

## 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. Proc. 2014-64, page 1022.**

Revenue Procedure 2014-64 provides an updated list of jurisdictions with which the United States has in effect an income tax or other convention or bilateral agreement relating to the exchange of information for purposes of the bank deposit interest reporting requirements under §§ 1.6049-4(b)(5) and 1.6049-8(a), as well as jurisdictions with which the IRS and Treasury have determined the automatic exchange of such information is appropriate.

#### **Notice 2014-81, page 1001.**

Reallocation of Section 48B Credits under the Qualifying Gasification Project Program. This notice establishes section 48B Phase III of the qualifying gasification project program to reallocate the section 48B Phase I credits that are available for allocation after the conclusion of the section 48B Phase I program.

#### **T.D. 9706, page 980.**

Section 6038D of the Internal Revenue Code, added by the Hiring Incentives to Restore Employment (HIRE) Act, Public Law 111-147 (124 Stat. 71), requires foreign financial assets to be reported to the Internal Revenue Service for taxable years beginning after March 18, 2010. These regulations provide guidance relating to the requirement that individuals attach a statement to their income tax return to provide required information regarding foreign financial assets in which they have an interest.

### EMPLOYEE PLANS

#### **Notice 2014-78, page 998.**

This notice sets forth updates on the corporate bond monthly yield curve, the corresponding spot segment rates for November 2014 used under § 417(e)(3)(D), the 24-month average segment rates applicable for December 2014, and the 30-year Treasury rates. These rates reflect the application of § 430(h)(2)(C)(iv), which was added by the Moving Ahead for Progress in the 21st Century Act, Public Law 112-141 (MAP-21) and amended by section 2003 of the Highway and Transportation Funding Act of 2014 (HATFA).

### ADMINISTRATIVE

#### **Rev. Proc. 2014-63, page 1014.**

This revenue procedure updates Revenue Procedure 2009-44, 2009-2 C.B. 462, incorporating provisions of Announcements 2008-111 and 2011-6 relating to mediation, to expand and clarify the types of examination and collection cases and issues in the Appeals administrative process that are eligible for mediation pursuant to section 7123(b)(1) of the Internal Revenue Code.

#### **Notice 2014-79, page 1001.**

Optional standard mileage rates. This notice announces 57.5 cents as the optional standard mileage rate for substantiating the amount of the deduction for the business use of an automobile, 14 cents as the optional rate for use of an automobile as a charitable contribution, and 23 cents as the optional rate for use of an automobile as a medical or moving expense for 2015. The notice also provides the amount a taxpayer must use in calculating reductions to basis for depreciation taken under the business standard mileage rate and the maximum standard automobile cost for automobiles under a FAVR allowance.

Finding Lists begin on page ii.

# The IRS Mission

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

## Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

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.

The contents of this publication are not copyrighted and may be reprinted freely. A citation of the Internal Revenue Bulletin as the source would be appropriate.

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

26 CFR 1.6038D-1: *Reporting with respect to specified foreign financial assets, definition of terms.*

26 CFR 1.6038D-2: *Requirement to report specified foreign financial assets.*

26 CFR 1.6038D-3: *Specified foreign financial assets.*

26 CFR 1.6038D-4: *Information required to be reported.*

26 CFR 1.6038D-5: *Valuation guidelines.*

26 CFR 1.6038D-6: *Specified domestic entities.* [Reserved]

26 CFR 1.6038D-7: *Exceptions from the reporting of certain assets under section 6038D.*

26 CFR 1.6038D-8: *Penalties for failure to disclose.*

## T.D. 9706

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

### Reporting of Specified Foreign Financial Assets

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations providing guidance relating to the provisions of the Hiring Incentives to Restore Employment (HIRE) Act that require specified foreign financial assets to be reported to the Internal Revenue Service for taxable years beginning after March 18, 2010. In particular, the final regulations provide guidance relating to the requirement that individuals attach a statement to their income tax return to provide required information regarding specified foreign financial assets in which they have an interest. The final regulations affect individuals required to file Form 1040, "U.S. Individual Income Tax Return," or Form 1040-EZ, "Income Tax Return for Single and Joint Filers With No Dependents," and certain individuals required to file Form 1040-NR, "Non-resident Alien Income Tax Return," or Form 1040NR-EZ, "U.S. Income Tax Return for Certain Nonresident Aliens with No Dependents."

**DATES: Effective Date:** These regulations are effective on December 12, 2014.

**Applicability Date:** For dates of applicability, see §§ 1.6038D-1(b), 1.6038D-2(g), 1.6038D-3(e), 1.6038D-4(b), 1.6038D-5(g), 1.6038D-7(d), and 1.6038D-8(g).

#### FOR FURTHER INFORMATION

**CONTACT:** Joseph S. Henderson or Michael Kaercher, (202) 317-6942 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### Paperwork Reduction Act

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number. The collection of information contained in these regulations has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). The collection of information is satisfied by filing Form 8938, "Statement of Specified Foreign Financial Assets," OMB No. 1545-2195, with the respondent's income tax return.

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

##### Background

On December 19, 2011, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) published temporary regulations (TD 9567) (the "2011 temporary regulations") and a notice of proposed rulemaking by cross-reference to the 2011 temporary regulations in the **Federal Register** addressing the reporting requirements under section 6038D (76 FR 78553, TD 9567, 2012-1 IRB 395); (76 FR 75894; REG-130302-10, 2012-1 IRB 412). The notice of proposed rulemaking also included Prop. Reg.

§ 1.6038D-6, setting out the conditions under which a domestic entity will be considered a specified domestic entity and, therefore, required to report specified foreign financial assets in which it holds an interest. Corrections to the 2011 temporary regulations were published on February 21, 2012, in the **Federal Register** (77 FR 9845). Corrections to Prop. Reg. § 1.6038D-6 were published in the **Federal Register** on February 21, 2012 (77 FR 9877) and February 22, 2012 (77 FR 10422).

The Treasury Department and the IRS received written comments on the 2011 temporary regulations and Prop. Reg. § 1.6038D-6. All comments are available at [www.regulations.gov](http://www.regulations.gov) or upon request. Because no requests to speak were received, no public hearing was held. After consideration of the comments received, the Treasury Department and the IRS adopt the 2011 temporary regulations as final regulations with the modifications described herein. The Treasury Department and the IRS are not adopting Prop. Reg. § 1.6038D-6 as a final regulation at this time. Prop. Reg. § 1.6038D-6 (REG-144339-14) will be adopted as a final regulation at a later date.

##### Summary of Comments and Explanation of Revisions

###### I. Requirement to Report Specified Foreign Financial Assets (§ 1.6038D-2)

###### A. Individuals Required to Report (§ 1.6038D-2(a))

A number of comments were received requesting that additional categories of individuals be relieved of the requirement to report specified foreign financial assets under section 6038D.

###### 1. Dual resident taxpayers

A comment recommended an exemption from the section 6038D reporting requirements be included for an individual who is a dual resident taxpayer and who, pursuant to a provision of a treaty that provides for resolution of conflicting claims of residence by the United States

and the treaty partner, claims to be treated as a resident of the treaty partner. In such a case, a dual resident taxpayer may claim a treaty benefit as a resident of the treaty partner and will be taxed as a nonresident for U.S. tax purposes for the taxable year (or portion of the taxable year) that the individual is treated as a nonresident. The final rule adopts this recommendation for a dual resident taxpayer who determines his or her U.S. tax liability as if he or she were a nonresident alien and claims a treaty benefit as a nonresident of the United States as provided in § 301.7701(b)-7 by timely filing a Form 1040NR, "Nonresident Alien Income Tax Return," (or such other appropriate form under that section) and attaching a Form 8833, "Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)." The Treasury Department and the IRS have concluded that reporting under section 6038D is closely associated with the determination of an individual's income tax liability. Because the taxpayer's filing of a Form 8833 with his or her Form 1040NR (or other appropriate form) will permit the IRS to identify individuals in this category and take follow-up tax enforcement actions when considered appropriate, reporting on Form 8938, "Statement of Specified Foreign Financial Assets," is not essential to effective IRS tax enforcement efforts relating to this category of U.S. residents.

## 2. Individuals resident in the United States under non-immigrant visas

A number of comments requested an exemption from the section 6038D reporting requirements for foreign executives and employees resident in the United States under non-immigrant H, L, or E visas. The final rule does not adopt this recommendation. Section 6038D is intended to provide the IRS with information concerning the specified foreign financial assets of U.S. taxpayers to aid the IRS in enforcing tax laws fairly and uniformly. Because all U.S. residents are taxable on worldwide income, excluding categories of residents from the scope of section 6038D reporting is not consistent with the purposes for which the provision was enacted. Individuals in the United States under non-immigrant visas often

stay in the United States for years, making it difficult to justify treating them more favorably than other U.S. residents. For stays in the United States of a shorter duration, the Treasury Department and the IRS have determined that the distinctions drawn in the definition of a U.S. resident in § 1.6038D-1(a)(3) (which cross-references section 7701(b)) best carry out the purposes of section 6038D.

### 3. Persons that do not owe U.S. tax for the taxable year

Another comment requested revising § 1.6038D-2(a)(7) to exempt from the section 6038D reporting requirements specified persons that do not owe U.S. taxes for the taxable year. The final rule does not adopt this comment. As provided in the 2011 temporary regulations, the final rule states that a specified person that does not have to file a tax return for the year does not have to file a Form 8938. See § 1.6038D-2(a)(7)(i). If the law requires the filing of a tax return, however, information reported on a Form 8938 concerning the taxpayer's specified foreign financial assets is an important component of that return, even if no tax liability is shown. Requiring this filing will aid the IRS in devising effective enforcement programs with respect to such returns.

## B. Applicable Reporting Thresholds (§ 1.6038D-2(a))

Several comments requested increases to the reporting thresholds provided in § 1.6038D-2(a) for certain types of assets or for certain classes of individuals. Other comments recommended that the increased thresholds in the 2011 temporary regulations applicable to certain specified individuals living abroad be extended to additional categories of taxpayers.

### 1. Assets received in connection with the performance of personal services

Some comments requested increased reporting thresholds, or a complete exemption from reporting, for specified foreign financial assets received in connection with an individual's performance of personal services as an employee of a foreign employer. The concerns raised in

these comment letters primarily relate to the difficulty of valuing these types of assets. However, the 2011 temporary regulations already broadly address valuation concerns relating to these assets by providing a simplified valuation rule for interests in foreign pension plans or foreign deferred compensation plans if the beneficiary does not know, or have reason to know based on readily accessible information, the value of the interest. In such cases, the value of the individual's interest in the plan is limited to the value of the distributions received from the plan during the year for purposes of both calculating the applicable reporting thresholds and reporting the maximum value of the interest. See § 1.6038D-5(f)(3).

These comments are further addressed by clarifying in the final rule that non-vested interests in property received in connection with the performance of personal services are not required to be reported. See section I.C.1 in this preamble, which describes this clarification incorporated in the final rule.

Because the Treasury Department and the IRS have determined that the concerns underlying these comments are best addressed by these rules and that the method of acquisition of a specified foreign financial asset should not determine an individual's section 6038D reporting obligations, the final rule does not adopt this request.

## 2. Employees seconded to the United States

Comments requested that higher reporting thresholds (or a reporting exemption) should apply in the case of certain employees seconded to the United States by foreign employers. For the reasons set forth in section I.A.2 (relating to individuals resident in the United States under non-immigrant visas) and in section I.B.3 (addressing U.S. residents who do not qualify for section 911 benefits), the final rule does not adopt this recommendation.

## 3. Non-citizen U.S. residents who do not qualify for section 911 benefits

A comment was received requesting that higher reporting thresholds apply in the case of a non-citizen resident of the United States who would qualify for ben-

efits under section 911(d)(1)(A) if he or she were a U.S. citizen. This request has not been adopted in the final rule for administrability reasons. The 2011 temporary regulations tie the increased reporting thresholds in § 1.6038D-2(a) to an individual's status as a qualified individual under section 911(d)(1) in order to allow the IRS to use the taxpayer's filing of the return required to claim section 911 benefits (Form 2555, "Foreign Earned Income", or Form 2555-EZ, "Foreign Earned Income Exclusion") as a marker to indicate that higher reporting thresholds may apply to the taxpayer. The ability to easily identify taxpayers who may be eligible for the increased thresholds is essential to permit the IRS to target appropriate enforcement programs to taxpayers subject to different reporting thresholds in a cost effective manner.

### *C. Interest in a Specified Foreign Financial Asset (§ 1.6038D-2(b))*

A number of comments requested that the final regulations clarify the reporting requirements with respect to certain interests in assets under § 1.6038D-2(b). These clarifications have been incorporated in the final rule.

#### *1. Nonvested property under section 83*

A comment requested clarification regarding whether an individual is considered to have an interest in property transferred in connection with the performance of personal services during any period that the individual's interest in the property is not vested. The final rule in § 1.6038D-2(b)(2) clarifies that a specified person that is transferred property in connection with the performance of personal services is first considered to have an interest in the property for purposes of section 6038D on the first date that the property is substantially vested (within the meaning of § 1.83-3(b)) or, in the case of property with respect to which a specified person makes a valid election under section 83(b), on the date of transfer of the property.

#### *2. Assets held by a disregarded entity*

A number of comments requested clarification of the section 6038D reporting

requirements with respect to specified foreign financial assets held by an entity disregarded as an entity separate from its owner under § 301.7701-2 of this chapter (a disregarded entity). In response to these requests, and consistent with instructions to Form 8938, the final rule provides in § 1.6038D-2(b)(4)(iii) that a specified person that owns a foreign or domestic entity that is a disregarded entity is treated as having an interest in any specified foreign financial assets held by the disregarded entity. As a result, a specified person that owns a disregarded entity (whether domestic or foreign) that, in turn, owns specified foreign financial assets must include the value of those assets in determining whether the specified person meets the reporting thresholds in § 1.6038D-2(a) and, if so, must report such assets on Form 8938.

### *D. Jointly Owned Assets (§ 1.6038D-2(c))*

A number of comments requested clarification of aspects of the rules in § 1.6038D-2(c) and (d) relating to joint owners of a specified foreign financial asset. These comments have been adopted. Specifically, the final rule clarifies that each of the joint owners of a specified foreign financial asset who are not married to each other must include the full value of the asset (rather than only the value of the specified person's interest in the asset) in determining whether the aggregate value of such specified individual's specified foreign financial assets exceeds the applicable reporting thresholds, and each joint owner must report the full value of the asset on his or her Form 8938. See § 1.6038D-2(c)(1)(i) and (c)(1)(ii). In addition, the final rule clarifies that, in the case of joint owners who are married to each other and file separate returns, each joint owner of a specified foreign financial asset must report the full value of the asset (rather than only the value of the specified person's interest in the asset) on the individual's Form 8938, even if both spouses are specified individuals and only one-half of the value of the asset is considered in determining the applicable reporting thresholds under § 1.6038D-2(c)(3)(i). See § 1.6038D-2(d)(2).

## *II. Specified Foreign Financial Assets (§ 1.6038D-3)*

### *A. Financial Account (§ 1.6038D-3(a))*

#### *1. Retirement and pension accounts and certain non-retirement savings accounts*

The definition of a financial account in the 2011 temporary regulations is based on the definition of a financial account for chapter 4 purposes, subject to an exception for certain retirement and pension accounts and non-retirement savings accounts that are financial accounts for section 6038D purposes but that are not treated as financial accounts for purposes of chapter 4. See §§ 1.6038D-1(a)(7), 1.1471-1(b)(49), and 1.1471-5(b). These final regulations modify the definition of a financial account for purposes of section 6038D in order to require consistent reporting under section 6038D with respect to retirement and pension accounts and certain non-retirement savings accounts regardless of whether the account is maintained in a jurisdiction treated as having in effect a Model 1 IGA or Model 2 IGA. For financial accounts that are maintained by a foreign financial institution that is not located in a jurisdiction treated as having in effect a Model 1 IGA or Model 2 IGA, the definition of a financial account in the final rule continues to include the retirement and pension accounts and non-retirement savings accounts described in § 1.1471-5(b)(2)(i), consistent with the section 6038D coordination rule in that section. See § 1.1471-5(b)(2)(i)(D). For taxable years beginning after December 12, 2014, these final regulations also provide that retirement and pension accounts, non-retirement savings accounts, and accounts satisfying conditions similar to those described in § 1.1471-5(b)(2)(i) and that are excluded from the definition of a financial account under an applicable Model 1 IGA or Model 2 IGA (as provided in § 1.1471-5(b)(2)(vi)) are included in the definition of a financial account for purposes of section 6038D. The Treasury Department and the IRS intend to amend the chapter 4 regulations to add a section 6038D coordination rule to § 1.1471-5(b)(2)(vi) providing that such accounts are included in the definition of a

financial account for purposes of section 6038D.

## 2. Short-term accounts

One comment recommended the addition of an exception to the definition of a financial account for an account in which funds are held for less than 15 days, provided the income generated from the account does not exceed \$1,000. The final rule does not incorporate this comment. The 2011 temporary regulations already provide relief for many short-term accounts through a broad exception to the definition of financial account for escrow accounts. See §§ 1.6038D-1(a)(7) and 1.1471-5(b)(2)(iv). This exception is administrable because these accounts are of a type that is distinguishable from other accounts. A broader exception for short-term accounts could significantly complicate IRS efforts to devise effective enforcement programs based on comprehensive account reporting under section 6038D.

## 3. Assets held in an account maintained by a foreign financial institution

Another comment requested clarification that specified foreign financial assets held in a financial account are excluded from the definition of specified foreign financial assets. The 2011 temporary regulations already provide that the foreign financial account itself, and not the assets held in such an account, must be reported for section 6038D purposes. See § 1.6038D-3(a)(1). Accordingly, no change has been adopted in response to this comment.

## 4. Life insurance with a cash surrender value

A comment requested clarification of the section 6038D reporting requirements applicable to a life insurance policy with a cash surrender value. Because the definition of financial account for section 6038D purposes is based on the definition of a financial account for chapter 4 purposes, which includes these contracts, the 2011 temporary regulations already provide clear rules requiring a taxpayer to report these contracts on Form 8938. Accordingly, the final rule is not modified to further ad-

dress this issue. See §§ 1.6038D-1(a)(7), 1.1471-5(b)(1)(iv), and 1.1471-5(b)(3)(vii).

## 5. Request for examples of foreign financial assets not to be reported

A number of comments requested examples of the types of financial assets that are not required to be reported under section 6038D. The Treasury Department and the IRS have not provided these examples in the final rule because the 2011 temporary regulations, as well as the relevant portions of the regulations under chapters 4 and 61, already include detailed rules to support taxpayer determinations as to whether an asset is a specified foreign financial asset that must be reported. For example, § 1.6038D-3(d) includes examples of assets other than financial accounts that are included within the definition of specified foreign financial asset, and the rules in § 1.6049-5(b)(5)(i) provide detail concerning which financial institutions are U.S. payors for purposes of determining that an account is maintained by such an institution and therefore is not required to be reported under section 6038D.

The Treasury Department and the IRS will continue to consider comments and whether additional guidance is warranted to address particular types of assets under section 6038D.

### B. Other Specified Foreign Financial Assets (§ 1.6038D-3(b))

#### 1. Assets held for investment and not used in, or held for use in, the conduct of the taxpayer's trade or business

A number of comment letters recommended changes to the approach set forth in the 2011 temporary regulations for determining whether an asset other than a financial account is held for investment (and therefore may be reportable under section 6038D) or is instead excepted from the definition of a specified foreign financial asset because it is used in, or held for use in, the conduct of a trade or business under § 1.6038D-3(b)(3), (b)(4), and (b)(5).

Several comments requested a bright line test for distinguishing between non-financial account assets subject to reporting and those not subject to reporting. For example, one such comment recom-

mended looking to whether an asset was *acquired in the taxpayer's trade or business* rather than whether the asset was used in, or held for use in, the conduct of the taxpayer's trade or business. Another comment suggested providing that contracts issued in the ordinary course of the *issuer's* (rather than the taxpayer's) trade or business should not be reportable by the taxpayer. The final rule does not change the definition of a specified foreign financial asset as suggested in these comments. The Treasury Department and the IRS have determined that the reporting rule under the 2011 temporary regulations strikes an appropriate balance under section 6038D by focusing on whether an asset is held for investment. Distinguishing assets held for investment from assets with a close nexus to the taxpayer's trade or business is an inherently factual determination that is not susceptible to a bright line test. The Treasury Department and the IRS have concluded that the 2011 temporary regulations provide reasonable rules that will yield appropriate reporting results in a wide variety of fact patterns involving the taxpayer's trade or business.

Another comment requested a rule specifying that an asset inadvertently acquired as a result of a corporate reorganization or an in-kind asset distribution not be treated as held for investment, so long as the asset is held by the taxpayer for only a short period of time. The Treasury Department and the IRS have concluded that this type of exception is not warranted because the general test set forth in the 2011 temporary regulations is fair, should be uniformly applied, and should not be unduly burdensome to apply under these fact patterns.

#### 2. Certain hedging transactions

One comment recommended modifying § 1.6038D-3(b) to provide that certain hedging transactions described in section 1221(a)(7) are not specified foreign financial assets. The final rule does not adopt the requested change. The Treasury Department and the IRS have concluded that taxpayers engaging in hedging transactions should determine whether such transactions are specified foreign financial assets by applying the same general test applied by other taxpayers, that is, by de-

termining whether the hedging transaction is “used in, or held for use in, the conduct of a trade or business and not held for investment.”

### 3. *Employment contracts*

Another comment requested that the final rule provide that employment contracts are not specified foreign financial assets. The comment did not, however, suggest a definition of an employment contract for this purpose. Moreover, the scope of property that could be covered by such a contract may vary widely among taxpayers depending on the industry and the location in which the taxpayer works. The Treasury Department and the IRS have determined that the trade or business test of § 1.6038D-3(b)(3), (b)(4), and (b)(5) should apply broadly to a wide range of financial assets in order to achieve uniform reporting results for taxpayers with aggregate specified foreign financial assets of similar value, and that a broad exclusion for employment contracts should not be provided. Accordingly, the final rule does not adopt this recommendation.

### 4. *Shares of foreign corporations traded on public stock exchange*

Some comments recommended that the definition of a specified foreign financial asset exclude stock of a foreign corporation that is traded on a public stock exchange (whether or not the exchange is located in the United States). The Treasury Department and the IRS have concluded that it is not appropriate to exclude stock or securities issued by a person other than a U.S. person from section 6038D reporting. If such stock or securities are held in a financial account, the financial account would be reported for section 6038D purposes, and if such stock or securities are held directly by a specified person and not in a financial account, based on section 6038D(b)(2), it is appropriate to require reporting of such stock or securities for section 6038D purposes. Thus, this comment is not adopted.

### 5. *Interest in a social security, social insurance, or similar program*

Several comments recommended amending § 1.6038D-3(b) to specify that an interest in a social security, social insurance, or similar program of a foreign government is not considered a specified foreign financial asset. As a general matter, the definition of a specified foreign financial asset already excludes these interests because they are not assets described in § 1.6038D-3(b)(1). In addition, the preamble to the 2011 temporary regulations and the instructions to Form 8938 already illustrate the application of this rule to these interests, stating that “an interest in a social security, social insurance, or other similar program of a foreign government” is not a specified foreign financial asset. A chart comparing the Form 8938 reporting requirements to the FBAR reporting requirements, available at [www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements](http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements), also addresses these programs. Because the Treasury Department and the IRS already have addressed this issue, the final rule does not adopt the recommendation.

### 6. *Financial assets issued by a person organized under the laws of a U.S. possession*

The final rule clarifies that specified foreign financial assets include stock, securities, financial instruments, and contracts that are held for investment and not held in an account maintained by a financial institution and are issued by a person organized under the laws of a U.S. possession. See § 1.6038D-3(b)(1). For special rules applicable to bona fide residents of the U.S. possessions, see § 1.6038D-7(c).

### C. *Interest in a Foreign Trust or Foreign Estate (§ 1.6038D-3(c))*

A number of comments expressed concern that the reason to know standard of knowledge to report an interest in a foreign trust or estate could result in compliance difficulties for specified individuals who are aware that they have a beneficial interest in a trust or estate but who have not received a distribution from the trust or estate and do not know the value of the interest. These comments recommended

that the final rule provide that a beneficiary of a foreign trust or estate should not be required to report the interest on Form 8938 for any year in which the beneficiary did not receive a distribution.

The Treasury Department and the IRS have concluded that the concerns expressed in these comments have already been addressed comprehensively in the 2011 temporary regulations, including by the adoption of simple valuation rules that substantially ease the reporting burdens of beneficiaries. In the case of a foreign trust, for a year in which the beneficiary does not know, or have reason to know based on readily accessible information, the fair market value of the beneficiary’s interest and the beneficiary does not receive a distribution, the value of the beneficiary’s interest in the trust, both for purposes of determining whether the beneficiary meets the reporting thresholds in § 1.6038D-2(a) and, if so, for reporting the maximum value of that beneficial interest, is considered to be zero. See § 1.6038D-5(f)(2). Similar rules apply with respect to a foreign estate. See § 1.6038D-5(f)(3). Thus, a specified individual who is such a beneficiary of a foreign trust or estate but has not received a distribution generally is only required to report the beneficial interest if the beneficiary otherwise is required to file Form 8938. If a Form 8938 filing is required, the taxpayer’s reporting burdens are minimal with respect to the beneficial interest. The Treasury Department and the IRS have determined that these rules achieve a reasonable and appropriate balance between the government’s tax administration interests and the beneficiary’s compliance burden.

### D. *Request for Comments on the Treatment of Virtual Currency*

The Treasury Department and the IRS are considering the proper treatment of virtual currency under section 6038D and welcome comments on this topic.

### III. *Information Required to be Reported (§ 1.6038D-4)*

#### A. *Reporting With Respect to Stock or Other Securities of a Foreign Corporation*

A comment requested clarification regarding whether to report on Form 8938

the foreign office address of a foreign corporation in which the taxpayer has an interest or the address of the U.S. payor reported on Form 1099 with respect to dividends paid by the foreign corporation. Because the rules set forth in the 2011 temporary regulations are clear, the final rule is not changed to reflect these comments. If stock of a foreign corporation is held by a taxpayer outside of a financial account, § 1.6038D-4(a)(2) provides that the corporation's address must be reported. If stock of a foreign corporation is held through a financial account other than one maintained by a financial institution that is a U.S. payor, the financial account is reported, and § 1.6038D-4(a)(1) provides that the address of the financial institution with which the account is maintained must be reported. However, if stock of a foreign corporation is held by a taxpayer in a financial account maintained by a financial institution that is a U.S. payor, § 1.6038D-3(a)(3)(i) provides that neither the financial account nor the foreign stock held in that account must be reported on Form 8938.

#### *B. Scope of Information Required to be Reported With Respect to an Asset*

Another comment recommended that taxpayers not be required to report the items listed in § 1.6038D-4(a)(6), (a)(7) and (a)(8) (that is, whether a financial account was opened or closed during the year, the date on which a specified foreign financial asset (other than a financial account) was acquired or disposed of during the year, and details regarding income, gain, loss, deduction or credit items recognized during the year and where those items are reported by the taxpayer, respectively). This comment has not been adopted in the final rule. The Treasury Department and the IRS have determined that collection of this information is necessary for effective tax enforcement actions and is consistent with congressional intent in enacting section 6038D.

#### *IV. Valuation Guidelines (§ 1.6038D-5)*

The Treasury Department and the IRS received a number of comments requesting changes and clarifications to the ap-

plicable valuation guidelines under the regulations.

#### *A. Asset With No Positive Value During the Year*

Several comments requested that the final rule clarify the valuation and reporting rules applicable to specified foreign financial assets with no positive value during the year. Under § 1.6038D-2(a)(5), a specified foreign financial asset is subject to reporting even if the asset does not have a positive value during the year, although reporting on Form 8938 is required only if the aggregate fair market value of a taxpayer's specified foreign financial assets exceeds the applicable reporting thresholds in § 1.6038D-2(a). The final rule clarifies in § 1.6038D-5(b)(3) that the maximum fair market value for a specified foreign financial asset with no positive value during the year is treated as zero. The final rule also is revised to include in § 1.6038D-2(a)(5) a cross-reference to the valuation rules in § 1.6038D-5(b)(3).

#### *B. Appraisals*

One comment recommended revising § 1.6038D-5 to provide that a specified person is not required to obtain an appraisal from a third party to establish a reasonable estimate of an asset's fair market value. For the reasons set forth in section IV.C. of this preamble (relating to a reasonable estimate of fair market value), the guidance provided with respect to the reasonable estimate standard adequately addresses this comment. In addition, the preamble to the 2011 temporary regulations and the instructions to Form 8938 already note that a taxpayer need not obtain a third-party appraisal to establish a reasonable estimate of a specified foreign financial asset's fair market value for purposes of section 6038D. Accordingly, the final rule does not adopt the requested change.

#### *C. Reasonable Estimate of Fair Market Value*

Several comments requested that the final rule clarify what constitutes a reasonable estimate of an asset's fair market value for purposes of reporting under section 6038D. Some comments also recommended including examples in the final

rule addressing when a taxpayer would be considered to know, or have reason to know based on readily accessible information, that a valuation in a periodic account statement was not a reasonable estimate for purposes of reporting.

The final rule does not provide additional guidance on what constitutes a reasonable estimate of fair market value under section 6038D. The Treasury Department and the IRS have concluded that the "reasonable estimate" standard is an appropriately flexible one that will result in helpful information for the IRS with respect to a wide range of assets, while not proving unduly burdensome for taxpayers. Further, valuation is an inherently factual inquiry, and it is not feasible to devise detailed rules that clearly describe outcomes that are appropriate for a broad range of factual situations. The 2011 temporary regulations and final rule incorporate valuation rules designed to reduce taxpayer reporting burdens in specific circumstances, such as the rule permitting reliance on periodic account statements from a financial institution to determine a financial account's fair market value (see § 1.6038D-5(d)) and the rule permitting the use of a year-end value to determine a reasonable estimate of maximum value for certain specified foreign financial assets held outside of a financial account (see § 1.6038D-5(f)(1)).

#### *D. Hard-to-Value Assets*

A comment requested that the final rule establish a presumptive standard to be applied to determine the fair market value of certain illiquid assets such as contractual rights and interests in non-publicly traded entities. The Treasury Department and the IRS recognize that the reporting burdens under section 6038D can be significant with respect to hard-to-value assets. However, the Treasury Department and the IRS have concluded that the requirement under the 2011 temporary regulations to make a reasonable estimate strikes an appropriate balance between the usefulness of the information reported on Form 8938 and the taxpayer burdens associated with complying with the standard. For these reasons, the final rule does not adopt valuation presumptions for particular types of assets that are hard to value.

### *E. Interests in Pension Plans and Deferred Compensation Plans*

Another comment recommended that the value of interests in pension plans and deferred compensation plans should not be considered to be readily ascertainable if the taxpayer has no current rights to withdraw plan assets without penalty. Adopting this recommendation would result in a taxpayer's interest in a pension or deferred compensation plan being valued at zero if the taxpayer has no right to withdraw, even if the taxpayer regularly receives statements providing the fair market value of the interest in the pension or deferred compensation plan. This result is not consistent with the purpose for requiring reporting of the maximum value of a specified foreign financial asset and is not adopted in the final rule.

### *F. Foreign Currency*

The final rule adopts two modifications to the valuation rules relating to foreign currency. First, in response to a comment, the final rule states that a foreign currency conversion shown on a periodic financial account statement is among the aspects of the statement that a taxpayer may rely upon to the extent provided in § 1.6038D-5(d). Second, § 1.6038D-5(c) of the 2011 temporary regulations provides that, except as otherwise provided, a specified person must use the foreign currency exchange rate issued by the U.S. Treasury Department's Financial Management Service for purposes of section 6038D. The final rule is updated to reflect the fact that foreign currency exchange rates are now issued by the Treasury Department's Bureau of the Fiscal Service.

### *V. Exceptions from the Reporting of Certain Assets Under Section 6038D (§ 1.6038D-6)*

#### *A. General Alternatives to Reporting on Form 8938*

Several comments recommended that the Treasury Department and the IRS adopt an alternative approach to Form 8938 reporting. One comment suggested consolidating all foreign asset reporting for U.S. tax purposes on one form and eliminating Form 8938. Another comment recommended a revision to Schedule B of

Form 1040 to permit specified individuals to indicate on that schedule that all of their specified foreign financial assets were reported on the IRS forms specified in § 1.6038D-7(a) such that no Form 8938 is required.

The final rule does not adopt these recommendations. The Treasury Department and the IRS have determined that consolidating a taxpayer's information concerning his or her specified foreign financial assets on Form 8938 best carries out the purposes of section 6038D by making the information readily accessible for use in IRS enforcement programs. In addition, using Form 8938 avoids the need to incur costs disproportionate to expected benefits from revising existing IRS forms, IT systems, submission processing, and enforcement programs.

#### *B. Form 8858, "Information Return of U.S. Persons With Respect to Foreign Disregarded Entities"*

Several comments recommended revising § 1.6038D-7(a) to add Form 8858, "Information Return of U.S. Persons With Respect to Foreign Disregarded Entities." However, the Treasury Department and the IRS do not regard the information furnished on Form 8858 concerning specified foreign financial assets held by a disregarded entity as sufficiently detailed to consider reporting on Form 8938 duplicative of reporting on Form 8858. Thus, the final rule does not adopt this recommendation.

#### *C. Form 8854, "Initial and Annual Expatriation Statement"*

Several comments recommended adding Form 8854, "Initial and Annual Expatriation Statement," to the list of forms in § 1.6038D-7(a) intended to relieve duplicative reporting. However, after considering the nature of the information collected on Form 8854, the Treasury Department and the IRS have concluded that requiring Form 8938 would not duplicate the information currently being reported on Form 8854. Further, filing of Form 8938 is expected to substantially enhance IRS compliance programs with respect to Form 8854 filers. Thus, the final rule does not adopt this recommendation.

#### *D. Form 8891, "U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans"*

Rev. Proc. 2014-55, 2014-44 IRB 753, obsoletes Form 8891, "U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans," on a prospective basis. Thus, the final rule is modified to describe the taxable years for which the taxpayer's reporting of an asset on Form 8891 will relieve the taxpayer of reporting that asset on Form 8938 (that is, taxable years beginning after March 18, 2010, and ending on or before December 31, 2013).

#### *E. Joint Filers of Forms Listed in § 1.6038D-7(a)*

A comment requested clarification that a specified person included as part of a jointly filed Form 5471, "Information Return of U.S. Persons With Respect to Certain Foreign Corporations," pursuant to § 1.6038-2(j) or as a joint filer of Form 8865, "Return of U.S. Persons With Respect to Certain Foreign Partnerships," pursuant to § 1.6038-3(c) and who notifies the IRS as required by § 1.6038-2(i) and § 1.6038-3(c) will be considered to have filed such forms for purposes of § 1.6038D-7(a). Because a joint filer of Form 5471 or Form 8865 fully meets the reporting requirements for such forms, reporting on the Form 8938 would be duplicative. Thus, the final rule adopts this clarification in § 1.6038D-7(a)(3).

#### *F. Interests in Certain Foreign Trusts*

A number of comments recommended revisions to the section 6038D reporting requirements for specified persons with an interest in a foreign trust.

One comment recommended that a foreign trustee of a foreign trust with a U.S. owner who is required to file Form 3520-A, "Annual Information Return of Foreign Trust With a U.S. Owner," be permitted to satisfy the section 6038D reporting requirements for all trust beneficiaries by filing Form 3520-A so as to consolidate all foreign trust filings in one place. Another comment recommended that a foreign trustee of a foreign trust be permitted to satisfy the Form 8938 filing requirements on behalf of the trust's bene-

ficiaries. Another comment recommended that trust beneficiaries should be excused from filing Form 8938 if a specified person files a Form 8938 as the owner of the trust and discloses the specified foreign financial assets of the foreign trust.

The final rule does not adopt these recommendations to allow a beneficiary's Form 8938 filing responsibilities to be satisfied by the trustee of the trust or to relieve the beneficiary's reporting obligation in the case of a specified person filing Form 8938 as the owner of the trust. The IRS can best use the information reported on the Form 8938 to enforce tax compliance when it is provided in connection with the filing of an annual return by the taxpayer who is the beneficial owner of the interest in the foreign trust. Thus, the final rule continues to provide that a beneficiary of a trust must file Form 8938 with his or her annual return when there is a section 6038D filing requirement.

#### G. Reporting on Both FinCEN Form 114 and Form 8938

A number of comments recommended that a foreign account reported on FinCEN Form 114, "Report of Foreign Bank and Financial Accounts," (formerly Form TD F 90-22.1, "Report of Foreign Bank and Financial Accounts") (an FBAR), should not be required to be reported on Form 8938. The final rule does not adopt this recommendation.

Congress enacted both the Title 31 and the Title 26 provisions regarding the reporting requirements of the FBAR and Form 8938. Reporting on the FBAR is required for law enforcement purposes under the Bank Secrecy Act, as well as for purposes of tax administration. As a consequence, different policy considerations apply to Form 8938 and FBAR reporting. These different policies are reflected in the different categories of persons required to file Form 8938 and the FBAR, the different filing thresholds for Form 8938 and FBAR reporting, and the different assets (and accompanying information) required to be reported on each form. Although certain information may be reported on both Form 8938 and the FBAR, the information required by the forms is not identical in all cases, and reflects the different rules, key definitions (for exam-

ple, "financial account"), and reporting requirements applicable to Form 8938 and FBAR reporting.

These differing policy considerations were recognized by Congress during the passage of the HIRE Act (Public Law 111-147 (124 Stat. 71)) and the enactment of Section 6038D. Congress's intention to retain FBAR reporting requirements, notwithstanding the enactment of section 6038D, was specifically noted in the *Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives To Restore Employment Act," Under Consideration by the Senate* (Staff of the Joint Committee on Taxation, JCX-4-10 (February 23, 2010)) (Technical Explanation) accompanying the HIRE Act. The Technical Explanation states that "[n]othing in this provision [section 511 of the HIRE Act enacting new section 6038D] is intended as a substitute for compliance with the FBAR reporting requirements, which are unchanged by this provision." (Technical Explanation at p. 60) Against this background, reporting on the Form 8938 and on the FBAR is not duplicative and both forms must be filed, if required. The IRS website provides additional guidance comparing the requirements of both forms (<http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements>).

## VI. Penalties

### A. Reasonable Cause for Failure to Report

Several comments requested that the final rule provide additional guidance concerning the reasonable cause standard for relief from the section 6038D penalty set forth in section 6038D(g) and § 1.6038D-8(e). For example, one comment recommended that the final rule provide objective examples of when a taxpayer would be considered to have reasonable cause for failing to report under section 6038D. Another comment requested that the final rule state that a specified person's failure to file Form 8938 would be considered due to reasonable cause and not subject to penalty if all of that person's specified foreign financial assets were reflected on timely and properly filed forms described in § 1.6038D-7(a)(i). Another comment

recommended that the final rule provide a presumption that reasonable cause exists with respect to all Form 8938 filing errors in the first year a taxpayer is required to file Form 8938. Yet another comment recommended that a specified person with a continuing failure to report for purposes of the section 6038D(d)(2) "add on" component of the penalty should no longer be subject to penalty once a specified person has requested the information necessary to complete Form 8938, provided the specified person furnishes the IRS with proof of the requests to obtain that information.

The final rule does not adopt these recommendations because the Treasury Department and the IRS have determined that the appropriate standards for determining whether the reasonable cause exception to the penalty applies in a particular case are the general standards set out in the Internal Revenue Manual (IRM) addressing the approach that IRS employees must take whenever considering the application of a civil penalty and whether a reasonable cause exception applies. The general reasonable cause standards are set out in the IRS's "Penalty Handbook," which is included in the IRM at section 20.1. The Penalty Handbook sets forth general policy and procedural requirements for assessing and abating penalties, as well as the criteria for relief from certain penalties. For example, IRM 20.1.1.2.2 discusses the need to have a fair and consistent approach to penalty administration. Section 20.1.1.3.2 of the IRM discusses reasonable cause and what constitutes reasonable cause. Consistent with § 1.6038D-8(e)(3), the Penalty Handbook states that all of the facts and circumstances must be considered to determine whether or not there is reasonable cause for penalty relief in a particular case.

### B. Section 6038D Penalty and Other Potentially Applicable Civil Penalties

Other comments requested the final rule modify the penalty amount and its application in the context of other potentially applicable civil penalties. One comment recommended that the final rule provide a range of penalties corresponding to the range of reporting errors as opposed to the \$10,000 penalty amount of section 6038D(d). Another comment requested

that the final rule provide that a specified person's failure to report a specified foreign financial asset on Form 8938 would not be penalized under section 6038D if the specified person was also being penalized for failing to report the asset on a separate IRS form (for example, Form 5471).

The final rule does not adopt these recommendations. The general penalty administration rules set forth in the IRM apply in the context of the section 6038D penalty and its interaction with other potentially applicable penalties. In addition, section 6038D provides a specific dollar amount of penalty and does not permit selection of a penalty amount from a range of permissible penalty amounts based on taxpayer-specific considerations.

### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13653. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### Drafting Information

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

\* \* \* \* \*

### Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

## PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entries for §§ 1.6038D-0T, 1.6038D-1T, 1.6038D-2T, 1.6038D-3T, 1.6038D-4T, 1.6038D-5T, 1.6038D-7T, and 1.6038D-8T and adding entries for §§ 1.6038D-0, 1.6038D-1, 1.6038D-2, 1.6038D-3, 1.6038D-4, 1.6038D-5, 1.6038D-7, and 1.6038D-8 in numerical order to read as follows:

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

Section 1.6038D-0 also issued under 26 U.S.C. 6038D.

Section 1.6038D-1 also issued under 26 U.S.C. 6038D.

Section 1.6038D-2 also issued under 26 U.S.C. 6038D.

Section 1.6038D-3 also issued under 26 U.S.C. 6038D.

Section 1.6038D-4 also issued under 26 U.S.C. 6038D.

Section 1.6038D-5 also issued under 26 U.S.C. 6038D.

Section 1.6038D-7 also issued under 26 U.S.C. 6038D.

Section 1.6038D-8 also issued under 26 U.S.C. 6038D.

\* \* \* \* \*

Par. 2. Section 1.6038D-0 is added to read as follows:

#### *§ 1.6038D-0 Outline of regulation provisions.*

This section lists the table of contents for §§ 1.6038D-1 through 1.6038D-8.

#### *§ 1.6038D-1 Reporting with respect to specified foreign financial assets, definition of terms.*

- (a) In general.
  - (1) Specified person.
  - (2) Specified individual.
  - (3) Resident alien.
  - (4) Bona fide resident of a U.S. possession.
  - (5) U.S. possession.
  - (6) Specified foreign financial asset.
  - (7) Financial account.
  - (8) Financial institution.
  - (9) Foreign financial institution.
  - (10) Foreign entity.
  - (11) Annual return.
  - (12) Specified domestic entity. [Reserved]
  - (13) Model 1 IGA and Model 2 IGA.
- (b) Effective/applicability dates.

- (1) In general.
- (2) Financial accounts.

#### *§ 1.6038D-2 Requirement to report specified foreign financial assets.*

- (a) Reporting requirement.
  - (1) In general.
  - (2) Special rule for married specified individuals filing a joint annual return.
  - (3) Special rule for certain specified individuals living abroad.
  - (4) Special rule for married specified individuals filing a joint annual return and living abroad.
  - (5) Assets with no positive value.
  - (6) Aggregate value calculation in case of specified foreign financial asset excluded from reporting.
  - (7) Form 8938 filed with annual return.
    - (i) General rule.
    - (ii) Consolidated returns.
  - (8) Reporting required regardless of tax result.
  - (9) Reporting period.
  - (10) Successor forms.
- (b) Interest in a specified foreign financial asset.
  - (1) In general.
  - (2) Property transferred in connection with the performance of services.
  - (3) Special rule for parent making an election under section 1(g)(7).
  - (4) Entities.
    - (i) In general.
    - (ii) Specified foreign financial assets held by certain trusts.
    - (iii) Specified foreign financial assets held by a disregarded entity.
    - (iv) Interest in a foreign trust or foreign estate.
  - (c) Special rules for joint interests.
    - (1) In general.
    - (i) Determining aggregate value of assets.
    - (ii) Reporting maximum value.
  - (2) Aggregate asset value for married specified individuals filing a joint annual return.
  - (3) Aggregate asset value for married specified individuals filing a separate annual return.
    - (i) Both spouses are specified individuals.
    - (ii) One spouse is not a specified individual.

(d) Annual return filed by a married specified individual.

(1) Joint annual return.

(2) Separate annual return.

(e) Special rules for dual resident taxpayers.

(1) In general.

(2) Dual resident taxpayer filing as a nonresident alien at end of taxable year.

(3) Dual resident taxpayer filing as a resident alien at end of taxable year.

(f) Example.

(1) Facts.

(2) Filing requirement.

(i) Married specified individuals filing separate annual returns.

(ii) Married specified individuals filing a joint annual return.

(g) Effective/applicability dates.

#### § 1.6038D-3 Specified foreign financial assets.

(a) Financial accounts.

(1) In general.

(2) Financial account in a U.S. possession.

(3) Excepted financial accounts.

(i) Accounts maintained by U.S. payors.

(ii) Mark-to-market election under section 475.

(b) Other specified foreign financial assets.

(1) In general.

(2) Mark-to-market election under section 475.

(3) Held for investment.

(4) Trade-or-business test.

(5) Direct relationship between holding an asset and a trade or business.

(i) In general.

(ii) Presumption of direct relationship.

(c) Special rule for interests in foreign trusts and foreign estates.

(d) Examples.

(e) Effective/applicability dates.

#### § 1.6038D-4 Information required to be reported.

(a) Required information.

(b) Effective/applicability dates.

#### § 1.6038D-5 Valuation guidelines.

(a) Fair market value.

(b) Valuation of assets.

(1) Maximum value.

(2) U.S. dollars.

(3) Asset with no positive value.

(c) Foreign currency conversion.

(1) In general.

(2) Other publicly available exchange rate.

(3) Currency exchange rate.

(4) Determination date.

(d) Financial accounts.

(e) Asset held in a financial account.

(f) Other specified foreign financial assets.

(1) General rule.

(2) Interests in trusts that are specified foreign financial assets.

(i) Maximum value.

(ii) Reporting threshold.

(3) Interests in estates, pension plans, and deferred compensation plans.

(i) Maximum value.

(ii) Reporting threshold.

(g) Effective/applicability dates.

#### § 1.6038D-6 Specified domestic entities. [Reserved]

#### § 1.6038D-7 Exceptions from the reporting of certain assets under section 6038D.

(a) Elimination of duplicative reporting of assets.

(1) In general.

(2) Foreign grantor trusts.

(3) Joint Form 5471 or Form 8865 filing.

(b) Owner of certain trusts.

(c) Special rules for bona fide residents of a U.S. possession.

(d) Effective/applicability dates.

#### § 1.6038D-8 Penalties for failure to disclose.

(a) In general.

(b) Married specified individuals filing a joint annual return.

(c) Increase in penalty.

(d) Presumption of aggregate value.

(e) Reasonable cause exception.

(1) In general.

(2) Affirmative showing required.

(3) Facts and circumstances taken into account.

(f) Penalties for underpayments attributable to undisclosed foreign financial assets.

(1) Accuracy related penalty.

(2) Criminal penalties.

(g) Effective/applicability dates.

#### § 1.6038D-0T [Removed]

Par. 3. Section 1.6038D-0T is removed.

Par. 4. Section 1.6038D-1 is added to read as follows:

#### § 1.6038D-1 Reporting with respect to specified foreign financial assets, definition of terms.

(a) *In general.* The following definitions apply for purposes of section 6038D and the regulations—

(1) *Specified person.* The term *specified person* means a specified individual or a specified domestic entity.

(2) *Specified individual.* The term *specified individual* means an individual who is a—

(i) U.S. citizen;

(ii) Resident alien of the United States for any portion of the taxable year;

(iii) Nonresident alien for whom an election under section 6013(g) or (h) is in effect; or

(iv) Nonresident alien who is a bona fide resident of Puerto Rico or a section 931 possession (as defined in § 1.931-1(c)(1)).

(3) *Resident alien.* The term *resident alien* has the meaning set forth in section 7701(b) and §§ 301.7701(b)-1 through 301.7701(b)-9 of this chapter.

(4) *Bona fide resident of a U.S. possession.* The term *bona fide resident of a U.S. possession* means an individual who is a “bona fide resident” under section 937(a) and § 1.937-1.

(5) *U.S. possession.* The term *U.S. possession* means American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, or the U.S. Virgin Islands.

(6) *Specified foreign financial asset.* The term *specified foreign financial asset* has the meaning set forth in § 1.6038D-3.

(7) *Financial account.* The term *financial account* has the meaning set forth in § 1.1471-5(b), provided, however, that the exclusions of retirement and pension accounts and non-retirement savings accounts under § 1.1471-5(b)(2)(i) and retirement and pension accounts, non-retirement savings accounts, and accounts satisfying similar conditions in an appli-

cable Model 1 IGA or Model 2 IGA under § 1.1471-5(b)(2)(vi) shall not apply (see the section 6038D coordination rule in § 1.1471-5(b)(2)(i)(D)). See § 1.6038D-3(a)(2) relating to financial accounts maintained by a financial institution that is organized under the laws of a U.S. possession.

(8) *Financial institution.* The term *financial institution* has the meaning set forth in section 1471(d)(5) and the regulations thereunder.

(9) *Foreign financial institution.* The term *foreign financial institution* has the meaning set forth in § 1.1471-5(d).

(10) *Foreign entity.* The term *foreign entity* has the meaning set forth in § 1.1473-1(e).

(11) *Annual return.* The term *annual return* means an annual federal income tax return of a specified individual or an annual federal income tax return or information return of a specified domestic entity filed with the Internal Revenue Service under section 876, 6011, 6012, 6013, 6031, or 6037, and the regulations.

(12) *Specified domestic entity.* [Reserved].

(13) *Model 1 IGA* and *Model 2 IGA.* The terms *Model 1 IGA* and *Model 2 IGA* have the meanings set forth in § 1.1471-1(b)(78) and (79), respectively.

(b) *Effective/applicability dates—(1) In general.* Except as otherwise provided in this paragraph (b), this section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

(2) *Financial accounts.* For purposes of applying the financial account definition in § 1.6038D-1(a)(7), the treatment under § 1.1471-5(b)(2)(vi) of retirement and pension accounts, non-retirement savings accounts, and accounts satisfying similar conditions in an applicable Model 1 IGA or Model 2 IGA (see § 1.1471-1(b)(78) and (79)) as financial accounts for purposes of the reporting required under section 6038D and § 1.6038D-2(a) shall apply to taxable years beginning after December 12, 2014.

#### § 1.6038D-1T [Removed]

Par. 5. Section 1.6038D-1T is removed.

Par. 6. Section 1.6038D-2 is added to read as follows:

#### § 1.6038D-2 Requirement to report specified foreign financial assets.

(a) *Reporting requirement—(1) In general.* Except as otherwise provided, a specified person that has any interest in a specified foreign financial asset during the taxable year must attach Form 8938, “Statement of Specified Foreign Financial Assets,” to that specified person’s annual return for the taxable year to report the information required by section 6038D and § 1.6038D-4 if the aggregate value of all such assets exceeds—

(i) \$50,000 on the last day of the taxable year; or

(ii) \$75,000 at any time during the taxable year.

(2) *Special rule for married specified individuals filing a joint annual return.* Except as provided in paragraph (a)(4) of this section, married specified individuals who file a joint annual return for the taxable year must attach a single Form 8938 to their joint annual return for the taxable year to report the information required by section 6038D and § 1.6038D-4 if the aggregate value of all of the specified foreign financial assets in which either married specified individual has an interest exceeds—

(i) \$100,000 on the last day of the taxable year; or

(ii) \$150,000 at any time during the taxable year.

(3) *Special rule for certain specified individuals living abroad.* Except as provided in paragraph (a)(4) of this section, a specified individual who is a qualified individual under section 911(d)(1) for the taxable year must attach a Form 8938 to his or her annual return for the taxable year to report the information required by section 6038D and § 1.6038D-4 if the aggregate value of the specified foreign financial assets in which the specified individual has an interest exceeds—

(i) \$200,000 on the last day of the taxable year; or

(ii) \$300,000 at any time during the taxable year.

(4) *Special rule for married specified individuals filing a joint annual return and living abroad.* A specified individual who is a qualified individual under section 911(d)(1) for the taxable year and the qualified individual’s spouse who file a

joint annual return for the taxable year must attach a single Form 8938 to their return for the taxable year to report the information required by section 6038D and § 1.6038D-4 if the aggregate value of the all of the specified foreign financial assets in which either married individual has an interest exceeds—

(i) \$400,000 on the last day of the taxable year; or

(ii) \$600,000 at any time during the taxable year.

(5) *Assets with no positive value.* A specified foreign financial asset is subject to reporting even if the specified foreign financial asset does not have a positive value. See § 1.6038D-5(b)(3) to determine the maximum value of a specified foreign financial asset that does not have a positive value during the taxable year.

(6) *Aggregate value calculation in case of specified foreign financial asset excluded from reporting.* The value of any specified foreign financial asset in which a specified individual has an interest and that is excluded from reporting on Form 8938 pursuant to § 1.6038D-7(a) (concerning certain assets reported on another form) is included for purposes of determining the aggregate value of specified foreign financial assets. The value of any specified foreign financial asset in which a specified individual has an interest and that is excluded from reporting under § 1.6038D-7(b) (concerning assets held by certain domestic trusts) or § 1.6038D-7(c) (concerning certain assets owned by a bona fide resident of a U.S. possession) is excluded for purposes of determining the aggregate value of specified foreign financial assets.

(7) *Form 8938 filed with annual return—(i) General rule.* A specified person, including a specified individual who is a bona fide resident of a U.S. possession, is not required to file Form 8938 with respect to a taxable year if the specified person is not required to file an annual return with the Internal Revenue Service with respect to such taxable year.

(ii) *Consolidated returns.* If a specified domestic entity is a member of an affiliated group of corporations that files a consolidated income tax return, the Form 8938 of the specified domestic entity must be filed with the affiliated group’s annual return.

(8) *Reporting required regardless of tax result.* The Form 8938 required by section 6038D and this section must be furnished by a specified person even if none of the specified foreign financial assets that must be reported affect the specified person's tax liability under the Internal Revenue Code for the taxable year.

(9) *Reporting period.* The reporting period covered by Form 8938 is the specified person's taxable year, except the reporting period for a specified person that is a specified individual for less than an entire taxable year is the portion of the taxable year that the specified person is a specified individual.

(10) *Successor forms.* References to Form 8938 include any successor form.

(b) *Interest in a specified foreign financial asset—(1) In general.* A specified person has an interest in a specified foreign financial asset if any income, gains, losses, deductions, credits, gross proceeds, or distributions attributable to the holding or disposition of the specified foreign financial asset are or would be required to be reported, included, or otherwise reflected by the specified person on an annual return. A specified person has an interest in a specified foreign financial asset even if no income, gains, losses, deductions, credits, gross proceeds, or distributions are attributable to the holding or disposition of the specified foreign financial asset for the taxable year.

(2) *Property transferred in connection with the performance of services.* A specified person that is transferred property in connection with the performance of personal services is first considered to have an interest in the property for purposes of section 6038D on the first date that the property is substantially vested (within the meaning of § 1.83-3(b)) or, in the case of property with respect to which a specified person makes a valid election under section 83(b), on the date of transfer of the property.

(3) *Special rule for parent making election under section 1(g)(7).* A parent who makes an election under section 1(g)(7) to include certain unearned income of a child in the parent's gross income has an interest in any specified foreign financial asset held by the child for the purposes of section 6038D and the regulations.

(4) *Entities—(i) In general.* Except as provided in this paragraph (b)(4), a specified person is not treated as having an interest in any specified foreign financial assets held by a corporation, partnership, trust, or estate solely as a result of the specified person's status as a shareholder, partner, or beneficiary of such entity.

(ii) *Specified foreign financial assets held by certain trusts.* A specified person that is treated as the owner of a trust or any portion of a trust under sections 671 through 679, other than a domestic liquidating trust under § 301.7701-4(d) of this chapter created pursuant to a court order issued in a bankruptcy under Chapter 7 (11 U.S.C. 701 *et seq.*) or a confirmed plan under Chapter 11 (11 U.S.C. 1101 *et seq.*) of the Bankruptcy Code, or a domestic widely held fixed investment trust under § 1.671-5, is treated as having an interest in any specified foreign financial assets held by the trust or the portion of the trust.

(iii) *Specified foreign financial assets held by a disregarded entity.* A specified person that owns a foreign or domestic entity that is disregarded as an entity separate from its owner as described in § 301.7701-2 of this chapter (a disregarded entity) is treated as having an interest in any specified foreign financial assets held by the disregarded entity.

(iv) *Interest in a foreign trust or foreign estate.* See § 1.6038D-3(c) to determine whether an interest in a foreign trust or foreign estate is a specified foreign financial asset. See § 1.6038D-5(f) to determine the maximum value of an interest in a foreign trust or foreign estate.

(c) *Special rules for joint interests—(1) In general—(i) Determining aggregate value of assets.* Except as otherwise provided in this paragraph (c), each specified person that is a joint owner of a specified foreign financial asset (whether with a spouse or other person) must include the entire value of the specified foreign financial asset (and not the value of the specified person's interest) for purposes of determining whether the aggregate value of the specified person's specified foreign financial assets exceeds the reporting thresholds set forth in § 1.6038D-2(a).

(ii) *Reporting maximum value.* Except as provided in paragraph (d) of this section, a specified person that is a joint

owner of a specified foreign financial asset must report the entire value of each jointly owned specified foreign financial asset on Form 8938.

(2) *Aggregate asset value for married specified individuals filing a joint annual return.* Married specified individuals who file a joint annual return must include the value of each specified foreign financial asset that they jointly own or in which both have an interest under paragraph (b)(1) of this section only once in determining whether the aggregate value of all of the specified foreign financial assets in which either married specified individual has an interest exceeds the reporting thresholds set forth in § 1.6038D-2(a).

(3) *Aggregate asset value for married specified individual filing a separate annual return—(i) Both spouses are specified individuals.* If a married specified individual files a separate annual return and his or her spouse is a specified individual, the married specified individual must include one-half of the value of a specified foreign financial asset that the married specified individual jointly owns with his or her spouse in determining whether the married specified individual has an interest in specified foreign financial assets the aggregate value of which exceeds the reporting thresholds set forth in § 1.6038D-2(a).

(ii) *One spouse is not a specified individual.* If a married specified individual files a separate annual return and his or her spouse is not a specified individual, the married specified individual must include the entire value of a specified foreign financial asset that the married specified individual jointly owns with his or her spouse in determining whether the married specified individual has an interest in specified foreign financial assets the aggregate value of which exceeds the reporting thresholds set forth in § 1.6038D-2(a).

(d) *Annual return filed by a married specified individual—(1) Joint annual return.* Married specified individuals who file a joint annual return must file a single Form 8938 to fulfill their reporting requirements under section 6038D and § 1.6038D-2(a). The single Form 8938 must report all of the specified foreign financial assets in which either married specified individual has an interest. If both

married specified individuals jointly own a specified foreign financial asset or if they have an interest in a specified foreign financial asset under paragraph (b)(1) of this section, the asset must be reported only once on the single Form 8938 filed for the taxable year.

(2) *Separate annual return.* A married specified individual who files a separate annual return for the taxable year must fulfill the reporting requirements under section 6038D and § 1.6038D-2(a) by filing a separate Form 8938 with his or her return that reports all of the specified foreign financial assets in which the married specified individual has an interest, including each of the assets jointly owned with the married specified individual's spouse or with another person. If both of the spouses are specified individuals, each specified individual must report the entire value of each specified foreign financial asset that the spouses jointly own on Form 8938, not the value taken into account under paragraph (c)(3)(i) of this section for purposes of applying the applicable reporting thresholds.

(e) *Special rules for dual resident taxpayers—(1) In general.* Subject to the provisions of paragraphs (e)(2) and (3) of this section, a specified individual is not required to report specified foreign financial assets on Form 8938 for a taxable year or any portion of a taxable year that the individual is a dual resident taxpayer (within the meaning of § 301.7701(b)-7(a)(1) of this chapter) who is treated as a nonresident alien pursuant to § 301.7701(b)-7 of this chapter for purposes of computing his or her U.S. tax liability with respect to the portion of the taxable year the individual is considered a dual resident taxpayer.

(2) *Dual resident taxpayer filing as a nonresident alien at end of taxable year.* If a specified individual to whom this paragraph (e) applies computes his or her U.S. income tax liability as a nonresident alien on the last day of the taxable year and complies with the filing requirements of § 301.7701(b)-7(b) and (c) of this chapter and, in particular, such individual timely files with the Internal Revenue Service Form 1040NR, "U.S. Nonresident Alien Income Tax Return," or Form 1040NR-EZ, "U.S. Income Tax Return for Certain Nonresident Aliens With No Dependents," as applicable, and attaches thereto

Form 8833, "Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)," such individual will not be required to report specified foreign financial assets on Form 8938 with respect to the portion of the taxable year covered by Form 1040NR (or Form 1040NR-EZ).

(3) *Dual resident taxpayer filing as resident alien at end of taxable year.* If a specified individual to whom this paragraph (e) applies computes his or her U.S. income tax liability as a resident alien on the last day of the taxable year and complies with the filing requirements of § 1.6012-1(b)(2)(ii)(a) and, in particular, such individual timely files with the Internal Revenue Service Form 1040, "U.S. Individual Income Tax Return," or Form 1040EZ, "Income Tax Return for Single and Joint Filers With No Dependents," as applicable, and attaches a properly completed Form 8833 to the schedule required by § 1.6012-1(b)(2)(ii)(a), such individual will not be required to report specified foreign financial assets on Form 8938 with respect to the portion of the individual's taxable year reflected on the schedule to such Form 1040 or Form 1040EZ required by § 1.6012-1(b)(2)(ii)(a).

(f) *Example.* The following example illustrates the application of paragraph (c) of this section:

*Example. (1) Facts.* Two married specified individuals, H and W, jointly own a specified foreign financial asset with a value of \$90,000 at all times during the taxable year. H separately has an interest in a specified foreign financial asset with a value of \$10,000 at all times during the taxable year. W separately has an interest in a specified foreign financial asset with a value of \$1,000 at all times during the taxable year.

(2) *Filing requirement—(i) Married specified individuals filing separate annual returns.* If H and W file separate annual returns, the aggregate value of the specified foreign financial assets in which H has an interest at the end of the taxable year is \$55,000, comprising one-half of the value of the jointly owned asset, \$45,000, and the value of H's separately owned specified foreign financial asset, \$10,000. The aggregate value of the specified foreign financial assets in which W has an interest at the end of the taxable year is \$46,000, comprising one-half of the value of the jointly owned asset, \$45,000, and the value of W's separately owned specified foreign financial asset, \$1,000. H must file Form 8938 with his annual return for the taxable year because the aggregate value of the specified foreign financial assets in which H has an interest exceeds the applicable reporting threshold (\$50,000) set forth in § 1.6038D-2(a)(1). H must report the maximum value of the entire jointly owned asset, \$90,000, and the maximum value of the separately owned asset,

\$10,000. See § 1.6038D-5(b) regarding the maximum value of a jointly owned specified foreign financial asset to be reported by a specified person, including a married specified individual, that is a joint owner of an asset. The aggregate value of the specified foreign financial assets in which W has an interest, \$46,000, does not exceed the applicable reporting threshold set forth in § 1.6038D-2(a)(1). W is not required to file Form 8938 with her separate annual return.

(ii) *Married specified individuals filing a joint annual return.* If H and W file a joint annual return, they must file a single Form 8938 with their joint annual return for the taxable year because the aggregate value of all of the specified foreign financial assets in which either H or W have an interest (\$90,000 (included only once), \$10,000, and \$1000, or \$101,000) exceeds the applicable reporting threshold (\$100,000) set forth in § 1.6038D-2(a)(2). The single Form 8938 must report the maximum value of the jointly owned specified foreign financial asset, \$90,000, and the maximum value of the specified foreign financial assets separately owned by H and W, \$10,000 and \$1,000, respectively.

(g) *Effective/applicability dates.* This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

#### § 1.6038D-2T [Removed]

Par. 7. Section 1.6038D-2T is removed.

Par. 8. Section 1.6038D-3 is added to read as follows:

#### § 1.6038D-3 Specified foreign financial assets.

(a) *Financial accounts—(1) In general.* Except as otherwise provided in this section, a specified foreign financial asset includes any financial account maintained by a foreign financial institution. An asset held in a financial account maintained by a foreign financial institution is not required to be separately reported on Form 8938, "Statement of Specified Foreign Financial Assets."

(2) *Financial account in a U.S. possession.* A specified foreign financial asset includes a financial account maintained by a financial institution that is organized under the laws of a U.S. possession.

(3) *Excepted financial accounts—(i) Accounts maintained by U.S. payors.* A financial account maintained by a U.S. payor as defined in § 1.6049-5(c)(5)(i) (including assets held in such an account) is not a specified foreign financial asset for purposes of section 6038D and the regulations.

(ii) *Mark-to-market election under section 475.* A financial account is not a specified foreign financial asset if the rules of section 475(a) apply to all of the holdings in the account or an election under section 475(e) or (f) is made with respect to all of the holdings in the account.

(b) *Other specified foreign financial assets—(1) In general.* Except as otherwise provided in this section, a specified foreign financial asset includes any of the following assets that are not financial accounts and that are held for investment and not held in an account maintained by a financial institution—

(i) Stock or securities issued by a person other than a United States person (including stock or securities issued by a person organized under the laws of a U.S. possession);

(ii) A financial instrument or contract that has an issuer or counterparty which is other than a United States person (including a financial instrument or contract issued by a person organized under the laws of a U.S. possession); and

(iii) An interest in a foreign entity.

(2) *Mark-to-market election under section 475.* An asset is not a specified foreign financial asset if the rules of section 475(a) apply to the asset or an election under section 475(e) or (f) is made with respect to the asset.

(3) *Held for investment.* An asset is held for investment for purposes of section 6038D and the regulations if that asset is not used in, or held for use in, the conduct of a trade or business of a specified person.

(4) *Trade-or-business test.* For purposes of section 6038D and the regulations, an asset is used in, or held for use in, the conduct of a trade or business and not held for investment if the asset is—

(i) Held for the principal purpose of promoting the present conduct of the trade or business;

(ii) Acquired and held in the ordinary course of the trade or business, as, for example, in the case of an account or note receivable arising from that trade or business; or

(iii) Otherwise held in a direct relationship to the trade or business as determined under paragraph (b)(5) of this section.

(5) *Direct relationship between holding an asset and a trade or business—(i) In general.* In determining whether an asset is held in a direct relationship to the conduct of a trade or business by a specified person, principal consideration will be given to whether the asset is needed in the trade or business of the specified person. An asset shall be considered needed in the trade or business, for this purpose, only if the asset is held to meet the present needs of that trade or business and not its anticipated future needs. An asset shall be considered as needed in the trade or business if, for example, the asset is held to meet the operating expenses of the trade or business. Conversely, an asset shall be considered as not needed in the trade or business if, for example, the asset is held for the purpose of providing for future diversification into a new trade or business, future plant replacement, or future business contingencies. Stock is never considered used or held for use in a trade or business for purposes of applying this test.

(ii) *Presumption of direct relationship.* An asset will be treated as held in a direct relationship to the conduct of a trade or business of a specified person if—

(A) The asset was acquired with funds generated by the trade or business of the specified person or the affiliated group of the specified person, if any;

(B) The income from the asset is retained or reinvested in the trade or business; and

(C) Personnel who are actively involved in the conduct of the trade or business exercise significant management and control over the investment of such asset.

(c) *Special rule for interests in foreign trusts and foreign estates.* An interest in a foreign trust or a foreign estate is not a specified foreign financial asset of a specified person unless the person knows, or has reason to know based on readily accessible information, of the interest. Receipt of a distribution from the foreign trust or foreign estate constitutes actual knowledge for this purpose.

(d) *Examples.* Examples of assets other than financial accounts that may be considered other specified foreign financial assets include, but are not limited to—

(1) Stock issued by a foreign corporation;

(2) A capital or profits interest in a foreign partnership;

(3) A note, bond, debenture, or other form of indebtedness issued by a foreign person;

(4) An interest in a foreign trust;

(5) An interest rate swap, currency swap, basis swap, interest rate cap, interest rate floor, commodity swap, equity swap, equity index swap, credit default swap, or similar agreement with a foreign counterparty; and

(6) Any option or other derivative instrument with respect to any of the items listed as examples in this paragraph or with respect to any currency or commodity that is entered into with a foreign counterparty or issuer.

(e) *Effective/applicability dates.* This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

#### § 1.6038D-3T [Removed]

Par. 9. Section 1.6038D-3T is removed.

Par. 10. Section 1.6038D-4 is added to read as follows:

#### § 1.6038D-4 Information required to be reported.

(a) *Required information.* The following information must be reported on Form 8938, "Statement of Specified Foreign Financial Assets," with respect to each specified foreign financial asset:

(1) In the case of a financial account, the name and address of the foreign financial institution with which the account is maintained and the account number of the financial account;

(2) In the case of stock or securities, the name and address of the issuer, and information that identifies the class or issue of which the stock or security is a part;

(3) In the case of a financial instrument or contract, information that identifies the financial instrument or contract, including the names and addresses of all issuers and counterparties;

(4) In the case of an interest in a foreign entity, information that identifies the interest, including the name and address of the foreign entity in which the interest is held;

(5) The maximum value of the specified foreign financial asset during the portion of the taxable year in which the specified person has an interest in the asset;

(6) In the case of a financial account that is a depository account as defined in § 1.1471-5(b)(3)(i) or a custodial account as defined in § 1.1471-5(b)(3)(ii), whether the account was opened or closed during the taxable year;

(7) The date, if any, on which the specified foreign financial asset, other than a financial account that is a depository account as defined in § 1.1471-5(b)(3)(i) or a custodial account as defined in § 1.1471-5(b)(3)(ii), was either acquired or disposed of (or both) during the taxable year;

(8) The amount of any income, gain, loss, deduction, or credit recognized for the taxable year with respect to the reported specified foreign financial asset, and the schedule, form, or return filed with the Internal Revenue Service on which the income, gain, loss, deduction, or credit, if any, is reported or included by the specified person;

(9) The foreign currency in which the account is maintained or the asset is denominated, the foreign currency exchange rate and, if the source of such rate is other than as described in § 1.6038D-5(c)(1), the source of the rate used to determine the specified foreign financial asset's U.S. dollar value, including maximum value;

(10) For any specified foreign financial asset excepted from reporting on Form 8938 under § 1.6038D-7(a), the specified person must report the number of Forms 3520, "Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts," Forms 3520-A, "Annual Information Return of Foreign Trust With a U.S. Owner," Forms 5471, "Information Return of U.S. Persons With Respect To Certain Foreign Corporations," Forms 8621, "Return by a Shareholder of a Passive Foreign Investment Company or a Qualified Electing Fund," Forms 8865, "Return of U.S. Persons With Respect To Certain Foreign Partnerships," and, solely for taxable years beginning after March 18, 2010, and ending on or before December 31, 2013, Forms 8891, "U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans," or such other form un-

der Title 26 of the United States Code identified by the Secretary under § 1.6038D-7(a), timely filed with the Internal Revenue Service on which excepted foreign financial assets are reported or reflected for the taxable year; and

(11) Such other information as may be required by Form 8938 or its instructions or other guidance.

(b) *Effective/applicability dates.* This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

#### § 1.6038D-4T [Removed]

Par. 11. Section 1.6038D-4T is removed.

Par. 12. Section 1.6038D-5 is added to read as follows:

#### § 1.6038D-5 Valuation guidelines.

(a) *Fair market value.* Except as provided in paragraphs (c) and (e) of this section, the value of a specified foreign financial asset for purposes of determining the aggregate value of specified foreign financial assets held by a specified person and the maximum value of a specified foreign financial asset required to be reported on Form 8938, "Statement of Specified Foreign Financial Assets," is the asset's fair market value.

(b) *Valuation of assets—(1) Maximum value.* Except as provided in this section, the maximum value of a specified foreign financial asset means a reasonable estimate of the asset's maximum fair market value during the taxable year.

(2) *U.S. dollars.* For purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest and determining the maximum value of a specified foreign financial asset, the value of a specified foreign financial asset denominated in a foreign currency during the taxable year must be determined in the foreign currency and then converted to U.S. dollars.

(3) *Asset with no positive value.* If the maximum fair market value of a specified foreign financial asset is zero or less than zero, then the asset's value is treated as zero for purposes of determining the aggregate value of specified foreign finan-

cial assets in which a specified person has an interest, and the maximum value of the specified foreign financial asset is zero for purposes of reporting under § 1.6038D-4(a)(5).

(c) *Foreign currency conversion—(1) In general.* Except as provided in paragraphs (c)(2) and (d) of this section, the U.S. Treasury Department's Bureau of the Fiscal Service foreign currency exchange rate is to be used to convert the value of a specified foreign financial asset into U.S. dollars for purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest and determining the maximum value of a specified foreign financial asset.

(2) *Other publicly available exchange rate.* If no U.S. Treasury Department Bureau of the Fiscal Service foreign currency exchange rate is available for a particular currency, another publicly available foreign currency exchange rate may be used to convert the value of a specified foreign financial asset into U.S. dollars. In such case, the source of the foreign currency exchange rate must be disclosed on Form 8938.

(3) *Currency exchange rate.* In converting the currency of a foreign country, the foreign currency exchange rate applicable for converting the currency into U.S. dollars (that is, to purchase U.S. dollars) must be used.

(4) *Determination date.* In converting the currency of a foreign country into U.S. dollars for purposes of determining the maximum value of a specified foreign financial asset and determining the aggregate value of specified foreign financial assets in which a specified person has an interest, the applicable foreign currency exchange rate is the rate on the last day of the taxable year of the specified person, even if the specified person sold or otherwise disposed of a specified foreign financial asset prior to the last day of such year.

(d) *Financial accounts.* A specified person may rely upon periodic account statements that are provided at least annually by or on behalf of a financial institution maintaining an account, including the foreign currency conversion reflected in those statements, to determine the financial account's maximum value unless the specified person has actual knowledge, or reason to know based on readily accessi-

ble information, that the statements do not reflect a reasonable estimate of the maximum account value during the taxable year.

(e) *Asset held in a financial account.* The value of an asset held in a financial account maintained by a foreign financial institution is included in determining the value of that financial account for purposes of § 1.6038D-5(a).

(f) *Other specified foreign financial assets—(1) General rule.* Except as provided in paragraphs (f)(2) and (3) of this section, for specified foreign financial assets that are not financial accounts and that are held for investment and not held in an account maintained by a financial institution, a specified person may use the value of the asset as of the last day of the taxable year on which the specified person has an interest in the asset as the maximum value of that asset, unless the specified person has actual knowledge, or reason to know based on readily accessible information, that the value does not reflect a reasonable estimate of the maximum value of the asset during the taxable year.

(2) *Interests in trusts that are specified foreign financial assets—(i) Maximum value.* If a specified person is a beneficiary of a foreign trust, the maximum value of the specified person's interest in the trust is the sum of—

(A) The fair market value, determined as of the last day of the taxable year, of all of the currency or other property distributed from the foreign trust during the taxable year to the specified person as a beneficiary; and

(B) The value, determined as of the last day of the taxable year, of the specified person's right as a beneficiary to receive mandatory distributions from the foreign trust as determined under section 7520.

(ii) *Reporting threshold.* For purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest, if the specified person does not know, or have reason to know based on readily accessible information, the fair market value of the person's interest in a foreign trust during the taxable year, the value to be included in determining the aggregate value of the specified foreign financial assets is the maximum value of the specified per-

son's interest in the foreign trust under paragraph (f)(2)(i) of this section.

(3) *Interests in estates, pension plans, and deferred compensation plans—(i) Maximum value.* The maximum value of a specified person's interest in a foreign estate, foreign pension plan, or foreign deferred compensation plan is the fair market value, determined as of the last day of the taxable year, of the specified person's beneficial interest in the assets of the foreign estate, foreign pension plan, or foreign deferred compensation plan. If the specified person does not know, or have reason to know based on readily accessible information, such fair market value, the maximum value to be reported is the fair market value, determined as of the last day of the taxable year, of the currency and other property distributed during the taxable year to the specified person as a beneficiary or participant.

(ii) *Reporting threshold.* For purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest, if the specified person does not know, or have reason to know based on readily accessible information, the fair market value of the person's interest in a foreign estate, foreign pension plan, or foreign deferred compensation plan during the taxable year, the value to be included in determining the aggregate value of the specified foreign financial assets is the fair market value, determined as of the last day of the taxable year, of the currency and other property distributed during the taxable year to the specified person as a beneficiary or participant.

(g) *Effective/applicability dates.* This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

#### § 1.6038D-5T [Removed]

Par. 13. Section 1.6038D-5T is removed.

Par. 14. Section 1.6038D-6 is added to read as follows:

§ 1.6038D-6 *Specified domestic entities.* [Reserved]

#### § 1.6038D-6T [Removed]

Par. 15. Section 1.6038D-6T is removed.

Par. 16. Section 1.6038D-7 is added to read as follows:

§ 1.6038D-7 *Exceptions from the reporting of certain assets under section 6038D.*

(a) *Elimination of duplicative reporting of assets—(1) In general.* A specified person is not required to report a specified foreign financial asset on Form 8938, "Statement of Specified Foreign Financial Assets," if the specified person—

(i) Reports the asset on at least one of the following forms timely filed with the Internal Revenue Service for the taxable year—

(A) Form 3520, "Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts" (in the case of a specified person that is the beneficiary of a foreign trust);

(B) Form 5471, "Information Return of U.S. Persons With Respect To Certain Foreign Corporations";

(C) Form 8621, "Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund";

(D) Form 8865, "Return of U.S. Persons With Respect To Certain Foreign Partnerships";

(E) For taxable years beginning after March 18, 2010, and ending on or before December 31, 2013, Form 8891, "U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans"; or

(F) Any other form under Title 26 of the United States Code timely filed with the Internal Revenue Service and identified for this purpose by the Secretary in regulations or other guidance; and

(ii) Reports on Form 8938 the filing of the form on which the asset is reported.

(2) *Foreign grantor trusts.* A specified person that is treated as an owner of a foreign trust or any portion of a foreign trust under sections 671 through 679 is not required to report any specified foreign financial assets held by the foreign trust on Form 8938, provided—

(i) The specified person reports the trust on a Form 3520 timely filed with the Internal Revenue Service for the taxable year;

(ii) The trust timely files Form 3520-A, "Annual Information Return of Foreign Trust With a U.S. Owner," with the Internal Revenue Service for the taxable year; and

(iii) The Form 8938 filed by the specified person for the taxable year reports the filing of the Form 3520 and Form 3520-A.

(3) *Joint Form 5471 or Form 8865 filing.* A specified person that is included as part of a joint Form 5471 filing pursuant to § 1.6038-2(j) or a joint Form 8865 filing pursuant to § 1.6038-3(c) and who notifies the Internal Revenue Service as required by § 1.6038-2(i) or § 1.6038D-(3)(c) will be considered to have filed a Form 5471 or Form 8865 for purposes of paragraph (a)(1) of this section.

(b) *Owner of certain trusts.* A specified person that is treated as an owner of any portion of a domestic trust under sections 671 through 678 is not required to file Form 8938 to report any specified foreign financial asset held by the trust if the trust is—

(1) A widely-held fixed investment trust under § 1.671-5; or

(2) A liquidating trust within the meaning of § 301.7701-4(d) of this chapter that is created pursuant to a court order issued in a bankruptcy under Chapter 7 (11 U.S.C. 701 *et seq.*) or a confirmed plan under Chapter 11 (11 U.S.C. 1101 *et seq.*) of the Bankruptcy Code.

(c) *Special rules for bona fide residents of a U.S. possession.* A specified individual who is a bona fide resident of a U.S. possession is not required to include the following specified foreign financial assets in the determination of the aggregate value of his or her specified foreign financial assets and, if required to file Form 8938 with the Internal Revenue Service, is not required to report the following specified foreign financial assets:

(1) A financial account maintained by a financial institution organized under the laws of the U.S. possession of which the specified individual is a bona fide resident;

(2) A financial account maintained by a branch of a financial institution not organized under the laws of the U.S. possession

of which the specified individual is a bona fide resident, if the branch is subject to the same tax and information reporting requirements applicable to a financial institution organized under the laws of the U.S. possession;

(3) Stock or securities issued by an entity organized under the laws of the U.S. possession of which the specified individual is a bona fide resident;

(4) An interest in an entity organized under the laws of the U.S. possession of which the specified individual is a bona fide resident; and

(5) A financial instrument or contract held for investment, provided each issuer or counterparty that is not a United States person is—

(i) An entity organized under the laws of the U.S. possession of which the specified individual is a bona fide resident; or

(ii) A bona fide resident of the U.S. possession of which the specified individual is a bona fide resident.

(d) *Effective/applicability dates.* This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

#### § 1.6038D-7T [Removed]

Par. 17. Section 1.6038D-7T is removed.

Par. 18. Section 1.6038D-8 is added to read as follows:

#### § 1.6038D-8 Penalties for failure to disclose.

(a) *In general.* If a specified person fails to file a Form 8938, "Statement of Specified Foreign Financial Assets," that includes the information required by section 6038D(c) and § 1.6038D-4 with respect to any taxable year at the time and in the manner described in section 6038D(a) and § 1.6038D-2, a penalty of \$10,000 will apply to that specified person.

(b) *Married specified individuals filing a joint annual return.* Married specified individuals who file a joint annual return and fail to file a required Form 8938 that includes the information required by section 6038D(c) and § 1.6038D-4 with respect to any taxable year at the time and in the manner described in section 6038D(a)

and § 1.6038D-2 are subject to penalties under this section as if the married specified individuals are a single specified individual. The liability of married specified individuals who file a joint annual return with respect to any penalties under this section is joint and several.

(c) *Increase in penalty.* If any failure to comply with the applicable reporting requirement of section 6038D and the regulations continues for more than 90 days after the day on which the Commissioner or his delegate mails a notice of the failure to the specified person required to file the Form 8938, the specified person is required to pay an additional penalty of \$10,000 for each 30-day period (or fraction thereof) during which the failure continues after the 90-day period has expired. The additional penalty imposed by section 6038D(d)(2) and this paragraph (c) is limited to a maximum of \$50,000 for each such failure.

(d) *Presumption of aggregate value.* For the purpose of assessing penalties imposed under section 6038D(d), if the Commissioner or his delegate determines that a specified person has an interest in one or more specified foreign financial assets and the specified person does not provide sufficient information to demonstrate the aggregate value of the assets upon request by the Commissioner or his delegate, then the aggregate value of the assets is treated as being in excess of the applicable reporting threshold set forth in § 1.6038D-2(a).

(e) *Reasonable cause exception—(1) In general.* If the failure to report the information required in section 6038D(c) and § 1.6038D-4 is shown to be due to reasonable cause and not due to willful neglect, no penalty will be imposed under section 6038D(d) or this section.

(2) *Affirmative showing required.* In order to show that the failure to report the information required in section 6038D(c) and § 1.6038D-4 is due to reasonable cause and not due to willful neglect for purposes of section 6038D(g) and this section, the specified person must make an affirmative showing of all the facts alleged as reasonable cause for the failure to disclose.

(3) *Facts and circumstances taken into account.* The determination of whether a failure to disclose a specified foreign

financial asset on Form 8938 was due to reasonable cause and not due to willful neglect is made on a case-by-case basis, taking into account all pertinent facts and circumstances. The fact that a foreign jurisdiction would impose a civil or criminal penalty on the specified person (or any other person) for disclosing the required information is not reasonable cause.

(f) *Penalties for underpayments attributable to undisclosed foreign financial assets*—(1) *Accuracy-related penalty*. For application of the accuracy-related penalty in the case of any portion of an underpayment attributable to any

undisclosed foreign financial asset understatement, see section 6662(j).

(2) *Criminal penalties*. In addition to other penalties, failure to comply with the reporting requirements of section 6038D and the regulations, or any underpayment related to such failure, may result in criminal penalties under sections 7201, 7203, 7206, et seq., or other provisions of Federal law.

(g) *Effective/applicability dates*. This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

**§ 1.6038D–8T [Removed]**

Par. 19. Section 1.6038D–8T is removed.

John Dalrymple,  
*Deputy Commissioner for  
Services and Enforcement.*

Approved: December 4, 2014.

Mark J. Mazur,  
*Assistant Secretary of the Treasury  
(Tax Policy).*

(Filed by the Office of the Federal Register on December 11, 2014, 8:45 a.m., and published in the issue of the Federal Register for December 12, 2014, 79 F.R. 239)

## Part III. Administrative, Procedural, and Miscellaneous

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

#### Notice 2014-78

This notice provides guidance on the corporate bond monthly yield curve, the corresponding spot segment rates used under § 417(e)(3), and the 24-month average segment rates under § 430(h)(2) of the Internal Revenue Code. In addition, this notice provides guidance as to the interest rate on 30-year Treasury securities under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning before 2008 and the 30-year Treasury weighted average rate under § 431(c)(6)(E)(ii)(I). The rates in this notice reflect the application of § 430(h)(2)(C)(iv), which was added by the Moving Ahead for Progress in the 21st Century Act, Public Law 112-141 (MAP-21) and amended by section 2003 of the Highway and Transportation Funding Act of 2014, Public Law 113-159 (HATFA).

#### YIELD CURVE AND SEGMENT RATES

Generally, except for certain plans under sections 104 and 105 of the Pension Protection Act of 2006 and CSEC plans under § 414(y), § 430 of the Code specifies the minimum funding requirements that apply to single-employer plans pursuant to § 412. Section 430(h)(2) specifies the interest rates that must be used to determine a plan's target normal cost and

funding target. Under this provision, present value is generally determined using three 24-month average interest rates ("segment rates"), each of which applies to cash flows during specified periods. To the extent provided under § 430(h)(2)(C)(iv), these segment rates are adjusted by the applicable percentage of the 25-year average segment rates for the period ending September 30 of the year preceding the calendar year in which the plan year begins. However, an election may be made under § 430(h)(2)(D)(ii) to use the monthly yield curve in place of the segment rates.

Notice 2007-81, 2007-44 I.R.B. 899, provides guidelines for determining the monthly corporate bond yield curve, and the 24-month average corporate bond segment rates used to compute the target normal cost and the funding target. In accordance with the methodology specified in Notice 2007-81, the monthly corporate bond yield curve derived from November 2014 data is in Table I at the end of this notice. The spot first, second, and third segment rates for the month of November 2014 are, respectively, 1.40, 3.88, and 4.96.

The 24-month average segment rates determined under § 430(h)(2)(C)(i) through (iii) must be adjusted pursuant to § 430(h)(2)(C)(iv) by the applicable percentage of the corresponding 25-year average segment rates. Section 2003(a) of HATFA amended the applicable percentages under § 430(h)(2)(C)(iv). This change generally applies to plan years beginning on or after January 1, 2013. However, pursuant to section 2003(e)(2) of HATFA, a plan sponsor can elect not to

have the amendments made to the applicable percentages by section 2003 of HATFA apply to any plan year beginning in 2013. These elections can be made either for all purposes or, alternatively, for purposes of determining the adjusted funding target attainment percentage under § 436. The 25-year average segment rates for plan years beginning in 2012, 2013, 2014 and 2015 were published in Notice 2012-55, 2012-36 I.R.B. 332, Notice 2013-11, 2013-11 I.R.B. 610, Notice 2013-58, 2013-40 I.R.B. 294, and Notice 2014-50, 2014-40 I.R.B. 590, respectively.

For plan years beginning in years 2012 through 2017, pursuant to the changes made by HATFA, the applicable minimum percentage is 90% and the applicable maximum percentage is 110%. These applicable percentages are referred to as HATFA applicable percentages. As described in the preceding paragraph, a special election is available for any plan year beginning in 2013 under which this change made by HATFA can be disregarded for all purposes or for limited purposes. To the extent such an election is made, the applicable minimum percentage for a plan year beginning in 2013 is 85% and the applicable maximum percentage for that plan year is 115%. These applicable percentages are referred to as MAP-21 applicable percentages.

The three 24-month average corporate bond segment rates applicable for December 2014 without adjustment for the 25-year average segment rate limits are as follows:

Applicable Month	First Segment	Second Segment	Third Segment
December 2014	1.20	4.10	5.20

Based on § 430(h)(2)(C)(iv) as amended by section 2003 of HATFA, the 24-month averages applicable for

December 2014 adjusted for the HATFA applicable percentages of the

corresponding 25-year average segment rates, are as follows:

For Plan Years Beginning In	Applicable Month		Adjusted 24-Month Average Segment Rates, Based on the HATFA Applicable Percentage of 25-Year Average Rates		
			First Segment	Second Segment	Third Segment
2013	December	2014	5.23	6.51	7.16
2014	December	2014	4.99	6.32	6.99
2015	December	2014	4.72	6.11	6.81

Based on § 430(h)(2)(C)(iv) as in effect prior to amendment by section 2003 of HATFA, the three 24-month averages applicable for December 2014 adjusted for the MAP-21 applicable percentages of the corresponding 25-year average segment rates, for plan years beginning in 2013, are as follows:

For Plan Years Beginning In	Applicable Month		Adjusted 24-Month Average Segment Rates, Based on the MAP-21 Applicable Percentage of 25-Year Average Rates		
			First Segment	Second Segment	Third Segment
2013	December	2014	4.94	6.15	6.76

### 30-YEAR TREASURY SECURITIES INTEREST RATES

Generally for plan years beginning after 2007, § 431 specifies the minimum funding requirements that apply to multiemployer plans pursuant to § 412. Section 431(c)(6)(B) specifies a minimum amount for the full-funding limitation described in section 431(c)(6)(A), based on the plan's current liability. Section 431(c)(6)(E)(ii)(I) provides that the interest rate used to calculate current liability for this purpose must be no more than 5 percent above and no more than 10 percent below the weighted average of the rates of interest on 30-year Treasury securities during the four-year period ending on the last day before the beginning of the plan year. Notice 88-73, 1988-2 C.B. 383, provides guidelines for determining the weighted average interest rate. The rate of interest on 30-year Treasury securities for November 2014 is 3.04 percent. The Service has determined this rate as the average of the daily determinations of yield on the 30-year Treasury bond maturing in August 2044 determined each day through November 12, 2014, and the yield on the 30-year Treasury bond maturing in November 2044 determined each day for the balance of the month. The following rates were determined for plan years beginning in the month shown below.

For Plan Years Beginning in		30-Year Treasury Weighted Average	Permissible Range		
Month	Year		90%	to	105%
December	2014	3.37	3.03		3.54

### MINIMUM PRESENT VALUE SEGMENT RATES

In general, the applicable interest rates under § 417(e)(3)(D) are segment rates computed without regard to a 24-month average. Notice 2007-81 provides guidelines for determining the minimum present value segment rates. Pursuant to that notice, the minimum present value segment rates determined for November 2014 are as follows:

First Segment	Second Segment	Third Segment
1.40	3.88	4.96

### DRAFTING INFORMATION

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

**Table I**  
 Monthly Yield Curve for November 2014  
 Derived from November 2014 Data

<i>Maturity</i>	<i>Yield</i>								
0.5	0.28	20.5	4.59	40.5	5.01	60.5	5.15	80.5	5.22
1.0	0.56	21.0	4.61	41.0	5.01	61.0	5.15	81.0	5.22
1.5	0.83	21.5	4.63	41.5	5.02	61.5	5.15	81.5	5.22
2.0	1.09	22.0	4.65	42.0	5.02	62.0	5.16	82.0	5.23
2.5	1.34	22.5	4.66	42.5	5.03	62.5	5.16	82.5	5.23
3.0	1.57	23.0	4.68	43.0	5.03	63.0	5.16	83.0	5.23
3.5	1.79	23.5	4.70	43.5	5.04	63.5	5.16	83.5	5.23
4.0	1.99	24.0	4.71	44.0	5.04	64.0	5.17	84.0	5.23
4.5	2.18	24.5	4.72	44.5	5.05	64.5	5.17	84.5	5.23
5.0	2.37	25.0	4.74	45.0	5.05	65.0	5.17	85.0	5.23
5.5	2.54	25.5	4.75	45.5	5.05	65.5	5.17	85.5	5.23
6.0	2.70	26.0	4.77	46.0	5.06	66.0	5.17	86.0	5.24
6.5	2.85	26.5	4.78	46.5	5.06	66.5	5.18	86.5	5.24
7.0	2.99	27.0	4.79	47.0	5.07	67.0	5.18	87.0	5.24
7.5	3.12	27.5	4.80	47.5	5.07	67.5	5.18	87.5	5.24
8.0	3.24	28.0	4.81	48.0	5.07	68.0	5.18	88.0	5.24
8.5	3.35	28.5	4.82	48.5	5.08	68.5	5.18	88.5	5.24
9.0	3.46	29.0	4.83	49.0	5.08	69.0	5.19	89.0	5.24
9.5	3.56	29.5	4.85	49.5	5.09	69.5	5.19	89.5	5.24
10.0	3.65	30.0	4.85	50.0	5.09	70.0	5.19	90.0	5.25
10.5	3.74	30.5	4.86	50.5	5.09	70.5	5.19	90.5	5.25
11.0	3.82	31.0	4.87	51.0	5.10	71.0	5.19	91.0	5.25
11.5	3.89	31.5	4.88	51.5	5.10	71.5	5.19	91.5	5.25
12.0	3.96	32.0	4.89	52.0	5.10	72.0	5.20	92.0	5.25
12.5	4.02	32.5	4.90	52.5	5.11	72.5	5.20	92.5	5.25
13.0	4.08	33.0	4.91	53.0	5.11	73.0	5.20	93.0	5.25
13.5	4.13	33.5	4.92	53.5	5.11	73.5	5.20	93.5	5.25
14.0	4.18	34.0	4.92	54.0	5.11	74.0	5.20	94.0	5.25
14.5	4.23	34.5	4.93	54.5	5.12	74.5	5.20	94.5	5.25
15.0	4.27	35.0	4.94	55.0	5.12	75.0	5.21	95.0	5.26
15.5	4.31	35.5	4.95	55.5	5.12	75.5	5.21	95.5	5.26
16.0	4.35	36.0	4.95	56.0	5.13	76.0	5.21	96.0	5.26
16.5	4.38	36.5	4.96	56.5	5.13	76.5	5.21	96.5	5.26
17.0	4.41	37.0	4.97	57.0	5.13	77.0	5.21	97.0	5.26
17.5	4.44	37.5	4.97	57.5	5.13	77.5	5.21	97.5	5.26
18.0	4.47	38.0	4.98	58.0	5.14	78.0	5.21	98.0	5.26
18.5	4.50	38.5	4.98	58.5	5.14	78.5	5.22	98.5	5.26
19.0	4.52	39.0	4.99	59.0	5.14	79.0	5.22	99.0	5.26
19.5	4.54	39.5	5.00	59.5	5.14	79.5	5.22	99.5	5.26
20.0	4.57	40.0	5.00	60.0	5.15	80.0	5.22	100.0	5.26

## 2015 Standard Mileage Rates

### Notice 2014-79

#### SECTION 1. PURPOSE

This notice provides the optional 2015 standard mileage rates for taxpayers to use in computing the deductible costs of operating an automobile for business, charitable, medical, or moving expense purposes. This notice also provides the amount taxpayers must use in calculating reductions to basis for depreciation taken under the business standard mileage rate, and the maximum standard automobile cost that may be used in computing the allowance under a fixed and variable rate (FAVR) plan.

#### SECTION 2. BACKGROUND

Rev. Proc. 2010-51, 2010-51 I.R.B. 883, provides rules for computing the deductible costs of operating an automobile for business, charitable, medical, or moving expense purposes, and for substantiating, under § 274(d) of the Internal Revenue Code and § 1.274-5 of the Income Tax Regulations, the amount of ordinary and necessary business expenses of local transportation or travel away from home. Taxpayers using the standard mileage rates must comply with Rev. Proc. 2010-51. However, a taxpayer is not required to use the substantiation methods described in Rev. Proc. 2010-51, but instead may substantiate using actual allowable expense amounts if the taxpayer maintains adequate records or other sufficient evidence.

An independent contractor conducts an annual study for the Internal Revenue Service of the fixed and variable costs of operating an automobile to determine the standard mileage rates for business, medical, and moving use reflected in this notice. The standard mileage rate for charitable use is set by § 170(i).

#### SECTION 3. STANDARD MILEAGE RATES

The standard mileage rate for transportation or travel expenses is 57.5 cents per mile for all miles of business use (busi-

ness standard mileage rate). See section 4 of Rev. Proc. 2010-51.

The standard mileage rate is 14 cents per mile for use of an automobile in rendering gratuitous services to a charitable organization under § 170. See section 5 of Rev. Proc. 2010-51.

The standard mileage rate is 23 cents per mile for use of an automobile (1) for medical care described in § 213, or (2) as part of a move for which the expenses are deductible under § 217. See section 5 of Rev. Proc. 2010-51.

#### SECTION 4. BASIS REDUCTION AMOUNT

For automobiles a taxpayer uses for business purposes, the portion of the business standard mileage rate treated as depreciation is 22 cents per mile for 2011, 23 cents per mile for 2012, 23 cents per mile for 2013, 22 cents per mile for 2014, and 24 cents for 2015. See section 4.04 of Rev. Proc. 2010-51.

#### SECTION 5. MAXIMUM STANDARD AUTOMOBILE COST

For purposes of computing the allowance under a FAVR plan, the standard automobile cost may not exceed \$28,200 for automobiles (excluding trucks and vans) or \$30,800 for trucks and vans. See section 6.02(6) of Rev. Proc. 2010-51.

#### SECTION 6. EFFECTIVE DATE

This notice is effective for (1) deductible transportation expenses paid or incurred on or after January 1, 2015, and (2) mileage allowances or reimbursements paid to an employee or to a charitable volunteer (a) on or after January 1, 2015, and (b) for transportation expenses the employee or charitable volunteer pays or incurs on or after January 1, 2015.

#### SECTION 7. EFFECT ON OTHER DOCUMENTS

Notice 2013-80 is superseded.

#### DRAFTING INFORMATION

The principal author of this notice is Bernard P. Harvey of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information on this

notice contact Bernard P. Harvey on (202) 317-7005 (not a toll-free call).

## Reallocation of Section 48B Credits under the Qualifying Gasification Project Program

### Notice 2014-81

#### SECTION 1. PURPOSE

Section 48B of the Internal Revenue Code, as originally enacted by section 1307(b) of the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 1004 (August 8, 2005), provided for the first phase of the qualifying gasification project program and authorized \$350 million of credits (“the § 48B Phase I program” and “§ 48B Phase I credits”). Section 48B, as amended by section 112 of the Energy Improvement and Extension Act of 2008, Pub. L. 110-343, 122 Stat. 3824 (October 3, 2008), provided for a second phase of the qualifying gasification project program and authorized an additional \$250 million of credits (“the § 48B Phase II program” and “§ 48B Phase II credits”).

This notice establishes a third phase of the qualifying gasification project program (“the § 48B Phase III program”) to reallocate the § 48B Phase I credits that are available for allocation after the conclusion of the § 48B Phase I program. The procedures in this notice apply only to § 48B Phase I credits that were forfeited and are available for reallocation as § 48B Phase III credits.

To be considered in the § 48B Phase III allocation round, applications must be submitted to the Department of Energy (“DOE”) and to the Internal Revenue Service (“Service”) on or before March 2, 2015. See section 5 of this notice for additional rules regarding these applications.

#### SECTION 2. BACKGROUND

.01 Section 46 provides that the amount of the investment credit for any taxable year is the sum of the credits listed in § 46. That list includes the qualifying gasification project credit under § 48B.

.02 Section 48B(d)(1) provides that the Secretary, in consultation with the Secretary of Energy, shall establish a qualifying

gasification project program to consider and award certifications for qualified investment eligible for credits to qualifying gasification project sponsors under § 48B. The Treasury Department and the Service, in consultation with the Secretary of Energy, established the § 48B Phase I program in Notice 2006–25, 2006–1 C.B. 609, as modified and updated by Notice 2007–53, 2007–1 C.B. 1474.

.03 Under the § 48B Phase I program, the qualifying gasification project credit for a taxable year was an amount equal to 20 percent of the qualified investment (as defined in § 48B(b)) for that taxable year in qualifying gasification projects (as defined in § 48B(c)(1)) for which the credit was allocated under § 48B(d)(1)(A).

.04 The term “qualified investment” is defined in § 48B(b) as the basis of eligible property placed in service by the taxpayer during such taxable year which is part of a qualifying gasification project (A) the construction, reconstruction, or erection of which is completed by the taxpayer, or which is acquired by the taxpayer if the original use of such property commences with the taxpayer, and (B) with respect to which depreciation (or amortization in lieu of depreciation) is allowable. Pursuant to § 48B(b)(2) and (3), rules regarding certain subsidized property similar to § 48(a)(4) (without regard to § 48(a)(4)(D)) and rules regarding certain qualified progress expenditures similar to § 46(c)(4) and (d) (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990) apply for purposes of § 48B.

.05 The term “qualifying gasification project” is defined in § 48B(c)(1) as any project that (A) employs gasification technology, (B) will be carried out by an eligible entity (as defined in section 3.02 of this notice), and (C) includes a qualified investment of which an amount not to exceed \$650 million is certified under the qualifying gasification program as eligible for credit under § 48B. Pursuant to § 48B(c)(2), gasification technology is any process that converts a solid or liquid product from coal (as defined in section 3.01 of this notice), petroleum residue (as defined in § 48B(c)(8)), biomass (as defined in § 48B(c)(4)), or other materials that are recovered for their energy or feedstock value into a synthesis gas composed primarily of carbon monoxide and hydro-

gen for direct use or subsequent chemical or physical conversion.

.06 Pursuant to § 48B(d)(1)(A), the § 48B Phase I program provided for \$350 million of credits to be allocated to qualifying gasification projects. The § 48B Phase I program under Notice 2006–25 and Notice 2007–53 provided for annual allocation rounds. The initial allocation round was conducted in 2006. An additional allocation round was conducted in 2007–08. The entire § 48B Phase I credit amount of \$350 million was allocated in these two allocation rounds.

.07 Under the § 48B Phase II program, the qualifying gasification project credit for a taxable year was an amount equal to 30 percent of the qualified investment (as defined in § 48B(b)) for that taxable year in qualifying gasification projects (as defined in § 48B(c)(1)) for which the credit is allocated under § 48B(d)(1)(B).

.08 Pursuant to § 48B(d)(1)(B), the § 48B Phase II program provided for \$250 million of credits to be allocated to qualifying gasification projects that include equipment which separates and sequesters at least 75 percent of such project’s total carbon dioxide (CO<sub>2</sub>) emissions. The Service established the § 48B Phase II program in Notice 2009–23, 2009–1 C.B. 802, which provided for an allocation round in 2009–2010. The entire § 48B Phase II credit amount of \$250 million was allocated in this allocation round.

.09 As originally enacted by the Energy Policy Act of 2005, § 48B(d)(1) directed the Secretary to carry out a certification program for the allocation of § 48B credits and authorized the Secretary to establish additional programs to reallocate § 48B credits by providing that allocations were to be made “under rules similar to the rules of section 48A(d)(4).” Although the Energy Improvement and Extension Act of 2008 amended § 48B(d)(1) and removed the cross-reference to § 48A(d)(4), the effective date provision of the 2008 amendment states that it “appl[ies] to credits described in Code section 48B(d)(1)(B) . . . which are allocated or reallocated after the date of enactment [October 3, 2008].” Thus, by its terms, the 2008 amendment was not intended to impact the program for the credits initially allocated as § 48B Phase I credits, and which pursuant to the statute as revised by

the 2008 amendment are described in § 48B(d)(1)(A). Accordingly, the authority to reallocate § 48B Phase I credits remains effective, and the Service may review prior § 48B Phase I allocations and conduct an additional certification program for any § 48B Phase I credits that are available for reallocation. Moreover, by referring to § 48(d)(1)(B) credits that are “allocated or reallocated” after the October 3, 2008, date of enactment, the effective date provision of the 2008 amendment indicates congressional support for reallocation of § 48B credits. The Service has completed its review of the prior § 48B Phase I allocations and has determined that § 48B Phase I credits in the total amount of \$ 309,337,000 are available for reallocation under the § 48B Phase III program.

.10 Pursuant to § 48B(d)(2), certificates of eligibility may be issued under the § 48B program only during the 10-year period beginning on October 1, 2005. As a result, the Service may only reallocate any available § 48B credits prior to October 1, 2015.

.11 Under the § 48B Phase III credit program, the qualifying gasification project credit for a taxable year is an amount equal to 20 percent of the qualified investment (as defined in § 48B(b)) for that taxable year in qualifying gasification projects (as defined in § 48B(c)(1)) for which the credit is allocated under § 48B(d)(1)(A).

.12 Section 48B(d)(4) provides that (A) highest priority is given to projects with the greatest separation and sequestration percentage of total CO<sub>2</sub> emissions, and (B) high priority is given to applicant participants who have a research partnership with an eligible educational institution (as defined in § 529(e)(5)). While the capability of a qualifying project to separate and sequester CO<sub>2</sub> emissions is considered in ranking projects, the § 48B Phase III program will not require a qualifying project to include equipment that separates and sequesters CO<sub>2</sub> emissions.

.13 Section 48A(d)(5) provides that the Secretary shall, upon making a certification under § 48B(d), publicly disclose the identity of the applicant and the amount of the credit certified with respect to such applicant.

.14 Section 48A(h) directs the Secretary to modify the terms of any competitive certification award under § 48B and any associated closing agreement where such modification (i) is consistent with the objectives of § 48B, (ii) is requested by the recipient, and (iii) involves moving the project site to improve the potential to capture and sequester CO<sub>2</sub> emissions, reduce costs of transporting feedstock, and serve a broader customer base. This directive does not apply if the Secretary determines that the dollar amount of tax credits available to the taxpayer under § 48B would increase as a result of the modification or such modification would result in such project not being originally certified. In addition, the Secretary is required to consult with other relevant Federal agencies, including the Department of Energy, in considering any modification under § 48A(h).

.15 The at-risk rules in § 49 and the recapture and other special rules in § 50 apply to the § 48B Phase III credit. Generally, section 49 provides that the investment credit is limited to the extent that the taxpayer is at risk with respect to the investment credit property. Section 50(a) provides for pro rata recapture of the investment tax credit if the investment credit property is disposed of, or otherwise ceases to be investment credit property, within five years after the property is placed in service.

### SECTION 3. DEFINITIONS

The following definitions apply for purposes of § 48B and this notice:

.01 *Coal*. Section 48B(c)(6) defines the term “coal” as anthracite, bituminous coal, subbituminous coal, lignite, and peat. Coal includes waste coal (that is, usable material that is a byproduct of the previous processing of anthracite, bituminous coal, subbituminous coal, lignite, or peat). Examples of waste coal include fine coal of any of the listed ranks, coal of any of the listed ranks obtained from a refuse bank or slurry dam, anthracite culm, bituminous gob, and lignite waste.

.02 *Eligible entity*. Section 48B(c)(7) defines “eligible entity” as any person whose application for certification is principally intended for use in a domestic project that employs domestic gasification applications related to chemicals, fertiliz-

ers, glass, steel, petroleum residues, forest products, agriculture, including feedlots and dairy operations, and transportation grade liquid fuels (qualifying industries). For purposes of § 48B, a qualifying gasification project is carried out by an eligible entity if the project supplies more than 50 percent of the thermal output in British thermal units (“Btu”) from the gasification process in the form of synthesis gas for direct use or subsequent chemical or physical conversion in an application related to one or more qualifying industries or if more than 50 percent of the fuel input in Btu to the gasification process is supplied from one or more qualifying industries.

.03 *Total synthesis gas capacity*. The total synthesis gas capacity of a project is the total MMBtu (one million Btu) per hour of the synthesis gas (higher heating value (HHV)) at the gasifier outlet of the project. The synthesis gas must be composed primarily of carbon monoxide and hydrogen for direct use or subsequent chemical or physical conversion.

#### .04 *Fuel Input*.

(1) *In general*. The term “fuel input” means, with respect to any type of fuel, the amount of such fuel used during normal plant operations. The amounts of the fuel used are measured (i) in Btu on an energy input basis and (ii) pursuant to applicable standards prescribed by the American Society for Testing and Materials (“ASTM”). For example, § 48B(d)(3)(D) provides that the fuels identified in § 48B(c)(2) will at all times cumulatively comprise at least 90 percent of the total fuels (fuels identified in § 48B(c)(2) and any other fuel input) required by the project. This requirement is satisfied if, after completion and during normal plant operations, the fuels identified in § 48B(c)(2) will cumulatively comprise at least 90 percent of the project’s total fuels measured in Btu on an energy input basis and pursuant to applicable ASTM standards.

(2) *Only normal plant operations taken into account*. Only fuel used during normal plant operations is taken into account for purposes of § 48B. Normal plant operations are operations other than during periods of initial plant certification, plant startup, plant shutdown, interconnected

gasifier(s) shutdown for gasification system maintenance, or interruptions of the supply of fuels identified in § 48B(c)(2) to the project resulting from an event of force majeure (including an act of God, war, strike, or other similar event beyond the control of the taxpayer). For example, the fuel input during the initial plant certification may consist entirely of natural gas or other fuels not identified in § 48B(c)(2) because fuel used during initial plant certification is disregarded in determining whether the requirement of § 48B(d)(3)(D) to use 90 percent of the fuels identified in § 48B(c)(2) is satisfied.

.05 *Placed In Service*. For purposes of § 48B, property is placed in service in the taxable year in which the property is placed in a condition or state of readiness and availability for a specifically assigned function. See § 1.46–3(d)(1)(ii) of the Income Tax Regulations. Thus, a qualifying gasification project or eligible property (as defined in § 48B(c)(3)) that is a part of the project is placed in service in the taxable year in which the project is placed in a condition or state of readiness and availability for producing synthesis gas from the feedstocks identified in § 48B(c)(2).

.06 *Separation and Sequestration*. The term “separation and sequestration” refers to the separation and capture of a project’s CO<sub>2</sub> emissions, and the placement of the captured CO<sub>2</sub> into a repository in which the CO<sub>2</sub> will remain permanently sequestered.

### SECTION 4. SECTION 48B PHASE III PROGRAM

.01 *In General*. To be considered in the § 48B Phase III allocation round, applications must be submitted separately to DOE and to the Service on or before March 2, 2015 pursuant to section 5 of this notice. The Service will consider a project under the § 48B Phase III program only if DOE provides a certification (“DOE certification”) and ranking (if any) for the project. Accordingly, a taxpayer must submit, for each § 48B Phase III gasification project: (i) an application for certification by DOE that the project is technically and economically feasible (“application for DOE certification”), and (ii) an application for certification by the Service under § 48B(d) (“application for § 48B certification”).

## .02 Program Specifications.

(1) The Service determines the amount of the § 48B Phase III credits allocated to a project at the time the Service accepts the application for § 48B certification for that project in accordance with section 4.02(9) of this notice (see section 5 of this notice for the requirements applicable to the application for DOE certification and the application for § 48B certification).

(2) The § 48B Phase III credit for a taxable year is an amount equal to 20 percent of the qualified investment (as defined in § 48B(b)) for that taxable year in qualifying gasification projects (as defined in § 48B(c)(1)).

(3) Section 48B Phase III credits in the amount of \$ 309,337,000 are available for the § 48B Phase III allocation round. Under § 48B(c)(1)(C), the certification for a § 48B Phase III project cannot apply to more than \$650 million of the qualified investment in the project. Thus, the maximum amount of the § 48B Phase III credit that will be allocated to a project is \$130 million. This limitation applies to a qualifying project rather than to the taxpayer holding interests in the project. Therefore, the number or type of entities holding ownership interests in a project does not change the maximum amount of the § 48B Phase III credit that may be allocated to that project. However, a taxpayer holding interests in multiple projects may be allocated more than the maximum § 48B Phase III credit that may be allocated to a single project.

(4) A taxpayer that was allocated § 48B Phase I credits or § 48B Phase II credits for a project may submit an application for § 48B Phase III credits for the same project if the project meets the requirements for a qualifying project under the § 48B Phase III gasification program.

(a) Section 48B Phase III credits will be allocated to the taxpayer's qualified investment in the project only to the extent such investment exceeds the qualified investment with respect to which § 48B Phase I credits or § 48B Phase II credits was awarded but does not exceed \$650 million. Thus, if the qualified investment in a project is \$700 million and § 48B Phase I credits were allocated with respect to \$500 million of the qualified investment, § 48B Phase III credits may be

allocated with respect to only \$150 million (\$650 million – \$500 million) of the qualified investment. Any § 48B Phase I or Phase II credits allocated to a project are not taken into account for purposes of determining the \$650 million qualified investment limitation to the extent the right to claim such credit has been irrevocably waived in such manner as the Commissioner may require.

(b) Section 48B Phase III credits allocated to a project will be forfeited if the taxpayer fails to place the project in service within 7 years of the date of acceptance of the application for § 48B certification under section 4.02(9) of this notice. The allocation of § 48B Phase III credits does not delay the taxpayer's placed in service obligations with respect to any § 48B Phase I credits or § 48B Phase II credits previously allocated to the project. Accordingly, any § 48B Phase I credits or § 48B Phase II credits allocated to the project will be forfeited if the taxpayer fails to place the project in service within 7 years of the date of acceptance of the application for § 48B certification under the applicable program.

(5) For § 48B Phase III credits, DOE will determine the technical and economic feasibility of the project and, if the project is determined to be feasible, will provide a DOE certification for the project to the Service. DOE will rank the certified projects based on the Program Policy Factors specified in Appendix B, and the Service will allocate the credits as follows:

(a) If the requested allocation of credit for projects that DOE has certified does not exceed the amount available for allocation, each certified project will be allocated the full amount of credit requested.

(b) If the requested allocation of credit for projects that DOE has certified exceeds the amount available for allocation, the amount available for allocation will be allocated as follows:

(i) The project receiving the highest ranking (that is, first) will be allocated the full amount of credit requested (but not exceeding the amount available for allocation) before any credit is allocated to a lower-ranked project. The amount available for allocation is reduced by the amount of credit so allocated and only the remainder is available for allocation to a lower-ranked project.

(ii) Second and lower-ranked projects will be entitled to similar priority in the allocation of credit and allocations to such projects will similarly reduce the remainder of the amount available for allocation until the amount available for allocation is exhausted.

(6) See section 5.02 of this notice and Appendix B to this notice for the information to be submitted to the DOE in an application for DOE certification. Appendix B to this notice also provides the instructions and address for filing the application for DOE certification. If an application for DOE certification is post-marked on or before March 2, 2015, DOE will determine the feasibility of the project and (for projects determined to be feasible) provide DOE certification and DOE ranking (if any) to the Service by July 1, 2015.

(7) For the § 48B Phase III allocation round, the application period for § 48B certification begins on December 29, 2014, and ends on March 2, 2015, and any completed application for § 48B certification received by the Service after December 28, 2014, and on or before March 2, 2015, will be deemed to be submitted by the taxpayer on March 2, 2015.

(8) For purposes of determining the timeliness of submission of applications the rules of § 7502 shall apply.

(9) By September 1, 2015, the Service will accept or reject the taxpayer's application for § 48B certification and will notify the taxpayer, by letter, of its decision. This acceptance letter constitutes a certificate of eligibility provided by the Service pursuant to § 48B(d)(2).

(10) If the taxpayer's application for § 48B certification is accepted, the acceptance letter will state the amount of the credit allocated to the project. If a credit is allocated to a taxpayer's project, the taxpayer will be required to execute an agreement in the form set forth in Appendix A to this notice. By November 2, 2015, the taxpayer must execute and return the agreement to the Service at the appropriate address listed in section 5.04 of this notice. The Service will execute and return the agreement to the taxpayer by February 1, 2016. The executed agreement applies only to the accepted taxpayer. The taxpayer must notify the Service within 90

days of the acquisition of the project by any other person (a successor in interest).

(11) A successor in interest that plans to claim the § 48B credit allocated to the project must request permission to execute a new agreement with the Service. If the request is granted, the new agreement must be executed no later than the due date (including extensions) of the successor in interest's Federal income tax return for the taxable year in which the transfer occurs. If the successor in interest does not execute a new agreement, the following rules apply:

(a) In the case of an interest acquired at or before the time the qualifying gasification project is placed in service, any credit allocated to the project will be fully forfeited (and rules similar to the recapture rules of § 50(a) apply with respect to qualified progress expenditures); and

(b) In the case of an interest acquired after the qualifying gasification project is placed in service, the project ceases to be investment credit property and the recapture rules of § 50(a) (and similar rules with respect to qualified progress expenditures) apply.

(12) The site of the qualifying gasification project relating to a credit allocation may be changed only if the change is consistent with the objectives of the qualifying gasification project program, is requested by the taxpayer that received the credit allocation, and involves moving the project site to improve the potential to capture and sequester CO<sub>2</sub> emissions, reduce costs of transporting feedstock, and serve a broader customer base. The Service will not agree to a project site change if the dollar amount of tax credits allocated to the taxpayer under § 48B would increase as a result of the site change or if the project would not have been originally certified had such modification been included in the taxpayer's application. In considering such modification, the Service will consult with DOE and any other relevant Federal agency.

(13) The § 48B Phase III credit allocated to the project will be forfeited if the taxpayer fails to place the project in service within 7 years from the date of the acceptance letter under section 4.02(9) of this notice.

(14) The taxpayer must notify the Service by letter of the date the project is

placed in service within 90 days of that date.

## SECTION 5. APPLICATIONS FOR CERTIFICATIONS

.01 *In General.* An application for § 48B certification and a separate application for DOE certification must be submitted for each qualifying gasification project. If an application for DOE certification does not include all of the information required by section 5.02 of this notice, DOE may decline to accept the application. If an application for § 48B certification does not include all of the information listed in section 5.03 of this notice the Service may decline to accept the application.

.02 *Information Required in the Application for DOE Certification.* An application for DOE certification must be sent to the address specified in Section C of Appendix B. The application must include all of the information requested in Appendix B to this notice and all of the following:

(1) The name, address, and taxpayer identification number of the taxpayer. If the taxpayer is a member of an affiliated group filing consolidated returns, also provide the name, address, and taxpayer identification number of the common parent of the group.

(2) The name and telephone number of a contact person.

(3) The name and address (or other unique identifying designation) of the qualifying gasification project.

(4) A statement specifying the projected placed in service date of the qualifying gasification project.

(5) The estimated total cost of the project and the estimated total qualified investment in the eligible property that will be part of the project.

(6) The amount of the qualifying gasification project credit requested for the project. The amount requested must not exceed \$130 million (the amount permitted under § 48B(a) and (c)(1)(C)).

(7) The exact total synthesis gas capacity (as defined in section 3.03 of this notice) of the project.

(8) A statement specifying whether the project is entitled to highest priority for the percentage of total CO<sub>2</sub> emissions that the project will separate and sequester.

(9) A statement specifying whether the project is entitled to high priority for having a research partnership with an eligible educational institution (as defined in § 529(e)(5)) and, if entitled to priority, a statement identifying the eligible educational institution, stating the name(s) of the eligible institution.

(10) The following declaration: "Under penalties of perjury, I declare that I have examined this submission, including accompanying documents, and, to the best of my knowledge and belief, all of the facts contained herein are true, correct, and complete."

(11) The taxpayer's signature. The taxpayer must sign and date the application, including the perjury declaration. A stamped, faxed, or electronic signature will not be accepted. The person signing for the taxpayer must have personal knowledge of the facts. Further, the application, including the perjury declaration, must be signed by a person authorized under state law to bind the taxpayer, such as an officer on behalf of a corporation, a general partner on behalf of a state-law partnership, a member-manager on behalf of a limited liability company, a trustee on behalf of a trust, or the proprietor in the case of a sole proprietorship. If the taxpayer is a member of an affiliated group filing consolidated returns, the application, including the perjury declaration, must be signed by a duly authorized officer of the common parent of the group.

.03 *Information to be Included in the Application for § 48B Certification.* An application for § 48B certification must include all of the following:

(1) The name, address, and taxpayer identification number of the taxpayer. If the taxpayer is a member of an affiliated group filing consolidated returns, also provide the name, address, and taxpayer identification number of the common parent of the group.

(2) The name and/or number of the IRS form that the taxpayer uses to file its Federal income tax return (e.g., Forms 1120, 1065) and the ending month of the taxpayer's tax year.

(3) The name, telephone number, and fax number of a contact person. For such person, attach a properly executed power of attorney, preferably on Form 2848,

*Power of Attorney and Declaration of Representative.*

(4) One electronic version on a USB flash drive or a CD of the completed application for DOE certification submitted with respect to the project in accordance with section 5.02 of this notice.

(5) If § 48B Phase I credits or § 48B Phase II credits were allocated to the project, the estimated total cost and estimated total qualifying investment of the project as represented in the application for the § 48B Phase I credits or § 48B Phase II credits, and the amount of the allocated § 48B Phase I credits or § 48B Phase II credits.

(6) The following declaration: “Under penalties of perjury, I declare that I have examined this submission, including accompanying documents, and, to the best of my knowledge and belief, all of the facts contained herein are true, correct, and complete.”

(7) The taxpayer’s signature. The taxpayer must sign and date the application, including the perjury declaration. A stamped, faxed, or electronic signature will not be accepted. The person signing for the taxpayer must have personal knowledge of the facts. Further, the application, including the perjury declaration, must be signed by an officer on behalf of a corporation, a general partner on behalf of a state-law partnership, a member-manager on behalf of a limited liability company, a trustee on behalf of a trust, or the proprietor in the case of a sole proprietorship. If the taxpayer is a member of an affiliated group filing consolidated returns, the application, including the perjury declaration, must be signed by a duly authorized officer of the common parent of the group.

.04 *Instructions and Address for Filing § 48B Application.* There is no user fee for these applications. The application for § 48B certification meeting the requirements of section 5.03 of this notice should be marked: “SECTION 48B APPLICATION FOR CERTIFICATION.” A taxpayer may submit the application to:

Internal Revenue Service  
Industry Director, Natural Resources  
and Construction  
Attn: Executive Assistant (Technical)  
1919 Smith Street, Floor P2  
Stop 1000-HOU  
Houston, TX 77002

If hand delivered, the application may be delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. central time.

## SECTION 6. OTHER REQUIREMENTS

.01 *Significant Change in Plans.* The Service must be informed if the plans for the project change in any significant respect from the plans set forth in the applications for § 48B and DOE certification. Except as otherwise provided under § 48A(h) and section 2.14 of this notice, any significant change to the plans set forth in the applications will have the following effects if the Service is informed of the change after the date on which the application for DOE certification was due for the § 48B Phase III allocation round under section 4.02(6) of this notice:

(1) The Service will give no further consideration to the project if acceptance has not yet been granted; and

(2) Any acceptance provided by the Service and any allocation or certification based on that acceptance will be void.

.02 *Recapture of § 48B Phase III credits.* Section 48B Phase III credits are subject to the recapture rules of § 50. Section 50(a)(1) provides, generally, for recapture of the investment credit if, during any taxable year, investment tax credit property is disposed of or otherwise ceases to be investment credit property with respect to the taxpayer before the close of the recapture period. The recapture period under § 50(a) is the 5-year period beginning on the date the property is placed in service.

.03 *Effect of an Acceptance, Allocation, or Certification.* An acceptance, allocation, or certification by the Service under this notice is not a determination that a project qualifies for the qualifying gasification project credit under § 48B. The Service may, upon examination, determine that the project does not qualify for this credit.

.04 *No Right to a Conference or Appeal.* A taxpayer does not have a right to a conference relating to, or a right of appeal with respect to, any decision made under this notice (including the acceptance or rejection of the application for DOE or § 48B certification, the amount of

credit allocated to a project, or whether or not to certify a project) to any official of the Service.

.05 *DOE Debriefings.* Although a taxpayer does not have a right to a conference relating to any matters under this notice, DOE will offer debriefings to all applicants that submitted an application for DOE certification. This debriefing will be held by DOE after the Service has accepted the applications for § 48B certification (as determined under this notice). The sole purpose of the debriefing is to enable applicants to develop better proposals in future allocation rounds, if any, by providing DOE’s assessment of the strengths and weaknesses of their applications for DOE certification. All requests for debriefings must be submitted to DOE within 30 days of receipt of the Service’s decision to accept or reject the application.

## SECTION 7. REDUCTION OR FORFEITURE OF ALLOCATED CREDITS

Under the provisions of this notice and the agreement set forth in Appendix A to this notice, the § 48B Phase III credits allocated under section 4 of this notice will be reduced or forfeited in certain situations. A taxpayer must notify the Service of the amount of any required reduction or forfeiture required under the agreement. This notification must be sent to the appropriate address listed in section 5.04 of this notice.

## SECTION 8. QUALIFIED PROGRESS EXPENDITURES

.01 Section 48B(b)(3) provides that rules similar to the rules of § 46(c)(4) and (d) (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990) shall apply for purposes of § 48B. Former §§ 46(c)(4) and 46(d) provided the rules for claiming the investment credit on qualified progress expenditures (as defined in former § 46(d)(3)) made by a taxpayer during the taxable year for the construction of progress expenditure property (as defined in former § 46(d)(2)).

.02 In the case of self-constructed property (as defined in former § 46(d)(5)(A)), former § 46(d)(3)(A) defined qualified prog-

ress expenditures to mean the amount that is properly chargeable (during the taxable year) to capital account with respect to that property. With respect to a qualifying gasification project that is self-constructed property, amounts paid or incurred are chargeable to capital account at the time and to the extent they are properly includible in computing basis under the taxpayer's method of accounting (for example, after applying the requirements of § 461, including the economic performance requirement of § 461(h)).

.03 To claim the qualifying gasification project credit for the qualified progress expenditures paid or incurred by a taxpayer during the taxable year for construction of a qualifying gasification project, the taxpayer must make an election under the rules set forth in § 1.46-5(o) of the Income Tax Regulations. The taxpayer may not make the qualified progress expenditures election for a qualifying gasification project until the taxpayer has received an acceptance letter for the project under section 4.02(9) of this notice.

.04 If a taxpayer makes the qualified progress expenditures election pursuant to section 8.03 of this notice, rules similar to the recapture rules in § 50(a)(2)(A)-(D) apply. In addition to the cessation events listed in § 50(a)(2)(A), examples of other events that will cause the project to cease being a qualifying gasification project are:

(1) Failure to place the project in service within 7 years from the date of the acceptance letter under section 4.02(9) of this notice; or

(2) A significant change to the plans for the project as set forth in the applications for § 48B and DOE certification if, under section 6.01 of this notice, the Service's acceptance of the project is void as a result of the change.

## SECTION 9. DISCLOSURE OF INFORMATION

.01 *Announcement.* Section 48A(d)(5) provides that the Secretary shall, upon making a certification under § 48A(d) and § 48B(d), publicly disclose the identity of the applicant and the amount of the credit allocated to such applicant. Accordingly, the Service intends to publish the results of the allocation process, and disclose the following return information in the event § 48B Phase III credits are allocated to the

taxpayer's project: (i) the name of the taxpayer and (ii) the amount of § 48B Phase III credits allocated to the project.

.02 *In general.* Any taxpayer associated information provided to or received, recorded, collected or prepared by the Service as part of this process is return information under § 6103. Unless authorized under the Internal Revenue Code, such as the authorization under § 48A(d)(5), return information may not be disclosed. This prohibition on disclosure, in conjunction with 5 U.S.C. § 552(b)(3), exempts return information from being provided under the Freedom of Information Act ("FOIA"). Other FOIA exemptions may also apply. For example, FOIA includes exemptions for trade secrets and commercial or financial information under 5 U.S.C. § 552(b)(4) and exempts personal information under 5 U.S.C. § 552(b)(6).

.03 *FOIA requests.* Anyone interested in submitting a request for records under the FOIA with respect to the qualifying gasification project program under § 48B should direct a request that conforms to the Service's FOIA regulations found at 26 C.F.R. § 601.702, to the following address:

IRS FOIA Request  
Baltimore Disclosure Office  
Room 940  
31 Hopkins Plaza  
Baltimore, MD 21201

## SECTION 10. EFFECT ON OTHER DOCUMENTS

Notice 2009-23 is amplified.

## SECTION 11. EFFECTIVE DATE

This notice is effective on December 29, 2014.

## SECTION 12. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545-2002.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information un-

less the collection of information displays a valid OMB control number.

The collections of information in this notice are in sections 4, 5, 6, 7, and 8 and Appendix B of this notice. This information is required to obtain an allocation of the qualifying gasification project credit. This information will be used by the Service to verify that the taxpayer is eligible for the qualifying gasification project credit. The collection of information is required to obtain a benefit. The likely respondents are business or other for-profit institutions.

The estimated total annual reporting burden is 1,700 hours.

The estimated annual burden per respondent varies from 50 to 125 hours, depending on individual circumstances, with an estimated average of 85 hours. The estimated number of respondents is 20.

The estimated annual frequency of responses is on occasion.

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

## SECTION 13. DRAFTING INFORMATION

The principal author of this notice is Jennifer C. Bernardini of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Ms. Bernardini on (202) 317-6853 (not a toll-free call).

## APPENDIX A

### AGREEMENT

[Insert taxpayer's name, address, and identifying number] ("Taxpayer") and the Commissioner of Internal Revenue ("Commissioner") make the following Agreement:

### WHEREAS:

1. On or before [insert date and year], Taxpayer submitted to the Internal Revenue Service ("Service"), an application for certification under the § 48B Phase III

program described in Notice 2014–81 (“Application for § 48B Certification”);

2. Taxpayer’s application for § 48B certification is for the qualifying gasification project (the “Project”) described below—

(a) The name of the Project is [insert name as provided in Taxpayer’s application];

(b) The Project will be located in or near [insert city and state];

(c) The Project site in subsection (b) above may be changed only if the change is consistent with the objectives of the qualifying gasification project program, is requested by the taxpayer that received the credit allocation (or a successor in interest that has timely entered into an Agreement regarding the Project with the Service), and involves moving the Project site to improve the potential to capture and sequester CO<sub>2</sub> emissions (if applicable), reduce costs of transporting feedstock, and serve a broader customer base. The Service will not agree to a project site change if the dollar amount of tax credits allocated to the taxpayer under § 48B would increase as a result of the site change or if the Project would not have been originally certified had such modification been included in the taxpayer’s application;

(d) The Project will have a total synthesis gas capacity (as defined in section 3.03 of Notice 2014–81) of at least [insert number] total MMBtu per hour of synthesis gas. The synthesis gas is composed primarily of carbon monoxide and hydrogen for direct use or subsequent chemical or physical conversion; and

(e) The fuels identified in § 48B(c)(2) will at all times cumulatively comprise at least 90 percent of the total fuel input (as defined in section 3.04 of Notice 2014–81 and including fuels identified in § 48B(c)(2) and any other fuel input) required by the Project for normal plant operations (as defined in section 3.04(2) of Notice 2014–81) for the production of chemical feedstocks, liquid transportation fuels, or co-production of electricity.

3. On [insert date of acceptance letter issued under section 4.02(9) of Notice 2014–81], the Service accepted Taxpayer’s application for § 48B certification for the Project and allocated qualifying gas-

ification project credit under § 48B Phase III in the amount of \$[insert number] to the Project.

4. Taxpayer understands that if the Project is not placed in service by Taxpayer within 7 years of [insert the date in WHEREAS clause 3] as determined under section 3.05 of Notice 2014–81, the § 48B Phase III credit in the amount allocated to the Project as specified in WHEREAS clause 3 is fully forfeited. Taxpayer must provide evidence to the Service that the Project has been timely placed in service.

5. Taxpayer understands that if the plans for the Project change in any significant respect from the plans set forth in the application for DOE certification (as defined in section 5.02 of Notice 2014–81) and the application for § 48B certification (as defined in section 5.03 of Notice 2014–81), other than a project site change agreed to by the Service as described in WHEREAS clause 2(c), the acceptance of Taxpayer’s application for § 48B certification on the date specified in WHEREAS clause 3 is void and the § 48B Phase III credit in the amount allocated to the Project as specified in WHEREAS clause 3 is fully forfeited.

6. Taxpayer understands that if the Project fails to satisfy any of the requirements in § 48B for a qualifying gasification project—

(a) at the time the Project is placed in service, the § 48B Phase III credit allocated to the Project as specified in WHEREAS clause 3 is fully forfeited; and

(b) after the Project is placed in service (and after satisfying all such requirements at the time the Project is placed in service), the Project ceases to be investment credit property and the recapture rules of § 50(a) apply.

7. Taxpayer understands that, if the Project fails to use gasification technology as defined in § 48B(c)(2) or is not carried out by an eligible entity (as defined in section 3.02 of Notice 2014–81), the § 48B Phase III credit in the amount of allocated to the Project as specified in WHEREAS clause 3 is fully forfeited.

8. Taxpayer understands that if, at any time, the fuels identified in § 48B(c)(2) with respect to gasification technology do not cumulatively comprise at least 90 per-

cent of the total fuel input (as defined in section 3.04 of Notice 2014–81 and including fuels identified in § 48B(c)(2) and any other fuel input) required by the Project for normal plant operations (as defined in section 3.04(2) of Notice 2014–81) for the production of chemical feedstocks, liquid transportation fuels, or co-production of electricity, the Project ceases to be investment credit property and the recapture rules of § 50(a) apply.

9. Taxpayer understands that it cannot claim the qualifying advanced coal project credit under § 48A for any qualified investment for which the qualifying gasification project credit is allowed under § 48B.

10. Taxpayer understands that if Taxpayer elects to claim the qualifying gasification project credit on the qualified expenditures paid or incurred by Taxpayer during the taxable year(s) during which the Project is under construction and the Project ceases to be a qualifying gasification project (whether before, at the time, or after the Project is placed in service), rules similar to the recapture rules in § 50(a)(2)(A) through (D) apply.

11. This Agreement applies only to Taxpayer. Taxpayer must notify the Service within 90 days of the acquisition of the Project by any other person (a successor in interest). A successor in interest that plans to claim the § 48B credit allocated to the Project must request permission to execute a new Agreement with the Service. If the request is granted, the new Agreement must be executed no later than the due date (including extensions) of the successor in interest’s Federal income tax return for the taxable year in which the transfer occurs. If the interest is acquired at or before the time the Project is placed in service and the successor in interest fails to execute a new Agreement, the § 48B Phase III credit in the amount allocated to the Project as specified in WHEREAS clause 3 is fully forfeited. If the interest is acquired after the time the Project is placed in service and the successor in interest fails to execute a new Agreement, the Project ceases to be investment credit property and the recapture rules of § 50(a) apply.

**NOW IT IS HEREBY  
DETERMINED AND AGREED FOR  
FEDERAL INCOME TAX  
PURPOSES THAT:**

1. The total amount of the § 48B Phase III credit that Taxpayer will claim for the Project under this Agreement on account of the acceptance of Taxpayer's application for § 48B certification cannot exceed the amount specified in WHEREAS clause 3;

2. This Agreement does not express whether the Taxpayer has met any of the

requirements to receive tax credits under § 48B; and

3. This Agreement is limited and applies only to Taxpayer. A successor in interest that plans to claim § 48B credit allocated to the Project must request permission to execute a new Agreement with the Service.

**THIS AGREEMENT IS FINAL AND  
CONCLUSIVE EXCEPT:**

1. The matter it relates to may be reopened in the event of fraud, malfeasance, or misrepresentation of a material fact;

2. It is subject to the Internal Revenue Code sections that expressly provide that effect be given to their provisions notwithstanding any law or rule of law; and

3. If it relates to a tax period ending after the date of this Agreement, it is subject to any law enacted after such date, which applies to the tax period.

By signing, the parties certify that they have read and agreed to the terms of this Agreement.

**Taxpayer: [insert name and identifying number]**

**By:** \_\_\_\_\_ **Date Signed:** \_\_\_\_\_

[insert name]

**Title:** [insert title]

[insert taxpayer's name]

**Commissioner of Internal Revenue**

**By:** \_\_\_\_\_ **Date Signed:** \_\_\_\_\_

Kathy J. Robbins

**Title:** Industry Director, Natural Resources & Construction

**APPENDIX B**

**APPLICATION FOR DOE  
CERTIFICATION**

**REQUEST FOR SUPPLEMENTAL  
APPLICATION INFORMATION  
FOR DOE**

The Internal Revenue Service ("Service") and the Department of Energy ("DOE") seek to certify applications that demonstrate a high likelihood of being successfully implemented by the applicants. To qualify, projects must be technically and economically feasible and use the appropriate gasification technology.

This request for submission of supplemental application information:

- Describes the information to be provided by the applicant seeking a DOE certification of feasibility, and
- Lists the evaluation criteria and Program Policy Factors that are to be used by DOE in the evaluation of applications.

If, after review by DOE, a project is determined to be feasible, DOE will

provide a DOE certification of feasibility to the Service. The Service will then accept or reject the taxpayer's application for certification of the tax credits.

In conducting this evaluation, DOE may utilize assistance and advice from qualified personnel from other Federal agencies and/or non-conflicted contractors. DOE will obtain assurances in advance from all evaluators that application information shall be kept confidential and used only for evaluation purposes. DOE reserves the right to request clarifications and/or supplemental information from some or all applicants through written submissions and/or oral presentations, but is not required to do so.

Notice is given that DOE may determine whether or not to provide a certification to the Service at any time after the application has been received, without further exchanges or discussions. Therefore, all applicants are advised to submit their most complete and responsive application.

Applications will not be returned.

**INFORMATION TO BE  
SUBMITTED IN AN APPLICATION  
FOR DOE CERTIFICATION**

**A. General**

This request, together with the information in relevant sections of Notice 2014-81 includes all the information needed to complete an application for DOE certification. All applications shall be prepared in accordance with this request in order to provide a standard basis for evaluation and to ensure that each application will be uniform as to format and sequence.

Each application should clearly demonstrate the applicant's capability, knowledge, and experience regarding the requirements described herein.

Applicants should fully address the requirements of Notice 2014-81 and this request and *not* rely on the presumed background knowledge of reviewers. DOE may reject an application that does not follow the instructions regarding the organization and content of the application when the nature of the deviation

and/or omission precludes meaningful review of the application.

## **B. Unnecessarily Elaborate Applications**

Unnecessarily elaborate brochures or other presentations beyond those sufficient to present a complete and effective application are not desired. Elaborate artwork, graphics and pictures are neither required nor encouraged.

## **C. Application Submission for DOE Certification**

The application submission to DOE must include the information and documentation required by relevant sections of Notice 2009–23.

An application to DOE will not be considered in the § 48B Phase III allocation round unless it is postmarked by March 2, 2015. One electronic version on a USB flash drive or a CD of the application must be submitted to:

Gina Mick  
National Energy Technology  
Laboratory  
3610 Collins Ferry Road  
Morgantown, WV 26507

Note that under section 5.03(4) of Notice 2014–81, one electronic version of the Application for DOE certification must be sent to the Service as part of the application for § 48B certification. The application for § 48B certification will not be considered in the § 48B Phase III allocation round under this notice unless it is submitted to the Service by March 2, 2015.

## **THE INFORMATION REQUIRED BY THIS REQUEST MUST BE SUBMITTED USING THE FORMAT AND THE HEADINGS OF THE PROJECT INFORMATION MEMORANDUM AS DESCRIBED BELOW.**

To aid in evaluation, applications shall be clearly and concisely written and logically assembled. All pages of each part shall be appropriately numbered and identified with the name of the applicant and the date.

The application, including the Project Information Memorandum, MUST be for-

matted in one of the following software applications:

- Microsoft Word™ 2010 or later edition
- Microsoft Excel™ 2010 or later edition
- Adobe Acrobat™ PDF 7.0 or later edition

Financial models should be submitted using the Excel™ spreadsheet and must include working calculation formulas and clearly identified assumptions.

The applicant is responsible for the integrity and structure of the electronic files. DOE will not be responsible for reformatting, restructuring or converting any files submitted in response to this request.

The Project Information Memorandum, *excluding Appendices*, shall not exceed seventy-five (75) pages. Pages in excess of the page limitation will not be considered for evaluation. All text shall be typed, single spaced, using 12 point font, 1 inch margins, and unreduced 8-1/2-inch by 11-inch pages. Illustrations and charts shall be legible with all text in legible font. Pages shall be sequentially numbered. Except as otherwise noted herein the page guidelines previously set forth constitute a limitation on the total amount of material that may be submitted for evaluation. No material may be incorporated in any application by reference as a means to circumvent the page limitation.

## **D. Project Information Memorandum**

### **1. Summary and Introduction**

- Description of the Project
- Financing and Ownership Structure
  - Include a list of all IRC section 48B tax credit allocations
- Description of the main parties to the project, including background, ownership and related experience
- Current Project Status and Schedule to Beginning of Construction

### **2. Technology and Technical Information**

Provide a description of the proposed technology, including sufficient supporting information (such as vendor guarantees, process flow diagrams, equipment descriptions, information on each major process unit and the total plant, compositions of major streams, and the technical plan for

achieving the goals proposed for the project) as would be needed to allow DOE to confirm that the technical requirements of § 48B are met. Specifically, the applicant should:

- Provide evidence sufficient to demonstrate that the proposed technology will employ gasification technology as defined in § 48B(c)(2).
- Present information sufficient to justify the total amount of synthesis gas (as defined in § 48B(c)(2)) to be produced by the project (synthesis gas capacity).
- Provide the total MMBtu/hr of the synthesis gas (HHV) at the gasifier outlet.
- Provide evidence sufficient to ensure that fuels identified in § 48B(c)(2) will comprise 90 percent of the total fuel input (fuels identified in § 48B(c)(2) and any other fuel input) for the project. Provide the total quantities of CO, H<sub>2</sub>, CH<sub>4</sub>, CO<sub>2</sub>, and water in the synthesis gas.
- Identify the domestic industry for which the proposed project is intended to be used.
- Identify the specific products and quantities produced by the proposed project, providing sufficient evidence to support claims.
- Provide evidence that indicates, for projects using nonrenewable fuels, the gasification technology design reflects reasonable consideration for, and if applicable, is capable of, accommodating equipment necessary to capture CO<sub>2</sub> for later use or sequestration. Include the project status and relevant information from ongoing engineering activities. Also include in an appendix any engineering report or reports used by the applicant to develop the project and to estimate costs and operating performance.
- If applicable, provide evidence sufficient to demonstrate that the project includes equipment which separates and permanently sequesters CO<sub>2</sub> emissions and provide the percentage of the project's total CO<sub>2</sub> emissions that are separated and permanently sequestered. The CO<sub>2</sub> separation and sequestration percentage shall be calculated based on the amount of CO<sub>2</sub> sent for permanent sequestration and the total CO<sub>2</sub> which would otherwise

be released into the atmosphere as industrial emission of greenhouse gas. Also provide CO<sub>2</sub> separation, capture, sequestration, and emission quantities on a metric tons per hour basis and on a metric tons per year basis, both under normal plant operating conditions.

### **3. Applicant's Capability to Accomplish the Technical Objectives**

Provide a narrative supporting the applicant's capability to accomplish the technical objectives of the proposed project, including supporting documentation demonstrating that the applicant has assembled a team that is formally committed to participate in the proposed project.

Provide information to support that the applicant has assembled a team with the skills and resources needed to implement the project as proposed.

Provide signed agreements or letters from team members demonstrating that the proposed team members are fully committed to the project.

Provide information, including examples of prior similar projects completed by applicant, engineering-procurement-construction ("EPC") contractor, and suppliers of major subsystems or equipment, which support the capabilities of the applicant and its team members to design, construct, permit, and operate the facility. The applicant should demonstrate that the team members have a corporate history of successful completion of similar projects.

Provide information to support that key personnel of the applicant and its team members have knowledge, experience, and adequate degree of involvement to successfully implement the project.

Include the project status and relevant information from ongoing engineering activities. Also include in an appendix any engineering report or reports used by the applicant to develop the project and to estimate costs and operating performance. Include copies of any signed agreements to support project status claims regarding preliminary design studies, front-end engineering design ("FEED") and EPC-type agreements.

### **4. Site Control and Ownership**

Provide evidence that demonstrates the overall feasibility of implementing the project at the proposed site.

Provide evidence that the applicant owns or controls a site in the United States of sufficient size to allow the proposed project to be constructed and operated on a long-term basis. Documentation such as a deed demonstrating the applicant owns the project site, a signed option to purchase the site from the site owner, or a letter of intent signed by the site owner and stating the site owner's intent to sell the site to the applicant should be provided.

Describe the current infrastructure at the site available to meet the needs of the project.

Provide documentation supporting applicant's conclusion that the proposed site can fully meet all environmental, feedstock supply, water supply, transmission interconnect and public policy requirements. Such documentation may include signed agreements, letters of intent, or term sheets relating to feedstock supply, water supply, and product (e.g. CO<sub>2</sub>) transportation etc., and regulatory approvals supporting the key claims.

Provide detailed plans, schedules and status updates, particularly for sites with pre-existing conditions that could impact the proposed project. Pre-existing conditions may include, but are not limited to, sites with mandated environmental remediation efforts; brown-field sites that will require building demolition; or sites requiring substantial rerouting of existing roads, railroads, transmission lines, or pipelines prior to the start of the project.

Applicants must select one "proposed site." However, projects with key physical or logistical elements that require close integration with another system for the project to succeed should provide information on all integrated systems regardless of where they are located. Example 1: a gasification plant designed to operate exclusively on coal from a to-be-opened mine should provide supporting documentation for the new mine. Example 2: an oxygen-blown gasification plant planning to purchase oxygen from a third party who will construct a plant exclusively for this project should provide documenta-

tion for the oxygen supplier. Example 3: an industrial gasification plant planning to sell CO<sub>2</sub> for enhanced oil recovery ("EOR") should provide an agreement for such a transaction indicating the annual CO<sub>2</sub> purchase quantity, expected project lifetime sales, CO<sub>2</sub> capacity of the site for EOR, and EOR site ownership.

### **5. Utilization of Project Output**

Provide evidence that demonstrates that a majority of the proposed project output is reasonably expected to be acquired or utilized.

Provide a projection of the anticipated costs of electricity and other marketable by-products produced by the plant.

Provide documentation establishing that a majority of the output of the plant is reasonably expected to be acquired or utilized. Such documentation should be signed by authorizing officials of both the buyer and seller, and may include: Sales Agreements, Letters of Intent, Memoranda of Understanding, Option Agreements, and Power Purchase Agreements.

Describe any energy sales arrangements that exist or that may be contemplated (e.g., a Power Purchase Agreement or Energy Sales Agreement) and summarize their key terms and conditions.

Include as an appendix any independent Energy Price Market Study that has been done in connection with this project, or if no independent market study has been completed, provide a copy of the applicant-prepared market study.

Identify and describe any firm arrangements to sell non-power output, such as CO<sub>2</sub>, and provide any evidence of such arrangements. If the project produces a product in addition to power, include as an appendix any related market study of price and volume of sales expected for that product.

### **6. Project Economics**

Describe the project economics and provide satisfactory evidence of economic feasibility as demonstrated through the financial forecast and the underlying project assumptions. The project economic and financial assumptions should be clearly stated and explained.

Show calculation of the amount of tax credit applied for based on allowable cost and any existing IRC Section 48B tax credit allocations.

## 7. Project Development and Financial Plan

Provide the total project budget and major plant costs (*e.g.*, development, operating, capital, construction, and financing costs). Provide the estimated annual budget for and source of project development costs from the time of the application until the beginning of construction, including legal, engineering, financial, environmental, overhead, and other development costs. Describe the overall approach to project development and financing sufficient to demonstrate project viability. Provide a complete explanation of the source and amount of project equity. Provide a complete explanation of the source and amount of project debt. Provide the audited financial statements for the most recently ended three fiscal years and quarterly interim financial statements for the current fiscal year for (a) the applicant, (b) for any of the project parties providing funding, and (c) for any third party funding source. If the applicant or another party does not have audited financial statements, the applicant or the party should provide equivalent financial statements prepared by the applicant or the party, in accordance with Generally Accepted Accounting Principles, and certified as to accuracy and completeness by the Chief Financial Officer of the party providing the statements.

For internally financed projects, provide evidence that the applicant has sufficient assets to fund the project with its own resources. Identify any internal approvals required to commit such assets. Include in an appendix copies of any board resolution or other approval authorizing the applicant to commit funds and proceed with the project.

For projects financed through debt instruments either unsecured or secured by assets other than the project, provide evidence that the applicant has sufficient creditworthiness to obtain such financing along with a discussion of the status of such instruments. Identify any internal approvals required to commit the applicant

to pursue such financing. Include in an appendix, copies of any board resolution or other approval authorizing the applicant to commit to such financing.

For projects financed through investor equity contributions, describe the source and status of each contribution. Discuss each investor's financial capability to meet its commitments. Include in an appendix copies of any executed investment agreements.

If financing through a public offering or private placement of either debt or equity is planned for the project, provide the expected debt rating for the issue and an explanation of applicant's justification for the rating. Describe the status of any discussions with prospective investment bankers or other financial advisors.

Include as an appendix copies of any existing funding commitments or expressions of interest from funding sources for the project.

For projects employing nonrecourse or limited recourse debt financing, provide a complete discussion of the approach to, and status of, such financing. In an appendix: (1) provide an Excel based financial model of the project, with formulas, so that review of the model calculations and assumptions may be facilitated; and (2) provide pro-forma project financial, economic, capital cost, and operating assumptions, including detail of all project capital costs, development costs, interest during construction, transmission interconnection costs, other operating expenses, and all other costs and expenses.

## 8. Project Contract Structure

Describe the current status of each of the agreements set forth below. Include as an appendix copies of the contracts or summaries of the key provisions of each of the following agreements:

- Power Purchase Agreement (if not fully explained in section 5 above).
- Raw Material Input: describe the source and price of raw material inputs for the project. Include as an appendix any studies of price and amount of raw materials that have been prepared. Include a summary of any supply contracts and a signed copy of the contracts.

- Transportation: explain the arrangements for transporting project inputs and outputs, including costs.
- Operations & Maintenance Agreement: include a summary of the terms and conditions of the contract and a copy of the contract.
- Shareholders Agreement: summarize key terms and include the agreement as an appendix.
- Engineering, Procurement and Construction Agreement: describe the key terms of the existing or expected EPC contract arrangement, including firm price, liquidated damages, hold-backs, performance guarantees, etc.
- Water Supply Agreement: confirm the amount, source, and cost of water supply.
- Transmission Interconnection Agreement: explain the requirements to connect to the system and the current status of negotiations in this respect.
- If CO<sub>2</sub> is separated by the project and is to be sold to a third party for sequestration, provide a Sales Agreement and provide specifics, such as CO<sub>2</sub> sales (metric tons per year), expected project lifetime sales (metric tons), potential CO<sub>2</sub> capacity of the site for sequestration (metric tons), technology and site suitability for sequestration, and sequestration site ownership and operation.

## 9. Permits Including Environmental Authorizations

Provide a complete list of all Federal, state, and local permits, including environmental authorizations or reviews, necessary to commence construction of the project.

Explain what actions have been taken to date to satisfy the required authorizations and reviews, and the status of each.

Provide a description of the applicant's plan to obtain and complete all necessary permits, and environmental authorizations and reviews.

## 10. Project Schedule

Provide an overall project schedule which includes technical, business, financial, permitting and other factors to sub-

stantiate that the project will meet the 7 year placed-in-service requirement.

The project schedule should be comprehensive and provide sufficient detail to demonstrate how applicant will meet the placed-in-service requirement. The schedule should demonstrate that the applicant understands the required tasks, and has allowed realistic times for accomplishing the technical and financial tasks. The schedule should include the milestone accomplishments needed to obtain the financing for the project.

## 11. Appendices

- Copy of internal or external engineering reports.
- Copy of site plan, together with evidence that applicant owns or controls a site. Examples of evidence would include a deed, or an executed contract to purchase or lease the site.
- Information supporting applicant's conclusion that the site is fully acceptable as the project site with respect to environment, raw material supply, water supply, transmission interconnect, and public policy reasons.
- Power Purchase or Energy Sales Agreement
- Energy Market Study.
- Financial Model of project.
- Financial statements for the applicant and other project funding sources for the most recently ended three fiscal years, and quarterly interim financial statements for the current fiscal year.
- Expressions of interest or commitment letters from funding sources.
- Copies of executed project contracts. If no contract currently exists, provide a summary of the expected terms and conditions.
- List of all Federal, state, and local permits, including environmental authorizations or reviews, necessary to commence construction.

### E. Supplemental Technical and Financial Guidance for Project Information Memorandum

#### Technology and Technical Information

It is important that the applicant select a specific gasification system for the project.

Without that decision, it is difficult to provide the necessary specific design information needed for DOE to evaluate the project feasibility with respect to performance, emissions, outputs of major streams as well as capital and operating costs.

#### Project Economics

Applicants should demonstrate the project's economic feasibility and financial viability by providing a clear statement and explanation of the economic and financial assumptions made by the applicant, and a financial forecast for the project. The financial forecast should flow logically from the applicant's assumptions and be consistent with them. Applicants should include assumptions regarding financial and economic issues that may not be included in the project costs but have a direct impact on the project. The examples given in the "Site Control and Ownership" section are relevant here and their impact on the project economics should be discussed here.

#### Project Development and Financial Plan

The information provided by the applicant in this section should demonstrate that the applicant's financial plan for developing the project is feasible and that the applicant will have access to necessary financing. The applicant should explain the source and timing for obtaining all financing, including the project development costs. It is important that the applicant explain and provide evidence that it has the capacity to fund the pre-construction project development costs, together with a budget for and description of those costs. Note that financial information is required for the applicant and for any other funding source.

#### Project Contract Structure

This section requires that the applicant demonstrate an understanding of the commercial contracting process and show progress in establishing the framework of contracts and agreements that a project typically requires. Applicants should show that their intended contract structure is reasonable and that their assumptions

relative to price, terms, and conditions are consistent with current market conditions. Evidence of final agreements, agreements in principle, or summaries of terms and conditions between the applicant and contract counterparties should be provided, if available.

## EVALUATION CRITERIA

### A. Criteria of § 48B

Gasification projects will be evaluated on whether they meet all the requirements of § 48B including:

Technical: whether the applicant has demonstrated the capability to accomplish the technical objectives.

Site: whether the site requirement for ownership or control has been met, and that the site is suitable for the proposed project.

Economic: whether the project has demonstrated economic feasibility, taking into consideration the submitted financial and project development, structural information, and financial plan.

Schedule: the applicant's ability to meet the 7 year placed-in-service requirement.

### B. Program Policy Factors to Be Used by DOE in the Evaluation of Applications

Section 48B identifies minimum requirements for consideration for the qualifying gasification project credit, including the project's technical feasibility, cost, and applicant's ability. In the event that there are more qualified (certifiable) applications than there are available amount of tax credits, DOE will apply additional factors to rank eligible projects based on their ability to advance gasification technology beyond its current state.

If there are more certified applications than available amount of § 48B Phase III credits, DOE will rank the certified projects based on evaluation of the following Program Policy Factors. In ranking certified projects, highest priority will be given to the Primary Ranking Factor. Secondary and Tertiary Ranking Factors will be taken into account to rank projects that are not clearly differentiated on the basis of the Primary Ranking Factor, with higher priority given to the Secondary Ranking Factors than to Tertiary Ranking Factors.

#### Primary Ranking Factor:

- Capacity to separate and sequester CO<sub>2</sub> emissions. Among the certified projects, highest rankings will be given to projects with the greatest separation and sequestration percentage of total CO<sub>2</sub> emissions.

#### Secondary Ranking Factor:

- Research partnership with an eligible educational institution as defined in § 48B(d)(4)(B).

#### Tertiary Ranking Factors:

- Presentation of other environmental, economic, or performance benefits.
- Higher plant efficiency.
- Geographic distribution of potential markets.
- The ratio of total synthesis gas capacity (as defined in section 3.03 of Notice 2014–81) to requested tax credit.
- Diversity of technology approaches and methods.

[26 CFR 601.106]: [Appeals Functions]  
(Also: §§ 601.202, 601.203; and Part I, § 7123(b))

## Rev. Proc. 2014–63

### SECTION 1. PURPOSE

This revenue procedure updates Revenue Procedure 2009–44, 2009–2 C.B. 462, incorporating provisions of Announcements 2008–111 and 2011–6 relating to mediation, to expand and clarify the types of examination and collection cases and issues in the Appeals administrative process that are eligible for mediation pursuant to section 7123(b)(1) of the Internal Revenue Code (Code).<sup>1</sup> Generally, mediation is available for examination cases and certain collection cases in which a limited number of legal and factual issues remain unresolved following settlement discussions in Appeals.

### SECTION 2. BACKGROUND

Section 7123(b)(1) of the Code, as enacted by section 3465 of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105–206, 112

Stat. 685, provides the statutory authority for the Appeals mediation program. Section 7123(b)(1)(A) provides that mediation will be available on any issue unresolved at the conclusion of Appeals procedures. Section 7123(b)(1)(B) provides that mediation will be available on any issue unresolved at the conclusion of unsuccessful attempts to enter into a closing agreement under section 7121 or a compromise under section 7122.

In announcements issued in 1995 and 1997, the IRS established procedures for taxpayers to request mediation in Coordination Examination Program cases assigned to Appeals Team Chiefs. See Announcement 95–86, 1995–44 I.R.B. 27, and Announcement 97–1, 1997–2 I.R.B. 62. In 1998, the IRS announced that it would begin a two-year pilot of an expanded mediation program that would encompass factual issues arising from examination, involving adjustments of \$1 million or more. See Announcement 98–99, 1998–2 C.B. 652. In 2001, that pilot program was extended for an additional year. See Announcement 2001–9, 2001–1 C.B. 357. On July 1, 2002, the IRS published Rev. Proc. 2002–44, 2002–2 C.B. 10, which superseded Announcement 98–99 and Announcement 2001–9, formally established the Appeals mediation program, and further expanded the types of cases for which mediation would be available, including cases where there was an unsuccessful attempt to enter into a closing agreement.

Under these programs, mediation was not available for any collection case or issue. In Announcement 2008–111, 2008–48 I.R.B. 1224, published December 1, 2008, Appeals established a two-year pilot program to extend mediation and arbitration to certain collection cases. Under the pilot program, certain offer-in-compromise (OIC) and Trust Fund Recovery Penalty (TFRP) cases in Appeals offices in select cities were eligible for mediation.

Rev. Proc. 2009–44 updated and superseded Rev. Proc. 2002–44 to again expand and clarify the types of cases that may be mediated in Appeals. In addition, Rev. Proc. 2009–44 provided that mediation may be available for OIC and TFRP

cases described in Announcement 2008–111. Announcement 2011–6, 2011–4 I.R.B. 433, published January 24, 2011, extended, without change, the mediation pilot for collection cases, through December 31, 2012.

This revenue procedure consolidates the procedures for mediation of examination cases and issues and collection cases and issues into a single revenue procedure. This revenue procedure also makes other changes to Rev. Proc. 2009–44, set forth in Section 3. Accordingly, this revenue procedure supersedes Rev. Proc. 2009–44 and Announcements 2008–111 and 2011–6.

### SECTION 3. SIGNIFICANT CHANGES TO REV. PROC. 2009–44 AND ANNOUNCEMENTS 2008–111 AND 2011–6

Significant changes to Rev. Proc. 2009–44 and Announcements 2008–111 and 2011–6 in this revenue procedure include:

.01 Section 4.04(7) clarifies that “whipsaw” issues include issues on a joint return where both spouses do not agree to participate in the same mediation proceeding or where a spouse is claiming innocent spouse treatment under section 6015.

.02 The mediation process for OIC and TFRP cases is no longer limited to taxpayers in selected cities.

.03 Section 5.01 incorporates from Announcement 2008–11 and Announcement 2011–6 the scope of OIC cases and issues for which mediation is available.

.04 Section 5.02 incorporates from Announcement 2008–11 and Announcement 2011–6 the scope of OIC cases and issues for which mediation is not available.

.05 Section 5.02(6) reflects that mediation is not available at this time for OIC cases that are worked solely at Appeals Campuses/Service Center sites.

.06 Section 6.01 incorporates from Announcement 2008–11 and Announcement 2011–6 the scope of TFRP cases and issues where mediation is available.

.07 Section 6.02 clarifies a circumstance in which mediation is not available in TFRP cases. Under this provision, mediation is not available to resolve issues concerning whether a TFRP is collectible.

<sup>1</sup>For purposes of this revenue procedure, the term “mediation” refers only to “non-binding mediation” as set forth in section 7123(b)(1).

Announcement 2008–11 and Announcement 2011–6 did not expressly exclude this issue from the list of TFRP issues where mediation would be available.

.08 Section 9.01 clarifies that a representative from the Appeals Office of Tax Policy and Procedure may participate in the negotiations to select an Appeals mediator.

#### **SECTION 4. SCOPE OF MEDIATION**

.01 *In general.* Mediation may be used to resolve issues in cases that qualify under this revenue procedure while they are under consideration by Appeals. This procedure may be used only after Appeals settlement discussions are unsuccessful and, generally, when all other issues are resolved but for the issue(s) for which mediation is being requested.

.02 *Authority.* The mediation procedure does not create any special authority for settlement by Appeals. During the mediation process, Appeals is still subject to the procedures that would be applicable if the issue were being considered via the standard Appeals process, including procedures in the Internal Revenue Manual and existing published guidance. The mediator does not have settlement authority and cannot render a decision regarding any issue in dispute.

.03 *Applicability.* Mediation is available for:

- (1) Legal issues;
- (2) Factual issues;
- (3) A Compliance Coordinated Issue (CCI) or an Appeals Coordinated Issue (ACI). (CCI and ACI issues are listed online at [www.irs.gov/appeals](http://www.irs.gov/appeals)). However, a CCI or ACI issue will not be eligible for mediation when the taxpayer has declined the opportunity to discuss the CCI or ACI issue with the Appeals CCI or ACI coordinator during the course of regular Appeals settlement discussions;
- (4) An early referral issue when an agreement is not reached, provided the early referral issue meets the requirements for mediation. For more information on early referrals, see section 2.16 of Rev. Proc. 99–28, 1999–2 C.B. 109, or the corresponding provision of any successor guidance;

(5) Issues for which a request for competent authority assistance has not yet

been filed. Taxpayers are cautioned that if they enter into a settlement with Appeals (including an Appeals settlement through the mediation process) and then request competent authority assistance, the competent authority will endeavor only to obtain a correlative adjustment with the treaty country and cannot take any actions that would otherwise change the settlement. See section 7.05 of Rev. Proc. 2006–54, 2006–2 C.B. 1035, or the corresponding provision of any successor guidance. If a taxpayer enters into the Appeals mediation program, the taxpayer may not request competent authority assistance until the mediation process is complete, unless the taxpayer demonstrates that a request for competent authority assistance is necessary to keep open a period of limitations in the treaty country. If so, competent authority assistance may be requested while mediation is pending. Where the requirements of this section have been satisfied and competent authority has been requested, and the taxpayer must notify the U.S. competent authority that the case is in mediation in Appeals, the taxpayer must notify the mediator that competent authority assistance has been requested and that the provisions of this section have been satisfied. The U.S. competent authority will suspend action on the case until mediation is completed;

(6) Unsuccessful attempts to enter into a closing agreement under section 7121;

(7) OIC issues, as provided in Section 5 of this revenue procedure; and

(8) TFRP issues, as provided in Section 6 of this revenue procedure.

.04 *Inapplicability.* Mediation is not available for:

(1) Cases in which mediation is not appropriate under either 5 U.S.C. § 572 or 5 U.S.C. § 575, which provide the general authority and guidelines for use of alternative dispute resolution in the administrative process;

(2) Issues designated for litigation;

(3) Issues docketed in any court (for the Chief Counsel mediation program involving issues in docketed cases, see Chief Counsel Directives Manual (CCDM) 35.5.5.4);

(4) Collection cases, except for certain OIC and TFRP cases as detailed in this revenue procedure;

(5) Issues for which mediation would not be consistent with sound tax administration, such as, but not limited to, issues governed by closing agreements, *res judicata*, or controlling Supreme Court precedent;

(6) Frivolous issues, such as, but not limited to, those identified in Rev. Proc. 2012–2, 2012–1 I.R.B. 92, or any subsequent revenue procedure;

(7) “Whipsaw” issues, or issues for which resolution with respect to one party might result in inconsistent treatment in the absence of participation of another party, such as, but not limited to, issues on a joint return where both spouses do not agree to participate in the same mediation proceeding or where one spouse is claiming innocent spouse treatment under section 6015;

(8) Cases in which the taxpayer did not act in good faith during settlement negotiations, such as, but not limited to, cases in which the taxpayer failed to timely respond to document requests or offers to settle, or failed to address arguments and precedents raised by Appeals;

(9) Cases that were previously mediated through a different alternative dispute resolution program within Appeals, such as Fast Track Settlement or Fast Track Mediation; and

(10) Issues that have been otherwise identified in subsequent guidance issued by the IRS as excluded from the mediation program.

#### **SECTION 5. OFFER-IN-COMPROMISE CASES**

.01 *In general.* Provided all facts are known by both parties, mediation in OIC cases is available for the following issues:

(1) The value of assets, including those held by a third party;

(2) The value of dissipated assets and what amount should be included in the overall determination of reasonable collection potential;

(3) A taxpayer’s proportionate interest in jointly held assets;

(4) Projections of future income based on calculations that do not involve current income;

(5) The calculations of a taxpayer’s future ability to pay when living expenses are shared with a non-liable person;

(6) Whether the taxpayer meets the criteria for deviating from national and/or local expense standards described in Internal Revenue Manual 5.15.1 and as set forth at <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/National-Standards-Food-Clothing-and-Other-Items>;

(7) Other factual determinations, such as whether a taxpayer's contributions into a retirement savings account are discretionary or mandatory as a condition of employment.

.02 *Exclusions*. Mediation is not available for OIC cases in which:

(1) The taxpayer has the ability to pay in full based on the unadjusted financial information submitted by the taxpayer, except when economic hardship exists;

(2) The taxpayer declines to amend or increase the offer without stating any specific disagreement with the valuations, figures, or methodology used by Appeals in determining reasonable collection potential;

(3) The disputed issue is explicitly addressed by IRS guidance or authority, including but not limited to regulations, published guidance, the Internal Revenue Manual, forms or instructions. For example, the instructions for Form 656 explicitly state that the IRS will not consider expenses for tuition for private schools, college expenses, charitable contributions, and other unsecured debt payments as part of the OIC expense calculation. Therefore, mediation is not available with respect to whether any of these expenses will be considered in evaluating the taxpayer's offer;

(4) An OIC is submitted as an alternative to collection in a Collection Due Process or equivalent hearing case;

(5) The issue of liability was previously determined by Appeals;

(6) The case was worked solely at an Appeals Campus/Service Center site; or

(7) Delegation Order 5-1 requires a level of approval higher than that of the Appeals Team Manager, such as certain Effective Tax Administration offers or those in which a determination is made by Appeals that acceptance is not in the best interest of the government (see Policy Statement P-5-100 and IRM 5.8.7, *Return, Terminate, Withdraw, and Reject Processing*).

## SECTION 6. TRUST FUND RECOVERY PENALTY CASES

.01 *In general*. Mediation is available in TFRP cases for the following issues:

(1) Whether the person was required to collect, truthfully account for, and pay over income, employment, or excise taxes;

(2) Whether a responsible person willfully failed to collect or truthfully account for and pay over income, employment, or excise taxes, or willfully attempted in any manner to evade or defeat the payment of such tax;

(3) Whether a taxpayer sufficiently designated a payment to the trust fund portion of the unpaid tax; and

(4) Whether the taxpayer provided sufficient corporate payroll tax records to establish that a corporate tax deposit was in the amount required by Treas. Reg. § 31.6302-1(c) and, therefore, was considered a designated payment to be applied to both the trust fund and non-trust fund portions of the employment taxes associated with that specific payroll. See IRM 5.7.4.3, *Investigation and Recommendation of the Trust Fund Recovery Penalty, Calculating the TFRP*.

.02 *Exclusions*. Mediation is not available to resolve issues concerning whether the penalty is collectible (see IRM 5.7.5, *Trust Fund Compliance, Collectibility Determination*).

## SECTION 7. APPLICATION PROCESS

.01 *Mediation is optional*. A taxpayer and Appeals may request mediation after consultation with each other. Mediation will not occur unless both parties agree to participate in the process.

.02 *Filing requirements*.

(1) *Where to file*. To request mediation, the taxpayer should send a written request to the appropriate Appeals Team Manager. The taxpayer should also send copies of the written request to the appropriate Appeals Area Director. (See Exhibit 1 of this revenue procedure for a listing of the addresses for each Appeals Area Director.)

(2) *Required information*. The mediation request should include:

(a) The taxpayer's name, taxpayer identification number, and address (and

the name, title, address, and telephone number of a different contact person, if applicable);

(b) The name of the Team Case Leader, Appeals Officer, or Settlement Officer;

(c) The taxable period(s) involved;

(d) A description of the issue for which mediation is being requested, including the dollar amount of the adjustment or, if applicable, the OIC in dispute; and

(e) A representation that the issue is not an excluded issue listed in Section 4, Section 5, or Section 6 above.

.03 *Review of mediation request*. The Appeals Team Manager will confer with the Appeals Office of Tax Policy and Procedure before deciding to approve or deny a mediation request. Generally, the Appeals Team Manager will respond to the taxpayer and the Team Case Leader or Appeals Officer within two weeks after the Appeals Team Manager receives the request for mediation.

(1) *Request approved*. If Appeals approves the mediation request, the Appeals Team Manager will inform the taxpayer and the Team Case Leader, Appeals Officer, or Settlement Officer and will schedule a conference or conference call at a mutually agreeable time that may include a representative from the Appeals Office of Tax Policy and Procedure to discuss the mediation process.

(2) *Request denied*. If Appeals denies the mediation request, the Appeals Team Manager will promptly inform the taxpayer and the Team Case Leader, Appeals Officer, or Settlement Officer. Although no formal appeal procedure exists for the denial of a mediation request, a taxpayer may request a conference with the Appeals Team Manager to discuss the denial. The denial of a mediation request is not subject to judicial review.

## SECTION 8. AGREEMENT TO MEDIATE

.01 *Written agreement*. Upon approval of the request to mediate, the taxpayer and Appeals will enter into a written agreement to mediate. See Exhibit 2 of this revenue procedure for a model agreement to mediate. A representative from the Appeals Office of Tax Policy and Procedure may participate in the negotiation. The agreement to mediate should:

- (a) Be as concise as possible;
- (b) Specify the issue(s) that the parties have agreed to mediate;
- (c) Contain an initial list of witnesses, attorneys, representatives, and observers for each party;
- (d) Identify the location and the proposed date of the mediation session; and
- (e) Prohibit *ex parte* contacts between the mediator and the parties.

The Appeals Team Manager, in consultation with the Team Case Leader or Appeals Officer, will sign the agreement to mediate on behalf of Appeals.

Generally, it is expected that the parties will complete and execute the agreement to mediate within three weeks after being notified that Appeals has approved the mediation request, and will proceed to mediation within 60 days after signing the written agreement to mediate. A taxpayer's inability to adhere to these timeframes, without reasonable cause, may result in Appeals' withdrawal from the mediation process.

*.02 Participants.* The parties to the mediation process will be the taxpayer and Appeals. Each party must have at least one participant with decision-making authority attending the mediation session. The written agreement to mediate will set forth the procedures by which the parties inform each other and the mediator of the participants in the mediation, and will set forth any limitation on the number, identity, or participation of such participants. The parties are encouraged to include, in addition to the required decision-makers, those persons with information and expertise that will be useful to the decision-makers and the mediator. To minimize the possibility of a last minute disqualification of the mediator, each party must notify the mediator and the other party of the participants on the party's mediation team no later than two weeks before the mediation. See Exhibit 3 of this revenue procedure for a model participants list.

*.03 Disclosure.* To participate in mediation under this revenue procedure, the taxpayer must consent under section 6103(c) to the disclosure by the IRS of the taxpayer's returns and return information incident to the mediation to the mediator and any participant or observer identified in the initial list of participants and observers and to any subsequent participants

and observers identified in writing by the parties. The taxpayer must execute a separate consent to disclose the taxpayer's return and return information. See Exhibit 4 of this revenue procedure for a model consent. If the agreement to mediate and consent are executed by a person pursuant to a power of attorney executed by the taxpayer, that power of attorney must clearly express the taxpayer's grant of authority to consent to disclose the taxpayer's returns and return information by the IRS to third parties, and a copy of that power of attorney must be attached to the agreement.

## SECTION 9. MEDIATION PROCESS

*.01 Selection of mediator and expenses.* An Appeals employee trained as a mediator will serve as the mediator under this revenue procedure. Appeals will pay all expenses associated with the use of an Appeals mediator. A representative from the Appeals Office of Tax Policy and Procedure may participate in the negotiations to select an Appeals mediator. Pursuant to IRM 8.26.5.4.4, the taxpayer and the Appeals Team Manager will select the Appeals mediator from a list of trained employees who, generally, will be located in the same Appeals office or geographical area as the taxpayer, but will not be a member of the same team that was assigned to the case. Other criteria for selecting a mediator from Appeals may include previous mediation experience or knowledge of industry practices.

Additionally, at the taxpayer's expense, the taxpayer may elect to use a co-mediator who is not employed by the IRS. The taxpayer and the Appeals Team Manager will select the non-IRS co-mediator from any local or national organization that provides a roster of neutrals. A representative from the Appeals Office of Tax Policy and Procedure may participate in the negotiations to select a non-IRS co-mediator. Criteria for selecting a non-IRS co-mediator may include: completion of mediation training; previous mediation experience; substantive knowledge of tax law; or knowledge of industry practices. An individual is not eligible to be a non-IRS co-mediator if the individual has an official, financial, or personal conflict of interest with respect to the parties, unless such interest is fully disclosed in

writing to the taxpayer and the Appeals Team Manager and they agree that the mediator may serve. See 5 U.S.C. § 573.

All mediators must be neutral. Mediators serve as facilitators, assist in defining the issues, and promote settlement negotiations between the parties. Mediators will inform and discuss with the parties the rules and procedures pertaining to the mediation process. Mediators do not have settlement authority and cannot render a decision regarding any issue in dispute. The parties will continue to have settlement authority for all issues considered under the mediation process.

*.02 Appeals personnel as mediators and conflict statement.* To address the inherent conflict arising from the Appeals mediator's status as an employee of the IRS, the Appeals mediator will provide to the taxpayer a statement confirming their proposed service as a mediator and stating that (i) they are a current employee of the IRS, (ii) a conflict results from the continued status as an IRS employee, and (iii) this conflict will not interfere in the mediator's ability to facilitate the case impartially. This statement will also be included in the written agreement to mediate.

## SECTION 10. MEDIATION SESSION

*.01 Discussion summaries.* Each party will prepare a discussion summary of the issues (including the party's arguments in favor of the party's position) for consideration by the mediator. The discussion summaries should be submitted to the mediator and the other party no later than two weeks before the mediation session is scheduled to occur.

*.02 Confidentiality.* The mediation process is confidential. Therefore, all information concerning any dispute resolution communication is confidential and may not be disclosed by any party, participant, observer, or mediator except as provided by statute, such as in section 6103 of the Internal Revenue Code, relating to confidentiality of taxpayer information, and 5 U.S.C. § 574, relating to confidentiality in federal administrative alternative dispute resolution proceedings. A dispute resolution communication includes all oral or written communications prepared for the purposes of a dispute resolution proceeding. See 5 U.S.C. § 571(5).

.03 *Ex Parte Contacts With Mediator Prohibited.* To ensure that one party is not in a position to exert undue influence on the mediator, *ex parte* contacts with the mediator outside the mediation session are prohibited.

The prohibition against *ex parte* communications with the mediator is intended to apply only to unsolicited contacts from one of the parties with the mediator that occur outside the mediation session. The prohibition prevents the mediator from receiving information or evidence from one party that the other party is unaware of and is unable to respond to or rebut. This provision does not prevent the mediator from contacting a party outside the mediation session, or a party from answering a question or request posed by the mediator outside of the mediation session provided that the information furnished to the mediator is made available to both parties so that no party is unaware of or unable to respond to or rebut the information.

.04 *Withdrawal.* Either party may withdraw from the process at any time before reaching a settlement of the issue(s) being mediated by notifying the other party and the mediator in writing.

## SECTION 11. POST-SESSION PROCEDURES

.01 *Mediator's report.* At the conclusion of the mediation process, the mediator will prepare a brief written report and submit a copy to each party. See Exhibit 5 of this revenue procedure for a model mediator's report.

.02 *Closing procedures.* If the parties reach an agreement on all or some of the issues through the mediation process, Appeals will use established procedures to close the case, including preparation of a Form 906, *Closing Agreement on Final Determination Covering Specific Matters*. See Statement of Procedural Rules, 26 C.F.R. § 601.106, Delegation Order 236 (Rev. 3) (addressing settlement authority for issues in a Coordinated Examination Program), or § 7122(b) (regarding OIC cases).

If the parties do not reach an agreement on an issue being mediated, Appeals will not reconsider the mediated issue(s), and a statutory notice of deficiency will be issued with respect to all unagreed issues, or

the case will be processed using established closing procedures if there is no deficiency.

.03 *Special closing procedures for certain offer-in-compromise cases.* For OIC cases with liabilities of \$50,000 or more, any settlement or agreement reached through mediation must be reviewed by the Office of Chief Counsel pursuant to section 7122(b) before being finalized. When review is required, Appeals will forward the case to Area Counsel for an opinion as to the legal sufficiency of the offer. See IRM 5.8.8, *Offer in Compromise, Acceptance Processing*, and IRM 8.23.4, *Appeals Function, Offer in Compromise, Acceptance, Rejection Sustention, and Withdrawal Procedures for non-Collection Due Process (CDP) Offers*.

## SECTION 12. GENERAL PROVISIONS

01. *Communication with IRS and Counsel Permitted.* Except as described in Section 10.03 with respect to mediators, Appeals has the discretion to communicate with the IRS Office of Chief Counsel, the originating IRS function, or both, in preparation for or during the mediation session. See Rev. Proc. 2012-18, 2012-10 I.R.B. 455. Appeals also has the discretion to have Counsel, the originating IRS function, or both, participate in the mediation proceeding to present the position and views of the IRS, and to rebut representations and arguments made by the taxpayer. Counsel's participation in this regard is separate from the review function outlined in Section 11.03 of this revenue procedure.

.02 *Employees.* IRS employees who participate in or observe the mediation process in any way, and any person under contract to the IRS pursuant to section 6103(n) that the IRS invites to participate or observe, will be subject to the confidentiality and disclosure provisions of the Internal Revenue Code, including sections 6103, 7213, and 7431.

.03 *Section 7214(a)(8) disclosure.* Under section 7214(a)(8), IRS employees must report information concerning violations of any revenue law to the Secretary. The agreement to mediate will state this requirement and the parties will acknowledge this duty.

.04 *Disqualification of the non-IRS co-mediator.* The non-IRS co-mediator will be disqualified from representing the taxpayer in any pending or future action that involves the transactions or issues that are the particular subject matter of the mediation. This disqualification extends to representing any other parties involved in the transactions or issues that are the particular subject matter of the mediation.

(a) Disqualification of co-mediator's firm. Moreover, except as provided in section 12.04(b), the co-mediator's firm will be disqualified from representing the taxpayer or any other parties involved in the transactions or issues that are the particular subject matter of the mediation in any action that involves the transactions or issues that are the particular subject matter of the mediation.

(b) Exception to disqualification of co-mediator's firm. The co-mediator's firm will not be disqualified from representing the taxpayer or any other parties in any future action that involves the same transactions or issues that are the particular subject matter of the mediation, provided that (i) the co-mediator disclosed the potential of such representation to the parties to the mediation conducted by the co-mediator prior to the parties' acceptance of the co-mediator, (ii) such action relates to a taxable year that is different from the taxable year that is the subject matter of the mediation, (iii) the firm's internal controls preclude the co-mediator from any form of participation in the matter, and (iv) the firm does not apportion to the co-mediator any part of the fee therefrom. In the event the co-mediator has been selected prior to the co-mediator learning of the identity of one or more of the parties involved in the mediation, requirement (i) will be deemed satisfied if the co-mediator promptly notifies the parties of the potential representation.

Although the co-mediator is prohibited from receiving a direct allocation of the fee from the taxpayer (or other party) in the matter for which the internal controls are in effect, the co-mediator will not be prohibited from receiving a salary, partnership share, or corporate distribution established by prior independent agreement. The co-mediator and

his or her firm are not disqualified from representing the taxpayer or any other parties involved in the mediation in any matters unrelated to the transactions or issues that are the particular subject matter of the mediation.

This section 12.04 only applies to representations on matters before the IRS.

The provisions of this section 12.04 are in addition to any other applicable disqualification provisions, including, for example, the rules of the United States Tax Court and applicable canons of ethics.

.05. *Recording of mediation session.* The parties to the mediation may not make a stenographic record, audio or video tape recording, or other transcript of the mediation session.

.06 *Use as precedent.* A settlement reached by the parties through mediation will not be binding on the parties (or be otherwise controlling) for taxable years not covered by the agreement. Except as provided in the agreement, no party may use such settlement as precedent.

### SECTION 13. EFFECTIVE DATE

This procedure is effective December 29, 2014, the date this revenue procedure is published in the Internal Revenue Bulletin.

### SECTION 14. EFFECT ON OTHER DOCUMENTS

Revenue Procedure 2009–44 and Announcements 2008–111 and 2011–6 are superseded.

### DRAFTING INFORMATION

The principal authors of this revenue procedure are Debra Kohn, Office of Chief Counsel, Procedure and Administration, Charmaine Osbin, Office of Appeals, Tax Policy and Procedure for non-collection cases, and Dale Veer, Office of Appeals, Tax Policy and Procedure for OIC and TFRP cases. For further information regarding this revenue procedure, contact Ms. Kohn at (202) 317-3600, Ms. Osbin at (281) 721-7275, or Mr. Veer at (651) 726-7430 (not toll-free calls).

### Exhibit 1: Addresses for Appeals Area Directors

Director, Area 1 IRS Appeals 701 Market Street, Suite 2200 Philadelphia, PA 19106-1538
Director, Area 2 – Collection IRS Appeals 10715 David Taylor Drive Charlotte, NC 28262
Director, Area 3 IRS Appeals 810 Broadway, Suite 300 Nashville, TN 37203-3810
Director, Area 4 IRS Appeals 701 Market St., Suite 2200 Philadelphia, PA 19106-1538
Director, Area 5 – Campus IRS Appeals 5000 Corporate Drive Holtsville, NY 11742-2002
Director, Area 6 – Campus IRS Appeals 3333 Getwell Road, Stop 86E Memphis, TN 38118-7733
Director, Area 7 IRS Appeals 55 North Robinson Oklahoma City, OK 73102
Director, Area 8 IRS Appeals 100 First Street, Suite 2000 San Francisco, CA 94105
Director, Area 9 IRS Appeals 6377 Riverside Avenue Riverside, CA 92506-3124
Director, Area 10 – Campus IRS Appeals 7125 Industrial Road Florence, KY 41042-2907

Director, Area 11 – Collection IRS Appeals 100 First Street, Suite 2000 San Francisco, CA 94105
Director, Area 12 – Campus IRS Appeals 2525 Capitol Street Fresno, CA 93721-2227
Director, Area 13 – Collection IRS Appeals 810 Broadway, Suite 300 Nashville, TN 37203-3810
Director, Appeals Team Case Leaders IRS Appeals 300 North Los Angeles Street, Federal Building Los Angeles, CA 90012-3308
Director, Specialty Operations – Domestic IRS Appeals 290 Broadway, 11th Floor New York, NY 10007
Director, Specialty Operations – International IRS Appeals 300 Pearl Street Buffalo, NY 14202

### Exhibit 2: Model Agreement to Mediate

#### 1. The Mediation<sup>2</sup> Process.

The mediation will be an extension of the Appeals process to help [NAME OF TAXPAYER] and Internal Revenue Service (IRS)—Appeals (the PARTIES) reach a negotiated settlement of the issues to be mediated. See (2) below for the participants in the mediation process. To accomplish this goal, the mediator will act as a facilitator, assist in defining the issues, and promote settlement negotiations between the PARTIES. The mediator will inform and discuss with the PARTIES the rules and procedures pertaining to the mediation process. The mediator will not have settlement authority and will not ren-

<sup>2</sup>For purposes of this agreement, the term “mediation” refers only to “non-binding mediation” as set forth in section 7123(b)(1).

der a decision regarding any issue in dispute. The PARTIES will continue to have settlement authority for all issues considered under the mediation process.

## 2. Nature of Process, Participants, Withdrawal.

(a) The mediation process is optional.

(b) Each PARTY must have at least one participant attending the mediation session with decision-making authority. No later than two weeks before the mediation, each PARTY will submit to the other PARTY and the mediator a list of the participants who will attend the mediation session on behalf of or at the request of the PARTY, including a designation of the person with decision-making authority who will represent the PARTY at the mediation session. Each PARTY's list of participants will contain the participant's name, the participant's position with the PARTY or other affiliation (e.g., a member of XYZ law firm, counsel to the taxpayer), and the participant's address, [optional: telephone number, and fax number]. All participants attending the mediation on behalf of or at the request of a PARTY will be listed on the PARTY's list of participants, including witnesses, consultants, and attorneys.

[Insert limitations on the number or types of participants, if any.]

(c) Either PARTY may withdraw from the process at any time prior to reaching a settlement of the issues to be mediated by notifying the other PARTY and the mediator in writing.

## 3. Selection of Mediator and Costs.

(a) IRS Appeals will pay the costs associated with the Appeals mediator. The taxpayer will pay the cost of a non-IRS co-mediator.

(b) The taxpayer, by signing this agreement, acknowledges that (i) the Appeals mediator is a current employee of the IRS, (ii) a conflict results from his or her continued status as an IRS employee, and (iii) this conflict will not interfere with the mediator's ability to facilitate the case impartially.

## 4. Issues to be Mediated.

The mediation session will encompass the following issues in the IRS audit of the

federal tax returns of [NAME OF TAXPAYER] for tax year(s)\_\_\_\_\_:

- (a) Issue #1
- (b) Issue #2

## 5. Submission of Materials.

Each PARTY will present to the mediator a separate written summation not to exceed XX pages (exclusive of exhibits consisting of pre-existing documents and reports) regarding each issue. The mediator will have the right to ask either PARTY for additional information before the mediation session if deemed necessary for a full understanding of the issues to be mediated. Each PARTY will simultaneously submit to the other PARTY a copy of any submission to the mediator.

## 6. Place of Mediation.

The PARTIES will attempt to select a site at or near the mediator's office, [NAME OF TAXPAYER]'s office, or an Appeals office.

## 7. Proposed Schedule.

Subject to the approval of the mediator, the mediation session will be conducted according to the following schedule:

Submission of Materials to Mediator: **A DATE NO LATER THAN TWO WEEKS BEFORE THE DATE OF MEDIATION SESSION**

Mediation Session: **By MONTH DAY, YEAR and TIME**

## 8. Confidentiality.

IRS employees who participate in or observe the mediation process in any way, and any person under contract to the IRS pursuant to § 6103(n) of the Internal Revenue Code (including the mediator) that the IRS invites to participate or observe, will be subject to the confidentiality and disclosure provisions of the Internal Revenue Code, including §§ 6103, 7213 and 7431. See also 5 U.S.C § 574.

## 9. Ex Parte Contacts Prohibited.

There will be no *ex parte* contacts from a PARTY to the mediator outside the mediation session. This provision is not in-

tended to prevent the mediator from contacting a PARTY, or a PARTY from responding to the mediator's request for information.

## 10. Section 7214(a)(8) Disclosure.

The PARTIES to this agreement acknowledge that IRS employees involved in this mediation are bound by the § 7214(a)(8) disclosure requirements concerning violations of any revenue law.

## 11. No Record.

There will be no stenographic record, audio or video tape recording, or other transcript of the mediation session(s).

## 12. Report by Mediator.

At the conclusion of the mediation session, the mediator will issue a brief report to the PARTIES identifying each issue described in section 4, above, and whether the PARTIES either agreed to resolve or did not resolve the issue.

## 13. Appeals Procedures Apply.

If the mediation process enables the PARTIES to reach agreement on the issues, Appeals will use established procedures to close the case. Delegation Order 4-24, IRM 1.2.43.22 (addressing settlement authority for issues in a Coordinated Examination Program) or § 7122(b) (regarding offer-in-compromise cases) may apply to settlements resulting from the mediation process. Appeals will not reconsider the mediated issue(s), and a statutory notice of deficiency will be issued with respect to all unagreed issues (or the case will be processed using established closing procedures if there is no deficiency).

## 14. Precedential Use.

A settlement reached by the PARTIES through mediation will not be binding on the PARTIES (or be otherwise controlling) for taxable years not covered by the agreement. Except as provided in the agreement, no PARTY may use such settlement as precedent.

INTERNAL REVENUE SERVICE, APPEALS

By: \_\_\_\_\_  
Name  
Appeals Team Manager

Date: \_\_\_\_\_

NAME OF TAXPAYER

By: \_\_\_\_\_  
Name  
Title

Date: \_\_\_\_\_

Exhibit 3:

**Model Mediation Participants List**

Case Name: \_\_\_\_\_

Submitted By: \_\_\_\_\_

Date: \_\_\_\_\_

Please list below all participants attending the mediation, including witnesses, consultants, and attorneys. This form must be sent to the other PARTY and to the mediator(s) no later than two weeks before the mediation session. Insert an **asterisk (\*)** before the name of the person who has decision-making authority at the mediation session:

**NAME, POSITION AND ADDRESS  
(TELEPHONE OR FAX NUMBER OPTIONAL)**

Exhibit 4: **Consent to Disclose Tax Information**

Pursuant to section 6103(c) of the Internal Revenue Code of 1986 (as amended), I hereby consent to the disclosure of return information (as defined in section 6103(b)(2)) relating to the mediation session between \_\_\_\_\_ (Taxpayer) and the Commissioner of Internal Revenue to be held on \_\_\_\_\_ (date), as follows:

The Internal Revenue Service may disclose the taxpayer's return and return information incident to the mediation to the mediator and any participants or observers identified in the initial list of participants and to any subsequent participants and observers identified in writing by the parties.

This consent relates to the mediation session that is the subject of an agreement to mediate dated \_\_\_\_\_. I am aware that in the absence of this authorization, the return and return information of \_\_\_\_\_ (Taxpayer) is confidential and may not be disclosed except as authorized by the Internal Revenue Code.

I certify that I have the authority to execute this consent on behalf of Taxpayer.

Taxpayer Name: \_\_\_\_\_

Taxpayer Identification Number: \_\_\_\_\_

Taxpayer Address: \_\_\_\_\_

By: **[Name of Individual Executing Consent]** \_\_\_\_\_

Title: **[Title of Individual Executing Consent]** \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Exhibit 5: **Model Mediator's Report**

The parties below agreed to mediate their dispute and attended a mediation session on **MONTH DAY, YEAR** in an attempt to settle the following issue(s):

ISSUE:  
SETTLEMENT: [ ] Yes [ ] No [ ] Partial

Proposed Adjustment Amount: Amount Sustained:

ISSUE:  
SETTLEMENT: [ ] Yes [ ] No [ ] Partial

Proposed Adjustment Amount: Amount Sustained:

Settlement documents will be prepared under established Appeals procedures.

DATED this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
/s/ Mediator

\_\_\_\_\_  
/s/ Party

\_\_\_\_\_  
/s/ Party

26 CFR 1.6049.00–00: Returns Relating to Payments of Interest  
(Also: 1.3406.07–00 Exceptions to Backup Withholding)

## Rev. Proc. 2014–64

### SECTION 1. PURPOSE

This revenue procedure lists, in Section 3, the countries with which the United States has in effect an income tax or other convention or bilateral agreement relating to the exchange of information within the meaning of section 6103(k)(4) of the Internal Revenue Code pursuant to which the United States agrees to provide, as well as receive, information and under which the competent authority is the Secretary of the Treasury or his delegate for purposes of the reporting required of payors under §§ 1.6049–4(b)(5) and 1.6049–8(a) of the Income Tax Regulations. This revenue procedure also lists, in Section 4, the countries with which the Treasury Department and the IRS have determined that it is appropriate to have an automatic exchange relationship with respect to the information collected under §§ 1.6049–4(b)(5) and 1.6049–8. This revenue procedure updates Rev. Proc. 2012–24, 2012–20 I.R.B. 913, effective for interest paid on or after January 1, 2015, by adding additional countries to the lists set forth in Sections 3 and 4.

### SECTION 2. BACKGROUND

Sections 1.6049–4(b)(5) and 1.6049–8(a), as revised by TD 9584, require the reporting of certain deposit interest paid to nonresident alien individuals on or after January 1, 2013. Section 1.6049–4(b)(5) provides that in the case of interest aggregating \$10 or more paid to a nonresident alien individual (as defined in section 7701(b)(1)(B)) that is reportable under § 1.6049–8(a), the payor is required to make an information return on Form 1042–S for the calendar year in which the interest is paid. Interest that is reportable under § 1.6049–8(a) is interest described in section 871(i)(2)(A) that relates to a deposit maintained at an office within the United States and that is paid to a resident of a country that is identified, in an applicable revenue procedure (see § 601.601(d)(2)) as of December 31 prior to the calendar year in which the interest is paid, as a country with which the United States has in effect an income tax or other convention or bilateral agreement relating to the exchange of tax information within the meaning of section 6103(k)(4), under which the competent authority is the Secretary of the Treasury or his delegate and the United States agrees to provide, as well as receive, information. Rev. Proc. 2012–24 was published contemporaneously with the publication of TD 9584 to identify those countries with which the United States has in force an information exchange agreement, such that interest

paid to residents of such countries must be reported by payors to the extent required under §§ 1.6049–8(a) and 1.6049–4(b)(5). This revenue procedure updates Rev. Proc. 2012–24 and will be updated by subsequent revenue procedures as appropriate. As noted in the preamble to the regulations and Rev. Proc. 2012–24, the IRS is not required to exchange information with another country, even if an information exchange agreement is in effect, if there are concerns about confidentiality, safeguarding of data exchanged, the use of the information, or other factors that would make the exchange of information inappropriate.

### SECTION 3. COUNTRIES OF RESIDENCE WITH RESPECT TO WHICH THE REPORTING REQUIREMENT APPLIES

The following are the countries with which the United States has in effect an income tax or other convention or bilateral agreement relating to the exchange of tax information within the meaning of section 6103(k)(4) pursuant to which the United States agrees to provide, as well as receive, information and under which the competent authority is the Secretary of the Treasury or his delegate:

Antigua & Barbuda  
Aruba  
Australia  
Austria  
Azerbaijan  
Bangladesh

Barbados  
Belgium  
Bermuda  
Brazil  
British Virgin Islands  
Bulgaria  
Canada  
Cayman Islands  
China  
Colombia  
Costa Rica  
Croatia  
Curacao  
Cyprus  
Czech Republic  
Denmark  
Dominica  
Dominican Republic  
Egypt  
Estonia  
Finland  
France  
Germany  
Gibraltar  
Greece  
Grenada  
Guernsey  
Guyana  
Honduras  
Hong Kong  
Hungary  
Iceland  
India  
Indonesia  
Ireland  
Isle of Man  
Israel  
Italy  
Jamaica  
Japan  
Jersey  
Kazakhstan  
Korea (South)  
Latvia  
Liechtenstein

Lithuania  
Luxembourg  
Malta  
Marshall Islands  
Mauritius  
Mexico  
Monaco  
Morocco  
Netherlands  
Netherlands island territories: Bonaire,  
Saba, and St. Eustatius  
New Zealand  
Norway  
Pakistan  
Panama  
Peru  
Philippines  
Poland  
Portugal  
Romania  
Russian Federation  
Slovak Republic  
Slovenia  
South Africa  
Spain  
Sri Lanka  
St. Maarten (Dutch part)  
Sweden  
Switzerland  
Thailand  
Trinidad and Tobago  
Tunisia  
Turkey  
Ukraine  
United Kingdom  
Venezuela

**SECTION 4. COUNTRIES WITH WHICH TREASURY AND THE IRS HAVE DETERMINED THAT AUTOMATIC EXCHANGE OF DEPOSIT INTEREST INFORMATION IS APPROPRIATE**

The following list identifies the countries with which the automatic exchange of the

information collected under §§ 1.6049–4(b)(5) and 1.6049–8 has been determined by the Treasury Department and the IRS to be appropriate:

Australia  
Canada  
Denmark  
Finland  
France  
Germany  
Guernsey  
Ireland  
Isle of Man  
Italy  
Jersey  
Malta  
Mauritius  
Mexico  
Netherlands  
Norway  
Spain  
United Kingdom

**SECTION 5. EFFECT ON OTHER DOCUMENTS**

Revenue Procedure 2012–24, 2012–20 I.R.B. 913, is superseded with respect to interest paid on or after January 1, 2015.

**SECTION 6. EFFECTIVE DATE**

This revenue procedure is effective for interest paid on or after January 1, 2015.

**SECTION 7. DRAFTING INFORMATION**

The principal author of this revenue procedure is Leni C. Perkins of the Office of Associate Chief Counsel (International). For further information regarding this revenue procedure contact Ms. Perkins on (202) 317-6942 (not a toll free number).

# 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 sub-

stance 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 2014–27 through 2014–53

### Announcements:

2014-2, 2014-28 I.R.B. 120  
2014-28, 2014-34 I.R.B. 391  
2014-29, 2014-35 I.R.B. 452  
2014-31, 2014-46 I.R.B. 827  
2014-32, 2014-48 I.R.B. 907  
2014-33, 2014-49 I.R.B. 916  
2014-34, 2014-51 I.R.B. 949  
2014-36, 2014-51 I.R.B. 950  
2014-37, 2014-51 I.R.B. 951  
2014-38, 2014-51 I.R.B. 951  
2014-39, 2014-51 I.R.B. 953  
2014-40, 2014-51 I.R.B. 953  
2014-41, 2014-52 I.R.B. 979

### Notices:

2014-40, 2014-27 I.R.B. 100  
2014-41, 2014-27 I.R.B. 97  
2014-42, 2014-34 I.R.B. 387  
2014-43, 2014-31 I.R.B. 249  
2014-44, 2014-32 I.R.B. 270  
2014-45, 2014-34 I.R.B. 388  
2014-46, 2014-36 I.R.B. 520  
2014-47, 2014-36 I.R.B. 522  
2014-48, 2014-36 I.R.B. 523  
2014-49, 2014-41 I.R.B. 665  
2014-50, 2014-40 I.R.B. 590  
2014-51, 2014-40 I.R.B. 594  
2014-52, 2014-42 I.R.B. 712  
2014-53, 2014-43 I.R.B. 739  
2014-54, 2014-41 I.R.B. 670  
2014-55, 2014-41 I.R.B. 672  
2014-56, 2014-41 I.R.B. 674  
2014-57, 2014-42 I.R.B. 723  
2014-58, 2014-44 I.R.B. 746  
2014-59, 2014-44 I.R.B. 747  
2014-60, 2014-43 I.R.B. 743  
2014-61, 2014-43 I.R.B. 746  
2014-62, 2014-44 I.R.B. 749  
2014-63, 2014-45 I.R.B. 759  
2014-64, 2014-45 I.R.B. 759  
2014-65, 2014-47 I.R.B. 842  
2014-66, 2014-46 I.R.B. 820  
2014-67, 2014-46 I.R.B. 822  
2014-68, 2014-47 I.R.B. 842  
2014-69, 2014-48 I.R.B. 903  
2014-70, 2014-48 I.R.B. 905  
2014-71, 2014-49 I.R.B. 912  
2014-73, 2014-49 I.R.B. 912  
2014-74, 2014-50 I.R.B. 937  
2014-76, 2014-50 I.R.B. 946  
2014-77, 2014-52 I.R.B. 979  
2014-78, 2014-53 I.R.B. 998  
2014-79, 2014-53 I.R.B. 1001  
2014-81, 2014-53 I.R.B. 1001

## Proposed Regulations:

REG-151416-06, 2014-47 I.R.B. 870  
REG-104579-13, 2014-33 I.R.B. 370  
REG-120756-13, 2014-31 I.R.B. 252  
REG-105067-14, 2014-34 I.R.B. 391  
REG-110948-14, 2014-30 I.R.B. 239  
REG-121542-14, 2014-28 I.R.B. 119  
REG-107012-14, 2014-33 I.R.B. 371  
REG-123286-14, 2014-33 I.R.B. 377  
REG-209459-78, 2014-31 I.R.B. 253  
REG-129507-14, 2014-38 I.R.B. 561  
REG-129786-14, 2014-38 I.R.B. 562  
REG-105739-11, 2014-41 I.R.B. 704  
REG-136676-13, 2014-45 I.R.B. 814

## Revenue Procedures:

2014-26, 2014-27 I.R.B. 26  
2014-27, 2014-27 I.R.B. 41  
2014-29, 2014-28 I.R.B. 105  
2014-37, 2014-33 I.R.B. 363  
2014-38, 2014-29 I.R.B. 132  
2014-39, 2014-29 I.R.B. 151  
2014-40, 2014-30 I.R.B. 229  
2014-41, 2014-33 I.R.B. 364  
2014-42, 2014-29 I.R.B. 193  
2014-43, 2014-32 I.R.B. 273  
2014-44, 2014-32 I.R.B. 274  
2014-45, 2014-34 I.R.B. 388  
2014-46, 2014-33 I.R.B. 367  
2014-47, 2014-35 I.R.B. 393  
2014-48, 2014-36 I.R.B. 527  
2014-49, 2014-37 I.R.B. 535  
2014-50, 2014-37 I.R.B. 540  
2014-51, 2014-37 I.R.B. 543  
2014-52, 2014-38 I.R.B. 560  
2014-53, 2014-39 I.R.B. 573  
2014-54, 2014-41 I.R.B. 675  
2014-55, 2014-44 I.R.B. 753  
2014-56, 2014-45 I.R.B. 762  
2014-57, 2014-45 I.R.B. 777  
2014-58, 2014-45 I.R.B. 793  
2014-59, 2014-47 I.R.B. 843  
2014-60, 2014-47 I.R.B. 854  
2014-61, 2014-47 I.R.B. 860  
2014-62, 2014-50 I.R.B. 948  
2014-63, 2014-53 I.R.B. 1014  
2014-64, 2014-53 I.R.B. 1022

## Revenue Rulings:

2014-14, 2014-27 I.R.B. 12  
2014-19, 2014-32 I.R.B. 266  
2014-20, 2014-28 I.R.B. 101  
2014-21, 2014-34 I.R.B. 381  
2014-22, 2014-37 I.R.B. 523  
2014-23, 2014-40 I.R.B. 575  
2014-24, 2014-37 I.R.B. 529  
2014-25, 2014-40 I.R.B. 574  
2014-26, 2014-41 I.R.B. 663

## Revenue Rulings:—Continued

2014-26, 2014-41 I.R.B. 663  
2014-27, 2014-47 I.R.B. 832  
2014-28, 2014-45 I.R.B. 756  
2014-29, 2014-52 I.R.B. 960  
2014-30, 2014-49 I.R.B. 910  
2014-31, 2014-50 I.R.B. 935  
2014-32, 2014-50 I.R.B. 917  
2014-33, 2014-52 I.R.B. 957  
2014-34, 2014-52 I.R.B. 954

## Treasury Decisions:

9664, 2014-32 I.R.B. 254  
9668, 2014-27 I.R.B. 1  
9669, 2014-28 I.R.B. 103  
9670, 2014-29 I.R.B. 121  
9671, 2014-29 I.R.B. 124  
9672, 2014-30 I.R.B. 196  
9673, 2014-30 I.R.B. 212  
9674, 2014-30 I.R.B. 225  
9675, 2014-31 I.R.B. 242  
9676, 2014-32 I.R.B. 260  
9677, 2014-31 I.R.B. 241  
9678, 2014-32 I.R.B. 262  
9679, 2014-32 I.R.B. 267  
9680, 2014-32 I.R.B. 254  
9681, 2014-33 I.R.B. 340  
9682, 2014-33 I.R.B. 342  
9683, 2014-33 I.R.B. 330  
9684, 2014-33 I.R.B. 345  
9685, 2014-34 I.R.B. 379  
9686, 2014-34 I.R.B. 382  
9687, 2014-36 I.R.B. 486  
9688, 2014-36 I.R.B. 482  
9689, 2014-36 I.R.B. 456  
9690, 2014-38 I.R.B. 548  
9691, 2014-38 I.R.B. 547  
9692, 2014-40 I.R.B. 574  
9693, 2014-41 I.R.B. 596  
9694, 2014-41 I.R.B. 626  
9695, 2014-42 I.R.B. 707  
9696, 2014-43 I.R.B. 727  
9697, 2014-43 I.R.B. 729  
9698, 2014-47 I.R.B. 836  
9699, 2014-46 I.R.B. 818  
9700, 2014-48 I.R.B. 897  
9701, 2014-49 I.R.B. 908  
9702, 2014-48 I.R.B. 899  
9704, 2014-50 I.R.B. 922  
9706, 2014-53 I.R.B. 980

<sup>1</sup>A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2014–01 through 2014–26 is in Internal Revenue Bulletin 2014–26, dated June 30, 2014.

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

Bulletins 2014–27 through 2014–53

### Announcements:

#### 2008-11

Superseded by  
Rev. Proc. 2014-63, 2014-53 I.R.B. 1014

#### 2008-87

Supplemented by  
Ann. 2014-33, 2014-49 I.R.B. 916

#### 2011-6

Superseded by  
Rev. Proc. 2014-63, 2014-53 I.R.B. 1014

#### 2012-11

Supplemented by  
Ann. 2014-2, 2014-28 I.R.B. 120

#### 2013-11

Supplemented by  
Ann. 2014-2, 2014-28 I.R.B. 120

#### 2013-12

Supplemented by  
Ann. 2014-33, 2014-49 I.R.B. 916

#### 2010-41

Obsolated by  
Rev. Proc. 2014-43, 2014-32 I.R.B. 273

### Proposed Regulations:

#### 84-102

Obsolated by  
REG-151416-06 2014-47 I.R.B. 870

### Revenue Procedures:

#### 1981-38

Superseded by  
Rev. Proc. 2014-42, 2014-29 I.R.B. 193

#### 93-37

Modified and Superseded by  
Rev. Proc. 2014-43, 2014-32 I.R.B. 273

#### 1981-38

Modified by  
Rev. Proc. 2014-42, 2014-29 I.R.B. 193

#### 2000-12

Superseded by  
Rev. Proc. 2014-39, 2014-29 I.R.B. 151

#### 2002-23

Superseded by  
Rev. Proc. 2014-55, 2014-44 I.R.B. 753

### Revenue Procedures—Continued:

#### 2002-55

Revoked by  
Rev. Proc. 2014-39, 2014-29 I.R.B. 151

#### 2003-64

Superseded by  
Rev. Proc. 2014-47, 2014-35 I.R.B. 393

#### 2003-75

Superseded by  
Rev. Proc. 2014-55, 2014-44 I.R.B. 753

#### 2004-21

Superseded by  
Rev. Proc. 2014-47, 2014-35 I.R.B. 393

#### 2005-77

Superseded by  
Rev. Proc. 2014-47, 2014-35 I.R.B. 393

#### 2009-44

Superseded by  
Rev. Proc. 2014-63, 2014-53 I.R.B. 1014

#### 2011-14

Modified by  
Rev. Proc. 2014-48, 2014-36 I.R.B. 527

#### 2011-14

Modified by  
Rev. Proc. 2014-54, 2014-41 I.R.B. 675

#### 2011-16

Superseded by  
Rev. Proc. 2014-51, 2014-37 I.R.B. 543

#### 2011-16

Modified by  
Rev. Proc. 2014-51, 2014-51 I.R.B. 543

#### 2012-24

Superseded by  
Rev. Proc. 2014-64, 2014-53 I.R.B. 1022

#### 2012-38

Superseded by  
Rev. Proc. 2014-27, 2014-27 I.R.B. 26

#### 2012-46

Superseded by  
Rev. Proc. 2014-26, 2014-27 I.R.B. 41

#### 2014-4

Amplified by  
Rev. Proc. 2014-40, 2014-30 I.R.B. 229

#### 2014-4

Modified by  
Rev. Proc. 2014-41, 2014-41 I.R.B. 675

### Revenue Procedures—Continued:

#### 2014-5

Amplified by  
Rev. Proc. 2014-40, 2014-30 I.R.B. 229

#### 2014-8

Amplified by  
Rev. Proc. 2014-40, 2014-30 I.R.B. 229

#### 2014-9

Amplified by  
Rev. Proc. 2014-40, 2014-30 I.R.B. 229

#### 2014-10

Amplified by  
Rev. Proc. 2014-40, 2014-30 I.R.B. 229

#### 2014-13

Modified by  
Rev. Proc. 2014-38, 2014-29 I.R.B. 132

#### 2014-13

Superseded by  
Rev. Proc. 2014-38, 2014-29 I.R.B. 132

#### 2014-16

Superseded by  
Rev. Proc. 2014-51, 2014-37 I.R.B. 543

#### 2014-16

Modified by  
Rev. Proc. 2014-51, 2014-37 I.R.B. 543

#### 2014-12

Modified by  
Rev. Proc. 2014-54, 2014-41 I.R.B. 675

#### 2014-17

Modified by  
Rev. Proc. 2014-54, 2014-41 I.R.B. 675

### Revenue Rulings:

#### 2006-57

Modified by  
Rev. Rul. 2014-32, 2014-50 I.R.B. 917

#### 2006-57

Superseded by  
Rev. Rul. 2014-32, 2014-50 I.R.B. 917

#### 2008-40

Modified by  
Rev. Rul. 2014-24, 2014-37 I.R.B. 529

#### 2011-1

Modified by  
Rev. Rul. 2014-24, 2014-37 I.R.B. 529

#### 2012-6

Modified by  
Rev. Rul. 2014-24, 2014-37 I.R.B. 529

<sup>1</sup>A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2014–01 through 2014–26 is in Internal Revenue Bulletin 2014–26, dated June 30, 2014.

## Revenue Rulings—Continued:

### 2013-23

Superseded by  
Rev. Rul. 2014-30, 2014-49 I.R.B. 910

### 2013-23

Supplemented by  
Rev. Rul. 2014-30, 2014-49 I.R.B. 910

### 2014-27

Modified by  
Rev. Rul. 2014-33, 2014-52 I.R.B. 957

## Notices:

### 2009-23

Amplified by  
Notice 2014-81, 2014-53 I.R.B. 1001

### 2009-68

Modified by  
Notice 2014-74, 2014-50 I.R.B. 937

### 2010-62

Amplified by  
Notice 2014-58, 2014-44 I.R.B. 746

### 2013-1

Modified by  
Notice 2014-61, 2014-43 I.R.B. 746

### 2013-1

Superseded by  
Notice 2014-61, 2014-43 I.R.B. 746

### 2013-11

Modified by  
Notice 2014-48, 2014-36 I.R.B. 523

### 2013-23

Modified by  
Notice 2014-48, 2014-36 I.R.B. 523

### 2013-28

Modified by  
Notice 2014-48, 2014-36 I.R.B. 523

### 2013-29

Modified by  
Notice 2014-46, 2014-36 I.R.B. 520

### 2013-29

Clarified by  
Notice 2014-46, 2014-36 I.R.B. 520

### 2013-32

Modified by  
Notice 2014-48, 2014-36 I.R.B. 523

### 2013-37

Modified by  
Notice 2014-48, 2014-36 I.R.B. 523

## Notices—Continued:

### 2013-38

Superseded by  
Notice 2014-61, 2014-43 I.R.B. 746

### 2013-51

Obsoleted by  
Notice 2014-42, 2014-34 I.R.B. 387

### 2013-60

Modified by  
Notice 2014-46, 2014-36 I.R.B. 520

### 2013-60

Clarified by  
Notice 2014-46, 2014-36 I.R.B. 520

### 2013-65

Superseded by  
Notice 2014-57, 2014-42 I.R.B. 723

### 2013-38

Superseded by  
Notice 2014-61, 2014-43 I.R.B. 746

### 2013-80

Superseded by  
Notice 2014-79, 2014-53 I.R.B. 1001

### 2014-44

Supplemented by  
Notice 2014-45, 2014-34 I.R.B. 388

## Treasury Decisions:

### 2005-47

Obsoleted by  
T.D. 9668 2014-27 I.R.B. 1

### 2010-51

Obsoleted by  
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### 2010-71

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### 2011-6

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### 2011-9

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# Internal Revenue Service

## Washington, DC 20224

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## INTERNAL REVENUE BULLETIN

The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletins are available at [www.irs.gov/irb/](http://www.irs.gov/irb/).

## CUMULATIVE BULLETINS

The contents of the weekly Bulletins were consolidated semiannually into permanent, indexed, Cumulative Bulletins through the 2008–2 edition.

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## INTERNAL REVENUE BULLETINS ON CD-ROM

Internal Revenue Bulletins are available annually as part of Publication 1796 (Tax Products CD-ROM). The CD-ROM can be purchased from National Technical Information Service (NTIS) on the Internet at [www.irs.gov/cdorders](http://www.irs.gov/cdorders) (discount for online orders) or by calling 1-877-233-6767. The first release is available in mid-December and the final release is available in late January.

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## We Welcome Comments About the Internal Revenue Bulletin

If you have comments concerning the format or production of the Internal Revenue Bulletin or suggestions for improving it, we would be pleased to hear from you. You can email us your suggestions or comments through the IRS Internet Home Page ([www.irs.gov](http://www.irs.gov)) or write to the IRS Bulletin Unit, SE:W:CAR:MP:P:SPA, Washington, DC 20224.