

## **HIGHLIGHTS OF THIS ISSUE**

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

### **INCOME TAX**

#### **Rev. Rul. 2010-6, page 387.**

**Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate.** For purposes of sections 382, 642, 1274, 1288, and other sections of the Code, tables set forth the rates for February 2010.

#### **T.D. 9477, page 385.**

#### **REG-132232-08, page 401.**

Final, temporary, and proposed regulations under section 304 of the Code address the tax treatment of certain shareholders who transfer stock or securities to related corporations. When shareholders control two corporations and sell the stock or securities of one controlled corporation to the other, section 304 governs the tax treatment of the shareholders on the amounts received for the transferred stock or securities. The regulations provide that shareholders will not avoid the application of section 304 by causing controlled corporations to form or avail themselves of related corporations to execute the transaction.

#### **Notice 2010-16, page 396.**

**Haiti earthquake in 2010.** This notice designates the Haiti earthquake occurring in January 2010 as a qualified disaster for purposes of section 139 of the Code.

### **EMPLOYEE PLANS**

#### **Notice 2010-15, page 390.**

**Miscellaneous HEART Act changes.** This notice provides guidance in the form of questions and answers with respect to certain provisions of the Heroes Earnings Assistance and Relief Act of 2008 ("HEART Act"). The notice also requests

comments regarding any additional issues relating to sections of the HEART Act that are addressed in the notice.

### **EMPLOYMENT TAX**

#### **REG-137036-08, page 398.**

Proposed regulations under section 3504 of the Code relate to employment tax liability of agents authorized by the Secretary to perform acts required of employers with respect to Federal Unemployment Tax Act (FUTA) taxes on wages paid for home care services, as defined in these regulations. The regulations would allow an enrolled participant in a home care services program to designate an agent to report, file, and pay all employment taxes, including federal unemployment taxes. The change will allow an agent to file a single federal unemployment tax return for multiple home care service recipients.

### **ADMINISTRATIVE**

#### **Announcement 2010-5, page 402.**

This document contains a correction to Revenue Procedure 2010-1, 2010-1 I.R.B. 1, which contained an incorrect internal cross-reference.

#### **Announcement 2010-6, page 402.**

This announcement provides notice of a public hearing on proposed regulations (REG-127270-06, 2009-42 I.R.B. 534) relating to the exclusion from gross income for amounts received on account of personal physical injuries or physical sickness. A public hearing is scheduled for February 23, 2010.

**(Continued on the next page)**

Finding Lists begin on page ii.



**Announcement 2010-7, page 403.**

This document contains a correction to temporary regulations (T.D. 9458, 2009-43 I.R.B. 547) relating to modification to consolidated return regulation permitting an election to treat a liquidation of a target, followed by a retribution to a new target, as a crosschain reorganization.

# 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.

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

## Section 42.—Low-Income Housing Credit

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

## Section 280G.—Golden Parachute Payments

Federal short-term, mid-term, and long-term rates are set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

## Section 304.—Redemption Through Use of Related Corporations

26 CFR 1.304-4T: *Special rule for the use of related corporations to avoid the application of section 304 (temporary).*

**T.D. 9477**

### DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

### Use of Controlled Corporations to Avoid the Application of Section 304

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations under section 304 of the Internal Revenue Code (Code). The regulations apply to certain transactions that are subject to section 304 but that are entered into with a principal purpose of avoiding the application of section 304 to a corporation that is controlled by the issuing corporation in the transaction, or with a principal purpose of avoiding the application of section 304 to a corporation that controls the acquiring corporation in the transaction. The regulations affect persons treated as receiving distributions in redemption of stock by reason of section 304. The text of the temporary regulations

serves as the text of the proposed regulations (REG-132232-08) in the notice of proposed rulemaking on this subject published in this issue of the Bulletin.

**DATES: Effective Date:** These regulations are effective on December 30, 2009.

**Applicability Date:** These regulations apply to acquisitions of stock occurring on or after December 29, 2009.

**FOR FURTHER INFORMATION CONTACT:** Sean W. Mullaney, (202) 622-3860 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

#### Background

This document contains amendments to 26 CFR part 1 under section 304 of the Code. Section 304(a)(1) provides generally that, for purposes of sections 302 and 303, if one or more persons are in control of each of two corporations and one such corporation (acquiring corporation) acquires in exchange for property stock of the other corporation (issuing corporation) from the person (or persons) so in control, then, unless section 304(a)(2) applies, the property shall be treated as received in redemption of the stock of the acquiring corporation. Section 304(a)(2) provides generally that, for purposes of sections 302 and 303, if in exchange for property the acquiring corporation acquires stock of the issuing corporation from a shareholder of the issuing corporation and the issuing corporation controls the acquiring corporation, then the shareholder shall be treated as receiving the property in redemption of the stock of the issuing corporation. For purposes of section 304, control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of voting stock or at least 50 percent of the total value of shares of all classes of stock. With certain modifications, the constructive ownership rules of section 318 apply for this purpose.

Under section 304(b)(2), the determination of the amount of the property distribution that is a dividend (and the source thereof) is made as if the property were distributed by the acquiring corporation to the

extent of its earnings and profits, and then by the issuing corporation to the extent of its earnings and profits. If the acquiring corporation is foreign, section 304(b)(5) limits the amount of earnings and profits of the acquiring corporation that are taken into account for this purpose.

As part of a broad set of anti-avoidance rules published in the **Federal Register** on June 14, 1988 (T.D. 8209, 1988-2 C.B. 174) the IRS and the Treasury Department promulgated §1.304-4T to address transactions that are subject to section 304 but that are entered into with a principal purpose of avoiding the application of section 304 to certain corporations. Specifically, for purposes of determining the amount of a property distribution constituting a dividend (and the source thereof) under section 304(b)(2), the District Director (now known as the Director of Field Operations) is permitted to consider a corporation (deemed acquiring corporation) as having acquired for property the stock of the issuing corporation that is in fact acquired for property by the acquiring corporation, if the deemed acquiring corporation controls the acquiring corporation and if one of the principal purposes for creating, organizing, or funding the acquiring corporation (through capital contributions or debt) is to avoid the application of section 304 to the deemed acquiring corporation.

#### Explanation of the Provisions

##### A. Transactions at Issue

The IRS and Treasury Department have become aware of certain transactions that are subject to section 304 but that are entered into with a principal purpose of avoiding the treatment of a corporation as the issuing corporation. In one such transaction, for example, a domestic corporation (USP) wholly owns two foreign corporations (F1 and F2). The basis and fair market value of the F1 stock is \$100x. F1 does not have positive earnings and profits (or its earnings and profits for purposes of section 304(b)(2) are limited by section 304(b)(5)) but has at least \$100x cash. The basis and fair market value of the F2 stock is \$100x and F2 has earnings

and profits of at least \$100x. USP forms a new foreign corporation (F3) and contributes the stock of F2 to F3 in exchange for F3 stock. In a transaction subject to section 304(a)(1), USP then transfers the stock of F3 to F1 in exchange for \$100x cash. Because neither F1 (the acquiring corporation) nor F3 (the issuing corporation) has positive earnings and profits, USP reports the \$100x cash received in redemption of the shares deemed issued by F1 under section 304(a)(1) as a return of basis under section 301(c)(2).

#### *B. Anti-Avoidance Rule Applicable to Deemed Issuing Corporations*

The IRS and Treasury Department believe that an anti-avoidance rule similar to §1.304-4T, but that applies in the case of a transaction entered into with a principal purpose of avoiding the treatment of a corporation as the issuing corporation is appropriate for transactions such as the one described above. Accordingly, the regulations amend §1.304-4T to provide that for purposes of determining the amount of a property distribution that is a dividend (and the source thereof) under section 304(b)(2), the acquiring corporation shall be treated as acquiring for property the stock of a corporation (deemed issuing corporation) that is controlled by the issuing corporation, if, in connection with the acquisition for property of stock of the issuing corporation by the acquiring corporation, the issuing corporation acquired stock of the deemed issuing corporation with a principal purpose of avoiding the application of section 304 to the deemed issuing corporation.

#### *C. Modifications to Current §1.304-4T*

Current §1.304-4T applies at the discretion of the District Director. The IRS and the Treasury Department believe the anti-avoidance rule of current §1.304-4T should be self-executing. Thus, current §1.304-4T is amended accordingly.

Current §1.304-4T applies when “one of the principal purposes” for the transaction is to avoid the application of section 304. The regulations included in this document apply when “a principal purpose” for the transaction is to avoid the application of section 304. The IRS and the Treasury Department do not view this modification as a substantive change.

Finally, and as noted above, current §1.304-4T applies if one of the principal purposes for creating, organizing, or funding the acquiring corporation, through capital contributions or debt, is to avoid the application of section 304 to the deemed acquiring corporation. The regulations included in this document clarify that this rule may apply in cases where the funding is from an unrelated party. For example, the regulations may apply when the deemed acquiring corporation facilitates the repayment of an obligation incurred by the acquiring corporation (even if such obligation is with respect to a borrowing from an unrelated party) to acquire the stock of the issuing corporation.

#### *D. Effective/Applicability Dates*

The regulations apply to acquisitions occurring on or after December 29, 2009. No inference is intended as to the potential applicability of other Code or regulatory provisions or judicial doctrines (including step transaction or substance over form) to transactions described in the regulations.

#### **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 has also been determined that section 553(b) and (d) of the Administrative Procedure Act (5 U.S.C. chapter 5) do not apply to these regulations. For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble and to the cross-referenced notice of proposed rulemaking published elsewhere in this issue of the Bulletin. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

#### **Drafting Information**

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

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#### **Amendments to the Regulations**

Accordingly, 26 CFR part 1 is amended as follows:

#### **PART 1—INCOME TAXES**

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

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

Par. 2. Section 1.304-4 is added to read as follows:

*§1.304-4 Special rule for the use of related corporations to avoid the application of section 304.*

[Reserved]. For further guidance, see §1.304-4T(a) through (d).

Par. 3. Section 1.304-4T is revised to read as follows:

*§1.304-4T Special rule for the use of related corporations to avoid the application of section 304 (temporary).*

(a) *Scope and purpose.* This section applies to determine the amount of a property distribution constituting a dividend (and the source thereof) under section 304(b)(2), for certain transactions involving controlled corporations. The purpose of this section is to prevent the avoidance of the application of section 304 to a controlled corporation.

(b) *Amount and source of dividend.* For purposes of determining the amount constituting a dividend (and source thereof) under section 304(b)(2), the following rules shall apply:

(1) *Deemed acquiring corporation.* A corporation (deemed acquiring corporation) shall be treated as acquiring for property the stock of a corporation (issuing corporation) acquired for property by another corporation (acquiring corporation) that is controlled by the deemed acquiring corporation, if a principal purpose for creating, organizing, or funding the acquiring corporation by any means (including, through capital contributions or debt) is to avoid the application of section 304 to the deemed acquiring corporation. See paragraph (c) *Example 1* of this section for an illustration of this paragraph.

(2) *Deemed issuing corporation.* The acquiring corporation shall be treated as

acquiring for property the stock of a corporation (deemed issuing corporation) controlled by the issuing corporation if, in connection with the acquisition for property of stock of the issuing corporation by the acquiring corporation, the issuing corporation acquired stock of the deemed issuing corporation with a principal purpose of avoiding the application of section 304 to the deemed issuing corporation. See paragraph (c) Example 2 of this section for an illustration of this paragraph.

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

*Example 1.* (i) *Facts.* P, a domestic corporation, wholly owns CFC1, a controlled foreign corporation with substantial accumulated earnings and profits. CFC1 is organized in Country X, which imposes a high rate of tax on the income of CFC1. P also wholly owns CFC2, a controlled foreign corporation with accumulated earnings and profits of \$200x. CFC2 is organized in Country Y, which imposes a low rate of tax on the income of CFC2. P wishes to own all of its foreign corporations in a direct chain and to repatriate the cash of CFC2. In order to avoid having to obtain Country X approval for the acquisition of CFC1 (a Country X corporation) by CFC2 (a Country Y corporation) and to avoid the dividend distribution from CFC2 to P that would result if CFC2 were the acquiring corporation, P causes CFC2 to form CFC3 in Country X and to contribute \$100x to CFC3. CFC3 then acquires all of the stock of CFC1 from P for \$100x.

(ii) *Result.* Because a principal purpose for creating, organizing or funding CFC3 (acquiring corporation) is to avoid the application of section 304 to CFC2 (deemed acquiring corporation), under paragraph (b)(1) of this section, for purposes of determining the amount of the \$100x distribution constituting a dividend (and source thereof) under section 304(b)(2), CFC2 shall be treated as acquiring the stock of CFC1 (issuing corporation) from P for \$100x. As a result, P receives a \$100x distribution, out of the earnings and profits of CFC2, to which section 301(c)(1) applies.

*Example 2.* (i) *Facts.* P, a domestic corporation, wholly owns CFC1, a controlled foreign corporation with substantial accumulated earnings and profits. The CFC1 stock has a basis of \$100x. CFC1 is organized in Country X. P also wholly owns CFC2, a controlled foreign corporation with zero accumulated earnings and profits. CFC2 is organized in Country Y. P wishes to own all of its foreign corporations in a direct chain and to repatriate the cash of CFC2. In order to avoid having to obtain Country X approval for the acquisition of CFC1 (a Country X corporation) by CFC2 (a Country Y corporation) and to avoid a dividend distribution from CFC1 to P, P forms a new corporation (CFC3) in Country X and transfers the stock of CFC1 to CFC3 in exchange for CFC3 stock. P then transfers the stock of CFC3 to CFC2 in exchange for \$100x.

(ii) *Result.* Because a principal purpose for the transfer of the stock of CFC1 (deemed issuing corporation) by P to CFC3 (issuing corporation) is to avoid the application of section 304 to CFC1, under

paragraph (b)(2) of this section, for purposes of determining the amount of the \$100x distribution constituting a dividend (and source thereof) under section 304(b)(2), CFC2 (acquiring corporation) shall be treated as acquiring the stock of CFC1 from P for \$100x. As a result, P receives a \$100x distribution, out of the earnings and profits of CFC1, to which section 301(c)(1) applies.

(d) *Effective/applicability date.* This section applies to acquisitions of stock occurring on or after December 29, 2009. See §1.304-4T, as contained in 26 CFR part 1 revised as of April 1, 2008, for acquisitions of stock occurring on or after June 14, 1988, and before December 29, 2009.

(e) *Expiration date.* This section expires on or before December 28, 2012.

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

Approved December 18, 2009.

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

(Filed by the Office of the Federal Register on December 29, 2009, 8:45 a.m., and published in the issue of the Federal Register for December 30, 2009, 74 F.R. 69021)

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## Section 382.—Limitation on Net Operating Loss Carryforwards and Certain Built-In Losses Following Ownership Change

The adjusted applicable federal long-term rate is set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

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## Section 412.—Minimum Funding Standards

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

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## Section 467.—Certain Payments for the Use of Property or Services

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

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## Section 468.—Special Rules for Mining and Solid Waste Reclamation and Closing Costs

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

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## Section 482.—Allocation of Income and Deductions Among Taxpayers

Federal short-term, mid-term, and long-term rates are set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

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## Section 483.—Interest on Certain Deferred Payments

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

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## Section 642.—Special Rules for Credits and Deductions

Federal short-term, mid-term, and long-term rates are set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

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## Section 807.—Rules for Certain Reserves

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

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## Section 846.—Discounted Unpaid Losses Defined

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

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## Section 1274.—Determination of Issue Price in the Case of Certain Debt Instruments Issued for Property

(Also Sections 42, 280G, 382, 412, 467, 468, 482, 483, 642, 807, 846, 1288, 7520, 7872.)

**Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate.** For purposes of sections 382, 642, 1274, 1288, and other

sections of the Code, tables set forth the rates for February 2010.

## Rev. Rul. 2010-6

This revenue ruling provides various prescribed rates for federal income tax purposes for February 2010 (the current month). Table 1 contains the short-term, mid-term, and long-term applicable federal rates (AFR) for the current month for purposes of section 1274(d) of the

Internal Revenue Code. Table 2 contains the short-term, mid-term, and long-term adjusted applicable federal rates (adjusted AFR) for the current month for purposes of section 1288(b). Table 3 sets forth the adjusted federal long-term rate and the long-term tax-exempt rate described in section 382(f). Table 4 contains the appropriate percentages for determining the low-income housing credit described in section 42(b)(1) for buildings placed in service during the current month. How-

ever, under section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, and before December 31, 2013, shall not be less than 9%. Finally, Table 5 contains the federal rate for determining the present value of an annuity, an interest for life or for a term of years, or a remainder or a reversionary interest for purposes of section 7520.

REV. RUL. 2010-6 TABLE 1				
Applicable Federal Rates (AFR) for February 2010				
	<i>Period for Compounding</i>			
	<i>Annual</i>	<i>Semiannual</i>	<i>Quarterly</i>	<i>Monthly</i>
<i>Short-term</i>				
AFR	.72%	.72%	.72%	.72%
110% AFR	.79%	.79%	.79%	.79%
120% AFR	.86%	.86%	.86%	.86%
130% AFR	.94%	.94%	.94%	.94%
<i>Mid-term</i>				
AFR	2.82%	2.80%	2.79%	2.78%
110% AFR	3.10%	3.08%	3.07%	3.06%
120% AFR	3.39%	3.36%	3.35%	3.34%
130% AFR	3.67%	3.64%	3.62%	3.61%
150% AFR	4.24%	4.20%	4.18%	4.16%
175% AFR	4.96%	4.90%	4.87%	4.85%
<i>Long-term</i>				
AFR	4.44%	4.39%	4.37%	4.35%
110% AFR	4.89%	4.83%	4.80%	4.78%
120% AFR	5.34%	5.27%	5.24%	5.21%
130% AFR	5.79%	5.71%	5.67%	5.64%

REV. RUL. 2010-6 TABLE 2				
Adjusted AFR for February 2010				
	<i>Period for Compounding</i>			
	<i>Annual</i>	<i>Semiannual</i>	<i>Quarterly</i>	<i>Monthly</i>
Short-term adjusted AFR	.54%	.54%	.54%	.54%
Mid-term adjusted AFR	1.84%	1.83%	1.83%	1.82%
Long-term adjusted AFR	4.02%	3.98%	3.96%	3.95%



REV. RUL. 2010-6 TABLE 3  
Rates Under Section 382 for February 2010

Adjusted federal long-term rate for the current month	4.02%
Long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months.)	4.14%

REV. RUL. 2010-6 TABLE 4  
Appropriate Percentages Under Section 42(b)(1) for February 2010

Note: Under Section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, and before December 31, 2013, shall not be less than 9%.

Appropriate percentage for the 70% present value low-income housing credit	7.84%
Appropriate percentage for the 30% present value low-income housing credit	3.36%

REV. RUL. 2010-6 TABLE 5  
Rate Under Section 7520 for February 2010

Applicable federal rate for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest	3.4%
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**Section 1288.—Treatment of Original Issue Discount on Tax-Exempt Obligations**

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

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**Section 7520.—Valuation Tables**

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

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**Section 7872.—Treatment of Loans With Below-Market Interest Rates**

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2010. See Rev. Rul. 2010-6, page 387.

# Part III. Administrative, Procedural, and Miscellaneous

## Miscellaneous HEART Act Changes

### Notice 2010-15

#### I. Purpose and background

This notice provides guidance in the form of questions and answers with respect to certain provisions of the Heroes Earnings Assistance and Relief Tax Act of 2008 (“HEART Act” or “Act”), Pub. L. No. 110-245. This notice also requests comments regarding any additional issues relating to the sections of the HEART Act that are addressed in this notice.

The sections of the HEART Act addressed in this notice are section 104 (relating to survivor and disability payments with respect to qualified military service), section 105 (relating to treatment of differential military pay as wages), section 107 (relating to distributions from retirement plans to individuals called to active duty), section 109 (relating to contributions of military death gratuities to Roth IRAs and Coverdell education savings accounts), and section 111 (relating to an employer credit for differential wage payments to employees who are active duty members of the uniformed services).

#### II. Section 104 of the HEART Act

##### *Background*

Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), Pub. L. No. 103-353, an employee who leaves a civilian job for qualified military service generally is entitled to be reemployed by the pre-service civilian employer if the individual returns to employment within a specified period and meets the other eligibility criteria under USERRA. USERRA also provides that an individual, upon reemployment, is entitled to receive certain pension, profit-sharing, and similar benefits that would have been received but for the employee’s absence during military service.

Section 414(u) of the Internal Revenue Code (“Code”) provides rules regarding the interaction of USERRA with the rules governing tax-qualified retirement plans. Section 414(u)(8) provides, in part, that

an employer maintaining a plan is treated as meeting the requirements of USERRA only if: an employee reemployed under USERRA is treated as not having incurred a break in service because of the period of military service, the employee’s military service is treated as service with the employer for vesting and benefit accrual purposes, the employee is permitted to make additional elective deferrals and employee contributions in an amount not exceeding the maximum amount the employee would have been permitted or required to contribute during the period of military service if the employee actually had been employed by the employer during that period, and the employee is entitled to any accrued benefits that are contingent on employee contributions or elective deferrals to the extent the employee pays the contributions or elective deferrals to the plan.

##### *Section 104(a)*

Section 104(a) of the HEART Act adds § 401(a)(37) to the Code. Under § 401(a)(37), qualified retirement plans must provide that, in the case of a participant who dies while performing qualified military service, the survivors of the participant are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) that would have been provided under the plan had the participant resumed employment and then terminated employment on account of death. Under section 104(c) of the Act, this new tax qualification requirement also applies to tax-deferred annuities under § 403(b) of the Code and to governmental eligible deferred compensation plans under § 457(b).

Section 104(d)(1) of the Act states that the amendments made by section 104 of the Act apply with respect to deaths and disabilities occurring on or after January 1, 2007.

Q-1. What types of additional benefits provided by a plan are subject to § 401(a)(37) of the Code?

A-1. Section 401(a)(37) requires that the survivors of a participant who dies while performing qualified military service be entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) that

would be provided under the plan if the participant had resumed employment and then terminated employment on account of death. The types of benefits subject to § 401(a)(37) include accelerated vesting, ancillary life insurance benefits, and other survivor’s benefits provided under a plan that are contingent on a participant’s termination of employment on account of death.

Q-2. If the amount of death benefits provided under a plan is based on the amount of the deceased participant’s accrued benefit, does § 401(a)(37) require that the death benefit be determined as if the participant had received benefit accruals for the period of qualified military service?

A-2. No. Section 401(a)(37) specifically excepts benefit accruals for the period of qualified military service from the additional benefits to which survivors must be entitled in the case of a participant who dies while performing such service. Accordingly, § 401(a)(37) does not require that benefit accruals (whether benefit accruals under a defined benefit plan or contributions under a defined contribution plan) be imputed for the period of qualified military service for purposes of determining death benefits that are based on a deceased participant’s accrued benefit.

Q-3. Does § 401(a)(37) require that service credit for vesting purposes be provided for the period of a deceased participant’s qualified military service for purposes of determining death benefits under the plan?

A-3. Yes. Section 401(a)(37) requires that the survivors of a participant be entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) provided under the plan had the participant resumed employment and then terminated employment on account of death. Section 414(u)(8)(B) provides that each period of an individual’s qualified military service is, upon reemployment, deemed to constitute service with the employer for vesting and accrual purposes. Although § 401(a)(37) provides an exception for benefit accruals for the period of qualified military service, there is no exception for vesting service. Accordingly, even though

§ 401(a)(37) does not require that benefit accruals be provided for the deceased participant's period of qualified military service, service credit for the period of the deceased participant's period of qualified military service must be provided (due to the interaction of §§ 401(a)(37) and 414(u)(8)(B)) for vesting purposes.

Q-4. Does § 401(a)(37) apply in the case of a plan participant who dies while performing military service, but who was not entitled to reemployment rights with respect to the employer maintaining the plan?

A-4. No. Section 401(a)(37) provides that a qualified plan must provide that, in the case of a participant who dies while performing qualified military service (as defined in § 414(u)), the participant's survivors are entitled to certain death benefits. Section 414(u)(5) defines qualified military service with respect to an individual as any service in the uniformed services by an individual entitled to reemployment rights under USERRA. Therefore, if a participant would not be entitled to reemployment rights with respect to an employer under USERRA if the participant had applied for reemployment rights immediately before his or her death, § 401(a)(37) does not apply in determining the death benefits to which the participant's survivors are entitled under the employer's plan. For information regarding reemployment rights under USERRA, see <http://www.dol.gov/vets/programs/userra/main.htm>.

#### Section 104(b)

Section 104(b) of the HEART Act adds a new § 414(u)(9) to the Code. Under § 414(u)(9), an employer sponsoring a retirement plan may, for benefit accrual purposes, treat an individual who dies or becomes disabled while performing qualified military service as if the individual had resumed employment in accordance with the individual's USERRA reemployment rights on the day preceding the death or disability and then terminated employment on the actual date of death or disability. Section 414(u)(9) also provides that this provision applies only if all individuals performing qualified military service with respect to the employer maintaining the plan who die or become disabled as a result of performing qualified

military service prior to reemployment by the employer are credited with service and benefits on reasonably equivalent terms. Section 414(u)(9)(C) provides that the amount of employee contributions and the amount of elective deferrals of an individual treated as reemployed under § 414(u)(9) are determined on the basis of the individual's average actual employee contributions or elective deferrals for the lesser of: (1) the 12-month period of service with the employer immediately prior to qualified military service, or (2) the actual length of continuous service with the employer.

Section 104(d)(1) of the Act states that the amendments made by section 104 of the Act apply with respect to deaths and disabilities occurring on or after January 1, 2007.

Q-5. May § 414(u)(9) of the Code be applied to a plan as of any date on or after January 1, 2007?

A-5. Yes. Under section 104(d) of the HEART Act, § 414(u)(9) of the Code applies to deaths and disabilities occurring on or after January 1, 2007. However, because the provisions of § 414(u)(9) are permissive rather than mandatory, they may be applied beginning as of any date on or after January 1, 2007. For nondiscrimination rules regarding the timing of plan amendments, see § 1.401(a)(4)-5 of the Income Tax Regulations.

Q-6. If, for benefit accrual purposes, a plan provides under § 414(u)(9)(A) for treatment of an individual who dies while performing qualified military service as if the individual had resumed employment, must the plan also provide vesting credit for that service?

A-6. Yes. As described in Q&A-3 above, under §§ 401(a)(37) and 414(u)(8)(B), vesting credit must be provided for the period of the deceased individual's period of qualified military service. This vesting credit is taken into account for purposes of determining a participant's vested percentage in accruals earned both during qualified military service and during other periods.

Q-7. If, for benefit accrual purposes, a plan provides under § 414(u)(9)(A) for treatment of an individual who becomes disabled while performing qualified military service as if the individual had resumed employment, must the plan also provide vesting credit for that service?

A-7. No. Section 414(u)(9) applies only for benefit accrual purposes and neither that section nor any other Code section requires that a plan provide vesting credit to a disabled individual under these circumstances. However, § 414(u)(9) does not prohibit plans from providing vesting credit for a disabled individual's qualified military service to the extent permitted under other applicable rules, including § 1.401(a)(4)-11(d)(3), which provides nondiscrimination rules for crediting imputed service, *i.e.*, service other than actual service with the employer.

Under § 1.401(a)(4)-11(d)(3), there must be a legitimate business reason for crediting the imputed service (which is deemed to exist in the case of credit for military service), the plan provision crediting the imputed service to any highly compensated employee (HCE) must apply on the same terms to all similarly-situated nonhighly compensated employees (NHCEs), and the plan provision must not by design or in operation discriminate significantly in favor of HCEs. Pursuant to the authority granted by § 1.401(a)(4)-1(d), imputed service for a period of qualified military service that is credited for vesting purposes to an individual who became disabled while performing qualified military service will satisfy these requirements if the plan provision crediting the service to any HCE applies on the same terms to all similarly-situated NHCEs.

Q-8. How may a plan determine employer-provided contributions or benefits for an individual treated as reemployed under § 414(u)(9) when those contributions or benefits are contingent on the individual's employee contributions or elective deferrals?

A-8. Section 414(u)(9) does not provide for actual employee contributions or elective deferrals. Instead, under § 414(u)(9)(C), an individual who dies or becomes disabled while performing qualified military service is deemed to have made employee contributions or elective deferrals for the purpose of determining benefits under § 414(u)(8)(C) that are contingent on employee contributions or elective deferrals. Under § 414(u)(9)(C), for this purpose, the individual is deemed to have made employee contributions or elective deferrals in an amount equal to the lesser of the actual average employee

contributions or elective deferrals made by the individual under the plan during the 12-month period prior to military service or, if service with the employer is less than 12 months, the average actual employee contributions or elective deferrals for the actual length of continuous service with the employer.

However, in the case of a disabled individual who is covered by a plan that permits disabled individuals to make employee contributions or elective deferrals and who is treated as reemployed under § 414(u)(9), § 414(u)(9) does not prohibit the plan from allowing the disabled individual to make elective deferrals or employee contributions with respect to periods of qualified military service in the amounts permitted under § 414(u)(8)(C) without regard to § 414(u)(9). In that case, § 414(u)(9) also does not prohibit the plan from determining the disabled individual's employer-sponsored contributions or benefits based on the actual employee contributions or elective deferrals made by the disabled individual.

### III. Section 105 of the HEART Act

In the case of employees who are called to active duty, some employers have paid some or all of the compensation that a service member would have received from the employer during the service member's period of active duty had the employee not been called to active duty. Prior to the enactment of the HEART Act, these payments, commonly referred to as "differential wage payments," were not treated as wages for Federal employment tax purposes, pursuant to Rev. Rul. 69-136, 1969-1 C.B. 252.

Section 105(a) of the HEART Act amends § 3401 of the Code to treat differential wage payments as wages for income tax withholding purposes. The term "differential wage payment" is defined in § 3401(h) as any payment which (1) is made by an employer to an individual with respect to any period during which the individual is performing service in the uniformed services while on active duty for a period of more than 30 days, and (2) represents all or a portion of the wages the individual would have received from the employer if the individual were performing service for the employer. This amendment applies to remuneration paid

after December 31, 2008. See Rev. Rul. 2009-11, 2009-18 I.R.B. 896, for guidance relating to § 3401(h).

Section 105(b)(1)(A) of the Act adds § 414(u)(12)(A) to the Code, which provides that, for purposes of applying the Code to retirement plans subject to § 414(u), (1) an individual receiving a differential wage payment is treated as an employee of the employer making the payment, (2) the differential wage payment is treated as compensation, and (3) the plan is not treated as failing to meet the requirements of any provisions described in § 414(u)(1)(C) by reason of any contribution or benefit which is based on the differential wage payment. The provisions described in § 414(u)(1)(C) include various nondiscrimination requirements, including requirements under §§ 401(a)(4), 401(k)(3), and 401(m).

Section 105(b)(1)(A) of the Act also adds § 414(u)(12)(B) to the Code, under which, notwithstanding the treatment of an individual receiving differential wage payments as an employee, an individual is treated for purposes of distributions (including distributions from a designated Roth account under § 402A) under §§ 401(k)(2)(B)(i)(I), 403(b)(7)(A)(ii), 403(b)(11)(A), and 457(d)(1)(A)(ii) as having been severed from employment during any period the individual is performing service in the uniformed services described in § 3401(h). Section 414(u)(12)(B)(ii) provides that, if an individual elects to receive a distribution under this provision, the plan must provide that the individual may not make an elective deferral or employee contribution during the 6-month period beginning on the date of the distribution. For purposes of the 6-month restriction, the definition of "elective deferral" under § 414(u)(2)(C) applies, which includes any deferral of compensation under an eligible deferred compensation plan under § 457(b).

Section 105(b)(2) of the Act amends § 219(f)(1) of the Code to provide that, for purposes of determining the limitation on contributions to an IRA, the term "compensation" includes differential wage payments.

The amendments made by section 105(b) of the Act apply to years beginning after December 31, 2008.

Q-9. Must differential wage payments be treated as compensation for purposes

of determining contributions and benefits under a plan?

A-9. No. Differential wage payments are not required to be treated as compensation for purposes of determining contributions and benefits under a plan. However, such payments are treated as compensation for purposes of applying the Code. Accordingly, these payments must be treated as compensation under § 415(c)(3) and § 1.415-2(d).

Q-10. Will a plan's definition of compensation fail to satisfy § 414(s) if differential wage payments are excluded from the plan's definition of compensation for purposes of determining benefits and contributions under the plan?

A-10. No. A plan's definition of compensation will not fail to satisfy § 414(s) merely because differential wage payments are excluded from the plan's definition of compensation for purposes of determining benefits and contributions.

Q-11. Is the rule in § 414(u)(12)(B) which treats an individual as severed from employment while performing service in the uniformed services limited to individuals receiving differential wage payments?

A-11. No. Section 414(u)(12)(B) applies to all individuals on active duty for a period of more than 30 days, regardless of whether they are receiving differential wage payments. Thus, for purposes of applying rules that permit distributions upon severance from employment under §§ 401(k), 403(b), and 457(d), an individual is treated as having been severed from employment during any period the individual is performing service in the uniformed services while on active duty for a period of more than 30 days.

Q-12. Is a plan required to provide for distributions to an individual who is treated as severed from employment while performing service in the uniformed services pursuant to § 414(u)(12)(B)?

A-12. No. Just as a plan may, but is not required to, provide for distributions under § 401(k), 403(b), or 457(d) upon actual severance from employment, a plan may, but is not required to, provide for distributions upon a deemed severance from employment under § 414(u)(12)(B). Thus, for example, a plan that provides for distributions upon severance from employment may, but is not required to, also provide for distributions upon a deemed severance from employment under § 414(u)(12)(B).

If a plan provides for a distribution upon a deemed severance from employment under § 414(u)(12)(B), the plan must also provide that an individual receiving the distribution may not make an elective deferral or employee contribution during the 6-month period beginning on the date of the distribution.

Q-13. How does the deemed severance rule of § 414(u)(12)(B) affect other rules applicable to plan distributions?

A-13. Section 414(u)(12)(B) applies only for purposes of the provisions of §§ 401(k), 403(b), and 457(d) that permit distributions on severance from employment. Thus, for example, in the event an individual is treated as severed from employment under § 401(k)(2)(B)(i)(I), the individual may receive a distribution otherwise subject to the distribution restrictions of § 401(k)(2)(B). On the other hand, merely because an individual is treated as severed from employment under § 414(u)(12)(B) does not cause such individual to be treated as severed from employment under sections of the Code other than §§ 401(k)(2)(B)(i)(I), 403(b)(7)(A)(ii), 403(b)(11)(A), and 457(d)(1)(A)(ii).

Q-14. Does § 414(u)(12)(B) apply to individuals who have an actual severance from employment or who otherwise are eligible to take a distribution of plan benefits?

A-14. No. Section 414(u)(12)(B) does not affect the status of an individual who is on active duty for a period of more than 30 days and who has, in fact, had a severance from employment. Thus, for example, if such an individual receives a distribution from a retirement plan under § 401(k)(2)(B)(i)(I) and returns to employment within six months, § 414(u)(12)(B)(ii) would not preclude the individual from making elective deferrals (as defined under § 414(u)(2)(C)) or employee contributions to the plan before the end of the 6-month period.

Section 414(u)(12)(B) also does not affect a plan's ability to make other in-service distributions to the extent permitted under other applicable rules and plan terms. Thus, for example, a § 401(k) plan may distribute a participant's elective deferrals when the participant attains age 59½, or under other circumstances listed in § 401(k)(2)(B), and the distribution would not be subject to the 6-month

restriction on elective deferrals under § 414(u)(12)(B) (although a 6-month restriction may apply under § 401(k) to a distribution on account of a financial hardship under § 401(k)(2)(B)(i)(IV)).

Q-15. If an individual is eligible under a plan to receive a distribution under § 401(k)(2)(B)(i)(I) as a result of a deemed severance from employment under § 414(u)(12)(B), and is also eligible under the plan to receive a qualified reservist distribution within the meaning of § 72(t)(2)(G)(iii), as permitted under § 401(k)(2)(B)(i)(V), what treatment applies to a distribution that could be made under § 401(k)(2)(B)(i)(I) or under § 401(k)(2)(B)(i)(V)?

A-15. If an individual receives a distribution that meets the definition of a qualified reservist distribution under § 72(t)(2)(G)(iii), the distribution will be treated as a qualified reservist distribution, even if the distribution would also have been permitted as a result of a deemed severance of employment under § 414(u)(12)(B). For example, if a plan provides for qualified reservist distributions and for distributions on deemed severance under § 414(u)(12)(B), a distribution to an individual that could be either type of distribution will be treated as a qualified reservist distribution. In that case, the distribution would not be subject to the 6-month restriction on elective deferrals or to the 10-percent additional income tax of § 72(t). The rules applicable to qualified reservist distributions are discussed in Section IV, below.

Q-16. Is a distribution made pursuant to § 414(u)(12)(B) an eligible rollover distribution within the meaning of § 402(c)(4)?

A-16. Yes. A distribution made pursuant to § 414(u)(12)(B) is an eligible rollover distribution within the meaning of § 402(c)(4), except to the extent one of the exceptions listed under § 402(c)(4) (other than the exception for hardship distributions under § 401(k)(2)(B)(i)(IV)) applies. A distribution made pursuant to § 414(u)(12)(B) is not treated as a hardship distribution ineligible for rollover. An eligible rollover distribution that is paid to an employee (rather than directly rolled over) is subject to 20-percent mandatory withholding under § 3405(c).

Q-17. May the contributions and benefits provided as a result of differential wage

payments be included in a plan's nondiscrimination testing?

A-17. Yes. Under § 414(u)(12)(A), a qualified plan is not treated as failing to meet the requirements of any nondiscrimination provision described in § 414(u)(1)(C) by reason of any contribution or benefit based on a differential wage payment, as long as the differential wage payment and the ability to make contributions based on the differential wage payment are provided on reasonably equivalent terms. Accordingly, the contributions and benefits provided under a plan as a result of differential wage payments need not be included in the plan's nondiscrimination testing. On the other hand, § 414(u)(1)(C) does not prevent such contributions and benefits from being taken into account, as long as they do not cause the plan to fail the nondiscrimination requirements. If such contributions and benefits are included in the plan's nondiscrimination testing for any employee, they must be taken into account for all employees.

#### IV. Section 107 of the HEART Act

Under current law, a taxpayer who receives a distribution from a qualified retirement plan prior to age 59½, death, or disability is generally subject to a 10-percent additional income tax under § 72(t) unless an exception applies. Pursuant to amendments made by the Pension Protection Act of 2006 (PPA '06), Pub. L. No. 109-280, § 72(t)(2)(G) of the Code provides that the 10-percent additional income tax does not apply to a qualified reservist distribution.

A qualified reservist distribution is defined under § 72(t)(2)(G)(iii) as a distribution from an IRA or a distribution attributable to elective deferrals under a § 401(k) or 403(b) plan (or a plan described in § 501(c)(18)) to a member of the reserves who has been ordered or called to active duty for a period exceeding 179 days or for an indefinite period. A qualified reservist distribution can be made without regard to otherwise applicable restrictions under §§ 401(k) and 403(b) on in-service distributions of amounts attributable to elective deferrals. In addition, during the two-year period beginning on the day after the end of the individual's active duty service, an individual who

receives a qualified reservist distribution may make contributions to an IRA in an amount up to the amount of the qualified reservist distribution, which are not subject to the otherwise applicable limits on IRA contributions and are not deductible.

As originally enacted in PPA '06, these special rules for qualified reservist distributions applied to individuals ordered or called to active duty after September 11, 2001, and before December 31, 2007. Section 107 of the HEART Act amends § 72(t)(2)(G) of the Code to delete the reference to December 31, 2007, so that the special rules for qualified reservist distributions no longer have an expiration date.

#### **V. Remedial Amendment Period for Sections 104, 105, and 107 of the HEART Act**

Section 401(b) provides for a remedial amendment period during which certain plan amendments may be made retroactively effective to enable the plan to comply with the requirements of § 401(a) during that period. Section 1.401(b)-1(a) provides that, under § 401(b), a plan that does not satisfy the requirements of § 401(a) on any day solely as a result of a disqualifying provision (as defined in § 1.401(b)-1(b)) is considered to have satisfied those requirements on that date if, on or before the last day of the remedial amendment period with respect to the disqualifying provision, all provisions of the plan that are necessary to satisfy all requirements of § 401(a) are in effect and have been made effective for all purposes for the whole of the remedial amendment period. Section 1.401(b)-1(b)(1) provides that the term “disqualifying provision” includes a provision of a new plan, the absence of a provision from a new plan, or an amendment to an existing plan which causes the plan to fail to satisfy the requirements of the Code applicable to the qualification of the plan as of the date the plan or amendment is first made effective.

As provided in § 1.401(b)-1(d), the remedial amendment period for a disqualifying provision described in § 1.401(b)-1(b)(1) begins, in the case of a provision of, or absence of a provision from, a new plan, on the date the plan is put into effect, and, in the case of an amendment to an existing plan, on the

date the plan amendment is adopted or put into effect (whichever is earlier). Generally, the remedial amendment period for a disqualifying provision described in § 1.401(b)-1(b)(1) ends with the due date (including extensions) for filing the income tax return for the employer's tax year that includes, in the case of a provision of, or absence of a provision from, a new plan, the date the plan is put into effect, or, in the case of an amendment to an existing plan, the date the plan amendment is adopted or put into effect (whichever is later). Section 1.401(b)-1(f) grants the Commissioner the discretion to extend the remedial amendment period.

Section 1.401(b)-1(b)(3) provides that the Commissioner also may designate as a disqualifying provision under § 401(b) a plan provision that either (1) results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements, or (2) is integral to a qualification requirement that has been changed. Under § 1.401(b)-1(d)(1)(iv), in the case of a plan provision that is designated as a disqualifying provision under § 1.401(b)-1(b)(3) and that results in the failure of the plan to satisfy the changed qualification requirements, the remedial amendment period begins on the date on which the change effected by the amendment to the Code became effective with respect to the plan. Under § 1.401(b)-1(d)(1)(v), in the case of a plan provision that is designated as a disqualifying provision under § 1.401(b)-1(b)(3) and that is integral to a qualification requirement that has been changed, the remedial amendment period generally begins on the first day on which the plan was operated in accordance with the changed qualification requirement. Under § 1.401(b)-1(d)(2)(i), the remedial amendment period for a plan provision that is designated as a disqualifying provision under § 1.401(b)-1(b)(3) generally ends on the date prescribed by law, including extensions, for filing the income tax return of the employer for the employer's taxable year that includes the beginning of the remedial amendment period (unless the remedial amendment period is extended by the Commissioner).

Section 104(d)(1) of the Act provides that the statutory changes made by section 104 of the Act apply with respect to deaths and disabilities occurring on or after Jan-

uary 1, 2007. Section 104(d)(2) of the Act adds that a plan subject to these new provisions is treated as being operated in accordance with the terms of the plan if a plan amendment is made to comply with the requirements of § 401(a)(37) of the Code (which was added by section 104(a) of the Act) and is made on or before the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012, for governmental plans). By its terms, section 104(d)(2) of the Act does not apply to plan amendments made pursuant to § 414(u)(9) of the Code (which was added by section 104(b) of the Act).

Section 105(b)(2) of the Act provides that the statutory changes made by section 105(b) of the Act apply to years beginning after December 31, 2008. Section 105(c) of the Act adds that a plan subject to these new provisions is treated as being operated in accordance with the terms of the plan if a plan amendment is made pursuant to section 105(b)(1) of the Act and is made on or before the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012, for governmental plans).

Section 107 of the Act amends § 72(t)(2)(G) of the Code to delete the reference to December 31, 2007, added as part of PPA '06. This amendment applies to individuals ordered or called to active duty on or after December 31, 2007.

Q-18. When must plans be amended to satisfy the requirements of section 104(b) of the Act?

A-18. Pursuant to the authority provided under § 1.401(b)-1(b)(3), plan provisions that relate to the requirements of § 414(u)(9) of the Code (as added by section 104(b) of the Act) are hereby designated as disqualifying provisions. Moreover, pursuant to the authority granted to the Commissioner under § 1.401(b)-1(f) with respect to disqualifying provisions, plans need not be amended to include any provisions relating to the permissive rules of § 414(u)(9) of the Code until the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012, for governmental plans). Thus, the remedial amendment period for section 104(b) of the Act is the same period as the period for making plan amendments pursuant to sections 104(a) and 105(b) of the Act.

Q-19. When must plans be amended to satisfy the requirements of section 107 of the Act?

A-19. Section 72(t)(2)(G)(iv) of the Code, as amended by section 107 of the Act, generally does not affect the qualification of a retirement plan. However, the amendment to § 72(t)(2)(G)(iv) of the Code made by section 107 of the Act also applies under § 401(k)(2)(B)(i)(V) of the Code to the definition of a “qualified reservist distribution.” Pursuant to the authority provided under § 1.401(b)-1(b)(3), plan provisions that relate to the requirements of § 401(k)(2)(B)(i)(V), as extended by section 107 of the Act to individuals called to active duty after December 31, 2007, are hereby designated as disqualifying provisions. Pursuant to the authority granted to the Commissioner under § 1.401(b)-1(f) with respect to disqualifying provisions, the remedial amendment period with respect to these disqualifying provisions is extended so that it ends no earlier than the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012, for governmental plans).

## VI. Section 109 of the HEART Act

Section 1477 of Title 10 of the United States Code provides for the payment of a military death gratuity to an eligible survivor of a service member. This gratuity is excludable from income under § 134 of the Internal Revenue Code. Section 1967 of Title 38 of the United States Code provides that certain members of the uniformed services are automatically insured against death under the Servicemembers’ Group Life Insurance (SGLI) program. In general, life insurance proceeds are also excludable from income.

Section 408A of the Code provides rules for the tax treatment of Roth IRAs. Contributions to a Roth IRA are not deductible, and “qualified distributions” (generally distributions made after age 59½, death, or disability, and also made after the 5-year period following an initial contribution to any Roth IRA) from a Roth IRA are excluded from income. A distribution that is not a qualified distribution is generally taxed under the rules of §§ 72 and 408A(d)(4), under which the portion of the distribution that is not in excess of the participant’s investment in the contract (*i.e.*, basis), taking into account all prior distributions from the owner’s Roth IRAs, is not included in income, and any portion of the distribution that exceeds the recipi-

ent’s investment in the contract is included in income. Subject to certain exceptions, a 10-percent additional income tax on early distributions under § 72(t) will also apply. Contributions to a Roth IRA are subject to annual limits and a phase-out based on income, except for certain rollover contributions to the extent permitted from another IRA or employer-sponsored plan.

For years before 2008, § 408A(e) provided that a Roth IRA could only accept a rollover contribution of amounts distributed from another Roth IRA, from a non-Roth IRA (subject to income limits on conversion of a non-Roth IRA to a Roth IRA), or from a designated Roth account under an employer-sponsored plan described in § 402A. These rollover contributions to Roth IRAs are called “qualified rollover contributions.” Section 824 of PPA ’06 amended the definition of a qualified rollover contribution in § 408A(e) of the Code to also permit rollovers to Roth IRAs from various types of employer-sponsored plans, even if the rollover is not from a designated Roth account (subject to the income limits on conversion of a non-Roth IRA to a Roth IRA), effective for distributions made after December 31, 2007.

Section 530 provides rules for the tax treatment of a Coverdell education savings account (“Coverdell ESA”). Contributions to a Coverdell ESA are not deductible and distributions from a Coverdell ESA are generally excluded from income up to the amount of the beneficiary’s qualified education expenses, subject to coordination with other tax benefits for education expenses. Distributions that are not excluded from income are generally taxed under the rules of § 72, under which a portion of the distribution is treated as a non-taxable recovery of the recipient’s investment in the contract (*i.e.*, basis) and the remainder is included in income. Subject to certain exceptions, a 10-percent additional income tax on distributions not used for qualified expenses will also apply. Contributions to a Coverdell ESA are subject to an annual limit and a phase-out based on income. Special rules apply in the case of rollover contributions.

Under section 109 of the HEART Act, § 408A(e) of the Code, as in effect both before and after the amendments made by PPA ’06, is amended to include as a qualified rollover contribution the contribution

to a Roth IRA of a military death gratuity or SGLI payment if the contribution is made before the end of the 1-year period beginning on the date on which the IRA beneficiary receives the military death gratuity or SGLI payment. Thus, the annual limits on Roth IRA contributions and the phase-out based on income do not apply to such a contribution. Section 530 of the Code is similarly amended to treat the contribution of a military death gratuity or SGLI payment to a Coverdell ESA as a rollover contribution. The annual limit on Coverdell ESA contributions and the phase-out of the annual limit based on income do not apply to such a contribution.

The amount treated as a qualified rollover contribution to a Roth IRA cannot exceed the total amount of the military death gratuity and SGLI payments received, reduced by any portion of such amount contributed to a Coverdell ESA or another Roth IRA. Similarly, the amount treated as a qualified rollover contribution to a Coverdell ESA cannot exceed the total amount of the military death gratuity and SGLI payments received, reduced by any portion of such amount contributed to a Roth IRA or another Coverdell ESA. For purposes of applying § 72 to a distribution from a Roth IRA or Coverdell ESA, the amount treated as a qualified rollover contribution (in the case of a Roth IRA) or as a rollover contribution (in the case of a Coverdell ESA) is treated as investment in the contract.

The amendments made by section 109 of the Act generally apply with respect to deaths from injuries occurring on or after June 17, 2008. In addition, section 109 of the Act permits a contribution to a Roth IRA or a Coverdell ESA of a military death gratuity or an SGLI payment received with respect to a death from injuries occurring before June 17, 2008 (and on or after October 7, 2001), if the contribution is made no later than June 17, 2009.

## VII. Section 111 of the HEART Act

Section 111 of the HEART Act adds § 45P to the Code. Section 45P provides a credit to eligible small business employers that make eligible differential wage payments to qualified employees who are on active duty in the uniformed services for more than 30 days. An eligible small business employer may take

a credit against its income tax liability in an amount equal to 20 percent of the sum of the eligible differential wage payments made to qualified employees during the taxable year. The definition of eligible differential wage payments for purposes of the § 45P credit is the same definition enacted in new § 3401(h) discussed in Section III, above. The amount of eligible differential wage payments that may be taken into account for the taxable year is limited to \$20,000 per qualified employee, resulting in a maximum credit for a taxable year of \$4,000 per qualified employee. An employee is a qualified employee if he or she has been an employee of the taxpayer for the 91-day period immediately preceding the period for which differential wage payments are made. An employer is an eligible small business employer if it employed an average of fewer than 50 employees on business days during the taxable year and provides differential wage payments under a written plan to every qualified employee. For purposes of determining an employer's eligibility, the rules of § 414(b), (c), (m) and (o) apply, under which the members of a controlled group and other related entities are treated as a single employer.

Section 45P(c) provides a rule to coordinate the § 45P credit with other credits under Chapter 1 of the Code (§§ 1 through 1400T) that are calculated taking into account employee compensation. Under this rule, the amount of any such other credit determined with respect to compensation of an employee must be reduced by the amount of the § 45P credit determined with respect to that employee.

Q-20. In what circumstances does the credit under § 45P reduce the amount of another credit?

A-20. The amount of another credit under Chapter 1 of the Code determined with respect to compensation of an employee must be reduced by the amount of the § 45P credit determined with respect to that employee if: (1) compensation paid in the current taxable year is an expense used directly in determining the amount of the other credit, (2) military differential wage payments are a type of compensation that can be taken into account in determining the amount of the other credit, and (3) the military differential wage payments taken into account in determining the employer's

§ 45P credit are also taken into account in determining the other credit.

### Comments Requested

The Service is considering issuing additional guidance regarding the above sections of the HEART Act, and comments are requested regarding such possible guidance. Written comments should be submitted by April 9, 2010. Send submissions to CC:PA:LPD:DRU (Notice 2010-15), Room 5203, Internal Revenue Service, POB 7604 Ben Franklin Station, Washington, DC 20044. Comments may be hand delivered between the hours of 8 a.m. and 4 p.m., Monday through Friday, to CC:PA:LPD:DRU (Notice 2010-15), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking portal at <http://www.regulations.gov> (Notice 2010-15). All comments will be available for public inspection.

### DRAFTING INFORMATION

The principal authors of this notice are Robert M. Walsh of the Employee Plans, Tax Exempt and Government Entities Division and Joseph Perera of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding Sections I through VI of this notice, please call the Employee Plans taxpayer assistance number between 8:30 a.m. and 4:30 p.m. Eastern time, Monday through Friday at (877) 829-5500 (a toll-free number) or email Mr. Walsh at [RetirementPlanQuestions@irs.gov](mailto:RetirementPlanQuestions@irs.gov). For further information regarding Section VII of this notice, please contact Mr. Perera at 202-622-6040 (not a toll-free number).

## Haiti Earthquake Occurring in January 2010 Designated as a Qualified Disaster Under § 139 of the Internal Revenue Code

### Notice 2010-16

This notice designates the Haiti earthquake occurring in January 2010 as a qual-

ified disaster for purposes of § 139 of the Internal Revenue Code.

### EARTHQUAKE DISASTER

On January 12, 2010, a magnitude 7.0 earthquake with numerous significant aftershocks affected southern Haiti ("Haiti earthquake"). The earthquake and resulting aftershocks affected approximately 3 million people, and caused extensive damage to dwellings, transportation networks, and infrastructure in Port-au-Prince and the surrounding areas of Haiti. *USAID Haiti — Earthquake Fact Sheet No. 1* (January 13, 2010) and *No. 7* (January 19, 2010).

This notice enables employer-sponsored private foundations to assist certain victims in areas affected by the Haiti earthquake and enables recipients to exclude qualified disaster relief payments from gross income.

### QUALIFIED DISASTER RELIEF PAYMENTS EXCLUDED FROM RECIPIENT'S GROSS INCOME

Section 139(a) provides that gross income shall not include any amount received by an individual as a qualified disaster relief payment.

Section 139(b) provides that a qualified disaster relief payment includes any amount paid to or for the benefit of an individual—

(1) to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses (not otherwise compensated for by insurance or otherwise) incurred as a result of a qualified disaster, or

(2) to reimburse or pay reasonable and necessary expenses (not otherwise compensated for by insurance or otherwise) incurred for the repair or rehabilitation of a personal residence or repair or replacement of its contents to the extent that the need for such repair, rehabilitation, or replacement is attributable to a qualified disaster.

Under § 139(c)(3) the term "qualified disaster" includes a disaster resulting from an event that is determined by the Secretary to be of a catastrophic nature.



## DESIGNATION AS QUALIFIED DISASTER

The Commissioner of Internal Revenue, pursuant to delegation by the Secretary, has determined that the Haiti earthquake occurring in January 2010 is an event of a catastrophic nature under § 139(c)(3). Therefore, the Haiti earthquake is designated as a qualified disaster under § 139.

## SECTION 501(c)(3) ORGANIZATIONS

Employer-sponsored private foundations may choose to provide disaster relief to employee victims of the Haiti earthquake. Like all organizations described in § 501(c)(3), private foundations should exercise due diligence when providing disaster relief as set forth in Publication 3833, *Disaster Relief: Providing Assistance Through Charitable Organizations*.

## DRAFTING INFORMATION

The principal author of this notice is Sheldon Iskow of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this notice, contact Mr. Iskow at (202) 622-4920 (not a toll-free call).

# Part IV. Items of General Interest

## Notice of Proposed Rulemaking

### Section 3504 Agent Employment Tax Liability

#### REG-137036-08

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to employment tax liability of agents authorized by the Secretary under section 3504 of the Internal Revenue Code (Code) to perform acts required of employers with respect to taxes under the Federal Unemployment Tax Act on wages paid for home care services, as defined in these regulations. These proposed regulations affect employers who are home care service recipients, as defined in these regulations, and their designated agents. These regulations also propose amendments to modify the existing regulations under section 3504 to be consistent with the organizational structure of the Internal Revenue Service (IRS), and to update the citation to the Internal Revenue Code of 1986.

DATES: Written or electronic comments must be received by April 13, 2010.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-137036-08), room 5203, Internal Revenue Service, POB 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-137036-08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Additionally, taxpayers may submit comments electronically via the Federal eRulemaking Portal at <http://www.regulations.gov>. (Indicate IRS and REG-137036-08.)

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, contact Selvan Boominathan at

(202) 622-0047; concerning the submission of comments or requests for a hearing, contact Oluwafunmilayo (Funmi) Taylor, at (202) 622-7180 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### Background

Federal, state, and local government programs seek to help elderly or disabled individuals maintain their independence by funding home health care and other personal services. See, for example, Deficit Reduction Act of 2005, Public Law No. 109-171, section 6071, 120 Stat. 4, 102-110 (2006) (authorizing the Secretary of Health and Human Services to, among other things, award grants to states to “[i]ncrease the use of home and community-based, rather than institutional, long-term care services.”) The government agencies that administer the programs seek to assist the service recipients with employment tax compliance by helping the service recipients to designate agents to report, file, and pay employment taxes on their behalf. The IRS and the Treasury Department are proposing changes to the regulations under section 3504, the section under which a third party can be authorized to act as an agent for an employer, to permit designated agents to provide comprehensive assistance to these service recipients who are employers.

##### 1. Employment Taxes In General

Employers are generally required to withhold income tax and Federal Insurance Contributions Act (FICA) taxes from their employees' wages under sections 3402(a) and 3102(a), respectively, and are separately liable for the employer's share of FICA taxes and Federal Unemployment Tax Act (FUTA) taxes under sections 3111 and 3301, respectively (collectively referred to herein as “employment taxes”). Sections 3102(b), 3111, 3301, and 3403 provide that the employer is the person liable for the withholding and payment of employment taxes; additionally, the employer is required to make tax deposits, file employment tax returns, and file and furnish Forms W-2, *Wage and Tax Statement*, to employees (collectively referred to

herein as “employment tax obligations”). An *employer* is generally defined as the person for whom an individual performs services as an employee. See Sections 3121(d), 3306(a), and 3401(d).

FUTA tax is imposed under section 3301 on each employer in an amount equal to a percentage of wages paid by the employer with respect to employment. FUTA tax is imposed on the employer in an amount equal to 6.2 percent of wages. Under section 3306(b), wages of an employee subject to the FUTA tax are limited to \$7,000 per calendar year. Section 3302 provides for a credit against FUTA tax in the amount of contributions paid by the employer into an unemployment fund maintained during the taxable year under the unemployment law of a state. The credit is limited to an amount equal to 90 percent of the FUTA tax.

##### 2. Domestic Service Employment

The employment tax obligations of an employer are modified with respect to domestic services provided in a private home of the employer. Employers are not required to withhold income taxes on wages paid for domestic services, but may enter into a voluntary withholding agreement to withhold income taxes from one or more domestic employees. See sections 3401(a)(3) and 3402(p). An employer is not liable for FICA taxes with respect to cash wages for domestic services as long as the cash wages are less than an applicable dollar threshold amount, which is adjusted annually. Sections 3121(a)(7)(B) and 3121(x). When the cash wages equal or exceed the threshold amount, all of the cash wages (including amounts below the threshold) paid to that employee by the employer are subject to FICA taxes. For example, the FICA wage threshold for domestic services for 2009 is \$1,700. This threshold applies separately to each employer with respect to each employee. An employer is liable for FUTA taxes with regard to domestic services if the employer paid aggregate wages of \$1,000 or more (for all domestic employees) in any calendar quarter in the current or prior year. Section 3306(c)(2).

### 3. Agency Relationship Under Code Section 3504

Section 3504 of the Code authorizes the Secretary of the Treasury to promulgate regulations to authorize an agent to perform certain specified acts required of employers. Under section 3504, all provisions of law (including penalties) applicable with respect to employers are applicable to the agent and remain applicable to the employer. Accordingly, both the agent and employer are liable for the employment taxes and penalties associated with the employer's employment tax obligations undertaken by the agent. Section 31.3504-1 of the Employment Tax Regulations provides that the IRS may authorize an agent to undertake the employment tax obligations of an employer with respect to income tax withholding and FICA taxes. The agent is required to file only one return for each tax return period using the agent's own employer identification number (EIN) regardless of the number of employers for whom the agent acts. The current regulations do not authorize an agent to undertake the employment tax obligations of an employer with respect to the FUTA tax. Thus, an authorized agent can act on behalf of the employer for income tax withholding and FICA tax purposes, but the employer must continue to meet its employment tax obligations with respect to FUTA tax.

### 4. Home Care Service Recipients

Federal, state, and local governments fund programs to provide elderly or disabled individuals with services to assist them with health care or other personal needs in their homes or communities. Following an evolution in policy that seeks to empower the individuals receiving services to have autonomy, these programs generally give the service recipients discretion in selecting the service providers and directing their activities. See Deficit Reduction Act of 2005 section 6071(d)(2)(C)(ii), 120 Stat. at 108 (providing that the Secretary of Health and Human Services shall give preference when awarding grants to state applications proposing to provide eligible individuals with the opportunity to receive home and community-based long-term care services as

self-directed services); also see "Roadmap to Medicaid Reform," Centers for Medicare and Medicaid Services, available at <http://www.cms.hhs.gov/smdl/downloads/Rvltcneeds.pdf>. The programs authorize the use of certain intermediaries to serve as agents to disburse payments to service providers on the service recipient's behalf. The federal, state, or local government agencies that administer these programs screen intermediaries before they are entrusted with funds to pay for the services. Intermediaries can be public or private entities. Many are nonprofit organizations. The IRS addressed questions with regard to certain intermediaries working with state or local government agencies in previous guidance. See Notice 2003-70, 2003-2 C.B. 916. See §601.601(d)(2).

The service recipient is generally the employer of the individuals providing the services for employment tax purposes. However the Service recognizes that there are some government programs under which parents, grandparents, or guardians who are engaged in providing care for a disabled child or grandchild receive funding that do not give rise to an employment relationship between the service recipient and the care provider. Although the services generally constitute domestic services under section 3401(a)(3) such that income tax withholding is not required, FICA tax and FUTA tax must still be paid subject to the applicable thresholds, and some service recipients and their service providers may agree to voluntarily withhold income tax under section 3402(p). In recent years, many home care service recipients have applied to designate the intermediary that arranges to pay their service providers as an agent under section 3504 so that the intermediary can withhold, report, and pay income tax withholding and FICA tax on the service recipient's behalf. Designating these intermediaries as agents reduces the administrative burden on the service recipient who may not otherwise have an obligation to report, file, or pay employment taxes. The intermediaries have access to training in compliance with employment tax requirements and have the payroll information from the payments they make to the service providers. An intermediary that is designated as an agent can efficiently handle reporting, filing, and paying income tax withholding and

FICA on behalf of multiple service recipients on a single return. A service recipient can complete the application to designate the intermediary as agent at the time the recipient enrolls with the intermediary.

Under the current regulations, a service recipient can designate an intermediary as agent to handle income tax withholding and FICA but cannot designate an intermediary as agent to pay FUTA tax and file FUTA returns. As a result, separate FUTA returns must be prepared for thousands of individual service recipients reporting small amounts of wages and FUTA tax.

### Explanation of Provisions

These proposed regulations would amend the current regulations to allow a home care service recipient to designate an agent under section 3504 to report, file, and pay all employment taxes, including FUTA. This change will allow an intermediary to file a single FUTA return on behalf of multiple home care service recipients as the intermediary does currently with respect to income tax withholding and FICA.

Specifically, the proposed regulation would amend the employment tax regulations under section 3504 to provide that the IRS may authorize a party to act as agent on behalf of employers who are home care service recipients with respect to FUTA taxes imposed on wages paid for home care services, provided that the party has been authorized to act as an agent for those home care service recipients for income tax withholding and FICA tax purposes. The agent is permitted to act for FUTA tax purposes only on behalf of employers who are home care service recipients, and not for any other type of employer on whose behalf the agent is authorized to act for income tax withholding and FICA tax purposes. Additionally, the agent is permitted to act as an agent for FUTA tax purposes only with respect to wages paid for home care services rendered to the home care service recipient.

These regulations propose to define the term *home care service recipient* as an individual who is an enrolled participant in a program administered by a Federal, state, or local government agency that provides Federal, state, or local government funds to pay, in whole or in part, for the pro-

vision of home care services, as defined in the proposed regulations. A participant qualifies as a home care service recipient while enrolled in such a program and until the end of the calendar year in which the participant ceases to be enrolled in the program. In all such programs, intermediaries who are engaged to assist beneficiaries to receive and distribute funds on the beneficiaries' behalf are reviewed and approved by a state or local government agency.

These regulations propose to define *home care services* to include health care and personal attendant care services rendered to a home care service recipient in his home or local community. Services provided outside the home care service recipient's private home may qualify as home care services for purposes of these regulations even if the services do not qualify as domestic service in a private home of the employer for purposes of sections 3121(a)(7), 3306(c)(2), and 3401(a)(3), so long as the services are provided within the service recipient's local community.

Because section 3504 provides that all provisions of law applicable to an employer apply to the agent, the agent can report on its aggregate FUTA tax return the state unemployment contributions paid into a state unemployment fund on the home care service recipient's behalf as a credit under section 3302 against the FUTA tax. The credit can be reported by the agent regardless of whether the state unemployment contributions are made under the name and state identifying number of the home care service recipient or the agent.

These regulations also propose amendments to modify the existing regulations under section 3504 to be consistent with the organizational structure of the IRS and to update the citation to the Internal Revenue Code of 1986.

#### **Proposed Effective Date**

These regulations are proposed to apply to wages paid on or after January 1 of the calendar year following the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**. Taxpayers may rely on these proposed regulations for guidance pending the issuance of final regulations. Additionally, pursuant to sec-

tion 7805(b)(7), taxpayers may apply these proposed regulations to all taxable years for which a valid designation as an agent has been in effect under §31.3504-1(a) of the Employment Tax Regulations. Thus, prior to publication of a Treasury decision adopting these rules as final regulations, any party already authorized under section 3504 to serve as an agent for a home care service recipient, as defined in the proposed regulations, or with an application pending, will not need to file any additional application in order to expand the scope of the agency to cover FUTA taxes.

#### **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 this regulation, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the 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 Requests for Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any written or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS specifically request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled and held upon written request by any person who submits written comments on the proposed regulation. If a public hearing is scheduled, notice of the time and place for the hearing will be published in the **Federal Register**.

#### **Drafting Information**

The principal author of these proposed regulations is Selvan Boominathan, Of-

fice of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service. However, personnel from other offices of the IRS and Treasury participated in their development.

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#### **Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 31 is proposed to be amended as follows:

#### **PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE**

Paragraph 1. The authority citation for part 31 continues to read in part as follows:

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

Par.2. Section 31.3504-1 is revised to read as follows:

#### *§31.3504-1 Designation of Agent by Application.*

(a) *In general.* In the event wages as defined in chapter 21 or 24 of the Internal Revenue Code of 1986, or compensation as defined in chapter 22 of the Code, of an employee or group of employees, employed by one or more employers, is paid by a fiduciary, agent, or other person ("agent"), or if that agent has the control, receipt, custody, or disposal of those wages, or compensation, the Internal Revenue Service may, subject to the terms and conditions as it deems proper, authorize that agent to perform the acts required of the employer or employers under those provisions of the Code and the regulations which have application, for purposes of the taxes imposed by the chapter or chapters, in respect of the wages or compensation. If the agent is authorized by the Internal Revenue Service to perform such acts, all provisions of law (including penalties) and of the regulations applicable to an employer shall be applicable to the agent. However, each employer for whom the agent acts shall remain subject to all provisions of law (including penalties) and of the regulations applicable to an employer. Any application to authorize an agent to perform such acts, signed by the agent and the employer, shall be made on the form prescribed by the Internal Revenue Service

and shall be filed with the Internal Revenue Service as prescribed in the instructions to the form and other applicable guidance.

(b) *Special rule for home care service recipients.* (1) *In general.* In the event a fiduciary, agent, or other person (“agent”) is authorized pursuant to paragraph (a) of this section to perform the acts required of an employer under chapters 21 or 24 on behalf of one or more home care service recipients, as defined in paragraph (b)(3) of this section, the Internal Revenue Service may authorize that agent to perform the acts as are required of employers for purposes of the tax imposed by chapter 23 of the Internal Revenue Code of 1986 with respect to wages paid for home care services, as defined in paragraph (b)(2) of this section rendered to the home care service recipient. Each home care service recipient for whom the agent performs the acts of an employer and each agent authorized under this section to perform the acts of an employer shall remain subject to all provisions of law (including penalties) and of the regulations applicable to an employer with respect to those wages paid.

(2) *Home care services.* For purposes of this section, the term *home care services* includes health care and personal attendant care services rendered in the home care service recipient’s home or local community.

(3) *Home care service recipient.* For purposes of this section, the term *home care service recipient* means any individual who receives home care services, as defined in paragraph (b)(2) of this section, while enrolled, and for the remainder of the calendar year after ceasing to be enrolled, in a program administered by a Federal, state, or local government agency that provides Federal, state, or local government funds, to pay, in whole or in part, for the home care services for that individual.

(c) *Effective and applicability dates.* An authorization under paragraph (a) of this section in effect prior to the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register** continues to be in effect after that date. Paragraph (b) of this section applies to wages paid on or after January 1 of the calendar year following the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**. However, pursuant

to section 7805(b), taxpayers may rely on paragraph (b) of this section for all taxable years for which a valid designation is in effect under paragraph (a) of this section.

Linda M. Kroening,  
*Acting Deputy Commissioner  
for Services and Enforcement.*

(Filed by the Office of the Federal Register on January 12, 2010, 8:45 a.m., and published in the issue of the Federal Register for January 13, 2010, 75 F.R. 1735)

## Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

### Use of Controlled Corporations to Avoid the Application of Section 304

#### REG-132232-08

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: In this issue of the Bulletin, the IRS and the Treasury Department are issuing temporary regulations (T.D. 9477) under section 304 of the Internal Revenue Code (Code). The temporary regulations apply to certain transactions that are subject to section 304 but that are entered into with a principal purpose of avoiding the application of section 304 to a corporation controlled by the issuing corporation in the transaction, or to a corporation that controls the acquiring corporation in the transaction. The temporary regulations affect shareholders treated as receiving distributions in redemption of stock by reason of section 304. The text of temporary regulations published in this issue of the Bulletin serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by March 30, 2010.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-132232-08), 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-132232-08), Courier’s Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-132232-08).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Sean W. Mullaney, (202) 622-3860; concerning submissions of comments or requests for a public hearing, Richard Hurst at (202) 622-7180 (not toll-free numbers) or [Richard.A.Hurst@irs.counsel.treas.gov](mailto:Richard.A.Hurst@irs.counsel.treas.gov).

SUPPLEMENTARY INFORMATION:

#### Background and Explanation of Provisions

Temporary regulations in this issue of the Bulletin amend the Income Tax Regulations (26 CFR part 1) relating to section 304 of the Code. The text of the temporary regulations serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

#### Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that the collections of information contained in these regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. These regulations primarily will affect United States persons that are large corporations engaged in corporate transactions among their controlled corporations. Thus, the number of affected small entities—in whichever of the three categories defined in the Regulatory Flexibility Act (small businesses, small organizations, and small governmental jurisdictions)—will not be substantial. The IRS and the Treasury Department estimate that

small organizations and small governmental jurisdictions are likely to be affected only insofar as they transfer the stock of a controlled corporation to a related corporation. While a certain number of small entities may engage in such transactions, the IRS and the Treasury Department do not anticipate the number to be substantial. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic or written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. The IRS and the Treasury Department specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. Comments are also requested as to whether the regulations should include factors that are indicative of a principal purpose, or lack of a principal purpose, to avoid the application of section 304. If such factors should be included, specific examples are requested. See, for example, Prop. Treas. Reg. §1.987-2(b)(3)(ii) and (iii).

All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

### Drafting Information

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

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### Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

## PART 1—INCOME TAXES

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

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

Par. 2. Section 1.304-4 is revised to read as follows:

*§1.304-4 Special rule for the use of related corporations to avoid the application of section 304.*

[The text of proposed §1.304-4 is the same as the text of §1.304-4T(a) through (d) published elsewhere in this issue of the Bulletin].

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

(Filed by the Office of the Federal Register on December 29, 2009, 8:45 a.m., and published in the issue of the Federal Register for December 30, 2009, 74 F.R. 69043)

### Correction to an Erroneous Cross-Reference in Revenue Procedure 2010-1, 2010-1 I.R.B. 1

#### Announcement 2010-5

This document contains a correction to Revenue Procedure 2010-1, 2010-1 I.R.B. 1, which contained an incorrect internal cross-reference.

Section 8.08(2)(b) incorrectly read:

“For a § 301.9100 letter ruling request for an extension of time to file an entity classification election for multiple entities qualifying under section **15.07(4)** for the user fee provided in paragraph (A)(5)(d) of Appendix A of this revenue procedure, the Associate office generally will issue a single letter on behalf of all entities that are the subject of the request. The taxpayer may request that separate letters be issued to each entity that are the subject of the request. *See generally* section 5.03 of this revenue procedure.”

Section 8.08(2)(b) should have read:

“For a § 301.9100 letter ruling request for an extension of time to file an entity classification election for multiple entities qualifying under section **15.07(2)** for the user fee provided in paragraph (A)(5)(a) of Appendix A of this revenue procedure, the Associate office generally will issue a single letter on behalf of all entities that are

the subject of the request. The taxpayer may request that separate letters be issued to each entity that are the subject of the request. *See generally* section 5.03 of this revenue procedure.”

For further information regarding this announcement, contact Gregory T. Armstrong at (202) 622-7950 (not a toll-free call).

### Damages Received on Account of Personal Physical Injuries or Physical Sickness; Hearing

#### Announcement 2010-6

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: This document provides notice of public hearing on a notice of proposed rulemaking (REG-127270-06) relating to the exclusion from gross income for amounts received on account of personal physical injuries or physical sickness.

DATES: The public hearing is being held on Tuesday, February 23, 2010, at 10 a.m. The IRS must receive outlines of the topics to be discussed at the hearing by Tuesday, February 2, 2010.

ADDRESSES: The public hearing is being held in room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Send submissions to: CC:PA:LPD:PR (REG-127270-06), 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-127270-06), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit electronic outlines of oral comments via the Federal eRulemaking Portal at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Sheldon A. Iskow at (202)

622-4920; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard A. Hurst at *Richard.A.Hurst@irscounsel.treas.gov* or (202) 622-7180 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

The subject of the public hearing is the notice of proposed rulemaking (REG-127270-06, 2009-42 I.R.B. 534) that was published in the **Federal Register** on Tuesday, September 15, 2009 (74 FR 47152).

Persons, who wish to present oral comments at the hearing that submitted written comments, must submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (signed original and eight (8) copies) by February 2, 2010.

A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing or in the Freedom of Information Reading Room (FOIA RR) (Room 1621) which is located at the 11th and Pennsylvania Avenue NW entrance, 1111 Constitution Avenue, NW, Washington, DC.

Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT section of this document.

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 January 8, 2010, 8:45 a.m., and published in the issue of the Federal Register for January 11, 2010, 75 F.R. 1301)

**Modification to Consolidated Return Regulation Permitting an Election to Treat a Liquidation of a Target, Followed by a Recontribution to a New Target, as a Cross-Chain Reorganization Announcement 2010-7**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

Summary: This document contains a correction to temporary regulations (T.D. 9458, 2009-43 I.R.B. 547), which were published in the **Federal Register** on Friday, September 4, 2009 (74 FR 45757) relating to modification to consolidated return regulation permitting an election to treat a liquidation of a target, followed by a recontribution to a new target, as a cross-chain reorganization.

DATES: The correction is effective on January 13, 2010 and is applicable beginning September 4, 2009.

FOR FURTHER INFORMATION CONTACT: Guy Traynor at (202) 622-3693 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

The temporary regulation that is the subject to this correction is under section 1502 of the Internal Revenue Code.

**Need for Correction**

As published, temporary regulations (T.D. 9458), contains an error which may

prove to be misleading and is in need of clarification.

\* \* \* \* \*

**Correction of Publication**

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendment.

**PART 1—INCOME TAXES**

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

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

Par. 2. Paragraph (f)(5)(ii)(G) needs to be added following paragraph (f)(5)(ii)(F)(3), to read as follows:

*§1.1502-13T Intercompany transactions (temporary).*

\* \* \* \* \*

(f) \* \* \*

(5) \* \* \*

(ii) \* \* \*

(G) *Expiration date.* Paragraphs (f)(5)(ii)(B), (B)(1), (B)(2) and (F)(1), (2), and (3) of this section will expire on September 3, 2012.

\* \* \* \* \*

Guy R. Traynor,  
*Federal Register Liaison,  
Publications & Regulations Branch,  
Legal Processing Division,  
Associate Chief Counsel  
(Procedure & Administration).*

(Filed by the Office of the Federal Register on January 12, 2010, 8:45 a.m., and published in the issue of the Federal Register for January 13, 2010, 75 F.R. 1704)

# Definition of Terms

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

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

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

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

*Modified* is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A

and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

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

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

*Superseded* describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance

of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

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

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

# Abbreviations

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

A—Individual.  
Acq.—Acquiescence.  
B—Individual.  
BE—Beneficiary.  
BK—Bank.  
B.T.A.—Board of Tax Appeals.  
C—Individual.  
C.B.—Cumulative Bulletin.  
CFR—Code of Federal Regulations.  
CI—City.  
COOP—Cooperative.  
Ct.D.—Court Decision.  
CY—County.  
D—Decedent.  
DC—Dummy Corporation.  
DE—Donee.  
Del. Order—Delegation Order.  
DISC—Domestic International Sales Corporation.  
DR—Donor.  
E—Estate.  
EE—Employee.  
E.O.—Executive Order.

ER—Employer.  
ERISA—Employee Retirement Income Security Act.  
EX—Executor.  
F—Fiduciary.  
FC—Foreign Country.  
FICA—Federal Insurance Contributions Act.  
FISC—Foreign International Sales Company.  
FPH—Foreign Personal Holding Company.  
F.R.—Federal Register.  
FUTA—Federal Unemployment Tax Act.  
FX—Foreign corporation.  
G.C.M.—Chief Counsel's Memorandum.  
GE—Grantee.  
GP—General Partner.  
GR—Grantor.  
IC—Insurance Company.  
I.R.B.—Internal Revenue Bulletin.  
LE—Lessee.  
LP—Limited Partner.  
LR—Lessor.  
M—Minor.  
Nonacq.—Nonacquiescence.  
O—Organization.  
P—Parent Corporation.  
PHC—Personal Holding Company.  
PO—Possession of the U.S.  
PR—Partner.

PRS—Partnership.  
PTE—Prohibited Transaction Exemption.  
Pub. L.—Public Law.  
REIT—Real Estate Investment Trust.  
Rev. Proc.—Revenue Procedure.  
Rev. Rul.—Revenue Ruling.  
S—Subsidiary.  
S.P.R.—Statement of Procedural Rules.  
Stat.—Statutes at Large.  
T—Target Corporation.  
T.C.—Tax Court.  
T.D.—Treasury Decision.  
TFE—Transferee.  
TFR—Transferor.  
T.I.R.—Technical Information Release.  
TP—Taxpayer.  
TR—Trust.  
TT—Trustee.  
U.S.C.—United States Code.  
X—Corporation.  
Y—Corporation.  
Z—Corporation.



## **Numerical Finding List<sup>1</sup>**

Bulletins 2010–1 through 2010–6

### **Announcements:**

2010-1, 2010-4 I.R.B. 333  
2010-2, 2010-2 I.R.B. 271  
2010-3, 2010-4 I.R.B. 333  
2010-4, 2010-5 I.R.B. 384  
2010-5, 2010-6 I.R.B. 402  
2010-6, 2010-6 I.R.B. 402  
2010-7, 2010-6 I.R.B. 403

### **Notices:**

2010-1, 2010-2 I.R.B. 251  
2010-2, 2010-2 I.R.B. 251  
2010-3, 2010-2 I.R.B. 253  
2010-4, 2010-2 I.R.B. 253  
2010-5, 2010-2 I.R.B. 256  
2010-6, 2010-3 I.R.B. 275  
2010-7, 2010-3 I.R.B. 296  
2010-8, 2010-3 I.R.B. 297  
2010-9, 2010-3 I.R.B. 298  
2010-10, 2010-3 I.R.B. 299  
2010-11, 2010-4 I.R.B. 326  
2010-12, 2010-4 I.R.B. 326  
2010-13, 2010-4 I.R.B. 327  
2010-14, 2010-5 I.R.B. 344  
2010-15, 2010-6 I.R.B. 390  
2010-16, 2010-6 I.R.B. 396

### **Proposed Regulations:**

REG-132232-08, 2010-6 I.R.B. 401  
REG-137036-08, 2010-6 I.R.B. 398  
REG-101896-09, 2010-5 I.R.B. 347  
REG-131028-09, 2010-4 I.R.B. 332

### **Revenue Procedures:**

2010-1, 2010-1 I.R.B. 1  
2010-2, 2010-1 I.R.B. 90  
2010-3, 2010-1 I.R.B. 110  
2010-4, 2010-1 I.R.B. 122  
2010-5, 2010-1 I.R.B. 165  
2010-6, 2010-1 I.R.B. 193  
2010-7, 2010-1 I.R.B. 231  
2010-8, 2010-1 I.R.B. 234  
2010-9, 2010-2 I.R.B. 258  
2010-10, 2010-3 I.R.B. 300  
2010-11, 2010-2 I.R.B. 269  
2010-12, 2010-3 I.R.B. 302  
2010-13, 2010-4 I.R.B. 329

### **Revenue Rulings:**

2010-1, 2010-2 I.R.B. 248  
2010-2, 2010-3 I.R.B. 272  
2010-3, 2010-3 I.R.B. 272

### **Revenue Rulings— Continued:**

2010-4, 2010-4 I.R.B. 309  
2010-5, 2010-4 I.R.B. 312  
2010-6, 2010-6 I.R.B. 387

### **Treasury Decisions:**

9474, 2010-4 I.R.B. 322  
9475, 2010-4 I.R.B. 304  
9476, 2010-5 I.R.B. 336  
9477, 2010-6 I.R.B. 385  
9478, 2010-4 I.R.B. 315

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

## **Finding List of Current Actions on Previously Published Items<sup>1</sup>**

Bulletins 2010–1 through 2010–6

### **Notices:**

#### **2005-88**

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

#### **2008-41**

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

#### **2008-55**

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

#### **2008-88**

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

#### **2008-113**

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

#### **2008-115**

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

#### **2009-11**

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

#### **2009-13**

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

#### **2009-38**

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

### **Proposed Regulations:**

#### **REG-127270-06**

Hearing scheduled by  
Ann. 2010-6, 2010-6 I.R.B. 402

### **Revenue Procedures:**

#### **80-59**

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

#### **87-35**

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

#### **2009-1**

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

#### **2009-2**

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

### **Revenue Procedures— Continued:**

#### **2009-3**

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

#### **2009-4**

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

#### **2009-5**

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

#### **2009-6**

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

#### **2009-7**

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

#### **2009-8**

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

#### **2009-9**

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

#### **2009-15**

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

#### **2009-25**

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

#### **2010-1**

Corrected by  
Ann. 2010-5, 2010-6 I.R.B. 402

### **Revenue Rulings:**

#### **67-436**

Obsoleted by  
REG-101896-09, 2010-5 I.R.B. 347

#### **2008-52**

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

### **Treasury Decisions:**

#### **9458**

Corrected by  
Ann. 2010-7, 2010-6 I.R.B. 403

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



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