Internal Revenue
bulletin

Bulletin No. 2008-32
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HIGHLIGHTS OF THIS ISSUE

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

INCOME TAX

T.D. 9403, page 285.

Final regulations under section 664(c) of the Code provide that charitable remainder trusts with unrelated business taxable income (UBTI) in taxable years beginning after December 31, 2006, are exempt from federal income tax but are subject to a 100 percent excise tax on the UBTI of the charitable remainder trust pursuant to section 424 of the Tax Relief and Health Care Act of 2006. The regulations provide that the excise tax is reported and payable in accordance with appropriate forms. The regulations clarify that, consistent with regulations section 1.664–1(d)(2), the excise tax imposed upon the charitable remainder trust with UBTI is treated as paid from corpus, and the trust income that is UBTI is income of the trust for purposes of determining the character of the distribution made to the beneficiary.

T.D. 9404, page 280.
REG–143453–05, page 310.

Section 179B of the Code allows small business refiners to make an election to deduct as an expense 75 percent of the qualified costs paid or incurred to comply with the highway diesel fuel sulfur control requirements of the Environmental Protection Agency (EPA). Temporary and proposed regulations under Section 179B provide guidance relating to the deduction for qualified capital costs paid or incurred by a small business refiner to comply with the highway diesel fuel sulfur control requirements of the EPA and provide guidance for making the election. A public hearing on the proposed regulations is scheduled for October 28, 2008.

T.D. 9406, page 287.
REG–138355–07, page 311.

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

Notice 2008–67, page 307.

This notice explains how to claim the 50% additional first year depreciation provided by sections 15345(a)(1) and (d)(1) of the Food, Conservation, and Energy Act of 2008 for qualified Recovery Assistance property placed in service by the taxpayer in the Kansas disaster area on or after May 5, 2007, during the taxable year that includes May 5, 2007. The notice also explains how to elect not to claim that 50% additional first year depreciation if a taxpayer so chooses.

EMPLOYEE PLANS

REG–100464–08, page 313.

Proposed regulations under section 411(b)(1) of the Code provide guidance on the application of the accrual rule for defined benefit plans under section 411(b)(1)(B) in cases where plan benefits are determined on the basis of the greatest of two or more separate formulas. A public hearing is scheduled for October 15, 2008.

(Continued on the next page)

Announcement of Declaratory Judgment Proceedings Under Section 7428 begins on page 321.
Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

EXEMPT ORGANIZATIONS

T.D. 9403, page 285.
Final regulations under section 664(c) of the Code provide that charitable remainder trusts with unrelated business taxable income (UBTI) in taxable years beginning after December 31, 2006, are exempt from federal income tax but are subject to a 100 percent excise tax on the UBTI of the charitable remainder trust pursuant to section 424 of the Tax Relief and Health Care Act of 2006. The regulations provide that the excise tax is reported and payable in accordance with appropriate forms. The regulations clarify that, consistent with regulations section 1.664–1(d)(2), the excise tax imposed upon the charitable remainder trust with UBTI is treated as paid from corpus, and the trust income that is UBTI is income of the trust for purposes of determining the character of the distribution made to the beneficiary.

Announcement 2008–69, page 318.
The IRS has revoked its determination that Homes for All, Inc., of Fort Myers, FL; H & H Housing, Inc., of Los Angeles, CA; Family Home Providers, Inc., of Cumming, GA; Miller County New Vision Coalition, Inc., of Colquitt, GA; Buyer's Dream Fund of Cleveland Heights, OH; American Bowling Congress of Wyoming, MI; Accelerated Trust, Inc., of Boca Raton, FL; National Home Charities, Inc., of Westminster, CO; Independent Group, Inc., of Covington, KY; and Shepherd Hills Development Corporation of Las Vegas, NV, qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Code.

Announcement 2008–70, page 318.
A list is provided of organizations now classified as private foundations.

ESTATE TAX

Rev. Rul. 2008–44, page 292.
Special use value; farms; interest rates. The 2008 interest rates to be used in computing the special use value of farm real property for which an election is made under section 2032A of the Code are listed for estates of decedents.

EMPLOYMENT TAX

T.D. 9405, page 293.
Final regulations under sections 6205 and 6413 of the Code amend the process for making interest-free adjustments of underpayments and overpayments of employment taxes. The regulations also clarify the process for filing claims for refund of overpayments of employment taxes under sections 6402 and 6414. The regulations will continue to permit taxpayers to file a claim for refund in lieu of making an interest-free adjustment for an overpayment of employment taxes. The regulations also amend the regulations under section 6011 to reflect the changes to the adjustment and refund processes and amend the regulations under section 6302 to clarify deposit obligations with respect to interest-free adjustments.

ADMINISTRATIVE

Announcement 2008–71, page 321.
This document contains a correction to a notice of public hearing (Announcement 2008–64, 2008–28 I.R.B. 114) on proposed regulations (REG–151135–07) providing additional rules for certain multiemployer defined benefit plans that are in effect on July 16, 2006. The regulations affect sponsors and administrators of, and participants in multiemployer plans that are in either endangered or critical status. The regulations are necessary to implement the new rules set forth in section 432 that are effective for plan years beginning after 2007. The regulations reflect changes made by the Pension Protection Act of 2006.

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.

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 179B.—Deduction for Capital Costs Incurred in Complying With Environmental Protection Agency Sulfur Regulations

26 CFR 1.179B–1T: Deduction for capital costs incurred in complying with Environmental Protection Agency sulfur regulations (temporary).

T.D. 9404

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

Capital Costs Incurred to Comply With EPA Sulfur Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to the deduction provided under section 179B of the Internal Revenue Code (Code) for qualified capital costs paid or incurred by a small business refiner to comply with the highway diesel fuel sulfur control requirements of the Environmental Protection Agency (EPA). The regulations implement changes to the law made by the American Jobs Creation Act of 2004, the Energy Policy Act of 2005, and the Tax Technical Corrections Act of 2007. The text of these temporary regulations also serves as the text of the proposed regulations (REG–143453–05) set forth in the notice of proposed rulemaking on this subject in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective on June 27, 2008.

Applicability Date: For dates of applicability, see §1.179B–1T(f).

FOR FURTHER INFORMATION CONTACT: Nicole Cimino, (202) 622–3110 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These temporary regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545–2104. Responses to this collection of information are required to obtain a tax benefit.

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

For further information concerning this collection of information, and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in this issue of the Bulletin.

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

Background

This document contains amendments to 26 CFR part 1 providing temporary regulations under section 179B of the Code. Section 179B was added to the Code by section 338(a) of the American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1418), and was modified by section 1324(a) of the Energy Policy Act of 2005, Public Law 109–58 (119 Stat. 594), and the Tax Technical Corrections Act of 2007, Public Law 110–172 (121 Stat. 2473).

In general, the cost of property used in a trade or business or held for the production of income must be capitalized and, in the case of depreciable property, recovered through depreciation. Section 167 allows as a depreciation deduction a reasonable allowance for the exhaustion, wear, and tear of property used in a trade or business or held for the production of income. The depreciation allowable for tangible, depreciable property placed in service after 1986 generally is determined under section 168.

In lieu of deducting depreciation, section 179B(a) allows a small business refiner to deduct as an expense 75 percent of the qualified costs as defined in section 45H(c)(2) that are paid or incurred during the taxable year and are properly chargeable to capital account ("qualified capital cost"). Section 45H(c)(2) defines qualified costs as those costs paid or incurred during the applicable period to comply with the highway diesel fuel sulfur control requirements of the EPA (the "applicable EPA regulations"). The deduction is phased out for refiners whose production in calendar year 2002 exceeded a specified threshold. Section 179B applies to expenses paid or incurred after December 31, 2002, in taxable years ending after December 31, 2002.

In addition, section 45H allows a production credit of five cents per gallon for low sulfur diesel fuel produced by a small business refiner. The aggregate credit claimed by a small business refiner for all taxable years may not exceed 25 percent of the qualified costs paid or incurred by the small business refiner. The aggregate allowable credit is also phased out for refiners whose production in calendar year 2002 exceeded a specified threshold. The credit is not allowed unless Treasury certifies, after consultation with EPA, that the refiner's qualified costs will result in compliance with the applicable EPA regulations. Section 280C(d) provides for the reduction, by the amount of the credit determined under section 45H(a) for the taxable year, in deductions otherwise allowable for the taxable year under subtitle A, Chapter 1 of the Internal Revenue Code (sections 1 through 1400T). Section 45H applies to expenses paid or incurred after December 31, 2002, in taxable years ending after December 31, 2002.

Section 45H(c) provides definitions of terms for purposes of both the section 179B deduction and the section 45H credit. Under section 45H(c)(1), a taxpayer is a small business refiner for a taxable year if (i) the taxpayer is a refiner of crude oil with respect to which not more than 1,500 individuals are engaged in the refinery operations of the business on any day during the taxable year, and (ii) the taxpayer's average daily domestic refinery run or average retained production for all facilities of the taxpayer for the 1-year period ending on December 31, 2002, did not exceed 205,000 barrels. Under section 45H(c)(2), the qualified costs with respect to any facility of a small business refiner are, in general, costs that are paid or incurred by the small business refiner to comply with the applicable EPA regulations with respect to the facility during the period beginning on January 1, 2003, and ending on the earlier of the date that is one year after the date on which the small business refiner must comply with the applicable EPA regulations for that facility, or December 31, 2009.

The applicable EPA regulations are the regulations establishing the highway diesel fuel sulfur control program and apply to, among others, petroleum refiners that produce diesel fuel for heavy-duty highway vehicles. The regulations provide that these vehicles for the 2007 and later model years must be fueled with highway diesel fuel that meets a maximum sulfur standard of 15 parts per million (ppm). The regulations also require refiners to produce this new low sulfur diesel fuel beginning on June 1, 2006, but include several transition rules under which refiners are given additional time to comply with the 15 ppm sulfur standard (for example, the small refiner credit option for a refiner that is granted small refiner status by the EPA).

Explanation of Provisions

Scope

The temporary regulations provide rules prescribing how a small business refiner must determine the deduction allowable under section 179B(a) for any taxable year. The regulations also provide guidance for making the elections under section 179B.

Computation of Deduction Allowable under Section 179B

The deduction under section 179B is allowable with respect to the qualified capital costs paid or incurred by a small business refiner during the taxable year. The temporary regulations make it clear that the deduction is allowable with respect to costs paid or incurred during a taxable year even if the property to which the costs relate is not placed in service until a subsequent taxable year. The temporary regulations also make it clear that the deduction is allowable even if the small business refiner is not eligible for the credit under section 45H because of a failure to obtain the certification required by section 45H(e).

Elections

Section 179B provides two elections. The first election is provided under section 179B(a), which allows a small business refiner to elect to deduct an amount equal to 75 percent of the qualified capital costs paid or incurred by the small business refiner during the taxable year. These temporary regulations provide that this election is made for each taxable year in which the taxpayer seeks to deduct qualified capital costs under section 179B. The election for a taxable year applies to all qualified capital costs paid or incurred by the small business refiner during the taxable year. The election for a taxable year must be made by the due date (including extensions) for filing the small business refiner's Federal income tax return for the taxable year.

The second election is provided under section 179B(e). Section 179B(e) provides that if a small business refiner is a cooperative and makes an election under section 179B(a), the small business refiner may elect to allocate part or all of the deduction allowable under section 179B(a) for the taxable year to its owners that are themselves cooperatives. If a cooperative small business refiner makes the section 179B(e) election, the temporary regulations provide that the deduction amount allocated to an owner is equal to the owner's ratable share of the total deduction amount allocated, determined on the basis of ownership interests in the cooperative small business refiner. The temporary regulations provide that in cases in which ownership interests vary during the year, the small business refiner must determine ratable shares under a consistently applied method that reasonably takes into account the varying interests during the taxable year. Further, the temporary regulations clarify that, in computing its taxable income under section 1382, the cooperative small business refiner must reduce its section 179B deduction by the deduction amount allocated to its owners.

The section 179B(e) election for a taxable year is made by the due date (including extensions) for filing the cooperative small business refiner's Federal income tax return for the taxable year. In addition, section 179B(e)(3) requires the electing cooperative small business refiner to notify, in writing, each cooperative owner of the amount of the section 179B(a) deduction that is allocated to that cooperative owner. This written notice must be mailed to the cooperative owner before the due date (including extensions) of the cooperative small business refiner's Federal income tax return.

Effective/Applicability Date

These temporary regulations apply to taxable years ending on or after June 26, 2008. However, a taxpayer may apply the temporary regulations to taxable years ending after December 31, 2002, and before June 26, 2008, provided that the taxpayer applies all provisions in these regulations (other than those relating to elections) to the taxable year. A taxpayer applying the regulations to those years may make the election under section 179B(a) for such years under the rules provided in Notice 2006–47, 2006–1 C.B. 892. In addition, the taxpayer's election under section 179B(e) for those years will be accepted if made using any reasonable method consistent with the principles of section 179B(e). See §601.601(d)(2)(ii)(*b*) of this chapter.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does

not apply to these regulations. For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), please refer to the Special Analyses section of the preamble to the cross-reference notice of proposed rulemaking published in this issue of the Bulletin. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Nicole R. Cimino, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.179B–1T is added to read as follows:

§1.179B–1T Deduction for capital costs incurred in complying with Environmental Protection Agency sulfur regulations (temporary).

(a) *Scope and definitions*—(1) *Scope*. This section provides the rules for determining the amount of the deduction allowable under section 179B(a) for qualified capital costs paid or incurred by a small business refiner to comply with the highway diesel fuel sulfur control requirements of the Environmental Protection Agency (EPA). This section also provides rules for making elections under section 179B.

(2) *Definitions*. For purposes of section 179B and this section, the following definitions apply:

(i) The *applicable EPA regulations* are the EPA regulations establishing the highway diesel fuel sulfur control program (40 CFR part 80, subpart I).

(ii) The *average daily domestic refinery run* for a refinery is the lesser of—

(A) The total amount of crude oil input (in barrels) to the refinery's domestic processing units during the 1-year period ending on December 31, 2002, divided by 365; or

(B) The total amount of refined petroleum product (in barrels) produced by the refinery's domestic processing units during such 1-year period divided by 365.

(iii) The *aggregate average domestic daily refinery run* for a refiner is the sum of the average daily domestic refinery runs for all refineries that were owned by the refiner or a related person on April 1, 2003.

(iv) *Cooperative owner* is a person that—

(A) Directly holds an ownership interest in a cooperative small business refiner, as defined in paragraph (a)(2)(v) of this section; and

(B) Is a cooperative to which part 1 of subchapter T of the Internal Revenue Code (Code) applies.

(v) *Cooperative small business refiner* is a small business refiner that is a cooperative to which part 1 of subchapter T of the Code applies.

(vi) *Low sulfur diesel fuel* has the meaning prescribed in section 45H(c)(5).

(vii) *Qualified capital costs* are qualified costs as defined in section 45H(c)(2) that are properly chargeable to capital account.

(viii) *Related person* has the meaning prescribed in section 613A(d)(3) and the regulations under section 613A(d)(3).

(ix) *Small business refiner* has the meaning prescribed in section 45H(c)(1).

(b) *Section 179B deduction*—(1) *In general*. Section 179B(a) allows a deduction with respect to the qualified capital costs paid or incurred by a small business refiner (the section 179B deduction). The deduction is allowable with respect to the qualified capital costs paid or incurred during a taxable year only if the small business refiner makes an election under paragraph (d) of this section for the taxable year. The certification requirement in section 45H(e) (relating to the certification required to support a credit under section 45H) does not apply for purposes of the section 179B deduction. Accordingly, the section 179B deduction is allowable with respect to the qualified capital costs of an electing small business refiner even if the refiner never obtains a certification under section 45H(e) with respect to those costs.

(2) *Computation of section 179B deduction*—(i) *In general*. Except as provided in paragraphs (b)(2)(ii) and (c)(3) of this section, a small business refiner that makes an election under paragraph (d) of this section for a taxable year is allowed a section 179B deduction in an amount equal to 75 percent of qualified capital costs that are paid or incurred by the small business refiner during the taxable year.

(ii) *Reduced percentage*. A small business refiner's section 179B deduction is reduced if the refiner's aggregate average daily domestic refinery run is in excess of 155,000 barrels. In that case, the number of percentage points used in computing the deduction under paragraph (b)(2)(i) of this section (75) is reduced (not below zero) by the product of 75 and the ratio of the excess barrels to 50,000 barrels.

(3) *Example*. The application of this paragraph (b) is illustrated by the following example:

Example. (i) A, an accrual method taxpayer, is a small business refiner with a taxable year ending December 31. On April 1, 2003, A owns a refinery with an average daily domestic refinery run (that is, an average daily run during calendar year 2002) of 100,000 barrels and a person related to A owns a refinery with an average daily domestic refinery run of 85,000 barrels. These are the only domestic refineries owned by A and persons related to A. A's aggregate average daily domestic refinery run for the two refineries is 185,000 barrels. A incurs qualified capital costs of $10 million in the taxable year ended December 31, 2007. The costs are incurred with respect to property that is placed in service in year 2008. A makes the election under paragraph (d) of this section for the 2007 taxable year.

(ii) Because A's aggregate average daily domestic refinery run is 185,000 barrels, the percentage of the qualified capital costs that is deductible under section 179B(a) is reduced from 75 percent to 30 percent (75 percent reduced by 75 percent multiplied by 0.6 ((185,000 barrels minus 155,000 barrels)/50,000 barrels)). Thus, for 2007, A's deduction under section 179B(a) is $3,000,000 ($10,000,000 qualified capital costs multiplied by .30).

(c) *Effect on basis*—(1) *In general*. If qualified capital costs are included in the basis of property, the basis of the property is reduced by the amount of the section 179B deduction allowed with respect to such costs.

(2) *Treatment as depreciation*. If qualified capital costs are included in the basis of depreciable property, the amount of the section 179B deduction allowed with respect to such costs is treated as a depre-

ciation deduction for purposes of section 1245.

(d) *Election to deduct qualified capital costs*—(1) *In general*—(i) *Section 179B election*. This paragraph (d) prescribes rules for the election to deduct the qualified capital costs paid or incurred by a small business refiner during a taxable year (the section 179B election). A small business refiner making the section 179B election for a taxable year consents to, and agrees to apply, all of the provisions of section 179B and this section to qualified capital costs paid or incurred by the refiner during the taxable year. The section 179B election for a taxable year applies with respect to all qualified capital costs paid or incurred by the small business refiner during that taxable year.

(ii) *Year-by-year election*. A separate section 179B election must be made for each taxable year in which the taxpayer seeks to deduct qualified capital costs under section 179B. A small business refiner may make the section 179B election for some taxable years and not for other taxable years.

(iii) *Elections for cooperative small business refiners*. See paragraph (e) of this section for the rules applicable to the election provided under section 179B(e), relating to the election to allocate the section 179B deduction to cooperative owners of a cooperative small business refiner (the section 179B(e) election).

(2) *Time and manner for making section 179B election*—(i) *Time for making election*. Except as provided in paragraph (d)(2)(iii) of this section, a taxpayer's section 179B election for a taxable year must be made by the due date (including extensions) for filing the taxpayer's Federal income tax return for the taxable year.

(ii) *Manner of making election*—(A) *In general*. Except as provided in paragraph (d)(2)(iii) of this section, the section 179B election for a taxable year is made by claiming a section 179B deduction on the taxpayer's original Federal income tax return for the taxable year and attaching the statement described in paragraph (d)(2)(ii)(B) of this section to the return. The section 179B election with respect to qualified capital costs paid or incurred by a partnership is made by the partnership and the section 179B election with respect to qualified capital costs paid or incurred by an S corporation is made by the S corporation. In the case of qualified capital costs paid or incurred by the members of a consolidated group (within the meaning of §1.1502–1(h)), the section 179B election with respect to such costs is made for each member by the common parent of the group.

(B) *Information required in election statement*. The election statement attached to the taxpayer's return must contain the following information:

(*1*) The name and identification number of the small business refiner.

(*2*) The amount of the qualified capital costs paid or incurred during the taxable year for which the election is made.

(*3*) The aggregate average daily domestic refinery run (as determined under paragraph (a)(2)(iii) of this section).

(*4*) The date by which the small business refiner must comply with the applicable EPA regulations. If this date is not June 1, 2006, the statement also must explain why compliance is not required by June 1, 2006.

(*5*) The calculation of the section 179B deduction for the taxable year.

(*6*) For each property that will have its basis reduced on account of the section 179B deduction for the taxable year, a description of the property, the amount included in the basis of the property on account of qualified capital costs paid or incurred during the taxable year, and the amount of the basis reduction to that property on account of the section 179B deduction for the taxable year.

(iii) Except as otherwise expressly provided by the Code, the regulations under the Code, or other guidance published in the Internal Revenue Bulletin, a section 179B election is valid only if made at the time and in the manner prescribed in this paragraph (d)(2). For example, except as otherwise expressly provided, the 179B election cannot be made for a taxable year to which this section applies through a request under section 446(e) to change the taxpayer's method of accounting.

(3) *Revocation of election*. An election made under this paragraph (d) may not be revoked without the prior written consent of the Commissioner of Internal Revenue. To seek the Commissioner's consent, the taxpayer must submit a request for a private letter ruling (for further guidance, see, for example, Rev. Proc. 2008–1, 2008–1 I.R.B. 1, and §601.601(d)(2)(ii)(*b*) of this chapter).

(4) *Failure to make election*. If a small business refiner does not make the section 179B election for a taxable year at the time and in the manner prescribed in paragraph (d)(2) of this section, no deduction is allowed for the qualified capital costs that the refiner paid or incurred during the year. Instead these qualified capital costs are chargeable to a capital account in that taxable year, the basis of the property to which these costs are capitalized is not reduced on account of section 179B, and the amount of depreciation allowable for the property attributable to these costs is determined by reference to these costs unreduced by section 179B.

(5) *Elections for taxable years ending before June 26, 2008*. This section does not apply to section 179B elections for taxable years ending before June 26, 2008. The rules for making the section 179B election for a taxable year ending before June 26, 2008 are provided in Notice 2006–47, 2006–1 C.B. 892. See §601.601(d)(2)(ii)(*b*) of this chapter.

(e) *Election under section 179B(e) to allocate section 179B deduction to cooperative owners*—(1) *In general*. A cooperative small business refiner may elect to allocate part or all of its cooperative owners' ratable shares of the section 179B deduction for a taxable year to the cooperative owners (the section 179B(e) election). The section 179B deduction allocated to a cooperative owner is equal to the cooperative owner's ratable share of the total section 179B deduction allocated. A cooperative owner's ratable share is determined for this purpose on the basis of the cooperative owner's ownership interest in the cooperative small business refiner during the cooperative small business refiner's taxable year. If the cooperative owners' interests vary during the year, the cooperative small business refiner shall determine the owners' ratable shares under a consistently applied method that reasonably takes into account the owners' varying interests during the taxable year.

(2) *Cooperative small business refiner denied section 1382 deduction for allocated portion*. In computing taxable income under section 1382, a cooperative small business refiner must reduce its section 179B deduction for the taxable year by an amount equal to the section 179B de-

duction allocated under this paragraph (e) to the refiner's cooperative owners for the taxable year.

(3) *Time and manner for making election*—(i) *Time for making election*. The section 179B(e) election for a taxable year must be made by the due date (including extensions) for filing the cooperative small business refiner's Federal income tax return for the taxable year.

(ii) *Manner of making election*. The section 179B(e) election for a taxable year is made by attaching a statement to the cooperative small business refiner's Federal income tax return for the taxable year. The election statement must contain the following information:

(A) The name and identification number of the cooperative small business refiner.

(B) The amount of the section 179B deduction allowable to the cooperative small business refiner for the taxable year (determined before the application of section 179B(e) and this paragraph (e)).

(C) The name and identification number of each cooperative owner to which the cooperative small business refiner is allocating all or some of the section 179B deduction.

(D) The amount of the section 179B deduction that is allocated to each cooperative owner listed in response to paragraph (e)(3)(ii)(C) of this section.

(4) *Irrevocable election*. A section 179B(e) election for a taxable year, once made, is irrevocable for that taxable year.

(5) *Written notice to owners*. A cooperative small business refiner that makes a section 179B(e) election for a taxable year must notify each cooperative owner of the amount of the section 179B deduction that is allocated to that cooperative owner. This notification must be provided in a written notice that is mailed by the cooperative small business refiner to its cooperative owner before the due date (including extensions) of the cooperative small business refiner's Federal income tax return for the election year. In addition, the cooperative small business refiner must report the amount of the cooperative owner's section 179B deduction on Form 1099–PATR, *"Taxable Distributions Received From Cooperatives,"* issued to the cooperative owner. If Form 1099–PATR is revised or renumbered, the amount of the cooperative owner's section 179B deduction must be reported on the revised or renumbered form.

(f) *Effective/applicability date*—(1) *In general*. This section applies to taxable years ending on or after June 26, 2008.

(2) *Application to taxable years ending before June 26, 2008*. A small business refiner may apply this section to a taxable year ending before June 26, 2008, provided that the small business refiner applies all provisions in this section, with the modifications described in paragraph (f)(3) of this section, to the taxable year.

(3) *Modifications applicable to taxable years ending before June 26, 2008*. The following modifications to the rules of this section apply to a small business refiner that applies those rules to a taxable year ending before June 26, 2008:

(i) *Rules relating to section 179B election*. The section 179B election for a taxable year ending before June 26, 2008 may be made under the rules provided in Notice 2006–47, rather than under the rules set forth in paragraph (d) of this section.

(ii) *Rules relating to section 179B(e) election*. A section 179B(e) election for a taxable year ending before June 26, 2008 will be treated as satisfying the requirements of paragraph (f) if the cooperative small business refiner has calculated its tax liability in a manner consistent with the election and has used any reasonable method consistent with the principles of section 179B(e) to inform the Internal Revenue Service that an election has been made under section 179B(e) and to inform cooperative owners of the amount of the section 179B deduction they have been allocated.

(4) *Expiration date*. The applicability of §179B–1T expires on June 24, 2011.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

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

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

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

§602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.179B–1T	1545–2104
* * * * *	

Kevin M. Brown,
Deputy Commissioner for Services and Enforcement.

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

(Filed by the Office of the Federal Register on June 26, 2008, 8:45 a.m., and published in the issue of the Federal Register for June 27, 2008, 73 F.R. 36420)

Approved June 15, 2007.

Section 664.—Charitable Remainder Trusts

26 CFR 1.664–1: Charitable remainder trusts.

T.D. 9403

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

Guidance Under Section 664 Regarding the Effect of Unrelated Business Taxable Income on Charitable Remainder Trusts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that provide guidance under Internal Revenue Code (Code) section 664 on the tax effect of unrelated business taxable income (UBTI) on charitable remainder trusts. The regulations reflect the changes made to section 664(c) by section 424(a) and (b) of the Tax Relief and Health Care Act of 2006. The regulations affect charitable remainder trusts that have UBTI in taxable years beginning after December 31, 2006.

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

Applicability Date: For dates of applicability, see §1.664–1(c)(3).

FOR FURTHER INFORMATION CONTACT: Cynthia Morton at (202) 622–3060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–2101. The collection of information in these final regulations is in §1.664–1(c)(1). This information is required to enable a charitable remainder trust to report and pay the excise tax due on any UBTI of the trust.

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

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

Background and Explanation of Provisions

This document contains amendments to 26 CFR part 1 under section 664 of the Code. On March 7, 2008, proposed regulations (REG–127391–07, 2008–13 I.R.B. 689) relating to the tax effect of UBTI on charitable remainder trusts were published in the **Federal Register** (73 FR 12313). Although two comments were received in response to the proposed regulations, no request to speak was submitted, so no public hearing was held (see 73 FR 18729). After consideration of the comments, the proposed regulations are adopted by this Treasury decision without substantive change.

For taxable years beginning before January 1, 2007, section 664(c) provided that a charitable remainder trust (whether a charitable remainder annuity trust or a charitable remainder unitrust) would not be exempt from income tax for any year in which the trust had any UBTI (within the meaning of section 512). Instead, such trust was taxed for each such year under subchapter J as though it were a nonexempt, complex trust. The final regulations reflect the changes to section 664(c) made by section 424 of the Tax Relief and Health Care Act of 2006 (Act), Public Law 109–432, 120 Stat. 2922. Section 424(a) of the Act, which applies to taxable years beginning after December 31, 2006, provides that charitable remainder trusts that have UBTI remain exempt from Federal income tax, but imposes a 100-percent excise tax on their UBTI.

The regulations confirm that, for purposes of determining the character of the distribution made to the beneficiary, the charitable remainder trust income that is UBTI is considered income of the trust. Specifically, income of the charitable remainder trust is allocated among the trust income categories in Treasury Regulation §1.664–1(d)(1) without regard to whether any part of that income constitutes UBTI under section 512. The regulations also confirm that, consistent with §1.664–1(d)(2), the excise tax imposed upon a charitable remainder trust with UBTI is treated as paid from corpus.

Summary of Comments

Comments Relating to Transitional Relief

The two commentators requested transitional relief to allow time for charitable remainder trusts with investments producing significant UBTI to restructure these investments. The commentators noted that the Tax Relief and Health Care Act of 2006 revising section 664(c) was signed into law on December 20, 2006, and became effective for tax years beginning after December 31, 2006. Consequently, charitable remainder trusts had eleven days to make changes in their investments in response to the legislation.

The Treasury Department and the IRS have carefully considered the concerns of the commentators and the request for transitional relief, but have not adopted this comment. The primary objective of adopting the tax on UBTI was to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations on the same tax basis as the nonexempt businesses with which they compete. See §1.513–1(b). The provision denying the income tax exemption for charitable remainder trusts in years in which the trust has UBTI was enacted because Congress did "not believe that it is appropriate to allow the unrelated business income tax to be avoided by the use of a charitable remainder trust rather than a tax-exempt organization". See Public Law 91–172, Senate Report 91–552 (H.R. 13270), C.B. 1969–3, P. 481–2. The sanction imposed under prior law on a charitable remainder trust investing in UBTI-producing asset(s), specifically the loss of tax-exempt status, was generally viewed as particularly onerous. Section 424 of the Act changed the sanction to alleviate its severity, but did not reflect any change in the long-standing policy

to sanction and thus to discourage such investment by charitable remainder trusts.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This reporting burden flows directly from the statute implemented by these regulations. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) (RFA) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of the regulations is Cynthia Morton, Office of the Associate Chief Counsel (Passthroughs and Special Industries).

* * * * *

Adoption of Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.664–1 is amended as follows:

1. In paragraph (a)(1)(i), the last sentence is revised and two sentences are added to the end of the paragraph.

2. Paragraph (c) is revised.

3. In paragraph (d)(2), the fourth sentence is revised.

The revisions and addition read as follows:

§1.664–1 Charitable remainder trusts.

(a)* * * (1)* * * (i) * * * A trust created after July 31, 1969, which is a charitable remainder trust, is exempt from all of the taxes imposed by subtitle A of the Code for any taxable year of the trust, except for a taxable year beginning before January 1, 2007, in which it has unrelated business taxable income. For taxable years beginning after December 31, 2006, an excise tax, treated as imposed by chapter 42, is imposed on charitable remainder trusts that have unrelated business taxable income. See paragraph (c) of this section.

* * * * *

(c) *Excise tax on charitable remainder trusts*—(1) *In general.* For each taxable year beginning after December 31, 2006, in which a charitable remainder annuity trust or a charitable remainder unitrust has any unrelated business taxable income, an excise tax is imposed on that trust in an amount equal to the amount of such unrelated business taxable income. For this purpose, unrelated business taxable income is as defined in section 512, determined as if part III, subchapter F, chapter 1, subtitle A of the Internal Revenue Code applied to such trust. Such excise tax is treated as imposed by chapter 42 (other than subchapter E) and is reported and payable in accordance with the appropriate forms and instructions. Such excise tax shall be allocated to corpus and, therefore, is not deductible in determining taxable income distributed to a beneficiary. (See paragraph (d)(2) of this section.) The charitable remainder trust income that is unrelated business taxable income constitutes income of the trust for purposes of determining the character of the distribution made to the beneficiary. Income of the charitable remainder trust is allocated among the charitable remainder trust income categories in paragraph (d)(1) of this section without regard to whether any part of that income constitutes unrelated business taxable income under section 512.

(2) *Examples.* The application of the rules in this paragraph (c) may be illustrated by the following examples:

Example 1. For 2007, a charitable remainder annuity trust with a taxable year beginning on January 1, 2007, has $60,000 of ordinary income, including $10,000 of gross income from a partnership that constitutes unrelated business taxable income to the trust. The trust has no deductions that are directly connected with that income. For that same year, the trust has administration expenses (deductible in computing taxable income) of $16,000, resulting in net ordinary income of $44,000. The amount of unrelated business taxable income is computed by taking gross income from an unrelated trade or business and deducting expenses directly connected with carrying on the trade or business, both computed with modifications under section 512(b). Section 512(b)(12) provides a specific deduction of $1,000 in computing the amount of unrelated business taxable income. Under the facts presented in this example, there are no other modifications under section 512(b). The trust, therefore, has unrelated business taxable income of $9,000 ($10,000 minus the $1,000 deduction under section 512(b)(12)). Undistributed ordinary income from prior years is $12,000 and undistributed capital gains from prior years are $50,000. Under the terms of the trust agreement, the trust is required to pay an annuity of $100,000 for year 2007 to the noncharitable beneficiary. Because the trust has unrelated business taxable income of $9,000, the excise tax imposed under section 664(c) is equal to the amount of such unrelated business taxable income, $9,000. The character of the $100,000 distribution to the noncharitable beneficiary is as follows: $56,000 of ordinary income ($44,000 from current year plus $12,000 from prior years), and $44,000 of capital gains. The $9,000 excise tax is allocated to corpus, and does not reduce the amount in any of the categories of income under paragraph (d)(1) of this section. At the beginning of year 2008, the amount of undistributed capital gains is $6,000, and there is no undistributed ordinary income.

Example 2. During 2007, a charitable remainder annuity trust with a taxable year beginning on January 1, 2007, sells real estate generating gain of $40,000. Because the trust had obtained a loan to finance part of the purchase price of the asset, some of the income from the sale is treated as debt-financed income under section 514 and thus constitutes unrelated business taxable income under section 512. The unrelated debt-financed income computed under section 514 is $30,000. Assuming the trust receives no other income in 2007, the trust will have unrelated business taxable income under section 512 of $29,000 ($30,000 minus the $1,000 deduction under section 512(b)(12)). Except for section 512(b)(12), no other exceptions or modifications under sections 512–514 apply when calculating unrelated business taxable income based on the facts presented in this example. Because the trust has unrelated business taxable income of $29,000, the excise tax imposed under section 664(c) is equal to the amount of such unrelated business taxable income, $29,000. The $29,000 excise tax is allocated to corpus, and does not reduce the amount in any of the categories of income under paragraph (d)(1) of this section. Regardless of how the trust's income might be treated under sections 511–514, the entire $40,000 is capital gain for purposes of section 664 and is allocated accordingly to and within the second of the categories of income under paragraph (d)(1) of this section.

(3) *Effective/applicability date.* This paragraph (c) is applicable for taxable years beginning after December 31, 2006. The rules that apply with respect to taxable years beginning before January 1, 2007, are contained in §1.664–1(c) as in effect

prior to June 24, 2008. (See 26 CFR part 1, §1.664–1(c)(1) revised as of April 1, 2007).

(d) * * *

(2) * * * All taxes imposed by chapter 42 of the Code (including without limitation taxes treated under section 664(c)(2) as imposed by chapter 42) and, for taxable years beginning prior to January 1, 2007, all taxes imposed by subtitle A of the Code for which the trust is liable because it has unrelated business taxable income, shall be allocated to corpus. * * *

* * * * *

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

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

Authority: 26 U.S.C. 7805.

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

§602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.664–1(c)	1545–2101
* * * * *	

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

Approved June 18, 2008.

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

(Filed by the Office of the Federal Register on June 19, 2008, 1:29 p.m., and published in the issue of the Federal Register for June 24, 2008, 73 F.R. 35583)

Section 956.—Investment of Earnings in United States Property

26 CFR 1.956–2: Definition of United States property.

T.D. 9406

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Modifications to Subpart F Treatment of Aircraft and Vessel Leasing Income

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations addressing the treatment of certain income and assets related to the leasing of aircraft or vessels in foreign commerce under sections 367, 954, and 956 of the Internal Revenue Code (Code). The regulations reflect statutory changes made by section 415 of the American Jobs Creation Act of 2004 (AJCA). In general, the regulations will affect United States shareholders of controlled foreign corporations that derive income from the leasing of aircraft or vessels in foreign commerce and U.S. persons that transfer property subject to these leases to a foreign corporation. The text of these temporary regulations also serves as the text of the proposed regulations (REG–138355–07) set forth in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective on July 3, 2008.

Applicability Dates: For dates of applicability, see §§1.367–2T(e)(2), 1.367–4T(c)(3)(i), 1.367–5T(f)(3)(ii), 1.954–2T(i) and 1.956–2T(e).

FOR FURTHER INFORMATION CONTACT: Concerning the temporary regulations under section 367, John H. Seibert, at (202) 622–3860; concerning the temporary regulations under section 954 or 956, Paul J. Carlino at (202) 622–3840; concerning submissions of comments, Richard A. Hurst at *Richard.A.Hurst@irscounsel.treas.gov* (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

In General

This document contains amendments to 26 CFR Part 1 under sections 367, 954 and 956 of the Code. Section 415(a) of the AJCA, Public Law 108–357 (118 Stat. 1418) repealed sections 954(a)(4) and (f), the foreign base company shipping income provisions of subpart F. Following repeal of the foreign base company shipping income provisions, rents derived from leasing an aircraft or vessel in foreign commerce may be included in subpart F income only if the rents are described in another category of subpart F income, such as foreign personal holding company income (FPHCI) defined in section 954(c). Rents are included in FPHCI under section 954(c)(1)(A). Section 954(c)(2)(A) excludes from FPHCI rents received from unrelated persons and derived in the active conduct of a trade or business.

Rents derived by a controlled foreign corporation (CFC) are considered to be derived in the active conduct of a trade or business if the rents are derived under any one of four circumstances described in the Treasury regulations under section 954(c)(2)(A). One such circumstance, provided in §1.954–2(c)(1)(iv), is when rents are derived from property leased as a result of the performance of marketing functions by the lessor CFC. These rents are considered to be derived in the active conduct of a trade or business if the lessor CFC,

through its own officers or staff of employees located in a foreign country, maintains and operates an organization in the foreign country that is regularly engaged in the business of marketing, or of marketing and servicing, the leased property and that is substantial in relation to the amount of rents derived from leasing the property.

Section 1.954–2(c)(2)(ii) provides that the determination of whether the organization in the foreign country is substantial in relation to the amount of rents derived is based on all the facts and circumstances. However, under §1.954–2(c)(2)(ii), the organization will be considered substantial in relation to the amount of rents if active leasing expenses, as defined in §1.954–2(c)(2)(iii), equal or exceed 25 percent of the adjusted leasing profit, as defined in §1.954–2(c)(2)(iv).

Section 415(b) of the AJCA amended section 954(c)(2)(A) to create a new marketing safe harbor for the exclusion from FPHCI for rents derived from leasing an aircraft or vessel in foreign commerce. The amendment to section 954(c)(2)(A) provides:

> [R]ents derived from leasing an aircraft or vessel in foreign commerce shall not fail to be treated as derived in the active conduct of a trade or business if, as determined under regulations prescribed by the Secretary, the active leasing expenses are not less than 10 percent of the profit on the lease.

The legislative history of section 415(b) of the AJCA provides that the new safe harbor for rents derived from leasing an aircraft or vessel in foreign commerce "is to be applied in accordance with the existing regulations under section 954(c)(2)(A) by comparing the lessor's 'active leasing expenses' for its pool of leased assets to its 'adjusted leasing profit.'" H.R. Conf. Rep. No. 755, 108th Cong., 2d Sess. 389 (2004) (hereinafter 2004 Conference Report). The 2004 Conference Report includes in the definition of the term "aircraft or vessel" engines that are leased separately from an aircraft or vessel. *Id.* at 391.

An aircraft or vessel will qualify for the new safe harbor under section 954(c)(2)(A) only if it is leased in "foreign commerce." The legislative history provides that, for purposes of this safe harbor,

> An aircraft or vessel will be considered to be leased in foreign commerce if it is used for the transportation of property or passengers between a port (or airport) in the United States and one in a foreign country or between foreign ports (or airports), provided the aircraft or vessel is used predominantly outside the United States. An aircraft or vessel will be considered used predominantly outside the United States if more than 50 percent of the miles during the taxable year are traversed outside the United States or the aircraft or vessel is located outside the United States more than 50 percent of the time during such taxable year.

Id. at 390.

As an alternative to the new safe harbor, the legislative history makes clear that a lessor may qualify for the marketing exception by satisfying a facts and circumstances test. The report of the House of Representatives provides that:

> The safe harbor will not prevent a lessor from otherwise showing that it actively carries on a trade or business. In this regard, the requirements of section 954(c)(2)(A) will be met if a lessor regularly and directly performs active and substantial marketing, remarketing, management and operational functions with respect to the leasing of an aircraft or vessel (or component engines).

H.R. Rep. No. 108–548, Part I, at 210 (2004).

The 2004 Conference Report also clarifies that the marketing exception for aircraft and vessels will apply whether the lessor engages in the marketing of the lease as a form of financing (versus marketing the property as such) or whether the lease is classified as a finance lease or operating lease for financial accounting purposes. 2004 Conference Report at 390. The exception will also apply to an existing lease acquired by a lessor, if, following the acquisition, the lessor performs active and substantial management, operational, and remarketing functions with respect to the leased property. *Id.* The 2004 Conference Report makes clear that a taxpayer no longer can claim FSC or ETI benefits for an existing FSC or ETI lease transferred to a CFC lessor. *Id.*

The legislative history directs the Secretary of the Treasury to make conforming changes to the current regulations "including guidance that aircraft or vessel leasing activity that satisfies the requirements of section 954(c)(2)(A) shall also satisfy the requirements for avoiding income inclusion under section 956 and section 367(a)." *Id.* This legislative history indicates that Congress anticipated that taxpayers might restructure their operations with minimal tax cost to take advantage of the new benefits under subpart F provided by section 415 of the AJCA, namely the repeal of the foreign base company shipping income provisions and a liberalized marketing safe harbor for excluding active leasing income from aircraft or vessels engaged in foreign commerce from FPHCI.

Notice 2006–48

Notice 2006–48, 2006–1 C.B. 922, released on May 2, 2006, provided guidance and announced the Treasury Department's and IRS' intention to amend the regulations under sections 367(a), 954, and 956 in accord with section 415 of the AJCA, and the accompanying legislative history. The notice provided that the future regulations would generally be effective beginning on or after May 2, 2006. These temporary regulations incorporate the rules of Notice 2006–48 with minor changes. See §601.601(d)(2)(ii)(b).

Explanation of Provisions

The temporary regulations provide guidance with respect to the treatment of certain income and assets related to the leasing of aircraft or vessels in foreign commerce under sections 367, 954, and 956 of the Code in light of section 415 of the AJCA.

Section 954 Regulations

The temporary regulations add a new marketing safe harbor for purposes of determining whether rents derived from leasing aircraft or vessels (including component parts, such as engines, that are leased separately from an aircraft or vessel) in foreign commerce qualify for the active rents exclusion under section 954(c)(2)(A). This new safe harbor provides that an organization will be considered substantial under §1.954–2(c)(2)(ii) if active leasing expenses equal or exceed 10 percent of the adjusted leasing profit. The temporary regulations retain the rules in the current regulations regarding how to determine active leasing expenses and adjusted leas-

ing profit and that as an alternative to the safe harbor test, a CFC can satisfy the substantiality test based upon its facts and circumstances. The temporary regulations also amend the current regulations to include a definition of foreign commerce and predominant use of an aircraft or vessel outside the United States in accordance with the definitions given such terms in the legislative history to section 415(b) of the AJCA. The temporary regulations also clarify that rents derived from certain finance leases and acquired leases are eligible for the active rents exclusion.

Section 956 Regulations

Section 956(c)(1)(A) provides that the term "United States property" generally includes tangible property located in the United States. Section 956(c)(2) provides exceptions to the general definition of U.S. property. Section 956(c)(2)(D) excludes from the term U.S. property any aircraft, railroad rolling stock, vessel, motor vehicle, or container used in the transportation of persons or property in foreign commerce and used predominantly outside the United States.

Section 1.956–2(b)(1)(vi) provides that whether an aircraft, railroad rolling stock, vessel, motor vehicle, or container is used predominantly outside the United States depends on the facts and circumstances in each case. The regulations also provide that as a general rule, such transportation property will be considered used predominantly outside the United States if 70 percent or more of the miles traversed in the use of such property are traversed outside the United States or if such property is located outside the United States 70 percent of the time during such taxable year. The temporary regulations amend §1.956–2(b)(1)(vi) to provide that an aircraft or vessel is excluded from U.S. property if rents derived from leasing such aircraft or vessel are excluded from FPHCI under section 954(c)(2)(A).

Section 367 Regulations

Section 367 provides that if a U.S. person transfers property to a foreign corporation in an exchange described in sections 332, 351, 354, 356, or 361 of the Code, the foreign corporation will not be considered a corporation for purposes of determining the extent to which gain will be recognized on such transfer. However, section 367(a)(3)(A) generally provides an exception to this rule if the property is used by the foreign corporation in the active conduct of a trade or business outside of the United States. In general, this exception does not apply to property of which the transferor is a lessor at the time of the transfer, unless the transferee is the lessee or the regulations provide otherwise.

Section 1.367(a)–2T(a) provides, in part, that section 367(a)(1) does not apply to property transferred to a foreign corporation if the property is transferred for use by that corporation in the active conduct of a trade or business outside of the United States and certain reporting requirements are met. Section 1.367(a)–2T(b)(3) provides that the principles of §1.954–2(d)(1) are used to determine whether a trade or business that produces rents or royalties is actively conducted, without regard to whether the rents or royalties are received from an unrelated person. Section 1.367(a)–2T(b)(4) provides generally that a foreign corporation conducts a trade or business outside of the United States if the primary managerial and operational activities of the trade or business are located outside of the United States and if immediately after the transfer the transferred assets are located outside of the United States.

Section 1.367(a)–4T(c) through (f) contains rules for determining whether certain types of property are transferred for use in the active conduct of a trade or business outside the United States. Section 1.367(a)–4T(c)(1) provides that if the transferred property will be leased by the transferee foreign corporation, the property generally is considered to be transferred for use in the active conduct of a trade or business outside of the United States only if all three of the following conditions are met: (i) the transferee's leasing constitutes the active conduct of a leasing business; (ii) the lessee does not use the property in the United States; and (iii) the transferee has need for substantial investment in assets of the type transferred.

Section 1.367(a)–4T(b)(1) provides that even if property qualifies for the active trade or business exception, when a U.S. person transfers U.S. depreciated property to a foreign corporation, that person must include as ordinary income in the year of the transfer the gain realized that would have been included as ordinary income under section 617(d)(1), 1245(a), 1250(a), 1252(a), or 1254(a) of the Code if the taxpayer had sold the property at its fair market value on the date of the transfer (section 367 recapture). Section 1.367(a)–4T(b)(2)(ii) provides that, for this purpose, U.S. depreciated property includes property that has been used in the United States or has qualified as section 38 property by virtue of section 48(a)(2)(B).

Section 1.367(a)–4T(b)(3) provides a methodology to compute the section 367 recapture amount if the property has been used partly outside the United States. In this circumstance, the amount of the section 367 depreciation recapture is determined by multiplying the full section 367 recapture amount by a fraction, the numerator of which is the U.S. use of the property and denominator of which is the total use of the property. For this purpose, U.S. use is the number of months that the property either was used within the United States or qualified as section 38 property by virtue of section 48(a)(2)(B) and was subject to depreciation by the transferor or a related person. Total use is the total number of months that the property was used (or was available for use), and subject to depreciation, by the transferor or a related person. Property is not considered to be used outside the United States during any period in which the property was, for purposes of section 38 or 168, treated as property not used predominantly outside the United States pursuant to the provisions of section 48(a)(2)(B).

Section 1.367(a)–5T(f) provides that, regardless of use in an active trade or business, section 367(a)(1) applies to a transfer of tangible property with respect to which the transferor is a lessor at the time of the transfer unless: (i) the transferee was the lessee and the transferee will not lease to third persons; or (ii) the transferee will lease to third persons and the transferee satisfies the conditions of §1.367(a)–4T(c)(1) or (2).

The temporary regulations amend the section 367(a) regulations to provide that the principles of section 954(c)(2)(A) and the related regulations shall apply to determine whether a trade or business that produces rents or royalties is actively conducted under §1.367(a)–2T(b)(3). For purposes of applying §1.367(a)–2T(b)(4),

§1.367(a)–4T(c)(3) provides that the substantial managerial and operational activities of the trade or business of leasing an aircraft or vessel must be conducted outside of the United States, and the aircraft or vessel must be used predominantly outside of the United States, as defined in section 954 and under the amended regulation. A lessee that uses an aircraft or vessel predominantly outside of the United States will satisfy the requirement in §1.367(a)–4T(c)(1)(ii).

In addition, Notice 2006–48 states that the Treasury Department and IRS were considering future guidance regarding how to determine whether an aircraft or vessel was used predominantly outside the United States for a particular month for purposes of calculating section 367 recapture. The notice also states that until further guidance is issued, taxpayers are permitted to use any reasonable method to make this determination. The Treasury Department and IRS continue to study this issue and therefore taxpayers may continue to use any reasonable method to make this determination until further guidance is issued.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For applicability of the Regulatory Flexibility Act (5 U.S.C. Ch. 6) please refer to the cross-reference notice of proposed rulemaking published elsewhere in this 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 business.

Drafting Information

The principal authors of these regulations are John H. Seibert and Paul J. Carlino, Office of Associate Chief Counsel (International). However, other personnel from the IRS and 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 1.367(a)–2T is amended by adding paragraph (e) to read as follows:

§1.367(a)–2T Exception for transfers of property for use in the active conduct of a trade or business (temporary).

* * * * *

(e) *Special rules for certain transfers occurring on or after May 2, 2006*—(1) *General rule*. Whether a trade or business that produces rents or royalties is actively conducted shall be determined under the principles of section 954(c)(2)(A) and the accompanying regulations (but without regard to whether the rents or royalties are received from an unrelated party). See §1.954–2(c) and (d).

(2) *Effective/applicability date*. The rules of this paragraph (e) apply to transfers occurring on or after May 2, 2006. However, if the transferor makes the election to apply the provisions of §1.367(a)–4T(c)(3)(i) for transfers occurring on or after October 22, 2004, then paragraph (e)(1) will also be applicable for the transfers occurring on or after October 22, 2004.

(3) *Expiration date*. The applicability of this paragraph (e) will expire on July 1, 2011.

Par. 3. Section 1.367(a)–4T is amended by adding paragraphs (c)(3) and (i) to read as follows:

§1.367(a)–4T Special rules applicable to specified transfers of property (temporary).

* * * * *

(c) * * *

(3) *Aircraft and vessels leased in foreign commerce*—(i) *In general*. For the purposes of satisfying paragraph (c)(1) of this section, aircraft or vessels, including component parts such as engines leased separately from aircraft or vessels, transferred to a foreign corporation and leased to other persons by the foreign corporation shall be considered to be transferred for use in the active conduct of a trade or business if—

(A) The employees of the foreign corporation perform substantial managerial and operational activities of leasing aircraft or vessels outside the United States; and

(B) The leased tangible personal property is predominantly used outside the United States, as determined under §1.954–2T(c)(2)(v).

* * * * *

(i) *Effective/applicability date*. (1) The rules of paragraph (c)(3) of this section apply for transfers of property occurring on or after May 2, 2006. Transferors may elect to apply these provisions to transfers occurring on or after October 22, 2004, by citing the provisions of paragraph (c)(3) of this section in the documentation for such transfers required by §1.6038B–1T(c)(4)(i) and (iv).

(2) *Expiration date*. The applicability of paragraph (c)(3) of this section will expire on July 1, 2011.

Par. 4. Section §1.367(a)–5T is amended by adding paragraph (f)(3) to read as follows:

§1.367(a)–5T Property subject to section 367(a)(1) regardless of use in a trade or business (temporary).

* * * * *

(f) * * *

(3)(i) With respect to vessels and aircraft, including their component parts, that will be leased by the transferee to third persons, the transferee satisfies the conditions set forth in §1.367(a)–4T(c).

(ii) *Effective/applicability date*. The rules of this paragraph (f)(3) apply for transfers of property occurring on or after May 2, 2006. If the transferor makes the election to apply the provisions of §1.367(a)–4T(c)(3) to transfers occurring on or after October 22, 2004, then paragraph (f)(3)(i) of this section will also be applicable for the transfers affected by that election.

(iii) *Expiration date*. The applicability of this paragraph (f)(3) will expire on July 1, 2011.

Par. 5. Section 1.954–2 is amended as follows:

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

2. Paragraphs (c)(2)(v), (c)(2)(vi), (c)(2)(vii) and (c)(3) *Example 6, and (i)* are added. The revision and additions read as follows:

§1.954–2 Foreign personal holding company income.

* * * * *

(c) * * *

(2) * * *

(ii) [Reserved]. For further guidance, see §1.954–2T(c)(2)(ii).

* * * * *

(v) [Reserved]. For further guidance, see §1.954–2T(c)(2)(v).

(vi) [Reserved]. For further guidance, see §1.954–2T(c)(2)(vi).

(vii) [Reserved]. For further guidance, see §1.954–2T(c)(2)(vii).

(3) * * *

Example 6. [Reserved]. For further guidance, see §1.954–2T(c)(3) *Example 6*.

* * * * *

(i) [Reserved]. For further guidance, see §1.954–2T(i).

Par. 6. Section 1.954–2T is added to read as follows:

§1.954–2T Foreign personal holding company income (temporary).

(a) through (c)(2)(i) [Reserved]. For further guidance, see §1.954–2(a) through (c)(2)(i).

(ii) *Substantiality of foreign organization*. For purposes of paragraph (c)(1)(iv) of this section, whether an organization in a foreign country is substantial in relation to the amount of rents is determined based on all facts and circumstances. However, such an organization will be considered substantial in relation to the amount of rents if active leasing expenses, as defined in paragraph (c)(2)(iii) of this section, equal or exceed 25 percent of the adjusted leasing profit, as defined in paragraph (c)(2)(iv) of this section. In addition, for purposes of aircraft or vessels leased in foreign commerce, an organization will be considered substantial if active leasing expenses, as defined in paragraph (c)(2)(iii) of this section, equal or exceed 10 percent of the adjusted leasing profit, as defined in paragraph (c)(2)(iv) of this section. For purposes of paragraphs (c)(1)(iv) and (c)(2) of this section and §1.956–2T(b)(1)(vi), the term *aircraft or vessels* includes component parts, such as engines that are leased separately from an aircraft or vessel.

(c)(2)(iii) through (c)(2)(iv) [Reserved]. For further guidance, see §1.954–2(c)(2)(iii) through (c)(2)(iv).

(v) *Leased in foreign commerce*. For purposes of paragraph (c)(1)(iv) and (2)(ii) of this section, an aircraft or vessel is considered to be leased in foreign commerce if the aircraft or vessel is used in foreign commerce and is used predominately outside the United States. For purposes of this paragraph (c)(2)(v), an aircraft or vessel is considered to be leased in foreign commerce if used for the transportation of property or passengers between a port (or airport) in the United States and one in a foreign country or between foreign ports (or airports) provided the aircraft or vessel is used predominantly outside the United States. An aircraft or vessel will be considered to be used predominantly outside the United States if more than 50 percent of the miles traversed during the taxable year in the use of such property are traversed outside the United States or if the aircraft or vessel is located outside the United States more than 50 percent of the time during the taxable year.

(vi) *Leases acquired by the CFC lessor*. Except as provided in this paragraph (c)(2)(vi), the exception in paragraph (c)(1)(iv) of this section will also apply to rents from leases acquired from any person, if following the acquisition the lessor performs active and substantial management, operational, and remarketing functions with respect to the leased property. However, if any person is claiming a benefit with respect to an acquired lease pursuant to sections 921 or 114 of the Internal Revenue Code or section 101(d) of the American Jobs Creation Act of 2004, Public Law No. 108–357 (118 Stat. 1418) (2004), the rents from such lease, notwithstanding §1.954–2(b)(6), (2)(c) and the remainder of this section, are ineligible for the exception in section 954(c)(2)(A).

(vii) *Finance leases.* Paragraph (c)(1)(iv) of this section can apply to a lessor engaged in the marketing of leases that are treated as finance leases for financial accounting purposes but are treated as leases for Federal income tax purposes.

(3) *Examples 1* through *5* [Reserved]. For further guidance, see §1.954–2(c)(3) *Examples 1* through *5*.

Example 6. The facts are the same as in *Example 2*, except that controlled foreign corporation D purchases aircraft which it leases to others. If Corporation D incurs active leasing expenses, as defined in paragraph (c)(2)(iii) of this section, equal to or in excess of 10 percent of its adjusted leasing profit, as defined in paragraph (c)(2)(iv) of this section, the rental income of Corporation D from its leases with the unrelated foreign corporations is substantial and will be considered as derived in the active conduct of a trade or business for purposes of section 954(c)(2)(A). If a particular aircraft subject to lease was not used by the lessee corporation in foreign commerce, for example, because 50 percent or less of the miles during the taxable year were traversed outside the United States and the aircraft was located in the United States for 50 percent or more of the taxable year, Corporation D is not prevented from otherwise showing that it actively carries on a trade or business with regard to the rents derived from that aircraft, for example, based on its facts and circumstances, or as within the meaning of paragraph (c)(1)(i) or (iii) of this section.

(d) through (h) [Reserved]. For further guidance, see §1.954–2(d) through (h).

(i)(1) *Effective/applicability date*. Paragraph (c) of this section applies to taxable years of controlled foreign corporations beginning on or after May 2, 2006, and for tax years of United States shareholders with or within which such tax years of the controlled foreign corporations ends. Taxpayers may elect to apply paragraph (c) of this section to taxable years of controlled foreign corporations beginning after December 31, 2004, and for tax years of United States shareholders with or within which such tax years of the controlled foreign corporations end. If an election is made to apply paragraph (b)(1)(vi) of this section to taxable years beginning after December 31, 2004, then the election must also be made for paragraph (c) of this section.

(2) *Expiration date*. The applicability of §1.954–2T(c) will expire on July 1, 2011.

Par. 7. Section 1.956–2 is amended as follows:

1. Paragraph (b)(1)(vi) is revised.

2. Paragraph (e) is added.

The revisions and addition read as follows:

§1.956–2 Definition of United States property.

* * * * *

(b) * * *

(1) * * *

(vi) [Reserved]. For further guidance, see §1.956–2T(b)(1)(vi).

* * * * *

(e) [Reserved]. For further guidance, see §1.956–2T(e).

Par. 8. Section 1.956–2T is amended as follows:

1. Paragraphs (a), (b), (b)(1)(i), (b)(1)(ii), (b)(1)(iii), (b)(1)(iv), (b)(1)(v), (b)(i)(vi), (c), (d) and (d)(1) are added.

2. Paragraph (e) is added.

The revisions and addition read as follows:

§1.956–2T Definition of United States property (temporary).

(a) through (b)(1)(v) [Reserved]. For further guidance, see §1.956–2(a) through (b)(1)(v).

(vi) Any aircraft, railroad rolling stock, vessel, motor vehicle, or container used in the transportation of persons or property in foreign commerce and used predominantly outside the United States. Whether transportation property described in this subdivision is used in foreign commerce and predominantly outside the United States is to be determined from all the facts and circumstances of each case. As a general rule, such transportation property will be considered to be used predominantly outside the United States if 70 percent or more of the miles traversed (during the taxable year at the close of which a determination is made under section 956(a)(2)) in the use of such property are traversed outside the United States or if such property is located outside the United States 70 percent of the time during such taxable year. Notwithstanding the above, an aircraft or vessel (as the term is defined in §1.954–2T(c)(2)(ii)) is excluded from U.S. property if rents derived from leasing such aircraft or vessel are excluded from foreign personal holding company income under section 954(c)(2)(A). See paragraph (e) of this section for the effective/applicability dates of this paragraph (b)(1)(vi).

(c) through (d)(1) [Reserved]. For further guidance, see §1.956–2(b)(1)(vii) through (d)(1).

* * * * *

(e) *Effective/applicability date*. Paragraph (b)(1)(vi) of this section applies to taxable years of controlled foreign corporations beginning on or after May 2, 2006, and for tax years of United States shareholders with or within which such tax years of the controlled foreign corporations end. Taxpayers may elect to apply the rule of this section to taxable years of controlled foreign corporations beginning after December 31, 2004, and for tax years of United States shareholders with or within which such tax years of foreign corporations end. If an election is made to apply §1.954–2T(c) to taxable years of a controlled foreign corporation beginning after December 31, 2004, then the election must also be made for paragraph (b)(1)(vi) of this section.

(2) *Expiration date*. The applicability of paragraph (b)(1)(vi) of this section will expire on July 1, 2011.

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

Approved June 23, 2008.

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

(Filed by the Office of the Federal Register on July 2, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 3, 2008, 73 F.R. 38113)

Section 2032A.—Valuation of Certain Farm, etc., Real Property

26 CFR 20.2032A–4: Method of valuing farm real property.

Special use value; farms; interest rates. The 2008 interest rates to be used in computing the special use value of farm real property for which an election is made under section 2032A of the Code are listed for estates of decedents.

Rev. Rul. 2008–44

This revenue ruling contains a list of the average annual effective interest rates on new loans under the Farm Credit System. This revenue ruling also contains a list of the states within each Farm Credit System Bank Chartered Territory.

Under § 2032A(e)(7)(A)(ii) of the Internal Revenue Code, rates on new Farm Credit System Bank loans are used in computing the special use value of real property used as a farm for which an election is made under § 2032A. The rates in this revenue ruling may be used by estates that value farmland under § 2032A as of a date in 2008.

Average annual effective interest rates, calculated in accordance with § 2032A(e)(7)(A) and § 20.2032A–4(e) of the Estate Tax Regulations, to be used under § 2032A(e)(7)(A)(ii), are set forth in the accompanying Table of Interest Rates (Table 1). The states within each Farm Credit System Bank Chartered Territory are set forth in the accompanying Table of Farm Credit System Bank Chartered Territories (Table 2).

Rev. Rul. 81–170, 1981–1 C.B. 454, contains an illustrative computation of an average annual effective interest rate. The rates applicable for valuation in 2007 are in Rev. Rul. 2007–45, 2007–28 I.R.B. 49. For rate information for years prior to 2007, see Rev. Rul. 2006–32, 2006–1 C.B. 1170, and other revenue rulings that are referenced therein.

DRAFTING INFORMATION

The principal author of this revenue ruling is Lane Damazo of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue ruling, contact Lane Damazo at (202) 622–3090 (not a toll-free call).

REV. RUL. 2008–44 TABLE 1

TABLE OF INTEREST RATES
(Year of Valuation 2008)

Farm Credit System Bank Servicing State in Which Property is Located	Rate
AgFirst, FCB	7.56
AgriBank, FCB	6.38
CoBank, ACB	6.11
Texas, FCB	6.47
U.S. AgBank, FCB	6.09

REV. RUL. 2008–44 TABLE 2

TABLE OF FARM CREDIT SYSTEM BANK CHARTERED TERRITORIES

Farm Credit System Bank	Location of Property
AgFirst, FCB	Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, Pennsylvania, South Carolina, Virginia, West Virginia.
AgriBank, FCB	Arkansas, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, Wisconsin, Wyoming.
CoBank, ACB	Alaska, Connecticut, Idaho, Maine, Massachusetts, Montana, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington.
Texas, FCB	Alabama, Louisiana, Mississippi, Texas.
U.S. Agbank, FCB	Arizona, California, Colorado, Hawaii, Kansas, New Mexico, Nevada, Oklahoma, Utah.

Section 6205.—Special Rules Applicable to Certain Employment Taxes

26 CFR 31.6205–1: Adjustments of underpayments.

T.D. 9405

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Parts 31 and 602

Employment Tax Adjustments

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to employment tax adjustments and employment tax refund claims. The final regulations modify the process for making interest-free adjustments for both underpayments and overpayments of Federal Insurance Contributions Act (FICA) and Railroad Retirement Tax Act (RRTA) taxes and Federal income tax withholding (ITW) under sections 6205(a) and 6413(a), respectively, of the Internal Revenue Code (Code). These regulations also modify the process for filing claims for refund of overpayments of employment taxes under sections 6402 and 6414.

This document contains final regulations relating to the return requirements under section 6011 to reflect the changes to the adjustment and refund processes, and to reflect additional statutory and process updates. This document also contains final regulations under section 6302 to clarify deposit obligations with respect to interest-free adjustments of underpayments and the effect of adjustments and refunds on the deposit schedule of a Form 943 filer.

DATES: *Effective Date:* These final regulations are effective on January 1, 2009.

Applicability Date: With respect to the regulations under Code sections 6205, 6402, 6413, and 6414, these final regulations apply to any error ascertained on or after January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Ligeia M. Donis, (202) 622-0047 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–2097. The collection of information in these proposed regulations is in §§31.6011(a)–1, 31.6011(a)–4, 31.6011(a)–5, 31.6205–1, 31.6402(a)–2, 31.6413(a)–1, 31.6413(a)–2, and 31.6414–1. This information is required by the IRS to verify compliance with return requirements under section 6011, employment tax adjustments under sections 6205 and 6413, and claims for refund of overpayments of employment taxes under sections 6402 and 6414. This information will be used to determine whether the amount of tax has been reported and calculated correctly.

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

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

Background

These final regulations are issued in connection with the IRS's development of new forms to report adjustments to employment taxes which will replace the existing process of reporting adjustments of employment taxes on regularly filed employment tax returns. These regulations affect taxpayers that file employment tax returns, including Form 941, "*Employer's QUARTERLY Federal Tax Return*," Form 943, "*Employer's Annual Federal Tax Return for Agricultural Employees*," Form 944, "*Employer's ANNUAL Federal Tax Return*," Form 945, "*Annual Return of Withheld Federal Income Tax*," and Form CT–1, "*Employer's Annual Railroad Retirement Tax Return*," and any related Spanish-language returns or returns for U.S. possessions.

These final regulations are part of the IRS's effort to reduce taxpayer burden by permitting employers to make employment tax adjustments on a separately filed form as soon as an error is ascertained. These regulations amend the Employment Tax Regulations (26 CFR part 31) under section 6011 relating to the requirement to file a return, under sections 6205(a) and 6413(a) relating to the process for making adjustments of underpayments and overpayments, respectively, of employment taxes, under section 6302 relating to deposit obligations, and under sections 6402 and 6414 relating to the process of filing a claim for refund for an overpayment of employment taxes. For purposes of these regulations, the term *employment taxes* means the Federal Insurance Contributions Act (FICA) tax (both the social security and Medicare portions) imposed on both the employer and the employee, the Railroad Retirement Tax Act (RRTA) tax imposed on both the employer and employee, and Federal income tax withholding (ITW). To the extent that other types of withholding are treated as ITW under section 3402(a) (that is, gambling withholding, pension withholding, and backup withholding as set forth in sections 3402(q)(7), 3405(f), and 3406(h)(10), respectively), these other types of withholding are included in the term employment taxes.

Interest-free Adjustments

Generally, the Code requires that interest be paid to the IRS on any underpayment of tax and that interest be allowed and paid to the taxpayer on any overpayment of tax. See sections 6601(a) and 6611(a), respectively. An exception to the general rule, however, applies uniquely to employment taxes. Where an amount other than the correct amount of tax imposed by sections 3101 (employee FICA tax), 3111 (employer FICA tax), 3201 (employee RRTA tax), 3221 (employer RRTA tax), or 3402 (ITW) is reported to the IRS with respect to any payment of wages or compensation, sections 6205(a) and 6413(a) permit employers to make interest-free adjustments for underpayments and overpayments, respectively. Where the correct amount of tax has been reported but not paid, no adjustment to the amount reported is necessary; accordingly, the interest-free adjustment rules do not apply.

Claims for Refund

For overpayments of employment taxes, section 6413(b) permits the filing of a claim for refund when an interest-free adjustment cannot be made. Under the regulatory authority in section 6413(b), the IRS has permitted taxpayers to choose between filing a claim for refund pursuant to section 6402(a) and making an interest-free adjustment pursuant to section 6413(a) to correct an overpayment of employment taxes.

Under section 6402(a), the IRS, within the applicable period of limitations on credit or refund, may credit the amount of an overpayment, including any interest, against any tax liability of the person who made the overpayment and shall, subject to certain offsets, refund any balance to such person. A claim for refund under section 6402(a) must be filed within the period of limitations on credit or refund. Section 6414 permits refunds of ITW only to the extent the amount of the ITW overpayment was not actually deducted and withheld from an employee.

Since 1960, the regulations under sections 6205 and 6413 have provided that employment tax adjustments are made by reporting the adjustment on an employer's current period employment tax return. Because the adjustment was reported on a current period return, the amount of the adjustment was treated as part of the current period's liability. Such a process for making adjustments of employment taxes presented a number of problems for both employers and the IRS, in large part because it required employers to make adjustments for past periods in connection with the filing of their current period returns.

The IRS, as part of the Form 94X Project initiated by the Office of Taxpayer Burden Reduction and in response to the request of employers and the payroll community, is developing new forms to be used when making adjustments of employment taxes. The new forms will reduce the employer's burden in making and tracking adjustments and increase the IRS's ability to ensure employment tax compliance. The IRS is simultaneously revising the process for claiming refunds. These final regulations are issued in connection with

the IRS's development of such new forms which will be used by employers to make overpayment and underpayment adjustments to employment taxes or to claim refunds of overpaid employment taxes.

A notice of proposed rulemaking (REG–111583–07, 2008–4 I.R.B. 319 [72 FR 74233]) was published in the **Federal Register** on December 31, 2007. A correction to the notice of proposed rulemaking was published in the **Federal Register** on January 28, 2008 (73 FR 4765). No requests for a public hearing were received, therefore, no public hearing was held. The IRS received written and electronic comments responding to the notice of proposed rulemaking, but none of them requested substantive changes to the proposed regulations. The proposed regulations are adopted as amended by this Treasury decision. The revisions are discussed.

Summary of Comments and Explanation of Provisions

Several positive comments were received on the proposed regulations. No substantive changes to the regulations were requested. Several commentators suggested changes for the draft form, Form 941X, "*Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund*," which was released to the public on the IRS website (*www.irs.gov*) on March 4, 2008, as a vision draft for comment. The Form 941X is the first of a series of forms being developed by the IRS in conjunction with these regulations. The series of forms will correspond to Form 941, Form 943, Form 944, Form 945, and Form CT–1 and will be used by employers when making adjustments of employment taxes or claiming refunds of employment taxes. The comments on the draft Form 941X will be taken into account in preparing the final version of the form.

As the IRS has continued to prepare for the implementation of the new adjustment and refund claim processes for employment taxes, some necessary changes to the proposed regulations were identified and incorporated into these final regulations. These changes to the proposed regulations are discussed below.

Overview of Final Regulations Under Sections 6205 and 6413

The final regulations under sections 6205 and 6413 set forth the procedures for making interest-free adjustments for underpayments and overpayments of employment taxes, respectively. Like the proposed regulations, the final regulations under sections 6205 and 6413 have been drafted to set up parallel structures according to the type of tax being adjusted and when the error is ascertained. Accordingly, the final regulations under sections 6205 and 6413 are divided into provisions dealing with FICA and RRTA taxes and provisions dealing with ITW. The provisions are further broken down based on when the error is ascertained, that is, whether the error is ascertained before or after a return has been filed.

Interest-free Adjustments

The final regulations under section 6205 set forth the procedures for making interest-free adjustments for underpayments of employment taxes. They provide that if a return is filed and less than the correct amount of employee or employer portions of FICA or RRTA tax is reported, and the employer discovers such error after filing the return, the employer shall adjust the resulting underpayment of tax by reporting the additional amount due on an adjusted return for the return period in which the wages or compensation was paid. The adjustment must be made by the due date of the return for the return period in which the error is ascertained and the amount of the underpayment must be paid by the time the adjustment is made, or interest will begin to accrue from that date. An underpayment adjustment may only be made within the period of limitations for assessment. For underpayments of ITW where the incorrect amount was withheld, subject to limited exceptions, an adjustment may be made only for errors ascertained during the calendar year in which the wages were paid.

Under the final regulations interest-free adjustments for underpayments of FICA tax, RRTA tax, and ITW are available under certain circumstances where the underpayment arises because the employer failed to file an original return or failed to report and pay the correct type of tax. The final regulations revise the processes set forth in the proposed regulations to accommodate the various possibilities of errors in these situations and to ensure the IRS can process the adjustments.

Specifically, under the final regulations, if an employer filed a return reporting FICA tax when a return reporting RRTA tax should have been filed, the employer can make an interest-free adjustment by filing an original return reporting the correct amount of RRTA tax and attaching an adjusted return to correct the erroneously reported FICA tax. Conversely, if an employer filed a return reporting RRTA tax when a return reporting FICA tax should have been filed, the employer can make an interest-free adjustment by filing an original return reporting the correct amount of FICA tax and attaching an adjusted return to correct the erroneously reported RRTA tax. In the latter situation, if the employer already filed a return that is used to report FICA tax in order to report ITW, the employer can make an interest-free adjustment by filing an adjusted return to report the correct amount of FICA tax with an adjusted return to correct the erroneously reported RRTA tax. The final regulations also add a cross-reference to the regulations under section 3503 which provide that if an amount is paid under the wrong chapter, that is, an employer erroneously pays FICA tax under chapter 21 instead of RRTA tax under chapter 22, or RRTA tax instead of FICA tax, the amount erroneously paid shall be credited against the tax for which the employer is liable and any balance refunded.

In addition, the final regulations provide the process by which an employer can make an interest-free adjustment if the employer failed to file a return for a return period solely because the employer failed to treat any individuals as employees. The employer can make an interest-free adjustment to report the tax due with respect to the reclassified workers by filing an original return and an attached adjusted return reporting the correct amount of tax, in accordance with the instructions for the adjusted return.

Generally, such reporting will constitute an interest-free adjustment in each of these situations if the original return and/or adjusted return(s) are filed by the due date of the correct return for the return period in which the error is ascertained. The amount

reported must be paid by the time the original return and/or adjusted return(s) are filed or interest will accrue from that date.

The final regulations under section 6413(a) set forth the procedures for making interest-free adjustments for overpayments of employment taxes. They provide that, if an employer ascertains an overpayment error within the applicable period of limitations on credit or refund, the employer is required to repay or reimburse its employees the amount of overcollected employee FICA tax or employee RRTA tax prior to the expiration of the applicable period of limitations on credit or refund. However, the requirement to repay or reimburse does not apply to the extent that taxes were not withheld from the employee or if, after reasonable efforts, the employer cannot locate the employee; in such case, the employer may make an adjustment for only the employer share of FICA or RRTA tax. An interest-free adjustment for an overpayment may not be made once a claim for refund has been filed.

The final regulations under section 6413(a) further provide that once an employer repays or reimburses an employee to the extent required, the employer may report both the employee and employer portions of FICA or RRTA tax as an overpayment on an adjusted return. The employer must certify on the adjusted return that it has repaid or reimbursed its employees to the extent required.

Under the final regulations, the reporting of the overpayment constitutes an interest-free adjustment if the overpayment is reported on an adjusted return filed before the 90th day prior to expiration of the period of limitations on credit or refund. Similar rules apply for making interest-free adjustments for overpayments of ITW, except that an interest-free adjustment may only be made if the employer ascertains the error and repays or reimburses its employees within the same calendar year that the wages were paid and reports the adjustment on an adjusted return.

Unlike the proposed regulations, the final regulations do not require the employer to repay or reimburse the employee or to adjust the overpayment by the due date of the return for the return period following the return period in which the error is ascertained. Upon further consideration, the IRS determined there was insufficient reason to impose a timing restriction other than the period of limitations on credit or refund of taxes.

For both underpayments and overpayments, interest-free adjustments are made by reporting the error on a separately filed adjusted return. The new adjusted return will not be filed as an attachment to a current return and will not affect the liability reported on the current return. In addition, the regulations provide that the forms used to accept an assessment of employment taxes after an examination (that is, Form 2504, "*Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Excise or Employment Tax)*", and Form 2504–WC, "*Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment in Worker Classification Cases (Employment Tax)*") constitute adjusted returns for purposes of permitting the assessment to be treated as an interest-free adjustment.

The IRS intends to issue guidance to provide examples of how the final regulations under sections 6205, 6402, 6413, and 6414 apply in different factual scenarios.

Deposits, Payments, and Credits

The final regulations under section 6302 provide that an employer making an interest-free adjustment must pay the amount of the adjustment by the time it files an adjusted return; such timely payment will satisfy the employer's deposit obligations with respect to the adjustment. Conversely, if the amount of the adjustment is not paid by the time the adjusted return is filed, a penalty under section 6656 for failure to deposit may apply because the deposit obligation for such taxes is not deemed to be satisfied and the employer may not have otherwise satisfied its deposit obligations for accumulated employment taxes.

In addition, the final regulations governing agricultural employers (Form 943 filers) provide that for purposes of determining the amount of accumulated taxes in the employer's lookback period (which determines the employer's deposit schedule), adjustments to tax liability made pursuant to the filing of adjusted returns or claims for refund will not be taken into account. This rule is consistent with the rule already in effect with respect to Form 941 and Form 944 filers that adjustments to prior return periods are not taken into account in determining the employment tax liability for such prior return period. See §31.6302–1T(b)(4). The final regulations also added language to clarify that new agricultural employers are treated as having employment tax liabilities of zero for any lookback period before the date the employer started or acquired its business, which is consistent with the current rule governing the lookback period for Form 941 and Form 944 filers.

The adjusted overpayment amount will be applied as a credit toward payment of the employer's liability for the calendar quarter (or calendar year for annual returns being adjusted) in which the adjusted return is filed, unless the IRS notifies the employer that the employer is not entitled to the adjustment (that is, because there is no overpayment or because the requirements for making an adjustment were not satisfied) or that the credit will be applied to a different return period.

Refunds for Overpayments

In lieu of making an interest-free adjustment for an overpayment, employers may file a claim for refund pursuant to section 6402 or 6414 for the amount of the overpayment. Furthermore, if an employer cannot make an interest-free adjustment with respect to an overpayment because the period of limitations for claiming a credit or refund for such overpayment will expire within 90 days or because the IRS has otherwise notified the employer that it is not entitled to the adjustment, the employer may recover the overpayment only by filing a claim for refund.

The final regulations under section 6402(a) set out the procedures for filing a claim for refund of overpaid FICA and RRTA taxes. The regulations permit an employer to file a claim for refund of an overpayment of FICA or RRTA tax, but require the employer to certify as part of the claim process that the employer has repaid or reimbursed the employee's share of FICA or RRTA tax to the employee or has secured the written consent of the employee to allowance of the refund or credit. However, the employer is not required to repay or reimburse the employee or obtain the written consent of the employee to the extent that the overpayment does not include taxes withheld from the

employee or, after reasonable efforts, the employer cannot locate the employee or the employee, once contacted, will not provide the requested consent.

The final regulations under section 6414 set out the procedures for filing a claim for refund of overpaid ITW which are similar to the procedures for filing a claim for refund of overpaid FICA or RRTA tax, except that an employer may not file a claim for refund of an overpayment of ITW for an amount the employer deducted or withheld from an employee.

Tax Returns or Statements

The final regulations for reporting employment taxes under section 6011 reflect the changes to the adjustment and refund processes. The final regulations are updated to conform to current law due to the enactment of section 3510, added to the Code by section 2(b)(1) of the Social Security Domestic Employment Reform Act of 1994 (Public Law 103–387), which mandates annual returns for domestic service employment taxes, and to reflect the current use of Schedule H (Form 1040) as the generally prescribed form for reporting wages for domestic service in a private home paid in calendar years beginning after December 31, 1994.

Special Analyses

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

In accordance with the Regulatory Flexibility Act (5 U.S.C. chapter 6), this regulation will not have a significant economic impact on a substantial number of small entities.

The final regulations under sections 6011, 6205, 6402, 6413, and 6414 affect all taxpayers that file employment tax returns. Therefore, the IRS has determined that these regulations will have an impact on a substantial number of small entities.

The IRS has determined, however, that the impact on entities affected by the final regulations will not be significant. The regulations require taxpayers to provide certain information if they file adjusted returns to make interest-free adjustments to their employment taxes for either underpayments or overpayments or file claims for refund for an overpayment of employment tax. The taxpayer must provide an explanation setting forth the basis for the correction or the claim in detail, designating the return period in which the error was ascertained and the return period being corrected, and setting forth such other information as may be required by the instructions to the form. In addition, for adjustments of overpayments and for claims for refund, taxpayers must also obtain and retain the written receipt of the employee showing the date and amount of the repayment, evidence of reimbursement, or the written consent of the employee. For purposes of overpayment adjustments and claims for refund of employee FICA and RRTA tax overcollected in an earlier year, the employer must also obtain and retain the employee's written statement that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and that the employee will not claim refund or credit of the amount.

This collection of information is not new to the final regulations and has been in existence since the 1960's when the previous regulations were promulgated. In addition, the amendments to the regulations are being made in conjunction with a project of the Office of Taxpayer Burden Reduction which seeks to revise the process for making corrections to employment tax returns to make it less burdensome to taxpayers. The filing of a claim for refund and the making of an interest-free adjustment pursuant to the final regulations are voluntary on the part of taxpayers.

Based on these facts, the IRS hereby certifies that the collection of information contained in these regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

Pursuant to section 7805(f) of the Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

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

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 31 and 602 are amended as follows:

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

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

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

Par. 2. Section 31.6011(a)–1 is amended by revising the text of paragraphs (a)(2), (a)(3), and the section heading and text of paragraphs (a)(4) and (c) to read as follows:

§31.6011(a)–1 Returns under Federal Insurance Contributions Act.

(a) * * *

(2) *Employers of agricultural workers.* Every employer who pays wages for agricultural labor with respect to taxes imposed by the Federal Insurance Contributions Act must make a return for the first calendar year in which the employer pays such wages and for each subsequent calendar year (whether or not wages are paid) until the employer has filed a final return in accordance with §31.6011(a)–6. Form 943, "*Employer's Annual Federal Tax Return for Agricultural Employees*," is the form prescribed for making the annual return required by this section, except that, if the employer's principal place of business is in Puerto Rico, or if the employer has employees who are subject to income tax withholding for Puerto Rico, the return must be made on Form 943–PR, *"Planilla para la Declaración ANUAL de la Contribución Federal del Patrono de Empleados Agrícolas*." However, Form 943 is the form prescribed for making such return

in the case of every employer of agricultural workers who is required pursuant to §31.6011(a)–4 to make a return of income tax withheld from wages.

(3) *Employers of domestic workers*. Schedule H (Form 1040), "*Household Employment Taxes*," is the form prescribed for use by every employer in making a return as required under paragraph (a)(1) of this section in respect of wages, as defined in the Federal Insurance Contributions Act, paid by the employer in any calendar year for domestic service as defined in section 3510. Schedule H (Form 1040) is generally filed as an attachment to an income tax return; however, if the employer does not otherwise have an obligation to file an income tax return, Schedule H (Form 1040) may be filed as a separate return. If, however, the employer is required under paragraph (a)(1) of this section to make a return on Form 941, "*Employer's QUARTERLY Federal Tax Return*," or under paragraph (a)(2) of this section to make a return on Form 943, "*Employer's Annual Federal Tax Return for Agricultural Employees*," or under paragraph (a)(5) of this section to make a return on Form 944, "*Employer's ANNUAL Federal Tax Return*," the employer may choose instead to report wages with respect to domestic workers on such Form 941, Form 943, or Form 944. If such wages are included on Form 941, Form 943, or Form 944, the employer must also include Federal unemployment tax for the employee(s) on Form 940, "*Employer's Annual Federal Unemployment (FUTA) Tax Return*," under the provisions of §31.6011(a)–3.

(4) *Employers in Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands.* Form 941–PR, "*Planilla para la Declaración Federal TRIMESTRAL del Patrono*," (or Form 944–PR, "*Planilla para la Declaración Federal ANUAL del Patrono*," if the IRS notified the employer that the Form 944–PR must be filed in lieu of Form 941–PR) is the form prescribed for use in making the return required under paragraph (a)(1) (or (a)(5)) of this section in the case of every employer whose principal place of business is in Puerto Rico, or if the employer has employees who are subject to income tax withholding for Puerto Rico. Form 941–SS, "*Employer's QUARTERLY Federal Tax Return (American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands)*," (or Form 944–SS, "*Employer's ANNUAL Federal Tax Return (American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands)*," if the IRS notified the employer that Form 944–SS must be filed in lieu of Form 941–SS) is the form prescribed for use in making the return required under paragraph (a)(1) (or (a)(5)) of this section in the case of every employer whose principal place of business is in the U.S. Virgin Islands, Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands, or if the employer has employees who are subject to income tax withholding for these U.S. possessions. However, Form 941 (or Form 944 if the IRS notified the employer that Form 944 must be filed in lieu of Form 941) is the form prescribed for making such return in the case of every such employer who is required pursuant to §31.6011(a)–4 to make a return of income tax withheld from wages.

* * * * *

(c) *Adjustments and refunds*. For rules applicable to adjustments and refunds of employment taxes, see sections 6205, 6402, 6413, and 6414, and the applicable regulations.

* * * * *

Par. 3. Section 31.6011(a)–4 is amended by revising paragraph (a)(2) to read as follows:

§31.6011(a)–4 Returns of income tax withheld.

(a) * * *

(2) *Wages paid for domestic service*. Schedule H (Form 1040), "*Household Employment Taxes*," is the form prescribed for making the return required under paragraph (a)(1) of this section with respect to income tax withheld, pursuant to an agreement under section 3402(p), from wages paid for domestic service as defined in section 3510. Schedule H (Form 1040) is generally filed as an attachment to an income tax return; however, if the employer does not otherwise have an obligation to file an income tax return, Schedule H (Form 1040) may be filed as a separate return. The preceding sentence shall not apply in the case of an employer who has chosen under §31.6011(a)–1(a)(3) to use Form 941, "*Employer's QUARTERLY Federal Tax Return*," Form 943, "*Employer's Annual Tax Return for Agricultural Employees*," or Form 944, "*Employer's ANNUAL Federal Tax Return*," as the return with respect to such payments for purposes of the Federal Insurance Contributions Act. For the requirements relating for Schedule H (Form 1040) with respect to qualified State individual income taxes, see §301.6361–1(d)(3)(iv).

* * * * *

Par. 4. Section 31.6011(a)–5 is amended by revising paragraph (a) to read as follows:

§31.6011(a)–5 Monthly returns.

(a) *In general*—(1) *Requirement*. The provisions of this section are applicable in respect of the taxes reportable on returns required pursuant to §31.6011(a)–1 or §31.6011(a)–4. An employer (or other person) who is required by §31.6011(a)–1 or §31.6011(a)–4 to make quarterly or annual returns on any such form shall, in lieu of making such quarterly or annual returns, make returns of such taxes in accordance with the provisions of this section if the employer is so notified in writing by the IRS. Every employer (or other person) notified by the IRS shall make a return for the calendar month in which the notice is received, for each of the prior calendar months in the return period, and for each calendar month afterwards (whether or not wages are paid in any such month) until the employer has filed a final return or is required to make quarterly or annual returns pursuant to notification as provided in paragraph (a)(2) of this section. Each return required under this section shall be made on the form prescribed for making the return which would otherwise be required of the employer (or other person) under the provisions of §31.6011(a)–1 or §31.6011(a)–4, except that, if some other form is furnished by the IRS for use in lieu of such prescribed form, the return shall be made on such other prescribed form. The IRS may notify any employer (or other person)—

(i) Who by reason of notification as provided in §301.7512–1, is required to comply with the provisions of such §301.7512–1; or

(ii) Who failed to—

(A) Make any return required pursuant to §31.6011(a)–1 or §31.6011(a)–4;

(B) Pay tax reportable on any such form; or

(C) Deposit any such tax as required under the provisions of §31.6302–1.

(2) *Termination of requirement*. The IRS, in its discretion, may notify the employer in writing that the employer shall discontinue the filing of monthly returns under this section. If the employer is so notified, the IRS will provide the employer with instructions for filing the final monthly return. Afterwards, the employer shall make quarterly or annual returns in accordance with the provisions of §31.6011(a)–1 or §31.6011(a)–4.

* * * * *

Par. 5. Section 31.6205–1 is amended to read as follows:

§31.6205–1 Adjustments of underpayments.

(a) *In general*. (1) An employer who has underreported and underpaid employee Federal Insurance Contributions Act (FICA) tax under section 3101 or employer FICA tax under section 3111, employee Railroad Retirement Tax Act (RRTA) tax under section 3201 or employer RRTA tax under section 3221, or income tax required under section 3402 to be withheld, with respect to any payment of wages or compensation, shall correct such error as provided in this section. Such correction may constitute an interest-free adjustment as provided in paragraph (b) or (c) of this section.

(2) No correction will be eligible for interest-free adjustment treatment if the failure to report relates to an issue that was raised in an examination of a prior return period or if the employer knowingly underreported its employment tax liability.

(3) Every correction under this section of an underpayment of tax with respect to a payment of wages or compensation shall be made on the form prescribed by the IRS that corresponds to the return being corrected. The form, filed in accordance with this section and the instructions, will constitute an adjusted return for the return period being corrected.

(4) Every adjusted return on which an underpayment is corrected pursuant to this section shall designate the return period in which the error was ascertained and the return period being corrected, explain in detail the grounds and facts relied upon to support the correction, and set forth such other information as may be required by the regulations in this section and by the instructions relating to the adjusted return.

(5) For purposes of this section, an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(6) No correction will be eligible for interest-free adjustment treatment pursuant to this section after the earlier of the following:

(i) Receipt from the IRS of notice and demand for payment thereof based upon an assessment.

(ii) Receipt from the IRS of a Notice of Determination of Worker Classification (Notice of Determination) in connection with such underpayment. Prior to receipt of a Notice of Determination, the taxpayer may, in lieu of making a payment, make a cash bond deposit that would have the effect of stopping the accrual of any interest, but would not deprive the taxpayer of its right to receive a Notice of Determination and to petition the Tax Court under section 7436.

(7) Subject to the exceptions specified in paragraphs (a)(2) and (a)(6) of this section, Form 2504, "*Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Excise or Employment Tax)*," Form 2504–WC, "*Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment in Worker Classification Cases (Employment Tax)*," and such other forms as may be prescribed by the IRS, constitute adjusted returns for purposes of this section.

(8) For provisions related to furnishing employee statements and corrected employee statements reporting wages and withheld taxes, see sections 6041 and 6051 and §§1.6041–2 and 31.6051–1. For provisions relating to filing information returns and corrected information returns reporting wages and withheld taxes, see sections 6041 and 6051 and §§1.6041–2 and 31.6051–2.

(9) For the period of limitations upon assessment and collection of taxes, see §301.6501(a)–1.

(b) *Federal Insurance Contributions Act and Railroad Retirement Tax Act*—(1) *Undercollection ascertained before return is filed*. If an employer collects less than the correct amount of employee FICA or RRTA tax from an employee with respect to a payment of wages or compensation, and if the employer ascertains the error before filing the return on which the employee tax with respect to such wages or compensation is required to be reported, the employer shall nevertheless report on the return and pay to the IRS the correct amount of employee tax. If the employer does not report the correct amount of tax in these circumstances, the employer may not later correct the error through an interest-free adjustment.

(2) *Error ascertained after return is filed.* (i) If an employer files a return on which FICA tax or RRTA tax is required to be reported, and reports on the return less than the correct amount of employee or employer FICA or RRTA tax with respect to a payment of wages or compensation, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section. The employer shall adjust the underpayment of tax by reporting the additional amount due on an adjusted return for the return period in which the wages or compensation was paid, accompanied by a detailed explanation of the amount being reported on the adjusted return and any other information as may be required by this section and by the instructions relating to the adjusted return. The reporting of the underpayment on an adjusted return constitutes an adjustment within the meaning of this section only if the adjusted return is filed within the period of limitations for assessment for the return period being corrected, and by the due date for filing the return for the return period in which the error is ascertained. For purposes of the preceding sentence, the due date for filing the adjusted return is determined by reference to the return being corrected, without regard to the employer's current filing requirements. For example, an employer with a current annual filing requirement who is correcting an error on a previously filed quarterly return must file the adjusted return by the due date for filing a quarterly return for the quarter in which the error is ascertained. The amount of the underpayment adjusted in accordance with this section must be paid to the IRS

by the time the adjusted return is filed. If an adjustment is reported pursuant to this section, but the amount of the adjustment is not paid when due, interest accrues from that date (see section 6601).

(ii) If an employer files a return reporting FICA tax for a return period although the employer was required to file a return reporting RRTA tax, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section. The employer shall adjust the underpayment of RRTA tax by reporting the correct amount of RRTA tax on an original return for reporting RRTA tax for the return period for which the incorrect return was filed, accompanied by an adjusted return corresponding to the incorrect return that was filed to correct the erroneously reported and paid FICA tax. The adjusted return must include a detailed explanation of the amounts being reported on the original return and the adjusted return and any other information as may be required by the regulations in this section and by the instructions relating to the adjusted return. The reporting of the correct amounts for the period constitutes an adjustment within the meaning of this section only if the returns are filed by the due date of the return for reporting the RRTA tax for the return period in which the error is ascertained. Pursuant to §31.3503–1, the amount of erroneously paid FICA tax will be credited against the underpaid RRTA tax. Any remaining underpayment of RRTA tax adjusted in accordance with this section must be paid to the IRS by the time the returns are filed in accordance with this paragraph. If an adjustment is reported pursuant to this section, but the amount of the remaining underpayment is not paid when due, interest accrues from that date (see section 6601).

(iii) If an employer files a return reporting RRTA tax for a return period although the employer was required to file a return reporting FICA tax, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section. The employer shall adjust the underpayment of FICA tax by reporting the correct amount of FICA tax on an original return for reporting FICA tax for the return period for which the incorrect return was filed (or an adjusted return for reporting the FICA tax if an original return was already filed for such return period to report the income tax required to be withheld under section 3402), accompanied by an adjusted return corresponding to the incorrect return that was filed to correct the erroneously reported and paid RRTA tax. The adjusted return(s) must include a detailed explanation of the amount being reported on the original return and/or the adjusted return(s) and any other information as may be required by the regulations in this section and by the instructions relating to the form. The reporting of the correct amounts for the period constitutes an adjustment within the meaning of this section only if the returns are filed by the due date of the return for reporting the FICA tax for the return period in which the error is ascertained. Pursuant to §31.3503–1, the amount of erroneously paid RRTA tax will be credited against the underpaid FICA tax. Any remaining underpayment of FICA tax adjusted in accordance with this section must be paid to the IRS by the time the returns are filed in accordance with this paragraph (b)(2)(iii). If an adjustment is reported pursuant to this section, but the amount of the remaining underpayment is not paid when due, interest accrues from that date (see section 6601).

(3) *Return not filed because of failure to treat individual as employee*. If an employer fails to file a return for a return period solely because the employer failed to treat any individuals properly as employees for the return period (and, therefore, failed to withhold and pay any employer or employee FICA or RRTA tax with respect to wages or compensation paid to the employees) and if the employer ascertains the error after the due date of the return, the employer shall correct the error through an interest-free adjustment as provided in this section. The employer shall report the amount due by filing an original return required to be filed to report the tax for the return period for which the employer failed to file a return, accompanied by an adjusted return as provided in the instructions to the adjusted return. The adjusted return must include a detailed explanation of the amount being reported on the original return and adjusted return and any other information as may be required by this section and by the instructions relating to the adjusted return. The reporting of the correct amount of tax for the return period constitutes an adjustment within the meaning of this section only if the original and adjusted returns are filed by the due date of the return for reporting such tax for the return period in which the error is ascertained. For purposes of the preceding sentence, the due date for filing the adjusted return is determined by reference to the return being corrected, without regard to the employer's current filing requirements. For example, an employer with a current annual filing requirement who is correcting an error on a previously filed quarterly return must file the adjusted return by the due date for filing a quarterly return for the quarter in which the error is ascertained. The amount of the underpayment adjusted in accordance with this section must be paid to the IRS by the time the returns are filed in accordance with this paragraph. If an adjustment is reported pursuant to this section, but the amount of the adjustment is not paid when due, interest accrues from that date (see section 6601).

(c) *Income tax required to be withheld from wages*—(1) *Undercollection ascertained before return is filed*. If an employer collects less than the correct amount of income tax required to be withheld from wages under section 3402, and if the employer ascertains the error before filing the return on which the withheld tax is required to be reported, the employer shall nevertheless report on the return and pay to the IRS the correct amount of tax required to be withheld. If the employer does not report the correct amount of tax in these circumstances, the employer may not correct the error through an interest-free adjustment.

(2) *Error ascertained after return is filed*. If an employer files a return on which income tax required to be withheld from wages is required to be reported and reports on the return less than the correct amount of income tax required to be withheld, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section. The employer shall adjust the underpayment of tax by reporting the additional amount due on an adjusted return for the return period in which the wages were paid, accompanied by a detailed explanation of the amount being reported on the adjusted return and any other informa-

tion as may be required by this section and by the instructions relating to the adjusted return. The reporting of the underpayment on an adjusted return constitutes an adjustment within the meaning of this section only if the adjusted return is filed by the due date for filing the return for the return period in which the error is ascertained. For purposes of the preceding sentence, the due date for filing the adjusted return is determined by reference to the return being corrected, without regard to the employer's current filing requirements. For example, an employer with a current annual filing requirement who is correcting an error on a previously filed quarterly return must file the adjusted return by the due date for filing a quarterly return for the quarter in which the error is ascertained. However, an adjustment may only be reported pursuant to this section if the error is ascertained within the same calendar year that the wages to the employee were paid, unless the underpayment is attributable to an administrative error (that is, an error involving the inaccurate reporting of the amount actually withheld), section 3509 applies to determine the amount of the underpayment, or the adjustment is reported on a Form 2504 or Form 2504–WC. The amount of the underpayment adjusted in accordance with this section must be paid to the IRS by the time the adjusted return is filed. If an adjustment is reported pursuant to this section, but the amount of the adjustment is not paid when due, interest accrues from that date (see section 6601).

(3) *Return not filed because of failure to treat individual as employee*. If an employer fails to file a return for a return period solely because the employer failed to treat any individuals properly as employees for the return period (and, therefore, failed to withhold and pay any income tax required to be withheld from wages), the employer shall correct the error through an interest-free adjustment as provided in this section. The employer shall report the amount due by filing an original return for the return period for which the employer failed to file a return, accompanied by an adjusted return as provided in the instructions to the adjusted return. The adjusted return must include a detailed explanation of the amount being reported on the original and adjusted returns and any other information as may be required by this section and by the instructions relating to the adjusted return. The reporting of the correct amount of tax for the return period constitutes an adjustment within the meaning of this section only if the original and adjusted returns are filed by the due date of the return for reporting such tax for the return period in which the error is ascertained. For purposes of the preceding sentence, the due date for filing the adjusted return is determined by reference to the return being corrected, without regard to the employer's current filing requirements. For example, an employer with a current annual filing requirement who is correcting an error on a previously filed quarterly return must file the adjusted return by the due date for filing a quarterly return for the quarter in which the error is ascertained. However, an adjustment may only be reported pursuant to this section if the error is ascertained within the same calendar year that the wages to the employee were paid, or if section 3509 applies to determine the amount of the underpayment, or if the adjustment is reported on a Form 2504 or Form 2504–WC. The amount of the underpayment adjusted in accordance with this section must be paid to the IRS by the time the returns are filed in accordance with this paragraph. If an adjustment is reported pursuant to this section, but the amount of the adjustment is not paid when due, interest accrues from that date (see section 6601).

(d) *Deductions from employee*—(1) *Federal Insurance Contributions Tax Act and Railroad Retirement Tax Act*. If an employer collects less than the correct amount of employee FICA or RRTA tax from an employee with respect to a payment of wages or compensation, the employer must collect the amount of the undercollection by deducting the amount from remuneration of the employee, if any, paid after the employer ascertains the error. Such deductions may be made even though the remuneration, for any reason, does not constitute wages or compensation. The correct amount of employee tax must be reported and paid, as provided in paragraph (b) of this section, whether or not the undercollection is corrected by a deduction made as prescribed in this paragraph (d)(1), and even if the deduction is made after the return on which the employee tax must be reported is due. If such a deduction is not made, the obligation of the employee to the employer with respect to the undercollection is a matter for settlement between the employee and the employer. If an employer makes an erroneous collection of employee tax from two or more of its employees, a separate settlement must be made with respect to each employee. An overcollection of employee tax from one employee may not be used to offset an undercollection of such tax from another employee. For provisions relating to the employer's liability for the tax, whether or not it collects the tax from the employee, see §31.3102–1(d). This paragraph (d)(1) does not apply if section 3509 applies to determine the employer's liability.

(2) *Income tax required to be withheld from wages*. If an employer collects less than the correct amount of income tax required to be withheld from wages during a calendar year, the employer must collect the amount of the undercollection on or before the last day of the year by deducting the amount from remuneration of the employee, if any, paid after the employer ascertains the error. Such deductions may be made even though the remuneration, for any reason, does not constitute wages. The correct amount of income tax must be reported and paid, as provided in paragraph (c) of this section, whether or not the undercollection is corrected by a deduction made as prescribed in this paragraph (d)(2), and even if the deduction is made after the return on which the tax must be reported is due. If such a deduction is not made, the obligation of the employee to the employer with respect to the undercollection is a matter for settlement between the employee and the employer within the calendar year. If an employer makes an erroneous collection of income tax from two or more of its employees, a separate settlement must be made with respect to each employee. An overcollection of income tax from one employee may not be used to offset an undercollection of such tax from another employee. For provisions relating to the employer's liability for the tax, whether or not it collects the tax from the employee, see §31.3403–1. For provisions relating to the employer's liability for an underpayment of tax unless the employer can show that the income tax against which the tax under section 3402 may be credited has been paid, see §31.3402(d)–1. This paragraph (d)(2) does not apply if section

3509 applies to determine the employer's liability.

Par. 6. Section 31.6302–0 is amended by adding new entries for §31.6302–1 paragraphs (c)(7) and (g)(4)(i) and (ii) to read as follows:

§31.6302–0 Table of contents.

* * * * *

§31.6302–1 Federal tax deposit rules for withheld income taxes and taxes under the Federal Insurance Contributions Act (FICA) attributable to payments made after December 31, 1992.

* * * * *

(c) * * *

(7) Exception to the monthly and semiweekly deposit rules for employers making interest-free adjustments.

* * * * *

(g) * * *

(4) * * *

(i) In general.

(ii) Adjustments and Claims for Refund.

* * * * *

Par. 7. Section 31.6302–1 is amended by adding paragraph (c)(7) and revising paragraph (g)(4) to read as follows:

§31.6302–1 Federal tax deposit rules for withheld income taxes and taxes under the Federal Insurance Contributions Act (FICA) attributable to payments made after December 31, 1992.

* * * * *

(c) * * *

(7) *Exception to the monthly and semiweekly deposit rules for employers making interest-free adjustments.* An employer filing an adjusted return under §31.6205–1 to report taxes that were accumulated in a prior return period shall pay the amount of the adjustment by the time it files the adjusted return, and the amount timely paid will be deemed to have been timely deposited by the employer. The payment may be made by a check or money order with the adjusted return, by electronic funds transfer, or by other methods of payment as provided by the instructions relating to the adjusted return.

* * * * *

(g) * * *

(4) *Lookback period*—(i) *In general.* For purposes of this paragraph (g), the lookback period for Form 943 taxes is the second calendar year preceding the current calendar year. For example, the lookback period for calendar year 1993 is calendar year 1991. New employers shall be treated as having employment tax liabilities of zero for any lookback period before the date the employer started or acquired its business.

(ii) *Adjustments and Claims for Refund.* The employment tax liability reported on the original return for the return period is the amount taken into account in determining whether the amount of Form 943 taxes accumulated in the lookback period exceeds $50,000. Any amounts reported on adjusted returns or claims for refund pursuant to sections 6205, 6402, 6413 and 6414 filed after the due date of the original return are not taken into account when determining the amount of Form 943 taxes accumulated in the lookback period. However, prior period adjustments reported on Form 943 for 2008 and earlier years are taken into account in determining the employment tax liability for the return period in which the adjustments are reported.

* * * * *

Par. 8. Section 31.6402(a)–1 is amended by revising paragraph (a) to read as follows:

§31.6402(a)–1 Credits or refunds.

(a) *In general.* For regulations under section 6402 of special application to credits or refunds of employment taxes, see §§31.6402(a)–2, 31.6402(a)–3, and 31.6414–1. For regulations under section 6402 of general application to credits or refunds, see §§301.6402–1 and 301.6402–2. For provisions relating to adjustments without interest of overpayments of taxes under the Federal Insurance Contributions Act or the Railroad Retirement Tax Act or income tax withholding, see §§31.6413(a)–1 and 31.6413(a)–2.

* * * * *

Par. 9. Section 31.6402(a)–2 is amended by revising paragraph heading and text of paragraph (a) and removing paragraph (c) to read as follows:

§31.6402(a)–2 Credit or refund of tax under Federal Insurance Contributions Act or Railroad Retirement Tax Act

(a) *Claim by person who paid tax to IRS*—(1) *In general.* (i) Any person may file a claim for credit or refund for an overpayment (except to the extent that the overpayment must be credited pursuant to §31.3503–1) if the person paid to the IRS more than the correct amount of employee Federal Insurance Contributions Act (FICA) tax under section 3101 or employer FICA tax under section 3111, employee Railroad Retirement Tax Act (RRTA) tax under section 3201, employee representative RRTA tax under section 3211, or employer RRTA tax under section 3221, or interest, addition to the tax, additional amount, or penalty with respect to any such tax.

(ii) The claim for credit or refund must be made in the manner and subject to the conditions stated in this section. The claim for credit or refund must be filed on the form prescribed by the IRS and must designate the return period to which the claim relates, explain in detail the grounds and facts relied upon to support the claim, and set forth such other information as may be required by this section and by the instructions relating to the form used to make such claim. No refund or credit pursuant to this section for employer tax will be allowed unless the employer has first repaid or reimbursed its employee or has secured the employee's consent to the allowance of the claim for refund and includes a claim for the refund of such employee tax. However, this requirement does not apply to the extent that the taxes were not withheld from the employee or, after the employer makes reasonable efforts to repay or reimburse the employee or secure the employee's consent, the employer cannot locate the employee or the employee will not provide consent. No refund or credit of employee FICA or RRTA tax overcollected in an earlier year will be allowed if the employee has claimed a refund or credit of the amount of the overcollection which has not been rejected or if the employee has taken the amount of such tax into account in claiming a credit against or refund of the employee's income tax, including instances in which the employee has included an overcollection of

employee FICA or RRTA tax in computing a special refund (see §31.6413(c)–1).

(iii) For adjustments without interest of overpayments of FICA or RRTA taxes, see §31.6413(a)–2.

(iv) For corrections of FICA and RRTA tax paid under the wrong chapter, see §31.6205–1(b)(2)(ii) and (iii) and §31.3503–1.

(v) For provisions related to furnishing employee statements and corrected employee statements reporting wages and withheld taxes, see sections 6041 and 6051 and §§1.6041–2 and 31.6051–1. For provisions relating to filing information returns and corrected information returns reporting wages and withheld taxes, see sections 6041 and 6051 and §§1.6041–2 and 31.6051–2.

(vi) For the period of limitations on credit or refund of taxes, see §301.6511(a)–1.

(2) *Statements supporting employer's claims for employee tax.* (i) Every employer who files a claim for refund or credit of employee FICA tax under section 3101 or employee RRTA tax under section 3201 collected from an employee must certify as part of the claim process that the employer has repaid or reimbursed the tax to its employee or has secured the employee's written consent to allowance of the filing of the claim for refund except to the extent that the taxes were not withheld from the employee. The employer must retain as part of its records the written receipt of the employee showing the date and amount of the repayment, evidence of reimbursement, or the written consent of the employee, whichever is used in support of the claim.

(ii) Every employer who files a claim for refund or credit of employee FICA tax under section 3101 or employee RRTA tax under section 3201 collected from an employee in a calendar year prior to the year in which the credit or refund is claimed, also must certify as part of the claim process that the employer has obtained the employee's written statement that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and that the employee will not claim refund or credit of the amount. The employer must retain the employee's written statement as part of the employer's records.

* * * * *

Par. 10. Section 31.6413(a)–1 is revised to read as follows:

§31.6413(a)–1 Repayment or reimbursement by employer of tax erroneously collected from employee.

(a) *Federal Insurance Contributions Act and Railroad Retirement Tax Act*—(1) *Overcollection ascertained before return is filed.* (i) If an employer during any return period collects from an employee more than the correct amount of employee Federal Insurance Contributions Act (FICA) tax under section 3101 or employee Railroad Retirement Tax Act (RRTA) tax under section 3201, and if the employer ascertains the error before filing the return on which the employee tax is required to be reported, repays or reimburses the amount of the overcollection to the employee before filing the return for such return period, and obtains and keeps as part of its records the written receipt of the employee showing the date and amount of the repayment or evidence of reimbursement, the employer shall not report on any return or pay to the IRS the amount of the overcollection.

(ii) Any overcollection not repaid or reimbursed to the employee as provided in paragraph (a)(1)(i) of this section shall be reported and paid to the IRS on the return for reporting such tax for the return period in which the overcollection is made. However, the reporting and payment of the overcollection may subsequently be treated as an overpayment error ascertained after the return is filed for purposes of paragraph (a)(2) of this section.

(iii) For purposes of this paragraph (a)(1), an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(2) *Error ascertained after return is filed.* (i) If an employer files a return for a return period on which FICA tax or RRTA tax is reported, collects from an employee and pays to the IRS more than the correct amount of the employee FICA or RRTA tax, and if the employer ascertains the error after filing the return and within the applicable period of limitations on credit or refund, the employer shall repay or reimburse the employee in the amount of the overcollection prior to the expiration of such limitations period. However, this paragraph (a)(2) does not apply to the extent that, after reasonable efforts, the employer cannot locate the employee, or the employee does not provide the employer with the written statement required by §31.6413(a)–1(a)(2)(iv). This paragraph (a)(2) has no application in any case in which an overcollection is made the subject of a claim by the employer for refund or credit under the procedure provided in §31.6402(a)–2.

(ii) If the employer repays the amount of the overcollection to an employee, the employer shall obtain and keep as part of its records the written receipt of the employee, showing the date and amount of the repayment.

(iii) If the employer reimburses the amount of the overcollection to an employee, the employer shall keep as part of its records evidence of reimbursement. The employer shall reimburse the employee by applying the amount of the overcollection against the employee FICA or RRTA tax which attaches to wages or compensation paid by the employer to the employee prior to the expiration of the applicable period of limitations on credit or refund. If the amount of the overcollection exceeds the amount so applied against such employee tax, the excess amount shall be repaid to the employee as required by this section.

(iv) If, in any calendar year, an employer repays or reimburses an employee in the amount of an overcollection of employee FICA or RRTA tax that was collected from the employee in a prior calendar year, the employer shall obtain from the employee and keep as part of its records a written statement that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and that the employee will not claim refund or credit of such amount. For this purpose, a claim for refund or credit by the employee includes instances in which the employee has included an overcollection of employee FICA or RRTA tax in computing a special refund (see §31.6413(c)–1).

(v) For purposes of this paragraph (a)(2), an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(vi) For the period of limitations on credit or refund of taxes, see §301.6511(a)–1.

(vii) For corrections of FICA and RRTA tax paid under the wrong chapter, see §31.6205–1(b)(2)(ii) and (iii) and §31.3503–1.

(b) *Income tax withheld from wages*—(1) *Overcollection ascertained before return is filed.* (i) If an employer during any return period collects from an employee more than the correct amount of tax required to be withheld from wages under section 3402, and if the employer ascertains the error before filing the return on which such tax is required to be reported, repays or reimburses the amount of the overcollection to the employee before filing the return for such return period and before the end of the calendar year in which the overcollection was made, and obtains and keeps as part of its records the written receipt of the employee showing the date and amount of the repayment or evidence of reimbursement, the employer shall not report on any return or pay to the IRS the amount of the overcollection.

(ii) Any overcollection not repaid or reimbursed to the employee as provided in paragraph (b)(1)(i) of this section shall be reported and paid to the IRS on the return for reporting such tax for the return period in which the overcollection is made. However, the reporting and payment of the overcollection may subsequently be treated as an overpayment error ascertained after the return is filed for purposes of paragraph (b)(2) of this section.

(iii) For purposes of this paragraph (b)(1), an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(2) *Error ascertained after return is filed.* (i) If an employer files a return for a return period on which tax required to be withheld from wages is reported, collects from an employee and pays to the IRS more than the correct amount of the tax required to be withheld from wages, and if the employer ascertains the error after filing the return but before the end of the calendar year in which the wages were paid, the employer shall repay or reimburse the employee in the amount of the overcollection prior to the end of the calendar year. However, this paragraph does not apply to the extent that, after reasonable efforts, the employer cannot locate the employee.

(ii) If the employer repays the amount of the overcollection to an employee, the employer shall obtain and keep as part of its records the written receipt of the employee, showing the date and amount of the repayment.

(iii) If the employer reimburses the amount of the overcollection to an employee, the employer shall keep as part of its records evidence of reimbursement. The employer shall reimburse the employee by applying the amount of the overcollection against the tax under section 3402, which otherwise would be required to be withheld from wages paid by the employer to the employee in the calendar year in which the overcollection is made. If the amount of the overcollection exceeds the amount so applied against such tax, the excess amount shall be repaid to the employee as required by this section.

(iv) For purposes of this paragraph (b)(2), an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

Par. 11. Section 31.6413(a)–2 is revised to read as follows:

§31.6413(a)–2 Adjustments of overpayments.

(a) *In general.* (1) An employer who has overcollected or overpaid employee Federal Insurance Contributions Act (FICA) tax under section 3101 or employer FICA tax under section 3111, employee Railroad Retirement Tax (RRTA) tax under section 3201 or employer RRTA tax under section 3221, or income tax required under section 3402 to be withheld, and has repaid or reimbursed the amount of the overcollection of such tax to the employee, shall correct such error as provided in this section. Such correction may constitute an interest-free adjustment as provided in paragraph (b) or (c) of this section.

(2) Every correction under this section of an overpayment of tax shall be made on the form prescribed by the IRS that corresponds to the return being corrected. The form, filed in accordance with this section and the instructions, will constitute an adjusted return for the return period being corrected.

(3) Every adjusted return on which an overpayment is corrected pursuant to this section shall certify that the employer has repaid or reimbursed its employee, except where taxes were not withheld from the employee or where, after reasonable efforts, the employer cannot locate the employee. Every adjusted return shall designate the return period in which the error was ascertained and the return period being corrected, explain in detail the grounds and facts relied upon to support the correction, and set forth such other information as may be required by this section and §31.6413(a)–1 and by the instructions relating to the adjusted return. Every adjusted return, filed by an employer, for overpayment of employee FICA tax under section 3101 or employee RRTA tax under section 3201 collected from an employee in a calendar year prior to the year in which the adjusted return is filed, must also certify that the employer has obtained the employee's written statement that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and that the employee will not claim refund or credit of the amount.

(4) For purposes of this section, an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(5) For provisions related to furnishing employee statements and corrected employee statements reporting wages and withheld taxes, see sections 6041 and 6051 and §§1.6041–2 and 31.6051–1. For provisions relating to filing information returns and corrected information returns reporting wages and withheld taxes, see sections 6041 and 6051 and §§1.6041–2 and 31.6051–2.

(b) *Federal Insurance Contributions Act and Railroad Retirement Tax Act*—(1) *Overcollection ascertained before return is filed.* If an employer collects more than the correct amount of employee FICA or RRTA tax from an employee, and if the employer ascertains the error before filing the return on which the employee tax with respect to such wages or compensation is required to be reported, and repays or reimburses the employee under §31.6413(a)–1(a)(1), the employer shall not report on any return or pay to the IRS the amount of the overcollection. If the employer does not repay or reimburse the amount of the overcollection under §31.6413(a)–1(a)(1) before filing the return, the employer must report the amount of the overcollection on the return. However, the payment of the overcollection

may subsequently be treated as an overpayment error ascertained after the return is filed for purposes of paragraph (b)(2) of this section.

(2) *Error ascertained after return is filed*—(i) *Employee tax*. If an employer files a return for a return period on which FICA tax or RRTA tax is required to be reported and reports on the return more than the correct amount of employee FICA or RRTA tax, and if the employer ascertains the error after filing the return, and repays or reimburses the employee the amount of the overcollection of employee tax, as provided in §31.6413(a)–1(a)(2), the employer may correct the error through an interest-free adjustment as provided in this section. The employer shall adjust the overpayment of tax by reporting the overpayment on an adjusted return for the return period in which the wages or compensation was paid, accompanied by a detailed explanation of the amount being reported on the adjusted return as required by paragraph (a)(3) of this section. Except as provided in paragraph (d) of this section, the reporting of the overpayment on an adjusted return constitutes an adjustment within the meaning of this section only if the adjusted return is filed before the expiration of the period of limitations on credit or refund. The employer shall take the adjusted amount as a credit towards payment of employment tax liabilities for the return period in which the adjusted return is filed unless the IRS notifies the employer that the adjustment is not permitted under paragraph (d) of this section.

(ii) *Employer tax*. If an employer files a return for a return period on which FICA or RRTA tax is required to be reported and reports on the return more than the correct amount of employer FICA or RRTA tax, and if the employer ascertains the error after filing the return, the employer may correct the error through an interest-free adjustment as provided in this section. The employer must first repay or reimburse the employee the amount of any overcollection of employee tax, if any, as required by §31.6413(a)–1(a)(2), before making the adjustment for the employer tax. The employer shall adjust the overpayment of tax by reporting the overpayment on an adjusted return for the return period in which the wages or compensation was paid, accompanied by a detailed explanation of the amount being reported on the adjusted return as required by paragraph (a)(3) of this section. Except as provided in paragraph (d) of this section, the reporting of the overpayment on an adjusted return constitutes an adjustment within the meaning of this section only if the adjusted return is filed before the expiration of the period of limitations on credit or refund. The employer shall take the adjusted amount as a credit towards payment of employment tax liabilities for the return period in which the adjusted return is filed unless the IRS notifies the employer that the adjustment is not permitted under paragraph (d) of this section.

(c) *Income tax withheld from wages*—(1) *Overcollection ascertained before return is filed*. If an employer collects more than the correct amount of income tax required to be withheld from wages, and if the employer ascertains the error before filing the return on which the tax is required to be reported, and repays or reimburses the employee under §31.6413(a)–1(b)(1), the employer shall not report on any return or pay to the IRS the amount of the overcollection. If the employer does not repay or reimburse the amount of the overcollection under §31.6413(a)–1(b)(1) before filing the return, the employer must report the amount of the overcollection on the return. However, the reporting and payment of the overcollection may subsequently be treated as an overpayment error ascertained after the return is filed for purposes of paragraph (c)(2) of this section.

(2) *Error ascertained after return is filed*. If an employer files a return for a return period on which income tax required to be withheld from wages is required to be reported and reports on the return more than the correct amount of income tax required to be withheld, and if the employer ascertains the error after filing the return, and repays or reimburses the employee in the amount of the overcollection as provided in §31.6413(a)–1(b)(2), the employer may correct the error through an interest-free adjustment as provided in this section. The employer shall adjust the overpayment of tax by reporting the overpayment on an adjusted return for the return period in which the wages were paid, accompanied by a detailed explanation of the amount being reported on the adjusted return as required in paragraph (a)(3) of this section. Except as provided in paragraph (d) of this section, the reporting of the overpayment on an adjusted return constitutes an adjustment within the meaning of this section. If the amount of the overcollection is not repaid or reimbursed to the employee under §31.6413(a)–1(b)(2), there is no overpayment to be adjusted under this section. However, the employer may adjust an overpayment of tax attributable to an administrative error, that is, an error involving the inaccurate reporting of the amount withheld, pursuant to this section. The employer shall take the adjusted amount as a credit towards payment of employment tax liabilities for the return period in which the adjusted return is filed unless the IRS notifies the employer that the adjustment is not permitted under paragraph (d) of this section.

(d) *Adjustments not permitted*—(1) *In general*. If an adjustment cannot be made, a claim for refund or credit may be filed in accordance with §31.6402(a)–2 or §31.6414–1.

(2) *90-day exception*. No adjustment in respect of an overpayment may be made if the overpayment relates to a return period for which the period of limitations on credit or refund of such overpayment will expire within 90 days of filing the adjusted return.

(3) *No adjustment after claim for refund filed*. No adjustment in respect of an overpayment may be made after the filing of a claim for credit or refund of such overpayment under §31.6402(a)–2.

(4) *No adjustment after IRS notification*. No adjustment may be made upon notification by the IRS that the adjustment is not permitted.

Par. 12. Section 31.6414–1 is amended by revising paragraph (a) to read as follows:

§31.6414–1 Credit or refund of income tax withheld from wages.

(a) *In general.* (1) Any employer who pays to the IRS more than the correct amount of income tax required to be withheld from wages under section 3402 or interest, addition to the tax, additional amount, or penalty with respect to such tax, may file a claim for refund of the overpayment in the manner and subject to the conditions stated in this section on

the form prescribed by the IRS. The claim for refund must designate the return period to which the claim relates, explain in detail the grounds and facts relied upon to support the claim, and set forth such other information as may be required by the regulations in this section and by the instructions relating to the form used to make such claim. No refund to the employer will be allowed under this section for the amount of any overpayment of tax which the employer deducted or withheld from an employee.

(2) For provisions related to furnishing employee statements and corrected employee statements reporting wages and withheld taxes, see sections 6041 and 6051 and §§1.6041–2 and 31.6051–1. For provisions relating to filing information returns and corrected information returns reporting wages and withheld taxes, see sections 6041 and 6051 and §§1.6041–2 and 31.6051–2.

(3) For interest-free adjustments of overpayments of income tax withheld from wages, see §31.6413(a)–2.

* * * * *

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 13. The authority citation for part 602 continues to read in part as follows:

Authority: 26 U.S.C. 7805.

Par. 14. In §602.101, paragraph (b) is amended by adding the following entry in numerical order to the table to read as follows:

§602.101 OMB Control numbers

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
31.6011(a)–1	1545–2097
31.6011(a)–4	1545–2097
31.6011(a)–5	1545–2097
31.6205–1	1545–2097
31.6402(a)–2	1545–2097
31.6413(a)–1	1545–2097
31.6413(a)–2	1545–2097
31.6414–1	1545–2097
* * * * *	

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

Approved June 23, 2008.

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

(Filed by the Office of the Federal Register on June 30, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 1, 2008, 73 F.R. 37371)

Section 6402.—Authority to Make Credits or Refunds

Final regulations modify the process for making claims for refund of overpayments of Federal Insurance Contribution Act (FICA) and Railroad Retirement Tax Act (RRTA) taxes under section 6402 of the Code. See T.D. 9405, page 293.

Section 6413.—Special Rules Applicable to Certain Employment Taxes

Final regulations modify the process for making interest-free adjustments for overpayments of Federal Insurance Contribution Act (FICA) and Railroad Retirement Tax Act (RRTA) taxes and Federal income tax withholding (ITW) under section 6413(a) of the Code. See T.D. 9405, page 293.

Section 6414.—Income Tax Withheld

Final regulations modify the process for making claims for refund of overpayments of Federal income tax withholding (ITW) under section 6414 of the Code. See T.D. 9405, page 293.

Part III. Administrative, Procedural, and Miscellaneous

Bonus Depreciation for the Kansas Disaster Area

Notice 2008–67

SECTION 1. PURPOSE

This notice provides procedures for a taxpayer to claim the 50-percent additional first year depreciation (Kansas additional first year depreciation) provided by § 15345(a)(1) and (d)(1) of the Food, Conservation, and Energy Act of 2008 (the Act), Pub. L. No. 110–246, 122 Stat. 1651 (June 18, 2008), for qualified Recovery Assistance property (RA property) placed in service by the taxpayer on or after May 5, 2007, during the taxable year that includes May 5, 2007. This notice also explains how a taxpayer may elect not to deduct the Kansas additional first year depreciation for RA property.

SECTION 2. BACKGROUND AND RA PROPERTY

.01 Section 15345(a)(1) of the Act provides, in general, that § 1400N(d) of the Internal Revenue Code shall apply to the Kansas disaster area. Section 1400N(d), added by § 101 of the Gulf Opportunity Zone Act of 2005, Pub. L. No. 109–135, 119 Stat. 2577 (Dec. 21, 2005), generally allows a 50-percent additional first year depreciation deduction for qualified Gulf Opportunity Zone property. Section 15345(d)(1) of the Act provides that, with the exception of newly revised dates for determining the eligibility of the Kansas additional first year depreciation deduction for RA property, the rules for determining the eligibility of the Kansas additional first year depreciation deduction for RA property will be determined by following § 1400N(d)(1) through (5).

.02 RA property is depreciable property that meets all of the following requirements:

(1) The property is described in § 168(k)(2)(A)(i) and § 1.168(k)–1(b)(2)(i) of the Income Tax Regulations, or the property is nonresidential real property (as defined in § 168(e)(2)(B)) or residential rental property (as defined in § 168(e)(2)(A)) and depreciated under § 168;

(2) Substantially all of the use of the property is in the Kansas disaster area (as defined in § 15345(b) of the Act and section 2.04 of this notice) and in the active conduct of a trade or business by the taxpayer in the Kansas disaster area. For purposes of this section 2.02(2), rules similar to the rules in section 3 of Notice 2006–77, 2006–2 C.B. 590, for determining "substantially all" and "active conduct of a trade or business" apply;

(3) The original use of the property commences with the taxpayer in the Kansas disaster area on or after May 5, 2007. Used property will satisfy the original use requirement so long as the property has not been previously used within the Kansas disaster area. For purposes of this section 2.02(3), rules similar to the original use rules in section 5 of Notice 2007–36, 2007–17 I.R.B. 1000, apply;

(4) The property is acquired by the taxpayer by purchase (as defined in § 179(d) and § 1.179–4(c)) on or after May 5, 2007, but only if no written binding contract for the acquisition of the property was in effect on or before May 4, 2007. For purposes of this section 2.02(4), rules similar to the rules in § 1.168(k)–1(b)(4)(ii) (binding contract), in § 168(k)(2)(E)(i) and § 1.168(k)–1(b)(4)(iii) (self-constructed property), and in § 168(k)(2)(E)(iv) and § 1.168(k)–1(b)(4)(iv) (disqualified transactions) apply; and

(5) The property is placed in service by the taxpayer on or before December 31, 2008 (December 31, 2009, in the case of qualified nonresidential real property and residential rental property).

.03 Depreciable property is not eligible for the Kansas additional first year depreciation deduction if:

(1) The 50-percent additional first year depreciation deduction under § 168(k), as amended by § 103 of the Economic Stimulus Act of 2008, Pub. L. No. 110–185, 122 Stat. 613 (Feb. 13, 2008), applies to the property;

(2) The property is described in § 168(k)(2)(D)(i) and § 1.168(k)–1(b)(2)(ii)(A)(*2*);

(3) The property is described in § 168(f);

(4) Any portion of the property is financed with the proceeds of any obligation the interest on which is tax-exempt under § 103;

(5) The property is a qualified revitalization building (as defined in § 1400I(b)) for which the taxpayer has made an election under § 1400I(a)(1) or (a)(2) in accordance with section 7 of Rev. Proc. 2003–38, 2003–1 C.B. 1017;

(6) The property is included in any class of property for which the taxpayer elects not to deduct the Kansas additional first year depreciation (see section 4 of this notice);

(7) The property is placed in service and disposed of during the same taxable year. However, rules similar to the rules in § 1.168(k)–1(f)(1)(ii) and (iii) (technical termination of a partnership under § 708(b)(1)(B) or transactions described in § 168(i)(7)) apply; or

(8) The property is converted from business or income-producing use to personal use in the same taxable year in which the property is placed in service by a taxpayer.

.04 The counties in Kansas that comprise the Kansas disaster area are: Barton, Clay, Cloud, Comanche, Dickinson, Edwards, Ellsworth, Kiowa, Leavenworth, Lyon, McPherson, Osage, Osborne, Ottawa, Phillips, Pottawatomie, Pratt, Reno, Rice, Riley, Saline, Shawnee, Smith, and Stafford.

.05 If depreciable property is not RA property in the taxable year in which the property is placed in service by the taxpayer, the Kansas additional first year depreciation deduction is not allowable for the property even if the property subsequently becomes RA property due to a change in use. *See* § 1.168(k)–1(f)(6)(iv)(B).

.06 Limitation provisions of the Code (for example, §§ 465, 469, and 704(d)) apply and may limit the amount of the Kansas additional first year depreciation deduction that may be claimed by a taxpayer subject to such a provision.

.07 If RA property is no longer RA property in the hands of the same taxpayer at any time before the end of the RA property's recovery period as determined under § 167(f)(1) or § 168, as applicable, then the taxpayer generally must recapture in the taxable year in which the RA property is no longer RA property the benefit derived

from claiming the Kansas additional first year depreciation deduction for such property. *See* § 1400N(d)(5). For purposes of this section 2.07, rules similar to the recapture rules in section 3 of Notice 2008–25, 2008–9 I.R.B. 484, apply.

SECTION 3. CLAIMING THE KANSAS ADDITIONAL FIRST YEAR DEPECIATION FOR THE TAXABLE YEAR THAT INCLUDES MAY 5, 2007

.01 *In General*. The Kansas additional first year depreciation deduction is allowable in the taxable year in which the RA property is placed in service by the taxpayer. The computation of the allowable Kansas additional first year depreciation deduction and the otherwise allowable depreciation deduction for RA property is made in accordance with rules similar to the rules for 50-percent bonus depreciation property in § 1.168(k)–1(d)(1)(i), (1)(iii), and (2). Further, rules similar to the rules in § 1.168(k)–1(f) apply for purposes of the Kansas additional first year depreciation deduction.

.02 *Returns Not Filed for the Taxable Year that Includes May 5, 2007*. If a taxpayer has not filed its federal tax return for the taxable year that includes May 5, 2007, and wants to claim the Kansas additional first year depreciation for a class of property (as defined in section 4.02 of this notice) that is RA property placed in service by the taxpayer on or after May 5, 2007, during the taxable year that includes May 5, 2007, the taxpayer may claim the Kansas additional first year depreciation for that class of property on line 14 of Form 4562, *Depreciation and Amortization*, for the federal tax return for the taxable year that includes May 5, 2007. If the RA property is listed property under § 280F(d)(4), such as passenger automobiles or computers, the taxpayer may claim the Kansas additional first year depreciation for that listed property on line 25 of Form 4562, *Depreciation and Amortization*, for the federal tax return for the taxable year that includes May 5, 2007.

.03 *Returns Filed for the Taxable Year that Includes May 5, 2007*.

(1) *In general*. If a taxpayer timely filed its federal tax return for the taxable year that includes May 5, 2007, and did not claim on that return the Kansas additional first year depreciation for a class of property that is RA property placed in service by the taxpayer on or after May 5, 2007, during the taxable year that includes May 5, 2007, but wants to do so, the taxpayer may claim the Kansas additional first year depreciation for that class of property under this section 3.03, provided the taxpayer did not make an election not to deduct the Kansas additional first year depreciation for the class of property pursuant to section 4.03 of this notice. The taxpayer has the option of claiming the Kansas additional first year depreciation for the taxable year that includes May 5, 2007:

(a) by filing an amended federal tax return (or a qualified amended return under Rev. Proc. 94–69, 1994–2 C.B. 804, if applicable) on or before December 31, 2009, for the taxable year that includes May 5, 2007, and any affected subsequent taxable year, and including the statement "Filed Pursuant to Notice 2008–67" at the top of any amended return (or qualified amended return);

(b) by filing a Form 3115, *Application for Change in Accounting Method*, with the taxpayer's timely filed federal tax return for the first taxable year succeeding the taxable year that includes May 5, 2007, if this return has not been filed on or before August 11, 2008, and the taxpayer owns the property as of the first day of this taxable year; or

(c) if the taxpayer's federal tax return for the first taxable year succeeding the taxable year that includes May 5, 2007, was filed on or before August 11, 2008, by —

(i) filing an amended federal tax return (or a qualified amended return) on or before December 31, 2009, for the first taxable year succeeding the taxable year that includes May 5, 2007, attaching a Form 3115 to the amended federal tax return, and including the statement "Filed Pursuant to Notice 2008–67" at the top of any amended return (or qualified amended return); or

(ii) filing a Form 3115 with the taxpayer's timely filed federal tax return for the second taxable year succeeding the taxable year that includes May 5, 2007, if the taxpayer owns the property as of the first day of this taxable year.

(2) *Automatic change in method of accounting*. The Form 3115 is to be completed and filed in accordance with the automatic change in method of accounting provisions in Rev. Proc. 2002–9, 2002–1 C.B. 327 (as modified and amplified by Rev. Proc. 2002–19, 2002–1 C.B. 696, as amplified, clarified, and modified by Rev. Proc. 2002–54, 2002–2 C.B. 432, and as modified and clarified by Announcement 2002–17, 2002–1 C.B. 561), or any successor, with the following modifications:

(a) The scope limitations in section 4.02 of Rev. Proc. 2002–9 do not apply; and

(b) For purposes of section 6.02(4)(a) of Rev. Proc. 2002–9, the taxpayer must include on line 1a of the Form 3115 the designated automatic accounting method change number 115.

SECTION 4. ELECTION NOT TO DEDUCT THE KANSAS ADDITIONAL FIRST YEAR DEPRECIATION

.01 *In General*. A taxpayer may make an election not to deduct the Kansas additional first year depreciation for any class of property that is RA property placed in service during the taxable year. *See* § 1400N(d)(2)(B)(iv). If a taxpayer makes this election, then the election applies to all RA property that is in the same class of property and placed in service in the same taxable year, and no Kansas additional first year depreciation deduction is allowable for the class of property. The election not to deduct the Kansas additional first year depreciation is made by each person owning RA property (for example, for each member of a consolidated group by the common parent of the group, by the partnership, or by the S corporation). In addition, rules similar to the rules in § 1.168(k)–1(e)(5) (failure to make election), (6) (alternative minimum tax), and (7) (revocation of election) apply for purposes of the election not to deduct the Kansas additional first year depreciation deduction.

.02 *Definition of Class of Property*. For purposes of this notice, the term "class of property" means:

(1) Except for the property described in this section 4.02(2), (3), (4), (5), and (6), each class of property described in § 168(e) (for example, 5-year property);

(2) Water utility property as defined in § 168(e)(5) and depreciated under § 168;

(3) Computer software as defined in, and depreciated under, § 167(f)(1) and the regulations thereunder;

(4) Qualified leasehold improvement property as defined in § 168(k)(3) and § 1.168(k)–1(c) and depreciated under § 168;

(5) Nonresidential real property as defined in § 168(e)(2)(B) and depreciated under § 168; or

(6) Residential rental property as defined in § 168(e)(2)(A) and depreciated under § 168.

.03 *Time and Manner of Making the Election*.

(1) *In general*. Except as provided in section 4.03(3) of this notice, an election not to deduct the Kansas additional first year depreciation for any class of property that is RA property placed in service during the taxable year must be made by the due date (including extensions) of the federal tax return for the taxable year in which the RA property is placed in service by the taxpayer. Except as provided in sections 4.03(2) and (3) of this notice, the election not to deduct the Kansas additional first year depreciation must be made in the manner prescribed on Form 4562, *Depreciation and Amortization*, and its instructions.

(2) *Returns for the taxable year that includes May 5, 2007, filed on or after August 11, 2008*. If a taxpayer files its federal tax return for the taxable year that includes May 5, 2007, on or after August 11, 2008, and wants to make the election not to deduct the Kansas additional first year depreciation for any class of property that is RA property placed in service by the taxpayer on or after May 5, 2007, during the taxable year that includes May 5, 2007, the taxpayer must follow the instructions for that taxable year's Form 4562, *Depreciation and Amortization* (see "Election Out" on page 4 of the 2006 or 2007 Instructions for Form 4562). Pursuant to those instructions, the taxpayer attaches a statement to its timely filed return (including extensions) identifying the class of property for which the taxpayer is making the election and indicating that, for such class of property, the taxpayer is electing not to claim the Kansas additional first year depreciation.

(3) *Special rules for returns for the taxable year that includes May 5, 2007, filed before August 11, 2008*.

(a) If a taxpayer files its federal tax return for the taxable year that includes May 5, 2007, before August 11, 2008, then the taxpayer has made the election not to deduct the Kansas additional first year depreciation for a class of property that is RA property placed in service by the taxpayer on or after May 5, 2007, during the taxable year that includes May 5, 2007, if the taxpayer:

(i) made the election within the time prescribed in section 4.03(1) of this notice and in the manner prescribed in section 4.03(2) of this notice;

(ii) made the election within the time prescribed in section 4.03(1) of this notice and included with the taxpayer's federal tax return for the taxable year that includes May 5, 2007, an affirmative statement to the effect that the taxpayer is not deducting the Kansas additional first year depreciation for the class of property. The affirmative statement may be a statement attached to, or written on, the return (for example, writing on the Form 4562 "not deducting bonus for 5-year property"); or

(iii) made the deemed election provided for in section 4.03(3)(b) of this notice.

(b) *Deemed election*. If section 4.03(3)(a)(i) or (ii) of this notice does not apply, a taxpayer that files its federal tax return for the taxable year that includes May 5, 2007, before August 11, 2008, will be treated as having made the election not to deduct the Kansas additional first year depreciation for a class of property that is RA property placed in service by the taxpayer on or after May 5, 2007, during the taxable year that includes May 5, 2007, if the taxpayer:

(i) on that return, did not claim the Kansas additional first year depreciation deduction for that class of property but did claim depreciation; and

(ii) does not file an amended federal tax return (or qualified amended return) or a Form 3115 within the time and in the manner prescribed in section 3.03(1) of this notice to claim the Kansas additional first year depreciation for that class of property for the taxable year that includes May 5, 2007.

SECTION 5. DRAFTING INFORMATION

The principal author of this notice is Douglas H. Kim of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information regarding this notice, contact Mr. Kim at (202) 622–4930 (not a toll-free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations and Notice of Public Hearing

Capital Costs Incurred to Comply With EPA Sulfur Regulations

REG–143453–05

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9404) under section 179B of the Internal Revenue Code (Code) relating to the deduction for qualified capital costs paid or incurred by a small business refiner to comply with the highway diesel fuel sulfur control requirements of the Environmental Protection Agency (EPA). The temporary regulations implement changes to the law made by the American Jobs Creation Act of 2004, the Energy Policy Act of 2005, and the Tax Technical Corrections Act of 2007. The text of those temporary regulations also serves as the text of these proposed regulations. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by September 25, 2008. Outlines of topics to be discussed at the public hearing scheduled for October 28, 2008, at 10 a.m. must be received by September 22, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–143453–05), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–143453–05), 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–143453–05). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

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

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by August 26, 2008. Comments are specifically requested concerning:

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

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

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

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

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

The collection of information in this proposed regulation is in section 1.179B–1T(d) and section 1.179B–1T(e). This information collected under section 1.179B–1T(d) relates to the election under section 179B(a) by a small business refiner to deduct a portion of the qualified capital costs paid or incurred. The information collected under section 1.179B–1T(e) relates to the election under section 179B(e) by a cooperative small business refiner to allocate all or some of its section 179B(a) deduction to its cooperative owners and to notify those cooperative owners of the allocated amount. This information will be used by the IRS for examination purposes. The collection of information is required to obtain a benefit. The likely respondents are small business refiners.

Estimated total annual reporting burden: 50 hours.

The estimated annual burden per respondent varies from .75 to 1.5 hours, depending on individual circumstances, with an estimated average of 1 hour.

Estimated number of respondents: 50.

Estimated frequency of responses: Annually.

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

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

Background

Temporary regulations in this issue of the Bulletin amend 26 CFR part 1 by adding regulations under section 179B of the Code. The temporary regulations contain rules relating to the deduction provided under section 179B for qualified costs paid or incurred by a small business refiner to comply with the highway

diesel fuel sulfur control requirements of the EPA. The text of those temporary 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. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact, as discussed earlier in this preamble, that the amount of time necessary to record and retain the required information is estimated to average one hour for those taxpayers electing to deduct qualified capital costs and electing to allocate all or some of that deduction to certain owners. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department specifically request comments on the clarity of the proposed rules and how they may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for October 28, 2008, beginning at 10:00 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, all visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by September 25, 2008 and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by September 22, 2008. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Nicole R. Cimino, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

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Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.179B–1 is added to read as follows:

§1.179B–1 Deduction for capital costs incurred in complying with Environmental Protection Agency sulfur regulations.

[The text of this proposed §1.179B–1 is the same as the text of §1.179B–1T published elsewhere in this issue of the Bulletin].

Kevin M. Brown,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on June 26, 2008, 8:45 a.m., and published in the issue of the Federal Register for June 27, 2008, 73 F.R. 36475)

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

Modifications to Subpart F Treatment of Aircraft and Vessel Leasing Income

REG–138355–07

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9406) relating to the subpart F treatment of aircraft and vessel leasing income under sections 954 and 956 of the Internal Revenue Code (Code) and the transfer of tangible property incorporated in aircraft and vessels that are used predominantly outside the United States under section 367 of the Code. The regulations reflect statutory changes made by section 415 of the American Jobs Creation Act of 2004 (AJCA)). In general, the regulations will affect United States shareholders of controlled foreign corporations that derive income from the leasing of aircraft or vessels in foreign commerce and that transfer property subject to these leases to a foreign corporation. The text of those temporary 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 October 1, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–138355–07), 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–138355–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS-REG–138355–07).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations under section 367, John H. Seibert, at (202) 622–3860; concerning the proposed regulations under section 954 or 956, Paul J. Carlino at (202) 622–3840; concerning submissions of comments or a public hearing, Richard Hurst, at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in this issue of the Bulletin provide guidance under section 367 of the Code, relating to the nonrecognition of gain on certain property transferred to a foreign corporation if the property is used by the foreign corporation in the active conduct of a trade or business outside of the United States. The regulations also provide guidance under section 954 relating to the determination of whether rents derived from leasing an aircraft or vessel in foreign commerce will be treated as derived in the active conduct of a trade or business under section 954(c)(2)(A), and section 956, relating to whether an aircraft or vessel used in the transportation of persons or property in foreign commerce is excluded from U.S. property. The text of the temporary 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. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the proposed regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. Ch. 6) does not apply. 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 business.

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 Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

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

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Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Par. 2. In §1.367(a)–2 is added to read as follows:

§1.367(a)–2 Exception for transfers of property for use in the active conduct of a trade or business.

[The text of the proposed §1.367(a)–2 is the same as the text for §1.367(a)–2T(a) through (e)(2) published elsewhere in this issue of the Bulletin.]

Par. 3. In §1.367(a)–4 is added to read as follows:

§1.367(a)–4 Special rules applicable to specified transfers of property (temporary).

[The text of the proposed §1.367(a)–4 is the same as the text for §1.367(a)–4T(a) through (i)(1) published elsewhere in this issue of the Bulletin.]

Par. 4. In §1.367(a)–5 is added to read as follows:

§1.367(a)–5 Property subject to section 367(a)(1) regardless of use in trade or business.

[The text of the proposed §1.367(a)–5 is the same as the text for §1.367(a)–5T(a) through (f)(3)(ii) published elsewhere in this issue of the Bulletin.]

Par. 5. Section 1.954–2(c)(2)(ii), (c)(2)(v) and (c)(3) *Example 6* and (i) are revised to read as follows:

§1.954–2 Foreign personal holding company income.

* * * * *

(c) * * *

(2) * * *

(ii) [The text of the proposed amendment to §1.954–2(c)(2)(ii) is the same as the text of §1.954–2T(c)(2)(ii) published elsewhere in this issue of the Bulletin.]

* * * * *

(v) [The text of the proposed amendment to §1.954–2(c)(2)(v) is the same as the text for §1.954–2T(c)(2)(v) published elsewhere in this issue of the Bulletin.]

(vi) [The text of the proposed amendment to §1.954–2(c)(2)(vi) is the same as the text for §1.954–2T(c)(2)(vi) published elsewhere in this issue of the Bulletin.]

(vii) [The text of the proposed amendment to §1.954–2(c)(2)(vii) is the same as

the text for §1.954–2T(c)(2)(vii) published elsewhere in this issue of the Bulletin.]

(3) * * *

Example 6. [The text of the proposed amendment to §1.954–2(c)(3) *Example 6* is the same as the text for §1.954–2T(c)(3) *Example 6* published elsewhere in this issue of the Bulletin.]

(i) [The text of the proposed amendment to §1.954–2(c)(3)(i) is the same as the text for §1.954–2T(c)(3)(i) published elsewhere in this issue of the Bulletin.]

Par. 6. Section 1.956–2(b)(1)(vi) and (e) are revised to read as follows:

§1.956–2 Definition of United States Property

* * * * *

(b) * * *

(1) * * *

(vi) [The text of the proposed amendment to §1.956–2(b)(1)(vi) is the same as the text for §1.956–2T(b)(1)(vi) published elsewhere in this issue of the Bulletin.]

* * * * *

(e) [The text of the proposed amendment to §1.956–2(e) is the same as the text of §1.956–2T(e) published elsewhere in this issue of the Bulletin].

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

(Filed by the Office of the Federal Register on July 2, 2008, 8:45 a.m., and published in the issue of the Federal Register for the July 3, 2008, 73 F.R. 38162)

Notice of Proposed Rulemaking and Notice of Public Hearing

Accrual Rules for Defined Benefit Plans

REG–100464–08

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations providing guidance on the application of the accrual rule for defined benefit plans under section 411(b)(1)(B) of the Internal Revenue Code (Code) in cases where plan benefits are determined on the basis of the greatest of two or more separate formulas. These regulations would affect sponsors, administrators, participants, and beneficiaries of defined benefit plans. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by September 16, 2008. Outlines of topics to be discussed at the public hearing scheduled for October 15, 2008, at 10 a.m. must be received by September 24, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–100464–08), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–100464–08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–100464–08). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

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

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed Income Tax Regulations (26 CFR part 1) under section 411(b) of the Code.[1]

Section 401(a)(7) provides that a trust is not a qualified trust under section 401 unless the plan of which such trust is a part satisfies the requirements of section 411 (relating to minimum vesting standards).

Section 411(a) requires a qualified plan to provide that an employee's right to the normal retirement benefit is nonforfeitable upon attainment of normal retirement age and that an employee's right to his or her accrued benefit is nonforfeitable upon completion of the specified number of years of service under one of the vesting schedules set forth in section 411(a)(2). Section 411(a)(7)(A)(i) defines a participant's accrued benefit under a defined benefit plan as the employee's accrued benefit determined under the plan, expressed in the form of an annual benefit commencing at normal retirement age, subject to an exception in section 411(c)(3) under which the accrued benefit is the actuarial equivalent of the annual benefit commencing at normal retirement age in the case of a plan that does not express the accrued benefit as an annual benefit commencing at normal retirement age.

Section 411(a) also requires that a defined benefit plan satisfy the requirements of section 411(b)(1). Section 411(b)(1) provides that a defined benefit plan must satisfy one of the three accrual rules of section 411(b)(1)(A), (B), and (C) with respect to benefits accruing under the plan. The three accrual rules are the 3 percent method of section 411(b)(1)(A), the 133$^1/_3$ percent rule of section 411(b)(1)(B), and the fractional rule of section 411(b)(1)(C).

Section 411(b)(1)(A) provides that a defined benefit plan satisfies the requirements of the 3 percent method if, under the plan, the accrued benefit payable upon the participant's separation from service is not less than (A) 3 percent of the normal retirement benefit to which the participant would be entitled if the participant commenced participation at the earliest

[1] Section 204(b) of the Employee Retirement Income Security Act of 1974, Public Law 93–406 (88 Stat. 829), as amended (ERISA), sets forth rules that are parallel to those in section 411(b) of the Code. Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these proposed regulations for purposes of ERISA, as well as the Code. Thus, these proposed Treasury regulations issued under section 411(b)(1)(B) of the Code would apply as well for purposes of section 204(b)(1)(B) of ERISA.

possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age under the plan, multiplied by (B) the number of years (not in excess of 33 1/3 years) of his or her participation in the plan. Section 411(b)(1)(A) provides that, in the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled is determined as if the participant continued to earn annually the average rate of compensation during consecutive years of service, not in excess of 10, for which his or her compensation was highest. Section 411(b)(1)(A) also provides that Social Security benefits and all other relevant factors used to compute benefits are treated as remaining constant as of the current plan year for all years after the current year.

Section 411(b)(1)(B) provides that a defined benefit plan satisfies the requirements of the 133 1/3 percent rule for a particular plan year if, under the plan, the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit, and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which the individual can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year.

For purposes of applying the 133 1/3 percent rule, section 411(b)(1)(B)(i) provides that any amendment to the plan which is in effect for the current year is treated as in effect for all other plan years. Section 411(b)(1)(B)(ii) provides that any change in an accrual rate which does not apply to any individual who is or could be a participant in the current plan year is disregarded. Section 411(b)(1)(B)(iii) provides that the fact that benefits under the plan may be payable to certain participants before normal retirement age is disregarded. Section 411(b)(1)(B)(iv) provides that Social Security benefits and all other relevant factors used to compute benefits are treated as remaining constant as of the current plan year for all years after the current year.

Section 411(b)(1)(C) provides that a defined benefit plan satisfies the fractional rule if the accrued benefit to which any participant is entitled upon his or her separation from service is not less than a fraction of the annual benefit commencing at normal retirement age to which the participant would be entitled under the plan as in effect on the date of separation if the participant continued to earn annually until normal retirement age the same rate of compensation upon which the normal retirement benefit would be computed under the plan, determined as if the participant had attained normal retirement age on the date on which any such determination is made (but taking into account no more than 10 years of service immediately preceding separation from service). This fraction, which cannot exceed 1, has a numerator that is the total number of the participant's years of participation in the plan (as of the date of separation from service) and a denominator that is the total number of years the participant would have participated in the plan if the participant separated from service at normal retirement age. Section 411(b)(1)(C) also provides that Social Security benefits and all other relevant factors used to compute benefits are treated as remaining constant as of the current plan year for all years after the current year.

Section 1.411(a)–7(a)(1) of the Income Tax Regulations provides that, for purposes of section 411 and the regulations under section 411, the accrued benefit of a participant under a defined benefit plan is either (A) the accrued benefit determined under the plan if the plan provides for an accrued benefit in the form of an annual benefit commencing at normal retirement age, or (B) an annual benefit commencing at normal retirement age which is the actuarial equivalent (determined under section 411(c)(3) and §1.411(c)–1)) of the accrued benefit under the plan if the plan does not provide for an accrued benefit in the form of an annual benefit commencing at normal retirement age.

Section 1.411(b)–1(a)(1) provides that a defined benefit plan is not a qualified plan unless the method provided by the plan for determining accrued benefits satisfies at least one of the alternative methods in §1.411(b)–1(b) for determining accrued benefits with respect to all active participants under the plan. The three alternative methods are the 3 percent method, the 133 1/3 percent rule, and the fractional rule. A defined benefit plan may provide that accrued benefits for participants are determined under more than one plan formula. Section 1.411(b)–1(a)(1) provides that, in such a case, the accrued benefits under all such formulas must be aggregated in order to determine whether or not the accrued benefits under the plan for participants satisfy one of these methods. Under §1.411(b)–1(a)(1), a plan may satisfy different methods with respect to different classifications of employees, or separately satisfy one method with respect to the accrued benefits for each such classification, provided that such classifications are not so structured as to evade the accrued benefit requirements of section 411(b) and §1.411(b)–1.

Section 1.411(b)–1(b)(2)(i) provides that a defined benefit plan satisfies the 133 1/3 percent rule for a particular plan year if (A) under the plan the accrued benefit payable at the normal retirement age (determined under the plan) is equal to the normal retirement benefit (determined under the plan), and (B) the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year cannot be more than 133 1/3 percent of the annual rate at which the participant can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year.

Section 1.411(b)–1(b)(2)(ii)(A) through (D) sets forth a series of rules that correspond to the rules of section 411(b)(1)(B)(i) through (iv). For example, §1.411(b)–1(b)(2)(ii)(A) sets forth a special plan amendment rule for purposes of satisfying the 133 1/3 percent rule that corresponds to section 411(b)(1)(B)(i). Under that rule, any amendment to a plan that is in effect for the current year is treated as if it were in effect for all other plan years.

Section 1.411(b)–1(b)(2)(ii)(E) provides that a plan is not treated as failing to satisfy the requirements of §1.411(b)–1(b)(2) for a plan year merely because no benefits under the plan accrue to a participant who continues service with the employer after the participant has

attained normal retirement age.[2] Section 1.411(b)–1(b)(2)(ii)(F) provides that a plan does not satisfy the requirements of §1.411(b)–1(b)(2) if the base for the computation of retirement benefits changes solely by reason of an increase in the number of years of participation.

Rev. Rul. 2008–7, 2008–7 I.R.B. 419, see §601.601(d)(2)(ii)(*b*), describes the application of the accrual rules of section 411(b)(1)(A) through (C) and the regulations under section 411(b)(1)(A) through (C) to a defined benefit plan that was amended to change the plan's benefit formula from a traditional formula based on highest average compensation to a new lump sum-based benefit formula. Under the terms of the plan described in the revenue ruling, for an employee who was employed on the day before the change, a hypothetical account was established equal to the actuarial present value of the employee's accrued benefit as of that date, and that account was also to be credited with subsequent pay credits and interest credits. Under transition rules set forth in the plan, the accrued benefit of certain participants is the greater of the accrued benefit provided by the hypothetical account balance at the age 65 normal retirement age and the accrued benefit determined under the traditional formula as in effect on the day before the change, but taking into account post-amendment compensation and service for a limited number of years.

Revenue Ruling 2008–7 describes how the accrued benefits of different participant groups satisfy, or fail to satisfy, the accrual rules under section 411(b)(1)(A) through (C), taking into account the requirement in §1.411(b)–1(a)(1) that a plan that determines a participant's accrued benefits under more than one formula must aggregate the accrued benefits under all of those formulas in order to determine whether or not the accrued benefits under the plan satisfy one of the alternative methods under section 411(b)(1)(A) through (C). However, Revenue Ruling 2008–7 explains that, in the case of a plan amendment that replaces the benefit formula under the plan for all periods after the amendment, pursuant to section 411(b)(1)(B)(i) and §1.411(b)–1(b)(2)(ii)(A), the rule that would otherwise require aggregation of the multiple formulas does not apply. Under section 411(b)(1)(B)(i) and §1.411(b)–1(b)(2)(ii)(A), any amendment to the plan which is in effect for the current plan year is treated as if it were in effect for all other plan years (including past and future plan years).

Revenue Ruling 2008–7 illustrates the application of this rule with respect to participants who only accrue benefits under the new formula (who in the ruling are referred to as participants who are not "grandfathered"). For these participants, the plan amendment completely ceases accruals under a traditional pension benefit formula that provides an annuity at normal retirement age based on service and average pay and, for all periods after the amendment, provides for the greater of the section 411(d)(6) protected benefit under the pre-amendment formula and the benefit under a new post-amendment lump sum-based benefit formula. In such a case, as stated in Revenue Ruling 2008–7, the section 411(d)(6) protected benefit under the pre-amendment formula is not aggregated with the post-amendment formula, but rather is entirely disregarded, for purposes of applying the 133$^1/_3$ percent rule because the new formula is treated under section 411(b)(1)(B)(i) and §1.411(b)–1(b)(2)(ii)(A) as having been in effect for all plan years. This analysis was reflected in *Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56 (3d Cir. 2007).

In addition to satisfying the requirements of section 411(b)(1)(B), a defined benefit plan must also satisfy the age discrimination rules of section 411(b)(1)(H), taking into account section 411(b)(5), as added to the Code by the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780) (PPA '06). In the case of a conversion of a plan to a statutory hybrid plan pursuant to an amendment that is adopted after June 29, 2005 (a "post-PPA conversion plan"), the conversion amendment must satisfy the rule of section 411(b)(5)(B)(iii) that prohibits wearaway of benefits upon conversion. In the case of a plan converted to a statutory hybrid plan pursuant to an amendment that is adopted on or before June 29, 2005 (a "pre-PPA conversion plan"), as provided in Notice 2007–6, the IRS will not consider and will not issue determination letters with respect to whether such a pre-PPA conversion plan satisfies the requirements of section 411(b)(1)(H) (as in effect prior to the addition of section 411(b)(5) by PPA '06), including the effect of any wearaway. Thus, although wearaway upon conversion is expressly prohibited with respect to post-PPA conversion plans pursuant to section 411(b)(5), the IRS will not address and will not issue determination letters with respect to whether a conversion that results in wearaway with respect to a pre-PPA conversion plan violates the age discrimination rules of section 411(b)(1)(H). See §601.601(d)(2)(ii)(*b*).

Revenue Ruling 2008–7 provides a different analysis as to whether a plan with wearaway fails to satisfy the accrual rules of section 411(b)(1)(B) when the pre-amendment formula continues in place after the amendment for a group of participants. In such a case, where an amendment has gone into effect but continues the prior formula for some period of time with respect to one or more participants, the application of the rule in section 411(b)(1)(B)(i) and §1.411(b)–1(b)(2)(ii)(A) does not result in a disregard of the prior plan formula (which remains in effect after the amendment). Instead, the 133$^1/_3$ percent rule must be applied with respect to those participants based on the combined effect of the two ongoing formulas.[3]

Revenue Ruling 2008–7 provides relief from disqualification under the Internal Revenue Code (under the authority of section 7805(b)) for a limited class of plans under which a group of employees specified under the plan receives a benefit equal to the greatest of the benefits provided under two or more formulas (an applicable "greater-of" benefit), provided that each such formula standing alone would satisfy an accrual rule of section 411(b)(1)(A), (B), or (C) for the years involved. Under the relief set forth in Rev. Rul. 2008–7, for plan years beginning before January 1, 2009, the IRS will not treat a plan eligible for the relief as failing to satisfy the accrual rules of section 411(b)(1)(A), (B),

[2] However, section 411(b)(1)(H), which was added to the Code after the issuance of §1.411(b)–1, generally requires the continued accrual of benefits after attainment of normal retirement age.

[3] Two federal courts have taken a position contrary to this interpretation of section 411(b)(1)(B)(i) and §1.411(b)–1(b)(2)(ii)(A) as set forth in Revenue Ruling 2008–7. See *Tomlinson v. El Paso Corp.*, 2008 WL 762456 (D. Colo. Mar. 19, 2008); *Wheeler v. Pension Value Plan for Employees of Boeing Corp.*, 2007 WL 2608875 (S.D. Ill. Sept. 6, 2007).

and (C) solely because the plan provides an applicable "greater-of" benefit, where the separate formulas, standing alone, would satisfy an accrual rule of section 411(b)(1)(A), (B), and (C).

Explanation of Provisions

The fact pattern described in Revenue Ruling 2008–7 has occurred in a number of situations over the past few years. Employers sponsoring these plans have suggested that their plans should satisfy the accrual rules of section 411(b)(1)(A), (B), and (C), contending that any technical violation of the accrual rules is directly because the participant has higher front-loaded accruals under one formula when compared to the other formula that will ultimately provide the larger benefit under the plan. While the relief under section 7805(b) that is provided under Revenue Ruling 2008–7 addresses the situation for past years, the relief does not apply for the parallel accrual rules of section 204(b)(1)(A), (B) and (C) of ERISA and only applies to plan years beginning before January 1, 2009.

The proposed regulations would provide a limited exception to the existing requirement under §1.411(b)–1(a)(1) to aggregate the accrued benefits under all formulas in order to determine whether or not the accrued benefits under the plan for participants satisfy one of the alternative methods under section 411(b)(1)(A) through (C). Under this limited exception, certain plans that determine a participant's benefits as the greatest of the benefits determined under two or more separate formulas would be permitted to demonstrate satisfaction of the 133$^1/_3$ percent rule of section 411(b)(1)(B) by demonstrating that each separate formula satisfies the 133$^1/_3$ percent rule of section 411(b)(1)(B).[4]

A plan would be eligible for this exception only if each of the separate formulas uses a different basis for determining benefits. For example, a plan would be eligible for this special rule if it provides a benefit equal to the greater of the benefits under two formulas, one of which determines benefits on the basis of highest average compensation and the other of which determines benefits on the basis of career average compensation. As another example, a traditional defined benefit plan which determined benefits based on highest average compensation that is amended to add a cash balance formula (as in the facts of Rev. Rul. 2008–7) would be eligible for this exception where, in order to provide a better transition for longer service active participants, the plan provides that a group of participants is entitled to the greater of the benefit provided by the hypothetical account balance and the benefit determined under the continuing traditional formula. In each of the above two examples, each separate formula under the plan uses a different basis for determining benefits and, therefore, both of those plans would be eligible to utilize this exception. Accordingly, both plans would be permitted to demonstrate satisfaction of the 133$^1/_3$ percent rule of section 411(b)(1)(B) by demonstrating that each separate formula under the plan satisfies the 133$^1/_3$ percent rule of section 411(b)(1)(B).

The utility of this exception can be seen from the following example of a plan that provides a benefit equal to the greater of two formulas. One formula provides a benefit of 1 percent of average compensation for the 3 consecutive years of service with the highest such average multiplied by the number of years of service at normal retirement age (not in excess of 25 years of service), and the other formula provides a benefit that is the accumulation of 1.5 percent of compensation for each year of service. Under the existing final regulations, the 133$^1/_3$ percent rule of section 411(b)(1)(B) is applied by reference to the annual rate of accrual for each year from the year of the test through normal retirement age. If the participant's accrued benefit currently is determined using the 1 percent formula (because the high-3 average compensation is significantly higher than the effective career average compensation that is used under the 1.5 percent formula), but the participant's normal retirement benefit will ultimately be determined using the 1.5 percent formula if service continues to normal retirement age (because the 25-year service cap will apply to the 1 percent formula, but not the 1.5 percent formula), then the annual rate of accrual will have to be determined for testing purposes on a consistent basis for each year, either using each year's compensation or high-3 average compensation. Thus, in order to test the plan under the 133$^1/_3$ percent rule, the existing final regulations would require that either the accruals under the 1 percent formula be expressed in terms of a single year's pay or the accruals under the 1.5 percent formula be expressed in terms of high-3 average compensation. In either case, the annual rates of accrual would differ from the stated rates under the plan formulas. In addition, the annual rates of accrual for the accumulation formula when those rates are expressed in terms of high-3 average compensation could be negative in some cases. In contrast, using the exception set forth in the proposed regulation would enable the plan to be tested using the annual rates of accrual expressed in the plan formulas.

The proposed regulations would also provide an extension of this exception in the case of a plan that provides benefits based on the greatest of three or more benefit formulas. In such a case, the plan would be eligible for a modified version of the formula-by-formula testing under the proposed regulations. Under this modification, the accrued benefits determined under all benefit formulas that have the same basis are first aggregated and then those aggregated formulas are treated as a single formula for purposes of applying the separate testing rule under the proposed regulations.

Eligibility for separate testing under the proposed regulations would be constrained by an anti-abuse rule. The proposed regulations would provide that a plan is not eligible for separate testing if the Commissioner determines that the plan's use of separate formulas with different bases is structured to evade the general requirement to aggregate formulas under §1.411(b)–1(a)(1) (for example, if the differences between the bases of the separate formulas are minor).

Proposed Effective/Applicability Date

These regulations are proposed to be effective for plan years beginning on or after January 1, 2009.

[4] These proposed regulations would only apply for purposes of the 133$^1/_3$ percent rule of section 411(b)(1)(B) (and the parallel rule of section 204(b)(1)(B) of ERISA). Neither Rev. Rul. 2008–7 nor these proposed regulations are relevant to (and thus they do not affect) the application of the age discrimination rules of section 411(b)(1)(H) (or the parallel age discrimination rules of section 204(b)(1)(H) of ERISA).

Special Analyses

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

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying.

Under these proposed regulations, a plan eligible for the separate testing option would not violate the accrual rules merely because the plan provides higher frontloaded accruals under one formula when compared to the other formula that will ultimately provide the larger benefit under the plan. Some commentators have suggested a broader rule that would modify the regulations to provide that a plan does not violate the accrual rules where the plan provides a pattern of accruals that affords higher benefits in earlier years (that is, benefit accruals are frontloaded) relative to a pattern of accruals that satisfies the accrual rules. The 3 percent method of section 411(b)(1)(A) and the fractional rule of section 411(b)(1)(C) automatically achieve this result because they are cumulative tests that test on the basis of the total accrued benefit compared to the projected normal retirement benefit. By contrast, the 133⅓ percent rule is based on a comparison of the "annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age" for a later plan year with the annual rate for an earlier plan year. The existing final regulations include an example (§1.411(b)–1(b)(2)(iii), *Example (3)*) that demonstrates how a plan fails the 133⅓ percent rule where it provides accruals in earlier years that are frontloaded relative to accruals that apply in later years. The proposed regulations do not include a provision under the 133⅓ percent rule that recognizes prior frontloading of benefits. However, commentators who would suggest such a provision under the 133⅓ percent rule should describe how that provision would fit within the statutory language of section 411(b)(1)(B), including the application of section 411(b)(1)(B)(i) (which requires that an amendment to the plan that is in effect for the current year be treated as in effect for all other plan years).

A public hearing has been scheduled for October 15, 2008, beginning at 10 a.m. in the Auditorium, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by September 16, 2008, and an outline of topics to be discussed and the amount of time to be devoted to each topic (a signed original and eight (8) copies) by September 24, 2008. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

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

* * * * *

Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.411(b)–1 is amended by adding new paragraph (b)(2)(ii)(G) to read as follows:

§1.411(b)–1 Accrued benefit requirements.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(G) *Special rule for multiple formulas—(1) In general.* Notwithstanding paragraph (a)(1) of this section, a plan that determines a participant's accrued benefit as the greatest of the benefits determined under two or more separate formulas is permitted, to the extent provided under this paragraph (b)(2)(ii)(G), to demonstrate satisfaction of section 411(b)(1)(B) and this paragraph (b) by demonstrating that each separate formula satisfies the requirements of section 411(b)(1)(B) and this paragraph (b).

(*2*) *Separate bases requirement.* A plan is eligible for separate testing under this paragraph (b)(2)(ii)(G) if each of the separate formulas uses a different basis for determining benefits. For example, a plan is eligible for this special rule if it provides an accrued benefit equal to the greater of the benefits under two formulas, one of which determines accrued benefits on the basis of highest average compensation and the other of which determines accrued benefits

on the basis of career average compensation. As another example, a defined benefit plan that bases benefits on highest average compensation and that is amended to add a statutory hybrid benefit formula (as defined in §1.411(a)(13)–1(d)(3)) that provides for pay credits to be made based on each year's compensation is eligible for this separate testing exception if the plan provides that one or more participants are entitled to the greater of the benefit determined under the statutory hybrid benefit formula and the benefit determined under the original formula.

(*3*) *Plans with three or more formulas*. If a plan determines a participant's benefits as the greatest of the benefits determined under three or more separate formulas, but two or more of the formulas use the same basis for determining benefits, then the plan may nonetheless apply paragraphs (b)(2)(ii)(G)(*1*) and (*2*) of this section by aggregating all benefit formulas that have the same basis and treating those aggregated formulas as a single formula for purposes of paragraphs (b)(2)(ii)(G)(*1*) and (*2*) of this section.

(*4*) *Anti-abuse rule*. A plan is not eligible for separate testing under this paragraph (b)(2)(ii)(G) if the Commissioner determines that the plan's use of separate formulas with different bases is structured to evade the requirement to aggregate formulas under paragraph (a)(1) of this section (for example, if the differences between the bases of the separate formulas are minor).

(*5*) *Effective/applicability date*. This paragraph (b)(2)(ii)(G) is applicable for plan years beginning on or after January 1, 2009.

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

(Filed by the Office of the Federal Register on June 17, 2008, 8:45 a.m., and published in the issue of the Federal Register for June 18, 2008, 73 F.R. 34665)

Deletions From Cumulative List of Organizations Contributions to Which are Deductible Under Section 170 of the Code

Announcement 2008–69

The Internal Revenue Service has revoked its determination that the organizations listed below qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1986.

Generally, the Service will not disallow deductions for contributions made to a listed organization on or before the date of announcement in the Internal Revenue Bulletin that an organization no longer qualifies. However, the Service is not precluded from disallowing a deduction for any contributions made after an organization ceases to qualify under section 170(c)(2) if the organization has not timely filed a suit for declaratory judgment under section 7428 and if the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for or was aware of the activities or omissions of the organization that brought about this revocation.

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organizations described in section 170(c)(2) that are otherwise allowable will continue to be deductible. Protection under section 7428(c) would begin on August 11, 2008, and would end on the date the court first determines that the organization is not described in section 170(c)(2) as more particularly set forth in section 7428(c)(1). For individual contributors, the maximum deduction protected is $1,000, with a husband and wife treated as one contributor. This benefit is not extended to any individual, in whole or in part, for the acts or omissions of the organization that were the basis for revocation.

Homes for All, Inc.
Fort Myers, FL
H & H Housing, Inc.
Los Angeles, CA
Family Home Providers, Inc.
Cumming, GA
Miller County New Vision Coalition, Inc.
Colquitt, GA
Buyer's Dream Fund
Cleveland Heights, OH
American Bowling Congress
Wyoming, MI
Accelerated Trust, Inc.
Boca Raton, FL
National Home Charities, Inc.
Westminster, CO
Independent Group, Inc.
Covington, KY
Shepherd Hills Development Corporation
Las Vegas, NV

Foundations Status of Certain Organizations

Announcement 2008–70

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

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

Adonai Christian Ministries, Inc.,
Norfolk, VA
Advance Humanity Aide AHA,
McClellanville, SC
Almarie King Education Fund,
Port Orchard, WA
Alpha and Omega Church Alpha and Omega Immanuel NFP-Inc.,
Chicago, IL
Alvarado Project, San Francisco, CA
American Cowboy Association, Inc.,
Longwood, FL
American Indian Community History Center, Kensington, CA
Americare Community Services, Inc.,
Richmond, WA

Anchored in Excellence Community Development Corporation, Baytown, TX
Annie Laura Avant Community, Inc., Detroit, MI
Aqua Resources, Inc., Beaumont, TX
Arkansas Hunters Feeding the Hungry, Inc., Little Rock, AR
Arts Fund Inc., Salem, MA
Ascended Masters Healing Center for the Mind Body and Soul, Tucson, AZ
Associated Lenders, Desoto, TX
Auko Community Development Corporaton, Los Angeles, CA
B & S Kitter Kare, Crane, MO
Baby Basics, Inc., Milwaukee, WI
Backpacks for Kids, Dallas, TX
Baldwin Bethany Community Development Corporation, Los Angeles, CA
B E S T Academy, Houston, TX
Bewear Prison Ministry, Inc., Houston, TX
Breath of Life of Central Florida, Lake Panasoffke, FL
BRH New Communities, Inc., Baton Rouge, LA
Bridges of Hope Community Development Center, Inc., Inglewood, CA
Brooks Chapel Project Outreach, Inc., Moscow, TN
Building Blocks Center, Inc., Fresno, TX
Caeli Foundation, Orem, UT
Cairs, Inc., Nokomis, FL
California Museum of Military History, Inc., San Francisco, CA
CAPPA Children's Foundation, Sacramento, CA
Caring for Cats Charitable Trust, Stoughton, MA
Caring for Families, Los Angeles, CA
Center for Religious Architecture, Chicago, IL
Charity Challenges, Inc., Rochester, NY
Chisholm Community Services of Oklahoma, Inc., Jefferson, TX
Choice Resolutions Group, Inc., Houston, TX
Cian Society Foundation, New York, NY
Circle of Life Foundation, Inc., Odenton, MD
Citizens for Parental Rights, Grand Rapids, MI
City Community Development Corporation, Cleveland, OH
Claver House of Renewal NFP, Chicago, IL
College Solutions, Inc., Gilbert, AZ
Come and Dine Ministries, Inc., Adelphi, MD
Committee to Preserve Luna Park Housing, Brooklyn, NY
Community Awareness Committee, Avalon, PA
Community Mobilization Organization, Bronx, NY
Comnec, Incorporated, Los Angeles, CA
Compassion Global Relief Mission, Randallstown, MD
Concerned Rosebud Area Citizens, Inc., White River, SD
Creston Community Development Corporation, Inc., Houston, TX
Crew Ensemble, Inc., Baltimore, MD
Culverton Affordable Housing Development Fund Company, Inc., Troy, NY
Dawn of Hope, Granville, OH
Daybreak Community Development Corp., Plainfield, NJ
Deanza Clinic, Calexico, CA
Divine Institute of Modeling & Etiquette, Inc., Tempe, AZ
Dublin Area Senior Volunteer Program, Dublin, CA
Eagles Missionary Supply, Inc., Midlothian, VA
Eastside Affordable Housing Program, Bellevue, WA
Eastside Community and Development Center, Inc., Springfield, IL
Eden Foundation, Incorporated, Winter Park, FL
Education Support, Inc., Cheyenne, WY
E G T Community Development Corp., Bayonne, NJ
Emmanuel Christian Fellowship Ministries, Inc., Severn, MD
Emmanuel House, Newark, NJ
E-nitiative Wealth, Inc., Torrance, CA
E.R. Rewis Water & Spirit Outreach, Inc., Chokoloskee, FL
Evangelical Crusade Outreach, Phoenix, AZ
Ezekiel House, Inc., Lansing, MI
Faith Temple Outreach Ministries, Grenada, MS
Fannie Roberts Adult Day Care, Thomasville, GA
Financial Fitness Center, Inc., FFC, Atlanta, GA
Flips Community Development & Outreach of Texas, Inc., Irving, TX
For Childrens Sake of Maryland, Austin, TX
Foundation for Agape of North Alabama, Huntsville, AL
Foundation for People With Disabilities, Fulton, NY
Fourth Watch Ministries, Seymour, TN
Francies Nonprofit Housing Community Development Corporation, Rochester, MI
Friendly Community Services Outreach, Inc., Victorville, CA
Friendly Group Home, Inc., Lehigh Acres, FL
Friends & Neighbors Elderly Support & Housing Services of LA, Inc., Lafayette, LA
Friends of Idasa, Inc., Washington, DC
Full Gospel Globe Mission Church, Powell, OH
Genesis House, Inc., Indianapolis, IN
Ghana Golden Pod Organization, Inc., Bronx, NY
Ghova Institute, Inc., Hyattsville, MD
Gilbert Lindsay Manor Tenant Committe-Association, Los Angeles, CA
Global Harvest Ministerial Association, Inc., Clearwater, FL
Golden Gate Community Development Corporation, Raeford, NC
Good Stewardship, Inc., Summerville, SC
Grace and Mercy Foundation, Inglewood, CA
Grazette Halfway House, Inc., West Palm Beach, FL
Gregory House Foundation, Jackson, MS
Gregory Training Center, San Francisco, CA
Grupo Jalisco En San Antonio TX, San Antonio, TX
Guardian Angel Foster Home, Inc., Hinesville, GA
Guardians of Childrens and Parents Family Rights Organization, Washington, DC
Guidance Behind the Walls, Aurora, CO
Hawaii Mana, Honolulu, HI
Help Us, Incorporated, Martinsburg, WV
Helping Hands Community Resource Distribution Center, Inc., Miami, FL
Helping Hands Family Services, Chicago, IL
Heritage House, Inc., Lithonia, GA
His Greatest Creation, Fort Worth, TX
Historic Stop Six Empowerment Coalition, Fort Worth, TX
Hollies Hope, Inc., Metairie, LA
Home Buyers Network, Inc., McDonough, GA

HOPE, Philippi, WV
Hopkins County Healthcare Service, Sulphur Springs, TX
Humanity Resources, Inc., Ft. Lauderdale, FL
Illinois Chaplaincy, Inc., Chicago, IL
In the Gap Ministries Community Development Corporation, Charlotte, NC
Infamous Warriors Drill Team of Des Moines, Des Moines, IA
Inner Circle Counsel Enterprise, Inc., Miami, FL
Institute for World Transformation, Antioch, CA
Inter-Action, Inc., Stone Mountain, GA
International Association of Rosenbergs System of Integrative Body Psychotherapy, Santa Monica, CA
International Bodytalk Foundation, Inc., Sarasota, FL
Ivana Housing Development Corporation, Citrus Heights, CA
James A. Rhodes Leadership Foundation, Columbus, OH
Jesus Children Ministry, Sacramento, CA
Joshua Ministries, Inc., Nashville, TN
Jubilee House, Riverside, CA
Khmer County Services of Florida, Cerritos, CA
L & K Teen Summit, Jacksonville, FL
Laura B. Collins Child Development Center, Inc., Chicago, IL
Life Center, Inc., Newport News, VA
Lifefaqs Org., Oakdale, CT
Lord's Kitchenette & Ministries of Helps, Inc., Tulsa, OK
Los Angeles Oral Health Foundation, Los Angeles, CA
Lott of Love Foundation, Inc., Baton Rouge, LA
Love at Work Group, Inc., Washington, DC
Loving Care Foundation, Salem, VA
Marcelo Balboa Ironman Foundation, Superior, CO
Mary Alice Foundation, Inc., Milwaukee, WI
Mary Esther Enterprises, Inc., Shelby, NC
McPherson Gardens, Inc., Euclid, OH
Medicine Lodge, Inc., Great Falls, MT
Metrovoice Youth Entrepreneurs Program, Inc., Washington, DC
Michigan Elite Hoops, Detroit, MI
Michigan Institute for Prevention and Intervention, Gross Pointe, MI
Middle Tennessee Labrador Retriever Rescue, Nashville, TN
Milestone Social Services, Inc., Winter Park, FL
Mobiles Pride Youth Organization, Mobile, AL
Molly Crouch Anderson Scholarship Foundation, Itasca, TX
Moorish Development Corporation, Wichita, KS
More Than a Memory Productions, Channelview, TX
Morning Star Community Development Corporation, Williamston, NC
Mountain View Home for the Elderly Corp., Cidra, PR
Mt. Sinai Senior Services, Inc., South Setuaket, NY
Multicultural Citizens Advisory Commissioners, Inc., Atlantic City, NJ
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Organization for the Development of Agriculture in Haiti OADH, Brooklyn, NY
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River Ridge Learning Center, River Ridge, LA
Riverside County Underwater Search and Recovery Team, Inc., Perris, CA
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Robert L. Campbell Ministries, Inc., Sugar Land, TX
Roharco, Inc., Cincinnati, OH
Rural West Texas Community Partnerships, Denver City, TX
Safespaces Org., Brentwood, CA
Sant Kiltirel Mapou, Inc., Miami, FL
Second Baptist Community Development NFP, Evanston, IL
Seneca High School Foundation, Seneca, IL
Senior Services, Inc., Wheatfield, NY
Shelton and Lucille Buchanan Family Foundation, San Diego, CA
Sierra Development Corporation, Somerset, NJ
Southwest Community Center of Rockford, Rockford, IL
Special Education Advocacy Services for Children and Youth, Washington, DC
Spirit Builders, Inc., Cordova, TN
Spiritual Essence by Pamela Dorsey, Dallas, TX
St. Paul/Gillespie-Selden Rural Life Community Center, Inc., Cordele, GA
Stepping Stones Academy, Inc., Crosby, TX

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Women of Color Public Policy and Education Institute, Inc., Brooklyn, NY
Won Last Chance, Inc., Chandler, AZ
Work Works, Inc., Poughkeepsie, NY
Worstell Foundation, Mexico, MO
Youth Solutions, Inc., Brandon, MS

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

Multiemployer Plan Funding Guidance; Correction

Announcement 2008–71

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to a notice of a public hearing on proposed rulemaking.

SUMMARY: This document contains a correction to a notice of public hearing (Announcement 2008–64, 2008–28 I.R.B. 114) on a notice of proposed rulemaking that was published in the **Federal Register** on Friday, June 27, 2008 (73 FR 36476) providing additional rules for certain multiemployer defined benefit plans that are in effect on July 16, 2006. These proposed regulations affect sponsors and administrators of, and participants in multiemployer plans that are in either endangered or critical status. These regulations are necessary to implement the new rules set forth in section 432 that are effective for plan years beginning after 2007. The proposed regulations reflect changes made by the Pension Protection Act of 2006.

FOR FURTHER INFORMATION CONTACT: Bruce Perlin, (202) 622–6090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The correction notice that is the subject of this document is under section 432 of the Internal Revenue Code.

Need for Correction

As published, a notice of a public hearing on proposed rulemaking (REG–151135–07) contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of a notice of public hearing on proposed rulemaking (REG–151135–07), which was the subject of FR Doc. E8–14563, is corrected as follows:

On page 36477, column 1, under the caption "**SUPPLEMENTARY INFORMATION:**", line 5, the language "**Federal Register** on Tuesday, March 8," is corrected to read "**Federal Register** on Tuesday, March 18,".

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

(Filed by the Office of the Federal Register on July 1, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 2, 2008, 73 F.R. 37910)

Section 7428(c) Validation of Certain Contributions Made During Pendency of Declaratory Judgment Proceedings

Announcement 2007–72

This announcement serves notice to potential donors that the organization listed below has recently filed a timely declaratory judgment suit under section 7428 of the Code, challenging revocation of its status as an eligible donee under section 170(c)(2).

Protection under section 7428(c) of the Code begins on the date that the notice of revocation is published in the Internal Revenue Bulletin and ends on the date on which a court first determines that an organization is not described in section 170(c)(2), as more particularly set forth in section 7428(c)(1).

In the case of individual contributors, the maximum amount of contributions protected during this period is limited to $1,000.00, with a husband and wife being treated as one contributor. This protection is not extended to any individual who was responsible, in whole or in part, for the acts or omissions of the organization that were the basis for the revocation. This protection also applies (but without limitation as to amount) to organizations described in section 170(c)(2) which are exempt from tax under section 501(a). If the organization ultimately prevails in its declaratory judgment suit, deductibility of contributions would be subject to the

normal limitations set forth under section 170.

Sea of Sound Production, Inc.
Midlothian, VA
Educate the Children, Inc.
Long Beach, CA

Family Home Providers, Inc.
Cumming, GA

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

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[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.

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