MANUAL TRANSMITTAL

32.1.4

Department of the Treasury
Internal Revenue Service

NOVEMBER 13, 2019

EFFECTIVE DATE

(11-13-2019)

PURPOSE

(1) This transmits revised CCDM 32.1.4, Regulation Handbook, Outlining and Drafting Substantive Regulatory Text.

MATERIAL CHANGES

(1) CCDM 32.1.4, Outlining and Drafting Substantive Regulatory Text, is being revised to incorporate changes to the Federal Register Document Drafting Handbook.

EFFECT ON OTHER DOCUMENTS

This section supersedes CCDM 32.1.4, dated August 21, 2018.

AUDIENCE

Chief Counsel

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(Procedure & Administration)

32.1.4
Outlining and Drafting Substantive Regulatory Text

Table of Contents

32.1.4.1
(08-11-2004)
Overview of Drafting Process

(1) After the initial policy decisions are made, the drafting team should begin drafting the regulation. Outlines are not required, but may be useful in certain cases. The drafting team should consult this Handbook and contact the Federal Register Liaison (FRL) assigned to the project to ensure compliance with all required procedures. See Exhibit 32.1.4-1, Regulation Checklist.

32.1.4.1.1
(08-11-2004)
Drafting Standards — Executive Order 12866

(1) Executive Order 12866 mandates that the following drafting standards are to be used (unless one or more standard is determined to be unreasonable):

a. Draft regulations to minimize litigation,
b. Draft regulations to provide a clear legal standard for affected conduct rather than a general standard, to promote simplification and burden reduction,
c. Specify in clear language the preemptive effect, if any, to be given to the regulation,
d. Specify in clear language the effect, if any, on existing Federal law or regulation, including all provisions repealed, circumscribed, displaced, impaired, or modified,
e. Specify in clear language the retroactive effect, if any, to be given to the regulation,
f. Specify whether administrative proceedings are to be required before parties may file suit in court and, if so, describe those proceedings and any requirement of the exhaustion of administrative remedies, and
g. Define key terms used in regulations, either explicitly or by reference to other regulations or statutes that explicitly define those items.

32.1.4.2
(08-21-2018)
Outlining a Regulation before Drafting

(1) An outline is not required but outlining may help structure the regulation into manageable pieces. Additionally, an outline enables the drafter to visualize different ways to organize a regulation without the burden of editing text. For example, an initial outline may organize a regulation in the same sequence as the corresponding Internal Revenue Code section, and a later outline might show that the regulation is shorter and clearer if organized by the type of taxpayer affected.

(2) The drafting team should consider the following general guidelines:

a. Place general provisions before specific provisions;
b. Place more important provisions before less important provisions;
c. Place more frequently used provisions before less frequently used provisions;
d. Place permanent provisions before interim, transitional, and “grandfathered” provisions; and
e. Place technical “housekeeping” provisions, usually including the applicability date and transition rules, at the end.

Example 1: An initial outline may reveal that the organization of the regulation results in too many levels of subtopics. Before drafting any text, the drafting team should correct this problem by breaking a large section into two smaller sections. This eliminates the lowest levels.

THIS	NOT THIS
-1 VOLUNTARY PRODUCTION OF RECORDS -2 INVOLUNTARY PRODUCTION OF RECORDS (a) Summons (1) Courts that can approve issuance (2) Ex parte proceedings (i) Notice after proceeding (ii) Special court approval (b) District conference (c) Appellate conference	-1 PROCEDURE FOR PRODUCING RECORDS (a) Voluntary basis (b) Involuntary basis (1) Summons (i) Courts that can approve issuance (ii) Ex parte proceedings (A) Notice after proceeding (B) Special court approval (2) District conference (3) Appellate conference

Example 2: The initial outline may reveal that the organization of the regulation is lopsided. The drafting team should combine sections that are too small or divide sections that are too large.

THIS	NOT THIS
New (a)(1) portion of old (a)(1) (2) portion of old (a)(1) (3) portion of old (a)(1) (4) portion of old (a)(1) etc. New (b)(1) old (a)(2) (2) old (a)(3) (3) old (a)(4) (4) old (a)(5) New (c) old (b)	(a)(1) 5 pages (2) 4 lines (3) 14 lines (4) 6 lines (5) 5 lines (b) 1 page

32.1.4.3
(08-21-2018)
Draft Identification Block

(1) Until a regulation is put in signature package, the regulation should include the draft identification block on the first three lines of the first page of every draft, flush at the left margin.

(2) The draft identification block includes:

- The type of draft (precirculation or circulation) and the draft date
- The project number
- The drafter's organization, branch number, and name

Example:

Circulation draft of 10-31-2017
REG-123456-17
PA:B:2:JOAttorney

32.1.4.4
(11-13-2019)
Drafting

(1) The drafting team should consider the following when drafting the text of regulations:

a. Be precise; avoid legalese; to the extent possible, use singular nouns and pronouns; use the active voice; use gender-neutral terms; use short, simple sentences and brief paragraphs.
b. Do not use “i.e.,” “e.g.,” “shall,” “such,” “herein,” “thereunder,” “hereinafter,” “above,” or “below.” Use “for example,” “must,” “that,” and “in this paragraph” and “in this section”.

(2) All paragraphs must be designed, including examples and questions and answers.

32.1.4.4.1
(08-11-2004)
Organizing General Rules and Exceptions (Stop Sign Format)

(1) The drafting team should place the general rule before exceptions and special rules. This is referred to as a “stop sign format.” For the stop sign format to work, the general rule must contain a cross-reference to the exceptions or special rules and a statement about the scope of those rules.

(2) Writing a regulation using the stop sign format may reduce the complexity of a long regulation. This format allows the reader to determine if the exceptions or special rules apply without reading the entire regulation.

Example: If an additional set of complex requirements applies to a corporation with assets or gross receipts that exceed particular thresholds:

THIS	**NOT THIS**
Additional rules apply to corporations with assets that exceed [threshold 1] or gross receipts that exceed [threshold 2]. See [cross-reference to later rules].	For additional rules applicable to certain large corporations, see [cross-reference to later rules].

32.1.4.4.2
(08-11-2004)
Using a Logical Organization

(1) After developing a particular rule and any exceptions, the drafting team should review the rule to ensure that the organization is logical.

Example:

THIS	**NOT THIS**
A taxpayer receives tax result [X] if: 1. The taxpayer [condition 1]; 2. The taxpayer [condition 2]; and 3. [condition 3].	A taxpayer that [condition 1] receives tax result [X] if the taxpayer [condition 2], provided that [condition 3].

32.1.4.4.3
(11-13-2019)
Incorporating Material from an Existing Regulation

(1) A new regulation may incorporate rules in an existing regulation. For example, a new regulation might provide that, "For purposes of making this determination, the provisions of §1.XXX-X(a)(5) of this chapter apply."

(2) If a new regulation will not incorporate all the rules of another regulation section, the drafting team should specify the exception with language such as, "However, the rule in §1.XXX-X(a)(5)(iii) of this chapter (include general description) does not apply." If the new regulation will add to the incorporated rules, the drafting team should note the addition with language such as, "In addition, the following special rule applies to returns described in §1.XXX-5 of this chapter (include general description)."

(3) The drafting team should not use internal incorporation if changes to the incorporated provisions are needed to conform them to the new regulation. For example, do not incorporate an S corporation rule into a partnership provision by stating, "Substitute 'partnership' for 'S corporation' each place that it appears."

(4) The drafting team should be aware that any future changes to incorporated existing regulations will automatically affect the new regulation. For example, if §1.XXX-1 incorporates material from §1.XXX-5, an amendment to §1.XXX-5 will also amend §1.XXX-1.

32.1.4.4.4
(08-11-2004)
Using Cross References

(1) A cross-reference refers to rules in another part of a regulation or in a separate regulation. The drafting team should explain the cross-reference, usually with an identifying parenthetical. For example, a cross-reference to §1.382-1 might be explained with: (limitation on net operating losses and built-in losses of a corporation following an ownership change). Similarly, a cross-reference to another part of the regulation that provides an exception might read as follows, "Except as otherwise provided in paragraph (b)(3) of this section (relating to the de minimis exception), this section is effective January 1, 2003."

32.1.4.4.5
(08-21-2018)
Definitions

(1) If a regulation repeatedly uses words that need to be defined, the drafting team should define the words in a separate paragraph or section, usually at the beginning of the regulation.

(2) The drafting team should not define ordinary words used in their usual dictionary meaning. If a term is rarely used, it does not need to be separately defined. Instead, the drafting team should consider replacing the term with specific explanatory language in the few places it appears.

(3) The drafting team should not include operative rules within definitions.

THIS	**NOT THIS**
a. **Tax on sales**. A tax is imposed on each sale of an alcoholic beverage. b. **Definition**. For purposes of this section, **alcoholic beverage** means beer and wine.	a. **Definition**. For purposes of this section, **alcoholic beverage** means beer and wine. A tax is imposed on each sale of an alcoholic beverage.

(4) In the definition section of a regulation, the drafting team should italicize the terms defined. Do not put the term in quotation marks. Only italicize the term the first time when it is being defined. The drafting team should use "means" or "is" in definitional sentences. For example, "The term **qualified individual** means any natural person who..."

(5) If a regulation contains a series of definitions, the definitions may be listed in alphabetical order in a separate section or paragraph and need not be individually designated. The drafting team should begin each definition with the term being defined. If a definition has lower level paragraphs, the drafting team should designate those paragraphs based on the designation of the overall definitional section.

Example:

(b) **Definitions**.
Employee means a person who—
(1) [TEXT]; and
(2) [TEXT]
Employer means...
Taxable year means...

(6) Use the following instructional paragraph to add a new definition to an alphabetical series:

Example:

Par. 2. In §1.XXX-2, paragraph (b) is amended by adding a new definition in alphabetical order to read as follows:
§1.XXX-2 [HEADING OF REGULATION].
* * * * *
(b) **Definitions**.
Employee means a person who—
(1) [TEXT]; and
(2) [TEXT]

32.1.4.4.6
(08-11-2004)
Using Handles and Acronyms

(1) The drafting team should use handles as a substitute for long, unwieldy phrases that are used repeatedly. For example, the phrase: "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or possession of the United States with respect to foreign mineral income from sources within that country or possession," might be substituted with a handle, such as "(foreign mineral income taxes)" after the second use of the word "possession."

(2) Acronyms also keep the regulation text clean. For example, ozone-depleting chemicals becomes ODCs, voluntary employees' beneficiary association becomes VEBA, and foreign oil related income becomes FORI.

(3) The drafting team should assign a handle or acronym when a phrase or term is first used in the regulation. The drafting team should spell out the handle or acronym in parentheses without quotation marks following the phrase or term for which it will substitute.

32.1.4.4.7
(11-13-2019)
Examples

(1) The drafting team may use examples in the regulation to illustrate specific provisions of the regulation. It is not necessary to set forth all the facts that form the basis for an example's conclusion. Instead, the drafting team should provide only the facts necessary to illustrate the pertinent rule and include intermediate legal conclusions as assumed facts. The drafting team should then provide the legal analysis the example is meant to illustrate. An example cannot be the source of a rule.

(2) Examples follow a specified format. The drafting team should begin the paragraph containing one or more examples with a brief introductory text. Single-space the text of an example. If an example has more than one paragraph, the drafting team should designate each paragraph. If there is only one example, use the heading "**Example**.". If there are multiple examples, number the headings "*Example.*", "**Example 2**. ", etc. Descriptive titles should be used to assist the reader whenever possible.

(3) For computations, the drafting team should use the percent sign "%", the dollar sign "$", and the multiplication sign "x". The drafting team should use letters of the alphabet, rather than proper names, to designate taxpayers. Use different portions of the alphabet for different types of taxpayers. For example, A, B, and C for three individuals, and X and Y for two corporations.

(4) For a series of examples relying on a common set of facts, the drafting team may provide the facts before beginning the examples. The drafting team may also instruct the reader in an example to assume the same facts, with modifications, as in the previous example.

(5) The drafting team should identify the first line of each numbering level used in an example and should avoid using multiple numbering levels in examples whenever possible.

(6) All paragraphs with examples must be designated.

Example 1:

(g) **Examples**. The following examples illustrate the rules of this section:

(1) Example 1. No qualified intermediary. (i) A uses the calendar year as the taxable year and the cash receipts and disbursements method of accounting...

(ii) Under the agreement, B must deposit cash into the qualified escrow account equal to the agreed upon fair market...

(2) Example 2. Qualified intermediary. (i) The facts are the same as in paragraph (g)(1) of this section**(Example 1)**, except that the agreement between A and B requires B to pay $100,000 to a qualified intermediary (QI)...

(ii) QI deposits the $100,000 received from B into a qualified escrow account, the $100,000 is invested in a...

Example 2:

(4) **Examples**. The rules of this paragraph (h) are illustrated by the following examples in which X is an S corporation owned 50% by A and 50% by A's brother B:

32.1.4.4.8
(08-11-2004)
Special Formats

(1) The various types of special formats used in drafting regulatory text are discussed separately in this subsection.

32.1.4.4.8.1
(08-21-2018)
Table of Contents

(1) A table of contents lists the caption headings in the regulation. The drafting team should designate the table of contents as paragraph (a) if there is one regulation section. If there are multiple regulation sections, or multiple sections are anticipated, the drafting team should designate the table of contents as section -0.

(2) The drafting team should start the table of contents with undesignated introductory text identifying the table of contents. The table of contents appears flush left, single-spaced. All paragraph headings end with a period. The drafting team should not underline paragraph headings. It is not necessary to include every paragraph level in the table of contents, but the drafting team must be consistent from section to section.

Example:

Par. 2. Section 52.4681-0 is amended as follows:
1. The introductory text is revised.
2. Entries are added for §52.4682-5.
The revision and addition read as follows:

§52.4681-0 Table of contents.

This section lists the table of contents for §§52.4681-1 through 52.4681-5.

* * * * *

§52.4681-5 Exports.

(a) Overview.
(b) Exemption or partial exemption from tax.
(1) In general.
(2) Tax imposed if exemption amount exceeded.
(i) Post-1989 ODCs.
(ii) Post-1990 ODCs.
(3) Mixtures.
(c) Exemption amount.
(d) Effective date.

32.1.4.4.8.2
(08-21-2018)
Lists

(1) The drafting team should begin each list with introductory material identifying the list.

(2) If the introductory material ends in a complete sentence, the drafting team should end the introduction with a colon and end each item in the list with a period.

(3) If the introductory material ends in an incomplete sentence, the drafting team should end the introduction with two dashes (no space between the dashes and no space between the last word of the introduction and the dashes) and end each item in the list (except the last one) with a semicolon. After the last semicolon use "and" or "or" and end the last item in the list with a period. Flush language is not allowed at the end of the list.

Example 1:

(iii) **Examples of capital service costs.** Costs incurred in the following departments or functions are generally allocated among production or resale activities:

(A) The administration and coordination of production or resale activities (wherever performed in the business organization of the taxpayer).

(B) Personnel operation, including the cost of recruiting, hiring, relocation, assigning, and maintaining personnel records or employees.

(C) Purchasing operations, including purchasing materials and equipment, scheduling and coordinating delivery of materials and equipment to or from factories or job sites, and expediting and follow-up.

Example 2:

(a) **In general.** An escrow account, trust, or fund that is not a qualified settlement fund is a disputed ownership fund if—

(1) It is established to hold money or property subject to conflicting claims of ownership;

(2) The fund is subject to the continuing jurisdiction of a court; and

(3) Money or property cannot be paid or distributed from the fund to, or on behalf of, a claimant or transferor without the approval of the court.

32.1.4.4.8.3
(08-11-2004)
Titles of Forms, Publications, and Notices

(1) A regulation may refer to a form, publication, or notice. The drafting team should include the title of the item when first discussed in the preamble and first discussed in each regulation section amended. The drafting team should place the title in quotation marks, offset by commas.

Example: If the taxpayer timely files Form 3115, "Application for Change in Accounting Method," . . . the Form 3115 will be . . .

32.1.4.4.8.4
(08-21-2018)
Citations

(1) The drafting team should set out citations in parentheses.

Examples:

Paperwork Reduction Act (44 U.S.C. 3504(h))

Taxpayer Relief Act of 1997, Public Law 105-34 (11 Stat. 788, 955 (1997))

Notice 97-65 (1997-2 C.B. 326 (December 22, 1997)),

Rev. Proc. 81-46 (1981-2 C.B. 621),

32.1.4.4.8.5
(08-21-2018)
Graphs, Time lines, Flowcharts, etc.

(1) Regulations may contain graphs, time lines, flowcharts, diagrams, pictures, drawings, formulas, and tables as either substantive rules or examples. The OFR has special printing requirements with respect to documents with graphs, timelines, flowcharts, etc. Documents containing these features may need to be prepared in camera-ready copy. The FRL assigned to the project will help the drafting team prepare the document to meet the OFR requirements.

32.1.4.4.9
(08-21-2018)
Sample Documents

(1) The exhibits listed below are provided as samples for reference. Although the samples are based on previously issued guidance, some samples have been updated to provide current model language and are not exact reprints of the original guidance. The samples should not be relied on for substantive statements of law.

- Exhibit 32.1.4-2, Sample ANPRM
- Exhibit 32.1.4-3, Sample NPRM
- Exhibit 32.1.4-4, Sample NPRM By Cross-Reference To Temporary Regulation
- Exhibit 32.1.4-5, Sample Temporary Regulation
- Exhibit 32.1.4-6, Sample Final Regulation
- Exhibit 32.1.4-7, Sample NPRM By Cross-Reference To Temporary Regulations That Amend Existing Final Regulations
- Exhibit 32.1.4-8, Sample Existing Final Regulations Amended By Temporary Regulations

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Exhibit 32.1.4-1 (10-11-2011)
Regulation Checklist

REGULATION CHECKLIST	
Task	**Complete Date**
RIN	
7 Point Memo	
ANPRM:	
NPRM:	
TEMP:	
Copy to Federal Register Liaison	
Green Version (via email)	
Comments Due	
Signature Package	
Chief Counsel	
Commissioner	
Delivered to Treasury	
Treasury	
Plain Language Summary	
Submit Regulation to FRL	
Filing and Publication Date Assigned	
Deliver to Publications and Regulations Branch (Room 5203)	
Electronic Delivery to Publication and Regulations Branch by email (removed hidden codes)	
Form 12971	[Deliver on Date Filed with FR]
Form 12972	[Deliver on Date Filed with FR]
Congressional/GAO Submission	[Deliver on Date Filed with FR]
Email FILING DATE to: floyd.Williams@irs.gov	[on Filing Date]
Email Regulation and PL Summary to the Branch Chief, Senior FRL, and the project's FRL in the Publication and Regulations Branch	
Proofread regulation after publication	
Public Hearing	
Contact Regulations Unit to schedule	

Exhibit 32.1.4-1 (Cont. 1) (10-11-2011)
Regulation Checklist

REGULATION CHECKLIST	
Assemble Legal File (All Acknowledgement of Receipt forms for the CRA report must be included)	
Final Regulation	
Close File	

Exhibit 32.1.4-2 (08-21-2018)
Sample Advanced Notice of Proposed Rulemaking (ANPRM)

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-136596-07]

RIN 1545-BH12

Guidance Regarding Marketing of Refund Anticipation Loans (RALs) and Certain Other Products in Connection with the Preparation of a Tax Return

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This document describes rules that the Treasury Department and the IRS are considering proposing, in a notice of proposed rulemaking, regarding the disclosure and use of tax return information by tax return preparers. The rules would apply to the marketing of refund anticipation loans (RALs) and certain other products in connection with the preparation of a tax return and, as an exception to the general principle that taxpayers should have control over their tax return information that is reflected in final regulations published in T.D. 9375 which is published elsewhere in this issue of the Federal Register, provide that a tax return preparer may not obtain a taxpayer's consent to disclose or use tax return information for the purpose of soliciting taxpayers to purchase such products. This document invites comments from the public regarding these contemplated rules. All materials submitted will be available for public inspection and copying.

DATES: Comments must be received by April 7, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-136596-07), 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-136596-07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at http://**www.regulations.gov** (IRS REG-136596-07).

FOR FURTHER INFORMATION CONTACT: Concerning submissions of comments, Kelly Banks at (202) 317-XXXX; concerning the proposals, Lawrence Mack at (202) 317-XXXX (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document describes rules that the Treasury Department and the IRS are considering proposing in a notice of proposed rulemaking regarding the marketing of refund anticipation loans (RALs) and certain other products identified below in connection with the preparation of a tax return.

The proposed rules would amend the Regulations on Procedure and Administration (26 CFR Part 301) under section 7216 of the Internal Revenue Code. Section 7216 was enacted by section 316 of the Revenue Act of 1971, Public Law 92-178 (85 Stat. 529, 1971), and has been amended several times since 1971. Section 7216 imposes criminal penalties on tax return preparers who knowingly or recklessly make unauthorized disclosures or uses of information furnished to them in connection with the preparation of an income tax return. In addition, tax return preparers are subject to civil penalties under section 6713 for disclosure or use of this information unless an exception under the rules of section 7216(b) applies to the disclosure or use.

Exhibit 32.1.4-2 (Cont. 1) (08-21-2018)
Sample Advanced Notice of Proposed Rulemaking (ANPRM)

A notice of proposed rulemaking (REG-137243-02) was published in the Federal Register (70 FR 72954) on December 8, 2005. Concurrent with publication of the proposed regulations, the IRS published Notice 2005-93, 2005-52 I.R.B. 1204 (December 07, 2005), setting forth a proposed revenue procedure that would provide guidance to tax return preparers regarding the format and content of consents to use and consents to disclose tax return information under §301.7216-3.

Among other recommendations received in response to the notice of proposed rulemaking published on December 8, 2005, a number of commentators recommended that the regulations prohibit or substantially restrict the disclosure or use of tax return information for marketing purposes. As described in the preamble of the final regulations published in T.D. 9375 which is published elsewhere in this issue of the Federal Register, these commentators specifically recommended banning tax return preparers from disclosing or using tax return information for the purpose of soliciting refund anticipation loans (RALs) and similar products. The Treasury Department and the IRS did not adopt this recommendation in the final regulations that are being published concurrently with this ANPRM because of the significant policy issues that need to be considered and because they had not previously proposed a rule regarding the use or disclosure of tax return information for purposes of marketing of RALs and similar products.

This ANPRM addresses two major areas of concern that have been raised and describes rules that the Treasury Department and the IRS are considering proposing regarding the marketing of RALs and certain other products identified below in connection with the preparation of a tax return. It also solicits comments on specific issues as described herein.

Concerns Raised by RALs and Certain Other Products

Financial Incentive To Inflate Refunds

The Treasury Department and the IRS are concerned that RALs and certain other products may provide tax preparers with a financial incentive to take improper tax return positions in order to inappropriately inflate refund claims. In general, RAL amounts are capped by the amount of the refund claimed on a tax return. Therefore, a preparer who inappropriately inflates the amount of a refund is able, directly or indirectly through arrangement with a RAL provider, to collect a higher fee. Additionally, a significant number of RALs are made to taxpayers who claim the earned income tax credit (EITC). The Treasury Department and the IRS are concerned that the financial benefits of selling a RAL to a taxpayer can create an incentive for the preparer to not fully comply with due diligence requirements designed to ensure the accuracy of EITC claims. See section 6695(g).

Even when a flat fee is charged for RALs, it may be possible that a financial incentive to inappropriately inflate the amount of a refund exists. As an example, some merchants who offer tax preparation services may encourage customers to obtain RALs and spend the funds on the merchant's products or services. To the extent that the preparer prepares a return that claims an inappropriately large refund, the taxpayer is enabled to purchase more of the merchant's products or services.

The Treasury Department and the IRS are concerned that overall tax compliance suffers when tax advisors or tax preparers benefit directly from maximizing a refund in preparing a tax return. Treasury Department Circular 230 restricts the ability of tax practitioners to charge contingent fees in certain circumstances when there are tax administration concerns. **See** 31 C.F.R. § 10.27. The Treasury Department and the IRS are considering whether similar restrictions should be placed on use or disclosure of tax return information by preparers who receive a financial benefit from the sale of an ancillary product, such as a RAL, rather than directly from the determination of a taxpayer's tax liability.

There are two other products that potentially raise similar concerns – refund anticipation checks (RACs) and audit insurance. A RAC is a post-refund product that allows taxpayers to pay for return preparation services out of their refunds. As with a RAL, a taxpayer will only qualify to purchase a RAC if a refund is claimed on the return. Audit insurance is a type of insurance that covers professional fees and other expenses incurred in re-

Exhibit 32.1.4-2 (Cont. 2) (08-21-2018)
Sample Advanced Notice of Proposed Rulemaking (ANPRM)

sponding to or defending against an audit by the IRS. Taxpayers who purchase audit insurance may be encouraged to take aggressive tax reporting positions if they believe the insurance will provide protection against the risk of an adjustment. The Treasury Department and the IRS generally believe that arrangements that create financial incentives for taxpayers or tax preparers to exploit the audit selection process undermine tax compliance.

Potential for Inappropriate Use by Tax Preparers

In responding to the proposed regulations, some commentators expressed concern that tax preparers are inappropriately profiting from marketing RALs and certain other products to relatively unsophisticated taxpayers who do not comprehend the full costs of the products. These commentators noted that RALs are marketed primarily to low-income taxpayers who receive the EITC, that these taxpayers generally have relatively low levels of financial expertise, and that these taxpayers are more likely than other taxpayers to rely on the advice of their preparers. These commentators urged the IRS to amend the proposed regulations to protect these taxpayers from exploitation. The National Taxpayer Advocate also expressed similar concerns. **See** National Taxpayer Advocate FY 2007 Objectives Report to Congress, vol. II, **The Role of the IRS in the Refund Anticipation Loan Industry**, at 18 (June 30, 2006).

As a general rule, the Treasury Department and the IRS believe that taxpayers should have the ability to control the use or disclosure of their tax return information. Taxpayer control, however, must be balanced against the ability of the government to effectively administer the internal revenue laws, which includes guarding against (1) the potential lessening of tax compliance, (2) the potential exploitation of taxpayers described by certain commentators, and (3) the potential existence of inappropriate financial incentives for tax preparers to inflate tax refunds.

Explanation of Contemplated Rules

Sections 7216 and 6713 provide a broad prohibition against the disclosure and use of tax return information by return preparers. Statutory exceptions are provided for a **disclosure** pursuant to any other provision of the Internal Revenue Code or an order of a court and for a **use** by a preparer to assist the taxpayer in preparing his or her state and local tax returns and declarations of estimated tax. The statutory language also authorizes the Secretary to prescribe regulations permitting additional exceptions. Thus, tax return preparers may use or disclose tax return information beyond the statutory exceptions only if, and to the extent that, Treasury regulations expressly authorize such acts.

Among other exceptions, the regulations under section 7216 generally provide that preparers may use or disclose tax return information if the taxpayer provides consent. As a general rule, taxpayers should have the ability to control the use or disclosure of their tax return information. To address the tax administration concerns described above, the Treasury Department and the IRS are considering proposing regulations that would create an exception from the general consent framework prescribed by §301.7216-3 for RALs, RACs, audit insurance, and similar products. This exception would effectively separate the act of return preparation from the act of marketing or purchasing certain financial products by prohibiting the use of information obtained during the tax-preparation process for the non-tax administration purpose of marketing: (i) a RAL or a substantially similar product or service; (ii) a RAC or a substantially similar product or service; or (iii) audit insurance or a substantially similar product or service.

Proposed Effective Date

The Treasury Department and the IRS anticipate that these new proposed rules would apply for returns filed on or after January 1st of the year following the date of publication in the Federal Register as final or temporary regulations.

Exhibit 32.1.4-2 (Cont. 3) (08-21-2018)
Sample Advanced Notice of Proposed Rulemaking (ANPRM)

Request for Comments

Before a notice of proposed rulemaking is issued, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. All comments will be available for public inspection and copying.

Specifically, comments are encouraged on the following questions:

1. If RALs and certain other products create a direct financial incentive for preparers to inflate tax refunds, are there alternative approaches that would eliminate or reduce this incentive?

2. If the marketing of RALs and certain other products exploit or have the potential to exploit certain taxpayers, is the approach described in this ANPRM better viewed as protecting taxpayers from exploitation or as restricting taxpayers' ability to control their tax return information? If the latter, is there an alternative approach that would address the concerns described above?

3. Should RACs be treated the same way as RALs and audit insurance, or do RACs present lesser concerns?

4. Are there other products that present significant concerns for tax compliance or taxpayer exploitation that should be addressed by regulation?

Drafting Information

The principal author of this advance notice of proposed rulemaking is Dillon Taylor, formerly of the Office of the Associate Chief Counsel (Procedure and Administration). For further information, contact Lawrence Mack of the Office of Associate Chief Counsel (Procedure and Administration) at 202-317-XXXX (not a toll-free call).

/s/ Linda E. Stiff

Deputy Commissioner for Services and Enforcement.

Exhibit 32.1.4-3 (08-21-2018)
Sample Notice of Proposed Rulemaking (NPRM)

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 20, 25, 26, 31, and 301

[REG-148998-13]

RIN 1545-BM10

Definition of Terms Relating to Marital Status

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that reflect the holdings of Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015), Windsor v. United States, 570 U.S. ___, 133 S. Ct. 2675 (2013), and Revenue Ruling 2013-17 (2013-38 IRB 201), and that define terms in the Internal Revenue Code (Code) describing the marital status of taxpayers. The proposed regulations primarily affect married couples, employers, sponsors and administrators of employee benefit plans, and executors. This document invites comments from the public regarding these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by December 7, 2015.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-148998-13), room 5205, Internal Revenue Service, P.O. 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-148998-13), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC; or sent electronically via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-148998-13).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed amendments to the regulations, Mark Shurtliff at (202) 317-XXXX; concerning submissions of comments and requests for a hearing, Regina Johnson at (202) 317-XXXX (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1), the Estate Tax Regulations (26 CFR part 20), the Gift Tax Regulations (26 CFR part 25), the Generation-Skipping Transfer Tax Regulations (26 CFR part 26), the Employment Tax and Collection of Income Tax at Source Regulations (26 CFR part 31), and the Regulations on Procedure and Administration (26 CFR part 301).

Amendments to Regulations Incorporating Holdings of Windsor, Obergefell, and Revenue Ruling 2013-17

On June 26, 2013, the Supreme Court in **United States v. Windsor**, 570 U.S. ___, 133 S. Ct. 2675 (2013), held that Section 3 of the Defense of Marriage Act, which generally prohibited the federal government from recognizing the marriages of same-sex couples, is unconstitutional because it violates the principles of equal protection and due process. Revenue Ruling 2013-17 provides guidance on the **Windsor** decision's effect on the IRS's interpretation of Code sections that refer to taxpayers' marital status. **Cf**. Notice 2014-19 (2014-47

Exhibit 32.1.4-3 (Cont. 1) (08-21-2018)
Sample Notice of Proposed Rulemaking (NPRM)

IRB 979), amplified by Notice 2014-37 (2014-24 IRB 1100) (regarding the application of the **Windsor** decision to qualified retirement plans); Notice 2014-1 (2014-02 IRB 270) (regarding elections and reimbursements for same-sex spouses under cafeteria plans, flexible spending arrangements, and health savings accounts following the **Windsor** decision); Notice 2013-61 (2013-44 IRB 432) (regarding the application of the **Windsor** decision and Rev. Rul. 2013-17 to employment taxes and special administrative procedures for employers to make adjustments or claims for refund or credit); and Revenue Procedure 2014-18 (2014-7 IRB 513) (regarding extensions of time for estates to make a portability election). On June 26, 2015, the Supreme Court in **Obergefell v. Hodges**, 576 U.S. ___ (2015), held that state laws are **invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples** and **that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Obergefell**, 576 U.S. at 23, 28.

I. In General

In light of the holdings of **Windsor** and **Obergefell**, the Treasury Department and the IRS have determined that, for federal tax purposes, marriages of couples of the same-sex should be treated the same as marriages of couples of the opposite-sex and that, for reasons set forth in Revenue Ruling 2013-17, terms indicating sex, such as **husband, wife,** and **husband and wife,** should be interpreted in a neutral way to include same-sex spouses as well as opposite-sex spouses. Accordingly, these proposed regulations amend the current regulations under section 7701 of the Internal Revenue Code (Code) to provide that, for federal tax purposes, the terms **spouse, husband,** and **wife** mean an individual lawfully married to another individual, and the term **husband and wife** means two individuals lawfully married to each other. These definitions apply regardless of sex.

In addition, these proposed regulations provide that a marriage of two individuals will be recognized for federal tax purposes if that marriage would be recognized by any state, possession, or territory of the United States. Under this rule, whether a marriage conducted in a foreign jurisdiction will be recognized for federal tax purposes depends on whether that marriage would be recognized in at least one state, possession, or territory of the United States. This comports with the general principles of comity where countries recognize actions taken in foreign jurisdictions, but only to the extent those actions do not violate their own laws. See **Hilton v. Guyot**, 159 U.S. 113, 167 (1895) (**A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law.**).

Although these proposed regulations define terms relating to marital status for federal tax purposes, the IRS may provide additional guidance as needed. For example, the IRS has already issued more particular guidance for employers regarding the application of Revenue Ruling 2013-17 to qualified retirement plans, and that guidance remains in effect. See Notice 2014-19 (2014-47 IRB 979).

Registered Domestic Partnerships, Civil Unions, or Other Similar Relationships Not Denominated as Marriage

For federal tax purposes, the term **marriage** does not include registered domestic partnerships, civil unions, or other similar relationships recognized under state law that are not denominated as a marriage under that state's law, and the terms **spouse, husband and wife, husband,** and **wife** do not include individuals who have entered into such a relationship.

Except when prohibited by statute, the IRS has traditionally looked to the states to define marital status. See **Loughran v. Loughran**, 292 U.S. 216, 223 (1934) (**Marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction.**); see also Revenue Ruling 58-66 (1958-1 CB 60) (if a state recognizes a common-law marriage as a valid marriage, the IRS will also recognize the couple as married for purposes of federal income tax filing status and personal exemptions). States have carefully considered the types of relationships that they choose to recognize as a marriage and the types that they choose to recognize

Exhibit 32.1.4-3 (Cont. 2) (08-21-2018)
Sample Notice of Proposed Rulemaking (NPRM)

as something other than a marriage. Although some states extend all of the rights and responsibilities of marriage under state law to couples in registered domestic partnerships, civil unions, or other similar relationships, those states have intentionally chosen not to denominate those relationships as marriages. Similar rules exist in some foreign jurisdictions.

Some couples have chosen to enter into a civil union or registered domestic partnership even when they could have married, and some couples who are in a civil union or registered domestic partnership have chosen not to convert those relationships into a marriage even when they have had the opportunity to do so. In many cases, this choice was deliberate, and couples who enter into civil unions or registered domestic partnerships may have done so with the expectation that their relationship will not be treated as a marriage for purposes of federal law. For some of these couples, there are benefits to being in a relationship that provides some, but not all, of the protections and responsibilities of marriage. For example, some individuals who were previously married and receive Social Security benefits as a result of their previous marriage may choose to enter into a civil union or registered domestic partnership (instead of a marriage) so that they do not lose their Social Security benefits. More generally, the rates at which some couples' income is taxed may increase if they are considered married and thus required to file a married-filing-separately or married-filing-jointly federal income tax return. Treating couples in civil unions and registered domestic partnerships the same as married couples who are in a relationship denominated as marriage under state law could undermine the expectations certain couples have regarding the scope of their relationship. Further, no provision of the Code indicates that Congress intended to recognize as marriages civil unions, registered domestic partnerships, or similar relationships. Accordingly, the IRS will not treat civil unions, registered domestic partnerships, or other similar relationships as marriages for federal tax purposes.

Effect on Other Documents

These ***proposed regulations would, as of the date they are published as final regulations in the Federal Register***, obsolete Revenue Ruling 2013-17. Taxpayers may continue to rely on guidance related to the application of Revenue Ruling 2013-17 to employee benefit plans and the benefits provided under such plans, including Notice 2013-61, Notice 2014-37, Notice 2014-19, and Notice 2014-1.

Proposed Effective Date

The regulations, as proposed, would be effective as of the date of publication of a Treasury decision adopting these rules as final regulations in the Federal Register. See §301.7701-18(d) for applicability date.

Statement of Availability for IRS Documents

For copies of recently issued Revenue Procedures, Revenue Rulings, Notices, and other guidance published in the Internal Revenue Bulletin, please visit the IRS website at *https://www.irs.gov*.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations. Because the regulations do not impose a collection of information on small entities a Regulatory Flexibility Act (5 U.S.C. chapter 6) analysis is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **Addresses** heading. Treasury and the IRS request comments on all aspects of the proposed rules. All comments will be available at

Exhibit 32.1.4-3 (Cont. 3) (08-21-2018)
Sample Notice of Proposed Rulemaking (NPRM)

www.regulations.gov or upon request. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Mark Shurtliff of the Office of the Associate Chief Counsel, Procedure and Administration.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

26 CFR Part 26

Estate, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Reporting and recordkeeping requirements, Social Security, Unemployment compensation.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1, 20, 25, 26, 31, and 301 are 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 1.7701-1 is added to read as follows:

§1.7701-1 Definitions; spouse, husband and wife, husband, wife, marriage.

(a) **In general.** For the definition of the terms spouse, husband and wife, husband, wife, and marriage, see §301.7701-18 of this chapter.

(b) **Applicability date.** The rules of this section are proposed to apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the Federal Register.

Exhibit 32.1.4-3 (Cont. 4) (08-21-2018)
Sample Notice of Proposed Rulemaking (NPRM)

PART 20--ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Par. 3. The authority citation for part 20 continues to read in part as follows:

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

Par. 4. Section 20.7701-2 is added to read as follows:

§20.7701-2 Definitions; spouse, husband and wife, husband, wife, marriage.

(a) **In general.** For the definition of the terms spouse, husband and wife, husband, wife, and marriage, see §301.7701-18 of this chapter.

(b) **Applicability date.** The rules of this section are proposed to apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**.

PART 25--GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

Par. 5. The authority citation for part 25 continues to read in part as follows:

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

Par. 6. Section 25.7701-2 is added to read as follows:

§25.7701-2 Definitions; spouse, husband and wife, husband, wife, marriage.

(a) **In general.** For the definition of the terms spouse, husband and wife, husband, wife, and marriage, see §301.7701-18 of this chapter.

(b) **Applicability date.** The rules of this section are proposed to apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**.

PART 26--GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1986

Par. 7. The authority citation for part 26 continues to read in part as follows:

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

Par. 8. Section 26.7701-2 is added to read as follows:

§26.7701-2 Definitions; spouse, husband and wife, husband, wife, marriage.

(a) **In general.** For the definition of the terms spouse, husband and wife, husband, wife, and marriage, see §301.7701-18 of this chapter.

(b) **Applicability date.** The rules of this section are proposed to apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**.

PART 31--EMPLOYEMENT TAXES AND COLLECTION OF INCOME TAX AT THE SOURCE

Par. 9. The authority citation for part 31 continues to read in part as follows:

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

Par. 10. Section 31.7701-2 is added to read as follows:

Exhibit 32.1.4-3 (Cont. 5) (08-21-2018)
Sample Notice of Proposed Rulemaking (NPRM)

§31.7701-2 Definitions; spouse, husband and wife, husband, wife, marriage.

(a) **In general**. For the definition of the terms spouse, husband and wife, husband, wife, and marriage, see §301.7701-18 of this chapter.

(b) *Applicability date.* The rules of this section are proposed to apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the *Federal Register*.

PART 301--PROCEDURE AND ADMINISTRATION

Par. 11. The authority citation for part 301 continues to read in part as follows:

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

Par. 12. Section 301.7701-18 is added to read as follows:

§301.7701-18 Definitions; spouse, husband and wife, husband, wife, marriage.

(a) *In general.* For federal tax purposes, the terms *spouse*, *husband*, and *wife* mean an individual lawfully married to another individual. The term *husband and wife* means two individuals lawfully married to each other.

(b) *Persons who are married for federal tax purposes.* A marriage of two individuals is recognized for federal tax purposes if the marriage would be recognized by any state, possession, or territory of the United States.

(c) *Persons who are not married for federal tax purposes.* The terms *spouse*, *husband*, and *wife* do not include individuals who have entered into a registered domestic partnership, civil union, or other similar relationship not denominated as a marriage under the law of a state, possession, or territory of the United States. The term *husband and wife* does not include couples who have entered into such a relationship, and the term marriage does not include such relationships.

(d) *Applicability date.* The rules of this section are proposed to apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the *Federal Register*.

John M. Dalrymple

Deputy Commissioner for Services and Enforcement.

Exhibit 32.1.4-4 (08-21-2018)
Sample Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulation

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-13507-11]

RIN 1545-BK63

Application for Recognition as a 501(c)(29) Organization

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: In the Rules and Regulations section of this issue of the Federal Register are temporary regulations authorizing the IRS to prescribe the procedures by which a qualified nonprofit health insurance issuer participating in the Consumer Operated and Oriented Plan program, established by the Centers for Medicare and Medicaid Services, may apply for recognition as a tax-exempt organization under the Internal Revenue Code. The text of those regulations also serves as the text of these proposed regulations.

DATES: Comments and requests for a public hearing must be received by April 9, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-135071-11), Room 5203, Internal Revenue Service, P.O. 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-135071-11), 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-135071-11).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Amy Franklin or Martin Schäffer at (202) 317-XXXX; concerning submission of comments and request for hearing, Oluwafunmilayo Taylor at (202) 317-XXXX (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

The temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** make additions to the Income Tax Regulations (26 CFR part 1) relating to section 501(c)(29) of the Internal Revenue Code (Code). The temporary regulations provide that the Commissioner has the authority to prescribe the procedures under which a qualified nonprofit health insurance issuer (within the meaning of section 1322(c) of the Patient Protection and Affordable Care Act, Public Law 111-148 (March 23, 2010)) which has received a loan or grant from the Centers for Medicare and Medicaid Services under the Consumer Operated and Oriented Plan program may request to be recognized as tax-exempt under section 501(a) as an organization described in section 501(c)(29). The temporary regulations expressly authorize the Commissioner to recognize a qualified nonprofit health insurance issuer as exempt effective as of a date prior to the date of its application, provided that the application is submitted in the manner and within the time prescribed by the Commissioner and the organization's prior purposes and activities were consistent with the requirements for exempt status under section 501(c)(29). The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the additions.

Exhibit 32.1.4-4 (Cont. 1) (08-21-2018)
Sample Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulation

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations. Because no collection of information is imposed on small entities, a Regulatory Flexibility Act (5 U.S.C. chapter 6) analysis is not required. Pursuant to section 7805(f) of the Code, the proposed regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comments on its impact on small businesses.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **Addresses** heading. The IRS and the Treasury Department request comments on all aspects of the proposed regulations. All comments will be available at **www.regulations.gov** or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Amy Franklin and Martin Schäffer of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), although other persons in the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

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 is amended by adding an entry in numerical order to read as follows:

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

Section 1.501(c)(29)-1 also issued under 26 U.S.C. 501(c)(29)(B)(i). * * *

Par. 2. Section 1.501(c)(29)-1 is added to read as follows:

§1.501(c)(29)-1 CO-OP Health Insurance Issuers.

[The text of proposed §1.501(c)(29)-1 is the same as the text of §1.501(c)(29)-1T(a) published elsewhere in this issue of the **Federal Register**].

Steven T. Miller

Deputy Commissioner for Services and Enforcement.

Exhibit 32.1.4-5 (08-21-2018)
Sample Temporary Regulation

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9574]

RIN 1545-BK64

Application for Recognition as a 501(c)(29) Organization

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations authorizing the IRS to prescribe the procedures by which certain entities may apply to the IRS for recognition of exemption from Federal income tax. These regulations affect qualified nonprofit health insurance issuers, participating in the Consumer Operated and Oriented Plan program established by the Centers for Medicare and Medicaid Services, that seek exemption from federal income tax under the Internal Revenue Code. The text of the temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

DATES: Effective Date: These regulations are effective on February 7, 2012.
Applicability Date: For date of applicability, see §1.501(c)(29)-1T(c).

FOR FURTHER INFORMATION CONTACT: Amy Franklin or Martin Schäffer, (202) 317-XXXX (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 501(c)(29) of the Internal Revenue Code (Code) provides requirements for tax exemption under section 501(a) for qualified nonprofit health insurance issuers (QNHIIs). Section 501(c)(29) was added to the Code by section 1322(h)(1) of the Patient Protection and Affordable Care Act (Affordable Care Act), Public Law 111-148 (March 23, 2010).

Section 1322 of the Affordable Care Act directs the Centers for Medicare and Medicaid Services (CMS) to establish the Consumer Operated and Oriented Plan (CO-OP) program. The purpose of the CO-OP program is to foster the creation of member-governed QNHIIs that will operate with a strong consumer focus and offer qualified health plans in the individual and small group markets. CMS will provide loans and repayable grants (collectively, loans) to organizations applying to become QNHIIs, to help cover start-up costs and meet any solvency requirements in States in which the organization is licensed to issue qualified health plans. A Funding Opportunity Announcement for the CO-OP program (CFDA Number 93.545), published by CMS on July 28, 2011 (and amended on September 16, 2011), provides that for each loan the appropriate CMS official will issue a Notice of Award and Loan Agreement to the QNHII. In addition, the Chief Executive Officer of the QNHII, or an officer of the QNHII's Board of Directors, must sign and return the Loan Agreement to CMS. On December 13, 2011, CMS issued final regulations implementing the CO-OP program at 76 FR 77392.

The CMS final regulations define a QNHII as an entity that, within specified time frames, satisfies or can reasonably be expected to satisfy the standards in section 1322(c) of the Affordable Care Act and in the CMS

Exhibit 32.1.4-5 (Cont. 1) (08-21-2018)
Sample Temporary Regulation

final regulations. The entity will constitute a QNHII until such time as CMS determines the entity does not satisfy or cannot reasonably be expected to satisfy these standards. Section 1322(c) of the Affordable Care Act imposes a number of requirements, including that a QNHII be organized as a nonprofit member corporation under State law and that substantially all its activities consist of the issuance of qualified health plans in the individual and small group markets in each State in which it is licensed to issue such plans.

Section 501(c)(29)(A) of the Code provides that a QNHII (within the meaning of section 1322(c) of the Affordable Care Act) which has received a loan or grant under the CO-OP program may be recognized as exempt from taxation under section 501(a), but only for periods for which the organization is in compliance with the requirements of section 1322 of the Affordable Care Act and of any loan or grant agreement with the Secretary of Health and Human Services. Section 501(c)(29)(B) provides that a QNHII will not qualify for tax-exemption unless it meets four additional requirements. First, the QNHII must give notice to the Secretary of the Treasury, in such manner as the Secretary may by regulations prescribe, that it is applying for recognition of exemption as an organization described in section 501(c)(29). Second, no part of the QNHII's net earnings may inure to the benefit of any private shareholder or individual, except to the extent permitted by section 1322(c)(4) of the Affordable Care Act (which requires that any profits be used to lower premiums, to improve benefits, or for other programs intended to improve the quality of health care delivered to the organization's members). Third, no substantial part of the QNHII's activities may consist of carrying on propaganda, or otherwise attempting, to influence legislation. Finally, the QNHII may not participate in or intervene in (including the publishing or distributing of statements) any political campaign on behalf of (or in opposition to) any candidate for public office. As required by section 1322(b)(2)(C)(iii) of the Affordable Care Act, CMS must notify the IRS of any determination of a failure to comply with the CO-OP program standards, including any loan agreement, that may affect a QNHII's tax-exempt status under section 501(c)(29) of the Code.

The IRS issued Notice 2011-23, 2011-13 IRB 588 (March 10, 2011) (see §601.601(d)(2)(ii)(b) of this chapter), which addresses the requirements for tax exemption for QNHIIs described in section 501(c)(29). The Notice provides guidance on the annual filing requirement for QNHIIs that intend to apply for recognition of exempt status under section 501(c)(29). The Notice also states that the Treasury Department and the IRS intend to recognize a QNHII that has received a loan or grant under the CO-OP program as exempt effective from the later of the date of its formation or March 23, 2010, provided that the organization's purposes and activities have been consistent with the requirements for exemption since that date. In addition, the Notice states that the IRS intends to issue a revenue procedure explaining how and when a QNHII may apply for recognition of exempt status as an organization described in section 501(c)(29).

Under the authority provided by these temporary regulations, the Treasury Department and the IRS are issuing a revenue procedure regarding the application for recognition of exemption as an organization described in section 501(c)(29). The revenue procedure will provide that a substantially completed application for recognition of exemption under section 501(c)(29) must include a copy of both the Notice of Award issued by CMS and the fully executed Loan Agreement with CMS.

Explanation of Provisions

Section 501(c)(29)(B)(i) provides that a QNHII which has received a loan through the CO-OP program may be recognized as exempt from taxation under section 501(a) only if, among other things, the QNHII gives notice to the IRS, in such manner as the Secretary may by regulations prescribe, that it is applying for recognition as an organization described in section 501(c)(29). These temporary regulations provide that the Commissioner has the authority to prescribe the application procedures that a QNHII seeking such recognition must follow. These temporary regulations expressly authorize the Commissioner to recognize a QNHII as exempt effective as of a date prior to the date of its application, provided that the application is submitted in the manner and within the time prescribed by the Commissioner and the QNHII's prior purposes and activities were consistent with the requirements for exempt status under section 501(c)(29).

Exhibit 32.1.4-5 (Cont. 2) (08-21-2018)
Sample Temporary Regulation

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the cross-referenced notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Registe**r. 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 comments regarding its impact on small businesses.

Drafting Information

The principal authors of these regulations are Amy Franklin and Martin Schäffer of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), although other persons in the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

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 as follows:

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

Section 1.501(c)(29)-1T also issued under 26 U.S.C. 501(c)(29)(B)(i). * * *

Par. 2. Section 1.501(c)(29)-1T is added to read as follows:

§1.501(c)(29)-1T CO-OP Health Insurance Issuers (temporary).

(a) **Organizations must notify the Commissioner that they are applying for recognition of section 501(c)(29) status.** An organization will not be treated as described in section 501(c)(29) unless the organization has given notice to the Commissioner that it is applying for recognition as an organization described in section 501(c)(29) in the manner prescribed by the Commissioner in published guidance.

(b) **Effective date of recognition of section 501(c)(29) status.** An organization may be recognized as an organization described in section 501(c)(29) as of a date prior to the date of the notice required by paragraph (a) of this section if the notice is given in the manner and within the time prescribed by the Commissioner and the organization's purposes and activities prior to giving such notice were consistent with the requirements for exempt status under section 501(c)(29). However, an organization may not be recognized as an organization described in section 501(c)(29) before the later of its formation or March 23, 2010.

(c) **Applicability date.** Paragraphs (a) and (b) of this section are effective on February 7, 2012.

(B) Otherwise record in the preparer's paper or electronic files the information necessary to complete the Eligibility Checklist (Alternative Eligibility Record). The Alternative Eligibility Record may consist of one or more documents containing the required information.

Exhibit 32.1.4-5 (Cont. 3) (08-21-2018)
Sample Temporary Regulation

Steven T. Miller

Deputy Commissioner for Services and Enforcement.

Approved: January 26, 2012

Emily S. McMahon

Assistant Secretary of the Treasury.

Exhibit 32.1.4-6 (08-21-2018)
Sample Final Regulation

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9557]

RIN 1545-BF27

Application of Section 108(e)(8) to Indebtedness Satisfied by a Partnership Interest

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the application of section 108(e)(8) of the Internal Revenue Code (Code) to partnerships and their partners. These regulations provide guidance regarding the determination of discharge of indebtedness income of a partnership that transfers a partnership interest to a creditor in satisfaction of the partnership's indebtedness. The final regulations also address the application of section 721 to a contribution of a partnership's recourse or nonrecourse indebtedness by a creditor to the partnership in exchange for a capital or profits interest in the partnership. Moreover, the final regulations address how a partnership's discharge of indebtedness income is allocated as a minimum gain chargeback under section 704. The regulations affect partnerships and their partners.

DATES: Effective Date: These regulations are effective on November 17, 2011.

Applicability Dates: For dates of applicability, see §§1.108-8(d), 1.704-2(l)(1)(v), and 1.721-1(d)(4).

FOR FURTHER INFORMATION CONTACT: Joseph R. Worst or Megan A. Stoner, Office of Associate Chief Counsel (Passthroughs and Special Industries), (202) 317-XXXX (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 1 under sections 108, 704, and 721 of the Code relating to the application of section 108(e)(8) to partnerships.

Section 108(e)(8) was amended by section 896 of the American Jobs Creation Act of 2004, Public Law 108-357 (118 Stat. 1648), to include discharges of partnership indebtedness occurring on or after October 22, 2004. Prior to the amendment, section 108(e)(8) only applied to discharges of corporate indebtedness. Section 108(e)(8), as amended, provides that, for purposes of determining income of a debtor from discharge of indebtedness (COD income), if a debtor corporation transfers stock or a debtor partnership transfers a capital or profits interest in such partnership to a creditor in satisfaction of its recourse or nonrecourse indebtedness, such corporation or partnership shall be treated as having satisfied the indebtedness with an amount of money equal to the fair market value of the stock or interest. In the case of a partnership, any COD income recognized under section 108(e)(8) shall be included in the distributive shares of the partners in the partnership immediately before such discharge.

A notice of proposed rulemaking and a notice of public hearing (REG-164370-05, 2008-46 IRB 1157) were published in the Federal Register (73 FR 64903) on October 31, 2008, proposing amendments to the regulations regarding the application of section 108(e)(8) to partnerships and their partners, including the deter-

Exhibit 32.1.4-6 (Cont. 1) (08-21-2018)
Sample Final Regulation

mination of COD income of a partnership that transfers a partnership interest to a creditor in satisfaction of the partnership's indebtedness (debt for-equity exchange). The proposed regulations also provide that section 721 generally applies to a contribution of a partnership's recourse or nonrecourse indebtedness by a creditor to the partnership in exchange for a capital or profits interest in the partnership. A public hearing on the proposed regulations was scheduled for February 19, 2009, but was cancelled because no one requested to speak. However, comments responding to the proposed regulations were received. After consideration of these comments, the proposed regulations are adopted as revised by this Treasury decision. These final regulations generally retain the provisions of the proposed regulations with the modifications discussed in the preamble.

Summary of Comments and Explanation of Provisions

1. Valuation of Partnership Interest Transferred in Satisfaction of Partnership Indebtedness

Section 108(e)(8) provides that, for purposes of determining COD income of a debtor partnership, the partnership shall be treated as having satisfied the indebtedness with an amount of money equal to the fair market value of the interest transferred to the creditor. Generally, the amount by which the indebtedness exceeds the fair market value of the partnership interest transferred is the amount of COD income required to be included in the distributive shares of the partners that were partners in the debtor partnership immediately before the discharge.

The proposed regulations provide that, for purposes of determining the amount of COD income, the fair market value of the partnership interest transferred to the creditor in a debt-for-equity exchange (debt-for-equity interest) is the liquidation value of the partnership interest if four requirements are satisfied (liquidation value safe harbor). For this purpose, liquidation value equals the amount of cash that the creditor would receive with respect to the debt-for-equity interest if, immediately after the transfer, the partnership sold all of its assets (including goodwill, going concern value, and any other intangibles) for cash equal to the fair market value of those assets, and then liquidated.

The four conditions of the liquidation value safe harbor in the proposed regulations are that (i) the debtor partnership determines and maintains capital accounts of its partners in accordance with the capital accounting rules of §1.704 1(b)(2)(iv) (capital account maintenance requirement); (ii) the creditor, debtor partnership, and its partners treat the fair market value of the indebtedness as being equal to the liquidation value of the debt-for-equity interest for purposes of determining the tax consequences of the debt-for-equity exchange (consistency requirement); (iii) the debt-for-equity exchange is an arm's length transaction (arm's-length requirement); and (iv) subsequent to the debt-for-equity exchange, neither the partnership redeems nor any person related to the partnership purchases the debt-for-equity interest as part of a plan at the time of the debt-for-equity exchange which has as a principal purpose the avoidance of COD income by the partnership (anti-abuse provision). If these requirements are not satisfied, all of the facts and circumstances are considered in determining the fair market value of the debt-for-equity interest for purposes of applying section 108(e)(8). Each of the four requirements of the proposed regulations is discussed in the preamble.

The first requirement is the capital account maintenance requirement. Commenters requested that the final regulations clarify that this requirement does not necessitate compliance with all aspects of the substantial economic effect safe harbor under §1.704-1(b)(2), notably the requirement that the partnership liquidate in accordance with the positive capital account balances of its partners. To eliminate confusion over the capital account maintenance requirement in the liquidation value safe harbor, the IRS and the Treasury Department have decided to remove the capital account maintenance requirement from the liquidation value safe harbor because the maintenance of capital accounts is not necessary to the determination of the liquidation value of the partner's interest.

The second requirement of the liquidation value safe harbor in the proposed regulations is the consistency requirement. This requirement is intended to ensure consistent reporting by the creditor, debtor partnership, and its partners. One commenter suggested narrowing the scope of this requirement in the final

Exhibit 32.1.4-6 (Cont. 2) (08-21-2018)
Sample Final Regulation

regulations so that the failure of a partner to consistently treat the fair market value of the indebtedness as being equal to the liquidation value of the debt-for-equity interest does not invalidate the partnership's use of the liquidation value safe harbor, provided the creditor and the partnership otherwise consistently determine and report COD income based on such valuation. The IRS and the Treasury Department considered the issue and decided to not modify this requirement in the final regulations. The amount of COD income computed under the liquidation value safe harbor may differ from the amount computed using the fair market value of the partnership interest. Thus, in order for the partnership to use the liquidation value safe harbor, the IRS and the Treasury Department believe that the partnership and all of its partners must report consistently.

One commenter suggested that taxpayers should not be able to selectively exploit to their benefit the discrepancy between liquidation value and fair market value and suggested that the final regulations require that a partnership apply a consistent valuation methodology to all equity issued in any debt-for-equity exchange that is part of the same overall transaction. The IRS and the Treasury Department agree, and therefore the final regulations add this as a condition to the liquidation value safe harbor.

The third requirement of the liquidation value safe harbor in the proposed regulations is the arm's-length requirement. Commenters requested that the final regulations clarify whether this requirement can be satisfied where the exchange is between the partnership and an existing partner. The IRS and the Treasury Department believe that the liquidation value safe harbor should be available where the transaction involves related parties and have clarified this requirement in the final regulations to provide that, as long as the debt-for-equity exchange has terms that are comparable to terms that would be agreed to by unrelated parties negotiating with adverse interests, the third requirement is satisfied even if the transaction is between related parties.

The fourth requirement of the liquidation value safe harbor in the proposed regulations is an anti-abuse provision. The final regulations follow the anti-abuse provision of the proposed regulations by adding a restriction on subsequent purchases of the debt for equity interest by a person related to any partner (in addition to purchases by a person related to the partnership) as part of a tax avoidance plan. Thus, under the final regulations, the partnership cannot redeem and no person related to the partnership or to any partner can purchase the debt-for-equity interest as part of a plan at the time of the debt-for-equity exchange that has as a principal purpose the avoidance of COD income by the partnership. Commenters requested that the final regulations clarify the meaning of **related** in this context. The IRS and the Treasury Department agree that clarification is warranted and therefore the final regulations refer to sections 267(b) and 707(b) for the meaning of **related** in the anti-abuse provision.

The final regulations also address the application of the liquidation value safe harbor rule to a partnership (upper-tier partnership) that directly or indirectly owns an interest in one or more partnerships (lower-tier partnership(s)). The final regulations provide that, with respect to interests held in one or more lower-tier partnerships, the liquidation value of an interest in an upper-tier partnership is determined by taking into account the liquidation value of such lower-tier partnership interest.

The final regulations provide that if the fair market value of the debt-for-equity interest does not equal the fair market value of the indebtedness exchanged, then general tax law principles shall apply to account for the difference. Moreover, section 707(a)(2)(A), as it relates to the treatment of payments to partners for transfers of property, will be considered, if appropriate.

2. **Application of Section 721 to Debt-for-Equity Exchanges**

The proposed regulations generally provide that the nonrecognition rule of section 721 applies to the debt-for-equity exchange. Under the proposed regulations, the creditor does not recognize a loss or a bad debt deduction in the debt-for-equity exchange. The creditor's basis in the debt-for-equity interest is increased under section 722 by the adjusted basis of the indebtedness. The preamble to the proposed regulations requested comments on alternative approaches.

Exhibit 32.1.4-6 (Cont. 3) (08-21-2018)
Sample Final Regulation

A number of commenters agreed with the general application of section 721 to the debt for equity exchange, but recommended that the rule be modified in the final regulations. The commenters argued that the application of section 721 to the debt for equity exchange may result in asymmetry in the timing of the partnership's COD income inclusion and the creditor's loss, character conversion for the creditor from ordinary loss to capital loss, and disparities between the partners' aggregate bases in their partnership interests and the partnership's basis in its assets. Some commenters suggested that these results could be alleviated if the final regulations bifurcate the debt-for-equity exchange into two transactions, namely the cancellation of a portion of the indebtedness, and the contribution of the balance in exchange for an interest in the partnership in a transaction to which section 721 applies (bifurcation approach). Another commenter, however, stated that a bifurcation approach is not consistent with section 721 or case law.

The IRS and the Treasury Department agree with the latter comment and believe that the bifurcation approach would be inconsistent with the treatment of analogous corporate debt for equity transactions involving corporate indebtedness evidenced by a security in which section 351 would apply, for example. Further, comments in favor of the bifurcation approach assume a creditor has not validly taken a bad debt deduction under section 166 prior to the debt-for-equity exchange in a transaction independent of and separate from the debt-for-equity exchange. After consideration of the issue, the IRS and the Treasury Department have determined that the final regulations will not adopt the bifurcation approach.

3. **Obligations for Unpaid Rent, Royalties, and Interest**

The proposed regulations provide that section 721 does not apply to the transfer of a partnership interest to a creditor in satisfaction of a partnership's recourse or nonrecourse indebtedness for unpaid rent, royalties, or interest on indebtedness (including accrued original issue discount). These items generally give rise to ordinary income to the creditor and a deduction to the partnership. Most commenters agreed that the general nonrecognition rule under section 721 should not apply to the transfer of a partnership interest in satisfaction of these items. The IRS and the Treasury Department believe that the exception to section 721 for these items is necessary to prevent the conversion of ordinary income into capital gain.

The final regulations retain the exception for these ordinary income items, but, in response to a comment, limit the scope of the exception. The commenter suggested that the exception be limited to items that accrued on or after the beginning of the creditor's holding period for the indebtedness. The IRS and the Treasury Department agree with the comment, and therefore, the final regulations provide that section 721 does not apply to a debt-for-equity exchange to the extent the partnership interest is exchanged for the partnership's indebtedness for unpaid rent, royalties, or interest on the partnership's indebtedness (including accrued original issue discount) that accrued on or after the beginning of the creditor's holding period for the indebtedness.

The preamble to the proposed regulations states the general rule that when property is transferred as payment on indebtedness (or in satisfaction thereof), gain or loss on the property is recognized. Under that approach, in a debt-for-equity exchange, if the partnership is treated as satisfying its indebtedness for unpaid rent, royalties, or interest on indebtedness (including accrued original issue discount) with a fractional interest in each asset of the partnership, the partnership could recognize gain or loss equal to the difference between the fair market value of each partial asset deemed transferred to the creditor and the adjusted basis in that partial asset. The IRS and the Treasury Department believe that in a debt for equity exchange where the partnership has not disposed of any of its assets, the partnership should not be required to recognize gain or loss on the transfer of a partnership interest in satisfaction of its indebtedness for unpaid rent, royalties, or interest. Therefore, under the final regulations, a debtor partnership will not recognize gain or loss upon the transfer of a partnership interest to a creditor in a debt-for-equity exchange for unpaid rent, royalties, or interest that accrued on or after the beginning of the creditor's holding period for the indebtedness.

4. <u>COD Income as First-tier Item for Minimum Gain Chargeback Rules</u>

Exhibit 32.1.4-6 (Cont. 4) (08-21-2018)
Sample Final Regulation

The preamble to the proposed regulations requested comments regarding the manner in which COD income arising from a debt-for-equity exchange should be treated for purposes of the minimum gain chargeback rules under §1.704-2(f)(6). Section 1.704-2(f)(6) provides that any minimum gain chargeback required for a partnership taxable year consists first of certain gains recognized from the disposition of partnership property subject to one or more partnership nonrecourse liabilities and then, if necessary, of a pro rata portion of the partnership's other items of income and gain for that year. A similar rule applies to chargebacks of partner nonrecourse debt minimum gain. See §1.704-2(i)(4).

Commenters recommended that, where a minimum gain chargeback results from the discharge of partnership or partner nonrecourse debt, the first-tier of the minimum gain chargeback should include COD income relating to such debt. The IRS and the Treasury Department agree with this comment, and therefore the final regulations provide that COD income arising from a discharge of a partnership or partner nonrecourse indebtedness is treated as a first-tier item for minimum gain chargeback purposes under §§1.704-2(f)(6), 1.704 2(j)(2)(i)(A), and 1.704-2(j)(2)(ii)(A).

5. Disposition of Installment Oblications

Section 453B provides rules regarding dispositions of installment obligations. Generally, if an installment obligation of a taxpayer is satisfied at other than its face value or the taxpayer distributes, transmits, sells, or otherwise disposes of an installment obligation, the taxpayer recognizes any deferred gain or loss. However, §1.453-9(c)(2) provides that the contribution of an installment obligation to a partnership under section 721, for example, does not constitute a disposition. The IRS and the Treasury Department believe that this exception does not apply to a creditor who disposes of an installment obligation of a partnership by contributing it to the debtor partnership, even if the transaction qualifies under section 721. In that case, the creditor must recognize gain or loss under section 453B. This treatment is consistent with the corporate rules that require a creditor to recognize gain or loss under section 453B on the disposition of an installment obligation of a corporation to the debtor corporation in a transaction that qualifies under section 351. Rev. Rul. 73-423 (1973-2 CB 161), (see §601.601(d)(2)(ii)(b)). Accordingly, the IRS and the Treasury Department are proposing regulations under section 453B to clarify this issue.

6. **Additional Issues**

The preamble to the proposed regulations requested comments on whether any special allocation rules of COD income should apply where partnership indebtedness owed to a preexisting partner is satisfied with the transfer of a partnership interest. The proposed regulations did not address this issue. Commenters recommended that the final regulations not impose any special allocation rules regarding COD income realized under section 108(e)(8) from the cancellation of a partnership indebtedness owed to a preexisting partner. Commenters suggested that Rev. Rul. 92-97 (1992-2 CB 124) and Rev. Rul. 99-43 (1999-2 CB 506), (see §601.601(d)(2)(ii)(b)), provide an appropriate framework for determining how COD income should be allocated, whether or not the creditor is a partner in the partnership. The IRS and the Treasury Department agree that existing guidance provides a framework for allocating COD income and, thus, the final regulations do not adopt any additional guidance regarding the allocation of COD income among partners in a debt-for-equity exchange.

Effective and Applicability Dates

These regulations are effective [INSERT DATE THE REGULATIONS PUBLISH IN THE FEDERAL REGISTER]. These final regulations apply to debt-for-equity exchanges occurring on or after the date these final regulations are published in the **Federal Register**.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Department of Management and Budget regarding review of tax regulations. Because these regulations do not impose a col-

Exhibit 32.1.4-6 (Cont. 5) (08-21-2018)
Sample Final Regulation

lection of information on small entities a Regulatory Flexibility Act (5 U.S.C. chapter 6) analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Joseph R. Worst and Megan A. Stoner of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Par 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendment to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

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

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

Par. 2. Section 1.108-8 is added to read as follows:

§1.108-8 Indebtedness satisfied by partnership interest.

(a) **In general.** For purposes of determining income of a debtor from discharge of indebtedness (COD income), if a debtor partnership transfers a capital or profits interest in the partnership to a creditor in satisfaction of its recourse or nonrecourse indebtedness (a debt-for-equity exchange), the partnership is treated as having satisfied the indebtedness with an amount of money equal to the fair market value of the partnership interest.

(b) **Determination of fair market value -- (1) In general.** All the facts and circumstances are considered in determining the fair market value of a partnership interest transferred by a debtor partnership to a creditor in satisfaction of the debtor partnership's indebtedness (debt-for-equity interest) for purposes of paragraph (a) of this section. If the fair market value of the debt-for-equity interest does not equal the fair market value of the indebtedness exchanged, then general tax law principles shall apply to account for the difference.

(2) **Safe harbor -- (i) General rule.** For purposes of paragraph (a) of this section, the fair market value of a debt for-equity interest is deemed to be equal to the liquidation value of the debt-for-equity interest, as defined in paragraph (b)(2)(iii) of this section, if the following requirements are satisfied--

(A) The creditor, debtor partnership, and its partners treat the fair market value of the indebtedness as being equal to the liquidation value of the debt-for-equity interest for purposes of determining the tax consequences of the debt-for-equity exchange;

(B) If, as part of the same overall transaction, the debtor partnership transfers more than one debt-for-equity interest to one or more creditors, then each creditor, debtor partnership, and its partners treat the fair market value of each debt-for-equity interest transferred by the debtor partnership to such creditors as equal to its liquidation value;

(C) The debt-for-equity exchange is a transaction that has terms that are comparable to terms that would be agreed to by unrelated parties negotiating with adverse interests; and

Exhibit 32.1.4-6 (Cont. 6) (08-21-2018)
Sample Final Regulation

(D) Subsequent to the debt-for-equity exchange, the debtor partnership does not redeem the debt-for-equity interest, and no person bearing a relationship to the debtor partnership or its partners that is specified in section 267(b) or section 707(b) purchases the debt-for-equity interest, as part of a plan at the time of the debt for equity exchange that has as a principal purpose the avoidance of COD income by the debtor partnership.

(ii) **Tiered-partnership rule.** For purposes of this paragraph (b)(2), the liquidation value of a debt for equity interest in a partnership (upper-tier partnership) that directly or indirectly owns an interest in one or more partnerships (lower-tier partnership(s)) is determined by taking into account the liquidation value of such lower-tier partnership interests.

(iii) **Definition of liquidation value.** For purposes of this paragraph (b)(2), the liquidation value of a debt-for-equity interest equals the amount of cash that the creditor would receive with respect to the debt-for-equity interest if, immediately after the debt-for-equity exchange, the partnership sold all of its assets (including goodwill, going concern value, and any other intangibles) for cash equal to the fair market value of those assets and then liquidated.

(c) **Example.** The following example illustrates the provisions of this section:

Example. (i) AB partnership has $1,000 of outstanding indebtedness owed to C. C agrees to transfer to AB partnership the $1,000 indebtedness in a debt-for-equity exchange for a debt-for-equity interest in AB partnership. The liquidation value of C's debt-for-equity interest is $700, which is the amount of cash that C would receive with respect to that interest if, immediately after the debt-for-equity exchange, AB partnership sold all of its assets for cash equal to the fair market value of those assets and then liquidated. Each of the requirements of the liquidation value safe harbor described in paragraph (b)(2) of this section is satisfied.

(ii) Because the requirements in paragraph (b)(2) of this section are satisfied, the fair market value of C's debt-for-equity interest in AB partnership for purposes of determining AB partnership's COD income is the liquidation value of C's debt-for-equity interest, or $700. Accordingly, AB partnership is treated as satisfying the $1,000 indebtedness for $700 under section 108(e)(8).

(d) **Applicability date.** This section applies to debt-for-equity exchanges occurring on or after November 17, 2011.

Par. 3. Section 1.704-2 is amended as follows:

1. In paragraph (f)(6), the first sentence is revised and in the last sentence, the language "(j)(2)(i) and (iii)" is removed and the language **(j)(2)(i) and (j)(2)(iii)** is added in its place.

2. Paragraphs (j)(2)(i)(A) and (j)(2)(ii)(A) are revised.

3. In paragraph (l), revise the paragraph heading and add a new paragraph (l)(1)(v).

The revisions and additions read as follows:

§1.704-2 Allocations attributable to nonrecourse liabilities.

* * * * * *

(f) * * *

(6) * * * Any minimum gain chargeback required for a partnership taxable year consists first of a pro rata portion of certain gains recognized from the disposition of partnership property subject to one or more partnership nonrecourse liabilities and income from the discharge of indebtedness relating to one or more partnership nonrecourse liabilities to which partnership property is subject, and then, if necessary, consists of a pro rata portion of the partnership's other items of income and gain for that year.* * *

Exhibit 32.1.4-6 (Cont. 7) (08-21-2018)
Sample Final Regulation

* * * * *

(j) * * *

(2) * * *

(i) * * *

(A) First, a pro rata portion of gain from the disposition of property subject to partnership nonrecourse liabilities and discharge of indebtedness income relating to partnership nonrecourse liabilities to which property is subject;

* * * * *

(ii) * * *

(A) First, a pro rata portion of gain from the disposition of property subject to partner nonrecourse debt and discharge of indebtedness income relating to partner nonrecourse debt to which property is subject.

* * * * *

(l) **Effective/applicability dates.** * * *

(1) * * *

(v) The first sentence of paragraph (f)(6) of this section and paragraphs (j)(2)(i)(A) and (j)(2)(ii)(A) of this section apply on and after November 17, 2011.

* * * * *

Par. 4. Section 1.721-1 is amended by adding new paragraph (d) to read as follows:

§1.721-1 Nonrecognition of gain or loss on contribution.

* * * * *

(d) **Debt-for-equity exchange** -- (1) **In general**. Except as otherwise provided in section 721 and the regulations under section 721, section 721 applies to a contribution of a partnership's indebtedness by a creditor to the debtor partnership in exchange for a capital or profits interest in the partnership (debt-for-equity exchange). See §1.108 8(a) for rules in determining the debtor partnership's discharge of indebtedness income.

(2) **Exception.** Section 721 does not apply to a debt-for-equity exchange to the extent the transfer of the partnership interest to the creditor is in exchange for the partnership's indebtedness for unpaid rent, royalties, or interest (including accrued original issue discount) that accrued on or after the beginning of the creditor's holding period for the indebtedness. The debtor partnership will not recognize gain or loss upon the transfer of a partnership interest to a creditor in a debt-for-equity exchange for unpaid rent, royalties, or interest (including accrued original issue discount).

(3) **Cross reference.** For rules in determining whether a partnership interest transferred to a creditor in a debt for equity exchange is treated as payment of interest or accrued original issue discount, see §§1.446-2 and 1.1275-2, respectively.

(4) **Applicability date.** This paragraph (d) applies to debt-for-equity exchanges occurring on or after November 17, 2011.

Exhibit 32.1.4-6 (Cont. 8) (08-21-2018)
Sample Final Regulation

Steven T. Miller

Deputy Commissioner for Services and Enforcement.

Approved: November 8, 2011

Emily S. McMahon

Acting Assistant Secretary of the Treasury.

Exhibit 32.1.4-7 (08-21-2018)

Sample Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulation that Amends Existing Final Regulation

[4830-01-P]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-118809-11]

RIN 1545-BK27

Modification of Treasury Regulations Pursuant to Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing final and temporary regulations that remove any reference to, or requirement of reliance on, credit ratings in regulations under the Internal Revenue Code (Code) and provide substitute standards of credit-worthiness where appropriate. The Dodd-Frank Wall Street Reform and Consumer Protection Act requires each Federal agency to take such actions regarding its regulations. These regulations affect persons subject to various provisions of the Code. The text of the temporary regulations published in the Rules and Regulations section of the **Federal Register** also serves as the text of the proposed regulations.

DATES: Comments and requests for a public hearing must be received by **[INSERT DATE 60 DAYS AFTER THIS DOCUMENT IS FILED WITH THE OFFICE OF THE FEDERAL REGISTER]**.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-118809-11), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered to: CC:PA:LPD:PR Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-118809-11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG-118809-11).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Arturo Estrada, (202) 317-XXXX; concerning submissions of comments and requests for a public hearing, Oluwafunmilayo Taylor, (202) 317-XXXX (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 939A(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 (124 Stat. 1376 (2010)), (the **Dodd-Frank Act**), requires each Federal agency to review its regulations that require the use of an assessment of credit-worthiness of a security or money market instrument, and to review any references or requirements in those regulations regarding credit ratings. Section 939A(b) directs each agency to modify any regulation identified in the review required under section 939A(a) by removing any reference to, or requirement of reliance on, credit ratings and substituting a standard of credit-worthiness that the agency deems appropriate. Numerous provisions under the Code are affected.

Temporary regulations in the Rules and Regulations section of this issue of the Federal Register amend the Income Tax Regulations (26 CFR part 1) under sections 150, 171, 197, 249, 475, 860G, and 1001 of the

Exhibit 32.1.4-7 (Cont. 1) (08-21-2018)

Sample Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulation that Amends Existing Final Regulation

Code. The temporary regulations also amend the Manufacturers and Retailers Excise Tax Regulations (26 CFR part 48) under section 4101 of the Code. The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and the proposed regulations.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations. Because these regulations do not impose a collection of information on small entities a Regulatory Flexibility Act (5 U.S.C. chapter 6) analysis is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **Addresses** heading. The IRS and the Treasury Department request comments on all aspects of the proposed regulations. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

These regulations were drafted by personnel in the Office of Associate Chief Counsel (Financial Institutions and Products), the Office of Associate Chief Counsel (Income Tax and Accounting), the Office of Associate Chief Counsel (International) and the Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 48

Excise taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 48 are 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 1.150-1 is amended as follows:

1. Paragraph (a)(4) is added.

2. In paragraph (b), the definition of **Issuance costs**, is revised.

Exhibit 32.1.4-7 (Cont. 2) (08-21-2018)
Sample Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulation that Amends Existing Final Regulation

The addition and revision read as follows:

§1.150-1 **Definitions**

* * * * *

(4) [The text of the proposed amendments to §1.150-1(a)(4) is the same as the text of §1.150-1T(a)(4) published elsewhere in this issue of the **Federal Register**].

(b) * * *

Issuance costs. [The text of the proposed amendments to §1.150-1(b), **Issuance costs**, is the same as the text of §1.150-1T(b), **Issuance costs**, published elsewhere in this issue of the **Federal Register**].

* * * * *

Par. 3. Section 1.171-1 is amended by revising paragraph (f) **Example 2** to read as follows:

§1.171-1 Bond premium.

* * * * *

(f) * * *

Example 2. [The text of the proposed amendments to §1.171-1(f) **Example 2** is the same as the text of §1.171-1T(f) **Example 2** published elsewhere in this issue of the **Federal Register**].

Par. 4. Section 1.197-2 is amended by revising paragraph (b)(7) to read as follows:

§1.197-2 Amortization of goodwill and certain other intangibles.

* * * * *

(b) * * *

(7) [The text of the proposed amendments to §1.197-2(b)(7) is the same as the text of §1.197-2T(b)(7) published elsewhere in this issue of the Federal Register].

* * * * *

Par. 5. Section 1.249-1 is amended by revising paragraphs (e)(2)(ii) and (f)(3) to read as follows:

§1.249-1 Limitation on deduction of bond premium on repurchase.

* * * * *

(e) * * *

(2) * * *

(ii) [The text of the proposed amendments to §1.249-1(e)(2)(ii) is the same as the text of §1.249-1T(e)(2)(ii) published elsewhere in this issue of the **Federal Register**].

* * * * *

(f) Effective/applicability dates. * * *

Exhibit 32.1.4-7 (Cont. 3) (08-21-2018)

Sample Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulation that Amends Existing Final Regulation

(3) [The text of the proposed amendment to §1.249-1(f)(3) is the same as the text of §1.249-1T(f)(3) published elsewhere in this issue of the **Federal Register**].

* * * * *

Par. 6. Section 1.475(a)-4 is amended by revising paragraph (d)(4) **Examples 1**, **2**, and **3** and paragraph (n) to read as follows:

§1.475(a)-4 Valuation safe harbor.

* * * * *

(d) * * *

(4) * * *

Example 1. [The text of the proposed amendments to §1.475(a)-(4)(d)(4) **Example 1** is the same as the text of §1.475(a)-4T(d)(4) **Example 1** published elsewhere in this issue of the **Federal Register**].

Example 2. [The text of the proposed amendments to §1.475(a)-4(d)(4) **Example 2** is the same as the text of §1.475(a)-4T(d)(4) **Example 2** published elsewhere in this issue of the **Federal Register**].

Example 3. [The text of the proposed amendments to §1.475(a)-4(d)(4) **Example 3** is the same as the text of §1.475(a)-4T(d)(4) **Example 3** published elsewhere in this issue of the **Federal Register**].

* * * * *

Par. 7. Section 1.860G-2 is amended by revising paragraphs (g)(3)(ii)(B), (C), and (D) to read as follows:

§1.860G-2 Other rules.

* * * * *

(g) * * *

(3) * * *

(ii) * * *

(B) [The text of the proposed amendments to §1.860G-2(g)(3)(ii)(B) is the same as the text of §1.860G-2T(g)(3)(ii)(B) published elsewhere in this issue of the **Federal Register**].

(C) [The text of the proposed amendments to §1.860G-2(g)(3)(ii)(C) is the same as the text of §1.860G-2T(g)(3)(ii)(C) published elsewhere in this issue of the **Federal Register**].

(D) [The text of the proposed amendments to §1.860G-2(g)(3)(ii)(D) is the same as the text of §1.860G-2T(g)(3)(ii)(D) published elsewhere in this issue of the **Federal Register**].

* * * * *

Par. 8. Section 1.1001-3 is amended as follows:

1. Paragraph (d) **Example 9** is revised.

2. Paragraph (e)(4)(iv)(B) is revised.

Exhibit 32.1.4-7 (Cont. 4) (08-21-2018)
Sample Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulation that Amends Existing Final Regulation

3. Paragraph (e)(5)(ii)(B)(2) is revised.

4. Paragraph (g) **Examples 1**, **5**, and **8** are revised.

The revisions read as follows:

§1.1001-3 Modifications of debt instruments.

* * * * *

(d) * * *

Example 9. [The text of the proposed amendments to §1.1001-3(d) **Example 9** is the same as the text of §1.1001-3T(d) **Example 9** published elsewhere in this issue of the **Federal Register**].

* * * * *

(e) * * *

(4) * * *

(iv)* * *

(B) [The text of the proposed amendments to §1.1001-3(e)(4)(iv)(B) is the same as the text of §1.1001-3T(e)(4)(iv)(B) published elsewhere in this issue of the **Federal Register**].

* * * * *

(5) * * *

(ii) * * *

(B) * * *

(**2**) [The text of the proposed amendments to §1.1001-3(e)(5)(ii)(B)(**2**) is the same as the text of §1.1001-3T(e)(5)(ii)(B)(2) published elsewhere in this issue of the **Federal Register**].

* * * * *

(g) * * *

Example 1. [The text of the proposed amendments to §1.1001-3(g) **Example 1** is the same as the text of §1.1001-3T(g) **Example 1** published elsewhere in this issue of the **Federal Register**].

* * * * *

Example 5. [The text of the proposed amendments to §1.1001-3(g) **Example 5** is the same as the text of §1.1001-3T(g) **Example 5** published elsewhere in this issue of the **Federal Register**].

* * * * *

Example 8. [The text of the proposed amendments to §1.1001-3(g) **Example 8** is the same as the text of §1.1001-3T(g) **Example 8** published elsewhere in this issue of the **Federal Register**].

PART 48 -- MANUFACTURERS AND RETAILERS EXCISE TAXES

Par. 9. The authority citation for part 48 continues to read as follows:

Exhibit 32.1.4-7 (Cont. 5) (08-21-2018)

Sample Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulation that Amends Existing Final Regulation

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

Par. 10. Section 48.4101-1 paragraphs (f)(4)(ii)(B) and (l)(5) are revised to read as follows:

§48.4101-1 Taxable fuel; registration.

* * * * *

(f)* * *

(4) * * *

(ii) * * *

(B) [The text of the proposed amendments to §48.4101-1(f)(4)(ii)(B) is the same as the text of §48.4101-1T(f)(4)(ii)(B) published elsewhere in this issue of the **Federal Register**].

* * * * *

(l) * * *

(5) [The text of the proposed amendments to §48.4101-1(l)(50 is the same as the text of §48.4101-1(l)(5) published elsewhere in this issue of the **Federal Register**].

/s/ Steven T. Miller

Deputy Commissioner for Services and Enforcement.

Exhibit 32.1.4-8 (08-21-2018)
Sample Existing Final Regulations Amended by Temporary Regulations

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9585]

RIN 1545-BI41

Treatment of Gain Recognized With Respect to Stock in Certain Foreign Corporations Upon Distributions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations relating to the characterization of gain recognized with respect to stock in certain foreign corporations upon distributions. The regulations finalize proposed regulations and remove temporary regulations that characterize gain recognized with respect to stock in foreign corporations upon distributions as a deemed dividend in certain situations. The regulations affect certain persons that recognize gain with respect to stock in connection with the receipt of a distribution of property from a foreign corporation.

DATES: Effective Date: These regulations are effective on April 24, 2012.

Applicability Date: These regulations apply to distributions occurring on or after February 10, 2009.

FOR FURTHER INFORMATION CONTACT: Ryan A. Bowen, (202) 317-XXXX (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

On February 11, 2009, the IRS and the Department of the Treasury (the Treasury Department) published temporary and proposed regulations in the Federal Register (REG-147636-08, 74 FR 6824; TD 9444, 2009-1 CB 603) (the temporary or proposed regulations, as applicable, and collectively, the 2009 regulations). The 2009 regulations, in part, provide that for purposes of section 1248(a), gain recognized under section 301(c)(3) in connection with the receipt of a distribution of property from a foreign corporation with respect to its stock shall be treated as gain from the sale or exchange of the stock of such foreign corporation (2009 section 1248 regulations).

The 2009 regulations also addressed the application of section 367 to certain related party stock transactions that are recharacterized under section 304. As described in Notice 2012-15 (2012-9 IRB 495 (February 27, 2012)) (see §601.601(d)(2)(ii)(b) of this chapter), the IRS and the Treasury Department intend to amend the regulations under section 367 to provide that the section 351 exchange that is deemed to occur in a section 304 transaction is subject to section 367(a) and (b), as applicable. Accordingly, this Treasury decision does not finalize the portions of the 2009 regulations that address the interaction of sections 304 and 367. Those portions of the 2009 regulations will be withdrawn in separate published guidance (REG-104400-12).

Exhibit 32.1.4-8 (Cont. 1) (08-21-2018)
Sample Existing Final Regulations Amended by Temporary Regulations

No public hearing on the 2009 section 1248 regulations was requested or held and no written comments were received. This Treasury decision adopts the 2009 section 1248 regulations, with one modification to remove a deadwood provision, as final regulations under section 1248(a). This Treasury decision also removes the temporary regulations under section 1248(a).

Explanation of Provisions

The final regulations provide that gain recognized under section 301(c)(3) on the receipt of a distribution of property from a foreign corporation with respect to its stock shall be treated for purposes of section 1248(a) as gain from the sale or exchange of the stock of such corporation. For purposes of section 1248(a), a sale or exchange also includes a distribution that gives rise to gain with respect to stock under section 302(a) or 331(a). The final regulations ensure that the earnings and profits of lower-tier foreign subsidiaries described in section 1248(c)(2) are taken into account when gain is recognized with respect to stock of a controlled foreign corporation.

The 2009 section 1248 regulations incorporated a provision from the prior final regulations under section 1248 providing that section 1248(a) applies to gain recognized with respect to stock under section 331(a)(2) by reason of a partial liquidation of a corporation. The final regulations remove the reference to partial liquidations under section 331(a)(2) in order to reflect amendments made in 1982 by the Tax Equity and Fiscal Responsibility Act of 1982 (Public Law 97-248, 96 Stat. 324 (1982)), which repealed section 331(a)(2) and provided new rules regarding redemptions in partial liquidation under section 302. See section 302(b)(4) and (e).

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), it is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. These regulations primarily will affect large domestic corporations. Thus, the number of affected small entities will not be substantial. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comments on its impact on small business.

Drafting Information

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

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

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

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

Par. 2. Section 1.1248-1 is amended by:

Exhibit 32.1.4-8 (Cont. 2) (08-21-2018)
Sample Existing Final Regulations Amended by Temporary Regulations

1. Revising paragraphs (b) and (g)(2).

2. Removing paragraph (h).

The revisions read as follows.

§1.1248-1 Treatment of gain from certain sales or exchanges of stock in certain foreign corporations.

* * * * *

(b) **Sale or exchange.** For purposes of section 1248(a), the term sale or exchange includes the receipt of a distribution which is treated as in exchange for stock under section 302(a) (relating to distributions in redemption of stock) or section 331(a) (relating to distributions in complete liquidation of a corporation). For purposes of section 1248(a), gain recognized by a shareholder under section 301(c)(3) in connection with a distribution of property by a corporation with respect to its stock shall be treated as gain from the sale or exchange of stock of such corporation.

* * * * *

(g) * * *

(2) Paragraph (b) of this section applies to distributions that occur on or after February 10, 2009.

§1.1248-1T [Removed]

Par. 3. Section 1.1248-1T is removed.

/s/ Steven T. Miller

Deputy Commissioner for Services and Enforcement.

Approved: April 13, 2012

/s/ Emily S. McMahon

Acting Assistant Secretary of the Treasury (Tax Policy)