Internal Revenue
bulletin

Bulletin No. 2012-4
January 23, 2012

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

T.D. 9560, page 299.

Final regulations under section 45D of the Code relate to how an entity serving certain targeted populations can meet the requirements to be a qualified active low-income community business for the new markets tax credit.

REG–102988–11, page 326.

Proposed regulations under section 6045 of the Code modify information reporting requirements for a broker, transfer reporting requirements under section 6045A, and issuer statement requirements under section 6045B to cover debt instruments and options. A public hearing is scheduled for March 16, 2012.

Notice 2012–7, page 308.

This notice provides for the suspension of certain requirements under section 42 of the Code for low-income housing credit projects in Iowa in order to provide emergency housing relief needed as a result of the devastation in Iowa caused by flooding during the period of May 25, 2011, to August 1, 2011.

Notice 2012–8, page 309.

This notice provides a proposed revenue procedure that will update Rev. Proc. 2003–61, 2003–2 C.B. 296, which provides guidance regarding equitable relief from joint and several liability under section 6015(f) of the Code. Rev. Proc. 2003–61 superseded.

EMPLOYEE PLANS

Announcement 2012–3, page 335.

This announcement extends to April 2, 2012, the deadline to submit on-cycle applications for opinion and advisory letters for pre-approved defined contribution plans for the plans' second six-year remedial amendment cycle. Under Rev. Proc. 2007–44, 2007–2 C.B. 54, and Rev. Proc. 2011–49, 2011–44 I.R.B. 608, the submission period for these applications was scheduled to expire on January 31, 2012. Rev. Procs. 2007–44 and 2011–49 modified.

EMPLOYMENT TAX

Notice 2012–9, page 315.

This notice restates and amends the interim guidance on informational reporting to employees of the cost of their employer-sponsored group health plan coverage initially provided in Notice 2011–28, 2011–16 I.R.B. 656. This informational reporting is required under section 6051(a)(14) of the Code, enacted as part of the Patient Protection and Affordable Care Act of 2010 (the Affordable Care Act), Public Law, 111–148, to provide useful and comparable consumer information to employees on the cost of their health care coverage. Notice 2011–28 superseded.

ADMINISTRATIVE

Notice 2012–8, page 309.

This notice provides a proposed revenue procedure that will update Rev. Proc. 2003–61, 2003–2 C.B. 296, which provides guidance regarding equitable relief from joint and several liability under section 6015(f) of the Code. Rev. Proc. 2003–61 superseded.

Announcement 2012–4, page 335.

This document contains corrections to final regulations (T.D. 9517, 2011–15 I.R.B. 610) relating to the enrollment of actuaries.

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the 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 45D.—New Markets Tax Credit

26 CFR 1.45D–1: New markets tax credit.

T.D. 9560

DEPARTMENT OF TREASURY Internal Revenue Service 26 CFR Part 1

Targeted Populations Under Section 45D(e)(2)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations.

SUMMARY: This document contains final regulations relating to how an entity serving certain targeted populations can meet the requirements to be a qualified active low-income community business for the new markets tax credit. The regulations reflect changes to the law made by the American Jobs Creation Act of 2004. The regulations will affect certain taxpayers claiming the new markets tax credit.

DATES: *Effective Date:* These regulations are effective on December 5, 2011.

Applicability Dates: For dates of applicability, see §1.45D–1(h)(3).

FOR FURTHER INFORMATION CONTACT: Julie Hanlon Bolton, (202) 622–3040 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends 26 CFR part 1 to provide rules relating to certain targeted populations under section 45D(e)(2). On May 24, 2005, the Community Development Financial Institutions Fund published an advance notice of proposed rulemaking (ANPRM) (70 FR 29658) to seek comments from the public with respect to how targeted populations may be treated as eligible low-income communities under section 45D(e)(2). In response to the ANPRM, the IRS received various suggestions relating to the definition of the term *targeted populations* and proposing amendments to the requirements to be a qualified active low-income community business under §1.45D–1. On June 30, 2006, the IRS and Treasury Department released Notice 2006–60, 2006–2 C.B. 82, which announced that §1.45D–1 would be amended to provide rules relating to how an entity meets the requirements to be a qualified active low-income community business when its activities involve certain targeted populations under section 45D(e)(2). On September 24, 2008, a notice of proposed rulemaking (NPRM) (REG–142339–05, 2008–2 C.B. 1116) was published in the **Federal Register** (73 FR 54990). Written and electronic comments responding to the proposed regulations were received and a public hearing was held on January 22, 2009. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision.

General Overview

Section 45D(a)(1) provides a new markets tax credit on certain credit allowance dates described in section 45D(a)(3) with respect to a qualified equity investment in a qualified community development entity (CDE) described in section 45D(c).

Section 45D(b)(1) provides that an equity investment in a CDE is a *qualified equity investment* if, among other requirements: (A) the investment is acquired by the taxpayer at its original issue (directly or through an underwriter) solely in exchange for cash; (B) substantially all of the cash is used by the CDE to make qualified low-income community investments; and (C) the investment is designated for purposes of section 45D by the CDE.

Under section 45D(b)(2), the maximum amount of equity investments issued by a CDE that may be designated by the CDE as qualified equity investments shall not exceed the portion of the new markets tax credit limitation set forth in section 45D(f)(1) that is allocated to the CDE by the Secretary under section 45D(f)(2).

Section 45D(c)(1) provides that an entity is a CDE if, among other requirements, the entity is certified by the Secretary as a CDE.

Section 45D(d)(1) provides that the term *qualified low-income community investment* means: (A) any capital or equity investment in, or loan to, any qualified active low-income community business (as defined in section 45D(d)(2)); (B) the purchase from another CDE of any loan made by the entity that is a qualified low-income community investment; (C) financial counseling and other services specified in regulations prescribed by the Secretary to businesses located in, and residents of, low-income communities; and (D) any equity investment in, or loan to, any CDE.

Under section 45D(d)(2)(A), a qualified active low-income community business is any corporation (including a nonprofit corporation) or partnership if for such year, among other requirements, (i) at least 50 percent of the total gross income of the entity is derived from the active conduct of a qualified business within any low-income community, (ii) a substantial portion of the use of the tangible property of the entity (whether owned or leased) is within any low-income community, and (iii) a substantial portion of the services performed for the entity by its employees are performed in any low-income community.

Under section 45D(d)(3), with certain exceptions, a qualified business is any trade or business. The rental to others of real property is a qualified business only if, among other requirements, the real property is located in a low-income community.

Section 221(a) of the American Jobs Creation Act of 2004 (Act) (Public Law 108–357, 118 Stat. 1418) amended section 45D(e)(2) to provide that the Secretary shall prescribe regulations under which one or more targeted populations (within the meaning of section 103(20) of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4702(20))) may be treated as low-income communities. The regulations shall include procedures for determining which entities are qualified active low-income community businesses with respect

to those populations. Section 221(c)(1) of the Act provides that the amendment made by section 221(a) of the Act shall apply to designations made by the Secretary of the Treasury after October 22, 2004, the date of enactment of the Act.

The term *targeted population*, as defined in 12 U.S.C. 4702(20) and 12 CFR 1805.201, means individuals, or an identifiable group of individuals, including an Indian tribe, who (A) are low-income persons; or (B) otherwise lack adequate access to loans or equity investments. Under 12 U.S.C. 4702(17) as interpreted by 12 CFR 1805.104, the term *low-income* means having an income, adjusted for family size, of not more than (A) for metropolitan areas, 80 percent of the area median family income; and (B) for non-metropolitan areas, the greater of (i) 80 percent of the area median family income; or (ii) 80 percent of the statewide nonmetropolitan area median family income.

Section 101(a) of the Gulf Opportunity Zone Act of 2005 (Public Law 109–135, 119 Stat. 2577) added new sections 1400M and 1400N to the Code. Section 1400M(1) provides that the Gulf Opportunity Zone (GO Zone) is that portion of the Hurricane Katrina disaster area determined by the President to warrant individual or individual and public assistance from the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Act) by reason of Hurricane Katrina.

Section 1400M(2) provides that the Hurricane Katrina disaster area is an area with respect to which a major disaster has been declared by the President before September 14, 2005, under section 401 of the Act by reason of Hurricane Katrina. After determination by the President that a disaster area warrants assistance pursuant to the Act, the Federal Emergency Management Agency (FEMA) makes damage assessments. The categories for damage assessment in the wake of a hurricane are: flooded area, saturated area, limited damage, moderate damage, extensive damage, and catastrophic damage.

Under section 1400N(m)(1), a CDE shall be eligible for an allocation under section 45D(f)(2) of the increase in the new markets tax credit limitation described in section 1400N(m)(2) only if a significant mission of the CDE is the recovery and redevelopment of the GO Zone. Section 1400N(m)(2) provides that the new markets tax credit limitation otherwise determined under section 45D(f)(1) shall be increased by an amount equal to $300,000,000 for 2005 and 2006 and $400,000,000 for 2007, to be allocated among CDEs to make qualified low-income community investments within the GO Zone.

Under section 45D(b)(1), a qualified equity investment does not include any equity investment issued by a CDE more than 5 years after the date the entity receives an allocation under section 45D(f). Under section 45D(f)(3), if the new markets tax credit limitation for any calendar year exceeds the aggregate amount allocated under section 45D(f)(2) for the year, then the limitation for the succeeding calendar year is increased by the amount of the excess. However, no amount may be carried to any calendar year after 2016.

Summary of Comments and Explanation of Provisions

Ownership Requirement and Non-Profit Businesses

Generally, the proposed regulations provide that an entity will not be treated as a qualified active low-income community business for low-income targeted populations unless (*i*) at least 50 percent of the entity's total gross income for any taxable year is derived from sales, rentals, services, or other transactions with individuals who are low-income persons for purposes of section 45D(e)(2) (the 50-percent gross-income requirement), (*ii*) at least 40 percent of the entity's employees are individuals who are low-income persons for purposes of section 45D(e)(2), or (*iii*) at least 50 percent of the entity is owned by individuals who are low-income persons for purposes of section 45D(e)(2).

Commentators recommended that the ownership requirement for being treated as a qualified active low-income community business for low-income targeted populations under the proposed regulations be amended to accommodate non-profit businesses that are not individually owned. Commentators suggested that if a non-profit business can document that at least 20 percent of its board, with a minimum of two board members, are low-income persons or represent low-income targeted populations, then the non-profit business should be treated as satisfying the ownership requirement.

The final regulations do not adopt this recommendation because, if a non-profit business does not derive at least 50 percent of its gross income from sales, rentals, services, or other transactions with low-income persons, or if at least 40 percent of the non-profit business' employees are not low-income persons, then the non-profit business is not adequately serving targeted populations solely because 20 percent or more of its board members are low-income persons.

Start-up or Expanding Businesses

Commentators requested that, in order to accommodate start-up entities, the final regulations should provide a rule allowing an entity to meet the requirements to be a qualified active low-income community business for low-income targeted populations if the CDE reasonably expects that the entity will generate revenues within three years after the date the CDE makes the investment in, or loan to, that entity. If an entity serving targeted populations chooses to apply the 50-percent gross-income requirement rather than the employee requirement or the ownership requirement, then the commentators' suggestion could potentially allow an entity to be a qualified active low-income community business for three years without having to meet any requirement. As stated in the preamble of the proposed regulations, this result is clearly inappropriate. Therefore, the final regulations do not adopt the commentators' suggestion. In addition, the final regulations clarify that the three-year active conduct of a trade or business safe harbor in §1.45D–1(d)(4)(iv)(A) does not apply to the 50-percent gross-income requirement.

Documenting Low-Income Persons

The IRS and Treasury Department specifically requested comments on what measure of income should be used to determine an individual's income for purposes of the definition of low-income persons found in the proposed regulations. The proposed regulations asked whether the measure of income should be the same as the measure of income used by the U.S. Census Bureau, the measure of income on

the Form 1040, or the measure of income in 24 CFR Part 5, which is used for certain Department of Housing and Urban Development (HUD) programs and other Federal programs.

Two commentators recommended that the IRS and Treasury Department accept as a proxy for income documentation proof of an individual's participation in other federal programs targeted specifically to low-income individuals and families. The final regulations do not adopt the commentators' recommendation because, as stated in the proposed regulations, the IRS and Treasury Department have not analyzed other Federal programs to determine whether they meet the statutory requirements under section 45D(e), and whether the programs currently meeting the requirements will continue to do so in the future.

Another commentator recommended that the IRS and Treasury Department allow an entity to measure income using any reasonable method including measures of income by the U.S. Census Bureau, Form 1040, or the HUD rules in 24 CFR Part 5. If one measure must be used, the commentator recommended using the HUD rules because they are consistent with low-income determinations used for the Section 8 rental voucher program and the low-income housing tax credit under section 42. The final regulations adopt this commentator's recommendation that an entity may use any of the three stated methods. Specifically, the final regulations allow an individual's family income to be determined using household income as measured by the U.S. Census Bureau or HUD, or using the individual's total family income as reported on Form(s) 1040. An individual's family income includes the income of any member of the individual's family (as defined in section 267(c)(4)) if the family member resides with the individual regardless of whether the family member files a separate return. Lastly, the final regulations incorporate the preamble language in the proposed regulations that provides additional detail on what estimates may be relied upon in determining the applicable income limitation for *area median family income*.

Items Included in Gross Income

A commentator requested that the final regulations conclude that the term *derived from* in the proposed regulations includes gross income derived from payments made directly by low-income persons to an entity and amounts and contributions of property or services provided to the entity for the benefit of low-income persons. Another commentator recommended that only operating revenue should be included for the purpose of meeting the 50-percent gross-income requirement.

The final regulations adopt the first commentator's recommendation that the term *derived from* includes gross income derived from both payments made directly by low-income persons to the entity and money and the fair market value of contributions of property or services provided to the entity primarily for the benefit of low-income persons. However, persons providing the money and contributions cannot receive a direct benefit from the entity (notably, a contribution that benefits the general public is not a direct benefit). Accordingly, an entity's total gross income derived from transactions with low-income persons for purposes of section 45D(e)(2) can include Federal, state, or local grants, charitable donations, or in-kind contributions, as well as collected fees, insurance reimbursements, and other sources of income as long as these payments and contributions are provided for the benefit of low-income persons on an individual basis or as a class of individuals. If an entity receiving such payments can document that those amounts are legally required to be paid on behalf of individuals that meet the definition of low-income persons, the amounts may be treated as derived from transactions with low-income persons. The second commentator's suggestion to limit a gross income consideration to operating revenue is too restrictive because any money, property, or services provided to the entity may be provided to the entity for the benefit of low-income persons.

Owners

The proposed regulations provide that the determination of whether an owner is a low-income person must be made at the time the qualified low-income community investment is made. If an owner is a low-income person at the time the qualified low-income community investment is made, that owner is considered a low-income person for purposes of section 45D(e)(2) throughout the time the ownership interest is held by that owner. A commentator suggested that the rule locking in an owner's status as a low-income person as of the time of investment should be similarly applied to low-income persons who acquire an ownership interest after the time the qualified low-income community investment is made. The final regulations adopt this suggestion by locking in the status of an owner as a low-income person at the time the qualified low-income community investment is made or at the time the ownership interest is acquired by the owner, whichever is later.

Rental to Others of Real Property

Commentators requested clarification on the 50-percent gross-income requirement under the proposed regulations for an entity whose sole business is the rental to others of real property. Because an entity whose sole business is the rental to others of real property will often not have employees, the entity will have to satisfy the 50-percent gross-income requirement or the ownership requirement for low-income targeted populations. To satisfy the 50-percent gross-income requirement, the proposed regulations require that the entity must derive gross income solely from low-income individuals. However, in the case of an entity engaged solely in the rental of property, the entity's gross income would only be derived from rents, and in many instances, the tenants are not individuals as required under the proposed regulations. Thus, commentators recommend that the 50-percent gross-income requirement be deemed satisfied if at least 50 percent of gross rental income is derived from tenants that are low-income individuals and entities that are qualified active low-income community businesses for low-income targeted populations. The final regulations adopt a rule similar to this recommendation by providing a special rule that generally treats an entity whose sole business is the rental to others of real property as satisfying the 50-percent gross-income requirement if the entity is

treated as being located in a low-income community.

Gross Income — Fair Market Value of Sales, Rentals, Services, or Other Transactions

The IRS and Treasury Department specifically requested comments in the proposed regulations on the question of whether the 50-percent gross-income requirement should be modified to include the fair market value of goods and services provided to low-income persons at reduced fees. Commentators responded by stating that a CDE should have the option to include the fair market value of goods and services provided to low-income persons for purposes of the 50-percent gross-income requirement. The final regulations adopt the commentator's suggestion but limit the rule to an entity with gross income that is derived from sales, rentals, services, or other transactions with both non low-income persons and low-income persons. The entity may treat the value of the sales, rentals, services, or other transactions with low-income persons at fair market value even if the low-income persons do not pay fair market value.

Individuals or Groups That Otherwise Lack Adequate Access to Loans or Equity Investments

Commentators have asked that the IRS and the Treasury Department consider defining particular individuals or groups of individuals as lacking adequate access to loans or equity investments. Although the IRS and the Treasury Department cannot include new rules describing additional targeted populations in these final regulations, taxpayers are hereby invited to submit comments: (1) identifying individuals or groups that may be considered to lack adequate access to loans or equity investments, (2) describing the reasons such individuals or group of individuals qualify as lacking adequate access to loans or equity investments, and (3) suggesting ways for additional targeted populations rules to appropriately limit the definition of such individuals or group of individuals to ensure that the purposes of the targeted populations provision are not abused. Send submissions to:

Submissions to the Service submitted by U.S. mail:

Internal Revenue Service
Attn: Julie Hanlon Bolton
CC:PSI:5, Room 5111
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Submissions to the Service submitted by a private delivery service:

Internal Revenue Service
Attn: Julie Hanlon Bolton
CC:PSI:5, Room 5111
1111 Constitution Ave., N.W.
Washington, DC 20224

EFFECT ON OTHER DOCUMENTS

Notice 2006–60, 2006–1 C.B. 82, is obsolete for taxable years ending on or after December 5, 2011.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. 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. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that the final regulations provide a benefit to small entities in low-income communities from the proceeds of a tax credit because, consistent with legislative intent, the final regulations allow a tax credit to be claimed in situations where it was previously unavailable without the Secretary providing for such situations in final regulations. Accordingly, a Regulatory Flexibility Analysis under the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking 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 Julie Hanlon Bolton with the Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

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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 adding an entry in numerical order to read in part as follows:

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

Section 1.45D–1 also issued under 26 U.S.C. 45D(e)(2) and (i);* * *

Par. 2. Section 1.45D–0 is added to read as follows :

§1.45D–0 Table of contents.

This section lists the paragraphs contained in §1.45D–1.

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(5) Qualified business.

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(C) Farming.

(6) Qualifications.

(i) In general.

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(7) Financial counseling and other services.

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(9) Targeted populations.

(i) Low-income persons.

(A) Definition.

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(*3*) Individual's family income.

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(*1*) In general.

(*2*) Employee.

(*3*) Owner.

(*4*) Derived from.

(*5*) Fair market value of sales, rentals, services, or other transactions.

(C) 120-percent-income restriction.

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(*2*) Population census tract location.

(D) Rental of real property for low-income targeted populations.

(*1*) In general.

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(ii) Individuals who otherwise lack adequate access to loans or equity investments.

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(B) GO Zone Targeted Population.

(C) Qualified active low-income community business requirements for the GO Zone Targeted Population.

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(2) Exception for certain provisions.

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Par. 3. Section 1.45D–1 is amended by:

1. Revising paragraph (a).

2. Revising the first sentence in paragraph (b)(1).

3. Revising paragraph (d)(4)(i) introductory text.

4. Adding a new sentence to the end of paragraph (d)(4)(i)(A).

5. Adding a new sentence to the end of paragraph (d)(4)(i)(B)(*1*).

6. Adding a new sentence to the end of paragraph (d)(4)(i)(C).

7. Adding a new sentence at the end of paragraph (d)(4)(iv)(A).

8. Adding new paragraph (d)(9).

9. Revising the heading for paragraph (h) and adding new paragraph (h)(3).

The additions and revisions read as follows:

§1.45D–1 New markets tax credit.

(a) *Current year credit.* The current year general business credit under section 38(b)(13) includes the new markets tax credit under section 45D(a).

(b) * * * (1) * * * A taxpayer holding a qualified equity investment on a credit allowance date which occurs during the taxable year may claim the new markets tax credit determined under section 45D(a) and this section for such taxable year in an amount equal to the applicable percentage of the amount paid to a qualified community development entity (CDE) for such investment at its original issue. * * *

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(d) * * *

(4) * * *

(i) *In general.* The term *qualified active low-income community business* means, with respect to any taxable year, a corporation (including a nonprofit corporation) or a partnership engaged in the active conduct of a qualified business (as defined in paragraph (d)(5) of this section), if the requirements of paragraphs (d)(4)(i)(A), (B), (C), (D), and (E) of this section are met (or in the case of an entity serving targeted populations, if the requirements of paragraphs (d)(4)(i)(D), (E), and (d)(9)(i) or (ii) of this section are met). Solely for purposes of this section, a nonprofit corporation will be deemed to be engaged in the active conduct of a trade or business if it is engaged in an activity that furthers its purpose as a nonprofit corporation.

(A) * * * See paragraph (d)(9) of this section for rules relating to targeted populations.

(B) * * *

(*1*) * * * See paragraph (d)(9) of this section for rules relating to targeted populations.

* * * * *

(C) * * * See paragraph (d)(9) of this section for rules relating to targeted populations.

* * * * *

(iv) *Active conduct of a trade or business*—(A) * * * This paragraph (d)(4)(iv) applies only for purposes of determining whether an entity is engaged in the active conduct of a trade or business and does not apply for purposes of determining whether the gross-income requirement under paragraph (d)(4)(i)(A), (d)(9)(i)(B)(*1*)(*i*), or (d)(9)(ii)(C)(*1*)(*i*) of this section is satisfied.

* * * * *

(9) *Targeted populations.* For purposes of section 45D(e)(2), targeted populations that will be treated as a low-income community are individuals, or an identifiable group of individuals, including an Indian tribe, who are low-income persons as defined in paragraph (d)(9)(i) of this section or who are individuals who otherwise lack adequate access to loans or equity investments as defined in paragraph (d)(9)(ii) of this section.

(i) *Low-income persons*—(A) *Definition*—(*1*) *In general.* For purposes of section 45D(e)(2) and this paragraph (d)(9), an individual shall be considered to be low-income if the individual's family income, adjusted for family size, is not more than—

(*i*) For metropolitan areas, 80 percent of the area median family income; and

(*ii*) For non-metropolitan areas, the greater of 80 percent of the area median family income, or 80 percent of the statewide non-metropolitan area median family income.

(*2*) *Area median family income.* For purposes of paragraph (d)(9)(i)(A)(*1*) of this section, *area median family income* is determined in a manner consistent with the determinations of median family income under section 8 of the Housing Act of 1937, as amended. Taxpayers must use the annual estimates of median family income released by the Department of Housing and Urban Development (HUD) and may rely on those figures until 45 days after HUD releases a new list of income limits, or until HUD's effective date for the new list, whichever is later.

(*3*) *Individual's family income.* For purposes of paragraph (d)(9)(i)(A)(*1*) of this section, an individual's family income is determined using any one of the following three methods for measuring family income:

(*i*) Household income as measured by the U.S. Census Bureau,

(*ii*) Adjusted gross income under section 62 as reported on Internal Revenue Service Form 1040. Adjusted gross income must include the adjusted gross income of any member of the individual's family (as defined in section 267(c)(4)) if the family member resides with the individual regardless of whether the family member files a separate return,

(*iii*) Household income determined under section 8 of the Housing Act of 1937, as amended.

(B) *Qualified active low-income community business requirements for low-income targeted populations*—(*1*) *In general.* An entity will not be treated as a qualified active low-income community business for low-income targeted populations unless—

(*i*) Except as provided in paragraph (d)(9)(i)(D)(*2*) of this section, at least 50 percent of the entity's total gross income for any taxable year is derived from sales, rentals, services, or other transactions with individuals who are low-income persons for purposes of section 45D(e)(2) and this paragraph (d)(9);

(*ii*) At least 40 percent of the entity's employees are individuals who are low-income persons for purposes of section 45D(e)(2) and this paragraph (d)(9); or

(*iii*) At least 50 percent of the entity is owned by individuals who are low-income persons for purposes of section 45D(e)(2) and this paragraph (d)(9).

(*2*) *Employee.* The determination of whether an employee is a low-income person must be made at the time the employee is hired. If the employee is a low-income person at the time of hire, that employee is considered a low-income person for purposes of section 45D(e)(2) and this paragraph (d)(9) throughout the time of employment, without regard to any increase in the employee's income after the time of hire.

(*3*) *Owner.* The determination of whether an owner is a low-income person must be made at the time the qualified low-income community investment is made, or at the time the ownership interest is acquired by the owner, whichever is later. If an owner is a low-income person at the time the qualified low-income community investment is made or at the time the ownership interest is acquired by the owner, whichever is later, that owner is considered a low-income person for purposes of section 45D(e)(2) and this paragraph (d)(9) throughout the time the ownership interest is held by that owner.

(*4*) *Derived from.* For purposes of paragraph (d)(9)(i)(B)(*1*)(*i*) of this section, the

term *derived from* includes gross income derived from:

(*i*) Payments made directly by low-income persons to the entity; and

(*ii*) Money and the fair market value of property or services provided to the entity primarily for the benefit of low-income persons, but only if the persons providing the money, property, or services do not receive a direct benefit from the entity (for this purpose, a contribution that benefits the general public is not a direct benefit).

(*5*) *Fair market value of sales, rentals, services, or other transactions*. For purposes of paragraph (d)(9)(i)(B)(*1*)(*i*) of this section, an entity with gross income that is derived from sales, rentals, services, or other transactions with both non low-income persons and low-income persons may treat the gross income derived from the sales, rentals, services, or other transactions with low-income persons as including the full fair market value even if the low-income persons do not pay fair market value.

(C) *120-percent-income restriction*—(*1*) *In general*—(*i*) In no case will an entity be treated as a qualified active low-income community business under paragraph (d)(9)(i) of this section if the entity is located in a population census tract for which the median family income exceeds 120 percent of, in the case of a tract not located within a metropolitan area, the statewide median family income, or in the case of a tract located within a metropolitan area, the greater of statewide median family income or metropolitan area median family income (120-percent-income restriction).

(*ii*) The 120-percent-income restriction shall not apply to an entity located within a population census tract with a population of less than 2,000 if such tract is not located in a metropolitan area.

(*iii*) The 120-percent-income restriction shall not apply to an entity located within a population census tract with a population of less than 2,000 if such tract is located in a metropolitan area and more than 75 percent of the tract is zoned for commercial or industrial use. For this purpose, the 75 percent calculation should be made using the area of the population census tract. For purposes of this paragraph (d)(9)(i)(C)(*1*)(*iii*), property for which commercial or industrial use is a permissible zoning use will be treated as zoned for commercial or industrial use.

(*2*) *Population census tract location*—(*i*) For purposes of the 120-percent-income restriction, an entity will be considered to be located in a population census tract for which the median family income exceeds 120 percent of the applicable median family income under paragraph (d)(9)(i)(C)(*1*)(*i*) of this section (non-qualifying population census tract) if at least 50 percent of the total gross income of the entity is derived from the active conduct of a qualified business (as defined in paragraph (d)(5) of this section) within one or more non-qualifying population census tracts (non-qualifying gross income amount); at least 40 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more non-qualifying population census tracts (non-qualifying tangible property usage); and at least 40 percent of the services performed for the entity by its employees are performed in one or more non-qualifying population census tracts (non-qualifying services performance).

(*ii*) The entity is considered to have the non-qualifying gross income amount if the entity has non-qualifying tangible property usage or non-qualifying services performance of at least 50 percent instead of 40 percent.

(*iii*) If the entity has no employees, the entity is considered to have the non-qualifying gross income amount and non-qualifying services performance if at least 85 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more non-qualifying population census tracts.

(D) *Rental of real property for low-income targeted populations*—(*1*) *In general*. An entity that rents to others real property for low-income targeted populations and that otherwise satisfies the requirements to be a qualified business under paragraph (d)(5) of this section will be treated as located in a low-income community for purposes of paragraph (d)(5)(ii) of this section if at least 50 percent of the entity's total gross income is derived from rentals to individuals who are low-income persons for purposes of section 45D(e)(2) and this paragraph (d)(9) or rentals to a qualified active low-income community business that meets the requirements for low-income targeted populations under paragraphs (d)(9)(i)(B)(*1*)(*i*) or (*ii*) and (d)(9)(i)(B)(*2*) of this section.

(2) *Special rule for entities whose sole business is the rental to others of real property*. If an entity's sole business is the rental to others of real property under paragraph (d)(9)(i)(D)(*1*) of this section, then the gross income requirement in paragraph (d)(9)(i)(B)(*1*)(*i*) of this section will be considered satisfied if the entity is treated as being located in a low-income community under paragraph (d)(9)(i)(D)(*1*) of this section.

(ii) *Individuals who otherwise lack adequate access to loans or equity investments*—(A) *In general*. Paragraph (d)(9)(ii) of this section may be applied only with regard to qualified low-income community investments made under the increase in the new markets tax credit limitation pursuant to section 1400N(m)(2). Therefore, only CDEs with a significant mission of recovery and redevelopment of the Gulf Opportunity Zone (GO Zone) that receive an allocation from the increase described in section 1400N(m)(2) may make qualified low-income community investments from that allocation pursuant to the rules in paragraph (d)(9)(ii) of this section.

(B) *GO Zone Targeted Population*. For purposes of the targeted populations rules under section 45D(e)(2), an individual otherwise lacks adequate access to loans or equity investments only if the individual was displaced from his or her principal residence as a result of Hurricane Katrina or the individual lost his or her principal source of employment as a result of Hurricane Katrina (GO Zone Targeted Population). In order to meet this definition, the individual's principal residence or principal source of employment, as applicable, must have been located in a population census tract within the GO Zone that contains one or more areas designated by the Federal Emergency Management Agency (FEMA) as flooded, having sustained extensive damage, or having sustained catastrophic damage as a result of Hurricane Katrina.

(C) *Qualified active low-income community business requirements for the GO Zone Targeted Population*—(*1*) *In general*. An entity will not be treated as a qualified active low-income community business for the GO Zone Targeted Population unless—

(*i*) At least 50 percent of the entity's total gross income for any taxable year is derived from sales, rentals, services, or other transactions with the GO Zone Targeted Population, low-income persons as defined in paragraph (d)(9)(i) of this section, or some combination thereof;

(*ii*) At least 40 percent of the entity's employees consist of the GO Zone Targeted Population, low-income persons as defined in paragraph (d)(9)(i) of this section, or some combination thereof; or

(*iii*) At least 50 percent of the entity is owned by the GO Zone Targeted Population, low-income persons as defined in paragraph (d)(9)(i) of this section, or some combination thereof.

(*2*) *Location*—(*i*) *In general*. In order to be a qualified active low-income community business under paragraph (d)(9)(ii)(C) of this section, the entity must be located in a population census tract within the GO Zone that contains one or more areas designated by FEMA as flooded, having sustained extensive damage, or having sustained catastrophic damage as a result of Hurricane Katrina (qualifying population census tract).

(*ii*) *Determination*— For purposes of the preceding paragraph, an entity will be considered to be located in a qualifying population census tract if at least 50 percent of the total gross income of the entity is derived from the active conduct of a qualified business (as defined in paragraph (d)(5) of this section) within one or more qualifying population census tracts (gross income requirement); at least 40 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more qualifying population census tracts (use of tangible property requirement); and at least 40 percent of the services performed for the entity by its employees are performed in one or more qualifying population census tracts (services performed requirement). The entity is deemed to satisfy the gross income requirement if the entity satisfies the use of tangible property requirement or the services performed requirement on the basis of at least 50 percent instead of 40 percent. If the entity has no employees, the entity is deemed to satisfy the services performed requirement and the gross income requirement if at least 85 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more qualifying population census tracts.

(D) *200-percent-income restriction*—(*1*) *In general*—(*i*) In no case will an entity be treated as a qualified active low-income community business under paragraph (d)(9)(ii) of this section if the entity is located in a population census tract for which the median family income exceeds 200 percent of, in the case of a tract not located within a metropolitan area, the statewide median family income, or, in the case of a tract located within a metropolitan area, the greater of statewide median family income or metropolitan area median family income (200-percent-income restriction).

(*ii*) The 200-percent-income restriction shall not apply to an entity located within a population census tract with a population of less than 2,000 if such tract is not located in a metropolitan area.

(*iii*) The 200-percent-income restriction shall not apply to an entity located within a population census tract with a population of less than 2,000 if such tract is located in a metropolitan area and more than 75 percent of the tract is zoned for commercial or industrial use. For this purpose, the 75 percent calculation should be made using the area of the population census tract. For purposes of this paragraph (d)(9)(ii)(D)(*1*)(*iii*), property for which commercial or industrial use is a permissible zoning use will be treated as zoned for commercial or industrial use.

(*2*) *Population census tract location*—(i) For purposes of the 200-percent-income restriction, an entity will be considered to be located in a population census tract for which the median family income exceeds 200 percent of the applicable median family income under paragraph (d)(9)(ii)(D)(*1*)(*i*) of this section (non-qualifying population census tract) if— at least 50 percent of the total gross income of the entity is derived from the active conduct of a qualified business (as defined in paragraph (d)(5) of this section) within one or more non-qualifying population census tracts (non-qualifying gross income amount); at least 40 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more non-qualifying population census tracts (non-qualifying tangible property usage); and at least 40 percent of the services performed for the entity by its employees are performed in one or more non-qualifying population census tracts (non-qualifying services performance).

(*ii*) The entity is considered to have the non-qualifying gross income amount if the entity has non-qualifying tangible property usage or non-qualifying services performance of at least 50 percent instead of 40 percent.

(*iii*) If the entity has no employees, the entity is considered to have the non-qualifying gross income amount and non-qualifying services performance if at least 85 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more non-qualifying population census tracts.

(E) *Rental of real property for the GO Zone Targeted Population*. The rental to others of real property for the GO Zone Targeted Population that otherwise satisfies the requirements to be a qualified business under paragraph (d)(5) of this section will be treated as located in a low-income community for purposes of paragraph (d)(5)(ii) of this section if at least 50 percent of the entity's total gross income is derived from rentals to the GO Zone Targeted Population, rentals to low-income persons as defined in paragraph (d)(9)(i) of this section, or rentals to a qualified active low-income community business that meets the requirements for the GO Zone Targeted Population under paragraph (d)(9)(ii)(C)(*1*)(*i*) or (*ii*) of this section.

* * * * *

(h) *Effective/applicability dates*.

* * * * *

(3) *Targeted populations*. The rules in paragraph (d)(9) of this section and the last sentence in paragraph (d)(4)(iv)(A) of this section apply to taxable years ending on or after December 5, 2011. A taxpayer may apply the rules in paragraph (d)(9) of this section to taxable years ending before December 5, 2011 for designations made by the Secretary after October 22, 2004.

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

Approved November 22, 2011.

Emily S. McMahon,
Acting Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on December 2, 2011, 8:45 a.m., and published in the issue of the Federal Register for December 5, 2011, 76 F.R. 75774)

Part III. Administrative, Procedural, and Miscellaneous

Iowa Low-Income Housing Credit Disaster Relief

Notice 2012–7

The Internal Revenue Service is suspending certain requirements under § 42 of the Internal Revenue Code for low-income housing credit projects to provide emergency housing relief needed as a result of the devastation in Iowa caused by flooding during the period of May 25, 2011, to August 1, 2011. This relief is being granted pursuant to the Service's authority under § 42(n) and § 1.42–13(a) of the Income Tax Regulations.

BACKGROUND

On June 27, 2011, the President declared a major disaster for the State of Iowa. This declaration was made under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq*. On October 18, 2011, the Federal Emergency Management Agency (FEMA) designated jurisdictions for Individual Assistance resulting from the flooding during the period of May 25, 2011, to August 1, 2011. The State of Iowa has requested that the Service allow owners of low-income housing credit projects to provide temporary housing in vacant units to individuals who resided in jurisdictions designated for Individual Assistance in Iowa and who have been displaced because their residences were destroyed or damaged as a result of the devastation caused by the flooding. Based upon this request and because of the widespread damage to housing caused by the flooding, the Service has determined that the Iowa Finance Authority (Authority) may provide approval to project owners to provide temporary emergency housing for displaced individuals in accordance with this notice.

I. SUSPENSION OF INCOME LIMITATIONS

The Service has determined that it is appropriate to temporarily suspend certain income limitation requirements under § 42 for certain qualified low-income housing projects. The suspension will apply to low-income housing projects approved by the Authority, in which vacant units are rented to displaced individuals. The Authority will determine the appropriate period of temporary housing for each project, not to extend beyond December 31, 2012 (temporary housing period).

II. STATUS OF UNITS

A. Units in the first year of the credit period

A displaced individual temporarily occupying a unit during the first year of the credit period under § 42(f)(1) will be deemed a qualified low-income tenant for purposes of determining the project's qualified basis under § 42(c)(1), and for meeting the project's 20-50 test or 40-60 test as elected by the project owner under § 42(g)(1). After the end of the temporary housing period established by the Authority (not to extend beyond December 31, 2012), a displaced individual will no longer be deemed a qualified low-income tenant.

B. Vacant units after the first year of the credit period

During the temporary housing period established by the Authority, the status of a vacant unit (that is, market-rate or low-income for purposes of § 42 or never previously occupied) after the first year of the credit period that becomes temporarily occupied by a displaced individual remains the same as the unit's status before the displaced individual moves in. Displaced individuals temporarily occupying vacant units will not be treated as low-income tenants under § 42(i)(3)(A)(ii). However, even if it houses a displaced individual, a low-income or market rate unit that was vacant before the effective date of this notice will continue to be treated as a vacant low-income or market rate unit. Similarly, a unit that was never previously occupied before the effective date of this notice will continue to be treated as a unit that has never been previously occupied even if it houses a displaced individual. Thus, the fact that a vacant unit becomes occupied by a displaced individual will not affect the building's applicable fraction under § 42(c)(1)(B) for purposes of determining the building's qualified basis, nor will it affect the 20-50 test or 40-60 test of § 42(g)(1). If the income of occupants in low-income units exceeds 140 percent of the applicable income limitation, the temporary occupancy of a unit by a displaced individual will not cause application of the available unit rule under § 42(g)(2)(D)(ii). In addition, the project owner is not required during the temporary housing period to make attempts to rent to low-income individuals the low-income units that house displaced individuals.

III. SUSPENSION OF NON-TRANSIENT REQUIREMENTS

The non-transient use requirement of § 42(i)(3)(B)(i) shall not apply to any unit providing temporary housing to a displaced individual during the temporary housing period determined by the Authority in accordance with section I of this notice.

IV. OTHER REQUIREMENTS

All other rules and requirements of § 42 will continue to apply during the temporary housing period established by the Authority. After the end of the temporary housing period, the applicable income limitations contained in § 42(g)(1), the available unit rule under § 42(g)(2)(D)(ii), the nontransient requirement of § 42(i)(3)(B)(i), and the requirement to make reasonable attempts to rent vacant units to low-income individuals shall resume. If a project owner offers to rent a unit to a displaced individual after the end of the temporary housing period, the displaced individual must be certified under the requirements of § 42(i)(3)(A)(ii) and § 1.42–5(b) and (c) to be a qualified low-income tenant. To qualify for the relief in this notice, the project owner must additionally meet all of the following requirements:

(1) Major Disaster Area

The displaced individual must have resided in an Iowa jurisdiction designated for Individual Assistance by FEMA as a result of the devastation in Iowa caused by flooding during the period of May 25, 2011, to August 1, 2011.

(2) Approval of the Authority

The project owner must obtain approval from the Authority for the relief described in this notice. The Authority will determine the appropriate period of temporary housing for each project, not to extend beyond December 31, 2012.

(3) Certifications and Recordkeeping

To comply with the requirements of § 1.42–5, project owners are required to maintain and certify certain information concerning each displaced individual temporarily housed in the project, specifically the following: name, address of damaged residence, social security number, and a statement signed under penalties of perjury by the displaced individual that, because of damage to the individual's residence in an Iowa jurisdiction designated for Individual Assistance by FEMA as a result of the devastation caused in Iowa caused by flooding during the period of May 25, 2011, to August 1, 2011, the individual requires temporary housing. The owner must notify the Authority that vacant units are available for rent to displaced individuals.

The owner must also certify the date the displaced individual began temporary occupancy and the date the project will discontinue providing temporary housing as established by the Authority. The certifications and recordkeeping for displaced individuals must be maintained as part of the annual compliance monitoring process with the Authority.

(4) Rent Restrictions

Rents for the low-income units that house displaced individuals must not exceed the existing rent-restricted rates for the low-income units established under § 42(g)(2).

(5) Protection of Existing Tenants

Existing tenants in occupied low-income units cannot be evicted or have their tenancy terminated as a result of efforts to provide temporary housing for displaced individuals.

EFFECTIVE DATES

This notice is effective June 27, 2011 (the date of the President's major disaster declaration for devastation caused by flooding during the period of May 25, 2011, to August 1, 2011).

PAPERWORK REDUCTION ACT

The collection of information contained in this notice 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 1545–2223.

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 collection of information in this notice is in the section titled "OTHER REQUIREMENTS" under "(3) Certifications and Recordkeeping." This information is required to enable the Service to verify whether individuals are displaced as a result of the devastation in Iowa caused by flooding during the period of May 25, 2011, to August 1, 2011, and thus warrant temporary housing in vacant low-income housing units. The collection of information is required to obtain a benefit. The likely respondents are individuals and businesses.

The estimated total annual recordkeeping burden is 125 hours.

The estimated annual burden per recordkeeper is approximately 15 minutes. The estimated number of recordkeepers is 500.

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

DRAFTING INFORMATION

The principal author of this notice is David Selig of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Mr. Selig at (202) 622–3040 (not a toll-free call).

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26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct liability.
(Also: Part I, sections 66, 6015.)

Notice 2012–8

This notice provides a proposed revenue procedure that would update Rev. Proc. 2003–61, 2003–2 C.B. 296, which provides guidance regarding equitable relief from income tax liability under section 66(c) and section 6015(f) of the Internal Revenue Code. Since the issuance of Rev. Proc. 2003–61 in August 2003, the Internal Revenue Service's experience in working section 6015(f) equitable relief cases has grown significantly. This proposed update to Rev. Proc. 2003–61 addresses the criteria used in making innocent spouse relief determinations for section 6015(f) equitable relief cases and revises the factors for granting equitable relief. The factors have been revised to ensure that requests for innocent spouse relief are granted under section 6015(f) when the facts and circumstances warrant and that, when appropriate, requests are granted in the initial stage of the administrative process.

Significantly, this proposed revenue procedure expands how the IRS will take into account abuse and financial control by the nonrequesting spouse in determining whether equitable relief is warranted. Review of the innocent spouse program demonstrated that when a requesting spouse has been abused by the nonrequesting spouse, the requesting spouse may not have been able to challenge the treatment of any items on the joint return, question the payment of the taxes reported as due on the joint return, or challenge the nonrequesting spouse's assurance regarding the payment of the taxes. Review of the program also highlighted that lack of financial control may have a similar impact on the requesting spouse's ability to satisfy joint tax liabilities. As a result, this proposed revenue procedure provides that abuse or lack of financial control may mitigate other factors that might otherwise weigh against granting equitable relief under section 6015(f).

The proposed revenue procedure also provides for certain streamlined case determinations; new guidance on the potential impact of economic hardship; and the weight to be accorded to certain factual

circumstances in determining equitable relief.

The proposed revenue procedure sets forth the background concerning the relief from joint and several liability under section 6015, a summary of the proposed changes to Rev. Proc. 2003–61, and the proposed text of the updated revenue procedure. Before issuing an updated revenue procedure addressing the equitable relief under section 6015(f), the Department of the Treasury and the Internal Revenue Service invite comments from the public regarding the proposed revenue procedure. Treasury and the Service also invite comments related to the administration of the innocent spouse relief program. Because the provisions in the proposed revenue procedure expand the equitable relief analysis by providing additional considerations for taxpayers seeking relief, until the revenue procedure is finalized, the Service will apply the provisions in the proposed revenue procedure instead of Rev. Proc. 2003–61 in evaluating claims for equitable relief under section 6015(f). If taxpayers conclude that they would receive more favorable treatment under one or more of the factors provided in Rev. Proc. 2003–61 they should advise the Service in their application for relief or supplement an already existing application. Then the Service will apply those factors from Rev. Proc. 2003–61, until a new revenue procedure is finalized. Comments also are requested on any factors contained in Rev. Proc. 2003–61 that might be interpreted as being more favorable to requesting spouses than those proposed in this notice.

Comments should be submitted by February 21, 2012 to:

Internal Revenue Service
Attn: CC:PA:LPD:PR
(Notice 2012–8)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

or hand deliver comments Monday through Friday between the hours of 8 a.m. and 4 p.m. to:

Courier's Desk
Internal Revenue Service
Attn: CC:PA:LPD:PR
(Notice 2012–8)
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Alternatively, persons may submit comments electronically via e-mail to the following address: *Notice.Comments@irscounsel.treas.gov.* Persons should include "Notice 2012–8" in the subject line. All comments submitted by the public will be available for public inspection and copying in their entirety.

Proposed Rev. Proc. [XXXX–XX]

SECTION 1. PURPOSE AND SCOPE

.01 *Purpose.* This revenue procedure provides guidance for a taxpayer seeking equitable relief from income tax liability under section 66(c) or section 6015(f) of the Internal Revenue Code (a "requesting spouse"). Section 4.01 of this revenue procedure provides the threshold requirements for any request for equitable relief. Section 4.02 of this revenue procedure sets forth the conditions under which the Internal Revenue Service will make streamlined relief determinations granting equitable relief under section 6015(f) from an understatement of income tax or an underpayment of income tax reported on a joint return. Section 4.03 of this revenue procedure provides a nonexclusive list of factors for consideration in determining whether relief should be granted under section 6015(f) because it would be inequitable to hold a requesting spouse jointly and severally liable when the conditions of section 4.02 are not met. The factors in section 4.03 also will apply in determining whether to relieve a spouse from income tax liability resulting from the operation of community property law under the equitable relief provision of section 66(c).

.02 *Scope.* This revenue procedure applies to spouses who request either equitable relief from joint and several liability under section 6015(f), or equitable relief under section 66(c) from income tax liability resulting from the operation of community property law.

SECTION 2. BACKGROUND

.01 Section 6013(d)(3) provides that married taxpayers who file a joint return under section 6013 will be jointly and severally liable for the income tax arising from that joint return. For purposes of section 6013(d)(3) and this revenue procedure, the term "tax" includes penalties, additions to tax, and interest. See sections 6601(e)(1) and 6665(a)(2).

.02 Section 3201(a) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105–206, 112 Stat. 685, 734 (RRA), enacted section 6015, which provides relief in certain circumstances from the joint and several liability imposed by section 6013(d)(3). Section 6015(b) and (c) specify two sets of circumstances under which relief from joint and several liability is available in cases involving understatements of tax. Section 6015(b) is modeled after former section 6013(e), the prior innocent spouse statute, and section 6015(c) provides for separation of liability. If relief is not available under section 6015(b) or (c), section 6015(f) authorizes the Secretary to grant equitable relief if, taking into account all the facts and circumstances, the Secretary determines that it is inequitable to hold a requesting spouse liable for any unpaid tax or any deficiency (or any portion of either). Section 66(c) provides relief from income tax liability resulting from the operation of community property law to taxpayers domiciled in a community property state who do not file a joint return. Section 3201(b) of RRA amended section 66(c) to add an equitable relief provision similar to section 6015(f).

.03 Section 6015 provides relief only from joint and several liability arising from a joint return. If an individual signs a joint return under duress, the election to file jointly is not valid and there is no valid joint return. The individual is not jointly and severally liable for any income tax liabilities arising from that return. Therefore, section 6015 does not apply and is not necessary for obtaining relief.

.04 Under section 6015(b) and (c), relief is available only from an understatement or a deficiency. Section 6015(b) and (c) do not authorize relief from an underpayment of income tax reported on a joint return. Section 66(c) and section 6015(f) permit equitable relief from an underpay-

ment of income tax or from a deficiency. The legislative history of section 6015 provides that Congress intended for the Secretary to exercise discretion in granting equitable relief from an underpayment of income tax if a requesting spouse "does not know, and had no reason to know, that funds intended for the payment of tax were instead taken by the other spouse for such other spouse's benefit." H.R. Conf. Rep. No. 105–599, at 254 (1998). Congress also intended for the Secretary to exercise the equitable relief authority under section 6015(f) in other situations if, "taking into account all the facts and circumstances, it is inequitable to hold an individual liable for all or part of any unpaid tax or deficiency arising from a joint return." *Id*.

SECTION 3. SIGNIFICANT CHANGES

This revenue procedure supersedes Revenue Procedure 2003–61, changing the following:

.01 Section 4.01(3) of this revenue procedure provides that a request for equitable relief under section 6015(f) or section 66(c) must be filed before the expiration of the period of limitation for collection under section 6502, or, if applicable, the period of limitation for credit or refund under section 6511. This is a significant change to the requirement in Revenue Procedure 2003–61, section 4.01(3) and Treas. Reg. § 1.6015–5(b)(1) (T.D. 9003), that the requesting spouse's claim for equitable relief must be filed no later than two years after the date of the Service's first collection activity. *See* Notice 2011–70.

.02 Section 4.01(7)(e) of this revenue procedure adds a new exception to the threshold condition in section 4.01(7) that the income tax liability must be attributable to an item of the nonrequesting spouse, when the nonrequesting spouse's fraud gave rise to the understatement of tax or deficiency.

.03 Section 4.02 of this revenue procedure has been revised to apply to understatements of income tax in addition to underpayments. Section 4.02 has also been revised to apply to claims for equitable relief under section 66(c).

.04 Section 4.03(2) is revised to clarify that no one factor or a majority of factors necessarily controls the determination. Therefore, depending on the facts and circumstances of the case, relief may still be appropriate if the number of factors weighing against relief exceeds the number of factors weighing in favor of relief, or a denial of relief may still be appropriate if the number of factors weighing in favor of relief exceeds the number of factors weighing against relief.

.05 Section 4.03(2)(b) of this revenue procedure revises the economic hardship equitable factor to provide minimum standards based on income, expenses, and assets, for determining whether the requesting spouse would suffer economic hardship if relief is not granted. Section 4.03(2)(b) is also revised to provide that the lack of a finding of economic hardship does not weigh against relief.

.06 Section 4.03(2)(c)(i) of this revenue procedure provides that actual knowledge of the item giving rise to an understatement or deficiency will no longer be weighed more heavily than other factors. Further, section 4.03(2)(c)(ii) clarifies that, for purposes of this factor, if the nonrequesting spouse abused the requesting spouse or maintained control over the household finances by restricting the requesting spouse's access to financial information, and, therefore, because of the abuse or financial control the requesting spouse was not able to challenge the treatment of any items on the joint return for fear of the nonrequesting spouse's retaliation, then that abuse or financial control will result in this factor weighing in favor of relief even if the requesting spouse had knowledge or reason to know of the items giving rise to the understatement or deficiency.

.07 Section 4.03(2)(c)(ii) of this revenue procedure provides that, in determining whether the requesting spouse had knowledge or reason to know that the nonrequesting spouse would not pay the tax reported as due, the Service will consider whether the requesting spouse reasonably expected that the nonrequesting spouse would pay the tax liability within a reasonably prompt time. Further, section 4.03(2)(c)(ii) clarifies that for purposes of this factor, if the nonrequesting spouse abused the requesting spouse or maintained control over the household finances by restricting the requesting spouse's access to financial information, and, therefore, because of the abuse or financial control the requesting spouse was not able to question the payment of the taxes reported as due on the joint return or challenge the nonrequesting spouse's assurance regarding payment of the taxes for fear of the nonrequesting spouse's retaliation, then that abuse or financial control will result in this factor weighing in favor of relief even if the requesting spouse had knowledge or reason to know that the nonrequesting spouse would not pay the tax liability.

.08 Section 4.03(2)(d) of this revenue procedure clarifies that a requesting spouse's legal obligation to pay outstanding tax liabilities is a factor to consider in determining whether equitable relief should be granted, in addition to whether the nonrequesting spouse has a legal obligation to pay the tax liabilities.

.09 Section 4.03(2)(f) of this revenue procedure is revised to provide that the fact that a requesting spouse is subsequently compliant with all Federal income tax laws is a factor that may weigh in favor of relief.

.10 Section 4.04 of this revenue procedure broadens the availability of refunds in cases involving deficiencies by eliminating the rule in section 4.04(1) of Rev. Proc. 2003–61 that limited refunds in cases involving deficiencies to payments made by the requesting spouse pursuant to an installment agreement.

SECTION 4. GENERAL CONDITIONS FOR RELIEF

.01 *Eligibility for equitable relief.* A requesting spouse must satisfy all of the following threshold conditions to be eligible to submit a request for equitable relief under section 6015(f). With the exception of conditions (1) and (2), a requesting spouse must satisfy all of the following threshold conditions to be eligible to submit a request for equitable relief under section 66(c). The Service may relieve a requesting spouse who satisfies all the applicable threshold conditions set forth below of all or part of the income tax liability under section 66(c) or section 6015(f) if, taking into account all the facts and circumstances, the Service determines that it would be inequitable to hold the requesting spouse liable for the income tax liability. The threshold conditions are as follows:

(1) The requesting spouse filed a joint return for the taxable year for which he or she seeks relief.

(2) Relief is not available to the requesting spouse under section 6015(b) or (c).

(3) Time for filing claim for relief:

(a) If the requesting spouse is applying for relief from a liability or a portion of a liability that remains unpaid, the request for relief must be made before the expiration of the period of limitation on collection of the income tax liability, as provided in section 6502. Generally, that period expires 10 years after the assessment of tax. Section 6502.

(b) Claims for credit or refund of amounts paid must be made before the expiration of the period of limitation on credit or refund, as provided in section 6511. Generally, that period expires three years from the time the return was filed or two years from the time the tax was paid, whichever is later.

(4) No assets were transferred between the spouses as part of a fraudulent scheme by the spouses.

(5) The nonrequesting spouse did not transfer disqualified assets to the requesting spouse. For this purpose, the term "disqualified asset" has the meaning given the term by section 6015(c)(4)(B). If the nonrequesting spouse transferred disqualified assets to the requesting spouse, relief will be available only to the extent that the income tax liability exceeds the value of the disqualified assets. This condition will not result in the requesting spouse being ineligible for relief if the nonrequesting spouse abused the requesting spouse or maintained control over the household finances by restricting the requesting spouse's access to financial information, or the requesting spouse did not have actual knowledge that disqualified assets were transferred.

(6) The requesting spouse did not knowingly participate in the filing of a fraudulent joint return.

(7) The income tax liability from which the requesting spouse seeks relief is attributable (either in full or in part) to an item of the nonrequesting spouse or an underpayment resulting from the nonrequesting spouse's income. If the liability is partially attributable to the requesting spouse, then relief can only be considered for the portion of the liability attributable to the nonrequesting spouse. Nonetheless, the Service will consider granting relief regardless of whether the understatement, deficiency, or underpayment is attributable (in full or in part) to the requesting spouse if any of the following exceptions applies:

(a) *Attribution solely due to the operation of community property law*. If an item is attributable or partially attributable to the requesting spouse solely due to the operation of community property law, then for purposes of this revenue procedure, that item (or portion thereof) will be considered to be attributable to the nonrequesting spouse.

(b) *Nominal ownership*. If the item is titled in the name of the requesting spouse, the item is presumptively attributable to the requesting spouse. This presumption is rebuttable. For example, H opens an individual retirement account (IRA) in W's name and forges W's signature on the IRA in 2006. Thereafter, H makes contributions to the IRA and in 2008 takes a taxable distribution from the IRA. H and W file a joint return for the 2008 taxable year, but do not report the taxable distribution on their joint return. The Service later determines a deficiency relating to the taxable IRA distribution. W requests relief from joint and several liability under section 6015. W establishes that W did not contribute to the IRA, sign paperwork relating to the IRA, or otherwise act as if W were the owner of the IRA. W thereby rebutted the presumption that the IRA is attributable to W.

(c) *Misappropriation of funds*. If the requesting spouse did not know, and had no reason to know, that funds intended for the payment of tax were misappropriated by the nonrequesting spouse for the nonrequesting spouse's benefit, the Service will consider granting equitable relief although the underpayment may be attributable in part or in full to an item of the requesting spouse. The Service will consider granting relief in the case only to the extent that the funds intended for the payment of tax were taken by the nonrequesting spouse.

(d) *Abuse not amounting to duress*. If the requesting spouse establishes that he or she was the victim of abuse prior to the time the return was signed, and that, as a result of the prior abuse, the requesting spouse did not challenge the treatment of any items on the return, or question the payment of any balance due reported on the return, for fear of the nonrequesting spouse's retaliation, the Service will consider granting equitable relief even though the deficiency or underpayment may be attributable in part or in full to an item of the requesting spouse.

(e) *Fraud committed by nonrequesting spouse*. The Service will consider granting relief notwithstanding that the item giving rise to the understatement or deficiency is attributable to the requesting spouse, if the requesting spouse establishes that the nonrequesting spouse's fraud is the reason for the erroneous item. For example, W fraudulently accesses H's brokerage account to sell stock that H had separately received from an inheritance. W deposits the funds from the sale in a separate bank account to which H does not have access. H and W file a joint Federal income tax return for the year, which does not report the income from the sale of the stock. The Service determines a deficiency based on the omission of the income from the sale of the stock. H requests relief from the deficiency under section 6015(f). The income from the sale of the stock normally would be attributable to H. Because W committed fraud with respect to H, however, and because this fraud was the reason for the erroneous item, the liability is properly attributable to W.

.02. *Circumstances under which the Service will make streamlined determinations granting equitable relief under sections 66(c) and 6015(f).*

If a requesting spouse who filed a joint return, or a requesting spouse who filed a separate return in a community property state, satisfies the threshold conditions of section 4.01, the Service will consider whether the requesting spouse is entitled to a streamlined determination of equitable relief under section 66(c) or section 6015(f) under section 4.02. If a requesting spouse is not entitled to a streamlined determination because the requesting spouse does not satisfy all the elements in section 4.02, the requesting spouse is still entitled to be considered for relief under the equitable factors in section 4.03. The Service will make streamlined determinations granting equitable relief under sections 66(c) and 6015(f), in cases in which the requesting spouse establishes that the requesting spouse:

(1) Is no longer married to the nonrequesting spouse as set forth in section 4.03(2)(a);

(2) Would suffer economic hardship if relief were not granted as set forth in section 4.03(2)(b); and

(3) Did not know or have reason to know that there was an understatement or

deficiency on the joint return, as set forth in section 4.03(2)(c)(i), or did not know or have reason to know that the nonrequesting spouse would not or could not pay the underpayment of tax reported on the joint income tax return, as set forth in section 4.03(2)(c)(ii). If the nonrequesting spouse abused the requesting spouse or maintained control over the household finances by restricting the requesting spouse's access to financial information, and therefore, because of the abuse or financial control the requesting spouse was not able to challenge the treatment of any items on the joint return, or to question the payment of the taxes reported as due on the joint return or challenge the nonrequesting spouse's assurance regarding payment of the taxes, for fear of the nonrequesting spouse's retaliation, then the abuse or financial control will result in this factor being satisfied even if the requesting spouse had knowledge or reason to know of the items giving rise to the understatement or deficiency or had knowledge or reason to know that the nonrequesting spouse would not pay the tax liability.

.03. *Factors for determining whether to grant equitable relief.*

(1) *Applicability*. This section 4.03 applies to requesting spouses who request relief under section 66(c) or section 6015(f), and satisfy the threshold conditions of section 4.01, but do not qualify for streamlined determinations granting relief under section 4.02.

(2) *Factors*. In determining whether it is inequitable to hold the requesting spouse liable for all or part of the unpaid income tax liability or deficiency, and full or partial equitable relief under section 66(c) or section 6015(f) should be granted, all the facts and circumstances of the case are to be taken into account. The degree of importance of each factor varies depending on the circumstances of the requesting spouse and the factual context surrounding the marriage. The factors are designed as guides. It is not intended that only the factors described in this paragraph are to be taken into account in making the determination. No one factor or a majority of factors necessarily determines the outcome. Factors to consider include the following:

(a) *Marital status*. Whether the requesting spouse is no longer married to the nonrequesting spouse as of the date the Service makes its determination. If the requesting spouse is still married to the nonrequesting spouse, this factor is neutral. If the requesting spouse is no longer married to the nonrequesting spouse, this factor will weigh in favor of relief. For purposes of this section, a requesting spouse will be treated as being no longer married to the nonrequesting spouse only in the following situations:

(i) The requesting spouse is divorced from the nonrequesting spouse,

(ii) The requesting spouse is legally separated from the nonrequesting spouse under applicable state law,

(iii) The requesting spouse is a widow or widower and is not an heir to the nonrequesting spouse's estate which would have sufficient assets to pay the tax liability, or

(iv) The requesting spouse has not been a member of the same household as the nonrequesting spouse at any time during the 12-month period ending on the date relief was requested. For these purposes, a temporary absence (*e.g.*, due to incarceration, illness, business, military service, or education) is not considered separation if the absent spouse is expected to return to the household. See Treas. Reg. § 1.6015–3(b)(3)(i). A requesting spouse is a member of the same household as the nonrequesting spouse for any period in which the spouses maintain the same residence.

(b) *Economic hardship*. Whether the requesting spouse will suffer economic hardship if relief is not granted. For purposes of this factor, an economic hardship exists if satisfaction of the tax liability in whole or in part will cause the requesting spouse to be unable to pay reasonable basic living expenses. Whether the requesting spouse will suffer economic hardship is determined based on rules similar to those provided in §301.6343–1(b)(4), and will take into consideration a requesting spouse's current income and expenses and the requesting spouse's assets. In determining the requesting spouse's reasonable basic living expenses, the Service will consider whether the requesting spouse shares expenses or has expenses paid by another individual (such as a spouse). If denying relief from the joint and several liability will cause the requesting spouse to suffer economic hardship, this factor will weigh in favor of relief. If denying relief from the joint and several liability will not cause the requesting spouse to suffer economic hardship, this factor will be neutral.

In determining whether the requesting spouse would suffer economic hardship if relief is not granted, the Service will compare the requesting spouse's income to the Federal poverty guidelines (as updated periodically in the Federal Register by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. § 9902(2)) for the requesting spouse's family size and will determine by how much, if at all, the requesting spouse's monthly income exceeds the spouse's reasonable basic monthly living expenses. If the requesting spouse's income is below 250% of the Federal poverty guidelines, or if the requesting spouse's monthly income exceeds the requesting spouse's reasonable basic monthly living expenses by $300 or less, then this factor will weigh in favor of relief unless the requesting spouse has assets out of which the requesting spouse can make payments towards the tax liability and still adequately meet the requesting spouse's reasonable basic living expenses. If the requesting spouse's income exceeds these standards, the Service will consider all facts and circumstances in determining whether the requesting spouse would suffer economic hardship if relief is not granted. If the requesting spouse is deceased, this factor is neutral.

(c) *Knowledge or reason to know*.

(i) *Understatement cases*. Whether the requesting spouse knew or had reason to know of the item giving rise to the understatement or deficiency at the time the requesting spouse signed the joint return (including a joint amended return). In the case of an income tax liability that arose from an understatement or a deficiency, this factor will weigh in favor of relief if the requesting spouse did not know and had no reason to know of the item giving rise to the understatement. If the requesting spouse knew or had reason to know of the item giving rise to the understatement, this factor will weigh against relief. Actual knowledge of the item giving rise to the understatement or deficiency will not be weighed more heavily than any other factor. Depending on the facts and circumstances, if the requesting spouse was abused by the nonrequesting spouse (as described in section 4.03(2)(c)(iv)), or the nonrequesting spouse maintained control of the household finances by restricting

the requesting spouse's access to financial information and, therefore, the requesting spouse was not able to challenge the treatment of any items on the joint return for fear of the nonrequesting spouse's retaliation, this factor will weigh in favor of relief even if the requesting spouse had knowledge or reason to know of the items giving rise to the understatement or deficiency.

(ii) *Underpayment cases*. In the case of an income tax liability that was properly reported on a joint return (including a joint amended return) but not paid, whether the requesting spouse knew or had reason to know at the time the requesting spouse signed the joint return that the nonrequesting spouse would not or could not pay the tax liability at the time the joint return was filed or within a reasonably prompt time after the filing of the joint return. This factor will weigh in favor of relief if the requesting spouse reasonably expected the nonrequesting spouse to pay the tax liability reported on the joint return. This factor will weigh against relief if, based on the facts and circumstances of the case, it was not reasonable for the requesting spouse to believe that the nonrequesting spouse would or could pay the tax liability shown on the joint return within a reasonably prompt time after filing of the return. For example, if prior to signing the return, the requesting spouse knew of the nonrequesting spouse's prior bankruptcies, financial difficulties, or other issues with the IRS or other creditors, or was otherwise aware of difficulties in timely paying bills, then this factor will generally weigh against relief. Depending on the facts and circumstances, if the requesting spouse was abused by the nonrequesting spouse (as described in section 4.03(2)(c)(iv)), or the nonrequesting spouse maintained control of the household finances by restricting the requesting spouse's access to financial information and, therefore, the requesting spouse was not able to question the payment of the taxes reported as due on the joint return or challenge the nonrequesting spouse's assurance regarding payment of the taxes for fear of the nonrequesting spouse's retaliation, this factor will weigh in favor of relief even if the requesting spouse had knowledge or reason to know regarding the nonrequesting spouse's intent or ability to pay the taxes due.

(iii) *Reason to know*. The facts and circumstances that are considered in determining whether the requesting spouse had reason to know of an understatement, or reason to know the nonrequesting spouse could not or would pay the reported tax liability, include, but are not limited to, the requesting spouse's level of education, any deceit or evasiveness of the nonrequesting spouse, the requesting spouse's degree of involvement in the activity generating the income tax liability, the requesting spouse's involvement in business and household financial matters, the requesting spouse's business or financial expertise, and any lavish or unusual expenditures compared with past spending levels.

(iv) *Abuse by the nonrequesting spouse*. For purposes of this revenue procedure, if the requesting spouse establishes that he or she was the victim of abuse (not amounting to duress, see Treas. Reg. § 1.6015–1(b)), then depending on the facts and circumstances of the requesting spouse's situation, the abuse may result in certain factors weighing in favor of relief when otherwise the factor may have weighed against relief. Abuse comes in many forms and can include physical, psychological, sexual, or emotional abuse, including efforts to control, isolate, humiliate and intimidate the requesting spouse, or to undermine the requesting spouse's ability to reason independently and be able to do what is required under the tax laws. All the facts and circumstances are considered in determining whether a requesting spouse was abused. The impact of a nonrequesting spouse's alcohol or drug abuse is also considered in determining whether a requesting spouse was abused.

(d) *Legal obligation*. Whether the requesting spouse or the nonrequesting spouse has a legal obligation to pay the outstanding Federal income tax liability. For purposes of this factor, a legal obligation is an obligation arising from a divorce decree or other legally binding agreement. This factor will weigh in favor of relief if the nonrequesting spouse has the sole legal obligation to pay the outstanding income tax liability pursuant to a divorce decree or agreement. This factor, however, will be neutral if the requesting spouse knew or had reason to know, when entering into the divorce decree or agreement, that the nonrequesting spouse would not pay the income tax liability. This factor will weigh against relief if the requesting spouse has the sole legal obligation. The fact that the nonrequesting spouse has been relieved of liability for the taxes at issue as a result of a discharge in bankruptcy is disregarded in determining whether the requesting spouse has the sole legal obligation. If, based on an agreement or consent order, both spouses have a legal obligation to pay the outstanding income tax liability, the spouses are not separated or divorced, or the divorce decree or agreement is silent as to any obligation to pay the outstanding income tax liability, this factor is neutral.

(e) *Significant benefit*. Whether the requesting spouse received significant benefit (beyond normal support) from the unpaid income tax liability or item giving rise to the deficiency. See Treas. Reg. § 1.6015–2(d). If the requesting spouse enjoyed the benefits of a lavish lifestyle, such as owning luxury assets and taking expensive vacations, this factor will weigh against relief. If the nonrequesting spouse controlled the household and business finances or there was abuse (as described in section 4.03(2)(c)(iv)) such that the nonrequesting spouse made the decision on spending funds for a lavish lifestyle, then this mitigates this factor so that it is neutral. If only the nonrequesting spouse significantly benefitted from the unpaid tax or item giving rise to an understatement or deficiency, and the requesting spouse had little or no benefit, or the nonrequesting spouse enjoyed the benefit to the requesting spouse's detriment, this factor will weigh in favor of relief. If the amount of unpaid tax or understated tax was small such that neither spouse received a significant benefit, then this factor is neutral.

(f) *Compliance with income tax laws*. Whether the requesting spouse has made a good faith effort to comply with the income tax laws in the taxable years following the taxable year or years to which the request for relief relates.

(1) If the requesting spouse is compliant for taxable years after being divorced from the nonrequesting spouse, then this factor will weigh in favor of relief. If the requesting spouse is not compliant, then this factor will weigh against relief. If the requesting spouse made a good faith effort to comply with the tax laws but was unable to fully comply, then this factor will be neutral. For example, if the requesting spouse timely filed an income tax return but was unable to fully pay the tax liability due to

spouse's poor financial or economic situation after the divorce, then this factor will be neutral.

(2) If the requesting spouse remains married to the nonrequesting spouse, whether or not legally separated or living apart, and continues to file joint returns with the nonrequesting spouse after requesting relief, then this factor will be neutral if the joint returns are compliant with the tax laws, but will weigh against relief if the returns are not compliant.

(3) If the requesting spouse remains married to the nonrequesting spouse but files separate returns, this factor will weigh in favor of relief if the requesting spouse is compliant with the tax laws and will weigh against relief if the requesting spouse is not compliant with the tax laws. If the requesting spouse made a good faith effort to comply with the tax laws but was unable to fully comply, then this factor will be neutral. For example, if the requesting spouse timely filed an income tax return but was unable to fully pay the tax liability due to the requesting spouse's poor financial or economic situation as a result of being separated or living apart from the nonrequesting spouse, then this factor will be neutral.

(g) *Mental or physical health*. Whether the requesting spouse was in poor physical or mental health. This factor will weigh in favor of relief if the requesting spouse was in poor mental or physical health at the time the requesting spouse signed the return or returns for which the request for relief relates or at the time the requesting spouse requested relief. The Service will consider the nature, extent, and duration of the condition. If the requesting spouse was in neither poor physical nor poor mental health, this factor is neutral.

04. *Refunds*. In both understatement and underpayment cases, a requesting spouse is eligible for a refund of separate payments made by the requesting spouse after July 22, 1998, and the requesting spouse establishes that the funds used to make the payment for which a refund is sought were provided by the requesting spouse. A requesting spouse is not eligible for refunds of payments made with the joint return, joint payments, or payments that the nonrequesting spouse made. A requesting spouse, however, may be eligible for a refund of the requesting spouse's portion of the requesting and nonrequesting spouse's joint overpayment from another tax year that was applied to the joint income tax liability to the extent that the requesting spouse can establish that the requesting spouse provided the funds for the overpayment. The availability of refunds is subject to the refund limitations of section 6511.

SECTION 5. PROCEDURE

A requesting spouse seeking equitable relief under section 66(c) or section 6015(f) must file Form 8857, *Request for Innocent Spouse Relief* (*and Separation of Liability, and Equitable Relief*), or other similar statement signed under penalties of perjury, within the applicable period of limitation as set forth in section 4.01(3) of this revenue procedure.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Revenue Procedure 2003–61, 2003–2 C.B. 296, is superseded.

SECTION 7. EFFECTIVE DATE

This revenue procedure is effective for requests for relief filed on or after **[INSERT DATE REVENUE PROCEDURE IS RELEASED TO THE PUBLIC]**. In addition, this revenue procedure is effective for requests for equitable relief pending on **[INSERT DATE REVENUE PROCEDURE IS RELEASED TO THE PUBLIC]**, whether with the Service, the Office of Appeals, or in a case docketed with a Federal court.

SECTION 8. DRAFTING INFORMATION

The principal authors of this revenue procedure are Nancy Rose and Sheida Lahabi of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue procedure, contact Branches 1 or 2 of Procedure and Administration at (202) 622–4910 or (202) 622–4940 (not a toll-free call).

Interim Guidance on Informational Reporting to Employees of the Cost of Their Group Health Insurance Coverage

Notice 2012–9

I. PURPOSE

This notice restates and amends the interim guidance on informational reporting to employees of the cost of their employer-sponsored group health plan coverage initially provided in Notice 2011–28, 2011–16 I.R.B. 656. This informational reporting is required under § 6051(a)(14) of the Internal Revenue Code (Code), enacted as part of the Patient Protection and Affordable Care Act of 2010 (the Affordable Care Act), Public Law, 111–148, to provide useful and comparable consumer information to employees on the cost of their health care coverage. Notice 2011–28 solicited comments on various aspects of the reporting requirement. In response to comments, this notice supersedes Notice 2011–28 and makes the following changes to the guidance provided in Notice 2011–28:

- Modifies Q&A–3 to provide that until further guidance is issued, the reporting requirement will not apply to tribally chartered corporations wholly owned by Federally recognized Indian tribal governments.
- Modifies Q&A–3 to clarify the application of the interim relief from the reporting requirement for employers filing fewer than 250 Forms W–2 for the preceding calendar year.
- Modifies Q&A–7 to clarify the application of the reporting requirement to certain related employers not using a common paymaster.
- Adds a new example to Q&A–19 that demonstrates that the reporting requirement does not apply to coverage under a health flexible spending arrangement (FSA) if contributions occur only through employee salary reduction elections.
- Modifies Q&A–20 to clarify that the standard for determining whether coverage under a dental plan or vision plan is subject to the reporting requirement

is based upon the same standard for determining whether the coverage is subject to the rules set forth in the regulations under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

- Modifies and corrects Q&A–23 to clarify that the reporting requirement does not apply to the cost of coverage includible in income under § 105(h), or payments or reimbursements of health insurance premiums for a 2% shareholder-employee of an S corporation who is required to include the premium payments in gross income.
- Modifies Q&A–28 to clarify the application of the reporting requirement if a composite rate is used with respect to the premium charged active participants, but not the premium charged under COBRA to a qualifying beneficiary.

The notice also provides the following additional guidance through new Q&A's:

- Provides that employers are not required to include the cost of coverage under an employee assistance program (EAP), wellness program, or on-site medical clinic in the reportable amount if the employer does not charge a premium with respect to that type of coverage provided under COBRA to a qualified beneficiary (Q&A–32).
- Clarifies that employers may include the cost of coverage under programs not required to be included under applicable interim relief, such as the cost of coverage under a Health Reimbursement Arrangement (HRA) (Q&A–33).
- Clarifies how to calculate the reportable amount for coverage only a portion of which constitutes coverage under a group health plan (Q&A–34).
- Clarifies how to calculate the reportable amount if an employer is provided notice after December 31 of a calendar year of events that occurred on or before December 31 of a calendar year that affect the prior year's coverage, such as an employee providing an employer notice of a divorce or other change in family status that occurred during a prior calendar year (Q&A–35).
- Clarifies how to calculate the reportable amount where coverage extends over the payroll period including December 31 (Q&A–36).
- Clarifies the application of the exception for certain hospital indemnity or other fixed indemnity insurance offered by an employer on an after-tax basis (Q&A–37 and Q&A–38).
- Provides that the reportable amount is not required to be included on a Form W–2 provided by a third-party sick pay provider (Q&A–39).

This reporting to employees is for their information only. The reporting is intended to inform them of the cost of their health care coverage, and does not cause excludable employer-provided health care coverage to become taxable. Nothing in § 6051(a)(14), this notice, or the additional guidance that is contemplated under § 6051(a)(14), causes or will cause otherwise excludable employer-provided health care coverage to become taxable.

Section 6051(a)(14) was added to the Code by § 9002 of the Affordable Care Act, and provides that the reporting be made on Form W–2, *Wage and Tax Statement*. Notice 2010–69, 2010–44 I.R.B. 576, provides that this reporting will not be mandatory for 2011 Forms W–2 (that is, the forms required for the calendar year 2011 that employers are generally required to give employees by the end of January 2012 and then file with the Social Security Administration (SSA)).

This notice provides interim guidance that generally is applicable beginning with 2012 Forms W–2 (that is, the forms required for the calendar year 2012 that employers are generally required to give employees by the end of January 2013 and then file with the SSA). In addition, employers may rely on the guidance provided in this notice if they voluntarily choose to report the cost of coverage on 2011 Forms W–2, even though this reporting is not required for 2011. This interim guidance is applicable until further guidance is issued. Treasury and the IRS will continue to consider comments submitted in response to Notice 2011–28 as they work to develop regulations under § 6051(a)(14). To the extent that future guidance applies the reporting requirement to additional employers or categories of employers or additional types of coverage, that guidance will apply prospectively only and will not apply to any calendar year beginning within six months of the date the guidance is issued.

As explained above, this notice provides transition relief for certain employers and with respect to certain types of employer-sponsored coverage. This transition relief will be available at least for 2012 Forms W–2 and the availability of this transition relief for 2012 Forms W–2 will not be affected by the issuance of any further guidance. Thus, reporting by employers and with respect to the types of coverage covered by the exceptions provided in this notice will not be required for 2012 Forms W–2. For example, as provided in Q&A–3 of this notice, employers that are required to file fewer than 250 2011 Forms W–2 will not be subject to the reporting requirement for 2012 Forms W–2.

The interim guidance is set forth in section III of this notice. Q&A–1 and Q&A–2 discuss the general requirements. Q&A–3 identifies the employers subject to the reporting requirements. Q&A–4 through Q&A–10 provide the methods for reporting the cost of the coverage on the Form W–2. Q&A–11 through Q&A–15 define certain terms related to the cost of coverage required to be reported on the Form W–2. Q&A–16 through Q&A–23 set forth the types of coverage the cost of which is required to be included in the amount reported on the Form W–2. Q&A–24 through Q&A–27 describe several calculation methods that may be used to determine the cost of the coverage. Q&A–28 through Q&A–31 address a number of other issues employers may encounter in determining the cost of the coverage. Q&A–32 through Q&A–38 contain additions to the guidance initially set forth in Notice 2011–28. Section IV of this notice contains transition relief for certain employers and with respect to certain types of employer-sponsored coverage. Section V of this notice states that Notice 2011–28 is superseded.

II. BACKGROUND

Section 6051(a) provides generally that an employer must provide a written statement to each employee showing the remuneration paid by such person to such employee during the calendar year on or before January 31 of the succeeding year (or, if the employee terminates employ-

ment during the year, within 30 days after the date of receipt of a written request from such employee submitted before January 2). Form W–2, *Wage and Tax Statement*, is the form used to provide an employee this information.

Section 6051(a)(14) provides generally that the aggregate cost of applicable employer-sponsored coverage must be included in the information reported on Form W–2, effective for taxable years beginning on or after January 1, 2011. Section 6051(a)(14), provides that, for this purpose, the aggregate cost is to be determined under rules similar to the rules of § 4980B(f)(4), referring to the definition of the "applicable premium" for purposes of COBRA continuation coverage.

Section 6051(a)(14) does not apply to the amount contributed to any Archer MSA (as defined in § 220(d)) or to any health savings account (as defined in § 223(d)) of an employee or an employee's spouse. See § 6051(a)(11) and (a)(12). Section 6051(a)(14) also does not apply to the amount of any salary reduction contributions to a health flexible spending arrangement (within the meaning of §§ 106(c)(2) and 125).

Section 6051(a)(14) provides that the aggregate cost of applicable employer-sponsored coverage (the amount required to be reported on Form W–2) has the same meaning as in § 4980I(d)(1). Section 4980I(d)(1)(A) provides that the term "applicable employer-sponsored coverage" means, with respect to any employee, coverage under any group health plan made available to the employee by an employer which is excludable from the employee's gross income under § 106, or would be so excludable if it were employer-provided coverage (within the meaning of § 106). Section 4980I(f)(4) provides that, for purposes of § 4980I(d)(1), the term "group health plan" has the same meaning as under § 5000(b)(1).

Under § 4980I(d)(1)(B), the term "applicable employer-sponsored coverage" does not include (i) any coverage (whether through insurance or otherwise) described in § 9832(c)(1) (other than coverage for on-site medical clinics described in subparagraph (G) thereof) or for long-term care, or (ii) any coverage under a separate policy, certificate, or contract of insurance which provides benefits substantially all of which are for treatment of the mouth (including any organ or structure within the mouth) or for treatment of the eye, or (iii) any coverage described in § 9832(c)(3) the payment for which is not excludable from gross income and for which a deduction under § 162(l) is not allowable.

The types of coverage described in § 9832(c)(1) (providing that certain "excepted benefits" are not subject to the requirements of chapter 100 of the Code) that are not subject to this reporting requirement are the following:

- coverage only for accident, or disability income insurance, or any combination thereof;
- coverage issued as a supplement to liability insurance;
- liability insurance, including general liability insurance and automobile liability insurance;
- workers' compensation or similar insurance;
- automobile medical payment insurance;
- credit-only insurance;
- other similar insurance coverage, specified in regulations, under which benefits for medical care are secondary or incidental to other insurance benefits.

The types of coverage described in § 9832(c)(3) include the following, provided that such coverage is offered as independent, noncoordinated benefits:

(A) coverage only for a specified disease or illness; and

(B) hospital indemnity or other fixed indemnity insurance.

Section 4980I(d)(1)(C) provides that coverage shall be treated as applicable employer-sponsored coverage without regard to whether the employer or employee pays for the coverage.

Section 4980I(d)(1)(E) provides that applicable employer-sponsored coverage shall include coverage under any group health plan established and maintained primarily for its civilian employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any such government.

Section 4980B(f)(4)(A) provides that the term "applicable premium" means, with respect to any period of continuation coverage of qualified beneficiaries, the cost to the plan for such period of the coverage for similarly situated beneficiaries with respect to whom a qualifying event has not occurred (without regard to whether such cost is paid by the employer or employee). Section 4980B(f)(4)(B) provides a special rule for self-insured plans, generally requiring that such plans calculate the applicable premium through one of two methods — the actuarial method or the past cost method. Section 4980B(f)(4)(C) provides that the determination of any applicable premium shall be made for a period of 12 months and shall be made before the beginning of such period.

Section 54.4980B–1, Q&A–2 of the Miscellaneous Excise Tax Regulations, provides that, for purposes of § 4980B, for topics relating to the COBRA continuation coverage requirements of § 4980B that are not addressed in §§54.4980B–1 through 54.4980B–10 (such as methods for calculating the applicable premium), plans and employers must operate in good faith compliance with a reasonable interpretation of the statutory requirements in § 4980B.

III. INTERIM GUIDANCE

This interim guidance generally is applicable to 2012 Forms W–2 (that is, the forms required for the calendar year 2012 that employers generally are required to furnish to employees by the end of January 2013 and then file with the SSA) and Forms W–2 for later years. In addition, employers may rely on the guidance provided in this notice if they voluntarily report the cost of coverage on 2011 Forms W–2, even though such reporting is not required for 2011. This interim guidance is applicable until further guidance is issued. To the extent that future guidance applies the reporting requirement to additional employers or categories of employers, additional types of coverage, or otherwise applies the reporting requirement more expansively, that guidance will apply prospectively only and will not apply to any calendar year beginning within six months of the date the guidance is issued. See also Section IV of this notice for certain transition relief that will be extended at least for the 2012 Forms W–2.

Except as otherwise specified, the interim guidance in this section applies

solely for purposes of § 6051(a)(14) and no inference should be drawn concerning any other provision of the Code.

In General (Q&A–1 and Q&A–2)

Q–1: What does § 6051(a)(14) require?

A–1: Section 6051(a)(14) generally requires the aggregate cost of applicable employer-sponsored coverage to be reported on Form W–2.

Q–2: Does the requirement under § 6051(a)(14) to report the aggregate cost of employer-sponsored coverage on Form W–2, or compliance with this requirement, have any impact on whether such coverage is taxable?

A–2: No. The requirement is informational only. The provisions of § 6051(a)(14) do not affect whether any particular coverage is excludable from gross income under § 106 or any other Code provision, and the reporting of any amount on Form W–2 in compliance with the requirements of § 6051(a)(14) will not affect the amount includable in income or the amount reported in any other box on Form W–2. The purpose of the reporting is to provide useful and comparable consumer information to employees on the cost of their health care coverage.

Employers Subject to the Reporting Requirement (Q&A–3)

Q–3: What employers are subject to the reporting requirement under § 6051(a)(14)?

A–3: Except as provided in this Q&A–3, all employers that provide applicable employer-sponsored coverage (see Q&A–12) during a calendar year are subject to the reporting requirement under § 6051(a)(14). This includes employers that are federal, state and local government entities, churches and other religious organizations, and employers that are not subject to the COBRA continuation coverage requirements under § 4980B, to the extent such employers provide applicable employer-sponsored coverage under a group health plan. (Notice 2010–69, 2010–44 I.R.B. 576, provides that reporting by these employers is not mandatory prior to the issuance of the 2012 Forms W–2 (the forms required for the calendar year 2012 that employers generally are required to furnish to employees by the end of January 2013 and then file with the Social Security Administration (SSA))). Employers that are Federally recognized Indian tribal governments are not subject to the reporting requirements of § 6051(a)(14). Until further guidance is issued, employers that are tribally chartered corporations wholly-owned by a Federally recognized Indian tribal government also are not subject to the reporting requirements.

Also, in the case of the 2012 Forms W–2 (and Forms W–2 for later years unless and until further guidance is issued), an employer is not subject to the reporting requirement for any calendar year if the employer was required to file fewer than 250 Forms W–2 for the preceding calendar year. (This rule is based upon the rule in § 6011(e) that exempts employers from filing returns electronically if they file fewer than 250 returns.) Therefore, if an employer is required to file fewer than 250 2011 Forms W–2, the employer would not be subject to the reporting requirement for 2012 Forms W–2. For this purpose, whether an employer is required to file fewer than 250 Forms W–2 for a calendar year is determined based on the Forms W–2 that employer would be required to file if it filed Forms W–2 to report all wages paid by that employer and without regard to the use of an agent under § 3504. For example, an employer that would have filed only 100 Forms W–2 for the previous year had it not used an agent under § 3504 will not be subject to the reporting requirement for the year, nor will an agent under § 3504 with respect to that employer's Forms W–2 for the year. In contrast, if the same employer would have filed 300 Forms W–2 for the previous year had it not used an agent under § 3504 of the Code, that employer would be subject to the reporting requirement for the year so that if an agent under § 3504 is used again the information will need to be provided to the agent and reported on the Form W–2.

See also Q&A–21 for an exception to the reporting requirement for coverage under a self-insured plan that is not subject to any federal continuation coverage requirements and Q&A–22 for an exception from the reporting requirement for plans maintained primarily for members of the military, or primarily for members of the military and their families.

Method of Reporting on the Form W–2 (Q&A–4 through Q&A–10)

Q–4: Is the reporting of the aggregate cost of applicable employer-sponsored coverage required for Forms W–2 issued for the 2010 or 2011 calendar years?

A–4: No. Section 6051(a)(14) does not apply to Forms W–2 for calendar years prior to 2011 and, accordingly, reporting of the aggregate cost of applicable employer-sponsored coverage is not required for Forms W–2 issued for the 2010 calendar year. Moreover, Notice 2010–69 provides that reporting will not be mandatory for the 2011 calendar year and, accordingly, an employer will not be treated as failing to meet the requirements of § 6051 for 2011, and will not be subject to any penalties for failure to meet such requirements, merely because it does not report the aggregate cost of applicable employer-sponsored coverage on Forms W–2 for 2011.

Q–5: How is the aggregate reportable cost reported on Form W–2?

A–5: The aggregate reportable cost is reported on Form W–2 in box 12, using code DD.

Q–6: What rules apply in the case of coverage provided by the employer to an employee for a period during a calendar year after that employee has terminated employment?

A–6: An employer may apply any reasonable method of reporting the cost of coverage provided under a group health plan for an employee who terminated employment during the calendar year, provided that the method is used consistently for all employees receiving coverage under that plan who terminate employment during the plan year and continue or otherwise receive coverage after the termination of employment. However, regardless of the method of reporting used by the employer for other terminated employees, an employer is not required to report any amount in box 12 using Code DD for an employee who, pursuant to §31.6051–1(d)(1)(i), has requested to receive a Form W–2 before the end of the calendar year during which the employee terminated employment.

Example 1. Employee is an employee of Employer on January 1, and continues in employment through April 25. During that entire period and through April 30, Employee had individual coverage for himself under a group health plan with

a cost of coverage of $350 per month. Employee elects continuation coverage for the six months following termination of employment, covering the period May 1 through October 31, for which the Employee pays $350 per month. Employer reports $1,400 as the reportable cost under the plan for the calendar year, covering the four months during which Employee performed services and had coverage as an active employee. Employer applies this method consistently for all employees terminating during the calendar year who have coverage under that group health plan. Employer has applied a reasonable method of reporting Employee's reportable cost under the plan.

Example 2. Same facts as *Example 1*, except that Employer reports $3,500 as the reportable cost under the plan for the calendar year, covering both the monthly periods during which Employee performed services and had coverage as an active employee, and the monthly periods during which Employee retained continuation coverage under the plan. Employer applies this method consistently for all employees terminating during the calendar year who retained coverage under that group health plan. Employer has applied a reasonable method of reporting Employee's reportable cost under the plan.

Q–7: In the case of an individual who is an employee of multiple employers within a calendar year, must each employer provide a Form W–2 reporting the aggregate reportable cost that such employer provided?

A–7: Each employer providing employer-sponsored coverage must report the aggregate reportable cost of coverage it provides. However, if the employers concurrently employ an employee and are related employers within the meaning of § 3121(s) and one such employer is a common paymaster within the meaning of § 3121(s) for wages paid to an employee that is concurrently employed, the common paymaster must include the aggregate reportable cost of the coverage provided to that employee by all the employers for whom it serves as the common paymaster on the Form W–2 issued by the common paymaster. In such case, the related employers that use the common paymaster and that are not the common paymaster must not report the cost of coverage they provide. If the employers are related employers within the meaning of § 3121(s) but do not compensate an employee that is concurrently employed with a common paymaster, then with respect to that employee, the related employers may either report the entire aggregate reportable cost on one of the Forms W–2 provided to the employee, or allocate the aggregate reportable cost among the employers that concurrently employ the employee using any reasonable method of allocation.

For employers participating in a multiemployer healthcare plan, see Q&A–17.

Q–8: In the case of an individual who transfers to a new employer that qualifies as a successor employer under § 3121(a)(1), must both the predecessor and successor employers report the aggregate reportable cost of coverage each provided?

A–8: Yes, each of the predecessor and successor employers must report the aggregate reportable cost of coverage that that employer provided, unless the successor employer follows the optional procedure in Rev. Proc. 2004–53, 2004–2 C.B. 320, and issues one Form W–2 reflecting wages paid to the employee during the calendar year by both the predecessor employer and the successor employer. Consistent with the rules applicable to reporting of wages, the successor employer following the optional procedure must include the aggregate reportable cost of coverage provided by both employers on the Form W–2 that it issues, and the predecessor employer must not report the cost of coverage it provides.

Q–9: Must an employer issue a Form W–2 including the aggregate reportable cost to an individual to whom the employer is not otherwise required to issue a Form W–2, such as a retiree or other former employee receiving no compensation required to be reported on a Form W–2?

A–9: No. An employer is not required to issue a Form W–2 reporting the aggregate reportable cost to an individual to whom the employer is not otherwise required to issue a Form W–2.

Q–10: Is the total of the aggregate reportable costs attributable to an employer's employees required to be reported on Form W–3, *Transmittal of Wage and Tax Statements*?

A–10: No. The total of the aggregate reportable costs attributable to an employer's employees is not required to be reported on Form W–3, *Transmittal of Wage and Tax Statements*.

Aggregate Cost of Applicable Employer-Sponsored Coverage (Q&A–11 through Q&A–15)

Q–11: What is the aggregate cost of applicable employer-sponsored coverage and how is the aggregate cost of applicable employer-sponsored coverage referred to in this notice?

A–11: The aggregate cost of applicable employer-sponsored coverage is the total cost of coverage under all applicable employer-sponsored coverage (as defined in Q&A–12) provided to the employee. In this notice, the cost of coverage under a group health plan is referred to as the reportable cost and the aggregate cost of applicable employer-sponsored coverage is referred to as the aggregate reportable cost.

Q–12: What is applicable employer-sponsored coverage?

A–12: Applicable employer-sponsored coverage means, with respect to any employee, coverage under any group health plan (see Q&A–13) made available to the employee by an employer that is excludable from the employee's gross income under § 106, or would be so excludable if it were employer-provided coverage (within the meaning of such § 106), except that applicable employer-sponsored coverage does not include:

(1) any coverage for long-term care,

(2) any coverage (whether through insurance or otherwise) described in § 9832(c)(1) (other than subparagraph (G) thereof (coverage for on-site medical clinics)),

(3) any coverage under a separate policy, certificate, or contract of insurance which provides benefits substantially all of which are for treatment of the mouth (including any organ or structure within the mouth) or for treatment of the eye, and

(4) any coverage described in § 9832(c)(3) the payment for which is not excludable from gross income and for which a deduction under § 162(l) is not allowable.

See Q&A–16 through Q&A–23 for guidance on applicable employer-sponsored coverage that is not required to be included in the aggregate reportable cost.

Q–13: What is a group health plan?

A–13: A group health plan is a plan (including a self-insured plan) of, or contributed to by, an employer (including a self-employed person) or employee organization to provide health care (directly or otherwise) to the employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families.

Until further guidance is issued, for purposes of identifying whether a specific arrangement is a group health plan, taxpayers may rely upon a good faith application of a reasonable interpretation of the statutory provisions and applicable guidance, including §54.4980B–2, Q&A–1.

Q–14: Does the aggregate reportable cost include both the portion of the cost paid by the employer and the portion of the cost paid by the employee?

A–14: Yes. The aggregate reportable cost generally includes both the portion of the cost paid by the employer and the portion of the cost paid by the employee, regardless of whether the employee paid for that cost through pre-tax or after-tax contributions. However, see Q&A–19 regarding contributions to a health FSA.

Q–15: Does the aggregate reportable cost include any portion of the cost of coverage under an employer-sponsored group health plan that is includible in the employee's gross income, for example, the cost of coverage for a person other than an employee, the spouse of the employee, a dependent of the employee, or a child of the employee (provided that child will not have attained age 27 by the end of the taxable year)?

A–15: Yes. The aggregate reportable cost includes the cost of coverage under the employer-sponsored group health plan of the employee and any person covered by the plan because of a relationship to the employee, including any portion of the cost that is includible in an employee's gross income. Thus, the aggregate reportable cost is not reduced by the amount of the cost of coverage included in the employee's gross income. For the treatment of coverage included in gross income under § 105(h), or payments or reimbursements of health insurance premiums for a 2% shareholder-employee of an S corporation who is required to include the premium payments in gross income, see Q&A–23.

Example. An employee has family health coverage under an employer-sponsored group health plan for himself, his spouse and dependents, and an adult child age 28, with a cost of coverage of $15,000. The fair market value of the health coverage for the adult child age 28 is included in the income and wages of the employee. The aggregate reportable cost with respect to the family health coverage is $15,000.

Cost of Coverage Required to be Included in the Aggregate Reportable Cost (Q&A–16 through Q&A–23)

Q–16: Is the cost of coverage under all applicable employer-sponsored coverage required to be included in the aggregate reportable cost?

A–16: Except as provided in this Q&A and in Q&A–17 through Q&A–23, the cost of coverage under all applicable employer-sponsored coverage must be included in the aggregate reportable cost. However, the following amounts are not included in the aggregate reportable cost and are not reported under § 6051(a)(14)[1]:

(1) the amount contributed to any Archer MSA (as defined in § 220(d)),

(2) the amount contributed to any Health Savings Account (as defined in § 223(d)), and

(3) the amount of any salary reduction election to a health Flexible Spending Arrangement (FSA)(within the meaning of §§ 106(c)(2) and 125).

Q–17: Is the cost of coverage under a multiemployer plan (as defined in § 54.4980B–2, Q&A–3) required to be included in the aggregate reportable cost reported on Form W–2?

A–17: No. An employer that contributes to a multiemployer plan is not required to include the cost of coverage provided to an employee under that multiemployer plan in determining the aggregate reportable cost. If the only applicable employer-sponsored coverage provided to an employee is provided under a multiemployer plan, the employer is not required to report any amount under § 6051(a)(14) on the Form W–2 for that employee.

Q–18: Is the cost of coverage under a Health Reimbursement Arrangement (HRA) required to be included in the aggregate reportable cost reported on Form W–2?

A–18: No. An employer is not required to include the cost of coverage under an HRA in determining the aggregate reportable cost. If the only applicable employer-sponsored coverage provided to an employee is an HRA, the employer is not required to report any amount under § 6051(a)(14) on the Form W–2 for that employee.

Q–19: If an employer offers a health FSA through a § 125 cafeteria plan, is the amount of the health FSA required to be included in the aggregate reportable cost reported on Form W–2?

A–19: Yes, the amount of the health FSA is required to be included in the aggregate reportable cost reported on Form W–2, but only if the amount of the health FSA for the plan year exceeds the salary reduction elected by the employee for the plan year. The amount of a health FSA for a cafeteria plan year equals the amount of salary reduction (as defined in Proposed Treas. Reg. §1.125–1(r)) elected by the employee for the plan year, plus the amount of any optional employer flex credits (as defined under Proposed Treas. Reg. §1.125–5(b)) that the employee elects to apply to the health FSA. In determining the aggregate reportable cost, the amount of the health FSA is reduced (but not below zero) by the employee's salary reduction election (see Q&A–16).

If the amount of salary reduction (for all qualified benefits) elected by an employee equals or exceeds the amount of the health FSA for the plan year, the employer does not include the amount of the health FSA for that employee in the aggregate reportable cost. However, if the amount of the health FSA for the plan year exceeds the salary reduction elected by the employee for the plan year, then the amount of that employee's health FSA minus the employee's salary reduction election for the health FSA must be included in the aggregate reportable cost and reported under § 6051(a)(14).

For purposes of this Q&A–19, a health FSA means an FSA (as defined in Proposed Treas. Reg. §1.125–5(a)) that is a medical reimbursement arrangement.

Example 1: Employer maintains a § 125 cafeteria plan that offers permitted taxable benefits (including cash) and qualified nontaxable benefits (including a health FSA). The plan permits contributions only through employee salary reduction elections, and does not offer any employer flex credits. Employee makes a $2,000 salary reduction election for several qualified benefits under the plan, including a health FSA for $1,500. For purposes of reporting on Form W–2, none of the health FSA amount is included for purposes of determining the aggregate reportable cost.

Example 2: Employer maintains a § 125 cafeteria plan that offers permitted taxable benefits (including cash) and qualified nontaxable benefits (including a

[1] Contributions to an Archer MSA are separately required to be reported on a Form W–2 under § 6051(a)(11), and contributions to a Health Savings Account are separately required to be reported on a Form W–2 under § 6051(a)(12).

health FSA). The plan offers an employer flex credit of $1,000. Employee makes a $2,000 salary reduction election for several qualified benefits under the plan, including a health FSA for $1,500. The cost of the qualified benefits for Employee under the plan for the year is $3,000. The amount of Employee's salary reduction election ($2,000) for the plan year equals or exceeds the amount of the health FSA ($1,500) for the plan year. Thus, for purposes of reporting on Form W–2, none of the health FSA amount is permitted to be included for purposes of determining the aggregate reportable cost.

Example 3: Employer maintains a § 125 cafeteria plan that offers permitted taxable benefits (including cash) and qualified nontaxable benefits (including a health FSA). The plan offers a flex credit in the form of a match of each employee's salary reduction contribution. Employee makes a $700 salary reduction election for a health FSA. Employer provides an additional $700 to the health FSA to match Employee's salary reduction election. The amount of the health FSA for Employee for the plan year is $1,400. The amount of Employee's health FSA ($1,400) for the plan year exceeds the salary reduction election ($700) for the plan year. The employer must include $700 ($1,400 health FSA amount minus $700 salary reduction) in determining the aggregate reportable cost.

Q–20: Is the cost of coverage under a dental plan or a vision plan included in the aggregate reportable cost if that plan satisfies the requirements for being excepted benefits for purposes of HIPAA under §54.9831–1(c)(3)?

A–20: No. An employer is not required to include the cost of coverage under a dental plan or a vision plan if the plan satisfies the requirements for being excepted benefits for purposes of HIPAA under §54.9831–1(c)(3). (Generally, to be excepted benefits for purposes of HIPAA under §54.9831–1(c)(3), the dental or vision benefits must either (1) be offered under a separate policy, certificate, or contract of insurance (that is, not offered under the same policy, certificate, or contract of insurance under which major medical or other health benefits are offered) or (2) participants must have the right not to elect the dental or vision benefits and if they do elect the dental or vision benefits they must pay an additional premium or contribution for that coverage.) An employer must include the cost of coverage under a dental plan or a vision plan if the plan does not satisfy the requirements for being excepted benefits for purposes of HIPAA under §54.9831–1(c)(3).

Q–21: Is the cost of coverage provided under a self-insured group health plan that is not subject to any federal continuation coverage requirements (for example, a church plan within the meaning of § 4980B(d)(3) that is a self-insured group health plan) required to be included in the aggregate reportable cost reported on Form W–2?

A–21: No. An employer is not required to include in the aggregate reportable cost the cost of coverage provided under a self-insured group health plan that is not subject to any federal continuation coverage requirements. If the only group health plan coverage provided to an employee by the employer is provided under a self-insured group health plan that is not subject to any federal continuation coverage requirements, the employer is not required to report any amount under § 6051(a)(14) on the Form W–2 for that employee. Employers who provide coverage under a self-insured group health plan that is subject to Federal continuation coverage requirements must report the cost of coverage on Form W–2. For this purpose, federal continuation coverage requirements include the COBRA requirements under the Code, the Employee Retirement Income Security Act of 1974, or the Public Health Service Act and the temporary continuation coverage requirement under the Federal Employees Health Benefits Program.

Q–22: Is the cost of coverage provided by the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any such government, under a plan maintained primarily for members of the military or for members of the military and their families, required to be included in the aggregate reportable cost reported on Form W–2?

A–22: No. The cost of coverage provided by the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any such government, under a plan maintained primarily for members of the military or for members of the military and their families, is not required to be included in the aggregate reportable cost reported on Form W–2

Q–23: In determining the aggregate reportable cost, how should an employer treat an excess reimbursement of a highly compensated individual that is included in gross income under § 105(h), or payments or reimbursements of health insurance premiums for a 2% shareholder-employee of an S corporation who is required to include the premium payments in gross income?

A–23: The cost of applicable employer-sponsored coverage does not include excess reimbursements of highly compensated individuals that are included in gross income under § 105(h); that is, an excess reimbursement that is included in income is subtracted from the cost of coverage in determining the aggregate reportable cost. Similarly, the cost of applicable employer-sponsored coverage does not include the cost of coverage taken into income as the result of an employee being a 2% shareholder-employee of an employer that is an S corporation. For more information regarding the treatment of the employer payment or reimbursement of health insurance premiums for a 2% shareholder-employee, see Notice 2008–1, 2008–1 C.B. 251.

Example: Employer provides self-insured health coverage with a cost of coverage of $12,000 under which a highly compensated individual receives a $4,000 excess reimbursement. As a result, under § 105(h), that individual must include the $4,000 excess reimbursement in gross income. The excess reimbursement is not included in the determination of the aggregate reportable cost, so that Employer must include $8,000 as the cost of coverage under the plan in determining the aggregate reportable cost for that individual.

Methods of Calculating the Cost of Coverage (Q&A–24 through Q&A–27)

Q–24: How may an employer calculate the reportable cost under a plan?

A–24: An employer may calculate the reportable cost under a plan using the COBRA applicable premium method (Q&A–25). Alternatively, (1) an employer that is determining the cost of coverage for an employee covered by the employer's insured plan may calculate the reportable cost using the premium charged method (Q&A–26); and (2) an employer that subsidizes the cost of coverage or that determines the cost of coverage for a year by applying the cost of coverage in a prior year may calculate the reportable cost using the modified COBRA premium method (Q&A–27). For employers that charge employees a composite rate (the same premium for different types of coverage under a plan, for example, a premium for self-only coverage versus family coverage), see Q&A–28.

The reportable cost for an employee receiving coverage under the plan is the sum of the reportable costs for each period (such as a month) during the year as determined under the method used by the employer. An employer is not required to use the same method for every plan, but must use the same method with respect to a plan for every employee receiving coverage under that plan.

Q–25: How does an employer calculate the reportable cost for a period under the COBRA applicable premium method?

A–25: Under the COBRA applicable premium method, the reportable cost for a period equals the COBRA applicable premium for that coverage for that period. If the employer applies this method, the employer must calculate the COBRA applicable premium in a manner that satisfies the requirements under § 4980B(f)(4). Under current guidance, the COBRA applicable premium calculation would meet these requirements if the employer made such calculation in good faith compliance with a reasonable interpretation of the statutory requirements under § 4980B (see §54.4980B–1, Q&A–2).

Q–26: How does an employer calculate the reportable cost for a period under the premium charged method?

A–26: The premium charged method may be used to determine the reportable cost only for an employee covered by an employer's insured group health plan. In such a case, if the employer applies this method, the employer must use the premium charged by the insurer for that employee's coverage (for example, for self-only coverage or for family coverage, as applicable to the employee) for each period as the reportable cost for that period.

Q–27: How does an employer calculate the reportable cost for a period under the modified COBRA premium method?

A–27: An employer may use the modified COBRA premium method with respect to a plan only where it subsidizes the cost of COBRA (so that the premium charged to COBRA qualified beneficiaries is less than the COBRA applicable premium) or where the actual premium charged by the employer to COBRA qualified beneficiaries for each period in the current year is equal to the COBRA applicable premium for each period in a prior year. If the employer subsidizes the cost of COBRA, the employer may determine the reportable cost for a period based upon a reasonable good faith estimate of the COBRA applicable premium for that period, if such reasonable good faith estimate is used as the basis for determining the subsidized COBRA premium. If the actual premium charged by the employer to COBRA qualified beneficiaries for each period in the current year is equal to the COBRA applicable premium for each period in a prior year, the employer may use the COBRA applicable premium for each period in the prior year as the reportable cost for each period in the current year.

Example 1: For the calendar year 2012, Employer A subsidizes 50% of a reasonable good faith estimate of the COBRA applicable premium. Employer A's reasonable good faith estimate of the COBRA applicable premium for self-only coverage for each month in 2012 is $300. Accordingly, the actual COBRA premium Employer A charges individuals eligible for COBRA continuation coverage electing self-only coverage is $150 per month. Solely for purposes of § 6051(a)(14) reporting, if Employer A uses the modified COBRA premium method, it must treat $300 per month (the reasonable good faith estimate of the COBRA applicable premium) as the monthly reportable cost for self-only coverage for the calendar year 2012.

Example 2: Employer B determined that the COBRA applicable premium for each month in calendar year 2011 for individuals eligible for COBRA continuation coverage electing self-only coverage would be $350 per month, and charged an actual COBRA premium for such coverage of $357 per month ($350 x 102%). Employer B knows that the cost of coverage for 2012 is not less than the COBRA applicable premium for 2011 and decides not to make a new determination of the COBRA applicable premium for the calendar year 2012 but rather to continue to charge an actual COBRA premium for self-only coverage of $357 per month ($350 x 102%). Solely for purposes of § 6051(a)(14) reporting, if Employer B uses the modified COBRA premium method, it must treat $350 per month ($357 charged - $7 increase permissible under COBRA) as the monthly reportable cost for self-only coverage for the calendar year 2012.

Example 3: Employer C makes a good faith estimate of the COBRA applicable premium for the calendar year 2012 for individuals eligible for COBRA continuation coverage electing self-only coverage of $500 per month. To ensure compliance with the COBRA requirements despite not calculating a precise COBRA applicable premium, Employer C charges an actual COBRA premium of $350 per month for individuals eligible for COBRA coverage electing self-only coverage. Solely for purposes of § 6051(a)(14) reporting, if Employer C uses the modified COBRA premium method, it must treat $500 per month as the monthly reportable cost for self-only coverage for the calendar year 2012.

Other Issues Relating to Calculating the Cost of Coverage (Q&A–28 through Q&A–31)

Q–28: How may an employer charging an employee a composite rate calculate the reportable cost for a period?

A–28: An employer is considered to charge employees a composite rate if (1) there is a single coverage class under the plan (that is, if an employee elects coverage, all individuals eligible for coverage under the plan because of their relationship to the employee are included in the elections and no greater amount is charged to the employee regardless of whether the coverage will include only the employee or the employee plus other such individuals), or (2) there are different types of coverage under a plan (for example, self-only coverage and family coverage, or self-plus-one coverage and family coverage) and employees are charged the same premium for each type of coverage. In such a case, the employer using a composite rate may calculate and use the same reportable cost for a period for (1) the single class of coverage under the plan, or (2) all the different types of coverage under the plan for which the same premium is charged to employees, provided this method is applied to all types of coverage provided under the plan.

For example, if a plan charges one premium for either self-only coverage, or self-and-spouse coverage (the first coverage group), and also charges one premium for family coverage regardless of the number of family members covered (the second coverage group), an employer may calculate and report the same reportable cost for all of the coverage provided in the first coverage group, and the same reportable cost for all of the coverage provided in the second coverage group. In such a case, the reportable costs under the plan must be determined under one of the methods described in Q&A–25 through Q&A–27 for which the employer is eligible.

If an employer is using a composite rate for active employees, but is not using a composite rate for determining applicable COBRA premiums for qualified beneficiaries, the employer may use either the composite rate or the applicable COBRA premium for determining the aggregate cost of coverage, provided that the same method is used consistently for all active employees and is used consistently for all

qualified beneficiaries receiving COBRA coverage.

Q–29: If the reportable cost for a period changes during the year, must the reportable cost under the plan for the year for an employee reflect the increase or decrease?

A–29: If the cost for a period changes during the year (for example, under the COBRA applicable premium method because the 12-month period for determining the COBRA applicable premium is not the calendar year), the reportable cost under the plan for an employee for the year must reflect the increase or decrease for the periods to which the increase or decrease applies. For examples of the application of this rule, see Q&A–30.

Q–30: How is the reportable cost under a plan calculated if an employee commences, changes or terminates coverage during the year?

A–30: If an employee changes coverage during the year, the reportable cost under the plan for the employee for the year must take into account the change in coverage by reflecting the different reportable costs for the coverage elected by the employee for the periods for which such coverage is elected. If the change in coverage occurs during a period (for example, in the middle of a month where costs are determined on a monthly basis), an employer may use any reasonable method to determine the reportable cost for such period, such as using the reportable cost at the beginning of the period or at the end of the period, or averaging or prorating the reportable costs, provided that the same method is used for all employees with coverage under that plan. Similarly, if an employee commences coverage or terminates coverage during a period, an employer may use any reasonable method to calculate the reportable cost for that period, provided that the same method is used for all employees with coverage under the plan.

The following examples illustrate the principles set forth in Q&A–29 and Q&A–30:

Example 1: Employer determines that the monthly reportable cost under a group health plan for self-only coverage for the calendar year 2012 is $500. Employee is employed by employer for the entire calendar year 2012, and had self-only coverage under the group health plan for the entire year. For purposes of reporting for the 2012 calendar year, Employer must treat the 2012 reportable cost under the plan for Employee as $6,000 ($500 x 12).

Example 2: Employer determines that the monthly reportable cost under a group health plan for self-only coverage for the period October 1, 2011 through September 30, 2012 is $500, and that the monthly reportable cost under a group health plan for self-only coverage for the period October 1, 2012 through September 30, 2013 is $520. Employee is employed by employer for the entire calendar year 2012 and had self-only coverage under the group health plan for the entire year. For purposes of reporting for the 2012 calendar year, Employer must treat the 2012 reportable cost under the plan for Employee as $6,060 (($500 x 9) + ($520 x 3)).

Example 3: Employer determines that the monthly reportable cost under a group health plan for self-only coverage for the calendar year 2012 is $500, and that the monthly reportable cost under the same group health plan for self-plus-spouse coverage for the calendar year 2012 is $1,000. Employee is employed by Employer for the entire calendar year 2012. Employee had self-only coverage under the group health plan from January 1, 2012 through June 30, 2012, and then had self-plus-spouse coverage from July 1, 2012 through December 31, 2012. For purposes of reporting for the 2012 calendar year, Employer must treat the 2012 reportable cost under the plan for Employee as $9,000 (($500 x 6) + ($1,000 x 6)).

Example 4: Employer determines that the monthly reportable cost under a group health plan for self-only coverage for the calendar year 2012 is $500. Employee commences employment and self-only coverage under the group health plan on March 14, 2012, and continues employment and self-only coverage through the remainder of the calendar year. For purposes of reporting for the 2012 calendar year, Employer treats the cost of coverage under the plan for Employee for March 2012 as $250 ($500 x 1/2). Because Employer's method of calculating the reportable cost under the plan for March 2012 by prorating the reportable cost for March 2012 to reflect Employee's date of commencement of coverage is reasonable, Employer must treat the 2012 reportable cost under the plan for Employee as $4,750 (($500 x 1/2) + ($500 x 9)).

Q–31: If an employer has used a 12-month determination period that is not the calendar year for purposes of applying the COBRA applicable premium under a plan, may the employer also use that 12-month determination period for purposes of calculating the reportable cost for the year under the plan?

A–31: No. The reportable cost under a plan must be determined on a calendar year basis. For rules on translating the COBRA applicable premium to a calendar year amount, see Q&A–29 and Q&A–30.

Additional Issues

Q–32: Is the cost of coverage provided under an employee assistance program (EAP), wellness program, or on-site medical clinic required to be included in the aggregate reportable cost reported on Form W–2?

A–32: Coverage provided under an EAP, wellness program, or on-site medical clinic is only includible in the aggregate reportable cost to the extent that the coverage is provided under a program that is a group health plan for purposes of § 5000(b)(1). An employer is not required to include the cost of coverage provided under an EAP, wellness program, or on-site medical clinic that otherwise would be required to be included in the aggregate reportable cost reported on Form W–2 because it constitutes applicable employer-sponsored coverage, if that employer does not charge a premium with respect to that type of coverage provided to a beneficiary qualifying for coverage in accordance with any applicable federal continuation coverage requirements. If an employer charges a premium with respect to that type of coverage provided to a beneficiary qualifying for coverage in accordance with any applicable federal continuation coverage requirements, that employer is required to include the cost of that type of coverage provided. An employer that is not subject to any federal continuation coverage requirements is not required to include the cost of coverage provided under an EAP, wellness program, or on-site medical clinic. For this purpose, federal continuation coverage requirements include the COBRA requirements under the Code, the Employee Retirement Income Security Act of 1974, or the Public Health Service Act and the temporary continuation coverage requirement under the Federal Employees Health Benefits Program.

Q–33: Are there circumstances in which an employer may include in the aggregate reportable cost reported on Form W–2 the cost of coverage that is not required to be included in the aggregate reportable cost under applicable interim relief?

A–33: Yes. An employer may include in the aggregate reportable cost the cost of coverage that is not required to be included in the aggregate reportable cost under applicable interim relief, such as the cost of coverage under a Health Reimbursement Account (HRA), a multi-employer plan, an EAP, wellness program, or on-site medical clinic, provided that the calculation of the

cost of coverage otherwise meets the requirements of Q&A–24 through Q&A–27, and provided that such coverage constitutes applicable employer-sponsored coverage.

Q–34: How may an employer calculate the reportable cost under a program providing benefits that constitute applicable employer-sponsored coverage and other benefits that do not constitute applicable employer-sponsored coverage, such as a long-term disability program that also provides certain health care benefits?

A–34: For a program under which an employee receives benefits that constitute applicable employer-sponsored coverage and other benefits that do not constitute applicable employer-sponsored coverage, an employer may use any reasonable allocation method to determine the cost of the portion of the program providing applicable employer-sponsored coverage.

If the portion of the program providing a benefit that is applicable employer-sponsored coverage is only incidental in comparison to the portion of the program providing other benefits, the employer is not required to include either portion of the cost in the aggregate reportable cost. Similarly, if the portion of the program providing a benefit that is not applicable employer-sponsored coverage is only incidental to the portion of the program providing a benefit that is applicable employer-sponsored coverage, the employer may, at its option, include the benefit that is not applicable employer-sponsored coverage in determining the reportable cost, notwithstanding the prohibition in Q&A–33 on reporting coverage that is not applicable employer-sponsored coverage.

Q–35: Must the aggregate reportable cost reported on Form W–2 for a calendar year be adjusted for any elections or notifications in the subsequent year that may have an effect on the cost of coverage in the earlier year, such as notice of a divorce in the earlier year?

A–35: No. The aggregate reportable cost for a calendar year reported on Form W–2 may be based on the information available to the employer as of December 31 of the calendar year. Therefore, any election or notification that is made or provided in the subsequent calendar year that has a retroactive effect on coverage in the earlier year is not required to be included in the calculation of the aggregate reportable cost for the calendar year. In addition, an employer is not required to furnish a Form W–2c if a Form W–2 has already been provided for a calendar year, before this type of election or notification (for example, if a Form W–2 is provided on January 15, and the election or notification is provided on January 20).

Q–36: How may an employer address a coverage period, such as the final payroll period of a calendar year that includes December 31 but continues into the subsequent calendar year?

A–36: An employer may include the coverage period that includes December 31 but continues into the subsequent calendar year in one of the following manners: (1) treat the coverage as provided during the calendar year that includes December 31; (2) treat the coverage as provided during the calendar year immediately subsequent to the calendar year that includes December 31; or (3) allocate the cost of coverage for the coverage period between each of the two calendar years under any reasonable allocation method, which generally should relate to the number of days in the period of coverage that fall within each of the two calendar years. Whichever method the employer uses must be applied consistently to all employees.

Q–37: Is the cost of coverage provided under hospital indemnity or other fixed indemnity insurance by an employer on an excludible or pre-tax basis required to be included in the aggregate reportable cost reported on Form W–2?

A–37: Yes. An employer is required to include in the aggregate reportable cost reported on Form W–2 the cost of coverage provided under hospital indemnity or other fixed indemnity insurance, or the cost of coverage only for a specified disease or illness, if the employer makes any contribution to the cost of coverage that is excludable under § 106 or if the employee purchases the policy on a pre-tax basis under a § 125 cafeteria plan.

Q–38: Is the cost of coverage provided under hospital indemnity or other fixed indemnity insurance required to be included in the aggregate reportable cost reported on Form W–2 if the payment for those benefits is includable in the employee's gross income (or, in the case of a self-employed individual, the payment is one for which a deduction under § 162(l) is allowable) ?

A–38: No. An employer is not required to include in the aggregate reportable cost reported on Form W–2 the cost of coverage provided under hospital indemnity or other fixed indemnity insurance, or the cost of coverage only for a specified disease or illness, if those benefits are offered as independent, noncoordinated benefits and if the payment for those benefits is includable in the employee's gross income (or, in the case of a self-employed individual, the payment is one for which a deduction under § 162(l) is allowable). Therefore, to the extent the employer merely provides the opportunity for employees to purchase an independent, noncoordinated fixed indemnity policy and the employee pays the full amount of the premium with after-tax dollars, the cost of coverage provided under that policy is not required to be reported on Form W–2.

Q–39: Must the aggregate reportable cost be reported on a Form W–2 provided by a third-party sick pay provider?

A–39: No. Third-party sick pay providers are required to furnish Forms W–2 to employees to report the sick pay unless (1) the third party withholds and deposits the employee tax and notifies the employer within the required time period, or (2) the third party is acting only as the agent of the employer and has not otherwise agreed with the employer to act as the employer with respect to the sick pay. The aggregate reportable cost is not required to be reported on a Form W–2 furnished by a third-party sick pay provider. However, a Form W–2 furnished by the employer to an employee must include the aggregate reportable cost regardless of whether that Form W–2 includes sick pay, or whether a third-party sick pay provider is furnishing a separate Form W–2 reporting the sick pay. For more information about reporting of third-party payments of sick pay, see Publication 15-A, *Employer's Supplemental Tax Guide (Circular E)*, Section 6 (Sick Pay Reporting).

IV. TRANSITION RELIEF

Certain provisions of this interim guidance provide transition relief intended to facilitate compliance with the reporting requirement under § 6051(a)(14). See Q&A–3 (relief for employers filing fewer

than 250 Forms W–2); Q&A–6 (relief with respect to certain Forms W–2 furnished to terminated employees before the end of the year); Q&A–17 (relief with respect to multiemployer plans); Q&A–18 (relief for HRAs); Q&A–20 (relief with respect to certain dental and vision plans); Q&A–21 (relief with respect to self-insured plans of employers not subject to COBRA continuation coverage or similar requirements); and Q&A–32 (relief for certain employers with respect to coverage under an employee assistance program, on-site medical clinic or wellness program). Future guidance may limit the availability of some or all of this transition relief; however, any such future guidance will be prospective only and will not be applicable earlier than January 1 of the calendar year beginning at least six months after the date of issuance of the guidance. In no case will any such future guidance limit the availability of this transition relief for the 2012 Forms W–2 (the Forms W–2 for the calendar year 2012 that employers generally are required to furnish to employees in January 2013 and then file with the SSA). For example, in no event will reporting be required for 2012 Forms W–2 for any employer required to file fewer than 250 2011 Forms W–2.

V. EFFECT ON OTHER DOCUMENTS

Notice 2011–28 is superseded by this notice.

VI. DRAFTING INFORMATION

The principal author of this notice is Leslie Paul of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), though other Treasury Department and IRS officials participated in its development. For further information on the provisions of this notice, contact Leslie Paul at (202) 622–6080 (not a toll-free number).

Part IV. Items of General Interest

Notice of Proposed Rulemaking and Notice of Public Hearing

Basis Reporting by Securities Brokers and Basis Determination for Debt Instruments and Options

REG–102988–11

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to reporting by brokers for transactions related to debt instruments and options. The proposed regulations reflect changes in the law made by the Energy Improvement and Extension Act of 2008 (the Act) that require brokers when reporting the sale of securities to the IRS to include the customer's adjusted basis in the sold securities and to classify any gain or loss as long-term or short-term. The proposed regulations also implement the Act's requirement that a broker report gross proceeds from a sale or closing transaction with respect to certain options. In addition, this document contains proposed regulations that implement reporting requirements for a transfer of a debt instrument or an option to another broker and for an organizational action that affects the basis of a debt instrument or option. This document also provides for a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by February 23, 2012. Outlines of topics to be discussed at the public hearing scheduled for Friday, March 16, 2012, must be received by Friday, February 24, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–102988–11), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 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–102988–11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–102988–11). The public hearing will be held in the Auditorium, beginning at 10:00 a.m. at the Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Pamela Lew of the Office of Associate Chief Counsel (Financial Institutions and Products) at (202) 622–3950; concerning submissions of comments, the public hearing, and/or to be placed on the building access list to attend the public hearing, Richard Hurst at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking relating to the furnishing of information in connection with the transfer of securities was previously reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–2186. Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:M:S, Washington, DC 20224. Comments on the collection of information should be received by February 23, 2012. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information is in §§ 1.6045–1(c)(3)(xi)(C) and 1.6045A–1 of these proposed regulations and is an increase in the total annual burden from the burden in the current regulations to reflect the addition of debt instruments and options to the definition of covered securities. The collection of information is necessary to allow brokers that effect sales of transferred covered securities to determine and report the adjusted basis of the securities and whether any gain or loss with respect to the securities is long-term or short-term in compliance with section 6045(g) of the Internal Revenue Code. The collection of information is required to comply with the provisions of section 403 of the Energy Improvement and Extension Act of 2008, Division B of Public Law 110–343 (122 Stat. 3765, 3854 (2008)). The likely respondents are brokers of securities and issuers, transfer agents, and professional custodians of securities that do not effect sales.

Estimated total annual reporting burden is 450,000 hours.

Estimated average annual burden per respondent is 15 hours.

Estimated average burden per response is 4 minutes.

Estimated number of respondents is 30,000.

Estimated total frequency of responses is 7 million.

The burden for the collection of information contained in the proposed amendments to §1.6045–1 will be reflected in the burden on Form 1099–B, "*Proceeds from Broker and Barter Exchange Trans-*

actions," when revised to request the additional information in the regulation. The burden for the collection of information contained in the proposed amendments to §1.6045B–1 will be reflected in the burden on Form 8937, "*Report of Organizational Actions Affecting Basis of Securities*," when revised to request the additional information in the regulation.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) relating to information reporting by brokers and others as required by section 6045 of the Internal Revenue Code (Code). This section was amended by section 403 of the Energy Improvement and Extension Act of 2008, Division B of Public Law 110–343 (122 Stat. 3765, 3854 (2008)) (the Act) to require the reporting of adjusted basis for a covered security and whether any gain or loss upon the sale of the security is long-term or short-term. The Act also requires the reporting of gross proceeds for an option that is a covered security. In addition, the Act added section 6045A to the Code, which requires certain information to be reported in connection with a transfer of a covered security to another broker, and section 6045B, which requires an issuer of a specified security to file a return relating to certain actions that affect the basis of the security. Final regulations under these provisions relating to stock were published in the **Federal Register** on October 18, 2010, in T.D. 9504, 2010–47 I.R.B. 670. The proposed regulations in this document address reporting by brokers under §1.6045–1 for debt instruments and options. This document also contains proposed amendments to the Income Tax Regulations under sections 6045A and 6045B for debt instruments and options.

Section 6045(g)(1) requires every broker that is required to file a return with the IRS under section 6045(a) showing the gross proceeds from the sale of a covered security to include in the return the customer's adjusted basis in the security and whether any gain or loss with respect to the security is long-term or short-term. Under section 6045(g)(3), a note, bond, debenture, or other evidence of indebtedness acquired on or after January 1, 2013, is a security subject to the information reporting rules in section 6045(g)(1). Section 6045(h) provides rules for reporting certain information, including gross proceeds, with respect to the sale, exercise, lapse, or other closing transaction with respect to an option on a specified security granted or acquired on or after January 1, 2013.

Explanation of the Provisions

In general, these regulations would amend §§1.6045–1, 1.6045A–1, and 1.6045B–1 to require additional information reporting by a broker for a debt instrument acquired on or after January 1, 2013. The proposed regulations also require information reporting for an option granted or acquired on or after January 1, 2013. Many of the changes are technical provisions needed to incorporate debt instruments and options into the rules established for stock in the final regulations published in T.D. 9504. As a result of these changes, the general rules of §1.6045–1 that currently apply to stock also will apply to a debt instrument or an option that is a covered security, including the wash sale and short sale provisions. In addition, the general rules of §1.6045A–1 relating to transfer statement requirements and §1.6045B–1 relating to issuer statement requirements will apply to a debt instrument or an option. Certain substantive changes were also needed to accommodate debt instruments and options. Certain other changes were made that will affect all specified securities, including stock. The significant substantive changes to the regulations are described in this preamble.

A. *Section 1.6045–1*

1. *Options*

Under section 6045(h), for any sale or other closing transaction with respect to an option that is a covered security, a broker is required to report gross proceeds, adjusted basis, and whether any gain or loss is short-term or long-term.

For purposes of §1.6045–1, certain options have been added to the definition of a *security*, *specified security*, and *covered security*. In general, an option on one or more specified securities, including an index of such securities or financial attributes of such securities, that is granted or acquired on or after January 1, 2013, will be a covered security. For example, as indicated by the Joint Committee on Taxation, the proposed regulations would apply to an option on the S&P 500 Index. *See General Explanation of Tax Legislation Enacted in the 110th Congress*, JCS–1–09 at 366.

An exception to the general rules described in proposed §1.6045–1(m) for reporting basis for an option is provided for a compensation-related option. The proposed rules retain the existing rules for a compensation-related option, but make those rules applicable to all compensation-related options, and not just those granted or acquired before January 1, 2013. Under the regulations, if a customer exercises a compensation-related option, a broker is permitted, but not required, to adjust basis of the acquired stock for any amounts included as compensation income. Instructions to the Form 1040 (Schedule D) and other IRS forms and publications will be amended to remind a taxpayer that a reconciliation of basis may be required if the sale reported on a Form 1099–B is a sale of stock acquired through a stock grant or the exercise of a compensatory option. The IRS is exploring the possibility of adding an indicator on the Form 1099–B to denote a sale of compensation-related stock.

The definitions for the terms *closing transaction* and *sale* have been updated to be consistent with sections 1234 and 1234A and to accommodate the reporting of options granted or acquired on or after January 1, 2013. In particular, the cancellation, lapse, expiration, or other termination of an option will be a closing transaction, as will a cash settlement.

For an option that is a covered security, reporting requirements will depend on whether or not the option was physically settled. If an option is physically settled, the premium paid or received, as the case may be, will be used by the broker for the asset purchaser to adjust the basis of the purchased asset and by the broker for the asset seller to adjust reported proceeds. Publication 550, *Investment Income and Expenses*, contains a detailed explanation of the appropriate tax treatment of the exercise or lapse of an option. If an option that is a covered security is sold or is part

of a closing transaction that does not entail physical settlement, a broker is required to report gross proceeds and whether the gain or loss is long-term or short-term. It should be noted that if a customer sells any option prior to expiration, including an option acquired prior to January 1, 2013, the regulations currently in effect already require a broker to report the gross proceeds from that sale except in cases in which an option is closed by offset.

If a customer receives a warrant or stock right in a section 305(a) distribution, a broker must determine the basis of the warrant or stock right by applying the rules described in sections 305 and 307.

2. *Debt instruments*

Under section 6045(g), upon the sale of a debt instrument that is a covered security, a broker is required to report the adjusted basis of the debt instrument and whether any gain or loss is short-term or long-term. Pursuant to section 6045(g), the proposed regulations amend §1.6045–1 to include a debt instrument in the definition of a *specified security* and a debt instrument acquired for cash in an account on or after January 1, 2013, in the definition of a *covered security*.

For purposes of §1.6045–1, the proposed regulations define a debt instrument to include any instrument described in §1.1275–1(d) and any instrument or position that is treated as a debt instrument under a specific provision of the Internal Revenue Code. This definition of a debt instrument applies whenever the term *debt instrument*, *bond*, *debt obligation*, or *obligation* is used anywhere in §1.6045–1. Under the proposed regulations, solely for purposes of §1.6045–1, a security classified as debt by the issuer is treated as a debt instrument. If the issuer has not classified the security, however, the security is not treated as a debt instrument unless the broker knows that the security is reasonably classified as debt under general Federal tax principles or that the instrument or position is treated as a debt instrument under a specific provision of the Internal Revenue Code.

Due to the difficulties in implementing a broker's reporting obligations under section 6045(g) that would arise with respect to debt instruments described in section 1272(a)(6) (debt instruments with principal subject to acceleration) that are acquired on or after January 1, 2013, the proposed regulations provide that a debt instrument described in section 1272(a)(6) is not a covered security.

If a debt instrument is acquired on or after January 1, 2013, a broker will be required to determine and account for original issue discount ("OID"), bond premium, acquisition premium, market discount, and principal payments to determine the adjusted basis of the debt instrument and whether any gain or loss upon the sale of the debt instrument is short-term or long-term. Further, a broker will be required to report the amount of any market discount that has accrued as of the date of a sale or transfer of a debt instrument.

Under §1.6045–1(d)(6)(i) of the existing final regulations, a broker is not required to consider elections occurring outside the account. Consistent with this rule, a broker generally is required to calculate amounts relating to OID, bond premium, acquisition premium, and market discount by assuming that the customer has not made any elections with respect to the debt instrument. The proposed regulations, however, provide two exceptions to this general rule: 1) a broker must assume that a customer has elected to use the constant interest rate method under section 1276(b)(2) to determine the amount of accrued market discount; and 2) a broker must assume that the customer has elected under section 171 to amortize bond premium on a taxable debt instrument.

Both of these elections have the effect of minimizing the customer's ordinary income inclusion when compared with the alternatives available under the existing rules. It is also expected that prescribing which elections are to be ignored and which elections are assumed to be made will standardize, and therefore simplify, the information reporting required with respect to OID, bond premium, acquisition premium, and market discount.

The Treasury Department and the IRS recognize that the section 171 election assumption is inconsistent with the rule under section 6049 providing that a payor is not permitted to take premium into account for purposes of reporting a holder's interest or OID income on Form 1099–INT or 1099–OID each year. However, because the Treasury Department and the IRS believe that most holders will make a section 171 election to treat the premium as an offset to ordinary income rather than as a capital loss, the Treasury Department and the IRS believe that the section 171 election assumption will result in fewer instances in which a customer will need to reconcile the reported adjusted basis number to the proper number.

In general, the proposed regulations will result in the following outcomes for a debt instrument:

a. If a debt instrument is sold prior to maturity, a broker will report any accrued market discount as of the sale date based on a constant interest rate.

b. Except as provided in c below, a broker must determine a customer's basis in a debt instrument by computing any OID, bond premium, or acquisition premium using the default method described in the relevant provisions of the Code or regulations. A broker also must adjust the basis for any principal payments received.

c. If a taxable debt instrument has bond premium, a broker must assume a customer has elected current amortization when computing the amount of the customer's basis.

A broker generally must use a consistent accrual period to determine the accruals of discount or premium on a debt instrument. If a debt instrument has both OID and market discount, the accrual period used for the OID computation must be used for the market discount computation. In all other situations, a broker must use the shorter of an annual accrual period or a period that matches the frequency of regular coupon or principal payments.

The rules in §1.6045–1(n) only apply for purposes of a broker's reporting obligation under section 6045. A customer can use any method or make any election permitted under the relevant provisions of the Code and regulations and is not bound by the assumptions that the broker uses to satisfy the broker's reporting obligations under section 6045. For example, even though a broker will compute and report any accrued market discount on a debt instrument by assuming that a customer made the constant yield election under section 1276(b)(2), the customer can determine the amount of accrued market discount using ratable accrual as described in section 1276(b)(1).

Notwithstanding the information reported by a broker, a customer is still required to comply with all relevant provisions of the Code and regulations. For example, if a customer sells a debt instrument at a loss in one account with Broker A and reacquires a substantially identical debt instrument in a different account with Broker B within 30 days of the loss transaction, Broker A is not required to apply the wash sale rules under section 1091 when reporting the sale. However, the customer is required to properly apply the rules of section 1091 to defer some or all of the loss and must make appropriate basis adjustments.

If a customer uses an assumption or method different from the assumption or method used by the broker to determine a debt instrument's adjusted basis or other information for purposes of the Form 1099–B sent to the customer, the customer must reconcile the amount reported on the Form 1099–B to the amount reported on the customer's tax return.

3. *Changes affecting all specified securities (including stock)*

Under §1.6045–1(d)(5) of the final regulations relating to stock, a broker may choose to report gross proceeds from the sale of a security as the entire proceeds from the sale or as the proceeds reduced by the commissions and transfer taxes related to the sale. Commenters requested that the regulations remove this choice in order to standardize broker reporting on Form 1099–B and taxpayer reporting on Form 1040. The proposed regulations adopt this request and require brokers to reduce reported gross proceeds by commissions and transfer taxes related to a sale.

Under §1.6045–1(d)(6) of the final regulations relating to stock, a broker currently must adjust basis reported for an organizational action taken by an issuer of a security during the period the broker has custody of the security. For a transferred security, the regulations exclude adjustments for organizational actions taken on the transfer settlement date. The proposed regulations amend this exclusion to clarify that the exclusion applies only to the broker receiving custody of a transferred security. The proposed regulations require that a broker transferring a security reflect all necessary adjustments for organizational actions taken through and on the transfer settlement date when completing a transfer statement.

B. *Section 1.6045A–1*

If a specified security is transferred between brokers, the transferring broker must provide the receiving broker with certain information related to the transferred security that will enable the receiving broker to properly report under section 6045. The existing regulations under §1.6045A–1(b)(1) list information that must be reported for a transfer of any specified security. The proposed regulations under §1.6045A–1 modify this existing list by adding information about whether the security was acquired through an equity-based compensation arrangement.

Because debt instruments and options are being added to the definition of specified security under proposed changes to §1.6045–1(a)(14), the information required to be provided for stock under §1.6045A–1(b)(1) also will be required to be provided for debt instruments and options. Further, additional data specific to the transfer of a debt instrument or an option is required to be provided. This additional data falls into two broad categories: 1) data that adequately identifies the instrument; and 2) data that is specific to the particular customer, particularly trade date and price or premium.

This additional information is required to enable a broker that receives a debt instrument pursuant to a transfer to compute OID, market discount, bond premium, or acquisition premium. The description of the payment terms may be done in any manner that fully describes the debt instrument. The information can be in the form of a table of payments, or may be a description of the payment terms. The use of a single identifier, such as a CUSIP number, that can be used by the transferee broker to identify the security and its related payment terms is also an acceptable means of providing the additional information to the transferee broker.

For an option, a transfer statement must include the date the option was granted or acquired, the amount of the premium, and whether the premium was paid or received. The data also must include any other information required to describe fully the option. This information may be a description of the relevant terms, or it may be an identifier, such as a CUSIP or Options Clearing Corporation number or code that can be used by the transferee broker to identify the security and its related terms.

C. *§1.6045B–1*

Under §1.6045B–1, if the issuer of a specified security takes an organizational action that affects the basis of the security, the issuer must file an issuer return. A commenter asked for clarification about how this rule applies to option writers, because an organizational action usually is initiated by the issuer of the security underlying an option. The proposed regulations amend §1.6045B–1 to provide rules for certain option writers if there is an organizational action. If the organizational action results in an option writer replacing the original option contract with a different number of option contracts, the option writer must prepare an issuer return as required by §1.6045B–1.

Proposed Effective/Applicability Dates

These regulations are proposed to take effect when published in the **Federal Register** as final regulations. In general, the regulations regarding reporting of basis and whether any gain or loss on a sale is long-term or short-term under section 6045(g) are proposed to apply to debt instruments acquired on or after January 1, 2013. The regulations regarding reporting of gross proceeds, basis, and whether any gain or loss on a sale is long-term or short-term under section 6045(h) are proposed to apply to options granted or acquired on or after January 1, 2013.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. 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 this regulation.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities, because any ef-

fect on small entities by the rules proposed in this document flows directly from section 403 of the Energy Improvement and Extension Act of 2008, Division B of Public Law 110–343 (122 Stat. 3765, 3854 (2008)).

Section 403(a) of the Act modifies section 6045 to require that brokers report the adjusted basis of the securities and whether any gain or loss with respect to the securities is long-term or short-term when reporting the sale of a covered security. The Act also requires gross proceeds reporting for options. It is anticipated that these statutory requirements will fall only on financial services firms with annual receipts greater than $7 million and, therefore, on no small entities. Further, in implementing the statutory requirements, the regulation proposes to limit reporting to information required under the Act.

Section 403(c) of the Act added section 6045A, which requires applicable persons to furnish a transfer statement in connection with the transfer of custody of a covered security. The proposed modifications to §1.6045A–1 effectuate the Act by giving the broker who receives the transfer statement the information necessary to determine and report adjusted basis and whether any gain or loss with respect to a debt instrument or option is long-term or short-term as required by section 6045 when the security is subsequently sold. Consequently, the regulation does not add to the impact on small entities imposed by the statutory scheme. Instead, it limits the information to be reported to only those items necessary to effectuate the statutory scheme.

Section 403(d) of the Act added section 6045B, which requires issuer reporting by all issuers of specified securities regardless of size and even when the securities are not publicly traded. The proposed modifications to §1.6045B–1 limit reporting to the additional information for options necessary to meet the Act's requirements. Additionally, the regulation, as modified, retains the rule that permits an issuer to report each action publicly instead of filing a return and furnishing each nominee or holder a statement about the action. The regulation therefore does not add to the statutory impact on small entities but instead eases this impact to the extent the statute permits.

Therefore, because this regulation will not have a significant economic impact on a substantial number of small entities, a regulatory flexibility analysis is not required. The Treasury Department and IRS request comments on the accuracy of this statement. 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 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 timely submitted to the IRS. The IRS and Treasury Department specifically request comments on the clarity of the proposed regulations and how they can be made easier to understand. The IRS and Treasury Department further request comments about suggested changes or improvements to sections of §1.6045–1 that are not specifically affected by the proposed regulation. The IRS and Treasury Department also request comments on the accuracy of the certification that the regulation in this document will not have a significant economic impact on a substantial number of small entities. All comments will be available for public inspection and copying.

A public hearing has been scheduled for Friday, March 16, 2012, beginning at 10 a.m. in the IRS Auditorium, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter through the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the "**FOR FURTHER INFORMATION CONTACT**" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by February 23, 2012 and submit an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by Friday, February 24, 2012. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Pamela Lew, Office of Associate Chief Counsel (Financial Institutions and Products). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be 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 1.6045–1 is amended by:

1. Revising paragraphs (a)(3)(v) and (a)(3)(vi) and adding paragraph (a)(3)(vii).

2. Revising paragraphs (a)(8) and (a)(9).

3. Revising paragraphs (a)(14) and (a)(15)(i)(A).

4. Redesignating paragraph (a)(15)(i)(C) as paragraph (a)(15)(i)(E) and adding new paragraphs (a)(15)(i)(C) and (a)(15)(i)(D).

5. Revising newly redesignated paragraph (a)(15)(i)(E).

6. Adding a new sentence to the end of paragraph (a)(15)(ii).

7. Adding a new paragraph (a)(15)(iv)(E).

8. Adding a new paragraph (a)(17).

9. Revising paragraph (c)(3)(x) and the first two sentences in paragraph (c)(3)(xi)(C).

10. Revising the last sentence of paragraph (c)(4) *Example 9* (i).

11. Adding a sentence at the end of paragraph (d)(2)(i) and revising paragraph (d)(2)(ii).

12. Revising paragraphs (d)(3), (d)(5), (d)(6)(i), and (d)(6)(ii)(A).

13. Revising the heading for paragraph (d)(6)(ii)(B).

14. Revising the sixth and seventh sentences and removing the last sentence in paragraph (d)(6)(vii) *Example 4*.

15. Adding paragraphs (m) and (n).

The additions and revisions read as follows:

§1.6045–1 Returns of information of brokers and barter exchanges.

(a) * * *

(3) * * *

(v) An interest in or right to purchase any of the foregoing in connection with the issuance thereof from the issuer or an agent of the issuer or from an underwriter that purchases any of the foregoing from the issuer;

(vi) An interest in a security described in paragraph (a)(3)(i) or (iv) (but not including executory contracts that require delivery of such type of security); or

(vii) An option described in paragraph (m)(1) of this section.

* * * * *

(8) The term *closing transaction* means any cancellation, lapse, expiration, settlement, abandonment, or other termination of a right or an obligation under a forward contract, a regulated futures contract, or an option.

(9) The term *sale* means any disposition of securities, commodities, options, regulated futures contracts, or forward contracts, and includes redemptions of stock, retirements of debt instruments, and enterings into short sales, but only to the extent any of these actions are conducted for cash. In the case of an option, a regulated futures contract, or a forward contract, a sale includes any closing transaction. When a closing transaction in a regulated futures contract involves making or taking delivery, the profit or loss on the contract is a sale and the delivery is a separate sale. When a closing transaction in a forward contract involves making or taking delivery, the delivery is a sale without separating the profit or loss on the contract from the profit or loss on the delivery, except that taking delivery for United States dollars is not a sale. The term *sale* does not include entering into a contract that requires delivery of personal property or an interest therein, the initial grant or purchase of an option, or the exercise of a call option for physical delivery. For purposes of this section only, a constructive sale under section 1259 and a mark to fair market value under section 475 or 1296 are not sales.

* * * * *

(14) The term *specified security* means:

(i) Any share of stock (or any interest treated as stock, including, for example, an American Depositary Receipt) in an entity organized as, or treated for Federal tax purposes as, a corporation, either foreign or domestic (Solely for purposes of this paragraph (a)(14)(i), a security classified as stock by the issuer is treated as stock. If the issuer has not classified the security, the security is not treated as stock unless the broker knows that the security is reasonably classified as stock under general Federal tax principles.);

(ii) Any debt instrument described in paragraph (a)(17) of this section; or

(iii) Any option described in paragraph (m)(1) of this section.

(15) * * *

(i) * * *

(A) A specified security described in paragraph (a)(14)(i) of this section acquired for cash in an account on or after January 1, 2011, except stock for which the average basis method is available under §1.1012–1(e).

* * * * *

(C) A debt instrument described in paragraph (a)(14)(ii) of this section acquired for cash in an account on or after January 1, 2013.

(D) An option described in paragraph (a)(14)(iii) of this section granted or acquired for cash in an account on or after January 1, 2013.

(E) A specified security transferred to an account if the broker or other custodian of the account receives a transfer statement (as described in §1.6045A–1) reporting the security as a covered security.

(ii) * * * Acquiring a security in an account includes a security that represents a liability (for example, granting an option).

* * * * *

(iv) * * *

(E) A debt instrument that is described in paragraph (n)(2)(ii) of this section.

* * * * *

(17) For purposes of this section, the terms *debt instrument*, *bond*, *debt obligation*, and *obligation* mean a debt instrument as defined in §1.1275–1(d) and any instrument or position that is treated as a debt instrument under a specific provision of the Internal Revenue Code (for example, a regular interest in a REMIC as defined in section 860G(a)(1) and §1.860G–1). Solely for purposes of this section, a security classified as debt by the issuer is treated as debt. If the issuer has not classified the security, the security is not treated as debt unless the broker knows that the security is reasonably classified as debt under general Federal tax principles or that the instrument or position is treated as a debt instrument under a specific provision of the Internal Revenue Code.

* * * * *

(c) * * *

(3) * * *

(x) *Certain retirements.* No return of information is required from an issuer or its agent with respect to the retirement of book entry or registered form debt instruments issued before January 1, 2013, as to which the relevant books and records indicate that no interim transfers have occurred.

(xi) * * *

(C) *Short sale obligation transferred to another account.* If a short sale obligation is satisfied by delivery of a security transferred into a customer's account accompanied by a transfer statement (as described in §1.6045A–1(b)(7)) indicating that the security was borrowed, the broker receiving custody of the security may not file a return of information under this section. The receiving broker must furnish a statement to the transferor that reports the amount of gross proceeds received from the short sale, the date of the sale, the quantity of shares, units, or amounts sold, and the Committee on Uniform Security Identification Procedures (CUSIP) number of the sold security (if applicable) or other security identifier number that the Secretary may designate by publication in the **Federal Register** or in the Internal Revenue Bulletin (see §601.601(d)(2) of this chapter). * * *

* * * * *

(4) * * *

Example 9. ***

(i) * * * N indicates on the transfer statement that the transferred stock was borrowed in accordance with §1.6045A–1(b)(7).

* * * * *

(d) * * *

(2) * * *

(i) * * * See paragraph (m) of this section for additional rules related to options and paragraph (n) of this section for additional rules related to debt instruments.

(ii) *Specific identification of securities.* Except as provided in §1.1012–1(e)(7)(ii), for securities described in paragraph (a)(14)(i) of this section sold on or after January 1, 2011, or securities described in paragraph (a)(14)(ii) or (a)(14)(iii) of this section sold on or after January 1, 2013, a broker must report a sale of less than the entire position in an account of a specified security that was acquired on different dates or at different prices consistently with a customer's adequate and timely identification of the security to be sold. *See* §1.1012–1(c). If the customer does not provide an adequate and timely identification for the sale, the broker must first report the sale of securities in the account for which the broker does not know the acquisition or purchase date followed by the earliest securities purchased or acquired, whether covered securities or noncovered securities.

* * * * *

(3) *Sales between interest payment dates.* For each sale of a debt instrument prior to maturity with respect to which a broker is required to make a return of information under this section, a broker must show separately on Form 1099 the amount of accrued and unpaid interest as of the sale date that must be reported by the customer as interest income under §1.61–7(d) (but not the amount of any market discount on a noncovered security or original issue discount). Such interest information must be shown in the manner and at the time required by Form 1099 and section 6049.

* * * * *

(5) *Gross proceeds.* For purposes of this section, *gross proceeds* on a sale are the total amount paid to the customer or credited to the customer's account as a result of the sale reduced by the amount of any stated interest reported under paragraph (d)(3) of this section and increased by any amount not paid or credited by reason of repayment of margin loans. In the case of a closing transaction that results in a loss, gross proceeds are the amount debited from the customer's account. For sales before January 1, 2013, a broker may, but is not required to, reduce gross proceeds by the amount of commissions and transfer taxes, provided the treatment chosen is consistent with the books of the broker. For sales on or after January 1, 2013, a broker must reduce gross proceeds by the amount of commissions and transfer taxes related to the sale of the security. For securities sold pursuant to the exercise of an option granted or acquired before January 1, 2013, a broker may, but is not required to, take the option premiums into account in determining the gross proceeds of the securities sold, provided the treatment chosen is consistent with the books of the broker. For securities sold pursuant to the exercise of an option granted or acquired on or after January 1, 2013, see paragraph (m) of this section. A broker must report the gross proceeds of identical stock (within the meaning of §1.1012–1(e)(4)) by averaging the proceeds of each share if the stock is sold at separate times on the same calendar day in executing a single trade order and the broker executing the trade provides a single confirmation to the customer that reports an aggregate total price or an average price per share. However, a broker may not average the proceeds if the customer notifies the broker in writing of an intent to determine the proceeds of the stock by the actual proceeds per share and the broker receives the notification by January 15 of the calendar year following the year of the sale. A broker may extend the January 15 deadline but not beyond the due date for filing the return required under this section.

(6) *Adjusted basis*—(i) *In general.* For purposes of this section, the adjusted basis of a security is determined from the initial basis under paragraph (d)(6)(ii) of this section as of the date the security is acquired in an account, increased by the commissions and transfer taxes related to its sale to the extent not accounted for in gross proceeds as described in paragraph (d)(5) of this section. A broker is not required to consider transactions, elections, or events occurring outside the account except for an organizational action taken by an issuer during the period the broker holds custody of the security (not including the settlement date that the broker received a transferred security) reported on an issuer statement (as described in §1.6045B–1) furnished or deemed furnished to the broker. For rules related to the adjusted basis of a debt instrument, see paragraph (n) of this section.

(ii) *Initial basis*—(A) *Cost basis.* For a security acquired for cash, the initial basis generally is the total amount of cash paid by the customer or credited against the customer's account for the security, increased by the commissions and transfer taxes related to its acquisition. A broker may, but is not required to, take option premiums into account in determining the initial basis of securities purchased or acquired pursuant to the exercise of an option granted or acquired before January 1, 2013. For rules related to options granted or acquired on or after January 1, 2013, see paragraph (m) of this section. A broker may, but is not required to, increase initial basis for income recognized upon the exercise of a compensatory option or the vesting or exercise of other equity-based compensation arrangements. A broker must report the basis of identical stock (within the meaning of §1.1012–1(e)(4)) by averaging the basis of each share if the stock is purchased at separate times on the same calendar day in executing a single trade order and the broker executing the trade provides a single confirmation to the customer that reports an aggregate total price or an average price per share. However, a broker may not average the basis if the customer timely notifies the broker in writing of an intent to determine the basis of the stock by the actual cost per share in accordance with §1.1012–1(c)(1)(ii).

(B) *Basis of transferred securities* * * *

* * * * *

(vii) * * *

Example 4. * * * Under paragraph (d)(6)(ii)(A) of this section, C is permitted, but not required, to determine adjusted basis from the amount R pays under the terms of the option. Under paragraph (d)(6)(ii)(A) of this section, C is permitted, but not required, to adjust basis for any amount R must include as wage income with respect to the October 2, 2013, stock purchase.

* * * * *

(m) *Additional rules for option transactions*—(1) *Scope.* This paragraph (m) applies to the following types of options granted or acquired on or after January 1, 2013:

(i) An option on one or more specified securities. For purposes of this paragraph (m), the phrase *one or more specified securities* includes an index substantially all the components of which are specified securities, and the term *option* includes a warrant or a stock right.

(ii) An option on financial attributes of specified securities, such as interest rates or dividend yields.

(2) *Physically settled option*. If a covered security is acquired or disposed of pursuant to the exercise of an option that was granted or acquired in the same account as the covered security, a broker must adjust the basis of the acquired asset or the gross proceeds amount as appropriate to account for any premium related to the option.

(3) *Rules for an option that is not physically settled*. For purposes of paragraph (d) of this section, for an option that is not physically settled and is sold (as defined in paragraph (a)(9) of this section), the following rules apply:

(i) *Gross proceeds*. A broker must increase gross proceeds for all payments received on the option and decrease gross proceeds for all payments paid on the option.

(ii) *Long-term or short-term gain or loss*. For purposes of paragraph (d)(7) of this section, when determining if any gain or loss is long-term or short-term within the meaning of section 1222, a broker must apply the rules described in sections 1234 and 1234A.

(4) *Rules for warrants and stock rights*. For a right to acquire stock (including a warrant) received in the same account as the underlying equity in a distribution that is described in section 305(a), a broker must determine basis in the option in accordance with the rules described in sections 305 and 307. Upon exercise or sale of a warrant or stock right, a broker must account for the warrant or stock right as if it were purchased and must treat as premium paid any basis allocated to the warrant or stock right.

(5) *Example*. The following example illustrates the rules in this paragraph (m):

Example. (i) On January 15, 2013, C, an individual, sells a 2-year exchange-traded option on 100 shares of Company X through Broker D. C receives a premium for the option of $100 and pays no commission. In C's hands, Company X stock is a capital asset. On December 16, 2013, C pays $110 to close out the option.

(ii) D is required to report information about the closing transaction because the option is on a covered security as described in paragraph (a)(15)(i)(D) of this section and was part of a closing transaction described in paragraph (a)(8) of this section. D will report as gross proceeds the net of the $100 received as option premium minus the $110 C paid to close out the option, for a total of -$10. Under the rules of section 1234(b)(1) and paragraph (d)(2) of this section, D will also report that the loss on the closing transaction is a short-term loss.

(6) *Multiple options documented in a single contract*. If more than one option described in paragraph (m)(1) of this section is documented in a single contract, a broker must separately report the required information for each option as that option is sold.

(n) *Reporting for bond transactions*—(1) *In general*. For purposes of paragraph (d) of this section, this paragraph (n) provides rules for brokers to determine and report information for a debt instrument.

(2) *Scope*—(i) *In general*. Except as provided in paragraph (n)(2)(ii) of this section, this paragraph (n) applies to a debt instrument that is a covered security under paragraph (a)(15)(i)(C) of this section.

(ii) *Excluded debt instruments*. A debt instrument subject to section 1272(a)(6) (certain interests in or mortgages held by a REMIC, certain other debt instruments with payments subject to acceleration, and pools of debt instruments the yield on which may be affected by prepayments) is not a covered security.

(3) *Reporting of accrued market discount*. In addition to the information required to be reported under paragraph (d) of this section, if a debt instrument is subject to the market discount rules in sections 1276 through 1278, a broker also must report the amount of market discount that has accrued on the debt instrument as of the date of the sale. A broker must compute the accruals of market discount by assuming that the customer elected to use the constant interest rate method under section 1276(b)(2) for the taxable year in which the customer acquired the debt instrument. See paragraph (n)(5) of this section to determine the accrual period to be used to compute the accruals of market discount.

(4) *Adjusted basis*. For purposes of this section, a broker must use the rules in this paragraph (n)(4) to determine the adjusted basis of a debt instrument. To the extent the rules in this paragraph (n)(4) are inconsistent with the rules in paragraph (d)(6) of this section, the rules in this paragraph (n)(4) control.

(i) *Original issue discount*. If a debt instrument is subject to the original issue discount rules in sections 1271 through 1275 and section 6049, a broker must increase a customer's basis in the debt instrument by the amount of original issue discount reported to the customer under section 6049 for each year the debt instrument is held by the customer in the account. If the debt instrument is not subject to section 6049 or is a tax-exempt debt instrument subject to section 1288, the broker must increase the customer's basis in the debt instrument by the amount of original issue discount that accrued on the debt instrument while held by the customer in the account. To determine this amount, the broker must use the accrual period required under paragraph (n)(5) of this section.

(ii) *Bond premium*. If a debt instrument is subject to the bond premium rules in section 171, a broker must decrease a customer's basis in the debt instrument by the amount of bond premium allocable to the period the debt instrument is held by the customer in the account. In the case of a taxable debt instrument, a broker must compute any basis adjustment for bond premium by assuming that the customer elected to amortize bond premium under section 171(c) for the taxable year in which the customer acquired the debt instrument and that such election remained in effect for all subsequent years.

(iii) *Acquisition premium*. If a debt instrument is acquired at an acquisition premium (as determined under §1.1272–2(b)(3)), a broker must decrease the customer's basis in the debt instrument by the amount of acquisition premium that is taken into account each year to reduce the amount of the original issue discount that is otherwise includible in the customer's income for that year. *See* §1.1272–2(b)(4) to determine the amount of the acquisition premium taken into account each year.

(iv) *Principal and certain other payments*. A broker must decrease the customer's basis by the amount of any payment made to the customer during the period the debt instrument is held in the account, other than a payment of qualified stated interest as defined in §1.1273–1(c).

(5) *Accrual period*. If a debt instrument is subject both to the original issue discount and the market discount rules, a broker must use the same accrual period that is used to determine the original issue discount reported to the customer under section 6049 to compute accruals of market discount. In any other situation, a broker must use an annual accrual period or, if there are scheduled payments of principal or interest at regular intervals of one year or less over the entire term of the debt instrument, a broker must use an accrual period equal in length to this interval. For example, if a debt instrument provides for semiannual payments of interest over the entire term of the debt instrument, the broker should use a semiannual accrual period.

(6) *Broker assumptions not controlling for customer*. The rules in this paragraph (n) only apply for purposes of a broker's reporting obligation under section 6045. A customer is not bound by the assumptions that the broker uses to satisfy the broker's reporting obligations under section 6045.

* * * * *

Par. 3. Section 1.6045A–1 is amended by:

1. Revising paragraphs (b)(1) introductory text and (b)(1)(v).

2. Redesignating paragraphs (b)(2) through (b)(9) as paragraphs (b)(5) through (b)(12) respectively.

3. Redesignating paragraph (b)(1)(viii) as paragraph (b)(2).

4. Revising the introductory text to the examples in newly redesignated paragraph (b)(2).

5. Revising newly redesignated paragraph (b)(5).

6. Revising the first and last sentences of newly redesignated paragraph (b)(6).

7. Revising newly redesignated paragraph (b)(8)(ii).

8. Revising the first sentence of newly redesignated paragraph (b)(9)(ii).

9. Revising the introductory text to the examples in newly redesignated paragraph (b)(9)(iii), the fifth sentence of paragraph (b)(9)(iii) *Example 1*, and the second sentence of paragraph (b)(9)(iii) *Example 2*.

10. Revising the last sentence of newly redesignated paragraph (b)(10).

11. Adding new paragraphs (b)(1)(viii), (b)(3) and (b)(4).

12. Revising paragraph (d).

The additions and revisions read as follows:

§1.6045A–1 Statements of information required in connection with transfers of securities.

* * * * *

(b) *Information required*—(1) *In general*. For all specified securities, each transfer statement must include the information described in this paragraph (b)(1).

* * * * *

(v) *Security identifiers*. The Committee on Uniform Security Identification Procedures (CUSIP) number of the security transferred (if applicable) or other security identifier number that the Secretary may designate by publication in the **Federal Register** or in the Internal Revenue Bulletin (*see* §601.601(d)(2) of this chapter), quantity of shares, units, or amounts, and classification of the security (such as stock).

* * * * *

(viii) *Relationship to a compensation arrangement*. Whether the security was received in connection with the exercise of a compensatory option or the vesting or exercise of any other equity-based compensation arrangement and whether basis has been adjusted for any compensation income.

(2) *Examples*. The following examples illustrate the rules of paragraph (b)(1) of this section:

* * * * *

(3) *Additional information required for a transfer of a debt instrument*. In addition to the information required in paragraph (b)(1) of this section, for a transfer of a debt instrument that is a covered security, the following additional information is required:

(i) A description of the payment terms;

(ii) The issue price of the debt instrument;

(iii) The issue date of the debt instrument;

(iv) The adjusted issue price of the debt instrument as of the transfer date;

(v) The customer's initial basis in the debt instrument;

(vi) The yield used to compute any accruals of original issue discount, bond premium, and/or market discount;

(vii) Any market discount that has accrued as of the transfer date (as determined under §1.6045–1(n)); and

(viii) Any bond premium that has been amortized as of the transfer date (as determined under §1.6045–1(n)).

(4) *Additional information required for option transfers*. In addition to the information required in paragraph (b)(1) of this section, for a transfer of an option that is a covered security, the following additional information is required:

(i) The date of grant or acquisition of the option;

(ii) The amount of premium paid or received; and

(iii) Any other information required to fully describe the option.

(5) *Format of identification*. An applicable person furnishing a transfer statement and a broker receiving the transfer statement may agree to combine the information required in paragraphs (b)(1), (b)(3), and (b)(4) of this section in any format or to use a code in place of one or more required items. For example, a transferor and a receiving broker may agree to use a single code to represent the broker instead of the broker's name, address, and telephone number, or may use a security symbol or other identification number or scheme instead of the security identifier required by paragraphs (b)(1), (b)(3), and (b)(4) of this section.

(6) *Transfers of noncovered securities*. The information described in paragraphs (b)(1)(vii), (b)(8), and (b)(9) of this section is not required for a transfer of a noncovered security if the transfer statement identifies the security as a noncovered security. * * * For purposes of this paragraph (b)(6), a transferor must treat a security for which a broker makes a single-account election described in §1.1012–1(e)(11)(i) as a covered security.

*****

(8) * * *

(ii) *Transfers of shares to satisfy a cash legacy*. If a security is transferred from a decedent or a decedent's estate to satisfy a cash legacy, paragraph (b)(1) of this section applies and paragraph (b)(8)(i) of this section does not apply.

* * * * *

(9) * * *

(ii) *Subsequent transfers of gifts by the same customer*. If a transferor transfers to

a different account of the same customer a security that a prior transfer statement reported as a gifted security, the transferor must include on the transfer statement the information described in paragraph (b)(9)(i) of this section for the date of the gift to the customer. * * *

(iii) *Examples*. The following examples illustrate the rules of this paragraph (b)(9):

Example 1. * * * Under paragraph (b)(9)(i) of this section, S must provide a transfer statement to T that identifies the securities as gifted securities and indicates X's adjusted basis and original acquisition date. * * *

Example 2. * * * Under paragraph (b)(9)(ii) of this section, T must provide a transfer statement to U that identifies the securities as gifted securities and indicates X's adjusted basis and original acquisition date of the stock. * * *

(10) * * * If the customer does not provide an adequate and timely identification for the transfer, a transferor must first report the transfer of any securities in the account for which the transferor does not know the acquisition or purchase date followed by the earliest securities purchased or acquired, whether covered securities or noncovered securities.

* * * * *

(d) *Effective/applicability dates*. This section applies to:

(1) A transfer on or after January 1, 2011, of stock other than stock in a regulated investment company within the meaning of §1.1012–1(e)(5);

(2) A transfer of stock in a regulated investment company on or after January 1, 2012; and

(3) A transfer of a debt instrument or an option on or after January 1, 2013.

Par. 4. Section 1.6045B–1 is amended by redesignating paragraph (h) as paragraph (j), adding new paragraphs (h) and (i), and revising newly-designated paragraph (j) to read as follows:

§1.6045B–1 Returns relating to actions affecting basis of securities.

* * * * *

(h) *Rule for options*—(1) *In general*. For an option granted or acquired on or after January 1, 2013, if the original contract is replaced by a different number of option contracts, the option writer is the issuer of the option for purposes of section 6045B and the option writer must prepare an issuer return.

(2) *Example*. The following example illustrates the rule of paragraph (h)(1) of this section:

Example. On January 15, 2013, F, an individual, purchases a one-year exchange-traded call option on 100 shares of Company X stock, with a strike price of $110. The call option is cleared through Clearinghouse G. Company X undertakes a 2-for–1 stock split as of April 1, 2013. Due to the stock split, the terms of F's option are altered, resulting in two option contracts, each on 100 shares of Company X stock with a strike price of $55. All other terms of F's option remain the same. Under paragraph (h)(1) of this section, Clearinghouse G is required to prepare an issuer report to F.

(i) [Reserved]

(j) *Effective/applicability dates*. This section applies to—

(1) Organizational actions occurring on or after January 1, 2011, that affect the basis of specified securities within the meaning of §1.6045–1(a)(14)(i) other than stock in a regulated investment company within the meaning of §1.1012–1(e)(5);

(2) Organizational actions occurring on or after January 1, 2012, that affect stock in a regulated investment company;

(3) Organizational actions occurring on or after January 1, 2013, that affect debt instruments described in §1.6045–1(a)(14)(ii), and

(4) Actions occurring on or after January 1, 2013, that affect options described in §1.6045–1(a)(14)(iii).

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

(Filed by the Office of the Federal Register on November 22, 2012, 4:15 p.m., and published in the issue of the Federal Register for November 25, 2012, 76 F.R. 72652)

Deadline to Submit Opinion and Advisory Letter Applications for Pre-Approved Defined Contribution Plans is Extended to April 2, 2012

Announcement 2012–3

This announcement extends to April 2, 2012, the deadline to submit on-cycle applications for opinion and advisory letters for pre-approved defined contribution plans for the plans' second six-year remedial amendment cycle. Under Rev. Proc. 2007–44, 2007–2 C.B. 54, and Rev. Proc. 2011–49, 2011–44 I.R.B. 608, the submission period for these applications was scheduled to expire on January 31, 2012.

The extension provided by this announcement applies to the deadline for submitting on-cycle applications for opinion and advisory letters for mass submitter lead plans, word-for-word identical plans, master and prototype plan minor modifier placeholder applications and non-mass submitter defined contribution plans.

Effect on Other Documents

Rev. Proc. 2007–44 and Rev. Proc. 2011–49 are modified.

DRAFTING INFORMATION

The principal author of this announcement is Angelique Carrington of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this announcement, please call the Employee Plans taxpayer assistance answering service at (877) 829–5500 (a toll-free number) or email Ms. Carrington at *retirementplanquestions@irs.gov*.

Regulations Governing the Performance of Actuarial Services Under the Employee Retirement Income Security Act of 1974; Correction

Announcement 2012–4

AGENCY: Joint Board for the Enrollment of Actuaries.

ACTION: Correction to final regulations.

SUMMARY: This document contains corrections to final regulations (T.D. 9517, 2011–15 I.R.B. 610) that were published in the Federal Register on Thursday, March 31, 2011 (76 FR 17762) relating to the enrollment of actuaries.

DATES: This correction is effective on December 28, 2011, and is applicable on March 31, 2011.

FOR FURTHER INFORMATION CONTACT: Patrick McDonough, Executive Director, Joint Board for the Enroll-

ment of Actuaries, at (202) 622–8229 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (T.D. 9517) that are the subject of this correction are under section 3042 of the Employee Retirement Income Security Act of 1974 (88 Stat. 829), Public Law 93–406 (ERISA).

Need for Correction

As published, final regulations (T.D. 9517) contain errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the final regulations (T.D. 9517) which were the subject of FR Doc. 2011–7573 is corrected as follows:

On page 17762, column 1, in the preamble, under the paragraph heading "Paperwork Reduction Act", last paragraph of the column, fourth line, the language "901.11(f)(2)(D), 901.11(f)(2)(G) and (H)," is corrected to read "901.11(f)(2)(i)(D), 901.11(f)(2)(i)(G) and (H),".

Guy R. Traynor,
Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

(Filed by the Office of the Federal Register on December 27 2011, 8:45 a.m., and published in the issue of the Federal Register for December 28, 2011, 76 F.R. 81362)

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.

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[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2011–27 through 2011–52 is in Internal Revenue Bulletin 2011–52, dated December 27, 2011.

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