

# INTERNAL REVENUE BULLETIN



## 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.

**Bulletin No. 2020-35**  
**August 24, 2020**

## ADMINISTRATIVE

### **REG-132434-17, page 508.**

These proposed regulations interpret new section 7602(f)'s restrictions on the non-governmental persons (contractors) to whom the IRS may provide books, papers, records, or other data for the sole purpose of providing expert evaluation and assistance to the IRS. Ancillary contractors, such as court reporters, translators or interpreters, photocopy services, providers of data processing programs or equipment, litigation support services, and other similar contractors may continue to assist the IRS in its examinations of taxpayers, but the IRS will not hire certain types of non-governmental attorneys for these purposes. No person other than an officer or employee of the IRS or IRS Chief Counsel may, on behalf of the IRS, question a witness under oath as part of an examination, but IRS contractors who are court reporters or foreign language interpreters may continue to play their customary roles in asking a witness certain non-substantive questions in a summons interview.

## ADMINISTRATIVE, EXCISE TAX

### **Notice 2020-55, page 467.**

Notice 2020-55 provides expanded disaster relief, in the form of postponing until October 31, 2020, certain Federal excise tax filing and payment deadlines, and associated interest, penalties, and additions to tax, for taxpayers who owe a federal excise tax for sales of sport fishing or archery equipment for the first quarter of 2020.

## EMPLOYEE PLANS

### **Notice 2020-61, page 468.**

The notice provides guidance regarding the special rules relating to single-employer defined benefit pension plans under § 3608 of the CARES Act. Under these special rules, a

contribution that would otherwise be required to be made to such a plan during 2020 is required to be made by January 1, 2021, and special interest adjustment rules apply to a contribution that is made after the otherwise applicable deadline. In addition, an employer may elect to apply the benefit restrictions for underfunded plans under § 436 of the Code for the 2020 plan year (or a fiscal plan year that contains any part of 2020) using the plan's funded status for the last plan year ending in 2019.

### **Notice 2020-62, page 476.**

Notice 2020-62 modifies the two safe harbor explanations in Notice 2018-74, 2018-40 I.R.B. 529, that may be provided to recipients of eligible rollover distributions to satisfy the notice requirements under § 402(f). The safe harbor explanations, as modified by this notice, take into consideration certain legislative changes, including changes related to the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act"), and include other clarifying changes.

## INCOME TAX

### **Announcement 2020-13, page 492.**

A copy of the Competent Authority Arrangement entered into by the competent authorities of the United States of America and Switzerland, arranging the implementation of the arbitration process provided for in paragraphs 6 and 7 of Article 25 of the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income.

### **Notice 2020-63, page 491.**

This notice modifies Notice 2006-09, 2006-6 I.R.B. 413 and Notice 2008-33, 2008-12 I.R.B. 642, 2008, by providing a new address to which a vehicle manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) must send vehicle certifications and quarterly reports.

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 III

## Relief for Taxpayers Affected by Ongoing Coronavirus Disease Pandemic, Related to Sport Fishing Equipment and Bows and Arrows Excise Tax Filing and Payment Deadlines

### Notice 2020-55

#### SECTION 1. PURPOSE

On March 13, 2020, the President of the United States issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in response to the ongoing Coronavirus Disease 2019 (COVID-19) pandemic (Emergency Declaration). The Emergency Declaration instructed the Secretary of the Treasury “to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant to 26 U.S.C. 7508A(a).” Pursuant to the Emergency Declaration, this notice provides relief under section 7508A(a) of the Internal Revenue Code (Code) for the persons described in section 3 of this notice that the Secretary of the Treasury has determined to be affected by the COVID-19 emergency. Notice 2020-48, 2020-29 IRB 72 (July 13, 2020), previously postponed certain federal tax filing and payment deadlines related to second quarter 2020 sport fishing equipment and bows and arrows excise taxes.

#### SECTION 2. BACKGROUND

Section 7508A of the Code provides the Secretary of the Treasury or his delegate (Secretary) with authority to postpone the time for performing certain acts under the internal revenue laws for a taxpayer determined by the Secretary to be affected by a federally declared disaster as defined in § 165(i)(5)(A) of the Code. Pursuant to § 7508A(a), a period of up to one year may be disregarded in determin-

ing whether the performance of those acts is timely under the internal revenue laws.

Section 40.0-1(a) of the Excise Tax Procedural Regulations applies the part 40 procedural regulations to various excise taxes including those imposed on sporting goods by chapter 32, subchapter D, part I of the Code. Section 40.6011(a)-1(a) (1) provides that the return of any tax to which part 40 applies must be made on Form 720 (Quarterly Federal Excise Tax Return) according to the instructions applicable to the form. The requirement for filing a return under part 40 applies separately to each tax listed by IRS Number on Form 720.

The federal sporting goods excise taxes are imposed by § 4161(a) on sport fishing equipment and by § 4161(b) on bows and arrows. These taxes are reported on Form 720, Part II, IRS Numbers: 41 (sport fishing equipment (other than fishing rods and fishing poles)), 110 (fishing rods and fishing poles), 42 (electric outboard motors), 114 (fishing tackle boxes), 44 (bows, quivers, broadheads, and points), and 106 (arrow shafts) (hereafter the “sport fishing and archery equipment numbers”). Under § 40.6011(a)-1(a), an entry for each IRS Number on Form 720 constitutes a separate return. The Form 720 due on April 30, 2020, covers the first calendar quarter (January, February, March) of the year 2020.

#### SECTION 3. GRANT OF RELIEF

Any person (as defined in § 7701(a) (1) of the Code) with a federal sporting goods excise tax payment due and the requirement to file a return under the sport fishing and archery equipment numbers on Part II of Form 720, on April 30, 2020 (the first quarter of 2020), is determined to be affected by the COVID-19 emergency for purposes of the relief described in this section 3 (Affected Taxpayer).

For an Affected Taxpayer, the April 30, 2020, due date for filing Form 720 for the sport fishing and archery equipment numbers and making corresponding federal sporting goods excise tax payments is automatically postponed to October 31, 2020. This postponement of the due date

is automatic; Affected Taxpayers do not have to call the IRS or file any extension forms.

An Affected Taxpayer who has already filed a first quarter Form 720 for excise taxes and fully paid the corresponding excise taxes on sport fishing and archery equipment by the normal due date (April 30, 2020) may disregard this notice and does not need to do anything further. An Affected Taxpayer who has already filed a first quarter Form 720 for excise taxes on sport fishing and archery equipment but has not fully paid such excise taxes may pay those taxes by the postponed deadline of October 31, 2020. An Affected Taxpayer who has not already filed its first quarter Form 720 and who takes advantage of this postponement should file only one Form 720 for the sport fishing and archery equipment numbers for the first quarter of 2020 by the postponed deadline of October 31, 2020.

Any Affected Taxpayer that, pursuant to this notice, files its first quarter Form 720 for the sport fishing and archery equipment numbers after August 7, 2020, but by October 31, 2020, must adhere to the following instructions to take advantage of the postponed deadline of October 31, 2020, to file and pay such excise taxes:

- Any Affected Taxpayer that has not already filed a first quarter Form 720 that wants to take advantage of the postponement must file a paper Form 720, rather than an electronic Form 720, to file its return for excise taxes on sport fishing and archery equipment. An Affected Taxpayer should file only one Form 720 for the sport fishing and archery equipment numbers for the first quarter of 2020 by the postponed deadline of October 31, 2020. In addition, an Affected Taxpayer must write “Notice 2020-55” on the top-center of the Form 720 on which its first quarter 2020 excise taxes on sport fishing and archery equipment are reported after August 7, 2020.
- If any Affected Taxpayer that wants to take advantage of this postponement in filing is required to file a Form 720 for excise taxes other than for sport

fishing and archery equipment on April 30, 2020, and has not done so, such an Affected Taxpayer should file a Form 720 reporting such excise taxes as soon as possible with the sport fishing and archery lines blank, to stop the further accrual of late filing penalties.

- Any Affected Taxpayer that wants to take advantage of the postponement must not combine first quarter (the calendar quarter containing January, February, and March 2020) with second or third quarter (the calendar quarters containing April, May, and June, and July, August, and September 2020, respectively) excise taxes onto one Form 720. Affected Taxpayers who are seeking the second quarter relief provided by Notice 2020-48 should follow the filing procedures described in that notice. Affected Taxpayers must file separate Forms 720 for the first, second, and third quarters by October 31, 2020. Moreover, first, second, and third quarter Form 720 excise tax payments must be made separately, and Affected Taxpayers should clearly designate payments with respect to the type of tax and tax period for which the payment is made.

As a result of the postponement of the April 30, 2020, due date for timely filing Forms 720 for the excise taxes on sport fishing and archery equipment and timely making such excise tax payments to October 31, 2020, the period beginning on May 1, 2020, and ending on October 31, 2020, will be disregarded in the calculation of any interest, penalty, or addition to tax for failure to file a Form 720 for the excise taxes on sport fishing and archery equipment or to pay such excise taxes shown on that form and postponed by this notice. Interest, penalties, and additions to tax with respect to such postponed Forms 720 and payments will begin to accrue on November 1, 2020, if the taxes are then unpaid or the Forms are not timely filed.

Affected Taxpayers that have been assessed penalties and interest with respect to untimely filing or payment for first quarter 2020 sport fishing and archery equipment excise taxes may request abatement pursuant to this notice.

If an Affected Taxpayer receives a late filing or late payment penalty notice from the IRS regarding interest, penalties, or additions to tax calculated for the period prior to November 1, 2020, with respect to first quarter sport fishing and archery equipment excise taxes, the Affected Taxpayer should call the telephone number listed on the applicable IRS billing notice to have any such amount abated.

#### SECTION 4. CONTACT INFORMATION

For further information regarding this notice, you may call the COVID-19 Disaster Relief Hotline at (202) 317-5436 (not a toll-free number).

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## Special Funding and Benefit Limitation Rules for Single-Employer Defined Benefit Pension Plans under the CARES Act

### Notice 2020-61

#### I. Purpose

This notice provides guidance on the special rules relating to funding of single-employer defined benefit pension plans, and related benefit limitations, under § 3608 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136 (134 Stat. 281).

#### II. Background

##### A. Minimum funding rules for single employer defined benefit plans

###### 1. General timing requirements

Section 412 of the Internal Revenue Code (Code) provides that a sponsor of a qualified defined benefit plan (other than a multiemployer plan as defined in § 414(f) or a CSEC plan as defined in § 414(y)) must make contributions to or under the plan for the plan year that, in the aggregate, are not less than the min-

imum required contribution determined under § 430 for the plan year. Section 4971(a) imposes an excise tax on an employer that sponsors a plan subject to § 412 that has an unpaid minimum required contribution within the meaning of § 4971(c)(4) as of the end of the plan year.

Section 430(j)(1) provides that the due date for the payment of any minimum required contribution for a plan year is 8½ months after the close of the plan year. Section 430(j)(2) provides that any payment made on a date other than the valuation date for the plan year must be adjusted for interest accruing for the period between the valuation date and the payment date, determined using the plan's effective interest rate under § 430(h)(2)(A) for the plan year.

Section 430(j)(3) provides that if the plan had a funding shortfall (as defined in § 430(c)(4)) for the preceding plan year, then the plan sponsor must pay four quarterly installments toward the required minimum contribution for the plan year. The due dates for the installments are April 15, July 15, and October 15 of the plan year, and January 15 of the following year (adjusted for a plan year that is not a calendar year under § 1.430(j)-1(c)(6)). Section 430(j)(3)(D)(i) provides that each quarterly installment is 25 percent of the required annual payment defined in § 430(j)(3)(D)(ii). Section 430(j)(3)(A) provides that if a quarterly installment is paid after the due date for that installment, then the interest rate that applies for the period of underpayment (in lieu of the interest rate that would apply under § 430(j)(2)) is the plan's effective interest rate plus 5 percentage points.

Section 430(g)(4)(A) provides that if a plan sponsor makes a contribution to the plan after the valuation date for the plan year in which the contribution is made, and the contribution is for a preceding plan year, the contribution is taken into account as an asset of the plan for the plan year in which it is made, except that only the present value (determined as of the valuation date) of that contribution may be taken into account. For this purpose, the present value of the contribution is determined using the effective interest rate for the preceding plan year for which the contribution is made.

## 2. CARES Act changes

Section 3608(a)(1) of the CARES Act provides that any minimum required contribution that would otherwise be due under § 430(j) of the Code (and § 303(j) of the Employee Retirement Income Security Act, Pub. L. 93-406, as amended (ERISA)) during calendar year 2020 (including quarterly installments under § 430(j)(3) of the Code and § 303(j)(3) of ERISA) are due on January 1, 2021. Section 3608(a)(2) of the CARES Act provides that those contributions and installments are to be increased with interest accruing for the period between the original due date for the contribution or installment and the date of the payment at the effective interest rate for the plan for the plan year that includes the payment date.

### **B. Benefit limitations for underfunded defined benefit plans**

#### 1. General rules regarding benefit limitations

Section 436 of the Code provides limits on benefits and benefit accruals under single-employer defined benefit pension plans, which are applied based on the plan's adjusted funding target attainment percentage (AFTAP) for a plan year. Section 436(b) provides generally that unpredictable contingent event benefits resulting from an event may not be paid if, taking into account the payment of those benefits, the plan's AFTAP would be less than 60 percent. Section 436(c) provides generally that no amendment increasing liabilities may take effect if, after taking into account that amendment, the plan's AFTAP would be less than 80 percent. Section 436(d) provides generally that the plan may not pay certain accelerated forms of benefit (such as a single-sum distribution) if the plan's AFTAP is less than 80 percent. Section 436(e) provides generally that benefit accruals must cease if the plan's AFTAP is less than 60 percent.

## 2. CARES Act changes

Section 3608(b) of the CARES Act provides that for purposes of applying

§ 436 of the Code (and § 206(g) of ERISA), a plan sponsor may elect to treat the plan's AFTAP for the last plan year ending before January 1, 2020, as the AFTAP for plan years that include calendar year 2020.

### **C. Other rules related to contributions and benefit limitations**

Under § 430(f), the plan sponsor of a defined benefit plan that is not a multi-employer plan may elect to maintain a prefunding balance that may be used, at the plan sponsor's election, to offset the minimum required contribution for a plan year.<sup>1</sup> Under § 430(f)(6)(B)(i), a plan sponsor may elect to add contributions that exceed the minimum required contribution for a plan year (adjusted with interest using the effective interest rate for the plan year in accordance with § 430(f)(6)(B)(ii)) to the plan's prefunding balance. A plan sponsor may also elect to reduce the plan's prefunding balance or the funding standard carryover balance as provided in § 430(f)(5). Section 1.430(f)-1(f)(1)(i) generally provides that any election under § 430(f) by the plan sponsor must be made by providing written notification of the election to the plan's enrolled actuary and the plan administrator. Section 1.430(f)-1(f)(2)(i) generally provides that any election under § 430(f) with respect to a plan year must be made no later than the last date for making the minimum required contribution for the plan year as described in § 430(j)(1), or such later date as prescribed in guidance published in the Internal Revenue Bulletin. However, § 1.430(f)-1(f)(2)(iii) provides that any election to reduce the prefunding balance or funding standard carryover balance for a plan year (for example, in order to avoid or terminate a benefit restriction under § 436) must be made by the end of the plan year to which the election relates.

Section 436(h) provides rules that apply prior to the certification of the AFTAP for a plan year by the plan's actuary. Under § 436(h)(1), if a benefit limitation applied to a plan on the last day of the preceding plan year, then the current year's AFTAP generally is presumed to be equal to the prior year's AFTAP for the period

beginning on the first day of the plan year and ending when the plan's enrolled actuary certifies the AFTAP for the current plan year. Under § 436(h)(3), if (i) the plan's enrolled actuary has not certified the AFTAP for the current plan year by the first day of the 4th month of the plan year, and (ii) the AFTAP for the prior plan year did not result in the application of a benefit limitation for that prior plan year (but would have resulted in the application of a benefit limitation had that AFTAP been 10 percentage points lower), then the AFTAP for the current plan year is presumed to be equal to 10 percentage points less than the AFTAP for the prior plan year, for the period beginning on that first day of the fourth month and ending when the enrolled actuary of the plan certifies the plan's AFTAP for the current plan year. Under § 436(h)(2), if no certification of the AFTAP for the current plan year is made before the first day of the 10th month of that year, then the AFTAP for the current plan year is presumed to be less than 60 percent as of that first day.

Sections 436(b)(2) and (c)(2) provide rules that allow a plan sponsor to avoid or terminate benefit restrictions under § 436(b) or (c) by making an additional contribution of a certain amount to the plan. Section 1.436-1(f) provides rules for these contributions, which are referred to as § 436 contributions. Section 1.436-1(f)(2)(i)(A) provides that any § 436 contribution made by a plan sponsor on a date other than the valuation date for the plan year must be adjusted with interest at the plan's effective interest rate for the plan year. If the plan's effective interest rate for the plan year has not been determined at the time of the contribution, then this interest adjustment must be made using the highest of the three segment rates as applicable for the plan year. In such a case, if the effective interest rate for the plan year is subsequently determined to be less than that highest rate, the excess is recharacterized as an employer contribution taken into account under § 430 for the current plan year.

The regulations under § 436 address the calculation of a plan's AFTAP. Section 1.436-1(h)(4)(iii) provides rules relating to changes in a plan's AFTAP after it has

<sup>1</sup> Similar elections to maintain a funding standard carryover balance and to use that balance to offset the minimum required contribution are available to the plan sponsor.

been certified, and the effect of such a change depends on whether the change is material (within the meaning of § 1.436-1(h)(4)(iii)(B)) or immaterial (within the meaning of § 1.436-1(h)(4)(iii)(C)). In general, a material change in AFTAP is defined as a change under which plan operations would have been different based on the subsequent AFTAP determination, and an immaterial change in AFTAP is defined as a change that is not material. Under § 1.436-1(h)(4)(iv)(A), a material change in a plan's AFTAP will cause a plan to fail to comply with § 401(a).

Section 1.436-1(h)(4)(iii)(C) provides a special rule that, subject to certain conditions, deems a change in a plan's AFTAP to be immaterial (even if the change would otherwise be material) if the change results from an event specified in § 1.436-1(h)(4)(iii)(C)(1) through (8). Section 1.436-1(h)(4)(iii)(C)(9) provides authority for the expansion of the list of events for which a resulting change in AFTAP may be deemed immaterial through publication of guidance in the Internal Revenue Bulletin. Deemed immaterial treatment under § 1.436-1(h)(4)(iii)(C) with respect to an event that results in a change in AFTAP is conditioned on the AFTAP being recertified as soon as reasonably practicable after the event. The effect of this deemed immaterial treatment is that the change in the plan's AFTAP will not cause the plan to fail to comply with § 401(a) merely because of the change, provided that the plan administrator reflects the new AFTAP in plan operations on a prospective basis beginning with the date of the recertification.

Section 404 provides rules regarding the deductibility of employer contributions to an employees' trust or annuity plan and compensation under a deferred payment plan. Under § 404(a)(1)(A), contributions paid to the trust of a qualified defined benefit pension plan are deductible in the taxable year when paid, subject to the applicable limits. Under § 404(a)(6), a taxpayer making a contribution in a taxable year is deemed to have made the contribution on the last day of the preceding taxable year if the payment is on account of that preceding taxable year and is made not later than the time prescribed by law for filing the return for that preceding taxable year (including extensions thereof).

Under § 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713) and § 3002(c) of ERISA, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in this notice for purposes of ERISA, as well as the Code. Thus, the provisions of this notice pertaining to §§ 430 and 436 of the Code also apply for purposes of §§ 303 and 206(g) of ERISA.

### III. Questions & Answers

The following questions and answers provide guidance regarding § 3608 of the CARES Act. To the extent the instructions for Schedule SB, "Single-Employer Defined Benefit Plan Actuarial Information" of Form 5500, "Annual Return/Report of Employee Benefit Plan" are inconsistent with this guidance, this guidance supersedes those instructions.

#### A. Extended deadline for contributions and interest adjustments

Q-1: To which plans does the extended contribution due date of January 1, 2021, under § 3608(a)(1) of the CARES Act, apply?

A-1: The extended contribution due date of January 1, 2021, applies to a defined benefit plan for which the minimum required contribution is determined under § 430. Thus, this extended contribution due date of January 1, 2021, does not apply to a multiemployer plan, a CSEC plan, a fully-insured plan described in § 412(e)(3), or a money purchase pension plan.

Q-2: How is a contribution adjusted for interest between the valuation date and the payment date for the contribution, taking into account the interest adjustment rules of § 3608(a)(2) of the CARES Act?

A-2: To determine the portion of the minimum required contribution for a plan year that is satisfied by a contribution, § 430(j)(2) of the Code and § 1.430(j)-1(b)(4)(i) provide that the contribution is adjusted for interest for the period between the valuation date for the plan year and the payment date for the contribution, at the plan's effective interest rate for the plan year. Under § 3608(a)(2) of the CARES Act, any payment that is made after the original due date for the contribution and by the extended due date under § 3608(a)(1) must be increased for the pe-

riod between the original due date and the payment date at the effective interest rate for the plan year that includes the payment date. Thus, if a contribution for a plan year were to be made during this period, the amount of the contribution must be larger to account for interest (determined using the plan's effective interest rate for the plan year that includes the payment date) for the period between the original due date and the payment date in order to satisfy the minimum required contribution for the plan year to the same extent as a contribution made on the original due date. The following example illustrates the application of the interest adjustment described in this A-2:

(a) Plan A has a plan year that is the calendar year and has a 2019 minimum required contribution, calculated as of the January 1, 2019, valuation date, of \$1,000,000. The effective interest rate for the 2019 plan year is 5.75%, and the effective interest rate for the 2020 plan year is 5.65%. Plan A had no funding shortfall for 2018 (so there are no quarterly installment requirements for 2019), and the plan sponsor made no contributions for 2019 (and no elections to use a funding standard carryover balance or prefunding balance) before September 15, 2020. The actuary takes into account February 29, 2020, in counting the number of days in 2020 for purposes of calculating interest.

(b) In the absence of § 3608(a) of the CARES Act, the final contribution for the 2019 plan year would have been due on September 15, 2020. A final contribution of \$1,100,009 made on September 15, 2020, would satisfy the 2019 minimum required contribution. This is because a contribution of \$1,100,009 made on that date, discounted using the 2019 effective interest rate to January 1, 2019, would equal the \$1,000,000 minimum required contribution ( $\$1,100,009 \div 1.0575^{(258/366 + 365/365)} = \$1,000,000$ ).

(c) Pursuant to § 3608(a)(1) of the CARES Act, the plan sponsor has until January 1, 2021, to satisfy the 2019 minimum required contribution for Plan A. If, on December 31, 2020, the plan sponsor were to make a single contribution necessary to satisfy the 2019 minimum required contribution for Plan A, the contribution would be \$1,117,827. This is because a contribution of \$1,117,827

made on December 31, 2020, discounted using the 2020 effective interest rate back to September 15, 2020, and the 2019 effective interest rate from September 15, 2020, to January 1, 2019, would equal the \$1,000,000 minimum required contribution ( $\$1,117,827 \div 1.0565^{(107/366)} \div 1.0575^{(258/366 + 365/365)} = \$1,000,000$ ).

Q-3: What is the result if the contribution that the plan sponsor makes is less than the amount that was due on the original due date for the minimum required contribution, as increased with interest pursuant to § 3608(a)(2) of the CARES Act?

A-3: If, after the original due date for the minimum required contribution for a plan year, the plan sponsor makes a contribution that is less than the amount that was due on that date, as adjusted for additional interest to account for the period between the original due date and the date of payment of the contribution (at the effective interest rate for the plan year in which the payment is made), then a portion of the minimum required contribution for that plan year would remain unpaid. The unpaid portion of the minimum required contribution, determined as of the valuation date and based on contributions made on or before January 1, 2021, with the contributions discounted for interest to the valuation date as described in A-2 of this notice, would give rise to an unpaid minimum required contribution within the meaning of § 4971(c)(4) of the Code that would be subject to an excise tax under § 4971(a). Furthermore, a contribution made after January 1, 2021, to satisfy that unpaid minimum required contribution must be adjusted for interest for the period between the date that the contribution is made and the valuation date at the effective interest rate for the plan year for which the contribution is made (with additional interest as required to reflect any late quarterly installments for the plan year). The following example illustrates the situation described in this A-3:

The facts are the same as in the example in A-2 of this notice, except that the plan sponsor makes a contribution of \$1,100,009 on December 31, 2020, and makes no other contributions by January 1, 2021. The \$1,100,009 contribution is discounted using the 2020 effective interest rate back to September 15, 2020,

and the 2019 effective interest rate from September 15, 2020, to January 1, 2019, resulting in \$984,061 toward satisfaction of the 2019 plan year minimum required contribution ( $\$1,100,009 \div 1.0565^{(107/366)} \div 1.0575^{(258/366 + 365/365)} = \$984,061$ ). Because the contribution is discounted for a longer period, this amount of the discounted contribution is not enough to satisfy the minimum required contribution of \$1,000,000 as of January 1, 2019, resulting in an unpaid minimum required contribution of \$15,939 ( $\$1,000,000 - \$984,061 = \$15,939$ ). The \$15,939 unpaid minimum required contribution is subject to excise tax under § 4971(a).

Q-4: Does the extended due date under § 3608(a) of the CARES Act apply to contributions in excess of the amount needed to satisfy the minimum required contribution?

A-4: Yes, if the contribution deadline under § 430(j)(1) of the Code for a plan year is during 2020, a contribution in excess of the amount needed to satisfy the minimum required contribution for the plan year that is made by January 1, 2021, may be designated as a contribution for that plan year. The present value of the excess contributions for a plan year, which can be used to increase the prefunding balance, is determined using the interest rate adjustment described in A-2 of this notice. In accordance with § 1.430(f)-1(b)(1)(iv)(A), this present value is increased for interest for the period between the valuation date for the plan year and the first day of the next plan year. In general, this increase for interest is made using the plan's effective interest rate for the plan year for which the contributions are made. However, pursuant to § 1.430(f)-1(b)(3)(iii), this present value is instead adjusted using the plan's investment experience to the extent that the excess results from the use of a funding balance to offset the minimum required contribution.

Q-5: How is the amount of a quarterly installment determined, if the extended due date under § 3608(a) of the CARES Act applies to the installment?

A-5: Section 3608(a)(2) of the CARES Act specifies that, to determine the amount of a quarterly installment due by the extended due date under § 3608(a)(1) of the CARES Act of January 1, 2021, the amount of that installment is increased

from the installment's original due date to the payment date at the effective interest rate for the plan year that includes the date the quarterly installment is paid. Section 1.430(j)-1(c)(3)(ii) provides that if a contribution is made before the due date for the required installment to which it is allocated, then the amount credited toward that installment includes interest on the contribution from the date of the contribution to the due date for the installment (at the plan's effective interest rate for the plan year for which the installment is paid). The following example illustrates the application of the interest adjustment described in this A-5:

(a) The facts are the same as in the example in A-2 of this notice. In addition, for 2020, Plan A has required quarterly installments of \$250,000.

(b) In the absence of § 3608(a)(1) of the CARES Act, the first quarterly installment for the 2020 plan year would be due on April 15, 2020. Under § 3608(a)(1) of the CARES Act, the plan sponsor's deadline for satisfying this quarterly installment is January 1, 2021. If the contribution is made on December 31, 2020, then the amount necessary to satisfy the first quarterly installment under § 3608(a)(2) of the CARES Act is \$259,954 ( $\$250,000 \times 1.0565^{(260/366)} = \$259,954$ ).

(c) Under the extended deadline of § 3608(a) of the CARES Act, the quarterly installments for Plan A that were originally due July 15, 2020, and October 15, 2020, are also now due on January 1, 2021. The amount of these quarterly installments would be calculated in the same manner as shown in paragraph (b) of this example, except that the increase for interest would be for the period between the original due date and the payment date.

(d) If, instead of waiting until December 31, 2020, the plan sponsor makes a contribution of \$400,000 on June 1, 2020, then some of that contribution will satisfy the first quarterly installment (originally due April 15, 2020) and the balance of that contribution will be applied towards the second quarterly installment (originally due July 15, 2020). The portion of the June 1 contribution that is used to satisfy the first quarterly installment is \$251,771 ( $\$250,000 \times 1.0565^{(47/366)} = \$251,771$ ). Therefore, the balance of that contribution, which will be applied to the

second quarterly installment, is \$148,229 (\$400,000 - \$251,771 = \$148,229). The remaining contribution needed to satisfy the second quarterly installment on its original due date of July 15, 2020, is \$100,788 (\$250,000 - \$148,229  $\times$  1.0565<sup>(44/366)</sup>) = \$100,788). If the contribution necessary to satisfy that quarterly installment is not made before that due date, but is made later in the year, then the contribution necessary to satisfy the unpaid installment must be increased with interest at the effective interest rate for the plan year from July 15, 2020, until it is made.

Q-6: For a quarterly installment originally due during 2020 for which the due date is extended under § 3608(a) of the CARES Act to January 1, 2021, what is the result if a plan sponsor does not satisfy that installment?

A-6: If a plan sponsor does not satisfy a quarterly installment originally due during 2020 by the extended due date under § 3608(a) of the CARES Act of January 1, 2021, then under § 430(j)(3)(A) of the Code, the unpaid portion of that installment is subject to a higher interest rate for the period during which the installment (or a portion of the installment) remains unpaid when determining the amount of the minimum required contribution that is satisfied by a contribution. As a result of § 3608(a) of the CARES Act, the period of underpayment does not begin until January 1, 2021. The unpaid portion of the quarterly installment as of that date, if any, is re-determined as of the original due date for the installment (based on contributions made on or before January 1, 2021, and discounted for interest as described in A-5 of this notice) and then increased from the original due date to January 1, 2021, using the effective interest rate for the plan year for which the installment is due. The following examples illustrate the application of these rules:

*Example 1:* (a) The facts are the same as in the example in A-5 of this notice. The plan sponsor of Plan A makes a contribution of \$100,788 on July 15, 2020. As shown in paragraph (d) of the example in A-5 of this notice, the first two quarterly installments have been satisfied by their original due dates. The plan sponsor does not make any additional contributions by the extended due date of January 1, 2021. As a result, the third quarterly installment

of \$250,000 (originally due on October 15, 2020) remains unpaid as of that date, and this unpaid installment is increased using the effective interest rate for 2020, resulting in an unpaid installment on January 1, 2021 of \$252,945 (\$250,000  $\times$  1.0565<sup>(78/366)</sup>).

(b) If the plan sponsor makes its next contribution to Plan A on February 15, 2021, the first \$252,945 of that contribution will be used to satisfy the missed third quarterly installment. The interest rate used to discount the late required installment back to the due date will include the 5 percentage point increase for the period of time from February 15, 2021, to the extended due date of January 1, 2021, resulting in \$249,809 as of January 1, 2021 (\$252,945  $\div$  1.1065<sup>(45/365)</sup>). Therefore, the first \$252,945 of that contribution that is used to satisfy the third quarterly installment would result in \$236,449 toward satisfaction of the 2020 plan year minimum required contribution for Plan A (\$249,809 as of January 1, 2021, divided by 1.0565).

*Example 2:* (a) The facts are the same as in the first example in this A-6, except that Plan A has a plan year that began October 1, 2019, and ended September 30, 2020, and the required quarterly installments for that plan year are \$200,000. In addition, Plan A's effective interest rate is 5.71% for the plan year beginning October 1, 2019, and 5.61% for the plan year beginning October 1, 2020. The first three quarterly installments for the plan year were paid by the original due dates and the fourth quarterly installment of \$200,000 (originally due October 15, 2020) is not paid by January 1, 2021. Because this quarterly installment was not paid by January 1, 2021, under the rules of this A-6, the unpaid portion of the installment is increased to January 1, 2021, using the effective interest rate for the plan year beginning October 1, 2019, resulting in an unpaid installment on that date of \$202,387 (\$200,000  $\times$  1.0571<sup>(78/365)</sup>).

(b) Note that if the contributions made by January 1, 2021, satisfy some, but not all, of the fourth quarterly installment, then the unpaid portion of that installment would be re-determined as of October 15, 2020, by discounting those contributions from the date of the contribution to October 15, 2020 (using the 5.61% effective interest rate for the plan year in which the

contributions are made). The resulting unpaid quarterly installment is increased with interest to January 1, 2021 (using the 5.71% effective interest rate for the plan year for which the installment is due, rather than the 5.61% effective interest rate for the 2020 plan year). For example, if a contribution of \$120,000 was made on December 15, 2020, then the unpaid portion of the quarterly installment as of January 1, 2021, is \$82,058 (((\$200,000 - \$120,000  $\div$  1.0561<sup>(61/365)</sup>)  $\times$  1.0571<sup>(78/365)</sup>).

Q-7: How are the interest adjustments determined if the plan's effective interest rate for the plan year in which the contribution is made has not been determined at the time the payment is made?

A-7: If the plan's effective interest rate for the plan year in which the contribution is made has not been determined at the time the payment is made, then the rules for determining the interest rate for this adjustment are the same as the rules for determining the interest rate for the interest adjustment under § 1.436-1(f)(2)(i)(A). Thus, the interest adjustment must be made using the highest of the three segment rates for the plan year. However, if the effective interest rate for the plan year in which the contribution is made is subsequently determined to be less than the interest rate that was used under the preceding sentence, the difference in the present value of the contribution as of the valuation date may be added to the prefunding balance for the plan year. The following example illustrates the situation described in this A-7:

(a) The facts are the same as in the example in A-3 of this notice, except that the plan sponsor realizes that the December 31, 2020, contribution that was made would result in an unpaid minimum required contribution for 2019 and wishes to make a final contribution on January 1, 2021. However, the 2021 effective interest rate is not known as of the date of the contribution.

(b) Under this A-7, the amount necessary to avoid an unpaid minimum required contribution for 2019 is determined using the highest of the three segment rates for the 2021 plan year in accordance with the rules of § 1.436-1(f)(2)(i)(A). For purposes of this example, it is assumed that the highest of the three segment rates for the 2021 plan year is 5.45%. Therefore,

the amount of the contribution needed to avoid an unpaid minimum required contribution if made on January 1, 2021, is \$17,810 ( $\$15,939 \times 1.0575^{(258/366 + 365/365)} \times 1.0545^{(108/366)}$ ).

(c) Later during 2021, the 2021 effective interest rate is determined to be 5.15%. The \$17,810 contribution made on January 1, 2021, results in \$15,953 ( $\$17,810 \div 1.0515^{(108/366)} \div 1.0575^{(258/366 + 365/365)}$ ) toward the 2019 minimum required contribution. As a result, the plan sponsor has excess contributions for 2019, which have a present value as of January 1, 2019, of \$14 ( $\$15,953 - \$15,939$ ). This amount, adjusted for interest in accordance with § 1.430(f)-1(b)(1)(iv), may be added to the prefunding balance as of January 1, 2020.

Q-8: If a plan sponsor makes a contribution for a plan year after the original due date for the plan year, but on or before the extended due date under § 3608(a) of the CARES Act, how is it reported on Schedule SB of Form 5500?

A-8: Except as provided in this A-8, there are no special rules for reporting contributions that are made for a plan year after the original due date for the plan year but on or before the extended due date under § 3608(a) of the CARES Act. Thus, a plan's actuary may not report contributions on Schedule SB of Form 5500 that will be made after the actuary signs the Schedule SB. If any contributions are made after the actuary signs the Schedule SB and the Form 5500 for a plan year has been filed but before the extended due date under § 3608(a) of the CARES Act, then the contributions may be designated as for that prior plan year only if an amended Form 5500 that includes an amended Schedule SB reflecting those contributions is filed.

In addition, if a plan sponsor makes a contribution for a plan year (including a quarterly installment) after the original due date for that contribution but on or before the extended due date under § 3608(a) of the CARES Act, the plan's actuary must attach to the Schedule SB a schedule supporting the line 19 entry for discounted employer contributions showing the dates and amounts of individual contributions, the year to which the contributions (or portion of the individual contributions) are applied, the effective interest rate or rates that apply to those contributions (including the effective rate of interest for the

plan year in which a payment subject to § 3608(a) of the CARES Act occurs), the 5 percentage point increase that applies for late quarterly installments, the periods during which each such rate applies, and the interest-adjusted employer contributions for the plan year. This schedule must be attached even if the contributions were made by the due date under § 3608(a) of the CARES Act.

Q-9: Is a contribution for a plan year that is made after the original due date for the plan year (but on or before the extended due date for the plan year under § 3608(a) of the CARES Act) taken into account for purposes of determining the value of plan assets for a plan year following the plan year for which the contribution is made?

A-9: Yes, for purposes of § 430, a contribution that is made after the original due date for a plan year (but on or before the extended due date for the plan year under § 3608(a) of the CARES Act) is taken into account as of a valuation date for a plan year after the plan year for which the contribution was made. Under § 1.430(g)-1(d)(1)(i), for purposes of determining the value of plan assets, if an employer makes a contribution to the plan after the valuation date for the current plan year and the contribution is for an earlier plan year, then the present value of the contribution determined as of that valuation date is taken into account as an asset of the plan as of the valuation date, provided the contribution is made before a specified deadline. The specified deadline is the deadline for contributions under § 430(j)(1) for the plan year immediately preceding the current plan year. However, that deadline is extended by § 3608(a)(1) of the CARES Act. Furthermore, the interest adjustment rules of § 3608(a)(2) of the CARES Act (as described in A-2 of this notice) override the discounting rules that apply generally for this purpose. Note, however, under § 1.436-1(h)(4)(i)(B), certification of the AFTAP for a plan year must not take into account contributions that are expected to be made after the certification date. The following example illustrates the application of these rules:

(a) Plan C has a plan year that begins on October 1 and ends on September 30, and a valuation date that is the first day of the plan year. A contribution of \$1,000,000 is

made on December 31, 2020, for the plan year beginning on October 1, 2018.

(b) As of October 1, 2019 (the valuation date for the plan year following the plan year for which the December 31, 2020, contribution was made), the present value of the contribution is included in plan assets for purposes of § 430 as a contribution receivable. That present value is determined by discounting the contribution from December 31, 2020, to June 15, 2020 (the original due date for the minimum required contribution for the plan year), at the effective interest rate for the plan year beginning October 1, 2020 (the plan year in which the contribution is made), and further discounting the contribution from June 15, 2020, to October 1, 2019, at the effective interest rate for the plan year beginning October 1, 2018 (the plan year for which the contribution is made).

(c) As of October 1, 2020 (the valuation date for the second plan year following the plan year for which the December 31, 2020, contribution was made), the present value of the contribution is included in plan assets for purposes of § 430 as a contribution receivable. That present value is determined by discounting the contribution from December 31, 2020, to October 1, 2020, at the effective interest rate for the plan year beginning October 1, 2020 (the plan year in which the contribution is made).

Q-10: Does the extended due date under § 3608(a) of the CARES Act change the date by which a plan sponsor may make an election to increase a prefunding balance or to use a prefunding balance or a funding standard carryover balance to offset the minimum funding requirement for a plan year?

A-10: Yes, if the plan year is a plan year for which the extended due date for minimum required contributions under § 3608(a) of the CARES Act applies, then the deadline for a plan sponsor's election to increase a prefunding balance or to use a prefunding balance or a funding standard carryover balance to offset the minimum required contribution for that plan year is extended to January 1, 2021.

Q-11: Does the extended due date under § 3608(a) of the CARES Act change the date by which a contribution must be made in order to be deducted for a taxable year under § 404 of the Code?

A-11: No, the extended due date under § 3608(a) of the CARES Act does not change the date by which a contribution must be made in order to be deducted for a taxable year under § 404 of the Code. Under § 404(a)(6), a taxpayer is deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of that taxable year and is made no later than the time prescribed by law for filing the return for that taxable year (including extensions).

## **B. Use of prior year AFTAP for benefit restrictions**

Q-12: May a plan sponsor make an election under § 3608(b) of the CARES Act (to apply the AFTAP for the last plan year ending before January 1, 2020) for a plan with a plan year that is not a calendar year?

A-12: Yes, a plan sponsor may make an election under § 3608(b) of the CARES Act for a plan year that includes any portion of calendar year 2020. If the election is made for such a plan year, the AFTAP that applies for the plan year pursuant to the election is the AFTAP certified for the last plan year that ends on or before December 31, 2019. For example, if a plan sponsor makes an election under § 3608(b) of the CARES Act for a plan year that runs from July 1, 2019, to June 30, 2020, then the AFTAP that applies to determine benefit limitations under § 436 of the Code for that plan year is the certified AFTAP from the plan year that ends on June 30, 2019. In addition, that plan sponsor may separately elect to use that same AFTAP for the plan year that begins on July 1, 2020.

Q-13: What procedures must a plan sponsor follow for making an election under § 3608(b) of the CARES Act?

A-13: The election described in § 3608(b) of the CARES Act must be made using the procedures that apply for elections relating to funding balances specified in § 1.430(f)-1(f)(1)(i). Thus, the plan sponsor must provide written notification of the election to the plan's actuary and the plan administrator. However, a plan sponsor's election made using a different procedure will not be treated as invalid provided that, by September 30, 2020, the plan sponsor complies with the require-

ment described in the first sentence of this A-13.

Q-14: If a plan's actuary has not certified the plan's AFTAP for a plan year before the plan sponsor makes an election under § 3608(b) of the CARES Act, what is the effect of the election for purposes of the presumption rules of § 436(h) of the Code?

A-14: If a plan's actuary has not certified the plan's AFTAP for a plan year before the plan sponsor makes the election under § 3608(b) of the CARES Act, then the plan sponsor's election is treated as a certification of the AFTAP for purposes of the presumption rules of § 436(h) of the Code. Thus, beginning with the date of the election, the AFTAP for the last plan year ending on or before December 31, 2019, applies for the plan year for which the election is made, rather than any presumed AFTAP determined under § 1.436-1(h)(1), (2), or (3). The following example illustrates the operation of this rule:

(a) Plan B, which is not a collectively bargained plan, has a plan year that is a calendar year. On September 30, 2019, the actuary for Plan B certified the 2019 AFTAP to be 82%. On April 30, 2020, before the actuary has certified the AFTAP for 2020, the plan sponsor makes an election under § 3608(b) of the CARES Act to apply the 2019 AFTAP to the 2020 plan year.

(b) Section 1.436-1(h)(2) applies to the plan (because, as of April 1, 2020, the plan's actuary has not certified the plan's AFTAP for 2020 and the AFTAP for 2019 was at least 80 percent and less than 90 percent). Accordingly, under § 1.436-1(h)(2)(iii), the presumed AFTAP for 2020 is reduced to 72 percent beginning on April 1, 2020.

(c) The plan sponsor's election under § 3608(b) of the CARES Act is treated as a certification of the plan's AFTAP for the plan year. Accordingly, under § 1.436-1(h)(2)(v), the 2019 AFTAP of 82 percent is used for the plan beginning April 30, 2020.

Q-15: Is a plan's actuary required to certify the plan's AFTAP for a plan year for which the plan sponsor makes the election under § 3608(b) of the CARES Act?

A-15: A plan's actuary generally is required to certify the plan's AFTAP for a plan year for which the plan sponsor makes the election under § 3608(b) of the

CARES Act. This is because, as provided in A-18 of this notice, the certified AFTAP generally is relevant for the next plan year. However, if the plan sponsor makes the election under § 3608(b) of the CARES Act for a plan year that begins in 2019 and ends in 2020 and also makes an election for the next plan year, then the actuary is not required to certify the plan's AFTAP for the plan year that begins in 2019.

If the plan's actuary has certified an AFTAP for a plan year, then the Schedule SB of Form 5500 for that plan year should reflect the certified AFTAP. Without regard to whether the plan's actuary has certified an AFTAP for a plan year, if the plan sponsor made an election under § 3608(b) of the CARES Act, then the plan's actuary should attach to the Schedule SB a statement relating to the line 15 entry stating that the plan sponsor made that election, the date of that election, and the AFTAP that applied for the plan year pursuant to the election.

Q-16: If a plan's actuary certified the plan's AFTAP for a plan year for which the plan sponsor later makes the election under § 3608(b) of the CARES Act, what is the effect of that certification?

A-16: If a plan's actuary certified the plan's AFTAP for a plan year before the plan sponsor makes the election under § 3608(b) of the CARES Act, then the plan sponsor's election is treated as a subsequent determination of the AFTAP for that plan year. However, pursuant to § 1.436-1(h)(4)(iii)(C)(9) and this notice, the plan sponsor's election is eligible for deemed immaterial treatment (and for purposes of § 1.436-1(h)(4)(iii)(C), the plan sponsor's election is treated as the recertification on the part of the actuary that is otherwise required for deemed immaterial treatment pursuant to § 1.436-1(h)(4)(v)(D)). Thus, the AFTAP that applies pursuant to the plan sponsor's election is applied on a prospective basis beginning with the date of the election.

If a plan's actuary certifies the plan's AFTAP for a plan year after the plan sponsor makes the election under § 3608(b) of the CARES Act for that plan year, then that certified AFTAP does not apply for that plan year unless the plan sponsor revokes the election. Any revocation must be made using the same procedures as the election, and, in that case, the certified

AFTAP is treated as a subsequent determination of the AFTAP that is not eligible for deemed immaterial treatment under § 1.436-1(h)(4)(iii)(C).

Q-17: How does the restriction on plan amendments and unpredictable contingent event benefits apply if the AFTAP that applies is pursuant to a plan sponsor's election under § 3608(b) of the CARES Act?

A-17: If the AFTAP that applies is pursuant to a plan sponsor's election under § 3608(b) of the CARES Act, then the restriction on plan amendments and unpredictable contingent event benefits is applied using the rules of § 1.436-1(g) (2) through (4) (which apply for the period in a plan year during which a § 436(h) presumption applies), except that the AFTAP that applies pursuant to the plan sponsor's election is substituted for the presumed AFTAP. Thus, for example, the AFTAP that applies pursuant to the plan sponsor's election will be used to calculate a presumed adjusted funding target pursuant to § 1.436-1(g)(2)(ii) and an inclusive presumed AFTAP as described in § 1.436-1(g)(2)(iii). The following example illustrates the application of the rules described in this A-17:

(a) The facts are the same as in the example in A-14 of this notice. Additionally, as of January 1, 2020, Plan B has assets of \$8,600,000, and a prefunding balance of \$400,000. During the period January 1, 2020, through June 30, 2020, the plan's actuary did not certify the plan's AFTAP for 2020, no contributions were made for 2019, no § 436 contributions were made, and the plan sponsor made no elections under § 430(f). Plan B's sponsor amends the plan to increase benefits effective on July 1, 2020. The amendment would increase Plan B's funding target as of January 1, 2020, by \$500,000.

(b) The determination of whether the amendment is permitted to take effect is made by applying the rules of § 1.436-1(g)(2) through (4) but substituting the elected AFTAP of 82% for the presumed AFTAP. Thus, this determination is made based on a comparison of the presumed adjusted funding target (calculated using an AFTAP of 82%) with the updated interim value of adjusted plan assets.

(c) Plan B's interim value of adjusted plan assets as of the valuation date is

\$8,200,000 (that is, \$8,600,000 minus the prefunding balance of \$400,000). Because there were no events that must be reflected in an update to the interim value of adjusted plan assets under the rules of § 1.436-1(g)(2)(iii)(A), the updated interim value of adjusted plan assets remains \$8,200,000. Prior to reflecting the amendment, Plan B's presumed adjusted funding target as of January 1, 2020, is \$10,000,000 (\$8,200,000, divided by the AFTAP of 82%). Increasing Plan B's presumed adjusted funding target by \$500,000 to reflect the amendment results in an inclusive presumed adjusted funding target of \$10,500,000 and would result in an AFTAP of 78% (that is, the updated interim value of adjusted plan assets as of January 1, 2020, of \$8,200,000 divided by the inclusive presumed adjusted funding target of \$10,500,000).

(d) Because Plan B's AFTAP was over 80% prior to taking the amendment into account but would be less than 80% if the amendment were taken into account, § 436(c) prohibits the plan amendment from taking effect unless the updated interim value of adjusted plan assets is increased so that the AFTAP would equal 80%. This would require an increase of \$200,000 (that is, 80% of the presumed adjusted funding target of \$10,500,000 less the interim value of adjusted plan assets of \$8,200,000). Therefore, the plan sponsor may either elect to reduce Plan B's prefunding balance as of January 1, 2020, by \$200,000, or make a \$200,000 § 436 contribution (with interest to the date of payment) in order to increase the AFTAP to 80% (that is, an updated interim value of adjusted plan assets as of January 1, 2020, of \$8,400,000 divided by the inclusive presumed adjusted funding target of \$10,500,000).

Q-18: Does the AFTAP that applies pursuant to a plan sponsor's election for a plan year apply for purposes of the presumptions under § 436(h) used in a subsequent plan year?

A-18: The AFTAP that applies pursuant to a plan sponsor's election for a plan year generally will not apply for purposes of the presumptions under § 436(h) used in a subsequent plan year. Instead, the actual AFTAP for the plan year that was certified by the plan's actuary generally is used for purposes of applying the pre-

sumption rules under § 436(h) for the subsequent plan year.

If, taking into account an election made under § 3608(b) of the CARES Act for a plan year, no benefit limitation applied to a plan on the last day of the plan year, then there is no presumption of continued underfunding under § 1.436-1(h)(1) as of the beginning of the subsequent plan year and the rules of § 1.436-1(g)(3) apply. Under those rules, no benefit limitation would apply under § 436(d) and (e) during the first three months of the subsequent plan year. However, under § 1.436-1(g)(3)(ii), the limitations on unpredictable contingent event benefits and plan amendments that increase benefit liabilities must be applied during that period, based on the inclusive presumed adjusted funding target determined using the prior plan year's certified AFTAP (as opposed to the AFTAP that applied for that prior plan year pursuant to an election under § 3608(b) of the CARES Act).

If a benefit limitation applied to a plan on the last day of the plan year for which an election under § 3608(b) of the CARES Act is made, then the rules providing a presumption of continued underfunding under § 1.436-1(h)(1) apply. Thus, as of the beginning of the subsequent plan year, the benefit limitations are applied based on a presumed AFTAP that is equal to the certified AFTAP for the plan year for which the election was made (rather than the AFTAP that applied for that plan year pursuant to an election under § 3608(b) of the CARES Act). This presumed AFTAP is used until the earliest of the four events specified in § 1.436-1(h)(1)(iv)(A) through (D). See A-14 of this notice for the rule that treats the plan sponsor's election under § 3608(b) of the CARES Act as a certification described in § 1.436-1(h)(1)(iv)(D).

Without regard to whether a benefit limitation applied to a plan on the last day of the plan year for which an election under § 3608(b) of the CARES Act is made, if a plan's actuary has not certified an AFTAP for the subsequent plan year before the first day of the fourth month of that year (and the plan sponsor has not made an election under § 3608(b) of the CARES Act for that plan year by that date), then the rules under § 1.436-1(h)(2) are applied based on the certified AFTAP for the plan year for which the election was made (rather than the AFTAP that applied for the plan year

pursuant to an election under § 3608(b) of the CARES Act). For example, if for a calendar year plan year, the plan sponsor made an election under § 3608(b) of the CARES Act to use the 2019 AFTAP of 82% for 2020, but the plan actuary certified the AFTAP for 2020 at 81%, then under § 1.436-1(h)(2)(i), the plan will be subject to limitations of § 1.436-1(d)(3) beginning April 1, 2021, based on a presumed AFTAP of 71% for 2020 (the certified AFTAP for 2020 reduced by 10 percentage points), unless the actuary has certified an AFTAP for 2021 by that date.

In order to properly reflect § 436(h)(3) in light of the CARES Act, the plan year following a plan year for which an election under § 3608(b) of the CARES Act is made must be treated as the first effective plan year, so that the special rule of § 1.436-1(h)(2)(ii) applies. Thus, if in the example in the preceding paragraph of this A-18, the plan's actuary certified an AFTAP for 2020 of 78%, then beginning April 1, 2021, the plan will be subject to the limitations of § 1.436-1(d)(3) based on a presumed AFTAP of 68% (the certified AFTAP for 2020 reduced by 10 percentage points), unless the plan's actuary has certified an AFTAP for 2021 by that date.

### **Paperwork Reduction Act**

The collections of information contained in this notice have 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 1545-2095.

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 OMB control number.

The collections of information in this notice are in A-13 of this notice. The collections of information are required to implement the application of § 3608 of the CARES Act. The collections of information are mandatory for those plan sponsors making an election under § 3608 of the CARES Act.

The likely respondents are sponsors of single-employer defined benefit plans.

Any potential changes on burden will be reported through the renewal of the current OMB approval numbers.

Estimates of the annualized cost to respondents are not available at this time.

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.

### **Drafting information**

The principal author of this notice is Tom Morgan of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the IRS participated in the development of this guidance. For further information regarding this notice, contact Mr. Morgan or Linda Marshall at 202-317-6700 (not a toll-free number).

## **Safe Harbor Explanations – Eligible Rollover Distributions**

### **Notice 2020-62**

#### **I. PURPOSE**

This notice modifies the two safe harbor explanations in Notice 2018-74, 2018-40 I.R.B. 529, that may be used to satisfy the requirement under § 402(f) of the Internal Revenue Code (Code) that certain information be provided to recipients of eligible rollover distributions. The safe harbor explanations as modified by this notice take into consideration certain legislative changes, including changes related to the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), which was enacted as part of the Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, 133 Stat. 2534 (2019). The SECURE Act adds § 72(t)(2)(H) of the Code as a new exception to the 10% additional tax under § 72(t)(1) for qualified birth or adoption distributions. The SECURE Act also includes an amendment to § 401(a)(9)(C)(i)(I) of the Code that increases the age for

required minimum distributions to age 72 for employees born after June 30, 1949.

To assist with the implementation of the modified safe harbor explanations, this notice includes an appendix with two model safe harbor explanations: one for distributions that are not from a designated Roth account, and the other for distributions from a designated Roth account.

## **II. BACKGROUND**

### **A. Section 402(f)**

Section 402(f) requires the plan administrator of a plan qualified under § 401(a) to provide the written explanation described in § 402(f)(1) to any recipient of an eligible rollover distribution, as defined in § 402(c)(4). In addition, §§ 403(a)(4)(B) and 457(e)(16)(B) require the plan administrator of a § 403(a) plan, or an eligible § 457(b) plan maintained by a governmental employer described in § 457(e)(1)(A), to provide the written explanation to any recipient of an eligible rollover distribution. Further, § 403(b)(8)(B) requires a payor under a § 403(b) plan to provide the written explanation to any recipient of an eligible rollover distribution.

Section 1.402(f)-1, Q&A-1(a), provides that the plan administrator of a qualified plan is required, within a reasonable period of time before making an eligible rollover distribution, to provide the distributee with the written explanation described in § 402(f) (§ 402(f) notice).

Notice 2018-74 sets forth two safe harbor explanations that reflect relevant law as of September 19, 2018: one safe harbor explanation is for payments not from a designated Roth account and the other safe harbor explanation is for payments from a designated Roth account. Notice 2018-74 provides that the safe harbor explanations may be used by plan administrators and payors to satisfy § 402(f) to the extent that the explanations accurately reflect current law.

### **B. Recent Statutory Changes Related to Distributions**

#### **1. Qualified Birth or Adoption Distributions**

Section 72(t)(1) generally provides for a 10% additional tax on a distribution

from a qualified retirement plan, unless the distribution qualifies for one of the exceptions in § 72(t)(2). Section 113 of the SECURE Act amended § 72(t)(2) of the Code to add § 72(t)(2)(H), which permits an individual to receive up to \$5,000 for a qualified birth or adoption distribution from an applicable eligible retirement plan (defined in § 72(t)(2)(H)(vi)(I) as an eligible retirement plan as defined in § 402(c)(8)(B) other than a defined benefit plan). The distribution is not subject to the 10% additional tax under § 72(t)(1) to the extent it meets the requirements of a qualified birth or adoption distribution. A qualified birth or adoption distribution is defined in § 72(t)(2)(H)(iii)(I) as any distribution from an applicable eligible retirement plan to an individual if made during the 1-year period beginning on the date on which the child of the individual is born or on which the legal adoption by the individual of an eligible adoptee is finalized.

Section 72(t)(2)(H)(v)(I) provides that the individual may recontribute a qualified birth or adoption distribution (not to exceed the amount of the distribution) to an applicable eligible retirement plan in which the taxpayer is a beneficiary and to which a rollover can be made. However, § 72(t)(2)(H)(vi)(II) provides that a qualified birth or adoption distribution is not treated as an eligible rollover distribution for purposes of the direct rollover rules of § 401(a)(31), the notice requirement under § 402(f), or the mandatory withholding rules under § 3405. Thus, although a qualified birth or adoption distribution generally may be recontributed to an applicable eligible retirement plan, a plan administrator is not required to provide a § 402(f) notice to a recipient of a qualified birth or adoption distribution.

## 2. Required Minimum Distributions

Section 114 of the SECURE Act amended § 401(a)(9) of the Code to change the required beginning date applicable to § 401(a) plans and other eligible retirement plans described in § 402(c)(8), including a § 401(a) qualified plan, a § 403(a) annuity plan, a § 403(b) annuity contract, a § 457(b) plan maintained by a governmental employer, and an individual retirement

account or annuity (IRA) described in § 408(a) or (b). The new required beginning date for an employee or an IRA owner is April 1 of the calendar year following the calendar year in which the individual attains age 72, rather than April 1 of the calendar year following the calendar year in which the individual attains age 70½. This amendment to § 401(a)(9) is effective for distributions required to be made after December 31, 2019, with respect to individuals who will attain age 70½ after that date. As a result of this change, employees and IRA owners who will attain age 70½ in 2020 will not have a required beginning date of April 1, 2021.

## 3. Coronavirus-related Distributions

Section 2202(a) of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134 Stat. 281 (2020) (CARES Act) permits an individual to receive a coronavirus-related distribution from an eligible retirement plan (as defined in § 402(c)(8)(B)). Section 2202(a)(4)(A) of the CARES Act defines a coronavirus-related distribution as any distribution from an eligible retirement plan made on or after January 1, 2020, and before December 31, 2020, to a qualified individual. Section 2202(a)(2) of the CARES Act limits the amount of the aggregate distributions from all eligible retirement plans that can be treated as coronavirus-related distributions to no more than \$100,000. A coronavirus-related distribution under section 2202(a) of the CARES Act is not subject to the 10% additional tax under § 72(t)(1). In addition, the coronavirus-related distribution may be included in gross income ratably over the 3-year period beginning with the taxable year of the distribution.

Section 2202(a)(3) of the CARES Act provides that a qualified individual may recontribute a coronavirus-related distribution (not to exceed the amount of the distribution) to an applicable eligible retirement plan in which the taxpayer is a beneficiary and to which a rollover can be made. However, a coronavirus-related distribution is not an eligible rollover distribution for purposes of the direct rollover rules of § 401(a)(31), the notice requirement under § 402(f), or the mandatory withholding rules under § 3405. Thus, although a coronavirus-related dis-

tribution generally may be recontributed to an applicable eligible retirement plan, a plan administrator is not required to provide a § 402(f) notice to a recipient of a coronavirus-related distribution. For more information relating to section 2202 of the CARES Act, see Notice 2020-50, 2020-28 I.R.B. 35.

## III. MODIFICATIONS TO THE SAFE HARBOR EXPLANATIONS

Two updated safe harbor explanations are appended to this notice (see the Appendix). The safe harbor explanations modify the safe harbor explanations in Notice 2018-74 to reflect certain legislative changes made after October 1, 2018, including: (1) the exception to the 10% additional tax under § 72(t)(1) for qualified birth or adoption distributions, and (2) the increase to age 72 for minimum required distributions for employees born after June 30, 1949. The safe harbor explanations also include other minor modifications to improve their clarity, including adding that payments of certain premiums for health and accident insurance are not eligible rollover distributions, rearranging bullets for readability, and spelling out acronyms when first used.

The updated safe harbor explanations provided in this notice may be used by plan administrators and payors to satisfy § 402(f). However, the updated safe harbor explanations will not satisfy § 402(f) to the extent the explanations are no longer accurate because of a change in the relevant law occurring after August 6, 2020.

The first safe harbor explanation reflects the rules relating to distributions not from a designated Roth account. Thus, the first safe harbor explanation should be used only for a distribution that is not from a designated Roth account. The second safe harbor explanation reflects the rules relating to distributions from a designated Roth account. Thus, the second safe harbor explanation should be used only for a distribution from a designated Roth account. Both explanations should be provided to a participant if the participant is eligible to receive eligible rollover distributions from both a designated Roth account and an account other than a designated Roth account.

The safe harbor explanation in this notice for distributions not from a designated Roth account meets the requirements of § 402(f) for an eligible rollover distribution that is not from a designated Roth account if provided to the recipient of the eligible rollover distribution within a reasonable period of time before the distribution is made. Similarly, the safe harbor explanation in this notice for distributions from a designated Roth account meets the requirements of § 402(f) for an eligible rollover distribution from a designated Roth account if provided to the recipient of the eligible rollover distribution within a reasonable period of time before the distribution is made.

Section 1.402(f)-1, Q&A-2, provides, in general, that a reasonable period of time for providing an explanation is no less than 30 days (subject to waiver) and no more than 90 days before the date on which the distribution is made. However, proposed § 1.402(f)-1, Q&A-2(a), pursuant to section 1102(a)(1)(B) of the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780 (2006), provides that a notice required to be provided under § 402(f) may be provided to a participant as much as 180 days before the date on which the distribution is

made (or the annuity starting date). These proposed regulations further provide that, with respect to the extended period for notices, plans may rely on the proposed regulations for notices provided during the period beginning on the first day of the first plan year beginning on or after January 1, 2007, and ending on the effective date of final regulations. Thus, the § 402(f) notice may be provided as many as 180 days before the date on which the distribution is made (or the annuity starting date).

A plan administrator or payor may customize a safe harbor explanation by omitting any information that does not apply to the plan. For example, if the plan does not hold after-tax employee contributions, it would be appropriate to eliminate the section “If your payment includes after-tax contributions” in the explanation for payments not from a designated Roth account. Similarly, if the plan does not provide for distributions of employer stock or other employer securities, it would be appropriate to eliminate the section “If your payment includes employer stock that you do not roll over.” Other information that may not be relevant to a particular plan includes, for example, the sections “If your payment is from a governmental section

457(b) plan” and “If you are an eligible retired public safety officer and your payment is used to pay for health coverage or qualified long-term care insurance.” In addition, the plan administrator or payor may provide additional information with a safe harbor explanation if the information is not inconsistent with § 402(f).

Alternatively, a plan administrator or payor may satisfy § 402(f) by providing an explanation that is different from a safe harbor explanation. Any explanation must include the information required by § 402(f) and must be written in a manner designed to be easily understood.

#### **IV. EFFECT ON OTHER DOCUMENTS**

Notice 2018-74 is modified.

#### **DRAFTING INFORMATION**

The principal author of this notice is Vernon Carter of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxation). For further information regarding this notice, contact Mr. Carter at (202) 317-6799 (not a toll-free number).

## Appendix

For Payments Not From a  
Designated Roth Account

### ***YOUR ROLLOVER OPTIONS***

You are receiving this notice because all or a portion of a payment you are receiving from the [INSERT NAME OF PLAN] (the “Plan”) is eligible to be rolled over to an IRA or an employer plan. This notice is intended to help you decide whether to do such a rollover.

This notice describes the rollover rules that apply to payments from the Plan that are *not* from a designated Roth account (a type of account in some employer plans that is subject to special tax rules). If you also receive a payment from a designated Roth account in the Plan, you will be provided a different notice for that payment, and the Plan administrator or the payor will tell you the amount that is being paid from each account.

Rules that apply to most payments from a plan are described in the “General Information About Rollovers” section. Special rules that only apply in certain circumstances are described in the “Special Rules and Options” section.

### **GENERAL INFORMATION ABOUT ROLLOVERS**

#### **How can a rollover affect my taxes?**

You will be taxed on a payment from the Plan if you do not roll it over. If you are under age 59½ and do not do a rollover, you will also have to pay a 10% additional income tax on early distributions (generally, distributions made before age 59½), unless an exception applies. However, if you do a rollover, you will not have to pay tax until you receive payments later and the 10% additional income tax will not apply if those payments are made after you are age 59½ (or if an exception to the 10% additional income tax applies).

#### **What types of retirement accounts and plans may accept my rollover?**

You may roll over the payment to either an IRA (an individual retirement account or individual retirement annuity) or an employer plan (a tax-qualified plan, section 403(b) plan, or governmental section 457(b) plan) that will accept the rollover. The rules of the IRA or employer plan that holds the rollover will determine your investment options, fees, and rights to payment from the IRA or employer plan (for example, IRAs are not subject to spousal consent rules, and IRAs may not provide loans). Further, the amount rolled over will become subject to the tax rules that apply to the IRA or employer plan.

#### **How do I do a rollover?**

There are two ways to do a rollover. You can do either a direct rollover or a 60-day rollover.

*If you do a direct rollover*, the Plan will make the payment directly to your IRA or an employer plan. You should contact the IRA sponsor or the administrator of the employer plan for information on how to do a direct rollover.

*If you do not do a direct rollover*, you may still do a rollover by making a deposit into an IRA or eligible employer plan that will accept it. Generally, you will have 60 days after you receive the payment to make the deposit. If you do not do a direct rollover, the Plan is required to withhold 20% of the payment for federal income taxes (up to the amount of cash and property received other than employer stock). This means that, in order to roll over the entire payment in a 60-day rollover, you must use other funds to make up for the 20% withheld. If you do not roll over the entire amount of the payment, the portion not rolled over will be taxed and will be subject to the 10% additional income tax on early distributions if you are under age 59½ (unless an exception applies).

#### **How much may I roll over?**

If you wish to do a rollover, you may roll over all or part of the amount eligible for rollover. Any payment from the Plan is eligible for rollover, except:

- Certain payments spread over a period of at least 10 years or over your life or life expectancy (or the joint lives or joint life expectancies of you and your beneficiary);

- Required minimum distributions after age 70½ (if you were born before July 1, 1949), after age 72 (if you were born after June 30, 1949), or after death;
- Hardship distributions;
- Payments of employee stock ownership plan (ESOP) dividends;
- Corrective distributions of contributions that exceed tax law limitations;
- Loans treated as deemed distributions (for example, loans in default due to missed payments before your employment ends);
- Cost of life insurance paid by the Plan;
- Payments of certain automatic enrollment contributions that you request to withdraw within 90 days of your first contribution;
- Amounts treated as distributed because of a prohibited allocation of S corporation stock under an ESOP (also, there generally will be adverse tax consequences if you roll over a distribution of S corporation stock to an IRA); and
- Distributions of certain premiums for health and accident insurance.

The Plan administrator or the payor can tell you what portion of a payment is eligible for rollover.

**If I don't do a rollover, will I have to pay the 10% additional income tax on early distributions?**

If you are under age 59½, you will have to pay the 10% additional income tax on early distributions for any payment from the Plan (including amounts withheld for income tax) that you do not roll over, unless one of the exceptions listed below applies. This tax applies to the part of the distribution that you must include in income and is in addition to the regular income tax on the payment not rolled over.

The 10% additional income tax does not apply to the following payments from the Plan:

- Payments made after you separate from service if you will be at least age 55 in the year of the separation;
- Payments that start after you separate from service if paid at least annually in equal or close to equal amounts over your life or life expectancy (or the joint lives or joint life expectancies of you and your beneficiary);
- Payments from a governmental plan made after you separate from service if you are a qualified public safety employee and you will be at least age 50 in the year of the separation;
- Payments made due to disability;
- Payments after your death;
- Payments of ESOP dividends;
- Corrective distributions of contributions that exceed tax law limitations;
- Cost of life insurance paid by the Plan;
- Payments made directly to the government to satisfy a federal tax levy;
- Payments made under a qualified domestic relations order (QDRO);
- Payments of up to \$5,000 made to you from a defined contribution plan if the payment is a qualified birth or adoption distribution;
- Payments up to the amount of your deductible medical expenses (without regard to whether you itemize deductions for the taxable year);
- Certain payments made while you are on active duty if you were a member of a reserve component called to duty after September 11, 2001 for more than 179 days;
- Payments of certain automatic enrollment contributions that you request to withdraw within 90 days of your first contribution;
- Payments excepted from the additional income tax by federal legislation relating to certain emergencies and disasters; and
- Phased retirement payments made to federal employees.

**If I do a rollover to an IRA, will the 10% additional income tax apply to early distributions from the IRA?**

If you receive a payment from an IRA when you are under age 59½, you will have to pay the 10% additional income tax on early distributions on the part of the distribution that you must include in income, unless an exception applies. In general, the exceptions to the 10% additional income tax for early distributions from an IRA are the same as the exceptions listed above for early distributions from a plan. However, there are a few differences for payments from an IRA, including:

- The exception for payments made after you separate from service if you will be at least age 55 in the year of the separation (or age 50 for qualified public safety employees) does not apply;
- The exception for qualified domestic relations orders (QDROs) does not apply (although a special rule applies under which, as part of a divorce or separation agreement, a tax-free transfer may be made directly to an IRA of a spouse or former spouse); and

- The exception for payments made at least annually in equal or close to equal amounts over a specified period applies without regard to whether you have had a separation from service.

Additional exceptions apply for payments from an IRA, including:

- Payments for qualified higher education expenses;
- Payments up to \$10,000 used in a qualified first-time home purchase; and
- Payments for health insurance premiums after you have received unemployment compensation for 12 consecutive weeks (or would have been eligible to receive unemployment compensation but for self-employed status).

### **Will I owe State income taxes?**

This notice does not address any State or local income tax rules (including withholding rules).

## **SPECIAL RULES AND OPTIONS**

### **If your payment includes after-tax contributions**

After-tax contributions included in a payment are not taxed. If you receive a partial payment of your total benefit, an allocable portion of your after-tax contributions is included in the payment, so you cannot take a payment of only after-tax contributions. However, if you have pre-1987 after-tax contributions maintained in a separate account, a special rule may apply to determine whether the after-tax contributions are included in the payment. In addition, special rules apply when you do a rollover, as described below.

You may roll over to an IRA a payment that includes after-tax contributions through either a direct rollover or a 60-day rollover. You must keep track of the aggregate amount of the after-tax contributions in all of your IRAs (in order to determine your taxable income for later payments from the IRAs). If you do a direct rollover of only a portion of the amount paid from the Plan and at the same time the rest is paid to you, the portion rolled over consists first of the amount that would be taxable if not rolled over. For example, assume you are receiving a distribution of \$12,000, of which \$2,000 is after-tax contributions. In this case, if you directly roll over \$10,000 to an IRA that is not a Roth IRA, no amount is taxable because the \$2,000 amount not rolled over is treated as being after-tax contributions. If you do a direct rollover of the entire amount paid from the Plan to two or more destinations at the same time, you can choose which destination receives the after-tax contributions.

Similarly, if you do a 60-day rollover to an IRA of only a portion of a payment made to you, the portion rolled over consists first of the amount that would be taxable if not rolled over. For example, assume you are receiving a distribution of \$12,000, of which \$2,000 is after-tax contributions, and no part of the distribution is directly rolled over. In this case, if you roll over \$10,000 to an IRA that is not a Roth IRA in a 60-day rollover, no amount is taxable because the \$2,000 amount not rolled over is treated as being after-tax contributions.

You may roll over to an employer plan all of a payment that includes after-tax contributions, but only through a direct rollover (and only if the receiving plan separately accounts for after-tax contributions and is not a governmental section 457(b) plan). You can do a 60-day rollover to an employer plan of part of a payment that includes after-tax contributions, but only up to the amount of the payment that would be taxable if not rolled over.

### **If you miss the 60-day rollover deadline**

Generally, the 60-day rollover deadline cannot be extended. However, the IRS has the limited authority to waive the deadline under certain extraordinary circumstances, such as when external events prevented you from completing the rollover by the 60-day rollover deadline. Under certain circumstances, you may claim eligibility for a waiver of the 60-day rollover deadline by making a written self-certification. Otherwise, to apply for a waiver from the IRS, you must file a private letter ruling request with the IRS. Private letter ruling requests require the payment of a nonrefundable user fee. For more information, see IRS Publication 590-A, *Contributions to Individual Retirement Arrangements (IRAs)*.

### **If your payment includes employer stock that you do not roll over**

If you do not do a rollover, you can apply a special rule to payments of employer stock (or other employer securities) that are either attributable to after-tax contributions or paid in a lump sum after separation from service (or after age 59½, disability, or the participant's death). Under the special rule, the net unrealized appreciation on the stock will not be taxed when distributed from the Plan

and will be taxed at capital gain rates when you sell the stock. Net unrealized appreciation is generally the increase in the value of employer stock after it was acquired by the Plan. If you do a rollover for a payment that includes employer stock (for example, by selling the stock and rolling over the proceeds within 60 days of the payment), the special rule relating to the distributed employer stock will not apply to any subsequent payments from the IRA or, generally, the Plan. The Plan administrator can tell you the amount of any net unrealized appreciation.

#### **If you have an outstanding loan that is being offset**

If you have an outstanding loan from the Plan, your Plan benefit may be offset by the outstanding amount of the loan, typically when your employment ends. The offset amount is treated as a distribution to you at the time of the offset. Generally, you may roll over all or any portion of the offset amount. Any offset amount that is not rolled over will be taxed (including the 10% additional income tax on early distributions, unless an exception applies). You may roll over offset amounts to an IRA or an employer plan (if the terms of the employer plan permit the plan to receive plan loan offset rollovers).

How long you have to complete the rollover depends on what kind of plan loan offset you have. If you have a qualified plan loan offset, you will have until your tax return due date (including extensions) for the tax year during which the offset occurs to complete your rollover. A qualified plan loan offset occurs when a plan loan in good standing is offset because your employer plan terminates, or because you sever from employment. If your plan loan offset occurs for any other reason (such as a failure to make level loan repayments that results in a deemed distribution), then you have 60 days from the date the offset occurs to complete your rollover.

#### **If you were born on or before January 1, 1936**

If you were born on or before January 1, 1936 and receive a lump sum distribution that you do not roll over, special rules for calculating the amount of the tax on the payment might apply to you. For more information, see IRS Publication 575, *Pension and Annuity Income*.

#### **If your payment is from a governmental section 457(b) plan**

If the Plan is a governmental section 457(b) plan, the same rules described elsewhere in this notice generally apply, allowing you to roll over the payment to an IRA or an employer plan that accepts rollovers. One difference is that, if you do not do a rollover, you will not have to pay the 10% additional income tax on early distributions from the Plan even if you are under age 59½ (unless the payment is from a separate account holding rollover contributions that were made to the Plan from a tax-qualified plan, a section 403(b) plan, or an IRA). However, if you do a rollover to an IRA or to an employer plan that is not a governmental section 457(b) plan, a later distribution made before age 59½ will be subject to the 10% additional income tax on early distributions (unless an exception applies). Other differences include that you cannot do a rollover if the payment is due to an “unforeseeable emergency” and the special rules under “If your payment includes employer stock that you do not roll over” and “If you were born on or before January 1, 1936” do not apply.

#### **If you are an eligible retired public safety officer and your payment is used to pay for health coverage or qualified long-term care insurance**

If the Plan is a governmental plan, you retired as a public safety officer, and your retirement was by reason of disability or was after normal retirement age, you can exclude from your taxable income Plan payments paid directly as premiums to an accident or health plan (or a qualified long-term care insurance contract) that your employer maintains for you, your spouse, or your dependents, up to a maximum of \$3,000 annually. For this purpose, a public safety officer is a law enforcement officer, firefighter, chaplain, or member of a rescue squad or ambulance crew.

#### **If you roll over your payment to a Roth IRA**

If you roll over a payment from the Plan to a Roth IRA, a special rule applies under which the amount of the payment rolled over (reduced by any after-tax amounts) will be taxed. In general, the 10% additional income tax on early distributions will not apply. However, if you take the amount rolled over out of the Roth IRA within the 5-year period that begins on January 1 of the year of the rollover, the 10% additional income tax will apply (unless an exception applies).

If you roll over the payment to a Roth IRA, later payments from the Roth IRA that are qualified distributions will not be taxed (including earnings after the rollover). A qualified distribution from a Roth IRA is a payment made after you are age 59½ (or after your death or disability, or as a qualified first-time homebuyer distribution of up to \$10,000) and after you have had a Roth IRA for at least

5 years. In applying this 5-year rule, you count from January 1 of the year for which your first contribution was made to a Roth IRA. Payments from the Roth IRA that are not qualified distributions will be taxed to the extent of earnings after the rollover, including the 10% additional income tax on early distributions (unless an exception applies). You do not have to take required minimum distributions from a Roth IRA during your lifetime. For more information, see IRS Publication 590-A, *Contributions to Individual Retirement Arrangements (IRAs)*, and IRS Publication 590-B, *Distributions from Individual Retirement Arrangements (IRAs)*.

#### **If you do a rollover to a designated Roth account in the Plan**

You cannot roll over a distribution to a designated Roth account in another employer's plan. However, you can roll the distribution over into a designated Roth account in the distributing Plan. If you roll over a payment from the Plan to a designated Roth account in the Plan, the amount of the payment rolled over (reduced by any after-tax amounts directly rolled over) will be taxed. In general, the 10% additional income tax on early distributions will not apply. However, if you take the amount rolled over out of the Roth IRA within the 5-year period that begins on January 1 of the year of the rollover, the 10% additional income tax will apply (unless an exception applies).

If you roll over the payment to a designated Roth account in the Plan, later payments from the designated Roth account that are qualified distributions will not be taxed (including earnings after the rollover). A qualified distribution from a designated Roth account is a payment made both after you are age 59½ (or after your death or disability) and after you have had a designated Roth account in the Plan for at least 5 years. In applying this 5-year rule, you count from January 1 of the year your first contribution was made to the designated Roth account. However, if you made a direct rollover to a designated Roth account in the Plan from a designated Roth account in a plan of another employer, the 5-year period begins on January 1 of the year you made the first contribution to the designated Roth account in the Plan or, if earlier, to the designated Roth account in the plan of the other employer. Payments from the designated Roth account that are not qualified distributions will be taxed to the extent of earnings after the rollover, including the 10% additional income tax on early distributions (unless an exception applies).

#### **If you are not a Plan participant**

*Payments after death of the participant.* If you receive a distribution after the participant's death that you do not roll over, the distribution generally will be taxed in the same manner described elsewhere in this notice. However, the 10% additional income tax on early distributions and the special rules for public safety officers do not apply, and the special rule described under the section "If you were born on or before January 1, 1936" applies only if the deceased participant was born on or before January 1, 1936.

**If you are a surviving spouse.** If you receive a payment from the Plan as the surviving spouse of a deceased participant, you have the same rollover options that the participant would have had, as described elsewhere in this notice. In addition, if you choose to do a rollover to an IRA, you may treat the IRA as your own or as an inherited IRA.

An IRA you treat as your own is treated like any other IRA of yours, so that payments made to you before you are age 59½ will be subject to the 10% additional income tax on early distributions (unless an exception applies) and required minimum distributions from your IRA do not have to start until after you are age 70½ (if you were born before July 1, 1949) or age 72 (if you were born after June 30, 1949).

If you treat the IRA as an inherited IRA, payments from the IRA will not be subject to the 10% additional income tax on early distributions. However, if the participant had started taking required minimum distributions, you will have to receive required minimum distributions from the inherited IRA. If the participant had not started taking required minimum distributions from the Plan, you will not have to start receiving required minimum distributions from the inherited IRA until the year the participant would have been age 70½ (if the participant was born before July 1, 1949) or age 72 (if the participant was born after June 30, 1949).

**If you are a surviving beneficiary other than a spouse.** If you receive a payment from the Plan because of the participant's death and you are a designated beneficiary other than a surviving spouse, the only rollover option you have is to do a direct rollover to an inherited IRA. Payments from the inherited IRA will not be subject to the 10% additional income tax on early distributions. You will have to receive required minimum distributions from the inherited IRA.

*Payments under a QDRO.* If you are the spouse or former spouse of the participant who receives a payment from the Plan under a QDRO, you generally have the same options and the same tax treatment that the participant would have (for example, you may roll over the payment to your own IRA or an eligible employer plan that will accept it). However, payments under the QDRO will not be subject to the 10% additional income tax on early distributions.

### **If you are a nonresident alien**

If you are a nonresident alien and you do not do a direct rollover to a U.S. IRA or U.S. employer plan, instead of withholding 20%, the Plan is generally required to withhold 30% of the payment for federal income taxes. If the amount withheld exceeds the amount of tax you owe (as may happen if you do a 60-day rollover), you may request an income tax refund by filing Form 1040NR and attaching your Form 1042-S. See Form W-8BEN for claiming that you are entitled to a reduced rate of withholding under an income tax treaty. For more information, see also IRS Publication 519, *U.S. Tax Guide for Aliens*, and IRS Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*.

### **Other special rules**

If a payment is one in a series of payments for less than 10 years, your choice whether to do a direct rollover will apply to all later payments in the series (unless you make a different choice for later payments).

If your payments for the year are less than \$200 (not including payments from a designated Roth account in the Plan), the Plan is not required to allow you to do a direct rollover and is not required to withhold federal income taxes. However, you may do a 60-day rollover.

Unless you elect otherwise, a mandatory cashout of more than \$1,000 (not including payments from a designated Roth account in the Plan) will be directly rolled over to an IRA chosen by the Plan administrator or the payor. A mandatory cashout is a payment from a plan to a participant made before age 62 (or normal retirement age, if later) and without consent, where the participant's benefit does not exceed \$5,000 (not including any amounts held under the plan as a result of a prior rollover made to the plan).

You may have special rollover rights if you recently served in the U.S. Armed Forces. For more information on special rollover rights related to the U.S. Armed Forces, see IRS Publication 3, *Armed Forces' Tax Guide*. You also may have special rollover rights if you were affected by a federally declared disaster (or similar event), or if you received a distribution on account of a disaster. For more information on special rollover rights related to disaster relief, see the IRS website at [www.irs.gov](http://www.irs.gov).

### **FOR MORE INFORMATION**

You may wish to consult with the Plan administrator or payor, or a professional tax advisor, before taking a payment from the Plan. Also, you can find more detailed information on the federal tax treatment of payments from employer plans in: IRS Publication 575, *Pension and Annuity Income*; IRS Publication 590-A, *Contributions to Individual Retirement Arrangements (IRAs)*; IRS Publication 590-B, *Distributions from Individual Retirement Arrangements (IRAs)*; and IRS Publication 571, *Tax-Sheltered Annuity Plans (403(b) Plans)*. These publications are available from a local IRS office, on the web at [www.irs.gov](http://www.irs.gov), or by calling 1-800-TAX-FORM.

## ***YOUR ROLLOVER OPTIONS***

You are receiving this notice because all or a portion of a payment you are receiving from the [INSERT NAME OF PLAN] (the “Plan”) is eligible to be rolled over to a Roth IRA or designated Roth account in an employer plan. This notice is intended to help you decide whether to do a rollover.

*This notice describes the rollover rules that apply to payments from the Plan that are from a designated Roth account. If you also receive a payment from the Plan that is not from a designated Roth account, you will be provided a different notice for that payment, and the Plan administrator or the payor will tell you the amount that is being paid from each account.*

Rules that apply to most payments from a designated Roth account are described in the “General Information About Rollovers” section. Special rules that only apply in certain circumstances are described in the “Special Rules and Options” section.

## **GENERAL INFORMATION ABOUT ROLLOVERS**

### **How can a rollover affect my taxes?**

After-tax contributions included in a payment from a designated Roth account are not taxed, but earnings might be taxed. The tax treatment of earnings included in the payment depends on whether the payment is a qualified distribution. If a payment is only part of your designated Roth account, the payment will include an allocable portion of the earnings in your designated Roth account.

If the payment from the Plan is not a qualified distribution and you do not do a rollover to a Roth IRA or a designated Roth account in an employer plan, you will be taxed on the portion of the payment that is earnings. If you are under age 59½, a 10% additional income tax on early distributions (generally, distributions made before age 59½) will also apply to the earnings (unless an exception applies). However, if you do a rollover, you will not have to pay taxes currently on the earnings and you will not have to pay taxes later on payments that are qualified distributions.

If the payment from the Plan is a qualified distribution, you will not be taxed on any part of the payment even if you do not do a rollover. If you do a rollover, you will not be taxed on the amount you roll over and any earnings on the amount you roll over will not be taxed if paid later in a qualified distribution.

A qualified distribution from a designated Roth account in the Plan is a payment made after you are age 59½ (or after your death or disability) and after you have had a designated Roth account in the Plan for at least 5 years. In applying the 5-year rule, you count from January 1 of the year your first contribution was made to the designated Roth account. However, if you did a direct rollover to a designated Roth account in the Plan from a designated Roth account in another employer plan, your participation will count from January 1 of the year your first contribution was made to the designated Roth account in the Plan or, if earlier, to the designated Roth account in the other employer plan.

### **What types of retirement accounts and plans may accept my rollover?**

You may roll over the payment to either a Roth IRA (a Roth individual retirement account or Roth individual retirement annuity) or a designated Roth account in an employer plan (a tax-qualified plan, section 403(b) plan, or governmental section 457 plan) that will accept the rollover. The rules of the Roth IRA or employer plan that holds the rollover will determine your investment options, fees, and rights to payment from the Roth IRA or employer plan (for example, Roth IRAs are not subject to spousal consent rules, and Roth IRAs may not provide loans). Further, the amount rolled over will become subject to the tax rules that apply to the Roth IRA or the designated Roth account in the employer plan. In general, these tax rules are similar to those described elsewhere in this notice, but differences include:

- If you do a rollover to a Roth IRA, all of your Roth IRAs will be considered for purposes of determining whether you have satisfied the 5-year rule (counting from January 1 of the year for which your first contribution was made to any of your Roth IRAs).
- If you do a rollover to a Roth IRA, you will not be required to take a distribution from the Roth IRA during your lifetime and you must keep track of the aggregate amount of the after-tax contributions in all of your Roth IRAs (in order to determine your taxable income for later Roth IRA payments that are not qualified distributions).
- Eligible rollover distributions from a Roth IRA can only be rolled over to another Roth IRA.

## **How do I do a rollover?**

There are two ways to do a rollover. You can either do a direct rollover or a 60-day rollover.

*If you do a direct rollover*, the Plan will make the payment directly to your Roth IRA or designated Roth account in an employer plan. You should contact the Roth IRA sponsor or the administrator of the employer plan for information on how to do a direct rollover.

*If you do not do a direct rollover*, you may still do a rollover by making a deposit (generally within 60 days) into a Roth IRA, whether the payment is a qualified or nonqualified distribution. In addition, you can do a rollover by making a deposit within 60 days into a designated Roth account in an employer plan if the payment is a nonqualified distribution and the rollover does not exceed the amount of the earnings in the payment. You cannot do a 60-day rollover to an employer plan of any part of a qualified distribution. If you receive a distribution that is a nonqualified distribution and you do not roll over an amount at least equal to the earnings allocable to the distribution, you will be taxed on the amount of those earnings not rolled over, including the 10% additional income tax on early distributions if you are under age 59½ (unless an exception applies).

If you do a direct rollover of only a portion of the amount paid from the Plan and a portion is paid to you at the same time, the portion directly rolled over consists first of earnings.

If you do not do a direct rollover and the payment is not a qualified distribution, the Plan is required to withhold 20% of the earnings for federal income taxes (up to the amount of cash and property received other than employer stock). This means that, in order to roll over the entire payment in a 60-day rollover to a Roth IRA, you must use other funds to make up for the 20% withheld.

## **How much may I roll over?**

If you wish to do a rollover, you may roll over all or part of the amount eligible for rollover. Any payment from the Plan is eligible for rollover, except:

- Certain payments spread over a period of at least 10 years or over your life or life expectancy (or the joint lives or joint life expectancies of you and your beneficiary);
- Required minimum distributions after age 70½ (if you were born before July 1, 1949), after age 72 (if you were born after June 30, 1949), or after death;
- Hardship distributions;
- Payments of employee stock ownership plan (ESOP) dividends;
- Corrective distributions of contributions that exceed tax law limitations;
- Loans treated as deemed distributions (for example, loans in default due to missed payments before your employment ends);
- Cost of life insurance paid by the Plan;
- Payments of certain automatic enrollment contributions that you request to withdraw within 90 days of your first contribution; and
- Amounts treated as distributed because of a prohibited allocation of S corporation stock under an ESOP (also, there generally will be adverse tax consequences if S corporation stock is held by an IRA); and
- Distributions of certain premiums for health and accident insurance.

The Plan administrator or the payor can tell you what portion of a payment is eligible for rollover.

## **If I don't do a rollover, will I have to pay the 10% additional income tax on early distributions?**

If a payment is not a qualified distribution and you are under age 59½, you will have to pay the 10% additional income tax on early distributions with respect to the earnings allocated to the payment that you do not roll over (including amounts withheld for income tax), unless one of the exceptions listed below applies. This tax is in addition to the regular income tax on the earnings not rolled over.

The 10% additional income tax does not apply to the following payments from the Plan:

- Payments made after you separate from service if you will be at least age 55 in the year of the separation;
- Payments that start after you separate from service if paid at least annually in equal or close to equal amounts over your life or life expectancy (or the joint lives or joint life expectancies of you and your beneficiary);
- Payments from a governmental plan made after you separate from service if you are a qualified public safety employee and you will be at least age 50 in the year of the separation;

- Payments made due to disability;
- Payments after your death;
- Payments of ESOP dividends;
- Corrective distributions of contributions that exceed tax law limitations;
- Cost of life insurance paid by the Plan;
- Payments made directly to the government to satisfy a federal tax levy;
- Payments made under a qualified domestic relations order (QDRO);
- Payments of up to \$5,000 made to you from a defined contribution plan if the payment is a qualified birth or adoption distribution;
- Payments up to the amount of your deductible medical expenses (without regard to whether you itemize deductions for the taxable year);
- Certain payments made while you are on active duty if you were a member of a reserve component called to duty after September 11, 2001 for more than 179 days;
- Payments of certain automatic enrollment contributions that you request to withdraw within 90 days of your first contribution; and
- Payments excepted from the additional income tax by federal legislation relating to certain emergencies and disasters.

**If I do a rollover to a Roth IRA, will the 10% additional income tax apply to early distributions from the IRA?**

If you receive a payment from a Roth IRA when you are under age 59½, you will have to pay the 10% additional income tax on early distributions on the earnings paid from the Roth IRA, unless an exception applies or the payment is a qualified distribution. In general, the exceptions to the 10% additional income tax for early distributions from a Roth IRA listed above are the same as the exceptions for early distributions from a plan. However, there are a few differences for payments from a Roth IRA, including:

- The exception for payments made after you separate from service if you will be at least age 55 in the year of the separation (or age 50 for qualified public safety employees) does not apply;
- The exception for qualified domestic relations orders (QDROs) does not apply (although a special rule applies under which, as part of a divorce or separation agreement, a tax-free transfer may be made directly to a Roth IRA of a spouse or former spouse); and
- The exception for payments made at least annually in equal or close to equal amounts over a specified period applies without regard to whether you have had a separation from service.

Additional exceptions apply for payments from an IRA, including:

- Payments for qualified higher education expenses;
- Payments up to \$10,000 used in a qualified first-time home purchase; and
- Payments for health insurance premiums after you have received unemployment compensation for 12 consecutive weeks (or would have been eligible to receive unemployment compensation but for self-employed status).

**Will I owe State income taxes?**

This notice does not address any State or local income tax rules (including withholding rules).

**SPECIAL RULES AND OPTIONS**

**If you miss the 60-day rollover deadline**

Generally, the 60-day rollover deadline cannot be extended. However, the IRS has the limited authority to waive the deadline under certain extraordinary circumstances, such as when external events prevented you from completing the rollover by the 60-day rollover deadline. Under certain circumstances, you may claim eligibility for a waiver of the 60-day rollover deadline by making a written self-certification. Otherwise, to apply for a waiver from the IRS, you must file a private letter ruling request with the IRS. Private letter ruling requests require the payment of a nonrefundable user fee. For more information, see IRS Publication 590-A, *Contributions to Individual Retirement Arrangements (IRAs)*.

### **If your payment includes employer stock that you do not roll over**

If you receive a payment that is not a qualified distribution and you do not roll it over, you can apply a special rule to payments of employer stock (or other employer securities) that are paid in a lump sum after separation from service (or after age 59½, disability, or the participant's death). Under the special rule, the net unrealized appreciation on the stock included in the earnings in the payment will not be taxed when distributed to you from the Plan and will be taxed at capital gain rates when you sell the stock. If you do a rollover to a Roth IRA for a nonqualified distribution that includes employer stock (for example, by selling the stock and rolling over the proceeds within 60 days of the distribution), you will not have any taxable income and the special rule relating to the distributed employer stock will not apply to any subsequent payments from the Roth IRA or, generally, the Plan. Net unrealized appreciation is generally the increase in the value of the employer stock after it was acquired by the Plan. The Plan administrator can tell you the amount of any net unrealized appreciation.

If you receive a payment that is a qualified distribution that includes employer stock and you do not roll it over, your basis in the stock (used to determine gain or loss when you later sell the stock) will equal the fair market value of the stock at the time of the payment from the Plan.

### **If you have an outstanding loan that is being offset**

If you have an outstanding loan from the Plan, your Plan benefit may be offset by the outstanding amount of the loan, typically when your employment ends. The offset amount is treated as a distribution to you at the time of the offset. Generally, you may roll over all or any portion of the offset amount. If the distribution attributable to the offset is not a qualified distribution and you do not roll over the offset amount, you will be taxed on any earnings included in the distribution (including the 10% additional income tax on early distributions, unless an exception applies). You may roll over the earnings included in the loan offset to a Roth IRA or designated Roth account in an employer plan (if the terms of the employer plan permit the plan to receive plan loan offset rollovers). You may also roll over the full amount of the offset to a Roth IRA.

How long you have to complete the rollover depends on what kind of plan loan offset you have. If you have a qualified plan loan offset, you will have until your tax return due date (including extensions) for the tax year during which the offset occurs to complete your rollover. A qualified plan loan offset occurs when a plan loan in good standing is offset because your employer plan terminates, or because you sever from employment. If your plan loan offset occurs for any other reason (such as a failure to make level repayments that results in a deemed distribution), then you have 60 days from the date the offset occurs to complete your rollover.

### **If you receive a nonqualified distribution and you were born on or before January 1, 1936**

If you were born on or before January 1, 1936, and receive a lump sum distribution that is not a qualified distribution and that you do not roll over, special rules for calculating the amount of the tax on the earnings in the payment might apply to you. For more information, see IRS Publication 575, *Pension and Annuity Income*.

### **If your payment is from a governmental section 457(b) plan**

If the Plan is a governmental section 457(b) plan, the same rules described elsewhere in this notice generally apply, allowing you to roll over the payment to an IRA or an employer plan that accepts rollovers. One difference is that, if you receive a payment that is not a qualified distribution and you do not roll it over, you will not have to pay the 10% additional income tax on early distributions with respect to the earnings allocated to the payment that you do not roll over, even if you are under age 59½ (unless the payment is from a separate account holding rollover contributions that were made to the Plan from a tax-qualified plan, a section 403(b) plan, or an IRA). However, if you do a rollover to an IRA or to an employer plan that is not a governmental section 457(b) plan, a later distribution that is not a qualified distribution made before age 59½ will be subject to the 10% additional income tax on earnings allocated to the payment (unless an exception applies). Other differences include that you cannot do a rollover if the payment is due to an "unforeseeable emergency" and the special rules under "If your payment includes employer stock that you do not roll over" and "If you were born on or before January 1, 1936" do not apply.

### **If you receive a nonqualified distribution, are an eligible retired public safety officer, and your payment is used to pay for health coverage or qualified long-term care insurance**

If the Plan is a governmental plan, you retired as a public safety officer, and your retirement was by reason of disability or was after normal retirement age, you can exclude from your taxable income nonqualified distributions paid directly as premiums to an accident or health plan (or a qualified long-term care insurance contract) that your employer maintains for you, your spouse, or your depen-

dents, up to a maximum of \$3,000 annually. For this purpose, a public safety officer is a law enforcement officer, firefighter, chaplain, or member of a rescue squad or ambulance crew.

### **If you are not a Plan participant**

*Payments after death of the participant.* If you receive a distribution after the participant's death that you do not roll over, the distribution generally will be taxed in the same manner described elsewhere in this notice. However, whether the payment is a qualified distribution generally depends on when the participant first made a contribution to the designated Roth account in the Plan. Also, the 10% additional income tax on early distributions and the special rules for public safety officers do not apply, and the special rule described under the section "If you receive a nonqualified distribution and you were born on or before January 1, 1936" applies only if the deceased participant was born on or before January 1, 1936.

**If you are a surviving spouse.** If you receive a payment from the Plan as the surviving spouse of a deceased participant, you have the same rollover options that the participant would have had, as described elsewhere in this notice. In addition, if you choose to do a rollover to a Roth IRA, you may treat the Roth IRA as your own or as an inherited Roth IRA.

A Roth IRA you treat as your own is treated like any other Roth IRA of yours, so that you will not have to receive any required minimum distributions during your lifetime and earnings paid to you in a nonqualified distribution before you are age 59½ will be subject to the 10% additional income tax on early distributions (unless an exception applies).

If you treat the Roth IRA as an inherited Roth IRA, payments from the Roth IRA will not be subject to the 10% additional income tax on early distributions. An inherited Roth IRA is subject to required minimum distributions. If the participant had started taking required minimum distributions from the Plan, you will have to receive required minimum distributions from the inherited Roth IRA. If the participant had not started taking required minimum distributions, you will not have to start receiving required minimum distributions from the inherited Roth IRA until the year the participant would have been age 70½ (if the participant was born before July 1, 1949) or age 72 (if the participant was born after June 30, 1949).

**If you are a surviving beneficiary other than a spouse.** If you receive a payment from the Plan because of the participant's death and you are a designated beneficiary other than a surviving spouse, the only rollover option you have is to do a direct rollover to an inherited Roth IRA. Payments from the inherited Roth IRA, even if made in a nonqualified distribution, will not be subject to the 10% additional income tax on early distributions. You will have to receive required minimum distributions from the inherited Roth IRA.

*Payments under a QDRO.* If you are the spouse or a former spouse of the participant who receives a payment from the Plan under a QDRO, you generally have the same options and the same tax treatment that the participant would have (for example, you may roll over the payment to your own Roth IRA or to a designated Roth account in an eligible employer plan that will accept it).

### **If you are a nonresident alien**

If you are a nonresident alien, you do not do a direct rollover to a U.S. IRA or U.S. employer plan, and the payment is not a qualified distribution, the Plan is generally required to withhold 30% (instead of withholding 20%) of the earnings for federal income taxes. If the amount withheld exceeds the amount of tax you owe (as may happen if you do a 60-day rollover), you may request an income tax refund by filing Form 1040NR and attaching your Form 1042-S. See Form W-8BEN for claiming that you are entitled to a reduced rate of withholding under an income tax treaty. For more information, see also IRS Publication 519, *U.S. Tax Guide for Aliens*, and IRS Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*.

### **Other special rules**

If a payment is one in a series of payments for less than 10 years, your choice whether to do a direct rollover will apply to all later payments in the series (unless you make a different choice for later payments).

If your payments for the year (only including payments from the designated Roth account in the Plan) are less than \$200, the Plan is not required to allow you to do a direct rollover and is not required to withhold federal income taxes. However, you can do a 60-day rollover.

Unless you elect otherwise, a mandatory cashout from the designated Roth account in the Plan of more than \$1,000 will be directly rolled over to a Roth IRA chosen by the Plan administrator or the payor. A mandatory cashout is a payment from a plan to a participant

made before age 62 (or normal retirement age, if later) and without consent, where the participant's benefit does not exceed \$5,000 (not including any amounts held under the plan as a result of a prior rollover made to the plan).

You may have special rollover rights if you recently served in the U.S. Armed Forces. For more information on special rollover rights related to the U.S. Armed Forces, see IRS Publication 3, *Armed Forces' Tax Guide*. You also may have special rollover rights if you were affected by a federally declared disaster (or similar event), or if you received a distribution on account of a disaster. For more information on special rollover rights related to disaster relief, see the IRS website at [www.irs.gov](http://www.irs.gov).

#### **FOR MORE INFORMATION**

You may wish to consult with the Plan administrator or payor, or a professional tax advisor, before taking a payment from the Plan. Also, you can find more detailed information on the federal tax treatment of payments from employer plans in: IRS Publication 575, *Pension and Annuity Income*; IRS Publication 590-A, *Contributions to Individual Retirement Arrangements (IRAs)*; IRS Publication 590-B, *Distributions from Individual Retirement Arrangements (IRAs)*; and IRS Publication 571, *Tax-Sheltered Annuity Plans (403(b) Plans)*. These publications are available from a local IRS office, on the web at [www.irs.gov](http://www.irs.gov), or by calling 1-800-TAX-FORM.

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## Notice 2020-63

### SECTION 1. PURPOSE

This notice modifies Notice 2006-09, 2006-6 I.R.B. 413 and Notice 2008-33, 2008-12 I.R.B. 642, 2008, by providing a new address to which a vehicle manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) must send vehicle certifications and quarterly reports.

### SECTION 2. BACKGROUND

On February 6, 2006, the Internal Revenue Service (“Service”) published Notice 2006-9, which provides guidance regarding the credit under § 30B(a)(2) for new advanced lean burn technology motor vehicle credit and the new qualified hybrid motor vehicle credit under § 30B(a)(3) and (d). Notice 2006-9 sets forth procedures for a vehicle manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) to certify to the Service both:

- (1) That a passenger automobile or light truck of a particular make, model, and model year meets certain requirements that must be satisfied to claim the new advanced lean burn technology motor vehicle credit under § 30B(a)(2) and (c) or the new qualified hybrid motor vehicle credit under § 30B(a)(3) and (d); and
- (2) The amount of the credit allowable with respect to that vehicle.

In addition, Notice 2006-9 sets forth procedures for a manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) that has received an acknowledgment of its certification from the Service to submit to the Service a report of the number of qualified plug-in

electric drive motor vehicles sold by the manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) to consumers or retail dealers during the calendar quarter.

Section 6.03 of Notice 2006-9 provides the address to which a vehicle manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) must send certifications and quarterly reports under Notice 2006-9.

On March 24, 2008, the Service published Notice 2008-33, which sets forth a similar procedure to that in Notice 2006-9 for fuel cell motor vehicle that allows a vehicle manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) to certify to the Service that a vehicle of a particular make, model, and model year meets the requirements for the fuel cell motor vehicle under § 30B(a)(1) and (b).

The Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594, added § 30B, allowing a credit for certain alternative motor vehicles. The Consolidated Appropriations Act, 2016, Pub. L. 114-113, 129 Stat. 2242, extended the § 30B(a)(1) credit for qualified fuel cell motor vehicles credit for qualified vehicles acquired after December 31, 2014, and before January 1, 2017. The Bipartisan Budget Act of 2018, Pub. L. 115-123, 132 Stat 2242, extended the § 30B(a)(1) credit for qualified fuel cell motor vehicles credit for qualified vehicles acquired after December 31, 2016, and before January 1, 2018. The Further Consolidated Appropriations Act of 2020, Pub. L. 116-94, 133 Stat 2534, extended the § 30B(a)(1) credit for qualified fuel cell motor vehicles credit for qualified vehicles acquired after December 31, 2017, and before January 1, 2021.

This notice modifies both Notice 2006-9 and Notice 2008-33 by providing an updated address for taxpayers who wish

to submit to the Service the material described in those notices.

### SECTION 3. MODIFICATION TO NOTICE 2006-9 AND NOTICE 2008-33

This notice modifies the address in Section 6.03 of Notice 2006-9 and in Section 6.02 of Notice 2008-33 to read as follows:

Internal Revenue Service  
Director, Eastern Compliance Practice Area  
2001 Butterfield Road, Mail Stop 5413  
Downers Grove, IL 60515

In the future, please refer to [www.irs.gov](http://www.irs.gov) for any changes to this address.

### SECTION 4. EFFECTIVE DATE

This notice is effective for certifications and quarterly reports submitted under Notice 2006-9 and Notice 2008-33 after [Date of Publication].

### SECTION 5. EFFECT ON OTHER DOCUMENTS

Notice 2006-9 and Notice 2008-33 are modified as provided in this notice. Except as explicitly provided, this notice does not otherwise affect the guidance or procedures provided in Notice 2006-9 and Notice 2008-33.

### SECTION 6. DRAFTING INFORMATION

The principal author of this notice is Christopher F. Price of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Mr. Price on (202) 317-6853 (not a toll-free number).

# Part IV

## Swiss-U.S. Competent Authority Arrangement Regarding Treaty Arbitration Clause

### Announcement 2020-13

The following is a copy of the Competent Authority Arrangement entered into by the competent authorities of the United States of America and Switzerland, regarding the implementation of the arbitration process provided for in paragraphs 6 and 7 of Article 25 of the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income signed at Washington on October 2, 1996, as Amended by the Protocols signed on October 2, 1996, and September 23, 2009 (the “Convention”) and the exchange of notes accompanying the 2009 Protocol which is annexed to the Convention as Annex A and which forms an integral part of the Convention.

The text of the Competent Authority Arrangement is as follows:

#### IMPLEMENTING ARRANGEMENT REGARDING PARAGRAPHS 6 AND 7 OF ARTICLE 25 OF THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE SWISS CONFEDERATION FOR THE AVOIDANCE OF DOUBLE TAXATION WITH REPECT TO TAXES ON INCOME

##### Introduction

The competent authorities of Switzerland and of the United States of America have established this arrangement to implement the arbitration process provided for in paragraphs 6 and 7 of Article 25 of the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income signed at Washington on October 2, 1996, as Amended by the Protocols signed on October 2, 1996, and Septem-

ber 23, 2009 (the “Convention”) and the exchange of notes accompanying the 2009 Protocol which is annexed to the Convention as Annex A (“Treaty Annex A”) and which forms an integral part of the Convention.

Subject to certain exceptions described in paragraph 4, this arbitration process applies to cases that the competent authorities of Switzerland and the United States have determined are suitable for assistance under the mutual agreement procedure of Article 25 of the Convention in accordance with published guidance, in the case of Switzerland the “Factsheet on the mutual agreement procedure” of May 2018 or any amendment or successor provisions thereof, and in the case of the United States, Revenue Procedure 2015-40 or any amendment or successor provisions thereof.

This arrangement is adopted in accordance with paragraphs 6 and 7 of Article 25 of the Convention and subparagraphs a) and q) of paragraph 1 of the Treaty Annex A.

The competent authorities of both Contracting States, the presenter of the case, and the arbitrators will follow the procedures in this arrangement in good faith.

##### 1. Definitions

- A. “MAP” is the abbreviation for the Mutual Agreement Procedure proceedings of competent authorities under Article 25 of the Convention.
- B. The term “Concerned Person” means the presenter of a case to a competent authority for consideration under Article 25 of the Convention and all other persons, if any, whose tax liability to either Contracting State may be directly affected by a mutual agreement arising from that consideration.
- C. The “Commencement Date” for a case is the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by the competent authorities of both Contracting States. The Commencement Date will be determined

in accordance with paragraph 5 or, with respect to a case originally submitted as a request for an advance pricing arrangement (“APA”), in accordance with paragraph 21.

##### 2. Competent Authority Assistance in General

- A. A request for competent authority assistance must comply with the requirements as set out for the United States in Revenue Procedure 2015-40, or subsequent guidance, and for Switzerland in the “Factsheet on the mutual agreement procedure” of May 2018, or any applicable subsequent guidance.
- B. Taxpayers shall submit their requests for competent authority assistance pursuant to Article 25, paragraph 1 of the Convention.

##### 3. Cases Eligible for Arbitration

- A. According to paragraphs 6 and 7 of Article 25 of the Convention, arbitration will be available where:
  1. pursuant to a mutual agreement procedure under Article 25 of the Convention the competent authorities have endeavored but are unable to reach a complete agreement; and
  2. all the requirements prescribed in paragraphs 6 and 7 of Article 25 of the Convention, paragraph 1 of the Treaty Annex A, and this arrangement are satisfied.
- B. An unresolved competent authority request which originated with a bilateral APA request will be subject to arbitration procedures in accordance with paragraph 21.
- C. Once a case is accepted into the MAP, neither competent authority will cease unilaterally to consider a case, except for the circumstances described in paragraph 4.

##### 4. Cases Not Eligible for Arbitration

- A. Arbitration is not available for cases that a competent authority

has not accepted, or in which a competent authority ceases to provide assistance, in accordance with the Convention, the Protocol or published guidance.

1. The Swiss competent authority will generally not accept a request for competent authority assistance or will generally cease providing assistance to a taxpayer, and thus not provide for arbitration if the taxpayer does not comply with the requirements or under circumstances as described in the “Factsheet on the mutual agreement procedure” of May 2018 (or any applicable subsequent guidance).
2. The U.S. competent authority generally will not accept a request for competent authority assistance or will cease providing assistance to a taxpayer, and thus not provide for arbitration in the circumstances described in section 7.02 (Denial and Termination of Assistance) of Revenue Procedure 2015-40 (or any applicable subsequent guidance). In addition, the U.S. competent authority will not provide for arbitration for a case in which the taxpayer has reached a settlement on the issue with IRS Appeals (including an Appeals settlement through the Appeals arbitration process) or with Chief Counsel pursuant to an executed closing agreement or other written agreement such as Form 870-AD, unless otherwise permitted by Revenue Procedure 2015 40 (or any applicable subsequent guidance).
- B. Arbitration is not available for cases that have been accepted for competent authority consideration, but for which the competent authorities agree that the particular case is not suitable for determination by arbitration and

have notified the presenter of the case of such decision before the date on which arbitration proceedings would otherwise begin.

- C. Arbitration is not available where a decision with respect to an unresolved case has been rendered by a court or administrative tribunal of either Contracting State.
5. Commencement Date
  - A. Within 60 days of receipt of a MAP request for assistance each competent authority will review the request and verify whether it contains the information necessary to undertake substantive consideration for a mutual agreement, pursuant to subparagraph b) of paragraph 7 of Article 25 of the Convention.
  - B. If a competent authority determines that the request for assistance is not complete, that competent authority will inform the taxpayer in writing within 60 days of receipt of the request, what information is necessary consistent with Rev. Proc. 2015-40 (or subsequent guidance) or the information required under Switzerland’s “Factsheet on the mutual agreement procedure” of May 2018 (or subsequent guidance).
  - C. Once complete information is provided, each competent authority will inform the other competent authority of the date it received the information necessary to undertake substantive consideration for a mutual agreement. The latter of these dates will be the Commencement Date, except as described in paragraph 21 with respect to cases that originated as an APA.
  - D. Contemporaneously, the competent authorities will confirm with each other that each has received the same information.
  - E. When the Commencement Date is established:
    1. the competent authorities of both Contracting States will exchange correspondence with each other confirming the Commencement Date

and the date the arbitration proceedings potentially shall begin for any subsequently necessary arbitration, and

2. each competent authority will inform the Concerned Person(s) resident in its territory in writing of the Commencement Date and the date the arbitration proceedings potentially shall begin for any subsequently necessary arbitration.
6. Date Arbitration Proceedings Begin
  - A. An arbitration proceeding with respect to a case will begin on a date (hereinafter “Date Arbitration Proceedings Begin”) which is the latest of:
    1. two years after the Commencement Date of that case, unless both competent authorities have previously agreed to a different date and notified the presenter of the case (as provided in subparagraphs B and C), and
    2. the earliest date upon which the nondisclosure agreements have been received by both competent authorities. (See subparagraph c) of paragraph 7 of Article 25 of the Convention.)
  - B. As provided in Article 25(7)(c)(i) of the Convention, the competent authorities of both Contracting States may decide that the Date Arbitration Proceedings Begin with respect to a case should be earlier or later than what it would have been without such decision in appropriate situations. Such appropriate situations could be, for example, where the competent authorities are close to reaching a mutual agreement to resolve the case, where there has been a delay by a Concerned Person in providing information in the MAP of the case, where MAP is suspended by a request from the presenter of the case, or where a Concerned Person has provided significant new information after the Commencement Date of the case.

- C. If the competent authorities of both Contracting States decide the Date Arbitration Proceedings Begin with respect to a case under subparagraph B, then the competent authorities will confirm that date in writing to each other and to the Concerned Persons resident in their territory.
7. Confidentiality
- According to subparagraph c) of paragraph 6 and subparagraphs d) and f) of paragraph 7 of Article 25 of the Convention and subparagraphs d) and n) of paragraph 1 of the Treaty Annex A, the confidentiality of a case will be maintained in the following manner:
- A. All Concerned Persons and their authorized representatives or agents must agree prior to the beginning of arbitration proceedings not to disclose to any other person any information received during the course of the arbitration proceeding from the competent authorities of either Contracting State or the arbitration panel, other than the determination of the panel.
- B. No information relating to an arbitration proceeding (including the determination of the arbitration panel) may be disclosed by the members of the arbitration panel or their staffs or by the competent authorities of the Contracting States, except as permitted by the Convention and the domestic laws of the Contracting States. In addition, all material prepared in the course of, or relating to, an arbitration proceeding will be considered to be information exchanged between the competent authorities pursuant to Article 26 of the Convention.
- C. For purposes of an arbitration proceeding under paragraphs 6 and 7 of Article 25 of the Convention, the members of arbitration panel (hereinafter referred to as “arbitrators”) and their staffs will be considered to be “persons or authorities” to whom information may be disclosed under Article 26 of the Convention.
- D. The competent authorities of both Contracting States will ensure that all arbitrators (and any of their staff which will assist them in carrying on the arbitration), prior to their acting in an arbitration proceeding, agree in a Declaration of Arbitrator specified by both of the competent authorities (see, e.g., Attachment 4 to this arrangement) to not disclose any information relating to an arbitration proceeding (including the determination of the arbitration panel), and to abide by and be subject to the confidentiality and non-disclosure provisions of Article 26 of the Convention and similar provisions of relevant domestic laws of the Contracting States. However, the members of the arbitration panel or their staff will disclose the determination of the arbitration panel to the competent authorities. In the event those provisions conflict, the most restrictive condition shall apply. The arbitrators must send their staff’s non-disclosure agreement to both of the competent authorities.
8. Eligibility of Arbitrators
- A. In order to be eligible as an arbitrator:
1. the individual is not an employee nor has been an employee within the twelve-month period prior to the Date Arbitration Proceedings Begin of the tax administration, the Treasury Department, or the Ministry of Finance of the Contracting State which identifies him or her;
  2. the individual does not have any prior involvement with the specific matters at issue in the arbitration proceeding for which he or she is being considered as an arbitrator; and
  3. in addition, the individual who will serve as the chair of the arbitration panel (“Chair”) is not a citizen or resident of either Contracting State.
- B. The competent authorities of both Contracting States will identify and jointly agree on 5 to 10 persons who are qualified and willing to serve as the Chair of an arbitration panel. The competent authorities will review and revise this list as necessary every three years or earlier if required.
- C. The arbitrator must maintain the impartiality and independence conditions set out in clauses 1 to 3 of subparagraph A throughout the proceedings and avoid any conduct for 12 months after the date the arbitration panel delivers its decision under paragraph 18 which may damage the appearance of impartiality and independence.
- D. The arbitrators will undertake to promptly disclose to both competent authorities, in writing, any new facts or circumstances that arise during or following the arbitration proceedings that might give rise to doubts with respect to their impartiality or independence.
- E. The staff person of an arbitrator will be subject to the same conflict of interest rules applicable to the arbitrators as described in subparagraph A of paragraph 8.
9. Appointment of Arbitrators
- A. Each competent authority of the Contracting States will appoint one arbitrator to the arbitration panel by sending a written communication (that includes a copy of the Declaration of Arbitrator identified in subparagraph D of paragraph 7, signed by the arbitrator) indicating their appointment to the other competent authority within 90 days of the Date Arbitration Proceedings Begin. (See subparagraph e) of paragraph 1 of the Treaty Annex A).
- B. In the event that the competent authority of a Contracting State fails to make such appointment

in the manner and within the time period in this paragraph, the appointed arbitrator shall contact the competent authority that appointed him or her. That competent authority shall contact the highest-ranking member of the Secretariat at the Centre for Tax Policy and Administration of the Organization for Economic Co-operation and Development (OECD) who is not a citizen or resident of either Switzerland or the United States, who shall appoint an arbitrator by written notice to both countries within 60 days of the date of such failure.

- C. The procedure in subparagraph B will not apply, where the failure of such appointment within the period in subparagraph A is due to the fact that an individual who had agreed to serve as an arbitrator becomes unable to serve because of circumstances outside his or her control (for example, death, serious illness or natural disaster). The competent authorities of both Contracting States will determine the appropriate time period for the appointment of an arbitrator in such a case.
- D. Within 60 days of the date on which the second communication of the country-appointed arbitrator is sent, the arbitrators so appointed will appoint a third arbitrator who shall serve as Chair of the panel among the list established pursuant to subparagraph B of paragraph 8. The third arbitrator so selected will inform the competent authorities of both Contracting States of his or her appointment as soon as possible and send the Declaration of Arbitrator to the competent authorities. The competent authority which received the request for assistance will inform the presenter of the case of the date of the Chair's appointment.
- E. If the two initial arbitrators fail to select the third arbitrator in

the manner and within the time period in this paragraph, the two initial arbitrators will be dismissed, and each competent authority of the Contracting States will select a new arbitrator of the arbitration panel within 30 days of the dismissal of the original members.

- F. The procedure in subparagraph E will not apply, where the failure of such selection within the time period in subparagraph D is due to the fact that the individual selected to serve as Chair becomes unable to serve because of circumstances outside his or her control (for example, death, serious illness or natural disaster). In such a case, unless otherwise decided, the two arbitrators will appoint a third arbitrator to serve as Chair from among the list of candidates described in subparagraph B of paragraph 8.
- G. The arbitrators will be selected from individuals who:
  - 1. satisfy the eligibility requirements identified in subparagraph A of paragraph 8 at the time of accepting an appointment to serve, and are reasonably expected to remain so during the entire arbitration proceeding and for a reasonable time thereafter in accordance with subparagraph C of paragraph 8; and
  - 2. have significant experience in international tax matters (he or she need not, however, have experience as either a judge or arbitrator).
- H. An arbitrator will be deemed appointed on the date on which he or she signs the Declaration of Arbitrator of intent to so serve required by subparagraph D of paragraph 7, such Declaration of Arbitrator to be in the form agreed by the competent authorities of both Contracting States.
- I. Where one of the two initial arbitrators becomes ineligible for service as an arbitrator (e.g., violates the Declaration of Arbitra-

tor identified in subparagraph D of paragraph 7) or for any other reason it is necessary to replace an arbitrator after the arbitrator was appointed, the competent authority who had selected that individual will select a replacement as soon as possible and no later than 30 days after the position becomes vacant.

- J. Where the third arbitrator (the Chair) becomes ineligible for service as an arbitrator (e.g., violates the Declaration of Arbitrator identified in subparagraph D of paragraph 7) or for any other reason it is necessary to replace the third arbitrator after he or she was appointed, the two initial arbitrators will select a replacement among the list established pursuant to subparagraph B of paragraph 8 as soon as possible and no later than 14 days after the position becomes vacant.
  - K. If any arbitrator is unable to fulfill his or her duties, the competent authorities will consult with the remaining panel members to determine a new timetable, if necessary.
  - L. Should it come to light that an arbitrator has a conflict of interest which would have prevented that arbitrator's original appointment, the arbitrator must recuse himself or herself from consideration of the case and inform the competent authorities.
10. Terms of Reference
- A. As soon as possible after the Date Arbitration Proceedings Begin, the competent authorities of both Contracting States will develop a brief Statement of Information which will identify the Concerned Person(s) and contain a general description of the proposed adjustments or similar issues to be resolved in a case. The competent authority of a Contracting State, or an arbitrator selected by the competent authority of a Contracting State, may disclose the Statement of Information, if the confidentiality of the information is ensured

by first obtaining an Affirmation of Confidentiality (see, e.g., Attachment 5 to this arrangement) and such disclosure is permitted by the law of the Contracting State, to a candidate to be an arbitrator of the case to check whether that candidate satisfies the eligibility requirements identified in subparagraph A of paragraph 8.

B. The competent authorities of both Contracting States undertake to develop, within 30 days after the Date Arbitration Proceedings Begin, a “Terms of Reference” for a case to include:

1. description of the relevant business activities of the Concerned Person(s);
2. description of the adjustments or similar issues in dispute in the case;
3. description of the matters to be considered for the resolution of the case; including identification of all matters in the case previously agreed between the competent authorities; and
4. a description of the final position taken by each competent authority in the negotiation of the unresolved matters which prevent the mutual agreement between the competent authorities.

The competent authorities may also provide logistical or procedural information in the Terms of Reference.

C. The Terms of Reference will be communicated to the Chair on the date of his or her appointment, or as soon thereafter as possible.

D. If the Terms of Reference has not been completed by the date for submission of the Proposed Resolutions and Position Papers, the competent authorities of both Contracting States will send to the Chair their most recent written proposals for the Terms of Reference along with their Proposed Resolutions and Position Papers. All the matters identi-

fied as unresolved in these draft Terms of References are treated as unresolved for the purpose of the subsequent proceedings.

11. Proposed Resolutions, Position Papers, and Reply Submissions

A. As provided in subparagraph g) of paragraph 1 of the Treaty Annex A, the competent authority of each of the Contracting States will be permitted to submit a Proposed Resolution, not to exceed five pages in total, addressing each adjustment or similar issue raised in a case. Such Proposed Resolution will be a resolution of the entire case, and will reflect, without modification, all matters in the case previously agreed between the competent authorities of both Contracting States. Such Proposed Resolution will be limited to a disposition of the specific monetary amounts of income, expense or taxation reportable to the Contracting States, for each adjustment or similar issue in the case, based on the application of the Convention to the case. The competent authority of each of the Contracting States will also be permitted to submit a supporting Position Paper, not to exceed 30 pages plus annexes, for consideration by the arbitration panel.

B. The submission of a Proposed Resolution and supporting Position Paper by the competent authority of a Contracting State will be made by posting it (or similarly sending it via express delivery service) to the Chair within 60 days of the appointment of the Chair. Unless alternative arrangements are made, the Chair will in turn send a copy of each competent authority’s Proposed Resolution and supporting Position Paper to the other panel members and the other competent authority within 5 days of receipt of the later submission by the panel.

C. In the event that only one of the competent authorities of the Contracting States submits a

Proposed Resolution within the allotted time, then that Proposed Resolution shall be deemed to be the determination of the arbitration panel in that case and the arbitration panel shall be terminated.

D. As provided in subparagraph g) of paragraph 1 of the Treaty Annex A, each of the competent authorities of the Contracting States will be permitted to submit a Reply Submission, not to exceed 10 pages, plus annexes, to the arbitration panel in order to address any points raised by the Proposed Resolution or supporting Position Paper submitted by the other competent authority. In this Reply Submission, the competent authority may also comment upon any Presenter Position Paper submitted under the provisions of paragraph 12. If the competent authority exercises its option to also comment upon a Presenter Position Paper, its Reply Submission should not exceed 20 pages, plus annexes. The submission of a Reply Submission by the competent authority will be made by posting it (or similarly sending it via express delivery service) to the Chair within 120 days of appointment of the Chair. Unless alternative arrangements are made, the Chair will send a copy of each competent authority’s Reply Submission paper to the other panel members and the other competent authority within 5 days of receipt of the later reply by the panel.

E. In a particular case, the competent authorities of both Contracting States may decide to use a different presentation or page limitation for the Proposed Resolutions, supporting Position Papers, or Reply Submissions, such as provided in paragraphs 13 and 14.

F. Any annex to a supporting Position Paper or Reply Submission which does not reflect information widely available to the

general public must be a document previously made available for the competent authorities of both Contracting States to use in negotiation. Any factual information used in a supporting Position Paper or Reply Submission, which does not reflect information widely available to the general public, must be what was contained in a document previously made available for both competent authorities to use in negotiation.

- G. Except with respect to the final position taken by the competent authority of the other Contracting State as described in clause 4 of subparagraph B of paragraph 10, the competent authority of a Contracting State will only be permitted to refer to a proposal for resolution made by either competent authority of the Contracting States during negotiations if that proposal is submitted to the arbitration panel for consideration as a Proposed Resolution.
- H. The arbitration panel may ask both competent authorities in writing for additional information. Such additional information may be submitted to the arbitration panel only at its request and copies of the panel's request and the competent authority's response shall be provided to the competent authority of the other Contracting State on the date on which the request or the response is submitted. The panel shall establish a deadline for responding to the request. If the panel requests information or analyses that have not previously been available or considered for purposes of the negotiation, the competent authorities will consult with each other to determine how to respond to the panel's request. The panel may not request additional information from the presenter of the case.
- I. Unless otherwise decided between the competent authorities of both Contracting States and

the Chair, the competent authorities will send to the Chair four copies of each document submitted to the arbitration panel, for distribution to the other arbitrators and the other competent authority.

- J. Unless otherwise decided between the competent authorities of both Contracting States, any information which does not reflect information widely available to the general public (including any information provided by the presenter of a case or his authorized representatives or agents in writing or orally) that was not available to both competent authorities before the Date Arbitration Proceedings Begin will not be taken into account for purposes of the arbitration decision. Furthermore, any Reply Submission or any additional information that was provided to the panel after the deadline specified in subparagraph D or H respectively will not be taken into account for purposes of the arbitration decision.
  - K. To the extent needed, the arbitration panel may adopt any additional procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of Article 25 of the Convention, the Treaty Annex A, or this arrangement or any other procedural rules decided between the competent authorities of both Contracting States. If the arbitration panel adopts any additional procedures, the Chair will provide a written copy of them to the competent authorities.
12. Presenter Position Paper
- A. According to subparagraph h) of paragraph 1 of the Treaty Annex A, within 90 days of the appointment of the Chair, the presenter of a case may submit a Position Paper ("Presenter Position Paper") not to exceed 30 pages, plus annexes. The position, arguments, or analyses raised in the Presenter Position Paper must be

positions, arguments, or analyses previously provided to the competent authorities for their consideration in negotiation prior to the Date Arbitration Proceedings Begin. Any annex of the Presenter Position Paper which does not reflect information widely available to the general public must be a document made available to the competent authorities for their consideration prior to the Date Arbitration Proceedings Begin.

- B. Any Presenter Position Paper should be sent so that each competent authority receives it simultaneously. The competent authority initiating the MAP will deliver copies of the Presenter Position Paper to the panel, according to the instructions of the Chair no later than 7 days after receipt of the original Presenter Position Paper.
13. Multiple Adjustments
- A. Where an arbitration proceeding concerns a case comprising multiple adjustments or similar issues each requiring a disposition of specific monetary amounts of income, expense or taxation, the Proposed Resolution may propose a separate disposition for each adjustment or similar issue.
  - B. Unless the competent authorities of both Contracting States decide upon a different presentation to the arbitration panel, the Proposed Resolution and supporting Position Paper in such a case will address each adjustment separately, within the overall page limitation.
  - C. The arbitration panel will make a determination on each adjustment or similar issue, separately. Thus, the final determination of the arbitration panel may be comprised of a Proposed Resolution from the competent authority of a Contracting State on one adjustment and a Proposed Resolution from the competent authority of the other Contracting State on another adjustment.
14. Permanent Establishment, Residency, and Other Threshold Questions

- A. In the case of an arbitration proceeding concerning:
1. the taxation of an individual with respect to whom the competent authorities of the Contracting States have been unable to reach an agreement regarding the Contracting State of which the individual is resident;
  2. the taxation of the business profits of an enterprise with respect to which the competent authorities have been unable to reach an agreement on whether a permanent establishment exists; or
  3. such other issues the determination of which are contingent on resolution of similar threshold questions; the competent authorities may submit Proposed Resolutions separately addressing the relevant threshold questions as described in clause 1, 2, or 3 (for example, the question of whether a permanent establishment exists) and the contingent determinations (for example, the determination of the amount of profit attributable to such permanent establishment).
- B. In such a case, a competent authority is allowed to submit a Proposed Resolution and supporting Position Paper which will address each issue separately, taking alternative positions as appropriate. For example, the competent authority is allowed to take a position that no permanent establishment exists in one Proposed Resolution, and to propose an amount of business profit to be attributable to a permanent establishment in another Proposed Resolution in case the arbitration panel determines that a permanent establishment exists.
- C. The arbitration panel will make a determination on the threshold question and the contingent determination separately. For example, if the competent authorities have not reached an agreement on the existence of a permanent establishment, the panel must first determine whether a permanent establishment exists. Once it is determined that a permanent establishment exists, the panel must then determine the amount of profits attributable to that permanent establishment.
15. Communication
- A. Before the Chair is appointed, the competent authorities of both Contracting States will send any correspondence concurrently to both arbitrators.
  - B. After the Chair is appointed, unless otherwise agreed between the Chair and competent authorities, the competent authorities will send any correspondence to the Chair. Similarly, the Chair will send any correspondence concurrently to the competent authorities.
  - C. No competent authority of the Contracting States will have any ex parte communications, except for administrative or logistical reasons, with an arbitrator.
  - D. All communication, except for logistical matters, between the competent authorities of both Contracting States and the panel must be in writing. Written communication by fax or email is allowed, however, no information that may identify the taxpayer(s) may be included in an email unless other security precautions to protect taxpayer information are agreed upon by both competent authorities. Express mail or air mail shall be used for all correspondence other than that sent via facsimile or email.
  - E. The arbitrators may communicate by telephone, videoconference, fax or face-to-face meetings. Arbitrators may communicate by e-mail; however, they must not include any taxpayer information in the e-mail.
  - F. All arbitrators must be present (physically or remotely) during substantive discussions.
- G. No arbitrator shall have communications regarding the issues or matters before the panel with the presenter of the case, the taxpayers involved in the case, or their representatives during or subsequent to the arbitration process.
16. Competent Authority Initiating the MAP
- A. For requests for competent authority assistance concerning an adjustment raised in either Switzerland or the United States, the competent authority of the country that proposed the adjustment (or in the case where there is no adjustment, denied the credit or claim) is considered the competent authority initiating the MAP.
  - B. For requests originally submitted as an APA, the competent authority of the country in which the parent company is located is considered the competent authority initiating the MAP. For APA requests originally submitted by associated enterprises other than the parent company, the competent authorities will determine the competent authority that is considered the competent authority initiating the MAP.
  - C. Meeting facilities, related resources, financial management, other logistical support, and general administrative coordination of the arbitration proceeding will be provided, at its own cost, by the Contracting State whose competent authority initiated the MAP in a case. (See subparagraph o) of paragraph 1 of the Treaty Annex A.)
  - D. The competent authorities encourage the arbitrators to use tele- and videoconferencing. If a face-to-face meeting is necessary, the Chair will contact the competent authority of the Contracting State who initiated the MAP in a case and ask it to arrange facilities for the meeting. The competent authority initiating the MAP in a case may arrange meeting facilities in a location that minimizes the arbitration panel's travel time and expenses. Each competent

authority may arrange a meeting in the other's meeting facilities, as needed.

17. Fees and Expenses

- A. The fees and expenses will be borne equally by the Contracting States. (See subparagraph o) of paragraph 1 of the Treaty Annex A.)
- B. Neither competent authority of both Contracting States will charge any Concerned Persons for costs associated with the arbitration procedure itself. The recharge of potential costs related to the mutual agreement procedure to the Concerned Person pursuant to domestic law remains reserved.
- C. The fees of the arbitrators will be set at the fixed amount of \$2000 (two thousand United States dollars) or the equivalent in Swiss francs per day, subject to modification by the competent authorities. (See subparagraph o) of paragraph 1 of the Treaty Annex A.) The competent authorities will not compensate a staff member of an arbitrator. The competent authorities anticipate that the arbitrators will be able to perform their duties without the use of staff.
- D. In general, each arbitrator will be compensated for no more than seven days of work on the arbitration (e.g., five days of preparation and two meeting days). If the arbitrators feel they require additional time to properly consider the case, the Chair will contact the competent authorities to request additional time. As a general rule, the competent authorities envision that the panel will be able to complete their joint consideration of the case through telecommunications.
- E. In general, the expenses of the arbitrators will be set in accordance with the International Centre for Settlement of Investment Disputes Schedule of Fees for arbitrators in effect on the Date Arbitration Proceedings Begin, subject to modification by the

competent authorities. (See subparagraph o) of paragraph 1 of the Treaty Annex A.) This applies in particular for hotel, meals and incidental costs. With regard to travel expenses, the arbitrators will be reimbursed for economy class travel.

18. Arbitration Panel Determination

- A. The arbitration panel shall deliver a written determination concurrently to the competent authorities of both Contracting States within six months of the appointment of its Chair (or, where subparagraph I or J of paragraph 9 applies, unless otherwise decided by the competent authorities of both Contracting States, within six months of the appointment of the new arbitrator).
- B. In making its determination, the arbitration panel will apply, as necessary and in descending order of priority:
  - 1. the provisions of the Convention, as interpreted according to the customary rules of international law;
  - 2. any agreed commentaries or explanations of the Contracting States concerning the Convention;
  - 3. the laws of the Contracting States to the extent they are not inconsistent with each other; and
  - 4. any OECD Commentary, Guidelines, or Reports regarding relevant analogous portions of the OECD Tax Model Convention.
- C. The determination of the arbitration panel will be limited to one of the Proposed Resolutions submitted by the competent authorities of the Contracting States for each adjustment or similar issue and any threshold questions, and will not include a rationale or any other explanation of the determination. The determination of the arbitration panel has no precedential value with respect to the application of the Convention to any other case.

- D. Unless the Concerned Persons do not accept the determination of the arbitration panel, such determination shall constitute a resolution by mutual agreement under Article 25 of the Convention and shall be binding on both competent authorities with respect to that case.
- E. The determination of the panel will be decided on the basis of a majority vote.
- F. Each Concerned Person must, within 30 days of receiving the determination of the panel from the competent authority to which the case was first presented, advise that competent authority in writing whether that Concerned Person accepts the determination of the panel. If the Concerned Persons fail to accept the determination within 30 days, the determination is considered rejected.
- G. If any Concerned Person fails to advise the competent authority within that period of time, the determination will be considered not to have been accepted and the case will be closed.
- H. If a Concerned Person has not renounced domestic legal remedies with respect to all of the issues covered by the arbitration decision by the time that person accepts the panel's determination, the determination is considered rejected and the case will be closed.
- I. Where the determination of the arbitration panel is not accepted, the case may not subsequently be the subject of an arbitration proceeding.
- J. The treatment of any interest or penalties will be determined by applicable domestic law of Switzerland or the United States.
- K. In the event that the panel does not agree on a determination within six months of the appointment of its Chair (or, where subparagraph I or J of paragraph 9 applies, unless otherwise decided by the competent authorities of both Contracting States, within

six months of the appointment of the new arbitrator), the Competent authorities will agree on the procedure to apply.

19. Terminating Proceedings

A. If at any time before the arbitration panel delivers a determination to the competent authorities of the Contracting States:

1. the competent authorities notify in writing the arbitrators and the presenter of the case that they have reached a mutual agreement to resolve the case pursuant to Article 25 of the Convention;

2. the competent authorities notify in writing the arbitrators that the presenter of the case has withdrawn its request for assistance;

3. a decision concerning the case is rendered by a court or administrative tribunal of one of the Contracting States during the arbitration proceeding; or

4. if any Concerned Person or their authorized representative or agents violates the written nondisclosure statement required by subparagraph d) of paragraph 7 of Article 25 of the Convention, and the competent authorities of both Contracting States agree that such violation should result in the termination of the arbitration proceeding;

then the MAP, including the arbitration proceeding, with respect to the case will terminate.

B. If the arbitration proceeding and MAP with respect to the case is terminated under clauses 2, 3, or 4 of subparagraph A, the competent authorities of both Contracting States will exchange letters to close the MAP case unagreed.

C. If the presenter terminates an arbitration proceeding by withdrawing its request for assistance, the presenter will not ordinarily be allowed access to the competent authority procedures

for the same matter and same years

D. The presenter's death is not an event triggering the termination of the arbitration proceeding, unless explicitly requested by the heirs.

E. At the termination of any proceeding each arbitrator must immediately destroy all documents or other information received from either competent authority of the Contracting State, or that otherwise reflect the considerations or discussions of the arbitration panel, and delete all information that may be stored on any computer, personal data assistant or other electronic device or media.

20. Miscellaneous

A. In computing the days necessary for an action in this arrangement, the day when the event beginning this computation occurred will not be counted.

B. Any due date which falls upon a weekend or holiday for either competent authority will be extended to the next calendar day which is a business day for both competent authorities.

21. Advance Pricing Agreements

A. A case initially submitted to the competent authorities as a request for an APA is eligible for arbitration, but only with respect to tax years covered by the APA for which tax returns have been filed. Tax years prior to those covered by the APA for which the taxpayer has requested a rollback will be covered by the arbitration determination only if both competent authorities have agreed to cover those years in their position papers and only to the extent the tax years are still open to assessment according to the time limits in the domestic law of both Contracting States.

B. For APA years for which tax returns have not been filed, the competent authorities agree to apply the transfer pricing method used in the Position Paper of the competent authority whose result

the panel determined was the better result, provided the transfer pricing method is sufficiently described in the supporting Position Paper.

C. For purposes of establishing a Commencement Date for a case initially submitted as a request for an APA, the information necessary to undertake substantive consideration for a mutual agreement in the United States is the information required to be submitted to the Internal Revenue Service under Revenue Procedure 2015-41, section 3 (or any applicable successor provisions). In Switzerland, the information is that which would be required under instructions or commentaries published by the Federal Department of Finance.

D. Once complete information is provided, the Commencement Date of the case, for purposes of any subsequently necessary arbitration, will be the earlier of i) the date on which the competent authorities have exchanged position papers setting forth their initial negotiating positions or ii) two years from the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement concerning the APA has been received by both competent authorities. The arbitration proceedings will begin on the date determined under paragraph 6.

E. For requests originally submitted as an APA, the competent authority of the country in which the parent company is located is considered the competent authority initiating the Mutual Agreement Procedure. For APA requests originally submitted by associated enterprises other than the parent company, the competent authorities will determine the competent authority serving as the one initiating the MAP.

F. The provisions of paragraphs 1 through 20 and 22 apply as appropriate.

22. Coordination with Protocol Entry into Force  
Notwithstanding subparagraphs A through D of paragraph 5 and subparagraph D of paragraph 21, the

Commencement Date for a MAP case (or a case that was initially submitted as an APA) that was already under consideration by the competent authorities as of September 20, 2019

will be September 20, 2019. (See subparagraph c) of paragraph 2 of Article 5 of the 2009 Protocol.)

Agreed:  
For Switzerland

For the United States of America

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Pascal Duss  
State Secretariat for International  
Financial Matters SIF

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Douglas W. O'Donnell  
United States Competent Authority  
Commissioner, Large Business and International Division

Date:

Date:

**Attachments:**

- 1. Sample Taxpayer Nondisclosure Statement**
- 2. Sample Nondisclosure Statement of Taxpayer's Authorized Representative**
- 3. Sample Taxpayer Authorization to Disclose Tax Information for Purposes of Treaty MAP Arbitration Proceedings**
- 4. Sample Declaration of Arbitrator**
- 5. Sample Affirmation of Confidentiality**

SAMPLE TAXPAYER NONDISCLOSURE STATEMENT

NAME OF TAXPAYER

ADDRESS

CITY

STATE/CANTON COUNTRY

POSTAL CODE (ZIP CODE)

The above-named taxpayer hereby consents to the competent authorities of the United States and Switzerland undertaking an arbitration proceeding described in paragraphs 6 and 7 of Article 25 (Mutual Agreement Procedure) of the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income signed at Washington on October 2, 1996 as Amended by the Protocols signed on October 2, 1996, and September 23, 2009 (Convention) as necessary in order to reach a mutual agreement under Article 25 regarding the request filed with the [United States/Switzerland] Competent Authority on      [date] .

This consent and nondisclosure statement also covers the following concerned persons<sup>1</sup> that the taxpayer has the legal authority to bind:

[Enter name and address of each such concerned person. If none, enter “Not Applicable.”]

The following concerned persons, if any, are not covered by this consent and nondisclosure statement (and therefore must submit a separate consent and nondisclosure statement on their own behalf): [Enter name and address of each such concerned person. If none, enter “Not Applicable.”]

In making this consent, the taxpayer and, if applicable, each of the concerned persons covered by this consent and nondisclosure statement, agrees not to disclose to any person (other than the taxpayer’s authorized representative or agent, another concerned person, its authorized representative or agent, or one of the competent authorities or its authorized representative<sup>2</sup>) any information received during the course of the arbitration proceeding from either Contracting State or the arbitration board, other than the determination of such board.

The following persons are all of the representatives or agents of the taxpayer or, if applicable, the specified concerned person, who have been authorized to assist the taxpayer or specified concerned person in the mutual agreement procedure to which this consent and nondisclosure statement applies. Attached to this consent and nondisclosure statement are the nondisclosure statements of each of these representatives and agents, as is required by paragraphs 6 and 7 of Article 25 of the Convention.

[Enter name and address of each such representative or agent and the concerned person(s) for which each is acting. If none, enter “Not Applicable.”]

[Under penalties of perjury]<sup>3</sup>, I declare that I have examined this consent and nondisclosure statement and any accompanying attachments and to the best of my knowledge and belief, they are true, correct, and complete. Furthermore, I certify that I have the legal authority to execute this consent and nondisclosure statement on behalf of each concerned person covered by it and to bind each concerned person to its terms.

Date

Signature

Printed Name

Position

<sup>1</sup> As defined in the relevant treaty provisions, the term “concerned person” means the taxpayer requesting mutual agreement procedure assistance from a competent authority under Article 25 of the Convention and any other person whose tax liability to either the United States or Switzerland may be directly affected by the mutual agreement arising from that request. A concerned person that has the legal authority to bind any other concerned person(s) on this matter may do so in a comprehensive statement.

<sup>2</sup> The U.S. Competent Authority has authorized the International Centre for Dispute Resolution (ICDR), a division of the American Arbitration Association, to act on its behalf with respect to certain designated matters concerning the arbitration proceeding.

<sup>3</sup> For use in the United States.

*Attachment 2*

**SAMPLE NONDISCLOSURE STATEMENT OF TAXPAYER’S AUTHORIZED REPRESENTATIVE**

I hereby agree that neither I nor any member of my firm’s office staff nor any other person who may assist me or the firm in the mutual agreement proceeding requested in the letter of *[date]* submitted by *[name of taxpayer]* to the competent authorities of the United States and Switzerland will disclose to any person (other than the taxpayer, another concerned person,<sup>1</sup> its authorized representative or agent, or one of the competent authorities or its authorized representative<sup>2</sup>) any information received during the course of the arbitration proceeding from either Contracting State or the arbitration board, other than the determination of such board.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Position

<sup>1</sup>As defined in the relevant treaty provisions, the term “concerned person” means the taxpayer requesting mutual agreement procedure assistance from a competent authority under Article 25 of the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income signed at Washington on October 2, 1996, as Amended by the Protocols signed on October 2, 1996, and September 23, 2009, and any other person whose tax liability to either the United States or Switzerland may be directly affected by the mutual agreement arising from that request.

<sup>2</sup>The U.S. Competent Authority has authorized the International Centre for Dispute Resolution (ICDR), a division of the American Arbitration Association to act on its behalf with respect to certain designated matters concerning the arbitration proceeding

**SAMPLE TAXPAYER AUTHORIZATION TO DISCLOSE TAX INFORMATION  
FOR PURPOSES OF TREATY MAP ARBITRATION PROCEEDINGS**

\_\_\_\_\_  
NAME OF TAXPAYER

\_\_\_\_\_  
U.S. OR SWISS TAX IDENTIFICATION NUMBER (e.g., EIN)

\_\_\_\_\_  
ADDRESS

\_\_\_\_\_  
CITY STATE/CANTON COUNTRY POSTAL CODE (ZIP CODE)

The above-named taxpayer, in accordance with the competent authorities of the United States and Switzerland undertaking an arbitration proceeding described in paragraphs 6 and 7 of Article 25 of the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income signed at Washington on October 2, 1996 as Amended by the Protocols signed on October 2, 1996 and September 23, 2009 (Convention), consents to the disclosure by the competent authorities of Switzerland and the United States of any and all returns and return information with respect to the taxpayer's mutual agreement procedure (MAP) request submitted to the competent authorities on [date], to the individuals appointed (or identified for potential appointment pending clearance) by the respective competent authorities to arbitrate the MAP case, the individual appointed (or identified for potential appointment pending clearance) as the Chair of the arbitration panel, and the following representatives, if any, of the respective competent authorities who are authorized by the competent authority to act on its behalf with respect to certain designated matters concerning the arbitration proceeding:

In the case of the United States: *International Centre for Dispute Resolution (ICDR), a division of the American Arbitration Association*

In the case of Switzerland: \_\_\_\_\_.

In the case of a consolidated group of U.S. corporations, this consent is made in regard to all such information concerning the following members of the consolidated group, who are the subjects of the mutual agreement request:

[Enter name and address of each consolidated group member, if any, who is a concerned person.<sup>1</sup> If none, enter "Not Applicable."]

I certify that I have the legal authority to execute a request for or consent to disclose a return or return information to disclose information to third parties and I hereby make this consent on behalf of the taxpayer, including each of the members of the consolidated group listed above.<sup>2</sup>

In the case of married Swiss tax resident filing jointly and involved in an arbitration, both spouses shall sign the authorization to disclose tax information for purposes of treaty MAP arbitration proceedings.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Position

<sup>1</sup>As defined in the relevant treaty provisions, the term "concerned person" means the taxpayer requesting mutual agreement procedure assistance from a competent authority under Article 25 of the Convention and any other person whose tax liability to either the United States or Switzerland may be directly affected by the mutual agreement arising from that request.

<sup>2</sup>Each taxpayer or concerned person (as defined in footnote 1) whose U.S. tax liability may be directly affected by the mutual agreement procedure request must sign a consent. In the case of a consolidated group (as defined in Treas. Reg. 1.1502-1(h)), a person authorized by law to act for the common parent should execute the consent on behalf of the group. See Treas. Reg. §1.1502-77(a).

**Attachment 4**

**SAMPLE DECLARATION OF ARBITRATOR**

In the matter of the Mutual Agreement Procedure case under Article 25 of the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income signed at Washington on October 2, 1996 as Amended by the Protocols signed on October 2, 1996, and September 23, 2009 (Convention) involving the following Concerned Persons:

[Names and addresses of taxpayers that will be directly affected by the decision]

Paragraphs 6 and 7 of Article 25 (Mutual Agreement Procedure) of the Convention and the Implementing Arrangement regarding paragraphs 6 and 7 of Article 25 of the Convention between the Competent Authorities of Switzerland and the United States (Implementing Arrangement) provide rules and procedures under which the United States - Switzerland arbitration process (the Proceeding) will operate. As provided in subparagraphs A and C of paragraph 8 of the Implementing Arrangement, I certify that I can serve impartially in this case, and that I am independent of the Contracting States and Concerned Persons at this time and shall remain so during the entire arbitration proceeding and for a reasonable period of time thereafter.

Past or existing facts or circumstances that might be likely to give rise to justifiable doubts as to my impartiality or independence, if any, are identified in an Attachment to this Declaration.

Notwithstanding such relationships and interests, if any, I believe that I can be impartial and can exercise independent judgment in making my decisions in the Proceeding and thus to the best of my knowledge and belief, there is no reason why I should not serve as an Arbitrator with respect to the above-noted case. If, at any stage during the Proceeding, any new fact or circumstance arises that might give rise to such doubts, I shall promptly disclose such fact or circumstance to both competent authorities.

I understand that with regard to any information received from International Centre for Dispute Resolution, a division of the American Arbitration Association, the Swiss State Secretariat for International Finance, and the U.S. Internal Revenue Service in connection with the Proceeding, I and my staff, if any, are considered to be among the “persons or authorities” involved in the administration of taxes covered by Article 26 (Exchange of Information) of the Convention. I and my staff agree to abide by and be subject to the confidentiality and nondisclosure provisions of Articles 25 (Mutual Agreement Procedure) and 26 (Exchange of Information) of the Convention and the applicable domestic laws of Switzerland and the United States concerning the confidentiality of tax information. In the event those provisions conflict, the most restrictive condition shall apply. I confirm that I have the legal authority to bind my staff in this matter and will ensure they are aware of their obligations regarding confidentiality and non-disclosure. In particular, I agree that I may not disclose any information relating to the Proceeding, except as permitted by the Convention and the domestic laws of Switzerland and the United States. In addition, all material received and prepared in the course of, or relating to the Proceeding shall be considered to be information exchanged between the Switzerland and the United States and shall be destroyed in accordance with subparagraph E of paragraph 19 of the Implementing Arrangement referenced above.

[Under penalties of perjury]<sup>1</sup>, I hereby accept appointment as an Arbitrator in this case and will fairly decide the matters in controversy between the Competent Authorities of Switzerland and the United States in accordance with the Convention and the related agreements referred to above. I declare that these statements and any accompanying attachments are, to the best of my knowledge and belief, true, correct, and complete.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Address

<sup>1</sup>For use in the United States.

**SAMPLE AFFIRMATION OF CONFIDENTIALITY**

This affirmation is provided in order to consider the acceptance of an appointment as an arbitrator in the MAP case number xxx (hereinafter referred to as the Proceeding) based on Article 25 (Mutual Agreement Procedure) of the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income signed at Washington on October 2, 1996 as Amended by the Protocols signed on October 2, 1996, and September 23, 2009 (hereinafter referred to as the Convention).

I understand that with regard to any information received from the International Centre for Dispute Resolution, a division of the American Arbitration Association, the Swiss State Secretariat for International Finance, and the U.S. Internal Revenue Service in connection with the Proceeding, I am considered to be among the “persons or authorities” involved in the administration of taxes covered by Article 26 (Exchange of Information) of the Convention. I agree to abide by and be subject to the confidentiality and non-disclosure provisions of Article 25 (Mutual Agreement Procedure) and Article 26 (Exchange of Information) of the Convention and the applicable domestic laws of the United States and Switzerland concerning the confidentiality of tax information. In the event those provisions conflict, the most restrictive condition shall apply. In particular, I agree that I may not disclose any information relating to the Proceeding, except as permitted by the Convention and the domestic laws of the United States and Switzerland. In addition, all material received and prepared in the course of, or relating to the Proceeding shall be considered to be information exchanged between United States and Switzerland, and shall be destroyed in accordance with subparagraph E of paragraph 19 of the Implementing Arrangement regarding paragraphs 6 and 7 of Article 25 of the Convention between the Competent Authorities of Switzerland and the United States.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Address

## Notice of Proposed Rulemaking

### Certain Non-Government Persons Not Authorized to Participate in Examinations of Books and Witnesses as a Section 6103(n) Contractor

#### REG-132434-17

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTIONS: Withdrawal of notice of proposed rulemaking; notice of proposed rulemaking.

SUMMARY: This document withdraws a notice of proposed rulemaking (REG-132434-17) published in the **Federal Register** on March 28, 2018, which contained proposed regulations that addressed the participation of persons described under section 6103(n) of the Code in the interview of a summoned witness and excluded certain non-government attorneys from participating in an IRS examination.

This document also contains new proposed regulations to implement section 7602(f) of the Internal Revenue Code (Code), which was added to the Code by the Taxpayer First Act of 2019. The new proposed regulations implement new section 7602(f) regarding the persons who may be provided books, papers, records, or other data obtained pursuant to section 7602 for the sole purpose of providing expert evaluation and assistance to the IRS, and continue to propose limitations on the types of non-governmental attorneys to whom, under the authority of section 6103(n), any books, papers, records, or other data obtained pursuant to section 7602 may be provided. The new proposed regulations also propose to prohibit any IRS contractors from asking a summoned person's representative to clarify an objection or assertion of privilege. The regulations affect these persons.

DATES: Written or electronic comments and requests for a public hearing must be received by October 6, 2020. Requests for a public hearing must be submitted as prescribed in the “**Comments and Requests for a Public Hearing**” section.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (indicate IRS and REG-132434-17) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket. Send paper submissions to: CC:PA:LPD:PR (REG-132434-17), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, William V. Spatz at (202) 317-5461; concerning submission of comments, Regina Johnson, (202) 317-5177; (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

#### Background

##### Overview

These proposed regulations amend the Procedure and Administration Regulations (26 CFR part 301) under section 7602(a) of the Code relating to participation by persons described in section 6103(n) and 26 CFR §301.6103(n)-1(a) in receiving and reviewing summoned books, papers, records, or other data and in interviewing a summoned witness under oath.

The U.S. tax system relies upon taxpayers' self-assessment and reporting of

their tax liability. The expansive information-gathering authority that Congress granted to the IRS under the Code includes the IRS's broad examination and summons authority, which allows the IRS to determine the accuracy of that self-assessment. See *United States v. Arthur Young & Co.*, 65 U.S. 805, 816 (1984). Section 7602(a), in relevant part, provides that, for the purpose of ascertaining the correctness of any return, making a return where none has been made, or determining the liability of any person for any internal revenue tax, the IRS is authorized to examine books and records, issue summonses seeking documents and testimony, and take testimony from witnesses under oath. These provisions have been part of the revenue laws since 1864.

Use of outside specialists is appropriate to assist the IRS in determining the correctness of the taxpayer's self-assessed tax liability. The assistance of persons from outside the IRS, such as economists, engineers, appraisers, individuals with specialized knowledge who are also attorneys, industry specialists, and actuaries, promotes fair and efficient administration and enforcement of the laws administered by the IRS by providing specialized knowledge, skills, or abilities that the IRS officers or employees assigned to the examination may not possess. Section 6103(n) and 26 CFR §301.6103(n)-1(a) authorize the IRS to disclose returns and return information to such persons in their capacity as contractors.

On June 18, 2014, temporary regulations (TD 9669) regarding participation in a summons interview of a person described in section 6103(n) were published in the **Federal Register** (79 FR 34625). A notice of proposed rulemaking (REG-121542-14) cross-referencing the temporary regulations was published in the **Federal Register** (79 FR 34668) the same day. No public hearing was requested or held. The IRS received two comments on the proposed regulations and, after consideration of these comments, the proposed regulations were adopted in final regulations (TD 9778) published in the **Federal Register** (81 FR 45409) on July 14, 2016 (2016 Summons Interview Regulations).

The 2016 Summons Interview Regulations under §301.7602-1(b)(3) were issued, in part, to clarify that per-

sons described in section 6103(n) and §301.6103(n)-1(a) may receive and review books, papers, records, or other data summoned by the IRS. The regulations under §301.7602-1(b)(3) were also issued to clarify that, in the presence and under the guidance of an IRS officer or employee, these non-government persons could participate fully in the interview of a person whom the IRS had summoned as a witness to provide testimony under oath, allowing a contractor to ask a summoned witness substantive questions. See 81 FR 45409, at 45410.

New section 7602(f), enacted by section 1208 of the Taxpayer First Act of 2019, Pub. L. No. 116-25, and effective on July 1, 2019, now bars non-government persons who are hired by the IRS from questioning a witness under oath whose testimony was obtained pursuant to a summons issued under section 7602.

*Executive Order 13789, Notice 2017-38, and the Reports to the President*

Before new section 7602(f) was enacted on July 1, 2019, the President issued Executive Order 13789 on April 21, 2017 (E.O. 13789, 82 FR 19317), instructing the Secretary of the Treasury (Secretary) to review all significant tax regulations issued on or after January 1, 2016, and to identify regulations that (i) impose an undue burden on U.S. taxpayers; (ii) add undue complexity to the Federal tax laws; or (iii) exceed the statutory authority of the IRS, and take appropriate action to alleviate the burdens of these regulations. E.O. 13789 further instructed the Secretary to submit to the President within 60 days a report (First Report) that identified regulations that meet the criteria and should be modified. Notice 2017-38 (2017-30 I.R.B. 147 (July 24, 2017)) included the 2016 Summons Interview Regulations in a list of regulations identified by the Secretary in the First Report as meeting the President's criteria. E.O. 13789 instructed the Secretary to submit to the President a second report (Second Report) that recommended specific actions to mitigate the burden imposed by regulations identified in the First Report.

In response to Notice 2017-38, the Treasury Department and the IRS received seven comments from professional

and business associations addressing the 2016 Summons Interview Regulations. All but one of these comments recommended removal of the regulations based primarily on the commenters' perception that the 2016 Summons Interview Regulations create longer and less efficient examinations by improperly delegating authority to outside law firms to conduct examinations. The one commenter that did not recommend removal of the regulations in their entirety requested removal of the provisions permitting a contractor to question directly a witness during a summons interview.

On October 16, 2017, the Secretary published the Second Report in the **Federal Register** (82 FR 48013) stating that the Treasury Department and the IRS were considering proposing an amendment to the 2016 Summons Interview Regulations to narrow their scope to prohibit certain non-government attorneys from questioning witnesses on behalf of the IRS and playing a behind-the-scenes role in an examination, such as by reviewing summoned records or consulting on IRS legal strategy.

*2018 Notice of Proposed Rulemaking*

On March 28, 2018, the Treasury Department and the IRS published proposed regulations (REG-132434-17) in the **Federal Register** (83 FR 13206), which split the 2016 Summons Interview Regulations in §301.7602-1(b)(3) into two new subparagraphs set forth as §301.7602-1(b)(3)(i) and (ii). The first new subparagraph – §301.7602-1(b)(3)(i) – described the general rule for IRS contractor participation in an examination of books, records, and witnesses under section 7602 in the same terms as the 2016 Summons Interview Regulations, except it did not include the last clause which addressed IRS contractors asking a summoned person's representative to clarify an objection or assertion of privilege. The second new subparagraph -- §301.7602-1(b)(3)(ii) -- provided that non-governmental attorneys were not eligible to be hired by the IRS to participate in an examination, unless the non-governmental attorney fit into one of three exceptions: (1) a specialist in foreign, state, or local law, including tax law; (2) a specialist in non-tax substan-

tive law that is relevant to an issue in the examination, such as patent law, property law, or environmental law; or (3) a person who happens to be an attorney, but is hired by the IRS for knowledge, skills, or abilities other than providing legal services as an attorney. These exceptions were designed to ensure that the IRS remained able to continue to hire and receive critical support from outside experts and ancillary contractors with the special skills, knowledge, and abilities the IRS needs to be successful in its most high profile cases, while prohibiting the IRS from hiring non-governmental attorneys as specialists in federal tax law or in U.S. civil litigation to participate in an examination under section 7602.

A public hearing on the 2018 proposed regulations was held on July 31, 2018. There were six speakers at the hearing, four of whom had previously provided the IRS with written public comments in response to the notice of proposed rulemaking. Those comments are available at [www.regulations.gov](http://www.regulations.gov).

Three speakers at the public hearing generally supported the direction of the 2018 proposed amendments to the 2016 Summons Interview Regulations. They supported both paring back the types of non-government attorney contractors whom the IRS may hire to assist it in the activities described in section 7602(a) and removing prior approval for any contractor to ask a summoned person's representative to clarify an objection or assertion of privilege. Two of these speakers stated in their public comments a new argument that allowing any non-government attorney to ask questions of a witness under oath was "the most intrusive of governmental actions, because it carries immediate perjury implications." Overall, however, these three speakers urged that the 2016 Summons Interview Regulations be eliminated entirely, contending that allowing any contractor to participate fully in a summons interview may cause the IRS officer or employee in charge of the interview to lose control of the interview, that permitting any IRS contractors to receive and review information and documents obtained pursuant to section 7602 was an unlawful delegation of inherently governmental functions to private contractors, and that allowing any IRS contractors ac-

cess to such information and documents posed an unacceptably high risk of unlawful disclosure of private tax information by these contractors. The Treasury Department and the IRS previously addressed and declined to adopt these arguments in the preamble to the 2016 Summons Interview Regulations (TD 9778) published in the **Federal Register** (81 FR 45409) on July 14, 2016.

A fourth speaker, who also submitted a public comment to the notice of proposed rulemaking, spoke for himself and six federal tax law professors. This speaker commented that under the 2018 proposed regulations the IRS was disarming itself in examinations of multinational companies in complex cases. This speaker opposed the 2018 proposed regulations, saying the IRS would be foreclosing its access to external expert litigation skills, while large U.S. taxpayers can hire all the legal talent they want. A fifth speaker observed that transfer pricing issues are complex, and the IRS needs non-tax law expertise to understand the technological, logistical, economic, and financial interactions that are at stake in transfer pricing cases.

A sixth speaker argued that the legislative history to section 6103(n) provided that the “other services” allowed thereunder through a 1990 amendment to the statute were limited to those provided to the IRS by “expert witnesses.” This was another argument that was previously discussed and addressed in the preamble to the 2016 Summons Interview Regulations. This speaker further contended that it would be improper for the IRS to use as an expert witness any specialist in domestic, non-tax laws. This second argument, in combination with the speaker’s first argument, argue for rejection of the portion of the 2018 proposed regulations (and of the present proposed regulations) that allows the IRS to use in an examination any attorney hired as a specialist “in non-tax substantive law that is relevant to an issue in the examination, such as patent law, property law, or environmental law.”

Most of the speakers and written comments recommended that the Treasury Department and the IRS postpone action on the 2018 proposed regulations, because the House of Representatives and Senate Finance Committee had each previously approved proposed legislation that would

alter the 2016 Summons Interview Regulations. Congress enacted new section 7602(f) on July 1, 2019, before the 2018 proposed regulations were finalized.

#### *Legislative History of Section 7602(f)*

Prior to 2018, bills were introduced in the House and Senate that included proposed legislative provisions to alter the IRS contractor conduct allowed pursuant to the 2016 Summons Interview Regulations. On April 18, 2018, H.R. 5444 passed the House with a section 11308 that would have added new section 7602(f) to the Internal Revenue Code. Section 11308 of H.R. 5444 was explained in H. Rep. 115-637, Part 1, at 34-36 (April 13, 2018). This bill was not passed by the Senate in 2018, but S. 3728 was introduced in the Senate on July 26, 2018 with a corresponding proposal in section 704 of the bill to add new section 7602(f) to the Internal Revenue Code.

In 2019, different versions of the Taxpayer First Act were introduced in the House and Senate, and these bills again contained provisions for adding new section 7602(f) to the Internal Revenue Code. H.R. 1957 was introduced in the House on March 28, 2019 and passed the House on April 9, 2019, but did not pass the Senate. Section 1208 of H.R. 1957 contained proposed statutory language for new Internal Revenue Code section 7602(f) that was identical to the statutory language that was enacted a short time later on July 1, 2019 in section 1208 of H.R. 3151. Due to the procedural way in which H.R. 3151 became a vehicle for enacting the Taxpayer First Act, there are no separate House, Senate, or Conference Reports regarding H.R. 3151. Therefore, it is appropriate for the Treasury Department and the IRS to look to the House Ways and Means Committee and Joint Committee Reports for H.R. 1957, the immediate predecessor to H.R. 3151, to identify what Congress meant by the words “expert evaluation and assistance” used in new section 7602(f).

The House Ways and Means Committee and Joint Committee Reports for H.R. 1957 clarify the meaning of “expert evaluation and assistance.” The House Ways and Means Committee Report explained that pursuant to new section 7602(f), the IRS could not under the authority of

section 6103(n) “provide to a tax administration contractor any books, papers, records or other data obtained by summons, except when such person requires such information for the sole purpose of providing expert evaluation and assistance to the IRS (*including, for example, access to such information by translators*) . . . [and, that new section 7602(f)] is not intended to restrict the Office of Chief Counsel’s ability to use *court reporters, translators or interpreters, photocopy services, and other similar ancillary contractors.*” H.R. Rep. No. 116-39, at 50 (2019) (emphasis added). The Joint Committee staff report for the House Committee markup of H.R. 1957 used the same explanatory language as the House Committee Report to describe the types of IRS contractor participation that new section 7602(f) was intended to allow under the terms “expert evaluation and assistance.” JCX-15-19, at 22 (2019). These reports confirm that Congress intended these terms to have a broad interpretation in the examination context of section 7602.

The restrictions in the second sentence of new section 7602(f) on an IRS contractor questioning a witness are expressly limited to witnesses whose testimony was obtained pursuant to section 7602 and to a witness questioned “under oath.” The IRS will continue to interview summoned witnesses “under oath,” even though doing so limits the opportunity of an IRS contractor to ask a summoned witness any questions directly. Contractors may continue to ask questions informally (not under oath) of a taxpayer, a taxpayer’s employee, or third parties in appropriate circumstances.

## **Explanation of Provisions**

### *Overview*

This document withdraws, effective as of August 7, 2020, the previously proposed 2018 regulations because Pub. L. No. 116-25 (enacted on July 1, 2019) bars persons other than officers or employees of the Internal Revenue Service or the Office of Chief Counsel from substantively questioning summoned persons who are providing testimony to the IRS under oath, effective as of July 1, 2019.

These new proposed regulations continue to narrow the scope of the 2016

Summons Interview Regulations by providing that non-government attorneys may not be hired by the IRS to assist in an examination under section 7602 unless the attorney is hired by the IRS as a specialist in foreign, state, or local law (including foreign, state, or local tax law), or in non-tax substantive law that is relevant to an issue in the examination, or is hired for knowledge, skills, or abilities other than providing legal services as an attorney. These proposed regulations also prohibit any IRS contractors from asking a summoned person's representative to clarify an objection or assertion of privilege.

These proposed regulations include some aspects of the 2018 proposed regulations and provide new rules. Consistent with the 2018 proposed regulations, these proposed regulations prohibit the hiring of certain non-government attorneys to assist in section 7602 examinations even though this prohibition on hiring is not required by section 7602(f). The 2018 proposed regulations described the extent of a contractor's participation in IRS examinations and summons interviews in broad terms. In contrast, these proposed regulations interpret and implement the statutory restrictions under section 7602(f) on sharing information obtained in an examination with contractors and questioning a witness under oath in a summons interview. These proposed regulations also prohibit IRS contractors from asking a summoned person's representative to clarify an objection or assertion of privilege in a summons interview even though this prohibition is not required by section 7602(f).

#### *Contractor Access to Books and Records*

Proposed §301.7602-1(b)(3)(i)(A) tracks the first sentence of new section 7602(f). Proposed §301.7602-1(b)(3)(i)(B) then describes three non-exclusive types of potential IRS contractors who may appropriately provide the IRS with "expert evaluation and assistance," so as to receive from and review for the IRS any books, papers, records, or other data the IRS obtained pursuant to section 7602 in an examination. The first of these non-exclusive types described in the proposed regulations is a person with specialized expertise in certain substantive areas, including but not limited to an economist,

an engineer, an attorney specializing in an area relevant to an issue in the examination (such as patent law, property law, environmental law, or foreign, state, or local law (including foreign, state, or local tax law)), an industry expert, or other subject-matter expert. The second type of specialists who are described in the proposed regulations as persons with whom the IRS may appropriately provide books, papers, records, or other data the IRS obtained pursuant to section 7602 in an examination for their assistance are persons providing support to an IRS examination as ancillary service providers, including but not limited to court reporters, translators or interpreters, photocopy services, providers of data processing programs or equipment, litigation support services, or other similar contractors. The third type of eligible potential contractors under section 7602(f) are whistleblower-related contractors, who are described in §301.6103(n)-2 and who may possess special factual knowledge that may assist the IRS in a section 7602 examination. Neither section 7602(f) nor its legislative history suggest that Congress intended to curtail the IRS's ability to work with whistleblower-related contractors.

Proposed §301.7602-1(b)(3)(i)(C) describes the circumstances in which the IRS may hire certain attorneys as contractors to assist the IRS in a section 7602 examination. The IRS will not hire an attorney as a contractor for this purpose unless the attorney is hired as a specialist in foreign, state, or local law (including foreign, state, or local tax law), or in non-tax substantive law that is relevant to an issue in the examination, such as patent law, property law, or environmental law, or is hired for knowledge, skills, or abilities other than providing legal services as an attorney. Proposed §301.7602-1(b)(3)(i)(C) largely repeats the restriction on non-government attorney hiring in the 2018 proposed regulations and is intended to exclude two types of potential IRS contractors – Federal tax lawyers and U.S. civil litigators – from being hired for their expertise in Federal tax law or civil litigation to assist in an examination under section 7602. Though not required by new section 7602(f), the Treasury Department and the IRS choose to impose this hiring restriction in the interests of sound tax

administration. The IRS workforce (including the Office of Chief Counsel), already possesses the knowledge, skills, and abilities the IRS needs with respect to the interpretation and application of Federal tax law and the practice of U.S. civil litigation involving Federal taxes in the U.S. Tax Court.

#### *IRS Contractor Participation in an IRS Summons Interview*

The first sentence of proposed §301.7602-1(b)(3)(ii)(A) tracks the second sentence of new section 7602(f). The 2016 Summons Interview Regulations and the 2018 proposed regulations both clarified that eligible IRS contractors could attend a summons interview and provide assistance to the IRS or Office of Chief Counsel employees in attendance. New section 7602(f) does not prevent these eligible IRS contractors from attending and providing assistance to the IRS at a summons interview under oath. New section 7602(f) only prohibits IRS contractors from asking substantive questions of the summoned witness under oath. The second sentence of proposed §301.7602-1(b)(3)(ii)(A) makes this distinction between allowable contractor attendance and assistance to the IRS, on the one hand, and unallowable direct questioning of a summoned witness under oath, on the other hand. In this second sentence, the Treasury Department and the IRS also make explicit the treatment of a potential issue that section 7602(f) did not address – whether the same IRS contractors who are now barred from questioning a summoned witness under oath could nevertheless ask a summoned person's representative to clarify an objection or assertion of privilege. The Treasury Department and the IRS propose in the interests of sound tax administration, and in light of the purposes behind new section 7602(f), to forego explicitly any potential opportunity for an IRS contractor attending an IRS summons interview to ask the summoned person's representative to clarify an objection or assertion of a privilege. However, a Department of Justice attorney in the Tax Division or U.S. Attorney office may attend a summons interview conducted under oath. The Department of Justice attorney may ask the summoned person's represen-

tative to clarify an objection or assertion of privilege.

Proposed §301.7602-1(b)(3)(ii)(B) provides, in part, that IRS contractors who are court reporters are not barred from asking a summoned witness the types of typical housekeeping questions which are an essential part of their jobs. Some examples of typical housekeeping questions asked by court reporters of a summoned witness include: does the witness swear to tell the truth, will the witness speak up or speak (rather than gesture) an answer, and will the witness spell a name or address provided in an answer. The IRS has for some time hired contractor court reporters to make a record of IRS summons interviews in both large- and medium-size civil tax cases, where creating an exact and undisputed record of the matters discussed is considered important by the IRS to the case. The House Ways and Means Committee Report and the Joint Committee Report both specifically state that Congress did not intend section 7602(f) to prohibit the IRS from continuing to use court reporters in section 7602 circumstances. Congress could not have intended that the IRS continue to hire court reporters to prepare transcripts of summoned witnesses under oath, but yet prevent these court reporters from asking the witness the types of ordinary housekeeping questions that go along with the job of acting as a court reporter.

Proposed §301.7602-1(b)(3)(ii)(B) also provides, in part, that IRS contractors who are translators or interpreters are permitted to translate questions asked by an IRS or Office of Chief Counsel employee to a summoned witness. In these circumstances, the Treasury Department and the IRS interpret new section 7602(f)'s restriction on a contractor asking questions as applying only to the originator of a question, and not to contractors who translate the original question from an IRS or Office of Chief Counsel employee for the witness. Translators or interpreters in these circumstances may also need to ask questions to clarify the translation. The IRS has again for some time hired contractor translators and interpreters in summons cases of all sizes where the IRS was alerted in advance of a summons interview of the need. The House Ways and Means Committee Report and the Joint Committee report both

again specifically state that Congress did not intend by section 7602(f) to prohibit the IRS from continuing to hire translators and interpreters in section 7602 circumstances. Congress could not have intended for the IRS to continue hiring translators and interpreters to assist the IRS with conducting summons interviews under oath, yet prevent these translators or interpreters from translating an IRS or Office of Chief Counsel employee's questions.

These regulations are proposed to be effective for examinations begun and summonses served by the IRS on or after the date that these proposed regulations are published in the Federal Register. This applicability date is appropriate because these proposed regulations would, as of August 7, 2020, prohibit the IRS from engaging in certain activities in the context of an examination under section 7602 that the Treasury Department and the IRS have determined are not in the interests of sound tax administration.

### Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and affirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. Because the proposed regulations mainly affect the IRS and would not impose requirements on small entities, it is certified, under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that the proposed regulations do not impose a significant economic impact on a substantial number of small entities. Pursuant to section 7805(f) of the Code, the IRS will submit the proposed regulations to the Chief Counsel for Advocacy of the Small Business Administration for comments about the regulations' impact on small businesses.

### Comments and Request for a Public Hearing

Before these proposed regulations are adopted as final, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the "ADDRESSES" section. The Treasury Department and the IRS request comments on all aspects of the proposed

regulations. Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at [www.regulations.gov](http://www.regulations.gov) or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are also encouraged to be made electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020-4, I.R.B. 2020-17, provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

### Drafting Information

The principal author of these regulations is William V. Spatz of the Office of Associate Chief Counsel (Procedure and Administration).

### List of Subjects in 26 CFR Part 301

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

### Withdrawal of a Notice of Proposed Rulemaking

Accordingly, under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking (REG-132434-17) that was published in the **Federal Register** on March 28, 2018 (83 FR 13206) is withdrawn.

### Proposed Amendments to the Regulations

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

#### PART 301—PROCEDURE AND ADMINISTRATION

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

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

Par. 2. Section 301.7602-1 is amended by:

1. In paragraph (b)(2), adding “(Secretary)” at the end of the first sentence.

2. Revising paragraphs (b)(3) and (d).  
The revisions read as follows:

§ 301.7602-1 *Examination of books and witnesses.*

\* \* \* \* \*

(b)\* \* \*

(3) *Participation of a person described in section 6103(n)--(i) IRS contractor access to books and records obtained by the IRS administratively--(A) In general.* The Secretary may not, under the authority of section 6103(n), provide any books, papers, records, or other data obtained pursuant to section 7602 to any person authorized under section 6103(n), except when such person requires such information for the sole purpose of providing expert evaluation and assistance to the IRS.

(B) *Persons providing expert evaluation and assistance.* For the purposes of paragraph (b)(3)(i)(A) of this section, persons providing expert evaluation and assistance may include, but are not limited to, the following:

(1) Persons with specialized expertise in certain substantive areas, including, but not limited to, economists, engineers, attorneys specializing in an area relevant to an issue in the examination (such as patent law, property law, environmental law, or foreign, state, or local law (including foreign, state, or local tax law)), industry experts, or other subject-matter experts;

(2) Persons providing support as ancillary service contractors including, but not limited to, court reporters, translators or interpreters, photocopy services, provid-

ers of data processing programs or equipment, litigation support services, or other similar contractors; and

(3) Whistleblower-related contractors described in §301.6103(n)-2.

(C) *Hiring of certain non-government attorneys.* The IRS may not hire an attorney as a contractor to assist in an examination under section 7602 unless the attorney is hired by the IRS as a specialist in foreign, state, or local law (including foreign, state, or local tax law), or in non-tax substantive law that is relevant to an issue in the examination, such as patent law, property law, or environmental law, or is hired for knowledge, skills, or abilities other than providing legal services as an attorney.

(ii) *IRS contractor participation in an IRS summons interview--(A) In general.* No person other than an officer or employee of the IRS or its Office of Chief Counsel may, on behalf of the Secretary, question a witness under oath whose testimony was obtained pursuant to section 7602. Persons authorized by section 6103(n) and with whom the Secretary may provide books, papers, records, or other data obtained pursuant to section 7602 may also attend a summons interview and provide assistance to the IRS or Office of Chief Counsel employees in attendance, but may not question the summoned witness under oath or ask a summoned person’s representative to clarify an objection or assertion of privilege.

(B) *Court reporters, translators, and interpreters are not barred from asking questions.* Court reporters who are hired as contractors by the IRS to make a record of an IRS summons interview are permitted to ask typical housekeeping questions of a summoned witness. Examples of such

questions include, but are not limited to, asking whether the witness swears to tell the truth, asking the witness to spell a word or phrase, and asking whether the witness can speak up or speak rather than gesture an answer. Translators and interpreters who are hired as contractors by the IRS to assist in the interview of a summoned witness are permitted to translate any of the questions that are asked of the witness by an IRS or Office of Chief Counsel officer or employee and to ask questions which may be necessary to clarify the translation.

\* \* \* \* \*

(d) *Applicability date.* This section is applicable after September 3, 1982, except for paragraphs (b)(1) and (2) of this section which are applicable on and after April 1, 2005 and paragraph (b)(3) of this section which applies to examinations begun or administrative summonses served by the IRS on or after August 6, 2020. For rules under paragraphs (b)(1) and (2) of this section that are applicable to summonses issued on or after September 10, 2002 or under paragraph (b)(3) of this section that are applicable to summons interviews conducted on or after June 18, 2014 and before July 14, 2016, see 26 CFR 301.7602-1T (revised as of April 1, 2016). For rules under paragraph (b)(3) of this section that are applicable to administrative summonses served by the IRS before August 6, 2020, see 26 CFR 301.7602-1 (revised as of April 1, 2020).

Sunita Lough,  
Deputy Commissioner for Services  
and Enforcement.

(Filed by the Office of the Federal Register on August 6, 2020, 8:45 a.m., and published in the issue of the Federal Register for August 7, 2020, 85 F.R. 47931)

# Definition of Terms

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

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

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

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

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

new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

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

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

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

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

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

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

# Abbreviations

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

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

ERISA—Employee Retirement Income Security Act.  
EX—Executor.  
F—Fiduciary.  
FC—Foreign Country.  
FICA—Federal Insurance Contributions Act.  
FISC—Foreign International Sales Company.  
FPH—Foreign Personal Holding Company.  
FR.—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.

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<sup>1</sup> A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2019–27 through 2019–52 is in Internal Revenue Bulletin 2019–52, dated December 27, 2019.

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

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<sup>1</sup> A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2019–27 through 2019–52 is in Internal Revenue Bulletin 2019–52, dated December 27, 2019.

# **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/).

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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 Internal Revenue Service, Publishing Division, IRB Publishing Program Desk, 1111 Constitution Ave. NW, IR-6230 Washington, DC 20224.