

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. 2023-26
June 26, 2023

ADMINISTRATIVE

Notice 2023-42, page 1085.

This notice provides relief from the addition to tax under § 6655 of the Internal Revenue Code (Code) in connection with the application of the new corporate alternative minimum tax (CAMT), as added to Code by the enactment of § 10101 of Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly referred to as the Inflation Reduction Act of 2022 (IRA).

INCOME TAX

Notice 2023-46, page 1086.

This notice publishes the inflation adjustment factor for the carbon oxide sequestration credit under § 45Q for calendar year 2023. The inflation adjustment factor is used to determine the amount of the credit allowable under § 45Q for taxpayers that make an election under § 45Q(b)(3) to have the dollar amounts applicable under § 45Q(a)(1) or (2) apply.

Notice 2023-49, page 1087.

This notice publishes the reference price under § 45K(d)(2) (C) of the Internal Revenue Code for calendar year 2022. The reference price applies in determining the amount of the enhanced oil recovery credit under § 43, the marginal well production credit for qualified crude oil production under § 45I, and the applicable percentage under § 613A to be used in determining percentage depletion in the case of oil and natural gas produced from marginal properties.

REG-110412-23, page 1098.

This notice of proposed rulemaking contains proposed rules concerning the low-income communities bonus energy investment credit program established pursuant to the Inflation Reduction Act of 2022. Applicants investing in certain solar and wind powered-electricity generation facilities may apply for an allocation of environmental justice solar and wind capacity limitation to increase the amount of an energy investment credit for the taxable year in which the facility is placed in service. This document describes proposed definitions and requirements that would be applicable for the program allocating the calendar year 2023 capacity limitation, which also would inform guidance applicable for future program years. The proposed rules would affect applicants seeking allocations of environmental justice solar and wind capacity limitation.

INCOME TAX, TAX CONVENTIONS

REG-106228-22, page 1088.

This NPRM contains proposed regulations that would identify transactions that are the same as, or substantially similar to, certain Malta personal retirement scheme transactions as listed transactions, a type of reportable transaction. Material advisors and participants in these listed transactions would be required to file disclosures with the IRS and be subject to penalties for failure to disclose. These proposed regulations would affect participants in these transactions as well as material advisors.

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.

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Part III

Relief from Certain Additions to Tax for Corporation's Underpayment of Estimated Income Tax under Section 6655

Notice 2023-42

SECTION 1. OVERVIEW

This notice provides relief from the addition to tax under § 6655 of the Internal Revenue Code (Code)¹ in connection with the application of the new corporate alternative minimum tax (CAMT), as added to the Code by the enactment of § 10101 of Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly referred to as the Inflation Reduction Act of 2022 (IRA).

SECTION 2. BACKGROUND

.01 *CAMT under the IRA.* Section 10101 of the IRA amended § 55 to impose the new CAMT based on the “adjusted financial statement income” (AFSI) of an applicable corporation for taxable years beginning after December 31, 2022. Pursuant to § 59(k)(1), in general, a corporation is an applicable corporation subject to the CAMT for a taxable year if it meets the average annual AFSI test for one or more taxable years that (i) are before that taxable year and (ii) end after December 31, 2021 (Applicable Corporation). Section 55(a) provides that, for the taxable year of an Applicable Corporation, the amount of CAMT imposed by § 55 equals the excess (if any) of (i) the tentative minimum tax for the taxable year, over (ii) the sum of the regular tax, as defined in section § 55(c), for the taxable year plus the tax imposed under § 59A. Section 55(b)(2)(A) provides that, in the case of an Applicable Corporation, the tentative minimum tax for the taxable

year is the excess of (i) 15 percent of AFSI for the taxable year (as determined under § 56A), over (ii) the CAMT foreign tax credit for the taxable year (as determined under § 59(l)). In the case of any corporation that is not an Applicable Corporation, § 55(b)(2)(B) provides that the tentative minimum tax for the taxable year is zero. See section 2.01 of Notice 2023-7, 2023-7 I.R.B. 390, for a general description of the CAMT. Notice 2023-7 announced that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to issue forthcoming proposed regulations addressing the application of the CAMT and provided interim guidance that taxpayers may rely on until the issuance of the forthcoming proposed regulations. Notice 2023-20, 2023-10 I.R.B. 523, provided additional interim guidance that is intended to clarify further the application of the CAMT.

.02 *Estimated taxes.* Section 6655(c) and (d)(1)(A) generally provide that, in the case of a corporation, estimated income tax is required to be paid in four installments and the amount of any required installment is 25 percent of the required annual payment. Generally, under § 6655(d)(1)(B), the required annual payment is the lesser of two amounts described in § 6655(d)(1)(B)(i) and (ii). The amount described in § 6655(d)(1)(B)(i) is 100 percent of the tax shown on the return for the taxable year. The amount described in § 6655(d)(1)(B)(ii) is 100 percent of the tax shown on the taxpayer's return for the preceding taxable year, so long as the preceding taxable year was a full twelve months long and the return for such year showed a liability for tax. However, pursuant to § 6655(d)(2), in the case of a large corporation (as defined under § 6655(g)(2)), the amount described in § 6655(d)(1)(B)(ii) may be applied only for purposes of determining the first installment payment, while the amount described in § 6655(d)(1)(B)(i) must be applied for purposes of determining the required annual payment. Under § 6655(e), the amount of the required installment is the

annualized income installment or adjusted seasonal installment for those taxpayers who establish that such amount is lower than 25 percent of the required annual payment determined under § 6655(d). Section 6655(a) imposes an addition to tax for failure to make a sufficient and timely payment of estimated income tax.

SECTION 3. ESTIMATED TAXES

.01 *Waiver of addition to tax.* In light of challenges associated with determining whether a corporation is an Applicable Corporation and the amount of a corporation's CAMT liability under § 55 for a taxable year that begins after December 31, 2022, and before January 1, 2024 (Covered CAMT Year), and in the interest of sound tax administration, the IRS will waive the addition to tax under § 6655 with respect to a corporation's CAMT liability under § 55 for any Covered CAMT Year. Accordingly, for a corporation's Covered CAMT Year, the corporation's required installments of estimated tax need not include amounts attributable to its CAMT liability under § 55 to prevent the imposition of an addition to tax under § 6655. If a corporation fails to timely pay its CAMT liability under § 55 when due, other sections of the Code may apply; for example, additions to tax could be imposed under § 6651 if payment of the CAMT liability is not made by the due date (without regard to any extension) of the corporation's return.

.02 *Instructions to be modified.* The instructions to Form 2220, *Underpayment of Estimated Tax by Corporations*, will be modified, as necessary, to clarify that no addition to tax will be imposed under § 6655 based on a corporation's failure to make estimated tax payments of its CAMT liability under § 55 for any Covered CAMT Year, and that a taxpayer may exclude such amounts when calculating the amount of its required annual payment on Form 2220. If necessary, the modified instructions will be posted on <https://www.irs.gov>.

¹ Unless otherwise specified, all “section” or “§” references are to sections of the Code.

.03 *Instructions to avoid penalty notice.* Affected taxpayers must still file Form 2220 with their Federal income tax return, even if they owe no estimated tax penalty. The Form 2220 must be completed without including the CAMT liability from Schedule J of Form 1120, *U.S. Corporation Income Tax Return* (or other appropriate line of the corporation's income tax return in the Form 1120 series). Affected taxpayers must also include an amount of estimated tax penalty on Line 34 of their Form 1120 (or other appropriate line of the corporation's income tax return in the Form 1120 series), even if that amount is zero. Failure to follow these instructions could result in affected taxpayers receiving a penalty notice that will require an abatement request to apply the relief provided by this notice.

SECTION 4. APPLICABILITY DATES

The waiver of the addition to tax imposed by § 6655 described in section 3.01 of this notice applies for any Covered CAMT Year.

SECTION 5. DRAFTING AND CONTACT INFORMATION

The principal author of this notice is David Bergman of the Office of the Associate Chief Counsel (Procedure and Administration). Other personnel from the Treasury Department and the IRS participated in its development. For further information, please contact David Bergman at (202) 317-6845 (not a toll-free number).

Credit for Carbon Oxide Sequestration 2023 Section 45Q Inflation Adjustment Factor

Notice 2023-46

SECTION 1. PURPOSE

This notice publishes the inflation adjustment factor for the credit for carbon

oxide sequestration under § 45Q of the Internal Revenue Code (§ 45Q credit) for calendar year 2023. The inflation adjustment factor is used to determine the amount of the credit allowable under § 45Q for taxpayers that make an election under § 45Q(b)(3) to have the dollar amounts applicable under § 45Q(a)(1) or (2) apply.

SECTION 2. BACKGROUND

Section 45Q was added to the Code by § 115 of the Energy Improvement and Extension Act of 2008, enacted as Division B of Pub. L. 110-343, 122 Stat. 3765, 3829 (October 3, 2008), to provide a credit for the sequestration of carbon dioxide. Section 45Q was amended by § 1131 of the American Recovery and Reinvestment Tax Act of 2009, enacted as Division B of Pub. L. 111-5, 123 Stat. 115 (February 17, 2009), § 41119 of the Bipartisan Budget Act of 2018 (BBA), Pub. L. No. 115-123 (February 9, 2018), § 121 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020, enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 3051 (December 27, 2020), and § 13104 of Pub. L. 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act (IRA).

Section 45Q(a)(1) allows a credit of \$20 per metric ton of qualified carbon oxide (i) captured by the taxpayer using carbon capture equipment which is originally placed in service at a qualified facility before the date of the enactment of BBA, (ii) disposed of by the taxpayer in secure geological storage, and (iii) not used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project.

Section 45Q(a)(2) allows a credit of \$10 per metric ton of qualified carbon oxide (i) captured by the taxpayer using carbon capture equipment which is originally placed in service at a qualified facility before the date of the enactment of BBA, and (ii) either (I) used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project and disposed of by the taxpayer in secure geological storage or (II) utilized by the taxpayer in a manner described in § 45Q(f)(5).

Section 45Q(b)(3) provides that, for purposes of determining the carbon oxide sequestration credit under this section, a taxpayer may elect to have the dollar amounts applicable under § 45Q(a)(1) or (2) apply in lieu of the dollar amounts applicable under § 45Q(a)(3) or (4) for each metric ton of qualified carbon oxide which is captured by the taxpayer using carbon capture equipment which is originally placed in service at a qualified facility on or after the date of the enactment of the Bipartisan Budget Act of 2018.

Under § 45Q(f)(7), for taxable years beginning in a calendar year after 2009, the dollar amounts contained in § 45Q(a)(1) and (2) must be adjusted for inflation by multiplying such dollar amount by the inflation adjustment factor for such calendar year determined under § 43(b)(3)(B), determined by substituting “2008” for “1990.”

Section 43(b)(3)(B) defines the term “inflation adjustment factor” as, with respect to any calendar year, a fraction the numerator of which is the GNP implicit price deflator for the preceding calendar year and the denominator of which is the GNP implicit price deflator for 1990. For purposes of § 45Q(f)(7), for the 2022 calendar year, the inflation adjustment factor is a fraction the numerator of which is the GNP implicit price deflator for 2022 (127.194) and the denominator of which is the GNP implicit price deflator for 2008 (94.421).

Section 45Q(g), as amended by § 13104(f) of the IRA, provides that in the case of any carbon capture equipment placed in service before the date of the enactment of BBA, the credit under § 45Q shall apply with respect to qualified carbon oxide captured using such equipment before the earlier of January 1, 2023, and the end of the calendar year in which the Secretary of the Treasury or her delegate, in consultation with the Administrator of the Environmental Protection Agency, certifies that, during the period beginning after October 3, 2008, a total of 75,000,000 metric tons of qualified carbon oxide have been taken into account in accordance with (i) § 45Q(a), as in effect on the day before the date of the enactment of BBA, and (ii) § 45Q(a)(1) and (2). Notice 2022-38 provided that 2022 was the final calendar year for which a

taxpayer may claim a § 45Q credit under § 45Q(a)(1) and (2) for qualified carbon oxide that is captured by carbon capture equipment originally placed in service at a qualified facility before the date of enactment of the Bipartisan Budget Act of 2018. Therefore, the inflation adjustment amounts in section 3 of this notice only apply if a taxpayer elects under § 45Q(b)(3) to apply the dollar amounts applicable under § 45Q(a)(1) or (2) in lieu of the dollar amounts applicable under § 45Q(a)(3) or (4).

SECTION 3. INFLATION ADJUSTMENT FACTOR

The inflation adjustment factor for calendar year 2023 is 1.3471. The § 45Q credit for calendar year 2023 is \$26.94 per metric ton of qualified carbon oxide under § 45Q(a)(1) and \$13.47 per metric ton of qualified carbon oxide under § 45Q(a)(2).

SECTION 4. DRAFTING INFORMATION

The principal author of this notice is Maggie Stehn of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Maggie Stehn at (202) 317-6853 (not a toll-free number).

2022 Section 45K(d)(2)(C) Reference Price

Notice 2023-49

SECTION 1. PURPOSE

This notice publishes the reference price under § 45K(d)(2)(C) of the Internal Revenue Code for calendar year 2022. The credit period for the nonconventional source production credit under § 45K ended on December 31, 2013, for facilities producing coke or coke gas (other than from petroleum based products). However, the reference price continues to apply in determining the amount of

the enhanced oil recovery credit under § 43, the marginal well production credit for qualified crude oil production under § 45I, and the applicable percentage under § 613A to be used in determining percentage depletion in the case of oil and natural gas produced from marginal properties.

SECTION 2. BACKGROUND

Section 45K(d)(2)(C) provides that the term “reference price” means, with respect to a calendar year, the Secretary’s estimate of the annual average wellhead price per barrel for all domestic crude oil the price of which is not subject to regulation by the United States.

Section 43(a) provides that, for purposes of § 38, the enhanced oil recovery credit for any taxable year is an amount equal to 15 percent of the taxpayer’s qualified enhanced oil recovery costs for such taxable year.

Section 43(b)(1) provides that the amount of enhanced oil recovery credit for any taxable year shall be reduced by an amount which bears the same ratio to the amount of such credit (determined without regard to this paragraph) as - (A) the amount by which the reference price for the calendar year preceding the calendar year in which the taxable year begins exceeds \$28, bears to (B) \$6. Section 43(b)(2) provides that the term “reference price” means, with respect to any calendar year, the reference price determined for such calendar year under § 45K(d)(2)(C).

Section 45I(a) provides that, for purposes of § 38, the marginal well production credit for any taxable year is an amount equal to the product of the credit amount and the qualified crude oil production and the qualified natural gas production which is attributable to the taxpayer.

Section 45I(b)(1) provides that for crude oil production, the amount of the marginal well production credit is \$3 per barrel of qualified crude oil production.

Section 45I(b)(2) provides that the \$3 amount under § 45I(b)(1) shall be reduced (but not below zero) by an amount which bears the same ratio to such amount (determined without regard to this paragraph) as - (i) the excess (if any) of the applicable reference price over \$15, bears

to (ii) \$3. The applicable reference price for a taxable year is the reference price of the calendar year preceding the calendar year in which the taxable year begins.

Section 45I(b)(2)(C) provides that for qualified crude oil production the term “reference price” means, with respect to any calendar year, the reference price determined under § 45K(d)(2)(C).

Section 613A(c)(6)(A) provides, in general, that the allowance for depletion under § 611 shall be computed in accordance with § 613 with respect to - (i) so much of the taxpayer’s average daily marginal production of domestic crude oil as does not exceed the taxpayer’s depletable oil quantity (determined without regard to paragraph (3)(A)(ii)), and (ii) so much of the taxpayer’s average daily marginal production of domestic natural gas as does not exceed the taxpayer’s depletable natural gas quantity (determined without regard to paragraph (3)(A)(ii)), and the applicable percentage shall be deemed to be specified in subsection (b) of § 613 for purposes of subsection (a) of that section.

Section 613A(c)(6)(C) provides that the term “applicable percentage” means the percentage (not greater than 25 percent) equal to the sum of - (i) 15 percent, plus (ii) 1 percentage point for each whole dollar by which \$20 exceeds the reference price for crude oil for the calendar year preceding the calendar year in which the taxable year begins. For purposes of this paragraph, the term “reference price” means, with respect to any calendar year, the reference price determined for such calendar year under § 45K(d)(2)(C).

SECTION 3. REFERENCE PRICE

The reference price under § 45K(d)(2)(C) for calendar year 2022 is \$93.97.

SECTION 4. DRAFTING INFORMATION

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

Part IV

Notice of Proposed Rulemaking

Malta Personal Retirement Scheme Listed Transaction

REG-106228-22

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations that would identify transactions that are the same as, or substantially similar to, certain Malta personal retirement scheme transactions as listed transactions, a type of reportable transaction. Material advisors and participants in these listed transactions would be required to file disclosures with the IRS and be subject to penalties for failure to disclose. These proposed regulations would affect participants in these transactions as well as material advisors. This document also provides notice of a public hearing on the proposed regulations.

DATES: Written or electronic comments must be received by August 7, 2023. A public hearing on this proposed regulation has been scheduled for September 21, 2023, at 10 a.m. EST. Requests to speak and outlines of topics to be discussed at the public hearing must be received by August 7, 2023. If no outlines are received by August 7, 2023, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5 p.m. EST on September 19, 2023. The public hearing will be made accessible to people with disabilities. Requests for special assistance during the public hearing must be received by 5 p.m. EST on September 18, 2023.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically via the Federal eRulemaking Portal at <https://www.regulations.gov>

(indicate IRS and REG-106228-22) by following the online instructions for submitting comments. Requests for a public hearing must be submitted as prescribed in the “Comments and Requests for a Public Hearing” section. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted to the IRS’s public docket. Send paper submissions to: CC:PA:LPD:PR (REG-106228-22), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

Comments and Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments regarding the notice of proposed rulemaking 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. All comments will be made available at <https://www.regulations.gov>. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

A public hearing has been scheduled for September 21, 2023, beginning at 10 a.m. EST, in the Auditorium at the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. Participants may alternatively attend the public hearing by telephone.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit an outline of the topics to be discussed and the time to be devoted to each topic by August 7, 2023. A period of

10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing. If no outline of the topics to be discussed at the hearing is received by August 7, 2023 the public hearing will be cancelled. If the public hearing is cancelled, a notice of cancellation of the public hearing will be published in the **Federal Register**.

Individuals who want to testify in person at the public hearing must send an email to publichearings@irs.gov to have your name added to the building access list. The subject line of the email must contain the regulation number REG-106228-22 and the language TESTIFY In Person. For example, the subject line may say: Request to TESTIFY In Person at Hearing for REG-106228-22.

Individuals who want to testify by telephone at the public hearing must send an email to publichearings@irs.gov to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-106228-22 and the language TESTIFY Telephonically. For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG-106228-22.

Individuals who want to attend the public hearing in person without testifying must also send an email to publichearings@irs.gov to have your name added to the building access list. The subject line of the email must contain the regulation number REG-106228-22 and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing In Person for REG-106228-22. Requests to attend the public hearing must be received by 5 p.m. EST on September 19, 2023.

Individuals who want to attend the public hearing by telephone without testifying must also send an email to publichearings@irs.gov to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-106228-22

and the language ATTEND Hearing Telephonically. For example, the subject line may say: Request to ATTEND Hearing Telephonically for REG-106228-22. Requests to attend the public hearing must be received by 5 p.m. EST on September 19, 2023.

Hearings will be made accessible to people with disabilities. To request special assistance during a hearing please contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to publichearings@irs.gov (preferred) or by telephone at (202) 317-6901 (not a toll-free number) by September 18, 2023.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, W. Shawver Adams at (202) 317-5132; concerning submissions of comments or requests for a public hearing, Vivian Hayes at (202) 317-6901 (not toll-free numbers) or by email at publichearings@irs.gov (preferred).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed additions to 26 CFR part 1 (Income Tax Regulations) under section 6011 of the Internal Revenue Code (Code). The additions identify certain transactions that are “listed transactions” for the purposes of section 6011. This regulation would also affect reporting requirements under section 6111 and list maintenance requirements under section 6112.

I. Overview of the Reportable Transaction Regime

Section 6011(a) generally provides that, when required by regulations prescribed by the Secretary, “any person made liable for any tax imposed by this title or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.”

On February 28, 2000, the Treasury Department and the IRS issued a series of

temporary regulations (TD 8877; TD 8876; TD 8875) and cross-referencing notices of proposed rulemaking (REG-103735-00; REG-110311-00; REG-103736-00) under sections 6011, 6111, and 6112. The temporary regulations and cross-referencing notices of proposed rulemaking were published in the **Federal Register** (65 FR 11205, 65 FR 11269; 65 FR 11215, 65 FR 11272; 65 FR 11211, 65 FR 11271) on March 2, 2000 (2000 Temporary Regulations). The 2000 Temporary Regulations were modified several times before March 4, 2003, the date on which the Treasury Department and the IRS, after providing notice and opportunity for public comment and considering the comments received, published final regulations (TD 9046) in the **Federal Register** (68 FR 10161) under sections 6011, 6111, and 6112 (2003 Final Regulations). The 2000 Temporary Regulations and 2003 Final Regulations consistently provided that reportable transactions include listed transactions and that a listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction.

As part of the American Jobs Creation Act of 2004 (AJCA), Public Law 108-357, 118 Stat. 1418 (October 22, 2004), Congress added sections 6707A, 6662A, and 6501(c)(10) to the Code and revised sections 6111, 6112, 6707, and 6708 of the Code. *See* sections 811-812 and 814-817 of the AJCA. The AJCA’s legislative history explains that Congress incorporated in the statute the method that the Treasury Department and the IRS had been using to identify reportable transactions, and provided incentives, via penalties, to encourage taxpayer compliance with the new disclosure reporting obligations. As the Committee on Ways and Means explained in its report accompanying H.R. 4520, which became the AJCA:

The Committee believes that the best way to combat tax shelters is to be aware of them. The Treasury Department, using the tools available, issued regulations requiring disclosure of certain transactions and requiring organizers and promoters of tax-engineered

transactions to maintain customer lists and make these lists available to the IRS. Nevertheless, the Committee believes that additional legislation is needed to provide the Treasury Department with additional tools to assist its efforts to curtail abusive transactions. Moreover, the Committee believes that a penalty for failing to make the required disclosures, when the imposition of such penalty is not dependent on the tax treatment of the underlying transaction ultimately being sustained, will provide an additional incentive for taxpayers to satisfy their reporting obligations under the new disclosure provisions.

House Report 108-548(I), 108th Cong., 2nd Sess. 2004, 2004 WL 1380512, at 261 (June 16, 2004) (House Report).

In Footnote 232 of the House Report, the Committee on Ways and Means notes that the statutory definitions of “reportable transaction” and “listed transaction” were intended to incorporate the pre-AJCA regulatory definitions, while providing the Secretary with leeway to make changes to those definitions:

The provision states that, except as provided in regulations, a listed transaction means a reportable transaction, which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011. For this purpose, it is expected that the definition of “substantially similar” will be the definition used in Treas. Reg. sec. 1.6011-4(c)(4). However, the Secretary may modify this definition (as well as the definitions of “listed transaction” and “reportable transactions”) as appropriate.

Id. at 261 n.232.

Section 6707A(c)(1) defines a “reportable transaction” as “any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under section 6011, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion.” A “listed transaction” is defined by section 6707A(c)

(2) as “a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for the purposes of section 6011.”

Section 6111(a), as revised by the AJCA, provides that each material advisor with respect to any reportable transaction shall make a return setting forth: (1) information identifying and describing the transaction, (2) information describing any potential tax benefits expected to result from the transaction, and (3) such other information as the Secretary may prescribe. Such return must be filed not later than the date specified by the Secretary. Section 6111(b)(2) provides that a reportable transaction has the meaning given to such term by section 6707A(c).

Section 6112(a), as revised by the AJCA, provides that each material advisor with respect to any reportable transaction (as defined in section 6707A(c)) must (whether or not required to file a return under section 6111 with respect to such transaction) maintain a list (1) identifying each person with respect to whom such advisor acted as a material advisor and (2) containing such other information as the Secretary may by regulations require.

On August 3, 2007, the Treasury Department and the IRS published final regulations in the **Federal Register** (72 FR 43146, 72 FR 43157, 72 FR 43154) under sections 6011, 6111, and 6112, modifying the rules relating to the disclosure of reportable transactions by participants in reportable transactions under section 6011, the disclosure of reportable transactions by material advisors under section 6111, and the list maintenance requirements of material advisors with respect to reportable transactions under section 6112 in response to the changes in the AJCA.

II. Disclosure of Reportable Transactions by Participants and Penalties for Failure to Disclose

Section 1.6011-4(a) provides that every taxpayer that has participated in a reportable transaction within the meaning of §1.6011-4(b) and who is required to file a tax return must file a disclosure statement within the time prescribed in § 1.6011-4(e).

Section 1.6011-4(d) and (e) provide that the disclosure statement - Form 8886, *Reportable Transaction Disclosure Statement* (or successor form) - must be attached to the taxpayer’s tax return for each taxable year for which a taxpayer participates in a reportable transaction. A copy of the disclosure statement must be sent to the IRS’s Office of Tax Shelter Analysis (OTSA) at the same time that any disclosure statement is first filed by the taxpayer pertaining to a particular reportable transaction.

Reportable transactions include listed transactions, confidential transactions, transactions with contractual protection, loss transactions, and transactions of interest. See §1.6011-4(b)(2) through (6). Consistent with the definitions previously provided in the 2000 Temporary Regulations and later in the 2003 Final Regulations as promulgated in 2007, §1.6011-4(b)(2) continues to define a listed transaction as a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction.

Section 1.6011-4(c)(4) provides that a transaction is “substantially similar” if it is expected to obtain the same or similar types of tax consequences and is either factually similar or based on the same or similar tax strategy. Receipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to another transaction. Further, the term substantially similar must be broadly construed in favor of disclosure. For example, a transaction may be substantially similar to a listed transaction even though it may involve different entities or use different Code provisions.

Section 1.6011-4(c)(3)(i)(A) provides that a taxpayer has participated in a listed transaction if the taxpayer’s tax return reflects tax consequences (including an exclusion from gross income) or a tax strategy described in the published guidance that lists the transaction under §1.6011-4(b)(2). A taxpayer also has participated in a listed transaction if the taxpayer knows or has reason to know that the

taxpayer’s tax benefits are derived directly or indirectly from tax consequences or a tax strategy described in published guidance that lists a transaction under §1.6011-4(b)(2). Published guidance may identify other types or classes of persons that will be treated as participants in a listed transaction. Published guidance may also identify types or classes of persons that will not be treated as participants in a listed transaction.

Section 1.6011-4(e)(2)(i) provides that if a transaction becomes a listed transaction after the filing of a taxpayer’s tax return reflecting the taxpayer’s participation in the listed transaction and before the end of the period of limitations for assessment for any taxable year in which the taxpayer participated in the listed transaction, then a disclosure statement must be filed with OTSA within 90 calendar days after the date on which the transaction becomes a listed transaction. This requirement extends to an amended return and exists regardless of whether the taxpayer participated in the transaction in the year the transaction became a listed transaction. The Commissioner may also determine the time for disclosure of listed transactions in the published guidance identifying the transaction.

Participants required to disclose these transactions under §1.6011-4 who fail to do so are subject to penalties under section 6707A. Section 6707A(b) provides that the amount of the penalty is 75 percent of the decrease in tax shown on the return as a result of the reportable transaction (or which would have resulted from such transaction if such transaction were respected for Federal tax purposes), subject to minimum and maximum penalty amounts. The minimum penalty amount is \$5,000 in the case of a natural person and \$10,000 in any other case. For a listed transaction, the maximum penalty amount is \$100,000 in the case of a natural person and \$200,000 in any other case.

Additional penalties may also apply. In general, section 6662A imposes a 20 percent accuracy-related penalty on any understatement (as defined in section 6662A(b)(1)) attributable to an adequately disclosed reportable transaction. If the taxpayer has a requirement to disclose participation in the reportable transaction but does not adequately disclose the

transaction in accordance with the regulations under section 6011, the taxpayer is subject to an increased penalty rate equal to 30 percent of the understatement. See section 6662A(c). Section 6662A(b)(2) provides that section 6662A applies to any item which is attributable to any listed transaction and any reportable transaction (other than a listed transaction) if a significant purpose of such transaction is the avoidance or evasion of Federal income tax.

Participants required to disclose listed transactions who fail to do so are also subject to an extended period of limitations under section 6501(c)(10). That section provides that the time for assessment of any tax with respect to the transaction shall not expire before the date that is one year after the earlier of the date the participant discloses the transaction or the date a material advisor discloses the participation pursuant to a written request under section 6112(b)(1)(A).

III. Disclosure of Reportable Transactions by Material Advisors and Penalties for Failure to Disclose

Section 301.6111-3(a) of the Procedure and Administration Regulations provides that each material advisor with respect to any reportable transaction, as defined in §1.6011-4(b), must file a return as described in §301.6111-3(d) by the date described in §301.6111-3(e).

Section 301.6111-3(b)(1) provides that a person is a material advisor with respect to a transaction if the person provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and directly or indirectly derives gross income in excess of the threshold amount as defined in §301.6111-3(b)(3) for the material aid, assistance, or advice. Under §301.6111-3(b)(2)(i) and (ii), a person provides material aid, assistance, or advice if the person provides a tax statement, which is any statement (including another person's statement), oral or written, that relates to a tax aspect of a transaction that causes the transaction to be a reportable

transaction as defined in §1.6011-4(b)(2) through (7).

Material advisors must disclose transactions on Form 8918, *Material Advisor Disclosure Statement*, (or successor form) as provided in §301.6111-3(d) and (e). Section 301.6111-3(e) provides that the material advisor's disclosure statement for a reportable transaction must be filed with the OTSA by the last day of the month that follows the end of the calendar quarter in which the advisor becomes a material advisor with respect to a reportable transaction or in which the circumstances necessitating an amended disclosure statement occur. The disclosure statement must be sent to the OTSA at the address provided in the instructions for Form 8918 (or successor form).

Section 301.6111-3(d)(2) provides that the IRS will issue to a material advisor a reportable transaction number with respect to the disclosed reportable transaction. Receipt of a reportable transaction number does not indicate that the disclosure statement is complete, nor does it indicate that the transaction has been reviewed, examined, or approved by the IRS. Material advisors must provide the reportable transaction number to all taxpayers and material advisors for whom the material advisor acts as a material advisor as defined in §301.6111-3(b). The reportable transaction number must be provided at the time the transaction is entered into, or, if the transaction is entered into prior to the material advisor receiving the reportable transaction number, within 60 calendar days from the date the reportable transaction number is mailed to the material advisor.

Additionally, material advisors must prepare and maintain lists identifying each person with respect to whom the advisor acted as a material advisor with respect to the reportable transaction in accordance with §301.6112-1(b) and furnish such lists to the IRS in accordance with §301.6112-1(e).

Section 6707(a) provides that a material advisor who fails to file a timely disclosure, or files an incomplete or false disclosure statement, is subject to a penalty. Pursuant to section 6707(b)(2),

for listed transactions, the penalty is the greater of (A) \$200,000 or (B) 50 percent of the gross income derived by such person with respect to aid, assistance, or advice which is provided with respect to the listed transaction before the date the return is filed under section 6111.

A material advisor may also be subject to a penalty under section 6708 for failing to maintain a list under section 6112(a) and failing to make the list available upon written request to the Secretary in accordance with section 6112(b) within 20 business days after the date of such request. Section 6708(a) provides that the penalty is \$10,000 per day for each day of the failure after the 20th day. However, no penalty will be imposed with respect to the failure on any day if such failure is due to reasonable cause.

IV. Malta Personal Retirement Schemes

Under U.S. Federal income tax law, individual savings arrangements are not entitled to tax-favored treatment available for pension or retirement arrangements if they do not meet the requirements for an individual retirement account (IRA) described in section 408 or a Roth IRA described in section 408A. The tax-favored treatment for an IRA or Roth IRA includes the deductibility (in many cases) of contributions to an IRA, tax deferral on the earnings of the IRA or Roth IRA, and exclusion from income for qualified distributions from a Roth IRA. IRAs and Roth IRAs are subject to certain requirements, such as a requirement that an individual's contributions, other than certain rollovers, are restricted to cash and limited by reference to an individual's earned income (including, in the case of spousal IRAs, a spouse's earned income). In addition, a distribution from an IRA (or a distribution from a Roth IRA that is not a qualified distribution) is generally subject to a 10% additional tax if paid before the IRA owner attains age 59½.

Malta's personal retirement schemes were enacted as part of the Retirement Pensions Act of 2011 and implemented by regulations in 2015.¹ They are tax-favored savings arrangements in Malta that

¹ Act No. XVI of 2011, as amended by Act No. XX of 2013, and amended by Act No. XXVI of 2018; Ch. 514 (Retirement Pensions Act). Pension Rules for Personal Retirement Schemes Issued in Terms of the Retirement Pensions Act, 2011, were issued on January 7, 2015, and effective January 1, 2015.

allow individuals or their employers to contribute assets to a trust or other investment vehicle for such individuals' benefit. In contrast to U.S. tax-favored individual savings arrangements, there is no requirement that contributions be limited by reference to income earned from employment or self-employment activities, no limitation on contribution amounts, and no restriction on the types of assets (such as securities) that may be contributed. Distributions, which may begin when an individual member is 50 but must start no later than age 75, may be exempt from Maltese income tax if the individual elects to receive initial and additional cash lump sum distributions.

Absent treaty relief, U.S. citizens and U.S. resident aliens who establish a foreign individual retirement trust or other individual retirement arrangement are generally required to take into account the arrangement's income on a current basis, even if there has been no distribution from the arrangement. *See, e.g.,* section 671. Under section 894(a), the Code applies to a taxpayer with due regard to any treaty obligations of the United States. Pursuant to the saving clause in Article 1, paragraph 4, of the Convention Between the Government of the United States of America and the Government of Malta for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Valetta, August 8, 2008 ("Treaty"), the United States retains its right to tax the income of its citizens and residents (as determined under Article 4 (Resident) of the Treaty) as if there were no Treaty between the United States and Malta. Notwithstanding the saving clause, U.S. citizens and U.S. resident aliens may claim an exemption from U.S. income tax in accordance with the Treaty if they qualify for an exception to the saving clause provided under paragraph 5 of Article 1.

Articles 17(1)(b) and 18 of the Treaty, are both listed as exceptions to the saving clause. These provisions may permit U.S. citizens and U.S. resident aliens an exemption from U.S. income tax on (1) "pensions and other similar remuneration" arising in Malta to the extent such pensions or remuneration would be exempt from tax under Maltese law if the beneficial owner were a resident of Malta (Article 17(1)(b)), and

(2) income earned by a "pension fund" established in Malta until such income is distributed (Article 18). As explained in Treasury's Technical Explanation to the Treaty, Article 17 applies generally to "distributions from pensions and other similar remuneration beneficially owned by a resident of a Contracting State in consideration of past employment. . .", whereas Article 18 applies to income of a "pension fund established in the other Contracting State . . ." Paragraph (1)(k) of Article 3 of the Treaty defines the term "pension fund" for purposes of the Treaty. In the case of Malta, a pension fund is a licensed fund or scheme subject to tax only on income derived from immovable property situated in Malta, and as relevant here, operated principally to "administer or provide pension or retirement benefits . . ."

On December 27, 2021, the IRS published in the Internal Revenue Bulletin a Competent Authority Arrangement (the "CAA") between the United States and Malta. I.R.B. 2021-52, Ann. 2021-19. In the CAA, the U.S. and Maltese competent authorities agreed that individual retirement arrangements established under Malta's Retirement Pensions Act of 2011 are not considered "pension funds" for purpose of relevant provisions of the Treaty. The CAA also confirmed that distributions from these types of arrangements are not "pensions or other similar remuneration" in consideration of past employment for purposes of paragraph 1(b) of Article 17. The CAA "reflects the original intent [of the United States and Malta] regarding the definition of 'pension fund' for purposes of the Treaty."

In addition to the income tax consequences associated with a U.S. taxpayer's transactions with or interest in a Malta personal retirement scheme, information reporting requirements also apply. Section 6048 generally requires annual information reporting of a U.S. person's transfers of money or other property to, ownership of, and distributions from, foreign trusts. Section 6677 imposes penalties on a U.S. person for failing to comply with section 6048. *See also* Notice 97-34, 1997-1 C.B. 422. Under section 6048(d) (4), the Secretary may suspend or modify any requirement under section 6048 if the United States has no significant tax

interest in obtaining the required information. The Treasury Department and the IRS have previously issued guidance providing that reporting is not required under section 6048(a), (b), and (c) for certain U.S. citizen and resident individuals with respect to their transactions with, and ownership of, certain tax-favored foreign retirement trusts and certain tax-favored foreign nonretirement savings trusts, as described in Revenue Procedure 2020-17, 2020-12 I.R.B. 539. Malta personal retirement schemes are not eligible for this relief from section 6048 reporting because contributions to these arrangements are not limited to income earned from the performance of services, subject to a certain annual or lifetime limit, or subject to a limit based on a percentage of the participant's earned income. *See* Section 5.03 of Rev. Proc. 2020-17. Section 6048 information reporting is provided on Form 3520, *Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*, and Form 3520-A, *Annual Information Return of Foreign Trust With a U.S. Owner (Under section 6048(b))*.

Section 6038D may also apply to a U.S. person's interest in a Malta personal retirement scheme. Under section 6038D, a specified person, which includes a U.S. citizen or resident alien, must report any interest in a specified foreign financial asset provided that the aggregate value of all such assets exceeds certain thresholds. *See* §1.6038D-2(a). Section 6038D(d) imposes a penalty for failing to comply. Section 6038D information reporting is provided on Form 8938, *Statement of Specified Foreign Financial Assets*. A specified person who is required to report information under section 6038D on Form 8938 may also be required to report similar identifying information under section 6048 on Form 3520 or Form 3520-A.

V. Tax Avoidance Transactions Using Malta Personal Retirement Schemes

The Treasury Department and the IRS are aware of transactions in which a U.S. citizen or a U.S. resident alien misconstrues the pension provisions of the Treaty to claim an exemption from U.S. income tax on earnings in and distributions from personal retirement schemes established

under the laws of Malta. E.g., IR-2022-113. Typically, the transaction is intended to permanently avoid U.S. tax on (1) the built-in-gain of appreciated property transferred to personal retirement schemes established in Malta, (2) income earned by and accumulated in such schemes, and/or (3) distributions from such schemes. The U.S. individuals who participate in these transactions generally lack any connection to Malta other than their participation in these arrangements. These individuals also may fail to comply with their U.S. information reporting requirements, including under section 6048.

In this transaction, the taxpayer (Taxpayer A), a U.S. citizen or a U.S. resident alien, establishes a personal retirement scheme under Malta's Retirement Pension Act of 2011. In Year 1, Taxpayer A transfers cash, appreciated property (annuities, securities, digital assets, partnership interests, etc.), or a combination thereof, to the scheme without recognizing gain on the transfer under section 684(b). In Year 2 or later, Taxpayer A takes the position on a U.S. income tax return that the income earned by the scheme (including gain on the sale or other disposition of appreciated property initially transferred to the scheme) is exempt from U.S. tax under Articles 18 and 1(5)(a) of the Treaty because the scheme is a "pension fund" for purposes of the Treaty. In Year 3 or later, Taxpayer A receives a distribution from the scheme and takes the position on a U.S. income tax return that such distributions are exempt from U.S. tax by reason of Articles 17(1)(b) and 1(5)(a) of the Treaty. Additionally, Taxpayer A may not comply with U.S. information reporting requirements related to these transactions, including under section 6048.

The taxpayer's positions in these transactions are incorrect. First, the Treaty benefits claimed with respect to personal retirement schemes established in Malta are not available because these schemes are not "pension funds," and their distributions are not "pensions or other similar remuneration," as explained in the CAA. Second, under Article 3(2) of the Treaty, the undefined terms "pension" and

"retirement" are interpreted according to the tax law of the United States, which is the country that is applying the Treaty.² Under U.S. law applicable to individual retirement arrangements, Malta personal retirement schemes are neither "pensions" nor do they provide "retirement benefits" for purposes of the Treaty. Maltese law does not condition the tax benefits it provides for these arrangements upon reasonably analogous requirements of U.S. law. Those requirements include that an individual's contributions to an individual retirement arrangement (other than qualified rollovers from a pension or retirement arrangement that is tax-favored under the same country's laws) must be made in cash and must be based on income earned from employment or self-employment activities. See sections 219, 408, and 408A. Third, in appropriate fact patterns, the transaction viewed as a whole may be disregarded under relevant judicial doctrines, including the step-transaction doctrine, the substance-over-form doctrine, and the assignment of income doctrine, in order to give effect to the general purpose of the Treaty to mitigate double taxation but not improperly create instances of non-taxation, especially in cases in which the person establishing the retirement arrangement has no other connection to the treaty jurisdiction.

VI. Purpose of Proposed Regulation

On March 3, 2022, the Sixth Circuit issued an order in *Mann Construction v. United States*, 27 F.4th 1138, 1147 (6th Cir. 2022), holding that Notice 2007-83, 2007-2 C.B. 960, which identified certain trust arrangements claiming to be welfare benefit funds and involving cash value life insurance policies as listed transactions, violated the Administrative Procedure Act (APA), 5 U.S.C. 551-559 because the notice was issued without following the notice-and-comment procedures required by section 553 of the APA. The Sixth Circuit concluded that Congress did not clearly express an intent to override the notice-and-comment procedures required by section 553 of the APA when it enacted

the AJCA. *Id.* at 1148. The Sixth Circuit reversed the decision of the district court, which held that Congress had authorized the IRS to identify listed transactions without notice and comment. See *Mann Construction, Inc. v. United States*, 539 F.Supp.3d 745, 763 (E.D. Mich. 2021).

Relying on the Sixth Circuit's analysis in *Mann Construction*, three district courts and the Tax Court have concluded that IRS notices identifying listed transactions were improperly issued because they were issued without following the APA's notice and comment procedures. See *Green Rock, LLC v. IRS*, 2023 WL 1478444 (N.D. AL., February 2, 2023) (Notice 2017-10); *GBX Associates, LLC, v. United States*, 1:22cv401 (N.D. Ohio, Nov. 14, 2022) (same); *Green Valley Investors, LLC, et al. v. Commissioner*, 159 T.C. No. 5 (Nov. 9, 2022) (same); see also *CIC Services, LLC v. IRS*, 2022 WL 985619 (E.D. Tenn. March 21, 2022), as modified by 2022 WL 2078036 (E.D. Tenn. June 2, 2022) (Notice 2016-66, identifying a transaction of interest).

The Treasury Department and the IRS disagree with the Sixth Circuit's decision in *Mann Construction* and the subsequent decisions that have applied that reasoning to find other IRS notices invalid and are continuing to defend the validity of notices identifying transactions as listed transactions in circuits other than the Sixth Circuit. At the same time, however, to avoid any confusion and ensure consistent enforcement of the tax laws throughout the nation, the Treasury Department and the IRS are issuing these proposed regulations to identify certain transactions involving Malta pension plans as listed transactions for purposes of all relevant provisions of the Code and Treasury Regulations, including section 6707A and §1.6011-4(b)(2).

The Treasury Department and the IRS believe that transactions involving a Malta personal retirement scheme described in the proposed regulations, and substantially similar transactions involving a retirement arrangement established in Malta, unless specifically excepted, are tax avoidance transactions and should be

²Treasury's Technical Explanation to Article 3(2) of the Treaty states:

Paragraph 2 provides that in the application of the Convention, any term used but not defined in the Convention will have the meaning that it has under the law of the Contracting State whose tax is being applied, unless the context requires otherwise, or the competent authorities have agreed on a different meaning pursuant to Article 25 (Mutual Agreement Procedure).

identified as listed transactions for purposes of §1.6011-4 and sections 6111 and 6112. Under the proposed regulations, participants involved in such transactions and their material advisors would need to comply with the information reporting and collection requirements under §1.6011-4 and sections 6111 and 6112. Failure to do so could result in penalties as described in sections II and III of the Background section of this preamble.

Explanation of Provisions

I. Malta Personal Retirement Scheme Transaction

Proposed §1.6011-12(a) provides that, except as provided in proposed §1.6011-12(b)(2), a transaction that is the same as, or substantially similar to, a Malta personal retirement scheme transaction (described in proposed §1.6011-12(b)(1)) is a listed transaction for purposes of §1.6011-4 and sections 6111 and 6112. A transaction is a Malta personal retirement scheme transaction as described in proposed §1.6011-12(b)(1) if a U.S. citizen or a U.S. resident alien directly or indirectly (1) transfers (within the meaning of §1.679-3 or §1.684-2) cash or other property to, or receives a distribution from, a personal retirement scheme established under Malta's Retirement Pension Act of 2011 (a "Malta personal retirement scheme"), and (2) takes the position on a U.S. Federal income tax return that (a) income earned or gain realized by the Malta personal retirement scheme is not includible in income on a current basis for U.S. Federal income tax purposes by reason of the Treaty, or (b) a distribution from a Malta personal retirement scheme attributable to earnings or gains of the scheme that have not been included in income for U.S. Federal income tax purposes is exempt from U.S. taxation by reason of the Treaty. Proposed §1.6011-12(b)(1). Indirect transfers include transfers to a Malta personal retirement scheme by any person (intermediary) to whom a U.S. person transfers property if such transfer is made pursuant to a plan one of the principal purposes of which is the avoidance of United States tax. *See, e.g.*, §1.679-3(c).

For example, assume in Year 1 Taxpayer A, a U.S. citizen or a U.S.

resident alien directly or indirectly transfers cash and appreciated property to a Malta personal retirement scheme. In Year 2 the Malta personal retirement scheme sells Taxpayer A's contributed property at a gain. On a U.S. income tax return for Year 2, Taxpayer A does not include the gain realized by the scheme, because, according to Taxpayer A, such gain is exempt from U.S. taxation under Articles 18 and 1(5)(a) of the Treaty. Taxpayer A has engaged in a Malta personal retirement scheme transaction as described in proposed §1.6011-12(b)(1). Unless the exception described in proposed §1.6011-12(b)(2) applies, the transaction is a listed transaction for purposes of §1.6011-4 and sections 6111 and 6112. Taxpayer A and any material advisor with respect to the listed transaction are therefore subject to the information reporting and collection of information requirements under §1.6011-4 and sections 6111 and 6112, respectively, as described in sections I through III of the Background section of this preamble. Taxpayer A must also comply with U.S. information reporting requirements including, for example, requirements under section 6048.

Under §1.6011-4(c)(3)(i)(E), Taxpayer A is a participant in a listed transaction for each year in which Taxpayer A's tax return reflects tax consequences or a tax strategy of a Malta personal retirement scheme transaction as described in proposed §1.6011-12(b)(1). Thus, continuing with the example in the preceding paragraph, if Taxpayer A receives a distribution from the Malta personal retirement scheme in Year 3, but does not include the distribution in income under Articles 17(1)(b) and 1(5)(a) of the Treaty, Taxpayer A will have participated in a Malta personal retirement scheme transaction as described in proposed §1.6011-12(b)(1) in each of Year 2 and Year 3.

A transaction is not substantially similar to a Malta personal retirement scheme transaction unless it involves the Treaty and a retirement arrangement established in Malta. The Treasury Department and the IRS are aware that taxpayers may attempt to use transactions similar to the Malta personal retirement scheme transaction in other jurisdictions to achieve a similar tax avoidance outcome. The Treasury Department and the IRS are therefore

considering whether transactions similar to the Malta personal retirement scheme transaction replicated in other jurisdictions should also be identified as listed transactions and request comments on this matter.

II. Exception

The Treasury Department and the IRS are aware that the United Kingdom allows tax-deferred transfers from its pension or retirement schemes to certain "qualified recognised overseas pension schemes" (or QROPS), including Malta personal retirement schemes. The Treasury Department and the IRS believe that certain U.S. individuals who may have transferred their foreign pension or retirement arrangements to Malta personal retirement schemes in accordance with foreign law and claimed an exemption from U.S. income tax for earnings in or distributions from such schemes on U.S. Federal income tax returns filed before the date these proposed regulations are published in the **Federal Register** should not be treated as participating in a listed transaction described in proposed §1.6011-12(b)(1) provided certain requirements are met. Accordingly, proposed §1.6011-12(b)(2) provides that if a U.S. citizen or resident alien described in proposed §1.6011-12(b)(1)(i) takes a position described in proposed §1.6011-12(b)(1)(ii) on a U.S. Federal income tax return filed before June 6, 2023, such U.S. citizen or U.S. resident alien will not be treated as participating in a listed transaction for the taxable year to which the U.S. Federal income tax return relates provided that (1) such U.S. citizen or U.S. resident alien (the transferor) established the Malta personal retirement scheme with a transfer (or rollover) of a pension or other retirement arrangement established in a country other than Malta or the United States (for example, a pension scheme established in the United Kingdom), and in compliance with the tax laws of such country, (2) the transferor was, when such pension or retirement arrangement was established and such rollover occurred, a resident of the other country under that country's tax law, including under Article 4 (Residency) of such country's income tax treaty with the United States, if applicable (for example,

a tax resident of the United Kingdom), and (3) the transferor's contributions to such pension or retirement arrangement consisted solely of cash in an amount that bears a relationship to the transferor's income earned from the performance of personal services. This exception does not apply to a U.S. citizen or U.S. resident alien who takes a position described in proposed §1.6011-12(b)(1)(ii) on a U.S. Federal income tax return filed on or after June 6, 2023, when U.S. citizens or U.S. resident aliens who own foreign pension or retirement arrangements and their material advisors are on notice that the Treasury Department and the IRS have proposed identifying Malta personal retirement scheme transactions as listed transactions for purposes of §1.6011-4(b)(2) and sections 6111 and 6112.

For example, assume Taxpayer B, a U.S. citizen, was a resident of Country Y when Taxpayer B established a Country Y pension plan in compliance with Country Y's laws. Taxpayer B made cash contributions from wages to the Country Y pension plan. Taxpayer B, while a U.S. citizen and resident of Country Y, transferred the Country Y pension plan to a Malta personal retirement scheme in accordance with Country Y tax law. In Year 1, Taxpayer B's Malta personal retirement scheme earned income. On Taxpayer B's Year 1 U.S. Federal income tax return, which is filed before June 6, 2023, Taxpayer B took a position described in proposed §1.6011-12(b)(1)(ii). Under proposed §1.6011-12(b)(2), Taxpayer B would not be treated as participating in a listed transaction with respect to such year.

A U.S. citizen or U.S. resident alien who is described in proposed §1.6011-12(b)(2), however, may be subject to U.S. income tax as a result of the transfer from a pension or retirement arrangement established in a country other than Malta to a Malta personal retirement scheme, as well as U.S. information reporting requirements under, for example, section 6048(a) and (c). *See* IRS INFO 2011-0096 (Dec. 30, 2011). U.S. citizens and U.S. residents who are described in proposed §1.6011-12(b)(2) are subject to U.S. income tax on income earned and gain realized by their Malta personal retirement schemes, as described in section IV of the Background section of this preamble.

III. *Effect of Transaction Becoming a Listed Transaction*

Participants required to disclose these transactions under §1.6011-4 who fail to do so would be subject to penalties under section 6707A. Participants required to disclose these transactions under §1.6011-4 who fail to do so would also be subject to an extended period of limitations under section 6501(c)(10). Material advisors required to disclose these transactions under section 6111 who fail to do so would be subject to the penalty under section 6707. Material advisors required to maintain lists of investors under section 6112 who fail to do so (or who fail to provide such lists when requested by the IRS) would be subject to the penalty under section 6708(a). In addition, the IRS may impose other penalties on persons involved in these transactions or substantially similar transactions, including accuracy-related penalties under section 6662 or section 6662A, the section 6694 penalty for understatements of a taxpayer's liability by a tax return preparer, and the section 6677 penalty for the failure to timely report certain transactions with, and ownership of, foreign trusts.

Taxpayers who have filed a tax return (including an amended return (or Administrative Adjustment Request (AAR) for certain partnerships)) reflecting their participation in these transactions before **[DATE THE FINAL REGULATIONS ARE PUBLISHED IN THE FEDERAL REGISTER]** (the finalization date) and who have not otherwise finalized a settlement agreement with the IRS with respect to the transaction must disclose the transactions as provided in §1.6011-4(d) and (e) provided that the period of limitations for assessment of tax, including any applicable extensions, for any taxable year in which the taxpayer participated in the transaction has not ended on or before the finalization date. Proposed §1.6011-12(b)(3); *see also* §1.6011-4(e)(2)(i). Thus, for example, taxpayers who participated in a Malta personal retirement scheme transaction before the finalization date, but did not comply with their foreign trust information reporting requirements under section 6048 with respect to such transaction, have an open period of limitations for

assessments under section 6501(c)(8) and therefore must file a disclosure statement with OTSA within 90 calendar days after the date on which the transaction becomes a listed transaction.

In addition, material advisors have disclosure requirements with regard to transactions occurring in prior years. However, notwithstanding §301.6111-3(b)(4)(i) and (iii), material advisors are required to disclose only if they have made a tax statement on or after the date that is six years before the date the regulations are published as final regulations in the **Federal Register**.

The Treasury Department and the IRS recognize that some taxpayers may have filed tax returns taking the position that they were entitled to the purported tax benefits of the types of transactions described in these proposed regulations. Because the IRS will take the position that taxpayers are not entitled to the purported tax benefits of the listed transactions described in the proposed regulations, taxpayers should consider filing amended returns to ensure that their transactions are disclosed properly.

Proposed Applicability Date

Proposed §1.6011-12 would identify certain Malta personal retirement scheme transactions described in proposed §1.6011-12(b)(1), except as described in proposed §1.6011-12(b)(2), as listed transactions effective as of the date of publication in the **Federal Register** of a Treasury decision adopting these regulations as final regulations.

Special Analyses

I. Regulatory Planning and Review -- Economic Analysis

The Administrator of the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB), has determined that this proposed rule is not a significant regulatory action, as that term is defined in section 3(f) of Executive Order 12866, as amended. Therefore, OIRA has not reviewed this proposed rule pursuant to section 6(a)(3)(A) of Executive Order 12866 and April 11, 2018, Memorandum

of Agreement between the Treasury Department and the OMB.

II. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) generally requires that a Federal agency obtain the approval of the OMB before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit.

The estimated number of taxpayers impacted by these proposed regulations ranges between 50 to 150 per year. No burden on these taxpayers would be imposed by these proposed regulations. Instead, the collection of information contained in these proposed regulations is reflected in the collection of information for Forms 8886 and 8918 that has been reviewed and approved by the OMB in accordance with the Paperwork Reduction Act (44 U.S.C. 3507(c)) under control numbers 1545-1800 and 1545-0865. Thus, the burden estimates for the Forms 8886 and 8918 will be adjusted to reflect the taxpayers impacted by these regulations. 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.

III. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (5 U.S.C. chapter 6) (“RFA”) requires the agency “to prepare and make available for public comment an initial regulatory flexibility analysis” that will “describe the impact of the proposed rule on small entities.” See 5 U.S.C. 603(a). Section 605 of the RFA provides an exception to this requirement if the agency certifies that the proposed rulemaking will not have a significant economic impact on a substantial number of small entities. A small entity is defined as a small business, small nonprofit organization, or small governmental jurisdiction. See 5 U.S.C. 601(3) through (6).

The Treasury Department and the IRS do not expect that the proposed regulations will have a significant economic impact on a substantial number of small

entities within the meaning of sections 601(3) through (6) of the RFA. The Malta personal retirement scheme transaction described in proposed §1.6011-12 only applies to U.S. citizens and U.S. resident individuals, and not entities. Therefore, with respect to its impact on participants, proposed §1.6011-12 will not impact small entities.

The Treasury Department and the IRS do not have information about which entities engage in the advising of this transaction, and therefore cannot accurately estimate the impact of proposed §1.6011-12 on material advisors that are small entities. However, the Treasury Department and the IRS do not expect proposed §1.6011-12 to impact a substantial number of small entities that may advise on this transaction. As explained in section III of the Background section of this preamble, participants in these transactions generally have no connection to Malta other than their participation in a Malta personal retirement scheme primarily to avoid U.S. tax, and to avoid detection, they may not comply with their U.S. information reporting requirements. This tax-avoidance motive of potential clients who are U.S. persons, combined with the necessary familiarity with, and access to, Malta’s pension system and tax law in order to facilitate the Malta personal retirement scheme transaction, means that it is unlikely for a substantial number of small entities to engage in advising on these transactions. The Treasury Department and the IRS request comments from the public on the number of small entities that may be impacted and whether that impact will be economically significant.

IV. Section 7805(f)

Pursuant to section 7805(f) of the Code, the proposed regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses.

V. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies

assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. The proposed regulations do not include any Federal mandate that may result in expenditures by State, local, or Tribal governments or by the private sector in excess of that threshold.

VI. Executive Order 13132: Federalism

Executive Order 13132 (“Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law unless the agency meets the consultation and funding requirements of section 6 of the Executive order. The proposed regulations do not have federalism implications, do not impose substantial direct compliance costs on State and local governments, and do not preempt State law within the meaning of the Executive order.

Statement of Availability of IRS Documents

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

Drafting Information

The principal authors of these regulations are Lara Banjanin and Tracy Villecco of the Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and record-keeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

PART 1--INCOME TAXES

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

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

Section 1.6011-12 also issued under 26 U.S.C. 6001 and 26 U.S.C. 6011 * * *
* * * * *

Par. 2. Section 1.6011-12 is added to read as follows:

§1.6011-12 Malta Personal Retirement Scheme Listed Transaction.

(a) *Malta personal retirement scheme listed transaction.* Transactions that are the same as, or substantially similar to, a transaction described in paragraph (b)(1) of this section are identified as listed transactions for purposes of §1.6011-4(b)(2), except as provided in paragraph (b)(2) of this section. A transaction is not substantially similar unless it involves a retirement arrangement established in Malta and the taxpayer takes a U.S. Federal income tax return position based on the income tax treaty between the United States and Malta.

(b) *Malta personal retirement scheme transaction—(1) Transaction description.* A transaction is described in this paragraph (b)(1) if:

(i) A U.S. citizen or U.S. resident alien, directly or indirectly--

(A) Transfers (within the meaning of §1.679-3 or §1.684-2) cash or other property to a personal retirement scheme established under Malta's Retirement Pension Act of 2011 (a "Malta personal retirement scheme"), or

(B) Receives a distribution from a Malta personal retirement scheme, and

(ii) A U.S. citizen or U.S. resident alien described in paragraph (b)(1)(i) of this section takes a position on a U.S. Federal income tax return that--

(A) Income earned or gain realized by the Malta personal retirement scheme is not includible on a current basis in income for U.S. Federal income tax purposes by reason of the income tax treaty between the United States and Malta, or

(B) A distribution received from the Malta personal retirement scheme attributable to earnings or gains that have not been included in income for U.S. Federal income tax purposes is exempt from U.S. taxation by reason of the income tax treaty between the United States and Malta.

(2) *Exception.* If a U.S. citizen or U.S. resident alien described in paragraph (b)(1) of this section takes a position described in paragraph (b)(1)(ii) of this section on a U.S. Federal income tax return filed before June 6, 2023, such U.S. citizen or U.S. resident alien will not be treated as participating in a listed transaction under this section for the taxable year to which the U.S. Federal income tax return relates provided that--

(i) Such U.S. citizen or U.S. resident alien (the transferor) established the Malta personal retirement scheme with a transfer (or rollover) of a pension or other retirement arrangement established in a country other than Malta or the United States, and in compliance with the tax laws of such country;

(ii) The transferor was, when such pension or retirement arrangement was established and such rollover occurred, a resident of the other country under that country's tax law, including under Article 4 (Residency) of such country's income tax treaty with the United States, if applicable; and

(iii) The transferor's contributions to such pension or retirement arrangement consisted solely of cash in an amount that bears a relationship to the transferor's income earned from the performance of personal services.

The preceding sentence does not apply, however, to any U.S. citizen or U.S. resident alien who takes a position described in paragraph (b)(1)(ii) of this section on a U.S. Federal income tax return filed on or after June 6, 2023.

(3) *Applicability date—(i) In general.* This section identifies transactions that are the same as, or substantially similar to,

the transaction described in paragraph (b) (1) of this section, except as provided in paragraph (b)(2) of this section, as listed transactions for purposes of §1.6011-4(b) (2) and sections 6111 and 6112 effective [DATE OF PUBLICATION OF THE FINAL REGULATIONS IN THE FEDERAL REGISTER].

(ii) *Obligations of participants with respect to prior periods.* Pursuant to §1.6011-4(d) and (e), taxpayers who have filed a tax return (including an amended return) reflecting their participation in these transactions prior to [DATE OF PUBLICATION OF THE FINAL REGULATIONS IN THE FEDERAL REGISTER], who have not otherwise finalized a settlement agreement with the Internal Revenue Service with respect to the transaction, must disclose the transactions as provided in §1.6011-4(d) and (e) provided that the period of limitations for assessment of tax for any taxable year in which the taxpayer participated in the transaction has not ended on or before [DATE OF PUBLICATION OF THE FINAL REGULATIONS IN THE FEDERAL REGISTER].

(iii) *Obligations of material advisors with respect to prior periods.* Material advisors defined in §301.6111-3(b) of this chapter who have previously made a tax statement with respect to a transaction described in paragraph (b)(1) of this section, except as provided in paragraph (b)(2) of this section, have disclosure and list maintenance obligations as described in §§301.6111-3 and 301.6112-1 of this chapter, respectively. Notwithstanding §301.6111-3(b)(4)(i) and (iii) of this chapter, material advisors are required to disclose only if they have made a tax statement on or after the date that is six years before the date the regulations are published as final regulations in the **Federal Register**.

Douglas W. O'Donnell,
*Deputy Commissioner for Services
and Enforcement.*

(Filed by the Office of the Federal Register June 6, 2023, 8:45 a.m., and published in the issue of the Federal Register for June 7, 2023, 88 FR 37186)

Notice of Proposed Rulemaking

Additional Guidance on Low-Income Communities Bonus Credit Program

REG-110412-23

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed rules concerning the low-income communities bonus energy investment credit program established pursuant to the Inflation Reduction Act of 2022. Applicants investing in certain solar and wind powered-electricity generation facilities may apply for an allocation of environmental justice solar and wind capacity limitation to increase the amount of an energy investment credit for the taxable year in which the facility is placed in service. This document describes proposed definitions and requirements that would be applicable for the program allocating the calendar year 2023 capacity limitation, which also would inform guidance applicable for future program years. The proposed rules would affect applicants seeking allocations of environmental justice solar and wind capacity limitation.

DATES: Written or electronic comments must be received by June 30, 2023.

ADDRESSES: Stakeholders are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and REG-110412-23) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted, whether electronically or on paper, to the IRS's

public docket. Send paper submissions to: CC:PA:LPD:PR (REG-110412-23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed rules, Office of Associate Chief Counsel (Passthroughs & Special Industries) at (202) 317-6853 (not a toll-free number); concerning submissions of written comments, Vivian Hayes at (202) 317-5306 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

I. Overview

Section 13103 of Public Law 117-169, 136 Stat. 1818, 1921 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA), added new section 48(e) to the Internal Revenue Code (Code) to increase the amount of the energy investment credit determined under section 48(a) (section 48 credit) with respect to eligible property that is part of a qualified solar and wind facility that is awarded an allocation of environmental justice solar and wind capacity limitation (Capacity Limitation). This document contains proposed definitions and rules relating to the allocation of Capacity Limitation for calendar year 2023 (2023 Capacity Limitation).

The amount of the energy investment credit determined under the section 48 credit for a taxable year is generally calculated by multiplying the basis of each energy property placed in service during that taxable year by the energy percentage (as defined in section 48(a)(2)). Section 48(e) increases the section 48 credit by increasing the energy percentage used to calculate the amount of the section 48 credit (section 48(e) Increase) in the case of qualified solar and wind facilities that receive an allocation of Capacity Limitation. The term “qualified solar and wind facility” is defined in section 48(e) (2) to mean any facility that (i) generates electricity solely from a wind facility, solar energy property, or small wind energy property; (ii) has a maximum net output of less than 5 megawatts (as measured in

alternating current); and (iii) is described in at least one of four categories in section 48(e)(2)(A)(iii) (and in part II of this Background).

As described in part III of this Background, section 48(e)(4)(A) directs the Secretary of the Treasury or her delegate (Secretary) to “provide procedures to allow for an efficient allocation” of Capacity Limitation to qualified solar and wind facilities. Later this year, the Treasury Department and the IRS expect to issue details for the program applicable for the calendar year 2023 Capacity Limitation, covering a comprehensive set of procedures and rules for applicants. The majority of the information regarding the program’s details will be procedural rules. Some of the information that the Treasury Department and the IRS intend to include, however, will provide more substantive details that cover threshold definitions and requirements that must be established to make allocations efficiently and effectively. Those aspects of the program’s details are the subject of this notice of proposed rulemaking. The Treasury Department and the IRS expect that final guidance will be reflected in regulations.

II. Four Categories of Qualified Solar and Wind Facilities

Depending on the category of the facility, an allocation of Capacity Limitation may result in a section 48(e) Increase equal to either 10 percentage points or 20 percentage points. Section 48(e)(1)(A)(i) provides for a section 48(e) Increase of 10 percentage points for eligible property that is located in a low-income community, as defined in section 45D(e) (Category 1 facility), or on Indian land, as defined in section 2601(2) of the Energy Policy Act of 1992 (25 U.S.C. 3501(2)) (Category 2 facility). Section 48(e)(1)(A)(ii) provides for a section 48(e) Increase of 20 percentage points for eligible property that is part of a qualified low-income residential building project (Category 3 facility) or a qualified low-income economic benefit project (Category 4 facility). Under section 48(e)(1)(A)(i), a Category 1 or Category 2 facility that also qualifies as a Category 3 or Category 4 facility is considered a Category 3 facility or Category 4 facility (as applicable).

Section 48(e)(2)(B) provides that a facility will be treated as part of a qualified low-income residential building project if such facility is installed on a residential rental building which participates in a covered housing program (as defined in § 41411(a) of the Violence Against Women Act of 1994 (34 U.S.C. 12491(a) (3)), a housing assistance program administered by the Department of Agriculture under title V of the Housing Act of 1949, a housing program administered by a tribally designated housing entity (as defined in § 4(22) of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4103(22)), or such other affordable housing programs as the Secretary may provide, and (ii) the financial benefits of the electricity produced by such facility are allocated equitably among the occupants of the dwelling units of such building.

Section 48(e)(2)(C) provides that a facility will be treated as part of a qualified low-income economic benefit project

if at least 50 percent of the financial benefits of the electricity produced by such facility are provided to households with income of less than 200 percent of the poverty line (as defined in section 36B(d) (3)(A) of the Code) applicable to a family of the size involved, or less than 80 percent of area median gross income (as determined under section 142(d)(2)(B) of the Code).

For a qualified low-income residential building project and a qualified low-income economic benefit project, section 48(e)(2)(D) provides that electricity acquired at a below-market rate will be considered a financial benefit.

III. Overview of Low-Income Communities Bonus Credit Program

Section 48(e)(4) directs the Secretary to establish a program, within 180 days of enactment of the IRA, to allocate amounts of Capacity Limitation to qualified solar and wind facilities. Notice

2023-17, 2023-10 I.R.B. 505, established the program under section 48(e) to allow amounts of Capacity Limitation to be allocated to qualified solar and wind facilities eligible for the section 48 credit (Low-Income Communities Bonus Credit Program).¹ Under section 48(e)(4)(C), the total annual Capacity Limitation that may be allocated under the Low-Income Communities Bonus Credit Program is 1.8 gigawatts of direct current capacity for each of the calendar years 2023 and 2024. Under section 48(e)(4)(D), if the annual Capacity Limitation for any calendar year exceeds the aggregate amount allocated for such year, the excess is carried forward to the next year, but not beyond calendar year 2024.²

Consistent with Notice 2023-17, the Treasury Department and the IRS propose to reserve a portion of the total annual Capacity Limitation of 1.8 gigawatts of direct current capacity for each facility category for calendar year 2023 as follows:

Category 1: Located in a Low-Income Community	700 megawatts
Category 2: Located on Indian Land	200 megawatts
Category 3: Qualified Low-Income Residential Building Project	200 megawatts
Category 4: Qualified Low-Income Economic Benefit Project	700 megawatts

The proposed rules in this document would supplement the guidance provided in Notice 2023-17 to outline the specific application procedures, additional allocation criteria, and applicable definitions, among other information, necessary to submit an application to request an allocation of the Capacity Limitation for calendar year 2023 under the Low-Income Communities Bonus Credit Program. The Treasury Department and the IRS request comments on these proposed definitions and requirements. The Treasury Department and the IRS also request comment on whether these proposed definitions and requirements should apply for purposes of the Low-Income

Communities Bonus Credit Program for calendar year 2024 and the program to be established under section 48E(h) for calendar year 2025 and future years. The Treasury Department and the IRS anticipate further evaluating the program for 2023 to determine what further guidance may be helpful or necessary in the future.

Explanation of Proposed Rules

The proposed rules relate to specific definitions and requirements regarding the following topics: (1) the definition of facility based on single project factors; (2) the definition of “in connection with” to demonstrate what it means for

energy storage technology to be considered part of eligible property of the qualified facility; (3) definitions of the terms “financial benefit” and “electricity acquired at a below market rate” under section 48(e)(2)(D), as well as a manner to apply such definitions, appropriately, to Category 3 facilities that are part of qualified low-income residential building projects and Category 4 facilities that are part of qualified economic benefit projects; (4) the definition of “located in” for relevant geographic criteria; (5) a rule for facilities placed in service prior to an allocation award; (6) reservations of Capacity Limitation allocation for applicant facilities that meet certain Additional Selection

¹ Notice 2023-17 describes several other definitions and requirements related to the Low-Income Communities Bonus Credit Program.

² Section 13702(a) of the IRA also enacted section 48E(h), which generally provides for a program similar to the Low-Income Communities Bonus Credit Program for calendar years after 2024. Section 48E(i) directs the Secretary to issue guidance regarding the implementation of section 48E not later than January 1, 2025. Any excess Capacity Limitation from calendar year 2024 may be carried forward and applied to the Capacity Limitation for calendar year 2025 under new section 48E(h)(4)(D)(ii). The Treasury Department and the IRS anticipate that operation of the Low-Income Communities Bonus Credit Program will inform the operation of the section 48E(h) program generally, as described in future guidance.

Criteria; (7) sub-reservations of Capacity Limitation allocation for facilities built in a low-income community; (8) application materials demonstrating facility viability in order to allow for an efficient allocation process; (9) documentation and attestations to be submitted when a facility is placed in service; and (10) post-allocation compliance including disqualification and recapture of section 48(e) Increases.

I. Proposed Definitions and Requirements

A. Definition of Facility

The term “qualified solar and wind facility” is defined in section 48(e)(2)(A) to mean any facility that (i) generates electricity solely from a wind facility, solar energy property, or small wind energy property; (ii) has a maximum net output of less than 5 megawatts (as measured in alternating current); and (iii) is described in at least one of the four categories described in section 48(e)(2)(A)(iii) (Category 1, 2, 3, or 4). The Treasury Department and the IRS are concerned that some applicants may attempt to circumvent the less than 5-megawatt output limitation provided in section 48(e)(2)(A)(ii) by artificially dividing larger projects into multiple facilities. To prevent applicants from dividing larger projects that should be regarded as a single facility under section 48(e)(2)(A), solely for the purpose of the Low-Income Communities Bonus Credit Program, the Treasury Department and the IRS propose to aggregate into a single “qualified solar and wind facility” multiple facilities or energy properties of the same type (solar or wind) that are operated as part of a single project consistent with the single-project factors provided in section 7.01(2)(a) of Notice 2018-59, 2018-28 I.R.B. 196 or section 4.04(2) of Notice 2013-29, 2013-20 I.R.B. 1085, as applicable.

Therefore, the Treasury Department and the IRS propose to define a single qualified solar or wind facility as any facility that (i) generates electricity solely from a wind facility, solar energy property, or small wind energy property; (ii) that has a maximum net output of less than 5 megawatts (as measured in alternating current); and (iii) that is described in at

least one of the four categories described in section 48(e)(2)(A)(iii) (Category 1, 2, 3, or 4). In addition, for purposes of determining allocations, administering the program fairly, and avoiding abuse, the Treasury Department and the IRS propose that multiple solar or wind energy properties or facilities that are operated as part of a single project would be aggregated and treated as a single facility. Whether multiple facilities or energy properties are operated as part of a single project would depend on the relevant facts and circumstances and would be evaluated based on the factors provided in section 7.01(2)(a) of Notice 2018-59 or section 4.04(2) of Notice 2013-29, as applicable.

B. Energy Storage Technology Installed in Connection with Solar and Wind Facility

Section 48(e)(3) defines “eligible property” to mean energy property that (i) is part of a wind facility described in section 45(d)(1) for which an election to treat the facility as energy property was made under section 48(a)(5) (wind facility), or (ii) is solar energy property described in section 48(a)(3)(A)(i) (solar energy property) or qualified small wind energy property described in section 48(a)(3)(A)(vi) (small wind energy property), including energy storage technology (as described in section 48(a)(3)(A)(ix)) “installed in connection with” such qualifying energy property. The Treasury Department and the IRS propose to define “installed in connection with” for energy storage technology to demonstrate what is required for such energy storage technology to be considered eligible property under section 48(e)(3).

Under the proposed definition energy storage technology would be “installed in connection with” other eligible property if both (1) the energy storage technology and other eligible property are considered part of a single qualified solar and wind facility because the energy storage technology and other eligible property are owned by a single legal entity, located on the same or contiguous pieces of land, have a common interconnection point, and are described in one or more common environmental or other regulatory permits; and (2) the

energy storage technology is charged no less than 50 percent by the other eligible property. The Treasury Department and the IRS also propose to add a safe harbor, which would deem the energy storage technology to be charged at least 50 percent by the facility if the power rating of the energy storage technology (in kW) is less than 2 times the capacity rating of the connected wind facility (in kW alternating current) or solar facility (in kW direct current).

C. Financial Benefits for Category 3 and Category 4 Allocations

Section 48(e)(2)(D) provides that “electricity acquired at a below market rate” will not fail to be taken into account as a financial benefit. To clarify this language, the Treasury Department and the IRS propose definitions of the terms “financial benefit” and “electricity acquired at a below market rate” under section 48(e)(2)(D), as well as a manner to apply such definitions, appropriately, to qualified low-income residential building projects (section 48(e)(2)(B)) and qualified economic benefit projects (section 48(e)(2)(C)). The definitions and requirements would be different for an allocation in Category 3 (section 48(e)(2)(B)) and Category 4 (section 48(e)(2)(C)).

1. Financial Benefits for Qualified Low-Income Residential Building Projects

For a facility to be treated as part of a qualified low-income residential building project, section 48(e)(2)(B)(ii) provides that the financial benefits of the electricity produced by such facility must be allocated equitably among the occupants of the dwelling units of a residential rental building that participates in a covered housing program or other affordable housing program (qualified residential property). The Treasury Department and the IRS propose to reserve allocations under this category exclusively for applicants that would apply the financial benefits requirement under Category 3 in the following manner.

The Treasury Department and the IRS propose that financial benefit can be demonstrated through net energy savings

as defined below. At least 50 percent of the financial value of net energy savings would be required to be equitably passed on to building occupants. This requirement would recognize that not all the financial value of the net energy savings can be passed on to building occupants because a certain percentage can be assumed to be dedicated to lowering the operational costs of energy consumption for common areas, which benefits all building occupants. The Treasury Department and the IRS propose to reserve allocations under this category exclusively for applicants that would equitably pass on net energy savings by distributing equal shares among the qualified residential property's units that are designated as low-income under the covered housing program, or by distributing proportional shares based on each dwelling unit's electricity usage.

This proposal accounts for the specific nature of facilities serving low-income residential buildings and facility ownership, as the facility may be third party owned or commonly owned with the building.

a. Facility and Qualified Residential Property Have Same Ownership

In scenarios where the facility and the qualified residential property have the same ownership, the Treasury Department and the IRS propose to define the financial value of net energy savings as the financial value equal to the greater of: (1) 25 percent of the gross financial value of the annual energy produced or (2) the gross financial value of the annual energy produced minus the annual costs to operate the facility. Gross financial value of the annual energy produced is calculated as the sum of (a) the total self-consumed kilowatt-hours produced by the qualified solar and wind facility multiplied by the applicable building's metered price of electricity and (b) the total exported kilowatt-hours produced by the qualified solar and wind facility multiplied by the applicable building's volumetric export compensation rate for solar and wind

kilowatt-hours. The annual operating costs are calculated as the sum of annual debt service, maintenance, replacement reserve, and other costs associated with maintaining and operating the qualified solar and wind facility.

If the facility and building are commonly owned, a signed benefits sharing agreement between the building owner and the tenants would be required. The Treasury Department and the IRS request comments on how to adjust definitions of gross financial value to account for scenarios in which building occupants are compensating the facility owner for energy services.

b. Facility and Qualified Residential Property Have Different Ownership

In scenarios where the facility and the qualified residential property have different ownership and the facility owner enters into a power purchase agreement or other contract for energy services with the qualified residential property owner, the Treasury Department and the IRS propose to define net energy savings as equal to the greater of: (1) 50 percent of the financial value of the annual energy produced by the facility which accrues to the owner of the qualified residential property in the form of utility bill credit and/or cash payments for net excess generation or (2) the financial value of the annual energy produced by the facility which accrues to the owner of the qualified residential property in the form of utility bill credit and/or cash payments for net excess generation minus any payments made by the building owner to the facility owner for energy services associated with the facility in a given year. In these scenarios, the facility owner must enter into an agreement with the building owner for the building owner to distribute the savings to residents.

The Treasury Department and the IRS request comments on how to adjust definitions of gross financial value to account for scenarios in which building occupants are compensating the facility owner for energy services.

c. Impact of Metering on Delivery of Financial Benefits

Regardless of ownership, residential buildings may have master-metered or sub-metered utilities. The financial benefits of the electricity produced by the facility cannot be distributed to residents in master-metered buildings in the same manner as in sub-metered buildings and is often administratively infeasible in certain sub-metered buildings. Therefore, the Treasury Department and the IRS propose that for sub-metered buildings, the tenants must receive the financial value associated with utility bill savings in the form of a credit on their utility bills. The U.S. Department of Housing and Urban Development (HUD) has issued guidance for residents of sub-metered HUD-assisted housing that participate in community solar, providing an analysis of how community solar credits may affect utility allowance and annual income for rent calculations.³ The Treasury Department and the IRS propose that applicants follow the HUD guidance and future HUD guidance on this issue to ensure that tenants' utility allowances and annual income for rent calculations are not negatively impacted.

The Treasury Department and the IRS are aware that in some States or jurisdictions it may not be administratively, or legally, possible to apply utility bill savings on residents' electricity bills. The Treasury Department and the IRS request comments on this issue and how financial benefits, such as services and building improvements, can be provided to residents in such residential buildings

For master-metered buildings, the Treasury Department and the IRS propose that because residents do not have individually metered utilities and do not receive utility bills, the building owner must pass on the savings through other means, such as by providing certain benefits to the building residents beyond those provided prior to the qualified solar and wind facility being placed in service. HUD has issued guidance for how residents of master-metered HUD-assisted housing can benefit from owners' sharing

³ U.S. Department of Housing and Urban Development, Treatment of Community Solar Credits on Tenant Utility Bills (July 2020): MF Memo re Community Solar Credits July 14 Draft (hud.gov).

financial benefits accrued from an investment in solar energy generation.⁴ The Treasury Department and the IRS propose that applicants follow the HUD guidance and future HUD guidance on this issue to ensure that tenants' utility allowances and annual income for rent calculations are not negatively impacted.

2. Financial Benefits in Qualified Low-Income Economic Benefit Projects

For a facility to be treated as part of a qualified low-income economic benefit project, section 48(e)(2)(C) requires that at least 50 percent of the financial benefits of the electricity produced by the facility be provided to qualifying low-income households. To satisfy this standard, the Treasury Department and the IRS propose to require that the facility serves multiple households and at least 50 percent of the facility's total output is distributed to qualifying low-income households under section 48(e)(2)(C)(i) or (ii). In addition, to further the overall goals of the program, the Treasury Department and the IRS propose to reserve allocations under this category exclusively for applicants that would provide at least a 20-percent bill credit discount rate for all such low-income households. The Treasury Department and the IRS propose defining a "bill credit discount rate" as the difference between the financial benefit distributed to the low-income household (including utility bill credits, reductions in the low-income household's electricity rate, or other monetary benefits accrued by the household) and the cost of participating in the program (including subscription payments for renewable energy and any other fees or charges), expressed as a percentage of the financial benefit distributed to the low-income household. The bill credit discount rate can be calculated by starting with the financial benefit distributed to the low-income household, subtracting all payments made by the low-income customer to the facility owner and any related third parties as a condition of receiving that financial benefit, then dividing that difference

by the financial benefit distributed to the low-income household.

To ensure these requirements are met, verification of households' qualifying low-income status is required. Applicants are responsible for proof-of-income verification and would be required to submit documentation upon placing the qualified solar and wind facility in service that identifies each qualifying low-income household, the output allocated to each qualifying low-income household in kW, and the method of income verification utilized.

Applicants may use category eligibility or other income verification methods to qualify low-income households. Categorical eligibility consists of obtaining proof of household participation in a needs-based Federal⁵, State, Tribal, or utility program with income limits at or below the qualifying income level for the specific facility (qualifying program). State agencies (for example, state community solar/wind program administrators) can also provide verification of low-income status if the State program's income limits are at or below the qualifying income level for the qualified solar and wind facility. If a household is not enrolled in a qualifying program, additional income verification methods can be used such as: paystubs, tax returns, or income verification through crediting agencies and commercial data sources. Eligibility based on the applicant (or contractors or subcontractors) collecting self-attestations is not permissible.

D. Location

A qualified solar and wind facility is treated as "located in a low-income community" or "on Indian Land" under section 48(e)(2)(A)(iii)(I) or located in a geographic area under the Additional Selection Criteria (see part II.C) if the facility satisfies the nameplate capacity test (Nameplate Capacity Test).

Under the Nameplate Capacity Test, a facility that has nameplate capacity (for example, wind and solar facilities) is considered located in or on the relevant

geographic area if 50 percent or more of the facility's nameplate capacity is in a qualifying area. A facility's nameplate capacity percentage is determined by dividing the nameplate capacity of the facility's energy-generating units that are located in the qualifying area by the total nameplate capacity of all the energy-generating units of the facility.

Nameplate capacity for an electricity generating unit means the maximum electricity generating output that the unit is capable of producing on a steady state basis and during continuous operation under standard conditions, as measured by the manufacturer and consistent with the definition provided in 40 CFR 96.202. Energy-generating units that generate direct current (DC) power before converting to alternating current (AC) (for example, solar photovoltaic) should use the nameplate capacity in DC, otherwise the nameplate capacity in AC should be used (for example, wind facilities). Where applicable, the International Standard Organization (ISO) conditions are used to measure the maximum electricity generating output or usable energy capacity. The nameplate capacity of any energy storage technology installed in connection with the qualified solar and wind facility does not affect the assessment of the Nameplate Capacity Test.

II. Proposed Program Requirements and Structure

A. Placed in Service Prior to Allocation Award

As stated in section 4.05 of Notice 2023-17, the Treasury Department and the IRS propose that facilities placed in service prior to being awarded an allocation of Capacity Limitation would not be eligible to receive an allocation. As described in Notice 2023-17, one of the broad goals of the Low-Income Communities Bonus Credit Program is to increase adoption of and access to renewable energy facilities in low-income and other communities with environmental justice concerns.

⁴ U.S. Department of Housing and Urban Development, Treatment of Solar Benefits in Mastered-metered Buildings (May 2023), MF_Memo_re_Community_Solar_Credits_in_MM_Buildings.pdf (hud.gov)

⁵ Federal programs may include, but are not limited to: Medicaid, Low-Income Home Energy Assistance Program (LIHEAP), Weatherization Assistance Program (WAP), Supplemental Nutrition Assistance Program (SNAP), Section 8 Project-Based Rental Assistance, and the Housing Choice Voucher Program.

Facilities that were placed in service prior to the allocation process do not increase adoption of and access to renewable energy facilities as compared to the absence of the Low-Income Communities Bonus Credit Program. Further, section 48(e)(4)(E)(i) provides that a facility must be placed in service within four years of receiving an allocation of Capacity Limitation, supporting allocations to new facilities that have not yet been placed in service. Accordingly, the Treasury Department and the IRS continue to propose that facilities placed in service prior to being awarded an allocation of Capacity Limitation would not be eligible to receive an allocation.

B. Selection Process

Under section 48(e)(4)(C), the total annual Capacity Limitation is 1.8 gigawatts of direct current capacity for the calendar year 2023 program. Section 4.02 of Notice 2023-17 specified how the annual Capacity Limitation would be allocated across the four facility categories in 2023: Located in a Low-Income Community (Category 1), Located on Indian Land (Category 2), Qualified Low-Income Residential Building Project (Category 3), and Qualified Low-Income Economic Benefit Project (Category 4). Section 4.07 of Notice 2023-17 provided that applications would be accepted in a phased approach for calendar year 2023, during 60-day application windows. Based on public feedback in response to Notice 2023-17 and an updated assessment of operational capabilities set up to administer the program, a new approach is proposed.

The Treasury Department and the IRS anticipate that the number of eligible applicants seeking an allocation may exceed the total Capacity Limitation allocation available to be allocated. The Treasury Department and the IRS are designing an application process that both ensures that allocations are awarded to facilities that advance the program goals previously stated in Notice 2023-17 and facilitates an efficient allocation process.

Accordingly, the Treasury Department and the IRS propose an approach that includes an initial application window in which applications received by a certain time and date would be evaluated together, followed with a rolling application process if Capacity Limitation is not fully allocated after the initial application window closes. Facilities that meet at least one of the two categories of specified ownership and geographic criteria (Additional Selection Criteria) would receive priority for an allocation within each facility category described in section 48(e)(2)(A)(iii). The Treasury Department and the IRS propose that at least 50 percent of the total Capacity Limitation in each facility category would be reserved for facilities meeting Additional Selection Criteria in the following fashion.

In evaluating applications received during the initial application window, priority would be given to eligible applications for facilities meeting at least one of the two Additional Selection Criteria. If the eligible applications for Capacity Limitation for facilities that meet at least one of the two Additional Selection Criteria categories exceed the Capacity Limitation for a category, facilities meeting both of the Additional Selection Criteria categories would be prioritized for an allocation. A lottery system may be used in oversubscribed categories to decide among similarly situated applications (for example, facilities that meet both of the Additional Selection Criteria categories, facilities that meet only one of the two Additional Selection Criteria categories, facilities that do not meet either of the Additional Selection Criteria categories). An applicant could not administratively appeal the Capacity Limitation allocation decisions made under the Low-Income Communities Bonus Credit Program.

If eligible applications for facilities that meet at least one of the two Additional Selection Criteria categories received during the initial application window total less than 50 percent of the Capacity Limitation for a category, additional Capacity Limitation would be reserved during the rolling application

period such that 50 percent of the total Capacity Limitation in the category would be reserved for these facilities.

The Treasury Department and the IRS would retain the discretion to reallocate Capacity Limitation across categories and sub-categories in order to maximize allocation in the event one category or sub-category is oversubscribed and another has excess capacity.

C. Additional Selection Criteria

The Treasury Department and the IRS propose that the two Additional Selection Criteria are Ownership Criteria and Geographic Criteria.

1. Ownership Criteria

The Ownership Criteria category is based on characteristics of the applicant that owns the qualified solar and wind facility. A qualified solar and wind facility would meet the Ownership Criteria if it is owned by a Tribal Enterprise, an Alaska Native Corporation, a renewable energy cooperative, a qualified renewable energy company meeting certain characteristics, or a qualified tax-exempt entity. If an applicant wholly owns an entity that is the owner of a qualified solar and wind facility, and the entity is disregarded as separate from its owner for Federal income tax purposes (disregarded entity), the applicant, and not the disregarded entity, is treated as the owner of the qualified solar and wind facility for purposes of the Ownership Criteria.

a. Tribal Enterprise

A “Tribal Enterprise” for purposes of the Ownership Criteria is an entity that is (1) an Indian Tribal government (as defined in section 30D(g)(9) of the Code) that owns at least a 51 percent interest in, either directly or indirectly (through a wholly owned corporation created under its Tribal laws or through a section 3 or section 17 Corporation)⁶, and (2) the Indian Tribal government has the power to appoint and remove a majority (more than 50 percent) of the individuals serving

⁶A “section 17 corporation” is a corporation incorporated under the authority of section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. 5124. A “section 3 corporation” is a corporation that is incorporated under the authority of section 3 of the Oklahoma Indian Welfare Act, 25 U.S.C. 5203.

on the entity's board of directors or equivalent governing board.

b. Alaska Native Corporation

An "Alaska Native corporation" for purposes of the Ownership Criteria is defined in section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602(m).

c. Renewable Energy Cooperative

A "renewable energy cooperative" for purposes of the Ownership Criteria is an entity that develops qualified solar and/or wind facilities and owns at least 51 percent of a facility and is either (1) a consumer or purchasing cooperative controlled by its members who are low-income households (as defined in section 48(e)(2)(C)) with each member having an equal voting right, or (2) a worker cooperative controlled by its worker-members with each member having an equal voting right.

d. Qualified Renewable Energy Company

A "qualified renewable energy company" for purposes of the Ownership Criteria would be an entity that serves low-income communities and provides pathways for the adoption of clean energy by low-income households. In addition to its general business purpose, the Treasury Department and the IRS are considering the following requirements that a qualified renewable energy company would need to satisfy:

(1) At least 51 percent of the entity's equity interests are owned and controlled by (a) one or more individuals, (b) a Community Development Corporation (as defined in 13 CFR 124.3), (c) an agricultural or horticultural cooperative (as defined in section 199A(g)(4)(A) of the Code), (d) an Indian Tribal government (as defined in section 30D(g)(9)), (e) an Alaska Native corporation (as defined in section 3 of the Alaska Native Claims

Settlement Act, 43 U.S.C. 1602(m)), or (f) a Native Hawaiian organization (as defined in 13 CFR 124.3);

(2) After applying the controlled group rules under section 52(a) of the Code, has less than 10 full-time equivalent employees (as determined under section 4980H(c)(2)(E) and (c)(4) of the Code) and less than \$5 million in annual gross receipts in the previous calendar year;

(3) First installed or operated a qualified solar and wind facility as defined in section 48(e)(2)(A) two or more years prior to the date of application; and

(4) Has installed and/or operated qualified solar and wind facilities as defined in section 48(e)(2)(A) with at least 100kW of cumulative nameplate capacity located in one or more Low-Income Communities as defined in section 48(e)(2)(A)(iii)(I).

The Treasury Department and the IRS specifically request comments on these proposed elements for determining whether a business is a qualified renewable energy company. The Treasury Department and the IRS also request comments on an administrable rule to ensure that qualified renewable energy companies are employing workers in the Low-Income Communities.

e. Qualified Tax-exempt Entity

A "qualified tax-exempt entity" for purposes of the Ownership Criteria is:

(1) An organization exempt from the tax imposed by subtitle A of the Code by reason of being described in section 501(c)(3) or section 501(d);

(2) Any State, the District of Columbia, or political subdivision thereof, any territory of the United States, or any agency or instrumentality of any of the foregoing;

(3) An Indian Tribal government (as defined in section 30D(g)(9)), political subdivision thereof, or any agency or instrumentality of any of the foregoing; or

(4) Any corporation described in section 501(c)(12) operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas.

2. Geographic Criteria

The Geographic Criteria category is based on where the facility will be placed in service. To meet the Geographic Criteria, a facility would need to be located in a Persistent Poverty County (PPC)⁷ or in a census tract that is designated in the Climate and Economic Justice Screening Tool (CEJST) as disadvantaged based on whether the tract is either (a) greater than or equal to the 90th percentile for energy burden and is greater than or equal to the 65th percentile for low income, or (b) greater than or equal to the 90th percentile for PM2.5 exposure and is greater than or equal to the 65th percentile for low income.⁸ The Treasury Department and the IRS propose that applicants who meet the Geographic Criteria at the time of application are considered to continue to meet the Geographic Criteria for the duration of the recapture period, unless the location of the facility changes.

A PPC is generally defined as any county where 20 percent or more of residents have experienced high rates of poverty over the past 30 years. For the purposes of the Low-Income Communities Bonus Credit Program, the Treasury Department and the IRS propose the PPC measure adopted by the U.S. Department of Agriculture to make this determination. The most recent measure, which would apply for the 2023 program year, incorporates poverty estimates from the 1980, 1990, 2000 censuses, and 2007-11 American Community Survey 5-year average.

D. Sub-Reservations of Allocation for Facilities Located in a Low-Income Community

Notice 2023-17 provided that 700 megawatts of 2023 calendar year Capacity Limitation would be reserved for Category 1. The Treasury Department and the IRS anticipate that Category 1 will receive the largest number of applications, and that most applications will be for small rooftop

⁷<https://www.ers.usda.gov/data-products/county-typology-codes/>

⁸<https://screeningtool.geoplatform.gov/en/#3/33.47/-97.5>. The CEJST website provides further detail on the terms used in identifying census tracts for the Energy category. "Energy cost" is defined as "Average household annual energy cost in dollars divided by the average household income." PM2.5 is defined as "Fine inhalable particles with 2.5 or smaller micrometer diameters. The percentile is the weight of the particles per cubic meter." "Low income" is defined as "Percent of a census tract's population in households where household income is at or below 200% of the Federal poverty level, not including students enrolled in higher education." See Methodology & data - Climate & Economic Justice Screening Tool (geoplatform.gov)

residential solar facilities. Therefore, the Treasury Department and the IRS propose to subdivide the 700 MW Capacity Limitation reservation for facilities seeking a Category 1 allocation with 560 megawatts reserved specifically for eligible residential behind the meter (BTM) facilities, including rooftop solar. The sub-reservation of a substantial portion of the allocation in Category 1 for eligible residential BTM facilities would help ensure that allocations are predominantly awarded to facilities serving residences and consumers, rather than facilities serving businesses. The remaining 140 megawatts of Capacity Limitation would be available for applicants with front of the meter (FTM) facilities as well as non-residential BTM facilities.

The Treasury Department and the IRS propose to define an eligible residential BTM facility as single-family or multi-family residential qualified solar and wind facility that does not meet the requirements for Category 3 and is BTM.

A qualified wind and solar facility is BTM if: (1) it is connected with an electrical connection between the facility and the panelboard or sub-panelboard of the site where the facility is located, (2) it is to be connected on the customer side of a utility service meter before it connects to a distribution or transmission system (that is, before it connects to the electricity grid), and (3) its primary purpose is to provide electricity to the utility customer of the site where the facility is located. This also includes systems not connected to a grid and that may not have a utility service meter, and whose primary purpose is to serve the electricity demand of the owner of the site where the system is located.

The Treasury Department and the IRS propose to define a FTM facility. A facility is FTM if it is directly connected to a grid and its sole purpose is to provide electricity to one or more offsite locations via such grid; alternatively, FTM is defined as a facility that is not BTM.

E. Application Materials

Section 48(e)(4)(A) directs the Secretary to provide procedures to allow for an efficient allocation process. Additionally, section 48(e)(4)(E)(i) requires that facilities allocated an amount of Capacity Limitation be placed in service within four years of the date of allocation. To promote efficient allocation, and to better ensure that allocations will be awarded to facilities that are sufficiently viable and well defined to allow for a review for an allocation, and sufficiently advanced such that they are likely to meet the four-year placed-in-service deadline, the Treasury Department and the IRS propose to require applicants to submit certain documentation and attestations when applying for an allocation. Some requirements differ for FTM and BTM facilities and other requirements differ by Category and Additional Selection Criteria.

Under this proposed approach, applicants would be required to submit the following:

1. Documentation and Attestations to be Submitted for all Facilities:

Proposed Document Requirement	FTM	BTM <= 1 MW AC	BTM > 1 MW AC
An executed contract to purchase the facility, an executed contract to lease the facility, or an executed power purchase agreement for the facility.	No	Yes	Yes
A copy of the final executed interconnection agreement, if applicable. ⁹	Yes	No	Yes

Proposed Attestation Requirement	FTM	BTM <= 1 MW AC	BTM > 1 MW AC
The applicant has site control through ownership, an executed lease contract, site access agreement or similar agreement between the property owner and the applicant.	Yes	No	No
The facility has obtained all applicable Federal, State, Tribal, and local non-ministerial permits, or that the facility is not required to obtain such permits.	Yes	Yes	Yes
The applicant is in compliance with all Federal, State, and Tribal laws, including consumer protection laws (as applicable).	Yes	Yes	Yes
The applicant has appropriately sized the facility (to meet no more than 110% of historical customer load).	No	Yes	Yes
The applicant has appropriately sized the customer's facility output share and has based facility output share on historical customer load.	Yes	No	No
The applicant has inspected installation sites for suitability (for example, roofs).	Yes	Yes	Yes

⁹ If an interconnection agreement is not applicable to the facility (for example, due to utility ownership), this requirement is satisfied by a final written decision from a Public Utility Commission, cooperative board, or other governing body with sufficient authority that financially authorizes the facility. If the facility is located in a market where the interconnection agreement cannot be signed prior to construction of the facility or interconnection facilities, this requirement is satisfied by a signed conditional approval letter from the jurisdictional utility and an affidavit from a senior corporate officer of the applicant (or someone with authority to bind the applicant) stating that an interconnection agreement cannot be executed until after construction of the facility.

2. Documentation and Attestations to be Submitted for Certain Facilities Depending on Category and Additional Selection Criteria:

Proposed Document Requirement	Category 1	Category 2	Category 3	Category 4
Documentation demonstrating property will be installed on an eligible residential building	No	No	Yes	No
Plans to ensure tenants receive required financial benefits	No	No	Yes	No
<i>If applying under Additional Selection Criteria: Documentation demonstrating applicant meets Ownership Criteria</i>	Yes	Yes	Yes	Yes

Proposed Attestation Requirement	Category 1	Category 2	Category 3	Category 4
Facility location is eligible ¹⁰	Yes	Yes	No	No
Consumer disclosures informing customers of their legal rights and protections have been provided to customers that have signed up and will be provided to future customers	Yes	Yes	Yes (provided to tenants)	Yes
The applicant will ensure at least 50% of the financial benefits will be provided to qualified households at 20% bill credit discount rate	No	No	No	Yes
<i>If applying under additional Selection Criteria: Facility location is eligible based on PPC/CEJST</i>	Yes	No	Yes	Yes

F. Documentation and Attestations to be Submitted when Placed in Service

The Treasury Department and the IRS also propose to require facilities that received a Capacity Limitation allocation to report to the Department of Energy (DOE) that the facility has been placed in service,

and to submit additional documentation or complete additional attestations with this reporting. At the time of application, applicants would not necessarily be able to demonstrate compliance with certain eligibility requirements, as the facility would not yet be operating at that time. Requiring placed in service reporting would allow for

final verification that the facilities that were awarded a Capacity Limitation Allocation have met certain eligibility requirements under the Low-Income Communities Bonus Credit Program.

The applicant-owner would submit documentation or sign an attestation for the following:

Proposed Attestation Requirement	Category
Confirmation of material ownership and/or facility changes from application or that there has been no change from the application.	All

Proposed Document Requirement	
Permission to Operate (PTO) letter (or commissioning report verifying for off-grid facilities) that the facility has been placed in service and the location of the facility being placed in service.	All
Final, Professional Engineer (PE) stamped as-built design plan, PTO letter with nameplate capacity listed, or other documentation from an unrelated party verifying as-built nameplate capacity.	All
Benefits Sharing Agreement for qualified residential building projects between building owner and tenants (including for facilities that are third party owned, additional sharing agreement between the facility owner and the building owner).	3
Final list of households or other entities served with name, address, subscription share, and income status of qualifying low-income households served, and the income verification method used.	4
Spreadsheet demonstrating the expected financial benefit to low-income subscribers to demonstrate the 20% bill credit discount rate	4

¹⁰ Facility location would be reviewed using latitude and longitude coordinates when possible.

G. Post-Allocation Compliance

1. Disqualification After Receiving an Allocation

The Treasury Department and the IRS recognize that because, under section 48(e)(4)(E)(i), an applicant has four years after the date of an allocation of Capacity Limitation to place eligible property in service, circumstances may change prior to the property being placed in service such that a facility is no longer eligible for the allocation it received. In addition, to promote an efficient allocation process consistent with section 48(e)(4)(A), the Treasury Department and the IRS want to discourage material changes in project plans, such as significant reductions in facility size that tie up Capacity Limitation that could otherwise be awarded to other qualified facilities.

Accordingly, the Treasury Department and the IRS propose that a facility that was awarded a Capacity Limitation allocation is disqualified from receiving that allocation if prior to or upon the facility being placed in service: (1) the location where the facility will be placed in service changes; (2) the nameplate capacity of the facility increases such that it exceeds the less than 5-megawatt alternating current output limitation provided in section 48(e)(2)(A)(ii) or decreases by the greater of 2 kW or 25 percent of the Capacity Limitation awarded in the allocation; (3) the facility cannot satisfy the financial benefits requirements under section 48(e)(2)(B)(ii) as planned (if applicable) or cannot satisfy the financial benefits requirements under section 48(e)(2)(C) as planned (if applicable); (4) the eligible property which is part of the facility that received the Capacity Limitation allocation is not placed in service within four years after the date the applicant was notified of the allocation of Capacity Limitation to the facility; or (5) the facility received a Capacity Limitation allocation based, in part, on meeting the Ownership Criteria and ownership of the facility changes prior to the facility being placed in service such that the Ownership criteria is no longer satisfied, unless a) the original applicant retains an ownership interest in the entity that owns the facility and b) the

successor owner attests that after the five year recapture period, the original applicant that met the Ownership Criteria will become the owner of the facility or that this original applicant will have the right of first refusal.

2. Recapture of Section 48(e) Increase

Section 48(e)(5) requires the Secretary, by regulations or other guidance, to provide rules for recapturing the benefit of any section 48(e) Increase with respect to any property which ceases to be property eligible for such section 48(e) Increase (but which does not cease to be investment credit property within the meaning of section 50(a)). The period and percentage of such recapture is determined under rules similar to the rules of section 50(a). To the extent provided by the Secretary, such recapture may not apply with respect to any property if, within 12 months after the date the applicant becomes aware (or reasonably should have become aware) of such property ceasing to be property eligible for such section 48(e) Increase, the eligibility of such property for such section 48(e) Increase is restored. Such restoration of a section 48(e) Increase is not available more than once with respect to any facility.

The Treasury Department and the IRS propose that the following circumstances result in a recapture event if the property ceases to be eligible for the increased credit under section 48(e): (1) property described in section 48(e)(2)(A)(iii)(II) fails to provide financial benefits over the 5-year period after its original placed-in-service date; (2) property described under section 48(e)(2)(B) ceases to allocate the financial benefits equitably among the occupants of the dwelling units, such as not passing on to residents the required net energy savings of the electricity; (3) property described under section 48(e)(2)(C) ceases to provide at least 50 percent of the financial benefits of the electricity produced to qualifying households as described under section 48(e)(2)(C) (i) or (ii), or fails to provide those households the required minimum 20 percent bill credit discount rate; (4) for property described under section 48(e)(2)(B), the residential rental building the facility is

a part of ceases to participate in a covered housing program or any other housing program described in section 48(e)(2)(B)(i), if applicable; and (5) a facility increases its output such that the facility's output is 5 MW AC or greater, unless the applicant can prove that the output increase is not attributable to the original facility but rather is output associated with a new facility under the 80/20 Rule (the cost of the new property plus the value of the used property). See Rev. Rul. 94-31, 1994-1 C.B. 16.

Proposed Applicability Date

These proposed rules are proposed to apply to taxable years ending on or after the date that final rules adopting these proposed rules are published in the *Federal Register*.

Special Analyses

I. Regulatory Planning and Review – Economic Analysis

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

These proposed rules have been designated by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax rules. OIRA has determined that the proposed rulemaking is significant and subject to review under Executive Order 12866 and section 1(b) of the Memorandum of Agreement. Accordingly, the proposed rules have been reviewed by OMB.

II. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) (PRA) requires that a Federal agency obtain the approval of OMB before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. The collections of information in these proposed regulations contain reporting and recordkeeping requirements that are required to obtain the section 48(e) Increase. This information in the collections of information would generally be used by the IRS and DOE for tax compliance purposes and by taxpayers to facilitate proper reporting and compliance. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The recordkeeping requirements mentioned within this proposed regulation are considered general tax records under section 1.6001-1(e). These records are required for IRS to validate that taxpayers have met the regulatory requirements and are entitled to receive section 48(e) Increase. For PRA purposes, general tax records are already approved by OMB under 1545-0123 for business filers, 1545-0074 for individual filers, and 1545-0047 for tax-exempt organizations.

The proposed regulation also mentions reporting requirements related to providing attestations and supporting documentation for initial application, supplemental documentation for specific facilities, and to confirm a facility is placed in service as detailed in this NPRM. These attestations and documentation would allow IRS to allocate Capacity Limitation and ensure taxpayers keep and maintain compliance for the credits. To assist with the collections of information, the DOE will provide certain administration services for the Low-Income Communities Bonus Credit Program. Among other things, the DOE will establish a website portal to review the applications for eligibility criteria and will provide recommendations to the IRS regarding the selection of applications for an allocation of Capacity Limitation. These collection requirements will be submitted to the Office of Management

and Budget (OMB) under 1545-NEW for review and approval in accordance with 5 CFR 1320.11. The likely respondents are business filers, individual filers, and tax-exempt organization filers. A summary of paperwork burden estimates for the application and attestations is as follows:

Estimated number of respondents: 70,000

Estimated burden per response: 60 minutes

Estimated frequency of response: 1 for initial applications, 1 for follow-up documentation, and 1 for projects placed in service.

Estimated total burden hours: 210,000 burden hours

IRS will be soliciting feedback on the collection requirements for the application and attestations. Commenters are strongly encouraged to submit public comments electronically. Written comments and recommendations for the proposed information collection should be sent to www.reginfo.gov/public/do/PRAMain, with copies to the Internal Revenue Service. Find this particular information collection by selecting “*Currently under Review - Open for Public Comments*” then by using the search function. Submit electronic submissions for the proposed information collection to the IRS via email at pra.comments@irs.gov (indicate REG-110412-23 on the Subject line). Comments on the collection of information should be received by June 30, 2023. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility. The accuracy of the estimated burden associated with the proposed collection of information. How the quality, utility, and clarity of the information to be collected may be enhanced. How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

III. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 et seq.) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rule. The Treasury Department and the IRS have not determined whether the proposed rule would likely have a significant economic impact on a substantial number of small entities. This determination requires further study and an IRFA is provided in these proposed regulations. The Treasury Department and the IRS invite comments on both the number of entities affected and the economic impact on small entities.

Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

1. Need for and Objectives of the Rule

The proposed regulations would provide guidance for purposes of participation in the program to allocate the environmental justice solar and wind capacity limitation under section 48(e) for the Low-Income Communities Bonus Credit Program. The proposed rule is expected to encourage applicants to invest in solar and wind energy. Thus, the Treasury Department and the IRS intend and expect that the proposed rule will deliver benefits across the economy and environment that will beneficially impact various industries.

2. Affected Small Entities

The Small Business Administration estimates in its 2018 Small Business Profile that 99.9 percent of United States businesses meet its definition of a small

business. The applicability of these proposed regulations does not depend on the size of the business, as defined by the Small Business Administration. As described more fully in the preamble to this proposed regulation and in this IRFA, these rules may affect a variety of different businesses across several different industries.

The Treasury Department and the IRS expect to receive more information on the impact on small businesses through comments on this proposed rule and again when participation in the Low-Income Communities Bonus Credit Program commences.

3. *Impact of the Rules*

The recordkeeping and reporting requirements would increase for applicants that participate in the Low-Income Communities Bonus Credit Program. Although the Treasury Department and the IRS do not have sufficient data to determine precisely the likely extent of the increased costs of compliance, the estimated burden of complying with the recordkeeping and reporting requirements are described in the Paperwork Reduction Act section of the preamble.

4. *Alternatives Considered*

The Treasury Department and the IRS considered alternatives to the proposed regulations. For example, the Treasury Department and the IRS considered exclusively using a lottery system for all over-subscribed categories, rather than creating reservations for facilities meeting additional selection criteria. Although a lottery system may ultimately need to be used for an oversubscribed category, the Treasury Department and the IRS decided that it was important to propose reserving Capacity Limitation for facilities that meet certain additional selection criteria that further the policy goals of the Low-Income Communities Bonus Credit Program.

Additionally, when considering how to define “in connection with,” the Treasury Department and the IRS were mindful that the statute requires the energy storage technology to be

installed in connection with a qualifying solar or wind facility to be eligible for an increase in the energy percentage used to calculate the amount of the section 48 credit. Different alternatives were considered on how to address this definition. For example, the Treasury Department and the IRS considered but ultimately decided not to incorporate the proposed safe harbor (deeming the energy storage technology to be charged at least 50 percent by the facility if the power rating of the energy storage technology is less than 2 times the capacity rating of the connected wind or solar) as part of the general rule to define “in connection with.” The proposed general rule instead requires the energy storage technology to have a sufficient nexus to the other eligible property because it is part of the single project and is significantly charged by the eligible property.

Another example where different alternatives were considered was with respect to application materials. Section 48(e)(4)(A) directs the Secretary to provide procedures to allow for an efficient allocation process, and section 48(e)(4)(E)(i) allows an applicant up to four years after receiving a Capacity Limitation allocation to place eligible property into service. Alternatives were considered on how best to balance these statutory requirements, considering practical issues for taxpayers and residents as well as the traditional structure and arrangement of these solar and wind transactions, including considerations on the type of facility (BTM or FTM) and the capacity of the facility. Among other things, the Treasury Department and the IRS considered whether an application for an interconnection agreement or an executed interconnection agreement should be required as part of the application materials. The proposed regulations are based on the view that the executed interconnection agreement, if applicable, is an essential documentation to demonstrate sufficient project maturity.

Additionally, the Treasury Department and the IRS considered a variety of bill credit discounts for Category 4 qualified low-income benefit project facilities. The bill credit discounts considered included 10 percent, 15 percent, or 20 percent.

Alternatively, the Treasury Department and the IRS considered the option of a range of discounts from 10 percent to 20 percent from which applicants could choose which discount rate to provide low-income customers. However, to ensure that low-income customers are receiving meaningful financial benefits, the Treasury Department and the IRS decided to propose a 20 percent discount.

5. *Duplicative, Overlapping, or Conflicting Federal Rules*

The proposed rule would not duplicate, overlap, or conflict with any relevant Federal rules. As discussed in the Explanation of Provisions, the proposed rules would merely provide requirements, procedures, and definitions related to the Low-Income Communities Bonus Credit Program. The Treasury Department and the IRS invite input from interested members of the public about identifying and avoiding overlapping, duplicative, or conflicting requirements.

IV. *Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. This proposed rule does not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

V. *Executive Order 13132: Federalism*

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order.

These regulations do not have federalism implications and do not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

Comments

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

proposed rules. Any electronic or paper comments submitted will be made available at <https://www.regulations.gov> or upon request.

Statement of Availability of IRS Documents

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

Drafting Information

The principal author of these proposed rules is the Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

Douglas W. O'Donnell,
*Deputy Commissioner for Services
and Enforcement.*

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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.

Numerical Finding List¹

Bulletin 2023–26

Announcements:

2023-2, 2023-2 I.R.B. 344
2023-1, 2023-3 I.R.B. 422
2023-3, 2023-5 I.R.B. 447
2023-4, 2023-7 I.R.B. 470
2023-5, 2023-9 I.R.B. 499
2023-6, 2023-9 I.R.B. 501
2023-8, 2023-14 I.R.B. 632
2023-9, 2023-15 I.R.B. 639
2023-10, 2023-16 I.R.B. 663
2023-7, 2023-17 I.R.B. 797
2023-11, 2023-17 I.R.B. 798
2023-12, 2023-17 I.R.B. 799
2023-13, 2023-18 I.R.B. 833
2023-14, 2023-19 I.R.B. 853
2023-16, 2023-20 I.R.B. 854
2023-15, 2023-21 I.R.B. 856

AOD:

2023-1, 2023-10 I.R.B. 502
2023-2, 2023-11 I.R.B. 529

Notices:

2023-4, 2023-2 I.R.B. 321
2023-5, 2023-2 I.R.B. 324
2023-6, 2023-2 I.R.B. 328
2023-8, 2023-2 I.R.B. 341
2023-1, 2023-3 I.R.B. 373
2023-2, 2023-3 I.R.B. 374
2023-3, 2023-3 I.R.B. 388
2023-7, 2023-3 I.R.B. 390
2023-9, 2023-3 I.R.B. 402
2023-10, 2023-3 I.R.B. 403
2023-11, 2023-3 I.R.B. 404
2023-12, 2023-6 I.R.B. 450
2023-13, 2023-6 I.R.B. 454
2023-16, 2023-8 I.R.B. 479
2023-17, 2023-10 I.R.B. 505
2023-18, 2023-10 I.R.B. 508
2023-20, 2023-10 I.R.B. 523
2023-19, 2023-11 I.R.B. 560
2023-21, 2023-11 I.R.B. 563
2023-22, 2023-12 I.R.B. 569
2023-23, 2023-13 I.R.B. 571
2023-24, 2023-13 I.R.B. 571
2023-26, 2023-13 I.R.B. 577
2023-25, 2023-14 I.R.B. 629
2023-27, 2023-15 I.R.B. 634
2023-28, 2023-15 I.R.B. 635
2023-31, 2023-16 I.R.B. 661
2023-30, 2023-17 I.R.B. 766
2023-33, 2023-18 I.R.B. 803
2023-34, 2023-19 I.R.B. 837

Notices:—Continued

2023-38, 2023-22 I.R.B. 872
2023-39, 2023-22 I.R.B. 877
2023-40, 2023-22 I.R.B. 879
2023-41, 2023-23 I.R.B. 905
2023-43, 2023-24 I.R.B. 919
2023-44, 2023-25 I.R.B. 924
2023-42, 2023-26 I.R.B. 1085
2023-46, 2023-26 I.R.B. 1086
2023-49, 2023-26 I.R.B. 1087

Proposed Regulations:

REG-100442-22, 2023-3 I.R.B. 423
REG-146537-06, 2023-3 I.R.B. 436
REG-114666-22, 2023-4 I.R.B. 437
REG 122286-18, 2023-11 I.R.B. 565
REG-120653-22, 2023-15 I.R.B. 640
REG-105954-22, 2023-16 I.R.B. 713
REG-120080-22, 2023-16 I.R.B. 746
REG 109309-22, 2023-17 I.R.B. 770
REG 121709-19, 2023-17 I.R.B. 789
REG-124064-19, 2023-17 I.R.B. 789
REG-108054-21, 2023-23 I.R.B. 907
REG-106228-22, 2023-26 I.R.B. 1088
REG-110412-23, 2023-26 I.R.B. 1098

Revenue Procedures:

2023-1, 2023-1 I.R.B. 1
2023-2, 2023-1 I.R.B. 120
2023-3, 2023-1 I.R.B. 144
2023-4, 2023-1 I.R.B. 162
2023-5, 2023-1 I.R.B. 265
2023-7, 2023-1 I.R.B. 305
2023-8, 2023-3 I.R.B. 407
2023-10, 2023-3 I.R.B. 411
2023-11, 2023-3 I.R.B. 417
2023-14, 2023-6 I.R.B. 466
2023-9, 2023-7 I.R.B. 471
2023-13, 2023-13 I.R.B. 581
2023-17, 2023-13 I.R.B. 604
2023-18, 2023-13 I.R.B. 605
2023-19, 2023-13 I.R.B. 626
2023-20, 2023-15 I.R.B. 636
2023-12, 2023-17 I.R.B. 768
2023-15, 2023-18 I.R.B. 806
2023-21, 2023-19 I.R.B. 837
2023-22, 2023-19 I.R.B. 838
2023-23, 2023-22 I.R.B. 883

Revenue Rulings:

2023-1, 2023-2 I.R.B. 309
2023-3, 2023-6 I.R.B. 448
2023-4, 2023-9 I.R.B. 480
2023-5, 2023-10 I.R.B. 503
2023-6, 2023-14 I.R.B. 627
2023-7, 2023-15 I.R.B. 633

Revenue Rulings:—Continued

2023-2, 2023-16 I.R.B. 658
2023-8, 2023-18 I.R.B. 801
2023-9, 2023-19 I.R.B. 835
2023-10, 2023-23 I.R.B. 884
2023-11, 2023-23 I.R.B. 886

Treasury Decisions:

9970, 2023-2 I.R.B. 311
9771, 2023-3 I.R.B. 346
9772, 2023-11 I.R.B. 530
9773, 2023-11 I.R.B. 557

¹ A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2022–27 through 2022–52 is in Internal Revenue Bulletin 2022–52, dated December 27, 2022.

Finding List of Current Actions on Previously Published Items¹

Bulletin 2023–26

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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/.

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