Internal Revenue bulletin

Bulletin No. 2008-19
May 12, 2008

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

Ct. D. 2086, page 905.

Tax evasion; return-of-capital treatment. The Supreme Court holds that a distributee accused of criminal tax evasion may claim return-of-capital treatment without producing evidence that, when the distribution occurred, either he or the corporation intended a return of capital. **Boulware v. United States.**

T.D. 9392, page 903.

Final regulations under section 6050L of the Code provide guidance for the filing of information returns by donees relating to qualified intellectual property contributions. These regulations reflect changes to the law enacted in 2004.

REG–141998–06, page 911.

Proposed regulations under section 6323 of the Code relate to the validity and priority of the federal tax lien against certain persons. The regulations that implement section 6323 have not been amended for some time. The most significant of the proposed changes reflect that most liens filed by the IRS are now self-releasing, and reflect the authority of the IRS to file liens electronically without obtaining the permission of the locality. Other changes update the regulations by making various incidental changes to dates and other language contained therein.

EMPLOYEE PLANS

REG–108508–08, page 923.

Proposed regulations under section 4971 of the Code provide guidance on the excise tax for failure to make certain required pension funding contributions. The regulations reflect changes made to section 4971 by the Pension Protection Act of 2006. A public hearing is scheduled for August 4, 2008.

EXEMPT ORGANIZATIONS

Announcement 2008–40, page 941.

A list is provided of organizations now classified as private foundations.

ESTATE TAX

REG–147775–06, page 916.

Proposed regulations under section 2642 of the Code identify the standards that the IRS will apply in determining whether to grant a transferor or a transferor's estate an extension of time under section 2642(g)(1) to: (1) allocate generation-skipping transfer (GST) exemption, as defined in section 2631, to a transfer; (2) elect under section 2632(b)(3) (the election not to have the deemed allocation of GST exemption apply to a direct skip); (3) elect under section 2632(c)(5)(A)(i) (the election not to have the deemed allocation of GST exemption apply to an indirect skip or transfers made to a particular trust); and (4) elect under section 2632(c)(5)(A)(ii) (the election to treat any trust as a GST trust for purposes of section 2632(c)). The regulations also identify situations with facts that do not satisfy the standards for granting relief and in which, as a result, the relief described above will not be granted. A public hearing is scheduled for August 5, 2008.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

EXCISE TAX

REG–108508–08, page 923.
Proposed regulations under section 4971 of the Code provide guidance on the excise tax for failure to make certain required pension funding contributions. The regulations reflect changes made to section 4971 by the Pension Protection Act of 2006. A public hearing is scheduled for August 4, 2008.

ADMINISTRATIVE

Announcement 2008–41, page 943.
This document contains a withdrawal of proposed regulations (REG–109367–06, 2006–2 C.B. 683) relating to the circumstances in which accounts or notes receivable are "acquired ... for services rendered" within the meaning of section 1221(a)(4) of the Code.

Announcement 2008–42, page 943.
This document provides notice of public hearing on proposed regulations (REG–139236–07, 2008–9 I.R.B. 491) preparing guidance on the determination of plan assets and benefit liabilities for purposes of the funding requirements that apply to single employer defined benefit plans. The regulations affect sponsors, administrators, participants, and beneficiaries of single employer defined benefit plans. A public hearing is scheduled for May 29, 2008.

Announcement 2008–43, page 944.
This document provides notice of public hearing on proposed regulations (REG–147290–05, 2008–10 I.R.B. 576) relating to deductions for contributions to trusts maintained for decommissioning nuclear power plants. A public hearing is scheduled for June 17, 2008.

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

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

Section 6050L.—Returns Relating to Certain Donated Property

26 CFR 1.6050L–2: Information returns by donees relating to qualified intellectual property contributions.

T.D. 9392

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

Information Returns by Donees Relating to Qualified Intellectual Property Contributions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations that provide guidance for filing information returns by donees relating to qualified intellectual property contributions. These final regulations reflect changes to the law made in 2004. The regulations affect donees receiving net income from qualified intellectual property contributions made after June 3, 2004.

DATES: *Effective date:* These regulations are effective April 7, 2008.

Applicability date: For dates of applicability, see §1.6050L–2(f).

FOR FURTHER INFORMATION CONTACT: Timothy S. Sheppard, (202) 622–4910 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–1932. The collection of information in these final regulations is in §1.6050L–2(a) and (b). Responses to this collection of information are required to obtain a tax benefit.

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

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 return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains amendments to the Income Tax Regulations (26 CFR Part 1) relating to section 6050L of the Internal Revenue Code (Code). These regulations reflect changes to the law made by the American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1418). On May 23, 2005, temporary regulations (T.D. 9206, 2005–1 C.B. 1283) relating to information returns by donees with respect to qualified intellectual property contributions under section 6050L were published in the **Federal Register** (70 FR 29450). A notice of proposed rulemaking (REG–158138–04, 2005–1 C.B. 1341) cross-referencing the temporary regulations was published in the **Federal Register** (70 FR 29460) on the same date. No comments were received from the public in response to the notice of proposed rulemaking and no public hearing was requested or held. Accordingly, the proposed regulations are adopted as amended by this Treasury decision and the corresponding temporary regulations are removed. The final regulations generally retain the provisions of the proposed and temporary regulations but eliminate transition rules that are no longer needed and make other minor editorial changes.

Explanation of Changes

The final regulations do not include certain transition rules that were included in the temporary and proposed regulations. Specifically, the proposed and temporary regulations provide guidance for donees on making the required information return before a form is prescribed by the IRS. The IRS has since issued a new Form 8899 on which donees must report qualified donee income. Thus, these transition rules are no longer needed and are not included in the final regulations. The proposed and temporary regulations also include a transition rule that applies to donees with taxable years to which net income from the qualified intellectual property is properly allocable that end prior to or on May 23, 2005, the issuance date of the proposed and temporary regulations. Under this transition rule, the donee shall furnish the information required under section 6050L to the donor on or before August 22, 2005. This transition rule is no longer needed and is not included in the final regulations.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that few, if any, small entities will be required to file under these regulations. 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 preceding this regulation 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 Timothy S. Sheppard, Office of Associate Chief Counsel (Procedure and Administration).

* * * * *

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. §1.6050L–2 is added to read as follows:

§1.6050L–2 Information returns by donees relating to qualified intellectual property contributions.

(a) *In general.* Each donee organization described in section 170(c), except a private foundation (as defined in section 509(a)), other than a private foundation described in section 170(b)(1)(F), that receives or accrues net income during a taxable year from any qualified intellectual property contribution (as defined in section 170(m)(8)) must make an annual information return on the form prescribed by the IRS. The information return is required for any taxable year of the donee that includes any portion of the 10-year period beginning on the date of the contribution, but not for taxable years beginning after the expiration of the legal life of the qualified intellectual property.

(b) *Information required to be provided on return.* The information return required by section 6050L and paragraph (a) of this section shall include the following—

(1) The name, address, taxable year, and employer identification number of the donee making the information return;

(2) The name, address, and taxpayer identification number of the donor;

(3) A description of the qualified intellectual property in sufficient detail to identify the qualified intellectual property received by such donee;

(4) The date of the contribution to the donee;

(5) The amount of net income of the donee for the taxable year that is properly allocable to the qualified intellectual property (determined without regard to paragraph (10)(B) of section 170(m) and with the modifications described in paragraphs (5) and (6) of such section); and

(6) Such other information as may be specified by the form or its instructions.

(c) *Special rule—statement to be furnished to donors.* Every donee making an information return under section 6050L and this section with respect to a qualified intellectual property contribution shall furnish a copy of the information return to the donor of the property. The information return required by section 6050L and this section shall be furnished to the donor on or before the date the donee is required to file the return with the IRS.

(d) *Place and time for filing information return*—(1) *Place for filing.* The information return required by section 6050L and this section shall be filed with the IRS location listed on the prescribed form or in its instructions.

(2) *Time for filing.* A donee is required to file the return required by section 6050L and this section on or before the last day of the first full month following the close of the donee's taxable year to which net income from the qualified intellectual property is properly allocable.

(e) *Penalties.* For penalties for failure to comply with the requirements of this section, see sections 6721 through 6724.

(f) *Effective/applicability date.* The rules of this section apply to qualified intellectual property contributions made after June 3, 2004.

§1.6050L–2T [Removed]

Par. 3. Section 1.6050L–2T is removed.

PART 602 —OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 4. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 5. In §602.101, paragraph (b) is amended by removing the following entry from the table:

§602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.6050L–2T	1545–1932
* * * * *	

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

Approved March 31, 2008.

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

(Filed by the Office of the Federal Register on April 4, 2008, 8:45 a.m., and published in the issue of the Federal Register for April 7, 2008, 73 F.R. 18709)

Section 7201.—Attempt to Evade or Defeat Tax

Ct. D. 2086

SUPREME COURT OF THE UNITED STATES

No. 06–1509

BOULWARE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

March 3, 2008

Syllabus

One element of tax evasion under 26 U. S. C. §7201 is "the existence of a tax deficiency." *Sansone* v. *United States*, 380 U. S. 343, 351. Petitioner Boulware was charged with criminal tax evasion and filing a false income tax return for diverting funds from a closely held corporation, HIE, of which he was the president, founder, and controlling shareholder. To support his argument that the Government could not establish the tax deficiency required to convict him, Boulware sought to introduce evidence that HIE had no earnings and profits in the relevant taxable years, so he in effect received distributions of property that were returns of capital, up to his basis in his stock, which are not taxable, see 26 U. S. C. §§301 and 316(a). Under §301(a), unless the Internal Revenue Code requires otherwise, a "distribution of property" "made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in [§301(c)]." Section 301(c) provides that the portion of the distribution that is a "dividend," as defined by §316(a), must be included in the recipient's gross income; and the portion that is not a dividend is, depending on the shareholder's basis for his stock, either a nontaxable return of capital or a taxable capital gain. Section 316(a) defines "dividend" as a "distribution" out of "earnings and profits." The District Court granted the Government's *in limine* motion to bar evidence supporting Boulware's return-of-capital theory, relying on the Ninth Circuit's *Miller* decision that a diversion of funds in a criminal tax evasion case may be deemed a return of capital only if the taxpayer or corporation demonstrates that the distributions were intended to be such a return. The court later found Boulware's proffer of evidence insufficient under *Miller* and declined to instruct the jury on his theory. In affirming his conviction, the Ninth Circuit held that Boulware's proffer was properly rejected under *Miller* because he offered no proof that the amounts diverted were intended as a return of capital when they were made.

Held: A distributee accused of criminal tax evasion may claim return-of-capital treatment without producing evidence that, when the distribution occurred, either he or the corporation intended a return of capital. Pp. 6–17.

(a) Tax classifications like "dividend" and "return of capital" turn on a transaction's "objective economic realities," not "the particular form the parties employed." *Frank Lyon Co.* v. *United States*, 435 U. S. 561, 573. In economic reality, a shareholder's informal receipt of corporate property "may be as effective a means of distributing profits among stockholders as the formal declaration of a dividend," *Palmer* v. *Commissioner*, 302 U. S. 63, 69, or as effective a means of returning a shareholder's capital, see *ibid*. Economic substance remains the touchstone for characterizing funds that a shareholder diverts before they can be recorded on a corporation's books. Pp. 6–8.

(b) *Miller*'s view that a return-of-capital defense requires evidence of a corresponding contemporaneous intent sits uncomfortably not only with the tax law's economic realism, but also with the particular wording of §§301 and 316(a). As these sections are written, the tax consequences of a corporation's distribution made with respect to stock depend, not on anyone's purpose to return capital or get it back, but on facts wholly independent of intent: whether the corporation had earnings and profits, and the amount of the taxpayer's basis for his stock. The *Miller* court could claim no textual hook for its contemporaneous intent requirement, but argued that it avoided supposed anomalies. The court, however, mistakenly reasoned that applying §§301 and 316(a) in criminal cases unnecessarily emphasizes the deficiency's amount while ignoring the willfulness of the intent to evade taxes. Willfulness is an element of the crimes because the substantive provisions defining tax evasion and filing a false return expressly require it, see, *e.g.,* §7201. Nothing in §§301 and 316(a) relieves the Government of the burden of proving willfulness or impedes it from doing so if there is evidence of willfulness. The *Miller* court also erred in finding it troublesome that, without a contemporaneous intent requirement, a shareholder distributee would be immune from punishment if the corporation had no earnings and profits but convicted if the corporation did have earning and profits. An acquittal in the former instance would in fact result merely from the Government's failure to prove an element of the crime. The fact that a shareholder of a successful corporation may have different tax liability from a shareholder of a corporation without earnings and profits merely follows from the way §§301 and 316(a) are written and from §7201's tax deficiency requirement. Even if there were compelling reasons to extend §7201 to cases in which no taxes are owed, Congress, not the Judiciary, would have to do the rewriting. Pp. 8–12.

(c) *Miller* also suffers from its own anomalies. First, §§301 and 316 are odd stalks for grafting a contemporaneous intent requirement. Correct application of their rules will often become possible only at the end of the corporation's tax year, regardless of the shareholder or corporation's understanding months earlier when a particular distribution may have been made. Moreover, §301(a), which expressly provides that distributions made with respect to stock "shall be treated in the manner provided in [§301(c)]," ostensibly provides for all variations of tax treatment of such distributions unless a separate Code provision requires otherwise. Yet *Miller* effectively converts the section into one of merely partial coverage, leaving the tax status of one class of distributions in limbo in criminal cases. Allowing §61(a) of the Code, which defines gross income, "[e]xcept as otherwise provided," as "all income from whatever source derived," to step in where §301(a) has been pushed aside would sanction yet another eccentricity: §301(a) would not cover what it says it "shall," (distributions with respect to stock for which no more specific provision is made), while §61(a) would have to

apply to what by its terms it should not (a receipt of funds for which tax treatment is "otherwise provided" in §301(a)). *Miller* erred in requiring contemporaneous intent, and the Ninth Circuit's judgment here, relying on *Miller*, is likewise erroneous. Pp. 12–14.

(d) This Court declines to address the Government's argument that the judgment should be affirmed on the ground that before any distribution may be treated as a return of capital, it must first be distributed to the shareholder "with respect to . . . stock." The facts in this case have not been raked over with that condition in mind, and any canvas of evidence and Boulware's proffer should be made by a court familiar with the entire evidentiary record. Nor will the Court take up in the first instance the question whether an unlawful diversion may ever be deemed a "distribution . . . with respect to [a corporation's] stock." Pp. 14–17.

470 F.3d 931, vacated and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 06–1509

MICHAEL H. BOULWARE, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

March 3, 2008

JUSTICE SOUTER delivered the opinion of the Court.

Sections 301 and 316(a) of the Internal Revenue Code set the conditions for treating certain corporate distributions as returns of capital, nontaxable to the recipient. 26 U. S. C. §§301, 316(a) (2000 ed. and Supp. V.). The question here is whether a distributee accused of criminal tax evasion may claim return-of-capital treatment without producing evidence that either he or the corporation intended a capital return when the distribution occurred. We hold that no such showing is required.

I

"[T]he capstone of [the] system of sanctions . . . calculated to induce . . . fulfillment of every duty under the income tax law," *Spies* v. *United States*, 317 U. S. 492, 497 (1943), is 26 U. S. C. §7201, making it a felony willfully to "attemp[t] in any manner to evade or defeat any tax imposed by" the Code.[1] One element of tax evasion under §7201 is "the existence of a tax deficiency," *Sansone* v. *United States*, 380 U. S. 343, 351 (1965); see also *Lawn* v. *United States*, 355 U. S. 339, 361 (1958),[2] which the Government must prove beyond a reasonable doubt, see *ibid.* ("[O]f course, a conviction upon a charge of attempting to evade assessment of income taxes by the filing of a fraudulent return cannot stand in the absence of proof of a deficiency").

Any deficiency determination in this case will turn on §§301 and 316(a) of the Code. According to §301(a), unless another provision of the Code requires otherwise, a "distribution of property" that is "made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in [§301(c)]." Under §301(c), the portion of the distribution that is a "dividend," as defined by §316(a), must be included in the recipient's gross income; and the portion that is not a dividend is, depending on the shareholder's basis for his stock, either a nontaxable return of capital or a gain on the sale or exchange of stock, ordinarily taxable to the shareholder as a capital gain. Finally, §316(a) defines "dividend" as

> "any distribution of property made by a corporation to its shareholders—
>
> "(1) out of its earnings and profits accumulated after February 28, 1913, or
>
> "(2) out of its earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made."

Sections 301 and 316(a) together thus make the existence of "earnings and profits"[3] the decisive fact in determining the tax consequences of distributions from a corporation to a shareholder with respect to his stock. This requirement of "relating the tax status of corporate distributions to earnings and profits is responsive to a felt need for protecting returns of capital from tax." 4 Bittker & Lokken ¶92.1.1, p. 92–3.

II

In this criminal tax proceeding, petitioner Michael Boulware was charged with several counts of tax evasion and filing a false income tax return, stemming from his diversion of funds from Hawaiian Isles Enterprises (HIE), a closely held corporation of which he was the president, founder, and controlling (though not sole) shareholder. At trial,[4] the United States sought to establish that Boulware had received taxable income by "systematically divert[ing] funds from HIE in order to support a lavish lifestyle." 384 F.3d 794, 799 (CA9 2004). The Government's evidence showed that

> "[Boulware] gave millions of dollars of HIE money to his girlfriend . . . and millions of dollars to his wife . . . without reporting any of this money on his personal income tax returns. . . . [H]e siphoned off this money primarily by writing checks to employees and friends and having them return the cash to him, by diverting payments by HIE customers, by submitting fraudulent invoices to HIE, and by laundering HIE

[1] A related provision, 26 U. S. C. §7206(1), criminalizes the willful filing of a tax return believed to be materially false. See n. 9, *infra*.

[2] "[T]he elements of §7201 are willfulness[,] the existence of a tax deficiency, . . . and an affirmative act constituting an evasion or attempted evasion of the tax." *Sansone v. United States*, 380 U. S. 343, 351 (1965). The Courts of Appeals have divided over whether the Government must prove the tax deficiency is "substantial," see *United States v. Daniels*, 387 F.3d 636, 640–641, and n. 2 (CA7 2004) (collecting cases); we do not address that issue here.

[3] Although the Code does not "comprehensively define 'earnings and profits,'" 4 B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts ¶92.1.3, p.92–6 (3d ed. 2003) (hereinafter Bittker & Lokken), the "[p]rovisions of the Code and regulations relating to earnings and profits ordinarily take taxable income as the point of departure," *id.*, at 92–9.

[4] The trial at issue in this case was actually Boulware's second trial on §§7201 and 7206(1) charges, his convictions on those counts in an earlier trial having been vacated by the Ninth Circuit for reasons not at issue here, see 384 F.3d 794 (2004). In that earlier trial, Boulware was also convicted of conspiracy to make false statements to a federally insured financial institution, in violation of 18 U. S. C. §371. The Ninth Circuit affirmed Boulware's conspiracy conviction that first time around, however, so the present trial did not include a conspiracy charge.

money through companies in the Kingdom of Tonga and Hong Kong." *Ibid.*

In defense, Boulware sought to introduce evidence that HIE had no retained or current earnings and profits in the relevant taxable years, with the consequence (he argued) that he in effect received distributions of property that must have been returns of capital, up to his basis in his stock. See §301(c)(2). Because the return of capital was nontaxable, the argument went, the Government could not establish the tax deficiency required to convict him.

The Government moved *in limine* to bar evidence in support of Boulware's return-of-capital theory, on the grounds of "irrelevan[ce] in [this] criminal tax case," App. 20. The Government relied on the Ninth Circuit's decision in *United States* v. *Miller*, 545 F.2d 1204 (1976), in which that court held that in a criminal tax evasion case, a diversion of funds may be deemed a return of capital only after "some demonstration on the part of the taxpayer and/or the corporation that such [a distribution was] intended to be such a return," *id.*, at 1215. Boulware, the Government argued, had offered to make no such demonstration. App. 21.

The District Court granted the Government's motion, and when Boulware sought "to present evidence of [HIE's] alleged over-reporting of income, and an offer of proof relating to the issue of . . . dividends," *id.*, at 135, the District Court denied his request. The court said that "[n]ot only would much of [his proffered] evidence be excludable as expert legal opinion, it is plainly insufficient under the Miller case," *id.*, at 138, and accordingly declined to instruct the jury on Boulware's return-of-capital theory. The jury rejected his alternative defenses (that the diverted funds were nontaxable corporate advances or loans, or that he used the moneys for corporate purposes), and found him guilty on nine counts, four of tax evasion and five of filing a false return.

The Ninth Circuit affirmed. 470 F.3d 931 (2006). It acknowledged that "imposing an intent requirement creates a disconnect between civil and criminal liability," but thought that under *Miller*, "the characterization of diverted corporate funds for civil tax purposes does not dictate their characterization for purposes of a criminal tax evasion charge." 470 F.3d, at 934. The court held the test in a criminal case to be "whether the defendant has willfully attempted to evade the payment or assessment of a tax." *Ibid.* Because Boulware "'presented no concrete proof that the amounts were considered, intended, or recorded on the corporate records as a return of capital at the time they were made,'" *id.*, at 935 (quoting *Miller*, *supra*, at 1215), the Ninth Circuit held that Boulware's proffer was "properly rejected . . . as inadequate," 470 F.3d, at 935.

Judge Thomas concurred because the panel was bound by *Miller*, but noted that "*Miller*—and now the majority opinion—hold that a defendant may be criminally sanctioned for tax evasion without owing a penny in taxes to the government." 470 F.3d, at 938. That, he said, not only "indicate[s] a logical fallacy, but is in flat contradiction with the tax evasion statute's requirement . . . of a tax deficiency." *Ibid.* (internal quotation marks omitted).[5]

We granted certiorari, 551 U. S. ___ (2007), to resolve a split among the Courts of Appeals over the application of §§301 and 316(a) to informally transferred or diverted corporate funds in criminal tax proceedings.[6] We now vacate and remand.

III

A

The colorful behavior described in the allegations requires a reminder that tax classifications like "dividend" and "return of capital" turn on "the objective economic realities of a transaction rather than . . . the particular form the parties employed," *Frank Lyon Co.* v. *United States*, 435 U. S. 561, 573 (1978); a "given result at the end of a straight path is not made a different result . . . by following a devious path," *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, 613 (1938)[7]. As for distributions with respect to stock, in economic reality a shareholder's informal receipt of corporate property "may be as effective a means of distributing profits among stockholders as the formal declaration of a dividend," *Palmer* v. *Commissioner*, 302 U. S. 63, 69 (1937), or as effective a means of returning a shareholder's capital, see *ibid.* Accordingly, "[a] distribution to a shareholder in his capacity as such . . . is subject to §301 even though it is not declared in formal fashion." B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders ¶8.05[1], pp. 8–36 to 8–37 (6th ed. 1999) (hereinafter Bittker & Eustice); see also Gardner, The Tax Consequences of Shareholder Diversions in Close Corporations, 21 Tax L. Rev. 223, 239 (1966) (hereinafter Gardner) ("Sections 316 and 301 do not require any formal path to be taken by a corporation in order for those provisions to apply").

There is no reason to doubt that economic substance remains the right touch-

[5] Judge Thomas went on to say that the Government would prevail even without *Miller*'s rule because, in his view, Boulware's diversions were "unlawful," and the return-of-capital rules would not apply to diversions made for unlawful purposes. See 470 F.3d, at 938–939.

[6] As noted, the Ninth Circuit holds that §§301 and 316(a) are not to be consulted in a criminal tax evasion case until the defendant produces evidence of an intent to treat diverted funds as a return of capital at the time it was made. See 470 F.3d 931 (2006) (case below). By contrast, the Second Circuit allows a criminal defendant to invoke §§301 and 316(a) without evidence of a contemporaneous intent to treat such moneys as returns of capital. See *United States v. Bok*, 156 F.3d 157, 162 (1998) ("[I]n return of capital cases, a taxpayer's intent is not determinative in defining the taxpayer's conduct"). Meanwhile, the Third, Sixth, and Eleventh Circuits arguably have taken the position that §§301 and 316(a) are altogether inapplicable in criminal tax cases involving informal distributions. See *United States v. Williams*, 875 F.2d 846, 850–852 (CA11 1989); *United States v. Goldberg*, 330 F.2d 30, 38 (CA3 1964); *Davis v. United States*, 226 F.2d 331, 334–335 (CA6 1955); but see Brief for Petitioner 16 ("[T]hese cases can be read to address the allocation of the burden of proof on the return of capital issue, rather than the applicable substantive principles").

[7] We have also recognized that "[t]he legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *Gregory v. Helvering*, 293 U. S. 465, 469 (1935). The rule is a two-way street: "while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not, . . . and may not enjoy the benefit of some other route he might have chosen to follow but did not," *Commissioner v. National Alfalfa Dehydrating & Milling Co.*, 417 U. S. 134, 149 (1974); see also *id.*, at 148 (referring to "the established tax principle that a transaction is to be given its tax effect in accord with what actually occurred and not in accord with what might have occurred"); *Founders Gen. Corp. v. Hoey*, 300 U. S. 268, 275 (1937) ("To make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create burden and uncertainty"). The question here, of course, is not whether alternative routes may have offered better or worse tax consequences, see generally Isenbergh, Review: Musings on Form and Substance in Taxation, 49 U. Chi. L. Rev. 859 (1982); rather, it is "whether what was done . . . was the thing which the statute [, here §§301 and 316(a),] intended," *Gregory*, *supra*, at 469.

stone for characterizing funds received when a shareholder diverts them before they can be recorded on the corporation's books. While they "never even pass through the corporation's hands," Bittker & Eustice ¶8.05[9], p. 8–51, even diverted funds may be seen as dividends or capital distributions for purposes of §§301 and 316(a), see *Truesdell* v. *Commissioner*, 89 T. C. 1280 (1987) (treating diverted funds as "constructive" distributions in civil tax proceedings). The point, again, is that "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid." *Corliss* v. *Bowers*, 281 U. S. 376, 378 (1930); see also *Griffiths* v. *Commissioner*, 308 U. S. 355, 358 (1939).[8]

B

Miller's view that a criminal defendant may not treat a distribution as a return of capital without evidence of a corresponding contemporaneous intent sits uncomfortably not only with the tax law's economic realism, but with the particular wording of §§301 and 316(a), as well. As those sections are written, the tax consequences of a "distribution by a corporation with respect to its stock" depend, not on anyone's purpose to return capital or to get it back, but on facts wholly independent of intent: whether the corporation had earnings and profits, and the amount of the taxpayer's basis for his stock. Cf. *Truesdell* v. *Commissioner*, Internal Revenue Service (IRS) Action on Decision 1988–25, 1988 WL 570761 (Sept. 12, 1988) (recommendation regarding acquiescence); IRS Non Docketed Service Advice Review, 1989 WL 1172952 (Mar. 15, 1989) (reply to request for reconsideration) ("[I]ntent is irrelevant. . . . [E]very distribution made with respect to a shareholder's stock is taxable as ordinary income, capital gain, or not at all pursuant to section 301(c) dependent upon the corporation's earnings and profits and the shareholder's stock basis. The determination is computational and not dependent upon intent").

When the *Miller* court went the other way, needless to say, it could claim no textual hook for the contemporaneous intent requirement, but argued for it as the way to avoid two supposed anomalies. First, the court thought that applying §§301 and 316(a) in criminal cases unnecessarily emphasizes the exact amount of deficiency while "completely ignor[ing] one essential element of the crime charged: the willful intent to evade taxes . . . ." 545 F.2d, at 1214. But there is an analytical mistake here. Willfulness is an element of the crimes charged because the substantive provisions defining tax evasion and filing a false return expressly require it, see §7201 ("Any person who willfully attempts . . . "); §7206(1) ("Willfully makes and subscribes . . . "). The element of willfulness is addressed at trial by requiring the Government to prove it. Nothing in §§301 and 316(a) as written (that is, without an intent requirement) relieves the Government of this burden of proving willfulness or impedes it from doing so if evidence of willfulness is there. Those two sections as written simply address a different element of criminal evasion, the existence of a tax deficiency, and both deficiency and willfulness can be addressed straightforwardly (in jury instructions or bench findings) without tacking an intent requirement onto the rule distinguishing dividends from capital returns.

Second, the *Miller* court worried that if a defendant could claim capital treatment without showing a corresponding and contemporaneous intent,

> "[a] taxpayer who diverted funds from his close corporation when it was in the midst of a financial difficulty and had no earnings and profits would be immune from punishment (to the extent of his basis in the stock) for failure to report such sums as income; while that very same taxpayer would be convicted if the corporation had experienced a successful year and had earnings and profits." 545 F.2d, at 1214.

"Such a result," said the court, "would constitute an extreme example of form over substance." *Ibid.* The Circuit thus assumed that a taxpayer like Boulware could be convicted of evasion with no showing of deficiency from an unreported dividend or capital gain.

But the acquittal that the author of *Miller* called form trumping substance would in fact result from the Government's failure to prove an element of the crime. There is no criminal tax evasion without a tax deficiency, see *supra*, at 1–2,[9] and there is no deficiency owing to a distribution (received with respect to a corporation's stock) if a corporation has no earnings and profits and the value distributed does not exceed the taxpayer-shareholder's basis for his stock. Thus the fact that a shareholder distributee of a successful corporation may have different tax liability from a shareholder of a corporation without earnings and profits merely follows from the way §§301 and 316(a) are written (to distinguish dividend from capital return), and from the requirement of tax deficiency for a §7201 crime. Without the deficiency there is nothing but some act expressing the will to evade, and, under §7201, acting on "bad intentions, alone, [is] not punishable," *United States* v. *D'Agostino*, 145 F.3d 69, 73 (CA2 1998).

It is neither here nor there whether the *Miller* court was justified in thinking it would improve things to convict more of the evasively inclined by dropping the deficiency requirement and finding some

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[8] Thus in the period between this Court's decisions in *Commissioner v. Wilcox*, 327 U. S. 404 (1946) (holding embezzled funds to be nontaxable to the embezzler) and *James v. United States*, 366 U. S. 213 (1961) (overruling *Wilcox*, holding embezzled funds to be taxable income), the Government routinely argued that diverted funds were "constructive distributions," taxable to the recipient as dividends. See generally Gardner 237 ("While *Wilcox* was good law, the safest way to insure that both the corporation and the shareholder would be taxed on their respective gain from the diverted funds was to label them dividends"); 4 Bittker & Lokken ¶92.2(7), p. 92–23, n. 37.

[9] Boulware was also convicted of violating §7206(1), which makes it a felony "[w]illfully [to] mak[e] and subscrib[e] any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which [the taxpayer] does not believe to be true and correct as to every material matter." He argues that if the Ninth Circuit erred, its error calls into question not only his §7201 conviction, but his §7206(1) conviction as well. Brief for Petitioner 15–16. Although the Courts of Appeals are unanimous in holding that §7206(1) "does not require the prosecution to prove the existence of a tax deficiency," *United States v. Tarwater*, 308 F.3d 494, 504 (CA6 2002); see also *United States v. Peters*, 153 F.3d 445, 461 (CA7 1998) (collecting cases), it is arguable that "the nature and character of the funds received can be critical in determining whether . . . §7206(1) has been violated, [even if] proof of a tax deficiency is unnecessary," 1 I. Comisky, L. Feld, & S. Harris, Tax Fraud & Evasion ¶2.03[5], p. 21 (2007); see also Brief for Petitioner 15–16. The Government does not argue that Boulware's §§7201 and 7206(1) convictions should be treated differently at this stage of the proceedings, however, and we will accede to the Government's working assumption here that the §§7201 and 7206(1) convictions stand or fall together.

other device to exempt returns of capital.[10] Even if there were compelling reasons to extend §7201 to cases in which no taxes are owed, it bears repeating that "[t]he spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute," *Morissette* v. *United States*, 342 U. S. 246, 263 (1952) (opinion for the Court by Jackson, J.). If §301, §316(a), or §7201 could stand amending, Congress will have to do the rewriting.

C

Not only is *Miller* devoid of the support claimed for it, but it suffers the demerit of some anomalies of its own. First and most obviously, §§301 and 316 are odd stalks for grafting a contemporaneous intent requirement, given the fact that the correct application of their rules will often become known only at the end of the corporation's tax year, regardless of the shareholder's or corporation's understanding months earlier when a particular distribution may have been made. Section 316(a)(2) conditions treating a distribution as a constructive dividend by reference to earnings and profits, and earnings and profits are to be" computed as of the close of the taxable year . . . without regard to the amount of the earnings and profits at the time the distribution was made." A corporation may make a deliberate distribution to a shareholder, with everyone expecting a profitable year and considering the distribution to be a dividend, only to have the shareholder end up liable for no tax if the company closes out its tax year in the red (so long as the shareholder's basis covers the distribution); when such facts are clear at the time the reporting forms and returns are filed,[11] the shareholder does not violate §7201 by paying no tax on the moneys received, intent being beside the point. And since intent to make a distribution a taxable one cannot control, it would be odd to condition nontaxable return-of-capital treatment on contemporaneous intent, when the statute says nothing about intent at all.

The intent interpretation is strange for another reason, too (a reason in some tension with the Ninth Circuit's assumption that an unreported distribution without contemporaneous intent to return capital will support a conviction for evasion). The text of §301(a) ostensibly provides for all variations of tax treatment of distributions received with respect to a corporation's stock unless a separate provision of the Code requires otherwise. Yet *Miller* effectively converts the section into one of merely partial coverage, with the result of leaving one class of distributions in a tax status limbo in criminal cases. That is, while §301(a) expressly provides that distributions made by a corporation to a shareholder with respect to its stock "shall be treated in the manner provided in [§301(c)]," under *Miller*, a distribution from a corporation without earnings and profits would fail to be a return of capital for lack of contemporaneous intent to treat it that way; but to the extent that distribution did not exceed the taxpayer's basis for the stock (and thus become a capital gain), §301(a) would leave the distribution unaccounted for.

It is no answer to say that §61(a) of the Code would step in where §301(a) has been pushed out. Although §61(a) defines gross income, "[e]xcept as otherwise provided," as "all income from whatever source derived," the plain text of §301(a) does provide otherwise for distributions made with respect to stock. So using §61(a) as a stopgap would only sanction yet another eccentricity: §301(a) would be held not to cover what its text says it "shall" (the class of distributions made with respect to stock for which no other more specific provision is made), while §61(a) would need to be applied to what by its terms it should not be (a receipt of funds for which tax treatment is "otherwise provided" in §301(a)).

The implausibility of a statutory reading that either creates a tax limbo or forces resort to an atextual stopgap is all the clearer from the Ninth Circuit's discussion in this case of its own understanding of the consequences of *Miller*'s rule: the court openly acknowledged that "imposing an intent requirement creates a disconnect between civil and criminal liability," 470 F.3d, at 934. In construing distribution rules that draw no distinction in terms of criminal or civil consequences, the disparity of treatment assumed by the Court of Appeals counts heavily against its contemporaneous intent construction (quite apart from the Circuit's understanding that its interpretation entails criminal liability for evasion without any showing of a tax deficiency).

Miller erred in requiring a contemporaneous intent to treat the receipt of corporate funds as a return of capital, and the judgment of the Court of Appeals here, relying on *Miller*, is likewise erroneous.

IV

The Government has raised nothing that calls for affirmance in the face of the Court of Appeals's reliance on *Miller*. The United States does not defend differential treatment of criminal and civil cases, see Brief for United States 24, and it thus stops short of fully defending the Ninth Circuit's treatment. The Government's argument, instead, is that we should affirm under the rule that before any distribution may be treated as a return of capital (or, by a parity of reasoning, a dividend), it must first be distributed to the shareholder "with respect to . . . stock." *Id.*, at 19 (internal quotations omitted). The taxpayer's intent, the Government says, may be relevant to this limiting condition, and Boulware never expressly claimed any such intent. See *ibid.* ("[I]ntent is . . . relevant to whether a payment is a 'distribution . . . with respect to [a corporation's] stock'"); but see Tr. of Oral Arg. 44 ("[J]ust to be clear, the Government is arguing for an objective test here").

[10] "A better [method of exempting returns of capital from taxation] could no doubt be devised." 4 Bittker & Lokken ¶92.1.1, p. 92–3; see *ibid.* (suggesting, for example, that "all receipts from a corporation could be treated as taxable income, and a correction for any resulting over taxation could be made in computing gain or loss when stock is sold, exchanged, or becomes worthless"); see also Andrews, "Out of its Earnings and Profits": Some Reflections on the Taxation of Dividends, 69 Harv. L. Rev. 1403, 1439 (1956) (criticizing the earnings and profits concept "[a]s a device for separating income from return of capital," and suggesting that "[d]istributions which ought to be treated as return of capital [could] be brought within the concept of a partial liquidation by special provision").

[11] Sometimes these facts are not clear, and in certain circumstances a corporation may be required to assume it is profitable. For example, the instructions to IRS Form 1099–DIV provide that when a corporation is unsure whether it has sufficient earnings and profits at the end of the taxable year to cover a distribution to shareholders, "the entire payment must be reported as a dividend." See *http://www.irs.gov/pub/irs-pdf/i1099div.pdf* (as visited Feb. 15, 2008, and available in Clerk of Court's case file).

The Government is of course correct that "with respect to . . . stock" is a limiting condition in §301(a). See *supra*, at 2–3.[12] As the Government variously says, it requires that "the distribution of property by the corporation be made to a shareholder because of his ownership of its stock," Brief for United States 16; and that "'an amount paid by a corporation to a shareholder [be] paid to the shareholder in his capacity as such,'" *ibid.* (quoting 26 CFR §1.301–1(c) (2007) (emphasis deleted)).

This, however, is not the time or place to home in on the "with respect to . . . stock" condition. Facts with a bearing on it may range from the distribution of stock ownership[13] to conditions of corporate employment (whether, for example, a shareholder's efforts on behalf of a corporation amount to a good reason to treat a payment of property as salary). The facts in this case have yet to be raked over with the stock ownership condition in mind, since *Miller* seems to have pretermitted a full consideration of the defensive proffer, and if consideration is to be given to that condition now, the canvas of evidence and Boulware's proffer should be made by a court familiar with the whole evidentiary record.[14]

As a more specific version of its "with respect to . . . stock" position, the Government says that the diversions of corporate funds to Boulware were in fact unlawful, see Brief for United States 34–37; see also n. 5, *supra*, and it argues that §§301 and 316(a) are inapplicable to illegal transfers, see Brief for United States 34–37; see also *D'Agostino*, 145 F.3d, at 73 ("[T]he 'no earnings and profits, no income' rule would not necessarily apply in a case of *unlawful* diversion, such as embezzlement, theft, a violation of corporate law, or an attempt to defraud third party creditors" (emphasis in original)); see also n. 8, *supra*. The Government goes so far as to claim that "[t]he only rational basis for the jury's judgment was a conclusion that [Boulware] unlawfully diverted the funds." Brief for United States 37.

But we decline to take up the question whether an unlawful diversion may ever be deemed a "distribution . . . with respect to [a corporation's] stock," a question which was not considered by the Ninth Circuit. We do, however, reject the Government's current characterization of the jury verdict in Boulware's case. True, the jurors were not moved by Boulware's suggestion that the diversions were corporate advances or loans, or that he was using the funds for corporate purposes. But the jury was not asked, and cannot be said to have answered, whether Boulware breached any fiduciary duty as a controlling shareholder, unlawfully diverted corporate funds to defraud his wife, or embezzled HIE's funds outright.

V

Sections §§301 and 316(a) govern the tax consequences of constructive distributions made by a corporation to a shareholder with respect to its stock. A defendant in a criminal tax case does not need to show a contemporaneous intent to treat diversions as returns of capital before relying on those sections to demonstrate no taxes are owed. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[12] Another limiting condition is that the diversion of funds must be a "distribution" in the first place (regardless of the "with respect to stock" limitation), see *supra*, at 6–8, though the Government is content to assume that §301(a)'s "distribution" language is capacious enough to cover the diversions involved here, and that if Boulware bears the burden of production in going forward with the defense that the funds he received constituted a "distribution" within the meaning of §301(a), see n. 14, *infra*, that burden has been met. Nor does the Government dispute that Boulware offered sufficient evidence of his basis and HIE's lack of earnings and profits. See Brief for United States 34, n. 11.

[13] See, *e.g.*, *Truesdell v. Commissioner*, IRS Non Docketed Service Advice Review, 1989 WL 1172952 (Mar. 15, 1989) ("We believe a corporation and its shareholders have a common objective—to earn a profit for the corporation to pass onto its shareholders. Especially where the corporation is wholly owned by one shareholder, the corporation becomes the alter ego of the shareholder in his profit making capacity. . . . [B]y passing corporate funds to himself as shareholder, a sole shareholder is acting in pursuit of these common objectives"). We note, however, that although Boulware was not a sole shareholder, the Tax Court has taken it as "well settled that a distribution of corporate earnings to shareholders may constitute a dividend," and so a return of capital as well, "notwithstanding that it is not in proportion to stock-holdings." *Dellinger v. Commissioner*, 32 T. C. 1178, 1183 (1959); see *ibid.* (noting that because other stockholders did not complain when a taxpayer received unequal property, "under the circumstances they must be deemed to have ratified the distribution"); see also *Crowley v. Comissioner*, 962 F.2d 1077 (CA1 1992); *Lengsfield v. Commissioner*, 241 F.2d 508 (CA5 1957); *Baird v. Commissioner*, 25 T. C. 387 (1955); *Thielking v. Commissioner*, 53 TCM 746 (1987), ¶87, 227, P-H Memo TC.

[14] Boulware does not dispute that he bears the burden of producing some evidence to support his return-of-capital theory, including evidence that the corporation lacked earnings and profits and that he had sufficient basis in his stock to cover the distribution. See Tr. of Oral Arg. 53. He instead argues that, as to the "with respect to . . . stock" requirement, it suffices to show "[t]hat he is a stockholder, and that he did not receive this money in any nonstockholder capacity." *Id.*, at 57. The Government, for its part, on the authority of *Holland v. United States*, 348 U. S. 121 (1954) and *Bok*, 156 F.3d, at 163–164, argues that Boulware must offer more evidence than that. We express no view on that issue here, just as we decline to consider the more general question whether the Second Circuit's rule in *Bok*, which places on the criminal defendant the burden to produce evidence in support of a return-of-capital theory, is authorized by *Holland* and consistent with *Sandstrom v. Montana*, 442 U. S. 510 (1979), and related cases.

Part IV. Items of General Interest

Notice of Proposed Rulemaking

Withdrawal of Regulations Under Old Section 6323(b)(10)

REG–141998–06

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations related to the validity and priority of the Federal tax lien against certain persons under section 6323 of the Internal Revenue Code (the Code). The proposed regulations update the corresponding Treasury Regulations in various respects. The proposed regulations reflect the adjustment within section 6323(b) of certain dollar amounts as well as the amendment of section 6323(b)(10) by the IRS Restructuring and Reform Act of 1998 (RRA 1998). In addition, the proposed regulations amend the existing regulations under section 6323(c), (g), and (h) to reflect that a notice of Federal tax lien (NFTL) is not treated as meeting the filing requirements until it is both filed and indexed in the office designated by the state (in the case of real property located in a state where a deed is not valid against a purchaser until the filing of such deed has been entered and recorded in the public index); the lien will be extinguished if an NFTL contains a certificate of release and the NFTL is not timely refiled; and current law provides the IRS with a 10-year period to collect an assessed tax. The proposed regulations also make changes to the existing regulations under section 6323(f) to clarify the IRS's authority to file NFTLs electronically. Finally, the proposed regulations make incidental changes throughout the existing regulations under section 6323 to make the dates in the examples more contemporaneous with the present and to remove language deemed no longer necessary.

DATES: Written or electronic comments and requests for a public hearing must be received by June 16, 2008.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–141998–06), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–141998–06), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, 20224, or via the Federal eRulemaking Portal at *www.regulations.gov* (IRS–REG–141998–06).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Debra A. Kohn at (202) 622–7985; concerning submissions of comments and the hearing, Regina Johnson at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Procedure and Administration Regulations (26 CFR part 301) under section 6323 of the Code. If any person liable for tax neglects or refuses to pay after demand, the amount of that tax is a lien in favor of the United States against all property and rights to property of such person under section 6321. Section 6323 provides that a Federal tax lien is only valid against certain persons if an NFTL is filed and addresses generally the validity and priority of the Federal tax lien against such persons. Section 6323(b) and (c) addresses the protection of certain interests even though an NFTL has been filed. Section 6323(f) prescribes the place for filing and the form of an NFTL. Section 6323(g) addresses the refiling of an NFTL. Section 6323(h) contains definitions of certain terms used throughout section 6323.

Since 1976, there have been numerous amendments to section 6323 that are not reflected in the existing regulations. Section 6323(b)(10) has been amended by RRA 1998. In addition, several subsections of section 6323(b) have been amended to increase the dollar amounts these sections reference. Also, section 6323(f)(4) was amended by the Revenue Act of 1978 to provide that an NFTL does not meet the filing requirements with respect to real property until the filing is entered and recorded in a public index maintained by the state if the laws of the state provide that a deed is not valid against a purchaser unless it is recorded in a public index. Moreover, section 6502, the statute that governs the period the IRS has to take collection action (referenced in various places throughout §301.6323(g)–1(c)), was amended by the Revenue Act of 1990 to change the period from six years to 10 years.

There have also been several changes to IRS practice that are not reflected in the existing regulations. Section 301.6323(f)–1(d)(2) of the existing regulations provides that an NFTL may be filed electronically if the state in which it is being filed permits electronic filing. Whether a state "permits" electronic filing of NFTLs has been subject to varying interpretations, thus casting doubt on the validity of NFTLs filed electronically in jurisdictions that do not specifically provide for electronic filing. However, the requirements for proper filing of liens are a matter of Federal, not state, law. *United States v. Union Cent. Life Ins. Co.*, 368 U.S. 291, 82 S. Ct. 349, 7 L. Ed. 2d 294 (1961). Thus, the IRS already possesses the authority to dictate the form and content of its NFTLs. The proposed regulations remove the "permits" language so that they correctly reflect the IRS's authority to file NFTLs electronically.

Section 301.6323(g)–1(a)(3) and (4) of the existing regulations states that the IRS may refile an NFTL once the filing period has elapsed and that failure to refile within the specified period does not affect the existence of the lien. The existing regulations also provide that failure to refile during the specified period does not affect the NFTL with respect to property that is the subject matter of a suit or that was levied upon prior to the expiration of the required refiling period. These provisions concerning the effect of a failure to refile are, to some extent, inconsistent with current IRS practice. Most filed NFTLs now contain a certificate of release that automatically releases the lien as of the date the NFTL prescribes, which is the date at the end of the required refiling period. Therefore, if

the IRS does not refile an NFTL within the specified period, the certificate of release contained in the NFTL extinguishes the lien. The proposed regulations update the regulations under section 6323 to reflect these changes in IRS practice.

The Code currently provides a 10-year period for instituting a proceeding in court or serving a levy to collect an assessed tax liability, while §301.6323(g)–1(c) of the existing regulations references the 6-year period that existed until 1990. The proposed regulations update §301.6323(g)–1(c) to reflect this change in the law.

The proposed regulations also update the regulations under section 6323(h) to reflect changes made by the Uniform Commercial Code (UCC). Section 9–312(a) of the UCC, as adopted by most states in 2001, now provides that a security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.

The proposed regulations also make various incidental changes throughout the §301.6323 regulations.

Explanation of Provisions

I. *Adjustment of Dollar Amounts*

Under section 6323(b) of the Code, a Federal tax lien is not valid against certain interests even though an NFTL has been filed.

Section 6323(b)(4) includes, as one such interest, certain tangible personal property purchased in a casual sale. In 1976, the purchase price of such property was required to be less than $250. The limit of $250 is reflected in §301.6323(b)–1(d)(1) and in examples 1 and 3 contained in §301.6323(b)–1(d)(3). This limit has been raised in the most recent amendment to section 6323(b)(4) to $1,000. The statutory limit is indexed annually for inflation. After indexing, the amount for 2008 is $1,320.

Section 6323(b)(7) protects a mechanic's lienor with respect to residential property subject to the mechanic's lien. In 1976, the protection extended to such property was limited to an amount not more than $1,000. The limit of $1,000 is reflected in §301.6323(b)–1(g)(1) and in the examples contained in §301.6323(b)–1(g)(2). This amount was raised to $5,000 in the most recent amendment to section 6323(b)(7). The statutory limit is indexed annually for inflation. After indexing, the amount for 2008 is $6,600. The proposed regulations update §301.6323(b)–1(d) and (g) to make the dollar limits consistent with those applicable under the current version of section 6323(b)(4) and (7).

Section 301.6323(b)–1(d)(3), *Example 3*, references a $500 limit on household goods exempt from levy, citing Treas. Reg. §301.6334–1(a)(2). Section 301.6334–1(a)(2) is the regulation under I.R.C. §6334(a)(2). The amount reflected in section 6334(a)(2) as set forth in the most recent version of the Code is $6,250. The amounts in both section 6334(a)(2) and the corresponding regulation are indexed annually for inflation. After indexing, the applicable amount for 2008 is $7,900. Accordingly, §301.6323(b)–1(d)(3), *Example 3*, is amended to make the reference to the limit on household goods exempt from levy consistent with the amounts applicable in section 6334(a)(2) and §301.6334–1(a)(2).

II. *Removal of Protection for Passbook Loans*

Section 6323(b)(10) currently protects from a Federal tax lien certain institutions holding deposit-secured loans, to the extent of any loan made without actual notice or knowledge of the Federal tax lien. Prior to the enactment of RRA 1998, section 6323(b)(10) was entitled "passbook loans" and protected from a Federal tax lien an institution granting a loan without actual notice or knowledge of the Federal tax lien, if the loan was secured by an account evidenced by a passbook and if the lending institution was continuously in possession of the passbook from the time the loan was made. Section 301.6323(b)–1(j) reflects this language and, in addition, includes both a definition of "passbook" and an example of the provision's operation.

The amendment of section 6323(b)(10) renders the language in the regulations pertaining to passbook accounts obsolete. Because leaving §301.6323(b)–1(j) in place is misleading and unnecessary in light of the amendment of section 6323(b)(10), the proposed regulations remove §301.6323(b)–1(j).

III. *Clarification of Language Authorizing IRS to File NFTLs Electronically*

Section 301.6323(f)–1(d)(2) sets forth a definition of a Form 668, the form that, when filed, serves as an NFTL. This section includes NFTLs filed by electronic or magnetic media "if a state in which [an NFTL] is filed permits a notice of Federal tax lien to be filed by the use of an electronic or magnetic medium."

Most local recording offices now have the technological capability to accept electronically-filed NFTLs. The proposed regulations amend §301.6323(f)–1(d)(2) to provide that a Form 668 may be filed either in paper form or electronically. In addition, the proposed regulations specifically define transmission by fax and e-mail as electronic, as opposed to paper, filings. The regulations as amended reflect the IRS's authority to file NFTLs electronically in all situations and allow the IRS to work with local jurisdictions to receive electronically-filed NFTLs if they have the capacity to do so without obtaining permission from the state.

IV. *Revision of Language on Late Refiling of NFTLs*

Section 301.6323(g)–1(a) sets forth general principles pertaining to refiling NFTLs. Section 301.6323(g)–1(a)(1) provides in part that if two or more NFTLs are filed with respect to a particular tax assessment, the failure to refile during the specified period in respect to one of the notices does not affect the effectiveness of the refiling of any other NFTL. Section 301.6323(g)–1(a)(3) states in part that the failure to refile an NFTL during the required filing period does not affect the effectiveness of the notice with respect to property that is the subject matter of a suit or that has been levied upon prior to the expiration of the filing period. Section 301.6323(g)–1(a)(4), as well as several of the examples in §301.6323(g)–1(b)(3) and (c)(3), suggest that a lien may continue to exist when an NFTL is not refiled. These provisions are, to some extent, inconsistent with current IRS practice. Most NFTLs now contain a certificate of release that automatically becomes effective on the date prescribed in the NFTL, which is the date the required refiling period ends. Therefore, if an NFTL that contains a cer-

tificate of release is not timely refiled in each jurisdiction where it was originally filed, the lien self-releases and is extinguished in all jurisdictions. See I.R.C. §6325(f)(1)(A). The extinguishment of the lien invalidates NFTLs filed in other jurisdictions and requires the IRS to file certificates of revocation, as well as new NFTLs, in each jurisdiction where NFTLs were previously filed.

The proposed regulations amend these provisions to provide that, with respect to an NFTL that includes a certificate of release, failure to timely refile the NFTL in any jurisdiction where it was originally filed extinguishes the lien, and that when an NFTL is filed in more than one jurisdiction, certificates of revocation as well as new NFTLs must be filed in all the jurisdictions for the lien to be reinstated.

V. *Revision of References to 6-Year Collection Period*

Section 6502 generally affords a 10-year period for instituting a proceeding in court or serving a levy to collect a properly assessed tax. The period section 6502 allowed for taking these collection actions was, until 1990, six years. The existing regulations under section 6323(g) do not reflect this change. Instead, subsections (b) and (c) of §301.6323(g)–1, which addresses refiling of NFTLs, imply that the applicable period for collection is six years. *Example 5* of §301.6323(g)–1(b)(3) references the 6-year period. In addition, several references to a 6-year collection period occur in §301.6323(g)–1(c)(1), and additional references to the 6-year period occur in *Example 1* in §301.6323(g)–1(c)(3). The proposed regulations update §301.6323(g)–1(c) to reflect this change in the law.

VI. *Incidental Updates*

Various references and dates contained in the regulations under section 6323 have been rendered obsolete since 1976. The proposed regulations update various provisions throughout the §301.6323 regulations to make dates more contemporaneous with the present and remove language deemed no longer necessary. In addition, the proposed regulations remove all references to Internal Revenue Service district directors, as these positions were eliminated by the Internal Revenue Service reorganization implemented pursuant to RRA 1998.

Proposed Effective Date

These regulations are proposed to generally apply with respect to any NFTL filed on or after the date that these regulations are published 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 also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has 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 Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are timely submitted to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they may be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person 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 Debra A. Kohn of the Office of the Associate Chief Counsel (Procedure and Administration).

* * * * *

Proposed Amendments to the Regulations

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

PART 301—PROCEDURE AND ADMINISTRATION

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

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

Par. 2. Section 301.6323(b)–1 is amended as follows:

1. Paragraph (d)(1) is revised.

2. Paragraphs (d)(3) *Example 1* and (d)(3) *Example 3* are revised.

3. Paragraphs (g)(1) and (g)(2) *Example 1* through *Example 3* are revised.

4. Paragraphs (i)(1)(iii) and (j) are revised.

The revisions read as follows:

§301.6323(b)–1 Protection for certain interests even though notice filed.

* * * * *

(d) *Personal property purchased in casual sale*—(1) *In general*. Even though a notice of lien imposed by section 6321 is filed in accordance with §301.6323(f)–1, the lien is not valid against a purchaser (as defined in §301.6323(h)–1(f)) of household goods, personal effects, or other tangible personal property of a type described in §301.6334–1 (which includes wearing apparel, school books, fuel, provisions, furniture, arms for personal use, livestock, and poultry (whether or not the seller is the head of a family); and books and tools of a trade, business, or profession (whether or not the trade, business, or profession of the seller)), purchased, other than for resale, in a casual sale for less than $1,320, effective for 2008 and adjusted each year based on the rate of inflation (excluding interest and expenses described in §301.6323(e)–1).

* * * * *

(3) * * *

Example 1. A, an attorney's widow, sells a set of law books for $200 to B, for B's own use. Prior to the sale a notice of lien was filed with respect to A's delinquent tax liability in accordance with §301.6323(f)–1. B has no actual notice or knowledge of the tax lien. In addition, B does not know that the sale is one of a series of sales. Because the sale is a casual sale for less than $1,320 and involves books

of a profession (tangible personal property of a type described in §301.6334–1, irrespective of the fact that A has never engaged in the legal profession), the tax lien is not valid against B even though a notice of lien was filed prior to the time of B's purchase.

* * * * *

Example 3. In an advertisement appearing in a local newspaper, G indicates that he is offering for sale a lawn mower, a used television set, a desk, a refrigerator, and certain used dining room furniture. In response to the advertisement, H purchases the dining room furniture for $200. H does not receive any information which would impart notice of a lien, or that the sale is one of a series of sales, beyond the information contained in the advertisement. Prior to the sale, a notice of lien was filed with respect to G's delinquent tax liability in accordance with §301.6323(f)–1. Because H had no actual notice or knowledge that substantially all of G's household goods were being sold or that the sale is one of a series of sales, and because the sale is a casual sale for less than $1,320, H does not purchase the dining room furniture subject to the lien. The household goods are of a type described in §301.6334–1(a)(2) irrespective of whether G is the head of a family or whether all such household goods offered for sale exceed $7,900 in value.

* * * * *

(g) *Residential property subject to a mechanic's lien for certain repairs and improvements*—(1) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with §301.6323(f)–1, the lien is not valid against a mechanic's lienor (as defined in §301.6323(h)–1(b)) who holds a lien for the repair or improvement of a personal residence if —

(i) The residence is occupied by the owner and contains no more than four dwelling units; and

(ii) The contract price on the prime contract with the owner for the repair or improvement (excluding interest and expenses described in §301.6323(e)–1) is not more than $6,600, effective for 2008 and adjusted each year based on the rate of inflation.

(iii) For purposes of paragraph (g)(1)(ii) of this section, the amounts of subcontracts under the prime contract with the owner are not to be taken into consideration for purposes of computing the $6,600 prime contract price. It is immaterial that the notice of tax lien was filed before the contractor undertakes his work or that he knew of the lien before undertaking his work.

(2) * * *

Example 1. A owns a building containing four apartments, one of which he occupies as his personal residence. A notice of lien which affects the building is filed in accordance with §301.6323(f)–1. Thereafter, A enters into a contract with B in the amount of $800, which includes labor and materials, to repair the roof of the building. B purchases roofing shingles from C for $300. B completes the work and A fails to pay B the agreed amount. In turn, B fails to pay C for the shingles. Under local law, B and C acquire mechanic's liens on A's building. Because the contract price on the prime contract with A is not more than $6,600 and under local law B and C acquire mechanic's liens on A's building, the liens of B and C have priority over the Federal tax lien.

Example 2. Assume the same facts as in *Example 1*, except that the amount of the prime contract between A and B is $7,100. Because the amount of the prime contract with the owner, A, is in excess of $6,600, the tax lien has priority over the entire amount of each of the mechanic's liens of B and C, even though the amount of the contract between B and C is $300.

Example 3. Assume the same facts as in *Example 1*, except that A and B do not agree in advance upon the amount due under the prime contract but agree that B will perform the work for the cost of materials and labor plus 10 percent of such cost. When the work is completed, it is determined that the total amount due is $850. Because the prime contract price is not more than $6,600 and under local law B and C acquire mechanic's liens on A's residence, the liens of B and C have priority over the Federal tax lien.

* * * * *

(i) * * * (1) * * *

(iii) After the satisfaction of a levy pursuant to section 6332(b), unless and until the Internal Revenue Service delivers to the insuring organization a notice (for example, another notice of levy, a letter, etc.) executed after the date of such satisfaction, that the lien exists.

* * * * *

(j) *Effective/applicability date.* This section applies to any notice of Federal tax lien filed on or after the date these regulations are published as final regulations in the **Federal Register**.

Par. 3. Section 301.6323(c)–2 is amended as follows:

1. Paragraph (d), *Example 1* through *Example 5*, is revised.

2. Paragraph (e) is added.

The revisions and addition read as follows:

§301.6323(c)–2 Protection for real property construction or improvement financing agreements.

* * * * *

(d) * * *

Example 1. A, in order to finance the construction of a dwelling on a lot owned by him, mortgages the property to B. The mortgage, executed January 4, 2006, includes an agreement that B will make cash disbursements to A as the construction progresses. On February 1, 2006, in accordance with §301.6323(f)–1, a notice of lien is filed and recorded in the public index with respect to A's delinquent tax liability. A continues the construction, and B makes cash disbursements on June 15, 2006, and December 15, 2006. Under local law B's security interest arising by virtue of the disbursements is protected against a judgment lien arising February 1, 2006 (the date of tax lien filing) out of an unsecured obligation. Because B is the holder of a security interest coming into existence by reason of cash disbursements made pursuant to a written agreement, entered into before tax lien filing, to make cash disbursements to finance the construction of real property, and because B's security interest is protected, under local law, against a judgment lien arising as of the time of tax lien filing out of an unsecured obligation, B's security interest has priority over the tax lien.

Example 2. (i) C is awarded a contract for the demolition of several buildings. On March 3, 2004, C enters into a written agreement with D which provides that D will make cash disbursements to finance the demolition and also provides that repayment of the disbursements is secured by any sums due C under the contract. On April 1, 2004, in accordance with §301.6323(f)–1, a notice of lien is filed with respect to C's delinquent tax liability. With actual notice of the tax lien, D makes cash disbursements to C on August 13, September 13, and October 13, 2004. Under local law D's security interest in the proceeds of the contract with respect to the disbursements is entitled to priority over a judgment lien arising on April 1, 2004 (the date of tax lien filing) out of an unsecured obligation.

(ii) Because D's security interest arose by reason of disbursements made pursuant to a written agreement, entered into before tax lien filing, to make cash disbursements to finance a contract to demolish real property, and because D's security interest is valid under local law against a judgment lien arising as of the time of tax lien filed out of an unsecured obligation, the tax lien is not valid with respect to D's security interest in the proceeds of the demolition contract.

Example 3. Assume the same facts as in *Example 2* and, in addition, assume that, as further security for the cash disbursements, the March 3, 2004, agreement also provides for a security interest in all of C's demolition equipment. Because the protection of the security interest arising from the disbursements made after tax lien filing under the agreement is limited under section 6323(c)(3) to the proceeds of the demolition contract and because, under the circumstances, the security interest in the equipment is not otherwise protected under section 6323, the tax lien will have priority over D's security interest in the equipment.

Example 4. (i) On January 3, 2006, F and G enter into a written agreement, whereby F agrees to provide G with cash disbursements, seed, fertilizer, and insecticides as needed by G, in order to finance the raising and harvesting of a crop on a farm owned by G. Under the terms of the agreement F is to have a security interest in the crop, the farm, and all other property then owned or thereafter acquired by G. In accordance with §301.6323(f)–1, on January 10, 2006, a notice of lien is filed and recorded in the public index with respect to G's delinquent tax liability. On March 3, 2006, with actual notice of the tax lien, F makes a cash disbursement of $5,000 to G and furnishes him seed, fertilizer, and insecticides having a value of $10,000. Under local law F's security in-

terest, coming into existence by reason of the cash disbursement and the furnishing of goods, has priority over a judgment lien arising January 10, 2006 (the date of tax lien filing and recording in the public index) out of an unsecured obligation.

(ii) Because F's security interest arose by reason of a disbursement (including the furnishing of goods) made under a written agreement which was entered into before tax lien filing and which constitutes an agreement to finance the raising or harvesting of a farm crop, and because F's security interest is valid under local law against a judgment lien arising as of the time of tax lien filing out of an unsecured obligation, the tax lien is not valid with respect to F's security interest in the crop even though a notice of lien was filed before the security interest arose. Furthermore, because the farm is property subject to the tax lien at the time of tax lien filing, F's security interest with respect to the farm also has priority over the tax lien.

Example 5. Assume the same facts as in *Example 4* and in addition that on October 2, 2006, G acquires several tractors to which F's security interest attaches under the terms of the agreement. Because the tractors are not property subject to the tax lien at the time of tax lien filing, the tax lien has priority over F's security interest in the tractors.

(e) *Effective/applicability date*. This section applies with respect to any notice of Federal tax lien filed on or after the date these regulations are published as final regulations in the **Federal Register**.

Par. 4. Section 301.6323(f)–1 is amended as follows:

1. Paragraph (d)(2) is revised.
2. Paragraph (f) is added.

The revision and addition read as follows:

§301.6323(f)–1 Place for filing notice; form.

* * * * *

(d) * * *

(2) *Form 668 defined*. The term *Form 668* means either a paper form or a form transmitted electronically, including a form transmitted by facsimile (fax) or electronic mail (e-mail). A Form 668 must identify the taxpayer, the tax liability giving rise to the lien, and the date the assessment arose regardless of the method used to file the notice of Federal tax lien.

* * * * *

(f) *Effective/applicability date*. This section applies with respect to any notice of Federal tax lien filed on or after the date these regulations are published as final regulations in the **Federal Register**.

Par. 5. Section 301.6323(g)–1 is amended as follows:

1. Paragraphs (a)(1), (a)(4), (b)(3) introductory text, (b)(3) *Example 1*, (b)(3) *Example 5*, and (c)(1) are revised.
2. Paragraphs (a)(3), (a)(3)(i), and (a)(3)(ii) are redesignated as paragraphs (a)(3)(i), (a)(3)(i)(A), and (a)(3)(i)(B), respectively.
3. The undesignated text following newly-designated paragraph (a)(3)(i)(B) is designated as paragraph (a)(3)(ii).
4. Newly-designated paragraph (a)(3)(i) is revised.
5. Newly-designated paragraph (a)(3)(i)(A) is revised.
6. Newly-designated paragraph (a)(3)(ii) is revised.
7. Paragraphs (c)(1) through (c)(1)(ii) are revised.
8. Paragraph (c)(2) is removed.
9. Paragraph (c)(3) is redesignated as paragraph (c)(2) and revised.
10. Paragraph (d) is added.

The revisions and addition read as follows:

§301.6323(g)–1 Refiling of notice of tax lien.

(a) *In general*—(1) *Requirement to refile*. In order to continue the effect of a notice of lien, the notice must be refiled in the place described in paragraph (b) of this section during the required filing period (described in paragraph (c) of this section). If two or more notices of lien are filed with respect to a particular tax assessment, and each notice of lien contains a certificate of release that releases the lien when the required refiling period ends, the failure to comply with the provisions of paragraphs (b)(1)(i) and (c) of this section in respect to one of the notices of lien releases the lien and renders ineffective the refiling of any other notice of lien.

* * * * *.

(3) *Effect of failure to refile*. (i) If the Internal Revenue Service fails to refile a notice of lien in the manner described in paragraphs (b) and (c) of this section, the notice of lien is not effective, after the expiration of the required filing period, as against any person without regard to when the interest of the person in the property subject to the lien was acquired. If a notice of lien contains a certificate of release that releases the lien at the end of the required refiling period and the notice of lien is not refiled during this period, the lien is extinguished and the notice of lien is ineffective with respect to—

(A) Property which is the subject matter of a suit, to which the United States is a party, commenced prior to the expiration of the required filing period; and

* * * * *

(ii) However, if a notice of lien does not contain a certificate of release that releases the lien at the end of the required refiling period, the failure to refile during the required refiling period will not affect the existence of the lien nor the effectiveness of the notice with respect to property which is the subject matter of a suit commenced prior to the expiration of the required refiling period, or property which has been levied upon prior to the expiration of such period.

(4) *Filing of new notice*. If a notice of lien is not refiled, and the notice of lien contains a certificate of release that automatically releases the lien when the required refiling period ends, the lien is released as of that date and is no longer in existence. The Internal Revenue Service must revoke the release before it can file a new notice of lien. This new filing must meet the requirements of section 6323(f) and §301.6323(f)–1 and is effective from the date on which such filing is made.

(b) * * *

(3) *Examples*. The following examples illustrate the provisions of this section:

Example 1. A, a delinquent taxpayer, is a resident of State M and owns real property in State N. In accordance with §301–6323–f(1), notices of lien are filed in States M and N. The notices of lien contain certificates of release that release the lien at the end of the required refiling period. In order to continue the effect of the notice of lien filed in either M or N, the IRS must refile, during the required refiling period, the notice of lien with the appropriate office in M as well as with the appropriate office in N.

* * * * *

Example 5. D, a delinquent taxpayer, is a resident of State M and owns real property in States N and O. In accordance with §301.6323(f)–1, the Internal Revenue Service files notices of lien in M, N, and O States. Nine years and 6 months after the date of the assessment shown on the notice of lien, D establishes his residence in P, and at that time the Internal Revenue Service receives from D a notification of his change in residence in accordance with the provisions of paragraph (b)(2) of this section. On a date which is 9 years and 7 months after the date of the assessment shown on the notice of lien, the IRS properly refiles notices of lien in M, N, and O which refilings are sufficient to continue the effect of each of the notices of lien. The Internal Revenue Service is not required to file a notice of lien in P because D did not notify the Internal Revenue Service of his change of residence

to P more than 89 days prior to the date each of the refilings in M, N, and O was completed.

* * * * *

(c) *Required filing period*—(1) *In general*. For the purpose of this section, except as provided in paragraph (c)(2) of this section, the term *required filing period* means—

(i) The 1-year period ending 30 days after the expiration of 10 years after the date of the assessment of the tax; and

(ii) The 1-year period ending with the expiration of 10 years after the close of the preceding required refiling period for such notice of lien.

(2) *Examples*. The following examples illustrate the provisions of this paragraph:

Example 1. On March 10, 1998, an assessment of tax is made against B, a delinquent taxpayer, and a lien for the amount of the assessment arises on that date. On July 10, 1998, in accordance with §301.6323(f)–1, a notice of lien is filed. The notice of lien filed on July 10, 1998, is effective through April 9, 2008. The first required refiling period for the notice of lien begins on April 10, 2007, and ends on April 9, 2008. A refiling of the notice of lien during that period will extend the effectiveness of the notice of lien filed on July 10, 1998, through April 9, 2018. The second required refiling period for the notice of lien begins on April 10, 2017, and ends on April 9, 2018.

Example 2. Assume the same facts as in *Example 1*, except that the Internal Revenue Service fails to refile a notice of lien during the first required refiling period (April 10, 2007, through April 9, 2008). A notice of lien is filed on June 9, 2009, in accordance with §301.6323(f)–1. This notice is ineffective if the original notice contained a certificate of release, as the certificate of release would have had the effect of extinguishing the lien as of April 10, 2008. The Internal Revenue Service could revoke the release and file a new notice of lien, which would be effective as of the date it was filed.

(d) *Effective/applicability date*. This section applies with respect to any notice of Federal tax lien filed on or after the date these regulations are published as final regulations in the **Federal Register**.

Par. 6. Section 301.6323(h)–1 is amended as follows:

1. Paragraphs (a)(2)(ii) and (a)(3) are revised.

2. A new paragraph (h) is added.

The revisions and addition read as follows:

§301.6323(h)–1 Definitions.

(a) * * *

(2) * * *

(ii) The following example illustrates the application of paragraph (a)(2):

Example. (i) Under the law of State X, a security interest in certificated securities, negotiable documents, or instruments may be perfected, and hence protected against a judgment lien, by filing or by the secured party taking possession of the collateral. However, a security interest in such intangible personal property is considered to be temporarily perfected for a period of 20 days from the time the security interest attaches, to the extent that it arises for new value given under an authenticated security agreement. Under the law of X, a security interest attaches to such collateral when there is an agreement between the creditor and debtor that the interest attaches, the debtor has rights in the property, and consideration is given by the creditor. Under the law of X, in the case of temporary perfection, the security interest in such property is protected during the 20-day period against a judgment lien arising, after the security interest attaches, out of an unsecured obligation. Upon expiration of the 20-day period, the holder of the security interest must perfect its security interest under local law.

(ii) Because the security interest is perfected during the 20-day period against a subsequent judgment lien arising out of an unsecured obligation, and because filing or the taking of possession before the conclusion of the period of temporary perfection is not considered, for purposes of paragraph (a)(2)(i) of this section, to be a requisite action which relates back to the beginning of such period, the requirements of this paragraph are satisfied. Because filing or taking possession is a condition precedent to continued perfection, filing or taking possession of the collateral is a requisite action to establish such priority after expiration of the period of temporary perfection. If there is a lapse of perfection for failure to take possession, the determination of when the security interest exists (for purposes of protection against the tax lien) is made without regard to the period of temporary perfection.

(3) *Money or money's worth*. For purposes of this paragraph, the term *money or money's worth* includes money, a security (as defined in paragraph (d) of this section), tangible or intangible property, services, and other consideration reducible to a money value. Money or money's worth also includes any consideration which otherwise would constitute money or money's worth under the preceding sentence which was parted with before the security interest would otherwise exist if, under local law, past consideration is sufficient to support an agreement giving rise to a security interest. A firm commitment to part with money, a security, tangible or intangible property, services, or other consideration reducible to a money value does not, in itself, constitute a consideration in money or money's worth. A relinquishing or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights is not a consideration in money or money's worth. Nor is love and affection, promise of marriage, or any other consideration not reducible to a money value a consideration in money or money's worth.

* * * * *

(h) *Effective/applicability date*. This section applies as of the date these regulations are published as final regulations in the **Federal Register**.

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

(Filed by the Office of the Federal Register on April 16, 2008, 8:45 a.m., and published in the issue of the Federal Register for April 17, 2008, 73 F.R. 20877)

Notice of Proposed Rulemaking and Notice of Public Hearing

Regulations Under Section 2642(g)

REG–147775–06

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations providing guidance under section 2642(g)(1). The proposed regulations describe the circumstances and procedures under which an extension of time will be granted under section 2642(g)(1). The proposed guidance affects individuals (or their estates) who failed to make a timely allocation of generation-skipping transfer (GST) exemption to a transfer, and individuals (or their estates) who failed to make a timely election under section 2632(b)(3) or (c)(5). This document also provides notice of a public hearing.

DATES: Written or electronic comments must be received by July 16, 2008. Outlines of topics to be discussed at the public hearing scheduled for August 5, 2008, must be received by July 15, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–147775–06), Internal Revenue Service, Room 5203,

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–147775–06), 1111 Constitution Avenue, NW, Washington, DC 20224; or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS-REG–147775–06). The public hearing will be held in the IRS auditorium.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Theresa M. Melchiorre, (202) 622–3090; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard Hurst at *Richard.A.Hurst@irscounsel.treas.gov* or (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have 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 collections of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by June 16, 2008.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The reporting requirement in these proposed regulations is in §26.2642–7(h)(2) and (3). This information must be reported by transferors or the executors of transferors' estates requesting relief under section 2642(g)(1). This information will be used by the IRS to determine whether to grant a transferor or a transferor's estate an extension of time to: (1) allocate GST exemption, as defined in section 2631, to a transfer; (2) elect under section 2632(b)(3) (the election not to have the deemed allocation of GST exemption apply to a direct skip); (3) elect under section 2632(c)(5)(A)(i) (the election not to have the deemed allocation of GST exemption apply to an indirect skip or transfers made to a particular trust); and (4) elect under section 2632(c)(5)(A)(ii) (the election to treat any trust as a GST trust for purposes of section 2632(c)).

The following estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on the information that is available to the IRS. Individual respondents may require greater or less time, depending on their particular circumstances.

Estimated total annual reporting burden: 1800 hours.

Estimated average annual burden: 2 hours.

Estimated number of respondents: 900.

Estimated annual frequency of response: When relief is requested.

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.

Background

The proposed regulations provide guidance on the application of section 2642(g)(1). Congress added section 2642(g)(1) to the Internal Revenue Code (Code) in section 564 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), (Public Law 107–16, §564, 115 Stat. 91). This section directs the Secretary to issue regulations describing the circumstances and procedures under which an extension of time will be granted to: (1) allocate GST exemption, as defined in section 2631(a), to a transfer; (2) elect under section 2632(b)(3) (the election not to have the deemed allocation of GST exemption apply to a direct skip); (3) elect under section 2632(c)(5)(A)(i) (the election not to have the deemed allocation of GST exemption apply to an indirect skip or transfers made to a particular trust); and (4) elect under section 2632(c)(5)(A)(ii) (the election to treat any trust as a GST trust for purposes of section 2632(c)). In determining whether to grant relief, section 2642(g)(1) directs that all relevant circumstances be considered including evidence of intent contained in the trust instrument or the instrument of transfer.

The legislative history accompanying section 2642(g)(1) indicates that Congress believed that, in appropriate circumstances, an individual should be granted an extension of time to allocate GST exemption regardless of whether any period of limitations had expired. Those circumstances include situations in which the taxpayer intended to allocate GST exemption and the failure to allocate the exemption was inadvertent. H.R. Conf. Rep. No. 107–84, 202 (2001).

After the enactment of section 2642(g)(1), the IRS issued Notice 2001–50, 2001–2 C.B. 189, which announced that transferors may seek an extension of time to make an allocation of GST exemption. The notice provides, generally, that relief will be granted under §301.9100–3 of the Procedure and Administration Regulations if the taxpayer satisfies the requirements of those regulations and establishes to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and that a grant of the requested relief will not prejudice the interests of the Government.

If relief is granted under §301.9100–3 and the allocation is made, the amount of GST exemption allocated to the transfer is the Federal gift or estate tax value of the property as of the date of the transfer and the allocation is effective as of the date of the transfer. (Notice 2001–50 will be made obsolete upon the publication of the Treasury decision adopting these proposed regulations as final regulations in the **Federal Register**.)

On August 2, 2004, the IRS issued Rev. Proc. 2004–46, 2004–2 C.B. 142, which provides an alternate simplified method to obtain an extension of time to allocate GST exemption in certain situations. Generally, this method is available only with regard to an *inter vivos* transfer to a trust from which a GST may be made and only if each of the following requirements is met: (1) the transfer qualified for the gift tax annual exclusion under section 2503(b); (2) the sum of the amount of the transfer and all other gifts by the transferor to the donee in the same year did not exceed the applicable annual exclusion amount for that year; (3) no GST exemption was allocated to the transfer; (4) the taxpayer has unused GST exemption to allocate to the transfer as of the filing of the request for relief; and (5) no taxable distributions or taxable terminations have occurred as of the filing of the request for relief.

To date, the IRS has issued numerous private letter rulings under §301.9100–3 granting an extension of time to timely allocate GST exemption in situations in which transferors (or their executors) failed to allocate GST exemption to a trust on a timely filed Federal gift or estate tax return. These proposed regulations are intended to replace §301.9100–3 with regard to relief under section 2642(g)(1).

Accordingly, §301.9100–3 will be amended to provide that relief under section 2642(g)(1) cannot be obtained through the provisions of §§301.9100–1 and 301.9100–3 after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. Relief under §301.9100–2(b) (the automatic 6-month extension) will continue to be available to transferors or transferor's estates qualifying for that relief. In addition, the procedures contained in Revenue Procedure 2004–46 will remain effective for transferors within the scope of that Revenue Procedure.

Explanation of Provisions

The proposed regulations identify the standards that the IRS will apply in determining whether to grant a transferor or a transferor's estate an extension of time to: (1) allocate GST exemption, as defined in section 2631, to a transfer; (2) elect under section 2632(b)(3) (the election not to have the deemed allocation of GST exemption apply to a direct skip); (3) elect under section 2632(c)(5)(A)(i) (the election not to have the deemed allocation of GST exemption apply to an indirect skip or transfers made to a particular trust); and (4) elect under section 2632(c)(5)(A)(ii) (the election to treat any trust as a GST trust for purposes of section 2632(c)). The proposed regulations also identify situations with facts that do not satisfy the standards for granting relief and in which, as a result, an extension of time will not be granted.

If an extension of time to allocate GST exemption is granted under section 2642(g)(1), the allocation of GST exemption will be considered effective as of the date of the transfer, and the value of the property transferred for purposes of chapter 11 or chapter 12 will determine the amount of GST exemption to be allocated. If an extension of time to elect out of the automatic allocation of GST exemption under section 2632(b)(3) or (c)(5)(A)(i) is granted under section 2642(g)(1), the election will be considered effective as of the date of the transfer. If an extension of time to elect to treat any trust as a GST trust under section 2632(c)(5)(A)(ii) is granted under section 2642(g)(1), the election will be considered effective as of the date of the first (or each) transfer covered by that election.

The amount of GST exemption that may be allocated to a transfer pursuant to an extension granted under section 2642(g)(1) is limited to the amount of the transferor's unused GST exemption under section 2631(c) as of the date of the transfer. Thus, if the amount of GST exemption has increased since the date of the transfer, no portion of the increased amount may be applied by reason of the grant of relief under section 2642(g)(1) to a transfer taking place in an earlier year and prior to the effective date of that increase.

Requests for relief under section 2642(g)(1) will be granted when the taxpayer establishes to the satisfaction of the IRS that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government.

For purposes of section 2642(g)(1), the following nonexclusive list of factors will be used to determine whether a transferor or the executor of a transferor's estate acted reasonably and in good faith: (1) the intent of the transferor or the executor of the transferor's estate to timely allocate GST exemption or to timely make an election under section 2632(b)(3) or (c)(5) as evidenced in the trust instrument, instrument of transfer, or contemporaneous documents, such as Federal gift or estate tax returns or correspondence; (2) the occurrence of intervening events beyond the control of the transferor as defined in section 2652(a), or of the executor of the transferor's estate as defined in section 2203, that caused the failure to allocate GST exemption to a transfer or the failure to elect under section 2632(b)(3) or (c)(5); (3) the lack of awareness by the transferor or the executor of the transferor's estate of the need to allocate GST exemption to a transfer after exercising reasonable diligence, taking into account the experience of the transferor or the executor of the transferor's estate and the complexity of the GST issue; (4) evidence of consistency by the transferor in allocating (or not allocating) the transferor's GST exemption, although evidence of consistency may be less relevant if there is evidence of a change of circumstances or change of trust beneficiaries that would otherwise support a deviation from prior GST tax exemption allocation practices; and (5) reasonable reliance by the transferor or the executor of the transferor's estate on the advice of a qualified tax professional retained or employed by either (or both) of them, and the failure of the transferor or executor, in reliance on or consistent with that advice, to allocate GST exemption to the transfer or to make an election described in section 2632(b)(3) or (c)(5). The IRS will consider all relevant facts and circumstances in making this determination.

For purposes of section 2642(g)(1), the following nonexclusive list of factors will be used to determine whether the interests of the Government would be preju-

diced: (1) the grant of requested relief would permit the use of hindsight to produce an economic advantage or other benefit that either would not have been available if the allocation or election had been timely made, or that results from the selection of one out of a number of alternatives (other than whether or not to make an allocation or election) that were available at the time the allocation or election could have been made timely; (2) if the transferor or the executor of the transferor's estate delayed the filing of the request for relief with the intent to deprive the IRS of sufficient time (by reason of the expiration or the impending expiration of the applicable statute of limitations or otherwise) to challenge the claimed identity of the transferor, the value of the transferred property that is the subject of the requested relief, or any other aspect of the transfer that is relevant for transfer tax purposes; and (3) a determination by the IRS that, in the event of a grant of relief under section 2642(g)(1), it would be unreasonably disruptive or difficult to adjust the GST tax consequences of a taxable termination or a taxable distribution that occurred between the time for making a timely allocation of GST exemption or a timely election described in section 2632(b)(3) or (c)(5) and the time at which the request for relief under section 2642(g)(1) was filed. The IRS will consider all relevant facts and circumstances in making this determination.

Relief under section 2642(g)(1) will not be granted when the standard of reasonableness, good faith and lack of prejudice to the interests of the Government is not met. This standard is not met in the following situations: (1) the transferor or the executor of the transferor's estate made an allocation of GST exemption as described in §26.2632–1(b)(4)(ii)(A)(*1*), or an election under section 2632(b)(3) or (c)(5), on a timely filed Federal gift or estate tax return, and the relief requested would decrease or revoke that allocation or election; (2) the transferor or the transferor's executor delayed in requesting relief in order to preclude the IRS, as a practical matter, from challenging the identity of the transferor, the value of the transferred interest on the Federal estate or gift tax return, or any other aspect of the transaction that is relevant for Federal estate or gift tax purposes; (3) the action or inaction that is the subject of the request for relief reflected or implemented the decision with regard to the allocation of GST exemption or an election described in section 2632(b)(3) or (c)(5) that was made by the transferor or executor of the transferor's estate who had been accurately informed in all material respects by a qualified tax professional retained or employed by either (or both) of them; or (4) the IRS determines that the transferor's request is an attempt to benefit from hindsight.

A request for relief under section 2642(g)(1) does not reopen, suspend or extend the period of limitations on assessment of any estate, gift, or GST tax under section 6501. Thus, the IRS may request that the transferor or the transferor's executor consent under section 6501(c)(4) to extend the period of limitations on assessment of any or all gift and GST taxes on the transfer(s) for which relief under section 2642(g)(1) has been requested. The transferor or the transferor's executor has the right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time. See section 6501(c)(4)(B).

If the grant of relief under section 2642(g)(1) results in a potential tax refund claim, no refund will be paid or credited to the taxpayer or the taxpayer's estate if, at the time of filing the request for relief, the period of limitations for filing a claim for a credit or refund of Federal gift, estate, or GST tax under section 6511 on the transfer for which relief is granted has expired.

Relief provided under section 2642(g)(1) will be granted through the IRS letter ruling program.

Proposed Effective Date

Section 26.2642–7 applies to requests for relief filed on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Availability of IRS Documents

The IRS notice and revenue procedure cited in this preamble are published in the Cumulative Bulletin and are available at *www.irs.gov.*

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. chapter 6), it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. The applicability of this rule is limited to individuals (or their estates) and trusts, which are not small entities as defined by the RFA (5 U.S.C. 601). Although it is anticipated that there may be a beneficial economic impact for some small entities, including entities that provide tax and legal services that assist individuals in the private letter ruling program, any benefit to those entities would be indirect. Further, this indirect benefit will not affect a substantial number of these small entities because only a limited number of individuals (or their estates) and trusts would submit a private letter ruling request under this rule. Therefore, only a small fraction of tax and legal services entities would generate business or benefit from this rule. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small entities.

Comments and 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 Treasury Department request comments on the clarity of the proposed rules and also on how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for August 5, 2008 in the IRS auditorium. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts.

For more information about having your name placed on the list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written (a signed original and eight (8) copies) or electronic comments by July 16, 2008, and an outline of the topics to be discussed and the time to be devoted to each topic by July 15, 2008. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Theresa M. Melchiorre, Office of Chief Counsel, IRS.

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 26 and 301 are proposed to be amended as follows:

PART 26—GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1986

Paragraph 1. The authority citation for part 26 is amended by adding an entry in numerical order to read in part as follows:

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

Section 26.2642–7 also issued under 26 U.S.C. 2642(g). * * *

Par. 2. Section 26.2642–7 is added to read as follows:

§26.2642–7 Relief under section 2642(g)(1).

(a) *In general.* Under section 2642(g)(1)(A), the Secretary has the authority to issue regulations describing the circumstances in which a transferor, as defined in section 2652(a), or the executor of a transferor's estate, as defined in section 2203, will be granted an extension of time to allocate generation-skipping transfer (GST) exemption as described in sections 2642(b)(1) and (2). The Secretary also has the authority to issue regulations describing the circumstances under which a transferor or the executor of a transferor's estate will be granted an extension of time to make the elections described in section 2632(b)(3) and (c)(5). Section 2632(b)(3) provides that an election may be made by or on behalf of a transferor not to have the transferor's GST exemption automatically allocated under section 2632(b)(1) to a direct skip, as defined in section 2612(c), made by the transferor during life. Section 2632(c)(5)(A)(i) provides that an election may be made by or on behalf of a transferor not to have the transferor's GST exemption automatically allocated under section 2632(c)(1) to an indirect skip, as defined in section 2632(c)(3)(A), or to any or all transfers made by such transferor to a particular trust. Section 2632(c)(5)(A)(ii) provides that an election may be made by or on behalf of a transferor to treat any trust as a GST trust, as defined in section 2632(c)(3)(B), for purposes of section 2632(c) with respect to any or all transfers made by that transferor to the trust. This section generally describes the factors that the Internal Revenue Service (IRS) will consider when an extension of time is sought by or on behalf of a transferor to timely allocate GST exemption and/or to make an election under section 2632(b)(3) or (c)(5). Relief provided under this section will be granted through the IRS letter ruling program. See paragraph (h) of this section.

(b) *Effect of Relief.* If an extension of time to allocate GST exemption is granted under this section, the allocation of GST exemption will be considered effective as of the date of the transfer, and the value of the property transferred for purposes of chapter 11 or chapter 12 will determine the amount of GST exemption to be allocated. If an extension of time to elect out of the automatic allocation of GST exemption under section 2632(b)(3) or (c)(5) is granted under this section, the election will be considered effective as of the date of the transfer. If an extension of time to elect to treat any trust as a GST trust under section 2632(c)(5)(A)(ii) is granted under this section, the election will be considered effective as of the date of the first (or each) transfer covered by that election.

(c) *Limitation on relief.* The amount of GST exemption that may be allocated to a transfer as the result of relief granted under this section is limited to the amount of the transferor's unused GST exemption under section 2631(c) as of the date of the transfer. Thus, if, by the time of the making of the allocation or election pursuant to relief granted under this section, the GST exemption amount under section 2631(c) has increased to an amount in excess of the amount in effect for the date of the transfer, no portion of the increased amount may be applied to that earlier transfer by reason of the relief granted under this section.

(d) *Basis for determination*—(1) *In general.* Requests for relief under this section will be granted when the transferor or the executor of the transferor's estate provides evidence (including the affidavits described in paragraph (h) of this section) to establish to the satisfaction of the IRS that the transferor or the executor of the transferor's estate acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government. Paragraphs (d)(2) and (d)(3) of this section set forth nonexclusive lists of factors the IRS will consider in determining whether this standard of reasonableness, good faith, and lack of prejudice to the interests of the Government has been met so that such relief will be granted. In making this determination, IRS will consider these factors, as well as all other relevant facts and circumstances. Paragraph (e) of this section sets forth situations in which this standard has not been met and, as a result, in which relief under this section will not be granted.

(2) *Reasonableness and good faith.* The following is a nonexclusive list of factors that will be considered to determine whether the transferor or the executor of the transferor's estate acted reasonably and in good faith for purposes of this section:

(i) The intent of the transferor to timely allocate GST exemption to a transfer or to timely make an election under section 2632(b)(3) or (c)(5), as evidenced in the trust instrument, the instrument of transfer, or other relevant documents contemporaneous with the transfer, such as Federal gift and estate tax returns and correspondence. This may include evidence of the intended GST tax status of the transfer or the trust (for example, exempt, non-exempt, or partially exempt), or more explicit evidence

of intent with regard to the allocation of GST exemption or the election under section 2632(b)(3) or (c)(5).

(ii) Intervening events beyond the control of the transferor or of the executor of the transferor's estate as the cause of the failure to allocate GST exemption to a transfer or the failure to make an election under section 2632(b)(3) or (c)(5).

(iii) Lack of awareness by the transferor or the executor of the transferor's estate of the need to allocate GST exemption to the transfer, despite the exercise of reasonable diligence, taking into account the experience of the transferor or the executor of the transferor's estate and the complexity of the GST issue, as the cause of the failure to allocate GST exemption to a transfer or to make an election under section 2632(b)(3) or (c)(5).

(iv) Consistency by the transferor with regard to the allocation of the transferor's GST exemption (for example, the transferor's consistent allocation of GST exemption to transfers to skip persons or to a particular trust, or the transferor's consistent election not to have the automatic allocation of GST exemption apply to transfers to one or more trusts or skip persons pursuant to section 2632(b)(3) or (c)(5)). Evidence of consistency may be less relevant if there has been a change of circumstances or change of trust beneficiaries that would otherwise explain a deviation from prior GST exemption allocation decisions.

(v) Reasonable reliance by the transferor or the executor of the transferor's estate on the advice of a qualified tax professional retained or employed by one or both of them and, in reliance on or consistent with that advice, the failure of the transferor or the executor to allocate GST exemption to the transfer or to make an election described in section 2632(b)(3) or (c)(5). Reliance on a qualified tax professional will not be considered to have been reasonable if the transferor or the executor of the transferor's estate knew or should have known that the professional either—

(A) Was not competent to render advice on the GST exemption; or

(B) Was not aware of all relevant facts.

(3) *Prejudice to the interests of the Government*. The following is a nonexclusive list of factors that will be considered to determine whether the interests of the Government would be prejudiced for purposes of this section:

(i) The interests of the Government would be prejudiced to the extent to which the request for relief is an effort to benefit from hindsight. The interests of the Government would be prejudiced if the IRS determines that the requested relief is an attempt to benefit from hindsight rather than to achieve the result the transferor or the executor of the transferor's estate intended at the time when the transfer was made. A factor relevant to this determination is whether the grant of the requested relief would permit an economic advantage or other benefit that would not have been available if the allocation or election had been timely made. Similarly, there would be prejudice if a grant of the requested relief would permit an economic advantage or other benefit that results from the selection of one out of a number of alternatives (other than whether or not to make an allocation or election) that were available at the time the allocation or election could have been timely made, if hindsight makes the selected alternative more beneficial than the other alternatives. Finally, in a situation where the only choices were whether or not to make a timely allocation or election, prejudice would exist if the transferor failed to make the allocation or election in order to wait to see (thus, with the benefit of hindsight) whether or not the making of the allocation of exemption or election would be more beneficial.

(ii) The timing of the request for relief will be considered in determining whether the interests of the Government would be prejudiced by granting relief under this section. The interests of the Government would be prejudiced if the transferor or the executor of the transferor's estate delayed the filing of the request for relief with the intent to deprive the IRS of sufficient time to challenge the claimed identity of the transferor of the transferred property that is the subject of the request for relief, the value of that transferred property for Federal gift or estate tax purposes, or any other aspect of the transfer that is relevant for Federal gift or estate tax purposes. The fact that any period of limitations on the assessment or collection of transfer taxes has expired prior to the filing of a request for relief under this section, however, will not by itself prohibit a grant of relief under this section. Similarly, the combination of the expiration of any such period of limitations with the fact that the asset or interest was valued for transfer tax purposes with the use of a valuation discount will not by itself prohibit a grant of relief under this section.

(iii) The occurrence and effect of an intervening taxable termination or taxable distribution will be considered in determining whether the interests of the Government would be prejudiced by granting relief under this section. The interests of the Government may be prejudiced if a taxable termination or taxable distribution occurred between the time for making a timely allocation of GST exemption or a timely election described in section 2632(b)(3) or (c)(5) and the time at which the request for relief under this section was filed. The impact of a grant of relief on (and the difficulty of adjusting) the GST tax consequences of that intervening termination or distribution will be considered in determining whether the occurrence of a taxable termination or taxable distribution constitutes prejudice.

(e) *Situations in which the standard of reasonableness, good faith, and lack of prejudice to the interests of the Government has not been met*. Relief under this section will not be granted if the IRS determines that the transferor or the executor of the transferor's estate has not acted reasonably and in good faith, and/or that the grant of relief would prejudice the interests of the Government. The following situations provide illustrations of some circumstances under which the standard of reasonableness, good faith, and lack of prejudice to the interests of the Government has not been met, and as a result, in which relief under this section will not be granted:

(1) *Timely allocations and elections*. Relief will not be granted under this section to decrease or revoke a timely allocation of GST exemption as described in §26.2632–1(b)(4)(ii)(A)(*1*), or to revoke an election under section 2632(b)(3) or (c)(5) made on a timely filed Federal gift or estate tax return.

(2) *Timing*. Relief will not be granted if the transferor or executor delayed the filing of the request for relief with the intent to deprive the IRS of sufficient time to challenge the claimed identity of the transferor or the valuation of the transferred property for Federal gift or estate tax purposes. (However, see paragraph (d)(3)(ii)

of this section for examples of facts which alone do not constitute prejudice.)

(3) *Failure after being accurately informed*. Relief will not be granted under this section if the decision made by the transferor or the executor of the transferor's estate (who had been accurately informed in all material respects by a qualified tax professional retained or employed by either (or both) of them with regard to the allocation of GST exemption or an election described in section 2632(b)(3) or (c)(5)) was reflected or implemented by the action or inaction that is the subject of the request for relief.

(4) *Hindsight*. Relief under this section will not be granted if the IRS determines that the requested relief is an attempt to benefit from hindsight rather than an attempt to achieve the result the transferor or the executor of the transferor's estate intended when the transfer was made. One factor that will be relevant to this determination is whether the grant of relief will give the transferor the benefit of hindsight by providing an economic advantage that may not have been available if the allocation or election had been timely made. Thus, relief will not be granted if that relief will shift GST exemption from one trust to another trust unless the beneficiaries of the two trusts, and their respective interests in those trusts, are the same. Similarly, relief will not be granted if there is evidence that the transferor or executor had not made a timely allocation of the exemption in order to determine which of the various trusts achieved the greatest asset appreciation before selecting the trust that should have a zero inclusion ratio.

(f) *Period of limitations under section 6501*. A request for relief under this section does not reopen, suspend, or extend the period of limitations on assessment or collection of any estate, gift, or GST tax under section 6501. Thus, the IRS may request that the transferor or the transferor's executor consent, under section 6501(c)(4), to an extension of the period of limitation on assessment or collection of any or all gift and GST taxes for the transfer(s) that are the subject of the requested relief. The transferor or the transferor's executor has the right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time. See section 6501(c)(4)(B).

(g) *Refunds*. The filing of a request for relief under section 2642(g)(1) with the IRS does not constitute a claim for refund or credit of an overpayment and no implied right to refund will arise from the filing of such a request for relief. Similarly, the filing of such a request for relief does not extend the period of limitations under section 6511 for filing a claim for refund or credit of an overpayment. In the event the grant of relief under section 2642(g)(1) results in a potential claim for refund or credit of an overpayment, no such refund or credit will be allowed to the taxpayer or to the taxpayer's estate if the period of limitations under section 6511 for filing a claim for a refund or credit of the Federal gift, estate, or GST tax that was reduced by the granted relief has expired. The period of limitations under section 6511 is generally the later of three years from the time the original return is filed or two years from the time the tax was paid. If the IRS and the taxpayer agree to extend the period for assessment of tax, the period for filing a claim for refund or credit will be extended. Section 6511(c). The taxpayer or the taxpayer's estate is responsible for preserving any potential claim for refund or credit. A taxpayer who seeks and is granted relief under section 2642(g)(1) will not be regarded as having filed a claim for refund or credit by requesting such relief. In order to preserve a right of refund or credit, the taxpayer or the executor of the taxpayer's estate also must file before the expiration of the period of limitations under section 6511 for filing such a claim any required forms for requesting a refund or credit in accordance with the instructions to such forms and applicable regulations.

(h) *Procedural requirements*—(1) *Letter ruling program*. The relief described in this section is provided through the IRS's private letter ruling program. See Revenue Procedure 2008–1, 2008–1 I.R.B. 1, or its successor, (which are available at *www.irs.gov*. Requests for relief under this section that do not meet the requirements of §301.9100–2 of this chapter must be made under the rules of this section.

(2) *Affidavit and declaration of transferor or the executor of the transferor's estate*—(i) The transferor or the executor of the transferor's estate must submit a detailed affidavit describing the events that led to the failure to timely allocate GST exemption to a transfer or the failure to timely elect under section 2632(b)(3) or (c)(5), and the events that led to the discovery of the failure. If the transferor or the executor of the transferor's estate relied on a tax professional for advice with respect to the allocation or election, the affidavit must describe—

(A) The scope of the engagement;

(B) The responsibilities the transferor or the executor of the transferor's estate believed the professional had assumed, if any; and

(C) The extent to which the transferor or the executor of the transferor's estate relied on the professional.

(ii) Attached to each affidavit must be copies of any writing (including, without limitation, notes and e-mails) and other contemporaneous documents within the possession of the affiant relevant to the transferor's intent with regard to the application of GST tax to the transaction for which relief under this section is being requested.

(iii) The affidavit must be accompanied by a dated declaration, signed by the transferor or the executor of the transferor's estate that states: "Under penalties of perjury, I declare that I have examined this affidavit, including any attachments thereto, and to the best of my knowledge and belief, this affidavit, including any attachments thereto, is true, correct, and complete. In addition, under penalties of perjury, I declare that I have examined all the documents included as part of this request for relief, and, to the best of my knowledge and belief, these documents collectively contain all the relevant facts relating to the request for relief, and such facts are true, correct, and complete."

(3) *Affidavits and declarations from other parties*—(i) The transferor or the executor of the transferor's estate must submit detailed affidavits from individuals who have knowledge or information about the events that led to the failure to allocate GST exemption or to elect under section 2632(b)(3) or (c)(5), and/or to the discovery of the failure. These individuals may include individuals whose knowledge or information is not within the personal knowledge of the transferor or the executor of the transferor's estate. The individuals described in paragraph (h)(3)(i) of this section must include—

(A) Each agent or legal representative of the transferor who participated in the

transaction and/or the preparation of the return for which relief is being requested;

(B) The preparer of the relevant Federal estate and/or gift tax return(s);

(C) Each individual (including an employee of the transferor or the executor of the transferor's estate) who made a substantial contribution to the preparation of the relevant Federal estate and/or gift tax return(s); and

(D) Each tax professional who advised or was consulted by the transferor or the executor of the transferor's estate with regard to any aspect of the transfer, the trust, the allocation of GST exemption, and/or the election under section 2632(b)(3) or (c)(5).

(ii) Each affidavit must describe the scope of the engagement and the responsibilities of the individual as well as the advice or service(s) the individual provided to the transferor or the executor of the transferor's estate.

(iii) Attached to each affidavit must be copies of any writing (including, without limitation, notes and e-mails) and other contemporaneous documents within the possession of the affiant relevant to the transferor's intent with regard to the application of GST tax to the transaction for which relief under this section is being requested.

(iv) Each affidavit also must include the name, and current address of the individual, and be accompanied by a dated declaration, signed by the individual that states: "Under penalties of perjury, I declare that I have personal knowledge of the information set forth in this affidavit, including any attachments thereto. In addition, under penalties of perjury, I declare that I have examined this affidavit, including any attachments thereto, and, to the best of my knowledge and belief, the affidavit contains all the relevant facts of which I am aware relating to the request for relief filed by or on behalf of [transferor or the executor of the transferor's estate], and such facts are true, correct, and complete."

(v) If an individual who would be required to provide an affidavit under paragraph (h)(3)(i) of this section has died or is not competent, the affidavit required under paragraph (h)(2) of this section must include a statement to that effect, as well as a statement describing the relationship between that individual and the transferor or the executor of the transferor's estate and the information or knowledge the transferor or the executor of the transferor's estate believes that individual had about the transfer, the trust, the allocation of exemption, or the election. If an individual who would be required to provide an affidavit under paragraph (h)(3)(i) of this section refuses to provide the transferor or the executor of the transferor's estate with such an affidavit, the affidavit required under paragraph (h)(2) of this section must include a statement that the individual has refused to provide the affidavit, a description of the efforts made to obtain the affidavit from the individual, the information or knowledge the transferor or the executor of the transferor's estate believes the individual had about the transfer, and the relationship between the individual and the transferor or the executor of the transferor's estate.

(i) *Effective/applicability date*. Section 26.2642–7 applies to requests for relief filed on or after the date of publication of the Treasury decision adopting these proposed rules as final regulations in the **Federal Register**.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 3. The authority citation for part 301 continues to read in part as follows:

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

Par. 4. Section 301.9100–3 is amended by adding a new paragraph (g) to read as follows:

§301.9100–3 Other extensions.

* * * * *

(g) *Relief under section 2642(g)(1)*—(1) *Procedures*. The procedures set forth in this section are not applicable for requests for relief under section 2642(g)(1). For requests for relief under section 2642(g)(1), see §26.2642–7.

(2) *Effective/applicability date*. Paragraph (g) of this section applies to requests for relief under section 2642(g)(1) filed on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

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

(Filed by the Office of the Federal Register on April 16, 2008, 8:45 a.m., and published in the issue of the Federal Register for April 17, 2008, 73 F.R. 20870)

Notice of Proposed Rulemaking and Notice of Public Hearing

Determination of Minimum Required Pension Contributions

REG–108508–08

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations providing guidance on the determination of minimum required contributions for purposes of the funding rules that apply to single employer defined benefit plans. These regulations would affect sponsors, administrators, participants, and beneficiaries of single employer defined benefit plans. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by July 14, 2008. Outlines of topics to be discussed at the public hearing scheduled for August 4, 2008, at 10 a.m. must be received by July 15, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–108508–08), 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–108508–08), 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–108508–08). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Lauson C. Green or Linda S. F. Marshall at (202) 622–6090; concerning submissions of comments, the hearing, and/or being placed on the building access list to attend the hearing, Richard A. Hurst, at *Richard.A.Hurst@irscounsel.treas.gov* or (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed Income Tax Regulations (26 CFR part 1) under sections 430(a), 430(c), 430(e), and 430(j), as added to the Internal Revenue Code (Code) by the Pension Protection Act of 2006 (PPA '06), Public Law 109–280 (120 Stat. 780). In addition, this document contains proposed Excise Tax Regulations (26 CFR part 54) under section 4971.

Section 412 provides minimum funding requirements that generally apply for pension plans (including both defined benefit pension plans and money purchase pension plans). PPA '06 makes extensive changes to those minimum funding requirements that generally apply for plan years beginning on or after January 1, 2008. Section 430, which was added by PPA '06, specifies the minimum funding requirements that apply to single employer defined benefit pension plans (including multiple employer plans) pursuant to section 412.[1]

Section 430(a) provides that a plan's minimum required contribution for a plan year is determined under one of two rules, depending on whether the value of plan assets is less than, or is equal to or greater than, the plan's funding target. If the value of plan assets is less than the funding target, the minimum required contribution is the sum of: (1) target normal cost; (2) any shortfall amortization charge; and (3) any waiver amortization charge. If the value of plan assets equals or exceeds the funding target, the minimum required contribution is the plan's target normal cost, reduced (but not below zero) by the excess of the value of plan assets over the plan's funding target. For purposes of section 430(a), the value of plan assets is determined after reduction for certain funding balances as provided under section 430(f)(4)(B).

Section 430(c) provides that a shortfall amortization charge is the total (not less than zero) of the shortfall amortization installments for the plan year with respect to any shortfall amortization base established for that plan year and the 6 preceding plan years. Section 430(c)(2)(A) provides that the shortfall amortization installments with respect to a shortfall amortization base established for a plan year are the amounts necessary to amortize the shortfall amortization base in level annual installments over the 7-plan-year period beginning with that plan year.

Section 430(c)(3) provides that a shortfall amortization base is determined for a plan year based on the plan's funding shortfall for the plan year. Under section 430(c)(4), the funding shortfall is the amount (if any) by which the plan's funding target for the year exceeds the value of the plan's assets (as reduced by the funding standard carryover balance and prefunding balance under section 430(f)(4)(B)). The shortfall amortization base for a plan year is the plan's funding shortfall, minus the present value (determined using the interest rates under section 430(h)(2)) of the total of the shortfall amortization installments and waiver amortization installments that have been determined for the plan year and any succeeding plan year with respect to any shortfall amortization bases and waiver amortization bases for preceding plan years.

Under section 430(c)(5), a shortfall amortization base is not established for a plan year if the value of a plan's assets is at least equal to the plan's funding target for the plan year. For this purpose, the prefunding balance is subtracted from the value of plan assets, but only if an election to use that prefunding balance to offset the minimum required contribution is in effect for the plan year. A transition rule applies for plan years beginning after 2007 and before 2011 under which only a specified percentage of the plan's funding target is taken into account for purposes of section 430(c)(5). The transition rule does not apply to a plan that is not in effect for 2007 or to a plan that is subject to the pre- PPA '06 deficit reduction contribution rules for 2007 (that is, a plan covering more than 100 participants and with a funded current liability below the applicable threshold).

Under section 430(e), the waiver amortization charge for a plan year is the total of the waiver amortization installments for the plan year with respect to any waiver amortization bases for the 5 preceding plan years. Under section 430(e)(2), the waiver amortization installments with respect to a waiver amortization base established for a plan year are the amounts necessary to amortize the waiver amortization base in level annual installments over the 5-plan-year period beginning with the succeeding plan year. Under section 430(e)(4), the waiver amortization base for a plan year is the amount of the waived funding deficiency (if any) for that plan year.

If a plan's funding shortfall for a plan year is zero (that is, the value of the plan's assets, reduced by the funding standard carryover balance and prefunding balance to the extent provided under section 430(f)(4)(B), is at least equal to the plan's funding target for the year), any shortfall amortization bases and waiver amortization bases for preceding plan years (and any associated shortfall amortization installments and waiver amortization installments) are eliminated.

Under section 430(j), as under pre-PPA '06 law, the due date for the payment of a minimum required contribution for a plan year is generally 8½ months after the end of the plan year. Any payment made on a date other than the valuation date for the plan year must be adjusted for interest accruing at the plan's effective interest rate under section 430(h)(2)(A) for the plan year for the period between the valuation date and the payment date. Pursuant to section 430(g)(2), the valuation date for a plan year must be the first day of the plan year except in the case of a small plan described in section 430(g)(2)(B).

Under section 430(j)(3)(A), quarterly contributions must be made during a plan year if the plan had a funding shortfall for the preceding plan year. Each quarterly installment is 25% of the required annual payment. The required annual payment is equal to the lesser of 90% of the minimum

[1] Section 302 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), sets forth funding rules that are parallel to those in Code section 412, and section 303 of ERISA sets forth additional funding rules for single employer plans that are parallel to those in section 430 of the Code. Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713) and section 302 of ERISA, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these proposed regulations for purposes of ERISA, as well as the Code. Thus, these proposed Treasury regulations issued under section 430 of the Code would apply as well for purposes of section 303 of ERISA.

required contribution under section 430 for the plan year or 100% of the minimum required contribution under section 430 (determined without regard to any waiver under section 412) for the preceding plan year. If a quarterly installment is not made, the interest charge that applies for the period of underpayment is determined using the plan's effective interest rate plus 5 percentage points. The requirements regarding quarterly contributions are similar to the requirements that formerly applied under section 412(m) as in effect before amendments made by PPA '06.

Under section 430(j)(4), a plan sponsor of a plan that is subject to the quarterly contribution requirements for a plan year (other than a small plan described in section 430(g)(2)(B)) must make additional quarterly contributions in order to ensure that a minimum level of liquid assets is available to pay benefits as of the end of each quarter. Generally, this required minimum level of liquid assets is the amount of liquid assets needed to pay for three years of benefits, and an additional quarterly contribution (made in liquid assets) is due if the plan has insufficient liquid assets to meet this minimum level. A plan sponsor that fails to satisfy this liquidity requirement is treated as failing to make the required quarterly contribution and, pursuant to section 206(e) of ERISA, is required to cease making certain types of accelerated payments that are described in section 401(a)(32)(B) of the Code. Pursuant to section 430(j)(4)(C), the portion of an installment that is treated as not made because of the liquidity requirement continues to be treated as unpaid until the close of the quarter that contains the due date for the contribution. These liquidity requirements are substantially similar to the requirements that formerly applied under section 412(m)(5), as in effect before amendments made by PPA '06.

Section 402 of PPA '06 provides a series of special funding rules for a plan maintained by a commercial passenger airline (or by an employer whose principal business is providing catering services to a commercial passenger airline) if such an employer has made an election provided under that section. If an eligible employer has made the election described in section 402(a)(1) of PPA '06 (which is only available for a frozen plan), the calculation of the minimum required contribution for the plan is determined using a special 17-plan-year amortization period and an interest rate of 8.85%. If an eligible employer has made the election described in section 402(a)(2) of PPA '06 (which can be made without regard to whether the plan is frozen), calculation of the minimum required contribution for the plan is determined using a special 10-plan-year amortization period for the initial shortfall amortization base (that is, the shortfall amortization base for the first plan year for which section 430 applies to the plan) and, pursuant to the amendment to section 402 of PPA '06 made by section 6615 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Public Law 110–28 (121 Stat. 112), an interest rate of 8.25% is used to determine the funding target for each of those 10 plan years.

Section 4971(a) provides an excise tax on a failure to meet applicable minimum funding requirements. In the case of a single employer plan, the tax is 10% of the aggregate unpaid minimum required contributions for all plan years remaining unpaid as of the end of any plan year ending with or within a taxable year. In the case of a multiemployer plan, the tax is 5% of the accumulated funding deficiency as of the end of any plan year ending with or within the taxable year. Section 4971(b) provides an additional excise tax that applies where the applicable minimum funding requirements remain unsatisfied for a specified period. Section 4971(c) provides definitions that apply for purposes of section 4971, including a definition of unpaid minimum required contribution (which is based on the new section 430 rules for determining the minimum required contribution for a year). Section 4971(f) imposes a tax of 10% of the amount of the liquidity shortfall for a quarter that is not paid by the due date for the installment for that quarter.

Regulations under section 4971 were issued on May 1, 1986 (T.D. 8084, 1986–1 C.B. 327). In addition, proposed regulations regarding section 4971 were issued on the same date. Guidance regarding quarterly contribution requirements under former section 412(m) was issued in Notice 89–52, 1989–1 C.B. 692, and guidance regarding the liquidity requirements under former section 412(m)(5) was issued in Rev. Rul. 95–31, 1995–1 C.B. 76. See §601.601(d)(2).

Explanation of Provisions

I. *Overview*

These proposed regulations are the fourth in a series of proposed regulations under new section 430.[2] These proposed regulations would provide guidance regarding the minimum contribution rules that apply to sponsors of single employer defined benefit plans under section 430. In addition, this document includes proposed regulations under section 4971, reflecting changes to the excise tax rules under PPA '06.

II. *Section 1.430(a)–1 Determination of Minimum Required Contribution*

Section 1.430(a)–1 would provide rules for determining the minimum required contribution for a single employer defined benefit plan (including a multiple employer plan under section 413(c)) for a plan year under section 430(a). The determination of the amount of the minimum required contribution for a plan year depends on whether the value of plan assets, as reduced to reflect certain funding balances pursuant to section 430(f)(4)(B) (but not below zero), equals or exceeds the plan's funding target for the plan year. If this value of plan assets is less than the funding target for the plan year, the minimum required contribution for that plan year is equal to the sum of the plan's target normal cost for the plan year plus any applicable shortfall amortization installments and waiver amortization installments. If this value of plan assets equals or exceeds the funding target for the plan year, the minimum required contribution for that plan year is equal to the target normal cost of the plan for the plan

[2] Proposed §§1.430(h)(3)–1 and 1.430(h)(3)–2, relating to the mortality tables used to determine liabilities under section 430(h)(3), were issued May 29, 2007 (REG–143601–06, 2007–24 I.R.B. 1398 [72 FR 29456]), proposed §1.430(f)–1, relating to prefunding and funding standard carryover balances under section 430(f), was issued August 31, 2007 (REG–113891–07, 2007–42 I.R.B. 821 [72 FR 50544]), and proposed §§1.430(d)–1, 1.430(g)–1, 1.430(h)(2)–1, and 1.430(i)–1, relating to measurement of plan assets and liabilities for pension funding purposes, were issued December 31, 2007 (REG–139236–07, 2008–9 I.R.B. 491 [72 FR 74215]).

year reduced (but not below zero) by any such excess.

The proposed regulations provide that the shortfall amortization installments with respect to a shortfall amortization base established for a plan year are the annual amounts necessary to amortize that shortfall amortization base in level annual installments over the 7-year period beginning with that plan year. As provided in proposed §1.430(h)(2)–1(f)(2), these installments are determined assuming that the installments are paid on the valuation date for each plan year and using the interest rates applicable under section 430(h)(2)(C) or (D). The shortfall amortization installments are determined using the interest rates that apply for the plan year for which the shortfall amortization base is established and are not redetermined in subsequent plan years to reflect changes in interest rates under section 430(h)(2) for those subsequent plan years.[3]

Under the proposed regulations, if the value of plan assets (reduced by the prefunding balance if the prefunding balance is used to offset the minimum required contribution for the plan year as provided under §1.430(f)–1(c), but not below zero) is equal to or greater than the funding target for the plan year, then no shortfall amortization base is established for that plan year. If this value of plan assets is less than the funding target for the plan year, a shortfall amortization base is established for the plan year. In such a case, the shortfall amortization base (which can be either positive or negative) is equal to the funding shortfall of the plan for the plan year, minus the sum of the present values of any remaining shortfall amortization installments and waiver amortization installments (determined in accordance with §1.430(h)(2)–1(f)(2) using the interest rates that apply for the current plan year). For this purpose, the funding shortfall of a plan for any plan year is the excess (if any) of the funding target of the plan for the plan year, over the value of plan assets for the plan year (as reduced to reflect the subtraction of the funding standard carryover balance and prefunding balance to the extent provided under §1.430(f)–1(c)).

The proposed regulations reflect the transition rule under section 430(c)(5)(B) under which only a specified portion of the funding target is taken into account in determining whether a shortfall amortization base is established for plan years beginning before January 1, 2011. This transition rule does not apply with respect to any plan year beginning after 2008 if a shortfall amortization base was required to be established for any preceding year, nor does it apply to a plan that was not in effect for a plan year beginning in 2007 or to a plan that was subject to section 412(l) for the last plan year before section 430 applies to the plan (the pre-effective plan year), determined after the application of section 412(l)(6) and (9). The proposed regulations would not provide for any adjustment to the applicable percentages under this transition rule for a plan for which the effective date of section 430 is delayed under sections 104 through 106 of PPA ’06.

Under the proposed regulations, the waiver amortization installments with respect to a waiver amortization base established for a plan year are the annual amounts necessary to amortize that waiver amortization base in level annual installments over the 5-year period beginning with the following plan year. As provided in proposed §1.430(h)(2)–1(f)(2), these installments are determined assuming that the installments are paid on the valuation date for each plan year and using the interest rates applicable under section 430(h)(2). Thus, if the plan is using segment rates, the installments are determined by applying the first segment rate to the first four installments and the second segment rate to the fifth (and final) installment. The waiver amortization installments established with respect to a waiver amortization base are determined using the interest rates that apply for the plan year for which the waiver is granted (even though the first installment with respect to the waiver amortization base is not due until the subsequent plan year) and are not redetermined in subsequent plan years to reflect changes in interest rates under section 430(h)(2) for those subsequent plan years. A waiver amortization base is established for each plan year for which a waiver of the minimum funding standard has been granted, and the amount of that waiver amortization base is equal to the amount of the minimum required contribution waived (or the waived funding deficiency) for the plan year.

In the case of a plan that received a funding waiver under section 412 for a plan year for which section 430 was not yet effective with respect to the plan, the proposed regulations provide that the waiver is treated as giving rise to a waiver amortization base, and the amortization charges with respect to that funding waiver are treated as waiver amortization installments. With respect to such a preexisting funding waiver, the amount of the annual waiver amortization installment is equal to the amortization charge with respect to that waiver determined using the interest rate or rates that applied for the pre-effective plan year. Thus, for a plan that received a waiver in the past, the plan sponsor would have to contribute the amounts needed to amortize that waiver over the original schedule as previously established.

In accordance with section 430(c)(6), the proposed regulations provide that, in any case in which the funding shortfall of a plan for a plan year is zero, the shortfall amortization bases for all preceding plan years (and all shortfall amortization installments determined with respect to those shortfall amortization bases) are reduced to zero, and the waiver amortization bases for all preceding plan years (and all waiver amortization installments determined with respect to such bases) are reduced to zero.

The proposed regulations would provide rules for determining the amount of a minimum required contribution for a short plan year. Under the proposed regulations, the amortization installments are prorated for a short plan year. The proposed regulations would not provide for any proration of the target normal cost. Instead, the determination of target normal cost would reflect actual accruals that accrue or are expected to accrue during the plan year.[4] The proposed regulations also provide rules for the treatment of installments in subsequent plan years to take into account the pro-

[3] The proposed regulations reflect the alternative amortization periods and interest rates that apply to a commercial passenger airline (or other eligible employer) that has made an election under section 402 of PPA ’06.

[4] See 29 CFR §2530.204–2(e) for rules relating to changes in accrual computation periods.

ration of these installments for short plan years and any change in valuation date.

III. *Section 1.430(j)–1 Payment of Minimum Required Contributions*

The proposed regulations under section 430(j) would provide rules related to the payment of minimum required contributions, including the payment of quarterly contributions and liquidity requirements. The proposed regulations provide that any payment of the minimum required contribution under section 430 for a plan year that is made on a date other than the valuation date for that plan year is adjusted for interest accruing for the period between the valuation date and the payment date, at the effective interest rate for the plan for that plan year determined pursuant to §1.430(h)(2)–1(f)(1). The direction of the adjustment depends on whether the contribution is paid before or after the valuation date for the plan year. If the contribution is paid after the valuation date for the plan year, the contribution is discounted to the valuation date using the plan's effective interest rate. By contrast, if the contribution is paid before the valuation date for the plan year (which could only occur in the case of a small plan described in section 430(g)(2)(B)), the contribution is increased for interest at that same interest rate.

Under the proposed regulations, a payment of the minimum required contribution under section 430 for a plan year can be made no earlier than the first day of the plan year. The deadline for any payment of any minimum required contribution for a plan year is 8½ months after the close of the plan year. If a minimum required contribution is not paid by this deadline, an excise tax applies under section 4971.

The proposed regulations would provide rules for accelerated quarterly contributions for underfunded plans. These rules are similar to the rules provided under Notice 89–52; however, these rules have been updated to reflect statutory changes. These statutory changes include changes regarding which plans are subject to the quarterly contribution requirements as well as the interest rates applicable to missed quarterly contributions.

Under the proposed regulations, in any case in which the plan has a funding shortfall for the preceding plan year, the employer maintaining the plan must make the required quarterly installments.[5] The amount of each required quarterly installment is equal to 25% of the required annual payment. For this purpose, the required annual payment is equal to the lesser of 90% of the minimum required contribution under section 430(a) for the plan year, or 100% of the minimum required contribution under section 430(a) (determined without regard to any funding waiver under section 412) for the preceding plan year. These minimum required contributions are determined under section 430 as of the valuation date for each year and have no adjustment for interest.[6] The proposed regulations provide that, for purposes of determining the required annual payment, the minimum required contribution for a plan year is determined without regard to use of the prefunding balance or funding standard carryover balance in the current year or any prior year.

Pursuant to section 430(j)(3)(C), the proposed regulations would provide that the due dates for the four required quarterly installments with respect to a full plan year are as follows: the first installment is due on the 15th day of the 4th plan month, the second installment is due on the 15th day of the 7th plan month, the third installment is due on the 15th day of the 10th plan month, and the fourth installment is due on the 15th day following the close of the plan year. In the case of a short plan year, the proposed regulations would provide rules for determining the amount of the required annual payment, the number and due dates of installments, and the amount of those installments. The proposed regulations also provide rules for determining the plan month in the case of a plan year that does not begin on the first day of a calendar month.

The proposed regulations would provide that, if the employer fails to pay the full amount of a required installment, then the rate of interest used to adjust the amount of the contribution with respect to the underpayment of the required installment for the period of time that begins on the due date for the required installment and that ends on the date of payment is equal to the effective interest rate for the plan for that plan year determined pursuant to §1.430(h)(2)–1(f)(1) plus 5 percentage points. This increased interest rate applies only to installments that are due after the valuation date for the plan year because section 430(j)(3) refers to interest being charged on late quarterly contributions. The amount of the underpayment is equal to the excess of the required installment over the amount (if any) of the installment contributed to or under the plan on or before the due date for the installment. For this purpose, the proposed regulations contain an ordering rule under which contributions are to be credited against unpaid required installments in the order in which those installments were required to be paid.

As was the case in Notice 89–52, the proposed regulations would provide that a plan sponsor generally can use a plan's funding balances to satisfy quarterly contribution requirements. However, this rule is subject to the new limitation on the use of funding balances by underfunded plans pursuant to section 430(f)(3)(C). An eligible plan sponsor's election to use the plan's prefunding balance and funding standard carryover balance under section 430(f) satisfies the obligation to make an installment on the date of the election, to the extent of the amount elected, as adjusted with interest at the plan's effective interest rate under section 430(h)(2)(A) for the plan year from the valuation date through the due date of the installment. Comments are requested regarding whether rules should be provided under which a plan sponsor is deemed to make an election to use a funding balance to the extent it is available to avoid a failure to make any required quarterly installment or under which a plan sponsor can make a single election that will apply to all future quarterly installments until revoked.

[5] These proposed regulations do not provide rules for determining whether a plan has a funding shortfall for the 2007 plan year for purposes of determining whether the plan must make required quarterly installments for the 2008 plan year. Nonetheless, plans must make this determination on a reasonable basis. See the discussion in this preamble under the heading "Proposed Legislation" for a rule that the IRS and the Treasury Department are considering for this purpose.

[6] In determining required installments for the plan year that begins in 2008, the minimum required contribution for the 2007 plan year under section 412 is used as the minimum required contribution for the preceding plan year. This amount, which does not reflect either use of the credit balance or the granting of any funding waiver, is adjusted with interest to the end of the 2007 plan year at the plan's valuation interest rate for the 2007 plan year.

A plan sponsor that uses the plan's prefunding balance or funding standard carryover balance toward satisfaction of the plan's quarterly contribution requirement before the plan's effective interest rate for the plan year has been determined should assume, in order to ensure that the quarterly contribution requirements are satisfied, that the effective interest rate is equal to the lowest of the three segment rates (generally the first segment rate) to adjust the elected amount. Plan sponsors should also note that, pursuant to proposed §1.430(f)–1(b)(1)(ii)(B), the amount of the funding balance that is used to satisfy the quarterly contribution requirements cannot later be added back to the prefunding balance (because only contributions in excess of the minimum funding requirement, determined without regard to the offset under section 430(f)(3), are eligible to be added to the prefunding balance).

The proposed regulations would provide rules for the liquidity requirements that generally apply to plans for which quarterly contributions are required. Under the proposed regulations, a plan subject to the requirement to make quarterly contributions (other than a small plan described in section 430(g)(2)(B)) is treated as failing to pay the full amount of the required installment for a quarter to the extent that the value of the liquid assets paid after the close of that quarter and on or before the due date for the installment is less than the liquidity shortfall for that quarter. Thus, in order to satisfy the quarterly contribution requirement for a quarter, liquid assets in the amount of the liquidity shortfall must be contributed after the close of that quarter and on or before the due date for the installment.[7] The use of funding balances or the contribution of illiquid assets cannot remedy a liquidity shortfall.

The rules under the proposed regulations relating to the liquidity requirements are similar to the rules provided under Rev. Rul. 95–31; however, these rules have been updated to reflect statutory changes. For example, the definition of liquid assets under the proposed regulations is the same as the definition of liquid assets under Rev. Rul. 95–31. Unlike Rev. Rul. 95–31, the proposed regulations measure satisfaction of a liquidity shortfall by reference to contributions made after the close of the quarter and by the due date for the installment while including contributions made during the plan quarter in plan assets. Although this appears to be a change from the rules of Rev. Rul. 95–31, the two formulations are mathematically identical.

The proposed regulations provide that, for purposes of applying the additional 5 percentage point interest adjustment in the case of a quarterly contribution that is not fully paid, the liquidity increment for the quarter (the portion of the quarterly installment that is due solely by reason of the liquidity requirements) continues to be treated as unpaid until the close of the quarter in which the due date for that installment occurs, regardless of when it is contributed. However, for purposes of adjusting the contribution to the valuation date at the effective interest rate, the adjustment is made from the actual contribution date (rather than from the close of the quarter). In addition, the proposed regulations provide an ordering rule under which, if a contribution for a quarter is less than the total amount needed to satisfy the quarterly contribution requirement taking into account the liquidity requirement, then the contribution is first attributed toward satisfying the quarterly contribution requirement determined without regard to the liquidity requirement.

Under the proposed regulations, if the amount of any required installment is increased because of the liquidity shortfall rules, that increase cannot exceed the amount that, when added to prior required installments determined under section 430(j) for the plan year, would increase the funding target attainment percentage of the plan for the plan year (taking into account the expected increase in funding target due to benefits accruing or earned during the plan year) to 100%.

The proposed regulations would provide that the rules under section 430(j) generally apply to a plan maintained by a commercial passenger airline (or other eligible employer) that has made an election under section 402(a)(1) or 402(a)(2) of PPA '06 in the same manner as they apply to any other plan subject to section 430. However, in the case of a plan with respect to which the election under section 402(a)(1) of PPA '06 has been made, the determination of the funding shortfall for a plan year is made by reference to the unfunded liability under section 402(e)(3)(A) of PPA '06. In addition, the effective interest rate for a plan with respect to which the election under section 402(a)(1) of PPA '06 has been made is deemed to be 8.85%. Pursuant to proposed §1.430(h)(2)–1(f)(1), the effective interest rate for a plan with respect to which the election under section 402(a)(2) of PPA '06 has been made will be 8.25% for the 10-year period during which the election applies to the plan.

IV. *Section 54.4971(c)–1 Taxes on Failure to Meet Minimum Funding Standards*

These proposed regulations set forth the definitions that apply for purposes of applying the rules of section 4971 that were modified by PPA '06.

The proposed regulations define the term *accumulated funding deficiency* (which is only relevant for a multiemployer plan) as having the meaning given to that term by section 431. A multiemployer plan's accumulated funding deficiency for a plan year takes into account all charges and credits to the funding standard account under section 412 for plan years before the first plan year for which section 431 applies to the plan.

The proposed regulations define the term *unpaid minimum required contribution*, with respect to any plan year, as any minimum required contribution under section 430 for the plan year that is not paid on or before the due date for the plan year under section 430(j)(1). The proposed regulations provide that a plan's accumulated funding deficiency under section 412 for the pre-effective plan year is treated as an unpaid minimum required contribution for that plan year until correction is made. Unlike the determination of accumulated funding deficiency which applied under section 412 prior to PPA '06, the total unpaid minimum required contributions is not adjusted with interest. However, as described in the following paragraph, correction of an unpaid minimum required contribution does require a contribution that includes an adjustment for interest.

[7] In this context, see Department of Labor Interpretive Bulletin 94–3 (29 CFR 2509.94–3), which sets forth the Department's view that, in the absence of an applicable exemption, a contribution by an employer to a defined benefit plan in a form other than cash constitutes a prohibited transaction under section 406 of ERISA and section 4975 of the Code.

The proposed regulations define the term *correct* as it applies to the accumulated funding deficiency and the unpaid minimum required contribution of a plan. With respect to an accumulated funding deficiency under a multiemployer plan, the proposed regulations set forth rules that are the same as the rules set forth in proposed §54.4971–2(a). Under the proposed regulations, the correction of an unpaid minimum required contribution under a single employer plan for a plan year requires the contribution, to or under the plan, of the amount that, when discounted to the valuation date for the plan year for which the unpaid minimum required contribution is due at the appropriate rate of interest, equals or exceeds the unpaid minimum required contribution. For this purpose, the appropriate rate of interest is the plan's effective interest rate for the plan year for which the unpaid minimum required contribution is due except to the extent that the payments are subject to additional interest as provided under section 430(j)(3) or (4). With respect to an unpaid minimum required contribution, the proposed regulations provide an ordering rule under which a contribution is attributable first to the earliest plan year of any unpaid minimum required contribution for which correction has not yet been made. With respect to an accumulated funding deficiency under section 412 for the pre-effective plan year that is treated as an unpaid minimum required contribution, the proposed regulations provide that correction requires the contribution, to or under the plan, of the amount of that accumulated funding deficiency adjusted with interest from the end of the pre-effective plan year to the date of the contribution at the plan's valuation interest rate for the pre-effective plan year.

The IRS and the Treasury Department intend to issue further guidance in the future on the application of section 4971, including special rules applicable to multiemployer plans that are in critical or endangered status under section 432.

Proposed Legislation

As of the date of the issuance of these proposed regulations, bills have been passed in the House of Representatives and the Senate that would provide for technical corrections to PPA '06.[8] These bills would amend section 430(j)(3)(A) to authorize the Treasury Department to provide rules for determining the funding shortfall for purposes of the pre-effective plan year and would add section 430(j)(3)(E)(iii) to authorize the Treasury Department to provide special rules for the treatment of quarterly contributions in the case of a plan with a valuation date other than the first day of the plan year. These bills would also specify an effective date for the PPA '06 amendments to section 4971.

These proposed regulations have reserved §1.430(j)–1(c)(6) and §1.430(j)–1(g)(5)(ii) in order to accommodate any enacted changes to section 430(j). If legislation similar to that in the proposed technical corrections is enacted, the IRS and the Treasury Department are considering including the following provisions in final regulations. First, the funding shortfall for the pre-effective plan year would be determined as the excess (if any) of the plan's current liability determined pursuant to section 412(l)(7) on the valuation date for the plan's pre-effective plan year, over the net plan assets for the pre-effective plan year as determined under §1.430(i)–1(f)(5)(ii). Second, if a quarterly installment is due before the valuation date for the plan year, the minimum required contribution for the plan year would be increased by an additional amount if that quarterly installment is not paid by the due date. This additional amount would be determined by applying interest at an annual rate of 5% to the underpayment of the required installment for the period of time between the due date for the required installment and the earlier of the date of payment or the valuation date.

Effective/Applicability Dates of Regulations

Section 430 generally applies to plan years beginning on or after January 1, 2008. The proposed regulations under section 430 are proposed to apply generally to plan years beginning on or after January 1, 2009. When the regulations are finalized, plans will be permitted to apply them for plan years beginning in 2008. In addition, for plan years beginning in 2008, plans are permitted to rely on the proposed regulations for purposes of satisfying the requirements of section 430. In the case of a plan for which the effective date of section 430 is delayed in accordance with sections 104 through 106 of PPA '06, the regulations are proposed to apply to plan years beginning on or after the date section 430 first applies with respect to the plan.

The amendments made to section 4971 by section 114 of PPA '06 do not have a specific effective date. The regulations provide that the amendments to section 4971 generally apply at the same time as the amendments to section 430 (or section 431, as applicable) apply to the plan. Thus, the regulations provide that the amendments to section 4971 generally apply to taxable years beginning on or after January 1, 2008, but only with respect to plan years for which section 430 (or section 431) applies to the plan that end with or within any such taxable year. In the case of a plan to which a delayed effective date applies pursuant to sections 104 through 106 of PPA '06, the regulations provide that the amendments made to section 4971 apply to the same taxable years, but only with respect to plan years for which section 430 applies to the plan. The regulations under section 4971 generally are proposed to apply at the same time the statutory changes to section 4971 under PPA '06 become effective but would not apply to taxable years ending before April 15, 2008. Thus, for example, the regulations under section 4971 would not apply to a short taxable year beginning January 1, 2008, and ending February 29, 2008.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because the proposed regulations do not impose a collection of information on small entities, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Code, these regulations have

[8] See H.R. 3361 as passed by the House of Representatives on March 13, 2008 and S. 1974 as passed by the Senate on December 19, 2007.

been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and 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 specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for August 4, 2008, beginning at 10 a.m. in the Auditorium, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by July 15, 2008, and an outline of topics to be discussed and the amount of time to be devoted to each topic (a signed original and eight (8) copies) by July 15, 2008. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

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

* * * * *

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 1.430(a)–1 is added to read as follows:

§1.430(a)–1 Determination of minimum required contribution.

(a) *In general*—(1) *Overview*. This section sets forth rules for determining a plan's minimum required contribution for a plan year under section 430(a). Section 430 and this section apply to single employer defined benefit plans (including multiple employer plans as defined in section 413(c)) that are subject to section 412 but do not apply to multiemployer plans (as defined in section 414(f)). Paragraph (b) of this section defines a plan's minimum required contribution for a plan year. Paragraph (c) of this section provides rules for determining shortfall amortization installments. Paragraph (d) of this section provides rules for determining waiver amortization installments. Paragraph (e) of this section provides for early deemed amortization of shortfall and waiver amortization bases for fully funded plans. Paragraph (f) of this section provides definitions that apply for purposes of this section. Paragraph (g) of this section provides examples that illustrate the application of this section. Paragraph (h) of this section provides effective/applicability dates and transition rules.

(2) *Special rules for multiple employer plans*. In the case of a multiple employer plan to which section 413(c)(4)(A) applies, the rules of section 430 and this section are applied separately for each employer under the plan, as if each employer maintained a separate plan. Thus, the minimum required contribution is computed separately for each employer under such a multiple employer plan. In the case of a multiple employer plan to which section 413(c)(4)(A) does not apply (that is, a plan described in section 413(c)(4)(B) that has not made the election for section 413(c)(4)(A) to apply), the rules of section 430 and this section are applied as if all participants in the plan were employed by a single employer.

(b) *Definition of minimum required contribution*—(1) *In general*. In the case of a defined benefit plan that is not a multiemployer plan (within the meaning of section 414(f)), except as offset under section 430(f) and §1.430(f)–1, the minimum required contribution for a plan year is determined as the applicable amount determined under paragraph (b)(2) of this section or paragraph (b)(3) of this section, reduced by the amount of any funding waiver under section 412(c) that is granted for the plan year. See paragraph (b)(4) of this section for special rules for a plan maintained by a commercial passenger airline (or other eligible employer) for which an election under section 402 of the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780) (PPA '06), has been made, and see section 430(j) and §1.430(j)–1 for rules regarding the required interest adjustment for a contribution that is paid on a date other than the valuation date for the plan year.

(2) *Plan assets less than funding target*—(i) *General rule*. For any plan year in which the value of plan assets of the plan (as reduced to reflect the subtraction of certain funding balances as provided under §1.430(f)–1(c), but not below zero) is less than the funding target of the plan for the plan year, the minimum required contribution for that plan year is equal to the sum of—

(A) The target normal cost of the plan for the plan year;

(B) The total (not less than zero) of the shortfall amortization installments determined with respect to the shortfall amortization bases for the plan year and each of the 6 preceding plan years as described in paragraph (c) of this section; and

(C) The total of the waiver amortization installments determined with respect to the waiver amortization bases for each of the 5 preceding plan years as described in paragraph (d) of this section.

(ii) *Special rule for short plan years*—(A) *Proration of amortization installments*. In determining the minimum

required contribution in the case of a plan year that is shorter than 12 months (and is not a 52-week plan year of a plan that uses a 52–53 week plan year), the shortfall amortization installments and waiver amortization installments that are taken into account under paragraphs (b)(2)(i)(B) and (C) of this section are determined by multiplying the amount of those installments that would be taken into account for a 12-month plan year by a fraction, the numerator of which is the duration of the short plan year and the denominator of which is 1 year.

(B) *Effect on subsequent years.* In plan years after the short plan year, installments with respect to a shortfall amortization base (or waiver amortization base) continue to be taken into account under paragraphs (b)(2)(i)(B) and (C) of this section until the total amount of those installments, as originally determined to be paid over 7 years (or 5 years in the case of waiver amortization installments), has been taken into account. Thus, for example, in the case of a plan that has a short plan year, an additional partial installment will be taken into account under paragraphs (b)(2)(i)(B) and (C) of this section during the plan year after the end of the original amortization period in an amount determined so that the total of the amortization installments (including the prorated installment payable for the short plan year and the additional partial installment) is equal to the total amount of the amortization installments as originally determined. Similarly, in the case of a plan that has a short plan year, the total number of plan years required to take into account the full amount of installments will exceed 7 plan years (or 5 plan years in the case of waiver amortization installments), and, accordingly, the number of preceding plan years taken into account in paragraphs (b)(2)(i)(B) and (C) of this section is correspondingly increased so that the total amount of the amortization installments as originally determined is taken into account. In addition, for plan years beginning after the close of the short plan year, the shortfall amortization installments and waiver amortization installments that are taken into account under paragraphs (b)(2)(i)(B) and (C) of this section are assumed to be paid on the valuation date for the new plan year (rather than on the valuation date for the short plan year and preceding plan years).

(3) *Plan assets equal or exceed funding target.* For any plan year in which the value of plan assets (as reduced to reflect the subtraction of certain funding balances as provided under §1.430(f)–1(c), but not below zero) equals or exceeds the funding target of the plan for the plan year, the minimum required contribution for that plan year is equal to the target normal cost of the plan for the plan year reduced (but not below zero) by that excess.

(4) *Special rules for commercial passenger airlines*—(i) *In general.* This paragraph (b)(4) provides special rules for a plan maintained by a commercial passenger airline (or an employer whose principal business is providing catering services to a commercial passenger airline) for which an election under section 402 of PPA ’06 has been made.

(ii) *Frozen plans*—(A) *Determinations during 17-year amortization period.* If an election described in section 402(a)(1) of PPA ’06 applies for the plan year with respect to an eligible plan described in section 402(c)(1) of PPA ’06, then the plan’s minimum required contribution for purposes of section 430 of the Code for the plan year is equal to the amount necessary to amortize (at an interest rate of 8.85 percent) the unfunded liability of the plan in equal installments over the remaining amortization period. For this purpose, the unfunded liability means the excess of the accrued liability under the plan determined using the unit credit funding method and an interest rate of 8.85 percent over the fair market value of assets, and the remaining amortization period is the 17-plan-year period beginning with the first plan year for which the election was made, reduced by 1 year for each plan year after the first plan year for which the election was made. In addition, the section 430(f)(3) election to apply funding balances against the minimum required contribution does not apply to a plan to which the election described in section 402(a)(1) of PPA ’06 applies for the plan year.

(B) *Determinations following 17-year amortization period.* If an election described in section 402(a)(1) of PPA ’06 applied to the plan for any preceding plan year but does not apply for the current plan year, then the plan’s minimum required contribution for purposes of section 430 of the Code for the plan year is determined without regard to that election. For the first plan year for which that election no longer applies to the plan, any prefunding balance or funding standard carryover balance is reduced to zero.

(iii) *Other plans of commercial passenger airlines.* If an election described in section 402(a)(2) of PPA ’06 has been made for an eligible plan described in section 402(c)(1) of PPA ’06, then the minimum required contribution for purposes of section 430 is determined under generally applicable rules, except that the shortfall amortization base for the first plan year for which section 430 applies to the plan is amortized over 10 years (rather than over 7 years as provided in paragraph (c)(1) of this section) in accordance with §1.430(h)(2)–1(e) and (f) using the interest rates that apply for the first plan year for which section 430 applies to the plan. In such a case, the shortfall amortization installments with respect to the shortfall amortization base for that plan year will continue to be included in determining the minimum required contribution for 10 years rather than 7 years. See also §1.430(h)(2)–1(b)(6) for a special rule for determining the funding target in the case of a plan for which an election under section 402(a)(2) of PPA ’06 has been made.

(c) *Shortfall amortization installments*—(1) *In general.* For purposes of this section, the shortfall amortization installments with respect to a shortfall amortization base established for a plan year are the annual amounts necessary to amortize that shortfall amortization base in level annual installments over the 7-year period beginning with that plan year. See §1.430(h)(2)–1(e) and (f) for rules regarding interest rates used for determining shortfall amortization installments and the date within each plan year on which the installments are assumed to be paid. The shortfall amortization installments are determined using the interest rates that apply for the plan year for which the shortfall amortization base is established and are not redetermined in subsequent plan years to reflect changes in interest rates under section 430(h)(2) for those subsequent plan years.

(2) *Shortfall amortization base*—(i) *In general.* For purposes of this section, unless the value of plan assets (as reduced to reflect the subtraction of certain funding balances as provided under §1.430(f)–1(c)(2), but not below zero) is

equal to or greater than the funding target of the plan for the plan year, a shortfall amortization base is established for the plan year equal to—

(A) The funding shortfall of the plan for the plan year; minus

(B) The amount attributable to future installments determined under paragraph (c)(2)(ii) of this section.

(ii) *Amount attributable to future installments*. The amount attributable to future installments is equal to the sum of the present values (determined in accordance with §1.430(h)(2)–1(e) and (f) using the interest rates that apply for the current plan year) of—

(A) The shortfall amortization installments that have been determined for the plan year and any succeeding plan year with respect to the shortfall amortization bases of the plan for any plan year preceding the plan year; and

(B) The waiver amortization installments that have been determined for the plan year and any succeeding plan year with respect to the waiver amortization bases of the plan for any plan year preceding the plan year.

(iii) *Transition rule*. See paragraph (h)(4) of this section for a transition rule under which only a portion of the funding target is taken into account in determining whether a shortfall amortization base is established under this paragraph (c)(2).

(d) *Waiver amortization installments*—(1) *In general*. For purposes of this section, the waiver amortization installments with respect to a waiver amortization base established for a plan year are the annual amounts necessary to amortize that waiver amortization base in level annual installments over the 5-year period beginning with the following plan year. See §1.430(h)(2)–1(e) and (f) for rules regarding interest rates used for determining waiver amortization installments and the date within each plan year on which the installments are assumed to be paid. The waiver amortization installments established with respect to a waiver amortization base are determined using the interest rates that apply for the plan year for which the waiver is granted (even though the first installment with respect to the waiver amortization base is not due until the subsequent plan year) and are not redetermined in subsequent plan years to reflect changes in interest rates under section 430(h)(2) for those subsequent plan years.

(2) *Waiver amortization base*—(i) *In general*. For purposes of this section, a waiver amortization base is established for each plan year for which a waiver of the minimum funding standard has been granted in accordance with section 412(c). The amount of the waiver amortization base is equal to the amount of the minimum required contribution waived (or the waived funding deficiency) for the plan year.

(ii) *Transition rule*. See paragraph (h)(3) of this section for the treatment of funding waivers granted for plan years beginning before 2008.

(e) *Early deemed amortization upon attainment of funding target*. In any case in which the funding shortfall of a plan for a plan year is zero—

(1) The shortfall amortization bases for all preceding plan years (and all shortfall amortization installments determined with respect to those shortfall amortization bases) are reduced to zero; and

(2) The waiver amortization bases for all preceding plan years (and all waiver amortization installments determined with respect to such bases) are reduced to zero.

(f) *Definitions*—(1) *In general*. The definitions set forth in this paragraph (f) apply for purposes of this section.

(2) *Funding shortfall*. The term *funding shortfall* means the excess (if any) of—

(i) The funding target of the plan for a plan year; over

(ii) The value of plan assets for the plan year (as reduced to reflect the subtraction of the funding standard carryover balance and prefunding balance to the extent provided under §1.430(f)–1(c), but not below zero).

(3) *Funding target*. The term *funding target* means the plan's funding target for a plan year determined under §1.430(d)–1(b)(2), §1.430(i)–1(c), or §1.430(i)–1(e)(1), whichever applies to the plan for the plan year.

(4) *Target normal cost*. The term *target normal cost* means the plan's target normal cost for a plan year determined under §1.430(d)–1(b)(1), §1.430(i)–1(d), or §1.430(i)–1(e)(2), whichever applies to the plan for the plan year.

(g) *Examples*. The following examples illustrate the rules of this section. Unless otherwise indicated, these examples are based on the following assumptions: the plan is subject to section 430 starting in 2008; the plan year is the calendar year; the valuation date is January 1; and the plan's funding standard carryover balance is $0.

Example 1. (i) Plan A has a funding target of $2,500,000 and assets totaling $1,800,000 as of January 1, 2008. The 2008 actuarial valuation is performed using the 24-month average segment rates applicable for September 2007 (determined without regard to the transitional rule of section 430(h)(2)(G)).

(ii) A $700,000 shortfall amortization base is established for 2008, which is equal to the $2,500,000 funding target less $1,800,000 of assets.

(iii) With respect to this shortfall amortization base of $700,000, there is a shortfall amortization installment of $116,852 (which is equal to the $700,000 shortfall amortization base amortized over 7 years) for each year from 2008 through 2014. The amount of this shortfall amortization installment is determined by discounting the first five installments using the first segment interest rate of 5.26%, and by discounting the sixth and seventh installments using the second segment rate of 5.82%.

Example 2. (i) The facts are the same as in *Example 1*, except that the plan was granted a funding waiver of $300,000 in 2006, as of December 31, 2006. The valuation interest rate for the January 1, 2007, actuarial valuation is 8.50% (which exceeds 150% of the applicable federal mid-term rate).

(ii) The waiver amortization installment for the plan year beginning January 1, 2007, is $70,166, which is equal to the $300,000 funding waiver base amortized over 5 years at the valuation interest rate of 8.50%.

(iii) As of January 1, 2008, the present value of the remaining waiver amortization installments is $260,318, which is determined by discounting the remaining four waiver amortization installments of $70,166 to January 1, 2008, using the first segment rate of 5.26%. See paragraph (h)(3) of this section.

(iv) A $439,682 shortfall amortization base is established for 2008, which is equal to the $2,500,000 funding target, less $1,800,000 of assets, less $260,318 (which is the present value of the remaining waiver amortization installments).

(v) With respect to this shortfall amortization base of $439,682, there is a shortfall amortization installment of $73,397 (which is equal to the $439,682 shortfall amortization base amortized over 7 years) for each year from 2008 through 2014.

Example 3. (i) The facts are the same as in *Example 2*. Plan A has a $100,000 target normal cost for the 2008 plan year and was granted a funding waiver for 2008 to the largest extent permitted under section 412(c).

(ii) The minimum required contribution is $243,563 as of January 1, 2008. This is equal to the $100,000 target normal cost, plus the $70,166 waiver amortization installment from the 2006 waiver, plus the $73,397 January 1, 2008, shortfall amortization installment.

(iii) In accordance with section 412(c)(1)(C), the portion of the minimum required contribution attributable to the amortization of the 2006 funding waiver cannot be waived. Therefore, the maximum amount of the January 1, 2008, minimum required contribution that can be waived is $173,397.

(iv) In accordance with paragraph (d) of this section, a waiver amortization base of $173,397 is established as of January 1, 2008, to be amortized over 5 years beginning with the 2009 plan year. Although the waiver amortization installments for the 2008 funding waiver are not included in the minimum required contribution until 2009, the amount of those installments is determined based on the interest rates used for the 2008 plan year.

(v) The waiver amortization installments are calculated using the first segment interest rate of 5.26% for the first four installments (calculated as of January 1, 2009, through January 1, 2012) and the second segment interest rate of 5.82% for the final installment payable as of January 1, 2013. Accordingly, the waiver amortization installments that are payable beginning January 1, 2009, are $40,530 each.

Example 4. (i) The facts are the same as in *Example 3*. As of January 1, 2009, Plan A has a funding target of $2,750,000 and assets totaling $1,900,000. The 2009 actuarial valuation is performed using the 24-month average segment rates applicable for September 2008 (determined without regard to the transitional rule of section 430(h)(2)(G)). For the 2009 plan year, the first segment rate is equal to 5.50%, the second segment rate is equal to 6.00%, and the third segment rate is equal to 6.50%.

(ii) As of January 1, 2009, the present value of the remaining three waiver amortization installments with respect to the 2006 waiver is $199,715, which is determined using the first segment rate of 5.50%.

(iii) As of January 1, 2009, the present value of the remaining five waiver amortization installments with respect to the 2008 waiver is $182,594, which is determined using the first segment rate of 5.50%.

(iv) As of January 1, 2009, the present value of the remaining six shortfall amortization installments with respect to the 2008 shortfall amortization base is $385,511, which is determined using the first segment rate of 5.50% for the first five installments and the second segment rate of 6.00% for the sixth installment.

(v) A shortfall amortization base of $82,180 is established for 2009, which is equal to the $2,750,000 funding target, less $1,900,000 of assets, less $199,715 (the present value of the remaining waiver amortization installments with respect to the 2006 waiver), less $182,594 (the present value of the remaining waiver amortization installments with respect to the 2008 waiver), less $385,511 (the present value of the remaining installments with respect to the 2008 shortfall amortization base).

(vi) With respect to this shortfall amortization base of $82,180, there is a shortfall amortization installment of $13,795 (which is equal to the $82,180 shortfall amortization base amortized over 7 years) for each year from 2009 through 2015.

Example 5. (i) The facts are the same as in *Example 4*, except that Plan A has assets totaling $2,000,000 as of January 1, 2009. Plan A has a target normal cost of $110,000 as of January 1, 2009.

(ii) A shortfall amortization base of -$17,820 is established for 2009, which is equal to the $2,750,000 funding target, less $2,000,000 of assets, less $199,715 (the present value of the remaining installments with respect to the 2006 waiver), less $182,594 (the present value of the remaining installments with respect to the 2008 waiver), less $385,511 (the present value of the remaining installments with respect to the 2008 shortfall amortization base).

(iii) The shortfall amortization installment for the 2009 shortfall amortization base is -$2,991, which is equal to the -$17,820 shortfall amortization base amortized over 7 years. The first five shortfall amortization installments are discounted using the first segment rate of 5.50% and the sixth and seventh shortfall amortization installments are discounted using the second segment rate of 6.00%.

(iv) The minimum required contribution for the 2009 plan year is $291,102. This is equal to the target normal cost of $110,000 plus the shortfall amortization charge of $70,406 (that is, $73,397 minus $2,991) plus the waiver amortization charge of $110,696 (that is, $70,166 plus $40,530).

Example 6. (i) The facts are the same as in *Example 5*, except that Plan A has assets totaling $2,800,000 as of January 1, 2009.

(ii) Because the assets of $2,800,000 exceed the funding target of $2,750,000 as of January 1, 2009, no new shortfall amortization base is established under paragraph (c)(2) of this section.

(iii) Furthermore, under paragraph (e) of this section, all shortfall amortization bases and waiver amortization bases (and all shortfall amortization installments and waiver amortization installments associated with those bases) are reduced to zero as of January 1, 2009.

(iv) The minimum required contribution for the 2009 plan year is $60,000, which is equal to the $110,000 target normal cost less the excess of the assets over the funding target ($2,800,000 minus $2,750,000).

Example 7. (i) The actuarial valuation for Plan B as of January 1, 2008, based on a 12-month plan year, determines a target normal cost of $110,000 and a shortfall amortization installment for 2008 of $185,000. The plan year for Plan B is changed to April 1 through March 31, effective April 1, 2008, resulting in a short plan year beginning January 1, 2008, and ending March 31, 2008.

(ii) The target normal cost for the short plan year is redetermined in order to reflect the fact that there is a short plan year. An actuarial valuation shows that the target normal cost is $25,000 for the short plan year based on the accruals for that short plan year (determined in accordance with 29 CFR §2530.204–2(e)).

(iii) In accordance with paragraph (b)(2)(ii)(A) of this section, the shortfall amortization base is prorated to reflect the three months covered by the short plan year. Accordingly, the shortfall amortization installment for the short plan year is $46,250 (that is, $185,000 multiplied by 3/12).

(iv) The total minimum required contribution for the short plan year (without offset for any carryover balance as of January 1, 2008) is $71,250 (that is, the sum of the target normal cost of $25,000 plus the shortfall amortization installment of $46,250).

Example 8. (i) The facts are the same as in *Example 7*. The first segment rate for the plan year beginning April 1, 2008, is 5.30%, and the second segment rate is 5.80%.

(ii) The present value of the remaining shortfall amortization installments with respect to the January 1, 2008, shortfall amortization base is equal to $1,074,937. This is determined by discounting the remaining installments (6 full-year installments due April 1, 2008 through April 1, 2013, and a final 9-month installment due April 1, 2014) using the first segment rate of 5.30% for the first five installments and the second segment rate of 5.80% for the remaining installments.

(h) *Effective/applicability dates and transition rules*—(1) *In general*. Section 430 generally applies to plan years beginning on or after January 1, 2008. In general, this section applies to plan years beginning on or after January 1, 2009. However, plans are permitted to apply this section in determining the minimum required contribution for plan years beginning in 2008.

(2) *Plans with delayed effective date*. In the case of a plan for which the effective date of section 430 is delayed in accordance with sections 104 through 106 of PPA ’06, this section applies to plan years beginning on or after the date section 430 first applies with respect to the plan.

(3) *Treatment of pre–2008 funding waivers*. In the case of a plan that has received a funding waiver under section 412 for a plan year for which section 430 was not yet effective with respect to the plan, the waiver is treated as giving rise to a waiver amortization base and the amortization charges with respect to that funding waiver are treated as waiver amortization installments as described in paragraph (d) of this section. With respect to such a preexisting funding waiver, the amount of the waiver amortization installment is equal to the amortization charge with respect to that waiver determined using the interest rate or rates that applied for the pre-effective plan year.

(4) *Transition rule for determining whether shortfall amortization base is established*—(i) *In general*. Except as provided in paragraphs (h)(4)(iii) and (iv) of this section, in the case of plan years beginning after 2007 and before 2011, only the applicable percentage of the funding target is taken into account in determining whether a shortfall amortization base is established for the plan year under paragraph (c)(2) of this section.

(ii) *Applicable percentage*. For purposes of paragraph (h)(4)(i) of this section, the applicable percentage is determined in accordance with the following table:

Calendar year in which the plan year begins	Applicable percentage
2008	92
2009	94
2010	96

(iii) *Transition rule not available if funding falls below applicable percentage*. The transition rule of paragraph (h)(4)(i) of this section does not apply with respect to any plan year beginning after 2008 if a shortfall amortization base was required to be established under paragraph (c)(2) of this section for any preceding year.

(iv) *Transition rule not available for new plans or deficit reduction plans*. The transition rule of paragraph (h)(4)(i) of this section does not apply to a plan—

(A) That was not in effect for a plan year beginning in 2007; or

(B) That was subject to section 412(l) for the pre-effective plan year, determined after the application of sections 412(l)(6) and (9) (regardless of whether the deficit reduction contribution for the pre-effective plan year was equal to zero).

(v) *Pre-effective plan year*. For purposes of this section, the pre-effective plan year for a plan is the last plan year beginning before section 430 applies to the plan. Thus, except for plans with a delayed effective date under paragraph (h)(2) of this section, the pre-effective plan year for a plan is the last plan year beginning before January 1, 2008.

Par. 3. Section 1.430(j)–1 is added to read as follows:

§1.430(j)–1 Payment of minimum required contributions.

(a) *In general*—(1) *Overview*. This section provides rules related to the payment of minimum required contributions, including the payment of quarterly contributions. Section 430(j) and this section apply to single employer defined benefit plans (including multiple employer plans as defined in section 413(c)) but do not apply to multiemployer plans (as defined in section 414(f)). Paragraph (b) of this section describes the general timing requirement for minimum required contributions. Paragraph (c) of this section describes the accelerated quarterly contribution schedule for plans with a funding shortfall in the preceding plan year. Paragraph (d) of this section provides rules regarding liquidity requirements. Paragraph (e) of this section provides definitions. Paragraph (f) of this section provides examples that illustrate the rules of this section. Paragraph (g) of this section sets forth effective/applicability dates and transition rules.

(2) *Special rules for multiple employer plans*. In the case of a multiple employer plan to which section 413(c)(4)(A) applies, the rules of section 430 and this section are applied separately for each employer under the plan, as if each employer maintained a separate plan. Thus, for example, required quarterly contributions are determined separately for each employer under such a multiple employer plan. In the case of a multiple employer plan to which section 413(c)(4)(A) does not apply (that is, a plan described in section 413(c)(4)(B) that has not made the election for section 413(c)(4)(A) to apply), the rules of section 430 and this section are applied as if all participants in the plan were employed by a single employer.

(3) *Applicability of section 430(j) to plans of commercial passenger airlines*—(i) *In general*. Except as otherwise provided in this section, the rules of section 430(j) and this section apply to a plan for which an election described in section 402 of the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780) (PPA ’06), has been made in the same manner as those rules apply to any other plan subject to section 430.

(ii) *Special rules for plans for which election was made pursuant to section 402(a)(1) of PPA ’06*. For purposes of applying the rules of section 430(j) and this section to a plan with respect to which the election under section 402(a)(1) of PPA ’06 has been made, the effective interest rate for the plan is deemed to be 8.85% during the period for which the election applies. In addition, see paragraph (e)(4)(ii) of this section for a special determination of the funding shortfall for a plan for which the election in section 402(a)(1) of PPA ’06 has been made.

(b) *General timing requirement for minimum required contributions*—(1) *Earliest date for contributions*. A payment of the minimum required contribution under section 430 for a plan year can be made no earlier than the first day of the plan year.

(2) *Deadline for contributions*. The deadline for any payment of any minimum required contribution for a plan year is 8½ months after the close of the plan year. See section 4971 and the regulations thereunder regarding an excise tax that applies with respect to minimum required contributions not paid by this deadline. See also section 430(k) of the Code and section 101(d) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1021(d), for additional rules that apply in the case of a failure to pay minimum required contributions by this deadline.

(3) *Adjustment for interest*. Any payment of the minimum required contribution under section 430 for a plan year that is made on a date other than the valuation date for that plan year is adjusted for interest accruing for the period between the valuation date and the payment date, at the effective interest rate for the plan for that plan year determined pursuant to §1.430(h)(2)–1(f)(1). The direction of the adjustment depends on whether the contribution is paid before or after the valuation date for the plan year. If the contribution is paid after the valuation date for the plan year, the contribution is discounted to the valuation date using the plan’s effective interest rate. By contrast, if the contribution is paid before the valuation date for the plan year (which could only occur in the case of a small plan described in section 430(g)(2)(B)), the contribution is increased for interest using the plan’s effective interest rate.

(c) *Accelerated quarterly contribution schedule for underfunded plans*—(1) *In general*—(i) *Plan subject to quarterly contribution requirement*. In any case in which the plan has a funding shortfall for the preceding plan year, the employer

maintaining the plan shall make the required installments described in paragraph (c)(3) of this section by the due dates described in paragraph (c)(4) of this section.

(ii) *Satisfaction of installments through use of funding balances*. In the case of a plan that is subject to the quarterly contribution requirement under this paragraph (c), if the plan sponsor makes an election to use the plan's prefunding balance or funding standard carryover balance under section 430(f), then the plan sponsor is treated as satisfying the obligation to make a required installment under paragraph (c)(1)(i) of this section on the date of the election to the extent of the amount elected, as adjusted with interest. This interest adjustment is made at the plan's effective interest rate under section 430(h)(2)(A) for the plan year from the valuation date through the due date of the installment.

(iii) *Consequences of failure to make quarterly contribution*—(A) *Interest adjustment*. If the full amount of a required installment is not paid by the due date for that installment, then an increased rate of interest applies in adjusting the payment to the valuation date. This increased rate of interest is equal to the rate otherwise used under paragraph (b) of this section plus 5 percentage points, and applies with respect to the underpayment of the required installment (determined pursuant to paragraph (c)(2) of this section) for the period of time that begins on the due date for the required installment and that ends on the date on which payment is made.

(B) *Application to required installments due before the valuation date*. The modified interest rate described in paragraph (c)(1)(iii)(A) of this section only applies to a required installment that is due on or after the valuation date for the plan year. See paragraph (c)(6) of this section for rules that apply to required installments that are due before the valuation date for the plan year.

(C) *Additional consequences*. See section 430(k) of the Code and section 101(d) of ERISA for examples of additional consequences of failure to make quarterly contributions.

(2) *Determination of underpayment*—(i) *Underpayment for a quarter*. For purposes of this section, the amount of the underpayment with respect to a required installment for a quarter is equal to the excess of—

(A) The required installment; over

(B) The amount (if any) of the installment contributed to or under the plan on or before the due date for the installment.

(ii) *Order of crediting contributions*. For purposes of this section, contributions are first credited against the earliest unpaid required installments.

(3) *Amount of required installment*—(i) *In general*. For purposes of this section, the amount of any required installment is equal to 25% of the required annual payment described in paragraph (c)(3)(ii) of this section.

(ii) *Required annual payment*. The required annual payment is equal to the lesser of—

(A) 90% of the minimum required contribution under section 430 for the plan year; or

(B) 100% of the minimum required contribution under section 430 (determined without regard to any funding waiver under section 412) for the preceding plan year.

(iii) *Treatment of funding balances*. For purposes of paragraph (c)(3)(ii) of this section, the minimum required contribution for a plan year is determined without regard to the use of the prefunding balance or funding standard carryover balance in the current year or any prior year. However, see paragraph (c)(1)(ii) of this section regarding a plan sponsor's election to use the plan's prefunding balance or funding standard carryover balance in the current year for the payment of quarterly installments.

(4) *Due dates for installments*. For purposes of this section, there is a required installment for each quarter of the plan year. The due dates for the four required quarterly installments with respect to a full plan year are set forth in the following table:

Installment	Due date
First quarter's installment	15th day of 4th plan month
Second quarter's installment	15th day of 7th plan month
Third quarter's installment	15th day of 10th plan month
Fourth quarter's installment	15th day after the close of the plan year

(5) *Special rules for short plan years*—(i) *In general*. In the case of a short plan year, the rules of this paragraph (c) are modified as provided in this paragraph (c)(5).

(ii) *Current plan year is short plan year*—(A) *Amount of required annual payment*. In determining the required annual payment pursuant to paragraph (c)(3)(ii) of this section for a short plan year, the amount otherwise determined under paragraph (c)(3)(ii)(B) (based on the prior year's minimum required contribution) is multiplied by a fraction, the numerator of which is the duration of the short plan year and the denominator of which is 1 year.

(B) *Number and due dates of installments*. If the plan has a short plan year, then an installment is due 15 days after the close of that short plan year. In addition, an installment is required for each due date determined under paragraph (c)(4) of this section that falls within the short plan year. Thus, for example, if the short plan year ends before the 15th day of the 4th plan month of the plan year, there will be only one installment for that short plan year, and that installment will be due on the 15th day after the close of the short plan year.

(C) *Amount of installments*. The amount of each installment required to be paid for the short plan year is equal to the required annual payment determined pursuant to paragraph (c)(3)(ii) of this section (as modified by paragraph (c)(5)(ii)(A) of this section) divided by the number of installments determined pursuant to paragraph (c)(5)(ii)(B) of this section.

(iii) *Prior plan year is short plan year*. If the prior plan year is a short plan year, then the rule of paragraph (c)(3)(ii)(B) regarding the use of 100% of the prior year's minimum required contribution in determining the required annual payment does not apply. Accordingly, in such a case, the required annual payment is equal to 90% of the minimum required contribution under section 430 for the current plan year.

(6) *Special rule for plans with valuation dates after the first day of the plan year*. [Reserved]

(d) *Liquidity requirement in connection with quarterly contributions*—(1) *In general*—(i) *Requirement to make additional quarterly contributions*. Except as provided in paragraphs (d)(1)(ii) and (iii) of this section, if a plan is subject to the requirement to make quarterly contributions under paragraph (c) of this section, then the plan is treated as failing to pay the full amount of a required installment for a quarter to the extent that the value of the liquid assets contributed after the close of that quarter and on or before the due date for the installment is less than the liquidity shortfall for that quarter.

(ii) *Limitation on increase*. The amount by which any required installment is increased by reason of paragraph (d)(1)(i) of this section cannot exceed the amount that, when added to prior required installments for the plan year, would increase the funding target attainment percentage of the plan for the plan year (taking into account the expected increase in the funding target due to benefits accruing or earned during the plan year) to 100%.

(iii) *Small plan exception*. The liquidity requirement of this paragraph (d) does not apply to a small plan that is described in §1.430(g)–1(b)(2).

(2) *Period of underpayment*—(i) *General rule*. For purposes of applying the additional 5 percentage point interest adjustment pursuant to paragraph (c)(1)(iii) of this section, the liquidity increment with respect to a quarter as described in paragraph (d)(2)(ii) of this section continues to be treated as unpaid until the close of the quarter in which the due date for that installment occurs without regard to when that portion is paid. However, for purposes of adjusting the contribution to the valuation date at the effective interest rate under paragraph (b)(3) of this section, the adjustment is made from the contribution date (rather than the close of the quarter).

(ii) *Liquidity increment*. For purposes of this paragraph (d), the liquidity increment with respect to a quarter is the portion of the required installment for that quarter that is treated as not paid solely by reason of paragraph (d)(1)(i) of this section.

(iii) *Ordering rule*. If the employer makes a contribution for a quarter that, after application of paragraph (c)(2)(ii) of this section, is less than the total amount needed to satisfy the requirements of paragraph (c) of this section as increased by this paragraph (d) for a quarter, then the contribution is first attributed toward satisfying the requirements of paragraph (c) of this section (without regard to this paragraph (d)) and then to the liquidity increment.

(3) *Consequences of failure to pay liquidity shortfall*. See section 4971(f) for an excise tax on the failure to pay a liquidity shortfall. See also section 206(e) of ERISA.

(e) *Definitions*—(1) *In general*. The definitions set forth in this paragraph (e) apply for purposes of this section.

(2) *Adjusted disbursements*. The term *adjusted disbursements* means disbursements from the plan reduced by the product of—

(i) The plan's funding target attainment percentage determined under section 430(d)(2) for the plan year; and

(ii) The sum of the purchases of annuities and payments of single sums.

(3) *Disbursements from the plan*. The term *disbursements from the plan* means all disbursements from the trust, including purchases of annuities, payments of single sums and other benefits, and administrative expenses.

(4) *Funding shortfall*—(i) *In general*. The term *funding shortfall* means the excess (if any) of—

(A) The funding target of the plan for a plan year; over

(B) The value of plan assets for the plan year (as reduced to reflect the subtraction of certain funding balances as provided under §1.430(f)–1(c), but not below zero).

(ii) *Special rule for plans of commercial passenger airlines*. In the case of a plan year for which an election described in section 402(a)(1) of PPA '06 is in effect, the term *funding shortfall* means the unfunded liability for that plan year determined under §1.430(a)–1(b)(4)(ii).

(iii) *Special rule for first effective plan year*. See paragraph (g)(5)(ii) of this section for a calculation of the funding shortfall for the plan's pre-effective plan year.

(iv) *Special rule for plan spinoffs and mergers*. [Reserved]

(5) *Liquid assets*—(i) *In general*. The term *liquid assets* means cash, marketable securities, and other assets described in this paragraph (e)(5)(i). For this purpose, marketable securities include financial instruments such as stocks and other equity interests, evidences of indebtedness (including certificates of deposit), options, futures contracts, and other derivatives, for which there is a liquid financial market, and other interests in entities (such as partnerships, trusts, or regulated investment companies) for which there is a liquid financial market. For purposes of the preceding sentence, a liquid financial market is an established financial market described in §1.1092(d)–1(b) (other than an interbank market or an interdealer market described in §1.1092(d)–1(b)(1)(v) and (vi), respectively). Any security that is issued or guaranteed by the government of the United States or an agency or instrumentality thereof for which there is an established financial market described in §1.1092(d)–1(b) is a marketable security. Finally, any financial instrument or other interest in an entity that, under its terms, contains a right by which the instrument or other interest may immediately be redeemed, exchanged, or converted into cash or a marketable security, is a marketable security, provided there are no restrictions on the exercise of that right.

(ii) *Insurance and annuity contracts*. Other assets that are treated as liquid assets of a plan are insurance, annuity, or other contracts issued by an insurance company that is licensed to do business under the laws of any State, but only if the insurance, annuity, or other contract—

(A) Would be treated as a marketable security under paragraph (e)(5)(i) of this section if it were a financial instrument;

(B) Provides for substantially equal monthly disbursements to the extent provided in paragraph (e)(5)(iii) of this section; or

(C) Is benefit responsive within the meaning of paragraph (e)(5)(iv) of this section.

(iii) *Insurance and annuity contracts providing for substantially equal periodic payments*. If the contract provides for substantially equal monthly disbursements (for example, an annuity contract in pay status), the only portion of the contract that may be treated as liquid assets for a quarter is the amount equal to 36 times the monthly disbursement (in the month containing the last day of the quarter) which is available under the terms of the contract, provided there are no restrictions (within the meaning of paragraph (e)(5)(v) of this section) on the disbursements.

(iv) *Benefit responsive insurance and annuity contracts*. A contract is considered benefit responsive if, under applicable law and contractual provisions, the plan has the right to receive disbursements from the contract in order to pay plan benefits for any participant in the plan, without restrictions (within the meaning of paragraph (e)(5)(v) of this section).

(v) *Restrictions*. For purposes of paragraphs (e)(5)(iii) and (iv) of this section, a restriction on a redemption, exchange or conversion right, or a restriction on a disbursement, may result not only from applicable law or contractual provisions, but also from rehabilitation, conservatorship, receivership, insolvency, bankruptcy or similar proceedings.

(6) *Liquidity shortfall*—(i) *In general*. The term *liquidity shortfall* means, with respect to any required installment, an amount equal to the excess (as of the last day of the quarter for which that installment is made) of—

(A) The base amount with respect to the quarter, over

(B) The value (as of the last day of the quarter) of the plan's liquid assets.

(ii) *Base amount*—(A) *In general*. For purposes of this paragraph (e)(6)(ii), the term *base amount* means, with respect to any quarter, an amount equal to 3 times the sum of the adjusted disbursements from the plan for the 12 months ending on the last day of such quarter.

(B) *Special rule*. If the generally applicable base amount for a quarter determined under paragraph (e)(6)(ii)(A) of this section exceeds an amount equal to 2 times the sum of the adjusted disbursements from the plan for the 36 months ending on the last day of the quarter and the enrolled actuary for the plan certifies to the satisfaction of the Commissioner that such excess is the result of nonrecurring circumstances, the base amount with respect to that quarter is determined without regard to amounts related to those nonrecurring circumstances.

(7) *Plan month*—(i) *Plan year begins on the first day of a calendar month*. For a plan year that begins with the first day of a calendar month, the term *plan month* means any calendar month that begins during the plan year.

(ii) *Plan year begins on a date other than the first day of a calendar month*. For a plan year that begins on a date other than the first day of a calendar month, the first day of each *plan month* is the day of the calendar month that corresponds to the day of the calendar month that is the first day of the plan year. Thus, for example, if the first day of a plan year is January 15, then a plan month starts on the 15th of each calendar month. However, if a calendar month does not contain a day that corresponds to the day of the calendar month which is the first day of the plan year (for example, if a calendar month has only 30 days and the first day of the plan year is the 31st day of a calendar month), then the first day of the plan month that begins during that calendar month is the last day of that calendar month.

(8) *Quarter*. The term *quarter* means, with respect to any required installment, the 3-plan-month period preceding the plan month in which the due date for that installment occurs.

(9) *Short plan year*. The term *short plan year* means a plan year that is shorter than 12 months (and is not a 52-week plan year of a plan that uses a 52–53 week plan year).

(f) *Examples*. The following examples illustrate the rules of this section.

Example 1. (i) Plan A has a calendar year plan year and a January 1 valuation date. Plan A has a funding standard carryover balance of $15,000 as of January 1, 2008, and the plan's funding ratio for 2007 (determined using the transition rule in §1.430(f)–1(h)(5)) was over 80%. The minimum required contribution for Plan A (prior to any offset for the carryover balance) is $100,000 for 2008 and is $125,000 for 2009. The effective interest rate for the 2009 plan year is 5.90%. Plan A is subject to the quarterly contribution requirements for 2009.

(ii) The required annual payment for 2009 is equal to the lesser of (a) 100% of the 2008 minimum required contribution ($100,000) or (b) 90% of the 2009 minimum required contribution (90% of $125,000, or $112,500). Therefore, each required quarterly installment for 2009 is 25% of $100,000, or $25,000.

(iii) Installments of $25,000 each are due by April 15, 2009, July 15, 2009, October 15, 2009, and January 15, 2010. The final contribution for the 2009 plan year is due by September 15, 2010. The amount of this contribution is equal to $125,000, less the contributions made prior to that date, with all contributions adjusted to the valuation date using the effective interest rate for the 2009 plan year. If the plan sponsor makes each required quarterly installment on the date due, the remaining amount due is determined as follows:

(A) The contribution paid April 15, 2009, is adjusted by discounting the contribution amount for $3^1/_2$ months at the effective interest rate ($\$25{,}000 \div 1.0590^{(3.5/12)} = \$24{,}585$).

(B) The contribution paid July 15, 2009, is discounted for $6^1/_2$ months at the effective interest rate ($\$25{,}000 \div 1.0590^{(6.5/12)} = \$24{,}236$).

(C) The contribution paid October 15, 2009, is discounted for $9^1/_2$ months at the effective interest rate ($\$25{,}000 \div 1.0590^{(9.5/12)} = \$23{,}891$).

(D) The contribution paid January 15, 2010, is discounted for $12^1/_2$ months at the effective interest rate ($\$25{,}000 \div 1.0590^{(12.5/12)} = \$23{,}551$).

(E) The sum of the above contributions for the 2009 plan year paid through January 15, 2010, adjusted for interest to the valuation date, is $96,263. The remaining amount due for the 2009 plan year is $125,000 minus $96,263, or $28,737, as of January 1, 2009.

(iv) If the final contribution is made on September 15, 2010, the remaining amount due must be increased for interest at the plan's effective interest rate for the $20^1/_2$ months between January 1, 2009, and September 15, 2010 (so that when it is discounted with interest for those $20^1/_2$ months the resulting amount will equal $28,737). Therefore, the remaining contribution made on September 15, 2010, is $\$28{,}737 \times 1.0590^{(20.5/12)} = \$31{,}694$.

Example 2. (i) The facts are the same as in *Example 1*, except that the plan sponsor elects to use the $15,000 carryover balance as of January 1, 2008, to offset the minimum required contribution for the 2008 plan year. The plan sponsor makes a contribution on January 1, 2008, of $85,000, which satisfies the minimum contribution requirement for 2008.

(ii) The required quarterly installment for 2009 is unaffected by the plan sponsor's election to offset the minimum required contribution by the carryover balance for 2008. Therefore, the required annual payment is $100,000 (determined as the lesser of (a) 100% of $100,000 or (b) 90% of $125,000) and the amount of each required quarterly installment for 2009 is 25% of the required annual payment, or $25,000.

Example 3. (i) The facts are the same as in *Example 1*. Plan A's funding standard carryover balance has increased to $17,000 as of January 1, 2009, based on the actual rate of return of plan assets for the 2008 plan year. Plan A's funding ratio for 2008 (determined under §1.430(f)–1(d)(3)) is over 80%. On April 13, 2009, the plan sponsor elects to use the entire amount of the carryover balance to offset the minimum required contribution for 2009.

(ii) The plan sponsor's election to use the carryover balance to offset the minimum required contribution is treated as satisfying the requirement to make a required installment to the extent of the amount elected, adjusted with interest. This adjustment is made at the plan's effective interest rate for the 2009 plan year, and applies for the period

between January 1, 2009, and April 15, 2009. Therefore, the $17,000 carryover balance as of January 1, 2009, offsets $17,000 x $1.0590^{(3.5/12)}$ or $17,287 of the $25,000 quarterly contribution installment due April 15, 2009, and the remaining contribution due on April 15, 2009, is $25,000 minus $17,287, or $7,713.

(iii) The interest adjustments in paragraph (ii) of this *Example 3* are based on the effective interest rate even if that rate is not determined by the time that the quarterly contribution is due. If the plan's effective interest rate for the plan year has not been determined at the time that the quarterly contribution is due, the actual amount of the required installment satisfied by the use of the carryover balance is determined after the effective interest rate is determined. If the extent to which the carryover balance satisfies the installment requirement is overestimated and the result is the full amount of the required quarterly installment is not paid by the due date, the plan is subject to the consequences for late or unpaid quarterly contributions as described in paragraph (c)(1)(iii) of this section.

Example 4. (i) The facts are the same as in *Example 3*. The plan sponsor makes a contribution of $7,713 (which is equal to the remaining portion of the first required quarterly installment) on April 15, 2009. For the 2009 plan year, the plan sponsor makes another contribution of $200,000 on June 30, 2009. No further contributions are made for the 2009 plan year.

(ii) The contributions made for the 2009 plan year are adjusted to the valuation date using the plan's effective interest rate for the 2009 plan year. The contribution paid April 15, 2009, is discounted for the 3½ months between January 1, 2009, and the date of payment, using the effective interest rate of 5.90% ($7,713 / $1.0590^{(3.5/12)}$ = $7,585). The contribution paid June 30, 2009, is discounted for 6 months using the effective interest rate ($200,000 / $1.0590^{(6/12)}$ = $194,349), for a total interest-adjusted contribution of $201,934.

(iii) The minimum required contribution for 2009 (prior to any offset for the carryover balance) is $125,000 and, under §1.430(f)–1(b)(1)(ii)(B), this amount is used to determine the interest-adjusted excess contribution. Accordingly, the interest-adjusted excess contribution for 2009 is $201,934 minus $125,000, or $76,934, increased for interest to January 1, 2010, using the effective interest rate for 2009 of 5.90%. Thus, the interest-adjusted excess contribution as of January 1, 2010, is $76,934 multiplied by 1.059, or $81,473. All or a portion of this amount may be credited to the prefunding balance at the election of the plan sponsor.

Example 5. (i) The facts are the same as in *Example 3*. The plan sponsor pays the required quarterly installment of $7,713 on April 15, 2009, and installments of $25,000 each on July 15, 2009, and October 15, 2009. However, only $10,000 of the installment due on January 15, 2010, is paid. No additional contributions are made until the final contribution for the plan year of $55,000 is paid on September 15, 2010.

(ii) The 2009 Schedule SB shows that the contributions for the plan year exceed the minimum required contribution. This is determined by comparing the minimum required contribution of $108,000 ($125,000 offset by $17,000 for the amount of carryover balance used) and the interest-adjusted contributions made for the 2009 plan year, developed as shown below:

(A) The contribution paid April 15, 2009, is adjusted by discounting the contribution amount for 3½ months at the effective interest rate ($7,713 ÷ $1.0590^{(3.5/12)}$ = $7,585).

(B) The contribution paid July 15, 2009, is discounted for 6½ months at the effective interest rate ($25,000 ÷ $1.0590^{(6.5/12)}$ = $24,236).

(C) The contribution paid October 15, 2009, is discounted for 9½ months at the effective interest rate ($25,000 ÷ $1.0590^{(9.5/12)}$ = $23,891).

(D) The contribution paid January 15, 2010, is discounted for 12½ months at the effective interest rate ($10,000 ÷ $1.0590^{(12.5/12)}$ = $9,420).

(E) Pursuant to paragraph (c)(1)(iii)(A) of this section, the adjustment for interest on the $15,000 underpayment of the quarterly installment due January 15, 2010, is increased by 5 percentage points for the 8-month period of underpayment (January 15, 2010, through September 15, 2010). Accordingly, $15,000 of the contribution paid on September 15, 2010, is discounted using a rate of 10.90% for 8 months and at the 5.90% effective interest rate for the remaining 12½ months between the quarterly contribution due date of January 15, 2010, and the valuation date of January 1, 2009. This portion of the September 15, 2010, contribution results in an adjusted amount of $13,189 as of January 1, 2009 ($15,000 ÷ $1.1090^{(8/12)}$ ÷ $1.0590^{(12.5/12)}$).

(F) The remaining $40,000 of the contribution paid on September 15, 2010, is discounted using the effective interest rate of 5.90% for the 20½-month period between the date of payment and the valuation date. This portion of the payment is therefore adjusted to $36,268 as of the valuation date (that is, $40,000 ÷ $1.0590^{(20.5/12)}$).

(G) The sum of the above contributions for the 2009 plan year paid through January 15, 2010, adjusted for interest to the valuation date, is $114,589. This is greater than the minimum required contribution for the 2009 plan year of $108,000.

Example 6. (i) The facts are the same as in *Example 5*, except that the plan sponsor does not make a contribution on September 15, 2010. Another contribution is not made until December 15, 2010.

(ii) The 2009 Schedule SB shows an unpaid minimum required contribution of $42,868 as of January 1, 2009. This is equal to the difference between the minimum required contribution of $108,000 ($125,000 offset by $17,000 for the amount of carryover balance used) and $65,132 (the interest-adjusted contributions made for the 2009 plan year before the 8½ month deadline, as illustrated in paragraphs (ii)(A) through (ii)(D) of *Example 5*).

Example 7. (i) The facts are the same as in *Example 1*, except that the plan year is changed to an August 1 - July 31 plan year effective August 1, 2009. This results in a short plan year beginning January 1, 2009, and ending July 31, 2009. The minimum required contribution for the 7-month period covered by the plan year is calculated as $72,917 in accordance with §1.430(a)–1(b)(2)(ii).

(ii) As provided in paragraph (c)(5) of this section, a required installment is due 15 days after the close of the short plan year (August 15, 2009), and required installments are also due on the regularly scheduled due dates for quarterly installments that occur within the short plan year (April 15, 2009, and July 15, 2009).

(iii) The required installments are determined based on the lesser of (a) 90% of the minimum required contribution for the short plan year ending July 31, 2009 (90% of $72,917, or $65,625) or (b) 7/12 of 100% of the 2008 minimum required contribution ($100,000 x 7/12, or $58,333). The required installments are thus based on $58,333 since that is the smaller amount.

(iv) The amount of each required installment is determined by dividing the amount determined in paragraph (iii) of this *Example 7* by the number of required installments for the short plan year. This calculation results in required installments of $19,444 each (that is, $58,333 divided by 3 installments).

(v) The deadline for the remaining payment is 8½ months after the end of the short plan year, or April 15, 2010. If the plan sponsor pays the minimum required amount at each installment date, does not elect to offset any amounts by any carryover or prefunding balance, and makes a final payment on April 15, 2010, then the remaining payment is $17,429, determined as follows:

(A) The contribution paid April 15, 2009, is adjusted by discounting the contribution amount for 3½ months at the effective interest rate ($19,444 ÷ $1.0590^{(3.5/12)}$ = $19,122).

(B) The contribution paid July 15, 2009, is discounted for 6½ months at the effective interest rate ($19,444 ÷ $1.0590^{(6.5/12)}$ = $18,850).

(C) The contribution paid August 15, 2009, is discounted for 7½ months at the effective interest rate ($19,444 ÷ $1.0590^{(7.5/12)}$ = $18,760).

(D) The sum of the above contributions for the 2009 plan year paid through August 15, 2009, adjusted for interest to the valuation date, is $56,732. The remaining amount paid April 15, 2010, for the 2009 plan year is ($72,917 - $56,732) x $1.059^{(15.5/12)}$ = $17,429.

Example 8. (i) Plan B has an August 10 to August 9 plan year. Quarterly installments are required for the plan year that begins August 10, 2009.

(ii) For the plan year that begins on August 10, 2009, a plan month begins on the 10th day of each calendar month. Accordingly, the due dates for the required installments for that plan year are November 24, 2009, February 24, 2010, May 24, 2010, and August 24, 2010. The deadline for the final contribution for the plan year is April 24, 2011.

Example 9. (i) Plan C has a calendar-year plan year and is not a small plan described in section 430(g)(2)(B). Plan C is subject to the requirement to pay quarterly contributions under paragraph (c) of this section for the 2009 plan year. The valuation date for Plan C is January 1, and Plan C's funding target attainment percentage ("FTAP") is 85% as of January 1, 2009. Before taking the liquidity requirement of paragraph (d) of this section into account, quarterly contributions are required for the 2009 plan year in the amount of $50,000 each. During the 12-month period ending March 31, 2009, periodic annuity payments of $350,000 and lump sum payments of $200,000 were made by Plan C. None of these payments were due to nonrecurring circumstances. In addition, administrative expenses of $100,000 were paid from the plan trust. The market value of Plan C's assets is $1,500,000 as of March 31, 2008, of which $1,300,000 is in liquid assets. The amount

needed to increase the plan's FTAP (including the expected increase in the funding target due to benefits accruing or earned during the plan year) to 100% is $500,000.

(ii) The amount of the adjusted disbursements from Plan C for the 12-month period ending March 31, 2009, is calculated as the sum of the annuity benefits, lump sum payments, and administrative expenses paid during the 12-month period, reduced by the product of the lump sum payments and the plan's FTAP. This results in adjusted disbursements for the period of $480,000 (that is, $350,000 plus $200,000 plus $100,000, reduced by 85% of $200,000 in lump sum payments).

(iii) The base amount is calculated in accordance with paragraph (e)(6)(ii) of this section as three times the adjusted disbursements determined in paragraph (ii) of this *Example 9*, or $1,440,000.

(iv) The liquidity shortfall is the difference between the base amount of $1,440,000 determined in paragraph (iii) of this *Example 9* and the $1,300,000 in liquid assets as of March 31, 2008, or $140,000. The quarterly contribution due on April 15, 2009, is therefore $140,000, since this amount is larger than the $50,000 quarterly contribution requirement otherwise applicable but less than the $500,000 needed to increase the plan's FTAP (including the expected increase in the funding target due to benefits accruing or earned during the plan year) to 100%. The liquidity increment is $90,000.

(v) Note that any contributions made through March 31, 2009, are included in Plan C's assets as of March 31, 2009, and would therefore not be applied toward satisfying the liquidity shortfall contribution requirement due April 15, 2009. Similarly, any funding standard carryover balance or prefunding balance as of January 1, 2009, cannot be applied to offset the liquidity shortfall contribution requirement. Only contributions made in cash or other liquid assets made after March 31, 2009, and by April 15, 2009, can be used to timely satisfy this requirement.

Example 10. (i) The facts are the same as in *Example 9*. The plan sponsor makes a contribution of $30,000 on April 15, 2009, and makes an additional contribution of $110,000 on April 30, 2009. The effective interest rate for Plan C for the 2009 plan year is 5.90%.

(ii) The contribution paid on April 15, 2009, is applied first to the portion of the quarterly contribution that is required under paragraph (c) of this section (that is, the portion not attributable to the liquidity shortfall contribution). This results in an underpayment of this portion of the quarterly contribution due April 15, 2009, of $20,000 (that is, $50,000 minus $30,000). In accordance with paragraph (c)(1)(iii)(A) of this section, the interest rate used to adjust this portion of the late quarterly contribution is increased by 5 percentage points for the 1/2-month period of underpayment. Accordingly, $20,000 of the April 15, 2009, contribution is adjusted to the January 1, 2009, valuation date using an interest rate of 10.90% for the 1/2 month between the April 15, 2009, due date and the April 30, 2009, payment date, and by 5.90% for the 3 1/2-month period between January 1, 2009, and the April 15, 2009, due date. This portion results in an interest-adjusted contribution of $19,584 as of January 1, 2009 ($20,000 ÷ $1.1090^{(0.5/12)}$ ÷ $1.059^{(3.5/12)}$).

(iii) Under paragraph (d)(2) of this section, the interest rate used to adjust the portion of the underpayment attributable to the liquidity shortfall contribution is increased by 5 percentage points, and the contribution is treated as unpaid until the close of the quarter in which the due date occurs. Therefore, even though the full amount of the liquidity shortfall was paid by April 30, 2009, the increase in the interest rate is applied as if the late liquidity shortfall contribution was not made until June 30, 2009, 2 1/2 months after the contribution was due.

(iv) However, in accordance with paragraph (d)(2) of this section, each payment is discounted for interest based on the date of the actual payment, despite the fact that the 5-percentage-point increase in the interest rate is calculated as if the payment was not made until the end of the quarter. Therefore, the portion of the underpayment due to the liquidity increment ($140,000 minus the $50,000 quarterly contribution requirement otherwise required, or $90,000) is adjusted for interest for the 4-month period between the January 1, 2009, valuation date and the April 30, 2009, date of payment. An interest rate of 10.90% is used for 2 1/2 months (corresponding to the period between the April 15, 2009, due date and June 30, 2009, the end of the quarter in which the payment was due), and Plan C's effective interest rate for the 2009 plan year (5.90%) is used for the remaining 1 1/2 months. Therefore, the portion of the April 30, 2009, contribution attributable to the liquidity increment is adjusted to $87,452 as of January 1, 2009 ($90,000 ÷ $1.1090^{(2.5/12)}$ ÷ $1.0590^{(1.5/12)}$).

Example 11. (i) The facts are the same as in *Example 10*, except that the plan sponsor does not make the second contribution of $110,000 until July 15, 2009.

(ii) The July 15, 2009, contribution is adjusted for interest for a total of 6 1/2 months for the period between January 1, 2009, and the payment date of July 15, 2009. In accordance with paragraph (d)(2) of this section, the 5-percentage-point increase in the interest rate used to adjust the portion of the contribution attributable to the unpaid liquidity shortfall contribution is applied as if the contribution was made at the end of the quarter in which the payment was due. Therefore, the interest adjustment for the $90,000 attributable to the late liquidity shortfall contribution uses an interest rate of 10.90% for the 2 1/2-month period corresponding to the period between the April 15, 2009, due date and June 30, 2009, the end of the quarter in which the payment was due, and the effective interest rate of 5.90% for the remaining 4 months.

(iii) The liquidity shortfall is recalculated as of June 30, 2009, and the larger of the resulting amount or the $50,000 quarterly contribution otherwise applicable is due on July 15, 2009. This amount is required to be paid in addition to the unpaid liquidity shortfall contribution due April 15, 2009. Note that the amount of liquid assets as of June 30, 2009 is smaller than it would have been had the April 15, 2009, liquidity shortfall payment been made. Therefore, the fact that the April 15, 2009, liquidity shortfall payment was not made before June 30, 2009, means that the plan sponsor is required to contribute more than the amount needed to increase the liquid assets to the base amount as of June 30, 2009. However, in accordance with paragraph (d)(1)(ii) of this section, the total amount of the required installments (including those due but not paid) is limited so that it is no larger than the amount that would increase the plan's FTAP (taking into account the expected increase in the funding target due to benefits accruing or earned during the plan year) to 100%.

Example 12. (i) Plan D, which is a small plan described in section 430(g)(2)(B), has a calendar year plan year and a valuation date of December 31. The quarterly required installments for the 2009 plan year are $30,000 each and each of the required installments is paid on the due date. The effective interest rate for Plan D for the 2009 plan year is 5.90%.

(ii) The total contributions made for the plan year and before the valuation date, adjusted with interest to the valuation date, equal $92,402. This is developed as shown below:

(A) The contribution paid April 15, 2009, is adjusted by increasing the contribution amount for 8 1/2 months at the effective interest rate ($30,000 x $1.0590^{(8.5/12)}$ = $31,243).

(B) The contribution paid July 15, 2009, is increased for 5 1/2 months at the effective interest rate ($30,000 x $1.0590^{(5.5/12)}$ = $30,799).

(C) The contribution paid October 15, 2009, is increased for 2 1/2 months at the effective interest rate ($30,000 x $1.0590^{(2.5/12)}$ = $30,360).

(iii) Pursuant to §1.430(g)–1(d)(2), the interest-adjusted value of the contributions for the 2009 plan year that are made before the valuation date is subtracted from the December 31, 2009, plan assets in determining the value of plan assets for the December 31, 2009 actuarial valuation.

(g) *Effective/applicability dates and transition rules*—(1) *In general*. Section 430 generally applies to plan years beginning on or after January 1, 2008. In general, this section applies to plan years beginning on or after January 1, 2009. However, plans are permitted to apply this section in applying the rules of section 430(j) for plan years beginning in 2008.

(2) *Plans with delayed effective date*. In the case of a plan for which the effective date of section 430 is delayed in accordance with sections 104 through 106 of PPA '06, this section applies to plan years beginning on or after the first day of the first effective plan year.

(3) *First effective plan year*. For purposes of this section, the first effective plan year for a plan is the first plan year for which section 430 applies to the plan.

(4) *Pre-effective plan year*. For purposes of this section, the pre-effective plan year for a plan is the last plan year before the first effective plan year. Thus, except for plans with a delayed effective date under paragraph (g)(2) of this section, the pre-effective plan year for a plan is the last plan year beginning before January 1, 2008.

(5) *Special rules relating to first effective plan year*—(i) *Determination of minimum required contribution for pre-effec-*

tive plan year. In the case of the plan's first effective plan year, the minimum required contribution for the preceding plan year for purposes of paragraph (c)(3)(ii)(B) of this section is equal to the minimum required contribution under section 412 for the pre-effective plan year (determined without regard to any funding waiver under section 412), which is determined as of the last day of the pre-effective plan year and is determined without regard to the use of the plan's credit balance.

(ii) *Determination of funding shortfall for pre-effective plan year*. [Reserved]

PART 54—PENSION EXCISE TAXES

Par. 4. The authority citation for part 54 continues to read in part as follows:

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

Par. 5. Section 54.4971(c)–1 is added to read as follows:

§54.4971(c)–1 Taxes on failure to meet minimum funding standards; definitions

(a) *In general*. This section sets forth definitions that apply for purposes of applying the rules of section 4971.

(b) *Accumulated funding deficiency*. With respect to a multiemployer plan, the term *accumulated funding deficiency* has the meaning given to that term by section 431. A plan's accumulated funding deficiency for a plan year takes into account all charges and credits to the funding standard account under section 412 for plan years before the first plan year for which section 431 applies to the plan.

(c) *Unpaid minimum required contribution*—(1) *In general*. The term *unpaid minimum required contribution* means, with respect to any plan year, any minimum required contribution under section 430 for the plan year that is not paid on or before the due date for the plan year under section 430(j)(1).

(2) *Accumulated funding deficiency for pre-effective plan year*. For purposes of this section, a plan's accumulated funding deficiency under section 412 for the pre-effective plan year is treated as an unpaid minimum required contribution for that plan year until correction is made under the rules of paragraph (d)(2) of this section.

(d) *Correct*—(1) *Accumulated funding deficiency*. The term *correct* means, with respect to an accumulated funding deficiency for a plan year, the contribution, to or under the plan, of the amount necessary to reduce the accumulated funding deficiency as of the end of that plan year to zero. To reduce the deficiency to zero, the contribution must include interest at the plan's valuation interest rate for the period between the end of that plan year and the date of the contribution.

(2) *Unpaid minimum required contribution*—(i) *Interest adjustments*—(A) *General rule*. The term *correct* means, with respect to an unpaid minimum required contribution for a plan year, the contribution, to or under the plan, of an amount that, when discounted to the valuation date for the plan year for which the unpaid minimum required contribution is due at the appropriate rate of interest, equals or exceeds the unpaid minimum required contribution. For this purpose, the appropriate rate of interest is the plan's effective interest rate for the plan year for which the unpaid minimum required contribution is due except to the extent that the payments are subject to additional interest as provided under section 430(j)(3) or (4).

(B) *Pre-PPA accumulated funding deficiency*. The term *correct* means, with respect to the accumulated funding deficiency under section 412 for the pre-effective plan year that is described in paragraph (c)(2) of this section, the contribution, to or under the plan, of the amount of that accumulated funding deficiency increased with interest from the end of the pre-effective plan year to the date of the contribution at the plan's valuation interest rate for the pre-effective plan year.

(ii) *Ordering rule*. For purposes of section 4971 and this section, a contribution is attributable first to the earliest plan year of any unpaid minimum required contribution for which correction has not yet been made.

(3) *Corrective action of certain retroactive plan amendments*. Certain retroactive plan amendments that meet the requirements of section 412(d)(2) may reduce the minimum required contribution for a plan year, which would reduce the accumulated funding deficiency or the amount of the unpaid minimum required contribution for a plan year.

(e) *Taxable period*. The term *taxable period* has the same meaning given that term under §54.4971–1(e).

(f) *Examples*. The following examples illustrate the rules of this section.

Example 1. (i) Plan A, a single employer defined benefit plan, has a calendar year plan year and a January 1 valuation date. The sponsor of Plan A has a calendar taxable year. Plan A has no funding shortfall as of the end of 2008, and Plan A has no unpaid minimum required contributions for 2008 or any earlier plan year. The minimum required contribution for the 2009 plan year is $250,000. The plan sponsor makes one contribution for 2009 on July 1, 2009, in the amount of $200,000, and the sponsor does not make an election to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution for 2009. The effective interest rate for Plan A for the 2009 plan year is 5.90%.

(ii) The interest-adjusted contribution for 2009 is $200,000 divided by $1.0590^{(6/12)}$, or $194,349, as of January 1, 2009. The unpaid minimum required contribution for the 2009 plan year is $250,000 minus $194,349, or $55,651. The excise tax due under section 4971(a) is 10% of the unpaid minimum required contribution, or $5,565.

Example 2. (i) The facts are the same as in *Example 1*. The plan sponsor makes a contribution of $175,000 on December 31, 2010.

(ii) Under the ordering rule in paragraph (d)(2)(ii) of this section, the contribution made on December 31, 2010, is applied first to correct the unpaid minimum required contribution for 2009. The portion of the contribution paid December 31, 2010, that is required to eliminate the unpaid minimum required contribution for 2009 (taking into account the 2009 effective interest rate for the 24 months between January 1, 2009, and the payment date of December 31, 2010), is $55,651 multiplied by $1.059^{(24/12)}$ or $62,412. The remaining payment of $112,588 ($175,000 minus $62,412) is applied to the contribution required for the 2010 plan year.

Example 3. (i) Plan B, a single employer defined benefit plan, has a calendar plan year. The sponsor of Plan B has a calendar taxable year. Plan B has an accumulated funding deficiency of $100,000 as of December 31, 2007, including additional interest due to late quarterly contributions during 2007. The valuation interest rate for the 2007 plan year is 7.5%.

(ii) In accordance with paragraph (c)(2) of this section, the accumulated funding deficiency under section 412 as of December 31, 2007, is considered an unpaid minimum required contribution until it is corrected. Pursuant to paragraph (d)(2)(i)(B) of this section, the amount needed to correct that accumulated funding deficiency is $100,000 plus interest at the valuation interest rate of 7.5% for the period between December 31, 2007, and the date of payment of the contribution.

(iii) The funding shortfall as of January 1, 2008, is calculated as the difference between the funding target and the value of assets as of that date. The assets are not adjusted by the amount of the accumulated funding deficiency; the fact that the contribution was not made for the 2007 plan year means that the January 1, 2008, funding shortfall is larger than it would have been otherwise.

Example 4. (i) The facts are the same as in *Example 3*. The minimum required contribution for the 2008 plan year is $125,000, but the plan sponsor does not make any required contributions for 2008.

(ii) The total unpaid minimum required contribution as of December 31, 2008, is the sum of the $100,000 accumulated funding deficiency under section 412 from 2007 and the $125,000 unpaid minimum required contribution for 2008, or $225,000. The section 4971(a) excise tax applies to the aggregate unpaid minimum required contributions for all plan years that remain unpaid as of the end of 2008. In this case, there is an unpaid minimum required contribution of $100,000 for the 2007 plan year and an unpaid minimum required contribution of $125,000 for the 2008 plan year. The section 4971(a) excise tax is 10% of the aggregate of those unpaid amounts, or $22,500.

Example 5. (i) The facts are the same as in *Example 4*, except that the plan sponsor makes a contribution of $150,000 on December 31, 2008. No additional contributions are paid through September 15, 2009. Quarterly contributions of $25,000 each are due April 15, 2008, July 15, 2008, October 15, 2008, and January 15, 2009. Plan B's effective interest rate for the 2008 plan year is 5.75%.

(ii) In accordance with paragraph (c)(2) of this section, the accumulated funding deficiency under section 412 as of December 31, 2007, is treated as an unpaid minimum required contribution until it is corrected.

(iii) The December 31, 2008, contribution is first applied to the 2007 accumulated funding deficiency under section 412 that is treated as an unpaid minimum required contribution. Accordingly, the amount needed to correct the 2007 unpaid required minimum contribution ($100,000 multiplied by 1.075, or $107,500) is applied to eliminate this unpaid minimum required contribution for the 2007 plan year.

(iv) The remaining December 31, 2008, contribution ($150,000 minus $107,500, or $42,500) is then applied to the 2008 minimum required contribution. This amount is first allocated to the quarterly contribution due April 15, 2008. In accordance with §1.430(j)–1(c)(1)(iii)(A), the adjustment for interest on late quarterly contributions is increased by 5 percentage points for the period of underpayment. Therefore, $25,000 of the remaining December 31, 2008, contribution is discounted using an interest rate of 10.75% for the 8½-month period between the payment date of December 31, 2008 and the quarterly contribution due date of April 15, 2008, and at the 5.75% effective interest rate for the 3½ months between April 15, 2008, and January 1, 2008. This portion of the December 31, 2008, contribution results in an adjusted amount of $22,880 (that is, $\$25{,}000 \div 1.1075^{(8.5/12)} \div 1.0575^{(3.5/12)}$) as of January 1, 2008.

(v) The remaining December 31, 2008, contribution is then applied to the quarterly contribution due July 15, 2008. The balance of the December 31, 2008, contribution ($150,000 minus $107,500 minus $25,000, or $17,500) is paid after the due date for the second required quarterly installment. Accordingly, the remaining $17,500 contribution is adjusted using an interest rate of 10.75% for the 5½-month period between the payment date of December 31, 2008 and the quarterly contribution due date of July 15, 2008, and at the 5.75% effective interest rate for the 6½ months between July 15, 2008, and January 1, 2008. This portion of the December 31, 2008, contribution results in an adjusted amount of $16,202 (that is, $\$17{,}500 \div 1.1075^{(5.5/12)} \div 1.0575^{(6.5/12)}$) as of January 1, 2008.

(vi) The remaining unpaid minimum required contribution for 2008 is $125,000 minus the interest-adjusted amounts of $22,880 and $16,202 applied towards the 2008 minimum required contribution as determined in paragraphs (iv) and (v) of this *Example 5*. This results in an unpaid minimum required contribution of $85,918 for 2008. The section 4971(a) excise tax is 10% of the unpaid minimum required contribution, or $8,592.

Example 6. (i) Plan C, a single employer defined benefit plan, has a calendar year plan year and a January 1 valuation date, and has no funding standard carryover balance or prefunding balance as of January 1, 2008. Plan C's sponsor has a calendar year taxable year. The minimum required contributions for Plan C are $100,000 for the 2008 plan year, $110,000 for the 2009 plan year, $125,000 for the 2010 plan year, and $135,000 for the 2011 plan year. No contributions for these plan years are made until September 15, 2012, at which time the plan sponsor contributes $273,000 (which is exactly enough to correct the unpaid minimum required contributions for the 2008 and 2009 plan years).

(ii) The excise tax under section 4971(a) is 10% of the aggregate unpaid minimum required contributions for all plan years remaining unpaid as of the end of any plan year ending within the 2008 taxable year. Accordingly, the excise tax for the 2008 taxable year is $10,000 (that is, 10% of $100,000). The excise tax for the 2009 taxable year is $21,000 (that is, 10% of the sum of $100,000 and $110,000) and the excise tax for the 2010 taxable year is $33,500 (that is, 10% of the sum of $100,000, $110,000, and $125,000).

(iii) The contribution made on September 15, 2012, is applied to correct the unpaid minimum required contributions for the 2008 and 2009 plan years by the deadline for making contributions for the 2011 plan year. Therefore, the excise tax under section 4971(a) for the 2011 taxable year is based only on the remaining unpaid minimum required contributions for the 2010 and 2011 plan years, or $26,000 (that is, 10% of the sum of $125,000 and $135,000).

(iv) The plan sponsor may also be required to pay an excise tax of 100% under section 4971(b), if the unpaid minimum required contributions are not corrected by the end of the taxable period.

(g) *Effective/applicability dates and transition rules*—(1) *Statutory effective date*—(i) *In general*. In general, the amendments made to section 4971 by section 114 of the Pension Protection Act of 2006, Public Law 109–280, 120 Stat. 780 (PPA '06), apply to taxable years beginning on or after January 1, 2008, but only with respect to plan years that end with or within any such taxable year.

(ii) *Plans with delayed PPA '06 effective dates*. In the case of a plan for which the effective date of section 430 is delayed in accordance with sections 104 through 106 of PPA '06, the amendments made to section 4971 by section 114 of PPA '06 apply to taxable years beginning on or after January 1, 2008, but only with respect to plan years beginning on or after the date section 430 first applies with respect to the plan.

(2) *Effective date of regulations*. This section is effective for taxable years beginning on and after the statutory effective date described in paragraph (g)(1) of this section, but in no event does this section apply to taxable years ending before April 15, 2008.

(3) *Pre-effective plan year*. For purposes of this section, the pre-effective plan year for a plan is the last plan year beginning before section 430 applies to the plan. Thus, except for plans with a delayed effective date under paragraph (g)(1)(ii) of this section, the pre-effective plan year for a plan is the last plan year beginning before January 1, 2008.

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

(Filed by the Office of the Federal Register on April 11, 2008, 10:10 a.m., and published in the issue of the Federal Register for April 15, 2008, 73 F.R. 20203)

Foundations Status of Certain Organizations

Announcement 2008–40

The following organizations have failed to establish or have been unable to maintain their status as public charities or as operating foundations. Accordingly, grantors and contributors may not, after this date, rely on previous rulings or designations in the Cumulative List of Organizations (Publication 78), or on the presumption arising from the filing of notices under section 508(b) of the Code. This listing does *not* indicate that the organizations have lost their status as organizations described in section 501(c)(3), eligible to receive deductible contributions.

Former Public Charities. The following organizations (which have been treated as organizations that are not private foundations described in section 509(a) of the Code) are now classified as private foundations:

3 Squares, Inc., Manlius, NY
A A Jones Community Development Corporation, New Orleans, LA

Adaptive Summiteers Association, Burbank, CA
Adonai Endowment Fund, Inc., Baltimore, MD
Africa Aids Foundation, Bronx, NY
Agape Paradise Haven, Detroit, MI
Alamo Fountain Center, Inc., Sugar Land, TX
Always Keep God First Ministry, Inc., Camden, NJ
Arkansas Automotive School for Mechanics, Little Rock, AR
Austin Advocate Services, Inc., Arlington, TX
Barberton Health District Fund, Akron, OH
Bartlesville Demolay, Inc., Bartlesville, OK
Benedictine Military School Endowment Fund Series II, Inc., Savannah, GA
Bernardtown Outreach Group, Coatesville, PA
Best Program, Pomona, CA
Bossier Colone Senior Care Center, Inc., Bossier City, LA
Bostons Children First, Inc., Dorchester, MA
Boys to Men of Texas, Houston, TX
Bridge to Bridge River to Railroad Development Corporation, Kennewick, WA
Brooks Center, Falls Church, VA
Broward Christian Drama Ministry, Inc., Davie, FL
Camp Noah, Charleston, SC
Center at North Branch for Life Transitions, Inc., North Branch, NJ
Centre Township Land Protection Foundation, Mohrsville, PA
Charles I. Goldfarb Foundation, Birmingham, AL
Chris Maritimes International, Inglewood, CA
Community Initiative, Inc., Cookville, TN
Counseling Services Foundation, Plano, TX
Cultural Awareness, Inc., Oakland, CA
Dependable Community Development Corporation, Bronx, NY
Disabilities Unlimited, Inc., West Allis, WI
Eduit, Inc., Washington, DC
Elyon Community Center, Inc., Miami, FL
Ephesians Economic Development Corporation, New Orleans, LA
Essential Money Matters, Inc., McDonough, GA
Faithful Community Development, Inc., Dallas, TX
Family Foundation, Inc., Ypsilanti, MI
First Nations Council, Inc., Brighton, CO
Florida Arts Foundation, West Palm Beach, FL
Florida Horsemen's Charitable Foundation, Inc., Miami, FL
Four Corners Small Business Foundation, Gallup, NM
Fox Hill Educational Tech Program, Great Neck, NY
Friends of Sewell Park, Inc., Miami, FL
Friends of West Augustine, St. Augustine, FL
Galisteo International Stone Sculpture Symposium, Galisteo, NM
Generations, Brodnax, VA
Genesis Group (A Christian Church), Fresno, CA
Georgia Works, Incorporated, Lilburn, GA
Godsearch, Inc., Aurora, CO
Golden Hearts Foundation, Inc., Topanga, CA
Good Hope Community Foundation, Inc., Erwin, NC
Harrisville Society of Friends, Harrisville, OH
Helping Hands for the Disabled and Disadvantaged, Inc., St. Louis, MO
Holy David Community Development Center, Inc., Chicago, IL
House of the Children, Inc., Camden, NJ
IGBO Kwenu, Inc., Washington, DC
Integrated Health Corporation, Kensington, MD
International Youth Mind Society, Irvine, CA
It Takes a Nation It Takes a Village, Dallas, TX
J W Knowledge Enrichment Foundation, Pasadena, CA
Kingdom Builders 2000, Inc., Indianapolis, IN
Kingdom Builders Ministries, Inc., Portsmouth, VA
Lady Jammers Basketball, Irving, TX
Ladys Choice Crisis Intervention and Resource Center, Fayetteville, NC
Little World Development Center, Inc., Hyde Park, MA
Maestro Community Development Corporation, Long Branch, NJ
Match, Milwaukee, WI
Millennium Community Housing Corp., Waterford, MI
Miracle House for Children, Myrtle Beach, SC
Moon is Always the Moon, Inc., Brooklyn, NY
Mountain Watershed Institute, Missoula, MT
Networks Electronic Commerce and Telecommunications NET Institute, New York, NY
New Beginnings Residential Care Facility, Inc., Cross, SC
New Canaan Community Development, Inc., Newark, NJ
Noble Symond Golub and Lelia J. Golub Educational Trust, Wilmington, MA
Northampton County Faith Community Enterprises, Murfreesboro, NC
Oath, Inc., Brooklyn, NY
Operation H.E.L.P., Inc. Ministries, Olmsted, IL
Operation P.U.L.L., Inc., West Memphis, AR
Palace of Refuge, St. Louis, MO
Peace for All, Los Angeles, CA
Peacemakers, Inc., Reading, PA
Prepared, Inc., Columbus, GA
Priest River Community Center Corporation, Priest River, ID
Ranch Schoolhouse Family Support Services & Economic Development Corp., Grenada, MS
R.E.A.L. Force Services, Detroit, MI
Red Rose Child Care, Byram, MS
Refuge for Prodigals International Bible Ministries, Inc., Baltimore, MD
Roaming Buffalo Healing Ministries, Eagle Butte, SD
Roloc Senior Housing Corporation, Charlotte, NC
Romans 10–13 Ministries, Augusta, GA
Samaritan Flights, Inc., Alpharetta, GA
Society for Addictive Disorders, Santee, CA
Soldiers of Peace, Inc., Sherman Oaks, GA
Song of Peace Ministries, Inc., Norco, CA
Spiritual and Truth Center of Excellence, Inc., Savannah, GA
Spring of Spiritual Harmony, Fremont, CA
St. Clair County Health Facilities Corporation, Osceola, MO
Taste, Inc., Boise, ID
Team Ministries, Round Rock, TX
Texas Community Transitional Center, Inc., Houston, TX
Texas Educational Outreach, Incorporated, Houston, TX
TLF Child Protection Fund, Cleveland, OH
Top Rank Sports Corp., Riviera Beach, FL
Total You Ministry, Ridgeland, MS

Treme Arts Center, New Orleans, LA
Trumpet Ministries, Inc., Newark, NJ
TSB Welcome Home, Inc., Dallas, TX
US-China Youth Culture Exchange Foundation Corporation, Lexington, KY
Vester Community Services, Inc., Downey, CA
Victims of Intense Crimes Embracing Others Foundation, Inc., Milwaukee, WI
Women Celebrating Victory Over Pain, Alpharetta, GA
Zawadi Foundation, Inc., East Point, GA

If an organization listed above submits information that warrants the renewal of its classification as a public charity or as a private operating foundation, the Internal Revenue Service will issue a ruling or determination letter with the revised classification as to foundation status. Grantors and contributors may thereafter rely upon such ruling or determination letter as provided in section 1.509(a)–7 of the Income Tax Regulations. It is not the practice of the Service to announce such revised classification of foundation status in the Internal Revenue Bulletin.

Section 1221(a)(4) Capital Asset Exclusion for Accounts and Notes Receivable

Announcement 2008–41

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: This document withdraws a notice of proposed rulemaking (REG–109367–06, 2006–2 C.B. 683) relating to the circumstances in which accounts or notes receivable are "acquired ... for services rendered" within the meaning of section 1221(a)(4).

FOR FURTHER INFORMATION CONTACT: K. Scott Brown, (202) 622–7454 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

On August 7, 2006, the Treasury Department and the IRS published in the **Federal Register** (71 FR 44600) proposed regulations § 1.1221–1(e) under section 1221(a)(4) of the Internal Revenue Code. These regulations sought to clarify the circumstances in which accounts or notes receivable are "acquired ... for services rendered" within the meaning of section 1221(a)(4).

Written comments were received from interested parties, and public hearings to discuss these regulations were held on November 7, 2006, and August 22, 2007. Most of the comments focused on the decisions in *Burbank Liquidating Corp. v. Commissioner*, 39 T.C. 999 (1963), *acq. sub nom. United Assocs., Inc.*, 1965–1 C.B. 3, *aff'd in part and rev'd in part on other grounds*, 335 F.2d 125 (9th Cir. 1964) and *Federal National Mortgage Association v. Commissioner*, 100 T.C. 541 (1993). The Treasury Department and the IRS considered the comments and have decided to withdraw the proposed regulations.

The IRS will not challenge return reporting positions of taxpayers under section 1221(a)(4) that apply existing law, including *Burbank Liquidating*; *Federal National Mortgage Association*; and *Bieldfeldt v. Commissioner*, 231 F.3d 1035 (7th Cir. 2000), *cert. denied*, 534 U.S. 813 (2001). *See also* Rev. Rul. 80–56, 1980–1 C.B. 154, and Rev. Rul. 80–57, 1980–1 C.B. 157. The IRS and the Treasury Department will continue to study this area and may issue guidance in the future.

* * * * *

Withdrawal of Notice of Proposed Rulemaking

Accordingly, under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking (REG–109367–06) published in the **Federal Register** on August 7, 2006 (71 FR 44600) is withdrawn.

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

(Filed by the Office of the Federal Register on April 22, 2008, 8:45 a.m., and published in the issue of the Federal Register for April 23, 2008, 73 F.R. 21861)

Measurement of Assets and Liabilities for Pension Funding Purposes; Hearing

Announcement 2008–42

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: This document provides notice of public hearing on a notice of proposed rulemaking (REG–139236–07, 2008–9 I.R.B. 491) preparing guidance on the determination of plan assets and benefit liabilities for purposes of the funding requirements that apply to single employer defined benefit plans. These regulations affect sponsors, administrators, participants, and beneficiaries of single employer defined benefit plans.

DATES: The public hearing is being held on May 29, 2008, at 10 a.m. The IRS must receive outlines of the topics to be discussed at the hearing by May 8, 2008.

ADDRESSES: The public hearing is being held in the auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Send submissions to: CC:PA:LPD:PR (REG–139236–07), room 5203, Internal Revenue Service, P. O. 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–139236–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit electronic outlines of oral comments via the Federal eRulemaking Portal at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Lauson C. Green or Linda S. F. Marshall at (202) 622–6090; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard A. Hurst at *Richard.A.Hurst@irscounsel.treas.gov* or (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is

the notice of proposed rulemaking (REG–139236–07) that was published in the **Federal Register** on Monday, December 31, 2007 (72 FR 74215).

Persons, who wish to present oral comments at the hearing that submitted written comments, must submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (signed original and eight (8) copies) by May 8, 2008.

A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing or in the Freedom of Information Reading Room (FOIA RR) (Room 1621) which is located at the 11th and Pennsylvania Avenue, NW, entrance, 1111 Constitution Avenue, NW, Washington, DC.

Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT section of this document.

LaNita Van Dyke,
Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

(Filed by the Office of the Federal Register on April 22, 2008, 8:45 a.m., and published in the issue of the Federal Register for April 23, 2008, 73 F.R. 21860)

Nuclear Decommissioning Funds; Hearing

Announcement 2008–43

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: This document provides notice of public hearing on proposed regulations (REG–147290–05, 2008–10 I.R.B. 576) relating to deductions for contributions to trusts maintained for decommissioning nuclear power plants.

DATES: The public hearing is being held on Tuesday, June 17, 2008, at 10:00 a.m. The IRS must receive outlines of the topics to be discussed at the public hearing by Tuesday, May 20, 2008.

ADDRESSES: The public hearing is being held in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW, Washington, DC 20224.

Send Submissions to CC:PA:LPD:PR (REG–147290–05), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday to CC:PA:LPD:PR (REG–147290–05), 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–147290–05).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Patrick Kirwan (202) 622–3110; concerning submissions of comments, the hearing and/or to be placed on the building access list to attend the hearing Funmi Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

The subject of the public hearing is the notice of proposed rulemaking (REG–147290–05) that was published in the **Federal Register** on Monday, December 31, 2007 (72 FR 74213).

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing that submitted written comments by March 31, 2008, must submit an outline of the topics to be addressed and the amount of time to be denoted to each topic (Signed original and eight (8) copies).

A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing or in the Freedom of Information Reading Room (FOIA RR) (Room 1621) which is located at the 11th and Pennsylvania Avenue, NW, entrance, 1111 Constitution Avenue, NW, Washington, DC.

Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this document.

LaNita Van Dyke,
Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

(Filed by the Office of the Federal Register on April 22, 2008, 8:45 a.m., and published in the issue of the Federal Register for April 23, 2008, 73 F.R. 21860)

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

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