

## **Part IV. Items of General Interest**

### **Change in Reporting Section 404(k) Dividends**

#### **Announcement 2008-56**

##### **Purpose**

This announcement provides for a change in the reporting of dividends on employer securities that are distributed from an employee stock ownership plan (“ESOP”) under § 404(k) of the Internal Revenue Code (“§ 404(k) dividends”).

##### **Background**

Section 404(k)(1) provides that, in the case of a C corporation, there is allowed as a deduction for a taxable year the amount of any applicable dividend paid in cash by such corporation during the taxable year with respect to applicable employer securities held by an ESOP maintained by the corporation or by a related corporation within the meaning of § 409(l)(4). Section 404(k)(2)(A) provides, in relevant part, that the term "applicable dividend" means any dividend which, in accordance with plan provisions, is paid directly to plan participants or their beneficiaries; is paid to the plan and is distributed in cash to plan participants or their beneficiaries not later than 90 days after the close of the plan year in which paid; or is, at the election of plan participants or their beneficiaries, paid to such participants or their beneficiaries or paid to the plan and distributed in cash to such participants or their beneficiaries not later than 90 days after the close of the plan year in which paid.

Plan distributions that are § 404(k) dividends are not subject to the 10% additional tax under § 72 (see § 72(t)(2)(A)(vi)), are not eligible rollover distributions (see § 1.402(c)-2 of the Income Tax Regulations, Q&A-4(e)), are not subject to withholding under § 3405 (see § 3405(e)(1)(B)(iv)), and are not taken into account in determining if required minimum distributions have been made (see § 1.401(a)(9)-5, Q&A-9(b)(5)). For purposes of § 72, such distributions are treated as plan distributions paid from a contract that is separate from any other contract under the plan (see § 1.404(k)-1T, Q&A-3). In addition, backup withholding under § 3406 does not apply to distributions that are § 404(k) dividends because they are reportable under § 6047 and not reportable under § 6041 or 6042.

Announcement 85-168, 1985-48 I.R.B. 40, provides that “to allow taxpayers using short Form 1040A to report this § 404(k) dividend income,” a plan must use Form 1099-DIV. At the time of the announcement, payments

reported on Form 1099-R and its predecessor forms could not be reported on Form 1040A. The announcement further provided that if § 404(k) dividends were distributed in the same year as a total qualified distribution, the entire amount should be reported on Form 1099-R.

### New Reporting

Distributions from a plan that are made in 2009 or later years and that are § 404(k) dividends must be reported on a Form 1099-R that does not report any other distributions, in accordance with the instructions to the form. Accordingly, if there are other distributions from the plan in such years that are not § 404(k) dividends, they must be reported on a separate Form 1099-R. It is anticipated that the instructions will require a special code in box 7 of the form to indicate the special tax treatment and rollover restrictions applicable to § 404(k) dividends. Payments of § 404(k) dividends made directly from the corporation to the plan participants or their beneficiaries are reported on Form 1099-DIV in accordance with the instructions to that form.

### Effect on Other Documents

Announcement 85-168 is revoked.