treated as married under section 7703.

(2) *Spouse or dependent of the taxpayer.* No reduction of taxable income is allowed for a displaced individual who is the spouse or a dependent of the taxpayer.

(3) *One reduction per displaced individual.* Except as provided in paragraph (c)(5) of this section, a taxpayer may not reduce taxable income under paragraph (a) of this section for a displaced individual for whom the taxpayer or any taxpayer residing in the same principal residence has reduced taxable income under this section for any prior taxable year.

(4) *Taxpayers occupying the same principal residence.* Except as provided in paragraph (c)(5) of this section, for all taxable years, only one taxpayer occupying the same principal residence may reduce taxable income for a particular displaced individual.

(5) *Limitations applied separately to each disaster.* The limitations of this paragraph (c) apply separately to each disaster area. Thus, a taxpayer may reduce taxable income by $2,000 for providing housing to Midwestern disaster displaced individuals even though the taxpayer reduced taxable income for providing housing to one or more Hurricane Katrina displaced individuals. For this purpose, all areas within the Midwestern disaster area are treated as one disaster area.

(d) *Substantiation.* A taxpayer claiming a reduction of taxable income under this section must maintain records sufficient to show entitlement to the reduction as provided in forms, instructions, publications or other guidance published by the IRS.

(e) The Commissioner may apply this section in additional guidance of general applicability, see §601.601(d)(2) of this chapter, to other disaster areas to which Congress extends relief under section 302 of the Katrina Emergency Tax Relief Act of 2005.

(f) *In general.* The following definitions apply for all purposes of this section.

(1) *Applicable taxable year*. The term *applicable taxable year* means—

(i) A taxable year beginning in 2005 or 2006, in the case of housing provided to a Hurricane Katrina displaced individual (as defined in paragraph (f)(2)(ii) of this section); and

(ii) A taxable year beginning in 2008 or 2009, in the case of housing provided to a Midwestern disaster displaced individual (as defined in paragraph (f)(2)(iii) of this section).

(2) *Displaced individual*—(i) *Scope*. The term *displaced individual* means a Hurricane Katrina displaced individual as defined in paragraph (f)(2)(ii) of this section and a Midwestern disaster displaced individual as defined in paragraph (f)(2)(iii) of this section.

(ii) *Hurricane Katrina displaced individual*. The term *Hurricane Katrina displaced individual* means any natural person (other than the spouse or a dependent of the taxpayer) if the following requirements are met—

(A) The person's principal place of abode on August 28, 2005, was in the Hurricane Katrina disaster area (as defined in paragraph (f)(4)(ii) of this section);

(B) The person was displaced from that abode; and

(C) If the abode was located outside the Hurricane Katrina core disaster area (as defined in paragraph (f)(5)(ii) of this section)—

(*1*) The abode was damaged by Hurricane Katrina; or

(*2*) The person was evacuated from that abode by reason of Hurricane Katrina.

(iii) *Midwestern disaster displaced individual*. The term *Midwestern disaster displaced individual* means any natural person (other than the spouse or a dependent of the taxpayer) if the following requirements are met—

(A) The person's principal place of abode on the Midwestern disaster date (as defined in paragraph (f)(3) of this section), was in any Midwestern disaster area (as defined in paragraph (f)(4)(iii) of this section);

(B) The person was displaced from that abode; and

(C) If the abode was located outside the Midwestern core disaster area (as defined in paragraph (f)(5)(iii) of this section)—

(*1*) The abode was damaged by any Midwestern disaster; or

(*2*) The person was evacuated from that abode by reason of any Midwestern disaster.

(3) *Midwestern disaster date*. The term *Midwestern disaster date* means—

(i) In Arkansas, May 2 through May 12, 2008;

(ii) In Illinois, June 1 through July 22, 2008;

(iii) In Indiana, May 30 through June 27, 2008;

(iv) In Iowa, May 25 through August 13, 2008;

(v) In Kansas, May 22 through June 16, 2008;

(vi) In Michigan, June 6 through June 13, 2008;

(vii) In Minnesota, June 6 through June 12, 2008;

(viii) In Missouri, May 10 through May 11, 2008, and June 1 through August 13, 2008;

(ix) In Nebraska, April 23 through April 26, 2008, May 22 through June 24, 2008, and June 27, 2008; or

(x) In Wisconsin, June 5 through July 25, 2008.

(4) *Disaster area*—(i) *Scope*. The term *disaster area* means the Hurricane Katrina disaster area as defined in paragraph (f)(4)(ii) of this section and the Midwestern disaster area as defined in paragraph (f)(4)(iii) of this section.

(ii) *Hurricane Katrina disaster area*. The term *Hurricane Katrina disaster area* means the states of Alabama, Florida, Louisiana, and Mississippi.

(iii) *Midwestern disaster area*. The term *Midwestern disaster area* means an area for which the President declared a major disaster on or after May 20, 2008, and before August 1, 2008, under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) (Stafford Act) by reason of severe storms, tornados, or flooding occurring in any of the states of Arkansas, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, and Wisconsin.

(5) *Core disaster area*—(i) *Scope*. The term *core disaster area* means the Hurricane Katrina core disaster area as defined in paragraph (f)(5)(ii) of this section and the Midwestern core disaster area as defined in paragraph (f)(5)(iii) of this section.

(ii) *Hurricane Katrina core disaster area*. The term *Hurricane Katrina core disaster area* means the portion of the Hurricane Katrina disaster area designated by the President to warrant individual or individual and public assistance from the federal government under the Stafford Act.

(iii) *Midwestern core disaster area*. The term *Midwestern core disaster area* means the portion of the Midwestern disaster area designated by the President to warrant individual or individual and public assistance from the federal government under the Stafford Act for damages attributable to the severe storms, tornados, or flooding in the Midwestern disaster area.

(g) *Examples*. The provisions of this section are illustrated by the following examples. In each example, a taxpayer provides housing within the meaning of paragraph (b) of this section in, or on the site of, the taxpayer's principal residence for a period of at least 60 consecutive days (the 60th day being in the applicable taxable year) for each displaced individual, none of whom is a spouse or dependent of the taxpayer. The examples are as follows:

Example 1. Taxpayer A provides housing to N, a Hurricane Katrina displaced individual, from September 1, 2005, until March 10, 2006. Under paragraphs (a) and (c)(3) of this section, A may reduce A's taxable income by $500 on A's income tax return for calendar year 2005 or 2006 (but not both) for providing housing to N.

Example 2. The facts are the same as in *Example 1*, except that A and A's unmarried roommate B are co-lessees of their principal residence. Both A and B provide housing to N. Under paragraphs (a) and (c)(4) of this section, either A or B, but not both, may reduce taxable income by $500 for 2005 or 2006 for providing housing to N. If A or B reduces taxable income for 2005 for providing housing to N, neither A nor B may reduce taxable income for 2006 for providing housing to N.

Example 3. The facts are the same as in *Example 2*, except that in 2009 A and B provide housing to N, who in 2009 is a Midwestern disaster displaced individual. Under paragraph (c)(5) of this section, the limitation of paragraph (c)(4) of this section applies separately to each disaster. Therefore, either A or B may reduce taxable income by $500 for 2009 for providing housing to N.

Example 4. During 2008, unmarried roommates and co-lessees C and D provide housing to eight Midwestern disaster displaced individuals. Under paragraphs (a) and (c)(1)(i)(A) of this section, C may reduce taxable income by $2,000 on C's 2008 income tax return for providing housing to any four of these displaced individuals and D may reduce taxable income by $2,000 on D's 2008 income tax return for providing housing to the other four displaced individuals.

Example 5. (i) In 2008, a married couple, H and W, provide housing to a Midwestern disaster displaced individual, O. H and W file their 2008 income

tax return as married filing jointly. Under paragraphs (a) and (c)(4) of this section, H and W may reduce taxable income by $500 on their 2008 income tax return for providing housing to O.

(ii) In 2009, H and W provide housing to O and to another Midwestern disaster displaced individual, P. H and W file their 2009 income tax returns as married filing separately. Because H and W reduced their 2008 taxable income for providing housing to O, under paragraph (c)(3) of this section, neither H nor W may reduce taxable income on their 2009 income tax returns for providing housing to O. Under paragraphs (a) and (c)(4) of this section, either H or W but not both, may reduce taxable income by $500 on his or her 2009 income tax return for providing housing to P.

Example 6. The facts are the same as in *Example 5*, except that in 2009 H and W provide housing to five Midwestern disaster displaced individuals in addition to O. H and W together may reduce taxable income on their 2009 income tax returns by a total of $2,000 for the Midwestern disaster displaced individuals (other than O). Under paragraph (c)(1)(i)(B) of this section, H and W may allocate the $2,000 in increments of $500 between their separate returns. For example, either one may reduce taxable income by $500 and the other may reduce taxable income by $1,500, or H and W each may reduce taxable income by $1,000.

(h) *Effective/applicability date*. This section applies for taxable years ending after December 11, 2006.

§1.9300–1T [Removed]

Par. 3. Section 1.9300–1T is removed.

Steven T. Miller,
Deputy Commissioner for Services and Enforcement.

Approved December 8, 2009.

Michael F. Mundaca,
Acting Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on December 11, 2009, 8:45 a.m., and published in the issue of the Federal Register for December 14, 2009, 74 F.R. 66048)

Part III. Administrative, Procedural, and Miscellaneous

Extension of Temporary Suspension of AHYDO Rules

Notice 2010–11

This notice extends the temporary suspension of the rules for certain applicable high yield discount obligations ("AHYDOs") pursuant to § 163(e)(5)(F) of the Internal Revenue Code.

Under § 163(e)(5), in the case of an AHYDO as defined in § 163(i), a corporation is not allowed a deduction for the disqualified portion of the original issue discount ("OID") on the obligation, and the corporation's deduction for the remaining portion of the OID is deferred until the OID is paid in cash or in property (other than debt of the issuer or a related person within the meaning of § 453(f)(1)). Section 163(e)(5)(F)(i), which was added to the Internal Revenue Code by section 1232(a) of the American Recovery and Reinvestment Tax Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 (2009), generally provides that § 163(e)(5) does not apply to any AHYDO issued during the period beginning on September 1, 2008, and ending on December 31, 2009, in exchange (including an exchange resulting from a modification of the debt instrument) for an obligation which is not an AHYDO and the issuer (or obligor) of which is the same as the issuer (or obligor) of such AHYDO.

Section 163(e)(5)(F)(iii) permits the Secretary to suspend the applicability of § 163(e)(5) for AHYDOs issued after December 31, 2009, if the Secretary determines that such application is appropriate in light of distressed conditions in the debt capital markets.

Pursuant to the authority granted in § 163(e)(5)(F)(iii), the suspension of the applicability of § 163(e)(5) provided for in § 163(e)(5)(F)(i) is extended to December 31, 2010 for any AHYDO that is a qualified obligation. For purposes of the preceding sentence, an AHYDO is a qualified obligation only if: (1) the AHYDO is issued after December 31, 2009, and on or before December 31, 2010, in exchange (including an exchange resulting from a modification of the debt instrument) for an obligation that is not an AHYDO; (2) the issuer (or obligor) of the AHYDO is the same as the issuer (or obligor) of the obligation exchanged for the AHYDO; (3) the AHYDO does not pay interest that would be treated as contingent interest for purposes of § 871(h)(4) (without regard to § 871(h)(4)(D)); (4) the AHYDO is not issued to a related person (within the meaning of § 108(e)(4)); (5) the issue price of the AHYDO is determined under § 1273(b)(1), 1273(b)(2), 1273(b)(3), or 1274(b)(3), whichever is applicable, and the regulations thereunder; and (6) the AHYDO would not otherwise be an AHYDO if its issue price were increased by the amount of any discharge of indebtedness income realized by the issuer (or obligor) upon the exchange.

For example, assume that prior to 2010 Corporation X issued a debt instrument that was not an AHYDO. In 2010, Corporation X exchanges the debt instrument issued prior to 2010, which has an adjusted issue price of $100x as of the exchange date, for a new debt instrument that is an AHYDO with an issue price of $80x (determined under § 1273(b)(3)) and a stated redemption price at maturity of $100x. Corporation X realizes $20x of discharge of indebtedness income on the exchange. To determine whether the new debt instrument is a qualified obligation, the issue price of the new debt instrument is increased from $80x to $100x ($80x plus $20x) and this deemed issue price is used to determine whether the new debt instrument is an AHYDO for purposes of this notice. If the new debt instrument would be an AHYDO if the issue price were $100x, then the new debt instrument is not a qualified obligation and the new debt instrument does not qualify for the relief provided by § 163(e)(5)(F) and this notice. If the new debt instrument would not be an AHYDO if the issue price were $100x, then the new debt instrument is a qualified obligation and the new debt instrument does qualify for the relief provided by § 163(e)(5)(F) and this notice, provided that the other requirements to be a qualified obligation are satisfied.

The principal author of this notice is William E. Blanchard of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this notice, contact William E. Blanchard at (202) 622–3950 (not a toll-free call).

Treatment of Certain Obligations Under Section 956(c)

Notice 2010–12

1. On October 27, 2008, the Treasury Department and the Internal Revenue Service (Service) published Notice 2008–91, 2008–43 I.R.B. 1001, which describes regulations that the Treasury Department and the Service intend to issue that will provide an elective exclusion from the definition of "obligation" for purposes of section 956 of the Internal Revenue Code for the first two taxable years of a controlled foreign corporation ending after October 3, 2008. Notice 2008–91, however, does not apply to taxable years of a controlled foreign corporation beginning after December 31, 2009. The Treasury Department and the Service subsequently issued Notice 2009–10, 2009–1 C.B. 419, to provide that the regulations described in Notice 2008–91 will also apply to the third consecutive taxable year of a controlled foreign corporation, if any, that ends after October 3, 2008, and that ends on or before December 31, 2009.

This notice provides that the regulations described in Notice 2008–91 will also apply to the taxable year of a controlled foreign corporation that immediately follows the last taxable year of such controlled foreign corporation to which the regulations described in Notice 2008–91 could apply without regard to this notice. In no case shall the regulations described in Notice 2008–91 apply to a taxable year of a controlled foreign corporation beginning on or after January 1, 2011. The Treasury Department and the Service do not anticipate extending the application of the regulations described in Notice 2008–91 to any additional periods.

2. On May 27, 2008, the Treasury Department and the Service published Rev. Proc. 2008–26, 2008–1 C.B. 1014, which applies to determine whether securities are "readily marketable" for purposes of section 956(c)(2)(J) for any day during calen-

dar years 2007 or 2008, for which it is relevant whether securities are readily marketable for purposes of that section. In Notice 2009–10, the Treasury Department and the Service subsequently extended that period to include any such day during calendar year 2009. This notice extends the application of Rev. Proc. 2008–26 to any day during calendar year 2010, for which it is relevant whether securities are readily marketable for purposes of section 956(c)(2)(J) (in addition to any day during calendar years 2007, 2008 or 2009).

DRAFTING INFORMATION

The principal author of this notice is Phyllis E. Marcus of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact Phyllis E. Marcus at (202) 622–3840 (not a toll-free call).

Form 1120, Form 1120–F, Form 1120S, Form 990, and Form 990–PF Electronic Filing Waiver Request Procedures

Notice 2010–13

Background

This notice provides procedures for corporations, electing small business corporations, and organizations required to file returns under section 6033 (filers) to request a waiver of the requirement to electronically file Form 1120, *U.S. Corporation Income Tax Return;* Form 1120–F, *U.S. Income Tax Return of a Foreign Corporation*; Form 1120S, *U.S. Income Tax Return for an S Corporation*; Form 990, *Return of Organization Exempt From Income Tax*; Form 990–PF, *Return of Private Foundation or Section 4947(a)(1) Nonexempt Charitable Trust Treated as a Private Foundation*; and returns, amended returns, and superseding returns in the Form 1120 and 990 series of returns when required by regulations and IRS publications. This notice also includes guidance on the timely filing of a return required to be electronically filed that is rejected.

Section 6011(e) authorizes the Internal Revenue Service (Service) to issue regulations that require an entity to file returns on electronic media when the entity is required to file at least 250 returns during the calendar year. On November 13, 2007, the Treasury Department and the Service issued final regulations that require certain large corporations, electing small business corporations, and organizations required to file returns under section 6033 to electronically file their income tax or annual information returns. T.D. 9363, 2007–2 C.B. 1084, 72 F.R. 63807.

Under the final regulations, corporations that meet this 250 return threshold and that have assets of $10 million or more generally must file their Form 1120 or Form 1120S returns electronically for taxable years ending on or after December 31, 2006. Foreign corporations that meet this 250 return threshold and that have assets of $10 million or more generally must file their Form 1120–F electronically for taxable years ending on or after December 31, 2008.

The final regulations also generally require that tax exempt organizations with assets of $10 million or more that are required to file returns under section 6033 and that meet the 250 return threshold file their Form 990 electronically for taxable years ending on or after December 31, 2006. The final regulations further generally require certain tax exempt organizations, private foundations, or section 4947(a)(1) trusts (regardless of asset size) that are required to file returns under section 6033 and that meet the 250 return threshold to file their Form 990–PF electronically for taxable years ending on or after December 31, 2006.

Exclusions from the e-file Requirement

Final regulations sections 301.6011–5, 301.6033–4, and 301.6037–2 and IRS publications provide for exceptions and hardship waivers from the electronic filing requirement for corporations, organizations required to file returns under section 6033, and electing small business corporations. IRS Publication 4163, *Modernized e-File (MeF) Information for Authorized IRS e-file Providers for Business Returns*, and IRS Publication 4164, *Modernized e-File (MeF) Guide for Software Developers And Transmitters*, contain instructions for filing corporate and tax-exempt organization returns electronically, and exclude certain types of returns from the electronic filing requirement. For a complete and up to date list of the exclusions or for further information on electronic filing, refer to Publication 4163, Publication 4164, and the IRS.gov Internet site. The Service will post answers to Frequently Asked Questions on this site.

Timely Filing of Rejected e-filed Returns and Perfection Procedures

If the return required to be filed electronically is transmitted on or before the due date (including extensions) and is rejected, but the electronic return originator or the filer comply with the following requirements for timely submission of the return, the return will be considered timely filed and any elections attached to the return will be considered valid. For returns filed on or after January 1, 2010, the Service will allow the filer 10 calendar days from the date of first transmission to perfect the return for electronic resubmission.

If the electronic return cannot be accepted for processing electronically, the filer must file a paper return with the Service Center where it would normally be filed. In order for the paper return to be considered timely, it must be postmarked by the U.S. Postal Service (or a foreign postal service, or in the case of private delivery services designated by Notice 2004–83, 2004–2 C.B. 1030, have a postmark date as determined by Notice 97–26, 1997–1 C.B. 413), or delivered to the Service by the later of the due date of the return (including extensions), or 10 calendar days after the date the Service last gives notification to the filer that the return has been rejected, as long as:

(1) The first transmission was made on or before the due date of the return (including extensions) and

(2) The last transmission was made within 10 calendar days of the first transmission.

The paper return must be completed consistent with the instructions to file the return, including providing required information from the taxpayer and include the signature of the tax return preparer, if any. The PIN that was used on the electronically filed return that was rejected may not be used as the signature on the paper return. Corporations, partnerships, and tax-exempt organizations that are required to *e-file* must contact

the e-Help Desk ((866) 255–0654) for assistance in correcting rejected returns **before filing a paper return.** If the taxpayer cannot correct the rejected return errors, they must receive authorization from the e-Help Desk prior to filing a paper return. However, the taxpayer is not otherwise required to complete a waiver request as discussed below.

If the paper return is postmarked after its due date (including extensions), then the paper return should include an explanation of why the return is being filed after the due date and include a copy of the Service's final rejection notification. Similarly, if the paper return is being submitted by a corporation, partnership, or tax-exempt entity that is required to *e-file* the return, then the return should include an explanation of why the return is being filed in paper form and include a copy of the Service's final rejection notification. A paper return filed in accordance with the above procedures will be considered timely filed, any elections attached to the return will be considered valid, and no penalty will be imposed for failing to *e-file* the return.

The procedures set forth in the preceding paragraphs apply to submissions of paper returns only when the filer has unsuccessfully attempted to *e-file*. Filers who are required to *e-file* but desire to seek a waiver of that requirement under a claim of undue hardship must use the procedures discussed below in order to receive IRS approval of a waiver request.

Requests for Waiver of Electronic Filing Requirement Due to Undue Hardship

When certain filers required to file over 250 returns fail to file electronically as required, those filers may be liable for failure to file penalties under I.R.C. §§ 6651 or 6652, unless the filer can establish that the failure to file the return electronically was due to reasonable cause and not due to willful neglect. The final regulations permit the Service to waive the electronic filing requirement if the filer demonstrates that undue hardship would result if it were required to file its return electronically. The regulations require that filers seeking a waiver should request that waiver in the manner prescribed in applicable revenue procedures or publications.

The Service will approve or deny requests for a waiver of the electronic filing requirement based on each filer's particular facts and circumstances. In determining whether to approve or deny a waiver request, the Service will consider the filer's ability to timely file its return electronically without incurring an undue economic hardship. The Service will generally grant a waiver where the filer can demonstrate the undue hardship that would result by complying with the electronic filing requirement, including any incremental costs to the filer. Mindful of the software and technological issues in filing electronically, the Service also generally will grant a waiver where technology issues prevent the filer from filing its return electronically. Guidance on situations in which deviations or exclusions from the electronic filing requirement can be made without a waiver is available in IRS Publication 4163, IRS Publication 4164, and on the IRS.gov Internet site.

Elements of a Waiver Request Claiming Undue Hardship

To request a waiver, the filer must file a written request containing the following information:

(1) A notation at the top of the request stating, in large letters, the type of form followed by the words "*e-file* Waiver Request" (*e.g.*, "Form 1120 *e-file* Waiver Request" or "Form 990 *e-file* Waiver Request").

(2) The filer's name, federal tax identification number, mailing address, contact name, phone number and e-mail address.

(3) The type of form for which the waiver is requested.

(4) The taxable year for which the waiver is requested.

(5) The value of the filer's total assets at the end of the taxable year as reported (or to be reported) on the entity's return.

(6) A detailed statement which lists:

a) the steps the filer has taken in an attempt to meet its requirement to timely file its return electronically,

b) why the steps were unsuccessful,

c) the undue hardship that would result by complying with the electronic filing requirement, including any incremental costs to the filer of complying with the electronic filing requirement. Incremental costs are those costs that are above and beyond the costs to file on paper. The incremental costs must be supported by a detailed computation. The detailed computation must include a schedule detailing the costs to file on paper and the costs to file electronically.

(7) A statement as to what steps the filer will take to assure its ability to file future returns electronically.

(8) A statement (signed by an officer authorized to sign the return, as defined in section 6062 of the Code) with the following language:

Under penalties of perjury, I declare that the information contained in this waiver request is true, correct and complete to the best of my knowledge and belief.

Requests made by an authorized representative of the filer must include a valid power of attorney.

The waiver request should not be attached to the filer's paper tax return. Extension requests or payments should not be submitted with the waiver request.

Time for Filing a Waiver Request

Filers are encouraged to file electronic filing waiver requests for failure to file a return electronically as soon as possible after it is determined that the filer is unable to electronically file the return or amended return. This will give the Service time to process the waiver request.

Place for Filing a Waiver Request

Until the Service issues further guidance, filers should file a waiver request with the Ogden Submission Processing Center.

Use the following address if using the U.S. Postal Service:

Internal Revenue Service
Ogden Submission Processing Center
Attn: Forms 1120 and 990 *e-file*
Waiver Request, Stop 1057
Ogden, UT 84201

Use the following address if using an overnight delivery service:

Internal Revenue Service
Ogden Submission Processing Center
Attn: Forms 1120 and 990 *e-file* Waiver
Request, Stop 1057
1973 N. Rulon White Blvd.
Ogden, UT 84404

Filers may also fax the waiver request to the following number: (877) 477–0575.

Approval of the Waiver Request

The Service will review and process waiver requests in a timely manner and will send the filer written notice of any approval or rejection of the filer's waiver request. The Service will not be considered to have waived the e-filing requirement unless the filer receives written approval from the Service that the waiver request has been approved. In the absence of written approval, a failure to *e-file* may be subject to penalty unless such failure was due to reasonable cause and not willful neglect.

Effect on Other Documents

This notice supersedes Notice 2005–88, 2005–2 C.B. 1060.

Effective Date

This notice is effective for all returns, including amended and superseding returns, filed after December 31, 2009.

Contact Information

Software developers and vendors may contact the e-Help Desk at (866) 255–0654 with questions about corporate *e-file.* Further information is available on the *e-file* for Charities and Nonprofits webpage at the IRS.gov Internet site.

The principal author of this announcement is Michael Hara of the Office of Associate Chief Counsel (Procedure & Administration). For questions concerning a request for waiver, you may contact the e-Help Desk at (866) 255–0654. To have your call directed to the appropriate area, select the options for *e-file* questions, business returns, and the form type for which you are calling.

---

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also Part I, §§ 469, 1.469–4.)

Rev. Proc. 2010–13

SECTION 1. PURPOSE

This revenue procedure requires taxpayers to report to the Internal Revenue Service their groupings and regroupings of activities and the addition of specific activities within their existing groupings of activities for purposes of section 469 of the Internal Revenue Code and § 1.469–4 of the Income Tax Regulations.

On August 4, 2008, Notice 2008–64, 2008–31 I.R.B. 268, (the notice) was published in the Internal Revenue Bulletin. The notice proposed a disclosure regime for taxpayer groupings under section 469 and solicited comments both on whether the proposal sufficiently balanced the need for disclosure with taxpayer burden, and on alternative approaches. In response, the Service received several comments suggesting ways in which the proposal could be improved. This revenue procedure reflects some of the changes suggested by the comments received. Specifically, the regime proposed in the notice required taxpayers to make a disclosure whenever there is a disposition of an activity within a chosen grouping; this requirement has been removed. In addition, the notice did not contain a relief provision for taxpayers that, in a given year, fail to make the required disclosure. Section 4.07 of this revenue procedure contains a relief provision for taxpayers that can meet certain additional criteria to demonstrate their groupings of activities.

SECTION 2. BACKGROUND

.01 Section 469 generally provides that losses from and credits attributable to passive trade or business activities, to the extent they exceed, respectively, income from or the regular tax liability associated with all such passive activities, are disallowed for the taxable year and carried forward to the subsequent taxable year, subject to certain exceptions.

.02 Section 469(g)(1)(A) generally provides that if during the taxable year a taxpayer disposes of his entire interest in any passive activity (or former passive activity), and all gain or loss realized on such disposition is recognized, the excess of (i) any loss from such activity for such taxable year (determined after the application of section 469(b)), over (ii) any net income or gain for such taxable year from all other passive activities (determined after the application of section 469(b)), shall be treated as a loss which is not from a passive activity.

.03 Section 1.469–4 sets forth the rules for grouping a taxpayer's trade or business activities and rental activities for purposes of applying the passive activity loss and credit limitation rules of section 469.

.04 Section 1.469–4(c)(1) provides that one or more trade or business activities or rental activities may be treated as a single activity if the activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of section 469.

.05 Section 1.469–4(c)(2) provides guidelines for determining whether activities constitute an appropriate economic unit and, therefore, may be treated as a single activity. Section 1.469–4(d) describes limitations on grouping certain activities. Section 1.469–4(d)(5) provides that a C corporation subject to section 469, an S corporation, or a partnership (a section 469 entity) must group its activities under the rules of § 1.469–4. Once a section 469 entity groups its activities, a shareholder or partner may group those activities with each other, with the activities conducted directly by the shareholder or partner, and with activities conducted through other section 469 entities, in accordance with the rules of this section. The shareholder or partner may not treat activities grouped together by a section 469 entity as separate activities.

.06 Section 1.469–4(e)(1) provides that except as provided in § 1.469–4(e)(2) and § 1.469–11 (providing three periods of time, all of which are now closed, in which a taxpayer could have regrouped its activities without having to establish that the original grouping was clearly inappropriate under § 1.469–4(e)(2)), once a taxpayer has grouped activities under § 1.469–4, the taxpayer generally may not regroup those activities in subsequent taxable years. Taxpayers must comply with disclosure requirements that the Commissioner may prescribe with respect to both

their original groupings and the addition and disposition of specific activities within those existing groupings in subsequent taxable years.

.07 Section 1.469–4(e)(2) provides that if it is determined that a taxpayer's original grouping was clearly inappropriate or a material change in the facts and circumstances has occurred that makes the original grouping clearly inappropriate, the taxpayer must regroup the activities and must comply with the disclosure requirements that the Commissioner may prescribe.

.08 Section 1.469–4(f) provides that the Commissioner may regroup a taxpayer's activities if any of the activities resulting from the taxpayer's grouping is not an appropriate economic unit and a principal purpose of the taxpayer's grouping (or failure to regroup under paragraph (e) of § 1.469–4) is to circumvent the underlying purposes of section 469.

SECTION 3. SCOPE

This revenue procedure applies to all taxpayers to which the rules in § 1.469–4 apply. Special rules apply for groupings by partnerships and S corporations and are described in section 4.05 of this revenue procedure. This revenue procedure does not apply to the rental real estate activities (as defined in § 1.469–9(b)(3)) of a taxpayer in a year in which the taxpayer is a qualifying taxpayer (as defined in § 1.469–9(b)(6)) if it has made the election provided for in § 1.469–9(g).

SECTION 4. APPLICATION

.01 *Disclosure Requirements for Taxpayer Groupings.*

Sections 4.02 through 4.04 of this revenue procedure require taxpayers to report to the Service, as part of their annual income tax return, certain changes to the taxpayer's groupings that occur during the taxable year. Section 4.05 of this revenue procedure provides special rules for groupings by partnerships and S corporations. Section 4.06 of this revenue procedure governs the treatment of groupings existing prior to the effective date of this revenue procedure. Section 4.07 of this revenue procedure stipulates the consequences for failing to make the disclosures required by sections 4.02 through 4.04.

.02 *Statement Required for New Groupings.*

A taxpayer shall file a written statement with its original income tax return for the first taxable year in which two or more trade or business activities or rental activities are originally grouped as a single activity. This statement must identify the names, addresses, and employer identification numbers, if applicable, for the trade or business activities or rental activities that are being grouped as a single activity. In addition, any statement reporting a new grouping of two or more trade or business activities or rental activities as a single activity must contain a declaration that the grouped activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of section 469.

.03 *Statement Required for Addition of New Activities to Existing Groupings.*

If a taxpayer adds a new trade or business activity or a rental activity to an existing grouping for a taxable year, the taxpayer shall file a written statement with the taxpayer's original income tax return for that taxable year. This statement must identify the names, addresses, and employer identification numbers, if applicable, for the new trade or business activity or rental activity that is being added to the existing grouping, as well as the names, addresses, and employer identification numbers, if applicable, for the activity or activities within the existing grouping. In addition, the statement reporting an addition to an existing grouping must contain a declaration that the activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of section 469.

.04 *Statement Required for Regroupings.*

Under § 1.469–4(e)(2), if it is determined that the taxpayer's original grouping was clearly inappropriate or a material change in the facts and circumstances has occurred that makes the original grouping clearly inappropriate, the taxpayer must regroup the activities. If such a determination and regrouping is made, the taxpayer shall file a written statement with the taxpayer's original income tax return for the taxable year in which the trade or business activities or rental activities are regrouped. This statement must identify the names, addresses, and employer identification numbers, if applicable, for the trade or business or rental activities that are being regrouped. If two or more activities are regrouped into a single activity, the statement reporting a regrouping must also contain a declaration that the regrouped activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of section 469. Furthermore, the statement reporting a regrouping must contain an explanation of why the taxpayer's original grouping was determined to be clearly inappropriate or the nature of the material change in the facts and circumstances that makes the original grouping clearly inappropriate.

.05 *Special Rules for Groupings by Partnerships and S Corporations.*

Under § 1.469–4(d)(5), a section 469 entity must group its activities under the rules of that section. However, partnerships and S corporations are not subject to the requirements of §§ 4.02, 4.03, and 4.04 of this revenue procedure. Instead, partnerships and S corporations must comply with the disclosure instructions for grouping activities provided for on Form 1065, *U.S. Return of Partnership Income* and Form 1120S, *U.S. Income Tax Return for an S Corporation*, respectively. Generally, compliance with the applicable form requires disclosing the entity's groupings to the partner or shareholder by separately stating the amounts of income and loss for each grouping conducted by the entity on attachments to the entity's annual Schedule K–1. The partner or shareholder is not required to make a separate disclosure of the groupings disclosed by the entity under §§ 4.02, 4.03, and 4.04 of this revenue procedure unless the partner or shareholder (1) groups together any of the activities that the entity does not group together, (2) groups the entity's activities with activities conducted directly by the partner or shareholder, or (3) groups the entity's activities with activities conducted through other section 469 entities. Pursuant to § 1.469–4(d)(5)(i), a shareholder or partner may not treat activities grouped together by a section 469 entity as separate activities.

.06 *Reporting of Pre-Existing Groupings Required only upon Change.*

A taxpayer is not required to file a written statement reporting the grouping of the trade or business activities and rental activities that have been made prior to the effec-

tive date of this revenue procedure (pre-existing groupings) until the taxpayer makes a change to the grouping as described in sections 4.03 and 4.04 of this revenue procedure.

.07 *Effect of Failure to Report*.

Except as provided in § 4.05, if a taxpayer is engaged in two or more trade or business activities or rental activities and fails to report whether the activities have been grouped as a single activity in accordance with this revenue procedure, then each trade or business activity or rental activity will be treated as a separate activity for purposes of applying the passive activity loss and credit limitation rules of section 469. Notwithstanding the previous sentence, a timely disclosure shall be deemed made by a taxpayer who has filed all affected income tax returns consistent with the claimed grouping of activities and makes the required disclosure on the income tax return for the year in which the failure to disclose is first discovered by the taxpayer. If the failure to disclose is first discovered by the Service, however, the taxpayer must also have reasonable cause for not making the disclosures required by this revenue procedure. Although the default rule established by this section 4.07 will generally result in unreported activities being treated as separate activities, the Commissioner may still regroup a taxpayer's activities to prevent tax avoidance pursuant to § 1.469–4(f). This revenue procedure provides alternative relief for untimely filing of the disclosures required by this revenue procedure; therefore, relief for untimely disclosures under § 301.9100 of the Procedure and Administration Regulations is not available pursuant to § 301.9100–1(d)(2).

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective for taxable years beginning on or after January 25, 2010.

SECTION 6. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–2156.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this revenue procedure are in section 4. This information is required to be submitted in order to disclose a taxpayer's grouping of activities. This information will be used to measure gain or loss for purposes of section 469. The collection of information is required to assist in compliance with tax obligations. The likely respondents are individuals and section 469 entities, including certain C corporations, S corporations, and partnerships.

The estimated total annual reporting burden for the taxable years in which this revenue procedure applies is 36,000 hours.

The estimated annual burden per respondent for the taxable years in which this revenue procedure applies varies from 10 minutes to 20 minutes, depending on individual circumstances, with an estimated average burden of 15 minutes. The estimated annual number of respondents for the taxable years in which this revenue procedure applies is 144,000.

The estimated annual frequency of responses is regular.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

DRAFTING INFORMATION

The principal authors of this revenue procedure are Bryan A. Rimmke and Jonathan E. Cornwell of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Mr. Rimmke or Mr. Cornwell at (202) 622–3050 (not a toll-free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

Amendments to the Section 7216 Regulations—Disclosure or Use of Information by Preparers of Returns

REG–131028–09

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9478) that provide updated guidance affecting tax return preparers regarding the use of information related to lists for solicitation of tax return business; the disclosure or use of statistical compilations of data under section 7216 of the Internal Revenue Code (Code) by a tax return preparer in connection with, or in support of, a tax return preparer's tax return preparation business, including identification of additional limited circumstances when a tax return preparer who compiles statistical information may disclose the compilation without taxpayer consent, and the placement of additional restrictions on the content of the compilation that may be disclosed under those circumstances without taxpayer consent; and the disclosure or use of information for the purpose of performing conflict reviews. The text of those temporary regulations also serves as the text of these proposed regulations. This document invites comments from the public on these regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by March 5, 2010.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–131028–09), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–131028–09), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C., or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–131028–09).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Molly K. Donnelly, (202) 622–4940; concerning the submissions of comments and requests for hearing, Richard Hurst, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains proposed amendments to 26 CFR part 301 under section 7216 to provide modified rules relating to the ability of a tax return preparer to use tax return information, without taxpayer consent, for the purposes of compiling, maintaining, and using lists for solicitation of tax return business under §301.7216–2(n); disclose and use statistical compilations of data described in §301.7216–1(b)(3)(i)(B) under §301.7216–2(o), and disclose and use tax return information for the purpose of performing conflict reviews under §301.7216–2(p). Temporary regulations in the Procedure and Administration section of this issue of the Bulletin amend 26 CFR part 301. The text of those regulations also serves as the text of these regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed rules, how they can be made easier to understand, and the administrability of the rules in the proposed regulations. All comments will be made available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Molly K. Donnelly, Office of the Associate Chief Counsel (Procedure and Administration).

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.7216–2 is amended by revising paragraphs (n), (o), and (p) to read as follows:

§301.7216–2 Permissible disclosures or uses without consent of the taxpayer.

* * * * *

(n) [The text of proposed amendments to §301.7216–2(n) is the same as the text for §301.7216–2T(n) published elsewhere in this issue of the Bulletin].

(o) [The text of proposed amendments to §301.7216–2(o) is the same as the text for §301.7216–2T(o) published elsewhere in this issue of the Bulletin].

(p) [The text of proposed amendments to §301.7216–2(p) is the same as the text for §301.7216–2T(p) published elsewhere in this issue of the Bulletin].

* * * * *

Steven T. Miller,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on December 29, 2009, 4:15 p.m., and published in the issue of the Federal Register for January 4, 2010, 75 F.R. 94)

Deletions From Cumulative List of Organizations Contributions to Which are Deductible Under Section 170 of the Code

Announcement 2010–1

The Internal Revenue Service has revoked its determination that the organizations listed below qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1986.

Generally, the Service will not disallow deductions for contributions made to a listed organization on or before the date of announcement in the Internal Revenue Bulletin that an organization no longer qualifies. However, the Service is not precluded from disallowing a deduction for any contributions made after an organization ceases to qualify under section 170(c)(2) if the organization has not timely filed a suit for declaratory judgment under section 7428 and if the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for or was aware of the activities or omissions of the organization that brought about this revocation.

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organizations described in section 170(c)(2) that are otherwise allowable will continue to be deductible. Protection under section 7428(c) would begin on January 25, 2010, and would end on the date the court first determines that the organization is not described in section 170(c)(2) as more particularly set forth in section 7428(c)(1). For individual contributors, the maximum deduction protected is $1,000, with a husband and wife treated as one contributor. This benefit is not extended to any individual, in whole or in part, for the acts or omissions of the organization that were the basis for revocation.

Call of the Wild Sportsmen, Inc
Mt Airy, MD

Automatic Approval of Changes in Funding Method for Takeover Plans and Changes in Pension Valuation Software

Announcement 2010–3

This announcement provides, for plan years beginning on or after January 1, 2009, automatic approval for certain changes in funding method with respect to single-employer defined benefit plans that result either from a change in the valuation software used to determine the liabilities for such plans or from a change in the enrolled actuary and the business organization providing actuarial services to the plan. This guidance is being provided in response to numerous requests from actuaries and plan sponsors, many of whom are continuing to modify their valuation software in order to implement the changes to the funding rules made by the Pension Protection Act of 2006 (PPA '06), the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA '08), and guidance regarding these legislative changes.

Background

A change in funding method can occur when the business organization providing actuarial services to a plan modifies its valuation software. A change in funding method can also occur when the enrolled actuary and business organization providing actuarial services for a plan is changed and the new enrolled actuary uses different valuation software than the prior enrolled actuary, or otherwise applies the overall funding method in a different manner (plans for which both the enrolled actuary and the business organization providing actuarial services are changed are referred to as "takeover plans").

Under § 412(c)(5) of the Code (and its counterpart in section 302(c)(5) of ERISA) as in effect prior to PPA '06, any change of funding method required the approval of the Secretary. Revenue Procedure 2000–40, 2000–2 C.B. 357, provided automatic approval for certain changes in funding method resulting from changes in valuation software (section 4.04) and for changes in funding method that occurred with respect to takeover plans (section 4.03). With respect to changes in funding method resulting from changes in valuation software, Revenue Procedure 2000–40 provided approval for the changes if: (1) net charges to the funding standard account determined using the new valuation software did not differ by more than 2% from the net charges determined using the old valuation software (the "pre-PPA 2% test"); (2) the modification to the computations in the valuation software or the use of a different valuation software system were designed to produce results that were no less accurate than the results produced prior to the modification or change; and (3) the approval for takeover plans described in the next paragraph was not applicable.

With respect to takeover plans, Revenue Procedure 2000–40 provided approval for changes in funding method if: (1) there was both a change in the enrolled actuary for the plan and a change in the business organization providing actuarial services to the plan; and (2) the method used by the new actuary was applied to the prior plan year and that the absolute value of each resulting difference in normal cost, accrued liability (if directly computed under the method), and actuarial value of

assets, that was attributable to the change in method did not exceed 5% of the respective amounts calculated by the prior actuary for that prior year (the "pre-PPA 5% test").

PPA '06 Funding Rules

Section 412 of the Code and section 302 of ERISA, as amended by PPA '06, retain the requirement that a change in funding method be approved by the Secretary. Under PPA '06, a single funding method must be used for any single-employer defined benefit plan, but there may be some variation in the manner the method is applied. Final regulations were issued under § 430 on October 15, 2009, T.D. 9467, 2009–50 I.R.B. 760, 74 FR 53004, (the "October 2009 regulations") and are generally effective for plan years beginning on or after January 1, 2010. Under § 1.430(d)–1(f)(1)(iv) of the October 2009 regulations, a plan's funding method includes not only the overall funding method used by the plan, but also each specific method of computation used in applying the overall method. Accordingly, a change in valuation software can result in a change in funding method that requires the approval of the Secretary.

The October 2009 regulations provide approval for a number of changes in funding method and for changes in the interest rate. For the first plan year beginning on or after January 1, 2008, any changes in funding method that are not inconsistent with the requirements of § 430 are treated as having been approved by the Commissioner and do not require specific prior approval. For plan years beginning in 2009 and 2010, certain changes in funding method (concerning the methodology of allocating liabilities to years, the selection of the valuation date, and the selection of the asset valuation method) and in the selection of interest rates are also approved. Section 1.430(d)–1(g)(3) provides general approval for a change in funding method (which would include a change in funding method resulting from a change in valuation software) for the first plan year beginning on or after January 1, 2010. However, if certain sections of the regulations were applied to a plan for a plan year beginning on or after January 1, 2009, but before January 1, 2010, approval is provided with respect to such a plan for a change in funding method (including a change in funding method resulting from a change in valuation software) for that plan year, in lieu of the general approval for changes for the first plan year beginning on or after January 1, 2010.

Even though approval was provided for certain changes for the 2009 and 2010 plan years, actuaries and plan sponsors have expressed concern that changes in valuation software may encompass changes in funding method for which the October 2009 regulations do not provide automatic approval. Furthermore, forthcoming regulations under § 430 may result in additional changes in valuation software.

Revenue Procedure 2000–40 has not been updated to reflect the changes made by PPA '06. Moreover, the calculations that were used for the pre-PPA 2% test and the pre-PPA 5% test are not used under § 430 of the Code and section 303 of ERISA.

Automatic Approval for Takeover Plans and Valuation Software Changes

For plan years beginning on or after January 1, 2009, automatic approval is provided for any change in funding method under § 430 if the following conditions are satisfied:

(1) There has been a change both in the enrolled actuary for the plan and in the business organization providing actuarial services to the plan;

(2) The new method is substantially the same as the method used by the prior enrolled actuary and is consistent with the description of the method contained in the prior actuarial valuation report or prior Schedule SB of Form 5500;

(3) The funding target and target normal cost (without regard to any adjustments for employee contributions and plan-related expenses), as determined for the prior plan year by the new enrolled actuary (using the actuarial assumptions of the prior enrolled actuary), are both within 5% of those values as determined by the prior enrolled actuary; and

(4) For plan years beginning on or after January 1, 2011, the actuarial value of plan assets, as determined for the prior plan year by the new enrolled actuary (using the actuarial assumptions of the prior enrolled actuary), is within 5% of the value as determined by the prior enrolled actuary.

Conditions (2), (3), and (4) are each applied by disregarding any change in funding method for which approval has been automatically provided (without regard to this announcement) for the current plan year. For example, automatic approval is provided under § 1.430(d)–1(g)(3)(ii)(C) for changes in the allocation of liabilities that are necessary to apply the rules of § 1.430(d)–1(c)(1)(iii) for a plan year beginning before January 1, 2010. Thus, if such a change in funding method is made for a takeover plan for the 2009 plan year, the 5% test of condition (3) with respect to the prior plan year (2008) is determined using the allocation of liabilities used by the prior enrolled actuary.

For plan years beginning on or after January 1, 2009, automatic approval is provided for any change in funding method under § 430 resulting from a change in valuation software if the following conditions are satisfied:

(1) There has not been both a change in the enrolled actuary for the plan and a change in the business organization providing actuarial services to the plan;

(2) Except to the extent automatic approval has been provided for a change in funding method without regard to this announcement, the underlying method is unchanged and is consistent with the information contained in the prior actuarial valuation report and prior Schedule SB of Form 5500;

(3) The new valuation software is generally used by the enrolled actuary for the single-employer plans to which the enrolled actuary provides actuarial services;

(4) The funding target and target normal cost (without regard to any adjustments for employee contributions and plan-related expenses) under the new valuation software (for either the current plan year or the prior plan year) are each within 2% of the respective values under the prior valuation software (all other factors being held constant);

(5) For plan years beginning on or after January 1, 2011, the actuarial value of assets for the plan under the new valuation software (for either the current plan year or the prior plan year) is within 2% of the value under the prior valuation software (all other factors being held constant); and

(6) The modifications to the computations in the valuation software or the use of a different valuation software system are

designed to produce results that are no less accurate than the results produced prior to the modifications or change.

The automatic approval provided by this announcement will apply until it is superseded by future guidance.

The principal authors of this announcement are James E. Holland, Jr. and Carolyn E. Zimmerman of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this announcement, please email *RetirementPlanQuestions@irs.gov*.

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D. —Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z —Corporation.

Numerical Finding List[1]

Bulletins 2010–1 through 2010–4

Announcements:

Notices:

Proposed Regulations:

Revenue Procedures:

Revenue Rulings:

Treasury Decisions:

[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2009–27 through 2009–52 is in Internal Revenue Bulletin 2009–52, dated December 28, 2009.

Finding List of Current Actions on Previously Published Items[1]

Bulletins 2010–1 through 2010–4

Notices:

2005-88
Superseded by
Notice 2010-13, 2010-4 I.R.B. *327*

2008-41
Modified by
Notice 2010-7, 2010-3 I.R.B. *296*

2008-55
Modified by
Notice 2010-3, 2010-2 I.R.B. *253*

2008-88
Modified by
Notice 2010-7, 2010-3 I.R.B. *296*

2008-113
Modified by
Notice 2010-6, 2010-3 I.R.B. *275*

2008-115
Modified by
Notice 2010-6, 2010-3 I.R.B. *275*

2009-11
Amplified by
Notice 2010-9, 2010-3 I.R.B. *298*

2009-13
Obsoleted by
T.D. 9478, 2010-4 I.R.B. *315*
REG-131028-09, 2010-4 I.R.B. *332*

2009-38
Amplified and superseded by
Notice 2010-2, 2010-2 I.R.B. *251*

Revenue Procedures:

80-59
Modified and superseded by
Rev. Proc. 2010-11, 2010-2 I.R.B. *269*

87-35
Obsoleted by
Rev. Proc. 2010-3, 2010-1 I.R.B. *110*

2009-1
Superseded by
Rev. Proc. 2010-1, 2010-1 I.R.B. *1*

2009-2
Superseded by
Rev. Proc. 2010-2, 2010-1 I.R.B. *90*

2009-3
Superseded by
Rev. Proc. 2010-3, 2010-1 I.R.B. *110*

Revenue Procedures— Continued:

2009-4
Superseded by
Rev. Proc. 2010-4, 2010-1 I.R.B. *122*

2009-5
Superseded by
Rev. Proc. 2010-5, 2010-1 I.R.B. *165*

2009-6
Superseded by
Rev. Proc. 2010-6, 2010-1 I.R.B. *193*

2009-7
Superseded by
Rev. Proc. 2010-7, 2010-1 I.R.B. *231*

2009-8
Superseded by
Rev. Proc. 2010-8, 2010-1 I.R.B. *234*

2009-9
Superseded by
Rev. Proc. 2010-9, 2010-2 I.R.B. *258*

2009-15
Amplified and superseded by
Rev. Proc. 2010-12, 2010-3 I.R.B. *302*

2009-25
Superseded by
Rev. Proc. 2010-3, 2010-1 I.R.B. *110*

Revenue Rulings:

2008-52
Supplemented and superseded by
Rev. Rul. 2010-2, 2010-3 I.R.B. *272*

[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2009–27 through 2009–52 is in Internal Revenue Bulletin 2009–52, dated December 28, 2009.

INDEX

Internal Revenue Bulletins 2010–1 through 2010–4

The abbreviation and number in parenthesis following the index entry refer to the specific item; numbers in roman and italic type following the parenthesis refers to the Internal Revenue Bulletin in which the item may be found and the page number on which it appears.

Key to Abbreviations:

Ann	Announcement
CD	Court Decision
DO	Delegation Order
EO	Executive Order
PL	Public Law
PTE	Prohibited Transaction Exemption
RP	Revenue Procedure
RR	Revenue Ruling
SPR	Statement of Procedural Rules
TC	Tax Convention
TD	Treasury Decision
TDO	Treasury Department Order

EMPLOYEE PLANS

EMPLOYMENT TAX

ESTATE TAX

EXCISE TAX

EXEMPT ORGANIZATIONS

GIFT TAX

INCOME TAX

INCOME TAX—Cont.

SELF-EMPLOYMENT TAX

U.S. GOVERNMENT PRINTING OFFICE
KEEPING AMERICA INFORMED

Order Processing Code: 3465

Easy Secure Internet: bookstore.gpo.gov

Internal Revenue Cumulative Bulletins Publications and Subscription Order Form

Toll Free: 866 512-1800
DC Area: 202 512-2800
Fax: 202 512-2250

Mail: Superintendent of Documents
P.O. Box 371954
Pittsburgh, PA 15250-7954

Publications

Qty.	Stock Number	Title	Price Each	Total Price
	048–004–02467–5	Cum. Bulletin 1999–3	20.40	
	048–004–02462–4	Cum. Bulletin 2001–2 (Jul-Dec)	24.00	
	048–004–02480–2	Cum. Bulletin 2001–3	71.00	
	048–004–02470–5	Cum. Bulletin 2002–2 (Jul-Dec)	28.80	
	048–004–02486–1	Cum. Bulletin 2002–3	54.00	
	048–004–02483–7	Cum. Bulletin 2004–2 (July–Dec)	54.00	
	048–004–02488–8	Cum. Bulletin 2005–2	56.00	
			Total for Publications	

Subscriptions

Qty.	List ID	Title	Price Each	Total Price
	IRS	Internal Revenue Bulletin	$247	
		Optional – Add $50 to open Deposit Account		
			Total for Subscriptions	
			Total for Publications and Subscriptions	

NOTE: Price includes regular shipping and handling and is subject to change. International customers please add 40 percent.

Standing Order Service*

To automatically receive future editions of *Internal Revenue Cumulative Bulletins* without having to initiate a new purchase order, sign below for Standing Order Service.

Qty.	Standing Order	Title
	ZIRSC	Internal Revenue Cumulative Bulletins

Authorization

I hereby authorize the Superintendent of Documents to charge my account for Standing Order Service:
(enter account information at right)

❑ VISA ❑ MasterCard ❑ Discover/NOVUS ❑ American Express

❑ Superintendent of Documents (SOD) Deposit Account

Authorizing signature (Standing orders not valid unless signed.)

_____

Please print or type your name.

Daytime phone number (_____) _____

SuDocs Deposit Account

A Deposit Account will enable you to use Standing Order Service to receive subsequent volumes quickly and automatically. For an initial deposit of $50 you can establish your Superintendent of Documents Deposit Account.

❑ **YES!** Open a SOD Deposit Account for me so I can order future publications quickly and easily.
I am enclosing the $50 initial deposit.

Check method of payment:

❑ Check payable to Superintendent of Documents

❑ SOD Deposit Account ☐☐☐☐☐☐☐ – ☐

❑ VISA ❑ MasterCard ❑ Discover/Novus ❑ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your Order!

Authorizing signature 06/06

Company or personal name (Please type or print)

Additional address/attention line

Street address

City, State, Zip Code

E-mail address

Daytime phone including area code

Purchase order number (optional)

*Standing Order Service

Just sign the authorization above to charge selected items to your existing Deposit Account, VISA or MasterCard, Discover/NOVUS, or American Express account. Or open a Deposit Account with an initial deposit of $50 or more. Your account will be charged only as each volume is issued and mailed. Sufficient money must be kept in your account to insure that items are shipped. Service begins with the next issue released of each item you select.

You will receive written acknowledgement for each item you choose to receive by Standing Order Service.

If you wish to cancel your Standing Order Service, please notify the Superintendent of Documents in writing (telephone cancellations are accepted, but must be followed up with a written cancellation within 10 days).

Important: Please include this completed order form with your payment.

INTERNAL REVENUE BULLETIN

The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletin is sold on a yearly subscription basis by the Superintendent of Documents. Current subscribers are notified by the Superintendent of Documents when their subscriptions must be renewed.

CUMULATIVE BULLETINS

The contents of this weekly Bulletin are consolidated semiannually into a permanent, indexed, Cumulative Bulletin. These are sold on a single copy basis and *are not* included as part of the subscription to the Internal Revenue Bulletin. Subscribers to the weekly Bulletin are notified when copies of the Cumulative Bulletin are available. Certain issues of Cumulative Bulletins are out of print and are not available. Persons desiring available Cumulative Bulletins, which are listed on the reverse, may purchase them from the Superintendent of Documents.

ACCESS THE INTERNAL REVENUE BULLETIN ON THE INTERNET

You may view the Internal Revenue Bulletin on the Internet at www.irs.gov. Select Businesses. Under Businesses Topics, select More Topics. Then select Internal Revenue Bulletins.

INTERNAL REVENUE BULLETINS ON CD-ROM

Internal Revenue Bulletins are available annually as part of Publication 1796 (Tax Products CD-ROM). The CD-ROM can be purchased from National Technical Information Service (NTIS) on the Internet at www.irs.gov/cdorders (discount for online orders) or by calling 1-877-233-6767. The first release is available in mid-December and the final release is available in late January.

HOW TO ORDER

Check the publications and/or subscription(s) desired on the reverse, complete the order blank, enclose the proper remittance, detach entire page, and mail to the Superintendent of Documents, P.O. Box 371954, Pittsburgh PA, 15250–7954. Please allow two to six weeks, plus mailing time, for delivery.

WE WELCOME COMMENTS ABOUT THE INTERNAL REVENUE BULLETIN

If you have comments concerning the format or production of the Internal Revenue Bulletin or suggestions for improving it, we would be pleased to hear from you. You can email us your suggestions or comments through the IRS Internet Home Page (www.irs.gov) or write to the IRS Bulletin Unit, SE:W:CAR:MP:T:T:SP, Washington, DC 20224.

Internal Revenue Service
Washington, DC 20224

Official Business
Penalty for Private Use, $300