Internal Revenue
bulletin

Bulletin No. 2009-52
December 28, 2009

HIGHLIGHTS OF THIS ISSUE

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

INCOME TAX

Rev. Rul. 2009–37, page 957.

Interest rates; underpayment and overpayments. The rate for interest determined under section 6621 of the Code for the calendar quarter beginning January 1, 2010, will be 4 percent for overpayments (3 percent in the case of a corporation), 4 percent for underpayments, and 6 percent for large corporate underpayments. The rate of interest paid on the portion of a corporate overpayment exceeding $10,000 will be 1.5 percent.

T.D. 9473, page 945.

Final regulations under section 6159 of the Code relate to the payment of tax liabilities in installments and reflects changes to the law made by the Taxpayer Bill of Rights II, the Internal Revenue Service Restructuring and Reform Act of 1998, and the American Jobs Creation Act of 2004.

REG–111833–99, page 1000.

Proposed regulations under section 7430 of the Code relate to awards of administrative costs and attorneys fees to conform the regulations to the amendments made in the Taxpayer Relief Act of 1997 and the IRS Restructuring and Reform Act of 1998. A public hearing is scheduled for March 10, 2010.

Rev. Proc. 2009–55, page 982.

Insurance companies; loss reserves; discounting unpaid losses. This procedure sets forth the loss payment patterns and discount factors for accident year 2009. Under section 846 of the Code, discount factors are determined by the Secretary based on the interest rate determined annually under section 846(c) and on loss payment patterns determined every five years under section 846(d). Section 846(d) directs the Secretary to use the most recent aggregate loss payment data of property and casualty insurance companies to determine and publish a loss payment pattern for each line of business every five years

Rev. Proc. 2009–56, page 993.

Insurance companies; discounting estimated salvage recoverable. This procedure sets forth the salvage discount factors for accident year 2009 for purposes of section 832 of the Code. Under section 832, discount factors are determined by the Secretary based on the interest rate determined annually by the Secretary under section 846(c) and on salvage recovery patterns determined every five years by the Secretary.

EMPLOYEE PLANS

Rev. Rul. 2009–40, page 942.

2010 covered compensation tables; permitted disparity. The covered compensation tables under section 401 of the Code for the year 2010 are provided for use in determining contributions to defined benefit plans and permitted disparity.

Notice 2009–92, page 964.

This notice provides that a delay or acceleration of the payment of nonqualified deferred compensation in order to comply with an advisory opinion issued by the Office of the Special Master for Troubled Asset Relief Program (TARP) Executive Compensation, pursuant to the Emergency Economic Stabilization Act of 2008 and regulations thereunder, including conditioning payment on satisfaction of a requirement related to TARP, such as repayment of the financial assistance granted under TARP, will not cause the plan to fail to meet the requirements of section 409A of the Code.

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Finding Lists begin on page ii.
Index for July through December begins on page v.

Department of the Treasury
Internal Revenue Service

Notice 2009–96, page 968.
Weighted average interest rate update; corporate bond indices; 30-year Treasury securities; segment rates. This notice contains updates for the corporate bond weighted average interest rate for plan years beginning in December 2009; the 24-month average segment rates; the funding transitional segment rates applicable for December 2009; and the minimum present value transitional rates for November 2009.

Notice 2009–97, page 972.
This notice extends the deadline for amending qualifed retirement plans to meet certain requirements of the Code that were added by the Pension Protection Act of 2006 (PPA '06), P.L. 109–280, and subsequently modified by the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), P.L. 110–458. The deadline is extended to the last day of the first plan year that begins on or after January 1, 2010. Rev. Proc. 2007–44 modified. Notice 2008–18 modified.

Notice 2009–98, page 974.
Retirement plans; qualification, list of changes. This notice sets forth a list of changes referred to in Rev. Proc. 2007–44, 2007–2 C.B. 54, pertaining to the statutory, regulatory, and guidance changes needed for certain requests to the Service for opinion, advisory, and determination letters for the 12-month period beginning February 1, 2010.

Announcement 2009–89, page 1009.
Remedial amendment period and reliance for section 403(b) plans. This announcement provides for a remedial amendment period and reliance for employers that, pursuant to the upcoming revenue procedures, either adopt a pre-approved plan with a favorable opinion letter or apply for an individual determination letter when available. Employers should not request ruling or determination letters on the form of their § 403(b) plans at this time, pending publication of the revenue procedure for pre-approved § 403(b) plans and additional procedures on applying for individual determination letters for § 403(b) plans.

EXEMPT ORGANIZATIONS

Announcement 2009–88, page 1008.
A list is provided of organizations now classified as private foundations.

Announcement 2009–90, page 1010.
The IRS has revoked its determination that Twenty First Century World — TEMENOS of San Rafael, CA, qualifies as an organization described in sections 501(c)(3) and 170(c)(2) of the Code.

ESTATE TAX

T.D. 9473, page 945.
Final regulations under section 6159 of the Code relate to the payment of tax liabilities in installments and reflects changes to the law made by the Taxpayer Bill of Rights II, the Internal Revenue Service Restructuring and Reform Act of 1998, and the American Jobs Creation Act of 2004.

GIFT TAX

T.D. 9473, page 945.
Final regulations under section 6159 of the Code relate to the payment of tax liabilities in installments and reflects changes to the law made by the Taxpayer Bill of Rights II, the Internal Revenue Service Restructuring and Reform Act of 1998, and the American Jobs Creation Act of 2004.

EMPLOYMENT TAX

Rev. Rul. 2009–39, page 951.
94X examples revenue ruling. This revenue ruling illustrates the application of the interest-free adjustment and claim for refund processes under the final regulations promulgated by Treasury Decision 9405 (T.D. 9405), 2008–32 I.R.B. 293. T.D 9405 amends the process for making interest-free adjustments of employment taxes under sections 6205 and 6413 of the Code, and claiming refunds of employment taxes under sections 6402 and 6414. T.D. 9405 was initiated in connection with the Service's development of new "X" forms (*e.g.*, Form 941–X, *Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund*) as part of the Form 94X Project initiated by the Office of Taxpayer Burden Reduction and now led by SB/SE Employment Tax Policy. The proposed revenue ruling applies the final regulations under T.D. 9405 to 10 different situations to show how the new processes operate. Rev. Rul. 75–464 obsoleted.

T.D. 9473, page 945.
Final regulations under section 6159 of the Code relate to the payment of tax liabilities in installments and reflects changes to the law made by the Taxpayer Bill of Rights II, the Internal Revenue Service Restructuring and Reform Act of 1998, and the American Jobs Creation Act of 2004.

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SELF-EMPLOYMENT TAX

T.D. 9473, page 945.
Final regulations under section 6159 of the Code relate to the payment of tax liabilities in installments and reflects changes to the law made by the Taxpayer Bill of Rights II, the Internal Revenue Service Restructuring and Reform Act of 1998, and the American Jobs Creation Act of 2004.

EXCISE TAX

T.D. 9473, page 945.
Final regulations under section 6159 of the Code relate to the payment of tax liabilities in installments and reflects changes to the law made by the Taxpayer Bill of Rights II, the Internal Revenue Service Restructuring and Reform Act of 1998, and the American Jobs Creation Act of 2004.

ADMINISTRATIVE

T.D. 9473, page 945.
Final regulations under section 6159 of the Code relate to the payment of tax liabilities in installments and reflects changes to the law made by the Taxpayer Bill of Rights II, the Internal Revenue Service Restructuring and Reform Act of 1998, and the American Jobs Creation Act of 2004.

REG–111833–99, page 1000.
Proposed regulations under section 7430 of the Code relate to awards of administrative costs and attorneys fees to conform the regulations to the amendments made in the Taxpayer Relief Act of 1997 and the IRS Restructuring and Reform Act of 1998. A public hearing is scheduled for March 10, 2010.

Notice 2009–95, page 968.
This notice delays the effective date of compliance with Rev. Rul. 2006–57, 2006–2 C.B. 911, which provides guidance on the use of smartcards, debit or credit cards, or other electronic media to provide qualified transportation fringes under section 132(f) of the Code, until January 1, 2011. Rev. Rul. 2006–57 modified.

Announcement 2009–91, page 1010.
This document contains corrections to final regulations (T.D. 2009–33 I.R.B. 188) providing guidance regarding the treatment of controlled services transactions under section 482 of the Code and the allocation of income from intangible property, in particular with respect to contributions by a controlled party to the value of intangible property owned by another controlled party. These final regulations modify regulations under section 861 concerning stewardship expenses to be consistent with the changes made to the guidance under section 482.

Announcement 2009–92, page 1012.
This document contains a correction to Notice 2009–80, 2009–51 I.R.B. 859, which contained an incorrect taxable year at the end of the first paragraph.

The IRS Mission

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

Introduction

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

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

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

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

The Bulletin is divided into four parts as follows:

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

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

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

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

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

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

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

Section 401.—Qualified Pension, Profit-Sharing, and Stock Bonus Plans

26 CFR 1.401(l)–1: Permitted disparity in employer-provided contributions or benefits.

2010 covered compensation tables; permitted disparity. The covered compensation tables under section 401 of the Code for the year 2010 are provided for use in determining contributions to defined benefit plans and permitted disparity.

Rev. Rul. 2009–40

This revenue ruling provides tables of covered compensation under § 401(l)(5)(E) of the Internal Revenue Code (the "Code") and the Income Tax Regulations, thereunder, for the 2010 plan year.

Section 401(l)(5)(E)(i) defines covered compensation with respect to an employee, as the average of the contribution and benefit bases in effect under section 230 of the Social Security Act (the "Act") for each year in the 35-year period ending with the year in which the employee attains social security retirement age.

Section 401(l)(5)(E)(ii) of the Code states that the determination for any year preceding the year in which the employee attains social security retirement age shall be made by assuming that there is no increase in covered compensation after the determination year and before the employee attains social security retirement age.

Section 1.401(l)–1(c)(34) defines the taxable wage base as the contribution and benefit base under section 230 of the Act.

Section 1.401(l)–1(c)(7)(i) defines covered compensation for an employee as the average (without indexing) of the taxable wage bases in effect for each calendar year during the 35-year period ending with the last day of the calendar year in which the employee attains (or will attain) social security retirement age. A 35-year period is used for all individuals regardless of the year of birth of the individual. In determining an employee's covered compensation for a plan year, the taxable wage base for all calendar years beginning after the first day of the plan year is assumed to be the same as the taxable wage base in effect as of the beginning of the plan year. An employee's covered compensation for a plan year beginning after the 35-year period applicable under §1.401(l)–1(c)(7)(i) is the employee's covered compensation for a plan year during which the 35-year period ends. An employee's covered compensation for a plan year beginning before the 35-year period applicable under §1.401(l)–1(c)(7)(i) is the taxable wage base in effect as of the beginning of the plan year.

Section 1.401(l)–1(c)(7)(ii) provides that, for purposes of determining the amount of an employee's covered compensation under §1.401(l)–1(c)(7)(i), a plan may use tables, provided by the Commissioner, that are developed by rounding the actual amounts of covered compensation for different years of birth.

For purposes of determining covered compensation for the 2010 year, the taxable wage base is $106,800.

The following tables provide covered compensation for 2010.

ATTACHMENT I

2010 COVERED COMPENSATION TABLE

CALENDAR YEAR OF BIRTH	CALENDAR YEAR OF SOCIAL SECURITY RETIREMENT AGE	2010 COVERED COMPENSATION TABLE II
1907	1972	$4,488
1908	1973	4,704
1909	1974	5,004
1910	1975	5,316
1911	1976	5,664
1912	1977	6,060
1913	1978	6,480
1914	1979	7,044
1915	1980	7,692
1916	1981	8,460
1917	1982	9,300
1918	1983	10,236
1919	1984	11,232
1920	1985	12,276
1921	1986	13,368
1922	1987	14,520
1923	1988	15,708
1924	1989	16,968
1925	1990	18,312

ATTACHMENT I

2010 COVERED COMPENSATION TABLE

CALENDAR YEAR OF BIRTH	CALENDAR YEAR OF SOCIAL SECURITY RETIREMENT AGE	2010 COVERED COMPENSATION TABLE II
1926	1991	19,728
1927	1992	21,192
1928	1993	22,716
1929	1994	24,312
1930	1995	25,920
1931	1996	27,576
1932	1997	29,304
1933	1998	31,128
1934	1999	33,060
1935	2000	35,100
1936	2001	37,212
1937	2002	39,444
1938	2004	43,992
1939	2005	46,344
1940	2006	48,816
1941	2007	51,348
1942	2008	53,952
1943	2009	56,628
1944	2010	59,268
1945	2011	61,884
1946	2012	64,464
1947	2013	67,008
1948	2014	69,408
1949	2015	71,724
1950	2016	73,920
1951	2017	76,044
1952	2018	78,084
1953	2019	80,052
1954	2020	81,972
1955	2022	85,620
1956	2023	87,384
1957	2024	89,064
1958	2025	90,660
1959	2026	92,184
1960	2027	93,648
1961	2028	95,052
1962	2029	96,372
1963	2030	97,680
1964	2031	98,940
1965	2032	100,116
1966	2033	101,220
1967	2034	102,192
1968	2035	103,068
1969	2036	103,824
1970	2037	104,448
1971	2038	105,012
1972	2039	105,552
1973	2040	106,032
1974	2041	106,392

ATTACHMENT I

2010 COVERED COMPENSATION TABLE

CALENDAR YEAR OF BIRTH	CALENDAR YEAR OF SOCIAL SECURITY RETIREMENT AGE	2010 COVERED COMPENSATION TABLE II
1975	2042	106,656
1976 and Later	2043 and Later	106,800

ATTACHMENT II

2010 ROUNDED COVERED COMPENSATION TABLE

CALENDAR YEAR OF BIRTH	2010 COVERED COMPENSATION ROUNDED
1937	$39,000
1938 – 1939	45,000
1940	48,000
1941	51,000
1942	54,000
1943	57,000
1944	60,000
1945 – 1946	63,000
1947	66,000
1948	69,000
1949	72,000
1950 – 1951	75,000
1952	78,000
1953 – 1954	81,000
1955 – 1956	87,000
1957 – 1958	90,000
1959 – 1960	93,000
1961 – 1962	96,000
1963 – 1965	99,000
1966 – 1968	102,000
1969 – 1972	105,000
1973 and Later	106,800

DRAFTING INFORMATION

The principal author of this revenue ruling is Michael Spaid of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue ruling, please contact the Employee Plans taxpayer assistance telephone service at 1–877–829–5500, between the hours of 8:30 a.m. and 4:30 p.m. Eastern time, Monday through Friday (a toll-free number). Mr. Spaid may be reached via e-mail at *RetirementPlanQuestions@irs.gov.*

Section 832.—Insurance Company Taxable Income

26 CFR 1.832–4: Gross income.

The salvage discount factors are set forth for 2009. These factors must be used to compute discounted estimated salvage recoverable for purposes of section 832 of the Code. See Rev. Proc. 2009-56, page 993.

Section 846.—Discounted Unpaid Losses Defined

26 CFR 1.846–1: Application of discount factors.

The loss payment patterns and discount factors are set forth for the 2009 accident year. These factors will be used for computing discounted unpaid losses under section 846 of the Code. See Rev. Proc. 2009-55, page 982.

The salvage discount factors are set forth for 2009. These factors must be used to compute discounted estimated salvage recoverable for purposes of section 832 of the Code. See Rev. Proc. 2009-56, page 993.

Section 6159.—Agreements for Payment of Tax Liability in Installments

26 CFR 1.301.6159–0: Table of contents.

T.D. 9473

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 301

Agreements for Payment of Tax Liability in Installments

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations.

SUMMARY: This document contains final regulations relating to the payment of tax liabilities in installments. The regulations reflect changes to the law made by the Taxpayer Bill of Rights II, the Internal Revenue Service Restructuring and Reform Act of 1998, and the American Jobs Creation Act of 2004. The regulations will affect taxpayers submitting installment agreements to the IRS.

DATES: *Effective Date:* These regulations are effective on November 25, 2009.

Applicability Date: For the date of applicability, see §301.6159(k).

FOR FURTHER INFORMATION CONTACT: Walter Ryan, (202) 622–3620 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Procedure and Administration Regulations (26 CFR part 301) under section 6159 of the Internal Revenue Code (Code). Section 6159 allows the IRS to enter into agreements for the payment of any unpaid tax in installments. Taxpayers may request administrative review of IRS decisions to terminate installment agreements pursuant to section 6159(e), added to the Code by section 202 of the Taxpayer Bill of Rights II, Public Law 104–168 (110 Stat. 1452, 1457 (1996)). Taxpayers may appeal rejections of proposed installment agreements under section 7122(e), added to the Code by section 3462 of Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), Public Law 105–206 (112 Stat. 685, 764 (1998)). Section 6159(c), added to the Code by section 3467 of RRA 1998, requires the IRS to accept a proposed installment agreement for income taxes under certain circumstances. Section 3506 of RRA 1998 requires the IRS to send each taxpayer with an installment agreement an annual statement showing the balance due at the beginning of the year, the payments made during the year, and the remaining balance due at the end of the year.

Section 843 of the American Jobs Creation Act of 2004 (AJCA), Public Law 108–357 (118 Stat. 1418, 1600 (2004)), amended section 6159(a) to allow the IRS to enter into installment agreements that provide for partial (as well as full) payment of a tax liability, but excludes partial payment installment agreements from the scope of installment agreements that must be accepted by the IRS. Section 843 of the AJCA also added new section 6159(d), requiring the IRS to review partial payment installment agreements every two years. The primary purpose of the review is to determine whether the financial condition of the taxpayer has significantly changed so as to warrant an increase in the value of the payments being made. See H. Rep. No. 108–755, 108th Cong., 2d Sess., 2005 U.S.C.C.A.N. 1341 (October 7, 2004).

On March 5, 2007, a notice of proposed rulemaking (REG–100841–97, 2007–1 C.B. 763 [72 FR 9712]) was published in the **Federal Register.** The proposed regulations reflected the changes made to section 6159 by the Taxpayer Bill of Rights II, the RRA 98, and the AJCA. The proposed regulations reflected current IRS administrative practice. The IRS received one set of written comments with numerous recommendations. No public hearing was requested or held. After consideration of the comments, the proposed regulations are adopted as revised by this Treasury decision.

Summary of Comments and Explanation of Revisions

The final regulations adopt certain recommendations contained in the comments by clarifying two provisions of the proposed regulations. As explained in this preamble, §301.6159–1(e)(3) was amended to clarify that the taxpayer may submit a request to modify or terminate the installment agreement. Section 301.6159–1(e)(3) further clarifies that such a request will not suspend the statute of limitations on collection and the taxpayer must comply with the existing installment agreement while the request is being considered. As also explained in this preamble, §301.6159–1(e)(1)(i) clarifies that the IRS may terminate an installment agreement if the taxpayer provides materially incomplete or inaccurate information in response to an IRS request for a financial update.

The following is a section-by-section analysis of the comments.

Section 301.6159–1(b): Procedures for submission and consideration of proposed installment agreements.

Section 301.6159–1(b) of the proposed regulations provided that an installment agreement request must be submitted according to procedures prescribed by the IRS. It did not require the IRS to accept or reject the request within a specific time frame. The commenter proposed to limit the IRS's time to consider an installment agreement to 90 days; if the IRS fails to act in that time, the agreement would be granted automatically. The commenter reasoned that the limited time frame would benefit the IRS because more installments agreements would be automatically allowed, thereby increasing revenues, and would benefit the taxpayer by allowing payments to begin quickly and efficiently. The recommendation was not adopted for two reasons. First, the IRS already grants installment agreements quickly and automatically in the vast majority of cases. If the taxpayer owes less than $25,000 and offers to pay the liabilities in full within 5 years, the agreement can be granted automatically under the IRS's "streamlined" installment agreement procedures. See Internal Revenue Manual 5.14.5.2 at *http://www.irs.gov/irm/part5/*

irm_05–014–005.html. The IRS granted over 2.62 million installment agreements in fiscal year 2008, of which over 2.51 million were granted through the IRS's streamlined procedures. In cases that do not meet the streamlined criteria, the IRS has determined that a more detailed review of the taxpayer's financial situation is warranted. Second, the IRS generally responds to non-streamlined installment agreement requests in a timely manner. During the filing season, however, inventory fluctuations may cause delays. The automatic allowance of installment agreements in such cases would not be appropriate.

Proposed § 301.6159–1(b)(2) provided that an installment agreement request becomes pending when it is accepted for processing. The commenter recommended that the IRS send an automatically-generated response acknowledging the date of acceptance for processing to the taxpayer and the taxpayer's representative. This recommendation was not adopted. The vast majority of installment agreements are streamlined agreements, which the IRS accepts very quickly. The IRS will, however, consider adopting an administrative procedure for the minority of cases where it anticipates a time lag between acceptance for processing and the acceptance or rejection of the installment agreement.

Proposed §301.6159–1(b)(2) also provided that if an installment agreement request does not contain sufficient information to permit the IRS to evaluate whether the request should be accepted, the IRS will request the needed information. The commenter recommended that all requests for additional information should be reasonably necessary. The proposed regulations already address this recommendation by directing that requests be for "needed" information.

Proposed §301.6159–1(b)(3) allowed a taxpayer to submit a good faith revision of a rejected installment agreement request within 30 days of rejection. The commenter recommended that the time for taxpayers to submit a good faith revision should be extended to 60 days because taxpayers often have difficulty obtaining the necessary documents within 30 days. This recommendation was not adopted. The recommendation would apply to a small number of installment agreement requests that are not accepted under the IRS's streamlined procedures. In these cases, the IRS requests the information necessary for a financial analysis before rejecting the installment agreement request. See Internal Revenue Manual 5.15.1.6 at *http://www.irs.gov/irm/part5/irm_05–015–001.html*. Allowing 60 days following the rejection would encourage untimely responses and delay case resolution.

Section 301.6159–1(c): Acceptance, form, and terms of installment agreements.

Section 301.6159–1(c)(1) of the proposed regulations provided that an installment agreement request has not been accepted until the IRS notifies the taxpayer or the taxpayer's representative of the acceptance. Section 6159(a) requires that an installment agreement be in writing, and proposed §301.6159–1(c)(2) provided that the writing may take the form of a document signed by the taxpayer and the IRS or the written confirmation of an agreement entered into by the taxpayer and the IRS that is mailed or personally delivered to the taxpayer. The commenter recommended that the IRS's notification of the acceptance or rejection of a proposed installment agreement also be directed to the taxpayer's representative and include the terms of the agreement and payment submission information. These recommendations were not adopted in the regulations because they are more appropriately addressed in the IRS's procedures. The IRS currently does, however, provide written notification to the taxpayer and the taxpayer's representative of the acceptance or rejection of an installment agreement and the suggested information.

The commenter was concerned that the IRS intended to change its streamlined procedures and recommended that the procedures be retained. The commenter was also concerned that proposed §301.6159–1(c)(3)(iii)(A) may represent a departure from the IRS's current policy that limits the acceptance of extensions of the collection statute of limitations in connection with installment agreements to the narrow subset of partial payment installment agreements in which the liability will not be paid in full under the agreement before the collection statute expires. As stated in the preamble to the notice of proposed rulemaking, the regulations were intended to reflect existing practices. The regulations will have no effect on the IRS's streamlined procedures or its policy with regard to waivers of the collection statute.

The commenter stated that the proposed regulations did not explain the inclusion of §301.6159–1(c)(3)(ii), which provided that an installment agreement may, by its terms, end upon the expiration of the period of limitations on collection, or at some prior date. As explained in the preamble to the proposed regulations, this provision clarifies that the IRS may enter into partial payment installment agreements that end upon the running of the collection statute, or that end prior to that time so that the IRS may collect the balance of the tax liability against any property belonging to the taxpayer before the collection period expires. The IRS does not currently enter into partial payment installment agreements that expire before the end of the collection statute and has no plans to do so routinely in the future.

Proposed §301.6159–1(c)(3)(v) provided that while an installment agreement is in effect, the IRS may request a financial condition update from the taxpayer at any time. The commenter recommended that the IRS be permitted to request only one financial condition update per year. This recommendation was not adopted. The IRS very rarely requests updates more than once a year. In certain rare circumstances, more frequent updates may be appropriate, such as when the IRS has reason to believe that the taxpayer's financial condition has improved.

Section 301.6159–1(d): Rejection of a proposed installment agreement.

Section 301.6159–1(d)(2) of the proposed regulations provided that the IRS may not notify a taxpayer or the taxpayer's representative of the rejection of an installment agreement until an independent review of proposed rejection is completed. The commenter was concerned that the proposed regulations did not provide any guidance as to how the independent administrative review will be assured. The commenter recommended that the review be undertaken by an IRS office located in a different territory. The recommendation was not adopted. Managers in the IRS offices in San Jose, California, and

Jacksonville, Florida, supervise employees throughout the United States who review rejected installment agreements. An independent review is assured by assigning these cases to an employee who has no prior involvement in the case and who reports to a supervisor in either of these two offices.

The commenter recommended that the determination that the taxpayer did not submit a good faith revision be subject to independent administrative review. This recommendation was not adopted because it would delay case resolution and would, in effect, treat requests that were not made in good faith as valid requests. The commenter also recommended that the rejection of revisions that were made in good faith receive independent review. The proposed regulation already provided for this review. Proposed §301.6159–1(b) stated that if the IRS determines that the taxpayer made a good faith revision within 30 days of the rejection, the provisions of §301.6159–1 apply to the revised proposal.

Proposed §301.6159–1(d)(3) provided that a taxpayer may appeal the rejection of an installment agreement request within 30 days of the rejection. The commenter recommended that the 30-day period be tolled while a revised proposal of a rejected request is being evaluated so that the taxpayer would not have to file an appeal while the revision is under consideration. This recommendation was not adopted. The IRS's procedures are designed to allow a quick resolution of the taxpayer's request; tolling the appeal period would add an unneeded layer of complexity to the process and delay case resolution. The commenter also recommended that the IRS provide more definitive guidance as to what qualifies as a good faith revision. This recommendation was not adopted because this guidance is more appropriately left to the IRS procedures.

Section 301.6159–1(e): Modification or termination of installment agreements by the Internal Revenue Service.

Proposed §301.6159–1(e)(2)(i) provided that the IRS may modify or terminate an installment agreement if the IRS determines that the financial condition of the taxpayer has significantly changed. Proposed §301.6159–1(c)(3)(vi) provided that the IRS and the taxpayer may agree to modify or terminate an installment agreement or may agree to a new installment agreement that supersedes the existing agreement. The commenter recommended that the regulations explicitly allow taxpayers to request a modification or termination of an existing installment agreement, as was stated in existing §301.6159–1(c)(3). This clarification was adopted in §301.6159–1(e)(3).

The commenter recommended that the regulations require the taxpayer to comply with the terms of an installment agreement while a request for modification is being considered and that a proposed modification will not result in a suspension of the statute of limitations on collection. These clarifications were also adopted in §301.6159–1(e)(3).

The commenter recommended that a taxpayer's request to modify an existing installment agreement should be exempt from user fees under regulations §§300.1 and 300.2. This recommendation was not adopted because user fees are outside the scope of this regulation project.

Proposed §301.6159–1(e)(2)(ii)(C) provided that the IRS may modify or terminate an installment agreement if the taxpayer fails to provide a financial condition update requested by the IRS. The commenter recommended that the regulations provide explicitly whether the IRS may terminate an installment agreement if the taxpayer provided materially inaccurate or incomplete information. This recommendation was adopted. Section 301.6159–1(e)(1)(i) was revised to clarify that the IRS may terminate an installment agreement if the taxpayer provided materially inaccurate or incomplete information in connection with a requested financial update.

Proposed §301.6159–1(e)(3) provided that the IRS will generally notify the taxpayer in writing at least 30 days prior to terminating an installment agreement and describe the reason for the termination, after which the taxpayer may provide information showing that the IRS's reason is incorrect. Proposed §301.6159–1(e)(4) provided for the administrative appeal of the modification or termination of an installment agreement to the Office of Appeals if the request is properly made within 30 days after the termination or modification is to take effect. The commenter recommended that the regulations clarify that an appeal should be made to the Office of Appeals within 30 days after the modification or termination will take effect, regardless of whether the taxpayer submits additional information under §301.6159–1(e)(3), has filled out Form 9423, "*Collection Appeal Request*," or has requested a meeting with a Collection Manager. This recommendation was not adopted in the regulations because it is more appropriately addressed in IRS forms and procedures.

Proposed §301.6159–1(e)(4) provided, in part, that the taxpayer may administratively appeal the modification or termination of an installment agreement to the Office of Appeals. The commenter recommended that the taxpayer be allowed to appeal the IRS's determination not to modify an installment agreement. This recommendation was not adopted. The IRS routinely grants taxpayer modification requests that result in agreements within the streamlined criteria. See Internal Revenue Manual 5.19.1.5.4.24 at *http://www.irs.gov/irm/part5/irm_05–019–001.html*. Taxpayers do not have a statutory right to appeal rejected modification requests, and the IRS has not determined there is a need for additional administrative review of the denial of a modification request.

Section 301.6159–1(f): Effect of installment agreement or pending installment agreement on collection activity.

Section 301.6159–1(f)(1) of the proposed regulations stated that the IRS may not levy during the time an installment agreement is pending. Proposed §301.6159–1(f)(2) stated that levy is not prohibited if an installment agreement request was made solely to delay collection. The commenter recommended that the solely to delay collection standard in the proposed regulations be replaced with language that references the "frivolous submission" standard in section 6702(b) of the Code. This recommendation was not adopted. Under existing IRS procedures, an installment agreement is returned as made solely to delay collection when there is no economic reality to the request, the request fails to address changes previously requested by the IRS in response to a prior request, the request ignores direction pro-

vided by revenue officers, the request is made by a taxpayer that has defaulted prior installment agreements, or the request is made at a time that causes it to be classified as a request made to delay enforcement action. See Internal Revenue Manual 5.14.3.2 at *http://www.irs.gov/irm/part5/irm_05–014–003.html*. Section 6702(b) imposes a $5,000 penalty for installment agreement requests that reflect a desire to delay or impede the administration of the Federal tax laws, and the IRS has not yet developed procedures defining the kinds of installment agreements that constitute frivolous submissions. The standard in section 6702(b) therefore may not be an appropriate standard for identifying those installment agreements that fail to qualify for the prohibition against levy.

In the alternative, the commenter recommended that the regulations state that a taxpayer may appeal the IRS's levy action when the IRS determines that an installment agreement request was made solely to delay collection, and that damages may be appropriate under section 7433 of the Code. These recommendations were not adopted. Taxpayers' rights to appeal proposed levies and seek damages are provided for in the regulations under sections 6330 and 7433 of the Code, respectively.

Section 301.6159–1(g): Suspension of the statute of limitations on collection.

Section 301.6159–1(g) of the proposed regulations provided that the statute of limitations on collection under section 6502 of the Code is suspended for the period that a proposed installment agreement is pending, plus 30 days following a rejection, and during any appeal. The commenter recommended that the regulations clearly define when an installment agreement is pending. This recommendation is already addressed by proposed §301.6159–1(b)(2), which provides a detailed explanation of when an installment agreement is pending.

Section 301.6159–1(h): Annual statement.

Section 301.6159–1(h) of the proposed regulations requires the IRS to provide taxpayers with an annual statement setting forth the balance owed at the beginning of the year, the payments made during the year, and the remaining balance at the end of the year. The commenter recommends that the annual statement be as clear as possible and that the IRS provide the taxpayer with a single annual statement describing all tax liabilities covered by the agreement. Currently, the IRS sends an annual statement for each separate liability covered by an installment agreement. No change was made to the final regulations because this recommendation is more appropriately addressed when the IRS updates the forms used for the annual statements.

Section 301.6159–1(i): Biennial review of partial payment installment agreements.

Section 301.6159–1(i) of the proposed regulations required the IRS to perform a review of the taxpayer's financial condition at least once every two years in cases of partial payment installment agreements. The proposed regulations also stated that the purpose of the review was to determine whether an increase in payments is warranted. The commenter recommended that §301.6159–1(i) be rephrased to provide that the biennial review of a taxpayer's financial condition may result in a decrease, as well as an increase, in the amount of payments being made. This recommendation was not adopted. While taxpayers may request a decrease in the amount of payments due under an installment agreement, the IRS does not have the information to unilaterally make that determination. The automatic biennial review done by the IRS does not, in every case, result in a request for updated financial information. As explained above, taxpayers may request that their payments be lowered if their financial condition has worsened.

Section 301.6159–1(k): Effective/applicability date.

Section 301.6159–1(k) of the proposed regulations provided that the effective date of the final regulations would be the date the final regulations are published in the **Federal Register**. The commenter was concerned about how previously proposed or accepted installment agreements will be affected by the regulations and recommended that the effective date of paragraphs (b), (c), and (d) apply prospectively. This recommendation was not adopted. As explained earlier and in the preamble to the proposed regulations, the regulations substantially reflect existing practices. The regulations will therefore have no effect on previously proposed or accepted installment agreements.

Special Analyses

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

Drafting Information

The principal author of these regulations is Walter Ryan, Office of Associate Chief Counsel (Procedure and Administration).

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

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

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

Par. 2. Section 301.6159–0 is added to read as follows:

§301.6159–0 Table of contents.

This section lists the major captions that appear in the regulations under §301.6159–1.

§301.6159–1 Agreements for the payment of tax liabilities in installments.

(a) Authority.

(b) Procedures for submission and consideration of proposed installment agreements.

(c) Acceptance, form, and terms of installment agreements.

(d) Rejection of a proposed installment agreement.

(e) Modification or termination of installment agreements by the Internal Revenue Service.

(f) Effect of installment agreement or pending installment agreement on collection activity.

(g) Suspension of the statute of limitations on collection.

(h) Annual statement.

(i) Biennial review of partial payment installment agreements.

(j) Cross reference.

(k) Effective/applicability date.

Par. 3. Section 301.6159–1 is revised to read as follows:

§301.6159–1 Agreements for payment of tax liabilities in installments.

(a) *Authority*. The Commissioner may enter into a written agreement with a taxpayer that allows the taxpayer to make scheduled periodic payments of any tax liability if the Commissioner determines that such agreement will facilitate full or partial collection of the tax liability.

(b) *Procedures for submission and consideration of proposed installment agreements*—(1) *In general*. A proposed installment agreement must be submitted according to the procedures, and in the form and manner, prescribed by the Commissioner.

(2) *When a proposed installment agreement becomes pending*. A proposed installment agreement becomes pending when it is accepted for processing. The Internal Revenue Service (IRS) may not accept a proposed installment agreement for processing following reference of a case involving the liability that is the subject of the proposed installment agreement to the Department of Justice for prosecution or defense. The proposed installment agreement remains pending until the IRS accepts the proposal, the IRS notifies the taxpayer that the proposal has been rejected, or the proposal is withdrawn by the taxpayer. If a proposed installment agreement that has been accepted for processing does not contain sufficient information to permit the IRS to evaluate whether the proposal should be accepted, the IRS will request the taxpayer to provide the needed additional information. If the taxpayer does not submit the additional information that the IRS has requested within a reasonable time period after such a request, the IRS may reject the proposed installment agreement.

(3) *Revised proposals of installment agreements submitted following rejection*. If, following the rejection of a proposed installment agreement, the IRS determines that the taxpayer made a good faith revision of the proposal and submitted the revision within 30 days of the date of rejection, the provisions of this section shall apply to that revised proposal. If, however, the IRS determines that a revision was not made in good faith, the provisions of this section do not apply to the revision and the appeal period in paragraph (d)(3) of this section continues to run from the date of the original rejection.

(c) *Acceptance, form, and terms of installment agreements*—(1) *Acceptance of an installment agreement*—(i) *In general*. A proposed installment agreement has not been accepted until the IRS notifies the taxpayer or the taxpayer's representative of the acceptance. Except as provided in paragraph (c)(1)(iii) of this section, the Commissioner has the discretion to accept or reject any proposed installment agreement.

(ii) *Acceptance does not reduce liabilities*. The acceptance of an installment agreement by the IRS does not reduce the amount of taxes, interest, or penalties owed. (However, penalties may continue to accrue at a reduced rate pursuant to section 6651(h).)

(iii) *Guaranteed installment agreements*. In the case of a liability of an individual for income tax, the Commissioner shall accept a proposed installment agreement if, as of the date the individual proposes the installment agreement—

(A) The aggregate amount of the liability (not including interest, penalties, additions to tax, and additional amounts) does not exceed $10,000;

(B) The taxpayer (and, if the liability relates to a joint return, the taxpayer's spouse) has not, during any of the preceding five taxable years—

(*1*) Failed to file any income tax return;

(*2*) Failed to pay any required income tax; or

(*3*) Entered into an installment agreement for the payment of any income tax;

(C) The Commissioner determines that the taxpayer is financially unable to pay the liability in full when due (and the taxpayer submits any information the Commissioner requires to make that determination);

(D) The installment agreement requires full payment of the liability within three years; and

(E) The taxpayer agrees to comply with the provisions of the Internal Revenue Code for the period the agreement is in effect.

(2) *Form of installment agreements*. An installment agreement must be in writing. A written installment agreement may take the form of a document signed by the taxpayer and the Commissioner or a written confirmation of an agreement entered into by the taxpayer and the Commissioner that is mailed or personally delivered to the taxpayer.

(3) *Terms of installment agreements*. (i) Except as otherwise provided in this section, an installment agreement is effective from the date the IRS notifies the taxpayer or the taxpayer's representative of its acceptance until the date the agreement ends by its terms or until it is superseded by a new installment agreement.

(ii) By its terms, an installment agreement may end upon the expiration of the period of limitations on collection in section 6502 and §301.6502–1, or at some prior date.

(iii) As a condition to entering into an installment agreement with a taxpayer, the Commissioner may require that—

(A) The taxpayer agree to a reasonable extension of the period of limitations on collection; and

(B) The agreement contain terms that protect the interests of the Government.

(iv) Except as otherwise provided in an installment agreement, all payments made under the installment agreement will be applied in the best interests of the Government.

(v) While an installment agreement is in effect, the Commissioner may request, and the taxpayer must provide, a financial condition update at any time.

(vi) At any time after entering into an installment agreement, the Commissioner and the taxpayer may agree to modify or terminate an installment agreement or may

agree to a new installment agreement that supersedes the existing agreement.

(d) *Rejection of a proposed installment agreement*—(1) *When a proposed installment agreement becomes rejected*. A proposed installment agreement has not been rejected until the IRS notifies the taxpayer or the taxpayer's representative of the rejection, the reason(s) for rejection, and the right to an appeal.

(2) *Independent administrative review*. The IRS may not notify a taxpayer or taxpayer's representative of the rejection of an installment agreement until an independent administrative review of the proposed rejection is completed.

(3) *Appeal of rejection of a proposed installment agreement*. The taxpayer may administratively appeal a rejection of a proposed installment agreement to the IRS Office of Appeals (Appeals) if, within the 30-day period commencing the day after the taxpayer is notified of the rejection, the taxpayer requests an appeal in the manner provided by the Commissioner.

(e) *Modification or termination of installment agreements by the Internal Revenue Service*—(1) *Inadequate information or jeopardy*. The Commissioner may terminate an installment agreement if the Commissioner determines that—

(i) Information which was provided to the IRS by the taxpayer or the taxpayer's representative in connection with either the granting of the installment agreement or a request for a financial update was inaccurate or incomplete in any material respect; or

(ii) Collection of any liability to which the installment agreement applies is in jeopardy.

(2) *Change in financial condition, failure to timely pay an installment or another Federal tax liability, or failure to provide requested financial information*. The Commissioner may modify or terminate an installment agreement if—

(i) The Commissioner determines that the financial condition of a taxpayer that is party to the agreement has significantly changed; or

(ii) A taxpayer that is party to the installment agreement fails to—

(A) Timely pay an installment in accordance with the terms of the installment agreement;

(B) Pay any other Federal tax liability when the liability becomes due; or

(C) Provide a financial condition update requested by the Commissioner.

(3) *Request by taxpayer*. Upon request by a taxpayer that is a party to the installment agreement, the Commissioner may terminate or modify the terms of an installment agreement if the Commissioner determines that the financial condition of the taxpayer has significantly changed. The taxpayer's request will not suspend the statute of limitations under section 6502 for collection of any liability. While the Commissioner is considering the request, the taxpayer shall comply with the terms of the existing installment agreement.

(4) *Notice*. Unless the Commissioner determines that collection of the tax is in jeopardy, the Commissioner will notify the taxpayer in writing at least 30 days prior to modifying or terminating an installment agreement pursuant to paragraph (e)(1) or (2) of this section. The notice provided pursuant to this section must briefly describe the reason for the intended modification or termination. Upon receiving notice, the taxpayer may provide information showing that the reason for the proposed modification or termination is incorrect.

(5) *Appeal of modification or termination of an installment agreement*. The taxpayer may administratively appeal the modification or termination of an installment agreement to Appeals if, following issuance of the notice required by paragraph (e)(4) of this section and prior to the expiration of the 30-day period commencing the day after the modification or termination is to take effect, the taxpayer requests an appeal in the manner provided by the Commissioner.

(f) *Effect of installment agreement or pending installment agreement on collection activity*—(1) *In general*. No levy may be made to collect a tax liability that is the subject of an installment agreement during the period that a proposed installment agreement is pending with the IRS, for 30 days immediately following the rejection of a proposed installment agreement, during the period that an installment agreement is in effect, and for 30 days immediately following the termination of an installment agreement. If, prior to the expiration of the 30-day period following the rejection or termination of an installment agreement, the taxpayer appeals the rejection or termination decision, no levy may be made while the rejection or termination is being considered by Appeals. This section will not prohibit levy to collect the liability of any person other than the person or persons named in the installment agreement.

(2) *Exceptions*. Paragraph (f)(1) of this section shall not prohibit levy if the taxpayer files a written notice with the IRS that waives the restriction on levy imposed by this section, the IRS determines that the proposed installment agreement was submitted solely to delay collection, or the IRS determines that collection of the tax to which the installment agreement or proposed installment agreement relates is in jeopardy.

(3) *Other actions by the IRS while levy is prohibited*—(i) *In general*. The IRS may take actions other than levy to protect the interests of the Government with regard to the liability identified in an installment agreement or proposed installment agreement. Those actions include, for example—

(A) Crediting an overpayment against the liability pursuant to section 6402;

(B) Filing or refiling notices of Federal tax lien; and

(C) Taking action to collect from any person who is not named in the installment agreement or proposed installment agreement but who is liable for the tax to which the installment agreement relates.

(ii) *Proceedings in court*. Except as otherwise provided in this paragraph (f)(3)(ii), the IRS will not refer a case to the Department of Justice for the commencement of a proceeding in court, against a person named in an installment agreement or proposed installment agreement, if levy to collect the liability is prohibited by paragraph (f)(1) of this section. Without regard to whether a person is named in an installment agreement or proposed installment agreement, however, the IRS may authorize the Department of Justice to file a counterclaim or third-party complaint in a refund action or to join that person in any other proceeding in which liability for the tax that is the subject of the installment agreement or proposed installment agreement may be established or disputed, including a suit against the United States under 28 U.S.C. 2410. In addition, the United States may file a claim in any bankruptcy proceeding or insolvency action brought by or against such person. If a

person named in an installment agreement is joined in a proceeding, the United States obtains a judgment against that person, and the case is referred back to the IRS for collection, collection will continue to occur pursuant to the terms of the installment agreement. Notwithstanding the installment agreement, any claim or suit permitted will be for the full amount of the liabilities owed.

(g) *Suspension of the statute of limitations on collection*. The statute of limitations under section 6502 for collection of any liability shall be suspended during the period that a proposed installment agreement relating to that liability is pending with the IRS, for 30 days immediately following the rejection of a proposed installment agreement, and for 30 days immediately following the termination of an installment agreement. If, within the 30 days following the rejection or termination of an installment agreement, the taxpayer files an appeal with Appeals, the statute of limitations for collection shall be suspended while the rejection or termination is being considered by Appeals. The statute of limitations for collection shall continue to run if an exception under paragraph (f)(2) of this section applies and levy is not prohibited with respect to the taxpayer.

(h) *Annual statement*. The Commissioner shall provide each taxpayer who is party to an installment agreement under this section with an annual statement setting forth the initial balance owed at the beginning of the year, the payments made during the year, and the remaining balance as of the end of the year.

(i) *Biennial review of partial payment installment agreements*. The Commissioner shall perform a review of the taxpayer's financial condition in the case of a partial payment installment agreement at least once every two years. The purpose of this review is to determine whether the taxpayer's financial condition has significantly changed so as to warrant an increase in the value of the payments being made or termination of the agreement.

(j) *Cross reference*. Pursuant to section 6601(b)(1), the last day prescribed for payment is determined without regard to any installment agreement, including for purposes of computing penalties and interest provided by the Internal Revenue Code. For special rules regarding the computation of the failure to pay penalty while certain installment agreements are in effect, see section 6651(h) and §301.6651–1(a)(4).

(k) *Effective/applicability date*. This section is applicable on November 25, 2009.

Par. 4. Section 301.6331–4, paragraph (d) is revised and paragraph (e) is added to read as follows:

§301.6331–4 Restrictions on levy while installment agreements are pending or in effect.

* * * * *

(d) *Cross-reference*. For provisions relating to the making of levies while an installment agreement is pending or in effect, see §301.6159–1.

(e) *Effective/applicability date*. Paragraphs (a), (b) and (c) are applicable beginning December 18, 2002. Paragraph (d) is applicable on November 25, 2009.

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

Approved November 11, 2009.

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

(Filed by the Office of the Federal Register on November 24, 2009, 8:45 a.m., and published in the issue of the Federal Register for November 25, 2009, 74 F.R. 61525)

Section 6205.—Special Rules Applicable to Certain Employment Taxes

26 CFR 31.6205–1: Adjustments of underpayments. (Also: 6402, 6413, 6414, 31.6402(a)–1, 31.6402(a)–2, 31.6413(a)–1, 31.6413(a)–2, 31.6414–1.)

94X examples revenue ruling. This revenue ruling illustrates the application of the interest-free adjustment and claim for refund processes under the final regulations promulgated by Treasury Decision 9405 (T.D. 9405), 2008–32 I.R.B. 293. T.D 9405 amends the process for making interest-free adjustments of employment taxes under sections 6205 and 6413 of the Code, and claiming refunds of employment taxes under sections 6402 and 6414. T.D. 9405 was initiated in connection with the Service's development of new "X" forms (*e.g.*, Form 941–X, *Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund*) as part of the Form 94X Project initiated by the Office of Taxpayer Burden Reduction and now led by SB/SE Employment Tax Policy. The proposed revenue ruling applies the final regulations under T.D. 9405 to 10 different situations to show how the new processes operate. Rev. Rul. 75–464 obsoleted.

Rev. Rul. 2009–39

ISSUE

How does an employer correct employment tax reporting errors using the interest-free adjustment and refund claim processes under sections 6205, 6402, 6413, and 6414 of the Internal Revenue Code and the accompanying regulations in the following situations:

(1) an underpayment of Federal Insurance Contributions Act (FICA) tax and income tax withholding (ITW) when the error is not ascertained in the year the wages were paid; (2) an overpayment of ITW when the error is ascertained in the same year the wages were paid; (3) both an overpayment and an underpayment of FICA tax for the same tax period; (4) an underpayment of FICA tax when the employer's filing requirement has changed; (5) an underpayment of FICA tax and ITW resulting from a failure to file an employment tax return because the employer failed to treat any workers as employees; (6) an overpayment of FICA tax on wages paid to a household employee; (7) an overpayment of FICA tax when the error is ascertained close to the expiration of the period of limitations on credit or refund; (8) an underpayment of FICA tax and ITW ascertained in the course of an employment tax examination; (9) an underpayment of FICA tax and ITW ascertained in the course of the appeals process; (10) an underpayment of FICA tax and ITW resulting from the misclassification of employees ascertained in the course of the appeals process.

LAW, ANALYSIS, AND HOLDINGS

For purposes of this revenue ruling, *employment tax* means FICA tax (both the social security and Medicare portions) imposed by section 3101 (employee FICA

tax) and section 3111 (employer FICA tax), and ITW imposed by section 3402. To the extent other types of withholding are treated as ITW under section 3402(a) (that is, gambling withholding, pension withholding, and backup withholding as set forth in sections 3402(q)(7), 3405(f), and 3406(h)(10), respectively), these other types of withholding are included in the term employment tax.

Sections 6205, 6402, 6413, and 6414 permit interest-free adjustments and claims for refund to correct employment tax reporting errors. Sections 31.6205–1, 31.6402(a)–1, 31.6402(a)–2, 31.6413(a)–1, 31.6413(a)–2, and 31.6414–1, as amended by Treasury Decision 9405 (T.D. 9405, 2008–32 I.R.B. 293 [73 FR 37371]), provide rules for making interest-free adjustments and claiming refunds of employment tax. Section 31.6302–1, as amended by T.D. 9405, provides rules relating to deposit obligations with respect to interest-free adjustments of employment tax. T.D. 9405 is effective on January 1, 2009 and applies to errors ascertained on or after January 1, 2009.

T.D. 9405 was issued in coordination with "X" forms developed by the Internal Revenue Service (IRS) that employers use to correct employment tax reporting errors ascertained on or after January 1, 2009. The "X" forms correspond with Form 941, "*Employer's QUARTERLY Federal Tax Return*"; Form 943, "*Employer's Annual Federal Tax Return for Agricultural Employees*"; Form 944, "*Employer's ANNUAL Federal Tax Return*"; and Form 945, "*Annual Return of Withheld Federal Income Tax*." The new "X" forms (*e.g.*, Form 941–X, "*Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund*") are used to claim refunds, make adjustments, and request abatements of employment tax.

This revenue ruling refers to corrections made pursuant to sections 6205 and 6413 of underpayments or overpayments, respectively, resulting from employment tax reporting errors as having been made using the adjustment process. This revenue ruling refers to corrections made pursuant to sections 6402 and 6414 of overpayments resulting from employment tax reporting errors as having been made using the refund claim process.

Underpayments

Pursuant to § 31.6205–1(b), an employer that has underreported and underpaid FICA tax with respect to any payment of wages can correct the error as an interest-free adjustment if the error is ascertained after the return reporting such tax has been filed. An error is ascertained when the employer has sufficient knowledge of the error to be able to correct it. An interest-free underpayment adjustment is made by reporting the additional amount due on an adjusted return filed by the due date for filing the employment tax return for the return period in which the error was ascertained. The due date for filing the adjusted return is determined by reference to the type of return (*e.g.*, Form 941 or Form 944) being corrected, without regard to the employer's current filing requirements. The amount of the underpayment must be paid to the IRS by the date the adjusted return is filed. Section 31.6205–1(a)(7) provides that agreement forms, such as Form 2504, "*Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Excise or Employment Tax),"* which are used in the context of an examination or appeals process, constitute adjusted returns. If an adjustment is reported but the amount of the adjustment is not paid when due, interest will accrue thereafter.

Section 31.6205–1(c) provides similar rules for correcting underpayments of ITW. However, an interest-free adjustment of ITW may only be made if the error is ascertained within the same calendar year that the wages to the employee were paid, unless: (1) the underpayment is attributable to an administrative error, (2) section 3509 (a relief provision to reduce employment tax liability in certain worker misclassification situations) applies to determine the amount of the underpayment, or (3) the adjustment is reported on a Form 2504, Form 2504–WC, "*Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment in Worker Classification Cases (Employment Tax)*," or other agreement forms prescribed by the IRS (such as, Form 2504–AD, "*Excise or Employment Tax-Offer of Agreement to Assessment and Collection of Additional Tax and Offer of Acceptance of Overassessment*," and Form 2504–S, "*Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Including Section 530 Statement)*").

Section 31.6205–1(a)(2) provides that an interest-free adjustment may not be made to correct an underpayment of any employment tax if the failure to report relates to an issue that was raised in an examination of a prior return period or if the employer knowingly underreported its employment tax liability. In addition, § 31.6205–1(a)(6) provides that an interest-free adjustment generally may not be made after receipt of notice and demand for payment or receipt of a Notice of Determination of Worker Classification (Notice of Determination).

Section 7436 grants the U.S. Tax Court jurisdiction to review determinations by the IRS regarding worker classification, relief under section 530 of the Revenue Act of 1978, and the proper amount of employment tax under those determinations. The Notice of Determination serves as the IRS's determination for purposes of section 7436, and therefore is a jurisdictional prerequisite for seeking U.S. Tax Court review in worker classification cases. In order to provide a mechanism for taxpayers to make an interest-free adjustment yet receive a Notice of Determination enabling them to petition the U.S. Tax Court, § 31.6205–1(a)(6)(ii) permits an employer, prior to receipt of a Notice of Determination, to make a cash bond deposit in lieu of making a payment to stop the accrual of any interest. The IRS treats a cash bond deposit made prior to receipt of a Notice of Determination as an interest-free adjustment. Without this rule, an employer would not be able to both make an interest-free adjustment and receive a Notice of Determination enabling it to seek U.S. Tax Court review under section 7436. Moreover, this cash bond deposit is the only way an employer can make an interest-free adjustment other than filing an adjusted return.

Section 31.6205–1(b)(2)(i) provides that an adjusted return reporting an underpayment must be filed within the period of limitations for assessment under section 6501, which is generally 3 years after the due date of the return or the date the return was filed, whichever is later. In computing the period of limitations for assessment, section 6501(b)(2) provides that employment tax returns reporting FICA tax or

ITW for any period ending with or within a calendar year filed before April 15 of the succeeding calendar year are deemed filed on April 15 of such succeeding calendar year.

Section 31.6205–1(b)(3) provides that, if an employer fails to file a return for a return period solely because the employer failed to treat any individuals properly as employees for the return period (and, therefore, failed to withhold and pay any employer or employee FICA tax with respect to wages paid to the employees) and if the employer ascertains the error after the due date of the return, the employer shall correct the error as an interest-free adjustment. The regulations also provide the process for correcting this type of error. Section 31.6205–1(c)(3) provides a similar rule for ITW; however, an adjustment of ITW may only be made if (1) the error is ascertained within the same calendar year that the wages to the employee were paid, (2) section 3509 applies to determine the amount of the underpayment, or (3) the adjustment is reported on a Form 2504, Form 2504–WC, or other prescribed agreement form.

Section 31.6302–1(c)(7) provides that an employer filing an adjusted return under § 31.6205–1 in order to report taxes that were accumulated in a prior return period shall pay the amount of the adjustment by the time it files the adjusted return; the amount paid by the time the employer files the adjusted return will be deemed to have been timely deposited by the employer. Amounts not timely deposited may be subject to the failure to deposit penalty under section 6656.

Overpayments

In general, employers may choose to correct employment tax overpayment errors by either making an interest-free adjustment or filing a claim for refund after an error has been ascertained. An error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

Under § 31.6413(a)–1(a), an employer has a duty to assure that its employee's rights to recover overcollected taxes are protected by repaying or reimbursing overcollected amounts. Section 31.6413(a)–1(a) provides that before making an adjustment of an overpayment of FICA tax, an employer must repay or reimburse its employee in the amount of the overcollection prior to the expiration of the period of limitations on credit or refund and, for FICA tax overcollected in a prior year, must also secure the employee's written statement confirming that the employee has not made any previous claims (or the claims were rejected) and will not make any future claims for refund or credit of the amount of the overcollected FICA tax. Section 31.6413(a)–1(b) provides a similar rule for overcollected ITW; however, the employer is required to repay or reimburse the employee prior to the end of the calendar year in which the wages were paid or an adjustment may not be made to correct the error.

Section 31.6413(a)–2 provides the rules for making interest-free adjustments for overpayments of FICA tax or ITW, after the employer has repaid or reimbursed the employee the amount of any overcollection. An interest-free adjustment is made by filing an adjusted return. The employer is required to certify that it has repaid or reimbursed the employee in the amount of the overcollection. For adjustments of employee FICA tax overcollected in prior years, the employer must also certify that it has secured the required written statement from the employee. However, these requirements do not apply to the extent that the taxes were not withheld from the employee, nor do they apply if after having made reasonable efforts the employer cannot locate the employee or, for prior year FICA tax, the employee did not provide the required written statement. If, after the employer's reasonable efforts to secure the required written statement, the employee does not furnish it, the employer may make an adjustment of the overpaid employer FICA tax.

The employer must file an adjusted return before the expiration of the period of limitations on credit or refund under section 6511. However, § 31.6413(a)–2(d)(2) provides that no overpayment adjustment may be made if the overpayment relates to a return period for which the period of limitations on credit or refund under section 6511 will expire within 90 days of filing the adjusted return. This is referred to as the 90-day rule. The purpose of the 90-day rule is to give the IRS sufficient time to process the request for an overpayment adjustment. To satisfy the rule, an adjusted return must be filed 90 days before the expiration of the period of limitations on credit or refund under section 6511.

Section 6511(a) provides that a claim for credit or refund must be made within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever is later, or, if no return was filed, within 2 years from the time the tax was paid. In computing the period of limitations, section 6513(c) provides that employment tax returns reporting FICA tax or ITW for any period ending with or within a calendar year filed before April 15 of the succeeding calendar year are deemed filed on April 15 of such succeeding calendar year. Likewise, section 6513(c) provides that FICA tax or ITW paid during any period ending with or within a calendar year before April 15 of the succeeding calendar year is deemed paid on April 15 of the succeeding calendar year.

Section 31.6402(a)–2 provides rules under which a refund claim for an overpayment of FICA tax may be made. Pursuant to § 31.6402(a)–2(a), an employer has a duty to assure that its employee's rights to recover overcollected taxes are protected by repaying or reimbursing overcollected amounts. Alternatively, an employer may obtain the employee's consent to the filing of the refund claim, an option not available under the adjustment process. Under *Chicago Milwaukee Corp. v. U.S.,* 40 F.3d 373 (C.A. Fed. 1994), an employer need not repay or reimburse its employees or obtain the employees' consents for the filing of a refund claim prior to filing the claim, in order for the claim to be valid. However, the employer must repay or reimburse its employees or obtain the employees' consents before the IRS can grant the claim.

The regulations require that an employer certify that it has repaid or reimbursed its employee or obtained the employee's consent to the filing of the refund claim. For refund claims for employee FICA tax overcollected in prior years, the employer must also certify that it has obtained the employee's written statement confirming that the employee has not made any previous claims (or the claims were rejected) and will not make any future claims for refund or credit of the amount of the overcollection. However, these requirements do not apply to the extent that the taxes were not withheld

from the employee, nor do they apply if after having made reasonable efforts the employer cannot locate the employee or the employee will not provide consent, or the employee did not provide the required written statement. If, after the employer's reasonable efforts to obtain the employee's consent or secure the required written statement, the employee does not furnish one or the other of them, the employer may claim a refund of the overpaid employer FICA tax. A claim must be filed before the expiration of the period of limitations on credit or refund under section 6511.

Section 31.6414–1 provides rules under which a claim for credit or refund of an overpayment of ITW can be made. An employer that has overpaid ITW may file a claim for refund of the overpayment only if the amount was not actually withheld from the employee's wages.

As a result of T.D. 9405 and this revenue ruling, Revenue Ruling 75–464, 1975–2 C.B. 474, is no longer determinative of when interest-free adjustments are made in the context of an employment tax examination. Accordingly, Rev. Rul. 75–464 is obsolete.

Situations

In each of these situations, except as otherwise noted, (a) the amounts underreported do not relate to an issue that was raised in an examination of a prior period, (b) the employer did not knowingly underreport its employment tax liability, (c) the employer did not receive notice and demand for payment, and (d) the employer did not receive a Notice of Determination.

Situation 1: Employer R timely filed its 2009 fourth quarter Form 941 on January 10, 2010 and timely paid all employment tax reported on the return. On February 9, 2010, Employer R ascertains that it underwithheld and underpaid FICA tax and ITW with respect to its employees' wages in the fourth quarter of 2009.

Employer R must correct the underpayment of FICA tax on a Form 941–X using the adjustment process. Employer R must file Form 941–X by the due date of the return for the return period in which it ascertained the error (*i.e.,* April 30, 2010) and pay the amount owed by the time it files Form 941–X. If Employer R files Form 941–X by April 30, 2010 but does not pay by the time it files, interest will accrue from the date Form 941–X is filed until payment is made. If payment is not made until after receipt of a notice and demand for payment, Employer R is entitled to an interest-free adjustment for the period up to the date the Form 941–X is filed, but interest accrues from the date the Form 941–X is filed until payment is made.

Employer R may not use the interest-free adjustment process outside an employment tax examination to correct the underpayment of ITW, because the error was not ascertained in the same year that the wages were paid to the employees.

Situation 2: Employer S timely filed its 2011 third quarter Form 941 on October 10, 2011 and timely paid all employment tax reported on the return. On December 2, 2011, Employer S ascertains that it overwithheld and overpaid ITW in the third quarter of 2011 and reported the overpayment on its 2011 third quarter Form 941. Employer S repays the overcollected amounts to its affected employees on December 29, 2011. Employer S files Form 941–X on January 6, 2012 to correct the overpayment using the adjustment process.

Because Employer S repaid its employees the amount of the overcollection of ITW in the same year that the wages were paid, Employer S may correct the overpayment of ITW using the adjustment process even though the adjusted return is filed in a year after the wages were paid. Employer S may not use the refund claim process to correct the error because the ITW was actually withheld from the employees' wages. Since Employer S filed Form 941–X on or before January 15, 2015, it is a timely adjustment under the 90-day rule.

Situation 3: Employer T timely filed its 2006 fourth quarter Form 941 on January 19, 2007, and timely paid all employment tax reported on the return. On December 1, 2009, Employer T ascertains that it underpaid FICA tax with respect to wages of Employees A, B, and C and overwithheld and overpaid FICA tax with respect to wages of Employee D on its 2006 fourth quarter Form 941. Employer T reimbursed Employee D in the amount of the overcollection promptly after ascertaining the overpayment.

The underpaid FICA tax with respect to wages of Employees A, B, and C must be corrected on Form 941–X using the adjustment process. To correct the overpaid FICA tax with respect to wages of Employee D, Employer T may choose between the adjustment and refund claim processes because the error was ascertained on December 1, 2009 (more than 90 days before the expiration of the period of limitations on credit or refund) and because Employer T reimbursed Employee D in the amount of the overcollection. If Employer T obtained Employee D's consent to the filing of a refund claim instead of reimbursing the overcollected FICA tax, Employer T would have to use the refund claim process to correct the overpayment since the consent option is not available for the adjustment process.

In order for Employer T to correct the overpayment using the adjustment process, the adjusted return must be filed on or before January 15, 2010 (*i.e.*, 90 days before the expiration of the period of limitations on credit or refund); otherwise, after January 15, 2010, only the refund claim process will be available to correct the overpayment. To be timely, a refund claim must be filed on or before April 15, 2010 (*i.e*., the last day of the period of limitations on credit or refund).

If Employer T chooses to correct the overpayment using the adjustment process, it can file one Form 941–X correcting both the underpayment and the overpayment. However, because an overpayment adjustment may be made only if the adjusted return is filed within 90 days of the expiration of the period of limitations on credit or refund, Employer T may correct both the overpayment and underpayment on one Form 941–X only if it files by January 15, 2010. When both an overpayment and underpayment are corrected on the same Form 941–X, the amounts will be combined and may result in either a credit or a balance due.

If Employer T chooses to correct the overpayment using the refund claim process, or it is unable to file Form 941–X by January 15, 2010 (so that it must correct the overpayment using the refund claim process), it must file two separate Forms 941–X; one to correct the overpayment using the refund claim process, and one to correct the underpayment using the adjustment process. A refund claim and an adjustment may not be made on the same Form 941–X. Employer T must file the Form 941–X reporting the underpayment

by January 31, 2010 and pay any amount due by the date the Form 941–X is filed. If Employer T files the Form 941–X reporting the underpayment by January 31, 2010 and pays the amount due with that Form 941–X the amount will be deemed to have been timely deposited. If Employer T does not pay the amount due with that Form 941–X, interest will accrue from the date the Form 941–X is filed until the time of payment. The overpayment corrected on the separate Form 941–X using the refund claim process will be refunded, plus any interest that applies, unless Employer T owes other taxes, penalties, or interest. An employer may not designate an overpayment from one Form 941–X to pay an amount due on a separate Form 941–X.

Situation 4: Employer U timely filed its 2007 Form 944 and timely paid all employment tax reported on the return. In February 2010, the IRS notifies Employer U that its filing requirement has changed and it is required to file Form 941, rather than Form 944, for calendar year 2010 and thereafter. On May 23, 2010, Employer U ascertains that it underpaid FICA tax on its 2007 Form 944.

Employer U must correct the underpayment of FICA tax using the adjustment process. Because Employer U is correcting an error on a previously filed Form 944, it must file a Form 944–X, "*Adjusted Employer's ANNUAL Federal Tax Return or Claim for Refund*," to make the correction since the "X" form filed must correspond to the return being corrected. Employer U does not consider its current filing requirement (*i.e.*, Form 941) at the time the "X" form is filed to determine the appropriate "X" form to file and the date the "X" form is due. Employer U must file Form 944–X by January 31, 2011, the due date of the return for the return period in which it ascertained the error, and pay the amount owed by the time it files Form 944–X. If Employer U timely files Form 944–X but does not pay by the time it files, interest will accrue from the date Form 944–X is filed until payment is made. If payment is not made until after receipt of notice and demand for payment, Employer U is still entitled to an interest-free adjustment for the period up to the date the Form 944–X is filed, but interest accrues from the date the Form 944–X is filed until payment is made.

Situation 5: On February 6, 2012, Employer V, a sole proprietor, ascertains that he should have treated his bookkeeper as an employee, rather than as an independent contractor, for employment tax purposes. The bookkeeper worked each week for Employer V since March 2011. Because Employer V did not have any other employees, he never filed any Forms 941 and never withheld or paid any employment tax.

Employer V may correct the underpayment of FICA tax for each quarter in 2011 using the adjustment process because he failed to file the returns for 2011 due to his failure to treat any individuals as employees. However, because the error was not ascertained in the same year the wages were paid, Employer V may correct the underpayment of ITW using the adjustment process for each quarter in 2011 only if section 3509 applies to determine the FICA tax and ITW liability.

To make the adjustment for each quarter in 2011, Employer V must file a Form 941 and a Form 941–X for each quarter in 2011, as provided in the Instructions for Form 941–X. Employer V must file these returns by April 30, 2012 and pay the amount owed by the time he files the returns. If Employer V files by April 30, 2012 but does not pay by the time he files, interest will accrue from the date Form 941–X is filed until payment is made. Because Employer V ascertained the error prior to filing the return for the first quarter of 2012 there is no adjustment to be made for that quarter; however, Employer V must file his 2012 first quarter Form 941 and report and pay the correct amounts of FICA tax and ITW for that quarter and must file Forms 941 for any future quarters in which he pays wages to the bookkeeper or other employees.

Situation 6: Household Employer W timely filed his 2007 Form 1040, "*U.S. Individual Income Tax Return*," with an attached Schedule H (Form 1040), "*Household Employment Taxes*," on April 8, 2008, and timely paid all income and employment taxes reported on the return. On April 18, 2009, Household Employer W ascertains that he overwithheld and overpaid FICA tax on wages paid to a household employee on his 2007 return.

Household Employer W can choose between the adjustment and refund claim processes to correct the overpayment on his 2007 return because the error was ascertained more than 90 days before the expiration of the period of limitations on credit or refund. Regardless of the process chosen, Household Employer W must make the correction by filing Form 1040X, "*Amended U.S. Individual Income Tax Return*," and attaching a corrected Schedule H (Form 1040), as provided in Publication 926, *Household Employer's Tax Guide*. If Household Employer W chooses the refund claim process, the Form 1040X with the corrected Schedule H (Form 1040) must be filed by April 15, 2011. However, if Household Employer W chooses the adjustment process, the Form 1040X with the corrected Schedule H must be filed by January 15, 2011 under the 90 day rule.

If Household Employer W chooses the adjustment process, he must repay or reimburse his employee in the amount of the overcollection before filing the Form 1040X with the attached corrected Schedule H (Form 1040). Household Employer W can then adjust his return by indicating on the appropriate line of the Form 1040X that he wants the overpayment applied as a payment of estimated taxes on Form 1040, for the year in which the corrected Schedule H (Form 1040) is filed.

If Household Employer W chooses the refund claim process, he must either repay or reimburse his employee in the amount of the overcollection or obtain the employee's consent to file the claim for refund for the employee tax. Household Employer W can then claim a refund by indicating on the appropriate line of the Form 1040X that he wants the overpayment refunded. The overpayment will be refunded, plus any interest that applies, unless Household Employer W owes other taxes, penalties, or interest.

Situation 7: Employer X timely filed its 2006 Form 943 on January 26, 2007 and timely paid all employment tax reported on the return. On April 5, 2010, Employer X ascertains that it overpaid FICA tax on wages paid to its employees on its 2006 Form 943. Employer X does not have sufficient time to repay or reimburse its employees or obtain their consents and also timely file a claim for refund.

In order to correct the overpayment, Employer X must file Form 943–X, "*Adjusted Employer's Annual Federal Tax Return for Agricultural Employees or Claim for Refund*." Employer X may not

correct the error using the adjustment process because the error was ascertained too late for the adjusted return to be filed by January 15, 2010, as required under the 90-day rule. To correct the error using the refund claim process, Employer X must file Form 943–X by April 15, 2010 in order for the claim to be timely. Notwithstanding the fact that Employer X has not repaid or reimbursed its employees or obtained its employees' consents, if Employer X files Form 943–X by April 15, 2010, the claim will be considered timely filed. However, before the IRS can grant the claim, Employer X must certify that it has repaid or reimbursed its employees, or obtained their consents, and secured the employees' written statements confirming that the employees have not made any previous claims (or the claims were rejected) and will not make any future claims for refund or credit of the amount of the overcollected FICA tax.

Situation 8: In 2010, in the course of an employment tax examination, IRS determines that Employer Y underpaid FICA tax and ITW with respect to wages of its employees on its 2008 fourth quarter Form 941. Employer Y signs Form 2504 to agree to the assessment and submits it to the examiner, during the employment tax examination.

The determination by the IRS that Employer Y underpaid FICA tax and ITW on its 2008 fourth quarter Form 941 is treated as an error ascertained at the time Employer Y submits the signed Form 2504. Submitting a signed Form 2504 satisfies the requirement that an adjusted return be filed; therefore, Employer Y is entitled to an interest-free adjustment.

While the error was not ascertained in the same year that the wages were paid to the employees, the interest-free adjustment applies to both the FICA tax and ITW because the adjustment is reported on a signed Form 2504. In order for the adjustment to be entirely interest-free, Employer Y must pay the amount due when it submits the signed Form 2504. Otherwise, interest will accrue from the date Employer Y submits the signed Form 2504. Because an adjusted return (*i.e.*, Form 2504) was filed, even if payment is not made until after receipt of notice and demand, Employer Y is nevertheless entitled to interest-free treatment up to the date Employer Y submits the signed Form 2504; however, interest will accrue from the date the signed Form 2504 is submitted until the date of payment.

Situation 9: The same facts exist as in situation (8), except that Employer Y does not agree with the examiner's determination and exercises its appeal rights. No agreement is reached in Appeals. An Appeals closing letter, dated November 3, 2010, is sent to Employer Y informing Employer Y that it will receive notice and demand for payment of tax and interest owed and that it has the right to contest the Appeals' determination in the U.S. District Court or the U.S. Court of Federal Claims if it files a refund claim and later sues for a refund. The determination by Appeals that Employer Y underpaid FICA tax and ITW on its 2008 fourth quarter Form 941 is treated as an error ascertained on November 3, 2010, the date of the Appeals closing letter. Because Employer Y does not submit a signed Form 2504, an adjusted return has not been filed. As a result, no interest-free adjustment has been made, and Employer Y owes the amount due plus interest accrued from the due date of the return for which the underpayment was made (*i.e.,* January 31, 2009, the due date of the return for the 2008 fourth quarter Form 941). However, if Employer Y submits a signed Form 2504 by the due date of the return for the return period in which the error was ascertained (*i.e.,* January 31, 2011) and before receipt of notice and demand for payment, Employer Y is entitled to an interest-free adjustment. Submitting a signed Form 2504 will not prevent Employer Y from filing a refund claim to make it possible to contest its liability in the U.S. District Court or the U.S. Court of Federal Claims.

If Employer Y does not submit a signed Form 2504 by January 31, 2011, but pays the amount due prior to receiving notice and demand, Employer Y has not made an interest-free adjustment, and Employer Y will owe interest accrued from the due date of the return for which the underpayment was made (*i.e.,* from January 31, 2009).

Situation 10: In 2011, in the course of an employment tax examination, IRS determines that Employer Z misclassified some of its employees as independent contractors for the first quarter of 2009. Employer Z does not agree with the examiner's determination and exercises its appeal rights. No agreement is reached in Appeals, and Employer Z does not sign Form 2504–WC; however, Employer Z makes a cash bond deposit to stop the accrual of interest. A Notice of Determination is issued, and Employer Z subsequently files a petition with the U.S. Tax Court.

The error is treated as having been ascertained at the time Employer Z makes the cash bond deposit. Because Employer Z made a cash bond deposit prior to receiving the Notice of Determination, it is entitled to an interest-free adjustment.

EFFECT ON OTHER REVENUE RULING(S)

Rev. Rul. 75–464 is obsoleted.

DRAFTING INFORMATION

The principal author of this revenue ruling is Ligeia M. Donis of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding this revenue ruling, contact Ligeia M. Donis at (202) 622–0047 (not a toll-free call).

Section 6402.—Authority to Make Credits or Refunds

Final regulations modify the process for making claims for refund of overpayments of Federal Insurance Contribution Act (FICA) and Railroad Retirement Tax Act (RRTA) taxes under section 6402 of the Code. See Rev. Rul. 2009-39, page 951.

Section 6413.—Special Rules Applicable to Certain Employment Taxes

Final regulations modify the process for making interest-free adjustments for overpayments of Federal Insurance Contribution Act (FICA) and Railroad Retirement Tax Act (RRTA) taxes and Federal income tax withholding (ITW) under section 6413(a) of the Code. See Rev. Rul. 2009-39, page 951.

Section 6414.—Income Tax Withheld

Final regulations modify the process for making claims for refund of overpayments of Federal income tax withholding (ITW) under section 6414 of the Code. See Rev. Rul. 2009-39, page 951.

Section 6621.—Determination of Rate of Interest

26 CFR 301.6621–1: Interest rate.

Interest rates; underpayment and overpayments. The rate for interest determined under section 6621 of the Code for the calendar quarter beginning January 1, 2010, will be 4 percent for overpayments (3 percent in the case of a corporation), 4 percent for underpayments, and 6 percent for large corporate underpayments. The rate of interest paid on the portion of a corporate overpayment exceeding $10,000 will be 1.5 percent.

Rev. Rul. 2009–37

Section 6621 of the Internal Revenue Code establishes the rates for interest on tax overpayments and tax underpayments. Under section 6621(a)(1), the overpayment rate is the sum of the federal short-term rate plus 3 percentage points (2 percentage points in the case of a corporation), except the rate for the portion of a corporate overpayment of tax exceeding $10,000 for a taxable period is the sum of the federal short-term rate plus 0.5 of a percentage point. Under section 6621(a)(2), the underpayment rate is the sum of the federal short-term rate plus 3 percentage points.

Section 6621(c) provides that for purposes of interest payable under section 6601 on any large corporate underpayment, the underpayment rate under section 6621(a)(2) is determined by substituting "5 percentage points" for "3 percentage points." See section 6621(c) and section 301.6621–3 of the Regulations on Procedure and Administration for the definition of a large corporate underpayment and for the rules for determining the applicable date. Section 6621(c) and section 301.6621–3 are generally effective for periods after December 31, 1990.

Section 6621(b)(1) provides that the Secretary will determine the federal short-term rate for the first month in each calendar quarter. Section 6621(b)(2)(A) provides that the federal short-term rate determined under section 6621(b)(1) for any month applies during the first calendar quarter beginning after that month. Section 6621(b)(2)(B) provides that in determining the addition to tax under section 6654 for failure to pay estimated tax for any taxable year, the federal short-term rate that applies during the third month following the taxable year also applies during the first 15 days of the fourth month following the taxable year. Section 6621(b)(3) provides that the federal short-term rate for any month is the federal short-term rate determined during that month by the Secretary in accordance with section 1274(d), rounded to the nearest full percent (or, if a multiple of 1/2 of 1 percent, the rate is increased to the next highest full percent).

Notice 88–59, 1988–1 C.B. 546, announced that, in determining the quarterly interest rates to be used for overpayments and underpayments of tax under section 6621, the Internal Revenue Service will use the federal short-term rate based on daily compounding because that rate is most consistent with section 6621 which, pursuant to section 6622, is subject to daily compounding.

The federal short-term rate determined in accordance with section 1274(d) during October 2009 is the rate published in Revenue Ruling 2009–35, 2009–44 I.R.B. 568, to take effect beginning November 1, 2009. The federal short-term rate, rounded to the nearest full percent, based on daily compounding determined during the month of October 2009 is 1 percent. Accordingly, an overpayment rate of 4 percent (3 percent in the case of a corporation) and an underpayment rate of 4 percent are established for the calendar quarter beginning January 1, 2010. The overpayment rate for the portion of a corporate overpayment exceeding $10,000 for the calendar quarter beginning January 1, 2010, is 1.5 percent. The underpayment rate for large corporate underpayments for the calendar quarter beginning January 1, 2010, is 6 percent. These rates apply to amounts bearing interest during that calendar quarter.

Under section 6621(b)(2)(B), the 4 percent rate also applies to estimated tax underpayments for the first calendar quarter in 2010 and for the first 15 days in April 2010.

Interest factors for daily compound interest for annual rates of 1.5 percent, 3 percent, 4 percent, and 6 percent are published in Tables 8, 11, 13, and 17 of Rev. Proc. 95–17, 1995–1 C.B. 556, 562, 565, 567, and 571.

Annual interest rates to be compounded daily pursuant to section 6622 that apply for prior periods are set forth in the tables accompanying this revenue ruling.

DRAFTING INFORMATION

The principal author of this revenue ruling is Deborah Colbert-James of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue ruling, contact Ms. Colbert-James at (202) 622–8143 (not a toll-free call).

TABLE OF INTEREST RATES

PERIODS BEFORE JUL. 1, 1975 — PERIODS ENDING DEC. 31, 1986

OVERPAYMENTS AND UNDERPAYMENTS

PERIOD	RATE	In 1995–1 C.B. DAILY RATE TABLE
Before Jul. 1, 1975	6%	Table 2, pg. 557
Jul. 1, 1975—Jan. 31, 1976	9%	Table 4, pg. 559
Feb. 1, 1976—Jan. 31, 1978	7%	Table 3, pg. 558
Feb. 1, 1978—Jan. 31, 1980	6%	Table 2, pg. 557
Feb. 1, 1980—Jan. 31, 1982	12%	Table 5, pg. 560
Feb. 1, 1982—Dec. 31, 1982	20%	Table 6, pg. 560

TABLE OF INTEREST RATES

PERIODS BEFORE JUL. 1, 1975 — PERIODS ENDING DEC. 31, 1986

OVERPAYMENTS AND UNDERPAYMENTS – Continued

PERIOD	RATE	In 1995–1 C.B. DAILY RATE TABLE
Jan. 1, 1986—Jun. 30, 1986	10%	Table 25, pg. 579
Jul. 1, 1986—Dec. 31, 1986	9%	Table 23, pg. 577

TABLE OF INTEREST RATES

FROM JAN. 1, 1987 — Dec. 31, 1998

	OVERPAYMENTS			UNDERPAYMENTS		
		1995–1 C.B.			1995–1 C.B.	
	RATE	TABLE	PG	RATE	TABLE	PG
Jan. 1, 1987—Mar. 31, 1987	8%	21	575	9%	23	577
Apr. 1, 1987—Jun. 30, 1987	8%	21	575	9%	23	577
Jul. 1, 1987—Sep. 30, 1987	8%	21	575	9%	23	577
Oct. 1, 1987—Dec. 31, 1987	9%	23	577	10%	25	579
Jan. 1, 1988—Mar. 31, 1988	10%	73	627	11%	75	629
Apr. 1, 1988—Jun. 30, 1988	9%	71	625	10%	73	627
Jul. 1, 1988—Sep. 30, 1988	9%	71	625	10%	73	627
Oct. 1, 1988—Dec. 31, 1988	10%	73	627	11%	75	629
Jan. 1, 1989—Mar. 31, 1989	10%	25	579	11%	27	581
Apr. 1, 1989—Jun. 30, 1989	11%	27	581	12%	29	583
Jul. 1, 1989—Sep. 30, 1989	11%	27	581	12%	29	583
Oct. 1, 1989—Dec. 31, 1989	10%	25	579	11%	27	581
Jan. 1, 1990—Mar. 31, 1990	10%	25	579	11%	27	581
Apr. 1, 1990—Jun. 30, 1990	10%	25	579	11%	27	581
Jul. 1, 1990—Sep. 30, 1990	10%	25	579	11%	27	581
Oct. 1, 1990—Dec. 31, 1990	10%	25	579	11%	27	581
Jan. 1, 1991—Mar. 31, 1991	10%	25	579	11%	27	581
Apr. 1, 1991—Jun. 30, 1991	9%	23	577	10%	25	579
Jul. 1, 1991—Sep. 30, 1991	9%	23	577	10%	25	579
Oct. 1, 1991—Dec. 31, 1991	9%	23	577	10%	25	579
Jan. 1, 1992—Mar. 31, 1992	8%	69	623	9%	71	625
Apr. 1, 1992—Jun. 30, 1992	7%	67	621	8%	69	623
Jul. 1, 1992—Sep. 30, 1992	7%	67	621	8%	69	623
Oct. 1, 1992—Dec. 31, 1992	6%	65	619	7%	67	621
Jan. 1, 1993—Mar. 31, 1993	6%	17	571	7%	19	573
Apr. 1, 1993—Jun. 30, 1993	6%	17	571	7%	19	573
Jul. 1, 1993—Sep. 30, 1993	6%	17	571	7%	19	573
Oct. 1, 1993—Dec. 31, 1993	6%	17	571	7%	19	573
Jan. 1, 1994—Mar. 31, 1994	6%	17	571	7%	19	573
Apr. 1, 1994—Jun. 30, 1994	6%	17	571	7%	19	573
Jul. 1, 1994—Sep. 30, 1994	7%	19	573	8%	21	575
Oct. 1, 1994—Dec. 31, 1994	8%	21	575	9%	23	577
Jan. 1, 1995—Mar. 31, 1995	8%	21	575	9%	23	577
Apr. 1, 1995—Jun. 30, 1995	9%	23	577	10%	25	579
Jul. 1, 1995—Sep. 30, 1995	8%	21	575	9%	23	577
Oct. 1, 1995—Dec. 31, 1995	8%	21	575	9%	23	577
Jan. 1, 1996—Mar. 31, 1996	8%	69	623	9%	71	625
Apr. 1, 1996—Jun. 30, 1996	7%	67	621	8%	69	623
Jul. 1, 1996—Sep. 30, 1996	8%	69	623	9%	71	625
Oct. 1, 1996—Dec. 31, 1996	8%	69	623	9%	71	625
Jan. 1, 1997—Mar. 31, 1997	8%	21	575	9%	23	577
Apr. 1, 1997—Jun. 30, 1997	8%	21	575	9%	23	577
Jul. 1, 1997—Sep. 30, 1997	8%	21	575	9%	23	577

TABLE OF INTEREST RATES

FROM JAN. 1, 1987 — Dec. 31, 1998 – Continued

	OVERPAYMENTS			UNDERPAYMENTS		
		1995–1 C.B.			1995–1 C.B.	
	RATE	TABLE	PG	RATE	TABLE	PG
Oct. 1, 1997—Dec. 31, 1997	8%	21	575	9%	23	577
Jan. 1, 1998—Mar. 31, 1998	8%	21	575	9%	23	577
Apr. 1, 1998—Jun. 30, 1998	7%	19	573	8%	21	575
Jul. 1, 1998—Sep. 30, 1998	7%	19	573	8%	21	575
Oct. 1, 1998—Dec. 31, 1998	7%	19	573	8%	21	575

TABLE OF INTEREST RATES

FROM JANUARY 1, 1999 — PRESENT

NONCORPORATE OVERPAYMENTS AND UNDERPAYMENTS

		1995–1 C.B.	
	RATE	TABLE	PG
Jan. 1, 1999—Mar. 31, 1999	7%	19	573
Apr. 1, 1999—Jun. 30, 1999	8%	21	575
Jul. 1, 1999—Sep. 30, 1999	8%	21	575
Oct. 1, 1999—Dec. 31, 1999	8%	21	575
Jan. 1, 2000—Mar. 31, 2000	8%	69	623
Apr. 1, 2000—Jun. 30, 2000	9%	71	625
Jul. 1, 2000—Sep. 30, 2000	9%	71	625
Oct. 1, 2000—Dec. 31, 2000	9%	71	625
Jan. 1, 2001—Mar. 31, 2001	9%	23	577
Apr. 1, 2001—Jun. 30, 2001	8%	21	575
Jul. 1, 2001—Sep. 30, 2001	7%	19	573
Oct. 1, 2001—Dec. 31, 2001	7%	19	573
Jan. 1, 2002—Mar. 31, 2002	6%	17	571
Apr. 1, 2002—Jun. 30, 2002	6%	17	571
Jul. 1, 2002—Sep. 30, 2002	6%	17	571
Oct. 1, 2002—Dec. 31, 2002	6%	17	571
Jan. 1, 2003—Mar. 31, 2003	5%	15	569
Apr. 1, 2003—Jun. 30, 2003	5%	15	569
Jul. 1, 2003—Sep. 30, 2003	5%	15	569
Oct. 1, 2003—Dec. 31, 2003	4%	13	567
Jan. 1, 2004—Mar. 31, 2004	4%	61	615
Apr. 1, 2004—Jun. 30, 2004	5%	63	617
Jul. 1, 2004—Sep. 30, 2004	4%	61	615
Oct. 1, 2004—Dec. 31, 2004	5%	63	617
Jan. 1, 2005—Mar. 31, 2005	5%	15	569
Apr. 1, 2005—Jun. 30, 2005	6%	17	571
Jul. 1, 2005—Sep. 30, 2005	6%	17	571
Oct. 1, 2005—Dec. 31, 2005	7%	19	573
Jan. 1, 2006—Mar. 31, 2006	7%	19	573
Apr. 1, 2006—Jun. 30, 2006	7%	19	573
Jul. 1, 2006—Sep. 30, 2006	8%	21	575
Oct. 1, 2006—Dec. 31, 2006	8%	21	575
Jan. 1, 2007—Mar. 31, 2007	8%	21	575
Apr. 1, 2007—Jun. 30, 2007	8%	21	575
Jul. 1, 2007—Sep. 30, 2007	8%	21	575
Oct. 1, 2007—Dec. 31, 2007	8%	21	575
Jan. 1, 2008—Mar. 31, 2008	7%	67	621
Apr. 1, 2008—Jun. 30, 2008	6%	65	619
Jul. 1, 2008—Sep. 30, 2008	5%	63	617
Oct. 1, 2008—Dec. 31, 2008	6%	65	619

TABLE OF INTEREST RATES

FROM JANUARY 1, 1999 — PRESENT

NONCORPORATE OVERPAYMENTS AND UNDERPAYMENTS – Continued

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 2009—Mar. 31, 2009	5%	15	569
Apr. 1, 2009—Jun. 30, 2009	4%	13	567
Jul. 1, 2009—Sep. 30, 2009	4%	13	567
Oct. 1, 2009—Dec. 31, 2009	4%	13	567
Jan. 1, 2010—Mar. 31, 2010	4%	13	567

TABLE OF INTEREST RATES

FROM JANUARY 1, 1999 — PRESENT

CORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	OVERPAYMENTS			UNDERPAYMENTS		
		1995–1 C.B.			1995–1 C.B.	
	RATE	TABLE	PG	RATE	TABLE	PG
Jan. 1, 1999—Mar. 31, 1999	6%	17	571	7%	19	573
Apr. 1, 1999—Jun. 30, 1999	7%	19	573	8%	21	575
Jul. 1, 1999—Sep. 30, 1999	7%	19	573	8%	21	575
Oct. 1, 1999—Dec. 31, 1999	7%	19	573	8%	21	575
Jan. 1, 2000—Mar. 31, 2000	7%	67	621	8%	69	623
Apr. 1, 2000—Jun. 30, 2000	8%	69	623	9%	71	625
Jul. 1, 2000—Sep. 30, 2000	8%	69	623	9%	71	625
Oct. 1, 2000—Dec. 31, 2000	8%	69	623	9%	71	625
Jan. 1, 2001—Mar. 31, 2001	8%	21	575	9%	23	577
Apr. 1, 2001—Jun. 30, 2001	7%	19	573	8%	21	575
Jul. 1, 2001—Sep. 30, 2001	6%	17	571	7%	19	573
Oct. 1, 2001—Dec. 31, 2001	6%	17	571	7%	19	573
Jan. 1, 2002—Mar. 31, 2002	5%	15	569	6%	17	571
Apr. 1, 2002—Jun. 30, 2002	5%	15	569	6%	17	571
Jul. 1, 2002—Sep. 30, 2002	5%	15	569	6%	17	571
Oct. 1, 2002—Dec. 31, 2002	5%	15	569	6%	17	571
Jan. 1, 2003—Mar. 31, 2003	4%	13	567	5%	15	569
Apr. 1, 2003—Jun. 30, 2003	4%	13	567	5%	15	569
Jul. 1, 2003—Sep. 30, 2003	4%	13	567	5%	15	569
Oct. 1, 2003—Dec. 31, 2003	3%	11	565	4%	13	567
Jan. 1, 2004—Mar. 31, 2004	3%	59	613	4%	61	615
Apr. 1, 2004—Jun. 30, 2004	4%	61	615	5%	63	617
Jul. 1, 2004—Sep. 30, 2004	3%	59	613	4%	61	615
Oct. 1, 2004—Dec. 31, 2004	4%	61	615	5%	63	617
Jan. 1, 2005—Mar. 31, 2005	4%	13	567	5%	15	569
Apr. 1, 2005—Jun. 30, 2005	5%	15	569	6%	17	571
Jul. 1, 2005—Sep. 30, 2005	5%	15	569	6%	17	571
Oct. 1, 2005—Dec. 31, 2005	6%	17	571	7%	19	573
Jan. 1, 2006—Mar. 31, 2006	6%	17	571	7%	19	573
Apr. 1, 2006—Jun. 30, 2006	6%	17	571	7%	19	573
Jul. 1, 2006—Sep. 30, 2006	7%	19	573	8%	21	575
Oct. 1, 2006—Dec. 31, 2006	7%	19	573	8%	21	575
Jan. 1, 2007—Mar. 31, 2007	7%	19	573	8%	21	575
Apr. 1, 2007—Jun. 30, 2007	7%	19	573	8%	21	575
Jul. 1, 2007—Sep. 30, 2007	7%	19	573	8%	21	575
Oct. 1, 2007—Dec. 31, 2007	7%	19	573	8%	21	575
Jan. 1, 2008—Mar. 31, 2008	6%	65	619	7%	67	621
Apr. 1, 2008—Jun. 30, 2008	5%	63	617	6%	65	619
Jul. 1, 2008—Sep. 30, 2008	4%	61	615	5%	63	617

TABLE OF INTEREST RATES

FROM JANUARY 1, 1999 — PRESENT

CORPORATE OVERPAYMENTS AND UNDERPAYMENTS – Continued

	OVERPAYMENTS			UNDERPAYMENTS		
		1995–1 C.B.			1995–1 C.B.	
	RATE	TABLE	PG	RATE	TABLE	PG
Oct. 1, 2008—Dec. 31, 2008	5%	63	617	6%	65	619
Jan. 1, 2009—Mar. 31, 2009	4%	13	567	5%	15	569
Apr. 1, 2009—Jun. 30, 2009	3%	11	565	4%	13	567
Jul. 1, 2009—Sep. 30, 2009	3%	11	565	4%	13	567
Oct. 1, 2009—Dec. 31, 2009	3%	11	565	4%	13	567
Jan. 1, 2010—Mar. 31, 2010	3%	11	565	4%	13	567

TABLE OF INTEREST RATES FOR
LARGE CORPORATE UNDERPAYMENTS

FROM JANUARY 1, 1991 — PRESENT

		1995–1 C.B.	
	RATE	TABLE	PG
Jan. 1, 1991—Mar. 31, 1991	13%	31	585
Apr. 1, 1991—Jun. 30, 1991	12%	29	583
Jul. 1, 1991—Sep. 30, 1991	12%	29	583
Oct. 1, 1991—Dec. 31, 1991	12%	29	583
Jan. 1, 1992—Mar. 31, 1992	11%	75	629
Apr. 1, 1992—Jun. 30, 1992	10%	73	627
Jul. 1, 1992—Sep. 30, 1992	10%	73	627
Oct. 1, 1992—Dec. 31, 1992	9%	71	625
Jan. 1, 1993—Mar. 31, 1993	9%	23	577
Apr. 1, 1993—Jun. 30, 1993	9%	23	577
Jul. 1, 1993—Sep. 30, 1993	9%	23	577
Oct. 1, 1993—Dec. 31, 1993	9%	23	577
Jan. 1, 1994—Mar. 31, 1994	9%	23	577
Apr. 1, 1994—Jun. 30, 1994	9%	23	577
Jul. 1, 1994—Sep. 30, 1994	10%	25	579
Oct. 1, 1994—Dec. 31, 1994	11%	27	581
Jan. 1, 1995—Mar. 31, 1995	11%	27	581
Apr. 1, 1995—Jun. 30, 1995	12%	29	583
Jul. 1, 1995—Sep. 30, 1995	11%	27	581
Oct. 1, 1995—Dec. 31, 1995	11%	27	581
Jan. 1, 1996—Mar. 31, 1996	11%	75	629
Apr. 1, 1996—Jun. 30, 1996	10%	73	627
Jul. 1, 1996—Sep. 30, 1996	11%	75	629
Oct. 1, 1996—Dec. 31, 1996	11%	75	629
Jan. 1, 1997—Mar. 31, 1997	11%	27	581
Apr. 1, 1997—Jun. 30, 1997	11%	27	581
Jul. 1, 1997—Sep. 30, 1997	11%	27	581
Oct. 1, 1997—Dec. 31, 1997	11%	27	581
Jan. 1, 1998—Mar. 31, 1998	11%	27	581
Apr. 1, 1998—Jun. 30, 1998	10%	25	579
Jul. 1, 1998—Sep. 30, 1998	10%	25	579
Oct. 1, 1998—Dec. 31, 1998	10%	25	579
Jan. 1, 1999—Mar. 31, 1999	9%	23	577
Apr. 1, 1999—Jun. 30, 1999	10%	25	579
Jul. 1, 1999—Sep. 30, 1999	10%	25	579
Oct. 1, 1999—Dec. 31, 1999	10%	25	579
Jan. 1, 2000—Mar. 31, 2000	10%	73	627
Apr. 1, 2000—Jun. 30, 2000	11%	75	629
Jul. 1, 2000—Sep. 30, 2000	11%	75	629

TABLE OF INTEREST RATES FOR
LARGE CORPORATE UNDERPAYMENTS

FROM JANUARY 1, 1991 — PRESENT – Continued

	RATE	1995–1 C.B. TABLE	PG
Oct. 1, 2000—Dec. 31, 2000	11%	75	629
Jan. 1, 2001—Mar. 31, 2001	11%	27	581
Apr. 1, 2001—Jun. 30, 2001	10%	25	579
Jul. 1, 2001—Sep. 30, 2001	9%	23	577
Oct. 1, 2001—Dec. 31, 2001	9%	23	577
Jan. 1, 2002—Mar. 31, 2002	8%	21	575
Apr. 1, 2002—Jun. 30, 2002	8%	21	575
Jul. 1, 2002—Sep. 30, 2002	8%	21	575
Oct. 1, 2002—Dec. 30, 2002	8%	21	575
Jan. 1, 2003—Mar. 31, 2003	7%	19	573
Apr. 1, 2003—Jun. 30, 2003	7%	19	573
Jul. 1, 2003—Sep. 30, 2003	7%	19	573
Oct. 1, 2003—Dec. 31, 2003	6%	17	571
Jan. 1, 2004—Mar. 31, 2004	6%	65	619
Apr. 1, 2004—Jun. 30, 2004	7%	67	621
Jul. 1, 2004—Sep. 30, 2004	6%	65	619
Oct. 1, 2004—Dec. 31, 2004	7%	67	621
Jan. 1, 2005—Mar. 31, 2005	7%	19	573
Apr. 1, 2005—Jun. 30, 2005	8%	21	575
Jul. 1, 2005—Sep. 30, 2005	8%	21	575
Oct. 1, 2005—Dec. 31, 2005	9%	23	577
Jan. 1, 2006—Mar. 31, 2006	9%	23	577
Apr. 1, 2006—Jun. 30, 2006	9%	23	577
Jul. 1, 2006—Sep. 30, 2006	10%	25	579
Oct. 1, 2006—Dec. 31, 2006	10%	25	579
Jan. 1, 2007—Mar. 31, 2007	10%	25	579
Apr. 1, 2007—Jun. 30, 2007	10%	25	579
Jul. 1, 2007—Sep. 30, 2007	10%	25	579
Oct. 1, 2007—Dec. 31, 2007	10%	25	579
Jan. 1, 2008—Mar. 31, 2008	9%	71	625
Apr. 1, 2008—Jun. 30, 2008	8%	69	623
Jul. 1, 2008—Sep. 30, 2008	7%	67	621
Oct. 1, 2008—Dec. 31, 2008	8%	69	623
Jan. 1, 2009—Mar. 31, 2009	7%	19	573
Apr. 1, 2009—Jun. 30, 2009	6%	17	571
Jul. 1, 2009—Sep. 30, 2009	6%	17	571
Oct. 1, 2009—Dec. 31, 2009	6%	17	571
Jan. 1, 2010—Mar. 31, 2010	6%	17	571

TABLE OF INTEREST RATES FOR CORPORATE
OVERPAYMENTS EXCEEDING $10,000

FROM JANUARY 1, 1995 — PRESENT

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 1995—Mar. 31, 1995	6.5%	18	572
Apr. 1, 1995—Jun. 30, 1995	7.5%	20	574
Jul. 1, 1995—Sep. 30, 1995	6.5%	18	572
Oct. 1, 1995—Dec. 31, 1995	6.5%	18	572
Jan. 1, 1996—Mar. 31, 1996	6.5%	66	620
Apr. 1, 1996—Jun. 30, 1996	5.5%	64	618
Jul. 1, 1996—Sep. 30, 1996	6.5%	66	620
Oct. 1, 1996—Dec. 31, 1996	6.5%	66	620
Jan. 1, 1997—Mar. 31, 1997	6.5%	18	572

TABLE OF INTEREST RATES FOR CORPORATE OVERPAYMENTS EXCEEDING $10,000

FROM JANUARY 1, 1995 — PRESENT – Continued

	RATE	1995–1 C.B. TABLE	PG
Apr. 1, 1997—Jun. 30, 1997	6.5%	18	572
Jul. 1, 1997—Sep. 30, 1997	6.5%	18	572
Oct. 1, 1997—Dec. 31, 1997	6.5%	18	572
Jan. 1, 1998—Mar. 31, 1998	6.5%	18	572
Apr. 1, 1998—Jun. 30, 1998	5.5%	16	570
Jul. 1, 1998—Sep. 30, 1998	5.5%	16	570
Oct. 1, 1998—Dec. 31, 1998	5.5%	16	570
Jan. 1, 1999—Mar. 31, 1999	4.5%	14	568
Apr. 1, 1999—Jun. 30, 1999	5.5%	16	570
Jul. 1, 1999—Sep. 30, 1999	5.5%	16	570
Oct. 1, 1999—Dec. 31, 1999	5.5%	16	570
Jan. 1, 2000—Mar. 31, 2000	5.5%	64	618
Apr. 1, 2000—Jun. 30, 2000	6.5%	66	620
Jul. 1, 2000—Sep. 30, 2000	6.5%	66	620
Oct. 1, 2000—Dec. 31, 2000	6.5%	66	620
Jan. 1, 2001—Mar. 31, 2001	6.5%	18	572
Apr. 1, 2001—Jun. 30, 2001	5.5%	16	570
Jul. 1, 2001—Sep. 30, 2001	4.5%	14	568
Oct. 1, 2001—Dec. 31, 2001	4.5%	14	568
Jan. 1, 2002—Mar. 31, 2002	3.5%	12	566
Apr. 1, 2002—Jun. 30, 2002	3.5%	12	566
Jul. 1, 2002—Sep. 30, 2002	3.5%	12	566
Oct. 1, 2002—Dec. 31, 2002	3.5%	12	566
Jan. 1, 2003—Mar. 31, 2003	2.5%	10	564
Apr. 1, 2003—Jun. 30, 2003	2.5%	10	564
Jul. 1, 2003—Sep. 30, 2003	2.5%	10	564
Oct. 1, 2003—Dec. 31, 2003	1.5%	8	562
Jan. 1, 2004—Mar. 31, 2004	1.5%	56	610
Apr. 1, 2004—Jun. 30, 2004	2.5%	58	612
Jul. 1, 2004—Sep. 30, 2004	1.5%	56	610
Oct. 1, 2004—Dec. 31, 2004	2.5%	58	612
Jan. 1, 2005—Mar. 31, 2005	2.5%	10	564
Apr. 1, 2005—Jun. 30, 2005	3.5%	12	566
Jul. 1, 2005—Sep. 30, 2005	3.5%	12	566
Oct. 1, 2005—Dec. 31, 2005	4.5%	14	568
Jan. 1, 2006—Mar. 31, 2006	4.5%	14	568
Apr. 1, 2006—Jun. 30, 2006	4.5%	14	568
Jul. 1, 2006—Sep. 30, 2006	5.5%	16	570
Oct. 1, 2006—Dec. 31, 2006	5.5%	16	570
Jan. 1, 2007—Mar. 31, 2007	5.5%	16	570
Apr. 1, 2007—Jun. 30, 2007	5.5%	16	570
Jul. 1, 2007—Sep. 30, 2007	5.5%	16	570
Oct. 1, 2007—Dec. 31, 2007	5.5%	16	570
Jan. 1, 2008—Mar. 31, 2008	4.5%	62	616
Apr. 1, 2008—Jun. 30, 2008	3.5%	60	614
Jul. 1, 2008—Sep. 30, 2008	2.5%	58	612
Oct. 1, 2008—Dec. 31, 2008	3.5%	60	614
Jan. 1, 2009—Mar. 31, 2009	2.5%	10	564
Apr. 1, 2009—Jun. 30, 2009	1.5%	8	562
Jul. 1, 2009—Sep. 30, 2009	1.5%	8	562
Oct. 1, 2009—Dec. 31, 2009	1.5%	8	562
Jan. 1, 2010—Mar. 31, 2010	1.5%	8	562

Part III. Administrative, Procedural, and Miscellaneous

Guidance on the Application of § 409A(a) to Changes to Nonqualified Deferred Compensation Plans to Comply with an Advisory Opinion of the Office of the Special Master for TARP Executive Compensation

Notice 2009–92

I. Introduction

This notice provides that, subject to certain conditions, the compliance by a financial institution (TARP recipient) that has received financial assistance under the Troubled Asset Relief Program (TARP) with an advisory opinion of the Office of the Special Master for TARP Executive Compensation (the Special Master) determining that changing the time or form of payment of compensation to a service provider of the TARP recipient, or conditioning payment upon a TARP-related condition such as the prior repayment of some or all of the financial assistance, or both, is necessary for the payment or arrangement to be consistent with the standards set forth in Treasury's Interim Final Rule for TARP Compensation and Corporate Governance (74 FR 28394), will not result in a failure to comply with the requirements of § 409A(a) of the Internal Revenue Code (Code). This notice applies only to TARP recipients and the service providers of such TARP recipients and only to the extent that the compensation paid by the TARP recipient to a service provider of that TARP recipient is addressed by an advisory opinion of the Special Master issued after September 30, 2009. The Treasury Department and the IRS intend to amend the regulations under § 409A to incorporate guidance set forth in this notice as necessary.

II. Background

A. *Section 409A of the Code*

Section 409A prescribes certain requirements applicable to nonqualified deferred compensation plans. If a plan does not meet those requirements, participants in the plan are required to include in income immediately compensation otherwise deferred under the plan and pay taxes on such income, including an additional 20% tax and a tax generally based upon the underpayment interest that would have accrued had the amount been includible in income when first deferred or, if later, vested. As provided by § 409A(a)(1)(A)(i), a nonqualified deferred compensation plan must comply with the requirements of § 409A(a) both in form and in operation. Section 409A(e) provides that the Secretary of the Treasury (Secretary) shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of § 409A. On April 17, 2007, the Treasury Department and the IRS issued final regulations under § 409A that apply to taxable years beginning on or after January 1, 2009 (72 Fed. Reg. 19234).

Section 409A(a)(4) provides certain rules with respect to making an election to defer compensation under a nonqualified deferred compensation plan. Section 409A(a)(4)(B)(i) provides generally that a plan may permit compensation for services performed during a taxable year to be deferred at the participant's election only if the election to defer such compensation is made not later than the close of the preceding taxable year or at such other time as is provided in regulations. Section 409A(a)(4)(C) provides that a nonqualified deferred compensation plan that permits, under a subsequent election (a subsequent deferral election), a delay in a payment or a change in the form of payment must require that (i) such election will not take effect until at least 12 months after the date on which the election is made, (ii) in the case of an election related to a payment not made on account of disability, death or the occurrence of an unforeseeable emergency, the payment governed by the election will be deferred for a period of not less than five years from the date the payment would otherwise have been made, and (iii) any election related to a payment to be made at a specified time or pursuant to a fixed schedule will be made not less than 12 months prior to the date of the first scheduled payment.

Section 1.409A–2(b)(7) of the Income Tax Regulations provides that a payment may be delayed to a date after a designated payment date under certain circumstances, and that in these circumstances the applicable plan provision will not fail to meet the requirements of establishing a permissible payment event and the delay in the payment will not constitute a subsequent deferral election, as long as the service recipient treats all payments to similarly situated service providers on a reasonably consistent basis. Such circumstances include (i) the delay of payments subject to § 162(m) to the extent the service recipient reasonably anticipates that if the payments were made as scheduled, the service recipient's deduction with respect to such payments would not be permitted due to the application of § 162(m), (ii) the delay of payments to the extent the service recipient reasonably anticipates that making the payments will violate Federal securities laws or other applicable law, and (iii) such other events and conditions as the Commissioner may prescribe in generally applicable guidance published in the Internal Revenue Bulletin.

Section 409A(a)(3) provides that, except as provided in regulations issued by the Secretary, a nonqualified deferred compensation plan may not permit the acceleration of the time or schedule of payment of compensation deferred under the plan. Section 1.409A–3(j) further provides that a nonqualified deferred compensation plan may not permit the acceleration of the time or schedule of any payment, and no such accelerated payment may be made whether or not provided for under the terms of the plan, except pursuant to one of the exceptions set forth under such section.

Under § 1.409A–1(b)(4), an amount that constitutes a short-term deferral is not a deferral of compensation for purposes of § 409A. Generally, an amount must be paid not later than the end of the applicable 2½ month period (as defined in § 1.409A–1(b)(4)) in order to qualify as a short-term deferral. The applicable 2½ month period is the period ending on the 15th day of the third month following the later of the end of the service provider's first taxable year in which the right to payment is no longer subject to a substantial risk of forfeiture or the end of the service

recipient's first taxable year in which such right is no longer subject to such risk. Under § 1.409A–1(b)(4)(ii), a payment that otherwise qualifies as a short-term deferral but is made after the applicable 2½ month period may continue to so qualify if (i) it was administratively impracticable to make the payment by the end of such period and, as of the date the legally binding right to the compensation arose, such impracticability was unforeseeable, provided that the payment is made as soon as administratively practicable or (ii) making such payment by the end of such period would have jeopardized the ability of the service recipient to continue as a going concern, provided that the payment is made as soon as it would no longer have such effect. In addition, such a payment may continue to so qualify if the service recipient reasonably anticipates that § 162(m) would disallow its deduction for such payment and, at the time the legally binding right to the payment arose, a reasonable person would not have anticipated such disallowance, so long as the payment is made as soon as reasonably practicable following the first date on which the service recipient anticipates or reasonably should anticipate that, if it made the payment on such date, § 162(m) would not limit its ability to deduct the payment.

B. *The Troubled Asset Relief Program (TARP)*

In October, 2008, the Department of the Treasury (Treasury) established the TARP under the Emergency Economic Stabilization Act of 2008, as amended (12 U.S.C. 5021 *et seq.*) (EESA). EESA provided immediate authority and facilities that the Secretary of the Treasury (Secretary) could use to restore liquidity and stability to the financial system. Section 101(a) of EESA authorizes the Secretary to establish the TARP to "purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and policies and procedures developed and published by the Secretary." Section 101(c) of EESA authorizes the Secretary to take such actions as the Secretary deems necessary to carry out the authorities in EESA, including without limitation issuing such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of EESA.

The American Recovery and Reinvestment Act of 2009 (ARRA) was signed into law on February 17, 2009. Title VII of Division B of ARRA amended in its entirety section 111 of EESA. Section 111 of EESA, both as originally promulgated and as amended, provides that certain entities that receive financial assistance from Treasury under the TARP (TARP recipients) will be subject to specified executive compensation and corporate governance standards to be established by the Secretary.

C. *The Interim Final Rule and the Office of the Special Master for TARP Executive Compensation*

On June 15, 2009, Treasury issued an Interim Final Rule setting forth the rules on executive compensation and corporate governance applicable to TARP recipients (74 FR 28394). The rules apply solely to TARP recipients, as defined in §30.1 (Q–1) of the Interim Final Rule. Section 30.16 (Q–16) of the Interim Final Rule establishes an Office of the Special Master for TARP Executive Compensation (the Special Master). Sections 30.11 and 30.16(a) (Q–11 and Q–16(a)) provide that the Special Master must approve any compensation payments to, and the compensation structure of, certain employees of a TARP recipient receiving exceptional assistance (Exceptional Assistance Recipient). The employees affected generally are the employees subject to the bonus payment limitations under section 111(b)(3)(D) of EESA, who generally are the TARP recipient's senior executive officers (SEOs) whose compensation is subject to disclosure under Securities and Exchange Commission rules, and a number (determined by the level of TARP assistance received) of the next most highly compensated employees. In addition, the Special Master must approve the compensation structures of any other executive officers of the Exceptional Assistance Recipient, and certain other most highly compensated employees. Section 30.16(a)(3) (Q–16(a)(3)) provides that this determination is based upon whether the compensation structure for the affected employee, including in certain instances the amount payable or potentially payable under such compensation structure, will or may result in payments that are inconsistent with the purposes of section 111 of EESA or TARP, or are otherwise contrary to the public interest. For TARP recipients that are not Exceptional Assistance Recipients and their employees, and for other employees or payments to employees of Exceptional Assistance Recipients (such as payments not subject to section 111 of EESA), section 30.16(a)(4) (Q–16(a)(4)) provides that a TARP recipient or TARP recipient employee may request an advisory opinion from the Special Master as to whether a compensation structure is, or will or may result in payments that are, inconsistent with the purposes of EESA or TARP, or otherwise contrary to the public interest. Section 30.16(a)(4) (Q–16(a)(4)) further provides that the Special Master may render such an advisory opinion at his own initiative. An advisory opinion is not binding upon a TARP recipient receiving the opinion, but, under § 30.16(c)(3) (Q–16(c)(3)), may be relied upon by that TARP recipient and its employees, if that TARP recipient and its employees comply with the advisory opinion in all respects.[1]

D. *Interaction Between Advisory Opinions and § 409A*

To render a favorable advisory opinion, the Special Master may determine that changes to a compensation arrangement, including the time and form of payment, are necessary for the arrangement, or payments under the arrangement, to be consistent with the purposes of EESA or TARP, and otherwise consistent with the public interest. The Special Master may also determine that to be consistent with the purposes of EESA or TARP, and otherwise consistent with the public interest, a payment must be subject to certain TARP-re-

[1] For purposes of this notice, an advisory opinion includes any portion of a determination with respect to certain employees of Exceptional Assistance Recipients (see §30.16 Q–16(a)(3)(i) and (ii)), to the extent such portion of the determination addresses compensation arrangements or rights to payments that are not required to be approved by the Special Master under §30.16(a)(3)(i) or (ii) (Q–16(a)(3)(i) or (ii)) of the Interim Final Rule, for example because the determination addresses amounts payable pursuant to valid written employment contracts not subject to section 111 of EESA by virtue of the grandfathering rule of section 111(b)(3)(D)(iii) of EESA.

lated conditions, such as the prior repayment of some or all of the financial assistance received by the TARP recipient. The Special Master and TARP recipients have raised the issue of the application of § 409A(a) to such changes in the time and form of payment of a compensation arrangement and of the tax consequences under that section of adherence to conditions that may apply. Specifically, TARP recipients have noted that compliance with changes as part of the overall restructuring of a compensation arrangement would often result in delays in payments and possibly acceleration of certain payments that would not comply with § 409A(a). Thus, in the absence of the guidance provided for in this notice, the TARP recipient would be forced to choose between (i) making a payment under the original terms of an agreement that the Special Master determined to be inconsistent with the purposes of EESA or TARP, or otherwise contrary to the public interest, or (ii) instead making a payment that the Special Master has determined to be consistent with the purposes of EESA or TARP, and otherwise to be consistent with the public interest, but that also would result in severe adverse tax consequences to the individual receiving the payment. The application of § 409A(a) in these circumstances would produce a disincentive for TARP recipients to comply with the Special Master's advisory opinions and act in accordance with the public interest, severely diminishing the Special Master's ability to fulfill his intended role and damaging the entire TARP program. Furthermore, in these circumstances the changes in the time and form of payment result from a determination by the Special Master that the original time and form of payment terms were inconsistent with the purposes of EESA or TARP or otherwise contrary to the public interest. Finally, the final regulations under § 409A were promulgated before the enactment of EESA and ARRA and did not consider or address the need for an exception for a delay or acceleration of a payment under a nonqualified deferred compensation plan as a condition of receiving a favorable advisory opinion.

Section 1.409A–2(b)(7)(iii) provides that the Commissioner, in guidance of general applicability, may prescribe events that constitute exceptions to the prohibition on the delay of payment set forth under § 409A. Sections 1.409A–2(b)(7)(i) and (ii) provide specific exceptions allowing for the delay of payment to the extent making the payment would result in the payment not being deductible under § 162(m), or would result in violations of laws, including Federal securities laws and other applicable laws. These provision of the regulations resolve conflicts between § 409A and other laws by providing exceptions to the limitations under § 409A on further deferral of nonqualified deferred compensation, where compliance with those requirements would subject the employer to unfavorable tax treatment under § 162(m) or would violate other applicable law. The Treasury Department and IRS have determined that a delay in payment to comply with an advisory opinion of the Special Master in accordance with the guidance set forth in section III of this notice is another such event and the disclosure by the TARP recipient to the Special Master of all similarly situated service providers and, if requested by the Special Master, such information as may be necessary to make those service providers also subject to an advisory opinion, will satisfy the condition that the TARP recipient treat all payments to similarly situated service providers on a reasonably consistent basis. Section 409A(a)(3) authorizes the Secretary, by regulation, to permit a nonqualified deferred compensation plan to accelerate the time or schedule of payment of compensation deferred under the plan.

For the reasons discussed above, the Treasury and the IRS find that guidance permitting a TARP recipient to comply with an advisory opinion of the Special Master under the circumstances set out in this notice without triggering adverse tax consequences under § 409A(a) is necessary and appropriate. Pursuant to the authority in § 409A(a)(3), the Treasury Department and the IRS intend to issue regulations to allow for changes in the time and form of payment of nonqualified deferred compensation, including the acceleration of payments under a nonqualified deferred compensation plan by a TARP recipient, to the extent necessary to comply with an advisory opinion or other determination issued by the Special Master and to specify when a delay in making a payment as a result of conditions imposed pursuant to such an advisory opinion or other determination will not cause an amount to fail to qualify as a short-term deferral, consistent with this notice.

III. Guidance

A. Eligibility

The guidance set forth in section III.B of this Notice applies to a service provider of a TARP recipient only if:

(1) the advisory opinion is addressed to that TARP recipient, and specifically addresses the compensation arrangement between the TARP recipient and the service provider;

(2) the TARP recipient has fully disclosed to the Special Master the identities of any similarly situated service providers of the TARP recipient and, to the extent requested by the Special Master, included those service providers in a request for an advisory opinion (for this purpose, an employee subject to §30.16(a)(3)(i) (Q–16(a)(3)(i)) of the Interim Final Rule, which addresses certain employees of Exceptional Assistance Recipients (generally the SEOs and the next 20 most highly compensated employees), will not be treated as similarly situated to an employee subject to §30.16(a)(3)(ii) (Q–16(a)(3)(ii)) of the Interim Final Rule, which addresses certain other employees of Exceptional Assistance Recipients (generally the 26th through 100th most highly compensated employees and any remaining executive officers), and an employee not in either of those groups of employees will not be treated as similarly situated to an employee in one of those groups);

(3) the advisory opinion explicitly sets forth (a) a revised time and form of payment for the compensation that would have complied with the otherwise applicable requirements of § 409A(a) had such revised time and form of payment been the original time and form of payment, (b) a condition on payment that is directly related to the financial assistance received by the TARP recipient under the TARP program or the ability of the TARP recipient to repay the TARP assistance (for example, a condition that the amount cannot be paid prior to the repayment of all or a specified percentage or amount of the TARP assistance), or (c) a combination of (a) and (b);

(4) the advisory opinion does not authorize the TARP recipient or service provider to elect another time and form of pay-

ment other than in a manner compliant with § 409A(a) and the regulations thereunder without regard to the special rules set forth in this notice regarding compliance with advisory opinions (for this purpose a decision to repay some or all of the TARP assistance will not be treated as an election as to the time and form of payment, even if such repayment may affect the timing of some or all of the amount payable);

(5) the TARP recipient and the service provider enter into a written agreement containing the revised time and form of payment and any applicable conditions on payment not later than the end of the service provider's taxable year in which the advisory opinion is issued or the 15th day of the third month following the date the advisory opinion is issued, if later; and

(6) the TARP recipient and the service provider of the TARP recipient comply with the terms of the advisory opinion in all material respects.

B. *Application of § 409A(a)*

With respect to an arrangement between a TARP recipient and a service provider of the TARP recipient, if the conditions of section III.A. of this notice are met, changes in the time and form of payment pursuant to an advisory opinion will be treated in the following manner for purposes of § 409A(a) and the regulations thereunder:

(1) A failure to pay an amount upon the originally designated payment date will not be treated as an impermissible initial deferral election or subsequent deferral election, provided that the amount is paid pursuant to the advisory opinion. For this purpose, if the advisory opinion sets forth new payment dates pursuant to section III.A.3.a. of this notice, whether the amount is paid pursuant to the advisory opinion and in accordance with § 409A will be determined after application of the payment provisions under § 1.409A–3(d). For example, with respect to a payment date that is specified in the advisory opinion, the amount generally will be treated as paid pursuant to the advisory opinion if it is paid no earlier than 30 days before the specified payment date and no later than the last day of the service provider's taxable year in which the specified payment date occurs or, if later, the 15th day of the third calendar month after the specified payment date (in each case so long as the service provider is not permitted, directly or indirectly, to designate the taxable year in which the amount is paid). If the advisory opinion sets forth TARP-related conditions pursuant to section III.A.3.b. of this notice that must be met before a service recipient can pay an amount (for example, a prohibition on a payment being made until the service recipient repays all or a specified amount or percentage of TARP financial assistance), the amount will be treated as paid pursuant to the advisory opinion and in accordance with § 409A if it is paid at the earliest date at which the service recipient reasonably anticipates that the making of the payment will be permissible under such advisory opinion. For example, with respect to satisfaction of TARP-related conditions, the amount generally will be treated as paid pursuant to the advisory opinion if it is paid upon satisfaction of the TARP-related conditions.

(2) To the extent compliance with an advisory opinion requires payment of an amount that otherwise qualified as a short-term deferral under § 1.409A–1(b)(4) at a time or in a form that would cause such amount to be treated as deferred compensation subject to § 409A, except as otherwise provided in the next sentence, the amount will be treated as deferred compensation under § 409A once the time and form of payment have been changed. To the extent that an advisory opinion requires only that the payment of such an amount be delayed until specified TARP-related conditions are met, and does not otherwise prescribe changes in the time or form of payment, such condition will not cause the amount to fail to qualify as a short-term deferral provided that the amount is paid at the earliest date at which the service recipient anticipates or reasonably should anticipate that the payment will be permissible pursuant to the advisory opinion.

(3) Payment of a deferred amount before the original payment date pursuant to an advisory opinion, EESA or the regulations thereunder (including §§30.11(a) and 30.16(a)(3) (Q–11(a) and Q–16(a)(3)) of the Interim Final Rule (Special Master approval of certain payments to employees of TARP recipients receiving exceptional financial assistance)[2] will be treated as a permissible acceleration. For this purpose, arrangements that provide for payment upon, or an earlier payment date resulting from, the satisfaction of a TARP-related condition, such as a repayment of some or all of the TARP assistance, will be treated as providing for a permissible acceleration of a payment under §409A.

(4) Once the TARP recipient and service provider have agreed to a revised time and form of payment pursuant to an advisory opinion and have set forth the revised time and form of payment in writing, the revised time and form of payment is treated as the time and form of payment for purposes of determining future compliance with § 409A and the regulations thereunder.

(5) Nothing in this notice is intended to permit corrections of failures to comply with § 409A, or to otherwise affect the application of § 409A to a compensation arrangement, including the application of § 409A to any change to a compensation arrangement that does not meet the conditions of section III.A of this notice.

C. *Effective date*

The guidance in this notice is effective for arrangements addressed in advisory opinions issued by the Special Master pursuant to EESA and the guidance thereunder after September 30, 2009.

IV. Drafting Information

The principal author of this notice is Keith Ranta of the Office of Division Counsel/Associate Chief Counsel (Tax

[2] The treatment under § 409A of required deferrals of payments under EESA and the regulations thereunder was discussed in the preamble to the Interim Final Rule (IFR). Taxpayers may rely on the guidance provided in that discussion. In addition, because the determinations by the Special Master with respect to certain employees of Exceptional Assistance Recipients (generally the executive officers and any other employees that are among the top 100 most highly compensated employees) are required under the IFR (see §30.16(a)(i) and (ii) (Q–16(a)(3)(i) and (ii)), taxpayers may also apply that guidance to any changes to existing rights required by those determinations, so that any resulting delay in a payment will not constitute a failure to comply with § 409A and will not cause a payment that otherwise would have been a short-term deferral to be treated as a payment of deferred compensation. Because that discussion did not address the potential for the required acceleration of a payment as part of an opinion requiring modifications of a compensation structure, that guidance has been provided in this notice. The guidance referred to in the preamble to the IFR and provided in this footnote is not applicable to advisory opinions provided under §30.16(a)(4) (Q–16(a)(4)) of the IFR, including the portion of a Special Master determination under §30.16(a)(i) and (ii) (Q–16(a)(3)(i) and (ii)) of the IFR that is an advisory opinion. (See note 1 of this notice).

Exempt and Government Entities), although other Treasury and IRS officials participated in its development. For further information on the provisions of this notice, contact Keith Ranta at (202) 927–9639 (not a toll-free call). For further information about the Office of the Special Master for TARP Executive Compensation, contact that office at (202) 622–0667.

Qualified Transportation Fringes

Notice 2009–95

This notice delays the effective date of Revenue Ruling 2006–57. Revenue Ruling 2006–57 provides guidance to employers on the use of smartcards, debit or credit cards, or other electronic media to provide qualified transportation fringes under sections 132(a)(5) and (f) of the Code. This guidance is intended to provide relief to mass transit providers that have been unable to update their present systems in order to comply with the Revenue Ruling guidelines prior to the current effective date of January 1, 2010. The effective date of Revenue Ruling 2006–57 is further delayed until January 1, 2011. Revenue Ruling 2006–57 is modified.

Revenue Ruling 2006–57, 2006–2 C.B. 911, provides guidance to employers on the use of smartcards, debit or credit cards, or other electronic media to provide qualified transportation fringes under Internal Revenue Code §§ 132(a)(5) and 132(f). The ruling's effective date was set for January 1, 2008. In 2007, however, Treasury and the IRS became aware that certain transit systems needed additional time to modify their technology and make it compatible with the requirements for vouchers set forth in Revenue Ruling 2006–57. Consequently, Treasury and the IRS delayed the effective date of Revenue Ruling 2006–57 until January 1, 2009. See Notice 2007–76, 2007–2 C.B. 735. In 2008, Treasury and the IRS further delayed the effective date of Revenue Ruling 2006–57 until January 1, 2010. See Notice 2008–74, 2008–38 I.R.B. 718. Certain transit systems need additional time to complete the process of adapting their technology to achieve compatibility with the requirements for vouchers. Therefore, the ruling's effective date is further delayed until January 1, 2011. Nevertheless, employers and employees may rely on Revenue Ruling 2006–57 with respect to transactions occurring prior to January 1, 2011.

The principal author of this notice is Syd Gernstein of the Office of Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding this notice, contact Syd Gernstein at (202) 622–6040 (not a toll-free call).

Update for Weighted Average Interest Rates, Yield Curves, and Segment Rates

Notice 2009–96

This notice provides guidance as to the corporate bond weighted average interest rate and the permissible range of interest rates specified under § 412(b)(5)(B)(ii)(II) of the Internal Revenue Code as in effect for plan years beginning before 2008. It also provides guidance on the corporate bond monthly yield curve (and the corresponding spot segment rates), the 24-month average segment rates, and the funding transitional segment rates under § 430(h)(2). In addition, this notice provides guidance as to the interest rate on 30-year Treasury securities under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning before 2008, the 30-year Treasury weighted average rate under § 431(c)(6)(E)(ii)(I), and the minimum present value segment rates under § 417(e)(3)(D) as in effect for plan years beginning after 2007.

CORPORATE BOND WEIGHTED AVERAGE INTEREST RATE

Sections 412(b)(5)(B)(ii) and 412(l)(7)(C)(i), as amended by the Pension Funding Equity Act of 2004 and by the Pension Protection Act of 2006 (PPA), provide that the interest rates used to calculate current liability and to determine the required contribution under § 412(l) for plan years beginning in 2004 through 2007 must be within a permissible range based on the weighted average of the rates of interest on amounts invested conservatively in long term investment grade corporate bonds during the 4-year period ending on the last day before the beginning of the plan year.

Notice 2004–34, 2004–1 C.B. 848, provides guidelines for determining the corporate bond weighted average interest rate and the resulting permissible range of interest rates used to calculate current liability. That notice establishes that the corporate bond weighted average is based on the monthly composite corporate bond rate derived from designated corporate bond indices. The methodology for determining the monthly composite corporate bond rate as set forth in Notice 2004–34 continues to apply in determining that rate. See Notice 2006–75, 2006–2 C.B. 366.

The composite corporate bond rate for November 2009 is 5.79 percent. Pursuant to Notice 2004–34, the Service has determined this rate as the average of the monthly yields for the included corporate bond indices for that month.

The following corporate bond weighted average interest rate was determined for plan years beginning in the month shown below.

For Plan Years Beginning in		Corporate Bond Weighted Average	Permissible Range		
Month	*Year*		90%	to	100%
December	2009	6.42	5.78		6.42

YIELD CURVE AND SEGMENT RATES

Generally for plan years beginning after 2007 (except for delayed effective dates for certain plans under sections 104, 105, and 106 of PPA), § 430 of the Code specifies the minimum funding requirements that apply to single employer plans pursuant to § 412. Section 430(h)(2) specifies the interest rates that must be used to determine a plan's target normal cost and funding target. Under this provision, present value is generally determined using three 24-month average interest rates ("segment rates"), each of which applies to cash flows during specified periods. However, an election may be made under § 430(h)(2)(D)(ii) to use the monthly yield curve in place of the segment rates. For plan years beginning in 2008 and 2009, a transitional rule under § 430(h)(2)(G) provides that the segment rates are blended with the corporate bond weighted average as specified above. An election may be made under § 430(h)(2)(G)(iv) to use the segment rates without applying the transitional rule.

Notice 2007–81, 2007–2 C.B. 899, provides guidelines for determining the monthly corporate bond yield curve, the 24-month average corporate bond segment rates, and the funding transitional segment rates used to compute the target normal cost and the funding target. Pursuant to Notice 2007–81, the monthly corporate bond yield curve derived from November 2009 data is in Table I at the end of this notice. The spot first, second, and third segment rates for the month of November 2009 are, respectively, 2.35, 5.57, and 6.29. The three 24-month average corporate bond segment rates applicable for December 2009 under the election of § 430(h)(2)(G)(iv) are as follows:

First Segment	Second Segment	Third Segment
4.71	6.67	6.77

The transitional segment rates under § 430(h)(2)(G) applicable for December 2009, taking into account the corporate bond weighted average of 6.42 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2008	5.85	6.50	6.54
2009	5.28	6.59	6.65

The transitional rule of § 430(h)(2)(G) does not apply to plan years starting in 2010. Therefore, for a plan year starting in 2010 with a lookback month to December 2009, the funding segment rates are the three 24-month average corporate bond segment rates applicable for December 2009, listed above without blending for the transitional period.

30-YEAR TREASURY SECURITIES INTEREST RATES

Section 417(e)(3)(A)(ii)(II) (prior to amendment by PPA) defines the applicable interest rate, which must be used for purposes of determining the minimum present value of a participant's benefit under § 417(e)(1) and (2), as the annual rate of interest on 30-year Treasury securities for the month before the date of distribution or such other time as the Secretary may by regulations prescribe. Section 1.417(e)–1(d)(3) of the Income Tax Regulations provides that the applicable interest rate for a month is the annual rate of interest on 30-year Treasury securities as specified by the Commissioner for that month in revenue rulings, notices or other guidance published in the Internal Revenue Bulletin.

The rate of interest on 30-year Treasury securities for November 2009 is 4.31 percent. The Service has determined this rate as the average of the yield on the 30-year Treasury bond maturing in August 2039 determined each day through November 10, 2009, and the yield on the 30-year Treasury bond maturing in November 2039 determined each day for the balance of the month.

Generally for plan years beginning after 2007, § 431 specifies the minimum funding requirements that apply to multiemployer plans pursuant to § 412. Section 431(c)(6)(B) specifies a minimum amount for the full-funding limitation described in section 431(c)(6)(A), based on the plan's current liability. Section 431(c)(6)(E)(ii)(I) provides that the interest rate used to calculate current liability for this purpose must be no more than 5 percent above and no more than 10 percent below the weighted average of the rates of interest on 30-year Treasury securities during the four-year period ending on the last day before the beginning of the plan year. Notice 88–73, 1988–2 C.B. 383, provides guidelines for determining the weighted average interest rate. The following rates were determined for plan years beginning in the month shown below.

For Plan Years Beginning in		30-Year Treasury Weighted Average	Permissible Range		
Month	*Year*		90%	to	105%
December	2009	4.36	3.92		4.57

MINIMUM PRESENT VALUE SEGMENT RATES

Generally for plan years beginning after December 31, 2007, the applicable interest rates under § 417(e)(3)(D) are segment rates computed without regard to a 24-month average. For plan years beginning in 2008 through 2011, the applicable interest rates are the monthly spot segment rates blended with the applicable rate under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning in 2007. Notice 2007–81 provides guidelines for determining the minimum present value segment rates. Pursuant to that notice, the minimum present value transitional segment rates determined for November 2009, taking into account the November 2009 30-year Treasury rate of 4.31 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2008	3.92	4.56	4.71
2009	3.53	4.81	5.10
2010	3.13	5.07	5.50

DRAFTING INFORMATION

The principal author of this notice is Tony Montanaro of the Employee Plans, Tax Exempt and Government Entities Division. Mr. Montanaro may be e-mailed at *RetirementPlanQuestions@irs.gov*.

Table I

Monthly Yield Curve for November 2009
Derived from November 2009 Data

Maturity	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*
0.5	0.89	20.5	6.15	40.5	6.31	60.5	6.38	80.5	6.41
1.0	1.20	21.0	6.15	41.0	6.31	61.0	6.38	81.0	6.41
1.5	1.51	21.5	6.16	41.5	6.32	61.5	6.38	81.5	6.41
2.0	1.85	22.0	6.17	42.0	6.32	62.0	6.38	82.0	6.41
2.5	2.19	22.5	6.17	42.5	6.32	62.5	6.38	82.5	6.41
3.0	2.54	23.0	6.18	43.0	6.32	63.0	6.38	83.0	6.41
3.5	2.87	23.5	6.18	43.5	6.33	63.5	6.38	83.5	6.41
4.0	3.19	24.0	6.19	44.0	6.33	64.0	6.38	84.0	6.41
4.5	3.49	24.5	6.19	44.5	6.33	64.5	6.38	84.5	6.41
5.0	3.77	25.0	6.20	45.0	6.33	65.0	6.38	85.0	6.41
5.5	4.02	25.5	6.20	45.5	6.33	65.5	6.38	85.5	6.41
6.0	4.24	26.0	6.21	46.0	6.33	66.0	6.39	86.0	6.41
6.5	4.45	26.5	6.21	46.5	6.34	66.5	6.39	86.5	6.41
7.0	4.64	27.0	6.22	47.0	6.34	67.0	6.39	87.0	6.41
7.5	4.80	27.5	6.22	47.5	6.34	67.5	6.39	87.5	6.41
8.0	4.96	28.0	6.23	48.0	6.34	68.0	6.39	88.0	6.41
8.5	5.09	28.5	6.23	48.5	6.34	68.5	6.39	88.5	6.42
9.0	5.22	29.0	6.24	49.0	6.35	69.0	6.39	89.0	6.42
9.5	5.33	29.5	6.24	49.5	6.35	69.5	6.39	89.5	6.42
10.0	5.43	30.0	6.25	50.0	6.35	70.0	6.39	90.0	6.42
10.5	5.52	30.5	6.25	50.5	6.35	70.5	6.39	90.5	6.42
11.0	5.60	31.0	6.25	51.0	6.35	71.0	6.39	91.0	6.42
11.5	5.67	31.5	6.26	51.5	6.35	71.5	6.39	91.5	6.42
12.0	5.74	32.0	6.26	52.0	6.35	72.0	6.40	92.0	6.42
12.5	5.79	32.5	6.27	52.5	6.36	72.5	6.40	92.5	6.42
13.0	5.84	33.0	6.27	53.0	6.36	73.0	6.40	93.0	6.42
13.5	5.89	33.5	6.27	53.5	6.36	73.5	6.40	93.5	6.42
14.0	5.93	34.0	6.28	54.0	6.36	74.0	6.40	94.0	6.42
14.5	5.96	34.5	6.28	54.5	6.36	74.5	6.40	94.5	6.42
15.0	5.99	35.0	6.28	55.0	6.36	75.0	6.40	95.0	6.42
15.5	6.01	35.5	6.29	55.5	6.36	75.5	6.40	95.5	6.42
16.0	6.04	36.0	6.29	56.0	6.36	76.0	6.40	96.0	6.42
16.5	6.05	36.5	6.29	56.5	6.37	76.5	6.40	96.5	6.42
17.0	6.07	37.0	6.29	57.0	6.37	77.0	6.40	97.0	6.42
17.5	6.09	37.5	6.30	57.5	6.37	77.5	6.40	97.5	6.42
18.0	6.10	38.0	6.30	58.0	6.37	78.0	6.40	98.0	6.42
18.5	6.11	38.5	6.30	58.5	6.37	78.5	6.40	98.5	6.42
19.0	6.12	39.0	6.30	59.0	6.37	79.0	6.40	99.0	6.42
19.5	6.13	39.5	6.31	59.5	6.37	79.5	6.41	99.5	6.43
20.0	6.14	40.0	6.31	60.0	6.37	80.0	6.41	100.0	6.43

Extension of Deadline to Adopt Certain Retirement Plan Amendments

Notice 2009–97

I. Purpose

This notice extends the deadline for amending qualified retirement plans to meet certain requirements of the Internal Revenue Code that were added by the Pension Protection Act of 2006 (PPA '06), Pub. L. 109–280, and subsequently modified by the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), Pub. L. 110–458. The deadline is extended to the last day of the first plan year that begins on or after January 1, 2010. This extension applies to:

1. The deadline for amending single-employer defined benefit plans to meet the requirements of §§ 401(a)(29) and 436, relating to funding-based limits on benefits and benefit accruals under single-employer plans;

2. The deadline for amending cash balance and other applicable defined benefit plans, within the meaning of § 411(a)(13)(C), to meet the requirements of § 411(a)(13) (other than § 411(a)(13)(A)) and § 411(b)(5), relating to vesting and other special rules applicable to these plans; and

3. The deadline for amending applicable defined contribution plans, within the meaning of § 401(a)(35)(E), to meet the requirements of § 401(a)(35), relating to diversification requirements for certain defined contribution plans.

This notice also provides limited relief from the anti-cutback requirements of § 411(d)(6) for amendments that are adopted by the extended deadline for amending a plan to meet the requirements of §§ 401(a)(29) and 436. In addition, this notice provides that limited § 411(d)(6) relief is expected to be granted for amendments that are adopted by the extended deadline for amending a plan to meet the requirements of § 411(b)(5) once final regulations under §§ 411(a)(13) and 411(b)(5) are issued.

II. Background

Section 401(a)(29) requires single-employer defined benefit plans that are subject to the minimum funding requirements of § 412 to meet the requirements of § 436. Section 436, which was added by section 113(a)(1) of PPA '06, imposes funding-based limits on benefits and benefit accruals under single-employer plans. The requirements of § 436 generally apply to plan years that begin after December 31, 2007. Final regulations under § 436 were published in the Federal Register on October 15, 2009, 74 F.R. 53004.

Section 411(a)(13), which was added by section 701(b)(2) of PPA '06, contains special rules for cash balance and other applicable defined benefit plans. Section 411(a)(13)(A) provides, in general, that an applicable defined benefit plan will not fail to satisfy the requirements of § 411(a)(2), 411(c), or 417(e) solely because the present value of the participant's accrued benefit under the plan equals the balance in the participant's hypothetical account or the accumulated percentage of the participant's final average compensation. Section 411(a)(13)(B) requires an applicable defined benefit plan to provide 100 percent vesting for employer-derived benefits on completion of three years of service. Section 411(a)(13) is generally effective for years that begin after December 31, 2007, and for distributions made after August 17, 2006.

Section 411(b)(5), which was added by section 701(b)(1) of PPA'06 and is generally effective for years that begin after December 31, 2007, contains special rules for applicable defined benefit plans with regard to the requirements of § 411(b)(1)(H), which prohibits a defined benefit plan from ceasing an employee's benefit accruals or reducing an employee's rate of benefit accrual because of the attainment of any age.

Notice 2007–6, 2007–1 C.B. 273, provides transitional guidance regarding the requirements of §§ 411(a)(13) and 411(b)(5). Proposed regulations under §§ 411(a)(13) and 411(b)(5) were published in the Federal Register on December 28, 2007, 72 F.R. 73690. Announcement 2009–82, 2009–48 I.R.B. 720, announced certain relief with respect to the requirements of § 411(b)(5)(B)(i), relating to the interest crediting rate in applicable defined benefit plans. Final and additional proposed regulations under §§ 411(a)(13) and 411(b)(5) are expected to be published in the near future.

Section 401(a)(35), which was added by section 901(a)(1) of PPA '06, requires certain defined contribution plans to meet certain diversification requirements with respect to investments in employer securities. The requirements of § 401(a)(35) generally apply to plan years that begin after December 31, 2007. Notice 2006–107, 2006–2 C.B. 1114, provides transitional guidance regarding § 401(a)(35). Proposed regulations under § 401(a)(35) were published in the Federal Register on January 3, 2008, 73 F.R. 421. Final regulations under § 401(a)(35) are expected to be published in the near future.

Section 401(b) provides a period during which a plan may be amended retroactively to comply with the Code's qualification requirements. Section 1.401(b)–1 of the Treasury regulations and Rev. Proc. 2007–44, 2007–2 C.B. 54, describe the disqualifying provisions that may be amended retroactively and the remedial amendment period during which retroactive amendments may be adopted. The regulations also grant the Commissioner the discretion to extend the remedial amendment period.

Section 5.05 of Rev. Proc. 2007–44 provides that when there are statutory or regulatory changes to the plan qualification requirements that will impact provisions of the written plan document, the adoption of an interim amendment will generally be required by the later of the end of the plan year in which the change is first effective or the due date of the employer's tax return for the tax year that includes the date the change is first effective.

Section 411(d)(6) provides generally that a plan will not satisfy § 401(a) if an amendment to the plan decreases a participant's accrued benefit. For this purpose, a plan amendment which has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy or eliminating an optional form of benefit with respect to benefits attributable to service before the amendment is treated as reducing accrued benefits. Section 401(b) does not relieve a plan of the requirement to satisfy § 411(d)(6) with respect to any amendment.

Section 1.411(d)–4, A–2(b)(2)(i), provides that a plan may be amended to eliminate or reduce a § 411(d)(6) protected benefit, within the meaning of § 1.411(d)–4, A–1, if the following three requirements

are met: the amendment constitutes timely compliance with a change in law affecting plan qualification; there is an exercise of § 7805(b) relief by the Commissioner; and the elimination or reduction is made only to the extent necessary to enable the plan to continue to satisfy the requirements for qualified plans.

Section 1107 of PPA '06 provides, in general, that, except as provided by the Secretary of the Treasury, a plan will not fail to satisfy the anti-cutback requirements of § 411(d)(6) as a result of a plan amendment made pursuant to a provision of PPA '06 or regulations thereunder, provided that:

(1) the plan amendment is adopted no later than the section 1107 date, which is the last day of the first plan year that begins on or after January 1, 2009 (or 2011, in the case of a governmental plan as defined in § 414(d));

(2) if the plan amendment is required to enable the plan to continue to satisfy § 401(a), the amendment applies retroactively to the effective date of the provision of PPA '06 or regulation; and

(3) the plan is operated as if the plan amendment were in effect during the period beginning on the effective date of the amendment and ending on the section 1107 date or, if earlier, the date the amendment is adopted.

Section 1107 of PPA '06 also provides that a plan will not be treated as failing to be operated in accordance with its terms during the period described in (3), provided that the conditions in (1) through (3) are met.

Section 5.07(2) of Rev. Proc. 2007–44 provides an exception from the general deadline for adopting interim amendments. This section provides that the deadline for adopting an interim amendment pursuant to a provision of PPA '06 or regulations thereunder is the section 1107 date. This is also the deadline for adopting a discretionary amendment (within the meaning of section 5.05(2) of Rev. Proc. 2007–44) pursuant to a provision of PPA '06 or regulations thereunder.

The extension of time to adopt plan amendments that is provided by section 1107 of PPA '06 applies to any plan amendment that is adopted pursuant to a provision of PPA '06 or regulations thereunder. For example, section 1107 of PPA '06 extends the otherwise applicable deadline for adopting plan amendments to meet the requirements, if applicable, of §§ 401(a)(29) and 436, 401(a)(35), 401(a)(36), 401(k)(13) and 414(w), 411(a)(2), 411(a)(13), 411(b)(5), 417(a), 417(e), and 432 to the section 1107 date. In addition to extending the time by which an amendment pursuant to a provision of PPA '06 or regulations thereunder would otherwise have to be adopted, section 1107 of PPA '06 also generally provides relief from the requirements of § 411(d)(6) that would otherwise apply to the amendment.

Under the Commissioner's authority to extend remedial amendment periods under § 401(b), Part III of this notice grants a further extension of time, beyond the section 1107 date, to adopt certain plan amendments. However, except as described in Part IV of this notice regarding amendments for §§ 401(a)(29) and 436 and § 411(b)(5), this notice does not grant relief from the requirements of § 411(d)(6) for amendments adopted after the section 1107 date. For example, an amendment of an applicable defined benefit plan to eliminate, with respect to a post-August 17, 2006 distribution, the excess of a single-sum distribution over a participant's hypothetical account balance must comply with the generally applicable requirements of § 411(d)(6) if the amendment is adopted after the section 1107 date.

III. Extension of Deadline for Adopting Amendments Under §§ 401(a)(29) and 436, 401(a)(35), 411(a)(13) (other than § 411(a)(13)(A)), and 411(b)(5)

In order to give plan sponsors time to adopt plan amendments that take into account recently issued final regulations and those that are expected to be issued in the near future, the deadline for adopting an interim or discretionary plan amendment under §§ 401(a)(29) and 436, 401(a)(35), 411(a)(13) (other than § 411(a)(13)(A)), and 411(b)(5) is extended to the last day of the first plan year that begins on or after January 1, 2010. A plan must continue to satisfy the operational compliance requirements of section 1107 of PPA '06 as a condition of the extension of the deadline for adopting plan amendments provided by this notice.

This extension does not restrict rights with respect to the timing of plan amendments set out in Rev. Proc. 2007–44. For example, under section 5.03(2) of Rev. Proc 2007–44, the extension of the remedial amendment period to the end of the applicable remedial amendment cycle for a disqualifying provision continues to apply to a disqualifying provision where the employer reasonably and in good faith determines during the period when an interim amendment to reflect a qualification change would otherwise be required that no amendment is required because the qualification change does not impact provisions of the written plan document.

IV. Section 411(d)(6) Relief for Certain Amendments

A. Relief for Amendments Under §§ 401(a)(29) and 436

Pursuant to § 7805(b) and § 1.411(d)–4, A–2(b)((2)(i), an interim plan amendment that eliminates or reduces a § 411(d)(6) protected benefit will not cause a plan to fail to meet the requirements of § 411(d)(6) if the amendment is adopted by the last day of the first plan year that begins on or after January 1, 2010, and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of §§ 401(a)(29) and 436.

B. Relief for Amendments Under § 411(b)(5)

As provided in Announcement 2009–82, it is expected that once final regulations under § 411(b)(5)(B)(i) are issued, relief from the requirements of § 411(d)(6) will be granted to permit plan amendments that are adopted prior to the effective date of those final regulations to reduce the interest crediting rate on participants' accounts to the extent necessary to constitute a permissible rate under those final regulations. More broadly, pursuant to this notice, once final regulations under §§ 411(a)(13) and 411(b)(5) are issued, it is expected that relief from the requirements of § 411(d)(6) will be granted for a plan amendment that eliminates or reduces a § 411(d)(6) protected benefit, provided that the amendment is adopted by the last day of the first plan year that begins on or after January 1, 2010, and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of § 411(b)(5).

V. Determination Letters

The Service's review of an application for a determination letter that is submitted before February 1, 2011, will not take into account the requirements of §§ 401(a)(29) and 436. The Service's review of an application for a determination letter submitted after January 31, 2009, and before February 1, 2011, will take into account the requirements of §§ 401(a)(35), 411(a)(13) (including § 411(a)(13)(A)), or 411(b)(5), only if the plan has been amended to meet those requirements.

VI. Effect on Other Documents

Section 5.07(2) of Rev. Proc. 2007–44 is modified.

Notice 2008–108, 2008–50 I.R.B. 1275, which contains the 2008 Cumulative List of Changes in Plan Qualification Requirements, is modified to provide that the Service's review of an application for a determination letter submitted during the submission period beginning on February 1, 2009, will take into account the requirements of §§ 401(a)(35), 411(a)(13) (including § 411(a)(13)(A)), or 411(b)(5), only if the plan has been amended to meet those requirements.

Drafting Information

The principal author of this notice is James P. Flannery of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to *retirementplanquestions@irs.gov*.

2009 Cumulative List of Changes in Plan Qualification Requirements

Notice 2009–98

I. PURPOSE

This notice contains the 2009 Cumulative List of Changes in Plan Qualification Requirements (2009 Cumulative List) described in section 4 of Rev. Proc. 2007–44, 2007–2 C.B. 54. The 2009 Cumulative List is to be used primarily by plan sponsors of individually designed plans that are in Cycle E. An individually designed plan is in Cycle E if it is a single employer plan where the last digit of the employer identification number of the plan sponsor is 5 or 0, or it is a § 414(d) governmental plan for which an election has been made by the plan sponsor to treat Cycle E as the initial EGTRRA remedial amendment cycle for the plan.

The list of changes in section VI of this notice does not extend the deadline by which a plan must be amended to comply with any statutory, regulatory, or guidance changes. The general deadline for timely adoption of an interim or discretionary amendment can be found in section 5.05 of Rev. Proc. 2007–44.

II. BACKGROUND

Rev. Proc. 2007–44 sets forth procedures for issuing opinion, advisory, and determination letters and describes the five-year remedial amendment cycle for individually designed plans and the six-year remedial amendment cycle for pre-approved plans. In addition, section 5.05 of Rev. Proc. 2007–44 provides the deadline for timely adoption of an interim amendment or discretionary amendment.

Under section 4 of Rev. Proc. 2007–44, the Internal Revenue Service intends to annually publish a Cumulative List to identify statutory, regulatory, and guidance changes that must be taken into account in submissions by plan sponsors to the Service for opinion, advisory, and determination letters whose submission period begins on February 1st following issuance of the Cumulative List.

In Notice 2008–108, 2008–50 I.R.B. 1275, the Service published the 2008 Cumulative List of Changes in Plan Qualification Requirements (2008 Cumulative List).[1]

Under section 1107 of the Pension Protection Act of 2006 (PPA '06), a plan amendment made pursuant to any amendment made by PPA '06 generally may be retroactively effective, if, in addition to meeting the other applicable requirements, the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2009 (January 1, 2011 in the case of a governmental plan).

Pursuant to Notice 2008–108, as an alternative to submitting a plan in Cycle D (February 1, 2009 – January 31, 2010), a plan sponsor of a Cycle D plan whose first plan year beginning after January 1, 2009 ends on or after February 1, 2010, may defer submission of its plan until Cycle E (February 1, 2010 –. January 31, 2011). In order to defer submission of such a plan until Cycle E, an application for a determination letter must be timely filed in Cycle E. In such a case, the plan will be treated as having been filed within the plan's EGTRRA remedial amendment period and will be reviewed on the basis of the 2009 Cumulative List. However, such a plan will be treated as a Cycle E plan solely for this initial cycle, and all subsequent submissions will be made in Cycle D.

Rev. Proc. 2009–36, 2009–35 I.R.B. 304, provides, in part, that the sponsor of an individually designed governmental plan may make a one-time election to be in Cycle E (instead of Cycle C), as the initial EGTRRA remedial amendment cycle for the plan.

III. APPLICATION OF 2009 CUMULATIVE LIST

This notice is being issued for purposes of the determination letter program for plans submitted for determination letters during the Cycle E submission period. In Rev. Proc. 2005–66, 2005–2 C.B. 509, the Service announced the opening of the initial five-year remedial amendment cycle. In accordance with Rev. Proc. 2007–44, the Service will start accepting determination letter applications for Cycle E plans beginning on February 1, 2010. The 12-month submission period for Cycle E plans will end January 31, 2011.

The 2009 Cumulative List, set forth in section VI of this notice, informs plan sponsors of issues the Service has specifically identified for review in determining whether a plan filing in Cycle E has been properly updated. Specifically, the 2009 Cumulative List reflects law changes under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. 107–16 (with technical corrections made by the Job Creation and Worker Assistance Act of 2002

[1] See Notice 2007–94, 2007–2 C.B. 1179; Notice 2007–3, 2007–1 C.B. 255; Notice 2005–101, 2005–2 C.B. 1219; and Notice 2004–84, 2004–2 C.B. 1030, for the 2007, 2006, 2005, and 2004 Cumulative Lists, respectively.

(JCWAA)), Pub. L. 104–147, the Pension Funding Equity Act of 2004 (PFEA), Pub. L. 108–218, the American Jobs Creation Act of 2004 (AJCA), Pub. L. 108–357, the Katrina Emergency Tax Relief Act of 2005 (KETRA), Pub. L. 109–73, the Gulf Opportunity Zone Act of 2005 (GOZA), Pub. L. 109–135, the Pension Protection Act of 2006 (PPA '06), Pub. L. 109–280, the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. 110–28, the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act), Pub. L. 110–245, the Emergency Economic Stabilization Act of 2008 (EESA), Pub. L. 110–343, and the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), P.L. 110–458.

The Service will not consider in its review of any determination letter application, for the submission period that begins February 1, 2010, any:

(1) guidance issued after October 1, 2009;

(2) statutes enacted after October 1, 2009;

(3) qualification requirements first effective in 2011 or later; or

(4) statutory provisions that are first effective in 2010, for which there is no guidance identified in this notice.[2]

The 2009 Cumulative List does not include any items described in (1) through (4) above. However, in order to be qualified, a plan must comply with all relevant qualification requirements, not just those on the 2009 Cumulative List.

The Service will not consider the proposed regulations identified in the footnotes of section VI of this notice in issuing determination letters, and such letters cannot be relied on with respect to the proposed regulations.

Terminating plans must include all law changes in effect at the time of termination. See section 8 of Rev. Proc. 2007–44 regarding plan termination.

IV. SPECIAL RULES FOR THE HEROES EARNINGS ASSISTANCE AND RELIEF TAX ACT OF 2008

Under sections 104(d)(2) and 105(c) of the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act), Pub. L. 110–245, a plan amendment made pursuant to sections 104(a) or 105(b)(1) of the HEART Act generally may be retroactively effective, if, in addition to meeting the other applicable requirements, the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012 in the case of a governmental plan).

Plans submitted in Cycle E must meet the amendment deadline for the HEART Act, if applicable. However, the Service will not consider the HEART Act in issuing determination letters because no guidance has been issued with respect to the HEART Act, and such letters cannot be relied on with respect to the HEART Act. The HEART Act provisions are listed in section VII of this notice.

Section 107(a) of the HEART Act extends the applicability of the qualified reservist distribution to individuals ordered or called to duty after December 31, 2007. The Service is treating an amendment made pursuant to section 107 of the HEART Act as if it was included in the amendments described in section 1107 of PPA '06. See section VI of this notice, # 11, with respect to § 401(k)(2)(B)(i)(V) qualified reservist distributions.

V. SPECIAL RULES FOR THE WORKER, RETIREE, AND EMPLOYER RECOVERY ACT OF 2008

Section 201 of WRERA added section 401(a)(9)(H) to the Code. This provision provides, in part, a suspension of the minimum distribution requirement for 2009 applicable to defined contribution plans.

Under section 201(c)(2) of WRERA, a plan amendment made pursuant to WRERA section 201 generally may be retroactively effective, if, in addition to meeting the other applicable requirements, the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2011 (January 1, 2012 in the case of a governmental plan).

Plans submitted in Cycle E can be amended, at the option of plan sponsors to include WRERA section 201. However, the Service will not consider WRERA section 201 in issuing determination letters for Cycle E plans, and such letters cannot be relied on with respect to the requirements of WRERA section 201.

A plan restatement submitted in Cycle E must include the applicable WRERA provisions identified in section VI of this notice.

VI. 2009 CUMULATIVE LIST OF CHANGES IN PLAN QUALIFICATION REQUIREMENTS

The following list consists of statutory provisions and associated guidance which reflect changes to plan qualification requirements. Miscellaneous guidance is also provided. The Service has identified below plan qualification requirements which were not on the 2008 or earlier Cumulative Lists as "(New)". Thus, the 2009 Cumulative List contains those plan qualification requirements listed in the 2004, 2005, 2006, 2007, and 2008 Cumulative Lists as well as additional 2009 plan qualification requirements.

1. *72(p)*: Section 1.72(p)–1 of the Income Tax Regulations relating to plan loans was published on December 3, 2002 (67 Fed. Reg. 71821). (2004 C. L.).
2. *401(a):*
   - Final Regulations under § 401(a) of the Code regarding permissible normal retirement ages were published on May 22, 2007 (72 Fed. Reg. 28604). (2006 C. L.).
     - Notice 2007–69, 2007–2 C.B. 468, provides temporary relief, for certain pension plans under which the definition of normal retirement age may be required to be changed to comply with the regulations, but only until the first day of the first plan year that begins after June 30, 2008. (2007 C. L.).
     - Notice 2008–98, 2008–44 I.R.B. 1080, provides that the Service and Treasury intend to amend the normal retirement age regulations to change the effective date for governmental plans to plan years begin-

[2] The Service will also not consider the requirements of § 436 in its review of any Cycle E determination letter application. The Service will consider the requirements of §§ 401(a)(35), 411(a)(13), and 411(b)(5) in its review of a Cycle E determination letter application only if the plan has been amended to meet those requirements.

ning on or after January 1, 2011.[3] (New).

- Rev. Rul. 2008–40, 2008–30 I.R.B. 166, provides that the transfer of amounts from a trust under a plan qualified under § 401(a) to a nonqualified foreign trust is treated as a distribution from the transferor plan and that transfer of assets and liabilities from a qualified plan to a plan that satisfies § 1165 of the Puerto Rico Code is also treated as a distribution from the transferor plan. (2008 C. L.).
- Rev. Rul. 2008–45, 2008–34 I.R.B. 403, provides that the exclusive benefit rule of § 401(a) is violated if the sponsorship of a qualified retirement plan is transferred from an employer to an unrelated taxpayer and the transfer is not in connection with a transfer of business assets or operations from the employer to the unrelated taxpayer. (2008 C. L.).

3. *401(a)(4):*

   - Amendments to § 1.401(a)(4)–8 of the Regulations relating to new comparability plans were published on June 29, 2001 (66 Fed. Reg. 34535). (2004 C. L.).
   - Rev. Rul. 2001–30, 2001–2 C.B. 46. (2004 C. L.).
   - Amendments to § 1.401(a)(4)–9 of the Regulations relating to new comparability plans were published on June 29, 2001 (66 Fed. Reg. 34535). (2005 C. L.).
   - Rev. Rul. 2004–21, 2004–1 C.B. 544. (2005 C. L.).

4. *401(a)(5)*: Section 401(a)(5)(G) of the Code was amended by PPA '06 § 861(a)(1) with respect to governmental plans. (2008 C. L.).
5. *401(a)(9):*

   - Sections 1.401(a)(9)–1 through –9 of the Regulations were published on April 17, 2002 and June 15, 2004 (67 Fed. Reg. 18988 and 69 Fed. Reg. 33288). (2004 C. L.).
   - Final regulations under § 401(a)(9) were published on September 8, 2009 (74 Fed. Reg. 45993), which permit a governmental plan to comply with the required minimum distribution rules of § 401(a)(9) by using a reasonable and good faith interpretation of the statute. (New).

6. *401(a)(17)*: Section 401(a)(17) of the Code was amended by § 611(c) of EGTRRA to increase the compensation limit to $200,000. (2004 C. L.).

   - Notice 2001–56, 2001–2 C.B. 277. (2004 C. L.).

7. *401(a)(26)*: Section 401(a)(26)(G) of the Code was amended by PPA '06 § 861(a)(1) with respect to governmental plans. (2008 C. L.).
8. *401(a)(31)*:

   - Section 401(a)(31) was amended by § 643(b) of EGTRRA to allow employees' after-tax contributions to be rolled over under certain circumstances. (2004 C. L.).
   - Section 401(a)(31)(B) was amended by § 657(a) of EGTRRA (as amended by § 411(t) of JCWAA) to provide for the automatic rollover of certain mandatory distributions. The effective date is March 28, 2005. (2004 C. L.).
     - Notice 2005–5, 2005–1 C.B. 337. (2004 C. L.).
   - Sections 641, 642 and 643 of EGTRRA (as amended by § 411(q) of JCWAA) amended the definition of eligible retirement plan in § 402 of the Code to include a § 403(b) annuity contract and eligible governmental § 457(b) plan. (2004 C. L.).
   - Section 636(b) of EGTRRA modified the definition of eligible rollover distribution to exclude hardship distributions. (2004 C. L.).

9. *401(a)(35)*: PPA '06 § 901(a)(1) added § 401(a)(35) requiring that defined contribution plans provide employees with the freedom to divest publicly traded securities.[4] (2008 C. L.).

   - Notice 2006–107, 2006–2 C.B. 1114. (2008 C. L.).
   - Notice 2008–7, 2008–1 C.B. 276, extends certain transitional guidance and transitional relief provided to certain defined contribution plans holding publicly traded employer securities under Notice 2006–107. (2008 C. L.).
   - WRERA § 109(a) amended the definition of one-participant retirement plan under § 401(a)(35)(E)(iv). (New).

10. *401(a)(36)*: PPA '06 § 905(b) added § 401(a)(36) regarding distributions to a participant who has attained age 62 and who has not separated from employment at the time of the distribution. (2008 C. L.).
11. *401(k) & 401(m)*:

    - Section 401(k)(2) and § 401(k)(10) of the Code were amended by § 646(a)(1) of EGTRRA to permit distributions of elective deferrals from a § 401(k) plan upon severance from employment. (2004 C. L.).
      - Notice 2002–4, 2002–1 C.B. 298. (2004 C. L.).
    - Section 636(a) of EGTRRA directed the Secretary of the Treasury to revise the regulations relating to safe harbor hardship distributions of elective deferrals from § 401(k) plans so that the time the employee is prohibited from making elective and employee contributions is reduced from one year to six months after a hardship distribution. (2004 C. L.).
      - Notice 2001–56. (2004 C. L.).
      - Notice 2002–4. (2004 C. L.).
    - Section 401(k)(11) of the Code was amended by § 611(f) of EGTRRA to increase the maximum amount of qualified salary reduction contributions that can

[3] Notice 2009–86, 2009–46 I.R.B. 629, provides that the Service and Treasury intend to amend the normal retirement age regulations to change the effective date for governmental plans to plan years beginning on or after January 1, 2013.

[4] Proposed regulations under § 401(a)(35) were published on January 3, 2008 (73 Fed. Reg. 421) and may be relied upon until final regulations are issued. The Service will consider the requirements of § 401(a)(35) in its review of a Cycle E determination letter application only if the plan has been amended to meet those requirements.

be made to SIMPLE 401(k) plans. (2004 C. L.).

- Section 402(g) of the Code was amended by § 611(d) of EGTRRA to increase the applicable dollar amount. (2004 C. L.).
- Section 401(m)(9) of the Code was amended by § 666 of EGTRRA to eliminate the multiple use test. (2004 C. L.).
- Final Regulations under § 401(k) and § 401(m) of the Code were published on December 29, 2004 (69 Fed. Reg. 78144).[5] (2004 C. L.).
- Announcement 2007–59, 2007–1 C.B. 1448, provides that a plan will not fail to satisfy the requirements of a § 401(k) safe harbor plan because of a mid-year change to implement a designated Roth contribution program. (2007 C. L.).
- PPA '06 § 826 modified the rules relating to distributions from a § 401(k) plan on account of a participant's hardship to permit the plan to treat a participant's beneficiary under the plan the same as the participant's spouse or dependent. (2008 C. L.).
  - Notice 2007–7, 2007–1 C.B. 395, provides guidance regarding PPA '06 § 826. (2008 C. L.).
  - Announcement 2007–59, 2007–1 C.B. 1448, provides that a plan will not fail to satisfy the requirements of a § 401(k) safe harbor plan because of a mid-year change to implement the PPA '06 § 826 hardship withdrawals. (2008 C. L.).
- PPA '06 § 827 added § 401(k)(2)(B)(i)(V) which permits reservists called to active duty after September 11, 2001 and before 2008 to take in-service distributions from a § 401(k) plan. (2008 C. L.).
  - Section 107(a) of the HEART Act extends the applicability of the qualified reservist distribution to individuals ordered or called to active duty after December 31, 2007. (New).
- PPA '06 § 861(a)(2) amended § 401(k)(3)(G) with respect to governmental plans. (2008 C. L.).
- PPA '06 § 902(e)(3) eliminates the gap period income rule for excess contributions in § 401(k)(8)(A)(i). (2008 C. L.).
- PPA '06 § 902 added § 401(k)(13) with respect to qualified automatic contribution arrangements. (2008 C. L.).
  - Final regulations under § 401(k) with respect to qualified automatic contribution arrangements were published on February 24, 2009 (74 Fed. Reg. 8200). (New).
  - Rev. Rul. 2009–30, 2009–39 I.R.B. 391, provides information with respect to automatic contribution increases under automatic contribution arrangements. (New).
  - Notice 2009–65, 2009–39 I.R.B. 413, provides sample amendments that plan sponsors can use to add automatic contribution features to their plans. (New).
- PPA '06 § 902(e)(3) eliminates the gap period income rule for excess aggregate contributions in § 401(m)(6)(A). (2008 C. L.).
- PPA '06 § 902 added § 401(m)(12) with respect to qualified automatic contribution arrangements. (2008 C. L.).
  - Final regulations under § 401(m) with respect to qualified automatic contribution arrangements were published on February 24, 2009 (74 Fed. Reg. 8200). (New).

12. *402(c)(2)(A)*: PPA '06 § 822(a) amended § 402(c)(2)(A) to permit nontaxable distributions from a qualified plan to be directly rolled over tax-free to either another qualified plan or a § 403(b) plan if the separate accounting requirements are met. (2008 C. L.).

13. *402(c)(11)*: PPA '06 § 829(a)(1) added § 402(c)(11) to allow nonspouse beneficiaries to directly roll over distributions from a qualified plan to an individual retirement plan. (2008 C. L.).
    - Notice 2007–7, 2007–1 C.B. 395, provides guidance regarding § 402(c)(11). (2008 C. L.).
    - WRERA § 108(f) requires that plans provide for nonspouse beneficiary rollovers under § 402(c)(11), effective for plan years beginning after December 31, 2009. (New).

14. *402(f)*: PPA '06 § 1102(a) provides that notice required to be provided under § 402(f) may be provided as much as 180 days before the annuity starting date.[6] (2008 C. L.).
    - Notice 2007–7, 2007–1 C.B. 395, provides guidance regarding PPA '06 § 1102. (2008 C. L.).
    - Notice 2009–68, 2009–39 I.R.B. 423, provides two safe harbor explanations that may be provided to recipients of eligible rollover distributions from an employer to satisfy § 402(f). (New).
    - WRERA § 108(f)(2) amended § 402(f)(2)(A) with respect to the definition of eligible rollover distribution. (New).

15. *402(g)(2)*: WRERA § 109(b)(3) amended § 402(g)(2)(A)(ii) to eliminate the distribution of gap period earnings with excess deferrals. (New).
16. *402A*: Section 402A of the Code was added by § 617 of EGTRRA to offer optional treatment of elective deferrals as designated Roth contributions to defined contribution plans, effective for taxable years beginning after December 31, 2005. (2004 C. L.).
    - Final Regulations under § 401(k) and § 401(m) of the Code relating to designated Roth contributions were published on January 3, 2006 (71 Fed. Reg. 6). (2005 C. L.).

[5] Proposed amendments to the regulations under § 401(k) and § 401(m) were published on May 18, 2009 (74 Fed. Reg. 23134) and may be relied upon until final regulations are issued.

[6] Proposed regulations under § 402(f) were published on October 9, 2008 (73 Fed. Reg. 59575) and may be relied upon until final regulations are issued.

- Notice 2006–44, 2006–1 C.B. 889, provides a sample amendment for Roth § 401(k) plans. (2006 C. L.).
- Final Regulations under § 402A of the Code were published on April 30, 2007 (72 Fed. Reg. 21103). (2006 C. L.).

17. *404*:

- Section 404(k)(2)(A) of the Code was amended by § 662(a) of EGTRRA (as amended by § 411(w) of JCWAA) to allow ESOP dividends to be reinvested without the loss of dividend deductions. (2005 C. L.).
  - Notice 2002–2, 2002–1 C.B. 285, provides guidance with respect to the changes made to § 404(k) of the Code and on the effective date of § 409(p) of the Code. (2005 C. L.).

18. 408(q): Section 408(q) of the Code was added by § 602 of EGTRRA (as amended by § 411(i) of JCWAA) to allow for deemed individual retirement accounts (IRAs) in an eligible retirement plan. (2004 C. L.).

- Section 1.408(q)–1 of the Regulations was published on July 22, 2004 (69 Fed. Reg. 43735). (2004 C. L.).

19. *408A(e)*: PPA '06 § 824 added § 408A(e) which permits rollovers to Roth IRAs from accounts that are not designated Roth accounts that are part of qualified plans, § 403(b) plans, and § 457 plans. (2008 C. L.).

- Notice 2008–30, 2008–1 C.B. 638, provides guidance regarding PPA '06 § 824. (2008 C. L.).

20. *409*: Section 409(p) of the Code was added by § 656 of EGTRRA relating to restrictions on the allocation of employer securities in an ESOP maintained by an S corporation. (2005 C. L.).

- Section 1.409(p)–1T of the Regulations was published on July 21, 2003 (68 Fed. Reg. 42970). (2005 C. L.).
- Section 1.409(p)–1T of the Regulations was published on December 17, 2004 (69 Fed. Reg. 75455). (2005 C. L.).
- Rev. Proc. 2003–23, 2003–1 C.B. 599, as modified and superseded by Rev. Proc. 2004–14, 2004–1 C.B. 489, allows a direct rollover from an ESOP maintained by an S corporation to an individual retirement plan (IRA). (2005 C. L.).
- Rev. Rul. 2003–6, 2003–1 C.B. 286, provides guidance with respect to whether an ESOP maintained by an S corporation is eligible for the delayed effective date of § 409(p) under § 656(d)(2) of EGTRRA. (2005 C. L.).
- Rev. Rul. 2004–4, 2004–1 C.B. 414, provides guidance relating to synthetic equity owned by a disqualified person in a nonallocation year of an ESOP maintained by an S corporation. (2005 C. L.).
- Final Regulations were published on December 20, 2006 (71 Fed. Reg. 76134) that provide guidance concerning requirements under § 409(p) for ESOPs holding stock of S corporations. (2006 C. L.).

21. *410(b)*: Final Regulations were published on July 21, 2006 (71 Fed. Reg. 41357) permitting some employees of tax-exempt organizations to be excluded when determining whether a § 401(k) plan meets the § 410(b) minimum coverage requirements. (2006 C. L.).
22. *411(a)*:

- Section 411(a) of the Code was amended by § 633 of EGTRRA (as amended by § 411(o) of JCWAA) to provide for faster vesting of matching contributions. (2004 C. L.).
- Rev. Rul. 2003–65, 2003–1 C.B. 1035. (2005 C. L.).
- Amendments to § 1.411(d)–3 of the Final Regulations were published on August 9, 2006 (71 Fed. Reg. 45379) with respect to the interaction between the anti-cutback rules of § 411(d)(6) and the nonforfeitability requirements of § 411(a). (2006 C. L.).
- Section 411(a) of the Code was amended by § 904 of PPA '06 to provide for faster vesting of employer nonelective contributions. (2008 C. L.).
  - Notice 2007–7, 2007–1 C.B. 395, provides guidance regarding § 411(a), as amended by § 904 of PPA '06. (2008 C. L.).

23. *411(a)(11)*: Section 411(a)(11)(D) of the Code was added by § 648(a) of EGTRRA (as amended by § 411(r) of JCWAA) to allow amounts attributable to rollover contributions to be disregarded in determining the value of an account balance for involuntary distributions. (2004 C. L.).

- PPA '06 § 1102(a) provides that notice required to be provided under § 411(a)(11) may be provided as much as 180 days before the annuity starting date. Section 1102(b) of PPA '06 requires that the notice under § 411(a)(11) also include a description of the consequences of failing to defer receipt of a distribution.[7] (2008 C. L.).
  - Notice 2007–7, 2007–1 C.B. 395, provides guidance regarding PPA '06 § 1102. (2008 C. L.).

24. *411(a)(13)*: PPA '06 § 701(b)(2) added § 411(a)(13) with respect to special vesting rules for applicable defined benefit plans, such as cash balance plans.[8] (2008 C. L.).

- Notice 2007–6, 2007–1 C.B. 272, provides guidance regarding cash balance plans and other hybrid defined benefit plans. (2008 C. L.).
- WRERA § 107(b)(2) amended § 411(a)(13)(A). (New).

[7] Proposed regulations under § 411(a)(11) were published on October 9, 2008 (73 Fed. Reg. 59575). Until final regulations are issued, a plan will be treated as complying with § 411(a)(11) if (1) the plan complies with either the proposed regulations or Q&A–32 and Q&A–33 in Notice 2007–7; or (2) if the plan administrator makes a reasonable attempt to comply with § 411(a)(11).

[8] Proposed regulations under § 411(a)(13) were published on December 28, 2007 (72 Fed. Reg. 73680) and may be relied upon until final regulations are issued. The Service will consider the requirements of § 411(a)(13) in its review of a Cycle E determination letter application only if the plan has been amended to meet those requirements.

25. *411(b)(1)*:

- Rev. Rul. 2008–7, 2008–1 C.B. 419, addresses (1) the application of the backloading provisions of § 411(b)(1)(A), (B), and (C) to defined benefit cash balance plans and (2) the use of a "greater of" formula in the instance of a conversion of a defined benefit pension plan to a cash balance plan, including limited § 7805(b) relief. (2008 C. L.).

26. *411(b)(5)*: PPA '06 § 701(b)(1) added § 411(b)(5) with respect to applicable defined benefit plans, such as cash balance plans, and special rules relating to age.[9] (2008 C. L.).

- Notice 2007–6, 2007–1 C.B. 272, provides guidance regarding cash balance plans and other hybrid defined benefit plans. (2008 C. L.).
- WRERA § 107(b)(1) amended § 411(b)(5). (New).

27. *411(d)(3)*:

- Rev. Rul. 2007–43, 2007–2 C.B. 45, provides guidance regarding the partial termination of a defined contribution plan. (2007 C. L.).

28. *411(d)(6)*:

- *Central Laborers' Pension Fund v. Heinz*, 124 S.Ct. 2230 (2004). (2005 C. L.).
  - Rev. Proc. 2005–23, 2005–1 C.B. 991, as modified by Rev. Proc. 2005–76, 2005–2 C.B. 1139. (2005 C. L.).
  - Amendments to § 1.411(d)–3 of the Final Regulations were published on August 9, 2006 (71 Fed. Reg. 45379) with respect to the interaction between the anti-cutback rules of § 411(d)(6) and the nonforfeitability requirements of § 411(a). (2006 C. L.).
- Section 645(b)(3) of EGTRRA directed the Secretary of the Treasury to issue regulations under § 411(d)(6)(B). (2005 C. L.).
  - Section 1.411(d)–3 of the Regulations was published on August 12, 2005 (70 Fed. Reg. 47109). (2005 C. L.).
  - Amendments to § 1.411(d)–3 of the Final Regulations were published on August 9, 2006 (71 Fed. Reg. 45379) with respect to a utilization test. (2006 C. L.).
- Section 411(d)(6)(D) and § 411(d)(6)(E) of the Code were added by § 645 of EGTRRA to permit the elimination of certain optional forms of benefit under certain conditions. (2005 C. L.).
  - Section 1.411(d)–4, Q&A–2(e) of the Regulations was published on January 25, 2005 (70 Fed. Reg. 3475) to implement § 411(d)(6)(E). (2005 C. L.).

29. *412*

- Rev. Rul. 2004–20, 2004–1 C.B. 546, provides guidance with respect to whether a qualified pension plan can be a § 412(i) plan if the plan holds life insurance contracts and annuity contracts for benefits at normal retirement age in excess of a participant's benefits at normal retirement age under the plan. (2005 C. L.).
- Notice 2004–59, 2004–2 C.B. 447, provides guidance with respect to restrictions placed on plan amendments following an employer's election of an alternative deficit reduction contribution. (2005 C. L.).

30. *414(d)*: PPA '06 § 906(a)(1) added language to the definition of governmental plan in § 414(d) with respect to Indian tribal governments. (2008 C. L.).

- Notice 2006–89, 2006–2 C.B. 772, provides transition relief for plans subject to PPA '06 § 906. (2008 C. L.).
- Notice 2007–67, 2007–2 C.B. 467, extends the transition relief provided in Notice 2006–89. (2008 C. L.).

31. *414(f)(6)*: PPA '06 § 1106(b) added § 414(f)(6) with respect to a multiemployer status election. Section 6611(a)(2) and (b)(2) of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 amends § 414(f)(6). (2008 C. L.).

32. *414(v)*: Section 414(v) of the Code was added by § 631 of EGTRRA (as amended by § 411(o) of JCWAA) to allow for catch-up contributions for individuals age 50 or older. (2004 C. L.).

- Regulations under § 414(v) were published on July 8, 2003 (68 Fed. Reg. 40510). (2004 C. L.).
  - Notice 2002–4. (2004 C. L.).

33. *414(w)*: PPA '06 § 902(d)(1) added § 414(w) with respect to eligible automatic contribution arrangements. (2008 C. L.).

- WRERA § 109(b)(4), (5), and (6) amended § 414(w)(3), (5), and (6) respectively. (New).
- Final regulations under § 414(w) with respect to eligible automatic contribution arrangements were published on February 24, 2009 (74 Fed. Reg. 8200). (New).
- Rev. Rul. 2009–30, 2009–39 I.R.B. 391, provides information with respect to automatic contribution increases under automatic contribution arrangements. (New).
- Notice 2009–65, 2009–39 I.R.B. 413, provides sample amendments that plan sponsors can use to add automatic contribution features to their plans. (New).

34. *415*:

- Section 415(c) of the Code was amended by §§ 611(b) and 632

[9] Proposed regulations under § 411(b)(5) were published on December 28, 2007 (72 Fed. Reg. 73680) and may be relied upon until final regulations are issued. Announcement 2009–82, 2009–48 I.R.B. 720 , November 30, 2009, announces relief for sponsors of statutory hybrid plans that must amend the interest crediting rate in those plans. Plan sponsors may rely on Ann. 2009–82 pending publication of the anticipated additional guidance described in the announcement. The Service will consider the requirements of § 411(b)(5) in its review of a Cycle E determination letter application only if the plan has been amended to meet those requirements.

of EGTRRA (as amended by § 411(p) of JCWAA) to increase the maximum annual additions permitted to the lesser of $40,000 or 100% of compensation. (2004 C. L.).

- Rev. Rul. 2001–51, 2001–2 C.B. 427. (2004 C. L.).
- Rev. Rul. 2002–27, 2002–1 C.B. 925, provided that "compensation" within the meaning of § 415(c) could in certain situations include "deemed § 125 compensation". (2004 C. L.).
- Section 415(b) of the Code was amended by § 611 of EGTRRA to increase the dollar limit and change the age when the limit is reduced or increased. (2005 C. L.).
  - Rev. Rul. 2001–51, 2001–2 C.B. 427. (2004 C. L.).
- Section 415(b)(2)(E)(ii) of the Code was amended by § 101(b)(4) of PFEA to fix the percentage at 5.5%. (2005 C. L.).
  - Notice 2004–78, 2004–2 C.B. 879, provides the actuarial assumptions that must be used for distributions with annuity starting dates occurring during the plan years beginning in 2004 and 2005. (2005 C. L.).
  - WRERA § 103(a) changed the deadline to adopt PFEA amendments from the end of the 2008 plan year to the end of the 2009 plan year. (New).
- Section 415(b)(2)(E)(ii) of the Code was amended by § 303 of PPA '06 regarding the interest rate assumption for applying benefit limitations to lump sum distributions. (2008 C. L.).
- PPA '06 § 832(a) amended § 415(b)(3) to eliminate the active participant restriction from the "average compensation for high 3 years" definition. (2008 C. L.).
- PPA '06 § 906(b)(1)(A) & (B) modified §§ 415(b)(2)(H) and 415(b)(10), respectively, regarding Indian tribal governments. (2008 C. L.).
- PPA '06 § 867(a) amended § 415(b)(11) to remove the 100% of compensation limitation for a church plan participant if the participant has never been a highly compensated employee of the church. (2008 C. L.).
- Final Regulations under § 415 were published on April 5, 2007 (72 Fed. Reg. 16878). (2006 C. L.).
- WRERA § 103(b)(2)(B)(i) amended § 415(b)(2)(E)(v). (New).

35. *416*:

- Section 416 of the Code was amended by § 613 of EGTRRA (as amended by § 411(k) of JCWAA) to make several changes to the top-heavy rules. (2004 C. L.).
- Section 416(g)(4)(H) of the Code was added by § 613(d) of EGTRRA to provide certain safe harbor § 401(k) plans and § 401(m) plans an exemption from the top-heavy rules. (2004 C. L.).
  - Rev. Rul. 2004–13, 2004–1 C.B. 485. (2004 C. L.).
- Section 416(c)(1)(C) of the Code was amended by § 613(e) of EGTRRA (as amended by § 411(k)(1) of JCWAA) to provide when a frozen defined benefit plan is exempt from the minimum benefit requirements. (2005 C. L.).
- PPA '06 § 902(c)(1) amended § 416(g)(4)(H)(i) by inserting § 401(k)(13) of the Code. (2008 C. L.).
- PPA '06 § 902(c)(2) amended § 416(g)(4)(H)(ii) by inserting § 401(m)(12) of the Code. (2008 C. L.).

36. *417*:

- Section 1.417(e)–1 of the Regulations was published on July 16, 2003 (68 Fed. Reg. 41906) relating to retroactive annuity starting dates. (2005 C. L.).
- Final Regulations under § 417(a)(3) were published on March 24, 2006 (71 Fed. Reg. 14798) regarding the disclosure of the relative value of optional forms of benefit. (2006 C. L.).
- PPA '06 § 1102(a) provides that notice required to be provided under § 417 may be provided as much as 180 days before the annuity starting date.[10] (2008 C. L.).
  - Notice 2007–7, 2007–1 C.B. 395, provides guidance regarding PPA '06 § 1102. (2008 C. L.).
- PPA '06 § 302(b) amended the applicable interest rate and mortality table to be used for determining the present value of lump sum distributions in § 417(e)(3). (2008 C. L.).
  - Rev. Rul. 2007–67, 2007–2 C.B. 1047, addresses the mortality tables required by § 417(e)(3). (2008 C. L.).
  - Notice 2008–30, 2008–1 C.B. 638, provides guidance regarding PPA '06 § 302. (2008 C. L.).
  - WRERA § 103(b)(2)(A) amended § 417(e)(3)(D)(i). (New).
- PPA '06 § 1004(a) added the qualified optional survivor annuity benefit to § 417. (2008 C. L.).
  - Notice 2008–30, 2008–1 C.B. 638, provides guidance regarding PPA '06 § 1004. (2008 C. L.).

37. *420*:

- Section 6613 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, amends § 420(c)(3)(A) regarding minimum cost requirements for transfers of

[10] Proposed regulations under § 417 were published on October 9, 2008 (73 Fed. Reg. 59575) and may be relied upon until final regulations are issued.

excess pension assets to retiree health accounts. (2007 C. L.).

- PPA '06 § 114(d)(1) modified the definition of the term "excess pension assets" in § 420(e)(2). Section 6612(b) of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, amends § 420(e)(2)(B). (2007 C. L.).

38. *432*: PPA '06 § 212(a) added § 432 which requires that a funding improvement plan or a rehabilitation plan be adopted for multiemployer plans in endangered or critical status and provides for certain benefit reductions.[11] (2008 C. L.).

- WRERA § 204 provides a temporary delay of designation of multiemployer plans in endangered or critical status. (New).
  - Notice 2009–31, 2009–16 I.R.B. 856, as modified by Notice 2009–42, 2009–20 I.R.B. 1011, provides election and notice procedures for multiemployer plans under WRERA § 204. (New).
  - Rev. Proc. 2009–43, 2009–40 I.R.B. 460, provides procedures with respect to the revocation of elections by multiemployer plans to freeze funded status under WRERA § 204. (New).
- WRERA § 205 provides a temporary extension of the funding improvement or rehabilitation periods for multiemployer plans in endangered or critical status for 2008 or 2009. (New).
  - Notice 2009–31, 2009–16 I.R.B. 856, as modified by Notice 2009–42, 2009–20 I.R.B. 1011, provides election and notice procedures for multiemployer plans under WRERA § 205. (New).

39. *4975*:

- Section 4975 of the Code was amended by § 612 of EGTRRA to allow plan loans for Subchapter S shareholder-employees. (2004 C. L.).
- Section 4975(f) of the Code was amended by § 240 of AJCA to allow an S corporation distribution on allocated shares to pay off an exempt loan as long as equal amounts are allocated to participant accounts. (2005 C. L.).

40. *Hurricane Relief*:

- Katrina Emergency Tax Relief Act of 2005, Pub. L. 109–73. (2005 C. L.).
  - Notice 2005–92, 2005–2 C.B. 1165. (2005 C. L.).
- Announcement 2005–70, 2005–2 C.B. 682. (2005 C. L.).
- Gulf Opportunity Zone Act of 2005, Pub. L. 109–135, added § 1400M and § 1400Q to the Code to provide certain tax benefits to those areas affected by Hurricanes Katrina, Wilma, and Rita. (2006 C. L.).
- Notice 2008–87, 2008–42 I.R.B. 930, provides relief in connection with certain employee benefit plans because of damage caused by Hurricane Ike. (New).
- Emergency Economic Stabilization Act of 2008, Pub. L. 110–343, provides temporary tax relief for areas damaged by 2008 Midwestern severe storms, tornados, and flooding by applying § 1400Q and KETRA to any Midwestern disaster area. (New).

41. *Miscellaneous*:

- Rev. Rul. 2002–42, 2002–1 C.B. 76, provides guidance with respect to a situation where a money purchase pension plan is merged or converted into a profit sharing plan. (2004 C. L.).
- Rev. Proc. 2002–21, 2002–1 C.B. 911, provides guidance with respect to defined contribution retirement plans maintained by professional employer organizations. (2004 C. L.).
- Rev. Proc. 2003–86, 2003–2 C.B. 1211, amplifies Rev. Proc. 2002–21 relating to relief provided for certain defined contribution plans maintained by professional employer organizations. (2004 C. L.).
- Rev. Rul. 2004–10, 2004–1 C.B. 484, provides guidance with respect to charging administrative expenses to former and current employees. (2004 C. L.).
- Rev. Rul. 2004–12, 2004–1 C.B. 478, provides guidance with respect to the distribution restrictions applicable to rollover contributions. (2004 C. L.).
- Rev. Rul. 2001–62, 2001–2 C.B. 632, provides guidance with respect to the mortality table under § 415(b)(2)(E)(v) of the Code and the applicable mortality table under § 417(e)(3)(A)(ii)(I) of the Code. (2005 C. L.).
- Rev. Rul. 2003–11, 2003–1 C.B. 285, provides guidance with respect to satisfying the nondiscrimination rules under § 401(a)(4) of the Code and the minimum coverage requirements under § 410(b) of the Code when applying the increased compensation limit to former employees. (2005 C. L.).
- Rev. Rul. 2005–55, 2005–2 C.B. 284, provides guidance with respect to medical reimbursement accounts under a profit sharing plan. (2005 C. L.).
- Section 1.401(a)–21 of the Final Regulations was published on October 20, 2006 (71 Fed. Reg. 61877) setting forth standards for the use of an electronic medium to provide applicable notices to recipients or to make participant elections. (2006 C. L.).
- Notice 2008–21, 2008–1 C.B. 431, provides transitional guidance for 2008 under § 436 for small plans with end-of-year valuation dates. (2008 C. L.).
- Notice 2008–73, 2008–38 I.R.B. 717, expands transition relief of Notice 2008–21. (2008 C. L.).
- Rev. Rul. 2009–31, 2009–39 I.R.B. 395, provides guidance with respect to annual paid time off contributions. (New).

[11] Proposed regulations under § 432 were published on March 18, 2008 (73 Fed. Reg. 14417) and may be relied upon until final regulations are issued.

- Rev. Rul. 2009–32, 2009–39 I.R.B. 398, provides guidance with respect to paid time off contributions at termination of employment. (New).

The following guidance contains sample or model amendments: Notice 2001–57, 2001–1 C.B. 279 (miscellaneous EGTRRA amendments); Rev. Rul. 2001–62, 2001–2 C.B. 632 (applicable mortality table); Rev. Proc. 2002–29, 2002–2 C.B. 1176 (required minimum distribution amendments); Rev. Proc. 2003–13, 2003–1 C.B. 317 (required language for deemed IRAs); Notice 2005–5 (automatic rollover); Notice 2006–44, 2006–1 C.B. 889 (Roth § 401(k) plans); and Notice 2009–65, 2009–39 I.R.B. 413 (automatic contribution features).

VII. HEROES EARNINGS ASSISTANCE AND RELIEF TAX ACT OF 2008 PROVISIONS

As provided in section IV of this notice, a plan amendment made pursuant to section 104(a) or 105(b)(1) of the HEART Act generally may be retroactively effective, if, in addition to meeting the other applicable requirements, the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012 in the case of a governmental plan). While plans submitting in Cycle E must meet the amendment deadline for the HEART Act, if applicable, the Service will not consider the HEART Act in issuing determination letters because no guidance has been issued with respect to the HEART Act. The HEART Act provisions are listed below.

1. *401(a)(37)*: Section 104(a) of the HEART Act added Code § 401(a)(37) with respect to benefits payable on the death of a plan participant while performing qualified military service. (2008 C. L.).
2. *414(u)(9)*: Section 104(b) of the HEART Act amended § 414(u) of the Code by adding a paragraph regarding how a plan may provide benefit accruals for a person who dies or becomes disabled while performing qualified military service. (2008 C. L.).
3. *414(u)(12)*: Section 105(b)(1) of the HEART Act added § 414(u)(12) with respect to the treatment of differential wage payments during the period a person, while on active duty, is performing service in the uniformed services. (2008 C. L.).

VIII. WORKER, RETIREE, AND EMPLOYER RECOVERY ACT OF 2009 PROVISION

As provided in section V of this notice, a plan amendment made pursuant to WRERA section 201 generally may be retroactively effective, if, in addition to meeting the other applicable requirements, the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2011 (January 1, 2012 in the case of a governmental plan). The WRERA provision is listed below.

1. *401(a)(9)(H)*: Section 201(a) of WRERA added § 401(a)(9)(H) which provides a suspension of the minimum distribution requirement for 2009 applicable to defined contribution plans. (New).
   - Notice 2009–82, 2009–41 I.R.B. 491, provides guidance relating to the suspension of the minimum distribution requirement for 2009 applicable to defined contribution plans. (New).

DRAFTING INFORMATION

The principal author of this notice is Angelique Carrington of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans taxpayer assistance answering service at 1–877–829–5500 (a toll free number) or e-mail Ms. Carrington at *RetirementPlanQuestions@irs.gov*.

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26 CFR 601.201: Rulings and determination letters. (Also Part I, Sections 846; 1.846–1.)

Rev. Proc. 2009–55

SECTION 1. PURPOSE

This revenue procedure prescribes the loss payment patterns and discount factors for the 2009 accident year. These factors will be used for computing discounted unpaid losses under § 846 of the Internal Revenue Code. *See* Rev. Proc. 2008–10, 2008–3 I.R.B. 290, for background concerning the loss payment patterns and application of the discount factors.

SECTION 2. SCOPE

This revenue procedure applies to any taxpayer that is required to discount its unpaid losses under § 846 for a line of business using discount factors published by the Secretary.

SECTION 3. TABLES OF DISCOUNT FACTORS

.01 The following tables present separately for each line of business the discount factors under § 846 for accident year 2009. All the discount factors presented in this section were determined using the applicable interest rate under § 846(c) for 2009, which is 4.06 percent, and by assuming all loss payments occur in the middle of the calendar year.

.02 If the groupings of individual lines of business on the annual statement change, taxpayers must discount the unpaid losses on the affected lines of business in accordance with the discounting patterns that would have applied to those unpaid losses based on their classification on the 2005 annual statement. *See* Rev. Proc. 2008–10, section 2, for additional background on discounting under § 846 and the use of the Secretary's tables.

.03 Section V of Notice 88–100, 1988–2 C.B. 439, sets forth a composite method for computing discounted unpaid losses for accident years that are not separately reported on the annual statement. The tables separately provide discount factors for taxpayers who elect to use the composite method of section V of Notice 88–100. *See* Rev. Proc. 2002–74, 2002–2 C.B. 980.

.04 Tables.

Tables of Factors to be Used to Discount Unpaid Losses Incurred in Accident Year 2009

(Interest rate: 4.06 percent)

Accident and Health (Other Than Disability Income or Credit Disability Insurance)

Taxpayers that do not use the composite method of Notice 88–100 should use 98.0298 percent to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the 2009 and later taxable years.

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount all unpaid losses in this line of business that are outstanding at the end of the 2009 taxable year.

Auto Physical Damage

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	89.4096	89.4096	10.5904	10.3639	97.8613
2010	99.6848	10.2752	0.3152	0.3030	96.1174

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2011 and later years		0.1576	0.1576	0.1545	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2011 taxable year.

Commercial Auto/Truck Liability/Medical

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	23.6718	23.6718	76.3282	70.1942	91.9637
2010	47.5425	23.8708	52.4575	48.6936	92.8249
2011	66.6847	19.1421	33.3153	31.1437	93.4816
2012	81.5105	14.8258	18.4895	17.2843	93.4819
2013	90.0548	8.5443	9.9452	9.2701	93.2115
2014	94.7311	4.6763	5.2689	4.8762	92.5459
2015	97.0602	2.3292	2.9398	2.6982	91.7820
2016	98.1174	1.0572	1.8826	1.7293	91.8572
2017	98.8692	0.7518	1.1308	1.0326	91.3161
2018	99.1160	0.2467	0.8840	0.8228	93.0737

Commercial Auto/Truck Liability/Medical

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019	0.2467	0.6373	0.6045	94.8560
2020	0.2467	0.3906	0.3774	96.6210
2021 and later years	0.2467	0.1439	0.1410	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 95.8392 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Composite

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	34.7004	34.7004	65.2996	59.2808	90.7829
2010	58.6076	23.9072	41.3924	37.2999	90.1131
2011	71.7608	13.1532	28.2392	25.3968	89.9346
2012	81.4987	9.7379	18.5013	16.4943	89.1521
2013	87.8488	6.3501	12.1512	10.6863	87.9440
2014	91.4226	3.5739	8.5774	7.4744	87.1415
2015	93.4057	1.9831	6.5943	5.7549	87.2720
2016	94.2280	0.8222	5.7720	5.1498	89.2206
2017	95.4875	1.2595	4.5125	4.0741	90.2843
2018	96.3560	0.8685	3.6440	3.3535	92.0287

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019	0.8685	2.7754	2.6036	93.8109
2020	0.8685	1.9069	1.8233	95.6199
2021	0.8685	1.0383	1.0114	97.4044
2022 and later years	0.8685	0.1698	0.1664	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 95.6075 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Fidelity/Surety

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	25.2328	25.2328	74.7672	71.0916	95.0839
2010	61.1025	35.8698	38.8975	37.3872	96.1174

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2011 and later years	19.4487	19.4487	19.0655	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2011 taxable year.

Financial Guaranty/Mortgage Guaranty

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	7.7824	7.7824	92.2176	88.2568	95.7050
2010	62.1390	54.3565	37.8610	36.3911	96.1174

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2011 and later years		18.9305	18.9305	18.5575	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2011 taxable year.

International (Composite)

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	34.7004	34.7004	65.2996	59.2808	90.7829
2010	58.6076	23.9072	41.3924	37.2999	90.1131
2011	71.7608	13.1532	28.2392	25.3968	89.9346
2012	81.4987	9.7379	18.5013	16.4943	89.1521
2013	87.8488	6.3501	12.1512	10.6863	87.9440
2014	91.4226	3.5739	8.5774	7.4744	87.1415
2015	93.4057	1.9831	6.5943	5.7549	87.2720
2016	94.2280	0.8222	5.7720	5.1498	89.2206
2017	95.4875	1.2595	4.5125	4.0741	90.2843
2018	96.3560	0.8685	3.6440	3.3535	92.0287

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019	0.8685	2.7754	2.6036	93.8109
2020	0.8685	1.9069	1.8233	95.6199
2021	0.8685	1.0383	1.0114	97.4044
2022 and later years	0.8685	0.1698	0.1664	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 95.6075 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Medical Malpractice — Claims-Made

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	4.9425	4.9425	95.0575	85.0276	89.4485
2010	19.9369	14.9944	80.0631	73.1839	91.4078
2011	44.3489	24.4120	55.6511	51.2525	92.0962
2012	64.8374	20.4885	35.1626	32.4331	92.2375
2013	80.2530	15.4156	19.7470	18.0245	91.2770
2014	85.7907	5.5377	14.2093	13.1072	92.2442
2015	91.2722	5.4815	8.7278	8.0478	92.2082
2016	93.3314	2.0593	6.6686	6.2739	94.0812
2017	96.1257	2.7942	3.8743	3.6782	94.9374
2018	97.6538	1.5281	2.3462	2.2687	96.6961

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019 and later years		1.5281	0.8182	0.8021	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Medical Malpractice — Occurrence

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	1.5878	1.5878	98.4122	82.1817	83.5076
2010	4.4720	2.8842	95.5280	82.5760	86.4417
2011	17.7738	13.3018	82.2262	72.3595	88.0005
2012	35.8814	18.1076	64.1186	56.8257	88.6260
2013	52.9447	17.0633	47.0553	41.7266	88.6757
2014	68.4348	15.4901	31.5652	27.6193	87.4993
2015	79.5616	11.1268	20.4384	17.3902	85.0861
2016	85.8198	6.2582	14.1802	11.7123	82.5961
2017	90.1267	4.3069	9.8733	7.7943	78.9437
2018	90.3701	0.2434	9.6299	7.8625	81.6469

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019		0.2434	9.3865	7.9335	84.5197
2020		0.2434	9.1431	8.0073	87.5770
2021		0.2434	8.8998	8.0841	90.8352
2022		0.2434	8.6564	8.1641	94.3126
2023 and later years		0.2434	8.4130	8.2473	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 87.6495 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Miscellaneous Casualty

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	72.9064	72.9064	27.0936	26.1964	96.6888
2010	93.5836	20.6771	6.4164	6.1673	96.1174

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2011 and later years		3.2082	3.2082	3.1450	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2011 taxable year.

Multiple Peril Lines
(Homeowners/Farmowners, Commercial Multiple Peril, and Special Liability
(Ocean Marine, Aircraft (All Perils), Boiler and Machinery))

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	52.5880	52.5880	47.4120	44.2537	93.3385
2010	80.0449	27.4570	19.9551	18.0416	90.4110
2011	86.1625	6.1175	13.8375	12.5336	90.5767
2012	90.7452	4.5827	9.2548	8.3676	90.4137
2013	93.9006	3.1555	6.0994	5.4885	89.9844
2014	95.7613	1.8607	4.2387	3.8132	89.9627
2015	96.8755	1.1141	3.1245	2.8315	90.6219
2016	97.6715	0.7960	2.3285	2.1345	91.6659
2017	98.0329	0.3615	1.9671	1.8524	94.1706
2018	98.6810	0.6481	1.3190	1.2665	96.0207

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019		0.6481	0.6709	0.6568	97.8997
2020 and later years		0.6481	0.0228	0.0224	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 97.9040 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Other (Including Credit)

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	67.9528	67.9528	32.0472	30.8190	96.1676
2010	89.4609	21.5081	10.5391	10.1299	96.1174

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2011 and later years		5.2695	5.2695	5.1657	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2011 taxable year.

Other Liability — Claims-Made

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	5.8796	5.8796	94.1204	83.2369	88.4367
2010	18.8735	12.9938	81.1265	73.3613	90.4283
2011	41.6840	22.8105	58.3160	53.0709	91.0056
2012	62.5322	20.8483	37.4678	33.9583	90.6333
2013	73.5207	10.9885	26.4793	24.1277	91.1189
2014	82.0036	8.4829	17.9964	16.4539	91.4286
2015	88.6279	6.6244	11.3721	10.3644	91.1391
2016	90.7107	2.0828	9.2893	8.6605	93.2317
2017	94.8439	4.1332	5.1561	4.7959	93.0145
2018	96.2689	1.4249	3.7311	3.5370	94.7977

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019		1.4249	2.3062	2.2270	96.5683
2020 and later years		1.4249	0.8812	0.8639	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 97.1192 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Other Liability — Occurrence

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	13.6594	13.6594	86.3406	74.5578	86.3531
2010	24.8389	11.1795	75.1611	66.1806	88.0517
2011	41.7792	16.9403	58.2208	51.5868	88.6055
2012	58.4995	16.7203	41.5005	36.6249	88.2518
2013	69.5197	11.0203	30.4803	26.8702	88.1560
2014	77.7513	8.2316	22.2487	19.5641	87.9336
2015	84.2243	6.4730	15.7757	13.7553	87.1929
2016	83.2275	-0.9968	16.7725	15.3306	91.4032
2017	88.8524	5.6249	11.1476	10.2151	91.6347
2018	91.3852	2.5328	8.6148	8.0461	93.3986

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019	2.5328	6.0820	5.7891	95.1836
2020	2.5328	3.5492	3.4404	96.9345
2021 and later years	2.5328	1.0164	0.9964	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 96.1213 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Private Passenger Auto Liability/Medical

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	42.6108	42.6108	57.3892	54.0511	94.1835
2010	71.5827	28.9719	28.4173	26.6915	93.9269
2011	84.6947	13.1120	15.3053	14.3997	94.0826
2012	92.3556	7.6610	7.6444	7.1693	93.7860
2013	96.2369	3.8812	3.7631	3.5012	93.0391
2014	97.9275	1.6907	2.0725	1.9187	92.5799
2015	98.7719	0.8444	1.2281	1.1352	92.4394
2016	99.2692	0.4973	0.7308	0.6740	92.2334
2017	99.5053	0.2361	0.4947	0.4606	93.0998
2018	99.6440	0.1387	0.3560	0.3378	94.8818

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019	0.1387	0.2174	0.2101	96.6446
2020 and later years	0.1387	0.0787	0.0772	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 97.0129 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Products Liability — Claims-Made

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	1.0259	1.0259	98.9741	84.7900	84.6586
2010	11.7927	10.7667	88.2073	76.2088	86.3973
2011	29.3642	17.5716	70.6358	61.3781	86.8939
2012	55.1655	25.8012	44.8345	37.5503	83.7531
2013	83.4171	28.2516	16.5829	10.2554	61.8434
2014	64.8933	-18.5238	35.1067	29.5679	84.2229
2015	82.3346	17.4414	17.6654	12.9765	73.4571
2016	86.3986	4.0640	13.6014	9.3576	68.7991
2017	76.3310	-10.0676	23.6690	20.0075	84.5305
2018	78.7910	2.4600	21.2090	18.3104	86.3331

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019	2.4600	18.7490	16.5444	88.2412
2020	2.4600	16.2890	14.7066	90.2855
2021	2.4600	13.8290	12.7943	92.5176
2022	2.4600	11.3691	10.8043	95.0326
2023 and later years	2.4600	8.9091	8.7336	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 90.1769 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Products Liability — Occurrence

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	5.0466	5.0466	94.9534	80.1653	84.4260
2010	13.6935	8.6469	86.3065	74.5994	86.4354
2011	28.2541	14.5606	71.7459	62.7748	87.4961
2012	41.3083	13.0542	58.6917	52.0070	88.6104
2013	59.3693	18.0610	40.6307	35.6944	87.8509
2014	73.0717	13.7024	26.9283	23.1659	86.0279
2015	74.6612	1.5895	25.3388	22.4849	88.7371
2016	78.9833	4.3221	21.0167	18.9889	90.3513
2017	86.1231	7.1398	13.8769	12.4765	89.9085
2018	88.6931	2.5700	11.3069	10.3614	91.6379

Products Liability — Occurrence

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019	2.5700	8.7369	8.1604	93.4018
2020	2.5700	6.1669	5.8701	95.1869
2021	2.5700	3.5969	3.4868	96.9378
2022 and later years	2.5700	1.0269	1.0067	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 95.5262 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Reinsurance — Nonproportional Assumed Property

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	12.9458	12.9458	87.0542	80.8403	92.8620
2010	60.1796	47.2338	39.8204	35.9393	90.2535
2011	80.8225	20.6429	19.1775	16.3406	85.2075
2012	84.9430	4.1205	15.0570	12.8008	85.0155
2013	85.6680	0.7250	14.3320	12.5809	87.7821
2014	80.0452	-5.6229	19.9548	18.8276	94.3509
2015	86.7013	6.6561	13.2987	12.8020	96.2654
2016	97.2533	10.5520	2.7467	2.5578	93.1205
2017	97.6721	0.4188	2.3279	2.2344	95.9820
2018	98.8078	1.1357	1.1922	1.1665	97.8487

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019 and later years	1.1357	0.0564	0.0553	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 94.3133 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Reinsurance — Nonproportional Assumed Liability

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	32.5917	32.5917	67.4083	54.5146	80.8723
2010	33.3995	0.8078	66.6005	55.9039	83.9392
2011	35.4948	2.0953	64.5052	56.0362	86.8708
2012	44.0321	8.5373	55.9679	49.6024	88.6265
2013	64.8299	20.7979	35.1701	30.4004	86.4383
2014	66.4358	1.6059	33.5642	29.9965	89.3706
2015	77.8097	11.3738	22.1903	19.6119	88.3805
2016	82.4438	4.6341	17.5562	15.6809	89.3183
2017	84.1944	1.7507	15.8056	14.5317	91.9406
2018	87.9223	3.7279	12.0777	11.3189	93.7176

Reinsurance — Nonproportional Assumed Liability

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019	3.7279	8.3498	7.9757	95.5191
2020	3.7279	4.6219	4.4967	97.2900
2021 and later years	3.7279	0.8940	0.8764	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 96.1991 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Reinsurance — Nonproportional Assumed Financial Lines

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	8.4783	8.4783	91.5217	82.6377	90.2930
2010	28.0475	19.5693	71.9525	66.0302	91.7692
2011	60.4351	32.3875	39.5649	35.6726	90.1622
2012	82.4448	22.0097	17.5552	14.6688	83.5583
2013	90.2720	7.8271	9.7280	7.2799	74.8343
2014	85.3168	-4.9551	14.6831	12.6301	86.0181
2015	88.3777	3.0608	11.6223	10.0206	86.2186
2016	89.9934	1.6157	10.0066	8.7793	87.7346
2017	81.6664	-8.3269	18.3336	17.6300	96.1625
2018	91.0491	9.3827	8.9509	8.7745	98.0298

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019 and later years	—	—	—	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 96.2888 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

Special Property
(Fire, Allied Lines, Inland Marine, Earthquake, Burglary and Theft)

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	44.5756	44.5756	55.4244	53.5639	96.6430
2010	88.4263	41.8507	13.5737	13.0467	96.1174

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2011 and later years	6.7869	6.7869	6.6531	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2011 taxable year.

Workers' Compensation

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2009	19.0410	19.0410	80.9590	69.6415	86.0207
2010	40.2442	21.2032	59.7558	50.8396	85.0789
2011	57.1497	16.9055	42.8503	35.6584	83.2162
2012	67.8601	10.7104	32.1399	26.1804	81.4579
2013	75.5399	7.6797	24.4601	19.4093	79.3507
2014	80.1157	4.5758	19.8843	15.5296	78.0994
2015	82.1828	2.0672	17.8172	14.0513	78.8640
2016	84.4045	2.2217	15.5955	12.3555	79.2248
2017	85.5195	1.1150	14.4805	11.7198	80.9346
2018	86.2855	0.7661	13.7145	11.4141	83.2269

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2009 accident year and that are outstanding at the end of the tax year shown.

2019	0.7661	12.9484	11.0961	85.6945
2020	0.7661	12.1823	10.7651	88.3666
2021	0.7661	11.4163	10.4207	91.2795
2022	0.7661	10.6502	10.0624	94.4802
2023 and later years	0.7661	9.8842	9.6894	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 88.4259 percent to discount unpaid losses incurred in this line of business in 2009 and prior years and that are outstanding at the end of the 2019 taxable year.

DRAFTING INFORMATION

The principal author of this revenue procedure is Sarah E. Swan of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact Ms. Swan at (202) 622–8443 (not a toll-free call).

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26 CFR 601.201: Rulings and determination letters. (Also Part I, Sections 832, 846; 1.832–4, 1.846–1.)

Rev. Proc. 2009–56

SECTION 1. PURPOSE

This revenue procedure prescribes the salvage discount factors for the 2009 accident year. These factors must be used to compute discounted estimated salvage recoverable under § 832 of the Internal Revenue Code.

SECTION 2. BACKGROUND

Section 832(b)(5)(A) requires that all estimated salvage recoverable (including that which cannot be treated as an asset for state accounting purposes) be taken into account in computing the deduction for losses incurred. Under § 832(b)(5)(A), paid losses are to be reduced by salvage and reinsurance recovered during the taxable year. This amount is adjusted to reflect changes in discounted unpaid losses on nonlife insurance contracts and in unpaid losses on life insurance contracts. An adjustment is then made to reflect any changes in discounted estimated salvage recoverable and in reinsurance recoverable.

Pursuant to § 832(b), the amount of estimated salvage is determined on a discounted basis in accordance with procedures established by the Secretary.

SECTION. 3. SCOPE

This revenue procedure applies to any taxpayer that is required to discount estimated salvage recoverable under § 832.

SECTION 4. APPLICATION

.01 The following tables present separately for each line of business the discount factors under § 832 for the 2009 accident year. All the discount factors presented in this section were determined using the applicable interest rate under § 846(c) for 2009, which is 4.06 percent, and by assuming all estimated salvage is recovered in the middle of each calendar year. *See* Rev. Proc. 2008–11, 2008–3 I.R.B. 301, for background regarding the tables.

.02 These tables must be used by taxpayers irrespective of whether they elected to discount unpaid losses using their own historical experience under § 846.

.03 Section V of Notice 88–100, 1988–2 C.B. 439, provides a composite discount factor to be used in determining the discounted unpaid losses for accident years that are not separately reported on the NAIC Annual Statement. The tables separately provide discount factors for taxpayers who elect to use the composite method. Rev. Proc. 2002–74, 2002–2 C.B. 980, clarifies that for certain insur-

ance companies subject to tax under § 831 the composite method for discounting unpaid losses set forth in Notice 88–100, section V, is permitted but not required. This revenue procedure further provides alternative methods for computing discounted unpaid losses that are permitted for insurance companies not using the composite method, and sets forth a procedure for insurance companies to obtain automatic consent of the Commissioner to change to one of the methods described in Rev. Proc. 2002–74.

.04 Tables.

Tables of Factors to be Used to Discount Salvage Recoverable With Respect to Losses Incurred in Accident Year 2009

(Interest rate: 4.06 percent)

Accident and Health (Other Than Disability Income or Credit Disability Insurance)

Taxpayers that do not use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable with respect to losses incurred in this line of business in the 2009 accident year as of the end of the 2009 and later taxable years.

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount all salvage recoverable in this line of business as of the end of the 2009 taxable year.

Auto Physical Damage

Tax Year	Discount Factors (%)
2009	97.2331
2010	96.1174

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

Auto Physical Damage

2011 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2011 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Commercial Auto/Truck Liability/Medical

Tax Year	Discount Factors (%)
2009	92.3526
2010	92.2970
2011	92.6408
2012	92.9897
2013	93.7281
2014	93.5170
2015	91.9508
2016	92.8642
2017	96.2378
2018	98.0298

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Composite

Tax Year	Discount Factors (%)
2009	92.3690
2010	92.1172
2011	91.9402
2012	91.7659
2013	91.1438
2014	90.2174
2015	91.0647
2016	92.4105
2017	94.4361
2018	96.2605

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 97.8009 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Fidelity/Surety

Tax Year	Discount Factors (%)
2009	93.6954
2010	96.1174

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

Fidelity/Surety

2011 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2011 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Financial Guaranty/Mortgage Guaranty

Tax Year	Discount Factors (%)
2009	94.7421
2010	96.1174

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2011 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2011 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

International (Composite)

Tax Year	Discount Factors (%)
2009	92.3690
2010	92.1172
2011	91.9402
2012	91.7659
2013	91.1438
2014	90.2174
2015	91.0647
2016	92.4105
2017	94.4361
2018	96.2605

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 97.8009 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Medical Malpractice — Claims-Made

Tax Year	Discount Factors (%)
2009	92.6642
2010	93.7424
2011	92.1505
2012	92.7778
2013	92.0831
2014	87.6889
2015	84.3189
2016	90.2868
2017	96.4445
2018	98.0298

Medical Malpractice — Claims-Made

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Medical Malpractice — Occurrence

Tax Year	Discount Factors (%)
2009	85.5177
2010	89.9300
2011	92.2898
2012	84.2693
2013	94.7905
2014	91.4234
2015	93.0145
2016	95.8751
2017	97.0989
2018	98.0298

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019 and later years	98.0298

Medical Malpractice — Occurrence

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Miscellaneous Casualty

Tax Year	Discount Factors (%)
2009	96.5837
2010	96.1174

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2011 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2011 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Multiple Peril Lines (Homeowners/Farmowners, Commercial Multiple Peril, and Special Liability (Ocean Marine, Aircraft (All Perils), Boiler and Machinery))

Tax Year	Discount Factors (%)
2009	93.0068
2010	92.3990
2011	92.3201
2012	92.2569
2013	91.4462
2014	89.8725
2015	91.0239
2016	93.4483
2017	94.8485
2018	96.6142

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Other (Including Credit)

Tax Year	Discount Factors (%)
2009	95.6448
2010	96.1174

Other (Including Credit)

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2010 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2011 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Other Liability — Claims-Made

Tax Year	Discount Factors (%)
2009	88.4208
2010	89.5374
2011	87.6521
2012	90.8781
2013	92.3590
2014	94.2379
2015	93.1673
2016	91.7716
2017	97.3613
2018	98.0298

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019 and later years	98.0298

Other Liability — Claims-Made

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Other Liability — Occurrence

Tax Year	Discount Factors (%)
2009	87.1236
2010	88.1600
2011	90.4878
2012	91.2470
2013	90.6851
2014	90.8000
2015	90.2668
2016	93.0020
2017	95.7619
2018	97.5722

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Private Passenger Auto Liability/Medical

Tax Year	Discount Factors (%)
2009	94.5329
2010	94.5579
2011	94.3102
2012	93.4459
2013	92.8620
2014	92.0891
2015	92.9858
2016	94.5440
2017	94.6149
2018	96.4088

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Products Liability — Claims-Made

Tax Year	Discount Factors (%)
2009	88.9426
2010	51.3741
2011	53.7803
2012	90.7115
2013	80.1341
2014	91.4320
2015	59.5121
2016	90.5055
2017	91.6367
2018	92.7680

Products Liability — Claims-Made

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019	94.5598
2020	96.3623
2021 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 95.6711 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Products Liability — Occurrence

Tax Year	Discount Factors (%)
2009	87.6369
2010	89.7198
2011	91.6030
2012	92.4224
2013	92.8704
2014	90.4185
2015	91.0511
2016	94.0066
2017	94.2757
2018	96.1335

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019 and later years	98.0298

Products Liability — Occurrence

Taxpayers that use the composite method of Notice 88–100 should use 97.2089 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Reinsurance — Nonproportional Assumed Property

Tax Year	Discount Factors (%)
2009	91.0976
2010	92.7443
2011	95.6984
2012	80.1417
2013	89.8643
2014	81.5378
2015	51.4095
2016	92.8399
2017	73.3181
2018	88.1043

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019	89.8547
2020	91.6751
2021	93.5877
2022	95.6459
2023 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 91.4735 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Reinsurance — Nonproportional Assumed Liability

Tax Year	Discount Factors (%)
2009	86.7636
2010	90.0422
2011	91.4998
2012	88.6312
2013	90.7036
2014	91.5709
2015	91.4636
2016	93.2257
2017	95.1632
2018	96.9140

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 96.5025 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Reinsurance — Nonproportional Assumed Financial Lines

Tax Year	Discount Factors (%)
2009	87.1652
2010	85.9016
2011	89.9069
2012	78.5011
2013	90.2511
2014	80.2802
2015	90.4154
2016	90.8197
2017	97.5152
2018	98.0298

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2019 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Special Property (Fire, Allied Lines, Inland Marine, Earthquake, Burglary and Theft)

Tax Year	Discount Factors (%)
2009	94.8844
2010	96.1174

Special Property (Fire, Allied Lines, Inland Marine, Earthquake, Burglary and Theft)

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

2011 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 98.0298 percent to discount salvage recoverable as of the end of the 2011 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

Workers' Compensation

Tax Year	Discount Factors (%)
2009	88.3785
2010	90.4189
2011	91.2195
2012	91.1364
2013	89.6372
2014	88.2223
2015	88.8169
2016	88.5309
2017	90.7105
2018	92.4766

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2009 accident year.

Workers' Compensation

2019	94.2879
2020	96.1430
2021 and later years	98.0298

Taxpayers that use the composite method of Notice 88–100 should use 95.7330 percent to discount salvage recoverable as of the end of the 2019 taxable year with respect to losses incurred in this line of business in 2009 and prior years.

DRAFTING INFORMATION

The principal author of this revenue procedure is Sarah E. Swan of the Office of the Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact Ms. Swan at (202)622–8443 (not a toll-free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking and Notice of Public Hearing

Amendments to Regulations Under I.R.C. Section 7430 Relating to Awards of Administrative Costs and Attorneys Fees

REG–111833–99

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations relating to awards of administrative costs and attorneys fees under section 7430 to conform to the amendments made in the Taxpayer Relief Act of 1997 and the IRS Restructuring and Reform Act of 1998. The regulations affect taxpayers seeking attorneys fees and costs. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by February 8, 2010. Outlines of topics to be discussed at the public hearing scheduled for 10:00 a.m. on March 10, 2010 must be received by February 10, 2010.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–111833–99), 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–111833–99), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–111833–99). The public hearing will be held in the Internal Revenue Building, Room 2615, 1111 Constitution Avenue, N.W., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the hearing, submission of written comments, and to be placed on the building access list to attend the hearing, contact Regina Johnson, (202) 622–7180; concerning the proposed regulations, contact Ronald J. Goldstein (202) 622–4910 (not toll-free numbers).

Background and Explanation of Provisions

The proposed amendments to the Treasury Regulations incorporate the 1997 and 1998 amendments to section 7430 of the Internal Revenue Code relating to awards of attorneys fees. These amendments were enacted as part of the Taxpayer Relief Act of 1997, Public Law No. 105–34, 111 Stat. 788, and the IRS Restructuring and Reform Act of 1998, Public Law No. 105–206, 112 Stat. 685.

The Taxpayer Relief Act of 1997 (TRA) contained several amendments to section 7430 that are addressed in the proposed amendments to the regulations. First, the TRA provided that a taxpayer has ninety days after the date the IRS mails to the taxpayer a final decision determining tax, interest or penalty, to file an application with the IRS to recover administrative costs. Second, a taxpayer has ninety days after the date the IRS mails to the taxpayer, by certified or registered mail, a final adverse decision regarding an award of administrative costs, to file a petition with the Tax Court. Third, the TRA clarified the application of the net worth requirements by providing that individuals filing joint returns should be treated as separate taxpayers for purposes of determining net worth. The TRA added trusts to the list of taxpayers subject to the net worth requirements and also specified the date on which the net worth determination should be made.

The TRA also added section 7436 to the Code, which gives the Tax Court jurisdiction in certain employment tax cases. Under section 7436, if the IRS determines in connection with an audit that (1) one or more individuals performing services for the taxpayer are employees of the taxpayer or (2) the taxpayer is not entitled to relief from employment taxes under section 530 of the Revenue Act of 1978 with respect to the individual(s), and the IRS sends a Notice of Determination of Worker Classification (NDWC) to the taxpayer by certified or registered mail, the taxpayer may petition the Tax Court to determine (1) whether the IRS's determination, as set forth in the NDWC, is correct and (2) the proper amount of employment tax under the determination. Various restrictions on assessment and collection in section 6213 apply to a section 7436 proceeding in the same manner as if the NDWC were a notice of deficiency. Section 7436(d)(2) provides that section 7430 applies to proceedings brought under section 7436.

The proposed amendments reflect the changes outlined in this preamble. Additional clarifying changes address the calculation of net worth. First, the regulation specifies that net worth will be calculated using the fair market value of assets to provide a more accurate assessment of a taxpayer's actual and current net worth as of the administrative proceeding date. Second, the regulation specifies which net worth and size limitations apply when a taxpayer is an owner of an unincorporated business. Third, the regulation has been amended to clarify the net worth requirement in cases involving partnerships subject to the unified audit and litigation procedures of sections 6221 through 6234 of the Code (the TEFRA partnership procedures).

The IRS Restructuring and Reform Act of 1998 (RRA) also contained several amendments affecting section 7430. First, the RRA increased the hourly rate limitation from $110 per hour to $125 per hour. Second, two special factors were added that may be considered to increase an attorney's hourly rate: difficulty of the issues presented and local availability of tax experts. Third, the RRA added a provision that requires a court to consider whether the IRS has lost cases with substantially similar issues in other circuit courts of appeal in deciding whether the IRS's position was substantially justified. Fourth, the RRA created an exception to the requirement that to recover attorneys fees, the taxpayer must have paid or incurred the fees. The exception provides that if an individual who is authorized to practice before the Tax Court or the IRS is representing the taxpayer on a *pro bono*

basis, then the taxpayer may petition for an award of reasonable attorneys fees in excess of the amounts that the taxpayer paid or incurred, as long as the fee award is ultimately paid to the individual or the individual's employer. Fifth, the period for recovery of reasonable administrative costs was extended to include costs incurred after the date on which the first letter of proposed deficiency, commonly known as a 30-day letter, is mailed to the taxpayer. The regulations clarify, however, that a taxpayer may be eligible to recover reasonable administrative costs from the date of the 30-day letter only if at least one issue (other than recovery of administrative costs) remains in dispute as of the date that the IRS takes a position in the administrative proceeding.

Special Analyses

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

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, 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. The IRS and Treasury Department specifically request comments on the clarity of the proposed rules and how it may be made easier to understand. All public comments will be made available for public inspection and copying.

A public hearing has been scheduled for 10:00 a.m. on March 10, 2010 in the Internal Revenue Building, Room 2615, 1111 Constitution Avenue N.W., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having a visitor's name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT caption.

An outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) must be submitted by any person that wishes to present oral comments at the hearing. Outlines must be received by February 10, 2010.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving requests to speak has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Ronald J. Goldstein, Office of Associate Chief Counsel (Procedure and Administration).

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Proposed Amendments to the Regulations

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

PART 301–PROCEDURE AND ADMINISTRATION

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

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

Par. 2. Section 301.7430–0 is amended by:

1. Adding a new entry for §301.7430–3(c)(4).

2. Adding new entries for §301.7430–4(b)(3)(iii)(A) through (F) and (d).

3. Revising the entries for §301.7430–5.

4. Revising the section heading for §301.7430–6.

5. Adding new entries for §§301.7430–7 and 301.7430–8.

The additions and revisions read as follows:

§301.7430–0 Table of contents.

* * * * *

§301.7430–3 Administrative proceeding and administrative proceeding date.

* * * * *

(c) * * *

(4) First letter of proposed deficiency that allows the taxpayer an opportunity for administrative review in the Office of Appeals.

* * * * *

§301.7430–4 Reasonable administrative costs.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(A) In general.

(B) Special factor.

(C) Limited availability.

(D) Local availability of tax expertise.

(E) Difficulty of the issues.

(F) Example.

(c) * * *

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(1) In general.

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(5) Requirements.

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(7) Examples.

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(b) Position of the Internal Revenue Service.

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(b) Prevailing party.
(c) Administrative proceeding.
(d) Costs incurred after filing of bankruptcy petition.
(e) Time for filing claim for administrative costs.
(f) Effective date.

Par. 3. Section 301.7430–1 is amended by:

1. Revising paragraphs (b)(1)(ii)(A), (d)(1)(i), (d)(1)(ii) and (d)(2) introductory text.

2. Removing the language "district director" in paragraphs (f)(2)(i), (f)(3)(ii), (f)(3)(iii), (f)(4)(i) and (g) *Examples 6, 7* and *8* and adding the language "Internal Revenue Service office" in its place in all locations.

3. Removing the language "such" in the second sentence of paragraph (g) *Example 9* and adding the language "these" in its place.

The revisions read as follows:

§301.7430–1 Exhaustion of administrative remedies.

* * * * *

(b) * * * (1) * * *

(ii) * * *

(A) Requests an Appeals office conference in accordance with §§601.105 and 601.106 of this chapter or any successor published guidance; and

* * * * *

(d) * * *(1) * * *

(i) The party follows all applicable Internal Revenue Service procedures for contesting the matter (including filing a written protest or claim, requesting an administrative appeal, and participating in an administrative hearing or conference); or

(ii) If there are no applicable Internal Revenue Service procedures, the party submits to the area director of the area having jurisdiction over the dispute a written claim for relief reciting facts and circumstances sufficient to show the nature of the relief requested and that the party is entitled to the requested relief; and the area director has denied the claim for relief in writing or failed to act on the claim within a reasonable period after the claim is received by the area director.

(2) For purposes of paragraph (d)(1)(ii) of this section, a *reasonable period* is—

* * * * *

Par. 4. Section 301.7430–2 is amended by:

1. Adding the language "from the Internal Revenue Service" at the end of the last sentence of paragraph (a).

2. Removing the language "such" in the fourth and fifth sentences of paragraph (b)(2) and adding the language "these" in its place in both locations.

3. Removing the ";" at the end of paragraph (c)(3)(i)(B) and adding a "." in its place.

4. Adding a new sentence at the end of paragraphs (c)(3)(i)(B), (c)(3)(i)(E) and (c)(7).

5. Revising paragraphs (c)(3)(ii)(C), (c)(5) and (e).

6. Adding new paragraph (c)(3)(iii)(C).

7. Removing the language "which" in the first sentence of paragraph (c)(4) and adding the language "that" in its place.

8. Removing the language "such" in the second sentence of paragraph (c)(6) and adding the language "the" in its place.

The additions and revisions read as follows:

§301.7430–2 Requirements and procedures for recovery of reasonable administrative costs.

* * * * *

(c) * * *

(3) * * *(i) * * *

(B) * * * For costs incurred after January 18, 1999, if the taxpayer alleges that the United States has lost in courts of appeal for other circuits on substantially similar issues, the taxpayer must provide the full name of the case, volume and pages of the reporter in which the opinion appears, the circuit in which the case was decided, and the year of the opinion;

* * * * *

(E) * * * This statement must identify whether the representation is on a *pro bono* basis as defined in §301.7430–4(d) and, if so, to whom payment should be made. Specifically, the statement must direct whether payment should be made to the taxpayer's representative or to the representative's employer.

(ii) * * *

(C) For costs incurred after January 18, 1999, if more than $125 per hour as adjusted for increases in the cost of living pursuant to §301.7430–4(b)(3) is claimed for the fees of a representative in connection with the administrative proceeding, an affidavit stating that a special factor described in §301.7430–4(b)(3) is applicable, such as the difficulty of the issues pre-

sented in the case or the lack of local availability of tax expertise. If a special factor is claimed based on specialized skills and distinctive knowledge as described in §301.7430–4(b)(2)(ii), the affidavit must state—

(1) Why the specialized skills and distinctive knowledge were necessary in the representation;

(2) That there is a limited availability of representatives possessing these specialized skills and distinctive knowledge; and

(3) How the education and experience qualifies the representative as someone with the necessary specialized skills and distinctive knowledge.

(iii) * * *

(C) In cases of *pro bono* representation, time records similar to billing records, detailing the time spent and work completed must be submitted for the requested fees.

* * * * *

(5) *Period for requesting costs from the Internal Revenue Service.* To recover reasonable administrative costs pursuant to section 7430 and this section, the taxpayer must file a written request for costs within 90 days after the date the final adverse decision of the Internal Revenue Service with respect to all tax, additions to tax, interest, and penalties at issue in the administrative proceeding is mailed or otherwise furnished to the taxpayer. For purposes of this section, *interest* means the interest that is specifically at issue in the administrative proceeding independent of the taxpayer's objections to the underlying tax imposed. The final decision of the Internal Revenue Service for purposes of this section is the document that resolves the tax liability of the taxpayer with regard to all tax, additions to tax, interest, and penalties at issue in the administrative proceeding (such as a Form 870 or closing agreement), or a notice of assessment for that liability (such as the notice and demand under section 6303), whichever is earlier mailed or otherwise furnished to the taxpayer. For purposes of this section, if the 90th day falls on a Saturday, Sunday, or a legal holiday, the 90-day period shall end on the next succeeding day that is not a Saturday, Sunday, or a legal holiday as defined by section 7503.

* * * * *

(7) * * * If the notice of decision denying (in whole or in part) an award for reasonable administrative costs was mailed by the Internal Revenue Service via certified mail or registered mail, a taxpayer may obtain judicial review of that decision by filing a petition for review with the Tax Court prior to the 91st day after the mailing of the notice of decision.

* * * * *

(e) * * *

Example 1. Taxpayer A receives a notice of proposed deficiency (30-day letter). A requests and is granted Appeals office consideration. Appeals requests that A submit certain documents as substantiation for the tax matters at issue. Appeals determines that the information submitted is insufficient. Appeals then issues a notice of deficiency. After receiving the notice of deficiency but before the 90-day period for filing a petition with the Tax Court has expired, A convinces Appeals that the information submitted during the review by Appeals is sufficient and, therefore, the notice of deficiency is incorrect and A owes no additional tax. Appeals then closes the case showing a zero deficiency and mails A a notice to this effect. Assuming that all of the other requirements of section 7430 are satisfied, A may recover reasonable administrative costs incurred after the date of the 30-day letter (the administrative proceeding date). To recover these costs, A must file a request for administrative costs with the Appeals office personnel who settled A's tax matter, or if that person is unknown to A, with the Area Director of the area that considered the underlying matter, within 90 days after the date of mailing of the Office of Appeals' final decision that A owes no additional tax.

Example 2. Taxpayer B files a request for an abatement of interest pursuant to section 6404 and the regulations thereunder. The Area Director issues a notice of proposed disallowance of the abatement request (akin to a 30-day letter). B requests and is granted Appeals office consideration. No agreement is reached with Appeals and the Office of Appeals issues a notice of disallowance of the abatement request. B does not file suit in the Tax Court, but instead contacts the Appeals office within 180 days after the mailing date of the notice of disallowance of the abatement request to attempt to reverse the decision. B convinces the Appeals office that the notice of disallowance is in error. The Appeals office agrees to abate the interest and mails the taxpayer a notification of this decision. The mailing date of the notification from Appeals of the decision to abate interest commences the 90-day period from which the taxpayer may request administrative costs. Assuming that all of the other requirements of section 7430 are satisfied, B may recover reasonable administrative costs incurred after the date of the notice of proposed disallowance of the abatement request (the administrative proceeding date). To recover these costs, B must file a request for costs with the Appeals office personnel who settled B's tax matter, or if that person is unknown to B, with the Area Director of the area that considered the underlying matter within 90 days after the date of mailing of the Office of Appeals' final decision that B is entitled to abatement of interest.

Example 3. Taxpayer C receives a notice of proposed adjustment and employment tax 30-day letter. C requests and is granted Appeals office consideration. Appeals requests that C submit certain documents to support C's position in the tax matters at issue. Appeals determines that the documents submitted are insufficient. Appeals then issues a notice of determination of worker classification. After receiving the notice of determination but before the 90-day period for filing a petition with the Tax Court has expired, C convinces Appeals that the documents submitted during the review by Appeals adequately support its position and, therefore, C owes no additional employment tax. Appeals then closes the case showing a zero tax adjustment and mails C a no-change letter. Assuming that all of the other requirements of section 7430 are satisfied, C may recover reasonable administrative costs incurred after the date of the notice of proposed adjustment and 30-day letter (the administrative proceeding date). To recover these costs, C must file a request for administrative costs with the Appeals office personnel who settled C's tax matter, or if that person is unknown to C, with the Area Director of the area that considered the underlying matter, within 90 days after the date of mailing of the Office of Appeals' final decision that C owes no additional tax.

Par. 5. Section 301.7430–3 is amended by:

1. Revising paragraphs (b), (c)(1), (c)(3) and (d).

2. Adding paragraph (c)(4).

The addition and revisions read as follows:

§301.7430–3 Administrative proceeding and administrative proceeding dates.

* * * * *

(b) *Collection action.* A collection action generally includes any action taken by the Internal Revenue Service to collect a tax (or any interest, additional amount, addition to tax, or penalty, together with any costs in addition to the tax) or any action taken by a taxpayer in response to the Internal Revenue Service's act or failure to act in connection with the collection of a tax (including any interest, additional amount, addition to tax, or penalty, together with any costs in addition to the tax). A collection action for purposes of section 7430 and this section includes any action taken by the Internal Revenue Service under Chapter 64 of Subtitle F to collect a tax. Collection actions also include collection due process hearings under sections 6320 and 6330 (unless the underlying tax liability is properly at issue), and those actions taken by a taxpayer to remedy the Internal Revenue Service's failure to release a lien under section 6325 or to remedy any unauthorized collection action as defined by section 7433, except those collection actions described by sec-

tion 7433(e). An action or procedure directly relating to a claim for refund after payment of an assessed tax is not a collection action.

(c) *Administrative proceeding date*—(1) *General rule*. For purposes of section 7430 and the regulations thereunder, the term *administrative proceeding date* means the earlier of—

(i) The date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals;

(ii) The date of the notice of deficiency; or

(iii) The date on which the first letter of proposed deficiency that allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals is sent.

(2) * * *

(3) *Notice of deficiency*. A notice of deficiency is a notice described in section 6212(a), including a notice rescinded pursuant to section 6212(d). For purposes of determining reasonable administrative costs under section 7430 and the regulations thereunder, the following will be treated as a notice of deficiency:

(i) A notice of final partnership administrative adjustment described in section 6223(a)(2).

(ii) A notice of determination of worker classification issued pursuant to section 7436.

(iii) A final notice of determination denying innocent spouse relief issued pursuant to section 6015.

(4) *First letter of proposed deficiency that allows the taxpayer an opportunity for administrative review in the Office of Appeals*. Generally, the first letter of proposed deficiency that allows the taxpayer an opportunity for administrative review in the Office of Appeals is the first letter issued to the taxpayer that describes the proposed adjustments and advises the taxpayer of the opportunity to contact the Office of Appeals. It also may be a claim disallowance or the first letter of determination that allows the taxpayer an opportunity for administrative review in the Office of Appeals.

(d) *Examples*. The provisions of this section are illustrated by the following examples:

Example 1. Taxpayer A receives a notice of proposed deficiency (30-day letter). A files a request for and is granted an Appeals office conference. At the Appeals conference no agreement is reached on the tax matters at issue. The Office of Appeals then issues a notice of deficiency. Upon receiving the notice of deficiency, A does not file a petition with the Tax Court. Instead, A pays the deficiency and files a claim for refund. The claim for refund is considered by the Internal Revenue Service and the Area Director issues a notice of proposed claim disallowance. A requests and is granted Appeals office consideration. A convinces Appeals that A's claim is correct and Appeals allows A's claim. A may recover reasonable administrative costs incurred on or after the date of the notice of proposed deficiency (30-day letter), but only if the other requirements of section 7430 and the regulations thereunder are satisfied. A cannot recover costs incurred prior to the date of the 30-day letter because these costs were incurred before the administrative proceeding date.

Example 2. Taxpayer B files an individual income tax return showing a balance due. No payment is made with the return and the Internal Revenue Service assesses the amount shown on the return. The Internal Revenue Service issues a notice of levy pursuant to section 6330. B requests and is granted a Collection Due Process (CDP) hearing. In connection with the CDP hearing, B enters into an installment agreement as a collection alternative. The costs that B incurred in connection with the CDP hearing were not incurred in an administrative proceeding, but rather in a collection action. Accordingly, B may not recover those costs as reasonable administrative costs under section 7430 and the regulations thereunder.

Par. 6. Section 301.7430–4 is amended by:

1. Removing the language "such" in the second and fifth sentences of paragraph (b)(2)(ii) and adding the language "that" in its place in both locations.

2. Revising paragraphs (b)(3)(i), (b)(3)(iii)(B), and (c)(4) *Examples 1* and *2*.

3. Removing the language "$110" from the first and second sentences in paragraph (b)(3)(ii) and adding the language "$125" in its place in both locations.

4. Revising the first sentence in paragraph (b)(3)(iii)(C).

5. Redesignating paragraph (b)(3)(iii)(D) as paragraph (b)(3)(iii)(F) and revising newly-designated paragraph (b)(3)(iii)(F).

6. Adding new paragraphs (b)(3)(iii)(D), (b)(3)(iii)(E) and (d).

7. Removing the language "Such" in the third sentence of paragraph (c)(2)(i) and adding the language "These" in its place.

8. Removing the language "$110" from the second and third sentences in paragraph (c)(2)(ii) and adding the language "$125" in its place in both locations.

9. Removing the language "which" in the fourth sentence of paragraph (c)(2)(i) and adding the language "that" in its place.

The additions and revisions read as follows:

§301.7430–4 Reasonable administrative costs.

* * * * *

(b) * * *

(3) *Limitation on fees for a representative*—(i) *In general*. Except as otherwise provided in this section, fees incurred after January 18, 1999, and described in paragraph (b)(1)(iv) of this section that are recoverable under section 7430 and the regulations thereunder as reasonable administrative costs may not exceed $125 per hour increased by a cost of living adjustment (and if appropriate, a special factor adjustment).

* * * * *

(iii) * * *

(B) *Special factor*. A *special factor* is a factor, other than an increase in the cost of living, that justifies an increase in the $125 per hour limitation of section 7430(c)(1)(B)(iii). The undesirability of the case, the work and the ability of counsel, the results obtained, and customary fees and awards in other cases, are factors applicable to a broad spectrum of litigation and do not constitute special factors for the purpose of increasing the $125 per hour limitation. By contrast, the limited availability of a specially qualified representative for the proceeding, the difficulty of the issues, and the limited local availability of tax expertise are special factors justifying an increase in the $125 per hour limitation.

(C) *Limited availability*. Limited availability of a specially qualified representative is established by demonstrating that a specially qualified representative for the proceeding is not available at the $125 per hour rate (as adjusted for an increase in the cost of living). * * *

(D) *Limited local availability of tax expertise*. Limited local availability of tax expertise is established by demonstrating that a representative possessing tax expertise is not available in the taxpayer's geographical area. Initially, this showing may be made by submission of an affidavit signed by the taxpayer, or by the taxpayer's counsel, that no representative possessing tax expertise practices within

a reasonable distance from the taxpayer's principal residence or principal office. The hourly rate charged by representatives in the geographical area is not relevant in determining whether tax expertise is locally available. If the Internal Revenue Service challenges this initial showing, the taxpayer may submit additional evidence to establish the limited local availability of a representative possessing tax expertise.

(E) *Difficulty of the issues*. In determining whether the difficulty of the issues justifies an increase in the $125 per hour limitation on the applicable hourly rate, the Internal Revenue Service will consider the following factors:

(*1*) The number of different provisions of law involved in each issue.

(*2*) The complexity of the particular provision or provisions of law involved in each issue.

(*3*) The number of factual issues present in the proceeding.

(*4*) The complexity of the factual issues present in the proceeding.

(F) *Example*. The provisions of this section are illustrated by the following example:

Example. Taxpayer A is represented by B, a CPA and attorney with a LL.M. Degree in Taxation with Highest Honors and who regularly handles cases dealing with TEFRA partnership issues. B represents A in an administrative proceeding involving TEFRA partnership issues that is subject to the provisions of this section. Assuming the taxpayer qualifies for an award of reasonable administrative costs by meeting the requirements of section 7430, the amount of the award attributable to the fees of B may not exceed the $125 per hour limitation (as adjusted for the cost of living), absent a special factor. B is not a specially qualified representative because extraordinary knowledge of the tax laws does not constitute distinctive knowledge or a unique and specialized skill constituting a special factor. A special factor must be comprised of nontax expertise unless the taxpayer establishes the limited local availability of tax expertise.

* * * * *

(c) * * *

(4)* * *

Example 1. After incurring fees for representation during the Internal Revenue Service's examination of taxpayer A's income tax return, A receives a notice of proposed deficiency (30-day letter). A files a request for and is granted an Appeals office conference. At the conference no agreement is reached on the tax matters at issue. The Internal Revenue Service then issues a notice of deficiency. Upon receiving the notice of deficiency, A discontinues A's administrative efforts and files a petition with the Tax Court. A's costs incurred before the date of the mailing of the 30-day letter are not reasonable administrative costs because they were incurred before the administrative proceeding date. Similarly, A's costs incurred in connection with the preparation and filing of a petition with the Tax Court are litigation costs and not reasonable administrative costs.

Example 2. Assume the same facts as in *Example 1* except that after A receives the notice of deficiency, A recontacts Appeals and Appeals agrees with A. If A seeks administrative costs, A may recover costs incurred after the date of the mailing of the 30-day letter, costs incurred in recontacting Appeals after the issuance of the notice of deficiency, and costs incurred up to the time the Tax Court petition was filed, as reasonable administrative costs, but only if the other requirements of section 7430 and the regulations thereunder are satisfied. The costs incurred before the date of the mailing of the 30-day letter are not reasonable administrative costs because they were incurred before the administrative proceeding date, as set forth in §301.7430–3(c)(1)(iii). A's costs incurred in connection with the filing of a petition with the Tax Court are not reasonable administrative costs because those costs are litigation costs. Similarly, A's costs incurred after the filing of the petition are not reasonable administrative costs, as they are litigation costs.

(d) *Pro bono services*—(1) *In general*. Fees recoverable under section 7430 and the regulations thereunder as reasonable administrative costs may exceed the attorneys' fees paid or incurred by the prevailing party if these fees are less than the reasonable attorneys' fees because an individual is representing the prevailing party on a pro bono basis. In addition to attorneys' fees, reasonable costs incurred or paid by the individual providing the *pro bono* services that are normally billed separately also may be recovered under this section.

(2) *Requirements*. *Pro bono* representation is established by demonstrating—

(i) Legal services were provided for no fee or for a fee that (taking into account all the facts and circumstances) constitutes a nominal fee;

(ii) The legal services were provided to or on behalf of either—

(A) Persons of limited financial means who meet the eligibility requirements for programs funded by the Legal Services Corporation as set forth in 45 C.F.R. § 1611; or

(B) Organizations operating primarily to address the needs of persons with limited means if payment of a standard legal fee would significantly deplete the person's financial resources; and

(iii) The service provider intended to perform services for no fee or for a nominal fee from the commencement of the representation. Intent to perform services for no fee or for a nominal fee may be demonstrated through documentation such as a retainer agreement. An individual will not be considered to have represented a client on a *pro bono* basis if the facts demonstrate that the individual anticipated a fee or provided services on a contingency fee basis. The fact that the service provider intended to seek recovery of fees under section 7430 will not prevent the service provider from satisfying this requirement.

(3) *Nominal fee*. A *nominal fee* is defined as one that is slight, inconsiderable or trifling (taking into account all the facts and circumstances).

(4) *Payment when services provided at no charge or for a nominal fee*. A prevailing party who receives legal services at no charge or for a nominal fee and who satisfies the requirements under this section is eligible to receive reasonable fees in excess of the fees actually paid or incurred and those otherwise meeting the requirements of this paragraph. Payment will be made to the representative or the representative's employer.

(5) *Record keeping*. Contemporaneous records must be maintained, demonstrating the work performed and the time allocated to each task. These records should contain similar information to billing records.

(6) *Hourly rate*. For purposes of this section, the hourly rate may not exceed the lesser of—

(i) The rate prescribed under section 7430(c)(1)(B); or

(ii) The hourly rate customarily charged by the representative in cases that are not handled on a *pro bono* basis.

(7) *Examples*. The provisions of this section are illustrated by the following examples:

Example 1. Taxpayer A, an attorney, files a petition with the Tax Court and pays a $60 filing fee. A appears *pro se* in the court proceeding. If A prevails, he will not be entitled to an award of reasonable litigation costs for his services. A is rendering services on his own behalf, not providing *pro bono* representation. His lost opportunity costs are not compensable under section 7430. A may recover the filing fee as a litigation cost, but only if the other requirements of section 7430 and the regulations thereunder are satisfied.

Example 2. Taxpayer retains attorney B with regard to the audit of taxpayer's individual income tax return. B agrees to represent taxpayer on a *pro bono* basis. Under this arrangement, taxpayer pays to attorney B a nominal fee. The customary hourly rate charged by B in cases not handled on a *pro bono* basis is less than the rate prescribed under section 7430(c)(1)(B). Any award paid to attorney B, or attorney B's employer, would be limited to attorney B's

customary hourly rate. Thus, attorney B, or attorney B's employer, would receive the customary hourly rate charged in cases not handled by attorney B on a *pro bono* basis rather than the nominal fee actually paid or incurred by the taxpayer.

Example 3. Assume the same facts in *Example 2* except that attorney B's customary hourly rate exceeds the rate prescribed under section 7430(c)(1)(B). Any award paid to attorney B, or attorney B's employer, would be made at the rate prescribed under section 7430(c)(1)(B).

Example 4. Organization C, a low income taxpayer clinic within the meaning of section 7526, agrees to represent taxpayer on a *pro bono* basis. Attorneys employed by C do not have a customary hourly rate and work exclusively for C. Any award paid to C, for representation by its attorneys, would be limited to the rate prescribed under section 7430(c)(1)(B).

§301.7430–5 [Amended]

Par. 7. For each entry in the table, redesignate the paragraph designated in the "Old Paragraph" column as the new paragraph designation in the "New Paragraph" column to read as follows:

Old Paragraph	New Paragraph
301.7430–5(a)(1)	301.7430–5(a)(2)
301.7430–5(a)(2)	301.7430–5(a)(3)
301.7430–5(a)(3)	301.7430–5(a)(4)
301.7430–5(c)	301.7430–5(d)(1)
301.7430–5(c)(2)	301.7430–5(d)(6)
301.7430–5(c)(3)	301.7430–5(d)(7)
301.7430–5(d)	301.7430–5(e)
301.7430–5(e)	301.7430–5(f)(1)
301.7430–5(f)(1)	301.7430–5(g)(1)
301.7430–5(f)(2)	301.7430–5(g)(3)
301.7430–5(f)(3)	301.7430–5(g)(4)
301.7430–5(g)	301.7430–5(h)

Par. 8. Section 301.7430–5 is amended by:

1. Removing the language "only if–" at the end of the introductory text in paragraph (a) and adding the language "(other than by reason of section 7430(c)(4)(E)) only if—" in its place.

2. Adding new paragraphs (a)(1), (c), (d)(2), (d)(3), (d)(4), (d)(5), (g)(2) and (g)(5).

3. Revising paragraph (b).

4. Revising the third sentence and removing the language "(c)(3)" from the fourth sentence in newly-designated paragraph (d)(7) and adding the language "(d)(7)" in its place.

5. Revising the paragraph heading for newly-designated paragraph (f)(1) and adding new paragraph (f)(2).

6. Revising newly-designated paragraphs (g)(1) and (g)(3).

7. Removing the language "Internal Revenue Code" in the first sentence of newly-designated paragraph (g)(4) in both places.

8. Removing the language "such" in the first sentence of newly-designated paragraph (h) and adding the language "an" in its place.

9. Removing paragraph (h).

The additions and revisions read as follows:

§301.7430–5 Prevailing party.

(a) * * *

(1) At least one issue (other than recovery of administrative costs) remains in dispute as of the date that the Internal Revenue Service takes a position in the administrative proceeding, as described in paragraph (b) of this section;

* * * * *

(b) *Position of the Internal Revenue Service*. The position of the Internal Revenue Service in an administrative proceeding is the position taken by the Internal Revenue Service as of the earlier of—

(1) The date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals; or

(2) The date of the notice of deficiency or any date thereafter.

* * * * *

(c) *Examples*. The provisions of this section may be illustrated by the following examples:

Example 1. Taxpayer A receives a notice of proposed deficiency (30-day letter). A pays the amount of the proposed deficiency and files a claim for refund. A's claim is considered and a notice of proposed claim disallowance is issued by the Area Director. A does not request an Appeals office conference and the Area Director issues a notice of claim disallowance. A then files suit in a United States District Court. A cannot recover reasonable administrative costs because the notice of claim disallowance is not a notice of the decision of the Internal Revenue Service Office of Appeals or a notice of deficiency. Accordingly, the Internal Revenue Service has not taken a position in the administrative proceeding pursuant to section 7430(c)(7)(B).

Example 2. Taxpayer B receives a notice of proposed deficiency (30-day letter). B disputes the proposed adjustments and requests an Appeals office conference. The Appeals office determines that B has no additional tax liability. B requests administrative costs from the date of the 30-day letter. B is not the prevailing party and may not recover administrative costs because all of the proposed adjustments in the case were resolved as of the date that the Internal Revenue Service took a position in the administrative proceeding.

(d) * * *

(2) *Position in courts of appeal*. Whether the United States has won or lost an issue substantially similar to the one in

the taxpayer's case in courts of appeal for circuits other than the one to which the taxpayer's case would be appealable should be taken into consideration in determining whether the Internal Revenue Service's position was substantially justified.

(3) *Example*. The provisions of this section are illustrated by the following example:

Example. The Internal Revenue Service, in the conduct of a correspondence examination of taxpayer A's individual income tax return, requests substantiation from A of claimed medical expenses. A does not respond to the request and the Service issues a notice of deficiency. After receiving the notice of deficiency, A presents sufficient information and arguments to convince a revenue agent that the notice of deficiency is incorrect and that A owes no tax. The revenue agent then closes the case showing no deficiency. Although A incurred costs after the issuance of the notice of deficiency, A is unable to recover these costs because, as of the date these costs were incurred, A had not presented relevant information under A's control and relevant legal arguments supporting A's position to the appropriate Internal Revenue Service personnel. Accordingly, the position of the Internal Revenue Service was substantially justified at the time the costs were incurred.

(4) *Included costs*. (i) An award of reasonable administrative costs shall only include costs incurred on or after the earliest of—

(A) The date of the receipt by the taxpayer of the notice of decision from Appeals;

(B) The date of the notice of deficiency; or

(C) The date on which the first letter of proposed deficiency that allows the taxpayer an opportunity for administrative review in the Office of Appeals is sent.

(ii) If the Internal Revenue Service takes a position in an administrative proceeding, as defined in paragraph (b) of this section, and the position is not substantially justified, the taxpayer may be permitted to recover costs incurred before the position was taken, but not before the dates set forth in this paragraph (d)(4).

(5) *Examples*. The provisions of this section may be illustrated by the following examples:

Example 1. Pursuant to section 6672, taxpayer D receives from the Area Director Collection Operations (Collection) a proposed assessment of trust fund taxes (Trust Fund Recovery Penalty). D requests and is granted Appeals office consideration. Appeals considers the issues and decides to uphold Collection's recommended assessment. Appeals notifies D of this decision in writing. Collection then assesses the tax and notice and demand is made. D timely pays the minimum amount required to commence a court proceeding, files a claim for refund, and furnishes the required bond. Collection disallows the claim, but Appeals, on reconsideration, reverses its original position, thus upholding D's position. If Appeals concedes its initial determination was not substantially justified, D may recover administrative costs incurred on or after the mailing of the proposed assessment of trust fund taxes, because the proposed assessment is the first determination letter that allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals.

Example 2. Taxpayer E receives a notice of proposed deficiency (30-day letter). E pays the amount of the proposed deficiency and files a claim for refund. E's claim is considered and a notice of proposed disallowance is issued by the Area Director. E requests and is granted Appeals office consideration. No agreement is reached with Appeals and the Office of Appeals issues a notice of claim disallowance. E does not file suit in a United States District Court but instead contacts the Appeals office to attempt to reverse the decision. E convinces the Appeals officer that the notice of claim disallowance is in error. The Appeals officer then abates the assessment. E may recover reasonable administrative costs if the position taken in the notice of claim disallowance issued by the Office of Appeals was not substantially justified and the other requirements of section 7430 and the regulations thereunder are satisfied. If so, E may recover administrative costs incurred from the mailing date of the 30-day letter because the requirements of paragraph (c)(2) of this section are met. E cannot recover the costs incurred prior to the mailing of the 30-day letter because they were incurred before the administrative proceeding date.

* * * * *

(7) *Presumption*. * * * For purposes of this paragraph (d)(7), the term *applicable published guidance* means final or temporary regulations, revenue rulings, revenue procedures, information releases, notices and announcements published in the Internal Revenue Bulletin and, if issued to the taxpayer, private letter rulings, technical advice memoranda, and determination letters (§601.601(d)(2) of this chapter). * * *

* * * * *

(f) *Most significant issue or set of issues presented*—(1) *In general*. *** * ***

(2) *Example*. The provisions of this section may be illustrated by the following example:

Example. In the purchase of an ongoing business, Taxpayer F obtains from the previous owner of the business a covenant not to compete for a period of five years. On audit of F's individual income tax return for the year in which the business is acquired, the Internal Revenue Service challenges the basis assigned to the covenant not to compete and a deduction taken as a business expense for a seminar attended by F. Both parties agree that the covenant not to compete is amortizable over a period of five years; however, the Internal Revenue Service asserts that the proper basis of the covenant is $2X while F asserts the basis is $4X. The deduction for the seminar attended by F was reported on the return in question in the amount of $7X. The Internal Revenue Service determines that the deduction for the seminar should be disallowed entirely. In the notice of deficiency, the Internal Revenue Service adjusts the amortization deduction to reflect the change to the basis of the covenant not to compete, and disallows the seminar expense. Thus, of the two adjustments determined for the year under audit, the adjustment attributable to the disallowance of the seminar is larger than that attributable to the covenant not to compete. Due to the impact on the next succeeding four years, however, the covenant not to compete adjustment is objectively the most significant issue to both F and the Internal Revenue Service.

* * * * *

(g) *Net worth and size limitations*—(1) *Individuals*. A taxpayer who is a natural person meets the net worth and size limitations of this paragraph if the taxpayer's net worth does not exceed two million dollars. The net worth limitation shall be determined for individuals using the fair market value of the individual's assets as of the administrative proceeding date. For purposes of determining net worth, individuals filing a joint return shall be treated as separate individuals. Thus, individuals filing a joint return will each be subject to a separate net worth limitation of two million dollars.

(2) *Estates and trusts*. An estate or a trust meets the net worth and size limitations of this paragraph if the taxpayer's net worth does not exceed two million dollars. The net worth of an estate shall be determined using the fair market value of the assets of the estate as of the date of the decedent's death provided the date of death is prior to the date the court proceeding is commenced. The net worth of a trust shall be determined using the fair market value of the assets of the trust as of the last day of the last taxable year involved in the proceeding.

(3) *Others*. (i) A taxpayer that is a partnership, corporation, association, unit of local government, or organization (other than an organization described in paragraph (g)(4) of this section) meets the net worth and size limitations of this paragraph if, as of the administrative proceeding date:

(A) The taxpayer's net worth does not exceed seven million dollars.; and

(B) The taxpayer does not have more than 500 employees.

(ii) A taxpayer who is a natural person and owns an unincorporated business

is subject to the net worth and size limitations contained in paragraph (g)(3)(i) of this section if the tax at issue (or any interest, additional amount, addition to tax, or penalty, together with any costs in addition to the tax) relates directly to the business activities of the unincorporated business.

(4) * * *

(5) *Special rule for TEFRA partnership proceedings*. (i) In cases involving partnerships subject to the unified audit and litigation procedures of subchapter C of chapter 63 of the Internal Revenue Code (TEFRA partnership cases), the TEFRA partnership meets the net worth and size limitations requirements of this paragraph (g) if, on the administrative proceeding date—

(A) The partnership's net worth does not exceed seven million dollars; and

(B) The partnership does not have more than 500 employees.

(ii) In addition, each partner requesting fees pursuant to section 7430 must meet the appropriate net worth and size limitations set forth in paragraph (g)(1), (g)(2) or (g)(3) of this section. For example, if a partner is an individual, his or her net worth must not exceed two million dollars as of the administrative proceeding date. If the partner is a corporation, its net worth must not exceed seven million dollars and it must not have more than 500 employees.

Par. 9. Section 301.7430–6 is amended by revising the section heading and adding a new sentence at the end of the paragraph to read as follows:

§*301.7430–6 Effective/applicability dates*.

* * * Sections 301.7430–2(c)(3)(i)(B), (c)(3)(i)(E), (c)(3)(ii)(C), (c)(3)(iii)(C), (c)(5), (c)(7), (e); 301.7430–3(c)(1), (c)(4), (d); 301.7430–4(b)(3)(i), (b)(3)(iii)(B), (b)(3)(iii)(D), (b)(3)(iii)(E), (c)(4), (d); and 301.7430–5(a), (b), (c), (d)(2), (d)(3), (d)(4), (d)(5), (f)(2), (g)(1), (g)(2) and (g)(5), as proposed, apply to costs incurred and services performed as of the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 10. Section 301.7430–7 is amended by adding new paragraph (c)(8) and new *Examples 16* and *17* to paragraph (e) to read as follows:

§301.7430–7 Qualified offers.

* * * * *

(c) * * *

(8) *Interest as a contested issue*. To constitute a qualified offer, an offer must specify the offered amount of the taxpayer's liability (determined without regard to interest, unless interest is a contested issue in the proceeding), as provided in paragraphs (c)(1)(ii) and (c)(3) of this section. Therefore, a qualified offer generally may only include an offer to compromise tax, penalties, additions to the tax and additional amounts. Interest may only be included in a qualified offer if interest is a contested issue in the proceeding. For purposes of this section, interest is a contested issue in the proceeding only if the court in which the proceeding could be brought would have jurisdiction to determine the amount of interest due on the underlying tax, penalties, additions to the tax and additional amounts. Examples of proceedings in which interest might be a contested issue include proceedings in which the increased interest rate for large corporate underpayments under section 6621(c) is imposed by the Internal Revenue Service and interest abatement proceedings brought under section 6404. Interest is not a contested issue in the proceeding if the court that would have jurisdiction over the proceeding would not have jurisdiction to determine the amount or rate of interest, regardless of whether the taxpayer attempts to raise interest as an issue in the proceeding. Consequently, interest will not be a contested issue in the vast majority of tax cases because they merely involve the straight forward application of statutory interest under section 6601. Accordingly, in those cases, interest may not be included in the offer.

* * * * *

(e) * * *

Example 16. Qualified offer may not compromise interest unless it is a contested issue. Taxpayer J receives a notice of deficiency making an adjustment resulting in a deficiency in tax of $6,500 plus a penalty of $500. Interest is not a contested issue in the proceeding. Within the qualified offer period, J submits a written offer to settle the case for a deficiency of $1,000, including all taxes, penalties, and interest. The offer states that it is a qualified offer for purposes of section 7430(g) and that it will remain open for acceptance by the IRS for a period of 90 days. Section 7430(g)(2)(B) and paragraph (c)(3) of this section state that the amount of a qualified offer must be without regard to interest unless interest is at issue in the proceeding. Since J's offer attempts to compromise interest, which is not a contested issue in the proceeding, it is not a qualified offer.

Example 17. Qualified offer based on new defense or legal theory. Taxpayers K and L received a statutory notice of deficiency for tax year 2005, a tax year when they were married and filed a joint income tax return. Taxpayer K files a sole petition claiming innocent spouse relief and simultaneously submits an offer purporting to be a qualified offer. The offer states that K is entitled to innocent spouse relief and offers to settle the 2005 deficiency as to K in the amount of $1,000. K's innocent spouse claim was not raised during K and L's audit, nor was it raised during their appeals conference. Additionally, at no time prior to or contemporaneously with submitting the offer did K file with the IRS a Form 8857, *Request for Innocent Spouse Relief*, or otherwise provide the information specified in §1.6015–5(a) of this chapter. K's offer is not a qualified offer because K did not file a Form 8857 or otherwise provide substantiation or legal and factual arguments necessary to allow for informed consideration of the merits of the innocent spouse claim as required by paragraph (c)(4) of this section, contemporaneously with the offer or prior to making the offer.

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

(Filed by the Office of the Federal Register on November 24, 2009, 8:45 a.m., and published in the issue of the Federal Register for November 25, 2009, 74 F.R. 61589)

Foundations Status of Certain Organization

Announcement 2009–88

The following organizations have failed to establish or have been unable to maintain their status as public charities or as operating foundations. Accordingly, grantors and contributors may not, after this date, rely on previous rulings or designations in the Cumulative List of Organizations (Publication 78), or on the presumption arising from the filing of notices under section 508(b) of the Code. This listing does *not* indicate that the organizations have lost their status as organizations described in section 501(c)(3), eligible to receive deductible contributions.

Former Public Charities. The following organizations (which have been treated as organizations that are not private foundations described in section 509(a) of the Code) are now classified as private foundations:

ABBA Enterprises, Inc.,
Independence, MO

Aspire Development Corporation, Memphis, TN
Balleine Supporting Organization, Salt Lake City, UT
B J & Friends India Ministry, Inc., Pasadena, CA
Boys and Girls Club of Bay City and Matagorda County, Bay City, TX
Brant Center, Selma, AL
California Girls Ranch, Auburn, CA
Childrens Piano Institute, New York, NY
Christian Transdenominational Spiritual Group & Enlightenment, Tallahassee, FL
Community Crossroads, Inc., Murfeesboro, TN
Community Family Life Center, St. Louis, MO
Community Service Television, Las Vegas, NV
Computer Enhancement Center, Jackson, MS
Cyberhood Foundation, Philadelphia, PA
Daddy Whites Unlimited, Fort Worth, TX
Dorsainvl Foundation, Delray Beach, FL
Dortch Outreach, Inc., Coy, AL
Empower, Inc., College Park, GA
Faces of New Mexico Concerned Citizens Unified for the Restoration of Errants, Alto, NM
Family Hope International, Inc., Stone Mountain, GA
Flint Hill Foundation, Inc., Trenton, SC
Gidewon Foundation, Atlanta, GA
Genesis RHF Housing, Inc., Long Beach, CA
Greater New Haven Partnership for a Healthy Community, Inc., New Haven, CT
Grounding Relationships in People, Playa Del Ray, CA
Help Me USA, Mineral Ridge, OH
Hopes and Dreams Foundation, Carson, CA
Insight, Joplin, MO
International Academy of Information Sciences Systems and Technologies, Los Altos, CA
Isaac L Floyd Ministries, Lansing, IL
Jasmine Foundation, Baton Rouge, LA
Jefferson Community Services, Inc., Marrero, LA
Keys To College Education Network, Inc., Boulder, CO
Lifeseed Foundation, Mt Prospect, IL
Marin County Mediation Service Advisory Committee, San Rafael, CA
Medi-Bill Training Center, Inc., Yorktown Heights, NY
Monterey Bay Police Activities League, Inc., Marina, CA
Mother Link, Fairfax, VA
Moving On Foundation, Las Vegas, NV
Mt. Pilgrim BC Outreach Ministries, Smithville, TX
Na Koa Opio, Waianae, HI
Nehemiah Ministry, Bakersfield, CA
Off the Street Youth Community Prepatory Academy, Memphis, TN
One Village NFP, Chicago, IL
Our Lord and Saviour Jesus Christ, Ordway, CO
Panache Youth Outreach, Inc., Loxchachee, FL
Parque Santa Cruz, Inc., Bayamon, PR
Paws of Hope Foundation, New York, NY
Public Advocate Org., Seattle, WA
Project Life Foundation, Inc., Dallas, TX
Reading Clubs of America, Inc., Hempstead, NY
Releasing Life International, Harrisburg, PA
Sage Enterprise, Waco, TX
Sarasota High School Basketball Booster Club, Inc., Sarasota, FL
Sawtooth Mountain Historical Society, Queencreek, AZ
Somalian Women Organization, Inc., Atlanta, GA
Special Care Services, Inc., Jersey City, NJ
Supply Our Schools, Reston, VA
Unconditional Care Services, Lawrenceville, GA
Unlimited Resources, Inc., Southfield, MI
USS United States Foundation, North Las Vegas, NV
Where 2 Go of Central Florida, Inc., Pomeroy, FL
WNC Dual Diagnosis Region, Black Mountain, NC

If an organization listed above submits information that warrants the renewal of its classification as a public charity or as a private operating foundation, the Internal Revenue Service will issue a ruling or determination letter with the revised classification as to foundation status. Grantors and contributors may thereafter rely upon such ruling or determination letter as provided in section 1.509(a)–7 of the Income Tax Regulations. It is not the practice of the Service to announce such revised classification of foundation status in the Internal Revenue Bulletin.

Remedial Amendment Period and Reliance for Section 403(b) Plans

Announcement 2009–89

Within the next few months, the Service expects to publish a revenue procedure for obtaining an opinion letter that the form of a prototype or other "pre-approved plan" meets the requirements of § 403(b) of the Internal Revenue Code and the regulations thereunder. The revenue procedure will reflect the Service's consideration of comments it has received on the draft revenue procedure that was included in Announcement 2009–34, 2009–18 I.R.B. 916. Subsequently, the Service intends to publish a revenue procedure for obtaining an individual determination letter for a § 403(b) plan. This announcement provides for a remedial amendment period and reliance for employers that, pursuant to the upcoming revenue procedures, either adopt a pre-approved plan with a favorable opinion letter or apply for an individual determination letter when available.

Notice 2009–3, 2009–2 I.R.B. 250, provides relief during 2009 with respect to the requirement in the regulations to have a written § 403(b) plan in place by January 1, 2009. The Service will not treat a § 403(b) plan as failing to satisfy the requirements of § 403(b) and the regulations during the 2009 calendar year, provided that the employer satisfies the conditions of Notice 2009–3.

As one of the conditions for relief under Notice 2009–3, a written § 403(b) plan that is intended to satisfy the requirements of § 403(b) and the regulations must be adopted on or before December 31, 2009. If this condition is met and, pursuant to the upcoming revenue procedures, the employer sponsoring the plan either adopts a pre-approved plan that has received a favorable opinion letter from the Service or applies for an individual determination letter when available, the employer will have a remedial amendment period in which to amend the plan to correct any form defects retroactive to January 1, 2010. Further, such an employer will have reliance, beginning January 1, 2010, that the form

of its written plan satisfies the requirements of § 403(b) and the regulations, provided that, during the remedial amendment period, the pre-approved plan is adopted retroactive to January 1, 2010 or the plan is amended to correct any defects in the form of the plan retroactive to January 1, 2010.

An employer that first establishes a § 403(b) plan after December 31, 2009, by adopting a written plan intended to satisfy the requirements of § 403(b) and the regulations will also have reliance beginning on the effective date of the plan, provided the employer either adopts a pre-approved plan with a favorable opinion letter or applies for an individual determination letter and corrects any defects in the form of the plan retroactive to the plan's effective date.

The upcoming revenue procedures will include this remedial amendment provision and will address the time-frames for adopting a pre-approved plan or applying for a determination letter and other details regarding the remedial amendment period.

Rev. Proc. 2007–71, 2007–2 C.B. 1184, provided model plan language for use by public schools and other employers in complying with the requirements of § 403(b) and the regulations. Employers may continue to rely on the model plan language in Rev. Proc. 2007–71 as provided in that revenue procedure.

Employers may rely on this announcement prior to publication of the revenue procedure for pre-approved § 403(b) plans. Accordingly, employers should not request ruling or determination letters on the form of their § 403(b) plans at this time, pending publication of the revenue procedure for pre-approved § 403(b) plans and additional procedures on applying for individual determination letters for § 403(b) plans.

The principal author of this notice is James P. Flannery of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to *retirementplanquestions@irs.gov*.

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

Announcement 2009–90

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

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

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organizations described in section 170(c)(2) that are otherwise allowable will continue to be deductible. Protection under section 7428(c) would begin on December 28, 2009, and would end on the date the court first determines that the organization is not described in section 170(c)(2) as more particularly set forth in section 7428(c)(1). For individual contributors, the maximum deduction protected is $1,000, with a husband and wife treated as one contributor. This benefit is not extended to any individual, in whole or in part, for the acts or omissions of the organization that were the basis for revocation.

Twenty First Century World —
TEMENOS
San Rafael, CA

Treatment of Services Under Section 482; Allocation of Income and Deductions From Intangible Property; Apportionment of Stewardship Expense; Correction

Announcement 2009–91

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to final regulations (T.D. 9456, 2009–33 I.R.B. 188) that were published in the **Federal Register** on Tuesday, August 4, 2009 (74 FR 38830) providing guidance regarding the treatment of controlled services transactions under section 482 and the allocation of income from intangible property, in particular with respect to contributions by a controlled party to the value of intangible property owned by another controlled party. These final regulations modify regulations under section 861 concerning stewardship expenses to be consistent with the changes made to the guidance under section 482.

DATES: This correction is effective on September 9, 2009, and is applicable on August 4, 2009.

FOR FURTHER INFORMATION CONTACT: Carol B. Tan or Gregory A. Spring, (202) 435–5265 for matters relating to section 482, or Richard L. Chewning, (202) 622–3850 for matters relating to stewardship expenses (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that are the subject of this document are under sections 482, 861, 6038, and 6662 of the Internal Revenue Code.

Need for Correction

As published, the final regulations (T.D. 9456) contains errors that may prove to be misleading and are in need of clarification.

* * * * *

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

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 1.482–1 is amended by revising the last sentence of paragraph (d)(3)(v) to read as follows:

§1.482–1 Allocation of income and deductions among taxpayers.

* * * * *

(d) * * *

(3) * * *

(v) * * * For guidance concerning the specific comparability considerations applicable to transfers of tangible and intangible property and performance of services, *see* §§1.482–3 through 1.482–6 and §1.482–9; *see* also §§1.482–3(f), 1.482–4(f)(4), and 1.482–9(m), dealing with the coordination of intangible and tangible property and performance of services rules.

Par. 3. Section 1.482–6 is amended by revising the third sentence of paragraph (c)(3)(i)(B)(*1*) to read as follows:

§1.482–6 Profit split method.

* * * * *

(c) * * *

(3) * * *

(i) * * *

(B) * * *

(*1*) * * * Thus, in cases where such nonroutine contributions are present, there normally will be an unallocated residual profit after the allocation of income described in paragraph (c)(3)(i)(A) of this section. * * *

Par. 4. Section 1.482–8 is amended by revising the second sentence of paragraph (b) *Example 10.* (iv) to read as follows:

§1.482–8 Examples of the best method rule.

* * * * *

(b) * * *

Example 10. * * *

(iv) * * * A functional analysis indicates that USSub's activities to promote Product Y in year 4 are similar to activities performed by Agency A during years 1 through 3 under the contract with USSub. * * *

* * * * *

Par. 5. Section 1.482–9 is amended as follows:

1. The last sentence of paragraph (b)(8) *Example 22.*(i) is revised.

2. Paragraphs (b)(8) *Example 23.*(ii) second occurrence, (b)(8) *Example 23.*(iii), and (b)(8) *Example 23.*(iv) are redesignated as paragraphs (b)(8) *Example 23.*(iii), (b)(8) *Example 23.*(iv), and (b)(8) *Example 23.*(v).

3. The table of paragraph (e)(4) *Example 4.*(ii) is revised.

4. The last sentence of paragraph (g)(2) *Example 2.* (iii) is revised.

5. The table of paragraph (k)(3) *Example 2.*(iii) is revised.

The revisions read as follows:

§1.482–9 Methods to determine taxable income in connection with a controlled services transaction.

* * * * *

(b) * * *

(8) * * *

Example 22. (i) * * * Company P's total services cost for services A, B, C, and D charged within the group is 100.

* * * * *

(e) * * *

(4) * * *

Example 4. * * *

(ii) * * *

Category	Rate
Project managers	$100 per hour.
Technical staff	$75 per hour.

* * * * *

(g) * * *

(2) * * *

Example 2. * * *

(iii) * * * In an effort to submit a winning bid to secure the contract, Company B points to its Level 2 license and its record of successful completion of projects, and also demonstrates to Country 2 government that it has access to substantial technical expertise pertaining to processing of Level 1 waste.

* * * * *

(k) * * *

(3) * * *

Example 2. * * *

(iii) * * *

Company	A	B	Total
Allocation	400/500	100/500	
Amount	80	20	100

* * * * *

Par. 6. Section 1.861–8 is amended by revising the fourth sentence of paragraph (g) *Example 17.* (ii)(A) to read as follows:

§1.861–8 Computation of taxable income from sources within the United States and from other sources and activities.

* * * * *

(g) * * *

Example 17. * * *

(ii) * * *

(A) * * * For purposes of applying the foreign tax credit limitation, the statutory

grouping is general category gross income from sources without the United States and the residual grouping is gross income from sources with in the United States. * * *

* * * * *

LaNita Van Dyke,
Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

(Filed by the Office of the Federal Register on September 8, 2009, 8:45 a.m., and published in the issue of the Federal Register for September 9, 2009, 74 F.R. 46345)

Announcement 2009–92

This document contains a correction to Notice 2009–80, 2009–51 I.R.B. 859, which contained an incorrect year.

The first paragraph incorrectly read:

"Under authority contained in the Social Security Act (Act), the Commissioner, Social Security Administration, has determined and announced (74 55614, dated October 28, 2009) that the contribution and benefit base for renumeration paid in 2010, and self-employment income earned in taxable years beginning in **2009** is $106,800".

The first paragraph should have read:

"Under authority contained in the Social Security Act (Act), the Commissioner, Social Security Administration, has determined and announced (74 55614, dated October 28, 2009) that the contribution and benefit base for renumeration paid in 2010, and self-employment income earned in taxable years beginning in **2010** is $106,800".

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

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

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