Internal Revenue bulletin

Bulletin No. 2008-31
August 4, 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

Rev. Rul. 2008–38, page 249.

Limited partner's distributive share. This ruling addresses whether a limited partner's distributive share of interest expense attributable to indebtedness allocable to property held for investment described in section 163(d)(5)(A)(ii) of the Code is taken into account when determining the limited partner's adjusted gross income. See Announcement 2008–65, in this Bulletin, for additional information. Rev. Rul. 2008–12 amplified.

Rev. Rul. 2008–39, page 252.

Characterization of management fees. This ruling addresses the characterization of the management fees paid by an upper-tier investment partnership (UTP) and by lower-tier trader partnerships (LTPs) to their respective managers under sections 162 and 212 of the Code where the UTP's activities consist solely of acquiring, holding, and disposing of interests in the LTPs and UTP's management fee is not paid or incurred by UTP on behalf of any LTP in connection with the trades or businesses of the LTPs.

Rev. Rul. 2008–43, page 258.

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, and other sections of the Code, tables set forth the rates for August 2008.

T.D. 9402, page 254.
REG–102122–08, page 278.

Final, temporary, and proposed regulations under section 956 of the Code provide guidance to determine the basis in property acquired by a controlled foreign corporation as a result of certain transactions that otherwise qualify for nonrecognition treatment.

Notice 2008–63, page 261.

This notice sets forth and requests comments on a proposed revenue ruling concerning the income, gift, estate, and generation-skipping transfer tax consequences in situations in which family members create a private trust company to serve as the trustee of trusts in which family members are grantors and beneficiaries.

Notice 2008–64, page 268.

This notice solicits comments on a proposal to require taxpayers to disclose to the IRS their groupings and regroupings of activities and the addition and disposition of specific activities within the chosen groupings of activities for purposes of section 469 of the Code and regulations section 1.469–4.

Notice 2008–66, page 270.

This notice provides for the suspension of certain requirements under section 42 of the Code for low-income housing credit projects in the United States in order to provide emergency housing relief needed as a result of the devastation caused by severe storms and flooding in Missouri beginning on June 1, 2008.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

Rev. Proc. 2008–47, page 272.

This procedure describes the conditions under which changes to certain subprime mortgage loans will not cause the Service to challenge the tax status of certain securitization vehicles holding the loans. Rev. Proc. 2007–72, 2007–52 I.R.B. 1257, provided similar guidance regarding fast-track loan modifications that were effected in a manner consistent with certain principles, recommendations, and guidelines (the "Framework"), which the American Securitization Forum (ASF) released on December 6, 2007. On July 8, 2008, the ASF released an updated Framework, which covers additional fast-track loan modifications. Rev. Proc. 2007–72 amplified and superseded.

Announcement 2008–65, page 279.

This announcement clarifies that the limited partner described in Rev. Rul. 2008–12, 2008–10 I.R.B. 520, properly includes the allowable amount of his distributive share of the trading partnership's interest expense in computing the limited partner's ordinary business income or loss on Schedule E of the partner's Form 1040. Rev. Rul. 2008–12 clarified.

ESTATE TAX

Notice 2008–63, page 261.

This notice sets forth and requests comments on a proposed revenue ruling concerning the income, gift, estate, and generation-skipping transfer tax consequences in situations in which family members create a private trust company to serve as the trustee of trusts in which family members are grantors and beneficiaries.

GIFT TAX

Notice 2008–63, page 261.

This notice sets forth and requests comments on a proposed revenue ruling concerning the income, gift, estate, and generation-skipping transfer tax consequences in situations in which family members create a private trust company to serve as the trustee of trusts in which family members are grantors and beneficiaries.

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.

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

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

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

Section 42.—Low-Income Housing Credit

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Section 62.—Adjusted Gross Income Defined

A ruling addresses whether a non materially participating partner's distributive share of interest expense attributable to indebtedness allocable to property held for investment described in section 163(d)(5)(A)(ii) is taken into account when determining the limited partner's adjusted gross income under section 62. See Rev. Rul. 2008-38, page 249.

A ruling addresses whether a non materially participating partner's distributive share of interest expense attributable to indebtedness allocable to property held for investment described in section 163(d)(5)(A)(ii) is taken into account when determining the limited partner's adjusted gross income under section 62. See Announcement 2008-65, page 279.

Section 162.—Trade or Business Expenses

A revenue ruling addresses the characterization of the management fees paid by an upper-tier investment partnership and by lower-tier trader partnerships to their respective managers under sections 162 and 212 where the upper tier partnership's activities consist solely of acquiring, holding, and disposing of interests in the lower tier trader partnerships and UTP's management fee is not paid or incurred by UTP on behalf of any LTP in connection with the trades or businesses of the LTPs. See Rev. Rul. 2008-39, page 252.

Section 163.—Interest

A ruling addresses whether a non materially participating partner's distributive share of interest expense attributable to indebtedness allocable to property held for investment described in section 163(d)(5)(A)(ii) is taken into account when determining the limited partner's adjusted gross income under section 62. See Rev. Rul. 2008-38, page 249.

A ruling addresses whether a non materially participating partner's distributive share of interest expense attributable to indebtedness allocable to property held for investment described in section 163(d)(5)(A)(ii) is taken into account when determining the limited partner's adjusted gross income under section 62. See Announcement 2008-65, page 279.

Section 212.—Expenses for Production of Income

A revenue ruling addresses the characterization of the management fees paid by an upper-tier investment partnership and by lower-tier trader partnerships to their respective managers under sections 162 and 212 where the upper tier partnership's activities consist solely of acquiring, holding, and disposing of interests in the lower tier trader partnerships and UTP's management fee is not paid or incurred by UTP on behalf of any LTP in connection with the trades or businesses of the LTPs. See Rev. Rul. 2008-39, page 252.

Section 280G.—Golden Parachute Payments

Federal short-term, mid-term, and long-term rates are set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Section 382.—Limitation on Net Operating Loss Carryforwards and Certain Built-In Losses Following Ownership Change

The adjusted applicable federal long-term rate is set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Section 412.—Minimum Funding Standards

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Section 467.—Certain Payments for the Use of Property or Services

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Section 468.—Special Rules for Mining and Solid Waste Reclamation and Closing Costs

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Section 482.—Allocation of Income and Deductions Among Taxpayers

Federal short-term, mid-term, and long-term rates are set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Section 483.—Interest on Certain Deferred Payments

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Section 642.—Special Rules for Credits and Deductions

Federal short-term, mid-term, and long-term rates are set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Section 671.—Trust Income, Deductions, and Credits Attributable to Grantors and Others as Substantial Owners

26 CFR 1.671–1: Grantors and others treated as substantial owners; scope.

This notice sets forth a proposed revenue ruling concerning the income, gift, estate, and generation-skipping transfer tax consequences in situations in which family members create a private trust company to serve as the trustee of trust in which family members are grantors and beneficiaries. See Notice 2008-63, page 261.

Section 702.—Income and Credits of Partner

(Also: §§ 62, 163.)

Limited partner's distributive share. This ruling addresses whether a limited

partner's distributive share of interest expense attributable to indebtedness allocable to property held for investment described in section 163(d)(5)(A)(ii) of the Code is taken into account when determining the limited partner's adjusted gross income. See Announcement 2008–65, in this Bulletin, for additional information. Rev. Rul. 2008–12 amplified.

Rev. Rul. 2008–38

ISSUES

(1) In the case of an individual, is interest paid or accrued on indebtedness allocable to property described in § 163(d)(5)(A)(ii) of the Internal Revenue Code deductible (after the application of the § 163(d)(1) limitation) in determining the taxpayer's adjusted gross income or does the interest (after the application of the § 163(d)(1) limitation) instead constitute an itemized deduction?

(2) If an individual has both investment interest expense attributable to indebtedness allocable to property described in § 163(d)(5)(A)(ii) and investment interest expense attributable to indebtedness allocable to property described in § 163(d)(5)(A)(i) and the individual's aggregate investment interest expense is greater than the individual's net investment income, how does the individual determine the portion of the allowed investment interest deduction that is deductible in determining the taxpayer's adjusted gross income and the portion that constitutes an itemized deduction?

FACTS

Situation 1

PRS is a partnership that is engaged solely in the trade or business of trading securities for its own account and not for customers. LP, an individual, owns an interest in PRS as a limited partner. LP does not materially participate (as that term is used in § 469) in the activity in which PRS is engaged. The taxable year for PRS and LP is the calendar year.

PRS incurs indebtedness in its trade or business of trading securities. In Year 1, LP's distributive share of PRS' income, gain, loss, deduction, and credit includes $200x of interest expense incurred by PRS with respect to its indebtedness. LP's net investment income, as defined in § 163(d)(4), for Year 1 is equal to $150x. During Year 1, LP's distributive share of PRS' interest expense is the only interest paid or accrued by LP (either directly or through any flow-through entity) on indebtedness properly allocable to property held for investment (as defined in § 163(d)(5)(A)). LP's distributive share of PRS' interest expense is not subject to any limitation under § 465 or 704(d).

Situation 2

The facts are the same as in *Situation 1* except that during Year 1 LP also pays $100x of interest expense on indebtedness properly allocable to stocks and bonds held by LP for investment (within the meaning of § 163(d)(5)(A)(i)). None of the $100x of interest expense is described in § 265(a).

LAW AND ANALYSIS

Section 62(a) provides that the term "adjusted gross income" means, in the case of an individual taxpayer, gross income minus the deductions specified in § 62(a)(1) through (21).

Section 62(a)(1) provides that deductions allowed by chapter 1 of subtitle A, other than by part VII of subchapter B, which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee, are taken into account in determining the adjusted gross income of the taxpayer.

Section 63(d) defines the term "itemized deductions" as including all deductions allowable under chapter 1 of subtitle A other than deductions allowable in arriving at adjusted gross income and the deduction for personal exemptions provided in § 151.

Section 163(d)(1) provides that, in the case of a noncorporate taxpayer, the amount allowed as a deduction under chapter 1 of subtitle A for investment interest for any taxable year shall not exceed the amount of the taxpayer's net investment income for the taxable year. Section 163(d)(2) provides that any amount not allowed as a deduction for a given taxable year by reason of § 163(d)(1) shall be treated as investment interest paid or accrued by the taxpayer in the next succeeding taxable year.

Section 163(d)(3)(A) provides that the term "investment interest" means any interest allowable as a deduction under chapter 1 of subtitle A (determined without regard to paragraph (1) of § 163(d)) which is paid or accrued on indebtedness properly allocable to property held for investment.

Section 702(a)(8) provides that, in determining the partner's income tax, each partner shall take into account the partner's distributive share of the partnership's taxable income or loss, exclusive of the items requiring separate computation under § 702(a)(1) through (7). Section 702(a)(1) through (6) lists specific items of income, gain, loss, deduction or credit that must be separately stated by a partnership. Section 702(a)(7) provides that other items of income, gain, loss, deduction or credit also must be separately stated if required by regulations prescribed by the Secretary.

Section 702(b) provides that the character of any item of income, gain, loss, deduction, or credit included in a partner's distributive share under paragraphs (1) through (7) of § 702(a) shall be determined as if such item were realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership.

Section § 1.702–1(a)(8)(ii) of the Income Tax Regulations provides that each partner must take into account separately the partner's distributive share of any partnership item that, if separately taken into account by the partner, would result in an income tax liability for that partner, or for any other person, different from that which would result if that partner did not take the item into account separately.

Section 706(a) provides that, in computing the taxable income of a partner for a taxable year, the inclusions required by § 702 and § 707(c) with respect to a partnership shall be based on the income, gain, loss, deduction, or credit of the partnership for any taxable year of the partnership ending within or with the taxable year of the partner.

Revenue Ruling 2008–12, 2008–10 I.R.B. 520, holds that, by virtue of the definition of the term "property held for investment" in § 163(d)(5)(A)(ii), a noncorporate limited partner's distributive share of interest expense on indebtedness allocable to a partnership's trade or business of trading securities for its own

account constitutes investment interest described in § 163(d)(3) and is therefore subject to the limitation on the deduction of investment interest in § 163(d)(1), provided that the limited partner does not materially participate (as that term is used in § 469) in the trading activity. The ruling further holds that a partnership that engages in the trade or business of trading securities for its own account must separately state the amount of interest paid or accrued on indebtedness properly allocable to its trading activity because the degree of participation by each noncorporate partner of the partnership could limit the deductibility of such interest by the partner on his or her individual tax return.

Situation 1

LP's only investment interest (as defined in § 163(d)(3)) for Year 1 is LP's $200x distributive share of PRS' interest expense in Year 1. This investment interest is subject to the limitation on investment interest in § 163(d)(1). Section 163(d)(1) limits LP's deduction for investment interest in Year 1 to $150x, the amount of LP's net investment income (as defined in § 163(d)(4)) for that year. Accordingly, in Year 1, LP may deduct $150x of LP's $200x distributive share of the interest expense of PRS. Pursuant to § 163(d)(2), the $50x of interest expense not allowed as a deduction for Year 1 is treated as investment interest paid or accrued in Year 2.

LP's distributive share of PRS' Year 1 interest expense that is allowed under § 163(d)(1) is deductible in arriving at LP's adjusted gross income pursuant to § 62(a)(1). Section 702(b) provides that the character of any item of deduction included in a partner's distributive share under § 702(a) shall generally be determined as if such item were incurred in the same manner as incurred by the partnership. Because the interest expense of PRS is attributable to the carrying on of its trade or business of trading securities, LP's share of that expense is described in § 62(a)(1). While LP's distributive share of PRS' interest expense is subject to the investment interest limitation in § 163(d)(1), the investment interest limitation does not affect the character of the interest expense for other purposes of the Code. Thus, except for purposes of applying the investment interest limitation, LP's distributive share of PRS' interest expense deductions are characterized under § 702(b).

Accordingly, $150x of LP's distributive share of the Year 1 interest expense of PRS is deductible in arriving at LP's adjusted gross income. Therefore, such amount does not constitute an itemized deduction (as defined in 63(d)).

Situation 2

In *Situation 2*, in addition to LP's $200x distributive share of PRS' Year 1 interest expense, LP also pays $100x of interest expense on indebtedness properly allocable to stocks and bonds held by LP for investment (within the meaning of § 163(d)(5)(A)(i)). Accordingly, LP's total investment interest expense for Year 1 is $300x. Pursuant to 163(d)(1), LP is allowed to deduct only $150x of this investment interest expense in Year 1.

To the extent that LP's $150x of allowed investment interest deduction is attributable to indebtedness incurred in PRS' trade or business of trading securities, the deduction is taken into account in arriving at LP's adjusted gross income. To the extent the $150x of allowed investment interest deduction is attributable to the indebtedness attributable to the stock and bonds held for investment, the deduction is not taken into account in arriving at LP's adjusted gross income and is instead reported as an itemized deduction.

When an individual has both investment interest expense attributable to property described in § 163(d)(5)(A)(i) and investment interest expense attributable to property described in § 163(d)(5)(A)(ii) and the individual's aggregate investment interest expense is greater than the individual's net investment income, the individual must allocate the taxpayer's net investment income to the two categories of investment interest expenses using a reasonable method of allocation. One reasonable method is to allocate the net investment income to the two categories of investment interest in the same proportion that the amount of investment interest in each category bears to the total amount of investment interest (the *pro rata* method). In *Situation 2*, two-thirds ($200x/$300x) of LP's aggregate investment interest expense is attributable to LP's interest in the trade or business of trading securities of PRS (property described in § 163(d)(5)(A)(ii)), and one-third ($100x/$300x) is attributable to stocks and bonds held by LP for investment (property described in § 163(d)(5)(A)(i)). Accordingly, using a *pro rata* method, two-thirds of LP's $150x of net investment income is allocated to LP's distributive share of the interest expense of PRS, while one-third of LP's $150x of net investment income is allocated to LP's other investment interest expense. Therefore, using this method of allocation, of LP's allowed $150x investment interest deduction in Year 1 under § 163(d)(1), $100x is taken into account in arriving at LP's adjusted gross income under § 62(a), while the remaining $50x constitutes an itemized deduction under § 63(d). The $150x of investment interest that is not allowed as a deduction under § 163(d)(1) in Year 1 is treated as investment interest paid or accrued in Year 2 pursuant to § 163(d)(2). The $150x of investment interest that is not allowed as a deduction under § 163(d)(1) in Year 1 is comprised of $100x of investment interest attributable to LP's interest in PRS' trade or business (an interest described in § 163(d)(5)(A)(ii)) and $50x of investment interest expense attributable to stocks and bonds held for investment (within the meaning of § 163(d)(5)(A)(i)).

HOLDINGS

Issue 1: In the case of an individual, interest paid or accrued on indebtedness allocable to property held for investment described in § 163(d)(5)(A)(ii) is (after the application of the § 163(d)(1) limitation) a deduction described in § 62(a)(1) and is therefore taken into account in determining the individual's adjusted gross income.

Issue 2: If an individual has both investment interest expense attributable to indebtedness allocable to property described in § 163(d)(5)(A)(i) and investment interest expense attributable to indebtedness allocable to property described in § 163(d)(5)(A)(ii) and the individual's aggregate investment interest expense is greater than the individual's net investment income, the individual must allocate the individual's net investment income between the two categories of investment interest expense using a reasonable method of allocation. One reasonable method of allocation is to allocate the individual's

net investment income to the two categories of investment interest in proportion to the relative amounts of interest expense within each category.

EFFECT ON OTHER REVENUE RULINGS

Rev. Rul. 2008–12 is amplified.

DRAFTING INFORMATION

The principal author of this revenue ruling is Faith P. Colson of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue ruling, contact Faith P. Colson at (202) 622–3060 (not a toll-free call).

---

26 CFR 1.702–1(b): Character of items constituting distributive share.
(Also: §§ 162, 212, 703.)

Characterization of management fees. This ruling addresses the characterization of the management fees paid by an upper-tier investment partnership (UTP) and by lower-tier trader partnerships (LTPs) to their respective managers under sections 162 and 212 of the Code where the UTP's activities consist solely of acquiring, holding, and disposing of interests in the LTPs and UTP's management fee is not paid or incurred by UTP on behalf of any LTP in connection with the trades or businesses of the LTPs.

Rev. Rul. 2008–39

ISSUE

Under the facts described below, how are the management fees incurred by each of the lower tier partnerships (LTPs) and the management fee incurred by the upper tier partnership (UTP) taken into account in computing the tax liability of an individual who is a limited partner (LP) of UTP?

FACTS

LP, an individual, owns a limited partnership interest in UTP. UTP owns limited partnership interests in several LTPs. Each LTP is engaged in the business of trading in securities and such business constitutes a trade or business within the meaning of § 162 of the Internal Revenue Code (Code). UTP's activities consist solely of acquiring, holding, and disposing of interests in LTPs, and such activities, without regard to the activities of LTPs, do not constitute a trade or business within the meaning of § 162. Instead, UTP's activities (without regard to the activities of LTPs) consist of holding limited partnership interests in LTPs for the production of income within the meaning of § 212. UTP and each LTP pay an annual management fee to their respective managers in consideration for management services performed for their benefit. Each management fee is computed as a specified percentage of the value of the net assets owned by UTP and each LTP, as the case may be.

The management fee paid or incurred by each LTP is an ordinary and necessary business expense within the meaning of § 162 in carrying on its trade or business. The management fee paid or incurred by UTP, without regard to the activities of LTP, is an ordinary and necessary expense in carrying on its investment activities. UTP's management fee is not paid or incurred by UTP on behalf of any LTP in connection with an LTP's trade or business. None of the management fees are properly capitalized under § 263.

Under the terms of the partnership agreement of each LTP, UTP receives a distributive share of the items of income, gain, loss, deduction and credit of each LTP. Under the terms of UTP's partnership agreement, LP receives a distributive share of UTP's items of income, gain, loss, deduction and credit.

LAW AND ANALYSIS

Section 162(a) provides, in part, that there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

Section 212 provides that in the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year (1) for the production or collection of income, (2) for the management, conservation, or maintenance of property held for the production of income, or (3) in connection with the determination, collection, or refund of any tax.

Section 1.212–1(d) of the Income Tax Regulations provides that expenses, to be deductible under § 212, must be "ordinary and necessary." Thus, such expenses must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income.

Section 1.212–1(g) provides that fees for services of investment counsel and similar expenses paid or incurred by a taxpayer in connection with investments held by the taxpayer are deductible under § 212 if they are paid or incurred for the production of income and they are ordinary and necessary under the circumstances.

Section 702(a)(8) provides that, in determining the partner's income tax, each partner shall take into account the partner's distributive share of the partnership's taxable income or loss, exclusive of the items requiring separate computation under § 702(a)(1) through (7). Section 702(a)(1) through (6) lists specific items of income, gain, loss, deduction or credit that must be separately stated by a partnership. Section 702(a)(7) provides that other items of income, gain, loss, deduction or credit also must be separately stated if required by regulations prescribed by the Secretary.

Section 702(b) provides that the character of any item of income, gain, loss, deduction, or credit included in a partner's distributive share under paragraphs (1) through (7) of § 702(a) shall be determined as if such item were realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership.

Section 703(a) provides that the taxable income of a partnership shall be computed in the same manner as in the case of an individual, except that the items listed in § 702(a) shall be separately stated and the deductions listed in paragraph (2) of § 703(a) shall not be allowed.

Section 703(a)(2)(E) provides that the additional itemized deductions for individuals in part VII of subchapter B of the Code, including expenses described in § 212, are not allowed to the partnership.

Section 1.702–1(a)(1) through (a)(8)(i) lists specific items of income, gain, loss, deduction or credit that must be separately stated by a partnership. Specifically,

§ 1.702–1(a)(8)(i) provides, in part, that each partner shall take into account separately the partner's distributive share of the partnership's nonbusiness expenses that are described in § 212.

In *Butler v. Commissioner*, 36 T.C. 1097 (1961), *acq.*, 1962–2 C.B. 4, the Tax Court held that, because loans made by a limited partner to a partnership were a vital factor in the existence and furtherance of the partnership's business and were proximately related to the business activities of the partnership, the limited partner was entitled to a business bad debt deduction. The Tax Court noted its agreement with other cases that "[b]y reason of being a partner in a business petitioner was individually engaged in business." 36 T.C. at 1106. Other courts have permitted a general partner to deduct as a trade or business expense amounts paid on behalf of the business of the partnership. In *Ward v. Commissioner*, 20 T.C. 332 (1953), *acq.*, 1956–2 C.B. 9, *aff'd*, 224 F.2d 547 (9th Cir. 1955), following the termination of a general partnership, a general partner paid medical expenses of a partnership employee. The court held that the partner was individually engaged in business by reason of being a partner. Because of the termination of the partnership, the fact that the partner was no longer in business at the time of the expense did not mean the deduction was denied. A similar result was reached in *Flood v. United States*, 133 F.2d 173 (1st Cir. 1943).

In *Goodwin v. Commissioner*, 75 T.C. 424 (1980), *aff'd,* 691 F.2d 490 (3d Cir. 1982), the Tax Court concluded that, for the purpose of characterizing partnership expenses for purposes of § 162, a partnership must be viewed as a substantive economic entity clearly distinct from its partners. In *Goodwin*, the taxpayer was individually engaged in real estate activities and attempted to claim deductions under § 162(a) for his distributive share as a limited partner of certain startup costs incurred by two limited partnerships formed to construct housing projects. The taxpayer argued that his activities as a partner constituted an expansion or continuation of his existing trade or business. The Tax Court, citing *Madison Gas and Electric Co. v. Commissioner*, 72 T.C. 521 (1979), *aff'd,* 633 F.2d 512 (7th Cir. 1980), held that in the context of § 162, the character of deductions incurred by the partnership, *i.e.*, whether the deductions are incurred in the course of a trade or business, must be resolved at the partnership level. The partnership was not yet carrying on a trade or business at the time the startup costs were paid or incurred. Accordingly, the Tax Court determined that the taxpayer's share of the startup costs were not deductible under § 162 regardless of the taxpayer's individual activities.

The Tax Court in *Goodwin* distinguished the question of whether a partnership expense was an ordinary and necessary expense incurred in carrying on the trade or business of a partnership from the question of whether a partner may deduct unreimbursed amounts paid by the partner on behalf of the partnership. It was the latter question that the Tax Court concluded was the issue in *Butler*, *Ward*, and *Flood*. In *Goodwin*, the Tax Court interpreted *Butler*, *Ward*, and *Flood* to stand for the proposition that, under certain facts, a partner may be entitled to individually deduct under § 162 as an ordinary and necessary expense an amount paid by the partner on behalf of the partnership for which the partner is not reimbursed. *See also Cropland Chemical v. Commissioner*, 75 T.C. 288 (1980); *Klein v. Commissioner*, 25 T.C. 1045 (1956), *acq.*, 1956–2 C.B. 6; and Rev. Rul. 70–253, 1970–1 C.B. 31.

UTP's management fee is not an ordinary and necessary expense paid or incurred by UTP on behalf of the LTPs in carrying on the trading business of the LTPs. Thus, the reasoning and conclusions in *Butler*, *Ward*, and *Flood* are inapposite to the facts presented in this ruling.

Further, the reasoning and conclusions in Rev. Rul. 98–15, 1998–1 C.B. 718, do not apply to the question presented in this ruling. Rev. Rul. 98–15 addresses whether, under the facts described in that ruling, an organization that operates an acute care hospital continues to qualify for exemption from federal income tax as an organization described in § 501(c)(3) when it forms a limited liability company (LLC) with a for-profit corporation and then contributes its hospital and all of its other operating assets to the LLC, which then operates the hospital. The question addressed in Rev. Rul. 98–15 is distinguishable from the question presented in this ruling.

Accordingly, under *Goodwin*, the question of whether the management fee paid or incurred by UTP may be deducted under § 162 or § 212 must be resolved solely by reference to the activities of UTP. Because UTP itself is not engaged in a trade or business within the meaning of § 162 and because the management fee is not paid or incurred on behalf of any LTP in connection with an LTP's trade or business, the management fee is not deductible under § 162. Instead, UTP's annual management fees are ordinary and necessary expenses described in § 212 paid or incurred in connection with UTP's investment activities. Accordingly, LP's share of the UTP's management fee is deductible under § 212. Pursuant to § 703(a)(2)(E), UTP does not take into account UTP's management fees in computing UTP's taxable income. Instead, § 1.702–1(8)(a)(i) requires that UTP separately state UTP's management fees and that LP take into account separately LP's distributive share of UTP's management fees.

Because the management fee of each LTP is an ordinary and necessary expense paid or incurred in carrying on the trade or business of the LTP, the management fee is deductible under § 162. As a result, each LTP takes its management fee into account in computing its taxable income or loss described in § 702(a)(8), and UTP takes into account its distributive share of the taxable income or loss of each LTP in computing UTP's own taxable income or loss described in § 702(a)(8). LP takes into account its distributive share of UTP's taxable income or loss in computing LP's tax liability.

HOLDING

UTP's management fee is not an ordinary and necessary expense paid or incurred by UTP on behalf of the LTPs in carrying on their trading business. The management fee paid or incurred by UTP constitutes an expense described in § 212. This expense is not taken into account in computing UTP's taxable income or loss described in § 702(a)(8). Instead, the management fee must be separately stated by UTP and separately taken into account by LP in computing LP's tax liability.

The management fee paid or incurred by an LTP constitutes an expense described in § 162 and is taken into account in computing the LTP's taxable income or loss described in § 702(a)(8). UTP's dis-

tributive share of taxable income or loss of an LTP is taken into account in computing UTP's taxable income or loss described in § 702(a)(8). In computing LP's tax liability, LP takes into account LP's distributive share of UTP's taxable income or loss.

DRAFTING INFORMATION

The principal author of this revenue ruling is Faith P. Colson of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue ruling, contact Faith P. Colson at (202) 622–3060 (not a toll-free call).

Section 807.—Rules for Certain Reserves

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Section 846.—Discounted Unpaid Losses Defined

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Section 860G.—Other Definitions and Special Rules

This revenue procedure describes the conditions under which changes to certain subprime mortgage loans will not cause the Internal Revenue Service to challenge the tax status of certain securitization vehicles holding the loans or to assert that those modifications create a liability for tax on a prohibited transaction. See Rev. Proc. 2008-47, page 272.

Section 956.—Investment of Earnings in United States Property

26 CFR 1.956–1: Shareholder's pro rata share of a controlled foreign corporation's increase in earnings invested in United States property.

T.D. 9402

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Guidance Under Section 956 for Determining the Basis of Property Acquired in Certain Nonrecognition Transactions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations under section 956 of the Internal Revenue Code (Code) regarding the determination of basis in certain United States property (within the meaning of section 956(c) of the Code) acquired by a controlled foreign corporation in certain nonrecognition transactions that are intended to repatriate earnings and profits of the controlled foreign corporation without United States income taxation. The final regulation adds a cross reference to the temporary regulations. These regulations affect United States shareholders of a controlled foreign corporation that acquires United States property in certain nonrecognition transactions. The text of the temporary regulations serves as the text of the proposed regulations (REG–102122–08) set forth in the notice of proposed rulemaking published in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective June 24, 2008.

Applicability Date: These regulations apply to property acquired in exchanges occurring on or after June 24, 2008.

FOR FURTHER INFORMATION CONTACT: John H. Seibert at (202) 622–3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR Part 1 under section 956, which was added to the Code by the Revenue Act of 1962, Public Law 87–834 (76 Stat. 960 (1962)). The temporary regulations in this document are issued under the authority of sections 367(b) and 956(e). Section 367(b) was added to the Code by section 1042(a) of the Tax Reform Act of 1976, Public Law 94–455 (90 Stat. 1520 (1976)). Section 956(e) was added to the Code by section 13232(b) of the Omnibus Budget Reconciliation Act of 1993, Public Law 103–66, (107 Stat. 312 (1993)).

The temporary regulations in this document apply to determine the basis of certain United States property (as defined in section 956(c) of the Code) acquired by a controlled foreign corporation in certain nonrecognition transactions that are intended to repatriate earnings and profits of the controlled foreign corporation without an income inclusion by the United States shareholders of the controlled foreign corporation under section 951(a)(1)(B).

Explanation of Provisions

A. *Transactions at Issue*

The IRS and the Treasury Department are aware that certain taxpayers are engaging in certain nonrecognition transactions in which a controlled foreign corporation (CFC) acquires certain United States property (within the meaning of section 956(c)) without resulting in an income inclusion to the United States shareholders of the CFC under section 951(a)(1)(B).

In one such transaction, for example, USP, a domestic corporation and the common parent of an affiliated group that files a consolidated tax return, owns 100-percent of the outstanding stock of US1 and US2, both domestic corporations that join USP in the filing of a consolidated tax return. US1 owns 100 percent of the stock of CFC, a controlled foreign corporation. US2 issues $100x of its stock to CFC in exchange for $10x of CFC stock and $90x cash.

USP takes the position that: (i) US2's transfer of its stock to CFC in exchange for $10x of CFC stock and $90x cash is an exchange to which section 351 applies;

(ii) US2 recognizes no gain on the receipt of $10x of CFC stock and $90x cash in exchange for its stock pursuant to section 1032(a); (iii) CFC recognizes no gain on the issuance of its stock to US2 under section 1032(a); (iv) CFC's basis in the US2 stock is zero pursuant to section 362(a); and (v) US1 and US2 do not and will not have an income inclusion under section 951(a)(1)(B) as a result of CFC holding the US2 stock (which constitutes United States property under section 956(c)).

The IRS and the Treasury Department believe these transactions raise significant policy concerns because the transactions may have the effect of repatriating earnings and profits of a CFC without a corresponding dividend inclusion, or an income inclusion under section 951(a)(1)(B) by reason of the CFC's investment in United States property.

B. *Section 956 — In General*

Section 956 was enacted to require an income inclusion by United States shareholders of a CFC that invests certain earnings and profits in United States property "on the grounds that [the investment] is substantially the equivalent of a dividend being paid to them." S. Rep. No. 87–1881, 1962–3 C.B. 703, 794 (1962). (See §601.601(d)(2)(ii)(*b*)).

Under Section 951(a)(1)(B) each United States shareholder (as defined in section 951(b)) of a CFC (as defined in section 957(a)) must include in its gross income for its taxable year in which or with which the taxable year of the CFC ends, the amount determined under section 956 with respect to such shareholder for such year (but only to the extent not excluded from gross income under section 959(a)(2)).

The amount determined under section 956 with respect to a United States shareholder of a CFC for any taxable year is the lesser of: (1) the excess, if any, of the shareholder's *pro rata* share of the average amounts of United States property held (directly or indirectly) by the CFC as of the close of each quarter of such taxable year, over the amount of earnings and profits of the CFC described in section 959(c)(1)(A) with respect to such shareholder; or (2) the shareholder's *pro rata* share of the applicable earnings of the CFC. In general, the amount taken into account with respect to any United States property for this purpose is the adjusted basis of such property as determined for purposes of computing earnings and profits, reduced by any liability to which the property is subject. Earnings and profits described in section 959(c)(1)(A) are attributable to amounts previously included in gross income by the United States shareholder under section 951(a)(1)(B) (or which would have been included except for section 959(a)(2)).

Section 956(c)(1) defines United States property to generally include stock of a domestic corporation and an obligation of a United States person. However, section 956(c)(2) excludes from the definition of United States property, the stock or obligations of a domestic corporation which is neither a United States shareholder of the CFC, nor a domestic corporation 25 percent or more of the total combined voting power of which, immediately after the CFC's acquisition of stock in such domestic corporation, is owned (or is considered as being owned) by the United States shareholders of the CFC in the aggregate.

Section 956(e) grants the Secretary authority to prescribe such regulations as may be necessary to carry out the purposes of section 956, including regulations to prevent the avoidance of section 956 through reorganizations or otherwise.

C. *Section 367(b) — In General*

Section 367(b)(1) provides that in the case of any exchange described in section 332, 351, 354, 355, 356 or 361, in connection with which there is no transfer of property described in section 367(a)(1), a foreign corporation shall be considered to be a corporation except to the extent provided in regulations prescribed by the Secretary which are necessary or appropriate to prevent the avoidance of Federal income taxes.

Section 367(b)(2) provides that the regulations prescribed pursuant to section 367(b)(1) shall include (but shall not be limited to) regulations dealing with the sale or exchange of stock or securities in a foreign corporation by a United States person, including regulations providing the circumstances under which gain is recognized, amounts are included in gross income as a dividend, adjustments are made to earnings and profits, or adjustments are made to basis of stock or securities, and basis of assets.

Section 367(b) was enacted to ensure that international tax considerations are adequately addressed when the provisions of subchapter C of the Code apply to certain nonrecognition exchanges involving foreign corporations. In adopting section 367(b), Congress noted that "it is essential to protect against tax avoidance...upon the repatriation of previously untaxed foreign earnings." H.R. Rep. No. 658, 94th Cong., 1st Sess. 241 (1975).

D. *Determination of Basis in Certain Nonrecognition Exchanges*

Section 358(a)(1) generally provides that the basis of property received pursuant to an exchange to which section 351, 354, 355, 356, or 361 applies is the same as that of the property exchanged, decreased by the fair market value of any other property (except money) received by the taxpayer, the amount of any money received by the taxpayer, and the amount of loss to the taxpayer which was recognized on such exchange, and increased by the amount which was treated as a dividend, and the amount of gain to the taxpayer which was recognized on such exchange (not including any portion of such gain which was treated as a dividend).

Section 362(a) provides that if property is acquired by a corporation in connection with a transaction to which section 351 applies, or as paid-in surplus or as a contribution to capital, then the basis of such property shall be the same as it would be in the hands of the transferor, increased in the amount of gain recognized to the transferor on such transfer.

Section 1032(a) provides that no gain or loss shall be recognized to a corporation on the receipt of money or other property in exchange for stock (including treasury stock) of such corporation.

E. *Determination of Basis for Purposes of Section 956*

These temporary regulations apply when a CFC acquires stock or obligations of a domestic issuing corporation, that constitute United States property under section 956(c), from such corporation pursuant to an exchange in which the controlled foreign corporation's basis in such property is determined under section

362(a). If these temporary regulations apply to such an exchange, then, solely for purposes of section 956, the CFC's basis in such United States property shall be no less than the fair market value of the property transferred by the controlled foreign corporation in exchange for such property. For purposes of the temporary regulations, the term property has the meaning set forth in section 317(a), but includes any liability assumed by the CFC in connection with the exchange notwithstanding section 357(a).

These temporary regulations also apply if United States property, the basis of which is determined under these temporary regulations, is transferred to a related person (related person transferee), or by a related person transferee to another related person, pursuant to an exchange in which the related person transferee's basis in such property is determined, in whole or in part, by reference to the transferor's basis in such property. This rule is intended to prevent taxpayers from attempting to avoid the general rule of the temporary regulations by subsequently transferring the United States property to a related person in another nonrecognition transaction.

The basis of United States property determined under the temporary regulations shall apply only for purposes of determining the amount of United States property acquired or held by a CFC under section 956, and accordingly the amount of a United States shareholder's income inclusion under section 951(a)(1)(B) with respect to such CFC.

The temporary regulations apply only to determine the basis of United States property acquired by a CFC pursuant to an exchange that is within the scope of these temporary regulations. All other basis determinations are made under the rules provided under section 956(a) and §1.956–1(e)(1)(4).

Effective/Applicability Dates

These regulations apply to United States property acquired in exchanges occurring on or after June 24, 2008. No inference is intended as to the basis of United States property acquired by a controlled foreign corporation pursuant to a transaction described herein under current law, and the IRS may, where appropriate, challenge such transactions under applicable provisions or judicial doctrines.

Special Analyses

These temporary and final regulations are necessary to prevent abusive transactions of the type described in the explanation of provisions in this preamble. Accordingly, good cause is found for dispensing with notice and public procedure pursuant to 5 U.S.C. 553(b) of the Administrative Procedures Act and for dispensing with a delayed effective date pursuant to 5 U.S.C. 553(d)(1) and (3) of such Act. For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), please refer to the notice of proposed rulemaking published in this issue of the Bulletin. 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.

Drafting Information

The principal author of these regulations is John H. Seibert, Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.956–1 is amended by adding a sentence to the end of paragraph (e)(1) and adding new paragraphs (e)(5), (e)(6) and (f) to read as follows:

§1.956–1 Shareholder's pro rata share of a controlled foreign corporation's increase in earnings invested in United States property.

* * * * *

(e) * * * (1) * * * See §1.956–1T(e)(6) for a special rule for determining amounts attributable to United States property acquired as the result of certain nonrecognition transactions.

* * * * *

(e)(5) and (e)(6) [Reserved]. For further guidance, see §1.956–1T(e)(5) and (e)(6).

(f) *Effective/applicability dates.* (1) Paragraph (e)(5) of this section is effective June 14, 1988, with respect to investments made on or after June 14, 1988. Paragraph (e)(6) of this section applies to nonrecognition property acquired in exchanges occurring on or after June 24, 2008.

Par. 3. Section 1.956–1T is amended by:

1. Redesignating paragraph (e)(5)(i) as paragraph (e)(5) and revising the paragraph heading for the newly-designated paragraph (e)(5).

2. Adding paragraph (e)(6).

3. Redesignating paragraph (e)(5)(ii) as paragraph (f) and revising newly-designated paragraph (f).

The revisions and additions read as follows:

§1.956–1T Shareholder's pro rata share of a controlled foreign corporation's increase in earnings invested in United States property (temporary).

* * * * *

(e)(5) *Exclusion for certain recourse obligations.* * * *

(6) *Adjusted basis of property acquired in certain nonrecognition transactions*—(i) *Scope and purpose.* This paragraph (e)(6) provides rules for determining, solely for purposes of section 956, the basis of certain United States property acquired by a controlled foreign corporation pursuant to an exchange in which the controlled foreign corporation's basis in such United States property is determined under section 362(a). This paragraph (e)(6) also applies if United States property, the basis in which has been determined under these temporary regulations, is transferred (in one or more subsequent exchanges) to a related person (within the meaning of section 954(d)(3)), pursuant to an exchange in which the related person's basis in such property is determined, in whole or in part, by reference to the transferor's basis in such property. The purpose of this paragraph

(e)(6) is to prevent the effective repatriation of earnings and profits of a controlled foreign corporation that acquires United States property in connection with an exchange to which this paragraph (e)(6) applies without a corresponding income inclusion under section 951(a)(1)(B) by claiming a basis in the United States property less than the amount of earnings and profits effectively repatriated.

(ii) *Definition of United States property*. For purposes of this paragraph (e)(6), *United States property* is stock of a domestic corporation described in section 956(c)(1)(B) or an obligation of a domestic corporation described in section 956(c)(1)(C) that is acquired by a controlled foreign corporation from the domestic issuing corporation. The exceptions provided under section 956(c)(2) shall apply for this purpose.

(iii) *Basis of United States property*. Solely for purposes of section 956, the basis of United States property acquired by a controlled foreign corporation in connection with an exchange to which this paragraph (e)(6) applies shall be no less than the fair market value of the property transferred by the controlled foreign corporation in exchange for such United States property. For purposes of this paragraph (e)(6), the term property has the meaning set forth in section 317(a), but also includes any liability assumed by the controlled foreign corporation in connection with the exchange notwithstanding the application of section 357(a). The fair market value of the property transferred by the controlled foreign corporation in exchange for the United States property shall be determined at the time of the exchange.

(iv) *Timing*. For purposes of §1.956–2(d)(1)(i)(a), a controlled foreign corporation that acquires United States property in an exchange to which this paragraph (e)(6) applies acquires an adjusted basis in such property at the time of the controlled foreign corporation's exchange of property for such United States property.

(v) *Transfers to related persons*. If a controlled foreign corporation transfers United States property, the basis in which has been determined under this paragraph (e)(6), to a related person (within the meaning of section 954(d)(3)) (related person transferee) in an exchange pursuant to which the related person transferee's basis in such United States property is determined, in whole or in part, by reference to the controlled foreign corporation's basis in such United States property, then, solely for purposes of section 956, the related person transferee's basis in such United States property shall be no less than the basis of such United States property in the hands of the controlled foreign corporation immediately before the exchange as determined under paragraph (e)(6)(iii) of this section. This paragraph (e)(6)(v) shall also apply in the case of one or more successive transfers of the United States property by a related person transferee to one or more persons related to the controlled foreign corporation (within the meaning of section 954(d)(3)). This paragraph (e)(6)(v) shall apply regardless of whether a subsequent transfer was part of a plan (or series of related transactions) that includes the controlled foreign corporation's acquisition of the United States property.

(vi) *Examples*. The rules of this paragraph (e)(6) are illustrated by the following examples:

Example 1. (i) *Facts*. USP, a domestic corporation, is the common parent of an affiliated group that joins in the filing of a consolidated return. USP owns 100 percent of the stock of US1 and US2, both domestic corporations and members of the USP consolidated group. US1 owns 100 percent of the stock of CFC, a controlled foreign corporation. US2 issues $100x of its stock to CFC in exchange for $10x of CFC stock and $90x cash. US2's transfer of its stock to CFC is described in section 351, US2 recognizes no gain in the exchange under section 1032(a), and CFC's basis in the US2 stock acquired in the exchange is determined under section 362(a).

(ii) *Analysis*. The US2 stock acquired by CFC in the exchange constitutes United States property under paragraph (e)(6)(ii) of this section because CFC acquires the US2 stock from US2, the issuing corporation. Therefore, because CFC's basis in the US2 stock is determined under section 362(a), then for purposes of section 956, CFC's basis in the US2 stock shall, under paragraph (e)(6)(iii) of this section, be no less than $90x, the fair market value of the property exchanged by CFC for the US2 stock (the $10x of CFC stock issued in the exchange does not constitute property for purposes of paragraph (e)(6)(iii) of this section). Pursuant to paragraph (e)(6)(iv) of this section, for purposes of §1.956–2(d)(1)(i)(a) CFC shall be treated as acquiring its basis of no less than $90x in the US2 stock at the time of its transfer of property to US2 in exchange for the US2 stock. The result would be the same if, instead of CFC transferring $90x of cash to US2 in the exchange, CFC assumes a $90x liability of US2.

Example 2. (i) *Facts*. USP, a domestic corporation owns 100 percent of the stock of USS, a domestic corporation. USP also owns 100 percent of the stock of CFC, a controlled foreign corporation. USP's basis in its USS stock equals the fair market value of the USS stock, or $100x. USP transfers its USS stock to CFC in exchange for $100x of CFC stock. USP's transfer of its USS stock to CFC is described in section 351, USP recognizes no gain in the exchange under section 351(a), and CFC's basis in the USS stock acquired in the exchange, determined under section 362(a), equals $100x.

(ii) *Analysis*. The USS stock acquired by CFC in the exchange does not constitute United States property under paragraph (e)(6)(ii) of this section because CFC acquires the USS stock from USP. Therefore, CFC's basis in the US2 stock, for purposes of section 956, is not determined under this paragraph (e)(6). Instead, CFC's basis in the USS stock is determined under the general rule of section 956(a) and under §1.956–1(e)(1) – (4). As determined under section 362(a), CFC's basis in the USS stock is $100x.

Example 3. (i) *Facts*. USP, a domestic corporation, owns 100 percent of the stock of CFC1, a controlled foreign corporation. CFC1 holds United States property (within the meaning of paragraph (e)(6)(ii) of this section) with a basis of $30x for purposes of section 956 that was determined under paragraph (e)(6)(iii) of this section. CFC1 owns 100 percent of the stock of CFC2, a controlled foreign corporation. CFC1 transfers the United States property to CFC2 in an exchange described in section 351. CFC2's basis in the United States property is determined under section 362(a).

(ii) *Analysis*. In the section 351 exchange, CFC1 transferred United States property to CFC2 with a basis that was determined under paragraph (e)(6)(iii) of this section. Further, CFC2's basis in the United States property is determined under section 362(a) by reference, in whole or in part, to CFC's basis in such property. Therefore, for purposes of section 956, pursuant to paragraph (e)(6)(v) of this section CFC2's basis in the United States property shall be no less than $30x. Paragraph (e)(6)(v) of this section would also apply if CFC2 subsequently transfers the United States property to another person related to CFC1 (within the meaning of section 954(d)(3)) if such related person's basis in the United States property is determined by reference, in whole or in part, to CFC2's basis in such property.

(f) *Effective/applicability date*. (1) Paragraph (e)(5) of this section is effective June 14, 1988, with respect to investments made on or after June 14, 1988. Paragraph (e)(6) of this section applies to nonrecognition property acquired in exchanges occurring on or after June 24, 2008.

(2) The applicability of paragraph (e)(6) of this section will expire on June 23, 2011.

Steven T. Miller,
Acting Deputy Commissioner
for Services and Enforcement.

Approved June 6, 2008.

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

(Filed by the Office of the Federal Register on June 23, 2008, 8:45 a.m., and published in the issue of the Federal Register for June 24, 2008, 73 F.R. 35580)

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

26 CFR 1.1001–3: Modifications of debt instruments.

This revenue procedure describes the conditions under which changes to certain subprime mortgage loans will not cause the Internal Revenue Service to challenge the tax status of certain securitization vehicles holding the loans or to assert that those modifications create a liability for tax on a prohibited transaction. See Rev. Proc. 2008-47, page 272.

Section 1274.—Determination of Issue Price in the Case of Certain Debt Instruments Issued for Property

(Also Sections 42, 280G, 382, 412, 467, 468, 482, 483, 642, 807, 846, 1288, 7520, 7872.)

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, and other sections of the Code, tables set forth the rates for August 2008.

Rev. Rul. 2008–43

This revenue ruling provides various prescribed rates for federal income tax purposes for August 2008 (the current month). Table 1 contains the short-term, mid-term, and long-term applicable federal rates (AFR) for the current month for purposes of section 1274(d) of the Internal Revenue Code. Table 2 contains the short-term, mid-term, and long-term adjusted applicable federal rates (adjusted AFR) for the current month for purposes of section 1288(b). Table 3 sets forth the adjusted federal long-term rate and the long-term tax-exempt rate described in section 382(f). Table 4 contains the appropriate percentages for determining the low-income housing credit described in section 42(b)(2) for buildings placed in service during the current month. Finally, Table 5 contains the federal rate for determining the present value of an annuity, an interest for life or for a term of years, or a remainder or a reversionary interest for purposes of section 7520.

REV. RUL. 2008–43 TABLE 1

Applicable Federal Rates (AFR) for August 2008

Period for Compounding

	Annual	*Semiannual*	*Quarterly*	*Monthly*
Short-term				
AFR	2.54%	2.52%	2.51%	2.51%
110% AFR	2.79%	2.77%	2.76%	2.75%
120% AFR	3.04%	3.02%	3.01%	3.00%
130% AFR	3.31%	3.28%	3.27%	3.26%
Mid-term				
AFR	3.55%	3.52%	3.50%	3.49%
110% AFR	3.91%	3.87%	3.85%	3.84%
120% AFR	4.26%	4.22%	4.20%	4.18%
130% AFR	4.63%	4.58%	4.55%	4.54%
150% AFR	5.35%	5.28%	5.25%	5.22%
175% AFR	6.25%	6.16%	6.11%	6.08%
Long-term				
AFR	4.58%	4.53%	4.50%	4.49%
110% AFR	5.04%	4.98%	4.95%	4.93%
120% AFR	5.51%	5.44%	5.40%	5.38%
130% AFR	5.98%	5.89%	5.85%	5.82%

REV. RUL. 2008–43 TABLE 2				
Adjusted AFR for August 2008				
Period for Compounding				
	Annual	*Semiannual*	*Quarterly*	*Monthly*
Short-term adjusted AFR	2.09%	2.08%	2.07%	2.07%
Mid-term adjusted AFR	3.48%	3.45%	3.44%	3.43%
Long-term adjusted AFR	4.65%	4.60%	4.57%	4.56%

REV. RUL. 2008–43 TABLE 3	
Rates Under Section 382 for August 2008	
Adjusted federal long-term rate for the current month	4.65%
Long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months.)	4.65%

REV. RUL. 2008–43 TABLE 4	
Appropriate Percentages Under Section 42(b)(2) for August 2008	
Appropriate percentage for the 70% present value low-income housing credit	7.94%
Appropriate percentage for the 30% present value low-income housing credit	3.40%

REV. RUL. 2008–43 TABLE 5	
Rate Under Section 7520 for August 2008	
Applicable federal rate for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest	4.2%

Section 1288.—Treatment of Original Issue Discount on Tax-Exempt Obligations

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Section 2036.—Transfers With Retained Life Estate

26 CFR 20.2036–1: Transfers with retained life estate.

This notice sets forth a proposed revenue ruling concerning the income, gift, estate, and generation-skipping transfer tax consequences in situations in which family members create a private trust company to serve as the trustee of trust in which family members are grantors and beneficiaries. See Notice 2008-63, page 261.

Section 2038.—Revocable Transfers

26 CFR 20.2038–1: Revocable transfers.

This notice sets forth a proposed revenue ruling concerning the income, gift, estate, and generation-skipping transfer tax consequences in situations in which family members create a private trust company to serve as the trustee of trust in which family members are grantors and beneficiaries. See Notice 2008-63, page 261.

Section 2041.—Powers of Appointment

26 CFR 20.2041–1: Powers of appointment; in general.

This notice sets forth a proposed revenue ruling concerning the income, gift, estate, and generation-skipping transfer tax consequences in situations in which family members create a private trust company to serve as the trustee of trust in which family members are grantors and beneficiaries. See Notice 2008-63, page 261.

Section 2511.—Transfers in General

26 CFR 25.2511–1: Transfers in general.

This notice sets forth a proposed revenue ruling concerning the income, gift, estate, and generation-skipping transfer tax consequences in situations in which family members create a private trust company to serve as the trustee of trust in which family members are grantors and beneficiaries. See Notice 2008-63, page 261.

Section 2601.—Tax Imposed

26 CFR 26.2601–1: Effective dates.

This notice sets forth a proposed revenue ruling concerning the income, gift, estate, and generation-

skipping transfer tax consequences in situations in which family members create a private trust company to serve as the trustee of trust in which family members are grantors and beneficiaries. See Notice 2008-63, page 261.

Section 7520.—Valuation Tables

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Section 7701.—Definitions

26 CFR 301.7701–4: Trusts.

This revenue procedure describes the conditions under which changes to certain subprime mortgage loans will not cause the Internal Revenue Service to challenge the tax status of certain securitization vehicles holding the loans or to assert that those modifications create a liability for tax on a prohibited transaction. See Rev. Proc. 2008-47, page 272.

Section 7872.—Treatment of Loans With Below-Market Interest Rates

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of August 2008. See Rev. Rul. 2008-43, page 258.

Part III. Administrative, Procedural, and Miscellaneous

Guidance on Private Trust Companies

Notice 2008–63

TEXT

I. *Overview and Purpose*

This notice sets forth the contents of a proposed revenue ruling concerning the income, estate, gift, and generation-skipping transfer tax consequences in situations in which family members create a private trust company to serve as the trustee of trusts having family members as grantors and beneficiaries.

This notice solicits public comments regarding the proposed revenue ruling. The IRS and the Treasury Department anticipate issuing a final revenue ruling after the comments have been considered. The IRS and the Treasury Department intend that the revenue ruling, once issued, will confirm certain tax consequences of the use of a private trust company that are not more restrictive than the consequences that could have been achieved by a taxpayer directly, but without permitting a taxpayer to achieve tax consequences through the use of a private trust company that could not have been achieved had the taxpayer acted directly. Comments are specifically requested as to whether or not the draft revenue ruling will achieve that intended result.

II. *Proposed Revenue Ruling*

Part I

Section 2036.—Transfers With Retained Life Estate

26 CFR 20.2036–1: Transfers with retained life estate.
(Also: § 2038, § 20.2038–1, § 2041, § 20.2041–1, § 2501, § 2511, § 25.2511, § 2601, § 26.2601–1, § 671, § 672(c), § 674, § 675, § 677, § 678.)

Rev. Rul. [XXXX–XX]

ISSUES

(1) If the private trust company (PTC) described in *Situation 1* or *Situation 2* is appointed and serves as the trustee of a trust, will the value of the trust assets be included in a grantor's gross estate under §§ 2036(a) or 2038(a)?

(2) If the PTC described in *Situation 1* or *Situation 2* is appointed and serves as the trustee of a trust, will the value of the trust assets be included in a beneficiary's gross estate under § 2041?

(3) If the PTC described in *Situation 1* or *Situation 2* is appointed and serves as the trustee of a trust that provides the trustee with the discretionary power to distribute income and/or principal to the grantor's child or descendants, will the grantor's transfer to that trust constitute a completed gift?

(4) Does the appointment and service of a PTC as the trustee of a trust affect the exempt status of a trust that is otherwise exempt from the generation-skipping transfer (GST) tax under § 2601, or change the inclusion ratio of a trust?

(5) If the PTC described in *Situation 1* or *Situation 2* is appointed and serves as the trustee of a trust, is the grantor or any beneficiary of that trust treated as the owner of any portion of the trust under §§ 671 through 678?

FACTS

A and B, who are husband and wife, have three children, C, D, and E. C, D, and E are each married, and each has children. References to Family include A, B, their children, the spouses and former spouses of their children, and each other descendant of A and B (both now living and future) and the spouses and former spouses of such descendants.

A and B have established separate irrevocable trusts for each of their children and grandchildren. In addition, C, D, and E have established irrevocable trusts for their respective descendants. Each child or grandchild of A and B is the primary beneficiary of the trust established for that child or grandchild. Each trust receives contributions only from the person who created the trust. All grantors and beneficiaries are United States persons and no trust is a foreign trust.

Each trust instrument provides the trustee with discretionary authority to distribute income and/or principal to the primary beneficiary of the trust during the primary beneficiary's lifetime. In addition, each trust provides the primary beneficiary with the testamentary power to appoint the trust corpus to or for the benefit of one or more members of Family (other than the primary beneficiary) and/or one or more organizations described in §§ 170(c), 2055(a) and 2522(a) of the Internal Revenue Code. Each trust also provides that the grantor, or the primary beneficiary if the grantor is not living, may appoint a successor trustee other than himself or herself if the current trustee either resigns or is no longer able to fulfill the duties of trustee. Finally, each trust provides that the trust will terminate, in all events, no later than 21 years after the death of the last to die of certain designated individuals living at the time of the creation of the trust.

Situation 1 — PTC formed under laws of a state that has enacted a private trust company statute. The facts and the terms of the trusts are as described above. All trusts are governed by the laws of State 1, a state that has enacted a private trust company statute (Statute). Statute provides that any PTC formed under Statute must create a Discretionary Distribution Committee (DDC) and delegate to the DDC the exclusive authority to make all decisions regarding discretionary distributions from each trust for which it serves as trustee. Discretionary distributions are defined as permissible distributions that are not mandated in the trust instrument or by applicable law. Statute does not restrict who may serve on the DDC, but provides that no member of the DDC may participate in the activities of the DDC with regard to any trust of which that DDC member or his or her spouse is a grantor, or any trust of which that DDC member or his or her spouse is a beneficiary. In addition, Statute provides that a DDC member may not participate in the activities of the DDC with respect to any trust with a beneficiary to whom that DDC member or his or her spouse owes a legal obligation of support. Statute provides that only officers and managers of the PTC may participate in decisions regarding personnel of the PTC (including the hiring, discharge, promotion and compensation of employ-

ees). Statute also provides that nothing in Statute or in PTC's governing documents may override a more restrictive provision in the trust instrument of a trust for which PTC is acting as a trustee. Finally, Statute provides that no Family member may enter into any reciprocal agreement, express or implied, regarding discretionary distributions from any trust for which PTC is serving as a trustee.

In 2008, Family formed a corporation that is a PTC under Statute. PTC's governing documents create a DDC that will make all decisions with respect to discretionary distributions from all trusts for which it serves as trustee, consistent with Statute. PTC's governing documents do not restrict who may serve on the DDC. Family owns all of the stock in PTC, either outright or through trusts and/or other entities. A, C, and D are officers of PTC and serve on PTC's Board of Directors. A, C, and D also serve on the DDC. B and E own shares of PTC, but neither is on the DDC and neither is an officer or director of PTC. E is a manager and employee of PTC.

X, a financial institution organized under the banking laws of State 1, has served as trustee of each of the trusts since their inception. No grantor of any of the trusts has a relationship with X other than as a customer or client of X.

Subsequent to PTC's formation, X resigned as trustee of each of the trusts and PTC was appointed as the successor trustee of each trust. In addition, A created and transferred property to three additional irrevocable trusts (the 2008 trusts), one for the primary benefit of each of A's children, C, D, and E, and that child's descendants. The terms of each of the 2008 trusts are the same as those described above, except that these trusts provide that the trustee has discretionary authority to distribute income and/or principal to any one or more beneficiaries during the beneficiary's life. Each 2008 trust receives contributions only from A. PTC will serve as the initial trustee of each of the 2008 trusts.

Situation 2 — PTC formed in a state without a statute governing private trust companies. The facts and the terms of the trusts are as described above. In 2008, Family formed a corporation that is a PTC in State 2, a state that has not enacted specific legislation governing the formation or operation of a private trust company. PTC is established for the specific purpose of acting as the trustee for the various trusts established by members of Family. Family owns all of the stock in PTC, either outright or through trusts and/or other entities.

PTC's governing documents create a DDC and delegate to the DDC the exclusive authority to make all decisions regarding discretionary distributions from each trust for which it serves as trustee. Discretionary distributions are defined as permissible distributions that are not mandated in the trust instrument or by applicable law. PTC's governing documents do not restrict who may serve on the DDC, but provide that no member of the DDC may participate in the activities of the DDC with regard to any trust of which that DDC member or his or her spouse is a grantor, or any trust of which that DDC member or his or her spouse is a beneficiary. In addition, the governing documents provide that a DDC member may not participate in the activities of the DDC with respect to any trust with a beneficiary to whom that DDC member or his or her spouse owes a legal obligation of support. PTC's governing documents also provide that only officers and managers of the PTC may participate in decisions regarding personnel of the PTC (including the hiring, discharge, promotion and compensation of employees). PTC's governing documents also provide that nothing in PTC's governing documents may override a more restrictive provision in the trust instrument of a trust for which PTC is acting as a trustee. In addition, PTC's governing documents also provide that no Family member may enter into any reciprocal agreement, express or implied, regarding discretionary distributions from any trust for which PTC is serving as a trustee.

PTC's governing documents also provide for the creation of an Amendment Committee, a majority of whose members must always be individuals who are neither Family members nor persons related or subordinate (as described in §672(c)) to any shareholder of PTC. The governing documents further provide that the Amendment Committee, by no less than majority vote, shall have the sole authority to make any changes to PTC's governing documents regarding the creation, function, or membership of the DDC or of the Amendment Committee itself, the provisions delegating exclusive authority regarding personnel decisions to the officers and managers, and the prohibition of reciprocal agreements between Family members. The vesting of these powers exclusively in the Amendment Committee is not contrary to any applicable provision of the law of State 2. F, G, and A are the initial members of the Amendment Committee. F and G are not members of Family, are not employed by PTC, and are not otherwise related or subordinate to any Family member as defined in § 672(c).

A, C, and D are officers of PTC. A, C, D, F, and G serve on PTC's Board of Directors. A, C, and D also serve on the DDC. B and E own shares of PTC, but neither is on the DDC and neither is an officer or director of PTC. E is a manager and employee of PTC.

X, a financial institution organized under the banking laws of State 2, has served as trustee of each of the trusts since their inception. No grantor of any of the trusts has a relationship with X other than as a customer or client of X.

Subsequent to PTC's formation, X resigned as trustee of each of the trusts and PTC was appointed as the successor trustee of each trust. In addition, A created and transferred property to three additional irrevocable trusts (the 2008 trusts), one for the primary benefit of each of A's children, C, D, and E, and that child's descendants. The terms of each of the 2008 trusts are the same as those described above, except that these trusts provide that the trustee has discretionary authority to distribute income and/or principal to any one or more beneficiaries during the beneficiary's life. Each 2008 trust receives contributions only from A. PTC will serve as the initial trustee of each of the 2008 trusts.

LAW AND ANALYSIS

Issue 1

Section 2036(a) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a *bona fide* sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period that does not in fact end

before his death — (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 20.2036–1(b)(2) of the Estate Tax Regulations provides that the "use, possession, right to the income, or other enjoyment of the transferred property" is considered as having been retained by or reserved to the decedent to the extent that the use, possession, right to the income, or other enjoyment is to be applied toward the discharge of a legal obligation of the decedent, or otherwise for the decedent's pecuniary benefit. The term "legal obligation" includes a legal obligation to support a dependent during a decedent's lifetime.

Section 20.2036–1(b)(3) provides, in part, that the phrase "right . . . to designate the person or persons who shall possess or enjoy the transferred property or the income therefrom" includes a reserved power to designate the person or persons to receive the income from the transferred property, or to possess or enjoy non-income-producing property, during the decedent's life. With respect to such power, it is immaterial: (i) whether the power was exercisable alone or only in conjunction with another person or persons, whether or not having an adverse interest; (ii) in what capacity the power was exercisable by the decedent or by another person or persons in conjunction with the decedent; and (iii) whether the exercise of the power was subject to a contingency beyond the decedent's control which did not occur before his death. The phrase, however, does not include a power over the transferred property itself which does not affect the enjoyment of the income received or earned during the decedent's life. (See, however, § 2038 for the inclusion of property in the gross estate on account of such a power.) Nor does the phrase generally apply to a power held solely by a person other than the decedent.

Section 2038(a)(1) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a *bona fide* sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of the decedent's death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired the power), to alter, amend, revoke, or terminate, or where any power is relinquished during the three-year period ending on the date of the decedent's death.

Under § 2038, the discretionary authority to distribute or withhold income is a right to alter, amend, revoke, or terminate a trust. Thus, if a grantor holds these powers at death, or if any such power is relinquished during the three-year period ending on the date of the decedent's death, the value of the trust corpus is includible in the grantor's gross estate under § 2038 and § 2035, respectively. See Rev. Rul. 70–348, 1970–2 C.B. 193.

In *Situation 1*, PTC is the trustee of the Family trusts. All distribution decisions are to be made by the DDC, and no Family member serving on the DDC may participate in making discretionary distribution decisions with respect to any trust of which that person or his or her spouse is either a grantor or a beneficiary, or with respect to any trust of which the beneficiary is a person to whom the Family member or his or her spouse owes an obligation of support. Further, Statute prohibits any shareholder(s) of PTC from changing the governing provisions regarding the DDC. Therefore, no Family member, either alone or with any other person, has any right or power described in § 2036(a) or § 2038(a) with regard to a Family trust solely by reason of PTC's service as trustee or of the Family member's ownership of or relationship(s) with PTC. In addition, no Family member may insert themselves into the position of holding such a power. As a result, provided that PTC operates as required by State 1's Statute, no portion of the value of a Family trust will be includible in the gross estate of A, C, or D under § 2036(a) or § 2038(a) by reason of PTC's service as trustee or that person's service as an officer, director, or member of the DDC. Finally, for the same reasons, no portion of the value of the trust will be includible in the gross estate of B or E solely because B and E are shareholders and/or a manager or employee of PTC.

In *Situation 2*, no Family member currently has a power described in § 2036(a) or § 2038(a) because of the provisions in PTC's governing documents regarding the DDC. With regard to whether any Family member may acquire such a power, however, *Situation 2* differs from *Situation 1*. As in *Situation 1*, Family owns all of the stock in PTC but, unlike *Situation 1*, State 2 has no state statute restricting the ability of PTC's shareholders to change the applicable provisions governing the DDC. In *Situation 2*, Family members who are PTC's shareholders do have a power to amend PTC's governing documents. However, PTC's Amendment Committee has the sole authority to amend PTC's governing documents with regard to the DDC and the Amendment Committee, with regard to the authority to make personnel decisions, and with regard to the prohibition on reciprocal agreements. Thus, as in *Situation 1*, even a sole shareholder of PTC does not have the authority to change the provisions regarding the Amendment Committee. Under these facts, no Family member, including A who is a member of the Amendment Committee, will be deemed to have a power to change the governing provisions regarding the DDC that would thereby result in the inclusion of any part of a Family trust in a Family member's gross estate. Therefore, if PTC operates in a manner consistent with its governing documents as described above, and if the provisions described above are not changed (those regarding the DDC, the Amendment Committee, the authority over personnel decisions, and the prohibition of reciprocal agreements), no portion of the value of a Family trust will be includible in the gross estate of a grantor under § 2036(a) or § 2038(a) by reason of PTC's service as Trustee, a grantor's interest in PTC, or a grantor's service as an officer, director, manager, employee, or member of the DDC or the Amendment Committee of PTC.

Issue 2

Section 2041(a)(2) provides that the value of the gross estate shall include the value of all property to the extent of any property with respect to which the decedent has, at the time of his death, a general power of appointment created after

October 21, 1942, or with respect to which the decedent has at any time exercised or released a power of appointment by a disposition that is of such nature that, if it were a transfer of property owned by the decedent, the property would be includible in the decedent's gross estate under §§ 2035 to 2038, inclusive. For purposes of § 2041(a)(2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not notice has been given or the power has been exercised on or before the date of the decedent's death.

Section 2041(b)(1) provides that a general power of appointment is a power that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate. However, a power to consume, invade, or appropriate the property for the benefit of the decedent that is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

Section 20.2041–1(b)(1) provides that a donee may have a power of appointment if he has the power to remove or discharge a trustee and appoint himself as trustee. For example, if under the terms of the instrument, the trustee or a successor trustee has the power to appoint the principal of the trust for the benefit of individuals including the decedent, and the decedent has the unrestricted power to remove or discharge the trustee at any time and appoint any other person including himself or herself as trustee, the decedent is considered to have a power of appointment. However, the mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests therein except as an incidental consequence of the discharge of fiduciary duties, is not a power of appointment.

Section 2041(b)(1) defines a general power of appointment as a power exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. The regulations contemplate that a beneficiary may possess a power of appointment over trust property. Section 20.2041–1(b)(1). Thus, if a trust instrument provides a beneficiary with the power to appropriate or consume the principal of a trust, the power is a general power of appointment. The fact that the beneficiary holds the power in a fiduciary capacity as a trustee will not prevent the power from being a general power of appointment. *Estate of Lanigan v. Commissioner*, 45 T.C. 247, 251 (1965).

In *Situation 1*, the governing documents of the Family trusts provide a trustee with the discretionary authority to distribute income or principal to a beneficiary of a trust. Under State 1's Statute, however, PTC's powers to make discretionary distributions are delegated exclusively to the DDC, and no beneficiary who is a member of the DDC is permitted to participate in discretionary distribution decisions with respect to a trust in which that beneficiary has a beneficial interest (including a trust whose beneficiary is a person to whom the beneficiary owes an obligation of support). In addition, Family members are prohibited from entering into reciprocal arrangements designed to affect distribution decisions. Under these circumstances, C and D, as beneficiaries who also serve as officers, directors, and members of PTC's DDC, do not have the unrestricted power to distribute trust assets to themselves as contemplated by § 2041. Similarly, neither E nor any other beneficiary will be deemed to have a general power of appointment under § 2041 solely because a particular beneficiary is a shareholder or otherwise participates in the daily activities of PTC, such as decisions regarding investments, or the retention of attorneys, accountants, or other professional advisors.

In *Situation 2*, the PTC's governing documents rather than applicable law restrict the powers of members of the DDC. PTC's governing documents preclude a beneficiary from having the power as a member of the DDC to affect the beneficial enjoyment of the trust property as described in § 2041. In addition, Family members are prohibited from entering into reciprocal arrangements designed to affect distribution decisions. Therefore, C and D, as beneficiaries who also serve as officers, directors, and members of PTC's DDC, do not have the power to distribute trust assets to themselves as contemplated by § 2041. Further, neither E nor any other beneficiary will be deemed to have a general power of appointment under § 2041 solely because a particular beneficiary is a shareholder or otherwise participates in the daily activities of PTC. In addition, based on the facts of *Situation 2*, and for the reasons discussed regarding Issue 1, no beneficiary who is a member of the Amendment Committee will be deemed to have a general power of appointment under § 2041 solely because such beneficiary serves on the Amendment Committee.

Issue 3

Section 2501 imposes a tax on any transfer of property by gift by any individual. Section 2511 provides for application of the gift tax regardless of the nature of the property transferred and whether the transfer is direct or indirect, or in trust or otherwise.

Section 25.2511–1(g)(1) provides, in part, that a transfer by a trustee of trust property in which the trustee has no beneficial interest does not constitute a gift by the trustee (but such a transfer may constitute a gift by the creator of the trust, if until the transfer the creator had the power to change the beneficiaries by amending or revoking the trust).

Section 25.2511–2(b) provides that, as to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case.

Section 25.2511–2(c) provides that a gift is incomplete if the grantor has reserved the power to revest the beneficial title to the property in the grantor, or to the extent that the grantor has reserved a power to name new beneficiaries or to change the interests of the beneficiaries as between themselves, unless the power is a fiduciary power limited by a fixed or ascertainable standard.

Section 25.2511–2(e) provides that a grantor is considered to hold a power if the power is exercisable by the grantor in conjunction with any other person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom. A trustee, merely by reason of that fiduciary position, does not have such an adverse interest.

In *Situation 1* and *Situation 2,* subsequent to the formation of PTC, A, a Family member, creates and transfers property to the 2008 trusts, one for the benefit of each of A and B's children, C, D, and E, and that child's descendants. Each trust instrument provides the trustee with discretionary authority to distribute income and/or principal to the child and/or the child's then-living descendants. PTC will serve as the trustee of each trust, and the DDC will make all of the decisions with respect to discretionary distributions. Statute in *Situation 1* and the governing documents in *Situation 2* do not prohibit A from serving on the DDC, and in each situation, A is a member of the DDC. However, pursuant to Statute in *Situation 1* and the governing documents in *Situation 2*, no member of the DDC may participate in the activities of the DDC with regard to any trust of which that DDC member or his or her spouse is a grantor, or any trust of which that DDC member or his or her spouse is a beneficiary. Further, in both situations, Family members are prohibited from entering into any reciprocal agreements designed to affect distribution decisions. If PTC operates in accordance with Statute in *Situation 1* or the governing documents in *Situation 2* as the case may be, A will not have the power to change the interests of the beneficiaries of the 2008 trusts. In addition, A will not be considered to hold a power exercisable by A in conjunction with any other person not having a substantial adverse interest in the disposition of the transferred property or the property's income merely because of A's membership on the DDC. Thus, in each situation, the value of the property transferred by A to the 2008 trusts will be considered completed gifts for purposes of chapter 12 of the Code. Also, in *Situation 1* and *Situation 2*, the provisions of the DDC prohibit any beneficiary who is a member of the DDC from participating in decisions with regard to any trust in which the beneficiary has a beneficial interest. Thus, distributions of income or principal from a trust of which PTC is the trustee will not be deemed to be a gift by any member of the DDC. See § 25.2511–1(g).

Issue 4

Section 2601 imposes a tax on every generation-skipping transfer. Under § 1433(b)(2)(A) of the Tax Reform Act of 1986 and § 26.2601–1(b)(1)(i), the GST tax provisions do not apply to any generation-skipping transfer under a trust (as defined in § 2652(b)) that was irrevocable on September 25, 1985, but only to the extent that the transfer is not made out of corpus added to the trust after September 25, 1985 (or out of income attributable to corpus so added).

Section 26.2601–1(b)(1)(ii)(A) provides that any trust in existence on September 25, 1985, is considered an irrevocable trust, except as provided in §§ 26.2601–1(b)(ii)(B) or (C) relating to property includible in a grantor's gross estate under §§ 2038 and 2042, respectively.

Section 26.2601–1(b)(1)(v)(B) provides that the release, exercise, or lapse of a power of appointment (other than a general power of appointment as defined in § 2041(b)) is not treated as an addition to a trust if — (1) the power of appointment was created in an irrevocable trust that is not subject to chapter 13 under § 26.2601–1(b); and (2) in the case of an exercise, the power of appointment is not exercised in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years plus, if necessary, a reasonable period of gestation (the perpetuities period). For purposes of § 26.2601–1(b)(1)(v)(B)(2), the exercise of a power of appointment that validly postpones or suspends the vesting, absolute ownership or power of alienation of an interest in property for a term of years that will not exceed 90 years (measured from the date of creation of the trust) will not be considered an exercise that postpones or suspends vesting, absolute ownership or the power of alienation beyond the perpetuities period. If a power is exercised by creating another power, it is deemed to be exercised to whatever extent the second power may be exercised.

Section 26.2601–1(b)(4) provides rules for determining when a modification, judicial construction, settlement agreement, or trustee action with respect to a trust that is exempt from the GST tax under § 26.2601–1(b)(1), (2), or (3) (hereinafter referred to as an exempt trust) will not cause the trust to lose its exempt status. In general, unless specifically provided otherwise, the rules contained in § 26.2601–1(b)(4) are applicable only for purposes of determining whether an exempt trust retains its exempt status for GST tax purposes. Unless specifically noted, the rules do not apply in determining, for example, whether the transaction results in a gift subject to gift tax, or may cause the trust to be included in the gross estate of a beneficiary, or may result in the realization of capital gain for purposes of § 1001.

Section 26.2601–1(b)(4)(i)(D)(1) provides that a modification of the governing instrument of an exempt trust by judicial reformation, or nonjudicial reformation that is valid under applicable state law, will not cause an exempt trust to be subject to the provisions of chapter 13 if the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification, and if the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided in the original trust. Furthermore, a modification that is administrative in nature that only indirectly increases the amount transferred (for example, by lowering administrative costs or income taxes) will not be considered a shift in a beneficial interest in a trust.

In *Situation 1* and *Situation 2*, X resigned as trustee of each of the pre-2008 trusts and PTC replaced X as trustee. Under the facts of *Situation 1* and *Situation 2*, the change in trustee will not subject the value of the trust corpus to the tax under Chapter 11 or 12, and this modification is an administrative change that does not shift a beneficial interest in a trust to any beneficiary who occupies a lower generation (as described in § 2651) than the person or persons who held the beneficial interest prior to the modification. In ad-

dition, each trust will terminate no later than 21 years after the death of the last to die of certain designated individuals living at the time of the creation of the trust. Thus, even if PTC is formed and operates in a jurisdiction other than that of the original trustee, the appointment of PTC alone will not extend the time for vesting of any beneficial interest in a trust for which PTC acts as trustee beyond the date provided for in the original trust. See § 26.2601–1(b)(4)(i)(E), *Example 4* and *Example 10*. Therefore, under the facts of *Situation 1* and *Situation 2*, the appointment of PTC as trustee does not change the status of a trust that was otherwise exempt from the GST tax by virtue of having been irrevocable (as defined in § 26.2601–1(b)(1)(ii)(A)) on September 25, 1985.

Further, as discussed in Issues 1 and 2, if PTC operates in a manner consistent with Statute and/or its governing documents, no portion of the value of a Family trust will be includible in the gross estate of a grantor under § 2036(a) or § 2038(a) by reason of PTC's service as trustee, the grantor's interest in PTC, or the grantor's service as an officer, director, manager, employee, or member of the DDC or the Amendment Committee of PTC. Similarly, beneficiaries who also serve as officers, directors, and members of PTC's DDC, do not have the power to distribute trust assets to themselves as contemplated by § 2041, and no beneficiary will be deemed to have a general power of appointment under § 2041 solely because a particular beneficiary is a shareholder, or otherwise participates in the daily activities, of PTC. Therefore, under the circumstances described in *Situation 1* and *Situation 2*, appointing PTC as the trustee of the Family trusts does not affect the inclusion ratio of a trust subject to Chapter 13.

Issue 5

Section 671 provides that, where it is specified in subpart E of Part I of subchapter J that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of the trust's income, deductions, and credits against tax which are attributable to that portion of the trust to the extent that such items would be taken into account under chapter 1 in computing taxable income or credits against the tax of an individual.

Section 672(a) provides that the term "adverse party" means any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust. A person having a general power of appointment over the trust property shall be deemed to have a beneficial interest in the trust.

Section 672(c) provides that, for purposes of subpart E, part 1, subchapter J, chapter 1, subtitle A of the Code, the term "related or subordinate party" means any nonadverse party who is any one of the following: the grantor's spouse if living with the grantor; the grantor's father, mother, issue, brother or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; a subordinate employee of a corporation in which the grantor is an executive.

Section 674(a) provides, in general, that the grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.

Section 674(c) provides that § 674(a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a trustee or trustees, none of whom is the grantor, and no more than half of whom are related or subordinate parties who are subservient to the wishes of the grantor: (1) to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries; or (2) to pay out corpus to or for a beneficiary or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries).

Under § 675 and applicable regulations, the grantor is treated as the owner of any portion of a trust if, under the terms of the trust agreement or circumstances attendant on its operation, administrative control is exercisable primarily for the benefit of the grantor rather than the beneficiaries of the trust.

Section 675(4) provides that the grantor shall be treated as the owner of any portion of a trust in respect of which a power of administration is exercisable in a nonfiduciary capacity by any person without the approval or consent of any person in a fiduciary capacity. For purposes of § 675(4), the term "power of administration" means any one or more of the following powers: (A) a power to vote or direct the voting of stock or other securities of a corporation in which the holdings of the grantor and the trust are significant from the viewpoint of voting control; (B) a power to control the investment of the trust funds either by directing investments or reinvestments, or by vetoing proposed investments or reinvestments, to the extent that the trust funds consist of stocks or securities of corporations in which the holdings of the grantor and the trust are significant from the viewpoint of voting control; or (C) a power to reacquire the trust corpus by substituting other property of an equivalent value.

Section 677(a)(1) provides that the grantor shall be treated as the owner of any portion of a trust, whether or not the grantor is treated as such owner under § 674, whose income, without the approval or consent of any adverse party, is, or, in the discretion of the grantor or a nonadverse party, or both, may be distributed to the grantor or the grantor's spouse.

Section 1.677(a)–1(d) of the Income Tax Regulations provides that, under § 677, a grantor is, in general, treated as the owner of a portion of a trust whose income is, or in the discretion of the grantor or a nonadverse party, or both, may be applied in discharge of a legal obligation of the grantor or, in certain situations, of the grantor's spouse. However, § 1.677(b)–1(a) provides that a grantor is not treated as the owner of a trust merely because its income may, in the discretion of any person other than the grantor (except when the grantor is acting as trustee or cotrustee), be applied or distributed for the support or maintenance of a beneficiary (other than the grantor's spouse in the case of income from property transferred in trust after October 9, 1969), such as the child of the grantor, whom the grantor or his spouse is legally obligated to support. If income of the current year of the trust is actually so applied or distributed, the grantor may be treated as the owner of any portion of the trust under § 677 to that

extent, even though that income might have been applied or distributed for other purposes.

Section 678(a)(1) provides that a person other than the grantor is treated as the owner of any portion of a trust with respect to which the person has a power, exercisable solely by that person, to vest the corpus or the income therefrom in that person. This rule does not apply, however, to a power over income if a grantor or other transferor is otherwise treated as the owner of the trust.

In *Situation 1*, the existence of and provisions governing the DDC, as well as the provisions of Statute regarding the DDC, render the identity of the trustee irrelevant to the determination of whether any person is treated as an owner of a trust under §§ 675, 677, or 678. None of the terms of the Family trusts, the provisions of Statute, or the governing documents of PTC reveal any of the circumstances that would cause administrative controls to be considered exercisable primarily for the benefit of the grantors of the Family trusts for which PTC will act as trustee under § 675. Nevertheless, the circumstances attendant on the operation of the PTC, the DDC, and the Family trusts for which the PTC is acting as trustee will determine whether any grantor will be treated as the owner of any portion of those trusts under § 675. Whether or not a trust is a grantor trust by reason of a power described in § 675 is a question of fact, the determination of which is deferred until the examination of the federal income tax returns of the parties involved.

Similarly, nothing in the facts indicates that any grantor or beneficiary of the trust would be deemed to be an owner of a trust under § 673, § 676, § 677, or § 678, and Statute would prevent any grantor or beneficiary from acquiring any right or power that would result in such treatment. Under § 677(b), the grantor will be deemed to be the owner of the trust to the extent that trust income is actually used to discharge a support obligation of the grantor, but this will be true regardless of the identity of the trustee. Thus, the appointment and service of PTC as trustee does not affect whether or not the grantor or any other person will be treated as the owner of a trust under these provisions, and none of the grantors or beneficiaries of the Family trusts for which PTC is acting as trustee will be treated as an owner of those trusts or any portion thereof under §§ 673, 675, 676, 677, or 678 solely by reason of their ownership or management of, or employment by, PTC.

The identity of the trustee is relevant with regard to whether the grantor will be treated as the owner of a trust under § 674. The general rule is that powers must be subject to the approval or consent of an adverse party as defined in § 672(a) in order to avoid treating the grantor as the owner of a trust for income tax purposes. In *Situation 1* and *Situation 2*, Statute or the governing documents, as the case may be, prohibit a DDC member from acting with regard to each trust in which that DDC member has an interest, so there will be no adverse party with the power to grant approval or consent.

Some powers (specifically, those described in § 674(b) and (d)) may be held by any trustee without causing the grantor to be deemed to be the owner of the trust under this section. The appointment and service of PTC as trustee is irrelevant with regard to these powers. Section 674(c), however, describes powers that will not cause the grantor to be treated as the owner of the trust as long as those powers are held by trustees, none of whom is the grantor and no more than half of whom are related or subordinate to the grantor as defined in § 672(c).

Two clauses of § 672(c)(2) have relevance with regard to the facts described in *Situation 1* and *Situation 2*. The first is the clause defining "related or subordinate party" as including a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control.

For purposes of this test, voting control of PTC has been made irrelevant as it applies to the power to make distributions from the Family trusts by the provisions of Statute (in *Situation 1*) or the presence of the Amendment Committee (in *Situation 2*) with regard to the DDC and by the delegation of all PTC personnel decisions to the officers and managers of PTC. Thus, the ownership of voting stock of PTC (even the sole ownership of all of that voting stock) should not be deemed to be "significant" under § 672(c) for this purpose. "Voting control" is relevant insofar as it gives a grantor or trusts created by a grantor power over distributions made in the discretion of the corporate trustee or power over the employees of the corporate trustee who make such discretionary distribution decisions on behalf of the corporation. Under *Situation 1* and *Situation 2*, adequate safeguards protect against the exercise of such powers.

The second relevant clause of § 672(c)(2) is that which defines "related or subordinate party" as including a subordinate employee of a corporation in which the grantor is an executive.

In *Situation 1* and *Situation 2*, the trust instruments do not require the trustee to be a person or entity that is not related or subordinate to the grantor as defined in § 672(c). In fact, it is possible that more than half of the members of the DDC may be nonadverse parties who are related or subordinate to the grantor.

In determining whether or not PTC as trustee is related or subordinate for purposes of this second clause, one must look at the members of the DDC who are authorized to act with regard to that particular trust (as if those DDC members individually were the trustees). This partial look-through is necessary to ensure that a grantor cannot achieve income tax results indirectly through a PTC trustee that could not be achieved with an individual trustee or trustees. A subordinate employee of a corporation in which the grantor is an executive will still be deemed to be subordinate to the grantor under § 672(c). Thus, under *Situation 1* and *Situation 2* a non-Family member serving on the DDC who is an employee of PTC will be related and subordinate to A, C, D, and E, but not to B who is not an officer or manager of PTC.

In summary, whether or not a grantor will be treated as the owner of a trust or any portion thereof under § 674 depends both upon the powers of the trustee and upon the proportion of the members of the DDC with authority to act with regard to that trust who are related or subordinate to the grantor applying a "look-through" test in which each employee of PTC serving on the DDC, if any, is tested as if that employee was a trustee of the trust in his or her individual capacity, rather than as a member of a committee existing within and functioning on behalf of PTC. For purposes of this test, the ownership of the voting stock of PTC in *Situation 1* and *Situation 2* shall be deemed to be not significant.

For these purposes, the analysis and tax consequences under *Situation 1* and *Situation 2* are substantially identical.

HOLDINGS

Under the facts set forth in *Situation 1* and *Situation 2*:

(1) Neither the appointment nor the service of PTC as the trustee of a Family trust described in *Situation 1* or *Situation 2* will alone cause the value of the trust assets to be included in a grantor's gross estate under §§ 2036(a) or 2038(a).

(2) Neither the appointment nor the service of PTC as the trustee of a Family trust described in *Situation 1* or *Situation 2* will alone cause the value of the trust assets to be included in a beneficiary's estate under § 2041.

(3) Neither the appointment nor the service of PTC as the trustee of the trusts in which the trustee has the discretionary power to distribute income and/or principal to the grantor's child or descendants in *Situation 1* or *Situation 2* will alone cause the grantor's transfer to that trust to be deemed to be an incomplete gift under § 2511, or any distribution from the trust to be a gift by any DDC member.

(4) Neither the appointment nor the service of PTC as trustee of a Family trust in *Situation* 1 and *Situation 2* will alone affect the exempt status of that trust if the trust is otherwise exempt from the GST tax under § 26.2601–1(b)(1)(i), or change the inclusion ratio of a trust.

(5) Neither the appointment nor the service of PTC as the trustee of a Family trust in either *Situation 1* or *Situation 2* will alone cause any grantor or beneficiary of that trust to be treated as the owner of that trust or any portion thereof under §§ 673, 676, 677, or 678. Whether any grantor is treated as an owner of the trust or any portion thereof under § 675 is a question of fact, the determination of which must be deferred until the federal income tax returns of the parties involved have been examined by the office with responsibility for such examination. Whether any grantor is treated as an owner of the trust or any portion thereof under § 674 will depend upon the particular powers of the trustee and may depend upon the proportion of the members of the DDC with authority to act with regard to that trust who are related or subordinate to the grantor. For purposes of this determination, the ownership of voting stock of PTC shall be deemed to be not significant under § 672(c).

The conclusions regarding the tax consequences of PTC as trustee of the Family trusts would not change even if (1) in *Situation 2*, F and/or G also serve on the Board of Directors, (2) any of the discretionary distributions are made pursuant to a reasonably definite external standard provided in the trust instrument; or (3) a single Family member was the sole owner of PTC. Distribution powers subject to such a standard would generally not cause the grantor or beneficiary to be treated as the owner of a trust or any portion of a trust under §§ 674 and 678, unless a grantor or spouse of a grantor is the trustee, regardless of the terms of Statute or the existence of the Amendment Committee.

The conclusions in *Situation 1* and *Situation 2* are otherwise limited to the facts of those situations. If the Statute in *Situation 1* was changed, or if the Amendment Committee in *Situation 2* exercised its powers to change the provisions regarding the DDC and/or the Amendment Committee itself, then the federal tax treatment of the Family trusts for which PTC acts as trustee, and/or the grantors and/or beneficiaries of those trusts, may be different from that described for *Situation 1* and *Situation 2*.

III. *Request for Comments*

Comments are requested regarding the proposed revenue ruling. The IRS and the Treasury Department also welcome comments regarding any potential alternative scenarios that should be addressed in the final revenue ruling. In particular, the IRS and the Treasury Department request comments on whether additional guidance is necessary where trust assets include stock in a controlled corporation or life insurance, and whether the creation of similar special committees for tax sensitive issues relating to such assets would be helpful. All comments will be available for public inspection and copying. Comments must be submitted by November 4, 2008. Comments should be addressed to:

Internal Revenue Service
Office of the Associate Chief Counsel (Passthroughs and Special Industries), CC:PSI
Attn: Mary Berman, Room 5300
1111 Constitution Avenue, NW
Washington, DC 20224.

In addition, comments may be submitted electronically via the Internet by sending them in an e-mail to *notice.comments@irscounsel.treas.gov* and specifying that the comments concern Notice 2008–63.

DRAFTING INFORMATION

The principal authors of this notice are Mary Berman and Bradford Poston of the Office of the Associate Chief Counsel (Passthroughs & Special Industries). However, other personnel from the IRS and the Treasury Department participated in its development. For further information regarding the estate, gift, and generation-skipping transfer tax issues, contact Ms. Berman at (202) 622–3090 (not a toll-free call); for further information regarding the income tax issues, contact Mr. Poston at (202) 622–3060 (not a toll-free call).

Disclosure of Activity Groupings Under Section 469

Notice 2008–64

PURPOSE

This notice requests comments from the public regarding a proposal to require taxpayers to report to the Internal Revenue Service their groupings and regroupings of activities and the addition and disposition of specific activities within their existing groupings of activities for purposes of § 469 of the Internal Revenue Code and § 1.469–4 of the Income Tax Regulations. To date, the IRS has not prescribed reporting requirements for taxpayer groupings under section 469 other than those provided for in § 1.469–9(g) (relating to the election available to certain real estate professionals). As a result, the IRS and taxpayers have had difficulty verifying taxpayers' historical groupings. The proposal

described in this notice would provide a reporting system that seeks to address this issue without unduly burdening taxpayers.

The proposal described in this notice is one possible approach. The IRS is interested in considering other possible approaches. Therefore, any requirement will not become effective until the IRS considers public comments and suggestions received in response to this notice and publishes final guidance announcing any new reporting rules.

BACKGROUND

Section 469 generally provides that deductions from passive trade or business activities, to the extent they exceed income from all such passive activities (exclusive of portfolio income), may not be deducted against other income.

Section 469(g)(1)(A) generally provides that if during the taxable year a taxpayer disposes of his entire interest in any passive activity (or former passive activity), and all gain or loss realized on such disposition is recognized, the excess of (i) any loss from such activity for such taxable year (determined after the application of § 469(b)), over (ii) any net income or gain for such taxable year from all other passive activities (determined after the application of § 469(b)), shall be treated as a loss which is not from a passive activity.

Section 1.469–4 sets forth the rules for grouping a taxpayer's trade or business activities and rental activities for purposes of applying the passive activity loss and credit limitation rules of § 469.

Section 1.469–4(c)(1) provides that one or more trade or business activities or rental activities may be treated as a single activity if the activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of § 469.

Section 1.469–4(c)(2) provides guidelines for determining whether activities constitute an appropriate economic unit and, therefore, may be treated as a single activity. Section 1.469–4(d) describes limitations on grouping certain activities.

Section 1.469–4(e)(1) provides that except as provided in § 1.469–4(e)(2) and § 1.469–11 (providing three periods of time, all of which are now closed, in which a taxpayer could have regrouped its activities without having to establish that the original grouping was clearly inappropriate under § 1.469–4(e)(2)), once a taxpayer has grouped activities under § 1.469–4, the taxpayer generally may not regroup those activities in subsequent taxable years. Taxpayers must comply with disclosure requirements that the Commissioner may prescribe with respect to both their original groupings and the addition and disposition of specific activities within those existing groupings in subsequent taxable years.

Section 1.469–4(e)(2) provides that if it is determined that a taxpayer's original grouping was clearly inappropriate or a material change in the facts and circumstances has occurred that makes the original grouping clearly inappropriate, the taxpayer must regroup the activities and must comply with the disclosure requirements that the Commissioner may prescribe.

PROPOSAL

The IRS is considering whether to change the reporting requirements for taxpayer groupings under section 469. Although the Service has considered a number of approaches, the proposal described in paragraphs A through F would generally require taxpayers to report to the Service, as part of their regular annual return, changes to a taxpayer's groupings. The proposal would apply to all persons or entities to whom the rules in § 1.469–4 apply. It would not apply to persons or entities who have made the election provided for in § 1.469–9(g) (relating to the election available to certain real estate professionals).

A. *Statement Required for New Groupings*

The proposal provides that a taxpayer shall file a written statement with its original return for the first taxable year in which one or more trade or business activities or rental activities are originally grouped as a single activity or as separate activities. This statement must identify the names, addresses, and employer identification numbers, if applicable, for the trade or business activities or rental activities that are being grouped as a single activity or as separate activities. In addition, any statement reporting a new grouping of two or more trade or business activities or rental activities as a single activity must contain a declaration that the grouped activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of § 469. Pursuant to § 1.469–4(e)(1) and except as otherwise provided in § 1.469–4(e)(2) and § 1.469–11, once a taxpayer has grouped activities under § 1.469–4, the taxpayer may not regroup those activities in subsequent taxable years.

B. *Statement Required for Addition of New Activities to Existing Groupings*

The proposal provides that whenever a taxpayer adds a new trade or business activity or a rental activity to an existing grouping within a taxable year, the taxpayer shall file a written statement with the taxpayer's original return for the taxable year in which the new trade or business activity or rental activity is added to the existing grouping. This statement must identify the names, addresses, and employer identification numbers, if applicable, for the new trade or business activity or rental activity that is being added to the existing grouping. The statement reporting an addition to an existing grouping must also identify the names, addresses, and employer identification numbers, if applicable, for the activity or activities within the existing grouping. In addition, the statement reporting an addition to an existing grouping must contain a declaration that the activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of § 469.

C. *Statement Required for Disposition of Activities from Existing Groupings*

The proposal provides that whenever a taxpayer disposes of a specific activity from an existing grouping within a taxable year, the taxpayer shall file a written statement with the taxpayer's original return for the taxable year in which the disposition of the specific trade or business activity or rental activity within the existing grouping occurs. This statement must identify the names, addresses, and employer identification numbers, if applicable, for the specific trade or business activity or rental activity that is disposed of, as well as the names, addresses, and employer identification numbers, if applicable, for the activity or activities that remain in the existing

grouping. The statement reporting a disposition of a specific activity within an existing grouping must contain a declaration that the remaining activities (if more than one) within the existing grouping constitute an appropriate economic unit for the measurement of gain or loss for purposes of § 469. Except as otherwise provided in § 1.469–4(g) (providing for the treatment of partial dispositions where there is a disposition of substantially all of an activity), the rules provided for in § 469(g) will not apply to the disposition of a specific activity from an existing grouping. For example, assume *A*, an individual, owns and operates four bakeries which *A* has treated as one activity under § 1.469–4. If, within a taxable year, *A* sells *A*'s entire interest in one of those bakeries, the rules provided for in § 469(g) will generally not apply to the sale, and any losses or credits attributable to the disposed of bakery will be treated as a deduction or credit allocable to the continuing bakery activity. If a taxpayer believes § 1.469–4(g) applies to the disposition of a specific activity within an existing grouping, the statement reporting the disposition must contain a declaration that the disposition satisfies the requirements of § 1.469–4(g).

D. *Statement Required for Regroupings*

The proposal provides that, under § 1.469–4(e)(2), if it is determined that the taxpayer's original grouping was clearly inappropriate or a material change in the facts and circumstances has occurred that makes the original grouping clearly inappropriate, the taxpayer must regroup the activities. If such a determination and regrouping is made, the taxpayer shall file a written statement with the taxpayer's original return for the taxable year in which the trade or business activities or rental activities are regrouped. This statement must identify the names, addresses, and employer identification numbers, if applicable, for the trade or business or rental activities that are being regrouped. If two or more activities are regrouped into a single activity, the statement reporting a regrouping must also contain a declaration that the regrouped activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of § 469. Furthermore, the statement reporting a regrouping must contain an explanation of why the taxpayer's original grouping was determined to be clearly inappropriate or the nature of the material change in the facts and circumstances that makes the original grouping clearly inappropriate.

E. *Reporting of Pre-Existing Groupings Required only upon Change*

The proposal clarifies that no written statement is required to be filed reporting the grouping of the trade or business activities and rental activities that have been made as of the effective date of any published final guidance until the taxpayer makes a change to the grouping as described in paragraphs A, B, C, or D of this notice.

F. *Effect of Failure to Report*

Under the proposal, except as provided in § 1.469–4(d)(5), if a taxpayer is engaged in two or more trade or business activities or rental activities and fails to report whether the activities have been grouped as a single activity or as separate activities in accordance with this proposal, then each trade or business activity or rental activity will be treated as having been grouped as a separate activity for purposes of applying the passive activity loss and credit limitation rules of § 469.

EFFECTIVE DATE

The proposal would be effective on the date that final guidance is published by the Internal Revenue Service.

REQUEST FOR COMMENTS

The proposal contained in this notice is one way, but not the only way, to implement a reporting system for taxpayer groupings under section 469. The IRS requests public comments on this proposal and, specifically, whether it sufficiently balances the need for reporting with the burden of compliance. Comments regarding other possible approaches are also requested. All comments will be available for public inspection and copying. Therefore, submissions received by the IRS should not include taxpayer-specific information of a confidential nature. Submissions should include the name and telephone number of a person to contact. Comments must be submitted by November 4, 2008. Comments should be addressed to:

Internal Revenue Service
Office of the Associate Chief Counsel
(Passthroughs and Special Industries),
CC:PSI
Attn: Jonathan Cornwell, Room 5004
1111 Constitution Avenue, NW
Washington, DC 20224

In addition, comments may be submitted electronically via the Internet by sending them in an email to *notice.comments@irscounsel.treas.gov* and specifying that the comments concern Notice 2008–64.

DRAFTING INFORMATION

The principal author of this notice is Jonathan E. Cornwell of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Mr. Cornwell at (202) 622–3050 (not a toll-free call).

Relief From Certain Low-Income Housing Credit Requirements Due to Severe Storms and Flooding in Missouri

Notice 2008–66

The Internal Revenue Service is suspending certain requirements under § 42 of the Internal Revenue Code for low-income housing credit projects in the United States to provide emergency housing relief needed as a result of the devastation caused by severe storms and flooding in Missouri beginning on June 1, 2008. This relief is being granted pursuant to the Service's authority under § 42(n) and § 1.42–13(a) of the Income Tax Regulations.

BACKGROUND

On June 25, 2008, the President declared a major disaster for the State of Missouri. This declaration was made under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (2000 and Supp. II 2002). Subsequently, the Federal Emergency Management Agency (FEMA) designated

jurisdictions for Individual Assistance. The State of Missouri has requested that the Service allow owners of low-income housing credit projects to provide temporary housing in vacant units to individuals who resided in jurisdictions designated for Individual Assistance in Missouri and who have been displaced because their residences were destroyed or damaged as a result of the devastation caused by the severe storms and flooding. Based upon this request and because of the widespread damage to housing caused by the severe storms and flooding, the Service has determined that the Missouri Housing Development Commission (Commission) may provide approval to project owners to provide temporary emergency housing for displaced individuals in accordance with this notice.

I. SUSPENSION OF INCOME LIMITATIONS

The Service has determined that it is appropriate to temporarily suspend certain income limitation requirements under § 42 for certain qualified low-income projects. The suspension will apply to low-income housing projects approved by the Commission, in which vacant units are rented to displaced individuals. The Commission will determine the appropriate period of temporary housing for each project, not to extend beyond July 31, 2009 (temporary housing period).

II. STATUS OF UNITS

A. Units in the first year of the credit period

A displaced individual temporarily occupying a unit during the first year of the credit period under § 42(f)(1) will be deemed a qualified low-income tenant for purposes of determining the project's qualified basis under § 42(c)(1), and for meeting the project's 20–50 test or 40–60 test as elected by the project owner under § 42(g)(1). After the end of the temporary housing period established by the Commission (not to extend beyond July 31, 2009), a displaced individual will no longer be deemed a qualified low-income tenant.

B. Vacant units after the first year of the credit period

During the temporary housing period established by the Commission, the status of a vacant unit (that is, market-rate or low-income for purposes of § 42 or never previously occupied) after the first year of the credit period that becomes temporarily occupied by a displaced individual remains the same as the unit's status before the displaced individual moves in. Displaced individuals temporarily occupying vacant units will not be treated as low-income tenants under § 42(i)(3)(A)(ii). However, even if it houses a displaced individual, a low-income or market rate unit that was vacant before the effective date of this notice will continue to be treated as a vacant low-income or market rate unit. Similarly, a unit that was never previously occupied before the effective date of this notice will continue to be treated as a unit that has never been previously occupied even if it houses a displaced individual. Thus, the fact that a vacant unit becomes occupied by a displaced individual will not affect the building's applicable fraction under § 42(c)(1)(B) for purposes of determining the building's qualified basis, nor will it affect the 20–50 test or 40–60 test of § 42(g)(1). If the income of occupants in low-income units exceeds 140 percent of the applicable income limitation, the temporary occupancy of a unit by a displaced individual will not cause application of the available unit rule under § 42(g)(2)(D)(ii). In addition, the project owner is not required during the temporary housing period to make attempts to rent to low-income individuals the low-income units that house displaced individuals.

III. SUSPENSION OF NON-TRANSIENT REQUIREMENTS

The non-transient use requirement of § 42(i)(3)(B)(i) shall not apply to any unit providing temporary housing to a displaced individual during the temporary housing period determined by the Commission in accordance with section I of this notice.

IV. OTHER REQUIREMENTS

All other rules and requirements of § 42 will continue to apply during the temporary housing period established by the Commission. After the end of the temporary housing period, the applicable income limitations contained in § 42(g)(1), the available unit rule under § 42(g)(2)(D)(ii), the nontransient requirement of § 42(i)(3)(B)(i), and the requirement to make reasonable attempts to rent vacant units to low-income individuals shall resume. If a project owner offers to rent a unit to a displaced individual after the end of the temporary housing period, the displaced individual must be certified under the requirements of § 42(i)(3)(A)(ii) and § 1.42–5(b) and (c) to be a qualified low-income tenant. To qualify for the relief in this notice, the project owner must additionally meet all of the following requirements:

(1) Major Disaster Area

The displaced individual must have resided in a Missouri jurisdiction designated for Individual Assistance by FEMA as a result of the severe storms and flooding in Missouri beginning on June 1, 2008.

(2) Approval of the Missouri Housing Development Commission

The project owner must obtain approval from the Commission for the relief described in this notice. The Commission will determine the appropriate period of temporary housing for each project, not to extend beyond July 31, 2009.

(3) Certifications and Recordkeeping

To comply with the requirements of § 1.42–5, project owners are required to maintain and certify certain information concerning each displaced individual temporarily housed in the project, specifically: name, address of damaged residence, social security number, and a statement signed under penalties of perjury by the displaced individual that, because of damage to the individual's residence in a Missouri jurisdiction designated for Individual Assistance by FEMA as a result of the severe storms and flooding beginning on June 1, 2008, the individual requires temporary housing. The owner must notify the Commission that vacant units are available for rent to displaced individuals.

The owner must also certify the date the displaced individual began temporary occupancy and the date the project will discontinue providing temporary housing as established by the Commission. The certifications and recordkeeping for displaced individuals must be maintained as part of the annual compliance monitoring process with the Commission.

(4) Rent Restrictions

Rents for the low-income units that house displaced individuals must not exceed the existing rent-restricted rates for

the low-income units established under § 42(g)(2).

(5) Protection of Existing Tenants

Existing tenants in occupied low-income units cannot be evicted or have their tenancy terminated as a result of efforts to provide temporary housing for displaced individuals.

EFFECTIVE DATE

This notice is effective June 25, 2008 (the date of the President's major disaster declarations as a result of the severe storms and flooding in Missouri beginning on June 1, 2008).

PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–2108.

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.

The collection of information in this notice is in the section titled "OTHER REQUIREMENTS" under "(3) Certifications and Recordkeeping." This information is required to enable the Service to verify whether individuals are displaced as a result of the devastation caused by severe storms and flooding in Missouri beginning on June 1, 2008, and thus warrant temporary housing in vacant low-income housing credit units. The collection of information is required to obtain a benefit. The likely respondents are individuals and businesses.

The estimated total annual recordkeeping burden is 125 hours.

The estimated annual burden per recordkeeper is approximately 15 minutes. The estimated number of recordkeepers is 500.

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

DRAFTING INFORMATION

The principal author of this notice is David Selig of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact Mr. Selig at (202) 622–3040 (not a toll-free call).

---

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

Rev. Proc. 2008–47

SECTION 1. PURPOSE

This revenue procedure describes the conditions under which modifications to certain subprime mortgage loans will not cause the Internal Revenue Service (Service) to challenge the tax status of certain securitization vehicles that hold the loans or to assert that those modifications create a liability for tax on a prohibited transaction.

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

Rev. Proc. 2007–72, 2007–52 I.R.B. 1257, provided similar guidance regarding fast-track loan modifications that were effected in a manner consistent with certain principles, recommendations, and guidelines (the "Original Framework"), which the American Securitization Forum ("ASF") released on December 6, 2007. In July 2008, the ASF released an updated Framework, which covers additional fast-track loan modifications.

This revenue procedure amplifies and supersedes Rev. Proc. 2007–72 by extending its provisions to these additional loan modifications.

SECTION 2. BACKGROUND—THE ASF "JULY 2008 FRAMEWORK"

.01 On July 8, 2008, the American Securitization Forum ("ASF") released a document entitled, "Statement of Principles, Recommendations and Guidelines for a Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans" (the "July 2008 Framework"). An Executive Summary of the July 2008 Framework (entitled "Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans") was released simultaneously and is attached as an Appendix to this revenue procedure.

.02 Both the Original Framework and the July 2008 Framework have been broadly supported as appropriate steps in addressing certain risks in the current economic environment.

.03 The July 2008 Framework applies to first-lien subprime residential adjustable rate mortgage (ARM) loans that—

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

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

(3) Are included in securitized pools; and

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

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

.04 The July 2008 Framework provides a "fast track" procedure for modifying Loans in advance of an initial, or any subsequent, interest rate reset date and details the criteria for determining which Loans are eligible for the procedure. Modifications pursuant to the procedure are referred to as "fast track modifications."

.05 A fast track modification affects the interest rate on the Loan, generally for five years following the date on which the rate would have reset in the absence of the modification. During the period affected by the modification, the interest rate on the modified Loan is generally fixed at the rate in effect prior to the upcoming reset date.

SECTION 3. BACKGROUND—REMICS

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

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

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

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

.05 Under section 860D(a)(4), an entity qualifies as a REMIC only if, among other things, as of the close of the third month beginning after the startup day and at all times thereafter, substantially all of its assets consist of qualified mortgages and permitted investments. This asset test is satisfied if the entity owns no more than a *de minimis* amount of other assets. *See* § 1.860D–1(b)(3)(i). As a safe harbor, the amount of assets other than qualified mortgages and permitted investments is *de minimis* if the aggregate of the adjusted bases of those assets is less than one percent of the aggregate of the adjusted bases of all of the entity's assets. § 1.860D–1(b)(3)(ii).

.06 With limited exceptions, a mortgage loan is not a qualified mortgage unless it is transferred to the REMIC on the startup day in exchange for regular or residual interests in the REMIC. *See* section 860G(a)(3)(A)(i).

.07 The legislative history of the REMIC provisions indicates that Congress intended the provisions to apply only to an entity that holds a substantially fixed pool of real estate mortgages and related assets and that "has no powers to vary the composition of its mortgage assets." S. Rep. No. 99–313, 99th Cong., 2d Sess. 791–92; 1986–3 (Vol. 3) C.B. 791–92.

.08 Section 1.1001–3(c)(1)(i) defines a "modification" of a debt instrument as any alteration, including any deletion or addition, in whole or in part, of a legal right or obligation of the issuer or holder of a debt instrument, whether the alteration is evidenced by an express agreement (oral or written), conduct of the parties, or otherwise. Section 1.1001–3(e) governs which modifications of debt instruments are "significant." Under § 1.1001–3(b), for most federal income tax purposes, a significant modification produces a deemed exchange of the original debt instrument for a new debt instrument.

.09 Under § 1.860G–2(b), related rules apply to determine REMIC qualification. Except as specifically provided in § 1.860G–2(b)(3), if there is a significant modification of an obligation that is held by a REMIC, then the modified obligation is treated as one that was newly issued in exchange for the unmodified obligation that it replaced. *See* § 1.860G–2(b)(1). For this purpose, the rules in § 1.1001–3(e) determine whether a modification is "significant." *See* § 1.860G–2(b)(2). Thus, even if an entity initially qualifies as a REMIC, one or more significant modifications of loans held by the entity may terminate the qualification if the modifications cause less than substantially all of the entity's assets to be qualified mortgages.

.10 Certain loan modifications, however, are not significant for purposes of § 1.860G–2(b)(1), even if the modifications are significant under the rules in § 1.1001–3. In particular, under § 1.860G–2(b)(3)(i), if a change in the terms of an obligation is "occasioned by default or a reasonably foreseeable default," the change is not a significant modification for purposes of § 1.860G–2(b)(1), regardless of the modification's status under § 1.1001–3.

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

SECTION 4. BACKGROUND—TRUSTS

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

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

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

SECTION 5. SCOPE

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

(1) A fast track modification of a Loan pursuant to the July 2008 Framework; and

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

.02 If the July 2008 Framework is materially modified after July 8, 2008, this revenue procedure does not necessarily apply to fast track modifications under the modified Framework or to second-lien subordinations to accommodate those modifications.

SECTION 6. APPLICATION

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

.01 The Service will not challenge a securitization vehicle's qualification as a

REMIC on the grounds that the transactions are not among the exceptions listed in § 1.860G–2(b)(3);

.02 The Service will not contend that the transactions are prohibited transactions under section 860F(a)(2) on the grounds that the transactions resulted in one or more dispositions of qualified mortgages and that the dispositions are not among the exceptions listed in section 860F(a)(2)(A)(i)–(iv);

.03 The Service will not challenge a securitization vehicle's classification as a trust under § 301.7701–4(c) on the grounds that the transactions manifest a power to vary the investment of the certificate holders; and

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

SECTION 7. OTHER GUIDANCE

For the treatment of mortgage loans modified pursuant to certain foreclosure prevention programs, see Rev. Proc. 2008–28, 2008–23 I.R.B. 1054.

SECTION 8. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2007–72 is amplified and, as amplified, is superseded.

SECTION 9. EFFECTIVE DATE

This revenue procedure is effective on July 8, 2008.

SECTION 10. DRAFTING INFORMATION

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

Appendix to Revenue Procedure 2008–47

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

Executive Summary

July 8, 2008

***Scope*:**

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

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

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

As a general overview, under this streamlined framework, if the loan is current and is eligible for refinance, then it should be refinanced. If the loan is current but is not eligible for a refinance, then it would be eligible for a streamlined modification if: the property is occupied as the borrower's primary residence; the borrower meets the "FICO test"; and the payment amount would go up by more than 10% over the current payment amount at the upcoming reset.

Overarching Principles:

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

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

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

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

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

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

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

***Borrower Segmentation*:**

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

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

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

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

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

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

- *Not eligible for refinance*: All current loans that do not satisfy FHA Secure requirements, including delinquency history, DTI at origination, LTV (97% is the maximum LTV allowed under FHA Secure) and loan amount standards for this program, are within Segment 2; unless the servicer can determine whether they may meet eligibility criteria for another product, by reviewing eligibility criteria without performing an underwriting analysis.

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

Segment 1 — Refinance:

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

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

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

Segment 2 — Loan Modification:

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

- FICO test:

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

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

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

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

  - The borrower meets the FICO test; and

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

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

- As to Segment 2 loans eligible for a fast track loan modification, the servicer may make the following presumptions:

  - The borrower is able and willing to pay under the loan modification based on his or her current payment history prior to the reset date.

- The borrower is unable to pay (and default is reasonably foreseeable) after the upcoming reset under the original loan terms, based on the size of the payment increase that would otherwise apply.
- The modification maximizes the net present value of recoveries to the securitization trust and is in the best interests of investors in the aggregate, because refinancing opportunities are likely not available and the borrower is able and willing to pay under the modified terms.
- The terms of the loan modification shall be binding on the servicer and the borrower, if there is no signed modification agreement, so long as a) the terms of such loan modification are more favorable to the borrower than the existing terms, and b) the servicer sends a written notice to the borrower describing the terms of the modification.

- For borrowers that do not meet the FICO test, the servicer will use an alternate analysis to determine if the borrower is eligible for a loan modification, as well as the terms of the modification (which may vary). This may include a) conducting an individual review of current income and debt obligations, debt-to-income analysis, and considering a tailored modification for a borrower, or b) applying any other framework consistent with the applicable servicing standard in the transaction documents to determine if a borrower is eligible for a loan modification.
- For borrowers that are eligible for a fast track modification, the fast track option is non-exclusive and does not preclude a servicer from using an alternate analysis to determine if a borrower is eligible for a loan modification, as well as the terms of the modification.

Segment 3 — Loss Mitigation:

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

Part IV. Items of General Interest

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

Guidance Under Section 956 for Determining the Basis of Property Acquired in Certain Nonrecognition Transactions

REG–102122–08

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: In this issue of the Bulletin, the IRS and the Treasury Department are issuing temporary regulations (T.D. 9402) under section 956 of the Internal Revenue Code (Code) relating to the determination of basis in property acquired by a controlled foreign corporation in certain nonrecognition transactions that are intended to avoid United States income tax. Those regulations affect United States shareholders of a controlled foreign corporation that acquires United States property in certain nonrecognition transactions. The text of those regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by September 22, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–102122–08), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–102122–08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–102122–08).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, John H. Seibert, (202) 622–3860; concerning submissions of comments and/or requests for a hearing, Regina Johnson, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in this issue of the Bulletin provide guidance regarding the determination of basis for property acquired in certain nonrecognition transactions that repatriate earnings and profits of a controlled foreign corporation but are structured with the intent to avoid an income inclusion by the United States shareholders of the controlled foreign corporation under section 951(a)(1)(B). This avoidance is achieved by the use of the basis rules under section 362(a) for the acquisition by the controlled foreign corporation of certain stock or obligations that constitute United States property within the meaning of section 956(c).

The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. chapter 6), it is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations will affect primarily large multi-national United States corporations that own a significant interest in foreign corporations that acquire certain United States property in a transaction subject to the regulations. 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 Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department continue to consider, outside the context of section 956, the appropriate basis of stock or obligations issued by a transferor in the hands of the transferee as determined under section 362. The IRS and the Treasury Department are also considering whether any additional rules are necessary or appropriate to coordinate the section 956 basis determinations under these regulations with basis determinations under other provisions of the Code or regulations. Comments are requested in this regard. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested by any person who timely submits comments. If a public hearing is scheduled, notice of the date, time and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is John H. Seibert, Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.956–1 is amended by adding a sentence to the end of paragraph (e)(1) and adding new paragraphs (e)(5), (e)(6) and (f) to read as follows:

§1.956–1 Shareholder's pro rata share of a controlled foreign corporation's increase in earnings invested in United States property.

* * * * *

(e) * * * (1) * * * See §1.956–1T(e)(6) for a special rule for determining amounts attributable to United States property acquired as the result of certain nonrecognition transactions.

* * *

(e)(5) [The text of the proposed amendment to §1.956–1(e)(5) is the same as the text for §1.956–1T(e)(5) published elsewhere in this issue of the Bulletin].

(e)(6) [The text of the proposed amendment to §1.956–1(e)(6) is the same as the text for §1.956–1T(e)(6) published elsewhere in this issue of the Bulletin].

(f) [The text of the proposed amendment to §1.956–1(f) is the same as the text for §1.956–1T(f) published elsewhere in this issue of the Bulletin].

Steven T. Miller,
Acting Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on June 23, 2008, 8:45 a.m., and published in the issue of the Federal Register for June 24, 2008, 73 F.R. 35606)

Treatment of an Individual Nonmaterially Participating Partner's Distributive Share of Investment Interest Expense From a Trader Partnership

Announcement 2008–65

In Revenue Ruling 2008–12, 2008–10 I.R.B. 520, the IRS clarified that a nonmaterially participating partner's distributive share of the interest expense of a partnership engaged in the trade or business of trading in securities is subject to the investment interest limitation in § 163(d)(1), provided that the partner is an individual. This conclusion is based on the definition of the term "property held for investment" in § 163(d)(5)(A)(ii). Pursuant to that definition, a taxpayer's interest in a trade or business activity that is not a passive activity is classified as property held for investment for § 163(d) purposes if the taxpayer does not materially participate in such activity. The scope of § 163(d)(5)(A)(ii) is narrow because trade or business activities in which the taxpayer does not materially participate are generally treated as passive activities under the general definition of "passive activity" in § 469(c)(1). However, certain specified trade or business activities are treated as *per se* nonpassive regardless of the taxpayer's degree of participation in the activity. For example, § 469(c)(3) provides that the term "passive activity" does not include certain working interests in oil and gas properties. In Revenue Ruling 2008–12, the partnership's activity involved the trading of personal property (as defined in § 1092(d)) for its own account. Under § 1.469–1T(e)(6), such activity is treated as *per se* nonpassive. Thus, even though the partnership's trading activity rose to the level of a trade or business, its interest expense attributable to such activity and allocable to individual partners who did not materially participate in the activity was subject to the § 163(d) limitation, which is applied at the partner level.

Since publication of Revenue Ruling 2008–12, a number of taxpayers have inquired as to whether the interest deduction allowable to the nonmaterially participating limited partner after the application of the § 163(d) limitation would properly be reported on Schedule A, "*Itemized Deductions*" of Form 1040, "*U.S. Individual Income Tax Return*" or whether instead the allowable deduction would properly be taken into account in computing the ordinary business income or loss from the trade or business activities of the partnership on Schedule E, "*Supplemental Income and Loss*." Revenue Ruling 2008–38, 2008–31 I.R.B. 249, published concurrently with this announcement, provides that, in the case of an individual taxpayer, interest paid or accrued on indebtedness allocable to property held for investment described in § 163(d)(5)(A)(ii) is a trade or business deduction described in § 62(a)(1) that is deductible (after the application of the § 163(d)(1) limitation) in determining the taxpayer's adjusted gross income. Accordingly, the limited partner described in Revenue Ruling 2008–12 would properly include the allowable amount of his distributive share of the trading partnership's interest expense in computing the limited partner's ordinary business income or loss on Schedule E. Consistent with the reporting requirements of Notice 88–37, 1988–1 C.B. 522, the interest deduction of the limited partner that is properly reportable on Schedule E should be identified on a separate line in Part II, Line 28, column (a), as "investment interest," followed by the name of the trading partnership that paid or incurred the interest expense, and the amount of such interest expense should be entered in column (h).

DRAFTING INFORMATION

The principal author of this announcement is Faith P. Colson of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this announcement, contact Faith P. Colson at (202) 622–3060 (not a toll-free call).

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

Numerical Finding List[1]

Bulletins 2008–27 through 2008–31

Announcements:

2008-62, 2008-27 I.R.B. *74*
2008-63, 2008-28 I.R.B. *114*
2008-64, 2008-28 I.R.B. *114*
2008-65, 2008-31 I.R.B. *279*
2008-66, 2008-29 I.R.B. *164*
2008-67, 2008-29 I.R.B. *164*
2008-68, 2008-30 I.R.B. *244*

Notices:

2008-55, 2008-27 I.R.B. *11*
2008-56, 2008-28 I.R.B. *79*
2008-57, 2008-28 I.R.B. *80*
2008-58, 2008-28 I.R.B. *81*
2008-59, 2008-29 I.R.B. *123*
2008-60, 2008-30 I.R.B. *178*
2008-61, 2008-30 I.R.B. *180*
2008-62, 2008-29 I.R.B. *130*
2008-63, 2008-31 I.R.B. *261*
2008-64, 2008-31 I.R.B. *268*
2008-65, 2008-30 I.R.B. *182*
2008-66, 2008-31 I.R.B. *270*

Proposed Regulations:

REG-129243-07, 2008-27 I.R.B. *32*
REG-149405-07, 2008-27 I.R.B. *73*
REG-101258-08, 2008-28 I.R.B. *111*
REG-102122-08, 2008-31 I.R.B. *278*
REG-121698-08, 2008-29 I.R.B. *163*

Revenue Procedures:

2008-32, 2008-28 I.R.B. *82*
2008-33, 2008-28 I.R.B. *93*
2008-34, 2008-27 I.R.B. *13*
2008-35, 2008-29 I.R.B. *132*
2008-37, 2008-29 I.R.B. *137*
2008-38, 2008-29 I.R.B. *139*
2008-39, 2008-29 I.R.B. *143*
2008-40, 2008-29 I.R.B. *151*
2008-41, 2008-29 I.R.B. *155*
2008-42, 2008-29 I.R.B. *160*
2008-43, 2008-30 I.R.B. *186*
2008-44, 2008-30 I.R.B. *187*
2008-45, 2008-30 I.R.B. *224*
2008-46, 2008-30 I.R.B. *238*
2008-47, 2008-31 I.R.B. *272*

Revenue Rulings:

2008-32, 2008-27 I.R.B. *6*
2008-33, 2008-27 I.R.B. *8*
2008-34, 2008-28 I.R.B. *76*
2008-35, 2008-29 I.R.B. *116*

Revenue Rulings— Continued:

2008-36, 2008-30 I.R.B. *165*
2008-37, 2008-28 I.R.B. *77*
2008-38, 2008-31 I.R.B. *249*
2008-39, 2008-31 I.R.B. *252*
2008-40, 2008-30 I.R.B. *166*
2008-41, 2008-30 I.R.B. *170*
2008-42, 2008-30 I.R.B. *175*
2008-43, 2008-31 I.R.B. *258*

Treasury Decisions:

9401, 2008-27 I.R.B. *1*
9402, 2008-31 I.R.B. *254*
9409, 2008-29 I.R.B. *118*

[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2008–1 through 2008–26 is in Internal Revenue Bulletin 2008–26, dated June 30, 2008.

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

Bulletins 2008–27 through 2008–31

Notices:

99-48
Superseded by
Rev. Proc. 2008-40, 2008-29 I.R.B. *151*

2000-9
Obsoleted by
Rev. Proc. 2008-41, 2008-29 I.R.B. *155*

2004-2
Amplified by
Notice 2008-59, 2008-29 I.R.B. *123*

2004-50
Amplified by
Notice 2008-59, 2008-29 I.R.B. *123*

2006-88
Modified and superseded by
Notice 2008-60, 2008-30 I.R.B. *178*

2007-22
Amplified by
Notice 2008-59, 2008-29 I.R.B. *123*

Proposed Regulations:

REG-151135-07
Hearing scheduled by
Ann. 2008-64, 2008-28 I.R.B. *114*

Revenue Procedures:

92-25
Superseded by
Rev. Proc. 2008-41, 2008-29 I.R.B. *155*

92-83
Obsoleted by
Rev. Proc. 2008-37, 2008-29 I.R.B. *137*

2001-42
Superseded by
Rev. Proc. 2008-39, 2008-29 I.R.B. *143*

2002-9
Modified and amplified by
Rev. Proc. 2008-43, 2008-30 I.R.B. *186*

2006-29
Superseded by
Rev. Proc. 2008-34, 2008-27 I.R.B. *13*

2006-34
Superseded by
Rev. Proc. 2008-44, 2008-30 I.R.B. *187*

2007-19
Superseded by
Rev. Proc. 2008-39, 2008-29 I.R.B. *143*

Revenue Procedures— Continued:

2007-42
Superseded by
Rev. Proc. 2008-32, 2008-28 I.R.B. *82*

2007-43
Superseded by
Rev. Proc. 2008-33, 2008-28 I.R.B. *93*

2007-70
Modified by
Ann. 2008-63, 2008-28 I.R.B. *114*

2007-72
Amplified and superseded by
Rev. Proc. 2008-47, 2008-31 I.R.B. *272*

2008-12
Modified and superseded by
Rev. Proc. 2008-35, 2008-29 I.R.B. *132*

Revenue Rulings:

67-213
Amplified by
Rev. Rul. 2008-40, 2008-30 I.R.B. *166*

71-234
Modified by
Rev. Proc. 2008-43, 2008-30 I.R.B. *186*

77-480
Modified by
Rev. Proc. 2008-43, 2008-30 I.R.B. *186*

91-17
Amplified by
Rev. Proc. 2008-41, 2008-29 I.R.B. *155*
Rev. Proc. 2008-42, 2008-29 I.R.B. *160*
Superseded in part by
Rev. Proc. 2008-40, 2008-29 I.R.B. *151*

2005-6
Amplified by
Rev. Proc. 2008-38, 2008-29 I.R.B. *139*

2008-12
Amplified by
Rev. Rul. 2008-38, 2008-31 I.R.B. *249*
Clarified by
Ann. 2008-65, 2008-31 I.R.B. *279*

[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2008–1 through 2008–26 is in Internal Revenue Bulletin 2008–26, dated June 30, 2008.

U.S. GOVERNMENT PRINTING OFFICE
KEEPING AMERICA INFORMED

Order Processing Code:
3465

Easy Secure Internet:
bookstore.gpo.gov

Internal Revenue Cumulative Bulletins Publications and Subscription Order Form

Toll Free: 866 512-1800
DC Area: 202 512-2800
Fax: 202 512-2250

Mail: Superintendent of Documents
P.O. Box 371954
Pittsburgh, PA 15250-7954

Publications

Qty.	Stock Number	Title	Price Each	Total Price
	048–004–02467–5	Cum. Bulletin 1999–3	20.40	
	048–004–02462–4	Cum. Bulletin 2001–2 (Jul-Dec)	24.00	
	048–004–02480–2	Cum. Bulletin 2001–3	71.00	
	048–004–02470–5	Cum. Bulletin 2002–2 (Jul-Dec)	28.80	
	048–004–02486–1	Cum. Bulletin 2002–3	54.00	
	048–004–02483–7	Cum. Bulletin 2004–2 (July–Dec)	54.00	
	048–004–02488–8	Cum. Bulletin 2005–2	56.00	
			Total for Publications	

Subscriptions

Qty.	List ID	Title	Price Each	Total Price
	IRS	Internal Revenue Bulletin	$247	
		Optional – Add $50 to open Deposit Account		
		Total for Subscriptions		
		Total for Publications and Subscriptions		

NOTE: Price includes regular shipping and handling and is subject to change. International customers please add 40 percent.

VISA MasterCard DISCOVER NOVUS AMERICAN EXPRESS

Check method of payment:

❑ Check payable to Superintendent of Documents

❑ SOD Deposit Account ☐☐☐☐☐☐☐ – ☐

❑ VISA ❑ MasterCard ❑ Discover/Novus ❑ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your Order!

Authorizing signature 06/06

Company or personal name (Please type or print)

Additional address/attention line

Street address

City, State, Zip Code

E-mail address

Daytime phone including area code

Purchase order number (optional)

Standing Order Service*

To automatically receive future editions of *Internal Revenue Cumulative Bulletins* without having to initiate a new purchase order, sign below for Standing Order Service.

Qty.	Standing Order	Title
	ZIRSC	Internal Revenue Cumulative Bulletins

Authorization

I hereby authorize the Superintendent of Documents to charge my account for Standing Order Service:
(enter account information at right)

❑ VISA ❑ MasterCard ❑ Discover/NOVUS ❑ American Express

❑ Superintendent of Documents (SOD) Deposit Account

Authorizing signature (Standing orders not valid unless signed.)

Please print or type your name.

Daytime phone number (_______) ______________________

SuDocs Deposit Account

A Deposit Account will enable you to use Standing Order Service to receive subsequent volumes quickly and automatically. For an initial deposit of $50 you can establish your Superintendent of Documents Deposit Account.

❑ **YES!** Open a SOD Deposit Account for me so I can order future publications quickly and easily.
I am enclosing the $50 initial deposit.

*Standing Order Service
Just sign the authorization above to charge selected items to your existing Deposit Account, VISA or MasterCard, Discover/NOVUS, or American Express account. Or open a Deposit Account with an initial deposit of $50 or more. Your account will be charged only as each volume is issued and mailed. Sufficient money must be kept in your account to insure that items are shipped. Service begins with the next issue released of each item you select.

You will receive written acknowledgement for each item you choose to receive by Standing Order Service.
If you wish to cancel your Standing Order Service, please notify the Superintendent of Documents in writing (telephone cancellations are accepted, but must be followed up with a written cancellation within 10 days).

Important: Please include this completed order form with your payment.

INTERNAL REVENUE BULLETIN

The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletin is sold on a yearly subscription basis by the Superintendent of Documents. Current subscribers are notified by the Superintendent of Documents when their subscriptions must be renewed.

CUMULATIVE BULLETINS

The contents of this weekly Bulletin are consolidated semiannually into a permanent, indexed, Cumulative Bulletin. These are sold on a single copy basis and *are not* included as part of the subscription to the Internal Revenue Bulletin. Subscribers to the weekly Bulletin are notified when copies of the Cumulative Bulletin are available. Certain issues of Cumulative Bulletins are out of print and are not available. Persons desiring available Cumulative Bulletins, which are listed on the reverse, may purchase them from the Superintendent of Documents.

ACCESS THE INTERNAL REVENUE BULLETIN ON THE INTERNET

You may view the Internal Revenue Bulletin on the Internet at www.irs.gov. Under information for: select Businesses. Under related topics, select More Topics. Then select Internal Revenue Bulletins.

INTERNAL REVENUE BULLETINS ON CD-ROM

Internal Revenue Bulletins are available annually as part of Publication 1796 (Tax Products CD-ROM). The CD-ROM can be purchased from National Technical Information Service (NTIS) on the Internet at www.irs.gov/cdorders (discount for online orders) or by calling 1-877-233-6767. The first release is available in mid-December and the final release is available in late January.

HOW TO ORDER

Check the publications and/or subscription(s) desired on the reverse, complete the order blank, enclose the proper remittance, detach entire page, and mail to the Superintendent of Documents, P.O. Box 371954, Pittsburgh PA, 15250–7954. Please allow two to six weeks, plus mailing time, for delivery.

WE WELCOME COMMENTS ABOUT THE INTERNAL REVENUE BULLETIN

If you have comments concerning the format or production of the Internal Revenue Bulletin or suggestions for improving it, we would be pleased to hear from you. You can e-mail us your suggestions or comments through the IRS Internet Home Page (www.irs.gov) or write to the IRS Bulletin Unit, SE:W:CAR:MP:T:T:SP, Washington, DC 20224

Internal Revenue Service
Washington, DC 20224

Official Business
Penalty for Private Use, $300