Internal Revenue bulletin

Bulletin No. 2003-38
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# HIGHLIGHTS OF THIS ISSUE

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

## INCOME TAX

### Rev. Rul. 2003–102, page 559.

**Self-insured medical reimbursement plans.** This ruling holds that employer reimbursements of amounts paid by an employee to purchase nonprescription medicines and drugs are excludable from gross income under section 105(b) of the Code. However, amounts paid by an employee for dietary supplements that are merely beneficial to the general health of the employee or the employee's spouse or dependents are not reimbursable or excludable from gross income under section 105(b). Rev. Rul. 2003–58 distinquished.

### Rev. Rul. 2003–103, page 568.

**LIFO; price indexes; department stores.** The July 2003 Bureau of Labor Statistics price indexes are accepted for use by department stores employing the retail inventory and last-in, first-out inventory methods for valuing inventories for tax years ended on, or with reference to, July 31, 2003.

### T.D. 9071, page 560.
### REG–143679–02, page 592.

Final, temporary, and proposed regulations under section 338 of the Code provide that the step transaction doctrine will not be applied if a taxpayer makes a valid section 338(h)(10) election with respect to a step in a multi-step transaction, even if the transaction would otherwise qualify as a reorganization if the step, standing alone, is a qualified stock purchase.

### REG–163974–02, page 595.

Proposed regulations under section 817 of the Code propose removing provisions of the regulations that apply a look-through rule to assets of a nonregistered partnership for purposes of satisfying the diversification requirements of section 817(h).

## EMPLOYEE PLANS

### T.D. 9076, page 562.

Final regulations under section 417(a)(7) of the Code relate to a special rule which permits the required written explanations of certain benefits to be provided by qualified retirement plans after the annuity starting date.

### Notice 2003–62, page 576.

**Mortality tables; retirement plans.** This notice seeks public comments with respect to the mortality tables in effect under section 412(l)(7)(C) of the Code and section 302(d)(7) of the Employee Retirement Income Security Act of 1974 (ERISA).

### Notice 2003–63, page 577.

**Weighted average interest rate update.** The weighted average interest rate for September 2003 and the resulting permissible range of interest rates used to calculate current liability for purposes of the full funding limitation of section 412(c)(7) of the Code are set forth.

### Rev. Proc. 2003–72, page 578.

**EP determination letters; extension of application deadline for certain pre-approved plans.** This procedure extends the deadline for filing EP determination letter requests for certain pre-approved qualified retirement plans. This procedure also extends the time for amending defined contribution plans to comply with regulations relating to required minimum distributions. Rev. Procs. 2000–20, 2002–29, and 2003–44 modified.

**(Continued on the next page)**

**Finding Lists begin on page ii.**

Department of the Treasury
Internal Revenue Service

## EXEMPT ORGANIZATIONS

**T.D. 9070, page 574.**
**REG–142538–02, page 590.**
Temporary and proposed regulations under section 6104 of the Code provide guidance about the fees which the IRS and exempt organizations may charge for providing copies of material required to be publicly available.

## EMPLOYMENT TAX

**REG–144908–02, page 593.**
Proposed regulations under section 6302 of the Code provide an additional exception to the FUTA deposit requirements for employers. The regulations would relieve employers from making deposits of FUTA taxes for a quarter if the amount of accumulated Federal Insurance Contributions Act (FICA) taxes and withheld income taxes for the quarter is less than $2,500.

## ADMINISTRATIVE

**T.D. 9073, page 570.**
**REG–140808–02, page 582.**
Temporary and proposed regulations under section 6103 of the Code describe the circumstances under which officers and employees of the IRS, the IRS Office of Chief Counsel, and the Office of Treasury Inspector General for Tax Administration may disclose return information for investigative purposes. The temporary regulations clarify and elaborate on the types and contexts in which investigative disclosures may be made.

**REG–140930–02, page 583.**
Proposed regulations provide procedures for current and former IRS employees and contractors to follow when they receive requests and subpoenas for IRS records and information. The regulations also provide procedures for the public to follow when seeking testimony or IRS records in nontax litigation.

**Announcement 2003–55, page 597.**
This document provides updated requirements for the private printing of Form 1099–B, *Proceeds From Broker and Barter Exchange Transactions*, and Form 1099–DIV, *Dividends and Distributions*. The rules and specifications for preparing other forms discussed in Rev. Proc. 2003–28, 2003–16 I.R.B. 759, remain the same.

# The IRS Mission

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

# Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are consolidated semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

**Part I.—1986 Code.**
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

**Part II.—Treaties and Tax Legislation.**
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

**Part III.—Administrative, Procedural, and Miscellaneous.**
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

**Part IV.—Items of General Interest.**
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The first 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 first Bulletin of the succeeding semiannual period, respectively.

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

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

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

## Section 105.—Amounts Received Under Accident and Health Plans

*(Also Section 213: Medical, dental, etc., expenses.)*

**Self-insured medical reimbursement plans.** This ruling holds that employer reimbursements of amounts paid by an employee to purchase nonprescription medicines and drugs are excludable from gross income under section 105(b) of the Code. However, amounts paid by an employee for dietary supplements that are merely beneficial to the general health of the employee or the employee's spouse or dependents are not reimbursable or excludable from gross income under section 105(b). Rev. Rul. 2003–58 distinquished.

## Rev. Rul. 2003–102

ISSUE

Are reimbursements by an employer of amounts paid by an employee for medicines, drugs, or dietary supplements purchased by the employee without a physician's prescription excludable from gross income under § 105(b) of the Internal Revenue Code?

FACTS

Employer N sponsors a health flexible spending arrangement (health FSA). The health FSA provides for the reimbursement of participating employees' medical care expenses that are not covered by other insurance. Employee A is a participating employee in Employer N's health FSA.

Employee A purchases an antacid, an allergy medicine, a pain reliever, and a cold medicine from a pharmacy, none of which are purchased with a physician's prescription. Employee A purchases these items for personal use, or for the use of Employee A's spouse or dependents, to alleviate or treat personal injuries or sickness. Employee A also purchases dietary supplements (*e.g.*, vitamins) without a physician's prescription to maintain the general health of Employee A, or Employee A's spouse or dependents. Employee A submits substantiated claims for all of these expenses, which have been incurred during the current plan year, to Employer N's health FSA for reimbursement. Employee A is not compensated for these expenses by insurance or otherwise.

LAW AND ANALYSIS

Section 61(a)(1) provides that, except as otherwise provided in subtitle A, gross income includes compensation for services, including fees, commissions, fringe benefits, and similar items.

Section 105(a) provides that amounts received by an employee through accident or health insurance for personal injuries or sickness are included in gross income to the extent such amounts (1) are attributable to contributions by the employer that were not includible in the gross income of the employee or (2) are paid by the employer.

However, § 105(b) provides an exception to the general rule requiring inclusion in income. Section 105(b) provides that, except in the case of amounts attributable to (and not in excess of) deductions allowed under § 213 (relating to medical expenses) for any prior taxable year, gross income does not include amounts paid, directly or indirectly, to the taxpayer to reimburse the taxpayer for expenses incurred by the taxpayer for the medical care (as defined in § 213(d)) of the taxpayer or the taxpayer's spouse or dependents (as defined in § 152).

Section 105(e) states that amounts received under an accident or health plan for employees are treated as amounts received through accident or health insurance for purposes of § 105. Section 1.105–5(a) of the Income Tax Regulations provides that an accident or health plan is an arrangement for the payment of amounts to employees in the event of personal injuries or sickness.

Section 213(d)(1) defines "medical care" to include amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.

Section 1.213–1(e)(1)(ii) states that an expenditure that is merely beneficial to the general health of an individual, such as an expenditure for a vacation, is not an expenditure for medical care. Section 1.213–1(e)(1)(ii) also states that expenditures for "medicines and drugs" are expenditures for medical care.

Section 1.213–1(e)(2) states that the term "medicine and drugs" includes only items that are legally procured and generally accepted as falling within the category of medicine and drugs. Section 1.213–1(e)(2) further provides that toiletries (*e.g.*, toothpaste), cosmetics (*e.g.*, face creams) and sundry items are not "medicines and drugs" and that amounts expended for these items are not expenditures for "medical care."

Rev. Rul. 2003–58, 2003–22 I.R.B. 959, considers whether amounts paid by an individual for medicines that may be purchased without a prescription of a physician are deductible under § 213. The ruling notes that § 213(b) permits an amount paid for a medicine or drug to be taken into account for the purposes of the § 213 deduction for medical care expenses only if the medicine or drug is a prescribed drug or insulin. Section 213(d)(3) defines a "prescribed drug" as a drug or biological that requires a prescription of a physician for its use by an individual. The ruling concludes that amounts paid for medicines or drugs that may be purchased without a prescription of a physician are not taken into account pursuant to § 213(b) and are therefore not deductible under § 213.

Section 105(b) specifically refers to "expenses incurred by the taxpayer for . . . medical care," as defined in § 213(d). There is no requirement in § 105(b) that the expense be allowed as a deduction for medical care under § 213(a) or that only medicines or drugs that require a physician's prescription be taken into account.

Accordingly, the amount expended by Employee A to purchase the antacid, allergy medicine, pain reliever, and cold medicine without a physician's prescription is an expenditure for medical care. Employer N's health FSA reimbursement of Employee A's cost for these items is therefore excludable under § 105(b), even though the cost would not have been deductible under § 213(a). However, the dietary supplements (*e.g.*, the vitamins) are merely beneficial to Employee A or Employee A's spouse or dependents' general good health. Therefore, the cost of the dietary supplements is not an expense for medical care and is not reimbursable or excludable under § 105(b).

HOLDING

Reimbursements by an employer of amounts paid by an employee for medicines and drugs purchased by the employee without a physician's prescription are excludable from gross income under § 105(b). However, amounts paid by an employee for dietary supplements that are merely beneficial to the general health of the employee or the employee's spouse or dependents, are not reimbursable or excludable from gross income under § 105(b).

EFFECT ON OTHER REVENUE RULINGS

Rev. Rul. 2003–58 is distinguished.

DRAFTING INFORMATION

The principal author of this revenue ruling is Barbara E. Pie of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this revenue ruling, contact Ms. Pie at (202) 622–6080 (not a toll-free call).

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## Section 338.—Certain Stock Purchases Treated as Asset Acquisitions

*26 CFR 1.338–3: Qualification for the section 338 election.*

## T.D. 9071

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

## Effect of Section 338(h)(10) Elections in Certain Multi-step Transactions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document gives effect to section 338(h)(10) elections in certain multi-step transactions. These regulations affect corporations and their shareholders. The text of the temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking (REG–143679–02) on this subject in this issue of the Bulletin.

DATES: Effective Date: These regulations are effective on or after July 9, 2003.

Applicability Date: For dates of applicability, see §1.338(h)(10)–1T(h).

FOR FURTHER INFORMATION CONTACT: Daniel Heins, Mary Goode or Reginald Mombrun at (202) 622–7930 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

**Background**

*A. Section 338 Generally*

In the case of any qualified stock purchase, section 338 allows a purchasing corporation to elect to treat the target corporation as having sold all of its assets at the close of the acquisition date at fair market value and then treats the target corporation as a new corporation that purchased all of its assets as of the beginning of the day after the acquisition date. Section 338 was enacted to replace former section 334(b)(2) and to repeal the *Kimbell-Diamond* doctrine. See H.R. Rep. No. 97–760 at 536 (1982), 1982–2 C.B. 600, 632 (reflecting that section 338 replaces "any nonstatutory treatment of a stock purchase as an asset purchase under the *Kimbell-Diamond* doctrine"). In *Kimbell-Diamond Milling Co. v. Commissioner*, 14 T.C. 74, aff'd *per curiam*, 342 U.S. 827 (1951), the court held that the purchase of the stock of a target corporation for the purpose of obtaining its assets through a prompt liquidation should be treated by the purchaser as a purchase of the target corporation's assets with the purchaser receiving a cost basis in the assets.

*B. Revenue Ruling 2001–46*

Rev. Rul. 2001–46, 2001–2 C.B. 321, considers whether the step transaction doctrine should apply to treat certain acquisitions of stock of a target corporation followed by mergers of the target corporation into the acquiring corporation as reorganizations under section 368(a)(1)(A). In Situation 1 of that ruling, Corporation X owns all of the stock of Corporation Y. Pursuant to an integrated plan, X acquires all of the stock of Corporation T in a statutory merger of Y into T (the "Acquisition Merger"), with T surviving. In the Acquisition Merger, the T shareholders exchange their T stock for consideration, 70 percent of which is X voting stock and 30 percent of which is cash. Following the Acquisition Merger and as part of the plan, T merges into X in a statutory merger (the "Upstream Merger"). If viewed separately from the Upstream Merger, the Acquisition Merger would qualify as a qualified stock purchase. If viewed separately from the Acquisition Merger, the Upstream Merger would qualify as a liquidation described in section 332. However, if the step transaction doctrine were applied to the Acquisition Merger and the Upstream Merger, the integrated transaction would be treated as an integrated acquisition of T's assets by X in a single statutory merger qualifying as a reorganization under section 368(a).

Considering the appropriate treatment of the Acquisition Merger and the Upstream Merger, Rev. Rul. 2001–46 examines, among other authorities, Rev. Rul. 67–274, 1967–2 C.B. 141, and Rev. Rul. 90–95, 1990–2 C.B. 67. In Rev. Rul. 67–274, a corporation's acquisition of stock of a target corporation that, viewed independently, qualifies as a reorganization under section 368(a)(1)(B), is followed by a liquidation of the target corporation into the acquiring corporation that, viewed independently, qualifies as a liquidation described in section 332. Rev. Rul. 67–274 holds that the transaction is an acquisition by the acquiring corporation of the target corporation's assets in a reorganization under section 368(a)(1)(C). In Rev. Rul. 90–95, a subsidiary of the acquiring corporation merges into the target corporation with the target corporation shareholders receiving solely cash in exchange for their stock. Immediately following this merger, the target corporation merges into the acquiring corporation. Rev. Rul. 90–95 rules that the first step is accorded independent significance from the subsequent liquidation of the target corporation and, therefore, is treated as a qualified stock purchase, regardless of whether an election under section 338 is made.

In Rev. Rul. 2001–46, the IRS concluded that treating the Acquisition Merger

and the Upstream Merger as a single statutory merger of T into X would not violate the policy underlying section 338 because that treatment results in a transaction that qualifies as a reorganization under section 368(a)(1)(A) in which X acquires the assets of T with a carryover basis under section 362, not a cost basis under section 1012. Finally, Rev. Rul. 2001–46 states that the IRS and Treasury are considering whether to issue regulations that would reflect the general principles of the revenue ruling, but would allow taxpayers to make an election under section 338(h)(10) with respect to a step in a multi-step transaction that, viewed independently, is a qualified stock purchase and is pursuant to a written agreement that requires, or permits, the purchasing corporation to cause a section 338(h)(10) election in respect of such step to be made. The IRS requested and received comments on this issue.

**Explanation of Provisions**

The IRS and Treasury have studied the comments received in response to the request made in Rev. Rul. 2001–46, all of which urge the IRS and Treasury to allow taxpayers to make section 338(h)(10) elections in certain transactions as contemplated by Rev. Rul. 2001–46. These final and temporary regulations adopt this recommendation and provide that the step transaction doctrine will not be applied if a taxpayer makes a valid section 338(h)(10) election with respect to a step in a multistep transaction, even if the transaction would otherwise qualify as a reorganization, if the step, standing alone, is a qualified stock purchase. The IRS and Treasury are continuing to study the other comments received. In particular, the IRS and Treasury are considering whether any amendments to the portion of the regulations under section 338 related to the corporate purchaser requirement are appropriate.

**Effective Date**

These final and temporary regulations are applicable to acquisitions of stock occurring on or after the date of publication of the regulations.

**Special Analyses**

These final and temporary regulations are necessary in order to provide taxpayers with immediate guidance regarding the validity of certain elections made under section 338(h)(10). Accordingly, good cause is found for dispensing with the notice and public procedure pursuant to 5 U.S.C. 553(b)(B) and with providing a delayed effective date pursuant to 5 U.S.C. 553(d)(1) and (3). For applicability of the Regulatory Flexibility Act, please refer to the cross-reference notice of proposed rulemaking (REG–143679–02) published elsewhere in this issue of the Bulletin. These final and temporary regulations have been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on their impact on small businesses.

**Drafting Information**

The principal authors of these final and temporary regulations are Daniel Heins and Mary Goode, Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

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**Adoption of Amendments to the Regulations**

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Section 1.338(h)(10)–1T also issued under 26 U.S.C. 337(d), 338 and 1502. ***

Par. 2. Section 1.338–3 is amended by adding a sentence at the end of paragraph (c)(1)(i) to read as follows:

*§1.338–3 Qualification for the section 338 election.*

* * * * *

(c) * * *

(1) * * *

(i) * * * See §1.338(h)(10)–1T(c)(2) for special rules concerning section 338(h)(10) elections in certain multi-step transactions.

Par. 3. Section 1.338(h)(10)–1 is amended as follows:

1. Paragraphs (c)(2), (c)(3) and (c)(4) are redesignated as paragraphs (c)(3), (c)(4) and (c)(5) respectively.

2. A newly designated paragraph (c)(2) is added.

The revisions and addition read as follows:

*§1.338(h)(10)–1 Deemed asset sale and liquidation.*

* * * * *

(c) * * *

(2) [**Reserved**] For further guidance, see §1.338(h)(10)–1T(c)(2).

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Par. 4. Section 1.338(h)(10)–1T is added to read as follows:

*§1.338(h)(10)–1T Deemed asset sale and liquidation (temporary).*

(a) through (c)(1) [Reserved]. For further guidance, see §1.338(h)(10)–1(a) through (c)(1).

(c)(2) *Availability of section 338(h)(10) election in certain multi-step transactions*. Notwithstanding anything to the contrary in §1.338–3(c)(1)(i), a section 338(h)(10) election may be made for T where P's acquisition of T stock, viewed independently, constitutes a qualified stock purchase and, after the stock acquisition, T merges or liquidates into P (or another member of the affiliated group that includes P), whether or not, under relevant provisions of law, including the step transaction doctrine, the acquisition of the T stock and the merger or liquidation of T qualify as a reorganization described in section 368(a). If a section 338(h)(10) election is made in a case where the acquisition of T stock followed by a merger or liquidation of T into P qualifies as a reorganization described in section 368(a), for all federal tax purposes, P's acquisition of T stock is treated as a qualified stock purchase and is not treated as part of a reorganization described in section 368(a).

(c)(3) through (e) (*Example 10*) [Reserved]. For further guidance, see §1.338(h)(10)–1(c)(3) through (e) (*Example 10*).

(e) *Example 11. Stock acquisition followed by upstream merger — without section 338(h)(10) election*. (i) P owns all the stock of Y, a newly formed subsidiary. S owns all the stock of T. Each of P, S, T and

Y is a domestic corporation. P acquires all of the T stock in a statutory merger of Y into T, with T surviving. In the merger, S receives consideration consisting of 50% P voting stock and 50% cash. Viewed independently of any other step, P's acquisition of T stock constitutes a qualified stock purchase. As part of the plan that includes P's acquisition of the T stock, T subsequently merges into P. Viewed independently of any other step, T's merger into P qualifies as a liquidation described in section 332. Absent the application of paragraph (c)(2) of this section, the step transaction doctrine would apply to treat P's acquisition of the T stock and T's merger into P as an acquisition by P of T's assets in a reorganization described in section 368(a). P and S do not make a section 338(h)(10) election with respect to P's purchase of the T stock.

(ii) Because P and S do not make an election under section 338(h)(10) for T, P's acquisition of the T stock and T's merger into P is treated as part of a reorganization described in section 368(a).

*Example 12. Stock acquisition followed by upstream merger — with section 338(h)(10) election.* (i) The facts are the same as in *Example 11* except that P and S make a joint election under section 338(h)(10) for T.

(ii) Pursuant to paragraph (c)(2) of this section, as a result of the election under section 338(h)(10), for all federal tax purposes, P's acquisition of the T stock is treated as a qualified stock purchase and P's acquisition of the T stock is not treated as part of a reorganization described in section 368(a).

*Example 13. Stock acquisition followed by brother-sister merger — with section 338(h)(10) election.* (i) The facts are the same as in *Example 12*, except that, following P's acquisition of the T stock, T merges into X, a domestic corporation that is a wholly owned subsidiary of P. Viewed independently of any other step, T's merger into X qualifies as a reorganization described in section 368(a). Absent the application of paragraph (c)(2) of this section, the step transaction doctrine would apply to treat P's acquisition of the T stock and T's merger into X as an acquisition by X of T's assets in a reorganization described in section 368(a).

(ii) Pursuant to paragraph (c)(2) of this section, as a result of the election under section 338(h)(10), for all federal tax purposes, P's acquisition of T stock is treated as a qualified stock purchase and P's acquisition of T stock is not treated as part of a reorganization described in section 368(a).

*Example 14. Stock acquisition that does not qualify as a qualified stock purchase followed by upstream merger.* (i) The facts are the same as in *Example 11*, except that, in the statutory merger of Y into T, S receives only P voting stock.

(ii) Pursuant to section 1.338–3(c)(1)(i) and paragraph (c)(2) of this section, no election under section 338(h)(10) can be made with respect to P's acquisition of the T stock because, pursuant to relevant provisions of law, including the step transaction doctrine, that acquisition followed by T's merger into P is treated as a reorganization under section 368(a)(1)(A), and that acquisition, viewed independently of T's merger into P, does not constitute a qualified stock purchase under section 338(d)(3). Accordingly, P's acquisition of the T stock and T's merger into P is treated as a reorganization under section 368(a).

(f) through (g) [Reserved]. For further guidance, see §1.338(h)(10)–1(f) through (g).

(h) *Effective date*. This section is applicable to stock acquisitions occurring on or after July 9, 2003.

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Robert E. Wenzel,
*Deputy Commissioner for Services and Enforcement.*

Approved June 27, 2003.

Pamela F. Olson,
*Assistant Secretary of the Treasury.*

(Filed by the Office of the Federal Register on July 8, 2003, 8:45 a.m., and published in the issue of the Federal Register for July 9, 2003, 68 F.R. 40766)

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## Section 417.—Definitions and Special Rules for Purposes of Minimum Survivor Annuity Requirements

*26 CFR 1.417(e)–1: Restrictions and valuations of distributions from plans subject to sections 401(a)(11) and 417.*

## T.D. 9076

## DEPARTMENT OF THE TREASURY
## Internal Revenue Service
## 26 CFR Parts 1 and 602

## Special Rules Under Section 417(a)(7) for Written Explanations Provided by Qualified Retirement Plans After Annuity Starting Dates

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the special rule added by the Small Business Job Protection Act of 1996 which permits the required written explanations of certain benefits to be provided by qualified retirement plans to plan participants after the annuity starting date. These final regulations affect sponsors and administrators of qualified retirement plans, and participants in those plans.

DATES: *Effective Date*: These regulations are effective July 16, 2003.

*Applicability Date*: These regulations apply to plan years beginning on or after January 1, 2004.

FOR FURTHER INFORMATION CONTACT: Robert Walsh (202) 622–6090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

### Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–1724.

The collection of information in this final regulation is in §1.417(e)–1(b)(3)(iv)(B) and §1.417(e)–1(b)(3)(v)(A). This collection of information is required by the IRS to ensure that the participant and the participant's spouse consent to a form of distribution from a qualified retirement plan that may result in reduced periodic payments.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, W:CAR:MP:T:T:SP, Washington, DC 20224, and to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

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

### Background

This document contains amendments to 26 CFR part 1 under section 417(a)(7).

On January 17, 2001, a notice of proposed rulemaking (REG–109481–99, 2001–1 C.B. 961 [66 FR 3916]) was published in the **Federal Register** under section 417(a)(7) of the Internal Revenue Code. No public hearing was requested or held. Written comments responding to the notice of proposed rulemaking were received. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision.

Section 401(a)(11) of the Internal Revenue Code provides that, subject to certain exceptions, all distributions from a qualified plan must be made in the form of a qualified joint and survivor annuity (QJSA). One such exception is provided in section 417, which allows a participant to elect to waive the QJSA in favor of another form of distribution. Section 417(a)(2) provides that, for the waiver to be valid, the participant's spouse must consent to the waiver. Section 417(a)(3)(A) requires a qualified plan to provide to each participant, within a reasonable period of time before the annuity starting date, a written explanation (QJSA explanation) that describes the QJSA, the right to waive the QJSA, and the rights of the participant's spouse.

Section 417(a)(7), which was added to the Code by section 1451(a) of the Small Business Job Protection Act of 1996, Public Law 104–188 (110 Stat. 1755) (SBJPA), creates an exception to the rules of section 417(a)(3)(A), effective for plan years beginning after December 31, 1996. Section 417(a)(7)(A) provides that, notwithstanding any other provision of section 417(a), a plan may furnish the QJSA explanation after the annuity starting date, as long as the applicable election period is extended for at least 30 days after the date on which the explanation is furnished. Thus, section 417(a)(7)(A) allows the annuity starting date to be a date that is earlier than the date the QJSA explanation is provided, thereby allowing the retroactive payment of benefits that are attributable to the period before the QJSA explanation is provided. Section 417(a)(7)(A)(ii) provides that the Secretary may limit the application of the provision permitting the selection of a retroactive annuity starting date by regulations, except that the regulations may not limit the period of time by which the annuity starting date precedes the furnishing of the written explanation other than by providing that the retroactive annuity starting date may not be earlier than termination of employment.

Section 205(c)(8) of the Employee Retirement Income Security Act of 1974, Public Law 93–406 (88 Stat. 829) (ERISA), provides a parallel rule to section 417(a)(7) of the Code that applies under Title I of ERISA, and authorizes the Secretary of the Treasury to issue regulations limiting the application of the general rule. Thus, Treasury regulations issued under section 417(a)(7) of the Code apply as well for purposes of section 205(c)(8) of ERISA.

**Explanation of Provisions**

In accordance with section 417(a)(7)(A), these regulations provide that the QJSA explanation may be furnished on or after the annuity starting date under certain circumstances. The regulations refer to the annuity starting date in such cases as the "retroactive annuity starting date", define how payments are made in the case of a retroactive annuity starting date, and set conditions for the use of a retroactive annuity starting date.

Like the proposed regulations, the final regulations provide that a retroactive annuity starting date may be used only if the plan provides for it and the participant affirmatively elects to use the retroactive annuity starting date. If a participant affirmatively elects a retroactive annuity starting date, the participant must be put in approximately the same situation he or she would have been in had benefit payments actually commenced on the retroactive annuity starting date. Accordingly, in the case where a participant affirmatively elects a retroactive annuity starting date, the plan benefits must be determined as of that retroactive annuity starting date (including the application of section 415 and, if applicable, section 417(e)(3) as of that retroactive annuity starting date). If the plan benefits are determined in that manner, future periodic payments for a participant who elects a retroactive annuity starting date will be the same as the periodic payments that would have been paid to the participant had payments actually commenced on the retroactive annuity starting date. In addition, the participant must receive a make-up amount to reflect any missed payments (with an appropriate adjustment for interest from the date the payments would have been made to the date of actual payment).

Several commentators suggested that an adjustment for interest should not be required where the period between the retroactive annuity starting date and the date payments begin was less than three or four months. It was argued that the requirement of an interest adjustment in such a case may create burdens for the plan that are more significant than the additional money that may be paid to the participant. The Treasury Department and the IRS continue to believe that an appropriate adjustment for interest is needed for make-up payments. Thus, the final regulations retain the rule that an appropriate adjustment is required for make-up payments. The extent to which an adjustment is appropriate for a particular make-up payment depends on the facts and circumstances related to that payment.

The final regulations retain the rules from the proposed regulations that provide that the notice, consent, and election rules of section 417(a)(1), (2), and (3) apply to the retroactive payment of benefits but with several modifications. These modifications generally reflect the fact that the existing timing rules relating to notice and consent are generally determined with reference to an annuity starting date that is after the furnishing of the QJSA explanation by a period of up to 90 days.[1] If legislation currently pending in Congress changing the 90-day QJSA election period to 180 days is enacted, it is anticipated that the regulations will be modified to reflect that change.

The final regulations also retain the special spousal consent rule provided for under the proposed regulations. Under this special rule, the participant's spouse as of

[1] For example, section 417(a)(1) provides that a participant may elect to waive the QJSA within the "applicable election period" which is defined by section 417(a)(6) as the 90-day period ending on the annuity starting date. Similarly, §1.417(e)–1(b)(3)(i) provides that the written consent of the plan participant and the participant's spouse must be made no more than 90 days before the annuity starting date. Also, §1.417(e)–1(b)(3)(ii) provides that the QJSA explanation must generally be provided no less than 30 days and no more than 90 days before the annuity starting date.

the time distributions actually commence must consent to the retroactive annuity starting date election, if the survivor payments under the retroactive annuity are less than under a QJSA with an annuity starting date after the date the QJSA explanation was provided. This special rule applies even if the form of benefit that the participant elects as of the retroactive annuity starting date is a QJSA. Thus, for example, where a QJSA that begins after the QJSA explanation is furnished would provide $1,000 monthly to the participant with a survivor annuity of $500 monthly to the spouse, and a QJSA with a retroactive annuity starting date would provide $900 monthly to the participant with a survivor annuity of $450 monthly to the spouse, together with a $20,000 make-up payment to the participant, the participant would be required to obtain the consent of the current spouse in order to elect the retroactive annuity starting date. Spousal consent would be required in this example because the spouse has a statutory entitlement to a survivor benefit of at least $500 per month under a QJSA with a current annuity starting date.

Various comments were received regarding this spousal consent requirement. For example, it was suggested that spousal consent should not be required in the cases of short delay if the QJSA form is elected, or where the survivor benefit under the retroactive annuity starting date is at least 95% of the survivor annuity payable under a current QJSA, because requiring consent in such a case would create additional work and confusion and result in little benefit to the spouse. The regulations are not changed in this regard, as the Treasury Department and the IRS believe that spousal protection cannot be diminished below the statutorily prescribed QJSA without spousal consent. However, these regulations provide that such consent is only necessary where the survivor annuity is less than 50% of the amount of the annuity payable during the life of the participant under a currently commencing QJSA. Thus, in the example provided above, if the participant elected a QJSA with a retroactive annuity starting date and a 66 2/3% survivor annuity, the QJSA would provide $840 monthly to the participant with a survivor annuity of $560 to the participant's spouse and a make-up payment of $18,666. Spousal consent is not required in such a case because the $560 survivor annuity exceeds the minimum permissible under a currently commencing QJSA.

The proposed regulations impose an additional condition on the availability of a retroactive annuity starting date, regarding the permissible amount of the distribution under sections 417(e)(3) (if applicable) and 415. To satisfy this condition, the distribution must be adjusted, if necessary, to satisfy the requirements of sections 417(e)(3) (if applicable) and 415 where the date the distribution commences is substituted for the annuity starting date.

Several comments raised concerns regarding the requirement that sections 415 and 417(e)(3) be satisfied as of the date of distribution as well as the retroactive annuity starting date. Some commentators suggested that testing whether the distributions satisfy section 415 as of the date of distribution could be particularly restrictive for multiemployer plans. The commentators noted, for example, that for a participant who left covered service under a multiemployer plan at age 60 and retires at age 68 under a plan with an age-62 normal retirement age, the amount payable in the year of benefit commencement, as calculated for purposes of section 415, could well be higher than 100% of that participant's average compensation for his high three years and thus would violate section 415.[2]

The IRS and Treasury Department believe this second test is generally needed to stop participants from using the retroactive annuity starting date as a means of receiving benefits in excess of the section 415 limits. However, the IRS and Treasury Department have weighed the importance of compliance with this requirement against the associated burdens and have concluded that testing for section 415 compliance as of the date distributions commence may not be needed in every case. Thus, the final regulations do not apply the requirement that satisfaction of the benefit limitations of section 415 be demonstrated as of the date distributions commence in the case of a distribution that commences no more than twelve months after the retroactive annuity starting date, unless the form of benefit (as of the retroactive annuity starting date) is a form of benefit subject to the valuation rules of section 417(e)(3). For example, in the case of a life annuity distribution, compliance with section 415 need not be demonstrated as of the date of distribution where that date is no more than twelve months after the retroactive annuity starting date. However, if the distribution was a single sum distribution, compliance with section 415 would need to be tested as of the actual commencement date.

Some commentators also objected to the rule in the proposed regulation that required the plan to comply with the valuation rules of section 417(e)(3) as of the date of distribution. The IRS and Treasury Department continue to believe that a participant should not be receiving a smaller lump sum through the election of a retroactive annuity starting date than would be available for a current annuity starting date. Accordingly, these regulations adopt the rules of the proposed regulations regarding the requirements of section 417(e)(3) with a clarification relating to the application of section 417(e)(3). Under this clarification, in the case of a form of benefit that would have been subject to section 417(e)(3) if distributions had commenced as of the retroactive annuity starting date, the distribution pursuant to a retroactive annuity starting date election must be no less than the distribution produced by applying the applicable interest rate and the applicable mortality table determined as of the date the distribution commences to the annuity form that corresponds to the annuity form that was used to determine the benefit amount as of the retroactive annuity starting date. Thus, for example, if a distribution paid pursuant to an election of a retroactive annuity starting date is a single-sum distribution that is based on the present value of the straight life annuity payable at normal retirement age, then the amount of the distribution must be no less than the present value of the annuity payable at normal retirement age, determined as of the distribution date using the applicable mortality table and applicable interest rate that apply as of the distribution date.

[2] After the comments relating to multiemployer plans were received, section 415(b)(11) was amended by the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law No. 107–16, to provide that the 100% test of section 415(b)(1)(B) no longer applies to multiemployer plans.

Likewise, if a distribution paid pursuant to an election of a retroactive annuity starting date is a single-sum distribution that is based on the present value of the early retirement annuity payable as of the retroactive annuity starting date, then the amount of the distribution must be no less than the present value of the early retirement annuity payable as of the distribution date, determined as of the distribution date using the applicable mortality table and applicable interest rate that apply as of the distribution date.

The final regulations retain the rule of the proposed regulations that the determination of whether the valuation rules of section 417(e)(3) apply is based upon the benefit form as of the retroactive annuity starting date. Accordingly, a distribution option that is a non-decreasing benefit under §1.417(e)–1(d)(6) does not become subject to the valuation rules of section 417(e)(3) merely because of the make-up payments for the period between the retroactive annuity starting date and the date distributions actually commence.

Similarly, the final regulations provide that annuity payments that otherwise satisfy the requirements for a QJSA under section 417(b) will not fail to be treated as a QJSA for purposes of section 415(b)(2)(B) because a retroactive annuity starting date is elected and a make-up payment is made. Further, to address concerns raised by commentators, these regulations provide that plan distributions may be considered to be a series of substantially equal periodic payments for purposes of section 72(t)(2)(A)(iv) even though the plan distributes a make-up payment to a participant who has elected a retroactive annuity starting date.

One commentator suggested that make-up payments made pursuant to a retroactive annuity starting date should be considered to be part of a series of substantially equal periodic payments for purposes of the eligible rollover distribution definition of section 402(c)(4)(A). However, these regulations do not address this issue. Section 1.402(c)–2, Q&A–6 provides that an adjustment in a payment that is part of a series of substantially equal periodic payments will be treated as part of the series of substantially equal periodic payments for purposes of section 402(c)(4)(A) where the adjustment was due solely to reasonable administrative error or delay. To ensure that any rule applicable to make-up payments under this regulation is consistent with the rules generally applicable to independent payments under Q&A–6, the IRS and Treasury Department anticipate reviewing these rules and issuing guidance.

Two commentators suggested that defined contribution plans should be allowed to adopt provisions for retroactive annuity starting dates. One of these commentators suggests that the proposed regulations would prohibit a defined contribution plan from making payments to cover amounts that were unpaid due to an administrative oversight. This commentator adds that such a prohibition may cause the plan to fail to provide required distributions under section 401(a)(9). The IRS and Treasury Department continue to believe that the rules applicable to retroactive annuity starting dates are relevant only to defined benefit plans because the benefit provided by a defined contribution plan is equal to the account balance and the concerns addressed in these regulations are generally not relevant in such a case. Moreover, the problem raised by the commentator appears to relate to an administrative delay in making a payment (which is an issue covered under §1.401(a)–20, A–10(b)(3)), rather than the topic of these regulations. In any event, a plan must provide all distributions required by section 401(a)(9) and these regulations do not affect that requirement.

One commentator noted that some plans currently allow retroactive annuity starting dates in reliance upon a good faith interpretation of the statute and existing regulations. This commentator suggested that some of the sponsors of these plans may not wish to provide retroactive annuity starting dates in light of these regulations and requested that the IRS and Treasury Department confirm that plan sponsors who currently allow retroactive annuity starting dates will not violate the anti-cutback rules of section 411(d)(6) if they choose to amend these plans to restrict the availability of retroactive annuity starting dates in the future. The issues raised in this comment are not addressed in this Treasury decision. It is anticipated that such plan amendments will be governed by regulations to be issued under section 411(d)(6) pursuant to section 645 of the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16 (115 Stat. 117).

**Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the regulations require the collection of plan participants' written elections requesting qualified retirement plan distributions, and written spousal consent to these distributions, under limited circumstances. It is anticipated that most small businesses affected by these regulations will be sponsors of qualified retirement plans. Since these written participant elections and written spousal consents are required to be collected only for certain distributions, and since, in the case of a small plan, there will be relatively few distributions per year (and even fewer that are subject to these requirements), small plans that provide distributions for which this collection of information is required will only have to collect a small number of participant elections and spousal consents as a result of these regulations. Accordingly, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

**Drafting Information**

The principal authors of these regulations are Robert M. Walsh and Linda S. F. Marshall, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in their development.

* * * * *

**Adoption of Amendments to the Regulations**

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAXES

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

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

Section 1.417(e)–1(b)(3) also issued under 26 U.S.C. 417(a)(7)(A)(ii); * * *

Par. 2. Section 1.417(e)–1 is amended by:

1. Revising paragraphs (b)(3)(i), (b)(3)(ii) introductory text, and (b)(3)(ii)(C).

2. Redesignating paragraphs (b)(3)(iii) and (b)(3)(iv) as paragraphs (b)(3)(viii) and (b)(3)(ix), respectively.

3. Adding new paragraphs (b)(3)(iii) through (b)(3)(vii).

The additions and revisions read as follows:

*§1.417(e)–1 Restrictions and valuations of distributions from plans subject to sections 401(a)(11) and 417.*

* * * * *

(b)* * * (1) * * *

(3)* * * (i) Written consent of the participant and the participant's spouse to the distribution must be made not more than 90 days before the annuity starting date, and, except as otherwise provided in paragraphs (b)(3)(iii) and (b)(3)(iv) of this section, no later than the annuity starting date.

(ii) A plan must provide participants with the written explanation of the QJSA required by section 417(a)(3) no less than 30 days and no more than 90 days before the annuity starting date, except as provided in paragraph (b)(3)(iv) of this section regarding retroactive annuity starting dates. However, if the participant, after having received the written explanation of the QJSA, affirmatively elects a form of distribution and the spouse consents to that form of distribution (if necessary), a plan will not fail to satisfy the requirements of section 417(a) merely because the written explanation was provided to the participant less than 30 days before the annuity starting date, provided that the following conditions are met:

* * * * *

(C) The annuity starting date is after the date that the explanation of the QJSA is provided to the participant.

* * * * *

(iii) The plan may permit the annuity starting date to be before the date that any affirmative distribution election is made by the participant (and before the date that distribution is permitted to commence under paragraph (b)(3)(ii)(D) of this section), provided that, except as otherwise provided in paragraph (b)(3)(vii) of this section regarding administrative delay, distributions commence not more than 90 days after the explanation of the QJSA is provided.

(iv) *Retroactive annuity starting dates*. (A) Notwithstanding the requirements of paragraphs (b)(3)(i) and (ii) of this section, pursuant to section 417(a)(7), a defined benefit plan is permitted to provide benefits based on a retroactive annuity starting date if the requirements described in paragraph (b)(3)(v) of this section are satisfied. A defined benefit plan is not required to provide for retroactive annuity starting dates. If a plan does provide for a retroactive annuity starting date, it may impose conditions on the availability of a retroactive annuity starting date in addition to those imposed by paragraph (b)(3)(v) of this section, provided that imposition of those additional conditions does not violate any of the rules applicable to qualified plans. For example, a plan that includes a single sum payment as a benefit option may limit the election of a retroactive annuity starting date to those participants who do not elect the single sum payment. A defined contribution plan is not permitted to have a retroactive annuity starting date.

(B) For purposes of this section, a "retroactive annuity starting date" is an annuity starting date affirmatively elected by a participant that occurs on or before the date the written explanation required by section 417(a)(3) is provided to the participant. In order for a plan to treat a participant as having elected a retroactive annuity starting date, future periodic payments with respect to a participant who elects a retroactive annuity starting date must be the same as the future periodic payments, if any, that would have been paid with respect to the participant had payments actually commenced on the retroactive annuity starting date. The participant must receive a make-up payment to reflect any missed payment or payments for the period from the retroactive annuity starting date to the date of the actual make-up payment (with an appropriate adjustment for interest from the date the missed payment or payments would have been made to the date of the actual make-up payment). Thus, the benefit determined as of the retroactive annuity starting date must satisfy the requirements of sections 417(e)(3), if applicable, and section 415 with the applicable interest rate and applicable mortality table determined as of that date. Similarly, a participant is not permitted to elect a retroactive annuity starting date that precedes the date upon which the participant could have otherwise started receiving benefits (*e.g.*, in the case of an ongoing plan, the earlier of the participant's termination of employment or the participant's normal retirement age) under the terms of the plan in effect as of the retroactive annuity starting date. A plan does not fail to treat a participant as having elected a retroactive annuity starting date as described in this paragraph (b)(3)(iv)(B) merely because the distributions are adjusted to the extent necessary to satisfy the requirements of paragraph (b)(3)(v)(B) and (C) of this section relating to sections 415 and 417(e)(3).

(C) If the participant's spouse as of the retroactive annuity starting date would not be the participant's spouse determined as if the date distributions commence was the participant's annuity starting date, consent of that former spouse is not needed to waive the QJSA with respect to the retroactive annuity starting date, unless otherwise provided under a qualified domestic relations order (as defined in section 414(p)).

(D) A distribution payable pursuant to a retroactive annuity starting date election is treated as excepted from the present value requirements of paragraph (d) of this section under paragraph (d)(6) of this section if the distribution form would have been described in paragraph (d)(6) of this section had the distribution actually commenced on the retroactive annuity starting date. Similarly, annuity payments that otherwise satisfy the requirements of a QJSA under section 417(b) will not fail to be treated as a QJSA for purposes of section 415(b)(2)(B) merely because a retroactive annuity starting date is elected and a make-up payment is made. Also, for purposes of section 72(t)(2)(A)(iv), a distribution that would otherwise be one of a series of substantially equal periodic payments will be treated as one of a series of substantially equal periodic payments notwithstanding the distribution

of a make-up payment provided for in paragraph (b)(3)(iv)(B) of this section.

(E) The following example illustrates the application of paragraph (b)(3)(iv)(D) of this section:

*Example*. Under the terms of a defined benefit plan, participant A is entitled to a QJSA with a monthly payment of $1,500 beginning as of his annuity starting date. Due to administrative error, the QJSA explanation is provided to A after the annuity starting date. After receiving the QJSA explanation A elects a retroactive annuity starting date. Pursuant to this election, A begins to receive a monthly payment of $1,500 and also receives a make-up payment of $10,000. Under these circumstances the monthly payments may be treated as a QJSA for purposes of section 415(b)(2)(B). In addition, the monthly payments of $1,500 and the make-up payment of $10,000 may be treated as part of as series of substantially equal periodic payments for purpose of section 72(t)(2)(A)(iv).

(v) *Requirements applicable to retroactive annuity starting dates*. A distribution is permitted to have a retroactive annuity starting date with respect to a participant's benefit only if the following requirements are met:

(A) The participant's spouse (including an alternate payee who is treated as the spouse under a qualified domestic relations order (QDRO), as defined in section 414(p)), determined as if the date distributions commence was the participant's annuity starting date, consents to the distribution in a manner that would satisfy the requirements of section 417(a)(2). The spousal consent requirement of this paragraph (b)(3)(v)(A) is satisfied if such spouse consents to the distribution under paragraph (b)(2)(i) of this section. The spousal consent requirement of this paragraph (b)(3)(v)(A) does not apply if the amount of such spouse's survivor annuity payments under the retroactive annuity starting date election is no less than the amount that the survivor payments to such spouse would have been under an optional form of benefit that would satisfy the requirements to be a QJSA under section 417(b) and that has an annuity starting date after the date that the explanation was provided.

(B) The distribution (including appropriate interest adjustments) provided based on the retroactive annuity starting date would satisfy the requirements of section 415 if the date the distribution commences is substituted for the annuity starting date for all purposes, including for purposes of determining the applicable interest rate and the applicable mortality table. However, in the case of a form of benefit that would have been excepted from the present value requirements of paragraph (d) of this section under paragraph (d)(6) of this section if the distribution had actually commenced on the retroactive annuity starting date, the requirement to apply section 415 as of the date distribution commences set forth in this paragraph (b)(3)(v)(B) does not apply if the date distribution commences is twelve months or less from the retroactive annuity starting date.

(C) In the case of a form of benefit that would have been subject to section 417(e)(3) and paragraph (d) of this section if distributions had commenced as of the retroactive annuity starting date, the distribution is no less than the benefit produced by applying the applicable interest rate and the applicable mortality table determined as of the date the distribution commences to the annuity form that corresponds to the annuity form that was used to determine the benefit amount as of the retroactive annuity starting date. Thus, for example, if a distribution paid pursuant to an election of a retroactive annuity starting date is a single-sum distribution that is based on the present value of the straight life annuity payable at normal retirement age, then the amount of the distribution must be no less than the present value of the annuity payable at normal retirement age, determined as of the distribution date using the applicable mortality table and applicable interest rate that apply as of the distribution date. Likewise, if a distribution paid pursuant to an election of a retroactive annuity starting date is a single-sum distribution that is based on the present value of the early retirement annuity payable as of the retroactive annuity starting date, then the amount of the distribution must be no less than the present value of the early retirement annuity payable as of the distribution date, determined as of the distribution date using the applicable mortality table and applicable interest rate that apply as of the distribution date.

(vi) *Timing of notice and consent requirements in the case of retroactive annuity starting dates*. In the case of a retroactive annuity starting date, the date of the first actual payment of benefits based on the retroactive annuity starting date is substituted for the annuity starting date for purposes of satisfying the timing requirements for giving consent and providing an explanation of the QJSA provided in paragraphs (b)(3)(i) and (ii) of this section, except that the substitution does not apply for purposes of paragraph (b)(3)(iii) of this section. Thus, the written explanation required by section 417(a)(3)(A) must generally be provided no less than 30 days and no more than 90 days before the date of the first payment of benefits and the election to receive the distribution must be made after the written explanation is provided and on or before the date of the first payment. Similarly, the written explanation may also be provided less than 30 days prior to the first payment of benefits if the requirements of paragraph (b)(3)(ii) of this section would be satisfied if the date of the first payment is substituted for the annuity starting date.

(vii) *Administrative delay*. A plan will not fail to satisfy the 90-day timing requirements of paragraphs (b)(3)(iii) and (vi) of this section merely because, due solely to administrative delay, a distribution commences more than 90 days after the written explanation of the QJSA is provided to the participant.

* * * * *

Part 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 3. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 4. In §602.101, paragraph (b) is amended by adding the following entry in numerical order to the table to read as follows:

*§602.101 OMB Control numbers.*

* * * * *

(b) * * *

| CFR part or section where identified and described | Current OMB Control No. |
|---|---|
| * * * * * | |
| 1.417(e)–1 | 1545–1724 |
| * * * * * | |

Robert E. Wenzel,
*Deputy Commissioner for Services and Enforcement.*

Approved June 9, 2003.

Pamela F. Olson,
*Assistant Secretary of the Treasury.*

(Filed by the Office of the Federal Register on July 15, 2003, 8:45 a.m., and published in the issue of the Federal Register for July 16, 2003, 68 F.R. 41906)

## Section 472.—Last-in, First-out Inventories

*26 CFR 1.472–1: Last-in, first-out inventories.*

**LIFO; price indexes; department stores.** The July 2003 Bureau of Labor Statistics price indexes are accepted for use by department stores employing the retail inventory and last-in, first-out inventory methods for valuing inventories for tax years ended on, or with reference to, July 31, 2003.

## Rev. Rul. 2003–103

The following Department Store Inventory Price Indexes for July 2003 were issued by the Bureau of Labor Statistics. The indexes are accepted by the Internal Revenue Service, under § 1.472–1(k) of the Income Tax Regulations and Rev. Proc. 86–46, 1986–2 C.B. 739, for appropriate application to inventories of department stores employing the retail inventory and last-in, first-out inventory methods for tax years ended on, or with reference to, July 31, 2003.

The Department Store Inventory Price Indexes are prepared on a national basis and include (a) 23 major groups of departments, (b) three special combinations of the major groups — soft goods, durable goods, and miscellaneous goods, and (c) a store total, which covers all departments, including some not listed separately, except for the following: candy, food, liquor, tobacco, and contract departments.

BUREAU OF LABOR STATISTICS, DEPARTMENT STORE INVENTORY PRICE INDEXES BY DEPARTMENT GROUPS
(January 1941 = 100, unless otherwise noted)

| | Groups | July 2002 | July 2003 | Percent Change from July 2002 to July 2003[1] |
|---|---|---|---|---|
| 1. | Piece Goods | 486.4 | 487.0 | 0.1 |
| 2. | Domestics and Draperies | 577.3 | 570.0 | -1.3 |
| 3. | Women's and Children's Shoes | 607.4 | 613.9 | 1.1 |
| 4. | Men's Shoes | 906.0 | 831.2 | -8.3 |
| 5. | Infants' Wear | 590.9 | 573.3 | -3.0 |
| 6. | Women's Underwear | 526.3 | 509.0 | -3.3 |
| 7. | Women's Hosiery | 345.2 | 346.9 | 0.5 |
| 8. | Women's and Girls' Accessories | 517.0 | 537.8 | 4.0 |
| 9. | Women's Outerwear and Girls' Wear | 342.0 | 342.8 | 0.2 |

BUREAU OF LABOR STATISTICS, DEPARTMENT STORE
INVENTORY PRICE INDEXES BY DEPARTMENT GROUPS
(January 1941 = 100, unless otherwise noted)

| Groups | July 2002 | July 2003 | Percent Change from July 2002 to July 2003[1] |
|---|---|---|---|
| 10. Men's Clothing | 565.1 | 533.3 | -5.6 |
| 11. Men's Furnishings | 573.1 | 562.7 | -1.8 |
| 12. Boys' Clothing and Furnishings | 455.1 | 424.4 | -6.7 |
| 13. Jewelry | 887.6 | 882.3 | -0.6 |
| 14. Notions | 795.1 | 792.1 | -0.4 |
| 15. Toilet Articles and Drugs | 970.8 | 992.0 | 2.2 |
| 16. Furniture and Bedding | 627.6 | 619.9 | -1.2 |
| 17. Floor Coverings | 617.6 | 587.3 | -4.9 |
| 18. Housewares | 752.9 | 722.5 | -4.0 |
| 19. Major Appliances | 221.4 | 213.3 | -3.7 |
| 20. Radio and Television | 48.4 | 45.3 | -6.4 |
| 21. Recreation and Education[2] | 86.3 | 82.8 | -4.1 |
| 22. Home Improvements[2] | 125.8 | 123.7 | -1.7 |
| 23. Auto Accessories[2] | 111.6 | 111.4 | -0.2 |
| Groups 1–15: Soft Goods | 555.9 | 549.6 | -1.1 |
| Groups 16–20: Durable Goods | 409.9 | 394.3 | -3.8 |
| Groups 21–23: Misc. Goods[2] | 96.6 | 94.0 | -2.7 |
| Store Total[3] | 502.8 | 493.4 | -1.9 |

[1]Absence of a minus sign before the percentage change in this column signifies a price increase.

[2]Indexes on a January 1986 = 100 base.

[3]The store total index covers all departments, including some not listed separately, except for the following: candy, food, liquor, tobacco and contract departments.

DRAFTING INFORMATION

The principal author of this revenue ruling is Michael Burkom of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information regarding this revenue ruling, contact Mr. Burkom at (202) 622–7924 (not a toll-free call).

## Section 6103.—Confidentiality and Disclosure of Returns and Return Information

*26 CFR 301.6103(k)(6)–1T: Disclosure of return information by certain officers and employees for investigative purposes (temporary).*

## T.D. 9073

## DEPARTMENT OF THE TREASURY
## Internal Revenue Service
## 26 CFR Part 301

## Disclosure of Return Information by Certain Officers and Employees for Investigative Purposes

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to the disclosure of return information pursuant to section 6103(k)(6) of the Internal Revenue Code. The temporary regulations describe the circumstances under which officers or employees of the IRS, the IRS Office of Chief Counsel, and the Office of Treasury Inspector General for Tax Administration (TIGTA), in connection with official duties relating to any examination, administrative appeal, collection activity, administrative, civil, or criminal investigation, enforcement activity, ruling, negotiated agreement, prefiling activity, or other proceeding or offense under the internal revenue laws or related statutes, or in preparation for any proceeding described in section 6103(h)(2) (or investigation which may result in such a proceeding), may disclose return information to the extent necessary to obtain information relating to such official duties or to accomplish properly any activity connected with such official duties. The temporary regulations amend the existing regulations to clarify and elaborate on the facts and circumstances in which disclosure pursuant to section 6103(k)(6) is authorized. The temporary regulations clarify that IRS and TIGTA officers and employees make the determination, based on the facts and circumstances, at the time of the disclosure, whether a disclosure is necessary to obtain the information sought, and that section 6103(k)(6) does not affect the authority or decision of IRS and TIGTA officers and employees to initiate, or to conduct, an investigation, or to determine the nature of the investigation. The temporary regulations clarify that the return information of any taxpayer, not only the taxpayer under investigation, may be disclosed when necessary to obtain the information sought in an investigation. The temporary regulations clarify that section 6103(k)(6) permits IRS and TIGTA officers and employees to identify themselves, their organizational affiliation with the IRS (*e.g.*, Criminal Investigation (CI)) or TIGTA (*e.g.*, Office of Investigations (OI)), and the nature of their investigation when making oral, written, or electronic contacts with third party witnesses. The text of the temporary regulations also serves as the text of the proposed regulations (REG–140808–02) set forth in the notice of proposed rulemaking on this subject in this issue of the Bulletin.

DATES: *Effective Date:* These temporary regulations are effective July 10, 2003.

FOR FURTHER INFORMATION CONTACT: Helene R. Newsome, 202–622–4570 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

### Background

Under section 6103(a), returns and return information are confidential unless the Code authorizes disclosure. Section 6103(k)(6) authorizes an internal revenue officer or employee and an officer or employee of TIGTA, in connection with official duties relating to any audit, collection activity, civil or criminal tax investigation, or offense under the internal revenue laws or related statutes, to disclose return information to a person other than the taxpayer to whom such return information relates (or his or her representative) to the extent that such disclosure is necessary to obtain information not otherwise reasonably available with respect to the correct determination of tax, liability for tax, or the amount to be collected, or with respect to the enforcement of any other provision of the Code or related statutes. Disclosure is subject to situations and conditions prescribed by regulation.

The temporary regulations amend the existing regulations to reflect a recent legislative amendment to section 6103(k)(6). The Consolidated Appropriations Act, 2001, Public Law 106–554 (114 Stat. 2763), was signed into law on December 21, 2000. Section 1 of that Act enacted into law H.R. 5662, the Community Renewal Tax Relief Act of 2000. Section 313(c) of the Community Renewal Tax Relief Act of 2000 amended section 6103(k)(6) to clarify that officers or employees of TIGTA are among those persons authorized to make disclosures under section 6103(k)(6).

The temporary regulations also clarify the standard used in determining whether disclosures are authorized under section 6103(k)(6). Recent litigation indicates that there is some confusion as to the authority of IRS (and now TIGTA) officers and employees to make disclosures in certain situations under section 6103(k)(6). The temporary regulations seek to address these issues. In particular, the temporary regulations address the issues surrounding the disclosures that occur when IRS or TIGTA officers and employees introduce themselves to third party witnesses or communicate in writing using, *e.g.*, official letterhead that reveals affiliation with IRS or TIGTA. The temporary regulations also clarify that section 6103(k)(6) does not limit IRS or TIGTA officers and employees with respect to the initiation or conduct of an investigation. Finally, the temporary regulations clarify that section 6103 does not require IRS and TIGTA officers or employees to contact a taxpayer for information before contacting third party witnesses.

### Explanation of Provisions

The temporary regulations amend the existing regulations to clarify that there is a single, objective standard for all disclosures under section 6103(k)(6). This standard is embodied in the definitions of the terms *disclosure of return information to the extent necessary* and *information not otherwise reasonably available*.

The definition of *disclosure of return information to the extent necessary* is a disclosure of return information that an IRS or TIGTA officer or employee, based on

the facts and circumstances known to the officer or employee at the time of the disclosure, reasonably believes is necessary to obtain information to perform properly the official duties described by the temporary regulations, or to accomplish properly the activities connected with carrying out those official duties. The term *necessary* in this context does not mean essential or indispensable, but rather appropriate and helpful in obtaining the information sought.

The definition of *information not otherwise reasonably available* is information that an IRS or TIGTA officer or employee reasonably believes, under the facts and circumstances known to the officer or employee at the time of a disclosure, cannot be obtained in a sufficiently accurate or probative form, or in a timely manner, and without impairing the proper performance of the official duties described by the temporary regulations, without making the disclosure. Corroboration of information provided by, or concerning, a taxpayer is, by definition, *information not otherwise reasonably available* from the taxpayer. In criminal cases, corroboration of information provided by the taxpayer is essential. See *Smith v. United States*, 348 U.S. 147 (1954).

The temporary regulations clarify that section 6103(k)(6) does not alter or affect the authority of IRS and TIGTA officers or employees to decide whether or how to conduct an investigation. For example, in an action for wrongful disclosure under section 7431, the inquiry is whether the particular disclosure at issue was consistent with section 6103(k)(6), not the necessity of conducting an investigation or the appropriateness of the means or methods chosen to conduct the investigation. Thus, the temporary regulations remove the term *necessary* from several places in the existing regulations where the term may have implied a requirement, under section 6103(k)(6), that the information sought be necessary to or for an investigation (*e.g.*, §301.6103(k)(6)–1(a) ("disclose . . . to obtain necessary information")). Removal of the term *necessary* in these instances clarifies that the standard is whether disclosure is necessary to obtain the information sought, not whether the information sought is necessary for the investigation. See *Barrett v. United States*, 795 F.2d 446 (5th Cir. 1986).

The temporary regulations also address certain issues that have arisen in criminal investigations, although similar issues may arise in civil investigations. Criminal investigations typically involve obtaining evidence and verifying taxpayer-supplied information through contacts with third party witnesses. A disclosure that a taxpayer is under criminal investigation may occur by various means including, but not limited to, direct oral, written, or electronic disclosure, or indirect disclosure by the introduction of the special agent through the presentation of a CI or OI badge, credential, or business card, or through the use of information document requests, summonses, or correspondence, about an identified taxpayer, on CI or OI letterhead or that bears a CI or OI return address or signature block. In litigation, taxpayers have asserted that CI special agents, by various means, wrongfully disclosed the criminal nature of the investigation of the taxpayers in the course of conducting third party witness interviews or inquiries. See, *e.g.*, *Comyns v. United States*, 155 F. Supp. 2d 1344 (S.D. Fla. 2001), *aff'd*, 287 F.3d 1034 (11th Cir. 2002); *Payne v. United States*, 91 F. Supp. 2d 1014 (S.D. Tex. 1999), *rev'd*, 289 F.3d 377 (5th Cir. 2002); *Gandy v. United States*, 99–1 U.S. Tax Cas. (CCH) ¶ 50,237 (E.D. Tex. 1999), *aff'd*, 234 F.3d 281 (5th Cir. 2000); *Rhodes v. United States*, 903 F. Supp. 819 (M.D. Pa. 1995); *Diamond v. United States*, 944 F.2d 431 (8th Cir. 1991).

When CI special agents disclose to third party witnesses that a taxpayer is under criminal investigation, there is a risk that the disclosure may adversely affect the taxpayer's reputation, particularly if the third party witnesses have no prior independent knowledge of the investigation. The government and third party witnesses have equally important interests at stake: the CI special agents' authority to accurately identify themselves so as not to mislead third party witnesses, and the third party witnesses' interest in knowing that the inquiry involves a criminal investigation to fairly assess the situation and protect their own interests. See *Roebuck v. United States*, 83 A.F.T.R.2d (RIA) ¶ 99–2947 (E.D.N.C. 1999), *aff'd*, 84 A.F.T.R.2d (RIA) ¶ 99–7051 (4th Cir. 1999). This issue has concerned the Department of the Treasury and the Staff of the Joint Committee on Taxation, both of which have recommended legislation to clarify that CI special agents may identify themselves as CI special agents when contacting third party witnesses in the course of a criminal investigation. See *Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998*, Vol. I: Study of General Disclosure Provisions (JCS–1–00), at 208–11, Joint Committee on Taxation, January 28, 2000; *Report to the Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions*, Vol. I: Study of General Provisions, at 51–52, Office of Tax Policy, Department of the Treasury, October 2000. The temporary regulations clarify that section 6103(k)(6) permits, but does not require, IRS or TIGTA officers or employees, including CI or OI special agents, to identify themselves, their organizational affiliation with the IRS or TIGTA, and the nature of the investigation, when making oral, written, or electronic contacts with third party witnesses.

Moreover, the temporary regulations do not require IRS or TIGTA officers or employees to contact a taxpayer for information before contacting a third party witness. The temporary regulations clarify that, if an IRS or TIGTA officer or employee reasonably believes, under the facts and circumstances, at the time of a disclosure, that information cannot be obtained from a taxpayer in a sufficiently accurate or probative form, or in a timely manner, without impairing the proper performance of official duties, then the officer or employee may disclose taxpayer identity or other return information in seeking information from a third party. For example, a taxpayer may be a reasonable source of routine business records, but not of records detailing alleged illegal transactions or sources of income. The facts and circumstances will help determine the necessity of the disclosures, but IRS and TIGTA officers or employees have wide latitude to determine whether the taxpayer is a reasonable source of information. The temporary regulations clarify that disclosures are authorized to verify independently, or to corroborate, from third party sources, information obtained from or concerning the taxpayer.

The temporary regulations expand upon the list of official duties relating to tax administration for which disclosure, pursuant to section 6103(k)(6), is authorized, and clarify that this list is not exhaustive. Finally, the temporary regulations retain the authority for IRS and TIGTA officers or employees to make section 6103(k)(6) disclosures in certain personnel or claimant representative matters.

**Special Analyses**

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

**Drafting Information**

The principal author of these regulations is Helene R. Newsome, Office of the Associate Chief Counsel (Procedure and Administration), Disclosure and Privacy Law Division.

* * * * *

**Amendments to the Regulations**

Accordingly, 26 CFR part 301 is amended as follows:

PART 301— PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding an entry in numerical order to read as follows:

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

Section 301.6103(k)(6)–1T also issued under 26 U.S.C. 6103(k)(6); * * *

**§301.6103(k)(6)–1 [Removed]**

Par. 2. Section 301.6103(k)(6)–1 is removed.

Par. 3. Section 301.6103(k)(6)–1T is added to read as follows:

*§301.6103(k)(6)–1T Disclosure of return information by certain officers and employees for investigative purposes (temporary).*

(a) *General rule*. (1) Pursuant to the provisions of section 6103(k)(6) and subject to the conditions of this section, an internal revenue employee or an Office of Treasury Inspector General for Tax Administration (TIGTA) employee, in connection with official duties relating to any examination, administrative appeal, collection activity, administrative, civil or criminal investigation, enforcement activity, ruling, negotiated agreement, prefiling activity, or other proceeding or offense under the internal revenue laws or related statutes, or in preparation for any proceeding described in section 6103(h)(2) (or investigation which may result in such a proceeding), may disclose return information, of any taxpayer, to the extent necessary to obtain information relating to such official duties or to accomplish properly any activity connected with such official duties, including, but not limited to—

(i) Establishing or verifying the correctness or completeness of any return or return information;

(ii) Determining the responsibility for filing a return, for making a return if none has been made, or for performing such acts as may be required by law concerning such matters;

(iii) Establishing or verifying the liability (or possible liability) of any person, or the liability (or possible liability) at law or in equity of any transferee or fiduciary of any person, for any tax, penalty, interest, fine, forfeiture, or other imposition or offense under the internal revenue laws or related statutes or the amount thereof for collection;

(iv) Establishing or verifying misconduct (or possible misconduct) or other activity proscribed by the internal revenue laws or related statutes;

(v) Obtaining the services of persons having special knowledge or technical skills (such as, but not limited to, knowledge of particular facts and circumstances relevant to a correct determination of a liability described in paragraph (a)(1)(iii) of this section or skills relating to handwriting analysis, photographic development, sound recording enhancement, or voice identification) or having recognized expertise in matters involving the valuation of property if relevant to proper performance of official duties described in this paragraph;

(vi) Establishing or verifying the financial status or condition and location of the taxpayer against whom collection activity is or may be directed, to locate assets in which the taxpayer has an interest, to ascertain the amount of any liability described in paragraph (a)(1)(iii) of this section for collection, or otherwise to apply the provisions of the Internal Revenue Code relating to establishment of liens against such assets, or levy, seizure, or sale on or of the assets to satisfy any such liability;

(vii) Preparing for any proceeding described in section 6103(h)(2) or conducting an investigation which may result in such a proceeding; or

(viii) Obtaining, verifying, or establishing information concerned with making determinations regarding a taxpayer's liability under the Internal Revenue Code, including, but not limited to, the administrative appeals process and any ruling, negotiated agreement, or prefiling process.

(2) Disclosure of return information for the purpose of obtaining information to carry out properly the official duties described by this paragraph, or any activity connected with the official duties, is authorized only if the internal revenue or TIGTA employee reasonably believes, under the facts and circumstances, at the time of a disclosure, the information is not otherwise reasonably available, or if the activity connected with the official duties cannot occur properly without the disclosure.

(3) Internal revenue and TIGTA employees may identify themselves, their organizational affiliation with the Internal Revenue Service (IRS) (*e.g.*, Criminal Investigation (CI)) or TIGTA (*e.g.*, Office of Investigations (OI)), and the nature of their investigation, when making an oral, written, or electronic contact with a third party witness through the use and presentation of any identification media (including, but not limited to, an IRS or TIGTA badge, credential, or business card) or through the use of an information document request, summons, or correspondence on IRS or

TIGTA letterhead or which bears a return address or signature block that reveals affiliation with the IRS or TIGTA.

(4) This section does not address or affect the requirements under section 7602(c) (relating to contact of third parties).

(b) *Disclosure of return information in connection with certain personnel or claimant representative matters*. In connection with official duties relating to any investigation concerned with enforcement of any provision of the Internal Revenue Code, including enforcement of any rule, or directive prescribed by the Secretary or the Commissioner of Internal Revenue under any provision of the Internal Revenue Code, or the enforcement of any provision related to tax administration under the jurisdiction of the IRS or TIGTA, that affects or may affect the personnel or employment rights or status, or civil or criminal liability, of any former, current, or prospective employee of the Treasury Department or the rights of any person who is, or may be, a party to an administrative action or proceeding pursuant to 31 U.S.C. 330 (relating to practice before the Treasury Department), an internal revenue or TIGTA employee is authorized to disclose return information for the purpose of obtaining, verifying, or establishing other information which is or may be relevant and material to the investigation.

(c) *Definitions*. The following definitions apply to this section—

(1) *Disclosure of return information to the extent necessary* means a disclosure of return information which an internal revenue or TIGTA employee, based on the facts and circumstances, at the time of the disclosure, reasonably believes is necessary to obtain information to perform properly the official duties described by this section, or to accomplish properly the activities connected with carrying out those official duties. The term *necessary* in this context does not mean essential or indispensable, but rather appropriate and helpful in obtaining the information sought. Nor does *necessary* in this context refer to the necessity of conducting an investigation or the appropriateness of the means or methods chosen to conduct the investigation. Section 6103(k)(6) does not limit or proscribe IRS or TIGTA officers and employees with respect to the decision to initiate or how to conduct an investigation. Disclosures under this subparagraph, however, may not be made indiscriminately or solely for the benefit of the recipient or as part of a negotiated *quid pro quo* arrangement. This paragraph (c)(1) is illustrated by the following examples:

*Example 1*. A revenue agent contacts a taxpayer's customer regarding the customer's purchases made from the taxpayer during the year under investigation. The revenue agent is able to obtain the purchase information only by disclosing the taxpayer's identity and the fact of the investigation. Depending on the facts and circumstances known to the revenue agent at the time of the disclosure, such as the way the customer maintains his records, it also may be necessary for the revenue agent to inform the customer of the date of the purchases and the types of merchandise involved for the customer to find the purchase information.

*Example 2*. A revenue agent contacts a third party witness to obtain copies of invoices of sales made to a taxpayer under examination. The third party witness provides copies of the sales invoices in question and then asks the revenue agent for the current address of the taxpayer because the taxpayer still owes money to the third party witness. The revenue agent may not disclose that current address because this disclosure would be only for the benefit of the third party witness and not necessary to obtain information for the examination.

*Example 3*. A revenue agent contacts a third party witness to obtain copies of invoices of sales made to a taxpayer under examination. The third party witness agrees to provide copies of the sales invoices in question only if the revenue agent provides him with the current address of the taxpayer because the taxpayer still owes money to the third party witness. The revenue agent may not disclose that current address because this disclosure would be a negotiated *quid pro quo* arrangement.

(2) *Disclosure of return information to accomplish properly an activity connected with official duties* means a disclosure of return information to carry out a function associated with official duties generally consistent with established practices and procedures. This paragraph (c)(2) is illustrated by the following example:

*Example*. A taxpayer failed to file an income tax return and pay the taxes owed. After the taxes were assessed and the taxpayer was notified of the deficiencies, a revenue officer filed a notice of federal tax lien and then served a notice of levy on the taxpayer's bank. The notices of lien and levy contained the taxpayer's name, social security number, amount of outstanding liability, and the tax period and type of tax involved. The taxpayer's assets were levied to satisfy the tax debt, but it was determined that, prior to the levy, the revenue officer failed to issue the taxpayer a notice of right to hearing before the levy, as required by section 6330. The disclosure of the taxpayer's return information in the notice of levy is authorized by section 6103(k)(6) despite the revenue officer's failure to issue the notice of right to hearing. The ultimate validity of the underlying levy is irrelevant to the issue of whether the disclosure was authorized by section 6103(k)(6).

(3) *Information not otherwise reasonably available* means information that an internal revenue or TIGTA employee reasonably believes, under the facts and circumstances, at the time of a disclosure, cannot be obtained in a sufficiently accurate or probative form, or in a timely manner, and without impairing the proper performance of the official duties described by this section, without making the disclosure. This definition does not require or create the presumption or expectation that an internal revenue or TIGTA employee must seek information from a taxpayer or authorized representative prior to contacting a third party witness in an investigation. Moreover, an internal revenue or TIGTA employee may make a disclosure to a third party witness to corroborate information provided by a taxpayer. This paragraph (c)(3) is illustrated by the following examples:

*Example 1*. A revenue agent is conducting an examination of a taxpayer. The taxpayer refuses to cooperate or provide any information to the revenue agent. Information relating to the taxpayer's examination would be information not otherwise reasonably available because of the taxpayer's refusal to cooperate and supply any information to the revenue agent. Therefore, the revenue agent may seek information from a third party witness. Neither the Internal Revenue Code, IRS procedures, nor these regulations require repeated contacting of an uncooperative taxpayer.

*Example 2*. A special agent is conducting a criminal investigation of a taxpayer. The special agent has acquired certain information from the taxpayer. Although the special agent has no specific reason to disbelieve the taxpayer's information, the special agent contacts several third party witnesses to confirm the information. The special agent may contact third party witnesses to verify the correctness of the information provided by the taxpayer because the IRS is not required to rely solely on information provided by a taxpayer, and a special agent may take appropriate steps, including disclosures to third party witnesses under section 6103(k)(6), to verify independently or corroborate information obtained from a taxpayer.

(4) *Internal revenue employee* means, for purposes of this section, an officer or employee of the IRS or Office of Chief Counsel for the IRS.

(5) *TIGTA employee* means an officer or employee of the Office of Treasury Inspector General for Tax Administration.

(d) *Examples*. The following examples illustrate the application of this section:

*Example 1*. A revenue agent is conducting an examination of a taxpayer. The taxpayer has been very

cooperative and has supplied copies of invoices as requested. Some of the taxpayer's invoices show purchases that seem excessive in comparison to the size of the taxpayer's business. The revenue agent contacts the taxpayer's suppliers for the purpose of corroborating the invoices the taxpayer provided. In contacting the suppliers, the revenue agent discloses the taxpayer's name, the dates of purchase, and the type of merchandise at issue. These disclosures are permissible under section 6103(k)(6) because, under the facts and circumstances known to the revenue agent at the time of the disclosures, the disclosures were necessary to obtain information (corroboration of invoices) not otherwise reasonably available because suppliers would be the only source available for corroboration of this information.

*Example 2*. A revenue agent is conducting an examination of a taxpayer. The revenue agent asks the taxpayer for business records to document the deduction of the cost of goods sold shown on Schedule C of the taxpayer's return. The taxpayer will not provide the business records to the revenue agent, who contacts a third party witness for verification of the amount on the Schedule C. In the course of the contact, the revenue agent shows the Schedule C to the third party witness. This disclosure is not authorized under section 6103(k)(6). Section 6103(k)(6) permits disclosure only of return information, not the return (including schedules and attachments) itself. If necessary, a revenue agent may disclose return information extracted from a return when questioning a third party witness. Thus, the revenue agent could have extracted the amount of cost of goods sold from the Schedule C and disclosed that amount to the third party witness.

*Example 3*. A special agent is conducting a criminal investigation of a taxpayer, a doctor, for tax evasion. Notwithstanding the records provided by the taxpayer and the taxpayer's bank, the special agent decided to obtain information from the taxpayer's patients to verify amounts paid to the taxpayer for his services. Accordingly, the special agent sent letters to the taxpayer's patients to verify these amounts. In the letters, the agent disclosed that he was a special agent with IRS-CI and that he was conducting a criminal investigation of the taxpayer. Section 6103(k)(6) permits these disclosures to confirm the taxpayer's income. The decision of whether to verify information already obtained is a matter of investigative judgment and is not limited by section 6103(k)(6).

*Example 4*. Corporation A requests a private letter ruling (PLR) as to the taxability of a merger with Corporation B. Corporation A has submitted insufficient information about Corporation B to consider properly the tax consequences of the proposed merger. Accordingly, information is needed from Corporation B. Under section 6103(k)(6), the IRS may disclose Corporation A's return information to Corporation B to the extent necessary to obtain information from Corporation B for the purpose of properly considering the tax consequences of the proposed merger that is the subject of the PLR.

(e) *Effective date*. This section is applicable on July 10, 2003.

Robert E. Wenzel,
*Assistant Deputy Commissioner of Internal Revenue*.

Approved June 27, 2003.

Pamela F. Olson,
*Assistant Secretary of the Treasury*.

(Filed by the Office of the Federal Register on July 9, 2003, 8:45 a.m., and published in the issue of the Federal Register for July 10, 2003, 68 F.R. 41073)

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## Section 6104.—Publicity of Information Required From Certain Exempt Organizations and Certain Trusts

*26 CFR 301.6104(b)–1: Publicity of information on certain information returns.*

## T.D. 9070

## DEPARTMENT OF THE TREASURY
## Internal Revenue Service
## 26 CFR Part 301

## Authority to Charge Fees for Furnishing Copies of Exempt Organizations' Material Open to Public Inspection Under IRC §6104

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: These temporary regulations amend the existing regulations regarding fees for copies of exempt organizations' material the IRS must make available to the public under section 6104 of the Internal Revenue Code (Code), to provide that copying fees shall be no more than under the fee schedule promulgated pursuant to the Freedom of Information Act (FOIA) by the Commissioner of Internal Revenue (Commissioner) (the "IRS' FOIA fee schedule"). The existing regulations authorize the IRS to charge fees for such copies, but do not stipulate the amount of the fees. These temporary regulations also make a conforming amendment to the existing regulation concerning the fees that an exempt organization may charge for furnishing copies of such material when required to do so, to provide that these fees shall be no more than the per-page copying fee — without regard to any otherwise applicable fee exclusion for the first 100 pages — under the IRS' FOIA fee schedule. The text of these temporary regulations also serves as the text of the proposed regulations (REG–142538–02) set forth in the notice of proposed rulemaking on this subject in this issue of the Bulletin.

DATES: These temporary regulations are effective July 9, 2003.

FOR FURTHER INFORMATION CONTACT: Sarah Tate, 202–622–4590 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

**Background**

The IRS' obligation under section 6104 of the Code to make certain information open to public inspection is satisfied by making the information available to the public at such times and places as the IRS shall reasonably prescribe. The existing regulations provide that copies of the information that the IRS must make open to public inspection shall be available to members of the public upon written request. Currently, §301.6104(a)–6(d) provides that the IRS will charge a "fee" for copies of material available to the public under section 6104(a)(1) of the Code, including approved applications for recognition of tax-exempt status and supporting papers. Currently, §301.6104(b)–1(d)(4) provides that the Commissioner may prescribe a "reasonable fee" for copies of material available to the public under section 6104(b) of the Code, including certain information furnished on exempt organization annual information returns.

These temporary regulations amend the existing regulations to clarify that any fee assessed by the IRS in the exercise of its discretion, whether in the case of requests for photocopies, or for special media (*e.g.*, computer printouts, transcripts, CD-ROM reproductions), shall be no more than the fee under the IRS' FOIA fee schedule. For paper copies, the IRS' FOIA fee schedule, at 26 CFR §601.702(f)(3)(iv), grants the first 100 pages free of charge to requesters other than commercial use requesters, but otherwise sets a per-page copying fee applicable to all requesters. The IRS' FOIA fee schedule, at 26 CFR §601.702(f)(5)(iii)(B), also authorizes

fees based on the actual costs of non-paper products, such as computer disks.

Currently, §301.6104(d)–1(d)(3)(i) provides that an exempt organization required to furnish copies to a requester may charge a copying fee corresponding to that which the IRS may charge. These temporary regulations amend existing regulation §301.6104(d)–1(d)(3)(i) to make clear that an exempt organization may charge the applicable per-page copying fee — for any number of pages — under the IRS' FOIA fee schedule. An exempt organization need not provide the first 100 pages of copies free of charge to requesters other than commercial use requesters as the IRS does.

Through December 18, 2002, the IRS' FOIA fee schedule set fees of $1.00 for the first page and $.15 for each subsequent page of exempt organization returns and related documents. 26 CFR §601.702(f)(5)(iv)(B). Effective December 19, 2002, the fees are to be established by the Commissioner from time to time. 26 CFR §601.702(f) as updated at 67 FR 69673, 69682. Currently, the Commissioner has established fees of $.20 per page, up to 8½ by 14 inches, made by photocopy or similar process, and actual cost for other types of duplication. 31 CFR §1.7(g)(1)(i), (ii) and (iii).

**Explanation of Provisions**

These temporary regulations amend §301.6104(a)–6(d) and §301.6104(b)–1(d)(4) to provide that the fees the IRS charges for furnishing copies of materials available to the public under §301.6104(a)–6(d) and §301.6104(b)–1(d)(4) shall be no more than under the IRS' FOIA fee schedule.

These temporary regulations also amend §301.6104(d)–1(d)(3)(i) to make clear that an exempt organization may charge the applicable per-page copying fee under the IRS' FOIA fee schedule — without regard to any otherwise applicable fee exclusion for the first 100 pages.

**Special Analyses**

It has been determined that this Treasury Decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these temporary regulations. For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6) please refer to the cross-reference notice of proposed rulemaking published elsewhere in this issue of the Bulletin. Pursuant to section 7805(f) of the Code, these temporary regulations will be submitted to the Chief Counsel of the Small Business Administration for comment on their impact on small businesses.

**Drafting Information**

The principal author of these temporary regulations is Sarah Tate, Office of Associate Chief Counsel (Procedure & Administration), Disclosure & Privacy Law Division.

**Adoption of Amendments to the Regulations**

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Par. 1. The authority citation for part 301 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. § 7805 * * *

Section 301.6104(a)–6(d) is also issued under 5 U.S.C. §552

Section 301.6104(b)–1(d)(4) is also issued under 5 U.S.C. §552

Section 301.6104(d)–1(d)(3)(i) is also issued under 5 U.S.C. §552 * * *

Par. 2. In §301.6104(a)–6(d), the fourth sentence is amended as follows:

*§301.6104(a)–6 Procedural rules for inspection.*

* * * * *

(d) * * * Any fees the Internal Revenue Service may charge for furnishing copies under this section shall be no more than under the fee schedule promulgated pursuant to section (a)(4)(A)(i) of the Freedom of Information Act, 5 U.S.C. §552, by the Commissioner from time to time.

Par. 3. In §301.6104(b)–1(d)(4), the last sentence is amended as follows:

*§301.6104(b)–1 Publicity of information on certain information returns.*

* * * * *

(d) * * * Any fees the Internal Revenue Service may charge for furnishing copies under this section shall be no more than under the fee schedule promulgated pursuant to section (a)(4)(A)(i) of the Freedom of Information Act, 5 U.S.C. §552, by the Commissioner from time to time.

Par. 4. In §301.6104(d)–1(d)(3)(i), the second sentence is amended as follows:

*§301.6104(d)–1 Public inspection and distribution of applications for tax exemption and annual information returns of tax-exempt organizations.*

* * * * *

(d)* * * A fee is reasonable only if it is no more than the total of the applicable per-page copying charge prescribed by the fee schedule promulgated pursuant to section (a)(4)(A)(i) of the Freedom of Information Act, 5 U.S.C. §552, by the Commissioner from time to time, and the actual postage costs incurred by the organization to send the copies. The applicable per-page copying charge shall be determined without regard to any applicable fee exclusion provided in the fee schedule for an initial or *de minimis* number of pages (*e.g.* the first 100 pages).

Robert E. Wenzel,
*Deputy Commissioner of Internal Revenue.*

Approved July 1, 2003.

Gregory Jenner,
*Deputy Assistant Secretary of the Treasury.*

(Filed by the Office of the Federal Register on July 8, 2003, 8:45 a.m., and published in the issue of the Federal Register for July 9, 2003, 68 F.R. 40768)

# Part III. Administrative, Procedural, and Miscellaneous

## Comments on Mortality Tables

## Notice 2003–62

The Internal Revenue Service and the Treasury Department request comments regarding the mortality tables used in determining current liability under § 412(l)(7) of the Internal Revenue Code and § 302(d)(7) of the Employee Retirement Income Security Act of 1974 (ERISA). The Service and Treasury anticipate that in no event will there be any change in the mortality tables for plan years beginning before January 1, 2005.

BACKGROUND

Section 412 of the Code and § 302 of ERISA provide minimum funding requirements with respect to defined benefit and money purchase pension plans. Section 412(l) of the Code and § 302(d) of ERISA provide additional funding requirements for certain underfunded defined benefit pension plans, generally based on a plan's unfunded current liability, as defined in § 412(l)(8) of the Code and § 302(d)(8) of ERISA.

Section 412(l)(7)(C)(ii) of the Code and § 302(d)(7)(C)(ii) of ERISA provide that, for purposes of determining current liability, the mortality table used shall be the table prescribed by the Secretary. These sections also set forth the basis for the Secretary to use in prescribing a mortality table. Under § 412(l)(7)(C)(ii)(I) of the Code and § 302(d)(7)(C)(ii)(I) of ERISA, the initial mortality table used in determining current liability under § 412(l)(7) of the Code and § 302(d)(7) of ERISA must be based on the prevailing commissioners' standard table (described in § 807(d)(5)(A) of the Code) used to determine reserves for group annuity contracts issued on January 1, 1993. Rev. Rul. 95–28, 1995–1 C.B. 74, sets forth two gender-specific mortality tables for this purpose.

Under § 412(l)(7)(C)(ii)(III) of the Code and § 302(d)(7)(C)(ii)(II) of ERISA, the Secretary of the Treasury is instructed to periodically (at least every 5 years) review any tables in effect under that subsection and, to the extent necessary, by regulation update the tables to reflect the actual experience of pension plans and projected trends in such experience. Section 412(l)(7)(C)(ii)(II) of the Code and § 302(d)(7)(C)(ii)(II) of ERISA further provide that such tables shall take into account the results of available independent studies of mortality of individuals covered by pension plans. Under § 412(l)(7)(C)(ii)(II) of the Code and § 302(d)(7)(C)(ii)(II) of ERISA, the earliest possible effective date for any new mortality tables is plan years beginning after December 31, 1999.

Section 412(l)(7)(C)(iii)(I) of the Code and § 302(d)(7)(C)(iii)(I) of ERISA provide that, in the case of plan years beginning after December 31, 1995, the Secretary shall establish mortality tables which may be used (in lieu of the tables under § 412(l)(7)(C)(ii) of the Code and § 302(d)(7)(C)(ii of ERISA) to determine current liability under § 412(l)(7) of the Code and § 302(d)(7) of ERISA for individuals who are entitled to benefits under the plan on account of disability. The Secretary shall establish separate tables for individuals whose disabilities occur in plan years beginning before January 1, 1995, and for individuals whose disabilities occur in plan years beginning on or after such date.

Section 412(l)(7)(C)(iii)(II) of the Code and § 302(d)(7)(C)(iii)(II) of ERISA provide that in the case of disabilities occurring in plan years beginning after December 31, 1994, the tables under § 412(l)(7)(C)(iii)(I) of the Code and § 302(d)(7)(C)(iii)(I) of ERISA shall apply only with respect to individuals described in each subclause who are disabled within the meaning of title II of the Social Security Act and the regulations thereunder. Rev. Rul. 96–7, 1996–1 C.B. 59, sets forth the mortality tables established under § 412(l)(7)(C)(iii).

In Rev. Rul. 95–28, the Service and Treasury requested comments regarding mortality tables to be used for determining current liability for plan years beginning after December 31, 1999.

In Announcement 2000–7, 2000–1 C.B. 586, the Service and Treasury also requested comments regarding mortality tables to be used for determining current liability for plan years beginning after December 31, 1999, but also indicated that it was anticipated that in no event would there be any change in the mortality tables for plan years beginning before January 1, 2001. To date, no change has been made in the mortality tables issued in Rev. Rul. 95–28 or Rev. Rul. 96–7.

INDEPENDENT STUDIES OF MORTALITY OF INDIVIDUALS COVERED BY PENSION PLANS

The Service and Treasury are aware of a number of reviews of mortality experience for retirement plan participants undertaken by the Retirement Plans Experience Committee of the Society of Actuaries. The most recent of these studies, titled the RP–2000 Mortality Tables Report, published in 2002 and based on pension plan experience for the years 1990–94, was submitted to the Secretary in response to Announcement 2000–7. The Service and Treasury invite commentators to submit any other independent studies of pension plan experience.

REFLECTION OF MORTALITY TRENDS

As noted above, any updated mortality tables the Secretary issues are to reflect projected trends in mortality experience. In that regard, the Service and Treasury request the submission of studies regarding trends in mortality experience, whether or not the studies are limited to individuals covered by pension plans. However, to the extent that a study relating to mortality experience is not limited to individuals covered by pension plans, comments are requested about how such mortality trends might be modified to reflect the trends among individuals covered by pension plans.

To the extent the Service and Treasury determine that it is appropriate to project increased longevity in the future, it will be necessary to determine the methodology to use in incorporating this increased longevity into the tables. The Service and Treasury are aware that mortality trends may be reflected on an ongoing basis through the use of the following types of mortality tables:

- generational (*i.e.*, tables that are updated each year through the use of prescribed projection factors. Thus, separate sets of mortality factors are determined for each year of birth.)
- modified generational (*i.e.*, generational tables that are applicable for grouped calendar years of birth)
- sequentially static (*i.e.*, tables that are applicable for all calendar years of birth that are updated periodically through the use of prescribed projection factors at prescribed times)

The Service and Treasury request comments on these methods and any other methods commentators believe appropriately reflect mortality trends. In particular, the Service and Treasury request comments on the relative administrative complexities of the various methods of reflecting mortality trends. In addition, with regard to modified generational tables, comments are requested as to the size of the calendar year groupings, and with regard to sequentially static tables, comments are requested as to how often such tables should be updated.

OTHER FACTORS TO BE TAKEN INTO ACCOUNT

In addition to age and year of birth, there are other factors that have been demonstrated to be relevant in predicting an individual's mortality. For example, as noted above, the current mortality tables used for purposes of determining current liability are gender specific. Comments are requested as to the extent that separate mortality tables should be prescribed that take into account gender or other factors, with particular attention paid to the administrative issues in applying such distinctions. Comments in this regard are specifically requested as to the how it would be determined which category an individual fits into, the extent to which an individual, once categorized, remains in that same category, the classification of individuals for whom adequate information is unavailable, whether distinctions are applicable to beneficiaries, and the extent to which distinctions may overlap or work at cross purposes. Some examples of factors that could be used to create separate mortality tables are the following:

- gender (*i.e.*, male versus female)
- tobacco use (*i.e.*, smoker versus non-smoker)
- job classification (*e.g.*, blue collar versus white collar)
- annuity size (*i.e.*, high annuity amount versus low annuity amount)
- Income (*i.e.*, high income versus low income)

Comments are also requested with regard to whether classification systems, if permitted, should be mandatory or optional.

COMMENTS REQUESTED

The Service and Treasury invite comments on the issues identified in this notice and other issues related to the mortality tables used in the determination of current liability. Comments should be submitted by December 31, 2003, and should reference Notice 2003–62.

Comments may be submitted to CC:PA:RU (Notice 2003–62), room 5203, Internal Revenue Service, Attention: SE:T:EP:RA:T:A1, POB 7604 Ben Franklin Station, Washington, DC 20044. Comments may be hand delivered between the hours of 8 a.m. and 5 p.m. Monday to Friday to: CC:PA:RU (Notice 2003–62), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, D.C. Alternatively, comments may be submitted via the Internet at ***Notice.Comments@irscounsel.treas.gov***. All comments will be available for public inspection and copying.

DRAFTING INFORMATION

The principal author of this notice is Lawrenece Isaacs of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans' taxpayer assistance telephone service at 1–877–829–5500 (a toll-free number) between the hours of 8:00 a.m. and 6:30 p.m., Eastern Time, Monday through Friday. Mr. Isaacs can be reached at (202) 283–9888 (not a toll-free number).

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## Weighted Average Interest Rate Update

## Notice 2003–63

Sections 412(b)(5)(B) and 412(l)(7)(C)(i) of the Internal Revenue Code provide that the interest rates used to calculate current liability for purposes of determining the full funding limitation under § 412(c)(7) and the required contribution under § 412(l) must be within a permissible range around the weighted average of the rates of interest on 30-year Treasury securities during the four-year period ending on the last day before the beginning of the plan year.

Notice 88–73, 1988–2 C.B. 383, provides guidelines for determining the weighted average interest rate and the resulting permissible range of interest rates used to calculate current liability for the purpose of the full funding limitation of § 412(c)(7) of the Code.

Section 417(e)(3)(A)(ii)(II) of the Code defines the applicable interest rate, which must be used for purposes of determining the minimum present value of a participant's benefit under § 417(e)(1) and (2), as the annual rate of interest on 30-year Treasury securities for the month before the date of distribution or such other time as the Secretary may by regulations prescribe. Section 1.417(e)–1(d)(3) of the Income Tax Regulations provides that the applicable interest rate for a month is the annual interest rate on 30-year Treasury securities as specified by the Commissioner for that month in revenue rulings, notices or other guidance published in the Internal Revenue Bulletin.

The rate of interest on 30-year Treasury Securities for August 2003 is 5.31 percent. Pursuant to Notice 2002–26, 2002–1 C.B. 743, the Service has determined this rate as the monthly average of the daily determination of yield on the 30-year Treasury bond maturing in February 2031.

Section 405 of the Job Creation and Worker Assistance Act of 2002 amended § 412(l)(7)(C) of the Code to provide that for plan years beginning in 2002 and 2003 the permissible range is extended to 120 percent.

The following rates were determined for the plan years beginning in the month shown below.

| Month | Year | Weighted Average | 90% to 110% Permissible Range | 90% to 120% Permissible Range |
|---|---|---|---|---|
| September | 2003 | 5.30 | 4.77 to 5.84 | 4.77 to 6.37 |

**Drafting Information**

The principal authors of this notice are Paul Stern and Tony Montanaro of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans' taxpayer assistance telephone service at 1–877–829–5500 (a toll-free number), between the hours of 8:00 a.m. and 6:30 p.m. Eastern time, Monday through Friday. Mr. Stern may be reached at 1–202–283–9703. Mr. Montanaro may be reached at 1–202–283–9714. The telephone numbers in the two preceding sentences are not toll-free.

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*26 CFR 601.201: Rulings and determination letters.*
*(Also, Part I, §§ 401; 1.401(b)–1.)*

## Rev. Proc. 2003–72

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SECTION 1. PURPOSE

.01 This revenue procedure extends until January 31, 2004, the deadline for applying for determination letters for certain pre-approved qualified retirement plans (that is, master and prototype and volume submitter plans). A plan is eligible for this extension only if the plan's GUST [1]remedial amendment period ends on or after September 30, 2003, and before January 1, 2004, and either (i) the plan is amended to comply with GUST within the plan's GUST remedial amendment period, or (ii) a compliance fee of $250 is paid with the determination letter application.

.02 This revenue procedure also extends the time by which defined contribution plans must be amended to comply with final and temporary regulations under § 401(a)(9) of the Internal Revenue Code, relating to required minimum distributions, until the later of the end of the first plan year beginning on or after January 1, 2003, or the end of the GUST remedial amendment period.

[1] "GUST" refers to the following:
- the Uruguay Round Agreements Act, Pub. L. 103–465;
- the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103–353;
- the Small Business Job Protection Act of 1996, Pub. L. 104–188;
- the Taxpayer Relief Act of 1997, Pub. L. 105–34;
- the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105–206; and
- the Community Renewal Tax Relief Act of 2000, Pub. L. 106–554.

## SECTION 2. BACKGROUND

.01 Under § 401(b), plan sponsors have a remedial amendment period in which to adopt plan amendments for GUST. The end of the GUST remedial amendment period is the deadline for making all GUST plan amendments and other plan amendments specifically enumerated in Rev. Proc. 99–23, 1999–1 C.B. 920. The GUST remedial amendment period also applies with respect to all disqualifying provisions of new plans adopted or effective after December 7, 1994, and with respect to all plan amendments adopted after December 7, 1994, that would cause an existing plan to fail to be qualified.

.02 Section 1.401(b)–1(e)(3) of the Income Tax Regulations provides that the filing of a determination letter request on or before the end of a remedial amendment period will extend the period until the expiration of 91 days after (i) the date on which notice of final determination with respect to the request is issued by the Service, the request is withdrawn, or the request is otherwise finally disposed of by the Service; or (ii) the date on which a decision of the United States Tax Court regarding a timely filed petition for declaratory judgment becomes final. Accordingly, if a determination letter application is filed on or before the end of a remedial amendment period, amendments that are included with the application may be submitted in proposed (unadopted) form and need not be adopted before filing the determination letter application. Of course, all amendments needed to qualify the plan must then be adopted by the time described in § 1.401(b)–1(e)(3).

.03 Generally, the GUST remedial amendment period ended on the later of February 28, 2002, or the last day of the first plan year beginning on or after January 1, 2001. However, Rev. Proc. 2000–20, 2000–1 C.B. 553, (as modified by Rev. Proc. 2000–27, 2000–1 C.B. 1272; Rev. Proc. 2001–55, 2001–2 C.B. 552; Rev. Proc. 2002–6, 2002–1 C.B. 203; Rev. Proc. 2002–29, 2002–1 C.B. 1176; Rev. Proc. 2002–73, 2002–2 C.B. 932; and Notice 2001–42, 2001–2 C.B. 70) provides an extension of the GUST remedial amendment period for employers who, by the end of the GUST remedial amendment period (determined without regard to the extension), have adopted a pre-approved plan or certified their intent to adopt such a plan. If the requirements for the extension are satisfied, the GUST remedial amendment period for the employer's plan will not end before the later of September 30, 2003, or the end of the 12th month beginning after the date on which the Service issues a GUST opinion or advisory letter for the pre-approved plan.

.04 Certain conditions must be met for a plan to be eligible for the extension of the GUST remedial amendment period under Rev. Proc. 2000–20. One of these conditions is that a determination letter application for the plan must be filed within the extended GUST remedial amendment period if the employer is not able to rely directly on a favorable opinion or advisory letter under section 8 of Rev. Proc. 2003–6, 2003–1 I.R.B. 191. In accordance with § 1.401(b)–1(e)(3), employers that request determination letters within the extended GUST remedial amendment period may submit amendments that are in proposed form.

.05 For plans eligible for the extension under Rev. Proc. 2000–20, the end of the GUST remedial amendment period is generally also the deadline for the adoption of plan amendments required by Rev. Rul. 2001–62, 2001–2 C.B. 632, regarding changes to the mortality tables under § 417(e); Rev. Rul. 2002–27, 2002–1 C.B. 925, regarding the incorporation of deemed § 125 compensation in a plan's § 415(c)(3) definition of compensation; and Notice 2001–37, 2001–1 C.B. 1340, regarding changes made by the Community Renewal Tax Relief Act of 2000 to the definitions of compensation in §§ 403(b)(3), 414(s)(2), and 415(c)(3).

.06 Notice 2001–42 provides a remedial amendment period under § 401(b), ending no earlier than the end of the 2005 plan year, in which any needed retroactive remedial plan amendments for the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16, (EGTRRA), must be adopted (the EGTRRA remedial amendment period). The availability of the EGTRRA remedial amendment period is conditioned on the timely adoption of required good faith EGTRRA plan amendments. For plans eligible for the extension under Rev. Proc. 2000–20, the end of the GUST remedial amendment period is generally also the deadline for the adoption of good faith EGTRRA plan amendments.[2]

.07 Rev. Proc. 2002–29, as modified by Rev. Proc. 2003–10, 2003–2 I.R.B. 259, provides that defined contribution plans must be amended to the extent necessary to comply with final and temporary regulations under § 401(a)(9). In general, these amendments must be adopted by the end of the first plan year beginning on or after January 1, 2003. However, sponsors of pre-approved plans are required to amend their defined contribution plans by December 31, 2003, and, in the case of master and prototype plans, furnish copies of the amendments to adopting employers. Rev. Proc. 2002–29 also provides that if a plan is timely amended to comply with the final and temporary regulations under § 401(a)(9) and, as a result of the amendment, there is a disqualifying provision under § 401(b), the remedial amendment period with respect to the disqualifying provision will end at the end of the EGTRRA remedial amendment period.

.08 Rev. Proc. 2003–44, 2003–25 I.R.B. 1051, describes the Employee Plans Compliance Resolution System (EPCRS), a comprehensive system of correction programs that permits plan sponsors to correct qualification failures and thereby preserve their plans' tax-favored status.

## SECTION 3. EXTENSION OF TIME TO AMEND DEFINED CONTRIBUTION PLANS FOR FINAL AND TEMPORARY REGULATIONS UNDER § 401(a)(9)

.01 The time by which defined contribution plans must be amended to comply with the final and temporary regulations under § 401(a)(9) is extended to the later of the last day of the first plan year beginning on or after January 1, 2003, or the end of the GUST remedial amendment period. This does not extend the December 31, 2003, deadline for sponsors of pre-approved plans to amend their defined contribution plans and, in the case of master and prototype plans, furnish copies of the

[2] In some cases, earlier adoption of good faith EGTRRA plan amendments may be necessary in order to avoid a decrease or elimination of benefits protected by § 411(d)(6). See the discussion of § 411(d)(6) in section III of Notice 2001–42.

amendments to adopting employers. As provided in Rev. Proc. 2002–29, if, as a result of a timely plan amendment to comply with the final and temporary regulations under § 401(a)(9), there is a disqualifying provision under § 401(b), the remedial amendment period with respect to the disqualifying provision will end at the end of the EGTRRA remedial amendment period.

.02 Sections 4 though 7, below, extend the time for filing determination letter applications for certain pre-approved plans to January 31, 2004. If a determination letter application is filed by January 31, 2004, for a plan that is eligible for the extension, the filing will extend the plan's GUST remedial amendment period as provided in § 1.401(b)–1(e)(3). Accordingly, in this case, plan amendments for the final and temporary regulations under § 401(a)(9) would not have to be adopted prior to the 91st day following issuance of the favorable determination letter.

## SECTION 4. EXTENSION OF TIME TO FILE DETERMINATION LETTER APPLICATIONS

.01 An application for a determination letter for an eligible plan that is filed after the end of the plan's GUST remedial amendment period but on or before January 31, 2004, will be deemed to have been filed within the plan's GUST remedial amendment period for purposes of satisfying the conditions for the extension of the GUST remedial amendment period under Rev. Proc. 2000–20 as well as for purposes of § 1.401(b)–1(e)(3). Thus, the filing of a determination letter application by January 31, 2004, for an eligible plan will extend the plan's GUST remedial amendment period through the 91st day following issuance of a favorable determination letter.

.02 A plan is an eligible plan for purposes of this revenue procedure if the plan's GUST remedial amendment period ends on or after September 30, 2003, and before January 1, 2004, and the plan satisfies either (i) the timely amendment requirements of section 5 or (ii) the streamlined compliance requirements of section 6.

## SECTION 5. PLANS THAT ARE AMENDED WITHIN THE GUST REMEDIAL AMENDMENT PERIOD

.01 A plan satisfies the timely amendment requirements of this section 5 if the plan is amended to comply with GUST within the plan's GUST remedial amendment period. For this purpose, a plan will be treated as having been amended to comply with GUST within the plan's GUST remedial amendment period if plan amendments that represent a *bona fide* effort to comply with the requirements of GUST have in fact been adopted (that is, they are not in proposed form) by the end of the plan's GUST remedial amendment period (determined without regard to § 1.401(b)–1(e)(3)).

.02 For purposes of this section, *bona fide* amendments that are adopted by the end of the GUST remedial amendment period that are made contingent on the receipt of a favorable determination letter will be considered adopted by that date, provided such amendments become effective (or would become effective, but for the Service's request for changes to the amendments or additional amendments) upon receipt of a favorable determination letter without further action by the plan sponsor.

.03 The Service recognizes that employers may discover, after the expiration of the GUST remedial amendment period, that changes to their amendments or other amendments may be needed. Similarly, the Service may request changes to amendments that employers submit or additional amendments in connection with determination letter applications. The fact that, in connection with the determination letter process, the employer adopts or submits in proposed form, or the Service requests, such changes or such additional amendments will not mean that the amendments the employer adopted by the end of the GUST remedial amendment period did not represent a *bona fide* effort to comply with the requirements of GUST.

## SECTION 6. STREAMLINED COMPLIANCE REQUIREMENTS FOR PLANS THAT ARE NOT AMENDED WITHIN THE GUST REMEDIAL AMENDMENT PERIOD

.01 A plan satisfies the streamlined compliance requirements of this section 6 if (i) the plan does not satisfy the timely amendment requirements of section 5 but would not be a late amender without regard to GUST and the other requirements described in section 2; and (ii) an application for a determination letter for the plan, including payment of a compliance fee of $250, is submitted by January 31, 2004. This fee is in addition to the determination letter user fee under Rev. Proc. 2003–8, 2003–1 I.R.B. 236, or its successor, if applicable.

.02 An application submitted under this section 6 should have the words "Rev. Proc. 2003–72" written on the top of the determination letter application form (generally Form 5307, *Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans*). The $250 compliance fee is to be paid by check or money order, made payable to the U.S. Treasury, and with "Rev. Proc. 2003–72" written on the check or money order. This $250 compliance fee should **not** be reported on Form 8717, *User Fee for Employee Plan Determination Letter Request*. The appropriate determination letter user fee under Rev. Proc. 2003–8 or its successor, if applicable, should be paid using a separate check or money order, with the words "User Fee" written on it and accompanied by a completed Form 8717. The completed application, with the two checks and all other required documents should be sent to the address indicated in the instructions for the determination letter application form.

.03 This section applies in lieu of Rev. Proc. 2003–44 to eligible plans that satisfy the requirements of this section, including plans for which determination letters would not have been required had the plans been timely amended to comply with GUST. For example, this section applies in lieu of Rev. Proc. 2003–44 to a standardized M&P plan that has not been amended to comply with GUST by September 30, 2003 (the end of the plan's GUST remedial amendment period), provided an application for a determination letter for the plan, including payment of a compliance fee of $250, is submitted by January 31, 2004. Rev. Proc. 2003–44 applies to late amended or filed plans that are not eligible plans or for which determination letter applications are not filed by January 31, 2004.

SECTION 7. EXAMPLES

.01 Assume an employer's extended GUST remedial amendment period under Rev. Proc. 2000–20 ends on September 30, 2003, and the employer is required to file a determination letter application by then in order to meet the conditions for the extension. Provided the employer adopts its GUST-restated plan by September 30, 2003, a determination letter application for the plan that is filed by January 31, 2004, will be deemed to have been filed by September 30, 2003. Therefore, the plan will have met the conditions for the extended GUST remedial amendment period under Rev. Proc. 2000–20 and the period will be extended as provided in § 1.401(b)–1(e)(3). Therefore, assuming the issuance of a favorable determination letter, the GUST remedial amendment period for the plan will remain open through the 91st day following the issuance of the letter. Thus, the employer will not be required to adopt plan amendments for the final and temporary regulations under § 401(a)(9), or any additional amendments required to be adopted as a condition of the favorable determination letter, prior to the 91st day following issuance of the letter.

.02 Assume the same facts, except the employer fails to adopt its GUST-restated plan by September 30, 2003. Provided the employer files a determination letter application by January 31, 2004, and includes payment of the $250 compliance fee required by section 6, the application will be deemed to have been filed by September 30, 2003, regardless of whether the plan submitted with the application is in adopted or proposed form. Therefore, the plan will have met the conditions for the extended GUST remedial amendment period under Rev. Proc. 2000–20 and the period will be extended as provided in § 1.401(b)–1(e)(3). Therefore, assuming the issuance of a favorable determination letter, the GUST remedial amendment for the plan will remain open through the 91st day following the issuance of the letter. Thus, the employer will not be required to adopt its proposed GUST amendments (if applicable), plan amendments for the final and temporary regulations under § 401(a)(9), or any additional amendments required to be adopted as a condition of the favorable determination letter, prior to the 91st day following issuance of the letter.

SECTION 8. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2000–20, Rev. Proc. 2002–29, and Rev. Proc. 2003–44 are modified.

SECTION 9. EFFECTIVE DATE

This revenue procedure is effective September 22, 2003.

DRAFTING INFORMATION

The principal author of this revenue procedure is James Flannery of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue procedure, please contact the Employee Plans' taxpayer assistance telephone service at 1–877–829–5500 (a toll-free number), between the hours of 8:00 a.m. and 6:30 p.m. Eastern time, Monday through Friday. Mr. Flannery may be reached at 1–202–283–9888 (not a toll–free number).

# Part IV. Items of General Interest

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

## Disclosure of Return Information by Certain Officers and Employees for Investigative Purposes

## REG–140808–02

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9073) relating to the disclosure of return information pursuant to section 6103(k)(6) of the Internal Revenue Code. The temporary regulations describe the circumstances under which officers or employees of the IRS, the IRS Office of Chief Counsel, and the Office of Treasury Inspector General for Tax Administration (TIGTA), in connection with official duties relating to any examination, administrative appeal, collection activity, administrative, civil or criminal investigation, enforcement activity, ruling, negotiated agreement, prefiling activity, or other proceeding or offense under the internal revenue laws or related statutes, or in preparation for any proceeding described in section 6103(h)(2) (or investigation which may result in such a proceeding), may disclose return information to the extent necessary to obtain information relating to such official duties or to accomplish properly any activity connected with such official duties. The temporary regulations amend the existing regulations to clarify and elaborate on the facts and circumstances in which disclosure pursuant to section 6103(k)(6) is authorized. The temporary regulations clarify that IRS and TIGTA officers and employees make the determination, based on the facts and circumstances, at the time of the disclosure, whether a disclosure is necessary to obtain the information sought, and that section 6103(k)(6) does not affect the authority or decision of IRS and TIGTA officers and employees to initiate, or to conduct, an investigation, or to determine the nature of the investigation. The temporary regulations clarify that the return information of any taxpayer, not only the taxpayer under investigation, may be disclosed when necessary to obtain the particular information sought. The temporary regulations clarify that section 6103(k)(6) permits IRS and TIGTA officers and employees to identify themselves, their organizational affiliation with the IRS (*e.g.*, Criminal Investigation (CI)) or TIGTA (*e.g.*, Office of Investigations (OI)), and the nature of their investigation when making oral, written, or electronic contacts with third party witnesses.

DATES: Written and electronic comments and requests for a public hearing must be received by October 8, 2003.

ADDRESSES: Send submissions to CC:PA:RU (REG–140808–02), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:RU (REG–140808–02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet directly to the IRS Internet site: *www.irs.gov/regs*.

FOR FURTHER INFORMATION CONTACT: Helene R. Newsome, 202–622–4570 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

**Background**

Under section 6103(a), returns and return information are confidential unless the Internal Revenue Code (Code) authorizes disclosure. Section 6103(k)(6) authorizes an internal revenue officer or employee and an officer or employee of TIGTA, in connection with official duties relating to any audit, collection activity, civil or criminal tax investigation, or offense under the internal revenue laws or related statutes, to disclose return information to a person other than the taxpayer to whom such return information relates (or his or her representative) to the extent that such disclosure is necessary to obtain information not otherwise reasonably available with respect to the correct determination of tax, liability for tax, or the amount to be collected, or with respect to the enforcement of any other provision of the Code or related statutes. Disclosure is subject to situations and conditions prescribed by regulation.

The proposed regulations amend the existing regulations to reflect a recent legislative amendment to section 6103(k)(6). The Consolidated Appropriations Act, 2001, Public Law 106–554 (114 Stat. 2763), was signed into law on December 21, 2000. Section 1 of that Act enacted into law H.R. 5662, the Community Renewal Tax Relief Act of 2000. Section 313(c) of the Community Renewal Tax Relief Act of 2000 amended section 6103(k)(6) to clarify that officers or employees of TIGTA are among those persons authorized to make disclosures under section 6103(k)(6).

The proposed regulations also clarify the standard used in determining whether disclosures are authorized under section 6103(k)(6). Recent litigation indicates that there is some confusion as to the authority of IRS (and now TIGTA) officers and employees to make disclosures in certain situations under section 6103(k)(6). The proposed regulations seek to address these issues. In particular, the proposed regulations address the issues surrounding the disclosures that occur when IRS or TIGTA officers and employees introduce themselves to third party witnesses or communicate in writing using, *e.g.*, official letterhead that reveals affiliation with IRS or TIGTA. The proposed regulations also clarify that section 6103(k)(6) does not limit IRS or TIGTA officers and employees with respect to the initiation or conduct of an investigation. Finally, the proposed regulations clarify that section 6103 does not require IRS and TIGTA officers or employees to contact a taxpayer for information before contacting third party witnesses.

The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations contains a full explanation of the reasons underlying the issuance of the proposed regulations.

**Special Analyses**

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

**Comments and Requests for a Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic and written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

**Drafting Information**

The principal author of these regulations is Helene R. Newsome, Office of the Associate Chief Counsel (Procedure and Administration), Disclosure and Privacy Law Division.

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**Proposed Amendments to the Regulations**

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

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding an entry in numerical order to read as follows:

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

Section 301.6103(k)(6)–1 also issued under 26 U.S.C. 6103(k)(6); * * *

Par. 2. Section 301.6103(k)(6)–1 is removed.

Par. 3. Section 301.6103(k)(6)–1T is added to read as follows:

[The text of this proposed section is the same as the text of §301.6103(k)(6)–1T published elsewhere in this issue of the Bulletin].

Robert E. Wenzel,
*Deputy Commissioner of Internal Revenue.*

(Filed by the Office of the Federal Register on July 9, 2003, 8:45 a.m., and published in the issue of the Federal Register for July 10, 2003, 68 F.R. 41089)

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## Notice of Proposed Rulemaking

## Testimony or Production of Records in a Court or Other Proceeding

## REG–140930–02

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the existing regulation that establishes the procedures to be followed by IRS officers and employees upon receipt of a request or demand for disclosure of IRS records or information. The purpose of the proposed amendments is to provide specific instructions and to clarify when the existing regulation does not apply because more specific procedures take precedence. The proposed amendments extend the application of the regulation to former IRS officers and employees as well as to persons who are or were under contract to the IRS. The proposed amendments would affect current and former IRS officers, employees and contractors and persons who make requests or demands for disclosure.

DATES: Written or electronic comments and requests for a public hearing must be received by October 7, 2003.

ADDRESSES: Send submissions to: CC:PA:RU (REG–140930–02), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:RU (REG–140930–02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit electronic comments directly to IRS Internet site at: *www.irs.gov/regs*.

FOR FURTHER INFORMATION CONTACT: David Fish or J. Suzanne Sones, (202) 622–4590 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

**Paperwork Reduction Act**

The collection of information contained in this notice of proposed rulemaking has been submitted to the **Office of Management and Budget** for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by September 8, 2003. 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 (see below);

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 service to provide information.

The collection of information in this proposed regulation is in 26 CFR 301.9000–5(a). This information is required to enable the authorizing official to make an informed decision as to whether to grant a request or demand in a non-IRS matter. This information will be used to inform the authorizing official of the background of the non-IRS matter and to refine the scope of the testimony or disclosures sought. The collection of information is voluntary and required to obtain a benefit. The likely respondents are individuals, farms, business or other for-profit institutions, nonprofit institutions, and small businesses or organizations.

Estimated total annual reporting: 1,400 hours.

Estimated average annual burden hours per respondent: 1 hour.

Estimated number of respondents: 1,400.

Estimated annual frequency of responses: On occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

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

**Background**

This document contains proposed amendments to 26 CFR Part 301 under 5 USC 301. The existing regulation provides procedures for IRS officers and employees to follow upon receipt of a request or demand for disclosure of IRS records or information. Under this proposed regulation, current and former IRS officers, employees and contractors may not disclose IRS records or information without first receiving authorization to do so. To conserve valuable resources, the IRS carefully considers the nature and circumstances of a request or demand for IRS records or information prior to committing resources to fulfilling the request or demand. If the IRS is a disinterested party or has no affected interest with respect to a request or demand and would consider the commitment of resources to comply with the request or demand inappropriate, the IRS may deny the request or demand for IRS records or information. For example, the IRS may deny a request by private litigants for the expert testimony of an IRS employee as to the federal tax ramifications of various transactions based on information furnished by the private litigants. Such testimony could compromise the enforcement of the tax laws, should the IRS later conduct an examination of the tax consequences of the transactions.

The proposed regulation provides more specificity regarding the content of a request to allow an authorizing official to make an informed decision when authorizing or denying the request. Similarly, the proposed regulation provides more specific guidance to the authorizing officials, or to current or former IRS officers, employees or contractors, who receive requests or demands for IRS records or information, as to the circumstances for authorization or denial of such requests. Additionally, the proposed regulation applies to former IRS officers, employees or contractors whose previous access to IRS records or information may be the subject of such requests or demands. In such cases the IRS has an interest in protecting IRS records or information and should receive notice and have an opportunity to determine the extent to which disclosure should be permitted.

The existing regulation at 26 CFR 301.9000–1(f) provides guidance for IRS officers and employees in state liquor, tobacco, firearms, or explosives cases. This proposed regulation does not contain such a provision because Treasury Department Order No. 120–01, effective July 1, 1972, transferred from the IRS to the United States Bureau of Alcohol, Tobacco and Firearms (ATF) those functions, powers and duties related to alcohol, tobacco, firearms and explosives. The ATF promulgated its own regulations guiding disclosure in testimony and in related matters, which can be found at 27 CFR 70.803. Effective January 24, 2003, the Homeland Security Act of 2002, Public Law 107–296, divided ATF into two new agencies, the Tax and Trade Bureau (TTB) in the Treasury Department and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATFE) in the Justice Department. Section 1111(c)(1)–(c)(2) of the Homeland Security Act transferred to ATFE the authorities and functions of ATF, except for the authorities and functions of ATF relating to the administration and enforcement of chapters 51 and 52 and sections 4181 and 4182 of the Code, and title 27, USC. Section 1111(d)(1), (d)(3) of the Homeland Security Act provided that TTB shall administer the authorities and functions of ATF not transferred to ATFE. Treasury Department Order No. 120–01, effective January 24, 2003, designated TTB as the Alcohol and Tobacco Tax and Trade Bureau. The disclosure regulations found at 27 CFR 70.803 are still applicable to TTB.

The existing regulation contains a delegation of authority from the Secretary of the Treasury to the Commissioner of Internal Revenue (Commissioner) to respond to requests and demands for IRS records and information. This delegation has been deleted as unnecessary as it is contained in existing statutes and delegation orders. See, *e.g.*, section 7804; Delegation Order 150–10.

This proposed regulation reflects changes in format and definitions to make it easier to understand and apply.

**Explanation of Provisions**

*Overview*

Under 5 USC 301, heads of Executive or military departments may prescribe regulations for, among other things, the custody, use, and preservation of the departments' records, papers, and property. Many departments and agencies have promulgated regulations under 5 USC 301 to

provide procedures for the disclosure of official records and information. Generally, these are termed Touhy regulations, after the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure. As such, an agency's Touhy regulations are the instructions agency employees are to follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

This proposed regulation expands the definition of IRS officers and employees to include both current and former officers and employees. In addition, this proposed regulation extends to IRS contractors, including their current and former employees. IRS records or information known by these persons retains the character of government records or information, subject to the direction and control of the Commissioner, even after the employment or contractual relationship has ended. This proposed regulation provides current and former IRS officers, employees and contractors with a procedure to follow when they receive requests and demands for IRS records and information.

This proposed regulation is separated into six sections for ease of use.

*§301.9000–1 Definitions*

New definitions appear in this proposed regulation to delineate the difference in treatment between requests or demands for IRS records or information in (1) tax administration proceedings and other proceedings in which the IRS or an IRS officer or employee acting in his or her official capacity is a party; (2) matters that do not involve the IRS, such as civil litigation between private parties; and (3) congressional matters. The proposed terminology is "IRS matters," "non-IRS matters," and "IRS congressional matters," respectively. Previously, "IRS matters" were also called "referred cases."

By including former as well as current IRS officers and employees in the definition of "IRS officers and employees," this proposed regulation extends the reach of the proposed procedures. Similarly, a new definition extends the proposed procedures to reach current and former "IRS contractors."

This proposed regulation defines "testimony authorization," the longstanding term for the instructions to the testifying employee or the employee providing the information, and "authorizing official," the employee with delegated authority to authorize testimony. In addition, this proposed regulation gives a more detailed definition of "internal revenue records or information."

*§301.9000–2 Considerations in responding to a request or demand for IRS records or information*

Testimony or disclosure of IRS records or information is not permitted if the testimony or disclosure would: violate a federal statute or rule of procedure, violate a tax treaty or convention of the United States, violate a federal regulation, or reveal classified national security information. This proposed regulation lists privileges that may be asserted in response to a request or demand.

This proposed regulation specifically mentions section 6103 of the Code, as that is the primary statute governing disclosure of IRS records and information. The majority of the records and information sought in both IRS and non-IRS matters are returns and return information protected by the confidentiality provisions of section 6103 of the Code.

This proposed regulation provides a list of factors to consider in deciding whether to authorize testimony or disclosure in non-IRS matters, because requests and demands in non-IRS matters divert resources from the administration of the internal revenue laws and related statutes. These factors generally are aimed at the effect compliance with the request or demand would have on the IRS's primary mission of enforcement of the internal revenue laws and related statutes. The factors include the IRS's anticipated commitment of time and anticipated expenditure of funds necessary to comply with the request or demand, the number of similar requests and their cumulative effect on the expenditure of IRS resources, the potential effect of a non-IRS matter on the administration of the internal revenue laws and related statutes, and the importance of the legal issues presented. The IRS also considers practical problems with complying with a request or demand for IRS records or information.

*§301.9000–3 Prohibition on disclosure of IRS records or information without testimony authorization*

The general rule is that, in response to a request or demand, an IRS officer, employee or contractor may not provide testimony or IRS records or information unless the Commissioner, or a delegate, gives instructions therefor. Such an instruction is called a "testimony authorization." A "testimony authorization" includes an instruction to testify or provide IRS records or information in whole, in part or not at all. In the interim between receipt of a request or demand and the issuance of a testimony authorization, an IRS officer, employee or contractor may appear in person to advise that he or she is awaiting instructions (in the form of a testimony authorization).

Testimony authorizations are required, for the most part, in situations involving court or congressional testimony. There are, however, exceptions to the requirement of a testimony authorization. In an IRS matter in which the attorney or other representative of the government requests testimony, no testimony authorization is required. Similarly, this proposed regulation does not require a testimony authorization in an IRS matter in which the request or demand is for responses solely in writing, produced under the direction of government counsel, such as admissions, document production and written interrogatories to parties. Also, testimony authorization is not required if a former IRS officer, employee or contractor receives a request or demand for IRS records or information that involve general knowledge gained while employed or under contract with the IRS. Finally, testimony authorization also is not required if more specific procedures of the Commissioner apply to the disclosure. Such procedures include, for example, those relating to Freedom of Information Act (5 USC 552) or Privacy Act (5 USC 552a) requests, disclosures in accordance with 26 CFR 601.702(d), disclosures to state tax agencies pursuant to section 6103(d) of the Code, or disclosures to the United States Department of Justice pursuant to

an *ex parte* order under section 6103(i)(1) of the Code.

*§301.9000–4 Procedure in the event of a request or demand for IRS records or information*

This proposed regulation gives specific instructions to IRS officers, employees and contractors who receive requests or demands for IRS records or information. An IRS officer, employee or contractor who receives a request or demand for IRS records or information (except for requests or demands in United States Tax Court cases, in personnel, labor relations, government contract, or IRS congressional matters, or in matters related to informant claims or the rules of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Bivens matters), or the Federal Tort Claims Act (FTCA)) shall notify promptly the IRS Disclosure Officer servicing the IRS officer's, employee's or contractor's geographic area and await instructions from an authorizing official.

In the case of a request or demand on behalf of a petitioner in a United States Tax Court case, IRS officers, employees and contractors shall notify promptly the IRS Chief Counsel attorney assigned to the case and await instructions from an authorizing official. In the case of a request or demand on behalf of an appellant, grievant, complainant or representative for IRS records or information in a personnel, labor relations, government contract, Bivens or FTCA matter, or a matter related to informant claims, IRS officers, employees or contractors shall notify promptly the IRS Associate Chief Counsel (General Legal Services) attorney assigned to the case. If there is no IRS Associate Chief Counsel (General Legal Services) attorney assigned to the case, the IRS officer, employee or contractor shall notify promptly the IRS Associate Chief Counsel (General Legal Services) attorney servicing the geographic area. The IRS officer, employee or contractor shall then await instructions from an authorizing official. In the case of a request or demand in an IRS congressional matter, the IRS officer, employee or contractor shall notify promptly the IRS Office of Legislative Affairs and await instructions.

If, in response to a demand for IRS records or information, an authorizing official has not had a sufficient opportunity to issue a testimony authorization, or determines that denial of the demand for IRS records or information is proper, the authorizing official shall request the attorney or other representative of the government to oppose such demand and respectfully inform the court, administrative agency or other authority, by appropriate action, that the authorizing official either has not yet issued a testimony authorization, or has issued a testimony authorization, to the IRS officer, employee or contractor, that denies permission, in whole or in part, to testify or disclose the IRS records or information. If the authorizing official denies a testimony authorization in whole or in part, the authorizing official shall request the attorney or other representative of the government to inform the court, administrative agency, or other authority of the reasons for not authorizing the testimony or the disclosure of the IRS records or information and to take such other action in opposition as may be appropriate (including, but not limited to, filing a motion to quash or a motion to remove to federal district court).

In addition to providing specific procedural instructions, this proposed regulation clarifies and updates the provision in the existing regulation pertaining to penalties that apply to IRS officers, employees and contractors in case of failure to follow the requirements of the proposed regulation.

*§301.9000–5 Written statement required by party seeking testimony or disclosure of IRS records or information in non-IRS matters*

This proposed regulation formalizes the practice of requiring a party who seeks testimony or disclosure of IRS records or information for use in any non-IRS matter to provide detailed information that would enable the authorizing official to make an informed decision whether to grant or limit the request or demand. Such information is necessary to inform the authorizing official of the factual background of the non-IRS matter. By contrast, generally the factual background information already is known to the authorizing official in an IRS matter. The factual background is also useful in refining the scope of the testimony or document production, thereby conserving IRS resources and avoiding waste. For example, a request for testimony may be obviated by providing IRS records or information in a form admissible in court without need for the presence of an IRS officer or employee, or by submission of a declaration under penalty of perjury pursuant to 28 USC 1746.

This proposed regulation establishes requirements for a written statement setting forth particular information that will provide authorizing officials with the facts necessary to determine whether to grant or limit testimony or the disclosure of IRS records or information so as to comply with the law and conserve IRS resources. Parties in non-IRS matters sometimes serve process with extremely short time frames. The IRS will comply with such requests or demands only if the IRS has time to evaluate adequately the request. This proposed regulation establishes a reasonable time for compliance, generally, not less than fifteen (15) business days. Also, parties in non-IRS matters are sometimes unaware that a request or demand does not supersede the confidentiality accorded to returns and return information under section 6103 of the Code. This proposed regulation generally requires a statement of the applicable exception under section 6103 of the Code that would permit the disclosure of returns and return information for the purpose sought. The authorizing official may waive the requirement of a written statement for good cause.

*§301.9000–6 Examples*

This proposed regulation gives examples of testimony authorization situations that illustrate the principles of this proposed regulation.

**Special Analyses**

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has been determined that 5 U.S.C. 553(b), the Administrative Procedure Act, does not apply to these proposed regulations.

It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a

substantial number of small entities. This certification is based upon the fact that of the estimated 1,400 requests received annually, less than 500 of those requests are estimated to be received from small entities. Moreover, the burden associated with complying with the collection of information in these regulations is estimated to be only 1 hour per respondent. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 USC chapter 6) is not required.

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

**Comments and Requests for a Public Hearing**

Before these proposed regulations are adopted as final regulations, the IRS will consider any written (a signed original and eight (8) copies) or electronic comments that the IRS timely receives. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person who timely submits a written comment. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

**Drafting Information**

The principal authors of this proposed regulation are David Fish and J. Suzanne Sones, Office of Associate Chief Counsel (Procedure & Administration), Disclosure & Privacy Law Division.

* * * * *

**Proposed Amendments to the Regulations**

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

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for Part 301 is amended by adding the following entries in numerical order to read as follows:

Authority: 26 USC 7805 * * *

Section 301.9000–1 also issued under 5 USC 301 and 26 USC 6103(q) and 7804;

Section 301.9000–2 also issued under 5 USC 301 and 26 USC 6103(q) and 7804;

Section 301.9000–3 also issued under 5 USC 301 and 26 USC 6103(q) and 7804;

Section 301.9000–4 also issued under 5 USC 301 and 26 USC 6103(q) and 7804;

Section 301.9000–5 also issued under 5 USC 301 and 26 USC 6103(q) and 7804;

Section 301.9000–6 also issued under 5 USC 301 and 26 USC 6103(q) and 7804; * * *

Par. 2. Section 301.9000–1 is revised and §§301.9000–2 through 301.9000–7 are added to read as follows:

*§301.9000–1 Definitions when used in §§ 301.9000–1 through 301.9000–6.*

(a) *IRS records or information* means any material (including copies thereof) contained in the files (including paper, electronic or other media files) of the Internal Revenue Service (IRS), any information relating to material contained in the files of the IRS, or any information acquired by an IRS officer or employee, while an IRS officer or employee, as a part of the performance of official duties or because of that IRS officer or employee's official status with respect to the administration of the internal revenue laws or any other laws administered by or concerning the IRS. IRS records or information includes, but is not limited to, returns and return information as those terms are defined in section 6103(b)(1) and (2) of the Internal Revenue Code (Code), tax convention information as defined in section 6105 of the Code, information gathered during Bank Secrecy Act and money laundering investigations, and personnel records and other information pertaining to IRS officers and employees. IRS records and information also includes information received, generated or collected by an IRS contractor pursuant to the contractor's contract or agreement with the IRS. The term does not include records or information obtained by IRS officers and employees while under the direction and control of the United States Attorney's Office during the conduct of a federal grand jury investigation. The term IRS records or information does include records or information obtained during the administrative stage of a criminal investigation (prior to the initiation of the grand jury), obtained from IRS files (such as transcripts or tax returns), or subsequently obtained by the IRS for use in a civil investigation.

(b) *IRS officers and employees* means all officers and employees of the United States appointed by, employed by, or subject to the directions, instructions, or orders of the Commissioner or IRS Chief Counsel and also includes such former officers and employees.

(c) *IRS contractor* means any person, including such person's current and former employees, maintaining IRS records or information pursuant to a contract or agreement with the IRS, and also includes former contractors.

(d) A *request* is any request for testimony of an IRS officer, employee or contractor or for production of IRS records or information, oral or written, by any person, which is not a demand.

(e) A *demand* is any subpoena or other order of any court, administrative agency or other authority, or the Congress, or a committee or subcommittee of the Congress, and any notice of deposition (either upon oral examination or written questions), request for admissions, request for production of documents or things, written interrogatories to parties, or other notice of, request for, or service for discovery in a matter before any court, administrative agency or other authority.

(f) An *IRS matter* is any matter before any court, administrative agency or other authority in which the United States, the Commissioner, the IRS, or any IRS officer or employee acting in an official capacity, or any IRS officer or employee (including an officer or employee of IRS Chief Counsel's office) in his or her individual capacity if the United States Department of Justice or the agency has agreed to represent or provide representation to the IRS officer or employee, is a party and that is directly related to official business of the IRS or to any law administered by or concerning the IRS, including, but not limited to, judicial and administrative proceedings described in section 6103(h)(4) and (l)(4) of the Code.

(g) An *IRS congressional matter* is any matter before the Congress, or a committee or subcommittee of the Congress, that is related to the administration of the internal revenue laws or any other laws administered by or concerning the IRS, or to IRS records or information.

(h) A *non-IRS matter* is any matter that is not an IRS matter or an IRS congressional matter.

(i) A *testimony authorization* is a written instruction or oral instruction memorialized in writing within a reasonable period by an authorizing official that sets forth the scope of and limitations on proposed testimony and/or disclosure of IRS records or information issued in response to a request or demand for such IRS records or information. A testimony authorization may grant or deny authorization to testify or disclose IRS records or information and may make an authorization effective only upon the occurrence of a precedent condition, such as the receipt of a consent complying with the provisions of section 6103(c) of the Code. To authorize testimony means to issue the instruction described in this paragraph (i).

(j) An *authorizing official* is a person with delegated authority to authorize testimony and the disclosure of IRS records or information.

*§301.9000–2 Considerations in responding to a request or demand for IRS records or information.*

(a) *Situations in which disclosure shall not be authorized*. Authorizing officials shall not permit testimony or disclosure of IRS records or information in response to requests or demands if—

(1) Testimony or disclosure of IRS records or information would violate a federal statute including, but not limited to, sections 6103 or 6105 of the Internal Revenue Code (Code), the Privacy Act of 1974 (5 USC 552a), or a rule of procedure, such as the grand jury secrecy rule, Fed. R. Crim. P. 6(e);

(2) Testimony or disclosure of IRS records or information would violate a specific federal regulation, including, but not limited to, 31 CFR 103.53;

(3) Testimony or disclosure of IRS records or information would reveal classified national security information, unless properly declassified;

(4) Testimony or disclosure of IRS records or information would reveal the identity of an informant; or

(5) Testimony or disclosure of IRS records or information would reveal investigatory records or information compiled for law enforcement purposes which would permit interference with law enforcement proceedings or would disclose investigative techniques and procedures, the effectiveness of which could thereby be impaired.

(b) *Assertion of privileges*. Any applicable privilege or protection under law may be asserted in response to a request or demand for testimony or disclosure of IRS records or information, including, but not limited to, the following—

(1) Attorney-client privilege;

(2) Attorney work product doctrine; and

(3) Deliberative process (executive) privilege.

(c) *Non-IRS matters*. If any person makes a request or demand for IRS records or information in connection with a non-IRS matter, authorizing officials shall take into account the following additional factors in responding to such request or demand—

(1) Whether the requester is a federal agency, or a state or local government or agency thereof;

(2) Whether the demand was issued by a federal or state court, administrative agency or other authority;

(3) The potential effect of the case on the administration of the internal revenue laws or any other laws administered by or concerning the IRS;

(4) The importance of the legal issues presented;

(5) Whether the IRS records or information are available from other sources;

(6) The IRS's anticipated commitment of time and anticipated expenditure of funds necessary to comply with the request or demand;

(7) The number of similar requests and their cumulative effect on the expenditure of IRS resources;

(8) Whether the request or demand allows a reasonable time for compliance (generally, at least fifteen business days);

(9) Whether the testimony or disclosure is appropriate under the rules of procedure governing the case or matter in which the request or demand arises;

(10) Whether the request or demand involves expert witness testimony;

(11) Whether the request or demand is for the testimony of an IRS officer, employee or contractor who is without personal knowledge of relevant facts;

(12) Whether the request or demand is for the testimony of a presidential appointee or senior executive and whether the testimony of a lower-level official would suffice;

(13) Whether the procedures in §301.9000–5 have been followed; and

(14) Any other relevant factors that may be brought to the attention of the authorizing official.

*§301.9000–3 Testimony authorizations.*

(a) *Prohibition on disclosure of IRS records or information without testimony authorization*. Except as provided in paragraph (b) of this section, when a request or demand for IRS records or information is made, no IRS officer, employee or contractor shall testify or disclose IRS records or information to any court, administrative agency or other authority, or to the Congress, or to a committee or subcommittee of the Congress without a testimony authorization. However, an IRS officer, employee or contractor may appear in person to advise that he or she is awaiting instructions from an authorizing official with respect to the request or demand.

(b) *Exceptions*. No testimony authorization is required in the following circumstances—

(1) To respond to a request or demand for IRS records or information by an attorney or other government representative regarding an IRS matter;

(2) To respond solely in writing, under the direction of an attorney or other representative of the government, to requests and demands in IRS matters, including, but not limited to, admissions, document production, and written interrogatories to parties;

(3) To respond to a request or demand issued to a former IRS officer, employee or contractor for expert or opinion testimony if the testimony involves general knowledge (such as information contained in published procedures of the IRS or the IRS Office of Chief Counsel) gained while

the former IRS officer, employee or contractor was employed or under contract with the IRS; or

(4) If a more specific procedure established by the Commissioner governs the disclosure of IRS records or information. These procedures include, but are not limited to, those relating to: procedures pursuant to 26 CFR 601.702(d), Freedom of Information Act requests pursuant to 5 USC 552, Privacy Act of 1974 requests pursuant to 5 U.S.C. 552a, disclosures to state tax agencies pursuant to section 6103(d) of the Code, and disclosures to the United States Department of Justice pursuant to an *ex parte* order under section 6103(i)(1) of the Code.

*§301.9000–4 Procedure in the event of a request or demand for IRS records or information.*

(a) *Purpose and scope*. This section prescribes procedures to be followed by IRS officers, employees and contractors upon receipt of a request or demand in matters where a testimony authorization is or may be required.

(b) *Notification of the Disclosure Officer*. Except for requests or demands in United States Tax Court cases, in personnel, labor relations, government contract, or IRS congressional matters, or in matters related to informant claims or the rules of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Bivens matters), or the Federal Tort Claims Act (FTCA), an IRS officer, employee or contractor who receives a request or demand for IRS records or information for which a testimony authorization is or may be required shall notify promptly the Disclosure Officer servicing the IRS officer's, employee's or contractor's geographic area. Such IRS officer, employee or contractor shall await instructions from the authorizing official concerning the response to the request or demand.

(c) *Requests or demands in United States Tax Court cases*. An IRS officer, employee or contractor who receives a request or demand for IRS records or information on behalf of a petitioner in a United States Tax Court case shall notify promptly the IRS Chief Counsel attorney assigned to the case. Such IRS Chief Counsel attorney shall notify promptly the authorizing official. The IRS officer, employee or contractor who received such request or demand shall await instructions from the authorizing official.

(d) *Requests or demands in personnel, labor relations, government contract, Bivens or FTCA matters, or matters related to informant claims*. An IRS officer, employee or contractor who receives a request or demand, on behalf of an appellant, grievant, complainant or representative, for IRS records or information in a personnel, labor relations, government contract, Bivens or FTCA matter, or matter related to informant claims, shall notify promptly the IRS Associate Chief Counsel (General Legal Services) attorney assigned to the case. If no IRS Associate Chief Counsel (General Legal Services) attorney is assigned to the case, the IRS officer, employee or contractor shall notify promptly the IRS Associate Chief Counsel (General Legal Services) attorney servicing the geographic area. Such IRS Associate Chief Counsel (General Legal Services) attorney shall notify promptly the authorizing official. The IRS officer, employee or contractor who received such request or demand shall await instructions from the authorizing official.

(e) *Requests or demands in IRS congressional matters*. An IRS officer, employee or contractor who receives a request or demand in an IRS congressional matter shall notify promptly the IRS Office of Legislative Affairs. The IRS officer, employee or contractor who received such request or demand shall await instructions from the authorizing official.

(f) *Opposition to a demand for IRS records or information in IRS and non-IRS matters*. If, in response to a demand for IRS records or information, an authorizing official has not had a sufficient opportunity to issue a testimony authorization, or determines that the demand for IRS records or information should be denied, the authorizing official shall request the attorney or other representative of the government to oppose such demand and respectfully inform the court, administrative agency or other authority, by appropriate action, that the authorizing official either has not yet issued a testimony authorization, or has issued a testimony authorization, to the IRS officer, employee or contractor, that denies permission to testify or disclose the IRS records or information. If the authorizing official denies authorization in whole or in part, the attorney or other representative of the government shall inform the court, administrative agency or other authority of the reasons the authorizing official gives for not authorizing the testimony or the disclosure of the IRS records or information or take such other action in opposition as may be appropriate (including, but not limited to, filing a motion to quash or a motion to remove to federal court).

(g) *Procedure in the event of an adverse ruling*. In the event such court, administrative agency, or other authority rules adversely with respect to the refusal to disclose the IRS records or information pursuant to the testimony authorization, or declines to defer a ruling until a testimony authorization has been received, the IRS officer, employee or contractor who has received the request or demand shall, pursuant to this section, respectfully decline to testify or disclose the IRS records or information.

(h) *Penalties*. Any IRS officer or employee who discloses IRS records or information without following the provisions of this section or §301.9000–3, may be subject to administrative discipline, up to and including dismissal. Any IRS officer, employee or contractor may be subject to applicable contractual sanctions and/or criminal penalties, including prosecution under 5 USC 552a(i), for willful disclosure in an unauthorized manner of information protected by the Privacy Act, or under section 7213 of the Code, for willful disclosure in an unauthorized manner of return information.

(i) *No creation of benefit or separate privilege*. Nothing in this section, and nothing in §§301.9000–1 through 301.9000–6, creates, is intended to create, or may be relied upon to create, any right or benefit, substantive or procedural, enforceable at law by a party against the United States. Nothing in these regulations creates a separate privilege or basis to withhold IRS records or information.

*§301.9000–5 Written statement required for requests or demands in non-IRS matters.*

(a) *Written statement*. A request or demand for IRS records or information for use in a non-IRS matter shall be accompanied by a written statement made by or on behalf of the party seeking the testimony or

disclosure of IRS records or information, setting forth—

(1) A brief description of the parties to and subject matter of the proceeding and the issues;

(2) A summary of the testimony, IRS records or information sought, the relevance to the proceeding, and the estimated volume of IRS records involved;

(3) The time that will be required to present the testimony (on both direct and cross examination);

(4) Whether any of the IRS records or information is a return or is return information (as defined in section 6103(b) of the Internal Revenue Code (Code)), or tax convention information (as defined in section 6105(c)(1) of the Code), and the statutory authority for the disclosure of such return or return information (and, if no consent to disclose pursuant to section 6103(c) of the Code accompanies the request or demand, the reason such consent is not necessary);

(5) Whether a declaration of an IRS officer, employee or contractor under penalties of perjury pursuant to 28 U.S.C. 1746 would suffice in lieu of deposition or trial testimony;

(6) Whether deposition or trial testimony is necessary where IRS records are authenticated under applicable rules of evidence and procedure;

(7) Whether IRS records or information are available from other sources; and

(8) A statement that the request or demand allows a reasonable time (generally, at least fifteen business days) for compliance.

(b) *Permissible waiver of statement*. The requirement of a written statement in paragraph (a) of this section may be waived by the authorizing official for good cause.

*§301.9000–6 Examples.*

The following examples illustrate the provisions of §§301.9000–1 through 301.9000–5:

*Example 1*. A taxpayer sues a practitioner in state court for malpractice in connection with the practitioner's preparation of a federal income tax return. The taxpayer subpoenas an IRS employee to testify concerning the IRS employee's examination of the taxpayer's federal income tax return. The taxpayer provides the statement required by §301.9000–5. This is a non-IRS matter. A testimony authorization would be required for the IRS employee to give such testimony. (In addition, the taxpayer would be required to execute an appropriate consent under section 6103(c) of the Internal Revenue Code (Code)). The IRS generally opposes an IRS officer's, employee's or contractor's appearance in such cases because the IRS is a disinterested party with respect to the dispute and would consider the commitment of resources to comply with the subpoena inappropriate.

*Example 2*. In a state judicial proceeding concerning child support, the child's custodial parent subpoenas for a deposition an Internal Revenue Service (IRS) agent who is examining certain of the non-custodial parent's post-divorce federal income tax returns. This is a non-IRS matter. The custodial parent submits with the subpoena the statement required by §301.9000–5 stating as the reason for the lack of taxpayer consent to disclosure that the non-custodial parent has refused to provide the consent. (Both a consent from the taxpayer complying with section 6103(c) and a testimony authorization would be required prior to the IRS agent testifying at the deposition.) Should taxpayer consent be obtained, where appropriate, the IRS may provide a declaration and/or certified return information of the taxpayer. A deposition would be unnecessary under the circumstances.

*Example 3*. The chairperson of a congressional committee requests the appearance of an IRS employee before the committee and committee staff to submit to questioning by committee staff concerning the procedures for processing federal employment tax returns. This is an IRS congressional matter. Even though questioning would not involve the disclosure of returns or return information, the questioning would involve the disclosure of IRS records or information; therefore, a testimony authorization would be required. The IRS employee must contact the IRS Office of Legislative Affairs for instructions before appearing.

*Example 4*. The IRS opens a criminal investigation as to the tax liabilities of a taxpayer. This is an IRS matter. At some point during the criminal investigation, the IRS refers the matter to the United States Department of Justice, requesting the institution of a federal grand jury to investigate further potential criminal tax violations. Subsequently, the United States Department of Justice approves the request and initiates a grand jury investigation. The grand jury subsequently indicts the taxpayer, and the taxpayer subpoenas an IRS special agent for testimony regarding the investigation. The records and information collected during the administrative stage of the investigation, including the taxpayer's tax returns from IRS files, are IRS records and information. A testimony authorization is required for the IRS special agent to testify regarding this information. However, no IRS testimony authorization is required regarding the information collected by the IRS special agent when the IRS special agent was acting under the direction and control of the United States Attorney's Office in the federal grand jury investigation. That information is not IRS records or information within the meaning of §301.9000–1(a).

*Example 5*. The United States Department of Justice attorney representing the IRS in a suit for refund requests testimony from an IRS revenue agent. This is an IRS matter. A testimony authorization would not be required in order for the IRS revenue agent to testify because the testimony was requested by government counsel.

*Example 6*. A state assistant attorney general, acting in accordance with a recommendation from his state's department of revenue, is prosecuting a taxpayer under a state criminal law proscribing the intentional failure to file a state income tax return. The assistant attorney general serves an IRS employee with a subpoena to testify concerning the taxpayer's federal income tax return filing history. This is a non-IRS matter. This is also a state judicial proceeding pertaining to tax administration within the meaning of section 6103(h)(4) and (b)(4). As such, the procedures of section 6103(h)(4) apply. A testimony authorization would be required for the testimony demand in the subpoena.

*Example 7*. A former IRS revenue agent is requested to testify in a divorce proceeding. The request seeks testimony explaining the meaning of entries appearing on one of the parties' transcript of account which is already in the possession of the parties. This is a non-IRS matter. No testimony authorization is required because the testimony requested from the former IRS employee involves general knowledge gained while the former IRS revenue agent was employed with the IRS.

*§301.9000–7 Effective date.*

The provisions of §§301.9000–1 through 301.9000–6 apply to any request or demand for IRS records or information received by any IRS officer, employee or contractor on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

David A. Mader,
*Assistant Deputy Commissioner of Internal Revenue.*

(Filed by the Office of the Federal Register on July 8, 2003, 8:45 a.m., and published in the issue of the Federal Register for July 9, 2003, 68 F.R. 40850)

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

## Authority to Charge Fees for Furnishing Copies of Exempt Organizations' Material Open to Public Inspection Under IRC §6104

## REG–142538–02

**AGENCY:** Internal Revenue Service (IRS), Treasury.

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

**SUMMARY:** In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9070) relating to fees for copies of exempt organizations' material available to the public under section 6104 of the Internal Revenue Code (Code). The text of the temporary regulations also serves as the text of the proposed regulations.

**DATES:** Written and electronic comments and requests for a public hearing must be received by November 13, 2003.

**ADDRESSES:** Send submissions to CC:PA:RU (REG–142538–02), Room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, D.C. 20044. Submissions may be delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to CC:PA:RU (REG–142538–02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. Alternatively, taxpayers may submit electronic comments directly to the IRS internet site at: *www.irs.gov/regs*.

**FOR FURTHER INFORMATION CONTACT:** Sarah Tate, 202–622–4590 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

The IRS' obligation under section 6104 of the Code to make certain information open to public inspection is satisfied by making the information available to the public at such times and places as the IRS shall reasonably prescribe. The existing regulations provide that copies of the information that the IRS must make open to public inspection shall be available to members of the public upon written request. Currently, §301.6104(a)–6(d) provides that the IRS will charge a "fee" for copies of material available to the public under section 6104(a)(1) of the Code, including approved applications for recognition of tax-exempt status and supporting papers. Currently, §301.6104(b)–1(d)(4) provides that the Commissioner of Internal Revenue (Commissioner) may prescribe a "reasonable fee" for copies of material available to the public under section 6104(b) of the Code, including certain information furnished on exempt organization annual information returns.

This notice of proposed rulemaking amends the existing regulations to clarify that any fee assessed by the IRS in the exercise of its discretion, whether in the case of requests for photocopies, or for special media (*e.g.*, computer printouts, transcripts, CD-ROM reproductions), shall be no more than the fee that would be assessed under the fee schedule promulgated pursuant to section (a)(4)(A)(i) of the Freedom of Information Act (FOIA), 5 U.S.C. §552(a)(4)(A)(i), by the Commissioner from time to time (the "IRS' FOIA fee schedule"). For paper copies, the IRS' FOIA fee schedule, at 26 CFR §601.702(f)(3)(iv), grants the first 100 pages free of charge to requesters other than commercial use requesters, but otherwise sets a per-page copying fee applicable to all requesters. The IRS' FOIA fee schedule, at 26 CFR §601.702(f)(5), authorizes fees based on the actual cost of non-paper products, such as computer disks.

Currently, §301.6104(d)–1(d)(3)(i) provides that an exempt organization required to furnish copies to a requester may charge a copying fee corresponding to that which the IRS may charge. This notice of proposed rulemaking amends the existing regulations to make clear that an exempt organization may charge the applicable per-page copying fee under the IRS' FOIA fee schedule. An exempt organization need not provide the first 100 pages of copies free of charge to requesters other than commercial use requesters as the IRS does.

Through December 18, 2002, the IRS' FOIA fee schedule set fees of $1.00 for the first page and $.15 for each subsequent page of exempt organization returns and related documents. 26 CFR §601.702(f)(5)(iv)(B). Effective December 19, 2002, the fees are to be established by the Commissioner from time to time. 26 CFR §601.702(f) as updated at 67 FR 69673, 69682. Currently, the Commissioner has established fees of $.20 per page, up to 8½ by 14 inches, made by photocopy or similar process, and actual cost for other types of duplication. 31 CFR §1.7(g)(1)(i), (ii) and (iii).

**Special Analyses**

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

**Comments and Request for a Public Hearing**

Before these proposed regulations are adopted as final regulations, the IRS will consider any electronic or written comments (a signed original and eight (8) copies) that the IRS timely receives. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

**Drafting Information**

The principal author of this notice of proposed rulemaking is Sarah Tate, Office of the Associate Chief Counsel (Procedure & Administration), Disclosure & Privacy Law Division.

**Proposed Amendments to the Regulations**

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

PART 301—PROCEDURE AND ADMINISTRATION

Para. 1. The authority citation for part 301 is amended by adding entries in numerical order to read as follows:

Authority: 26 U.S.C. §7805 * * *

Section 301.6104(a)–6(d) is also issued under 5 U.S.C. §552

Section 301.6104(b)–1(d)(4) is also issued under 5 U.S.C. §552

Section 301.6104(d)–1(d)(3)(i) is also issued under 5 U.S.C. §552 * * *

Par. 2. In §301.6104(a)–6(d), the fourth sentence is amended as follows:

[The text of this proposed revision is the same as the text of §301.6104(a)–6(d)–T published elsewhere in this issue of the Bulletin].

Par. 3. In §301.6104(b)–1(d)(4), the last sentence is amended as follows:

[The text of this proposed revision is the same as the text of §301.6104(b)–1(d)(4)–T published elsewhere in this issue of the Bulletin].

Par. 4. In §301.6104(d)–1(d)(3)(i), the second sentence is amended as follows:

[The text of this proposed revision is the same as the text of §301.6104(d)–1(d)(3)(i)–T published elsewhere in this issue of the Bulletin].

Robert E. Wenzel,
*Deputy Commissioner of Internal Revenue.*

(Filed by the Office of the Federal Register on July 8, 2003, 8:45 a.m., and published in the issue of the Federal Register for July 9, 2003, 68 F.R. 40849)

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

## Effect of Section 338(h)(10) Elections in Certain Multi-Step Transactions

## REG–143679–02

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9071) that give effect to section 338(h)(10) elections made in certain multi-step transactions. The text of the temporary regulations published in this issue of the Bulletin also serves as the text of these proposed regulations.

DATES: Written or electronic comments must be received by November 14, 2003.

ADDRESSES: Send submissions to: CC:PA:RU (REG–143679–02), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:RU (REG–143679–02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, 20044. Alternatively, taxpayers may submit electronic comments directly to the IRS Internet site at *www.irs.gov/regs*.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Daniel Heins, Mary Goode or Reginald Mombrun at (202) 622–7930; concerning submissions of comments, Guy Traynor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

### Background and Explanation of Provisions

Temporary regulations (T.D. 9071) in this issue of the Bulletin amend the Income Tax Regulations (26 CFR part 1) relating to section 338. The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations contains a full explanation of the reasons underlying the issues of the proposed regulations.

### Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact. It is hereby certified that these regulations do not have a significant economic impact on a substantial number of small entities. The number of corporations affected is limited because section 338(h)(10) elections are made only in extraordinary circumstances, the sale of a business. Furthermore, these regulations only affect transactions in which the stock of the acquiring corporation is a significant part of the consideration. Accordingly, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

### Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. Alternatively, taxpayers may submit comments electronically via the Internet directly to the IRS Internet site at *www.irs.gov/regs*. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the hearing will be published in the **Federal Register**.

### Drafting Information

The principal authors of these regulations are Daniel Heins and Mary Goode, Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

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### Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Section 1.338(h)(10)–1 is also issued under 26 U.S.C. 337(d), 338 and 1502.

Par. 2. § 1.338(h)(10)–1 is amended as follows:

1. Paragraph (c)(2) is revised.

2. Paragraph (e) *Examples 11* through *14* are added.

The revision and additions read as follows:

*§1.338(h)(10)–1 Deemed asset sale and liquidation.*

* * * * *

(c) * * *

(2) [The text of the proposed amendment to §1.338(h)(10)–1(c)(2) is the same as the text of §1.338(h)(10)–1T(c)(2) published elsewhere in this issue of the Bulletin.]

* * * * *

(e) * * *

*Examples 11* through *14* [The text of the proposed amendments to §1.338(h)(10)–1(e) *Examples 11* through *14* is the same as the text of §1.338(h)(10)–1T(e) *Examples 11* through *14* published elsewhere in the Bulletin.]

Robert E. Wenzel,
*Deputy Commissioner for Services and Enforcement.*

(Filed by the Office of the Federal Register on July 8, 2003, 8:45 a.m., and published in the issue of the Federal Register for July 9, 2003, 68 F.R. 40848)

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## Notice of Proposed Rulemaking

## Federal Unemployment Tax Deposits—*De Minimis* Threshold

## REG–144908–02

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the deposit of Federal Unemployment Tax Act (FUTA) taxes. The proposed regulations would provide an additional exception to the FUTA deposit requirements for taxpayers that qualify for the *de minimis* exception to the deposit requirements applicable to Federal Insurance Contribution Act (FICA) and withheld income taxes. The regulations affect small employers required to make deposits of FUTA taxes.

DATES: Written or electronically generated comments and requests for a public hearing must be received by October 15, 2003.

ADDRESSES: Send submissions to: CC:PA:RU (REG–144908–02), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:RU (REG–144908–02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet directly to the IRS Internet site at *www.irs.gov/regs*.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Heather L. Dostaler, (202) 622–4940; concerning submissions of comments and requests for a public hearing, Treena Garrett of the Regulations Unit at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

### Background

The current rules relating to the deposit of FUTA taxes require employers to deposit taxes on a quarterly basis. The only generally applicable exception to this requirement is for employers whose accumulated FUTA taxes (*i.e.*, FUTA taxes for the current quarter plus undeposited FUTA taxes for prior quarters) do not exceed $100. These employers are not subject to the deposit requirements until the quarter in which accumulated FUTA taxes exceed $100. Similarly, if FUTA tax liability for a calendar year exceeds deposits for the year, the employer may remit the balance with the annual return only if it does not exceed $100. In all other cases, the balance must be deposited with an authorized financial institution.

An employer is also generally required to deposit FICA taxes and withheld income taxes (employment taxes) on at least a monthly basis and file a quarterly or annual employment tax return. For any return period in which the employer's total liability for these taxes is less than $2,500, the employer may satisfy its deposit obligation by remitting the tax with a timely filed employment tax return. An employer that qualifies for this exception with respect to employment taxes accumulated during a return period may, nevertheless, be required to deposit FUTA taxes for that period if the amount of accumulated FUTA taxes exceeds $100.

### Explanation of Provisions

The proposed regulations would provide an additional exception to the FUTA deposit requirements for employers that are permitted to satisfy their obligation to deposit employment taxes by remitting the taxes with the employment tax return (*de minimis* depositors). Thus, an employer will not be required to deposit FUTA taxes for a quarter if the amount of the employer's accumulated FICA taxes and withheld income taxes for the quarter is less than $2,500 and those taxes are remitted with the employer's timely filed employment tax return for the quarter. The employer will remain subject to the FUTA deposit requirements and will be required to deposit accumulated FUTA taxes for any quarter in which the amount of accumulated FICA taxes and withheld income taxes is at least $2,500 and the amount of accumulated FUTA taxes exceeds $100. The proposed regulations would also permit an employer that is a *de minimis* depositor for the last calendar quarter of a year to remit the balance of its FUTA tax liability for the year with a timely filed return. These additional exemptions from the FUTA deposit requirements will lessen burdens on small business owners, especially those employing part-time or seasonal workers.

### Special Analyses

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

### Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration

will be given to any written (a signed original and eight (8) copies) and electronic comments that are submitted timely to the IRS. The IRS and Treasury specifically request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person that timely submits comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

**Drafting Information**

The principal author of these regulations is Heather L. Dostaler of the Office of Associate Chief Counsel, Procedure and Administration (Administrative Provisions and Judicial Practice Division).

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**Proposed Amendments to the Regulations**

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

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

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

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

Par. 2. In §31.6302(c)–3, paragraphs (a)(2) and (a)(3) are revised to read as follows:

*§31.6302(c)–3 Use of Government depositaries in connection with tax under the Federal Unemployment Tax Act.*

(a) * * *

(2) *Special rules*—(i) *De minimis rule for deposit of taxes attributable to payments made after December 31, 2003*. The provisions of paragraph (a)(1) of this section do not apply to a period described therein if the period ends after December 31, 2003, and the taxpayer is a *de minimis* depositor of employment taxes as defined in §31.6302–1(e) (Federal Insurance Contributions Act (FICA) taxes and withheld income taxes) for such period. A taxpayer is a *de minimis* depositor of employment taxes for a period described in paragraph (a)(1) of this section if—

(A) The period is a single calendar quarter and, under the *de minimis* rule of §31.6302–1(f)(4), the taxpayer is permitted to satisfy its obligation to deposit employment taxes accumulated during the quarter by remitting the taxes with a timely filed return; or

(B) The period includes two or more calendar quarters and, under the *de minimis* rule of §31.6302–1(f)(4), the taxpayer is permitted to satisfy its obligation to deposit employment taxes accumulated during the last quarter in the period by remitting the taxes with a timely filed return.

(ii) *Special rule where accumulated amount does not exceed $100*. The provisions of paragraph (a)(1) of this section do not apply with respect to a period described therein if the amount of the tax imposed by section 3301 for the period as computed under the provisions of section 6157 plus amounts not deposited for prior periods in the same calendar year does not exceed $100. Thus, an employer is not required to make a deposit for a period unless the tax for the period plus tax not deposited for prior periods exceeds $100.

(iii) The provisions of this paragraph (a)(2) are illustrated by the following examples. In the examples, A's FUTA tax rate, after the credit for contributions to state unemployment funds, is assumed to be 0.8 percent. The examples are as follows:

*Example 1*. In 2004, Employer A makes quarterly returns of employment taxes. In the first quarter, A's only employees are part-time workers B and C, who are each paid an annual salary of $15,000 in semi-monthly installments. Both B and C claim single filing status with one exemption on Form W–4 and each is paid $3,750 during the first quarter. The employees' share of FICA tax for the quarter is $573.75 (.0765 x ($3,750 + $3,750)), A's matching FICA tax is also $573.75, and federal income tax withheld from B and C is $518. Thus, the amount of accumulated employment taxes for the quarter ($1,665.50) is less than $2,500 and, under the *de minimis* rule of §31.6302–1(f)(4), A is permitted to satisfy its obligation to deposit employment taxes by remitting the taxes with a timely filed return. A's FUTA tax liability for the first quarter is $60 (.008 x ($3,750 + $3,750)). Because A is a *de minimis* depositor under paragraph (a)(2)(i) of this section and A's FUTA tax liability does not exceed $100, both of the exceptions in this paragraph (a)(2) apply and A is not required to deposit FUTA taxes for the first calendar quarter.

*Example 2*. On April 16, 2004, A hires part-time worker D, who is also paid an annual salary of $15,000 in semi-monthly installments and who also claims single filing status with one exemption on Form W–4. During the second quarter, B and C are each paid $3,750 and D is paid $3,125. The employees' share of FICA tax for the quarter is $812.81 (.0765 x ($3,750 + $3,750 + $3,125)), A's matching FICA tax is also $812.81, and federal income tax withheld from B, C, and D is $734. Again, the amount of accumulated employment taxes for the quarter ($2,359.62) is less than $2,500 and, under the *de minimis* rule of §31.6302–1(f)(4), A is permitted to satisfy its obligation to deposit employment taxes by remitting the taxes with a timely filed return. The FUTA tax applies only to the first $7,000 that each employee is paid during the calendar year. Thus, for both B and C, amounts paid in the second quarter are subject to the FUTA tax only to the extent they do not exceed $3,250 (the $7,000 annual limit less first quarter wages of $3,750). A's FUTA tax liability for the second quarter is $77 (.008 x ($3,250 + $3,250 + $3125)) and A has an accumulated FUTA tax liability in the amount of $137. Accordingly, the exception in paragraph (a)(2)(ii) of this section does not apply. A is, however, a *de minimis* depositor under paragraph (a)(2)(i) of this section and is, therefore, not required to deposit FUTA taxes for the second calendar quarter.

*Example 3*. On June 30, 2004, B and C quit employment with A. The following day, A hires E, a full-time employee who is paid an annual salary of $40,000 in semi-monthly installments and who also claims single filing status with one exemption on Form W–4. During the third quarter, D is paid $3,750 and E is paid $10,000. The employees' share of FICA tax for the quarter is $1,051.88 (.0765 x ($3,750 + $10,000)), A's matching FICA tax is also $1,051.88, and federal income tax withheld from D and E is $1,609. The *de minimis* rule of §31.6302–1(f)(4) does not apply because the amount of accumulated employment taxes for the quarter ($3,712.76) is not less than $2,500 and A may not satisfy its obligation to deposit employment taxes by remitting the taxes with a timely filed return. All amounts paid to D in the third quarter are subject to the FUTA tax because the total amount paid to D through the end of the quarter does not exceed the $7,000 annual limit. The tax also applies to the first $7,000 paid to E. A's FUTA tax liability for the third quarter is $86 (.008 x ($3,750 + $7,000)) and A has an accumulated FUTA tax liability of $223. Because A is not a *de minimis* depositor under paragraph (a)(2)(i) of this section and A's accumulated FUTA tax liability exceeds $100, neither of the exceptions in this paragraph (a)(2) apply and A is required to deposit the accumulated FUTA tax liability on or before October 31, 2004.

(3) *Requirement for deposit in lieu of payment with return*. If the amount of tax reportable on a return on Form 940 for a calendar year beginning after December 31, 2003, exceeds by more than $100 the sum of the amount deposited by the employer pursuant to paragraph (a)(1) of this section for such calendar year and the employer does not qualify as a *de minimis* depositor under paragraph (a)(2)(i) of this section during the last quarter of the calendar year, the employer shall, on or before

the last day of the first calendar month following the calendar year for which the return is required to be filed, deposit the balance of the tax due with an authorized financial institution. If the amount of tax reportable on a return on Form 940 for a calendar year beginning after December 31, 2003, does not exceed by more than $100 the sum of the amount deposited by the employer pursuant to paragraph (a)(1) of this section for such calendar year or if the employer qualifies as a *de minimis* depositor under paragraph (a)(2)(i) of this section during the last quarter of the calendar year, the employer may, on or before the last day of the first calendar month following the calendar year for which the return is required to be filed, remit the balance of the tax at the time and place fixed for filing the return.

* * * * *

Robert E. Wenzel,
*Deputy Commissioner for Services and Enforcement.*

(Filed by the Office of the Federal Register on July 16, 2003, 8:45 a.m., and published in the issue of the Federal Register for July 17, 2003, 68 F.R. 42329)

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## Notice of Proposed Rulemaking

## Diversification Requirements for Variable Annuity, Endowment, and Life Insurance Contracts

## REG–163974–02

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes removing provisions of the Income Tax Regulations that apply a look-through rule to assets of a nonregistered partnership for purposes of satisfying the diversification requirements of section 817(h) of the Internal Revenue Code. The Treasury Department and the IRS believe that removal of these provisions will eliminate any possible confusion regarding the prohibition on ownership of interests by the public in a nonregistered partnership funding a variable contract.

DATES: Written or electronic comments and requests for a public hearing must be received by December 3, 2003.

ADDRESSES: Send submissions to: CC:PA:RU (REG–163974–02), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Comments may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:RU (REG–163974–02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit electronic comments directly to the IRS internet site at *www.irs.gov/regs*.

FOR FURTHER INFORMATION CONTACT: James Polfer, (202) 622–3970 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

**Background**

Section 817(d) defines a variable contract as an annuity contract, a life insurance contract, or a contract that provides funding of insurance on retired lives as described in section 807(c)(6). A variable contract must provide for the allocation of all or part of the amounts received under the contract to an account that is segregated from the general asset accounts (a segregated asset account) of the company under state law. In the case of an annuity contract, the amounts paid in, or the amounts paid out, must reflect the investment return and the market value of the segregated asset account. Section 817(d)(3)(A). In the case of a life insurance contract, the amount of the death benefit (or the period of coverage) must be adjusted on the basis of the investment return and the market value of the account. Section 817(d)(3)(B). In the case of a contract for funding of insurance on retired lives, the amounts paid in, or the amounts paid out, must reflect the investment return and the market value of the account. Section 817(d)(3)(C).

Section 817(h)(1) provides that a variable contract based on a segregated asset account shall not be treated as an annuity, endowment, or life insurance contract unless the segregated asset account is adequately diversified in accordance with regulations prescribed by the Secretary. Under section 817(h)(1), if a segregated asset account fails to be adequately diversified for a period, then the contracts supported by that segregated asset account shall not be treated as annuity, endowment, or life insurance contracts for that period and subsequent periods, even if the segregated asset account is adequately diversified in those subsequent periods. Section 1.817–5(c)(1) defines period as a calendar quarter. If a segregated asset account is not adequately diversified, income earned by that segregated asset account is treated as ordinary income received or accrued by the policyholders.[1]

Section 817(h) was enacted by Congress in the Deficit Reduction Act of 1984 (Public Law No. 98–369). Congress enacted the diversification requirements of section 817(h) to "discourage the use of tax-preferred variable annuity and variable life insurance primarily as investment vehicles." H.R. Conf. Rep. No. 98–861, at 1055 (1984). In section 817(h)(1), Congress granted the Secretary broad regulatory authority to develop rules to carry out this intent. Pursuant to this authority, §1.817–5 sets forth the standards a segregated asset account must meet to be treated as adequately diversified within the meaning of section 817(h).

Section 817(h)(4) provides a look-through rule under which taxpayers do not treat the interest in a regulated investment company (RIC) or trust as a single asset of the segregated asset account but rather apply the diversification tests by taking into account the assets of the RIC or trust. Section 817(h) further provides that the look-through rule applies only if all of the beneficial interests in a RIC or trust are held by one or more general or segregated asset accounts of insurance companies (or affiliated companies), or by fund managers (or affiliated companies) in connection with the creation or management of the RIC or trust. "In authorizing Treasury to prescribe diversification standards, the conferees intend that the standards be designed to deny annuity or life insurance treatment for

[1] Section 1.817–5(a)(2) provides a mechanism for insurance companies to avoid this result if certain enumerated correction procedures are satisfied.

investments that are publicly available to investors . . .” H.R. Conf. Rep. at 1055.

Section 1.817–5(f)(1) of the regulations implements the Congressional directive to prescribe diversification standards by providing that if look-through treatment is available, a beneficial interest in a RIC, real estate investment trust, partnership, or trust that is treated under sections 671 through 679 as owned by the grantor or another person (investment company, partnership or trust) will not be treated as a single investment of a segregated asset account for purposes of testing diversification. Instead, a *pro rata* portion of each asset of the investment company, partnership, or trust will be treated as an asset of the segregated asset account.

Section 1.817–5(f)(2) provides more detailed rules for determining whether look-through treatment is available. Under §1.817–5(f)(2)(i), the look-through rule applies to any investment company, partnership, or trust if: (A) all the beneficial interests in the investment company, partnership, or trust are held by one or more segregated asset accounts of one or more insurance companies; and (B) public access to such investment company, partnership, or trust is available exclusively through the purchase of a variable contract. Section 1.817–5(f)(iii) provides exceptions to the general ownership limitations of §1.817–5(f)(2)(i), specifically permitting life insurance company general accounts, managers of the investment company, partnership or trust, pension or retirement plan trustees, and certain individuals whose investment falls into one of two limited classes.

Under §1.817–5(f)(2)(ii), the look-through rule applies to a partnership interest that is not registered under a federal or state law regulating the offering or sale of securities. Unlike §1.817–5(f)(2)(i), satisfaction of the non-registered partnership look-through rule of §1.817–5(f)(2)(ii) is not explicitly conditioned on limiting the ownership of interests in the partnership to certain specified holders.

Under §1.817–5(f)(2)(iii), the look-through rule applies to a trust that is treated under sections 671 through 679 as owned by the grantor or another person if substantially all of the assets of the trust are represented by Treasury securities.

Section 1.817–5(g) provides examples of the application of the look-through rules of §1.817–5(f). Example (3) of §1.817–5(g) provides an example of the application of the §1.817–5(f)(2)(ii) non-registered partnership look-through rule.

**Explanation of Provisions**

This document contains proposed amendments to 26 CFR part 1 under section 817(h). These proposed amendments would remove §1.817–5(f)(2)(ii), which requires taxpayers to look through an interest in a nonregistered partnership, as defined in §1.817–5(f)(2)(ii), to determine whether a segregated asset account supporting a variable contract is adequately diversified within the meaning of section 817(h) and §1.817–5. In addition, the proposed regulations would conform the other provisions of §1.817–5 to the removal of §1.817–5(f)(2)(ii), and would remove Example (3) of §1.817–5(g).

The application of §1.817–5(f)(2)(i) to interests in nonregistered partnerships will be unchanged by the removal of §1.817–5(f)(2)(ii). Thus, look through treatment will be available for interests in a nonregistered partnership if: (A) all the beneficial interests in the nonregistered partnership (other than those described in §1.817–5(f)(3)) are held by one or more segregated asset accounts of one or more insurance companies; and (B) public access to such nonregistered partnership is available exclusively (except as otherwise permitted in §1.817–5(f)(3)) through the purchase of a variable contract.

*Reasons for Change*

The Treasury Department and the IRS are concerned that §1.817–5(f)(2)(ii) is not consistent with Congressional intent because it is not explicitly subject to the public availability limitation of section 817(h). The Treasury Department and the IRS believe that removal of §1.817–5(f)(2)(ii) will eliminate any possible confusion regarding the prohibition on ownership of interests by the public in a non-registered partnership funding a variable contract.

In addition, the Treasury Department and the IRS understand that certain taxpayers are purchasing contracts invested in partnerships that rely on the nonregistered partnership rule of §1.817–5(f)(2)(ii) to satisfy the diversification requirements of section 817(h). The Treasury Department and the IRS are concerned that these contracts are funded by interests in partnerships that are also available to certain limited classes of investors, specifically individuals that are “qualified purchasers” within the meaning of 15 U.S.C. § 80a–2(a)(51) or “accredited investors” as defined in Regulation D of the Securities Act of 1933.[2] The Treasury Department and the IRS believe that Congress intended to treat qualified purchasers and accredited investors as part of the general public when determining whether an investment is available for the purchase by the general public. Elimination of §1.817–5(f)(2)(ii) will limit access to interests in non-registered partnerships to the same holders that are permitted under §1.817–5(f)(2)(i), which does not include either qualified investors or accredited investors.

**Proposed Effective Date**

The Treasury Department and the IRS intend revocation of §1.817–5(f)(2)(ii) and Example (3) of §1.817–5(g) to be effective on the date the final regulations are published in the Federal Register. The revocation will be effective for all investments in nonregistered partnerships, including investments made prior to the effective date of the revocation that relied on the look-through rule of §1.817–5(f)(2)(ii) to satisfy the diversification requirements of section 817(h) and the regulations and do not meet the requirements of §1.817–5(f)(2)(i). However, arrangements

[2] The Treasury Department and the IRS understand that many of the partnership interests that are available under these arrangements are interests in partnerships that operate as hedge funds, often established and operated in foreign jurisdictions. In many cases, interests in these partnerships are available for purchase directly by the general public as well as through the purchase of a variable contract. Taxpayers that purchase a variable annuity or life insurance contract are indirectly investing in partnership interests that are available for direct investment by the general public. By indirectly investing in these partnership interests through the purchase of a variable contract, taxpayers defer tax on partnership earnings that might otherwise be currently taxable. The Treasury Department and the IRS believe that these arrangements (often marketed as “insurance wrappers”) are the type of overly investment oriented insurance and annuity arrangements that Congress sought to prevent when it enacted the diversification rules of section 817(h).

in existence on the effective date of the revocation of §1.817–5(f)(2)(ii) will be considered to be adequately diversified if: (i) those arrangements were adequately diversified within the meaning of section 817(h) prior to the revocation of §1.817–5(f)(2)(ii) and (ii) by the end of the last day of the second calendar quarter ending after the effective date of the regulation, the arrangements are brought into compliance with the final regulations.

**Special Analyses**

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

**Comments and Request for a Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are timely submitted to the IRS. The Treasury Department and the IRS specifically request comments on the clarity of the proposed rule and how it may be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person that timely submits written or electronic comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

The Treasury Department and the IRS specifically request comments on: (1) whether revocation of §1.817–5(f)(2)(ii) necessitates other changes to the look-through rules of §1.817–5(f), in particular whether the list of holders permitted by §1.817–5(f)(3) should be amended or expanded, and whether a non-*pro-rata* distribution of the investment returns of a segregated asset account should be permitted to take account of certain bonus payments to investment managers commonly referred to as incentive payments, (2) whether §1.817–5 should be updated to take account of changes to variable contracts since the final regulations were published in 1986, and (3) whether regulations are needed to address when a holder of a variable contract will be treated as the owner of assets held in a segregated asset account and, therefore, required to include earnings on those assets in income.[3]

**Drafting Information**

The principal author of these proposed regulations is James Polfer, Office of the Associate Chief Counsel (Financial Institutions and Products), Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Treasury Department and the IRS participated in their development.

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**Proposed Amendment to the Regulations**

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

PART 1—INCOME TAX

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

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

Section 1.817–5 also issued under 26 U.S.C. 817(h). * * *

Par. 2. Section 1.817–5 is amended as follows:

1. Paragraphs (f)(2)(ii) and (g) *Example 3* are removed.

2. Paragraph (f)(2)(iii) is redesignated as paragraph (f)(2)(ii).

3. Paragraph (g) *Example 4* is redesignated as paragraph (g) *Example 3*.

Robert E. Wenzel,
*Deputy Commissioner for Services and Enforcement.*

(Filed by the Office of the Federal Register on July 29, 2003, 8:45 a.m., and published in the issue of the Federal Register for July 30, 2003, 68 F.R. 44689)

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## Pub. 1179 (Rev. Proc. 2003–28), *General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, W–2G, and 1042–S*; Updated

## Announcement 2003–55

After Revenue Procedure 2003–28 was released for print, the Jobs and Growth Tax Relief Reconciliation Act (JGTRRA) of 2003 (Public Law 108–27), was signed into law. Effective for transactions after May 5, 2003, the new law reduced capital gain rates and applied the new rates to qualified dividends. This required the IRS to revise forms and procedures affected by the changes. This document describes the changes and provides updated requirements for **Form 1099–B**, *Proceeds From Broker and Barter Exchange Transactions*, and **Form 1099–DIV**, *Dividends and Distributions*. The rules and specifications for preparing the other forms discussed in Rev. Proc. 2003–28, 2003–16 I.R.B. 759 remain the same.

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**Form 1099–B**. Brokers and others reporting the gain or (loss) on **regulated futures or foreign currency** contracts report the profit or (loss) realized in 2003 in box 6 and the portion of that amount that is post-May 5, 2003, is reported in box 6a. Likewise, the aggregate profit or (loss) is reported in box 9, and the portion of that amount that is post-May 5, 2003, is reported in box 9a.

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[3] The Treasury Department and the IRS have issued a number of revenue rulings that provide guidance for determining whether the holder of a variable contract will be treated as the owner of assets held by a segregated asset account by virtue of the control the contract holder has over those assets. *See* Rev. Rul. 2003–92, 2003–33 I.R.B. 350 (August 18, 2003); Rev. Rul. 2003–91, 2003–33 I.R.B. 347 (August 18, 2003); Rev. Rul. 82–54, 1982–1 C.B. 11; Rev. Rul. 81–225, 1981–2 C.B. 12; Rev. Rul. 80–274, 1980–2 C.B. 27; Rev. Rul. 77–85, 1977–1 C.B. 12. *See also Christoffersen v. U.S.*, 749 F.2d 513 (8th Cir. 1984), *rev'g* 578 F. Supp. 398 (N.D. Iowa 1984). These rulings apply general concepts of ownership that have developed in case law to conclude that a contract holder was the owner of assets held in the account that supported the contract holder's annuity contract, and was therefore subject to current taxation on the earnings on those assets.

Form 1099–B has been reformatted to two forms per page to allow for the additional reporting. Exhibit 1 provides an example of the new form with the proper dimensions. Copy A of privately printed continuous substitute forms must be perforated at each 11″ page depth. No perforations are allowed between the 5½″ forms on a single copy page of Copy A.

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**Form 1099–DIV**. Form 1099–DIV was reformatted to two forms per page to allow reporting of qualified dividends and post-May 5, 2003, capital gain distributions at the new rates. Form 1099–DIV boxes and their titles are as follows (boxes 2c–2f have been rearranged):

- Box 1a — Total ordinary dividends
- Box 1b — Qualified dividends
- Box 2a — Total capital gain distr.
- Box 2b — Post-May 5 capital gain distr.
- Box 2c — Qualified 5-year gain
- Box 2d — Unrecap. Sec. 1250 gain
- Box 2e — Section 1202 gain
- Box 2f — Collectibles (28%) rate gain
- Box 3 — Nontaxable distributions
- Box 4 — Federal income tax withheld
- Box 5 — Investment expenses
- Box 6 — Foreign tax paid
- Box 7 — Foreign country or U. S. possession
- Box 8 — Cash liquidation distributions
- Box 9 — Noncash liquidation distributions

Exhibit 2 provides an example of the new form with the proper dimensions. Copy A of privately printed continuous substitute forms must be perforated at each 11″ page depth. No perforations are allowed between the 5½″ forms on a single copy page of Copy A.

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If you are uncertain of any specification and want it clarified, submit a letter citing the specification, state your understanding and interpretation of the specification, and enclose an example of the form (if appropriate) to:

Internal Revenue Service
Attn: Substitute Forms Program
W:CAR:MP:T:T:SP
1111 Constitution Ave., NW
Room 6411
Washington, DC 20224

**Note:** *Allow at least 45 days for the IRS to respond.*

You may also contact the Substitute Forms Program Unit via email at **taxforms@irs.gov*. Enter "Substitute Forms" on the subject line.

# Exhibit 1

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7979 ☐ VOID ☐ CORRECTED

| PAYER'S name, street address, city, state, ZIP code, and telephone no. | | 1a Date of sale | OMB No. 1545-0715 **2003** Form **1099-B** | **Proceeds From Broker and Barter Exchange Transactions** |
|---|---|---|---|---|
| 3.40" | | 1b CUSIP no. | | |
| | | 2 Stocks, bonds, etc. $ | Reported to IRS ☐ Gross proceeds ☐ Gross proceeds less commissions and option premiums | |
| PAYER'S Federal identification number | RECIPIENT'S identification number | 3 Bartering $ | 4 Federal income tax withheld $ | **Copy A For Internal Revenue Service Center** |
| RECIPIENT'S name 4.50" | | 5 Description 2.80" | | **File with Form 1096.** |
| Street address (including apt. no.) | | 6a Profit or (loss) realized in 2003 $ | 6b Post–5/5/2003 profit or (loss) realized $ | For Privacy Act and Paperwork Reduction Act Notice, see the **2003 General Instructions for Forms 1099, 1098, 5498, and W-2G.** |
| City, state, and ZIP code | | 7 Unrealized profit or (loss) on open contracts—12/31/2002 $ | 8 Unrealized profit or (loss) on open contracts—12/31/2003 $ | |
| Account number (optional) | 2nd TIN not. ☐ | 9a Aggregate profit or (loss) $ | 9b Post–5/5/2003 aggregate profit or (loss) $ | |

5.50" .25"

Form **1099-B** Cat. No. 14411V Department of the Treasury - Internal Revenue Service

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7979 ☐ VOID ☐ CORRECTED

| PAYER'S name, street address, city, state, ZIP code, and telephone no. | | 1a Date of sale | OMB No. 1545-0715 **2003** Form **1099-B** | **Proceeds From Broker and Barter Exchange Transactions** |
|---|---|---|---|---|
| | | 1b CUSIP no. | | |
| | | 2 Stocks, bonds, etc. $ | Reported to IRS ☐ Gross proceeds ☐ Gross proceeds less commissions and option premiums | |
| PAYER'S Federal identification number | RECIPIENT'S identification number | 3 Bartering $ | 4 Federal income tax withheld $ | **Copy A For Internal Revenue Service Center** |
| RECIPIENT'S name | | 5 Description | | **File with Form 1096.** |
| Street address (including apt. no.) | | 6a Profit or (loss) realized in 2003 $ | 6b Post–5/5/2003 profit or (loss) realized $ | For Privacy Act and Paperwork Reduction Act Notice, see the **2003 General Instructions for Forms 1099, 1098, 5498, and W-2G.** |
| City, state, and ZIP code | | 7 Unrealized profit or (loss) on open contracts—12/31/2002 $ | 8 Unrealized profit or (loss) on open contracts—12/31/2003 $ | |
| Account number (optional) | 2nd TIN not. ☐ | 9a Aggregate profit or (loss) $ | 9b Post–5/5/2003 aggregate profit or (loss) $ | |

Form **1099-B** Cat. No. 14411V Department of the Treasury - Internal Revenue Service


.50"

## Exhibit 2

.3125" .50"

9191 VOID CORRECTED

| PAYER'S name, street address, city, state, ZIP code, and telephone no. | 1a Total ordinary dividends $ | OMB No. 1545-0110 **2003** Form **1099-DIV** | **Dividends and Distributions** |
|---|---|---|---|
| | 1b Qualified dividends $ | | |
| | 2a Total capital gain distr. $ | 2b Post-May 5 capital gain distr. $ | **Copy A For Internal Revenue Service Center** File with Form 1096. |
| PAYER'S Federal identification number / RECIPIENT'S identification number | 2c Qualified 5-year gain $ | 2d Unrecap. Sec. 1250 gain $ | |
| RECIPIENT'S name | 2e Section 1202 gain $ | 2f Collectibles (28%) gain $ | For Privacy Act and Paperwork Reduction Act Notice, see the **2003 General Instructions for Forms 1099, 1098, 5498, and W-2G.** |
| | 3 Nontaxable distributions $ | 4 Federal income tax withheld $ | |
| Street address (including apt. no.) | | 5 Investment expenses $ | |
| City, state, and ZIP code | 6 Foreign tax paid $ | 7 Foreign country or U.S. possession | |
| Account number (optional) / 2nd TIN not. | 8 Cash liquidation distributions $ | 9 Noncash liquidation distributions $ | |

3.40" 1.40" 1.40" .25" 5.50" 4.50"

Form **1099-DIV** Cat. No. 14415N Department of the Treasury - Internal Revenue Service

**Do Not Cut or Separate Forms on This Page — Do Not Cut or Separate Forms on This Page**

1.00"

9191 VOID CORRECTED

| PAYER'S name, street address, city, state, ZIP code, and telephone no. | 1a Total ordinary dividends $ | OMB No. 1545-0110 **2003** Form **1099-DIV** | **Dividends and Distributions** |
|---|---|---|---|
| | 1b Qualified dividends $ | | |
| | 2a Total capital gain distr. $ | 2b Post-May 5 capital gain distr. $ | **Copy A For Internal Revenue Service Center** File with Form 1096. |
| PAYER'S Federal identification number / RECIPIENT'S identification number | 2c Qualified 5-year gain $ | 2d Unrecap. Sec. 1250 gain $ | |
| RECIPIENT'S name | 2e Section 1202 gain $ | 2f Collectibles (28%) gain $ | For Privacy Act and Paperwork Reduction Act Notice, see the **2003 General Instructions for Forms 1099, 1098, 5498, and W-2G.** |
| | 3 Nontaxable distributions $ | 4 Federal income tax withheld $ | |
| Street address (including apt. no.) | | 5 Investment expenses $ | |
| City, state, and ZIP code | 6 Foreign tax paid $ | 7 Foreign country or U.S. possession | |
| Account number (optional) / 2nd TIN not. | 8 Cash liquidation distributions $ | 9 Noncash liquidation distributions $ | |

.50"

Form **1099-DIV** Cat. No. 14415N Department of the Treasury - Internal Revenue Service

# Definition of Terms

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

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

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

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

*Modified* is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

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

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

*Superseded* describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

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

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

# Abbreviations

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

*A*—Individual.
*Acq.*—Acquiescence.
*B*—Individual.
*BE*—Beneficiary.
*BK*—Bank.
*B.T.A.*—Board of Tax Appeals.
*C*—Individual.
*C.B.*—Cumulative Bulletin.
*CFR*—Code of Federal Regulations.
*CI*—City.
*COOP*—Cooperative.
*Ct.D.*—Court Decision.
*CY*—County.
*D*—Decedent.
*DC*—Dummy Corporation.
*DE*—Donee.
*Del. Order*—Delegation Order.
*DISC*—Domestic International Sales Corporation.
*DR*—Donor.
*E*—Estate.
*EE*—Employee.
*E.O.*—Executive Order.
*ER*—Employer.
*ERISA*—Employee Retirement Income Security Act.
*EX*—Executor.
*F*—Fiduciary.
*FC*—Foreign Country.
*FICA*—Federal Insurance Contributions Act.
*FISC*—Foreign International Sales Company.
*FPH*—Foreign Personal Holding Company.
*F.R.*—Federal Register.
*FUTA*—Federal Unemployment Tax Act.
*FX*—Foreign corporation.
*G.C.M.*—Chief Counsel's Memorandum.
*GE*—Grantee.
*GP*—General Partner.
*GR*—Grantor.
*IC*—Insurance Company.
*I.R.B.*—Internal Revenue Bulletin.
*LE*—Lessee.
*LP*—Limited Partner.
*LR*—Lessor.
*M*—Minor.
*Nonacq.*—Nonacquiescence.
*O*—Organization.
*P*—Parent Corporation.
*PHC*—Personal Holding Company.
*PO*—Possession of the U.S.
*PR*—Partner.
*PRS*—Partnership.
*PTE*—Prohibited Transaction Exemption.
*Pub. L.*—Public Law.
*REIT*—Real Estate Investment Trust.
*Rev. Proc.*—Revenue Procedure.
*Rev. Rul.*—Revenue Ruling.
*S*—Subsidiary.
*S.P.R.*—Statement of Procedural Rules.
*Stat.*—Statutes at Large.
*T*—Target Corporation.
*T.C.*—Tax Court.
*T.D.* —Treasury Decision.
*TFE*—Transferee.
*TFR*—Transferor.
*T.I.R.*—Technical Information Release.
*TP*—Taxpayer.
*TR*—Trust.
*TT*—Trustee.
*U.S.C.*—United States Code.
*X*—Corporation.
*Y*—Corporation.
*Z* —Corporation.

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