Internal Revenue
bulletin

Bulletin No. 2007-52
December 26, 2007

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. 2007–68, page 1236.

Interest rates; underpayments and overpayments. The rates of interest determined under section 6621 of the Code for the calendar quarter beginning January 1, 2008, will be 7 percent for overpayments (6 percent in the case of a corporation), 7 percent for underpayments, and 9 percent for large corporate underpayments. The rate of interest paid on the portion of a corporate overpayment exceeding $10,000 will be 4.5 percent.

T.D. 9365, page 1218.

Final regulations under section 45G of the Code provide rules for claiming the railroad track maintenance credit for qualified railroad track maintenance expenditures paid or incurred by a Class II railroad or Class III railroad and other eligible taxpayers during the taxable year.

Rev. Proc. 2007–72, page 1257.

This procedure describes the conditions under which changes to certain subprime mortgage loans will not cause the Internal Revenue Service to challenge the tax status of certain securitization vehicles holding the loans.

EMPLOYEE PLANS

Notice 2007–99, page 1243.

Distributions from governmental plans and health and accident insurance; section 845 of PPA '06. As a result of section 845 of the Pension Protection Act of 2006 and section 9(i)(1)(B) and (C) of S. 1974 and H.R. 3361, the pending Pension Protection Technical Corrections Acts of 2007, Q&A–23 of Notice 2007–7, 2007–5 I.R.B. 395, pertaining to distributions from certain health and accident plans is altered. Notice 2007–7 modified.

Notice 2007–100, page 1243.

This notice provides transition relief and guidance on the correction of certain failures of a nonqualified deferred compensation plan to comply with section 409A(a) of the Code in operation (an operational failure), including: (1) methods for correcting certain operational failures during a service provider's taxable year in which the failure occurs to avoid income inclusion under section 409A(a); (2) transition relief limiting the amount includible in income under section 409A(a) for certain operational failures occurring in a service provider's taxable year beginning before January 1, 2010, that involve only limited amounts; (3) an outline of, and request for comments on, a potential corrections program that would permit service recipients and service providers to limit the amounts required to be included in income under section 409A(a) due to certain operational failures.

Notice 2007–101, page 1253.

Weighted average interest rate update; corporate bond indices; 30-year Treasury securities; segment rates. This notice contains updates for the corporate bond weighted average interest rate for plan years beginning in December 2007; the 24-month average segment rates; the funding transitional segment rates applicable for December 2007; and the minimum present value transitional rates for November 2007.

(Continued on the next page)

Finding Lists begin on page ii.
Index for July through December begins on page vi.

Department of the Treasury
Internal Revenue Service

EXEMPT ORGANIZATIONS

T.D. 9366, page 1232.
REG–104942–07, page 1264.
Temporary and proposed regulations under section 6033 of the Code describe the time and manner in which certain tax-exempt organizations not currently required to file an annual information return under section 6033(a)(1) are required to submit an annual electronic notice including certain information required by section 6033(i)(1)(A) through (F).

EMPLOYMENT TAX

T.D. 9367, page 1229.
Final regulations under section 3121 of the Code define the term "salary reduction agreement" for purposes of section 3121(a)(5)(D). The regulations provide guidance to employers (public educational institutions and section 501(c)(3) organizations) purchasing annuity contracts described in section 403(b) on behalf of their employees.

ADMINISTRATIVE

T.D. 9366, page 1232.
REG–104942–07, page 1264.
Temporary and proposed regulations under section 6033 of the Code describe the time and manner in which certain tax-exempt organizations not currently required to file an annual information return under section 6033(a)(1) are required to submit an annual electronic notice including certain information required by section 6033(i)(1)(A) through (F).

REG–155669–04, page 1262.
Proposed regulations under section 6045 of the Code provide guidance relating to information on the sale or exchange of standing timber for lump-sum payment. The regulations would amend section 1.6045–4(b)(2) by providing that the term "ownership interest" includes any contractual interest in a sale or exchange of standing timber for a lump-sum payment that is fixed and contingent. The regulations would also amend section 1.6045–4(c) to provide that the terms "crops" and "natural resources" do not include standing timber.

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 compiled 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 last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

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

Section 199.—Income Attributable to Domestic Production Activities

26 CFR 1.45G–1: Railroad track maintenance credit.

T.D. 9365

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

Railroad Track Maintenance Credit

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations.

SUMMARY: This document contains final regulations that provide rules for claiming the railroad track maintenance credit under section 45G of the Internal Revenue Code for qualified railroad track maintenance expenditures paid or incurred by a Class II railroad or Class III railroad and other eligible taxpayers during the taxable year. These final regulations reflect changes to the law made by the American Jobs Creation Act of 2004, the Gulf Opportunity Zone Act of 2005, and the Tax Relief and Health Care Act of 2006.

DATES: *Effective Date:* These regulations are effective on November 13, 2007.

Applicability Date: For dates of applicability, see §1.45G–1(g).

FOR FURTHER INFORMATION CONTACT: David Selig, (202) 622–3040 (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 (44 U.S.C. 3507(d)) under control number 1545–2031.

The collection of information in these final regulations is in §1.45G–1(d). This information is required to enable the IRS to verify the assignments of railroad track miles made under section 45G(b).

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.

Books or records relating to this 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 to provide regulations under section 45G of the Internal Revenue Code (Code). Section 45G was added to the Code by section 245(a) of the American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1418) (AJCA), and was modified by section 403(f) of the Gulf Opportunity Zone Act of 2005, Public Law 109–135 (119 Stat. 2577), and section 423(a) of the Tax Relief and Health Care Act of 2006, Public Law 109–432 (120 Stat. 2922) (TRHCA). On September 8, 2006, the IRS and Treasury Department published in the **Federal Register** temporary and proposed regulations (REG–142270–05, 2006–43 I.R.B. 791) under section 45G (71 FR 53009, 71 FR 53053). The IRS and Treasury Department issued a correction notice for the temporary regulations in T.D. 9286, 2006–43 I.R.B. 750, on December 8, 2006 (71 FR 71039). No requests were received to testify on the proposed regulations and, accordingly, no public hearing was held. Written and electronic comments responding to the proposed regulations were received. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision and the corresponding temporary regulations are removed.

General Overview

Section 38 allows a credit for the taxable year for, among other things, the current year business credit. The current year business credit is the sum of the credits listed in section 38(b). Section 245(c)(1) of the AJCA amended section 38(b) to add to the list of credits the railroad track maintenance credit (RTMC) determined under section 45G(a).

Section 45G(a) provides that, for purposes of section 38, the RTMC for the taxable year is an amount equal to 50 percent of the qualified railroad track maintenance expenditures (QRTME) paid or incurred by an eligible taxpayer during the taxable year.

Section 45G(b) imposes limitations on the amount of the RTMC for any taxable year. The credit allowed under section 45G(a) may not exceed $3,500 multiplied by the sum of (1) the number of miles of railroad track owned by, or leased to, the eligible taxpayer as of the close of the taxable year, and (2) the number of miles of railroad track assigned to the eligible taxpayer by a Class II railroad or Class III railroad that owns or leases the track as of the close of the taxable year.

Section 45G(c) defines an eligible taxpayer to mean any Class II railroad or Class III railroad, and any person who transports property using the rail facilities of such a railroad, or who furnishes railroad-related property or services to such a railroad, but only with respect to miles of railroad track assigned to such person by a Class II railroad or Class III railroad.

Section 45G(d), as amended by section 423(a) of the TRHCA, defines the term QRTME to mean gross expenditures (whether or not chargeable to capital account) for maintaining railroad track (including roadbed, bridges, and related track structures) owned or leased as of January 1, 2005, by a Class II or Class III railroad (determined without regard to any consideration for such expenditures given by the

Class II or Class III railroad which made the assignment of such track).

Section 45G(e) defines the terms Class II railroad and Class III railroad to have the respective meanings given those terms by the Surface Transportation Board (STB).

Under section 45G(f), section 45G applies to QRTME paid or incurred during taxable years beginning after December 31, 2004, and before January 1, 2008. The amendments to section 45G(d) made by section 423(a) of the TRHCA apply retroactively to taxable years beginning after December 31, 2004.

Summary of Comments

Eligible Taxpayers

A commentator suggested that the final regulations clarify that a Class II or Class III railroad may not be recharacterized as an ineligible taxpayer because the railroad is a member of a controlled group of corporations under section 45G(e)(2) that includes a Class I railroad. Section 45G(c)(1) defines the term eligible taxpayer to include any Class II or Class III railroad. Section 45G(e)(1) provides that the terms Class II railroad and Class III railroad have the respective meanings given such terms by the STB. The controlled group rules do not affect the class designations made by the STB. The temporary regulations did not prescribe that the class designations made by the STB be superseded by the controlled group rules. Nevertheless, in response to the comment, the final regulations in §1.45G–1(b)(1) state explicitly that the definitions of Class II and Class III railroads are determined without regard to the controlled group rules under section 45G(e)(2).

Effect on Reimbursements

Commentators stated that the reimbursement rule in §1.45G–1T(c)(3)(ii) of the temporary regulations prevents eligible taxpayers from being made whole for their expenditures on railroad track infrastructure, because the credit is only for 50 percent of eligible expenditures. Under §1.45G–1T(c)(3)(ii), QRTME is treated as not paid or incurred during the taxable year to the extent that a taxpayer is entitled to reimbursement of any expenditures that would otherwise qualify as QRTME. Section 1.45G–1T(c)(3)(ii) further provides that reimbursements may consist of amounts paid either directly or indirectly to the taxpayer. Examples of indirect reimbursements in the temporary regulations include discounted freight shipping rates, price markups of railroad-related property, debt forgiveness, and similar arrangements. Thus, §1.45G–1T(c)(3)(ii) limits the QRTME paid or incurred to the actual out-of-pocket expenditures paid or incurred by an eligible taxpayer.

On December 20, 2006, Congress enacted the TRHCA, which changed the definition of QRTME. Although statutory changes other than technical corrections are usually made prospectively, this change to the statute was made retroactive to the original date of enactment of section 45G. The new definition provides that QRTME is not reduced by the discount amount in the case of discounted freight shipping rates, the increment in a markup of the price for track materials, or by debt forgiveness or cash payments made by the Class II or Class III railroad to the assignee as consideration for railroad track maintenance expenditures. Consideration received directly or indirectly from persons other than the Class II or Class III railroad, however, does reduce the amount of QRTME. See Joint Committee on Taxation Staff, *General Explanation of Tax Legislation Enacted in the 109th Congress*, 109th Cong., 2d Sess. 769 (January 17, 2007).

Consistent with the change to the statute, the final regulations retroactively limit the application of the reimbursement rule in §1.45G–1(c)(3)(ii) to consideration received directly or indirectly from persons other than the Class II or Class III railroad. A taxpayer that relied on the reimbursement rule in §1.45G–1T(c)(3)(ii) and reduced its QRTME reported on Form 8900, "*Qualified Railroad Track Maintenance Credit*," that was filed with the taxpayer's Federal income tax return, may amend its return to apply §1.45G–1(c)(3)(ii) to the taxable year provided the taxpayer applies all of §1.45G–1 to the taxable year.

Basis Adjustment

Commentators suggested that the basis reduction required by section 45G(e)(3) should only be taken by the Class II or Class III railroad owning the railroad track even if an assignee claims the RTMC. Section 45G(e)(3) requires that if a credit is allowed with respect to any railroad track, the basis of such track shall be reduced by the amount of the credit so allowed. Section 1.45G–1T(e) of the temporary regulations provides rules for adjusting basis for the amount of the RTMC claimed by an eligible taxpayer. The temporary regulations provide that for purposes of the basis adjustment under section 45G(e)(3), railroad track is the asset, if any, to which the QRTME must be capitalized, whether the asset is tangible or intangible. Therefore, the only basis that is reduced under section 45G(e)(3) is basis created by capitalizing the QRTME.

Congress commonly includes a basis adjustment rule when it enacts business tax credits as an investment incentive. See, for example, sections 43(d), 44(e), 45D(h), 45F(f), 45H(d), 45L(e), and 280C. The purpose of a basis adjustment is to prevent the taxpayer who claims the credit from obtaining a double tax benefit by also including the expenditures on which the credit was claimed in the basis of the asset created by the expenditures. Section 45G(e)(3) is clear and requires that the basis be reduced on the track with respect to which the credit is allowed. Therefore, to further the intent of Congress by preventing the double tax benefit, the basis adjustment rule must require that the increase in basis of property that results from the QRTME (without regard to the basis adjustment rule) be reduced by the amount of the credit allowed with respect to such QRTME. Allowing the reduction in basis by a taxpayer other than the taxpayer claiming the credit on property other than the property whose basis is increased by the QRTME (without regard to the basis adjustment rule) is contrary to the statute. Therefore, the final regulations do not adopt the commentators' suggestion.

Commentators also suggested that the definition of railroad track under section 45G(e)(3) should be limited to rails, ties, ballast, and other track materials. As stated previously, section 45G(e)(3) requires that basis be reduced on the track with respect to which the credit is allowed. The credit is allowed with respect to QRTME expended on railroad track. The definition of railroad track for purposes of the basis adjustment must be the same as the definition used for determining QRTME. Lim-

iting the definition of railroad track under the basis adjustment rule to rails, ties, ballast, and other track materials is inconsistent with the intent of the definition of railroad track on which expenditures may qualify as QRTME. The definition of railroad track for which expenditures may qualify as QRTME was intended by Congress to be expansive and includes bridges and other related track structures.

Commentators further suggested that the definition of railroad track under section 45G(e)(3) should not include intangibles. All or some of the QRTME paid or incurred by an eligible taxpayer during the taxable year may be required to be capitalized under section 263(a) as a tangible asset or as an intangible asset for improvements to another taxpayer's real property depending upon whether the eligible taxpayer owns (leases) the railroad track and improvements or not. (See, for example, §1.263(a)–4(d)(8), which generally requires capitalization of amounts paid or incurred by a taxpayer to produce or improve real property owned by another.) Regardless of whether an asset created by QRTME is tangible railroad track owned by the taxpayer, leasehold improvement to railroad track, or intangible railroad track for improvements to another taxpayer's real property, capitalization of the QRTME creates the basis in railroad track that must be reduced under section 45G(e)(3) if the RTMC is claimed on such expenditures. The rules requiring capitalization of amounts paid or incurred by a taxpayer to produce or improve real property owned by another under section 263(a) were prescribed prior to the enactment of section 45G. The provision in these final regulations that specifically references intangible assets is a reminder that, for purposes of section 45G(e)(3), it is possible that the basis that must be reduced is the basis of an intangible asset.

Coordination with Section 61

The temporary regulations, as corrected, do not contain a specific provision relating to the application of section 61, because such a provision would need to be placed in regulations under section 61. Section 1.45G–1T was never intended to provide rules for determining gross income under section 61. Section 61 and its regulations apply to certain transactions involving section 45G regardless of these regulations or the temporary regulations, and additional regulations under section 61 are not necessary. As stated in the preamble to the temporary regulations, there is no provision in section 45G that prevents the application of section 61 to certain transactions under section 45G. Taxpayers are reminded, therefore, that certain transactions under section 45G may generate gross income.

Other Changes

The final regulations contain other various changes that clarify the application of section 45G.

Effective Dates

Section 245(a) of the AJCA provides that section 45G applies to taxable years beginning after December 31, 2004 and beginning before January 1, 2008. Section 423(b) of the TRHCA provides that the amendments made by section 423(a) to section 45G(d) take effect as if included in section 245(a) of the AJCA. The final regulations provide that §1.45G–1 is effective for taxable years ending on or after September 7, 2006 (the effective date of §1.45G–1T). Section 1.45G–1(g)(2) provides that a taxpayer may apply §1.45G–1 to taxable years beginning after December 31, 2004, and ending before September 7, 2006, provided that the taxpayer applies all provisions in §1.45G–1 to the taxable year.

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 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. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is David Selig, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department 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 * * *

Par. 2. Section 1.45G–0 is added to read as follows:

§1.45G–0 Table of contents for the railroad track maintenance credit rules.

This section lists the table of contents for §1.45G–1.

§1.45G–1 Railroad track maintenance credit.

(a) In general.
(b) Definitions.
(1) Class II railroad and Class III railroad.
(2) Eligible railroad track.
(3) Eligible taxpayer.
(4) Qualifying railroad structure.
(5) Qualified railroad track maintenance expenditures.
(6) Rail facilities.
(7) Railroad-related property.
(8) Railroad-related services.
(9) Railroad track.
(10) Form 8900.
(11) Examples.
(c) Determination of amount of railroad track maintenance credit for the taxable year.
(1) General amount.
(2) Limitation on the credit.
(i) Eligible taxpayer is a Class II railroad or Class III railroad.
(ii) Eligible taxpayer is not a Class II railroad or Class III railroad.

(iii) No carryover of amount that exceeds limitation.

(3) Determination of amount of QRTME paid or incurred.

(i) In general.

(ii) Effect of reimbursements received from persons other than a Class II or Class III railroad.

(4) Examples.

(d) Assignment of track miles.

(1) In general.

(2) Assignment eligibility.

(3) Effective date of assignment.

(4) Assignment information statement.

(i) In general.

(ii) Assignor.

(iii) Assignee.

(iv) Special rule for returns filed prior to November 9, 2007.

(5) Special rules.

(i) Effect of subsequent dispositions of eligible railroad track during the assignment year.

(ii) Effect of multiple assignments of eligible railroad track miles during the same taxable year.

(6) Examples.

(e) Adjustments to basis.

(1) In general.

(2) Basis adjustment made to railroad track.

(3) Examples.

(f) Controlled groups.

(1) In general.

(2) Definitions.

(i) Trade or business.

(ii) Group and controlled group.

(iii) Group credit.

(iv) Consolidated group.

(v) Credit year.

(3) Computation of the group credit.

(4) Allocation of the group credit.

(i) In general.

(ii) Stand-alone entity credit.

(5) Special rules for consolidated groups.

(i) In general.

(ii) Special rule for allocation of group credit among consolidated group members.

(6) Tax accounting periods used.

(i) In general.

(ii) Special rule when timing of QRTME is manipulated.

(7) Membership during taxable year in more than one group.

(8) Intra-group transactions.

(i) In general.

(ii) Payment for QRTME.

(g) Effective/applicability date.

(1) In general.

(2) Taxable years ending before September 7, 2006.

(3) Special rules for returns filed prior to November 9, 2007.

§1.45G–0T [Removed]

Par. 3. Section 1.45G–0T is removed.

Par. 4. Section 1.45G–1 is added to read as follows:

§1.45G–1 Railroad track maintenance credit.

(a) *In general*. For purposes of section 38, the railroad track maintenance credit (RTMC) for qualified railroad track maintenance expenditures (QRTME) paid or incurred by an eligible taxpayer during the taxable year is determined under this section. A taxpayer claiming the RTMC must do so by filing Form 8900, "*Qualified Railroad Track Maintenance Credit*," with its timely filed (including extensions) Federal income tax return for the taxable year the RTMC is claimed. Paragraph (b) of this section provides definitions of terms. Paragraph (c) of this section provides rules for computing the RTMC, including rules regarding limitations on the amount of the credit. Paragraph (d) of this section provides rules for assigning miles of railroad track. Paragraph (e) of this section contains rules for adjusting basis for the amount of the RTMC claimed by an eligible taxpayer. Paragraph (f) of this section contains rules for computing the amount of the RTMC in the case of a controlled group, and for the allocation of the group credit among members of the controlled group.

(b) *Definitions*. For purposes of section 45G and this section, the following definitions apply:

(1) *Class II railroad and Class III railroad* have the respective meanings given to these terms by the Surface Transportation Board (STB) without regard to the controlled group rules under section 45G(e)(2).

(2) *Eligible railroad track* is railroad track (as defined in paragraph (b)(9) of this section) located within the United States that is owned or leased by a Class II railroad or Class III railroad at the close of its taxable year. For purposes of section 45G and this section, a Class II railroad or Class III railroad owns railroad track if the railroad track is subject to the allowance for depreciation under section 167 by the Class II railroad or Class III railroad.

(3) *Eligible taxpayer* is—

(i) A Class II railroad or Class III railroad during the taxable year;

(ii) Any person that transports property using the rail facilities (as defined in paragraph (b)(6) of this section) of a Class II railroad or Class III railroad during the taxable year, but only is an eligible taxpayer with respect to the miles of eligible railroad track assigned to the person for that taxable year by that Class II railroad or Class III railroad under paragraph (d) of this section; or

(iii) Any person that furnishes railroad-related property (as defined in paragraph (b)(7) of this section) or railroad-related services (as defined in paragraph (b)(8) of this section), to a Class II railroad or Class III railroad during the taxable year, but only is an eligible taxpayer with respect to the miles of eligible railroad track assigned to the person for that taxable year by that Class II railroad or Class III railroad under paragraph (d) of this section.

(4) *Qualifying railroad structure* is property located within the United States that is described in the following STB property accounts in 49 CFR Part 1201, Subpart A:

(i) Property Account 3, Grading.

(ii) Property Account 4, Other right-of-way expenditures.

(iii) Property Account 5, Tunnels and subways.

(iv) Property Account 6, Bridges, trestles, and culverts.

(v) Property Account 7, Elevated structures.

(vi) Property Account 8, Ties.

(vii) Property Account 9, Rails and other track material.

(viii) Property Account 11, Ballast.

(ix) Property Account 13, Fences, snowsheds, and signs.

(x) Property Account 27, Signals and interlockers.

(xi) Property Account 39, Public improvements; construction.

(5) *Qualified railroad track maintenance expenditures (QRTME)* are expenditures for maintaining, repairing, and improving qualifying railroad structure

(as defined in paragraph (b)(4) of this section) that is owned or leased as of January 1, 2005, by a Class II railroad or Class III railroad. These expenditures may or may not be chargeable to a capital account.

(6) *Rail facilities* of a Class II railroad or Class III railroad are railroad yards, tracks, bridges, tunnels, wharves, docks, stations, and other related assets that are used in the transport of freight by a railroad and that are owned or leased by the Class II railroad or Class III railroad.

(7) *Railroad-related property* is property that is provided directly to, and is unique to, a railroad and that, in the hands of a Class II railroad or Class III railroad, is described in—

(i) The following STB property accounts in 49 CFR Part 1201, Subpart A:

(A) Property Account 3, Grading;

(B) Property Account 5, Tunnels and subways;

(C) Property Account 22, Storage warehouses; and

(ii) Asset classes 40.1 through 40.54 in the guidance issued by the Internal Revenue Service under section 168(i)(1) (for further guidance, for example, see Rev. Proc. 87–56, 1987–2 C.B. 674, and §601.601(d)(2)(ii)(*b*) of this chapter), except that any office building, any passenger train car, and any miscellaneous structure if such structure is not provided directly to, and is not unique to, a railroad are excluded from the definition of railroad-related property.

(8) *Railroad-related services* are services that are provided directly to, and are unique to, a railroad and that relate to railroad shipping, loading and unloading of railroad freight, or repairs of rail facilities (as defined in paragraph (b)(6) of this section) or railroad-related property (as defined in paragraph (b)(7) of this section). Examples of railroad-related services are the transport of freight by rail; the loading and unloading of freight transported by rail; railroad bridge services; railroad track construction; providing railroad track material or equipment; locomotive leasing or rental; maintenance of railroad's right-of-way (including vegetation control); piggyback trailer ramping; rail deramping services; and freight train cars repair services. Examples of services that are not railroad-related services are general business services, such as, accounting and bookkeeping, marketing, legal services; janitorial services; office building rental; banking services (including financing of railroad-related property); and purchasing of, or services performed on, property not described in paragraph (b)(7) of this section.

(9) Except as provided in paragraph (e)(2) of this section, *railroad track* is property described in STB property accounts 8 (ties), 9 (rails and other track material), and 11 (ballast) in 49 CFR part 1201, Subpart A. *Double track* is treated as multiple lines of railroad track, rather than as a single line of railroad track. Thus, one mile of single track is one mile, but one mile of double track is two miles.

(10) *Form 8900*. If Form 8900 is revised or renumbered, any reference in this section to that form shall be treated as a reference to the revised or renumbered form.

(11) *Examples*. The application of this paragraph (b) is illustrated by the following examples. In all examples, the taxpayers use a calendar taxable year, and are not members of a controlled group.

Example 1. A is a manufacturer that in 2006, transports its products by rail using the railroad tracks owned by B, a Class II railroad that owns 500 miles of railroad track within the United States on December 31, 2006. B properly assigns for purposes of section 45G 100 miles of eligible railroad track to A in 2006. A is an eligible taxpayer for 2006 with respect to the 100 miles of eligible railroad track.

Example 2. C is a bank that loans money to several Class III railroads. In 2006, C loans money to D, a Class III railroad, who in turn uses the loan proceeds to purchase track material. Because providing loans is not a service that is unique to a railroad, C is not providing railroad-related services and, thus, C is not an eligible taxpayer, even if D assigns miles of eligible railroad track to C for purposes of section 45G.

Example 3. E leases locomotives directly to Class I, Class II, and Class III railroads. In 2006, E leases locomotives to F, a Class II railroad that owns 200 miles of railroad track within the United States on December 31, 2006. F properly assigns for purposes of section 45G 200 miles of eligible railroad track to E. Because locomotives are property that is unique to a railroad, and E leases these locomotives directly to F in 2006, E is an eligible taxpayer for 2006 with respect to the 200 miles of eligible railroad track assigned to E by F.

Example 4. The facts are the same as in *Example 3*, except that E leases passenger trains, not locomotives, to F. Because passenger trains are not railroad-related property for purposes of section 45G, E is not an eligible taxpayer even if F assigns miles of eligible railroad track to E for purposes of section 45G.

(c) *Determination of amount of railroad track maintenance credit for the taxable year*—(1) *General amount*. Except as provided in paragraph (c)(2) of this section, for purposes of section 38, the RTMC determined under section 45G(a) for the taxable year is equal to 50 percent of the QRTME paid or incurred (as determined under paragraph (c)(3) of this section) by an eligible taxpayer during the taxable year.

(2) *Limitation on the credit*—(i) *Eligible taxpayer is a Class II railroad or Class III railroad*. If an eligible taxpayer is a Class II railroad or Class III railroad, the RTMC determined under paragraph (c)(1) of this section for the Class II railroad or Class III railroad for any taxable year must not exceed $3,500 multiplied by the sum of—

(A) The number of miles of eligible railroad track owned or leased by the Class II railroad or Class III railroad, reduced by the number of miles of eligible railroad track assigned under paragraph (d) of this section by the Class II railroad or Class III railroad to another eligible taxpayer for that taxable year; and

(B) The number of miles of eligible railroad track owned or leased by another Class II railroad or Class III railroad that are assigned under paragraph (d) of this section to the Class II railroad or Class III railroad for the taxable year.

(ii) *Eligible taxpayer is not a Class II railroad or Class III railroad*. If an eligible taxpayer is not a Class II railroad or Class III railroad, the RTMC determined under paragraph (c)(1) of this section for the eligible taxpayer for any taxable year must not exceed $3,500 multiplied by the number of miles of eligible railroad track assigned under paragraph (d) of this section by a Class II railroad or Class III railroad to the eligible taxpayer for the taxable year.

(iii) *No carryover of amount that exceeds limitation*. Amounts that exceed the limitation under paragraph (c)(2)(i) of this section or paragraph (c)(2)(ii) of this section, may never be carried over to another taxable year.

(3) *Determination of amount of QRTME paid or incurred*—(i) *In general*. The term *paid or incurred* means, in the case of a taxpayer using an accrual method of accounting, a liability incurred (within the meaning of §1.446–1(c)(1)(ii)). A liability may not be taken into account under section 45G and this section prior to the taxable year during which the liability is incurred. Any amount that an eligible taxpayer (assignee) pays a Class II railroad or

Class III railroad (assignor) in exchange for an assignment of one or more miles of eligible railroad track under paragraph (d) of this section, is treated, for purposes of this section, as QRTME paid or incurred by the assignee, and not by the assignor, at the time and to the extent the assignor pays or incurs QRTME.

(ii) *Effect of reimbursements received from persons other than a Class II or Class III railroad*. The amount of QRTME treated as paid or incurred during the taxable year by an eligible taxpayer under paragraphs (b)(3)(ii) and (iii) of this section shall be reduced by any amount to which the eligible taxpayer is entitled to be reimbursed, directly or indirectly, from persons other than a Class II or Class III railroad.

(4) *Examples*. The application of this paragraph (c) is illustrated by the following examples. In all examples, the taxpayers use an accrual method of accounting and a calendar taxable year, and are not members of a controlled group.

Example 1. Computation of RTMC; section 45G credit limitation is not exceeded. (i) G is a Class II railroad that owns or has leased to it 1,000 miles of railroad track within the United States on December 31, 2006. H is a manufacturer that in 2006, transports its products by rail using the rail facilities of G. In 2006, for purposes of section 45G, G assigns 100 miles of eligible railroad track to H and does not make any other assignments of railroad track miles. H did not receive any other assignments of railroad track miles in 2006. During 2006, G incurred QRTME in the amount of $2.5 million and H incurred QRTME in the amount of $200,000.

(ii) For 2006, G determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $1,250,000 (50% multiplied by $2,500,000 QRTME incurred by G during 2006). G further determines G's credit limitation under paragraph (c)(2)(i) of this section for 2006 to be $3,150,000 ($3,500 multiplied by 900 miles of eligible railroad track (1,000 miles owned by, or leased to, G on December 31, 2006, less 100 miles assigned by G to H in 2006)). Because G's tentative amount of RTMC does not exceed G's credit limitation amount for 2006, G may claim a RTMC for 2006 in the amount of $1,250,000.

(iii) For 2006, H determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $100,000 (50% multiplied by $200,000 QRTME incurred by H during 2006). H further determines H's credit limitation under paragraph (c)(2)(ii) of this section for 2006 to be $350,000 ($3,500 multiplied by 100 miles of eligible railroad track assigned by G to H in 2006). Because H's tentative amount of RTMC does not exceed H's credit limitation amount for 2006, H may claim a RTMC in the amount of $100,000.

Example 2. Computation of RTMC; section 45G credit limitation is exceeded. (i) The facts are the same as in *Example 1*, except that G assigned for purposes of section 45G only 50 miles of railroad track to H in 2006 and, during 2006, H incurred QRTME in the amount of $400,000.

(ii) For 2006, G determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $1,250,000 (50% multiplied by $2,500,000 QRTME incurred by G during 2006). G further determines G's credit limitation under paragraph (c)(2)(i) of this section for 2006 to be $3,325,000 ($3,500 multiplied by 950 miles of eligible railroad track (1,000 miles owned by, or leased to, G on December 31, 2006, less 50 miles assigned by G to H in 2006)). Because G's tentative amount of RTMC does not exceed G's credit limitation amount for 2006, G may claim a RTMC in the amount of $1,250,000

(iii) For 2006, H determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $200,000 (50% multiplied by $400,000 QRTME incurred by H during 2006). H further determines H's credit limitation under paragraph (c)(2)(ii) of this section for 2006 to be $175,000 ($3,500 multiplied by 50 miles of eligible railroad track assigned by G to H in 2006). Because H's tentative amount of RTMC exceeds H's credit limitation amount for 2006, H may claim a RTMC in the amount of $175,000 (the credit limitation amount). Under paragraph (c)(2)(iii) of this section, there is no carryover of the $25,000 (the tentative amount of $200,000 less the credit limitation amount of $175,000) that exceeds the limitation.

Example 3. Railroad track miles assigned for payment. (i) J is a Class II railroad that owns or has leased to it 1,000 miles of railroad track within the United States on December 31, 2006. K is a corporation that sells ties, ballast, and other track material to Class I, Class II, and Class III railroads. During 2006, K sold these items to J and J incurred QRTME in the amount of $1 million. Also, on December 6, 2006, J assigned for purposes of section 45G 150 miles of eligible railroad track to K and K paid J $800,000 for that assignment. K did not pay or incur any other QRTME during 2006.

(ii) For 2006, in accordance with paragraph (c)(3)(ii) of this section, J is treated as having incurred QRTME in the amount of $200,000 ($1 million QRTME actually incurred by J less the $800,000 paid by K to J for the assignment of the railroad track miles in 2006). For 2006, J determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $100,000 (50% multiplied by $200,000 QRTME treated as incurred by J during 2006). J further determines J's credit limitation amount under paragraph (c)(2)(i) of this section for 2006 to be $2,975,000 ($3,500 multiplied by 850 miles of eligible railroad track (1,000 miles owned by, or leased to, J on December 31, 2006, less 150 miles assigned by J to K in 2006)). Because J's tentative amount of RTMC does not exceed J's credit limitation amount for 2006, J may claim a RTMC in the amount of $100,000.

(iii) For 2006, K is an eligible taxpayer because, during 2006, K provided railroad-related property to J and received an assignment of eligible railroad track miles from J. Under paragraph (c)(3)(ii) of this section, K is treated as having incurred QRTME in the amount of $800,000 (the amount paid by K to J for the assignment of the railroad track miles in 2006). For 2006, K determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $400,000 (50% multiplied by $800,000 QRTME treated as incurred by K during 2006). K further determines K's credit limitation amount under paragraph (c)(2)(ii) of this section for 2006 to be $525,000 ($3,500 multiplied by 150 miles of eligible railroad track assigned by J in 2006). Because K's tentative amount of RTMC does not exceed K's credit limitation amount for 2006, K may claim a RTMC in the amount of $400,000.

(iv) The results in this *Example 3* would be the same if K sold the ties, ballast, and other track material with a fair market value of $1 million to J for $200,000 in exchange for the assignment by J of 150 miles of eligible railroad track to K.

Example 4. Reimbursement of QRTME. (i) L is a Class III railroad that owns or has leased to it 500 miles of railroad track within the United States on December 31, 2006. M is a manufacturer that in 2006 transports its products by rail using the rail facilities of L. During 2006, L did not incur any QRTME. Also, in 2006, L assigned for purposes of section 45G 200 miles of eligible railroad track to M and agreed to reduce L's freight shipping rates to M by $250,000 in exchange for M upgrading these railroad track miles. Consequently, during 2006, M incurred QRTME of $500,000 to upgrade these 200 miles of railroad track and L reduced L's freight shipping rates for M by $250,000.

(ii) For 2006, M is an eligible taxpayer because, during 2006, M transported property using the rail facilities of L and received an assignment of eligible railroad track miles from L. The amount of QRTME paid or incurred by M during 2006 is $500,000 and is not reduced by the reimbursement of $250,000 by L to M because, under paragraph (c)(3)(ii) of this section, QRTME is not reduced by reimbursements from Class II or Class III railroads. For 2006, M determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $250,000 (50% multiplied by $500,000 QRTME incurred by M during 2006). M further determines M's credit limitation amount under paragraph (c)(2)(ii) of this section for 2006 to be $700,000 ($3,500 multiplied by 200 miles of eligible railroad track assigned by L to M in 2006). Because M's tentative amount of RTMC does not exceed M's credit limitation amount for 2006, M may claim a RTMC in the amount of $250,000.

(d) *Assignment of track miles*—(1) *In general*. An assignment of any mile of eligible railroad track under this paragraph (d) is a designation by a Class II railroad or Class III railroad that is made solely for purposes of section 45G and this section of a specific number of miles of eligible railroad track as being assigned to another eligible taxpayer for a taxable year. A designation must be in writing and must include the name and taxpayer identification number of the assignee, and the information required under the rules of paragraph (d)(4)(iii)(B) of this section. A designation requires no transfer of legal title or other *indicia* of ownership of the eligible railroad track, and need not specify the location of any assigned mile of eligible railroad track. Further, an assigned mile of el-

igible railroad track need not correspond to any specific mile of eligible railroad track with respect to which the eligible taxpayer actually pays or incurs the QRTME.

(2) *Assignment eligibility*. Only a Class II railroad or Class III railroad may assign a mile of eligible railroad track. If a Class II railroad or Class III railroad assigns a mile of eligible railroad track to an eligible taxpayer, the assignee is not permitted to reassign any mile of eligible railroad track to another eligible taxpayer. The maximum number of miles of eligible railroad track that may be assigned by a Class II railroad or Class III railroad for any taxable year is its total miles of eligible railroad track less the miles of eligible railroad track that the Class II railroad or Class III railroad retains for itself in determining its RTMC for the taxable year.

(3) *Effective date of assignment*. If a Class II railroad or Class III railroad assigns a mile of eligible railroad track, the assignment is treated as being made by the Class II railroad or Class III railroad at the close of its taxable year in which the assignment was made. With respect to the assignee, the assignment of a mile of eligible railroad track is taken into account for the taxable year of the assignee that includes the date the assignment is treated as being made by the assignor Class II railroad or Class III railroad under this paragraph (d)(3).

(4) *Assignment information statement*—(i) *In general*. A taxpayer must file Form 8900, "*Qualified Railroad Track Maintenance Credit*," with its timely filed (including extensions) Federal income tax return for the taxable year for which the taxpayer assigns any mile of eligible railroad track, even if the taxpayer is not itself claiming the RTMC for that taxable year.

(ii) *Assignor*. Except as provided in paragraph (d)(4)(iv) of this section, a Class II railroad or Class III railroad (assignor) that assigns one or more miles of eligible railroad track during a taxable year to one or more eligible taxpayers must attach to the assignor's Form 8900 for that taxable year an information statement providing—

(A) The name and taxpayer identification number of each assignee;

(B) The total number of miles of the assignor's eligible railroad track;

(C) The number of miles of eligible railroad track assigned by the assignor to each assignee for the taxable year; and

(D) The total number of miles of eligible railroad track assigned by the assignor to all assignees for the taxable year.

(iii) *Assignee*. Except as provided in paragraph (d)(4)(iv) of this section, an eligible taxpayer (assignee) that has received an assignment of miles of eligible railroad track during its taxable year from a Class II railroad or Class III railroad, and that claims the RTMC for that taxable year, must attach to the assignee's Form 8900 for that taxable year a statement—

(A) Providing the total number of miles of eligible railroad track assigned to the assignee for the assignee's taxable year; and

(B) Attesting that the assignee has in writing, and has retained as part of the assignee's records for purposes of §1.6001–1(a), the following information from each assignor:

(*1*) The name and taxpayer identification number of each assignor.

(*2*) The date of each assignment made by each assignor (as determined under paragraph (d)(3) of this section) to the assignee;

(*3*) The number of miles of eligible railroad track assigned by each assignor to the assignee for the assignee's taxable year.

(iv) *Special rules for returns filed prior to November 9, 2007*. If an eligible taxpayer's Federal income tax return for a taxable year beginning after December 31, 2004, and ending before November 9, 2007, was filed before December 13, 2007, and the eligible taxpayer is not filing an amended Federal income tax return for that taxable year pursuant to paragraph (g)(2) of this section before the eligible taxpayer's next filed original Federal income tax return, and the eligible taxpayer wants to apply paragraph (g)(2) of this section but did not include with that return the information specified in paragraph (d)(4)(ii) or (iii) of this section, as applicable, the eligible taxpayer must attach a statement containing the information specified in paragraph (d)(4)(ii) or (iii) of this section, as applicable, to either—

(A) The eligible taxpayer's next filed original Federal income tax return; or

(B) The eligible taxpayer's amended Federal income tax return that is filed pursuant to paragraph (g)(2) of this section, provided that amended Federal income tax return is filed by the eligible taxpayer before its next filed original Federal income tax return.

(5) *Special rules*—(i) *Effect of subsequent dispositions of eligible railroad track during the assignment year*. If a Class II railroad or Class III railroad assigns one or more miles of eligible railroad track that it owned or leased as of the actual date of the assignment, but does not own or lease any eligible railroad track at the close of the taxable year in which the assignment is made by the Class II railroad or Class III railroad, the assignment is not valid for that taxable year for purposes of section 45G and this section.

(ii) *Effect of multiple assignments of eligible railroad track miles during the same taxable year*. If a Class II railroad or Class III railroad assigns more miles of eligible railroad track than it owned or leased as of the close of the taxable year in which the assignment is made by the Class II railroad or Class III railroad, the assignment is valid for purposes of section 45G and this section only with respect to the name of the assignee and the number of miles listed by the assignor Class II railroad or Class III railroad on the statement required under paragraph (d)(4)(ii) of this section and only to the extent of the maximum miles of eligible railroad track that may be assigned by the assignor Class II railroad or Class III railroad as determined under paragraph (d)(2) of this section. If the total number of miles on this statement exceeds the maximum miles of eligible railroad track that may be assigned by the assignor Class II railroad or Class III railroad (as determined under paragraph (d)(2) of this section), the total number of miles on the statement shall be reduced by the excess amount of miles. This reduction is allocated among each assignee listed on the statement in proportion to the total number of miles listed on the statement for that assignee.

(6) *Examples*. The application of this paragraph (d) is illustrated by the following examples. In none of the examples are the taxpayers members of a controlled group:

Example 1. Assignor and assignee have the same taxable year. (i) N, a calendar year taxpayer, is a Class II railroad that owns 500 miles of railroad track within the United States on December 31, 2006. O, a calendar year taxpayer, is not a railroad, but is a taxpayer that provides railroad-related property to N during 2006. On November 7, 2006, N assigns for purposes of section 45G 300 miles of eligible railroad

track to O. O receives no other assignment of eligible railroad track in 2006. O pays or incurs QRTME in the amount of $100,000 in November 2006, and $50,000 in February 2007. N and O each file Form 8900 with their timely filed Federal income tax returns for 2006 and attach the statement required by paragraph (d)(4)(ii) and (iii), respectively, of this section reporting the assignment of the 300 miles of eligible railroad track to O.

(ii) The assignment of the 300 miles of eligible railroad track made by N to O on November 7, 2006, is treated as made on December 31, 2006 (at the close of the N's taxable year). Consequently, the assignment is taken into account by O for O's taxable year ending on December 31, 2006. For 2006, O is an eligible taxpayer because, during 2006, O provides railroad-related property to N and receives an assignment of 300 eligible railroad track miles from N. For 2006, O determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $50,000 (50% multiplied by $100,000 QRTME paid or incurred by O during 2006). O further determines the credit limitation amount under paragraph (c)(2)(i) of this section for 2006 to be $1,050,000 ($3,500 multiplied by 300 miles of eligible railroad track assigned by N to O on December 31, 2006). Because O's tentative amount of RTMC does not exceed O's credit limitation amount for 2006, O may claim a RMTC for 2006 in the amount of $50,000.

Example 2. Assignor and assignee have different taxable years. (i) The facts are the same as in *Example 1*, except that O's taxable year ends on March 31.

(ii) The assignment of the 300 miles of eligible railroad track made by N to O on November 7, 2006, is treated as made on December 31, 2006. As a result, the assignment is taken into account by O for O's taxable year ending on March 31, 2007. Thus, for the taxable year ending on March 31, 2007, O determines the tentative amount of RMTC under paragraph (c)(1) of this section to be $75,000 (50% multiplied by $150,000 QRTME incurred by O during its taxable year ending March 31, 2007). Because O's tentative amount of RTMC does not exceed O's credit limitation amount for the taxable year ending March 31, 2007, O may claim a RMTC for the taxable year ending March 31, 2007, in the amount of $75,000.

Example 3. Assignment location differs from QRTME location. (i) P, a calendar-year taxpayer, is a Class III railroad that owns or has leased to it 200 miles of railroad track within the United States on December 31, 2006. P owns 50 miles of this railroad track and leases 150 miles of this railroad track from Q, a Class I railroad. On February 8, 2006, P assigns for purposes of section 45G 50 miles of eligible railroad track to R. R is not a railroad, but is a taxpayer that ships products using the 50 miles of eligible railroad track owned by P, and R paid $100,000 in 2006 to P to enable P to upgrade these 50 miles of eligible railroad track. In March 2006, P also assigns for purposes of section 45G 150 miles of eligible railroad track to S. S is not a railroad, but is a taxpayer that provides railroad-related property to P, and S paid $400,000 to P to enable P to upgrade P's 200 miles of eligible railroad track. For 2006, P pays or incurs QRTME in the amount of $500,000 to upgrade the 150 miles of eligible railroad track that it leases from Q and pays or incurs no QRTME on the 50 miles of eligible railroad track that it owns. For 2006, P receives no other assignment of eligible railroad track miles and did not retain any eligible railroad track miles for itself. Also, R and S do not pay or incur any other amounts that would qualify as QRTME during 2006. P, R, and S each file Form 8900 with their timely filed Federal income tax returns for 2006 and attach the statement required by paragraph (d)(4)(ii) or (iii) of this section, whichever applies, reporting the assignment of eligible railroad track by P to R or S in 2006.

(ii) For 2006, in accordance with paragraph (c)(3)(ii) of this section, P is treated as having incurred QRTME in the amount of $0 ($500,000 QRTME actually incurred by P less the $100,000 paid by R to P for the assignment of the 50 miles of eligible railroad track and the $400,000 paid by S to P for the assignment of the 150 miles of eligible railroad track). Further, P assigned all of its eligible railroad track miles to R and S for 2006. Accordingly, for 2006, P may not claim any RTMC.

(iii) For 2006, R is an eligible taxpayer because, during 2006, R ships property using the rail facilities of P and receives an assignment of 50 eligible railroad track miles from P. In accordance with paragraph (c)(3)(ii) of this section, R is treated as having incurred QRTME in the amount of $100,000 (the amount paid by R to P for the assignment of the eligible railroad track miles in 2006) even though no work was performed on the 50 miles of eligible railroad track that was assigned by P to R. For 2006, R determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $50,000 (50% multiplied by $100,000 QRTME treated as incurred by R during 2006). R further determines the credit limitation amount under paragraph (c)(2)(ii) of this section to be $175,000 ($3,500 multiplied by 50 miles of eligible railroad track assigned by P to R in 2006). Because R's tentative amount of RTMC does not exceed R's credit limitation amount for 2006, R may claim a RTMC for 2006 in the amount of $50,000.

(iv) For 2006, S is an eligible taxpayer because, during 2006, S provides railroad-related property to P and receives an assignment of 150 eligible railroad track miles from P. In accordance with paragraph (c)(3)(ii) of this section, S is treated as having incurred QRTME in the amount of $400,000 (amount paid by S to P for the assignment of the eligible railroad track miles in 2006). For 2006, S determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $200,000 (50% multiplied by $400,000 QRTME treated as incurred by S during 2006). S further determines the credit limitation amount under paragraph (c)(2)(ii) of this section to be $525,000 ($3,500 multiplied by 150 miles of eligible railroad track assigned by P to S in 2006). Because S's tentative amount of RTMC does not exceed S's credit limitation amount for 2006, S may claim a RTMC for 2006 in the amount of $200,000.

Example 4. Multiple assignments of track miles. (*i*) T, a calendar-year taxpayer, is a Class III railroad that owns or has leased to it 200 miles of railroad track within the United States on December 31, 2006. T owns 75 miles of this railroad track and leases 125 miles of this railroad track from U, a Class I railroad. V and W are not railroads, but are both taxpayers that provide railroad-related services to T during 2006. On January 15, 2006, T assigns for purposes of section 45G 200 miles of eligible railroad track to V. V agrees to incur, in 2006, $1.4 million of QRTME to upgrade a portion of/segment of these 200 miles of eligible railroad track. Due to unexpected financial difficulties, V only incurs $250,000 of QRTME during 2006 and on May 15, 2006, T learns that V is unable to incur the remainder of the QRTME. On June 15, 2006, T assigns for purposes of section 45G the 200 miles of railroad track to W. In 2006, W incurs $1,100,000 of QRTME to upgrade a portion of/segment of the railroad track. For 2006, T receives no other assignment of eligible railroad track miles and did not retain any eligible railroad track miles for itself. V and W do not receive any other assignments of miles of eligible railroad track miles from a Class II railroad or Class III railroad during 2006. T and W each file Form 8900 with their timely filed Federal income tax returns for 2006, and attach the statement required by paragraph (d)(4)(ii) and (iii), respectively, of this section, reporting the assignment of 200 miles of eligible railroad track to W.

(ii) Because T did not retain any miles of eligible railroad track for itself for 2006, the maximum miles of eligible railroad track that may be assigned by T for 2006 is 200 miles pursuant to paragraph (d)(2) of this section. On the statement required by paragraph (d)(4)(ii) of this section, T assigned a total of 200 miles of eligible railroad track to W. Consequently, because T did not list V as an assignee on T's statement required by paragraph (d)(4)(ii) of this section, V did not receive an assignment of eligible railroad track miles from T during 2006 and V is not an eligible taxpayer for 2006. Thus, for 2006, V may not claim any RTMC even though V incurred QRTME in the amount of $250,000.

(iii) For 2006, W is an eligible taxpayer because, during 2006, W provides railroad-related services to T and receives an assignment of 200 eligible railroad track miles from T. W determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $550,000 (50% multiplied by $1,100,000 QRTME incurred by W during 2006). W further determines the credit limitation amount under paragraph (c)(2)(ii) of this section to be $700,000 ($3,500 multiplied by the 200 miles of eligible railroad track assigned by T to W in 2006). Because W's tentative amount of RTMC does not exceed W's credit limitation amount for 2006, W may claim a RTMC for 2006 in the amount of $550,000.

Example 5. Multiple assignments of track miles. (i) Same facts as in *Example 4*, except T, to its Form 8900 for 2006, attaches the statement required by paragraph (d)(4)(ii) of this section assigning 200 miles of eligible railroad track to W and 200 miles of eligible railroad track to V.

(ii) Because T did not retain any miles of eligible railroad track for itself for 2006, the maximum miles of eligible railroad track that may be assigned by T for 2006 is 200 miles pursuant to paragraph (d)(2) of this section. However, on the statement required by paragraph (d)(4)(ii) of this section, T assigned a total of 400 miles of eligible railroad track (200 miles to W and 200 miles to V). Consequently, the 400 miles of eligible railroad track on this statement must be reduced to the 200 maximum miles of eligible railroad track available for assignment for 2006. Because the statement reports 200 miles of eligible railroad track assigned to each W and V, the reduction of 200 miles (400 total miles of eligible railroad track on the statement less 200 maximum miles of eligible railroad track available for assignment) is allocated *pro-rata* between W and V and, therefore, 100 miles each to

W and V. Thus, pursuant to paragraph (d)(5)(ii) of this section, the number of miles of eligible railroad track assigned by T to W and V for 2006 is 100 miles each.

(iii) For 2006, V is an eligible taxpayer because, during 2006, V provides railroad-related services to T and receives an assignment of 100 eligible railroad track miles from T. V determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $125,000 (50% multiplied by $250,000 QRTME incurred by V during 2006). V further determines the credit limitation amount under paragraph (c)(2)(ii) of this section to be $350,000 ($3,500 multiplied by the 100 miles of eligible railroad track assigned by T to V in 2006). Because V's tentative amount of RTMC does not exceed W's credit limitation amount for 2006, V may claim a RTMC for 2006 in the amount of $125,000.

(iv) For 2006, W is an eligible taxpayer because, during 2006, W provides railroad-related services to T and receives an assignment of 100 eligible railroad track miles from T. W determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $550,000 (50% multiplied by $1,100,000 QRTME incurred by W during 2006). W further determines the credit limitation amount under paragraph (c)(2)(ii) of this section to be $350,000 ($3,500 multiplied by the 100 miles of eligible railroad track assigned by T to W in 2006). Because W's tentative amount of RTMC exceeds W's credit limitation amount for 2006, W may claim a RTMC for 2006 in the amount of $350,000 (the credit limitation). There is no carryover of the amount of $200,000 (the tentative amount of $550,000 less the credit limitation amount of $350,000).

(e) *Adjustments to basis*—(1) *In general*. All or some of the QRTME paid or incurred by an eligible taxpayer during the taxable year may be required to be capitalized under section 263(a) as a tangible asset or as an intangible asset. See, for example, §1.263(a)–4(d)(8), which requires capitalization of amounts paid or incurred by a taxpayer to produce or improve real property owned by another (except to the extent the taxpayer is selling services at fair market value to produce or improve the real property) if the real property can reasonably be expected to produce significant economic benefits for the taxpayer. The basis of the tangible asset or intangible asset includes the capitalized amount of the QRTME.

(2) *Basis adjustment made to railroad track*. An eligible taxpayer must reduce the adjusted basis of any railroad track with respect to which the eligible taxpayer claims the RTMC. For purposes of section 45G(e)(3) and this paragraph (e)(2), the adjusted basis of any railroad track with respect to which the eligible taxpayer claims the RTMC is limited to the amount of QRTME, if any, that is required to be capitalized into the qualifying railroad structure or an intangible asset. The adjusted basis of the railroad track is reduced by the amount of the RTMC allowable (as determined under paragraph (c) of this section) by the eligible taxpayer for the taxable year, but not below zero. This reduction is taken into account at the time the QRTME is paid or incurred by an eligible taxpayer and before the depreciation deduction with respect to such railroad track is determined for the taxable year for which the RTMC is allowable. If all or some of the QRTME paid or incurred by an eligible taxpayer during the taxable year is capitalized under section 263(a) to more than one asset, whether tangible or intangible (for example, railroad track and bridges), the reduction to the basis of these assets under this paragraph (e)(2) is allocated among each of the assets subject to the reduction in proportion to the unadjusted basis of each asset at the time the QRTME is paid or incurred during that taxable year.

(3) *Examples*. The application of this paragraph (e) is illustrated by the following examples. In each example, all taxpayers use a calendar taxable year, and no taxpayers are members of a controlled group.

Example 1. (i) X is a Class II railroad that owns 500 miles of railroad track within the United States on December 31, 2006. During 2006, X incurs $1 million of QRTME for maintaining this railroad track. X uses the track maintenance allowance method for track structure expenditures (for further guidance, see Rev. Proc. 2002–65, 2002–2 C.B. 700, and §601.601(d)(2)(ii)(*b*) of this chapter). Assume all of the $1 million QRTME is track structure expenditures and none of it was expended for new track structure.

(ii) For 2006, X determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $500,000 (50% multiplied by $1 million QRTME incurred by X during 2006). X further determines the credit limitation amount under paragraph (c)(2)(i) of this section for 2006 to be $1,750,000 ($3,500 multiplied by 500 miles of eligible railroad track). Because X's tentative amount of RTMC does not exceed X's credit limitation amount for 2006, X may claim a RTMC for 2006 in the amount of $500,000.

(iii) Of the $1 million QRTME incurred by X during 2006, X determines under the track maintenance allowance method that $750,000 is the track maintenance allowance under section 162 and $250,000 is the capitalized amount for the track structure. In accordance with paragraph (e)(2) of this section, X reduces the capitalized amount of $250,000 by the RTMC of $500,000 claimed by X for 2006, but not below zero. Thus, the capitalized amount of $250,000 is reduced to zero. X also deducts under section 162 a track maintenance allowance of $750,000 on its 2006 Federal income tax return.

Example 2. (i) Y is a Class II railroad that owns or has leased to it 500 miles of eligible railroad track within the United States on December 31, 2006. Z is not a railroad, but is a taxpayer that, in 2006, transports its products using the rail facilities of Y. In 2006, Y assigns for purposes of section 45G 300 miles of eligible railroad track to Z. Z does not receive any other assignments of eligible railroad track miles in 2006. During 2006, Z incurs QRTME in the amount of $1 million, and Y does not incur any QRTME. Y and Z each file Form 8900 with their timely filed Federal income tax returns for 2006 and attach the statement required by paragraph (d)(4)(ii) and (iii), respectively, of this section reporting the assignment of the 300 miles of eligible railroad track to Z.

(ii) For 2006, Z determines the tentative amount of RTMC under paragraph (c)(1) of this section to be $500,000 (50% multiplied by $1 million QRTME incurred by Z during 2006). Z further determines the credit limitation amount under paragraph (c)(2)(ii) of this section for 2006 to be $1,050,000 ($3,500 multiplied by 300 miles of eligible railroad track assigned by Y to Z in 2006). Because Z's tentative amount of RTMC does not exceed Z's credit limitation amount for 2006, Z may claim a RTMC for 2006 in the amount of $500,000.

(iii) For 2006, Z also must determine the portion of the $1 million QRTME that Z incurs that is required to be capitalized under section 263(a), and the portion that is a section 162 expense. Because Z is not a Class II railroad or Class III railroad, Z cannot use the track maintenance allowance method. Assume that all of the QRTME constitutes an intangible asset under §1.263(a)–4(d)(8) and, therefore, is required to be capitalized by Z under section 263(a) as an intangible asset. In accordance with paragraph (e)(2) of this section, Z reduces the capitalized amount of $1 million by the RTMC of $500,000 claimed by Z for 2006. Thus, the capitalized amount of $1 million for the intangible asset is reduced to $500,000. Further, pursuant to §1.167(a)–3(b)(1)(iv), Z may treat this intangible asset with an adjusted basis of $500,000 as having a useful life of 25 years for purposes of the depreciation allowance under section 167(a).

(f) *Controlled groups*—(1) *In general*. Pursuant to section 45G(e)(2), if an eligible taxpayer is a member of a controlled group of corporations, rules similar to the rules in §1.41–6T apply for determining the amount of the RTMC under section 45G(a) and this section. To determine the amount of RTMC (if any) allowable to a trade or business that at the end of its taxable year is a member of a controlled group, a taxpayer must—

(i) Compute the group credit in the manner described in paragraph (f)(3) of this section; and

(ii) Allocate the group credit among the members of the group in the manner described in paragraph (f)(4) of this section.

(2) *Definitions*. For purposes of section 45G(e)(2) and paragraph (f) of this section—

(i) A *trade or business* is a sole proprietorship, a partnership, a trust, an estate, or a corporation that is carrying on a trade

or business (within the meaning of section 162). Any corporation that is a member of a commonly controlled group shall be deemed to be carrying on a trade or business if any other member of that group is carrying on any trade or business;

(ii) *Group* and *controlled group* means a controlled group of corporations, as defined in section 41(f)(5), or a group of trades or businesses under common control. For rules for determining whether trades or businesses are under common control, see §1.52–1 (b) through (g);

(iii) *Group credit* means the RTMC (if any) allowable to a controlled group;

(iv) *Consolidated group* has the meaning set forth in §1.1502–1(h); and

(v) *Credit year* means the taxable year for which the member is computing the RTMC.

(3) *Computation of the group credit*. All members of a controlled group are treated as a single taxpayer for purposes of computing the RTMC. The group credit is computed by applying all of the section 45G computational rules (including the rules set forth in this section) on an aggregate basis.

(4) *Allocation of the group credit*—(i) *In general*. (A) To the extent the group credit (if any) computed under paragraph (f)(3) of this section does not exceed the sum of the stand-alone entity credits of all of the members of a controlled group, computed under paragraph (f)(4)(ii) of this section, such group credit shall be allocated among the members of the controlled group in proportion to the stand-alone entity credits of the members of the controlled group, computed under paragraph (f)(4)(ii) of this section:

$$\text{group credit that does not exceed sum of all the members' stand-alone entity credits} \times \frac{\text{member's stand-alone entity credit}}{\text{Sum of all the members' stand-alone entity credits.}}$$

(B) To the extent that the group credit (if any) computed under paragraph (f)(3) of this section exceeds the sum of the stand-alone entity credits of all of the members of the controlled group, computed under paragraph (f)(4)(ii) of this section, such excess shall be allocated among the members of a controlled group in proportion to the QRTMEs of the members of the controlled group:

$$\text{(group credit less the sum of all the members' stand-alone entity credits)} \times \frac{\text{QRTMEs of members that are eligible taxpayers}}{\text{sum of QRTMEs of all members that are eligible taxpayers.}}$$

(ii) *Stand-alone entity credit*. The term *stand-alone entity credit* means the RTMC (if any) that would be allowable to a member of a controlled group if the credit were computed as if section 45G(e)(2) did not apply, except that the member must apply the rules provided in paragraphs (f)(5) (relating to consolidated groups) and (f)(8) (relating to intra-group transactions) of this section.

(5) *Special rules for consolidated groups*—(i) *In general*. For purposes of applying paragraph (f)(4) of this section, a consolidated group whose members are members of a controlled group is treated as a single member of the controlled group and a single stand-alone entity credit is computed for the consolidated group.

(ii) *Special rule for allocation of group credit among consolidated group members*. The portion of the group credit that is allocated to a consolidated group is allocated to the members of the consolidated group in accordance with the principles of paragraph (f)(4) of this section. However, for this purpose, the stand-alone entity credit of a member of a consolidated group is computed without regard to section 45G(e)(2).

(6) *Tax accounting periods used*—(i) *In general*. The credit allowable to a member of a controlled group is that member's share of the group credit computed as of the end of that member's taxable year. In computing the group credit for a group whose members have different taxable years, a member generally should treat the taxable year of another member that ends with or within the credit year of the computing member as the credit year of that other member. For example, Q, R, and S are members of a controlled group of corporations. Both Q and R are calendar year taxpayers. S files a return using a fiscal year ending June 30. For purposes of computing the group credit at the end of Q's and R's taxable year on December 31, S's fiscal year ending June 30, which ends within Q's and R's taxable year, is treated as S's credit year.

(ii) *Special rule when timing of QRTME is manipulated*. If the timing of QRTME by members using different tax accounting periods is manipulated to generate a credit in excess of the amount that would be allowable if all members of the group used the same tax accounting period, then the appropriate Internal Revenue Service official in the operating division that has examination jurisdiction of the return may require each member of the group to calculate the credit in the current taxable year and all future years as if all members of the group had the same taxable year and base period as the computing member.

(7) *Membership during taxable year in more than one group*. A trade or business may be a member of only one group for a taxable year. If, without application of this paragraph (f)(7), a business would be a member of more than one group at the end of its taxable year, the business shall be

treated as a member of the group in which it was included for its preceding taxable year. If the business was not included for its preceding taxable year in any group in which it could be included as of the end of its taxable year, the business shall designate in its timely filed (including extensions) federal income tax return for the taxable year the group in which it is being included. If the business does not so designate, then the appropriate Internal Revenue Service official in the operating division that has examination jurisdiction of the return will determine the group in which the business is to be included. If the Federal income tax return for a taxable year beginning after December 31, 2004, and ending before November 9, 2007, was filed before December 13, 2007, and the business wants to apply paragraph (g)(2) of this section but did not designate its group membership in that return, the business must designate its group membership for that year either—

(i) In its next filed original Federal income tax return; or

(ii) In its amended Federal income tax return that is filed pursuant to paragraph (g)(2) of this section, provided that amended Federal income tax return is filed by the business before its next filed original Federal income tax return.

(8) *Intra-group transactions*—(i) *In general*. Because all members of a group under common control are treated as a single taxpayer for purposes of determining the RTMC, transfers between members of the group are generally disregarded.

(ii) *Payment for QRTME*. Amounts paid or incurred by the owner (or lessor) of eligible railroad track to another member of the group for QRTME shall be taken into account as QRTME by the owner (or lessor) of the eligible railroad track for purposes of section 45G only to the extent of the lesser of—

(A) The amount paid or incurred to the other member; or

(B) The amount that would have been considered paid or incurred by the other member for the QRTME, if the QRTME was not reimbursed by the owner (or lessor) of the eligible railroad track.

(g) *Effective/applicability date*—(1) *In general*. Except as provided in paragraphs (g)(2) and (g)(3) of this section, this section applies to taxable years ending on or after September 7, 2006.

(2) *Taxable years ending before September 7, 2006*. A taxpayer may apply this section to taxable years beginning after December 31, 2004, and ending before September 7, 2006, provided that the taxpayer applies all provisions in this section to the taxable year.

(3) *Special rules for returns filed prior to November 9, 2007*. If a taxpayer's Federal income tax return for a taxable year beginning after December 31, 2004, and ending before November 9, 2007, was filed before December 13, 2007, and the taxpayer is not filing an amended Federal income tax return for that taxable year pursuant to paragraph (g)(2) of this section before the taxpayer's next filed original Federal income tax return, see paragraphs (d)(4)(iv) and (f)(7) of this section for the statements that must be attached to the taxpayer's next filed original Federal income tax return.

§1.45G–1T [Removed]

Par. 5. Section 1.45G–1T is removed.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 6. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 7. In §602.101, paragraph (b) is amended by removing the entry for "1.45G–1T" from the table.

Par. 8. 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.
* * * * *	
1.45G–1	1545–2031
* * * * *	

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

Approved November 2, 2007.

Eric Solomon,
Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on November 9, 2007, 8:45 a.m., and published in the issue of the Federal Register for November 13, 2007, 72 F.R. 63813)

Section 1001.—Determination of Amount and Recognition of Gain or Loss

26 CFR 1.1001–3: Modifications of debt instruments.

This revenue procedure describes the conditions under which changes to certain subprime mortgage loans will not cause the Internal Revenue Service to challenge the tax status of certain securitization vehicles holding the loans. See Rev. Proc. 2007-72, page 1257.

Section 3121.—Definitions

26 CFR 31.3121(a)(5)–2: Payments under or to an annuity contract described in section 403(b).

T.D. 9367

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 31

Payments Made by Reason of a Salary Reduction Agreement

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document promulgates a final regulation that defines the term *salary reduction agreement* for purposes of section 3121(a)(5)(D) of the Internal Revenue Code (Code). The final regulation provides guidance to employers (public educational institutions and section 501(c)(3) organizations) purchasing annuity contracts described in section 403(b) on behalf of their employees.

DATES: *Effective Date:* This regulation is effective November 15, 2007.

Applicability Date: This regulation applies to contributions to section 403(b) plans made on or after November 15, 2007.

FOR FURTHER INFORMATION CONTACT: Neil D. Shepherd, (202) 622–6040 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This final regulation amends the Employment Tax Regulations (26 CFR part 31) by providing guidance relating to section 3121(a)(5)(D). The Federal Insurance Contributions Act (FICA) imposes taxes on employees and employers equal to a percentage of the wages received with respect to employment. Section 3121(a) defines wages for FICA tax purposes as all remuneration for employment unless otherwise excepted. Section 3121(a)(5)(D), added by the Social Security Amendments of 1983 (Public Law 98–21 (97 Stat. 65)), generally excepts from wages payments made by an employer for the purchase of an annuity contract described in section 403(b). However section 3121(a)(5)(D) expressly excludes from the exception payments made by reason of a salary reduction agreement (whether evidenced by a written instrument or otherwise). Thus, payments made under a salary reduction agreement to purchase a section 403(b) annuity contract are included in wages for FICA purposes. A temporary and proposed regulation (T.D. 9159, 2004–2 C.B. 895) defining the term "salary reduction agreement" for purposes of section 3121(a)(5)(D) was published in the **Federal Register** (69 FR 67054) on November 16, 2004.

For income tax purposes, contributions made by an employer to a section 403(b) contract, including contributions made pursuant to a cash or deferred election or other salary reduction agreement, are generally excluded from income. §403(b); see also section 1450(a) of the Small Business Job Protection Act of 1996 (Public Law 104–188 (110 Stat. 1755)). Conversely, for FICA tax purposes, contributions made by an employer to a section 403(b) contract pursuant to a cash or deferred election or other salary reduction agreement are included in wages. §3121(a)(5)(D); see also S. Rep. No. 98–23, at 40–41, 98th Cong., 1st Sess. (1983).

Summary of Comments and Explanation of Provisions

This regulation finalizes the temporary and proposed regulation without change. The final regulation provides that the term "salary reduction agreement" includes (1) a plan or arrangement whereby a payment will be made if the employee elects to reduce his or her compensation pursuant to a cash or deferred election as defined at §1.401(k)–1(a)(3) of the Income Tax Regulations, (2) a plan or arrangement whereby a payment will be made if the employee elects to reduce his or her compensation pursuant to a one-time irrevocable election made at or before the time of initial eligibility to participate in such plan or arrangement (or pursuant to a similar arrangement involving a one-time irrevocable election), and (3) a plan or arrangement whereby a payment will be made if the employee agrees as a condition of employment (whether such condition is set by statute, contract, or otherwise) to make a contribution that reduces the employee's compensation.

Comments were submitted with respect to the definition of the term "salary reduction agreement" for purposes of section 3121(a)(5)(D) and with respect to the applicability date of the temporary and proposed regulation.

Salary Reduction Agreement

Commentators asserted that Congress intended the term "salary reduction agreement" in section 3121(a)(5)(D) to apply only to voluntary reductions in salary and not to salary reductions required as a condition of employment. In support of this view, commentators cited the legislative history underlying section 3121(a)(5)(D), particularly the following language from the Senate Report:

> The bill also provides that any amounts paid by an employer to a tax-sheltered annuity by reason of a salary reduction agreement between the employer and the employee would be includible in the employee's social security wage base. The committee intended that the provision would merely codify the holding of Revenue Ruling 65–208, 1965–2 Cum. Bull. 383, without any implication with respect to the issue of whether a particular amount paid by an employer to a tax-sheltered annuity is, in fact, made by reason of a "salary reduction agreement."

S. Rep. No. 98–23, at 40–41, 98th Cong., 1st Sess. (1983).

Commentators maintained that Revenue Ruling 65–208 distinguishes between voluntary and mandatory salary reduction contributions and that the legislative history reflects Congress' intent to treat only voluntary salary reduction contributions as having been made by reason of a salary reduction agreement. While the Senate Report indicates a Congressional intent to "codify the holding of Revenue Ruling 65–208," the revenue ruling does not address any distinction between voluntary and mandatory reductions in salary. The critical distinction drawn in Revenue Ruling 65–208 is between situations "where an organization uses its own funds for the purchase of an annuity contract" (a supplemental contribution)

and situations "where the employee takes a voluntary reduction in salary to provide the necessary funds" (a salary reduction contribution). At the time Revenue Ruling 65–208 was issued the statutory standard under section 3121(a)(2) for determining whether to include contributions to section 403(b) annuity contracts in wages for FICA purposes was whether the contributions had been paid by the employer or by the employee. Thus, in determining whether the employer or the employee has paid the contribution, the revenue ruling distinguishes between supplemental contributions funded by the employer and salary reduction contributions funded by the employee. Whether a salary reduction contribution was voluntary or mandatory is irrelevant in establishing that the employee funded the contribution through a reduction in salary.

Several courts have discussed Revenue Ruling 65–208 and confirmed that it addresses the distinction between salary supplements and salary reductions. See *Temple University v. United States*, 769 F.2d 126, 130 (3d Cir. 1985), discussing the distinction drawn by Revenue Ruling 65–208 between supplemental contributions and salary reduction contributions, and *Canisius College v. United States*, 799 F.2d 18, 20–21 (2d Cir. 1986), distinguishing between "salary supplement plans" and "salary reduction plans." See also *University of Chicago v. United States*, No. 06 C 3452, 2007 U.S. Dist. LEXIS 61632, at *8 (N.D. Ill. Aug. 21, 2007) concluding that "the distinction that was being drawn in [Revenue Ruling 65–208] was between annuity purchase funds that come from employee contributions and those that come from employer contributions." The Treasury Department and the Internal Revenue Service (IRS) continue to believe that it is consistent with the legislative history of section 3121(a)(5)(D) and with the codification of Revenue Ruling 65–208 to treat both voluntary salary reductions and salary reductions to which the employee agrees as a condition of employment as payments made pursuant to a salary reduction agreement.

Commentators suggested that the term "salary reduction agreement" for purposes of section 3121(a)(5)(D) should mean an elective deferral within the meaning of section 402(g)(3)(C), which defines the term *elective deferral* for purposes of the section 402(g)(3) limit on the exclusion of elective deferrals from gross income. In their view, because salary reduction contributions made pursuant to a one-time irrevocable election or as a condition of employment are not elective deferrals under section 402(g)(3)(C) and its accompanying regulations, such contributions are not made pursuant to a salary reduction agreement and, consequently, are excluded from wages under section 3121(a)(5)(D).

Section 402(g)(3)(C) provides that the term "elective deferral" includes "any employer contribution to purchase an annuity contract under section 403(b) under a salary reduction agreement (within the meaning of section 3121(a)(5)(D))." However, when enacting section 402(g)(3), Congress made the following statement about the relationship among mandatory salary reduction contributions, elective deferrals, and salary reduction agreements: "if an employee is required to contribute a fixed percentage of compensation to a tax-sheltered annuity as a condition of employment, the contributions are not treated as elective deferrals." H.R. Rep. No. 99–841 at II–405 (1986). Similarly, in 1988 Congress added the flush language of 402(g)(3) providing that a one-time irrevocable election will not be treated as an elective deferral. Congress added the flush language to clarify that the term "elective deferral" excludes contributions "made pursuant to a one-time election to participate in the tax-sheltered annuity even though such contribution would be considered made under a salary reduction agreement under section 3121(a)(5)(D)." S. Rep. No. 100–445, at 151, 100th Cong., 2d Sess. (1988). Congress explained the clarification to section 402(g)(3) as follows:

> The bill conforms the statutory language to the legislative history by providing that contributions to a tax-sheltered annuity are not considered elective deferrals if the contributions are made pursuant to a one-time irrevocable election made by the employee at the time of initial eligibility to participate in the annuity or are made pursuant to a similar arrangement specified in regulations. The bill does not change the definition of salary reduction agreement for purpose of section 3121(a)(5)(D).

Sen. Rep. 100–445, 100th Cong., 2d Sess. (1988) 151.

Thus, as reflected in both the statutory language of section 402(g) and in its legislative history, Congress intended the definition of salary reduction agreement for purposes of section 3121(a)(5)(D) to be distinct from the definition of elective deferral for purposes of section 402(g)(3)(C).

Furthermore, Congress intended that the term *wages* would have different meanings for income tax withholding and FICA tax purposes. The broader scope of the term for FICA tax purposes is consistent with the general policy underlying the FICA. See S. Rep. No. 98–23, at 39, 98th Cong., 1st Sess. (1983) relating to the Social Security Amendments of 1983 (Public Law 98–21 (97 Stat. 65)). Moreover, the legislative history to section 3121(a)(5)(D) cited in this preamble describes Congress's intent to codify the holding in Revenue Ruling 65–208 (see §601.601(d)(2)(ii)(*b*)), which provides that certain amounts included in income and amounts included in wages with respect to contributions used to purchase a 403(b) annuity contract are not the same. Based on the statutory language and the legislative history of section 3121(a)(5)(D) and related provisions, including section 3121(v)(1)(B) as discussed in this preamble, the Treasury Department and the IRS continue to believe that the term "salary reduction agreement" in section 3121(a)(5)(D) includes salary reduction contributions made pursuant to a one-time irrevocable election or as a condition of employment.

The term "salary reduction agreement" is used not only in section 3121(a)(5)(D) but also in another subsection of section 3121, specifically section 3121(v)(1)(B), which provides that wages include "any amount treated as an employer contribution under section 414(h)(2) where the pickup referred to in such section is pursuant to a salary reduction agreement (whether evidenced by a written instrument or otherwise)." Commentators contended that the term "salary reduction agreement" should be interpreted differently for purposes of sections 3121(a)(5)(D) and 3121(v)(1)(B) because section 3121(v)(1)(B) applies only to salary reduction contributions made under a section 414(h) pick-up plan established by a State or local government employer.

By definition, the salary reductions that fund these employer contributions are mandatory whereas contributions to section 403(b) annuity plans may be mandatory or voluntary. While it is correct that salary reductions in connection with section 414(h) pick-up plans are mandatory, we see no evidence in the statute or legislative history that Congress intended to interpret the same language differently or to treat similarly situated employees differently for FICA purposes. Both section 3121(a)(5)(D) and section 3121(v)(1)(B) include salary reduction contributions in wages for FICA tax purposes. Neither the statute nor the legislative history gives a basis for concluding that mandatory salary reductions made in connection with a section 414(h) pick-up plan should be included in wages for FICA purposes while mandatory salary reductions made in connection with a section 403(b) annuity plan should be excluded from wages. Thus, the Treasury Department and the IRS continue to believe that it is appropriate to give a consistent interpretation to identical language in two subsections of the same statutory section enacted only one year apart.

Similarly, as discussed in the preamble to the temporary and proposed regulation, the Tenth Circuit's decision in *Public Employees' Retirement Board v. Shalala*, 153 F.3d 1160 (10th Cir. 1998) supports the view that a mandatory salary reduction contribution nonetheless requires the employee's agreement. In *Public Employees' Retirement Board* the Court of Appeals held that the term "salary reduction agreement" includes mandatory salary reduction contributions made as a condition of employment. As the Court said, "[A]n employee's decision to go to work or continue to work . . . constitutes conduct manifesting assent to a salary reduction." 153 F.3d at 1166. The employment relationship itself is a voluntary relationship, and the employee manifests his or her agreement with the terms and conditions of the employment relationship by accepting employment. See *University of Chicago v. United States*, No. 06 C 3452, 2007 U.S. Dist. LEXIS 61632, at *7 (N.D. Ill. Aug. 21, 2007) citing *Public Employees' Retirement Board* for the proposition that "a salary reduction agreed to as a condition of employment constitutes a salary reduction agreement because 'the employee has "agreed" to the salary reduction by continuing employment.'" The temporary and proposed regulations, and now the final regulations, read the term "agreement" for purposes of section 3121(a)(5)(D) as the Tenth Circuit read it for purposes of section 3121(v)(1)(B), as both an agreement to accept employment subject to a mandatory salary reduction and an agreement to a specified salary reduction.

Accordingly, the final regulation adopts the definition of salary reduction agreement as proposed.

Applicability Date

Commentators asked the IRS to confirm that the definition of salary reduction agreement provided in the temporary and proposed regulation would apply prospectively only and, therefore, would not affect contributions to a section 403(b) plan made prior to November 16, 2004, the date the temporary and proposed regulation went into effect. As explicitly set forth in §31.3121(a)(5)–2T the temporary and proposed regulation was applicable to contributions to section 403(b) annuity plans made on or after November 16, 2004. Therefore, the Internal Revenue Service will not apply the temporary and proposed regulation to contributions made to any section 403(b) plan prior to November 16, 2004, for purposes of determining whether such contributions were subject to FICA tax. The final regulation will apply only to contributions made to any section 403(b) plan on or after November 15, 2007.

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) and (d) of the Administrative Procedure Act (5 U.S.C. chapter 5) do not apply to this regulation, 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.

Drafting Information

The principal author of this regulation is Neil D. Shepherd, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in its development.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 31 is amended as follows:

PART 31—EMPLOYMENT TAXES

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

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

Par. 2. Section 31.3121(a)(5)–2 is added to read as follows:

§31.3121(a)(5)–2 Payments under or to an annuity contract described in section 403(b).

(a) *Salary reduction agreement defined.* For purposes of section 3121(a)(5)(D), the term *salary reduction agreement* means a plan or arrangement (whether evidenced by a written instrument or otherwise) whereby payment will be made by an employer, on behalf of an employee or his or her beneficiary, under or to an annuity contract described in section 403(b)—

(1) If the employee elects to reduce his or her compensation pursuant to a cash or deferred election as defined at §1.401(k)–1(a)(3) of this chapter;

(2) If the employee elects to reduce his or her compensation pursuant to a one-time irrevocable election made at or before the time of initial eligibility to participate in such plan or arrangement (or pursuant to a similar arrangement involving a one-time irrevocable election); or

(3) If the employee agrees as a condition of employment (whether such condition is set by statute, contract, or otherwise) to make a contribution that reduces his or her compensation.

(b) *Effective/applicability date.* This section is applicable on November 15, 2007.

§31.3121(a)(5)–2T [Removed]

Par. 3. Section 31.3121(a)(5)–2T is removed.

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

Approved November 13, 2007.

Eric Solomon,
Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on November 14, 2007, 1:17 p.m., and published in the issue of the Federal Register for November 19, 2007, 72 F.R. 64939)

Section 6033.—Return by Exempt Organizations

26 CFR 1.6033–6T: Notification requirement for entities not required to file an annual information return under section 6033(a)(1) (taxable years beginning after December 31, 2006)

T.D. 9366

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Notification Requirement for Tax-Exempt Entities Not Currently Required to File

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations describing the time and manner in which certain tax-exempt organizations not currently required to file an annual information return under section 6033(a)(1) are required to submit an annual electronic notice including certain information required by section 6033(i)(1)(A) through (F). The text of the temporary regulations also serves as the text of the proposed regulations (REG–104942–07) set forth in the notice of proposed rulemaking on this subject in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective on November 15, 2007.

Applicability Date: These regulations are applicable to taxable years beginning after December 31, 2006.

FOR FURTHER INFORMATION CONTACT: Monice Rosenbaum at (202) 622–6070 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 6033(i)(1) relating to the notification requirement for entities not currently required to file an annual information return under section 6033(a)(1). Section 6033(i)(1) was added by section 1223(a) of the Pension Protection Act of 2006, Public Law 109–208 (120 Stat. 1090 (2006)) (PPA 2006), effective for annual periods beginning after 2006. Section 6033(i)(1) requires the Treasury Secretary to promulgate regulations that describe the time and manner in which certain tax-exempt organizations not currently required to file an annual information return are to submit an annual electronic notice including information set forth in section 6033(i)(1)(A) through (F). Section 1223 of the PPA 2006 also contains new rules for termination, loss of exempt status, and reinstatement. These new rules do not require regulations for implementation and are therefore not addressed in this temporary regulation but are discussed in this preamble. Substantive and administrative rules related to termination, loss of exempt status, and reinstatement will be considered in separate guidance and other publications.

Prior to the PPA 2006, either by operation of law or through discretionary exceptions, certain organizations were not required to file an information return (for example, Form 990, *"Return of Organization Exempt From Income Tax")*. Section 6033(a)(3)(A)(ii) provided a mandatory exception from filing by certain organizations (other than private foundations) described in section 6033(a)(3)(C), whose annual gross receipts were normally not more than $5,000. Section 6033(a)(3)(B) provided a discretionary exception under which the Secretary relieved certain other organizations from filing. Exercising this discretionary authority, the IRS published Announcement 82–88, 1982–25 I.R.B. 23 (June 21, 1982), which provided an exception for organizations whose annual gross receipts were not normally in excess of $25,000 from filing Form 990 for tax years ending on or after December 31, 1982. The new electronic notice provision of section 6033(i)(1) applies to organizations whose gross receipts are low enough that they are not required to file information returns under sections (a)(3)(A)(ii) or (a)(3)(B). The substance of this electronic notice is discussed below in this preamble. See §601.601(d)(2)(ii)(*b*).

Section 6033(i)(2) provides that organizations required to submit annual electronic notification are also required to provide notice of termination upon the termination of the existence of the organization. The time and manner of the notice of termination is not specified in the statute.

Section 6033(j), added by section 1223(b) of the PPA 2006, provides that if an organization required to file an annual information return under section 6033(a)(1) or submit an electronic notice under section 6033(i) fails to provide the required return or notice for three consecutive years, the organization's tax-exempt status is revoked. The revocation is effective from the date the Secretary determines was the last day the organization could have timely filed the third required information return or submitted the notice. Any organization whose tax-exempt status is revoked under section 6033(j)(1) must apply in order to obtain reinstatement of that status regardless of whether such organization was originally required to make an application for tax-exempt status. If, upon application for reinstatement of tax-exempt status, an organization can show to the satisfaction of the Secretary evidence of reasonable cause for the failure to file the information return or submit the notice, the organization's tax-exempt status may, in the discretion of the Secretary, be reinstated retroactive to the date of revocation.

Section 7428(b), regarding limitations on declaratory judgments relating to status and classification of certain tax-exempt organizations, was amended by section 1223(c) of the PPA 2006 and provides that no action may be brought under section 7428 with respect to any revocation of tax-exempt status described in section 6033(j)(1), for failure to provide the required return under section 6033(a)(1) or notice under section 6033(i) for three consecutive years.

Section 6652(c)(1)(E), added by section 1233(d) of the PPA 2006, provides that there is no monetary penalty for failure to submit any notice required under section 6033(i).

Explanation of Provisions

Annual Electronic Notice Requirements and Other General Requirements Related to Maintaining Tax-Exempt Status

Section 6033(i)(1) provides that the annual notification, in electronic form, shall set forth: (A) the legal name of the organization, (B) any name under which the organization operates or does business, (C) the organization's mailing address and Internet Web site address (if any), (D) the organization's taxpayer identification number, (E) the name and address of a principal officer, and (F) evidence of the continuing basis for the organization's exemption from the filing requirements under section 6033(a)(1). The temporary regulations also provide that additional information necessary to process the notification may be required. For example, an organization will be required to state the tax period for which it is submitting the electronic notification.

The mailing address required by section 6033(i)(1)(C) and submitted in the annual electronic notification shall be the organization's last known address as provided by §301.6212–2(a) of the Regulations on Procedure and Administration. This last known address may be updated as provided under §301.6212–2 or by clear and concise notification as described in Rev. Proc. 2001–18, 2001–1 C.B. 708. The IRS will use this last known address as the organization's address of record and will direct all mailings to this address. See §601.601(d)(2)(ii)(*b*).

By submitting the annual electronic notification described in this paragraph, an organization acknowledges that it is not required to file a return under section 6033(a) because its gross receipts are not normally in excess of $25,000. In order to make this determination, the organization must keep records that enable it to calculate its gross receipts. All organizations are required to maintain records under section 6001. These records will provide evidence of the continuing basis for the organization's exemption from the filing requirements under section 6033(a)(1).

The temporary regulations restate that an organization, even though relieved from filing a return under section 6033(a), is still required under §1.6033–2(i) and (j) to inform the IRS in writing of any changes in the organization's character, operation, or purpose; provide additional information; and file other returns of information and unrelated business tax returns. Organizations are also reminded that if the organization is required to file an unrelated business tax return, Form 990–T, *"Exempt Organization Business Income Tax Return,"* the filing of the Form 990–T does not relieve the organization from the requirement of submitting the annual electronic notification under section 6033(i).

The statute requires that the annual notification be submitted electronically. There is no provision in the temporary regulations for any paper notification. However, if an organization that is required to submit an annual electronic notification files a complete Form 990 or Form 990EZ, *"Short Form Return of Organization Exempt From Income Tax,"* the annual notification requirement of section 6033(i) shall be deemed satisfied. The annual notification requirement is not satisfied if the Form 990 or Form 990–EZ contains only those items of information that would have been required by submitting the notification in electronic form.

The notification shall be submitted on or before the 15th day of the fifth calendar month following the close of the period for which the notification is required to be submitted. Thus, an organization with an accounting period ending December 31, 2007, is required to submit the annual notification by May 15, 2008.

Annual Electronic Notification Is Not a Return

The electronic notification is not a return because it does not contain sufficient data to calculate tax liability or determine tax-exempt status. Moreover, the electronic notification does not purport to be a return. The electronic notification simply identifies an organization and indicates the basis for it not having to file an information return under section 6033(a)(1). Because the electronic notification is not a tax or information return, submission of the notification does not trigger the period of limitations for assessment under section 6501(g)(2). However, the filing of a complete Form 990 or Form 990–EZ, as noted in this preamble, will start the period of limitations for assessment under section 6501(g)(2). Furthermore, there is no monetary penalty for failure to file under section 6033(i). To further distinguish the electronic notification from a tax or information return, the temporary regulations provide that the electronic notification is submitted to the IRS, rather than filed or furnished, the terms used in connection with tax and information returns.

The notifications required by section 6033(i) are subject to public disclosure and inspection. See section 6104 (generally applicable to Form 990 information returns). Further, this provision does not affect any other obligations an organization may have to file other required information and or tax returns, or penalties for failure to file such returns.

Form 990–N, Electronic Notice (e-Postcard) for Tax-Exempt Organizations Not Required to File Form 990 or 990–EZ

Form 990–N, *"Electronic Notice (e-Postcard) for Tax-Exempt Organizations Not Required To File Form 990 or 990–EZ,"* has been developed to satisfy the requirements of section 6033(i)(1). The IRS plans to deliver a simple, Internet based process for submitting the e-Postcard, Form 990–N. It is anticipated that organizations that do not have access to a computer can use their local public library to file the e-Postcard. Because the system will be Internet based, organizations should not need to purchase software to file the e-Postcard. The temporary regulations provide that the annual electronic notification shall be submitted in accordance with instructions and publications, including those provided at the IRS Web site for exempt organizations.

Organizations Required to File Returns or Submit Electronic Notice

In general, every organization exempt from taxation under section 501(a) that is not required to file a return described in §1.6033–2(a)(2), other than an organization described in section 401(a) (qualified pension, profit-sharing, and stock bonus

plans) or section 501(d) (religious and apostolic organizations), is required to submit an annual electronic notice under section 6033(i). However, a organization that is required to file or files an annual information return under section 6033(a)(1) should not submit an annual electronic notification under section 6033(i). This includes any organization included in a group return as provided in §1.6033–2 for that year; all private foundations required to file Form 990–PF, *"Return of Private Foundation or Section 4947(a)(1) Nonexempt Charitable Trust Treated as a Private Foundation";* section 509(a)(3) supporting organizations required to file Form 990 or Form 990–EZ; a section 501(c)(21) black lung trust required to file Form 990–BL, *"Information and Initial Excise Tax Return for Black Lung Benefit Trusts and Certain Related Persons";* and any organization that is required to file or files an annual information return under section 6033(a)(1) on any other form prescribed by the IRS for that purpose.

Neither annual information returns under section 6033(a)(1) nor annual electronic notices under section 6033(i) are required to be filed or submitted by an organization exempt from taxation under section 501(a) that is a church, an interchurch organization of local units of a church, a convention or association of churches, or an integrated auxiliary of a church (as defined in §1.6033–2(h)); an exclusively religious activity of any religious order; a mission society sponsored by or affiliated with one or more churches or church denominations, more than half of the activities of which society are conducted in, or directed at persons in, foreign countries; an educational organization (below college level) that is described in section 170(b)(1)(A)(ii), that has a program of a general academic nature, and that is affiliated (within the meaning of §1.6033–2(h)(2)) with a church or operated by a religious order; a State institution, the income of which is excluded from gross income under section 115(a); an organization described in section 501(c)(1); or an organization that is a governmental unit or an affiliate of a governmental unit exempt from Federal income tax under section 501(a) as described in Rev. Proc. 95–48, 1995–2 C.B. 418. See §601.601(d)(2)(ii)(*b*).

If an organization exempt from taxation under section 501(a) is not exempted in either of the two preceding paragraphs, the organization must submit an annual electronic notice. Thus, a black lung trust that normally has gross receipts of $25,000 or less is not required to file Form 990–BL but is required to submit an electronic notification. A section 509(a)(3) supporting organization of a religious organization that normally has gross receipts of $5,000 or less is not required to file Form 990 or Form 990–EZ but is required to submit an electronic notification.

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 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. For the applicability of the Regulatory Flexibility Act, 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 Internal Revenue Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Monice Rosenbaum, of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in their development.

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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 as follows:

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

Section 1.6033–6 also issued under 26 U.S.C. 6033(i)(1). * * *

Par. 2 Section 1.6033–6T is added to read as follows:

§1.6033–6T Notification requirement for entities not required to file an annual information return under section 6033(a)(1) (taxable years beginning after December 31, 2006)—

(a) *In general*. Except as otherwise provided in this paragraph, every organization exempt from taxation under section 501(a) that is not required to file a return described in §1.6033–2(a)(2), other than an organization described in section 401(a) or 501(d), shall submit annually, in electronic form, a notification setting forth the items described in paragraph (b) of this section and such other information as may be prescribed in the instructions and publications issued with respect to the notification.

(b) *Organizations not required to submit annual notification*. (1) An organization exempt from taxation under section 501(a) that is required to file or files an annual information return under section 6033(a)(1) shall not submit an annual notification under section 6033(i). This includes the following types of organizations:

(i) Any organization included in a group return for that year under §1.6033–2(d).

(ii) All private foundations required to file under §1.6033–2(a)(2)(i) Form 990–PF, *"Return of Private Foundation or Section 4947(a)(1) Nonexempt Charitable Trust Treated as a Private Foundation."*

(iii) Section 509(a)(3) supporting organizations required to file under §1.6033–2(a)(2)(i) Form 990, *"Return of Organization Exempt From Income Tax,"* or Form 990–EZ, *"Short Form Return of Organization Exempt From Income Tax."*

(iv) A section 501(c)(21) black lung trust required to file under §1.6033–2(a)(2)(i) Form 990–BL.

(v) Any organization that is required to file or files an annual information return under section 6033(a)(1) on any other form prescribed by the Internal Revenue Service for that purpose.

(2) An organization exempt from taxation under section 501(a) that is not

required to file a return under section 6033(a)(1) is also not required to submit an annual notification under section 6033(i). This includes the following types of organizations:

(i) A church, an interchurch organization of local units of a church, a convention or association of churches, or an integrated auxiliary of a church (as defined in §1.6033–2(h)).

(ii) An exclusively religious activity of any religious order.

(iii) A mission society sponsored by or affiliated with one or more churches or church denominations, more than one-half of the activities of which society are conducted in, or directed at persons in, foreign countries.

(iv) An educational organization (below college level) described in section 170(b)(1)(A)(ii), that has a program of a general academic nature, and that is affiliated (within the meaning of §1.6033–2(h)(2)) with a church or operated by a religious order.

(v) A State institution, the income of which is excluded from gross income under section 115(a);

(vi) An organization described in section 501(c)(1); or

(vii) An organization that is a governmental unit or an affiliate of a governmental unit exempt from Federal income tax under section 501(a).

(3) If an organization exempt from taxation under section 501(a) is not described in paragraph (b)(1) or (2) of this section, the organization must submit an annual notification. Thus, a black lung trust that normally has gross receipts of $25,000 or less is not required to file Form 990–BL but is required to submit electronic notification. A section 509(a)(3) supporting organization of a religious organization that normally has gross receipts of $5,000 or less is not required to file Form 990 or Form 990–EZ but is required to submit electronic notification.

(c) *Additional notification requirements*—(1) *In general*. Any organization described in paragraph (a)(1) of this section shall submit an annual notification described in section 6033(i)(1). The annual notification shall—

(i) Be in electronic form; and

(ii) Set forth—

(A) The legal name of the organization;

(B) Any name under which the organization operates or does business;

(C) The organization's mailing address and Internet Web site address (if any);

(D) The organization's taxpayer identification number;

(E) The name and address of a principal officer;

(F) Evidence of the continuing basis for the organization's exemption from the filing requirements under section 6033(a)(1); and

(G) Additional information necessary to process the notification.

(2) The mailing address required by section 6033(i)(1)(C) and submitted in the annual notification shall be the organization's last known address as provided by §301.6212–2(a) of this chapter. This last known address may be updated as provided under §301.6212–2 of this chapter, or by clear and concise notification. The Internal Revenue Service will use this last known address as the organization's address of record and will direct all mailings to this address.

(3) By submitting the annual notification described in this paragraph (c)(1), an organization acknowledges that it is not required to file a return under section 6033(a) because its annual gross receipts are not normally in excess of $25,000. In order to make this determination, the organization must keep records that enable it to calculate its gross receipts. All organizations are required to maintain records under section 6001. These records will provide evidence of the continuing basis for the organization's exemption from the filing requirements under section 6033(a)(1).

(4) If an organization that is required to submit an annual electronic notification files a complete Form 990 or Form 990–EZ the annual notification requirement shall be deemed satisfied. The annual notification requirement is not satisfied if the Form 990 or Form 990–EZ contains only those items of information that would have been required by submitting the notification in electronic form. Also, the filing of a complete Form 990 or Form 990–EZ, rather than the submission of an annual electronic notification, is the filing of a return that starts the period of limitations for assessment under section 6501(g)(2).

(d) *No effect on other filing requirements*. An organization that is relieved from filing an information return under section 6033(a) is still subject to the requirements of §1.6033–2(i) and (j), concerning notice regarding changes in character, operations, or purpose; providing additional information; duty to file other returns of information; and duty to file unrelated business tax returns. If an organization is required to file an unrelated business tax return, Form 990–T, *"Exempt Organization Business Income Tax Return,"* the filing of that return does not relieve the organization from the requirement of submitting notification under section 6033(i).

(e) *Accounting period for submitting electronic notification*. An annual notification required by this section shall be on the basis of the established annual accounting period of the organization. If the organization has no established accounting period, annual notification shall be on the basis of the calendar year.

(f) *Time and place for submitting electronic notification*. The annual notification required by this section shall be submitted on or before the 15th day of the fifth calendar month following the close of the period for which the notification is required to be submitted. Thus, an organization with an accounting period ending December 31, 2007, is required to submit annual notification by May 15, 2008. The notification shall be submitted in accordance with instructions and publications, including those provided at the Internal Revenue Service Web site for exempt organizations.

(g) *Effective/applicability date*. These regulations are applicable to annual periods beginning after 2006.

(h) *Expiration date*. These regulations expire February 12, 2010.

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

Approved November 6, 2007.

Eric Solomon,
Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on November 14, 2007, 8:45 a.m., and published in the issue of the Federal Register for November 15, 2007, 72 F.R. 64147)

Section 6621.—Determination of Rate of Interest

26 CFR 301.6621–1: Interest rate.

Interest rates; underpayments and overpayments. The rates of interest determined under section 6621 of the Code for the calendar quarter beginning January 1, 2008, will be 7 percent for overpayments (6 percent in the case of a corporation), 7 percent for underpayments, and 9 percent for large corporate underpayments. The rate of interest paid on the portion of a corporate overpayment exceeding $10,000 will be 4.5 percent.

Rev. Rul. 2007–68

Section 6621 of the Internal Revenue Code establishes the rates for interest on tax overpayments and tax underpayments. Under section 6621(a)(1), the overpayment rate is the sum of the federal short-term rate plus 3 percentage points (2 percentage points in the case of a corporation), except the rate for the portion of a corporate overpayment of tax exceeding $10,000 for a taxable period is the sum of the federal short-term rate plus 0.5 of a percentage point. Under section 6621(a)(2), the underpayment rate is the sum of the federal short-term rate plus 3 percentage points.

Section 6621(c) provides that for purposes of interest payable under section 6601 on any large corporate underpayment, the underpayment rate under section 6621(a)(2) is determined by substituting "5 percentage points" for "3 percentage points." See section 6621(c) and section 301.6621–3 of the Regulations on Procedure and Administration for the definition of a large corporate underpayment and for the rules for determining the applicable date. Section 6621(c) and section 301.6621–3 are generally effective for periods after December 31, 1990.

Section 6621(b)(1) provides that the Secretary will determine the federal short-term rate for the first month in each calendar quarter.

Section 6621(b)(2)(A) provides that the federal short-term rate determined under section 6621(b)(1) for any month applies during the first calendar quarter beginning after such month.

Section 6621(b)(3) provides that the federal short-term rate for any month is the federal short-term rate determined during such month by the Secretary in accordance with section 1274(d), rounded to the nearest full percent (or, if a multiple of 1/2 of 1 percent, the rate is increased to the next highest full percent).

Notice 88–59, 1988–1 C.B. 546, announced that, in determining the quarterly interest rates to be used for overpayments and underpayments of tax under section 6621, the Internal Revenue Service will use the federal short-term rate based on daily compounding because that rate is most consistent with section 6621 which, pursuant to section 6622, is subject to daily compounding.

Rounded to the nearest full percent, the federal short-term rate based on daily compounding determined during the month of October 2007 is 4 percent. Accordingly, an overpayment rate of 7 percent (6 percent in the case of a corporation) and an underpayment rate of 7 percent are established for the calendar quarter beginning January 1, 2008. The overpayment rate for the portion of a corporate overpayment exceeding $10,000 for the calendar quarter beginning January 1, 2008, is 4.5 percent. The underpayment rate for large corporate underpayments for the calendar quarter beginning January 1, 2008, is 9 percent. These rates apply to amounts bearing interest during that calendar quarter.

Interest factors for daily compound interest for annual rates of 4.5 percent, 6 percent, 7 percent, and 9 percent are published in Tables 14, 17, 19, and 23 of Rev. Proc. 95–17, 1995–1 C.B. 556, 568, 571, 573, and 577.

Annual interest rates to be compounded daily pursuant to section 6622 that apply for prior periods are set forth in the tables accompanying this revenue ruling.

DRAFTING INFORMATION

The principal author of this revenue ruling is Wendy Kribell of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue ruling, contact Ms. Kribell at (202) 622–4570 (not a toll-free call).

TABLE OF INTEREST RATES

PERIODS BEFORE JUL. 1, 1975 — PERIODS ENDING DEC. 31, 1986

OVERPAYMENTS AND UNDERPAYMENTS

PERIOD	RATE	In 1995–1 C.B. DAILY RATE TABLE
Before Jul. 1, 1975	6%	Table 2, pg. 557
Jul. 1, 1975—Jan. 31, 1976	9%	Table 4, pg. 559
Feb. 1, 1976—Jan. 31, 1978	7%	Table 3, pg. 558
Feb. 1, 1978—Jan. 31, 1980	6%	Table 2, pg. 557
Feb. 1, 1980—Jan. 31, 1982	12%	Table 5, pg. 560
Feb. 1, 1982—Dec. 31, 1982	20%	Table 6, pg. 560
Jan. 1, 1983—Jun. 30, 1983	16%	Table 37, pg. 591
Jul. 1, 1983—Dec. 31, 1983	11%	Table 27, pg. 581
Jan. 1, 1984—Jun. 30, 1984	11%	Table 75, pg. 629
Jul. 1, 1984—Dec. 31, 1984	11%	Table 75, pg. 629
Jan. 1, 1985—Jun. 30, 1985	13%	Table 31, pg. 585
Jul. 1, 1985—Dec. 31, 1985	11%	Table 27, pg. 581
Jan. 1, 1986—Jun. 30, 1986	10%	Table 25, pg. 579
Jul. 1, 1986—Dec. 31, 1986	9%	Table 23, pg. 577

TABLE OF INTEREST RATES

FROM JAN. 1, 1987 — Dec. 31, 1998

	OVERPAYMENTS			UNDERPAYMENTS		
		1995–1 C.B.			1995–1 C.B.	
	RATE	TABLE	PG	RATE	TABLE	PG
Jan. 1, 1987—Mar. 31, 1987	8%	21	575	9%	23	577
Apr. 1, 1987—Jun. 30, 1987	8%	21	575	9%	23	577
Jul. 1, 1987—Sep. 30, 1987	8%	21	575	9%	23	577
Oct. 1, 1987—Dec. 31, 1987	9%	23	577	10%	25	579
Jan. 1, 1988—Mar. 31, 1988	10%	73	627	11%	75	629
Apr. 1, 1988—Jun. 30, 1988	9%	71	625	10%	73	627
Jul. 1, 1988—Sep. 30, 1988	9%	71	625	10%	73	627
Oct. 1, 1988—Dec. 31, 1988	10%	73	627	11%	75	629
Jan. 1, 1989—Mar. 31, 1989	10%	25	579	11%	27	581
Apr. 1, 1989—Jun. 30, 1989	11%	27	581	12%	29	583
Jul. 1, 1989—Sep. 30, 1989	11%	27	581	12%	29	583
Oct. 1, 1989—Dec. 31, 1989	10%	25	579	11%	27	581
Jan. 1, 1990—Mar. 31, 1990	10%	25	579	11%	27	581
Apr. 1, 1990—Jun. 30, 1990	10%	25	579	11%	27	581
Jul. 1, 1990—Sep. 30, 1990	10%	25	579	11%	27	581
Oct. 1, 1990—Dec. 31, 1990	10%	25	579	11%	27	581
Jan. 1, 1991—Mar. 31, 1991	10%	25	579	11%	27	581
Apr. 1, 1991—Jun. 30, 1991	9%	23	577	10%	25	579
Jul. 1, 1991—Sep. 30, 1991	9%	23	577	10%	25	579
Oct. 1, 1991—Dec. 31, 1991	9%	23	577	10%	25	579
Jan. 1, 1992—Mar. 31, 1992	8%	69	623	9%	71	625
Apr. 1, 1992—Jun. 30, 1992	7%	67	621	8%	69	623
Jul. 1, 1992—Sep. 30, 1992	7%	67	621	8%	69	623
Oct. 1, 1992—Dec. 31, 1992	6%	65	619	7%	67	621
Jan. 1, 1993—Mar. 31, 1993	6%	17	571	7%	19	573
Apr. 1, 1993—Jun. 30, 1993	6%	17	571	7%	19	573
Jul. 1, 1993—Sep. 30, 1993	6%	17	571	7%	19	573
Oct. 1, 1993—Dec. 31, 1993	6%	17	571	7%	19	573
Jan. 1, 1994—Mar. 31, 1994	6%	17	571	7%	19	573
Apr. 1, 1994—Jun. 30, 1994	6%	17	571	7%	19	573
Jul. 1, 1994—Sep. 30, 1994	7%	19	573	8%	21	575

TABLE OF INTEREST RATES

FROM JAN. 1, 1987 — Dec. 31, 1998 – Continued

	OVERPAYMENTS			UNDERPAYMENTS		
		1995–1 C.B.			1995–1 C.B.	
	RATE	TABLE	PG	RATE	TABLE	PG
Oct. 1, 1994—Dec. 31, 1994	8%	21	575	9%	23	577
Jan. 1, 1995—Mar. 31, 1995	8%	21	575	9%	23	577
Apr. 1, 1995—Jun. 30, 1995	9%	23	577	10%	25	579
Jul. 1, 1995—Sep. 30, 1995	8%	21	575	9%	23	577
Oct. 1, 1995—Dec. 31, 1995	8%	21	575	9%	23	577
Jan. 1, 1996—Mar. 31, 1996	8%	69	623	9%	71	625
Apr. 1, 1996—Jun. 30, 1996	7%	67	621	8%	69	623
Jul. 1, 1996—Sep. 30, 1996	8%	69	623	9%	71	625
Oct. 1, 1996—Dec. 31, 1996	8%	69	623	9%	71	625
Jan. 1, 1997—Mar. 31, 1997	8%	21	575	9%	23	577
Apr. 1, 1997—Jun. 30, 1997	8%	21	575	9%	23	577
Jul. 1, 1997—Sep. 30, 1997	8%	21	575	9%	23	577
Oct. 1, 1997—Dec. 31, 1997	8%	21	575	9%	23	577
Jan. 1, 1998—Mar. 31, 1998	8%	21	575	9%	23	577
Apr. 1, 1998—Jun. 30, 1998	7%	19	573	8%	21	575
Jul. 1, 1998—Sep. 30, 1998	7%	19	573	8%	21	575
Oct. 1, 1998—Dec. 31, 1998	7%	19	573	8%	21	575

TABLE OF INTEREST RATES

FROM JANUARY 1, 1999 — PRESENT

NONCORPORATE OVERPAYMENTS AND UNDERPAYMENTS

		1995–1 C.B.	
	RATE	TABLE	PG
Jan. 1, 1999—Mar. 31, 1999	7%	19	573
Apr. 1, 1999—Jun. 30, 1999	8%	21	575
Jul. 1, 1999—Sep. 30, 1999	8%	21	575
Oct. 1, 1999—Dec. 31, 1999	8%	21	575
Jan. 1, 2000—Mar. 31, 2000	8%	69	623
Apr. 1, 2000—Jun. 30, 2000	9%	71	625
Jul. 1, 2000—Sep. 30, 2000	9%	71	625
Oct. 1, 2000—Dec. 31, 2000	9%	71	625
Jan. 1, 2001—Mar. 31, 2001	9%	23	577
Apr. 1, 2001—Jun. 30, 2001	8%	21	575
Jul. 1, 2001—Sep. 30, 2001	7%	19	573
Oct. 1, 2001—Dec. 31, 2001	7%	19	573
Jan. 1, 2002—Mar. 31, 2002	6%	17	571
Apr. 1, 2002—Jun. 30, 2002	6%	17	571
Jul. 1, 2002—Sep. 30, 2002	6%	17	571
Oct. 1, 2002—Dec. 31, 2002	6%	17	571
Jan. 1, 2003—Mar. 31, 2003	5%	15	569
Apr. 1, 2003—Jun. 30, 2003	5%	15	569
Jul. 1, 2003—Sep. 30, 2003	5%	15	569
Oct. 1, 2003—Dec. 31, 2003	4%	13	567
Jan. 1, 2004—Mar. 31, 2004	4%	61	615
Apr. 1, 2004—Jun. 30, 2004	5%	63	617
Jul. 1, 2004—Sep. 30, 2004	4%	61	615
Oct. 1, 2004—Dec. 31, 2004	5%	63	617
Jan. 1, 2005—Mar. 31, 2005	5%	15	569
Apr. 1, 2005—Jun. 30, 2005	6%	17	571
Jul. 1, 2005—Sep. 30, 2005	6%	17	571
Oct. 1, 2005—Dec. 31, 2005	7%	19	573
Jan. 1, 2006—Mar. 31, 2006	7%	19	573

TABLE OF INTEREST RATES

FROM JANUARY 1, 1999 — PRESENT – Continued

NONCORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	RATE	1995–1 C.B. TABLE	PG
Apr. 1, 2006—Jun. 30, 2006	7%	19	573
Jul. 1, 2006—Sep. 30, 2006	8%	21	575
Oct. 1, 2006—Dec. 31, 2006	8%	21	575
Jan. 1, 2007—Mar. 31, 2007	8%	21	575
Apr. 1, 2007- Jun. 30, 2007	8%	21	575
Jul. 1, 2007—Sep. 30, 2007	8%	21	575
Oct. 1, 2007—Dec. 31, 2007	8%	21	575
Jan. 1, 2008—Mar. 31, 2008	7%	67	621

TABLE OF INTEREST RATES

FROM JANUARY 1, 1999 — PRESENT

CORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	OVERPAYMENTS			UNDERPAYMENTS		
		1995–1 C.B.			1995–1 C.B.	
	RATE	TABLE	PG	RATE	TABLE	PG
Jan. 1, 1999—Mar. 31, 1999	6%	17	571	7%	19	573
Apr. 1, 1999—Jun. 30, 1999	7%	19	573	8%	21	575
Jul. 1, 1999—Sep. 30, 1999	7%	19	573	8%	21	575
Oct. 1, 1999—Dec. 31, 1999	7%	19	573	8%	21	575
Jan. 1, 2000—Mar. 31, 2000	7%	67	621	8%	69	623
Apr. 1, 2000—Jun. 30, 2000	8%	69	623	9%	71	625
Jul. 1, 2000—Sep. 30, 2000	8%	69	623	9%	71	625
Oct. 1, 2000—Dec. 31, 2000	8%	69	623	9%	71	625
Jan. 1, 2001—Mar. 31, 2001	8%	21	575	9%	23	577
Apr. 1, 2001—Jun. 30, 2001	7%	19	573	8%	21	575
Jul. 1, 2001—Sep. 30, 2001	6%	17	571	7%	19	573
Oct. 1, 2001—Dec. 31, 2001	6%	17	571	7%	19	573
Jan. 1, 2002—Mar. 31, 2002	5%	15	569	6%	17	571
Apr. 1, 2002—Jun. 30, 2002	5%	15	569	6%	17	571
Jul. 1, 2002—Sep. 30, 2002	5%	15	569	6%	17	571
Oct. 1, 2002—Dec. 31, 2002	5%	15	569	6%	17	571
Jan. 1, 2003—Mar. 31, 2003	4%	13	567	5%	15	569
Apr. 1, 2003—Jun. 30, 2003	4%	13	567	5%	15	569
Jul. 1, 2003—Sep. 30, 2003	4%	13	567	5%	15	569
Oct. 1, 2003—Dec. 31, 2003	3%	11	565	4%	13	567
Jan. 1, 2004—Mar. 31, 2004	3%	59	613	4%	61	615
Apr. 1, 2004—Jun. 30, 2004	4%	61	615	5%	63	617
Jul. 1, 2004—Sep. 30, 2004	3%	59	613	4%	61	615
Oct. 1, 2004—Dec. 31, 2004	4%	61	615	5%	63	617
Jan. 1, 2005—Mar. 31, 2005	4%	13	567	5%	15	569
Apr. 1, 2005—Jun. 30, 2005	5%	15	569	6%	17	571
Jul. 1, 2005—Sep. 30, 2005	5%	15	569	6%	17	571
Oct. 1, 2005—Dec. 31, 2005	6%	17	571	7%	19	573
Jan. 1, 2006—Mar. 31, 2006	6%	17	571	7%	19	573
Apr. 1, 2006—Jun. 30, 2006	6%	17	571	7%	19	573
Jul. 1, 2006—Sep. 30, 2006	7%	19	573	8%	21	575
Oct. 1, 2006—Dec. 31, 2006	7%	19	573	8%	21	575
Jan. 1, 2007—Mar. 31, 2007	7%	19	573	8%	21	575
Apr. 1, 2007- Jun. 30, 2007	7%	19	573	8%	21	575
Jul. 1, 2007—Sep. 30, 2007	7%	19	573	8%	21	575
Oct. 1, 2007—Dec. 31, 2007	7%	19	573	8%	21	575

TABLE OF INTEREST RATES

FROM JANUARY 1, 1999 — PRESENT – Continued

CORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	OVERPAYMENTS			UNDERPAYMENTS		
		1995–1 C.B.			1995–1 C.B.	
	RATE	TABLE	PG	RATE	TABLE	PG
Jan. 1, 2008—Mar. 31, 2008	6%	65	619	7%	67	621

TABLE OF INTEREST RATES FOR
LARGE CORPORATE UNDERPAYMENTS

FROM JANUARY 1, 1991 — PRESENT

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 1991—Mar. 31, 1991	13%	31	585
Apr. 1, 1991—Jun. 30, 1991	12%	29	583
Jul. 1, 1991—Sep. 30, 1991	12%	29	583
Oct. 1, 1991—Dec. 31, 1991	12%	29	583
Jan. 1, 1992—Mar. 31, 1992	11%	75	629
Apr. 1, 1992—Jun. 30, 1992	10%	73	627
Jul. 1, 1992—Sep. 30, 1992	10%	73	627
Oct. 1, 1992—Dec. 31, 1992	9%	71	625
Jan. 1, 1993—Mar. 31, 1993	9%	23	577
Apr. 1, 1993—Jun. 30, 1993	9%	23	577
Jul. 1, 1993—Sep. 30, 1993	9%	23	577
Oct. 1, 1993—Dec. 31, 1993	9%	23	577
Jan. 1, 1994—Mar. 31, 1994	9%	23	577
Apr. 1, 1994—Jun. 30, 1994	9%	23	577
Jul. 1, 1994—Sep. 30, 1994	10%	25	579
Oct. 1, 1994—Dec. 31, 1994	11%	27	581
Jan. 1, 1995—Mar. 31, 1995	11%	27	581
Apr. 1, 1995—Jun. 30, 1995	12%	29	583
Jul. 1, 1995—Sep. 30, 1995	11%	27	581
Oct. 1, 1995—Dec. 31, 1995	11%	27	581
Jan. 1, 1996—Mar. 31, 1996	11%	75	629
Apr. 1, 1996—Jun. 30, 1996	10%	73	627
Jul. 1, 1996—Sep. 30, 1996	11%	75	629
Oct. 1, 1996—Dec. 31, 1996	11%	75	629
Jan. 1, 1997—Mar. 31, 1997	11%	27	581
Apr. 1, 1997—Jun. 30, 1997	11%	27	581
Jul. 1, 1997—Sep. 30, 1997	11%	27	581
Oct. 1, 1997—Dec. 31, 1997	11%	27	581
Jan. 1, 1998—Mar. 31, 1998	11%	27	581
Apr. 1, 1998—Jun. 30, 1998	10%	25	579
Jul. 1, 1998—Sep. 30, 1998	10%	25	579
Oct. 1, 1998—Dec. 31, 1998	10%	25	579
Jan. 1, 1999—Mar. 31, 1999	9%	23	577
Apr. 1, 1999—Jun. 30, 1999	10%	25	579
Jul. 1, 1999—Sep. 30, 1999	10%	25	579
Oct. 1, 1999—Dec. 31, 1999	10%	25	579
Jan. 1, 2000—Mar. 31, 2000	10%	73	627
Apr. 1, 2000—Jun. 30, 2000	11%	75	629
Jul. 1, 2000—Sep. 30, 2000	11%	75	629
Oct. 1, 2000—Dec. 31, 2000	11%	75	629
Jan. 1, 2001—Mar. 31, 2001	11%	27	581
Apr. 1, 2001—Jun. 30, 2001	10%	25	579
Jul. 1, 2001—Sep. 30, 2001	9%	23	577
Oct. 1, 2001—Dec. 31, 2001	9%	23	577

TABLE OF INTEREST RATES FOR
LARGE CORPORATE UNDERPAYMENTS

FROM JANUARY 1, 1991 — PRESENT – Continued

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 2002—Mar. 31, 2002	8%	21	575
Apr. 1, 2002—Jun. 30, 2002	8%	21	575
Jul. 1, 2002—Sep. 30, 2002	8%	21	575
Oct. 1, 2002—Dec. 30, 2002	8%	21	575
Jan. 1, 2003—Mar. 31, 2003	7%	19	573
Apr. 1, 2003—Jun. 30, 2003	7%	19	573
Jul. 1, 2003—Sep. 30, 2003	7%	19	573
Oct. 1, 2003—Dec. 31, 2003	6%	17	571
Jan. 1, 2004—Mar. 31, 2004	6%	65	619
Apr. 1, 2004—Jun. 30, 2004	7%	67	621
Jul. 1, 2004—Sep. 30, 2004	6%	65	619
Oct. 1, 2004—Dec. 31, 2004	7%	67	621
Jan. 1, 2005—Mar. 31, 2005	7%	19	573
Apr. 1, 2005—Jun. 30, 2005	8%	21	575
Jul. 1, 2005—Sep. 30, 2005	8%	21	575
Oct. 1, 2005—Dec. 31, 2005	9%	23	577
Jan. 1, 2006—Mar. 31, 2006	9%	23	577
Apr. 1, 2006—Jun. 30, 2006	9%	23	577
Jul. 1, 2006—Sep. 30, 2006	10%	25	579
Oct. 1, 2006—Dec. 31, 2006	10%	25	579
Jan. 1, 2007—Mar. 31, 2007	10%	25	579
Apr. 1, 2007- Jun. 30, 2007	10%	25	579
Jul. 1, 2007—Sep. 30, 2007	10%	25	579
Oct. 1, 2007—Dec. 31, 2007	10%	25	579
Jan. 1, 2008—Mar. 31, 2008	9%	71	625

TABLE OF INTEREST RATES FOR CORPORATE
OVERPAYMENTS EXCEEDING $10,000

FROM JANUARY 1, 1995 — PRESENT

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 1995—Mar. 31, 1995	6.5%	18	572
Apr. 1, 1995—Jun. 30, 1995	7.5%	20	574
Jul. 1, 1995—Sep. 30, 1995	6.5%	18	572
Oct. 1, 1995—Dec. 31, 1995	6.5%	18	572
Jan. 1, 1996—Mar. 31, 1996	6.5%	66	620
Apr. 1, 1996—Jun. 30, 1996	5.5%	64	618
Jul. 1, 1996—Sep. 30, 1996	6.5%	66	620
Oct. 1, 1996—Dec. 31, 1996	6.5%	66	620
Jan. 1, 1997—Mar. 31, 1997	6.5%	18	572
Apr. 1, 1997—Jun. 30, 1997	6.5%	18	572
Jul. 1, 1997—Sep. 30, 1997	6.5%	18	572
Oct. 1, 1997—Dec. 31, 1997	6.5%	18	572
Jan. 1, 1998—Mar. 31, 1998	6.5%	18	572
Apr. 1, 1998—Jun. 30, 1998	5.5%	16	570
Jul. 1, 1998—Sep. 30, 1998	5.5%	16	570
Oct. 1, 1998—Dec. 31, 1998	5.5%	16	570
Jan. 1, 1999—Mar. 31, 1999	4.5%	14	568
Apr. 1, 1999—Jun. 30, 1999	5.5%	16	570
Jul. 1, 1999—Sep. 30, 1999	5.5%	16	570
Oct. 1, 1999—Dec. 31, 1999	5.5%	16	570
Jan. 1, 2000—Mar. 31, 2000	5.5%	64	618

TABLE OF INTEREST RATES FOR CORPORATE
OVERPAYMENTS EXCEEDING $10,000

FROM JANUARY 1, 1995 — PRESENT – Continued

	RATE	1995–1 C.B. TABLE	PG
Apr. 1, 2000—Jun. 30, 2000	6.5%	66	620
Jul. 1, 2000—Sep. 30, 2000	6.5%	66	620
Oct. 1, 2000—Dec. 31, 2000	6.5%	66	620
Jan. 1, 2001—Mar. 31, 2001	6.5%	18	572
Apr. 1, 2001—Jun. 30, 2001	5.5%	16	570
Jul. 1, 2001—Sep. 30, 2001	4.5%	14	568
Oct. 1, 2001—Dec. 31, 2001	4.5%	14	568
Jan. 1, 2002—Mar. 31, 2002	3.5%	12	566
Apr. 1, 2002—Jun. 30, 2002	3.5%	12	566
Jul. 1, 2002—Sep. 30, 2002	3.5%	12	566
Oct. 1, 2002—Dec. 31, 2002	3.5%	12	566
Jan. 1, 2003—Mar. 31, 2003	2.5%	10	564
Apr. 1, 2003—Jun. 30, 2003	2.5%	10	564
Jul. 1, 2003—Sep. 30, 2003	2.5%	10	564
Oct. 1, 2003—Dec. 31, 2003	1.5%	8	562
Jan. 1, 2004—Mar. 31, 2004	1.5%	56	610
Apr. 1, 2004—Jun. 30, 2004	2.5%	58	612
Jul. 1, 2004—Sep. 30, 2004	1.5%	56	610
Oct. 1, 2004—Dec. 31, 2004	2.5%	58	612
Jan. 1, 2005—Mar. 31, 2005	2.5%	10	564
Apr. 1, 2005—Jun. 30, 2005	3.5%	12	566
Jul. 1, 2005—Sep. 30, 2005	3.5%	12	566
Oct. 1, 2005—Dec. 31, 2005	4.5%	14	568
Jan. 1, 2006—Mar. 31, 2006	4.5%	14	568
Apr. 1, 2006—Jun. 30, 2006	4.5%	14	568
Jul. 1, 2006—Sep. 30, 2006	5.5%	16	570
Oct. 1, 2006—Dec. 31, 2006	5.5%	16	570
Jan. 1, 2007—Mar. 31, 2007	5.5%	16	570
Apr. 1, 2007- Jun. 30, 2007	5.5%	16	570
Jul. 1, 2007—Sep. 30, 2007	5.5%	16	570
Oct. 1, 2007—Dec. 31, 2007	5.5%	16	570
Jan. 1, 2008—Mar. 31, 2008	4.5%	62	616

Section 7701.—Definitions

26 CFR 301.7701–4: Trusts.

This revenue procedure describes the conditions under which changes to certain subprime mortgage loans will not cause the Internal Revenue Service to challenge the tax status of certain securitization vehicles holding the loans. See Rev. Proc. 2007-72, page 1257.

Part III. Administrative, Procedural, and Miscellaneous

Modification of Q&A–23 of Notice 2007–7

Notice 2007–99

I. Purpose

This notice modifies Q&A–23 of Notice 2007–7, 2007–5 I.R.B. 395. Notice 2007–7, Q&A–23, states that the exclusion provided under § 402(l) of the Internal Revenue Code with respect to the payment of certain health insurance premiums by certain pension plans does not apply to premiums paid to an accident or health plan that is self-insured.

II. Background

Section 402(l) of the Internal Revenue Code, which was added by section 845(a) of Pension Protection Act of 2006, P.L. 109–280 ("PPA '06"), provides for an exclusion from gross income up to $3,000 annually for certain distributions paid from an eligible governmental plan that are used to pay qualified health insurance premiums of an eligible retired public safety officer or his or her spouse or dependents. The term "qualified health insurance premiums" is defined in § 402(l)(4)(D) as "premiums for coverage for the eligible retired public safety officer, his spouse, and dependents, by an accident or health *insurance* plan or qualified long-term care insurance contract (as defined in § 7702B(b))." (Emphasis added.) Section 402(l)(5)(A) further limits the exclusion to premiums that are paid "directly to the provider of the accident or health *insurance* plan or qualified long-term care insurance contract." (Emphasis added.) Section 402(l) applies to distributions in taxable years beginning after December 31, 2006.

Notice 2007–7, Q&A–23, provides that premiums paid to self-insured accident or health plans are not eligible for the § 402(l) exclusion from gross income because, in order to receive favorable tax treatment under § 402(l), the accident or health plan receiving the premium payments must be an accident or health insurance plan. Thus, the plan must be providing insurance issued by an insurance company regulated by a State (including a managed care organization that is treated as issuing insurance).

In general, §§ 104(a)(3) and 105(b) and (c) exclude from gross income certain amounts received through accident or health insurance. Under § 105(e)(1), amounts received under an accident or health plan for employees are treated as received through accident or health insurance for purposes of §§ 104 and 105. Section 1.105–5(a) of the Income Tax Regulations provides that an accident or health plan may be either insured or self-insured.

On August 2, 2007, S. 1974, the Pension Protection Technical Corrections Act of 2007, was introduced in the Senate and, on August 3, 2007, H.R. 3361, the Pension Protection Technical Corrections Act of 2007, was introduced in the House of Representatives. Both bills have identical provisions — § 9(i)(1)(B) and (C) of S. 1974 and H.R. 3361 — which would revise section 845(a) of PPA '06 by deleting the word "insurance" from the term "accident or health insurance plan," which occurs in both the definition of qualified health insurance premiums in § 402(l)(4)(D) of the Code and the direct payment requirement in § 402(l)(5)(A). Because of these pending technical corrections and special considerations involving eligible retired public safety officers, Notice 2007–7, Q&A–23, is being modified.

III. Modification of Notice 2007–7, Q&A–23

Notice 2007–7, Q&A–23, is modified as follows:

Q–23. Can the accident or health plan receiving the payments of qualified health insurance premiums be a self-insured plan?

A–23. Yes. An accident or health plan, which is defined under § 105(e), includes a self-insured plan. See § 1.105–5(a) of the Income Tax Regulations.

IV. EFFECT ON OTHER DOCUMENTS

Notice 2007–7 is modified.

DRAFTING INFORMATION

The principal author of this notice is Angelique Carrington of Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please call the Employee Plans customer assistance service Monday through Friday between 8:30 a.m. and 4:30 p.m. Eastern time at (877) 829–5500 (a toll-free number) or e-mail Ms. Carrington at *RetirementPlanQuestions@irs.gov*.

Transition Relief and Guidance on Corrections of Certain Failures of a Nonqualified Deferred Compensation Plan to Comply with § 409A(a) in Operation

Notice 2007–100

I. PURPOSE

This notice provides transition relief and guidance on the correction of certain failures of a nonqualified deferred compensation plan to comply with § 409A(a) in operation (an operational failure). This transition relief and additional guidance includes:

- Methods for correcting certain operational failures during the taxable year of the service provider in which the failure occurs to avoid income inclusion under § 409A(a).
- Transition relief limiting the amount includible in income under § 409A(a) for certain operational failures occurring in a service provider's taxable year beginning before January 1, 2010, that involve only limited amounts.
- An outline of, and request for comments on, a potential corrections program that would permit service recipients and service providers to limit the amounts required to be included in income under § 409A(a) due to certain operational failures.

II. CORRECTIONS OF CERTAIN OPERATIONAL FAILURES IN THE SAME TAXABLE YEAR AS THE FAILURE OCCURS

A. *General Requirements*

If an unintentional operational failure to comply with § 409A(a) occurs, but the operational failure is corrected in accordance with this § II, no amount is required to be included in income under § 409A(a) as a result of the failure. The relief provided by this § II applies only to unintentional operational failures, which means an unintentional failure to comply with plan provisions that satisfy the requirements of § 409A(a) and the guidance thereunder, or an unintentional failure to follow the requirements of § 409A(a) in practice, due to one or more inadvertent errors in the operation of the plan. This § II does not provide relief for plan terms and provisions that fail to meet the requirements of § 409A and the applicable guidance or for operational failures for which a correction is not described in this § II.[1] Relief is not available under this § II with respect to any intentional failure to comply with the terms of a plan or the requirements of § 409A in the operation of a plan. In addition, relief is not available under this § II with respect to any exercise of a stock right that otherwise would result in a failure to comply with § 409A. Relief otherwise available under this § II is conditioned upon the timely filing and providing of the information required by § IV of this notice.

The relief provided under this § II is not available unless, in addition to correcting the operational failure in accordance with this § II, the service recipient takes commercially reasonable steps to avoid a recurrence of the operational failure. If the same or a substantially similar operational failure has occurred previously, the relief is not available for any taxable year of the service provider beginning after December 31, 2008, unless the service recipient demonstrates that the service recipient had established practices and procedures reasonably designed to ensure that such an operational failure would not recur, had taken commercially reasonable steps to avoid a recurrence of the operational failure, and the operational failure occurred despite the diligent efforts of the service recipient.

Relief is not available under this § II with respect to any intentional failure to comply with the terms of a plan or the requirements of § 409A in the operation of a plan. The relief provided in this section also is not available with respect to an operational failure that is egregious, or where the failure is directly or indirectly related to participation in an abusive tax avoidance transaction (meaning for this purpose any listed transaction under § 1.6011–4(b)(2)).

In each instance, the taxpayer claiming the relief has the burden of demonstrating that the taxpayer was eligible for the relief and that the requirements of this section have been met. Any application of the relief provided in this section is subject to examination by the IRS.

B. *Failure to Defer Amount or Incorrect Payment Corrected in the Same Taxable Year*

This § II.B applies to amounts of nonqualified deferred compensation that, under the terms of the plan and any applicable deferral election, and § 409A and the applicable guidance, should not have been paid or made available to a service provider in a taxable year of the service provider, but were paid or made available in that year due to an unintentional operational failure with respect to the plan, other than a payment that fails to meet the requirements of § 409A(a)(2)(B)(i) and the applicable guidance thereunder (requirement to delay for six months payments to a specified employee upon separation from service). For rules relating to correction of certain payments made in violation of § 409A(a)(2)(B)(i) and the applicable guidance under that section, see § II.C of this notice.

An amount to which this § II.B applies is treated as having been timely deferred in accordance with the terms of the plan and any applicable deferral election (or as having continued to be deferred under the terms of the plan) if the service provider repays to the service recipient the amount that was erroneously paid or made available to the service provider on or before the last day of the service provider's taxable year in which such amount was erroneously paid or made available, and immediately after such repayment the service provider has a legally binding right under the plan to be paid the amount that would have been due if such amount had not been erroneously paid or made available to the service provider during such taxable year, at the same time and in the same form of payment that the amount would have been payable if such amount had not been erroneously paid or made available to the service provider during such taxable year.

In addition, if the total of all amounts to which this § II.B applies that are erroneously paid or made available under a plan (as defined for purposes of § 409A) in a service provider's taxable year exceeds the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for the year in which the erroneous payment was made and the service provider is an insider (as defined in this § II.B) with respect to the service recipient, to qualify for the relief provided in this section, the service provider must also pay interest to the service recipient at the time the service provider repays the amount to the service recipient equal to the amount of the erroneous payment (E) multiplied by the short-term applicable Federal rate (AFR) under § 1274(d)(1) (r) multiplied by a fraction, the numerator of which is the number of days from the erroneous payment date to the repayment date (n_1) and the denominator of which is the number of days in such taxable year (n_2), or (E x r x n_1/n_2). For purposes of the preceding sentence, r is the short-term AFR, based on annual compounding, for the month in which the erroneous payment was paid or made available to the service provider. For purposes of counting days under this § II.B, the first day of the period is disregarded and the last day is taken into account. Where a repayment is made through a reduction of the service provider's other compensation, the repayment date occurs on each date the compensation otherwise would have been paid to the service provider, and if the amount withheld on a repayment date is less than the entire erroneous payment, the interest calculation in the preceding sen-

[1] Reliance on the transition relief provided in Notice 2007–86, 2007–46 I.R.B. 990, the preamble to the final regulations under § 409A, 72 Fed. Reg. 19234, Notice 2006–79, 2006–43 I.R.B. 763, the preamble to the proposed regulations under § 409A, 70 Fed. Reg. 57930, or Notice 2005–1, 2005–1 C.B. 274, for the years to which such transition relief applies, does not preclude a taxpayer from qualifying for the relief provided in this notice with respect to unintentional operational errors occurring in taxable years beginning before January 1, 2009.

tence is applied by substituting the unpaid balance immediately before the repayment for the amount of the erroneous payment.

For purposes of this notice, a service provider is an insider with respect to a service recipient if the service provider is a director or officer of the service recipient or is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security of the service recipient, determined in accordance with the rules of the Securities and Exchange Commission under § 16 of the Securities Exchange Act of 1934, as amended, 15 USC 78p, without regard to whether the service recipient has any class of equity securities registered under § 12 of such Act, 15 USC 78l. See 17 CFR § 240.16a–1(a) (beneficial owner) and (f) (officer). In the case of a service recipient that is not a corporation, such rules are applied by analogy.

The service provider may satisfy the requirement to repay the service recipient the amount erroneously paid to the service provider and interest (if applicable) by paying the service recipient the equivalent amount on or before the last day of such taxable year. Alternatively, in lieu of such repayment, the service recipient may reduce the service provider's compensation that otherwise would have been paid during such taxable year by an equivalent amount on or before the last day of such taxable year. In either case, an amount will not be treated as paid by the service provider if, in connection with such payment, the service recipient pays the service provider, or otherwise provides a benefit (including an obligation to pay an amount or provide a benefit in the future), intended as a substitute for all or part of the amount the service provider is required to repay the service recipient.

The amount erroneously paid to the service provider that is repaid by the service provider to the service recipient is not required to be included in income by the service provider, or reported as income to the service provider on a Form W–2 or Form 1099 by the service recipient. To the extent employment taxes have been withheld and paid with respect to such payment, appropriate adjustments should be made under the applicable rules under § 6413. To the extent that, in lieu of repayment, the service recipient reduces other compensation that would have been paid to the service provider, the other compensation that would have been paid to the service provider, but instead is used to repay the erroneous payment or to pay any required interest on the erroneous payment, is includible in income (and wages if the service provider is an employee); however, any employment taxes withheld and paid with respect to the original erroneous payment may be applied to satisfy the requirement to withhold and pay employment taxes on such compensation, in which case no adjustment to the employment taxes previously withheld and paid should be made.

For purposes of this § II.B, the service provider's account balance or other amount of deferred compensation under the plan may be adjusted for earnings (or losses) retroactive to the date the amount should have been credited to the service provider's account or otherwise deferred (or if the amount should have otherwise remained deferred compensation after the end of the service provider's taxable year, retroactive to the date the amount was paid or made available), provided that such adjustment must be made on or before the last day of such taxable year (or if it is impracticable to make the adjustment by the end of such taxable year, the service provider (in the case of earnings) and the service recipient (in the case of losses) must have a legally binding right to have such adjustment made on or before the last day of such taxable year).

The relief provided in this § II.B is not available with respect to any erroneous payment occurring during any taxable year of the service provider in which the service recipient experienced a substantial financial downturn or otherwise experienced financial or other issues that indicated a significant risk that the service recipient would not be able to pay the amount deferred when the payment became due.

In each of the following examples, it is assumed that Employer does not make any payment to Employee, or otherwise provide a benefit (including an obligation to pay an amount or provide a benefit in the future) to or on behalf of Employee, that is intended as a substitute for all or part of the amount that Employee pays to Employer (or the reduction in compensation otherwise payable to Employee), that Employee is an individual whose taxable year is the calendar year, that Employer did not experience a substantial financial downturn or otherwise experience financial or other issues that indicated a significant risk that the service recipient would not be able to pay the amount deferred when the payment became due, and that Employee and Employer each satisfy the other applicable requirements of this § II.

Example 1: Employee, who is not an insider with respect to Employer, makes a timely election to defer 50% of a bonus payable in 2007 pursuant to an account balance plan maintained by Employer. The bonus is $100,000. Due to an unintentional operational failure with respect to the plan, Employer defers only 10% of the bonus, or $10,000, and pays Employee the other $90,000 in 2007 (including the $40,000 that should have been deferred). The deferral is treated as made in accordance with the terms of the plan and the deferral election if, on or before December 31, 2007, the additional $40,000 is credited to Employee's account balance and Employee pays Employer $40,000. The $40,000 erroneously paid to Employee is not required to be included in income by Employee or reported by Employer on Form W–2. Alternatively, in lieu of the $40,000 repayment by Employee to Employer, compensation otherwise payable to Employee in 2007 (such as salary payments) may be reduced by $40,000, provided that the $40,000 reduction in Employee's compensation used to repay the amount (but not the $40,000 erroneous payment) is included in income by Employee and reported as wages by Employer on the 2007 Form W–2. Employer may also adjust Employee's account to reflect the earnings (or losses) that would have been allocated to Employee's account had the amount been timely deferred and credited to Employee's account balance, if such adjustment for earnings (or losses) is made on or before December 31, 2007. Alternatively, if it is impracticable to make the adjustment on or before December 31, 2007, such adjustment may be made later retroactively to December 31, 2007, provided that Employee and Employer each has a legally binding right on December 31, 2007 with respect to such adjustment. For example, if the original incorrect deferral would have been credited with 10% in deemed investment earnings, the deferral plus earnings would be $11,000. This amount must be increased by the $40,000 repaid by Employee and may also be increased by an additional $4,000 ($40,000 multiplied by 10%), to result in the $55,000 account balance that would have been reflected had the amount been properly deferred. If the original incorrect deferral would have been charged with 10% in deemed investment losses, the deferral less losses would be $9,000. This account balance must be increased by the $40,000, but may also be reduced by $4,000, for a net increase of $36,000, to result in the $45,000 account balance that would have been reflected had the amount been properly deferred.

Example 2: Pursuant to a nonqualified deferred compensation plan sponsored by Employer, Employee, who is an insider with respect to Employer, is scheduled to receive a $10,000 installment payment in 2007 that is not subject to the 6-month delay for payments to specified employees upon separation from service under § 409A(a)(2)(B)(i). Due to an unintentional operational failure with respect to the plan, Employer pays Employee $11,000. The installment payment is treated as made in accordance

with the terms of the plan and the deferral election if on or before December 31, 2007, the excess $1,000 payment is credited to Employee's account balance, and Employee pays Employer $1,000. The $1,000 is not required to be included in income by Employee or reported by Employer as wages on Form W–2. Alternatively, in lieu of the $1,000 payment by Employee to Employer, Employee's compensation otherwise payable in 2007 (such as salary payments) may be reduced by $1,000, provided that the $1,000 reduction in Employee's compensation used to repay the amount (but not the $1,000 erroneous payment) is included in income by Employee and reported by Employer as wages on the 2007 Form W–2. Because the excess $1,000 payment does not exceed the applicable limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B), Employee is not required to pay any interest to qualify for the relief. Employer may also adjust Employee's account to reflect the earnings (or losses) that would have been allocated to Employee's account had the amount been timely deferred and credited to Employee's account balance, if such adjustment for earnings (or losses) is made on or before December 31, 2007. Alternatively, if it is impracticable to make the adjustment on or before December 31, 2007, such adjustment may be made later retroactively to December 31, 2007, provided that on December 31, 2007, Employee and Employer each has a legally binding right with respect to such adjustment.

Example 3: Employee, who is an insider with respect to Employer, makes a timely election to defer 80% of a $100,000 bonus payable on July 1, 2009, pursuant to an account balance plan maintained by Employer. Due to an unintentional operational failure with respect to the plan, Employer defers only 10% of the bonus, or $10,000, and pays Employee the other $90,000 (including $70,000 that should have been deferred) on July 1, 2009. Assume for purposes of this example that the short-term AFR, based on annual compounding, for July 2009 is 4.0 percent. Employer notifies Employee of the error and Employee pays Employer $70,705.75 on October 1, 2009, consisting of the $70,000 erroneous payment plus interest equal to $705.75 ($70,000 x .04 x 92/365) (because the erroneous payment exceeds the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for 2009 and Employee is an insider). The deferral is treated as made in accordance with the terms of the plan under this § II.B. The $70,000 is not required to be included in income by Employee or reported as wages by Employer on Form W–2. Alternatively, in lieu of the $70,705.75 payment by Employee to Employer, compensation otherwise payable to Employee in 2009 (such as salary payments) may be reduced by $70,000 plus applicable interest, in which case the reduction in Employee's compensation used to repay the amount plus interest (but not the erroneous $70,000 payment) must be reported by Employer as wages on the 2009 Form W–2 issued to Employee and included in Employee's income for 2009. Employer may also adjust Employee's account to reflect the earnings that would have been allocated to Employee's account had the amount been timely deferred and credited to Employee's account balance, if such adjustment for earnings is made on or before December 31, 2009. Alternatively, if it is impracticable to make the adjustment on or before December 31, 2009, such adjustment may be made retroactively to December 31, 2009, provided that Employee and Employer each have a legally binding right on December 31, 2009 with respect to such adjustment.

C. *Incorrect Payment in Violation of § 409A(a)(2)(B)(i) Corrected in the Same Taxable Year*

This section applies to amounts of nonqualified deferred compensation that, under the terms of the plan and any applicable deferral election, and § 409A(a)(2)(B)(i) (requirement to delay for six months payments to a specified employee upon separation from service) and the applicable guidance, should not have been paid or made available to a service provider for at least six months following the service provider's separation from service, but that were paid or made available to the service provider before the expiration of such six-month period due to an unintentional operational failure with respect to the plan. For the ability to correct certain other payments in violation of § 409A and the applicable guidance, see § II.B of this notice.

With respect to an amount to which this § II.C applies, the service provider will not be treated as having failed to comply with § 409A(a)(2)(B)(i) and the terms of the plan and any applicable deferral election as a result of the amount being paid or made available at the earlier date if, on or before the last day of the service provider's taxable year in which the amount was paid or made available, the service provider repays to the service recipient the amount that was erroneously paid or made available to the service provider, immediately after such repayment the service provider has a legally binding right to receive such amount from the service recipient on the date that is the same number of days after the later of (i) the date the amount would otherwise have been payable under the terms of the plan and the applicable deferral election or (ii) the date of the repayment as the number of days from the date the service recipient made the erroneous payment to the service provider through the date the service provider repaid the erroneous payment to the service recipient, and the repaid amount is not paid or made available to the service provider before such date. For purposes of counting days under this § II.C, the first day of the period is disregarded and the last day is taken into account (for example, if on June 1, 2008, a service recipient mistakenly paid a service provider an amount that the service provider repaid on June 30, 2008, there would be 29 days from the date of payment through the date of repayment).

If the requirements of this § II.C are met, the original payment from the service recipient to the service provider that has been repaid to the service recipient is not required to be reported as income on Form W–2 or Form 1099, as applicable. To the extent employment taxes have been withheld and paid with respect to such payment, appropriate adjustments should be made under the applicable rules under § 6413. However, the subsequent payment of the amount by the service recipient to the service provider is required to be reported appropriately as income on Form W–2 or Form 1099, as applicable, and subject to the applicable employment taxes. If the payment is deductible by the service recipient, the taxable year in which such deduction is allowable will be determined in accordance with § 404(a)(5) and the service recipient's method of accounting.

The relief provided in this section is not available with respect to any erroneous payment occurring during any taxable year of the service provider in which the service recipient experienced a substantial financial downturn or otherwise experienced financial or other issues that indicated a significant risk that the service recipient would not be able to pay the amount deferred when the payment became due.

In each of the following examples, it is assumed that: Specified Employee is an individual whose taxable year is the calendar year; at all relevant times Specified Employee is a specified employee of Employer for purposes of § 409A(a)(2)(B)(i); at all relevant times Employer is not experiencing any substantial financial downturn or any other financial or other issue that indicates a significant risk that Employer would not be able to pay the relevant deferred amounts when due; and Employee and Employer each satisfy the other applicable requirements of this § II.

Example 1: Under a nonqualified deferred compensation plan sponsored by Employer, Specified Employee has a legally binding right to a payment of deferred compensation on the first day of the seventh month following Specified Employee's separation from service. Specified Employee separates from service on November 15, 2007 so that the payment

is due on June 1, 2008. Due to an unintentional operational failure with respect to the plan, Employer pays Specified Employee the amount of deferred compensation on May 1, 2008. Employer discovers the error on July 1, 2008, and Specified Employee repays the amount to Employer on July 1, 2008 (61 days after the erroneous payment). Provided that immediately after such repayment Specified Employee has a legally binding right to receive the amount from Employer on August 31, 2008 (61 days after the July 1, 2008 repayment date) and Employer does not repay the amount to Specified Employee before that date, Specified Employee will not be treated as having failed to comply with § 409A(a)(2)(B)(i) and the terms of the plan and the applicable deferral election solely as a result of the early payment.

Example 2: Under a nonqualified deferred compensation plan sponsored by Employer, Specified Employee has a legally binding right to a payment of deferred compensation payable on the first day of the seventh month following separation from service. Specified Employee separates from service on May 1, 2008 so that the payment is due on December 1, 2008. Due to an unintentional operational failure with respect to the plan, Employer pays Specified Employee the amount of deferred compensation on May 1, 2008. Employer discovers the error and Specified Employee repays the amount to Employer on July 1, 2008 (61 days after the erroneous payment). Provided that immediately after such repayment Specified Employee has a legally binding right to receive the amount from Employer on January 31, 2009 (61 days after December 1, 2008) and Employer does not repay the amount to Specified Employee before that date, Specified Employee will not be treated as having failed to comply with § 409A(a)(2)(B)(i) and the terms of the plan and the applicable deferral election solely as a result of the early payment. The erroneous payment is not includible in Specified Employee's income, and is not required to be reported on the 2008 Form W–2. Such amount is includible in Specified Employee's income in the year in which the amount is repaid by Employer to Specified Employee pursuant to the plan, and is required to be reported on that year's Form W–2 and subject to applicable employment taxes.

D. *Excess Deferred Amount Corrected in the Same Taxable Year*

If under the terms of a plan and an applicable deferral election, and § 409A and the applicable guidance, an amount that should not have been deferred compensation under the plan is credited to the service provider's account or otherwise treated as deferred compensation under the plan as a result of an unintentional operational failure with respect to the plan, and such excess amount otherwise would have been paid to the service provider during the service provider's taxable year in which the excess amount was incorrectly credited to the service provider's account or otherwise treated as deferred compensation under the plan, the excess amount is not treated as an amount deferred under the plan if the excess amount is paid to the service provider on or before the last day of the service provider's taxable year in which the excess amount was incorrectly treated as deferred compensation. The amount to which the service provider has a legally binding right under the plan at the end of the year must be adjusted to reflect the payment (for example, through a reduction in the account balance). In addition, if the service provider is an insider with respect to the service recipient (as defined in § II.B of this notice), the remaining account balance (or other deferred compensation under the plan) must be adjusted for positive earnings retroactive to the date the excess amount was incorrectly credited to the service provider's account or otherwise incorrectly treated as deferred under the plan, provided that such adjustment must be made on or before the last day of the service provider's taxable year in which such amount was incorrectly treated as deferred compensation under the plan (or if it is impracticable to make the adjustment by the end of such year, the service recipient must have a legally binding right on the last day of such taxable year to make such adjustment retroactively to such date). In other cases, such adjustment may be (but is not required to be) made. Where the amount was subject to losses, the remaining account balance (or other deferred compensation under the plan) is not required to be adjusted, but may be adjusted for such losses retroactive to the date the excess amount was incorrectly credited to the service provider's account or otherwise incorrectly treated as deferred under the plan, provided that such adjustment must be made on or before the last day of the service provider's taxable year in which such amount was incorrectly treated as deferred compensation under the plan (or if it is impracticable to make the adjustment by the end of such taxable year, the service provider must have a legally binding right on the last day of such taxable year to require that such an adjustment be made retroactively to the date of the failure). The service recipient may (but is not required to) pay reasonable interest to (or otherwise reasonably compensate) the service provider to reflect the time value of money with respect to the late payment, provided that such interest or other compensation is paid or made available by the end of the service provider's taxable year in which such amount was incorrectly treated as deferred compensation under the plan.

This relief is not applicable to a service recipient's failure to timely pay in the proper taxable year of a service provider amounts that were deferred in one or more previous taxable years of the service provider. However, see § 1.409A–3(d) for certain circumstances under which such payments may be treated as made in accordance with a designated payment date.

Example: Employee, who is an insider with respect to Employer and whose taxable year is the calendar year, makes a timely election pursuant to an account balance plan to defer 10% of a bonus otherwise payable in 2007. The bonus is $100,000. Due to an unintentional operational failure with respect to the plan, Employer defers 50% of the bonus, or $50,000, and pays Employee $50,000 (instead of deferring $10,000 and paying Employee $90,000). The excess $40,000 will not be treated as deferred under the plan if on or before December 31, 2007, Employer pays Employee $40,000 of the account balance under the plan, and Employee and Employer each satisfy the other applicable requirements of this § II. The remaining account balance must be adjusted for earnings and may be adjusted for losses that were allocable to such amount under the plan. For example, if the account was credited with 10% in deemed investment earnings, the account balance must be reduced by both the $40,000 paid to Employee and the $4,000 in earnings, or $44,000, to result in the $11,000 account balance that would have been reflected had the deferred compensation under the plan been properly deferred. The adjustment must be made by December 31, 2007, except that the adjustment can be made later, retroactively as of that date, if it is impracticable to make the adjustment by December 31, 2007 and the service recipient has a legally binding right on that date to make such a retroactive adjustment. If the account was charged with 10% in deemed investment losses, the account balance must be reduced by the $40,000, but may be increased not later than December 31, 2007, by the $4,000 in losses on the improperly deferred amount, for a net reduction of $36,000, to result in the $9,000 account balance that would have been reflected had the deferred compensation under the plan been properly deferred. Alternatively, if it is impracticable to make the adjustment on or before December 31, 2007, such $4,000 adjustment may be made later retroactively to December 31, 2007, provided that the service provider has a legally binding right on December 31, 2007, to have such adjustment made. Employer may (but is not required to) pay Employee reasonable interest on the $40,000 erroneous deferral provided such payment is made by December 31, 2007.

E. *Correction of Exercise Price of Otherwise Excluded Stock Rights*

This § II.E applies if under the terms of a stock right, the stock right would

not be nonqualified deferred compensation under § 1.409A–1(b)(5)(i)(A) (excluded stock options) or § 1.409A–1(b)(5)(i)(B) (excluded stock appreciation rights), except that the exercise price of the stock right is less than the fair market value of the underlying stock on the date of grant. This section applies only if the failure of the exercise price to equal or exceed the fair market value of the underlying stock results from an unintentional administrative error in determining the exercise price. If this section applies to a stock right, the stock right is treated from the date of grant as not providing for nonqualified deferred compensation for purposes of § 409A. This section applies if before the stock right is exercised and not later than the last day of a service provider's taxable year in which the service recipient granted the service provider the stock right, the exercise price is reset to an amount equal to or exceeding the fair market value of the underlying stock on the date of grant, and at all times before such increase in the exercise price the stock right otherwise would not have provided for nonqualified deferred compensation for purposes of § 409A. For example, assume that on January 1, 2008, an employer grants an employee a stock option to purchase 100 shares of stock, and the stock option would otherwise be excluded from coverage under § 409A except that due to an unintentional administrative error the exercise price is set at an amount below the fair market value of the stock on January 1, 2008. Assume further that on July 1, 2008, the employee partially exercises the stock option and purchases 40 shares, but retains a stock option to purchase 60 shares. Provided that on or before December 31, 2008, the exercise price of the remaining stock option to purchase 60 shares is reset to a price at or above the fair market value of the underlying stock on January 1, 2008, the stock option to purchase 60 shares may qualify for the relief provided in this section. Because the exercise price was not reset before July 1, 2008, the portion of the stock option that was exercised to purchase 40 shares is not eligible for the relief provided in this section.

III. TRANSITION RELIEF FOR CERTAIN OPERATIONAL FAILURES INVOLVING LIMITED AMOUNTS OCCURRING DURING TAXABLE YEARS BEGINNING BEFORE 2010

A. *General Requirements*

If an unintentional operational failure to comply with § 409A(a) occurs during a service provider's taxable year beginning before January 1, 2010, but the operational failure qualifies for the relief provided in this § III and is corrected in accordance with this § III, the amount required to be included in income under § 409A(a) as a result of the failure, and the resulting additional taxes under § 409A, are limited in accordance with the provisions of this section. In each instance, the taxpayer claiming the relief (the service provider, the service recipient, or both) has the burden of demonstrating that such taxpayer was eligible for the relief and that the requirements of this section have been met. Any application of the relief provided in this section is subject to examination by the IRS.

The relief provided by this section applies only to unintentional operational failures, which means an unintentional failure to comply with plan provisions that satisfy the requirements of § 409A(a) and the guidance thereunder, or an unintentional failure to follow the requirements of § 409A in practice, due to one or more inadvertent errors in the operation of the plan. This notice does not apply to plan terms that fail to meet the requirements of § 409A and applicable guidance or to operational failures for which a correction is not provided in this § III.

The relief provided under this § III is not available unless, in addition to correcting the operational failure in accordance with this § III, the service recipient takes commercially reasonable steps to avoid a recurrence of the operational failure. For any taxable year of the service provider beginning after December 31, 2008, if the same or a substantially similar operational failure has occurred previously, the service recipient must demonstrate that the service recipient had established practices and procedures reasonably designed to ensure that such an operational failure would not recur, had taken commercially reasonable steps to avoid a recurrence of the operational failure and that the operational failure occurred despite the diligent efforts of the service recipient. Relief otherwise available under this § III is conditioned upon the timely filing and providing of the information required by § IV of this notice.

The relief provided by this section is not available with respect to any failure unless all of the requirements of this section (other than the requirements of § IV of this notice) have been satisfied not later than the end of the second taxable year of the service provider following the taxable year of the service provider in which such failure occurred. In addition, the relief provided in this section is not available if a federal income tax return of the service provider for the taxable year of the service provider in which the failure occurred is under examination with respect to the plan. For this purpose, an individual service provider is treated as under examination with respect to the plan if the individual is under examination with respect to the individual's federal income tax return (for example, Form 1040) for the taxable year.

Relief is not available under this § III with respect to any intentional failure to comply with the terms of a plan or the requirements of § 409A in the operation of a plan. The relief provided in this section also is not available with respect to an operational failure that is egregious, or where the failure is directly or indirectly related to participation in an abusive tax avoidance transaction (meaning for this purpose any listed transaction under § 1.6011–4(b)(2)). The relief provided in this section also is not available with respect to a failure to comply with § 409A resulting from an exercise of a stock right.

B. *Failure to Defer Limited Amount not Corrected in the Same Taxable Year and Certain Erroneous Payments*

This § III.B applies if during a service provider's taxable year beginning before January 1, 2010, an unintentional operational failure occurs that meets the following requirements:

(1) An amount should have been treated as deferred compensation under the terms of the plan and any applicable deferral election, and § 409A and the applicable guidance, but the amount was not credited

to the service provider's account or otherwise treated as deferred compensation during the service provider's taxable year, or did not remain deferred compensation after the end of such year;

(2) Because the amount was not credited to the service provider's account or otherwise treated as deferred compensation under the plan during such year, or did not remain deferred compensation under the plan after the end of such year, the amount was paid or made available to the service provider during the service provider's taxable year;

(3) Section II.B of this notice does not apply because relief is not available under § II.B of this notice with respect to the failure, the failure is not corrected under § II.B of this notice, or otherwise; and

(4) The amount paid or made available to the service provider does not exceed the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for the year of the operational failure.

In such a case, if the plan is otherwise compliant with the requirements of § 409A and the applicable guidance, the amount includible in income under § 409A(a) as a result of such payment is limited to the amount that should have been treated as deferred compensation under the plan (or should have continued to be deferred compensation under the plan) but was instead paid or made available to the service provider, and does not include any other amounts deferred under the plan. In addition, with respect to such amount includible in income under § 409A(a), the service provider is required to pay the additional tax under § 409A(a)(1)(B)(i)(II) (the additional 20% tax), but is not required to pay the additional tax under § 409A(a)(1)(B)(i)(I) (the premium interest tax).

For purposes of this section, a payment of an amount (including a payment of an amount that is one of a series of installment payments or life annuity payments) that under the terms of the plan and § 409A(a)(2)(B)(i) and the applicable guidance is required to be delayed for at least six months following a separation from service, but is paid before the completion of that six months, may be treated as the payment of an amount that should have continued to be deferred compensation. In addition, for purposes of this section, the plan includes any arrangements treated as a single plan under § 1.409A–1(c), so that this section will apply only if any and all erroneous payments under the plan, in the aggregate, of amounts that otherwise should have been treated as deferred compensation with respect to the service provider during the taxable year (or should have continued to be deferred compensation during the taxable year), do not exceed the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for such year. The relief provided in this § III.B is not available if the operational failure occurred during a taxable year of the service provider in which the service recipient experienced a substantial financial downturn or otherwise experienced financial or other issues that indicated a significant risk that the service recipient would not be able to pay the amount deferred when the payment became due.

It is assumed for purposes of the following examples that: Employee is an individual whose taxable year is the calendar year; Employee's tax return is not under examination for any relevant period; during all relevant periods Employer did not experience any financial downturn or financial or other issues indicating a significant risk that Employer would not be able to pay relevant deferred amounts when due; and Employee and Employer each satisfy the other applicable requirements of this § III.

Example 1: Employee makes a timely election to defer 10% of a bonus payable in 2007 pursuant to an account balance plan. The bonus is $10,000. Due to an unintentional operational failure with respect to the plan, Employer defers only 8% of the bonus, or $800, and pays Employee $9,200 (instead of deferring $1,000 and paying Employee $9,000). The amount is not corrected by December 31, 2007, when Employee's account balance is $100,000. As a payment to Employee, Employer must treat the amount as a wage payment for employment tax and reporting purposes, as appropriate, including reporting as income and wages on the 2007 Form W–2. Employer is permitted to report as income under § 409A on the 2007 Form W–2 (or 2007 Form W–2c), Box 12, using Code Z, only $200, and Employee is permitted to include in income under § 409A for 2007 only $200. Furthermore, Employee is permitted to pay the additional 20% tax only with respect to the $200 (or $40 in additional income tax), and is not required to pay the premium interest tax.

Example 2: Employee is a specified employee entitled under a nonqualified deferred compensation plan to a life annuity commencing upon the first day of the seventh month following the specified employee's separation from service. The annuity payments are $2,000 per month. Employee separates from service on April 18, 2007, and is scheduled to receive an initial annuity payment on November 1, 2007. Due to an inadvertent miscalculation of the specified employee's separation from service date, Employee receives a $2,000 payment on October 1, 2007, before the end of the 6-month period following Employee's separation from service. Employer and Employee do not discover the error until 2008, so that the relief provided in § II.C of this notice is not available. As a payment to Employee, Employer must treat the amount as a wage payment for employment tax and reporting purposes, as appropriate, including reporting as income on the 2007 Form W–2. Employer is permitted to report as income under § 409A on the 2007 Form W–2 (or 2007 Form W–2c), Box 12, using Code Z, only $2,000, and Employee is permitted to include in income under § 409A in 2007 only $2,000. Furthermore, Employee is permitted to pay the additional 20% tax only with respect to the $2,000 (or $400 in additional income tax), and is not required to pay the premium interest tax.

C. *Limited Excess Deferred Amount not Corrected in the Same Taxable Year*

This § III.C applies if on or before the last day of a service provider's taxable year beginning before January 1, 2010, the following requirements are met:

(1) Under the terms of the plan and any applicable deferral election, and § 409A and the applicable guidance, an amount of deferred compensation under the plan should have been paid or made available to the service provider during the service provider's taxable year, or an amount is treated as deferred compensation under the plan that should have been paid or made available to the service provider during the service provider's taxable year, but such amount is not paid or made available due to an unintentional operational failure with respect to the plan;

(2) Section II.D of this notice does not apply because relief is not available under § II.D of this notice with respect to the failure, the failure is not corrected under § II.D of this notice, or otherwise;

(3) The amount that should have been paid or made available to the service provider during that service provider's taxable year does not exceed the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for such year;

(4) By the later of the end of the service provider's taxable year in which the failure is discovered or the fifteenth day of the third month following the date upon which the failure is discovered, the service recipient pays the service provider the amount that should have been paid or made available to the service provider, provided that

any earnings allocable to such amounts through the date of the payment are either forfeited or added to the payment to the service provider, and any losses allocable to such amounts through the date of the payment are either permanently disregarded or subtracted from the payment to the service provider, and the service recipient reports such payment on a Form W–2 or Form 1099, as applicable, in accordance with the requirements of this section; and

(5) The service provider includes such amount in income and pays the additional taxes under § 409A(a) as described in this section on a timely filed federal income tax return (including an income tax return filed in accordance with a timely request for extension, but not including an amended income tax return).

In such a case, if the plan otherwise complies with the requirements of § 409A and the applicable guidance, the amount includible in income under § 409A(a) as a result of such failure is limited to the excess amount paid to the service provider, and does not include any other deferred compensation under the plan, and the amount is includible in income only when paid to the service provider in accordance with this section. In addition, with respect to this amount includible in income under § 409A(a), the service provider is required to pay the additional 20% tax, but is not required to pay the premium interest tax. If the service recipient properly reports the payment as includible in income under § 409A on a Form W–2, if applicable, for the year in which the payment was made, including reporting such amount on Form W–2, Box 12 using Code Z, the service recipient will not be subject to penalties or liability for the failure to properly withhold under § 3402.

For purposes of this section, the plan includes any arrangements treated as a single plan under § 1.409A–1(c), so that this section will apply only if any and all erroneous deferrals under the plan, in the aggregate, of amounts that otherwise should have been paid during the service provider's taxable year to the service provider do not exceed the applicable limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B).

Example: Employee, who has a calendar year taxable year, makes a timely election to defer 8% of a bonus payable in 2007 into an account balance plan. The bonus is $10,000. Due to an unintentional operational failure with respect to the plan, Employer defers 10% of the bonus, or $1,000, and pays Employee $9,000 (instead of deferring $800 and paying Employee $9,200). The plan otherwise complies with § 409A and the applicable guidance. Employer discovers the error on February 1, 2008, so that the excess deferred amount of $200 is not corrected by December 31, 2007. On March 1, 2008, at which time Employee's account balance includes $15 in earnings on the excess $200 credited to the account, Employer pays Employee $215. Employer reports the $215 as income under § 409A on the 2008 Form W–2, Box 1 and Box 12, using Code Z and satisfies the other applicable requirements of this § III, including the requirements of § IV of this notice. Provided that Employee reports such income and pays the applicable taxes, including the additional § 409A taxes, on a timely filed 2008 Form 1040 (including a 2008 Form 1040 filed under extension, but not an amended 2008 Form 1040), and satisfies the applicable requirements of § IV of this notice, Employee is not required to include any additional amounts deferred under the plan in income under § 409A(a) or to include any amount in income under § 409A for years before 2008, and with respect to the $215 includible in income under § 409A is required to pay only the additional 20% tax (or $42.50 in additional income tax), and not the premium interest tax. Employer may also have paid Employee only the $200 excess deferred amount if the $15 in earnings on such amount were forfeited.

IV. INFORMATION AND REPORTING REQUIREMENTS

A. *Information Required with Respect to Correction of an Operational Failure in the Same Taxable Year as the Failure Occurs*

A service recipient described in § II of this notice must attach to its timely-filed (including extensions) original federal income tax return for its taxable year in which the failure occurred a statement entitled "§ 409A Relief under § II of Notice 2007–100" setting out the information required by § IV.A.1 of this notice, and must provide to each service provider affected by such failure a statement entitled "§ 409A Relief under § II of Notice 2007–100" setting out the information required by § IV.A.2 of this notice by no later than the date (with extensions) on which it is required to provide an information return (Form W–2 or 1099) to such service provider for the calendar year in which such failure occurred (or if no information return is required for such service provider, not later than the January 31 following the calendar year in which such failure occurred). Notwithstanding the foregoing, to qualify for the relief described in § II.E of this notice (Correction of Exercise Price of Otherwise Excluded Stock Rights), the service recipient is not required to provide a statement to such service provider with respect to such failure. In addition, each taxpayer relying on the relief provided in § II of this notice must provide notice to the examining agent upon the commencement of an examination of such taxpayer's federal tax return that the taxpayer was relying upon the relief provided under this notice for years covered by the examination (except in the case of a service provider for whom a correction has been made under § II.E of this notice).

1. *Attachment to Service Recipient Tax Return for Failures Described in § II*

The service recipient must attach a statement to its federal income tax return stating that it is relying upon § II of this notice with respect to a correction of a failure to comply with § 409A and setting out the following information with respect to each such failure:

a. The name and taxpayer identification number of each service provider affected by the failure and whether such service provider is an insider with respect to the service recipient. Where the same or a substantially similar operational failure has occurred with respect to multiple service providers, the information required in § IV.A.1.b through e of this notice may be supplied only once with respect to such operational failure, provided that the identification of each service provider affected by the operational failure in this § IV.A.1.a references such information and the amount involved in the operational failure with respect to such service provider.

b. Identification of the nonqualified deferred compensation plan with respect to which such failure occurred.

c. A brief description of the failure and the circumstances under which it occurred, including the amount involved and date on which the failure occurred.

d. A brief description of the steps taken to correct the failure and the date on which such correction was completed.

e. A statement that the operational failure is eligible for the correction under the terms of this notice, and that the service recipient has taken all actions required, and otherwise met all requirements, for such correction.

2. *Information to be Provided to Service Provider for Failures Described in § II*

The service recipient must provide the following information to each service provider affected by correction of a failure to comply with § 409A who is entitled to relief under § II of this notice (other than § II.E of this notice (Correction of Exercise Price of Otherwise Excluded Stock Rights)) with respect to such failure:

a. A statement that the service provider is entitled to the relief provided in § II of this notice with respect to a failure to comply with § 409A.

b. The information described in § IV.A.1.b through e of this notice.

B. *Information Required with Respect to Transition Relief for Certain Operational Failures Involving Limited Amounts*

A service recipient described in § III.B or III.C of this notice must attach to its timely-filed (including extensions) original federal income tax return for its taxable year in which it discovers the failure a statement entitled "§ 409A Relief under § III of Notice 2007–100" setting out the information required by § IV.B.1 of this notice and, not later than the date (with extensions) on which it is required to provide an information return (Form W–2 or 1099) for the calendar year in which it discovers such failure to a service provider who is affected by such failure (or if no information return is required for such service provider, not later than the January 31 following the calendar year in which it discovers such failure), must provide to each such service provider a statement entitled "§ 409A Relief under § III of Notice 2007–100" setting out the information required by § IV.B.2 of this notice. A service provider who is relying on the relief provided in § III.B or III.C of this notice with respect to a failure to comply with § 409A must attach to the service provider's timely-filed (including extensions) original federal income tax return for the year in which such failure was discovered the information required by § IV.B.3 of this notice. In addition, each taxpayer relying on the relief provided in § III of this notice must provide notice to the examining agent upon the commencement of an examination of such taxpayer's federal tax return that the taxpayer was relying upon the relief provided under this notice for years covered by the examination.

1. *Attachment to Service Recipient Tax Return for Failures Described in § III.B or III.C.*

The service recipient must attach a statement to its return setting out the following information with respect to each failure described in § III.B. or III.C of this notice:

a. The name and taxpayer identification number of each service provider affected by the failure. Where the same or a substantially similar operational failure has occurred with respect to multiple service providers, the information required in § IV.B.1.b through e of this notice may be supplied only once with respect to such operational failure, provided that the identification of each service provider affected by the operational failure in this § IV.B.1.a references such information and the amount involved in the operational failure with respect to such service provider.

b. Identification of the nonqualified deferred compensation plan with respect to which such failure occurred.

c. A brief description of the failure and the circumstances under which it occurred, including the amount involved and date on which the failure occurred.

d. A brief description of the steps taken by the service recipient to avoid a recurrence of the failure, including the date on which such steps were implemented.

e. A statement that the operational failure is eligible for the correction under the terms of this notice, and that the service recipient has taken all actions required, and otherwise met all requirements, for such correction.

2. *Information to be Provided to Service Provider for Failures Described in § III.B or III.C.*

The service recipient must provide the following information to each service provider affected by a failure to comply with § 409A who is entitled to relief under § III.B or III.C of this notice with respect to such failure:

a. A statement that the service provider is entitled to the relief provided in § III.B or III.C of this notice (as applicable) with respect to a failure to comply with § 409A and that the service provider must attach a copy of the statement to the service provider's income tax return for the taxable year in which the failure was discovered.

b. The information described in § IV.B.1.b through e of this notice.

3. *Attachment to Service Provider Tax Return for Failures Described in § III.B or III.C.*

The service provider must attach to the service provider's income tax return a copy of the statement the service provider received from the service recipient with respect to each such failure.

V. POTENTIAL PROGRAM TO CORRECT CERTAIN FAILURES TO COMPLY WITH § 409A(a) IN OPERATION

The Treasury Department and the IRS are considering establishing a corrections program under which taxpayers could correct certain failures to comply with § 409A(a) in the operation of a nonqualified deferred compensation plan (operational failures), including correction after the end of the service provider's taxable year in which an operational failure occurs. The Treasury Department and the IRS request comments on all aspects of this potential program. For information regarding the submission of comments, see § VI of this notice.

The program under consideration would cover failures that are not eligible for the transition relief provided in § III of this notice because the amount involved is too large. The program may also provide that the relief in § III for failures involving small amounts would be available permanently. In addition, it is expected that the program under consideration would, in general, permit a service provider with respect to whom an operational failure occurred that is addressed by the program but not eligible for the relief provided in § III of this notice, to include an amount in income, and pay the additional taxes under § 409A with respect to, only the amount involved in the operational failure, and not other amounts deferred under the plan. For example, if a service provider erroneously

deferred an additional $50,000 to a plan under which the service provider had previously deferred $1,000,000 (for a total of $1,050,000), and the $50,000 deferral and the error were corrected pursuant to the program, the service provider would not be required to include in income under § 409A, and pay the additional § 409A taxes with respect to, the $1,000,000 deferred under the plan that was not involved in the operational failure.

The Treasury Department and the IRS anticipate that the IRS would not issue a ruling, enter into a closing agreement or otherwise issue any formal approval evidencing that participating taxpayers had met the requirements of, and qualified for the relief available under, the program. Rather, if the IRS examined the relevant tax returns, the service recipient and service provider would have the burden of demonstrating that the applicable requirements had been met. The corrections program would be restricted to service providers that at the time of the correction are not under examination for the year or years in which the operational failure occurred, and would be limited to operational failures that are corrected promptly after discovery and in any case within two years after the occurrence. As part of the corrections program, the service recipient and the service provider would be required to satisfy information and reporting requirements substantially similar to those set forth in § IV.B of this notice and the service recipient and service provider would also be required to provide notice to the examining agent upon the commencement of an examination that the taxpayer was relying upon the relief provided under the program for years covered by the examination.

The Treasury Department and the IRS anticipate that the program would include the following limitations and requirements:

- Relief would only be available with respect to an operational failure that has occurred notwithstanding the service recipient's reasonable efforts to comply with the terms of the plan. Thus relief would only be available if the service recipient had established practices and procedures reasonably designed to ensure compliance with § 409A.

- Relief would only be available with respect to an operational failure if the service recipient also took commercially reasonable steps to avoid a recurrence of the same type of operational failure.

- Relief would also not be available to correct an operational failure that is egregious, intentional, or where the failure is directly or indirectly related to participation in an abusive tax avoidance transaction (meaning for this purpose any listed transaction under §1.6011–4(b)(2)).

- If the operational failure involved an accelerated payment that did not otherwise satisfy the plan's terms and the requirements of § 409A(a), the correction of the failure would require that the service provider return to the service recipient the amount improperly paid by the service provider to the service recipient. The service provider would not be entitled to any loss or deduction for either the year of the repayment or the year to which the correction applied. However, if the plan does not otherwise violate the provisions of § 409A and the applicable guidance, the service provider would be required thereafter to include in gross income only additional amounts subsequently paid from such plan (as if the amount taken into gross income in the year of the failure resulted in investment in the contract with respect to the amount that was actually included in gross income for the year of the erroneous payment).

- Relief would not be available for an accelerated payment that did not otherwise satisfy the terms of the plan and the requirements of § 409A(a) if the service recipient made the payment proximate to a financial downturn of the service recipient or the service recipient experiencing any financial or other issue that indicated a significant risk that the service recipient would not be able to pay the amount deferred when the payment became due under the plan.

- If the operational failure involved an amount that was improperly deferred (for example, the deferral of salary in excess of the applicable deferral election under the terms of the plan), or an amount of deferred compensation that was not paid to the service provider on the date applicable under the terms of the plan, the correction of the operational failure would require that the service recipient pay the amount to the service provider. The service provider would be required to include the amount in gross income in the service provider's taxable year in which the failure occurred and not at the time the service recipient made the corrective payment, with the service provider being required to report the amount on an original or amended return for such year and pay the appropriate tax thereon.

- Investment earnings (potentially including losses) in accordance with the terms of the plan for the period of time after the operational failure through the date of correction would be required to be taken into account.

- In addition to the requirement of income inclusion described above, the service provider would be required to pay income taxes, including the additional § 409A taxes (and any applicable interest on the underpayment of such § 409A taxes), as applicable. The service recipient would be required to file with the IRS and provide to the service provider a Form W–2c or corrected Form 1099, as applicable. If the service recipient and service provider met the requirements for the correction program, the service recipient would not be liable for any failure to withhold income taxes on the amount required to be included in income under § 409A as a result of the operational failure, to the extent the amounts required to be included in income had not been paid or made available to the service provider.

- Some or all of the relief may be available only to service providers that are not insiders with respect to the service recipient.

VI. SUBMISSION OF COMMENTS

The Treasury Department and the IRS are currently considering formulating general guidance on the correction of operational failures under a nonqualified deferred compensation plan resulting in a

failure to meet the requirements of § 409A. Some of the guidance being considered has been set forth in this notice. The Treasury Department and the IRS request comments on all aspects of a potential corrections program, including but not limited to the topics addressed in this notice and specifically request comments on the following:

- With respect to the program under consideration described in § V of this notice, potential methods of tracking the "investment in the contract" created when an amount is included in income under § 409A but not yet paid to the service provider.
- With respect to the program under consideration described in § V of this notice, potential methods of addressing the service recipient's deduction for payments made, and the affect of repayments by the service provider to the service recipient on such deductions.

Comments must be submitted by March 3, 2008. All materials submitted will be available for public inspection and copying. Comments may be submitted to Internal Revenue Service, CC:PA:LPD:RU (Notice 2007–100), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may also be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier's Desk at 1111 Constitution Avenue, NW, Washington, DC 20224, Attn: CC:PA:LPD:RU (Notice 2007–100), Room 5203. Submissions may also be sent electronically via the internet to the following email address: *Notice.comments@irscounsel.treas.gov*. Include the notice number (Notice 2007–100) in the subject line.

VII. EFFECT ON OTHER DOCUMENTS

For service recipients and service providers who are entitled to relief under this notice, Notice 2006–100, 2006–51 I.R.B. 1109 (relating to reporting and wage withholding for 2006) and Notice 2007–89, 2007–46 I.R.B. 998 (relating to reporting and wage withholding for 2007) are modified to conform to the provisions of this notice with respect to (i) the amount that is required to be included in income by a service provider under section 409A(a), and (ii) the amount that is required to be reported by the service recipient as an amount includible in income under section 409A(a) on Form W–2, Box 1 and Box 12, using Code V, or Form 1099–MISC, Box 7 and Box 15b, as applicable.

VIII. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 USC. 3507) under control number 1545–2086.

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

The collection of information in this notice is in section IV. This information is required to determine whether the taxpayers claiming the relief are eligible for the relief and that the applicable requirements for relief are met. The likely respondents are corporations and individuals.

The estimated annual reporting and/or recordkeeping burden is 5,000 hours.

The estimated annual burden per respondent/recordkeeper is .5 hours.

The estimated number of respondents is 10,000.

The estimated annual frequency of response is on occasion.

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

IX. DRAFTING INFORMATION

The principal authors of this notice are Stephen Tackney and Bill Schmidt of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), although other Treasury and IRS officials participated in its development. For further information on the provisions of this notice, contact Stephen Tackney or Bill Schmidt at (202) 927–9639 (not a toll-free number).

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

Notice 2007–101

This notice provides guidance as to the corporate bond weighted average interest rate and the permissible range of interest rates specified under § 412(b)(5)(B)(ii)(II) of the Internal Revenue Code. It also provides guidance on the corporate bond monthly yield curve (and the corresponding spot segment rates), the 24-month average segment rates, and the funding transitional segment rates under § 430(h)(2). In addition, this notice provides guidance as to the interest rate on 30-year Treasury securities under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning before 2008, and the minimum present value segment rates under § 417(e)(3)(D) as in effect for plan years beginning after 2007.

CORPORATE BOND WEIGHTED AVERAGE INTEREST RATE

Sections 412(b)(5)(B)(ii) and 412(l)(7)(C)(i), as amended by the Pension Funding Equity Act of 2004 and by the Pension Protection Act of 2006 (PPA), provide that the interest rates used to calculate current liability and to determine the required contribution under § 412(l) for plan years beginning in 2004 through 2007 must be within a permissible range based on the weighted average of the rates of interest on amounts invested conservatively in long term investment grade corporate bonds during the 4-year period ending on the last day before the beginning of the plan year.

Notice 2004–34, 2004–1 C.B. 848, provides guidelines for determining the corporate bond weighted average interest rate and the resulting permissible range of interest rates used to calculate current liability. That notice establishes that the corporate bond weighted average is based on the monthly composite corporate bond rate derived from designated corporate bond indices. The methodology for determining the monthly composite corporate bond rate as set forth in Notice 2004–34 continues to apply in determining that rate. See Notice 2006–75, 2006–36 I.R.B. 366.

The composite corporate bond rate for November 2007 is 6.14 percent. Pursuant

to Notice 2004–34, the Service has determined this rate as the average of the monthly yields for the included corporate bond indices for that month.

The following corporate bond weighted average interest rate was determined for plan years beginning in the month shown below.

For Plan Years Beginning in		Corporate Bond Weighted Average	Permissible Range		
Month	*Year*		90%	to	100%
December	2007	5.90	5.31		5.90

YIELD CURVE AND SEGMENT RATES

Generally for plan years beginning after 2007 (except for delayed effective dates for certain plans under sections 104, 105, and 106 of PPA), § 430 of the Code specifies the minimum funding requirements that apply to single employer plans pursuant to § 412. Section 430(h)(2) specifies the interest rates that must be used to determine a plan's target normal cost and funding target. Under this provision, present value is generally determined using three 24-month average interest rates ("segment rates"), each of which applies to cash flows during specified periods. However, an election may be made under § 430(h)(2)(D)(ii) to use the monthly yield curve in place of the segment rates. For plan years beginning in 2008 and 2009, a transitional rule under § 430(h)(2)(G) provides that the segment rates are blended with the corporate bond weighted average as specified above. An election may be made under § 430(h)(2)(G)(iv) to use the segment rates without applying the transitional rule.

Notice 2007–81, 2007–44 I.R.B. 899, provides guidelines for determining the monthly corporate bond yield curve, the 24-month average corporate bond segment rates, and the funding transitional segment rates used to compute the target normal cost and the funding target. Pursuant to Notice 2007–81, the monthly corporate bond yield curve derived from November 2007 data is in Table I at the end of this notice. The spot first, second, and third segment rates for the month of November 2007 are, respectively, 4.92, 6.02 and 6.47. The three 24-month average corporate bond segment rates applicable for December 2007 under the election of § 430(h)(2)(G)(iv) are as follows:

First Segment	Second Segment	Third Segment
5.31	5.90	6.41

The transitional segment rates under § 430(h)(2)(G) applicable for December 2007, taking into account the corporate bond weighted average of 5.90 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2008	5.70	5.90	6.07

30-YEAR TREASURY SECURITIES INTEREST RATE

Section 417(e)(3)(A)(ii)(II) (prior to amendment by PPA) 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 rate of interest 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 November 2007 is 4.52 percent. The Service has determined this rate as the monthly average of the daily determination of yield on the 30-year Treasury bond maturing in May 2037.

MINIMUM PRESENT VALUE SEGMENT RATES

Generally for plan years beginning after December 31, 2007, the applicable interest rates under § 417(e)(3)(D) of the Code are segment rates computed without regard to a 24-month average. For plan years beginning in 2008 through 2011, the applicable interest rate is the monthly spot segment rate blended with the applicable rate under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning in 2007. Notice 2007–81 provides guidelines for determining the minimum present value segment rates. Pursuant to that notice, the

minimum present value transitional segment rates determined for November 2007, taking into account the November 2007 30-year Treasury rate of 4.52 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2008	4.60	4.82	4.91

DRAFTING INFORMATION

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

Table I

Monthly Yield Curve for October 2007

Maturity	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*
0.5	5.04	20.5	6.32	40.5	6.49	60.5	6.55	80.5	6.58
1.0	4.86	21.0	6.33	41.0	6.49	61.0	6.55	81.0	6.58
1.5	4.73	21.5	6.33	41.5	6.50	61.5	6.55	81.5	6.58
2.0	4.68	22.0	6.34	42.0	6.50	62.0	6.55	82.0	6.58
2.5	4.70	22.5	6.35	42.5	6.50	62.5	6.55	82.5	6.58
3.0	4.79	23.0	6.36	43.0	6.50	63.0	6.55	83.0	6.58
3.5	4.90	23.5	6.36	43.5	6.50	63.5	6.56	83.5	6.58
4.0	5.03	24.0	6.37	44.0	6.51	64.0	6.56	84.0	6.58
4.5	5.15	24.5	6.38	44.5	6.51	64.5	6.56	84.5	6.58
5.0	5.27	25.0	6.38	45.0	6.51	65.0	6.56	85.0	6.58
5.5	5.38	25.5	6.39	45.5	6.51	65.5	6.56	85.5	6.58
6.0	5.47	26.0	6.39	46.0	6.51	66.0	6.56	86.0	6.59
6.5	5.56	26.5	6.40	46.5	6.51	66.5	6.56	86.5	6.59
7.0	5.63	27.0	6.40	47.0	6.52	67.0	6.56	87.0	6.59
7.5	5.70	27.5	6.41	47.5	6.52	67.5	6.56	87.5	6.59
8.0	5.76	28.0	6.41	48.0	6.52	68.0	6.56	88.0	6.59
8.5	5.81	28.5	6.42	48.5	6.52	68.5	6.56	88.5	6.59
9.0	5.86	29.0	6.42	49.0	6.52	69.0	6.56	89.0	6.59
9.5	5.90	29.5	6.42	49.5	6.52	69.5	6.57	89.5	6.59
10.0	5.94	30.0	6.43	50.0	6.52	70.0	6.57	90.0	6.59
10.5	5.97	30.5	6.43	50.5	6.53	70.5	6.57	90.5	6.59
11.0	6.01	31.0	6.44	51.0	6.53	71.0	6.57	91.0	6.59
11.5	6.04	31.5	6.44	51.5	6.53	71.5	6.57	91.5	6.59
12.0	6.06	32.0	6.44	52.0	6.53	72.0	6.57	92.0	6.59
12.5	6.09	32.5	6.45	52.5	6.53	72.5	6.57	92.5	6.59
13.0	6.11	33.0	6.45	53.0	6.53	73.0	6.57	93.0	6.59
13.5	6.13	33.5	6.45	53.5	6.53	73.5	6.57	93.5	6.59
14.0	6.15	34.0	6.46	54.0	6.54	74.0	6.57	94.0	6.59
14.5	6.17	34.5	6.46	54.5	6.54	74.5	6.57	94.5	6.59
15.0	6.19	35.0	6.46	55.0	6.54	75.0	6.57	95.0	6.59
15.5	6.20	35.5	6.47	55.5	6.54	75.5	6.57	95.5	6.59
16.0	6.22	36.0	6.47	56.0	6.54	76.0	6.57	96.0	6.59
16.5	6.23	36.5	6.47	56.5	6.54	76.5	6.57	96.5	6.59
17.0	6.25	37.0	6.47	57.0	6.54	77.0	6.58	97.0	6.59
17.5	6.26	37.5	6.48	57.5	6.54	77.5	6.58	97.5	6.59
18.0	6.27	38.0	6.48	58.0	6.54	78.0	6.58	98.0	6.60
18.5	6.28	38.5	6.48	58.5	6.55	78.5	6.58	98.5	6.60
19.0	6.29	39.0	6.48	59.0	6.55	79.0	6.58	99.0	6.60
19.5	6.30	39.5	6.49	59.5	6.55	79.5	6.58	99.5	6.60
20.0	6.31	40.0	6.49	60.0	6.55	80.0	6.58	100.0	6.60

26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.
(Also Part I, §§ 860D, 860G, 1001; 1.860G–2, 1.1001–3, 301.7701–2, 301.7701–3, 301.7701–4.)

Rev. Proc. 2007–72

SECTION 1. PURPOSE

This revenue procedure describes the conditions under which changes to certain subprime mortgage loans will not cause the Internal Revenue Service to challenge the tax status of certain securitization vehicles holding the loans.

The purpose of this revenue procedure is to provide certainty in the current economic environment with respect to certain potential tax issues that may be implicated by fast track loan modifications, as described below. No inference should be drawn about whether similar consequences would obtain if a transaction falls outside the limited scope of this revenue procedure. Furthermore, there should be no inference that this revenue procedure is necessary to prevent transactions within its scope from impacting the tax status of securitization vehicles.

SECTION 2. BACKGROUND-THE ASF "FRAMEWORK"

.01 On December 6, 2007, the American Securitization Forum ("ASF") released a document entitled, "Statement of Principles, Recommendations and Guidelines for a Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans" (the "Framework"). An Executive Summary of the Framework (entitled "Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans") was released simultaneously and is attached as an Appendix to this revenue procedure.

.02 The Framework has been broadly supported as an appropriate step in addressing certain risks in the current economic environment.

.03 The Framework applies to first-lien subprime residential adjustable rate mortgage (ARM) loans that—

(1) Have an initial fixed rate period of 36 months or less (including "2/28s" and "3/27s");

(2) Were originated between January 1, 2005, and July 31, 2007;

(3) Are included in securitized pools; and

(4) Have an initial interest rate reset between January 1, 2008, and July 31, 2010.

This revenue procedure refers to these instruments as "Loans."

.04 The Framework provides a "fast track" procedure for modifying Loans and details the criteria for determining which Loans are eligible for the procedure. Modifications pursuant to the procedure are referred to as "fast track modifications."

.05 In a fast track modification, a borrower is offered a Loan modification under which the interest rate on the affected Loan will be kept at the existing rate, generally for five years following the date on which the rate would have reset in the absence of the modification.

SECTION 3. BACKGROUND—REMICS

.01 Real Estate Mortgage Investment Conduits (REMICs) are widely used securitization vehicles for mortgages. REMICs are governed by sections 860A through 860G of the Internal Revenue Code.

.02 For an organization to qualify as a REMIC, all of the interests in the organization must consist of one or more classes of regular interests and a single class of residual interests, *see* section 860D(a), and those interests must be issued on the startup day, within the meaning of § 1.860G–2(k) of the Income Tax Regulations.

.03 A regular interest is one that is designated as a regular interest and whose terms are fixed on the startup day. Section 860G(a)(1). In addition, a regular interest must (1) unconditionally entitle the holder to receive a specified principal amount (or other similar amount), and (2) provide that interest payments, if any, at or before maturity are based on a fixed rate (or to the extent provided in regulations, at a variable rate).

.04 An interest issued after the startup day does not qualify as a REMIC regular interest.

.05 An entity qualifies as a REMIC only if, among other things, as of the close of the third month beginning after the startup day and at all times thereafter, substantially all of its assets constitute qualified mortgages and permitted investments. *See* section 860D(a)(4). An entity that initially qualifies as a REMIC may cease to qualify, if a sufficiently large portion of its qualified mortgages are significantly modified and the modified obligations are not qualified mortgages. *See* § 1.860G–2(b)(1). For this purpose, a qualified mortgage is generally treated as having been significantly modified if the change in terms would be treated as an exchange of obligations under section 1001 and the regulations thereunder. *See* § 1.860G–2(b)(2).

.06 Certain changes in the terms of an obligation, however, are not significant modifications for this purpose, regardless of whether they are significant modifications under section 1001 and § 1.1001–3. *See* § 1.860G–2(b)(3). In particular, changes in the terms of an obligation "occasioned by default or a reasonably foreseeable default" are not significant modifications for this purpose. *See* § 1.860G–2(b)(3)(i).

.07 Section 860F(a)(1) imposes a tax on REMICs equal to 100 percent of the net income derived from "prohibited transactions." The disposition of a qualified mortgage is a prohibited transaction unless the disposition is pursuant to (i) the substitution of a qualified replacement mortgage for a qualified mortgage; (ii) a disposition incident to the foreclosure, default, or imminent default of the mortgage; (iii) the bankruptcy or insolvency of the REMIC; or (iv) a qualified liquidation. Section 860F(a)(2)(A).

SECTION 4. BACKGROUND—TRUSTS

.01 Section 301.7701–2(a) of the Procedure and Administration Regulations defines a "business entity" as any entity recognized for federal tax purposes (including an entity with a single owner that may be disregarded as an entity separate from its owner under § 301.7701–3) that is not properly classified as a trust under § 301.7701–4 or otherwise subject to special treatment under the Code.

.02 Section 301.7701–4(a) provides that an arrangement is treated as a trust if the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are

not associates in a joint enterprise for the conduct of business for profit.

.03 Section 301.7701–4(c) provides that an "investment" trust is not classified as a trust if there is a power under the trust agreement to vary the investment of the certificate holders.

SECTION 5. SCOPE

.01 This revenue procedure applies to the following transactions occurring on or before July 31, 2010—

(1) A fast track modification of a Loan pursuant to the Framework; and

(2) A second-lien holder's action of subordinating its lien to any new lien that may arise under a Loan as the result of a fast track modification.

.02 If the Framework is materially modified after December 6, 2007, this revenue procedure does not necessarily apply to fast track modifications under the revised Framework or to second-lien subordinations to accommodate those modifications.

SECTION 6. APPLICATION

In the case of one or more transactions to which this revenue procedure applies—

.01 The Internal Revenue Service will not challenge a securitization vehicle's qualification as a REMIC on the grounds that the transactions are not among the exceptions listed in § 1.860G–2(b)(3);

.02 The Internal Revenue Service will not contend that the transactions are prohibited transactions under section 860F(a)(2) on the grounds that the transactions are not among the exceptions listed in section 860F(a)(2)(A)(i)–(iv);

.03 The Internal Revenue Service will not challenge a securitization vehicle's classification as a trust on the grounds that the transactions manifest a power to vary the investment of the certificate holders; and

.04 The Internal Revenue Service will not challenge a securitization vehicle's qualification as a REMIC on the grounds that the transactions resulted in a deemed reissuance of the REMIC regular interests.

SECTION 7. EFFECTIVE DATE

This revenue procedure is effective beginning December 6, 2007.

SECTION 8. DRAFTING INFORMATION

The principal author of this revenue procedure is Diana Imholtz of the Office of Associate Chief Counsel (Financial Institutions and Products). For further information, contact Ms. Imholtz at (202) 622–3930 (not a toll-free call).

Appendix to Revenue Procedure 2007–72

American Securitization Forum

Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans

Executive Summary

December 6, 2007

***Scope*:**

This streamlined framework applies to all first lien subprime residential adjustable rate mortgage (ARM) loans that have an initial fixed rate period of 36 months or less (including "2/28s" and "3/27s"), referred to below as "subprime ARM loans" that:

- were originated between January 1, 2005 and July 31, 2007;
- are included in securitized pools; and
- have an initial interest rate reset between January 1, 2008 and July 31, 2010.

This streamlined framework would be applied to subprime ARM loans in advance of an initial reset date. Typically, servicer/borrower communication should begin 120 days prior to the initial reset date.

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Overarching Principles:

- The servicer will not take any action that is prohibited by the pooling and servicing agreement ("PSA") or other applicable securitization governing document, or that would violate applicable laws, regulations, or accounting standards. ASF's Statement of Principles, Recommendations and Guidelines for a Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans, published concurrently with this document, analyzes how the framework described in the Executive Summary is consistent with typical PSA provisions. The ASF urges readers of this Executive Summary to review the full Statement.

- The ASF believes that this framework is consistent with the authority granted to a servicer to modify subprime mortgage loans in typical PSAs. The ASF expects that the procedures in this framework will constitute standard and customary servicing procedures for subprime loans.

- The servicer will expeditiously implement the ASF Investor Reporting Guidelines for the Modification of Subprime ARM Loans recommended by the ASF, which is simultaneously released with this framework.

- LTV and CLTV will be determined based on information at origination. If an origination LTV is below 97%, a servicer may obtain an updated home value by obtaining an AVM, BPO or other means.

- All servicers of second liens to subprime borrowers should cooperate fully with this framework by providing information needed by first lien servicers and by agreeing to subordinate the second lien to any new first lien resulting from a refinance (with no cash out) under this framework.

- All existing contractual obligations and remedies related to fraudulent mortgage origination activity should be strictly enforced.

- The streamlined framework outlined in this framework represents the consensus view of the membership of the ASF, acting through its Board of Directors, as to the parameters used to determine the segmentation of subprime ARM loans, including the numeric values included in those parameters. It is understood by the ASF's members that the numeric values included in the parameters are not based on historic data, but rather simply represent a consensus view as to appropriate numeric values for use within this framework for the purpose of supporting a streamlined approach to loan modifications that complies with typical securitization governing documents. The ASF, acting through its Board of Directors, may in the future change these numeric values or further refine these parameters as experience is gained and market conditions evolve.

***Borrower Segmentation*:**

Under this framework, subprime ARM loans are divided into 3 segments.

Segment 1 includes current (as defined below) loans where the borrower is likely to be able to refinance into any available mortgage product, including FHA, FHA Secure or readily available mortgage industry products.

- Generally, the servicer will determine whether loans may be eligible for refinancing into readily available mortgage industry products based on ascertainable data not requiring direct communication with the borrower, such as LTV, loan amount, FICO and payment history. Servicers will generally not determine current income or DTI to determine initial eligibility for refinancing.

- If the borrower also has a second lien on the property, this framework contemplates that the borrower is able to refinance the first lien only, on a no cash out basis. In order for the loan to fall into this segment, the second lien does not have to be refinanced; however, any second lien holder will need to agree to subordinate their interest to the refinanced first lien.

Segment 2 includes current loans where the borrower is unlikely to be able to refinance into any readily available mortgage industry product.

- *Current*: For purposes of this framework "current" means the loan must be not more than 30 days delinquent, and must not have been more than 1 x 60 days delinquent in the last 12 months, both under the OTS method. Corresponding tests would apply under the MBA method if the servicer uses that standard.

- *LTV test*: All current loans with an LTV (based on the first lien only) greater than 97% are deemed not to be eligible for refinance into any available product, and thus are within Segment 2. (97% is the maximum LTV allowed under FHA Secure.)

- *Not FHA Secure eligible*: All current loans that otherwise do not satisfy FHA Secure requirements, including delinquency history, DTI at origination and loan amount standards for this program, are within Segment 2 unless the servicer can determine whether they may meet eligibility criteria for another product, by reviewing eligibility criteria without performing an underwriting analysis.

Segment 3 includes loans where the borrower is not current as defined above, demonstrating difficulty meeting the introductory rate.

Segment 1 — Refinance:

- It is expected that borrowers in this category should refinance their loans, if they are unable or unwilling to meet their reset payment. However, a servicer may evaluate each borrower in this category on a case by case basis or apply any framework consistent with the applicable servicing standard in the transaction documents for a loan modification or other loss mitigation outcome.

- The servicer will facilitate a refinance in a manner that avoids the imposition of prepayment penalties wherever feasible. This may be accomplished by timing the refinance to occur after the upcoming reset date.

- Servicers should take all reasonable steps permitted under the PSA and other governing documents to encourage or facilitate refinancing for borrowers in Segment 1, or to borrowers in Segment 2 who become eligible for a refinance, including, where permitted, providing borrowers with information about FHA, FHA Secure and other readily available mortgage industry products, even if that servicer is not able to provide those products through any affiliated originator.

Segment 2 — Loan Modification:

- The servicer will determine the following for each Segment 2 borrower: current owner occupancy status (based on information known to the servicer, including billing and property address), current FICO score and the FICO score at origination of the loan.

- FICO test:

  - If the current FICO score is less than 660 and is less than a score 10% higher than the FICO score at origination, the borrower is considered to have met the "FICO test." If the borrower meets the FICO test, the servicer will generally not determine the borrower's current income.

  - If either a) the current FICO score is 660 or higher, or b) the current FICO is at least 10% higher than the FICO score at origination, the borrower is considered to not meet the "FICO test." If the borrower does not meet the FICO test, the servicer will use an alternate analysis to determine if the borrower is eligible for a loan modification.

- Segment 2 loans will only be eligible for a fast track loan modification if:

  - The borrower currently occupies the property as his or her primary residence;

  - The borrower meets the FICO test; and

  - The servicer determines that, at the upcoming reset, the payment amount would go up by more than 10%.

- Borrowers in this segment and eligible for a fast track loan modification as described above may be offered a loan modification under which the interest rate will be kept at the existing rate, generally for 5 years following the upcoming reset.

- As to Segment 2 loans eligible for a fast track loan modification, the servicer may make the following presumptions:
  - The borrower is able to pay under the loan modification based on his or her current payment history prior to the reset date.
  - The borrower is willing to pay under the loan modification, as evidenced by a) an agreement to the modification after being contacted or b) in the event that the affirmative agreement of the borrower cannot be obtained, the borrower's payment of two payments under the loan as modified after receiving notice of the modified terms.
  - The borrower is unable to pay (and default is reasonably foreseeable) after the upcoming reset under the original loan terms, based on the size of the payment increase that would otherwise apply.
  - The modification maximizes the net present value of recoveries to the securitization trust and is in the best interests of investors in the aggregate, because refinancing opportunities are likely not available and the borrower is able and willing to pay under the modified terms.
- For borrowers that do not meet the FICO test, the servicer will use an alternate analysis to determine if the borrower is eligible for a loan modification, as well as the terms of the modification (which may vary). This may include a) conducting an individual review of current income and debt obligations, debt-to-income analysis, and considering a tailored modification for a borrower, or b) applying any other framework consistent with the applicable servicing standard in the transaction documents to determine if a borrower is eligible for a loan modification.
- For borrowers that are eligible for a fast track modification, the fast track option is non-exclusive and does not preclude a servicer from using an alternate analysis to determine if a borrower is eligible for a loan modification, as well as the terms of the modification.

Segment 3 — Loss Mitigation:

- For loans in this category, the servicer will determine the appropriate loss mitigation approach in a manner consistent with the applicable servicing standard in the transaction documents, but without employing the fast tracking procedures described under Segment 2. The approach chosen should maximize the net present value of the recoveries to the securitization trust. The available approaches may include loan modification (including rate reduction and/or principal forgiveness), forbearance, short sale, short payoff, or foreclosure.
- These borrowers will require a more intensive analysis, including where appropriate current debt and income analysis, to determine the appropriate loss mitigation approach.

Part IV. Items of General Interest

Notice of Proposed Rulemaking

Information Reporting for Lump-Sum Timber Sales

REG–155669–04

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance regarding the information reporting requirements contained in section 6045(e) of the Internal Revenue Code (Code) on sales or exchanges of standing timber for lump-sum (outright) payments. The proposed regulations amend §1.6045–4 of the Income Tax Regulations to require real estate reporting persons, as defined in section 6045(e)(2) of the Code, to report lump-sum payments received by sellers (landowners) for sales or exchanges of standing timber. This action is being taken to make the reporting requirements for lump-sum sales of standing timber consistent with the reporting requirements applicable to pay-as-cut timber sales. The proposed regulations do not change the information reporting requirements that currently apply to sales or exchanges of standing timber for pay-as-cut (contingent) payments under section 6050N of the Code.

DATES: Written or electronic comments and requests for a public hearing must be received by February 27, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–155669–04), room 5203, Internal Revenue Service, PO Box 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:LPD:PR (REG–155669–04), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–155669–04).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulation, Julie Hanlon-Bolton of the Office of Chief Counsel (Procedure and Administration), at (202) 622–7028; for questions concerning submissions of comments, contact Kelly Banks at (202) 622–7180.

SUPPLEMENTARY INFORMATION:

Background

This document contains a proposed amendment to the Income Tax Regulations under section 6045(e). The amendment imposes information reporting requirements on sales or exchanges of standing timber for lump-sum payments, commonly referred to as lump-sum or outright timber sales. A lump-sum contract provides for a pre-set, fixed, and non-contingent payment in exchange for the right to cut and remove designated trees. In these transactions, sellers of standing timber receive fixed payments that are not based on the amount of the timber actually cut. The sellers do not retain any economic interest in the timber and bear no risk of loss upon execution of the sales contract.

Sales or exchanges of standing timber for contingent payments, commonly referred to as pay-as-cut timber sales, allow purchasers to cut designated trees in exchange for a payment that is based on a specified rate for each unit of timber actually cut and measured. In these transactions, sellers of standing timber receive payments that are contingent on the amount of timber actually cut. The sellers retain an economic interest in the timber and continue to bear economic risk associated with the sales contract until the timber is actually cut and removed.

Because the sellers of standing timber who enter into pay-as-cut transactions retain an economic interest until the timber is actually cut and removed, the payments are characterized as timber royalties reportable under section 6050N on Form 1099–S, *"Proceeds From Real Estate Transactions."* See Announcement 90–129, 1990–48 I.R.B. 10.

However, currently, no information reporting obligation applies to a sale or exchange of standing timber for a lump-sum payment. The information reporting requirements of section 6050N do not apply to a sale or exchange of timber for a lump-sum payment because the seller retains no economic interest and bears no economic risk of loss in the timber upon execution of the sales contract.

Recognizing the disparate treatment in the reporting of timber sale and exchange transactions, the Treasury Department has reconsidered the information reporting requirements under section 6045(e) as they apply to lump-sum sales or exchanges of standing timber and has decided to amend the regulations to require information reporting for these transactions.

Currently, section 6045(e) requires a "real estate reporting person," as defined in section 6045(e)(2), to make an information return and furnish a statement to the transferor with respect to a real estate transaction that consists in whole or in part of the sale or exchange of "reportable real estate." Section 1.6045–4(b)(2) defines "reportable real estate" as, among other things, any present or future ownership interest in land. Section 1.6045–4(c)(2)(i) provides that no return of information is required with respect to a sale or exchange of an interest in timber, provided that the sale or exchange of such property is not related to the sale or exchange of reportable real estate.

The preamble to §1.6045–4 provides background information concerning the exception for timber sales in §1.6045–4(c)(2)(i), stating in pertinent part as follows:

> The proposed regulations provided an exception from the reporting requirements for transactions involving natural resources, including standing timber. Section 6050N of the Code requires reporting for certain royalty payments, including timber royalties, but not for other transactions involving timber. The IRS believes that the disparity in the reporting requirements for different forms of timber transactions may be inappropriate. However, this issue was not addressed in the public comments and was not considered at the public hearing. Accordingly, the final regulations contain the exception for natural resource transactions, including standing timber. The IRS will open a new

regulations project to consider the expansion of the reporting requirements to include sales and exchanges of standing timber. Any requirements for the reporting of standing timber will apply only to transactions occurring after the issuance of such requirements. See 55 FR 51282, T.D. 8323.

The IRS has found that some taxpayers are underreporting income from lump-sum or outright sales of timber, resulting in a loss of tax revenue. Additionally, the Treasury Department and the IRS do not think that the disparate treatment of lump-sum and pay-as-cut timber transactions for information reporting purposes is in the interests of sound tax administration. Based on considerations of tax policy and sound tax administration, the Treasury Department has decided to amend the regulations under section 6045(e) to require information reporting for sales or exchanges of standing timber for lump-sum payments.

This amendment provides that sales or exchanges of standing timber for lump-sum payments are "reportable real estate" transactions under §1.6045–4(b)(2) and, thus, shall be reported as provided in section 6045(e) and the regulations.

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 Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by February 27, 2008. The Treasury Department is interested in comments on the following:

Whether the proposed collection of information is necessary for the proper performance of the function 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 collections 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 affected by this proposed regulation is described in §1.6045–4. The collection of information is mandatory. The likely respondents are for-profit corporations and small business entities.

Estimated total annual reporting burden: 10,000 hours.

Estimated average annual burden hours per respondent: .5 hours.

Estimated number of respondents: 20,000.

Estimated frequency of responses: annually.

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 26 U.S.C. 6103.

Proposed Effective Date

These amendments shall apply to sales or exchanges of standing timber for lump-sum payments completed on or after the date of publication of a Treasury decision adopting these rules as final regulations in the Federal Register.

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. It is hereby certified that collection of information in this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the collection of information burden imposed by these regulations flows directly from section 6045(e) of the Code. Moreover, requiring information reporting as described in the preamble with regard to sales or exchanges of standing timber for lump-sum payments imposes minimal burden in time or expense. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. Chapter 6) is not required. The IRS invites comments on the accuracy of this certification. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Request for 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) or electronic comments that are submitted timely to the IRS. The IRS and the 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 by any person who timely submits 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 Julie A. Hanlon-Bolton of the Office of Associate Chief Counsel (Procedure and Administration). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

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 continues to read in part as follows:

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

Par. 2. Section 1.6045–4 is amended by:

1. Redesignating paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iii), and (b)(2)(iv) as paragraphs (b)(2)(i)(A), (b)(2)(i)(B), (B)(2)(i)(C), and (b)(2)(i)(D), respectively.

2. Adding paragraph (b)(2)(i)(E).

3. Redesignating paragraph (b)(2) introductory text as (b)(2)(i) introductory text.

4. Designating the undesignated text as paragraph (b)(2)(ii).

5. Adding a new last sentence at the end of newly designated paragraph (b)(2)(ii).

6. Revising paragraph (c)(2)(i) and paragraph (s).

The revisions and additions read as follows:

§1.6045–4 Information reporting on real estate transactions with dates of closing on or after January 1, 1991.

* * * * *

(b) * * *

(2)* * * (i) * * *

(E) Any non-contingent interest in standing timber.

(ii) * * * Further, the term *ownership interest* includes any contractual interest in a sale or exchange of standing timber for a lump-sum payment that is fixed and not contingent.

* * * * *

(c) * * *

(2) * * *

(i) An interest in surface or subsurface natural resources (for example, water, ores, and other natural deposits) or crops, whether or not such natural resources or crops are severed from the land. For purposes of this section, the terms "natural resources" and "crops" do not include standing timber.

* * * * *

(s) *Effective/applicability date*. This section applies for real estate transactions with dates of closing (as determined under paragraph (h)(2)(ii) of this section) that occur on or after January 1, 1991. The amendments to paragraphs (b)(2)(i)(e), (b)(2)(ii) and (c)(2)(i) of this section shall apply to sales or exchanges of standing timber for lump-sum payments completed after the date specified in the final regulations.

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on November 28, 2007, 8:45 a.m., and published in the issue of the Federal Register for November 29, 2007, 72 F.R. 67589)

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

Notification Requirement for Tax-Exempt Entities Not Currently Required to File

REG–104942–07

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing.

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9366) describing the time and manner in which certain tax-exempt organizations not currently required to file an annual information return under section 6033(a)(1) are required to submit an annual electronic notice including certain information required by section 6033(i)(1)(A) through (F). The text of those regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by February 13, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–104942–07), room 5203, Internal Revenue Service, PO Box 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: LPD:PR (REG–104942–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC., or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS-REG–104942–07).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Monice Rosenbaum at (202) 622–6070 (not a toll-free number); concerning submission of comments and requests for a public hearing, Richard Hurst, *Richard.A.Hurst@irscounsel.treas.gov.*

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these proposed regulations has been reviewed by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). 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.

The information that is required to be collected for purposes of §1.6033–6(c) is required to be submitted on Form 990–N, *"Electronic Notice (e-Postcard) for Tax-Exempt Organizations not Required To File Form 990 or 990–EZ,"* under control number 1545–2085. The estimated number of recordkeepers that will submit electronic notification is approximately 520,000. The estimated paperwork burden for taxpayers submitting Form 990–N is 15 minutes per taxpayer.

Books and records relating to the collection of information must be retained as long as their contents may become material in the administration of any internal revenue law.

Background and Explanation of Provision

Temporary regulations in this issue of the Bulletin amend the Income Tax Regulations (26 CFR part 1) relating to sec-

tion 6033(i)(1). The temporary regulations describe the time and manner in which certain tax-exempt organizations not currently required to file are required to provide an annual electronic notice including certain information set forth in the section 6033(i)(1)(A) through (F). The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the amendments.

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. It is hereby certified that the collection of information in §1.6033–6T will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601) (RFA) is not required.

The effect of these proposed regulations on small entities flows directly from the statute these regulations implement. Section 6033(i)(1) requires that certain entities submit annual notification, in electronic form, setting forth: the legal name of the organization; any name under which such organization operates or does business; the organization's mailing address and Internet Web site address (if any); the organization's taxpayer identification number; the name and address of a principal officer; and evidence of the continuing basis for the organization's exemption from the filing requirements under section 6033(a)(1).

Pursuant to section 7805(f) of the Code, this regulation as been 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 the 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 submitted timely to the IRS. The IRS and Treasury Department specifically request comments on the clarity of the proposed rule and how it may be made easier to understand. Comments are requested on all aspects of the proposed regulations. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written 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 Monice Rosenbaum of the Office of the Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their development.

* * * * *

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 as follows:

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

Section 1.6033–6 also issued under 26 U.S.C. 6033(i)(1). * * *

Par. 2. Section 1.6033–6 is proposed to be added to read as follows:

§1.6033–6 Notification requirement for entities not required to file an annual information return under section 6033(a)(1) (taxable years beginning after December 31, 2006).

[The text of proposed §1.6033–6 is the same as the text of §1.6033–6T published elsewhere in this issue of the Bulletin].

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on November 14, 2007, 8:45 a.m., and published in the issue of the Federal Register for November 15, 2007, 72 F.R. 64174)

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.

Numerical Finding List[1]

Bulletins 2007–27 through 2007–52

Announcements:

Announcements— Continued:

Court Decisions:

Notices:

Notices— Continued:

Proposed Regulations:

Revenue Procedures:

[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2007–1 through 2007–26 is in Internal Revenue Bulletin 2007–26, dated June 25, 2007.

Finding List of Current Actions on Previously Published Items[1]

Bulletins 2007–27 through 2007–52

Announcements:

84-26
Obsoleted by
T.D. 9336, 2007-35 I.R.B. *461*

84-37
Obsoleted by
T.D. 9336, 2007-35 I.R.B. *461*

Notices:

89-110
Modified by
REG-142695-05, 2007-39 I.R.B. *681*

96-13
Superseded by
Notice 2007-96, 2007-49 I.R.B. *1091*

99-6
Obsoleted as of January 1, 2009 by
T.D. 9356, 2007-39 I.R.B. *675*

2002-45
Modified by
REG-142695-05, 2007-39 I.R.B. *681*

2003-81
Modified and supplemented by
Notice 2007-71, 2007-35 I.R.B. *472*

2005-1
Modified by
Notice 2007-89, 2007-46 I.R.B. *998*

2006-1
Modified by
Notice 2007-70, 2007-40 I.R.B. *735*

2006-43
Modified by
T.D. 9332, 2007-32 I.R.B. *300*

2006-56
Clarified by
Notice 2007-74, 2007-37 I.R.B. *585*

2006-79
Section 3 modified and superseded by
Notice 2007-86, 2007-46 I.R.B. *990*

2006-89
Modified by
Notice 2007-67, 2007-35 I.R.B. *467*

2007-3
Modified by
Notice 2007-69, 2007-35 I.R.B. *468*

2007-7
Modified by
Notice 2007-99, 2007-52 I.R.B. *1243*

Notices— Continued:

2007-26
Modified by
Notice 2007-56, 2007-27 I.R.B. *15*

2007-78
Modified by
Notice 2007-86, 2007-46 I.R.B. *990*

Proposed Regulations:

EE-16-79
Withdrawn by
REG-142695-05, 2007-39 I.R.B. *681*

EE-130-86
Withdrawn by
REG-142695-05, 2007-39 I.R.B. *681*

REG-243025-96
Withdrawn by
REG-142695-05, 2007-39 I.R.B. *681*

REG-105964-98
Withdrawn by
REG-107592-00, 2007-44 I.R.B. *908*

REG-117162-99
Withdrawn by
REG-142695-05, 2007-39 I.R.B. *681*

REG-157711-02
Corrected by
Ann. 2007-74, 2007-35 I.R.B. *483*

REG-119097-05
Hearing location change by
Ann. 2007-81, 2007-38 I.R.B. *667*

REG-142695-05
Hearing location change by
Ann. 2007-91, 2007-42 I.R.B. *857*

REG-148951-05
Corrected by
Ann. 2007-94, 2007-42 I.R.B. *858*

REG-109367-06
Hearing scheduled by
Ann. 2007-66, 2007-31 I.R.B. *296*

REG-128224-06
Hearing location change by
Ann. 2007-92, 2007-42 I.R.B. *857*
Corrected by
Ann. 2007-95, 2007-43 I.R.B. *894*

REG-138707-06
Corrected by
Ann. 2007-79, 2007-40 I.R.B. *749*
Cancellation of hearing by
Ann. 2007-101, 2007-43 I.R.B. *898*

REG-140206-06
Corrected by
Ann. 2007-116, 2007-51 I.R.B. *1216*

Proposed Regulations— Continued:

REG-143601-06
Corrected by
Ann. 2007-71, 2007-33 I.R.B. *372*

REG-143797-06
Cancellation of hearing by
Ann. 2007-85, 2007-39 I.R.B. *719*

REG-148393-06
Corrected by
Ann. 2007-98, 2007-43 I.R.B. *896*

REG-103842-07
Corrected by
Ann. 2007-77, 2007-38 I.R.B. *662*

REG-116215-07
Corrected by
Ann. 2007-97, 2007-43 I.R.B. *895*

Revenue Procedures:

90-12
Modified by
Rev. Proc. 2007-66, 2007-45 I.R.B. *970*

90-27
Superseded by
Rev. Proc. 2007-52, 2007-30 I.R.B. *222*

95-28
Superseded by
Rev. Proc. 2007-54, 2007-31 I.R.B. *293*

97-14
Modified and superseded by
Rev. Proc. 2007-47, 2007-29 I.R.B. *108*

97-27
Modified by
Rev. Proc. 2007-67, 2007-48 I.R.B. *1072*

98-48
Modified by
T.D. 9353, 2007-40 I.R.B. *721*

2002-9
Modified and amplified by
Rev. Proc. 2007-48, 2007-29 I.R.B. *110*
Rev. Proc. 2007-53, 2007-30 I.R.B. *233*

2002-41
Modified by
Rev. Proc. 2007-66, 2007-45 I.R.B. *970*

2003-43
Supplemented by
Rev. Proc. 2007-62, 2007-41 I.R.B. *786*

2004-42
Superseded by
Notice 2007-59, 2007-30 I.R.B. *135*

2004-48
Supplemented by
Rev. Proc. 2007-62, 2007-41 I.R.B. *786*

[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2007–1 through 2007–26 is in Internal Revenue Bulletin 2007–26, dated June 25, 2007.

Revenue Procedures— Continued:

2005-16
Modified by
Rev. Proc. 2007-44, 2007-28 I.R.B. *54*

2005-27
Superseded by
Rev. Proc. 2007-56, 2007-34 I.R.B. *388*

2005-66
Clarified, modified, and superseded by
Rev. Proc. 2007-44, 2007-28 I.R.B. *54*

2006-25
Superseded by
Rev. Proc. 2007-42, 2007-27 I.R.B. *15*

2006-27
Modified by
Rev. Proc. 2007-49, 2007-30 I.R.B. *141*

2006-33
Superseded by
Rev. Proc. 2007-51, 2007-30 I.R.B. *143*

2006-41
Superseded by
Rev. Proc. 2007-63, 2007-42 I.R.B. *809*

2006-45
Modified and clarified by
Rev. Proc. 2007-64, 2007-42 I.R.B. *818*

2006-49
Superseded by
Rev. Proc. 2007-70, 2007-50 I.R.B. *1162*

2006-53
Modified by
Rev. Proc. 2007-60, 2007-39 I.R.B. *679*

2006-55
Superseded by
Rev. Proc. 2007-43, 2007-27 I.R.B. *26*

2007-4
Modified by
Notice 2007-69, 2007-35 I.R.B. *468*

2007-15
Superseded by
Rev. Proc. 2007-50, 2007-31 I.R.B. *244*

2007-24
Superseded by
Rev. Proc. 2007-68, 2007-49 I.R.B. *1093*

Revenue Rulings:

54-378
Clarified by
Rev. Rul. 2007-51, 2007-37 I.R.B. *573*

65-18
Revoked by
Rev. Rul. 2007-69, 2007-49 I.R.B. *1083*

Revenue Rulings— Continued:

67-93
Obsoleted by
T.D. 9347, 2007-38 I.R.B. *624*

69-141
Modified by
REG-142695-05, 2007-39 I.R.B. *681*

72-605
Amplified by
Rev. Rul. 2007-69, 2007-49 I.R.B. *1083*

74-299
Amplified by
Rev. Rul. 2007-48, 2007-30 I.R.B. *129*

75-425
Obsoleted by
Rev. Rul. 2007-60, 2007-38 I.R.B. *606*

76-278
Obsoleted by
T.D. 9354, 2007-41 I.R.B. *759*

76-288
Obsoleted by
T.D. 9354, 2007-41 I.R.B. *759*

76-450
Obsoleted by
T.D. 9347, 2007-38 I.R.B. *624*

78-257
Obsoleted by
T.D. 9347, 2007-38 I.R.B. *624*

78-369
Revoked by
Rev. Rul. 2007-53, 2007-37 I.R.B. *577*

89-96
Amplified by
Rev. Rul. 2007-47, 2007-30 I.R.B. *127*

92-17
Modified by
Rev. Rul. 2007-42, 2007-28 I.R.B. *44*

94-62
Supplemented by
Rev. Rul. 2007-58, 2007-37 I.R.B. *562*

2001-48
Modified by
T.D. 9332, 2007-32 I.R.B. *300*

2001-62
Modified by
Rev. Rul. 2007-67, 2007-48 I.R.B. *1047*

2002-41
Modified by
REG-142695-05, 2007-39 I.R.B. *681*

2003-102
Modified by
REG-142695-05, 2007-39 I.R.B. *681*

Revenue Rulings— Continued:

2005-24
Modified by
REG-142695-05, 2007-39 I.R.B. *681*

2006-36
Modified by
REG-142695-05, 2007-39 I.R.B. *681*

2006-57
Modified by
Notice 2007-76, 2007-40 I.R.B. *735*

2007-54
Suspended by
Rev. Rul. 2007-61, 2007-42 I.R.B. *799*

2007-59
Amplified by
Notice 2007-74, 2007-37 I.R.B. *585*

Treasury Decisions:

8073
Removed by
T.D. 9349, 2007-39 I.R.B. *668*

9321
Corrected by
Ann. 2007-68, 2007-32 I.R.B. *348*
Ann. 2007-78, 2007-38 I.R.B. *663*

9330
Corrected by
Ann. 2007-80, 2007-38 I.R.B. *667*

9332
Corrected by
Ann. 2007-83, 2007-40 I.R.B. *752*
Ann. 2007-84, 2007-41 I.R.B. *797*

9334
Corrected by
Ann. 2007-93, 2007-42 I.R.B. *858*

9340
Corrected by
Ann. 2007-102, 2007-44 I.R.B. *922*

9353
Corrected by
Ann. 2007-103, 2007-44 I.R.B. *923*

INDEX

Internal Revenue Bulletins 2007–27 through 2007–52

The abbreviation and number in parenthesis following the index entry refer to the specific item; numbers in roman and italic type following the parenthesis refers to the Internal Revenue Bulletin in which the item may be found and the page number on which it appears.

Key to Abbreviations:

Ann	Announcement
CD	Court Decision
DO	Delegation Order
EO	Executive Order
PL	Public Law
PTE	Prohibited Transaction Exemption
RP	Revenue Procedure
RR	Revenue Ruling
SPR	Statement of Procedural Rules
TC	Tax Convention
TD	Treasury Decision
TDO	Treasury Department Order

EMPLOYEE PLANS

EMPLOYEE PLANS—Cont.

EXEMPT ORGANIZATIONS—Cont.

GIFT TAX

INCOME TAX

INCOME TAX—Cont.

INCOME TAX—Cont.

INCOME TAX—Cont.

INCOME TAX—Cont.

SELF-EMPLOYMENT TAX

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