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Guidance Regarding Deductions by Individuals for Qualified Conservation Contributions

Notice 2007–50

PURPOSE

This notice provides guidance relating to the percentage limitations imposed by § 170(b)(1)(E) of the Internal Revenue Code (Code) on "qualified conservation contributions" made by individuals. Section 170(b)(1)(E) was added to the Code by section 1206(a)(1) of the Pension Protection Act of 2006, Pub. L. No. 109–280, 120 Stat. 780 (2006) (PPA), and is effective for contributions made in taxable years beginning after December 31, 2005, and before January 1, 2008.

BACKGROUND

A. Percentage limitations and carryover rules under § 170(b)(1) and § 170(d)(1) of the Code: General rules

Section 170(a) of the Code generally allows a deduction, subject to certain limitations, for any charitable contribution (as defined in § 170(c)), payment of which is made during the taxable year. Section 1.170A–1(c)(1) of the Income Tax Regulations provides that the amount of a contribution of property is generally the fair market value of the property at the time of the contribution, subject to certain limitations in § 170(e).

The amount of charitable contributions that an individual may deduct in a taxable year is limited to the applicable percentage of the individual's contribution base, pursuant to § 170(b)(1). Section 170(b)(1)(G) provides that the term "contribution base" means the individual's adjusted gross income, computed without regard to any net operating loss carryback.

The applicable percentage of an individual's contribution base varies, depending on the donee organization and the property contributed. For example, for cash contributions made to organizations described in § 170(b)(1)(A), the applicable percentage is 50 percent. For cash contributions to organizations described in § 170(b)(1)(B), and contributions of capital gain property to organizations described in § 170(b)(1)(A), the applicable percentage is generally 30 percent. The term "capital gain property" is defined in § 170(b)(1)(C)(iv) as any capital asset or property which is property used in the trade or business (as defined in § 1231(b)) the sale of which at its fair market value at the time of the contribution would have resulted in gain which would have been long-term capital gain.

Under § 170(b)(1) and (d)(1), any charitable contribution made during the taxable year in excess of the applicable contribution base generally is carried forward for up to 5 succeeding taxable years (after the contribution year) in order of time.

The total of all charitable contributions deducted in a taxable year may not exceed 50 percent of the individual's contribution base. The contributions that are deducted against the contribution base must follow the order of priority set forth in § 170(b)(1) and (d)(1). For example, if during a taxable year an individual makes a cash contribution and a capital gain property contribution to one or more organizations described in § 170(b)(1)(A), generally the cash contribution is taken into account before the capital gain property contribution in determining the allowable deduction for the year and any carryovers to future years. If the cash contribution equals 50 percent of the contribution base, the entire amount of the capital gain property contribution is carried forward for up to 5 succeeding taxable years (after the contribution year) in order of time. Furthermore, the capital gain property contribution carryover retains its character in the carryover years as a capital gain property contribution to which the 30 percent limitation applies. For additional details about the percentage limitations and carryover rules, see § 1.170A–8 and § 1.170A–10.

Different percentage limitations and carryover rules, which are not relevant here, apply to C corporations. See § 170(b)(2) and (d)(2).

B. Changes to § 170(b)(1) made by § 1206(a)(1) of the PPA, applicable to qualified conservation contributions made in taxable years beginning after December 31, 2005, and before January 1, 2008

I. *General rule: 50 percent limitation*

Section 1206(a)(1) of the PPA added § 170(b)(1)(E) to the Code to increase the percentage limitations and carryover period applicable to qualified conservation contributions made in taxable years beginning after December 31, 2005, and before January 1, 2008. Under § 170(b)(1)(E)(i), an individual may be allowed a deduction for any qualified conservation contribution to an organization described in § 170(b)(1)(A) to the extent the aggregate of such contributions does not exceed the excess of 50 percent of the individual's contribution base over the amount of all other charitable contributions allowed under § 170(b)(1) (the 50 percent limitation). Thus, the 30 percent limitation applicable to contributions of capital gain property under § 170(b)(1)(C) does not apply to qualified conservation contributions. If the aggregate amount of qualified conservation contributions exceeds the 50 percent limitation, § 170(b)(1)(E)(ii) provides that the excess will be treated (consistent with § 170(d)(1)) as a charitable contribution to which § 170(b)(1)(E)(i) applies in each of the 15 succeeding years in order of time.

II. *100 percent limitation applicable to certain qualified conservation contributions taken into account by individuals who are qualified farmers or ranchers*

Section 170(b)(1)(E)(iv) provides a special rule for a qualified conservation contribution taken into account by an individual who in the taxable year of the contribution is a qualified farmer or rancher, defined in § 170(b)(1)(E)(v) as a taxpayer whose gross income from the trade or business of farming (within the meaning of § 2032A(e)(5)) is greater than 50 percent of the taxpayer's gross income for the taxable year. For such an individual, § 170(b)(1)(E)(iv)(I) provides a general rule that the 50 percent limitation described above is increased to 100 percent (the 100 percent limitation).

However, for any contribution of property made after August 17, 2006, that is used or available for use in agriculture or livestock production, the 100 percent limitation applies only if the contribution is subject to a restriction that the property remain available for agriculture or livestock production. If the contribution is not subject to such a restriction, the 50 percent limitation applies.

III. *Effect of qualified conservation contributions on the computation of charitable contribution deductions and carryovers*

i) In general

Qualified conservation contributions are not taken into account in determining the amount of other allowable charitable contributions. Therefore, for purposes of applying § 170(b)(1)(E) and (d)(1), qualified conservation contributions are not treated as described in § 170(b)(1)(A), (B), (C), or (D). Moreover, § 170(b)(1)(A), (B), (C), and (D) apply without regard to contributions described in § 170(b)(1)(E)(i).

ii) Qualified conservation contributions taken into account by qualified farmers and ranchers

Section 170(b)(1)(E)(iv)(II) provides that the percentage limitations applicable to qualified conservation contributions taken into account by a qualified farmer or rancher are applied in the following order: First, contributions of property to which the 50 percent limitation applies are taken into account; then contributions of property to which the 100 percent limitation applies are taken into account.

QUESTIONS AND ANSWERS

Q–1. How do the percentage limitations and the carryover rules apply in a taxable year in which an individual has made a qualified conservation contribution and one or more contributions subject to the limitations in § 170(b)(1)(A), (B), (C), or (D)?

A–1. The qualified conservation contribution may be taken into account only after taking into account contributions subject to the limitations in § 170(b)(1)(A), (B), (C), and (D).

For example, in taxable year 2007 individual *B*, a calendar year taxpayer who is not a qualified farmer or rancher in 2007, has a contribution base of $100. During 2007 *B* makes $60 of cash contributions to organizations described in § 170(b)(1)(A) (that is, contributions to which the 50 percent limitation of § 170(b)(1)(A) applies), and a qualified conservation contribution of capital gain property under § 170(b)(1)(C)(iv) with a fair market value of $80. Assuming all other requirements of § 170 are met, in 2007 *B* may deduct $50 of the cash contributions. The unused $10 of cash contributions is carried forward for up to 5 years. No current deduction is allowed for the qualified conservation contribution, but the entire $80 qualified conservation contribution deduction is carried forward for up to 15 years.

Q–2. How do the percentage limitations and the carryover rules apply if the individual is a qualified farmer or rancher for the taxable year in which the contribution is made?

A–2. Using the example in A–1 of this notice, if in 2007 *B* is a qualified farmer or rancher eligible for the 100 percent limitation in § 170(b)(1)(E)(iv), *B* may deduct $50 for the qualified conservation contribution in addition to the $50 deduction for cash contributions. As in A–1, the unused $10 of cash contributions is carried forward for up to 5 years. The unused $30 of the qualified conservation contribution is carried forward for up to 15 years.

Q–3. Do the 50 percent and 100 percent limitations in § 170(b)(1)(E)(i) and (iv) apply to all contributions of real property interests?

A–3. No. The 50 and 100 percent limitations in § 170(b)(1)(E) apply only to qualified conservation contributions, defined in § 170(h)(1) as a contribution of a qualified real property interest to a qualified organization, exclusively for conservation purposes. A qualified real property interest is defined in § 170(h)(2) as any of the following interests: A) the entire interest of the taxpayer other than a qualified mineral interest; B) a remainder interest; and C) a restriction (granted in perpetuity) on the use which may be made of the real property.

For example, a qualified real property interest, as defined in § 170(h)(2), does not include the taxpayer's entire interest in real property. Consequently, a contribution of the taxpayer's entire interest in real property does not qualify for the 50 and 100 percent limitations under § 170(b)(1)(E). For purposes of determining whether an entire interest in real property has been contributed, the retention of an insubstantial right or interest in the real property is disregarded. *See* § 1.170A–7(b)(1)(i); *see also*, *e.g.*, Rev. Rul. 75–66, 1975–1 C.B. 85.

Q–4. How may an individual determine whether the individual is a qualified farmer or rancher for the taxable year of the contribution (and thus may be eligible for the 100 percent limitation)?

A–4. An individual is a qualified farmer or rancher if the individual's gross income from the trade or business of farming (as defined in § 2032A(e)(5)) in the taxable year of the contribution is greater than 50 percent of the individual's total gross income for the taxable year of the contribution.

Gross income includes all income from whatever source derived, except as otherwise provided. Section 61(a); § 1.61–3. Gross income from the trade or business of farming is the gross income from activities described in § 2032A(e)(5). Such activities include cultivating the soil; raising or harvesting any agricultural or horticultural commodity; raising, shearing, feeding, caring for, training, and management of animals; handling, drying, packing, grading, or storing on a farm any agricultural or horticultural commodity in its unmanufactured state but only if the owner, operator, or tenant of the farm regularly produces more than one-half of the commodity; and the planting, cultivating, caring for, or cutting of trees, or the preparation (other than milling) of trees for market.

Q–5. If a qualified conservation contribution is made by a pass-through entity such as a partnership or S corporation, is the determination made at the entity level as to whether an individual who is a partner or shareholder is a qualified farmer or rancher for the taxable year of the contribution?

A–5. No. Section 170(b)(1)(E)(iv)(I) indicates that a qualified farmer or rancher must be an individual. Therefore, the determination is made at the partner or shareholder level as to whether an individual who is a partner or shareholder is a qual-

ified farmer or rancher for the taxable year of the contribution.

Q–6. Is income from a sale (including a bargain sale) of a conservation easement included in the individual's gross income from the trade or business of farming?

A–6. No. A sale (including a bargain sale) of a conservation easement is not an activity described in § 2032A(e)(5). Therefore, income derived from such a sale is not included in the individual's gross income from the trade or business of farming. However, the income from such a sale is included in the individual's gross income.

Q–7. Is income from the sale of timber included in the individual's gross income from the trade or business of farming?

A–7. Yes. The planting, cultivating, caring for, or cutting of trees, or the preparation (other than milling) of trees for market are activities described in § 2032A(e)(5). Therefore, income from the sale of timber is included in the individual's gross income from the trade or business of farming, and is also included in the individual's gross income.

Q–8. Is income from fees to permit hunting and fishing on the property included in an individual's gross income from the trade or business of farming?

A–8. No. Hunting and fishing activities are not activities described in § 2032A(e)(5). Therefore, income derived from permitting such activities is not included in the individual's gross income from the trade or business of farming. However, the income is included in the individual's gross income.

Q–9. Must a qualified conservation contribution be of property used or available for use in agriculture or livestock production in order for a qualified farmer or rancher to qualify for the 100 percent limitation under § 170(b)(1)(E)(iv)(I)?

A–9. No. Section 170(b)(1)(E)(iv)(I) requires that an individual be a qualified farmer or rancher to qualify for the 100 percent limitation. It does not require that the qualified conservation contribution be of property used or available for use in agriculture or livestock production. However, if the property is used or available for use in agriculture or livestock production, the restriction described in § 170(b)(1)(E)(iv)(II) may apply. See Q–10 and A–10 of this notice. See Q–13 of this notice for an example illustrating the application of § 170(b)(1)(E)(iv).

Q–10. If a qualified farmer or rancher makes a qualified conservation contribution of property used or available for use in agriculture or livestock production, must the contribution be subject to a restriction that the property remain available for such use in order to qualify for the 100 percent limitation?

A–10. The answer depends on the date of the contribution. If the contribution was made after August 17, 2006, the contribution must be subject to such a restriction in order to qualify for the 100 percent limitation. The contribution may qualify for the 50 percent limitation if the contribution lacks such a restriction. If the contribution was made on or before August 17, 2006, no such restriction is required in order to qualify for the 100 percent limitation.

Q–11. Does property used or available for use in agriculture or livestock production include the portions of the property upon which the following types of improvements are located: Dwellings used for family living by the farmer or rancher, a lessee that operates the property, or their employees; other types of buildings used for agriculture or livestock purposes; and roads throughout the property?

A–11. Yes. The portions of the property upon which such improvements are located are treated as property used or available for use in agriculture or livestock production. *See*, *e.g.*, § 1.170A–14(f), Example 5. To qualify for the 100 percent limitation, a qualified conservation contribution of the property made after August 17, 2006, by a qualified farmer or rancher must include a restriction that the entire property, including the portions upon which the improvements are located, remain available for agriculture or livestock production. If the contribution is not subject to such a restriction over the entire property, the contribution will not qualify for the 100 percent limitation, but may qualify for the 50 percent limitation.

Q–12. How may a qualified farmer or rancher comply with the requirement that a qualified conservation contribution of property used or available for use in agriculture or livestock production be subject to a restriction that the property (including the portions of the property upon which improvements described in Q–11 of this notice are located) remain available for such production?

A–12. The qualified conservation contribution must include a restriction that the property remain available for agriculture or livestock production, and must ensure that the property is protected from any use that would interfere with agriculture or livestock production. For example, a qualified conservation contribution of property used or available for use in agriculture or livestock production might include in the document of conveyance prohibitions against construction or placement of buildings (except those used for agriculture or livestock production purposes, or dwellings used for family living by the qualified farmer or rancher, a lessee that operates the property, or their employees); removal of mineral substances in any manner that adversely affects the property's agriculture or livestock production potential; and other uses detrimental to retention of the property for use in agriculture or livestock production. *See*, *e.g.*, § 1.170A–14(f), Example 5.

Q–13. Individual *B*, a calendar year taxpayer who is a qualified farmer or rancher for 2007, makes qualified conservation contributions during that year with respect to *B*'s 1,000 acre property. Of *B*'s 1,000 acres, 950 acres are used (or available for use) in agriculture or livestock production, and 50 acres are used as a game preserve that is unavailable for use in agriculture or livestock production. *B* contributes a qualified conservation contribution with respect to the 950 acre property, and a separate qualified conservation contribution with respect to the 50 acre property. The contribution with respect to the 950 acre property includes a restriction that the property remain available for use in agriculture or livestock production. Provided *B* meets all requirements of § 170, do both contributions qualify for the 100 percent limitation under § 170(b)(1)(E)(iv)?

A–13. Yes.

DRAFTING INFORMATION

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26 CFR 601.201: Rulings and determination letters. (Also Part I, § 430.)

Rev. Proc. 2007–37

SECTION 1. PURPOSE

The purpose of this revenue procedure is to set forth the procedure by which the sponsor of a defined benefit plan, other than a multiemployer plan, may request and obtain approval for the use of plan-specific substitute mortality tables in accordance with § 430(h)(3)(C) of the Internal Revenue Code (Code) and section 303(h)(3)(C) of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

SECTION 2. BACKGROUND INFORMATION

.01 Section 412 of the Code provides minimum funding requirements for defined benefit pension plans. Section 430, which was added by the Pension Protection Act of 2006, Pub. L. No. 109–280, 120 Stat. 780, specifies the minimum funding requirements for defined benefit plans other than multiemployer plans pursuant to § 412 and is generally effective for plan years beginning on or after January 1, 2008. Section 430(h)(3)(A) sets forth rules regarding the use of generally applicable mortality tables for purposes of § 430. Section 430(h)(3)(C) and section 303(h)(3)(C) of ERISA provide that the Secretary of the Treasury may approve substitute mortality tables to be used in determining any present value or making any computation under those sections for a period not to exceed ten years. Mortality tables meet the requirements for substitute mortality tables if the pension plan has a sufficient number of plan participants and the plan has been maintained for a sufficient period of time in order to have credible mortality experience, and such tables reflect the actual experience of the plan and projected trends in general mortality experience of participants in pension plans. Except as provided by the Secretary, a plan sponsor cannot use substitute mortality tables for any plan unless substitute mortality tables are established and used for each other plan subject to § 430 of the Code that is maintained by the plan sponsor and the plan sponsor's controlled group.

.02 Proposed regulation § 1.430(h)(3)–1, which sets forth proposed rules regarding the use of generally applicable mortality tables for purposes of § 430, and proposed regulation § 1.430(h)(3)–2, which sets forth proposed rules for the use of substitute mortality tables under § 430(h)(3)(C) (referred to elsewhere in this revenue procedure as the "proposed regulations"), were published in the Federal Register on May 29, 2007, at 72 FR 29456. Under the proposed regulations (REG–143601–06, 2007–24 I.R.B. 1398), substitute mortality tables must reflect the actual mortality experience of the pension plan maintained by the plan sponsor for which the tables are to be used and that mortality experience must be credible. Separate mortality tables must be established for each gender under the plan, and a substitute mortality table is permitted to be established for a gender only if the plan has credible mortality experience with respect to that gender. If the mortality experience for one gender is credible but the mortality experience for the other gender is not credible, then the substitute mortality tables are used for the gender that has credible mortality experience, and the mortality tables under proposed regulation § 1.430(h)(3)–1 are used for the gender that does not have credible mortality experience. If separate mortality tables under § 430(h)(3)(D) are used for certain disabled individuals under a plan, then those individuals are disregarded for all purposes with respect to substitute mortality tables under § 430(h)(3)(C). Thus, if the mortality tables under § 430(h)(3)(D) are used for certain disabled individuals under a plan, mortality experience with respect to those individuals must be excluded in determining mortality rates for substitute mortality tables with respect to a plan.

Under the proposed regulations, a substitute mortality table is based on credible mortality experience for a gender within a plan if and only if the mortality experience is based on at least 1,000 deaths within that gender over the period covered by the experience study. The experience study must be based on mortality experience data over a 2, 3, or 4-consecutive year period, the last day of which must be less than 3 years before the first day of the first plan year for which the substitute mortality tables are to apply.

Development of a substitute mortality table under the proposed regulations requires creation of a base table (Base Table) and identification of a base year (Base Year), which are then used to determine generational substitute mortality tables. The Base Table must be developed from a study of the mortality experience of the plan using amounts-weighted data. The proposed regulations also set forth rules regarding development of amounts-weighted mortality rates for an age and the determination of the Base Year. The proposed regulations provide that amounts-weighted mortality rates may be derived from amounts-weighted mortality rates for age groups.

The proposed regulations provide that Base Tables may be constructed either directly through graduation of amounts-weighted mortality rates or indirectly by applying a level percentage to tables prescribed by § 430(h)(3)(A), provided that the resulting tables sufficiently reflect the plan's mortality experience. The Service may permit the construction of Base Tables through application of a level percentage to other recognized mortality tables, applying similar standards to ensure that the resulting tables are sufficiently reflective of the plan's mortality experience.

As noted above, except as provided by the Secretary, a plan sponsor cannot use substitute mortality tables for any plan unless substitute mortality tables are established and used for each other plan subject to § 430 that is maintained by the plan sponsor and the plan sponsor's controlled group. Under the proposed regulations, the use of substitute mortality tables for one plan would not be prohibited merely because another plan maintained by the plan sponsor (or by a member of the plan sponsor's controlled group) cannot use substitute mortality tables because neither the males nor the females under that other plan have credible mortality experience for a plan year. Thus, if a sponsor's controlled group maintains two pension plans subject to § 430, each of which has credible mortality experience for at least one gender, then either both plans must obtain approval