

## **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.

## **SPECIAL ANNOUNCEMENT**

### **Announcement 2007-106, page 1021.**

The announcement for the 2008 IRS Individual e-file Partnership Program will solicit applications from potential partners for participation in the program. The partnership opportunities are a result of RRA 98, which authorized the IRS Commissioner to promote the benefits of and encourage the use of e-file products and services through partnerships with various entities that offer low-cost tax preparation and electronic filing of individual income tax returns for qualified taxpayers. Those applicants that are accepted into the program will have a link(s) and offer description(s) for their products and services posted to IRS.gov (Partners Page).

## **INCOME TAX**

### **Ct. D. 2083, page 986.**

**Levies upon third party property to collect taxes owed by another; wrongful levy action.** The Supreme Court holds that the Trust missed section 7426(a)(1)'s deadline for challenging a levy, and may not bring the challenge as a tax refund claim under section 1346(a)(1).

### **REG-140206-06, page 1006.**

Proposed regulations under section 1441 of the Code provide guidance regarding the withholding and reporting obligations of a withholding agent in the case of a self tender by a publicly traded corporation, when a determination is required under section 301 as to whether the distribution is treated as a dividend or a distribution in part or full payment in exchange for stock. A public hearing is scheduled for February 6, 2008.

### **REG-114125-07, page 1012.**

Proposed regulations under section 861 of the Code contain changes to existing final regulations regarding the source of compensation for labor or personal services.

### **Notice 2007-86, page 990.**

This notice provides additional transition relief, under section 409A of the Code, that was scheduled to expire on December 31, 2007. Generally, this notice extends relief to December 31, 2008, except that reliance on the proposed regulations under section 409A is not permitted after December 31, 2007. Notice 2007-78 modified. Section 3 of Notice 2006-79 modified and superseded.

### **Notice 2007-88, page 993.**

This notice requests public comment on a proposal to change the process by which taxpayers obtain the consent of the Commissioner of Internal Revenue to change a method of accounting for federal income tax purposes.

## **EMPLOYEE PLANS**

### **Notice 2007-86, page 990.**

This notice provides additional transition relief, under section 409A of the Code, that was scheduled to expire on December 31, 2007. Generally, this notice extends relief to December 31, 2008, except that reliance on the proposed regulations under section 409A is not permitted after December 31, 2007. Notice 2007-78 modified. Section 3 of Notice 2006-79 modified and superseded.

**(Continued on the next page)**

Announcements of Disbarments and Suspensions begin on page 1015.  
Finding Lists begin on page ii.



## ESTATE TAX

### **Notice 2007-90, page 1003.**

This notice provides interim guidance and describes a change in IRS policy regarding section 6166 of the Code, Extension of time for payment of estate tax where estate consists largely of interest in closely held business. The IRS will now determine on a case-by-case basis whether security will be required when a qualifying estate elects under section 6166 to pay all or a part of the estate tax in installments. This notice also informs taxpayers, tax practitioners, executors and other persons who represent estates of what factors the IRS will consider in determining whether an estate making the section 6166 election will be required to provide security.

## TAX CONVENTIONS

### **Announcement 2007-107, page 989.**

The competent authorities of the United States and the United Kingdom hereby enter into the following agreement (“the Agreement”) regarding the definition of “first notification” under paragraph 1 of Article 26 (Mutual Agreement Procedure) of the Convention between the United States of America and the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation with respect to taxes on income signed at London on July 24, 2001 (“the Treaty”). The Agreement is entered into under paragraph 3 of Article 26 (Mutual Agreement Procedure).

## ADMINISTRATIVE

### **Ct. D. 2083, page 986.**

**Levies upon third party property to collect taxes owed by another; wrongful levy action.** The Supreme Court holds that the Trust missed section 7426(a)(1)'s deadline for challenging a levy, and may not bring the challenge as a tax refund claim under section 1346(a)(1).

### **Notice 2007-89, page 998.**

This notice provides interim guidance to employers and payers on their reporting and wage withholding requirements for calendar year 2007 with respect to deferrals of compensation and amounts includible in gross income under section 409A of the Code. The notice also provides interim rules on calculating amounts includible in gross income under section 409A. Notice 2005-1 modified.

# The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by

applying the tax law with integrity and fairness to all.

## Introduction

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

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

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

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations,

court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

### **Part I.—1986 Code.**

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

### **Part II.—Treaties and Tax Legislation.**

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

### **Part III.—Administrative, Procedural, and Miscellaneous.**

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

### **Part IV.—Items of General Interest.**

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

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

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

## Section 1346.—Recovery of Unconstitutional Federal Taxes

The Supreme Court holds that the Trust missed section 7426(a)(1)'s deadline for challenging a levy, and may not bring the challenge as a tax refund claim under section 1346(a)(1). See Court Decision 2083, page 986.

## Section 7426.—Civil Actions by Persons Other Than Taxpayers

### Ct. D. 2083

#### SUPREME COURT OF THE UNITED STATES

No. 05–1541 (2007)

EC TERM OF YEARS  
TRUST v. UNITED STATES

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

April 30, 2007

Syllabus

Under 26 U.S.C. §7426(a)(1), if the Internal Revenue Service (IRS) levies upon a third party's property to collect taxes owed by another, the third party may bring a wrongful levy action against the United States, so long as such action is brought before "the expiration of 9 months from the date of the levy," §6532(c)(1). In contrast, the limitations period for a tax refund action under 28 U.S.C. §1346(a)(1) begins with an administrative claim that may be filed within at least two years, and may be brought to court within another two years after an administrative denial. The IRS levied on a bank account in which petitioner (Trust) had deposited funds because the IRS assumed that the Trust's creators had transferred assets to the Trust to evade taxes. The bank responded with a check to the Treasury. Almost a year later, the Trust and others brought a §7426(a)(1) action claiming wrongful levies, but the

District Court dismissed the complaint because it was filed after the 9-month limitations period had expired. After unsuccessfully pursuing a tax refund at the administrative level, the Trust filed a refund action under §1346(a)(1). The District Court held that a wrongful levy claim under §7426(a)(1) was the sole remedy possible and dismissed, and the Fifth Circuit affirmed.

*Held:* The Trust missed §7426(a)(1)'s deadline for challenging a levy, and may not bring the challenge as a tax refund claim under §1346(a)(1). Section 7426(a)(1) provides the exclusive remedy for third-party wrongful levy claims. "[A] precisely drawn, detailed statute pre-empts more general remedies," *Brown v. GSA*, 425 U.S. 820, 834, and it braces the pre-emption claim when resort to a general remedy would effectively extend the limitations period for the specific one, see *id.* at 833. If third parties could avail themselves of §1346(a)(1)'s general tax refund jurisdiction, they could effortlessly evade §7426(a)(1)'s much shorter limitations period. The Trust argues that because *United States v. Williams*, 514 U.S. 527, construed §1346(a)(1)'s general jurisdictional grant expansively enough to cover third parties' wrongful levy claims, treating §7426(a)(1) as the exclusive avenue for these claims would amount to a disfavored holding that §7426(a)(1) implicitly repealed §1346(a)(1)'s pre-existing jurisdictional grant. But this reads *Williams* too broadly. *Williams* involved a lien and was decided on the specific understanding that no other remedy was open to the plaintiff. Here, the Trust challenges a levy and could have made a timely claim under §7426(a)(1). Even if the presumption against implied repeals applied here, §7426(a)(1)'s 9-month limitations period cannot be reconciled with the notion that the same challenge would be open under §1346(a)(1) for up to four years. Nor can the two statutory schemes be harmonized by construing §7426(a)(1)'s filing deadline to cover only those actions seeking pre-deprivation remedies unavailable under §1346(a)(1). On its face, §7426(a)(1) applies to pre-deprivation and post-deprivation claims alike. Pp. 4–7.

434 F.3d 807 affirmed.

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

#### SUPREME COURT OF THE UNITED STATES

No. 05–1541 (2007)

EC TERM OF YEARS  
TRUST v. UNITED STATES

On WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

April 30, 2007

JUSTICE STEVENS delivered the opinion of the Court.

This is a challenge to the Internal Revenue Service's levy upon the property of a trust, to collect taxes owed by another, an action specifically authorized by 26 U.S.C. §7426(a)(1), but subject to a statutory filing deadline the trust missed. The question is whether the trust may still challenge the levy through an action for tax refund under 28 U.S.C. §1346(a)(1). We hold that it may not.

#### I

The Internal Revenue Code provides that "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. §6321. "A federal tax lien, however, is not self-executing," and the IRS must take "[a]ffirmative action . . . to enforce collection of the unpaid taxes." *United States v. National Bank of Commerce*, 472 U.S. 713, 720 (1985). One of its "principal tools," *ibid.*, is a levy, which is a "legally sanctioned seizure and sale of property," Black's Law Dictionary 926 (8th ed. 2004); see also §6331(b) ("The term 'levy' as used in this title includes the power of distraint and seizure by any means").

To protect against a “wrongful” imposition upon “property which is not the taxpayer’s,” S. Rep. No. 1708, 89th Cong., 2d Sess., 30 (1966), the Federal Tax Lien Act of 1966 added §7426(a)(1), providing that “[i]f a levy has been made on property . . . any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in . . . such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court. 80 Stat. 1143. The action must, however, be brought before “the expiration of 9 months from the date of the levy.”<sup>1</sup> §6532(c)(1). This short limitations period contrasts with its counterpart in a tax refund action under 28 U.S.C. §1346(a)(1), which begins with an administrative claim that may be filed within at least two years, and may be brought to court within another two after an administrative denial.<sup>2</sup> The demand for greater haste when a third party contests a levy is no accident; as the Government explained in the hearings before passage of the Act, “[s]ince after seizure of property for nonpayment of taxes [an IRS] district director is likely to suspend further collection activities against the taxpayer, it is essential that he be advised promptly if he has seized property which does not belong to the taxpayer. Hearings on H.R. 11256 and H.R. 11290 before the House Committee on Ways and Means, 89th Cong., 2d Sess., 57–58 (1966) (written statement of Stanley S. Surrey, Assistant Secretary of the Treasury); see also *id.* at 72 (statement of Laurens Williams, Chairman, Special Committee on Federal Liens, American Bar Association) (“A short (9-month) statute of limitations is provided, because it is important to get such controversies decided quickly so the Government may pursue the taxpayer’s own property if it made a mistake the first time”).

## II

After Elmer W. Cullers, Jr., and Dorothy Cullers established the EC Term of Years Trust in 1991, the IRS assessed

federal tax liabilities against them for what the Government claimed (and the Trust does not dispute, see Tr. of Oral Arg. 7) were unwarranted income tax deductions in the 1980s. The Government assumed that the Cullerses had transferred assets to the Trust to evade taxes, and so filed a tax lien against the Trust in August 1999. The Trust denied any obligation, but for the sake of preventing disruptive collection efforts by the IRS, it deposited funds in a bank account, against which the IRS issued a notice of levy to the bank in September 1999. In October, the bank responded with a check for over \$3 million to the United States Treasury.

Almost a year after that, the Trust (joined by several other trusts created by the Cullerses) brought a civil action under 26 U.S.C. §7426(a)(1) claiming wrongful levies, but the District Court dismissed it because the complaint was filed after the 9-month limitations period had expired, see §6532(c)(1). The court also noted that tax refund claims under 28 U.S.C. §1346(a)(1) were not open to the plaintiff trusts because §7426 “affords the exclusive remedy for an innocent third party whose property is confiscated by the IRS to satisfy another person’s tax liability.” *BSC Term of Years Trust v. United States*, 2001–1 USTC ¶50,174, p. 87,237, n. 1, 87 AFTR 2d ¶2001–390, p. 2001–547, n. 1 (WD Tex., 2000) (quoting *Texas Comm. Bank Fort Worth, N.A. v. United States*, 896 F.2d 152, 156 (CA5 1990); emphasis deleted). At first the Trust sought review by the Court of Appeals for the Fifth Circuit, but then voluntarily dismissed its appeal. *BSC Term of Years Trust v. United States*, 87 AFTR 2d ¶2001–1039, p. 2001–2532 (2001).

After unsuccessfully pursuing a tax refund at the administrative level, the Trust filed a second action, this one for a refund under §1346(a)(1). The District Court remained of the view that a claim for a wrongful levy under §7426(a)(1) had been the sole remedy possible and dismissed.<sup>3</sup> The Court of Appeals for the Fifth Circuit affirmed.

Because the Ninth Circuit, on the contrary, has held that §7426(a)(1) is not the exclusive remedy for third parties challenging a levy, see *WWSM Investors v. United States*, 64 F.3d 456 (1995), we granted certiorari to resolve the conflict, 549 U.S. \_\_\_\_ (2006). We affirm.

## III

“In a variety of contexts, the Court has held that a precisely drawn, detailed statute pre-empts more general remedies.” *Brown v. GSA*, 425 U.S. 820, 834 (1976); see *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 284–286 (1983) (adverse claimants to real property of the United States may not rely on “officer’s suits” or on other general remedies because the Quiet Title Act of 1972 is their exclusive recourse); see also *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942) (venue in patent infringement cases is governed by a statute dealing specifically with patents, not a general venue provision). It braces the preemption claim when resort to a general remedy would effectively extend the limitations period for the specific one. See *Brown v. GSA*, *supra*, at 833 (rejecting an interpretation that would “driv[e] out of currency” a narrowly aimed provision “with its rigorous . . . time limitations” by permitting “access to the courts under other, less demanding statutes”); see also *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 122–123 (2005) (concluding that 47 U.S.C. §332(c) precludes resort to the general cause of action under 42 U.S.C. §1983, in part because §332 “limits relief in ways that §1983 does not” by requiring judicial review to be sought within 30 days); 544 U.S. at 130, n. (STEVENS, J., concurring in judgment) (same).

Resisting the force of the better-fitted statute requires a good countervailing reason, and none appears here. Congress specifically tailored §7426(a)(1) to third-party claims of wrongful levy, and if third parties could avail themselves of the general tax refund jurisdiction of §1346(a)(1), they could effortlessly evade

<sup>1</sup> This period can be extended for up to 12 months if the third party makes an administrative request for the return of the property wrongfully levied upon. See 26 U.S.C. §6532(c)(2).

<sup>2</sup> Title 28 U.S.C. §1346(a)(1) gives district courts “jurisdiction, concurrent with the United States Court of Federal Claims,” over “[a]ny civil action against the United States for the recovery of,” among other things, “any internal revenue tax alleged to have been erroneously or illegally assessed or collected.” A taxpayer may bring such an action within two years after the IRS disallows the taxpayer’s administrative refund claim. See 26 U.S.C. Secs. 6532(a)(1)–(2); see also §7422(a) (requiring a taxpayer to file the administrative claim before seeking a refund in court). An administrative refund claim must, in turn, be filed within two years from the date the tax was paid or three years from the time the tax return was filed, whichever is later. See §6511(a).

<sup>3</sup> The District Court declined to dismiss the Trust’s claim on res judicata grounds, and the Government does not argue claim or issue preclusion in this Court, see Brief for United States 5, n. 2.

the levy statute's 9-month limitations period thought essential to the Government's tax collection.

The Trust argues that in *United States v. Williams*, 514 U.S. 527 (1995), we construed the general jurisdictional grant of §1346(a)(1) expansively enough to cover third parties' wrongful levy claims. So, according to the Trust, treating §7426(a)(1) as the exclusive avenue for these claims would amount to a disfavored holding that §7426(a)(1) implicitly repealed the pre-existing jurisdictional grant of §1346(a)(1). See *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974).

But the Trust reads *Williams* too broadly. Although we decided that §1346(a)(1) authorizes a tax-refund claim by a third party whose property was subjected to an allegedly wrongful tax lien, we so held on the specific understanding

that no other remedy, not even a timely claim under §7426(a)(1), was open to the plaintiff in that case. See *Williams, supra*, at 536–538. Here, on the contrary, the Trust challenges a levy, not a lien, and could have made a timely claim under §7426(a)(1) for the relief it now seeks under §1346(a)(1).<sup>4</sup>

And even if the canon against implied repeals applied here, the Trust still could not prevail. We simply cannot reconcile the 9-month limitations period for a wrongful levy claim under §7426(a)(1) with the notion that the same challenge would be open under §1346(a)(1) for up to four years. See *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) (“[W]here provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one”). On this point, the Trust proposes that the two statutory

schemes can be “harmonized” by construing the deadline for filing §7426(a)(1) claims to cover only those actions seeking “pre-deprivation” remedies unavailable under §1346(a)(1). See Reply Brief for Petitioner 6. But this reading would violate the clear text of §7426(a)(1), which on its face applies to pre-deprivation and post-deprivation claims alike. See 26 U.S.C. §7426(a)(1) (“Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary”).

\* \* \*

The Trust missed the deadline for challenging a levy under §7426(a)(1), and may not bring the challenge as a tax refund claim under §1346(a)(1). The judgment of the Court of Appeals is accordingly affirmed.

*It is so ordered.*

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<sup>4</sup> It has been commonly understood that *Williams* did not extend §1346(a)(1) to parties in the Trust's position. See 434 F.3d 807, 810 (CA5 2006) (case below) (“To construe *Williams* to allow an alternative remedy under §1346, with its longer statute of limitations period, would undermine the surety provided by the clear avenue to recovery under §7426” (citation omitted)); *Dahn v. United States*, 127 F.3d 1249, 1253 (CA10 1997) (“[T]here were no tax levies involved in [*Williams*]. Thus, the Court was concerned solely with the reach of §1346 per se; the exclusivity of a concurrent §7426 claim was never in issue. Indeed, the Court specifically emphasized the inapplicability of §7426 (or any other meaningful remedy) to reinforce its broad reading of §1346”); *WWSM Investors v. United States*, 64 F.3d 456, 459 (CA9 1995) (Brunetti, J., dissenting) (“The Supreme Court recognized *Williams* as a refund, not a wrongful levy, case, and [did not] even hint that §7426 was not the exclusive remedy for a claimed wrongful levy”); Rev.Rul. 2005–49, 2005–2 Cum.Bull. 126 (“The rationale in *Williams* is inapplicable to wrongful levy suits because, Congress created an exclusive remedy under section 7426 for third persons claiming an interest in property levied upon by the [IRS]”); but see *WWSM Investors, supra*, at 459 (majority opinion) (“[S]eizing money from WWSM's bank account is functionally equivalent to what the IRS did in *Williams* — placing a lien on property in escrow under circumstances which compelled Mrs. Williams to pay the IRS and discharge the lien”).

# Part II. Treaties and Tax Legislation

## Subpart A.—Tax Conventions and Other Related Items

### US-UK Agreement Defining the Term “First Notification” Under Treaty Article 26(1)

#### Announcement 2007–107

The following is a copy of the Competent Authority Agreement (“the Agree-

ment”) entered into by the Competent Authorities of the United States and the United Kingdom regarding the definition of “first notification” under paragraph 1 of Article 26 (Mutual Agreement Procedure) of the Convention between the United States of America and the United Kingdom of Great Britain and Northern Ireland

for the avoidance of double taxation with respect to taxes on income.

The text of the Agreement is as follows:

#### COMPETENT AUTHORITY AGREEMENT

The competent authorities of the United States and the United Kingdom hereby enter into the following agreement (“the Agreement”) regarding the definition of “first notification” under paragraph 1 of Article 26 (Mutual Agreement Procedure) of the Convention between the United States of America and the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation with respect to taxes on income signed at London on July 24, 2001 (“the Treaty”). The Agreement is entered into under paragraph 3 of Article 26 (Mutual Agreement Procedure).

It is understood that for the purposes of the Agreement the term “Article” refers to an Article of the Treaty.

#### *Definition of “First Notification” under Article 26(1)*

Paragraph 1 of Article 26 provides that

Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or national. The case must be presented within three years from the *first notification* of the action resulting in taxation not in accordance with the provisions of this Convention or, if later, within six years from the end of the taxable year or chargeable period in respect of which that taxation is imposed or proposed. [Emphasis added].

The competent authorities of the United States and the United Kingdom have agreed that paragraph 1 of Article 26 of the Convention shall be interpreted in the way most favourable to the taxpayer, consistent with the approach set out in the OECD commentary on the Model Tax Convention on Income and on Capital. In order to provide certainty for taxpayers and to ensure consistent application of the provision, the date of “first notification of the action resulting in taxation not in accordance with the Convention” shall be treated as the date when all domestic remedies have been exhausted.

In the United Kingdom, this will be either the date of issue of a statutory notice required to conclude an assessment and/or any related appeal procedures for the period of assessment in question, or a letter of acceptance by an officer of the Board of HM Revenue & Customs to settlement terms for the period in question.

In the United States, this will be the date of the later of: (1) an assessment pursuant to a notice of proposed adjustment or a statutory notice of deficiency; (2) when a closing agreement is accepted by the Secretary of the Treasury or his delegate; or (3) if the taxpayer is a party in an action in a US court regarding a redetermination of tax liability or requesting a refund of tax, when such action is finally resolved, including any appeal.

Upon signature by both Competent Authorities, this agreement shall have effect from the date of entry into force of the Convention, without regard to the taxable or chargeable period to which the matter relates.

Agreed to by the Undersigned competent authorities:

Date

Date

Frank Y. Ng  
U.S. Competent Authority

Diane Hay  
U.K. Competent Authority



## Part III. Administrative, Procedural, and Miscellaneous

### Notice of Additional 2008 Transition Relief under Section 409A

#### Notice 2007-86

##### SECTION 1. PURPOSE

This notice provides additional transition relief regarding the application of section 409A of the Internal Revenue Code to nonqualified deferred compensation plans. Generally, this notice extends to December 31, 2008, the transition relief that was scheduled to expire on December 31, 2007, as provided in Notice 2006-79, 2006-43 I.R.B. 763, and the preamble to the final regulations under section 409A (72 Fed. Reg. 19234 (April 17, 2007)) (the final regulations preamble). This transition relief revokes and supersedes the transition relief provided in § III of Notice 2007-78, 2007-41 I.R.B. 780, and modifies the relief provided in § IV of Notice 2007-78 related to employment agreements, as described below. This transition relief does not affect the guidance provided in § IV of Notice 2007-78 related to predetermined cashout features, or the guidance provided in § VI of Notice 2007-78, related to the application of section 409A(b) (restrictions on certain trusts and other arrangements).

##### SECTION 2. BACKGROUND

Section 409A provides certain requirements applicable to nonqualified deferred compensation plans. If a plan does not meet those requirements, participants in the plan are required to immediately include amounts deferred under the plan in income and pay additional taxes on such income. Beginning with Notice 2005-1, 2005-1 C.B. 274, the Treasury Department and the IRS have issued several notices and other guidance providing transition relief intended to permit and promote compliance with the requirements of section 409A. The Treasury Department and the IRS also issued proposed regulations under section 409A (70 Fed. Reg. 57930 (Oct. 4, 2005)) (the proposed regulations), and final regulations under section 409A in April 2007 (the final regulations).

On September 10, 2007, the Treasury Department and the IRS issued Notice 2007-78, granting certain transition relief intended to facilitate compliance with the written plan requirements set forth in the final regulations. See §1.409A-1(c). Commentators stated that although the Notice 2007-78 transition relief was helpful, the transition relief in that notice did not adequately address the need for additional time for service recipients and service providers to analyze all of their plans and make informed and reasoned decisions regarding the changes that would be necessary to bring existing arrangements into compliance with the final regulations. This notice addresses these concerns by generally extending the transition relief currently scheduled to expire on December 31, 2007 through December 31, 2008. Section III of Notice 2007-78 is revoked and superseded by this notice.

##### SECTION 3. EXTENSION OF TRANSITION RELIEF

###### .01 Extension of Transition Relief Provided in Notice 2006-79

Section 3 of Notice 2006-79 is modified and superseded in accordance with paragraphs (A) and (B) of this § 3.01.

(A) *General rule.* During 2008, taxpayers are not required to comply with the requirements of the final regulations. Instead, they are required to operate a nonqualified deferred compensation plan in compliance with the plan's terms, to the extent consistent with section 409A and the applicable guidance (including Notice 2005-1). Where a provision of Notice 2005-1 is inconsistent with the final regulations, taxpayers may rely upon either Notice 2005-1 or the final regulations. To the extent an issue is not addressed in Notice 2005-1 or other applicable guidance, taxpayers must apply a reasonable, good faith interpretation of the statute. Reliance upon the final regulations is treated as applying a reasonable, good faith interpretation of the statute.

Taxpayers may not rely upon the provisions of the proposed regulations for periods after December 31, 2007, except that taxpayers may continue to rely on sections II.E and VI.E of the preamble to the

proposed regulations (relating to the application of section 409A to partners and partnerships) until further guidance is issued and sections XI.C (relating to changes in payment elections or conditions) and XI.H (relating to substitutions of non-discounted stock options and stock appreciation rights for discounted stock options and stock appreciation rights) of the preamble to the proposed regulations continue to apply to the extent provided in § 3 of Notice 2006-79, as modified and superseded by paragraph (B) of this § 3.01.

(B) *Section 3 of Notice 2006-79 modified and superseded.*

(1) Paragraphs .01, .02, .03 and .04 of § 3 of Notice 2006-79 are modified and superseded to reflect the general rule provided in paragraph (A) and to read as follows:

.01. *Amendment and operation of plans adopted on or before December 31, 2008*

A plan adopted on or before December 31, 2008 will not be treated as violating section 409A(a)(2), (3) or (4) on or before December 31, 2008 if the plan is operated through December 31, 2008 in compliance with the provisions of section 409A and applicable provisions of Notice 2005-1 and any other generally applicable guidance published with an effective date prior to January 1, 2008, and the plan is amended on or before December 31, 2008 to conform to the provisions of section 409A and the final regulations under section 409A (70 Fed. Reg. 19234 (April 17, 2007)) with respect to amounts subject to section 409A. For such periods, to the extent an issue is not addressed in an applicable provision of Notice 2005-1 or other generally applicable guidance published with an effective date prior to January 1, 2008, the plan must be operated consistent with a good faith, reasonable interpretation of section 409A, and, to the extent not inconsistent therewith, the plan's terms. For purposes of this notice, "generally applicable guidance published with an effective date prior to January 1, 2008" does not include the final regulations.

Compliance with the proposed regulations is not required and compliance with the final regulations before January 1, 2009 is not required. However, for periods before January 1, 2008, compliance

with the proposed regulations or the final regulations will constitute reasonable, good faith compliance with the statute. For periods after December 31, 2007 and before January 1, 2009, compliance with the final regulations (but not the proposed regulations) will constitute reasonable, good faith compliance with the statute. To the extent that a provision of either the proposed regulations or the final regulations is inconsistent with a provision of Notice 2005-1, or a provision of the proposed regulations is inconsistent with a provision of the final regulations, for periods before January 1, 2008, the plan may comply with the provision of the proposed regulations, the final regulations or Notice 2005-1. To the extent that a provision of the final regulations is inconsistent with a provision of Notice 2005-1, after December 31, 2007 and before January 1, 2009, the plan may comply with the provision of the final regulations or Notice 2005-1.

A plan will not be operating in good faith compliance if discretion provided under the terms of the plan is exercised in a manner that causes the plan to fail to meet the requirements of section 409A. For example, if an employer retains the discretion under the terms of the plan to delay or extend payments under the plan in a manner that violates section 409A and exercises such discretion, the plan will not be considered to be operated in good faith compliance with section 409A with regard to any plan participant. However, an exercise of a right under the terms of the plan by a participant solely with respect to that participant's benefits under the plan, in a manner that causes the plan to fail to meet the requirements of section 409A, will not be considered to result in the plan failing to be operated in good faith compliance with respect to other participants. For example, the request for and receipt of an immediate payment permitted under the terms of the plan if the participant forfeits 20 percent of the participant's benefits (a haircut) will be considered a failure of the plan to meet the requirements of section 409A with respect to that participant, but not with respect to all other participants under the plan.

.02. *Change in payment elections or conditions on or before December 31, 2008*

The transition relief provided in section XI.C of the preamble to the proposed regulations generally continues to apply

through December 31, 2008, with certain clarifications described below, and subject to limitations for certain discounted stock rights also described below. Accordingly, with respect to amounts subject to section 409A, a plan may provide, or be amended to provide, for new payment elections on or before December 31, 2008, with respect to both the time and form of payment of such amounts and the election or amendment will not be treated as a change in the time or form of payment under section 409A(a)(4) or an acceleration of a payment under section 409A(a)(3), provided that the plan is so amended and elections are made on or before December 31, 2008. With respect to an election or amendment to change a time and form of payment made on or after January 1, 2006 and on or before December 31, 2006, the election or amendment may apply only to amounts that would not otherwise be payable in 2006 and may not cause an amount to be paid in 2006 that would not otherwise be payable in 2006. With respect to an election or amendment to change a time and form of payment made on or after January 1, 2007 and on or before December 31, 2007, the election or amendment may apply only to amounts that would not otherwise be payable in 2007 and may not cause an amount to be paid in 2007 that would not otherwise be payable in 2007. With respect to an election or amendment to change a time and form of payment made on or after January 1, 2008 and on or before December 31, 2008, the election or amendment may apply only to amounts that would not otherwise be payable in 2008 and may not cause an amount to be paid in 2008 that would not otherwise be payable in 2008. So, for example, where an amount would otherwise be payable upon an event, such as a separation from service, an election in 2008 cannot change the amount that would be payable in 2008 if the service provider separated from service in 2008. In addition, a deferral election may be made with respect to an amount that is a short-term deferral within the meaning of proposed §1.409A-1(b)(4), provided that the election is made before January 1, 2008 and before the year in which the amount would otherwise have been paid. Also, a deferral election may be made with respect to an amount that is a short-term deferral within the meaning of final §1.409A-1(b)(4),

provided that the election is made before January 1, 2009 and before the year in which the amount would otherwise have been paid.

This provision applies to elections or amendments by a service provider, a service recipient, or both a service provider and a service recipient. A service provider or service recipient may make more than one change or amendment under this relief, provided that each such change or amendment is made in accordance with the deadlines and conditions set forth in the applicable transition relief. For example, a service provider that in 2005 elected to change the time and form of payment of deferred compensation to a lump sum payment in 2010, may elect again in 2006, 2007 or 2008 to change the time and form of payment in accordance with this paragraph. However, a service provider that in 2005 elected to be paid an amount in 2008 (and that did not change such election in 2006 or 2007) may not in 2008 change the time and form of payment to be paid in a later year.

Similarly, except as provided below with respect to certain discounted stock rights, an outstanding stock right that provides for a deferral of compensation subject to section 409A may be amended to provide for fixed payment terms consistent with section 409A, or to permit holders of such rights to elect fixed payment terms consistent with section 409A, and such amendment or election will not be treated as a change in the time and form of payment under section 409A(a)(4) or an acceleration of a payment under section 409A(a)(3), provided that the option or right is so amended, and any elections are made, on or before December 31, 2008. For this purpose, a stock right will not be treated as payable in a year solely because the stock right is exercisable during that year, if the stock right is also reasonably expected to be exercisable in a subsequent year.

.03 *Payments linked to qualified plans and certain other plans*

The ability to link a payment election under a nonqualified deferred compensation plan to an election under a qualified plan is extended through 2008. In addition, this relief is extended to payment elections under nonqualified deferred compensation plans that are linked to certain additional employer plans, including section 403(b)

annuities, section 457(b) eligible plans, and certain foreign broad-based plans. Accordingly, (i) for periods ending on or before December 31, 2007, an election as to the time and form of a payment under a nonqualified deferred compensation plan that is controlled by a payment election made by the service provider or beneficiary of the service provider under a qualified employer plan described in proposed or final §1.409A-1(a)(2), a plan that includes a trust described in section 402(d), a plan described in section 1022(i)(1) or (2) of the Employee Retirement Income Security Act, or a foreign broad-based plan described in proposed or final §1.409A-1(a)(3)(v), will not violate the requirements of section 409A, provided that the determination of the time and form of the payment is made in accordance with the terms of the nonqualified deferred compensation plan that govern payment elections, as in effect on October 3, 2004 and (ii) for periods ending after December 31, 2007 and before January 1, 2009, the rules discussed in (i) will be applied by reference to the provisions of the final regulations only. For example, where a nonqualified deferred compensation plan provides as of October 3, 2004, that the time and form of payment to a service provider or beneficiary will be the same time and form of payment elected by the service provider or beneficiary under a qualified plan, it will not be a violation of section 409A for the plan administrator to make or commence payments under the nonqualified deferred compensation plan on or after January 1, 2005, and on or before December 31, 2008, pursuant to the payment election under the qualified plan. Notwithstanding the foregoing, other provisions of the Internal Revenue Code and common law tax doctrines continue to apply to any election as to the time and form of a payment under a nonqualified deferred compensation plan.

*.04 Substitutions of non-discounted stock options and stock appreciation rights for discounted stock options and stock appreciation rights*

Notice 2005-1, Q&A-18(d) provides that it will not be a material modification to replace a stock option or stock appreciation right otherwise providing for a deferral of compensation under section 409A with a stock option or stock appreciation right that would not have constituted a de-

ferred of compensation under section 409A if it had been granted upon the original date of grant of the replaced stock option or stock appreciation right, provided that the cancellation and reissuance occurs on or before December 31, 2005. Section XI.H of the preamble to the proposed regulations extended the period during which the cancellation and reissuance may occur until December 31, 2006, but only to the extent a cancellation and reissuance in 2006 does not result in the cancellation of a deferral in exchange for cash or vested property in 2006. Except with respect to certain discounted stock rights described in § 3.07 of Notice 2006-79, the period during which the cancellation and reissuance may occur is extended until December 31, 2008, but only to the extent such cancellation and reissuance in 2007 does not result in the cancellation of a deferral in exchange for cash or vested property in 2007 and only to the extent such cancellation and reissuance in 2008 does not result in the cancellation of a deferral in exchange for cash or vested property in 2008. For example, a discounted option generally may be replaced through December 31, 2008 with an option that would not have provided for a deferral of compensation, although the exercise of such a discounted option after 2005 and before the cancellation and replacement generally would result in a violation of section 409A unless such exercise complied in operation with the requirements of section 409A and the applicable guidance.

Where replacement stock options or stock appreciation rights that would not constitute deferred compensation subject to section 409A are issued in accordance with the conditions set forth in Notice 2005-1, Q&A-18(d), the preamble to the proposed regulations and this notice, such replacement stock options or stock appreciation rights will be treated for purposes of section 409A as if granted on the grant date of the original stock option or stock appreciation right. For a discussion of certain methods that commentators proposed to use to compensate option holders for the value of a lost discount, see section XI.H of the preamble to the proposed regulations.

(2) Paragraph .06 of § 3 of Notice 2006-79 is modified and superseded to read as follows:

*.06 Other transition issues*

Notice 2005-1, Q&A-21 provided relief with respect to certain initial deferral elections, generally providing that certain requirements would not be applicable to elections made on or before March 15, 2005. One of the conditions of the relief was that the plan be amended to comply with the requirements of section 409A in accordance with Notice 2005-1, Q&A-19. Notice 2005-1, Q&A-19 generally required that plans be amended by December 31, 2005. The March 15, 2005 deadline for initial deferral elections was not extended in the preamble to the proposed regulations; however, the plan amendment requirement generally was extended to December 31, 2006. Although the initial deferral election relief contained in Notice 2005-1, Q&A-21 only referred to the requirements of Notice 2005-1, Q&A-19, the Treasury Department and the IRS have become aware that many taxpayers interpreted the extension of the plan amendment deadlines as flowing through to the requirements of Notice 2005-1, Q&A-21. To avoid unintentional noncompliance in this area, the deadline for a plan to be amended to reflect use of the relief provided in Notice 2005-1, Q&A-21 is extended to December 31, 2008. However, taxpayers retain the burden of demonstrating satisfaction of the requirement by showing that the deferral election was made by the March 15, 2005 deadline, in accordance with the plan terms in effect on or before December 31, 2005 (other than a requirement to make a deferral election on or before March 15, 2005). See Notice 2005-1, Q&A-21.

(3) Paragraphs .05 and .07 of § 3 of Notice 2006-79 are not affected by this notice.

## **.02 Modification of Transition Relief Provided in the Final Regulations Preamble**

The relief provided in sections XII and XIII of the final regulations preamble is modified to reflect the extension of the Notice 2006-79 transition relief through December 31, 2008, and the guidance provided in section XIV of the final regulations preamble is modified with respect to periods after December 31, 2007, as follows:

(A) *General rule.* Sections XII and XIII of the final regulations preamble are ap-

plied by substituting references to December 31, 2008 for references to December 31, 2007, and substituting references to January 1, 2009 for references to January 1, 2008. However, references to April 10, 2007 (the date of issuance of the final regulations) and October 3, 2004 (the enactment date of the statute) are not modified.

(B) *Section XII.C.* With respect to the determination of the fair market value of stock, the last sentence of the second paragraph of section XII.C of the final regulations preamble is modified to delete the words “proposed or” so as to eliminate reliance on the provisions of the proposed regulations.

(C) *Section XII.D.* With respect to programs established before April 10, 2007 where initial deferral elections have not been made by January 1, 2008, the transition relief provided in the second paragraph of section XII.D of the final regulations preamble remains unchanged (that is, no further transition relief is provided by this notice).

(D) *Section XIV.* The guidance provided in section XIV of the final regulations preamble (Calculation and Timing of Income Inclusion Amounts, Reporting and Withholding) on the application of section 409A before January 1, 2008 is extended to apply before January 1, 2009 except that paragraph A of such section is not changed.

#### **SECTION 4. EFFECT ON OTHER DOCUMENTS**

Nothing in this notice is intended to limit the scope or applicability of the transition relief provided in Notice 2005-1, the proposed regulations or Notice 2006-79 for periods before January 1, 2008. This notice does not affect the guidance provided in Notice 2006-33, 2006-1 C.B. 754 (relating to the application of section 409A(b)), Notice 2005-94, 2005-2 C.B. 1208 (relating to reporting and wage withholding for 2005) and Notice 2006-100, 2006-51 I.R.B. 1109 (relating to reporting and wage withholding for 2006). Notwithstanding the section of the final regulations preamble entitled “Effect on Other Documents”, Notice 2005-1 is obsoleted only for taxable years beginning on or after January 1, 2009, except for the following sections of Notice 2005-1, which remain effective after that date as modified by

any other applicable guidance: Q&A-6 (application to arrangements covered by section 457); Q&A-7 (application to arrangements between a partnership and a partner of the partnership); and Q&A-24 through Q&A-38 (information reporting and withholding guidance).

Pursuant to this notice, Notice 2006-4, 2006-3 C.B. 307 (relating to the application of section 409A to certain outstanding stock rights), is superseded by the final regulations with respect to stock rights issued in taxable years of the service provider beginning after December 31, 2008. Notice 2006-64, 2006-29 I.R.B. 88 (relating to the acceleration of payments to comply with certain conflict of interest rules), is superseded by the final regulations effective for taxable years of the service provider beginning after December 31, 2008.

Section III of Notice 2007-78 is revoked and superseded by this notice. Pursuant to this notice, the penultimate paragraph and the first sentence of the final paragraph of § IV.A of Notice 2007-78 are modified by substituting references to December 31, 2008 for references to December 31, 2007. The guidance otherwise provided in § IV of Notice 2007-78 is not affected by this notice. Section 3 of Notice 2006-79 is modified and superseded as provided in this notice. The guidance and relief provided in the final regulations preamble is modified as provided in this notice.

The Treasury Department and the IRS anticipate issuing guidance as soon as possible with respect to the correction program and other matters discussed in § V of Notice 2007-78 and this notice does not affect that section. In addition, this notice does not affect the guidance provided in § VI of Notice 2007-78.

#### **SECTION 5. DRAFTING INFORMATION**

The principal authors of this notice are Stephen Tackney and Bill Schmidt of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), although other Treasury Department and IRS officials participated in its development. For further information on the provisions of this notice, contact Stephen Tackney or Bill Schmidt

at (202) 927-9639 (not a toll-free number).

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## **Proposed Changes to the Process for Obtaining the Commissioner’s Consent to Change a Method of Accounting**

### **Notice 2007-88**

#### **PURPOSE**

This notice requests comments from the public regarding a proposal to change the process by which taxpayers obtain the consent of the Commissioner of Internal Revenue to change a method of accounting for federal income tax purposes. The proposal described in this notice is one possible approach. The Internal Revenue Service (IRS) is interested in considering other possible approaches. Therefore, changes to the process, including any pilot program, will not become effective until the IRS considers public comments and suggestions received in response to this notice and publishes guidance announcing changes to the process.

#### **BACKGROUND**

##### *A. The Existing Accounting Method Change Process*

Section 446(e) of the Internal Revenue Code requires taxpayers to obtain the consent of the Commissioner before changing a method of accounting for federal income tax purposes. A change in a method of accounting includes a change in the overall plan of accounting for gross income or deductions or a change in the treatment of any item that involves the proper time for the inclusion of the item in income or the taking of the item as a deduction. Taxpayers request the Commissioner’s consent to change a method of accounting by filing a Form 3115, *Application for Change in Accounting Method*, that describes the current and new methods of accounting, identifies items that will be treated differently under the new method of accounting, and includes a computation of any adjustment required by section 481(a).

The Commissioner has issued administrative procedures instructing taxpayers

how and when to file Form 3115, and prescribing the terms and conditions necessary to obtain consent to change an accounting method. These procedures are contained principally in Rev. Proc. 2002-9, 2002-1 C.B. 327, as modified and clarified by Announcement 2002-17, 2002-1 C.B. 561, modified and amplified by Rev. Proc. 2002-19, 2002-1 C.B. 696, and amplified, clarified and modified by Rev. Proc. 2002-54, 2002-2 C.B. 432 (“automatic consent process”) and Rev. Proc. 97-27, 1997-1 C.B. 680, as modified and amplified by Rev. Proc. 2002-19, as amplified and clarified by Rev. Proc. 2002-54 (“nonautomatic consent process”).

#### 1. *The automatic consent process*

Under the existing process, the Commissioner grants eligible taxpayers automatic consent to change to certain methods of accounting, most of which are described in the Appendix to Rev. Proc. 2002-9. A taxpayer that seeks to change to one of these methods must attach Form 3115 to its timely filed (including extensions) original income tax return for the requested year of change and send a copy of the Form 3115 to the IRS national office no later than the date that the original Form 3115 is filed with the federal income tax return for the year of change. In general, a taxpayer, not under audit, complying with all the applicable provisions of Rev. Proc. 2002-9 has obtained the consent of the Commissioner to change its method of accounting and ordinarily receives both “audit protection” and “ruling protection.” That is, the IRS will not require the taxpayer to change its method of accounting for the same item for a taxable year prior to the year of change (“audit protection”). The IRS also will not require the taxpayer to change or modify the new method of accounting except in certain circumstances specifically enumerated in section 8 of Rev. Proc. 2002-9 and, if the IRS does require the taxpayer to change or modify the new method of accounting, the required change or modification to the new method of accounting generally will not be applied retroactively (“ruling protection”). In other words, the taxpayer receives protection with respect to the use of the new method of accounting in future years.

Rev. Proc. 2002-9 is the exclusive procedure for a taxpayer within the scope of Rev. Proc. 2002-9 to obtain the con-

sent of the Commissioner before changing a method of accounting. Accordingly, a taxpayer that qualifies to make a change through the automatic consent process may not opt to make the change under the nonautomatic consent process described below. A user fee is not charged in the automatic consent process.

The IRS national office reviews Forms 3115 filed through the automatic consent process to determine whether the form is properly completed and whether the taxpayer qualifies for automatic consent. If the IRS national office reviews a Form 3115 and determines that the form is not properly completed, or if supplemental information is needed, the IRS national office notifies the taxpayer, specifies the information that is needed, and permits the taxpayer 30 days to furnish the necessary information. If the IRS national office tentatively determines that the taxpayer has changed its method of accounting without complying with all the applicable provisions of Rev. Proc. 2002-9, the IRS national office notifies the taxpayer of its tentative adverse determination and offers the taxpayer a conference of right, if the taxpayer has requested such a conference. In cases where the IRS national office remains adverse after the conference of right, it notifies the taxpayer that consent to make the change in method of accounting is not granted.

#### 2. *The nonautomatic consent process*

Changes that do not qualify for automatic consent must be requested under the nonautomatic consent process described in Rev. Proc. 97-27. A taxpayer that seeks the Commissioner’s consent to change a method of accounting through the nonautomatic consent process must file Form 3115 with the IRS national office during the taxable year in which the taxpayer desires to make the proposed change. There is a user fee for a nonautomatic consent request (in general, the current fee is \$2,500 per request).

In processing a request for a change in method of accounting made through the nonautomatic consent process, the IRS national office considers, among other factors, whether the requested method of accounting is legally permissible for the taxpayer, whether the requested method clearly reflects the taxpayer’s income, and whether the taxpayer has appropriately computed any adjustment required by

section 481(a). The processing of a taxpayer’s request for an accounting method change may involve requests for supplemental information from the taxpayer, including requests for additional facts and clarification of how the taxpayer intends to apply the requested method to particular types of transactions. If supplemental information is needed, the IRS national office notifies the taxpayer and the taxpayer generally is permitted 21 days to furnish the necessary information.

If the taxpayer’s requested accounting method change is approved by the IRS national office, the taxpayer receives a letter ruling granting the taxpayer consent to make the change subject to certain terms and conditions. The taxpayer also generally receives audit protection and ruling protection. In cases where the IRS national office is tentatively adverse to the taxpayer’s requested change in method of accounting, the IRS national office notifies the taxpayer of its tentative adverse determination and offers the taxpayer a conference of right, if the taxpayer has requested such a conference. If the IRS national office remains adverse after the conference of right, it notifies the taxpayer that consent to make the change in method of accounting is denied.

#### B. *Reasons for Change*

The IRS is concerned that certain aspects of the existing accounting method change process make it a complex and inefficient means for taxpayers to obtain consent to change an accounting method. These complexities and inefficiencies often result in significant delays in the processing of accounting method change requests. The IRS believes that an efficient process that provides taxpayers with a means of obtaining timely consent to change to a proper method of accounting is crucial to ensuring that taxpayers comply with the consent requirement of section 446(e). Accordingly, the IRS is considering proposals to modify the accounting method change process. In considering any modifications to the existing process, the IRS will balance taxpayers’ need for timely consent with the Commissioner’s responsibility to ensure that the process comports with the purpose underlying section 446(e).

Prior to the codification of sections 446(e) and 481 in 1954, the regulations imposed a “consent” requirement on taxpayers seeking a change in accounting method, the purpose of which was to give the Commissioner the opportunity to insist on compensating adjustments to eliminate the omissions and duplications of income and deductions that can result from a change in accounting method. Today, section 481(a) provides for such adjustments, thereby diminishing the role of the consent requirement as a means for the Commissioner to mandate these adjustments. The consent requirement is recognized today as serving broader policy aims, such as promoting consistent accounting practices and easing the administrative burden on the Commissioner of detecting accounting method changes.

The IRS believes that the proposal contained in this notice fulfills the broad policy aims of section 446(e). As under the existing automatic consent and nonautomatic consent processes, the IRS intends to review all accounting method change requests, and to focus on those that raise novel or controversial accounting method change issues. The IRS expects that the proposal contained in this notice will simplify the consent process and reduce delays for most taxpayers, while preserving the ability of the IRS to effectively monitor changes of accounting methods.

## PROPOSAL

The IRS is considering whether to modify the accounting method change process so that the existing “automatic consent” process and “nonautomatic consent” process are replaced with a system under which a taxpayer requests “standard consent,” “specific consent” or “letter ruling consent.”

### A. Standard Consent Process

#### 1. In general

The IRS anticipates that, under this proposal, the majority of accounting method change requests would be made through the standard consent process. The proposed standard consent process is expected to operate in a manner similar to the existing automatic consent process — a taxpayer that timely files Form 3115 with its tax return and complies with the procedures governing the process is granted

the Commissioner’s consent to change its method of accounting. A change made under the standard consent process must be made under the published terms and conditions applicable to the standard consent process. No letter ruling would be issued by the IRS, and no user fee would be charged.

All changes in method of accounting that are specifically identified in Rev. Proc. 2002–9 (or any successor), or other automatic consent guidance, would be eligible for consent under the standard consent process. As is the case under the existing automatic consent process, taxpayers changing to one of these specifically identified methods of accounting would ordinarily obtain audit protection and ruling protection. The IRS anticipates that Rev. Proc. 2002–9 (or any successor), and other automatic consent guidance, would be incorporated into the administrative procedures that govern the standard consent process. Consequently, the standard consent process would be the exclusive process available to taxpayers changing to methods of accounting specifically identified in Rev. Proc. 2002–9 (or any successor) and other automatic consent guidance.

This proposal contemplates that the standard consent process would be available even for changes that are not identified in Rev. Proc. 2002–9 (or any successor), or other automatic consent guidance. That is, except for changes required to be made under the proposed specific consent process (described below), a taxpayer that timely files Form 3115 with its tax return and complies with the procedures governing the standard consent process would have the Commissioner’s consent to change to any permissible method of accounting for the requested year of change, including changes to methods of accounting not specifically identified in Rev. Proc. 2002–9 (or any successor) or other automatic consent guidance. However, unlike the consent applicable to method changes specifically identified in Rev. Proc. 2002–9 (or any successor), or other automatic consent guidance, a taxpayer’s change of its method of accounting to a method other than a method specifically identified in Rev. Proc. 2002–9 (or any successor), or other automatic consent guidance, would receive only audit protection for years prior to the requested year

of change and would not receive ruling protection.

Although the proposal contemplates that taxpayers would file Form 3115 with their returns for the requested year of change, the IRS is considering an alternative approach under which taxpayers would be required to file Form 3115 for changes to methods of accounting not specifically identified in Rev. Proc. 2002–9 (or any successor) or other automatic guidance, by the last day of the ninth month of the requested taxable year of change. Requiring Form 3115 to be filed during the requested taxable year of change, rather than with the tax return for the requested taxable year of change, would provide the IRS with time to consider the request before the taxpayer files its return for the requested taxable year of change. The IRS requests comments on this alternative approach.

The IRS expects that the standard consent process would give taxpayers who seek consent under section 446(e) without ruling protection the opportunity to obtain this consent in a timely and efficient manner. The taxpayer’s filing of Form 3115 would give the IRS adequate notice of the change in accounting method. Further, the lack of ruling protection for changes that are not specified in Rev. Proc. 2002–9 (or any successor), or other automatic consent guidance, puts the taxpayer in no worse a position with regard to the new method of accounting as the taxpayer is in with regard to other items of income or deduction reported on the return. That is, the taxpayer’s use of the new method of accounting is an issue that may be considered upon examination.

#### 2. IRS review of Forms 3115

Under the proposal, the IRS would screen accounting method change requests for completeness and for compliance with the procedures governing the standard consent process. Requests that are not substantially complete would be denied consent and the taxpayer would be notified that consent is not granted. In contrast to the procedures contained in section 10.02 of Rev. Proc. 2002–9, under the proposal, the IRS does not intend to permit taxpayers to perfect requests that are not substantially complete prior to denying consent. As a consequence, a taxpayer who submits a form that is not substantially complete would not receive consent

to change its method of accounting for the proposed year of change and, thus, would not receive ruling protection or audit protection. The IRS plans to issue guidelines and examples of what constitutes a substantially complete Form 3115. For example, a Form 3115 must include sufficient information about the current and new methods of accounting to permit the IRS to understand how the methods work, and must identify legal authority (including any contrary authority) governing the new method of accounting. However, minor omissions or errors on Form 3115 would not result in the denial of consent.

In addition to screening accounting method change requests for completeness, the IRS would review Forms 3115 filed under the standard consent process to determine whether the new accounting method is permissible. In cases where the IRS agrees that the new method is permissible, ordinarily no further action would be taken and the taxpayer would not be advised that the review has taken place. In cases where the IRS questions the propriety of the new method, the IRS may correspond with the taxpayer to resolve the matter. In some cases, resolution may require the taxpayer to provide additional information about the change. If the IRS tentatively determines that the new method of accounting is impermissible, the IRS would notify the taxpayer of the tentative adverse determination and will ordinarily offer the taxpayer a conference. In cases where the IRS remains adverse after the conference, it would notify the taxpayer that consent to make the change in method of accounting is not granted.

Under the existing accounting method change process, the IRS provides audit protection for changes in method of accounting only if the request for change is granted. The IRS is considering whether it would be appropriate to provide audit protection even in cases where consent is not granted. Providing audit protection in such cases may encourage taxpayers to seek consent to change from improper methods of accounting.

### *B. Specific Consent Process*

The specific consent process is proposed to be available for only two categories of accounting method changes:

(1) accounting method changes specifically identified in published guidance as required to be made under the specific consent process, and (2) changes that otherwise qualify under the standard consent process, but for which the taxpayer seeks different terms and conditions or a waiver of certain scope limitations that apply to the standard consent process. Each of these categories is discussed in further detail below. The IRS expects that under this proposal a user fee would apply to a change requiring specific consent.

#### *1. Changes identified in published guidance*

Under the proposal, the IRS would publish guidance in the Internal Revenue Bulletin that lists specific accounting method changes that must be made using the specific consent process. The specific accounting method changes listed in this published guidance would include the types of changes that the IRS wants to review in more depth and prior to the taxpayer implementing the accounting method on its tax return. The IRS would update the proposed published list as necessary to add or remove specific accounting method changes that are required to be made under the specific consent process. The IRS expects that, in general, the process for requesting specific consent would be similar to the existing advance consent process described in Rev. Proc. 97-27. That is, a taxpayer files a Form 3115 that is substantially complete (as discussed above in the description of the standard consent process) and awaits a ruling from the IRS granting consent to the change. To give the IRS adequate time to consider the request prior to the due date of the taxpayer's tax return for the requested taxable year of change, the IRS expects to require taxpayers to file Form 3115 by the last day of the ninth month of the requested taxable year of change, without the possibility of relief for late requests under section 301.9100 of the Regulations on Procedure and Administration. However, the IRS intends to consider an otherwise qualified request filed after the last day of the ninth month of a taxable year and before the beginning of the succeeding taxable year a timely filed request for the succeeding taxable year.

If a taxpayer's consent request is granted, audit protection would apply

and ruling protection would usually apply. However, the IRS, in its discretion, may decline to grant ruling protection in a particular case.

#### *2. Changes seeking modified terms and conditions or a waiver of certain scope limitations*

The specific consent process would also apply to any change that otherwise qualifies for the standard consent process (including a change specifically identified in Rev. Proc. 2002-9, or any successor, or other automatic consent guidance), but for the fact that the taxpayer seeks a term and condition different from those that apply to standard consent requests, or seeks a waiver of certain scope limitations that apply to standard consent requests. For example, a taxpayer that filed a Form 3115 under the standard consent process and seeks to make a subsequent change to the same item within five years would be required to request consent under this specific consent process to make the subsequent change. As provided in section 8.02 of Rev. Proc. 97-27, the IRS may determine that, based on the unique facts of a particular case and in the interest of sound tax administration, terms and conditions that differ from those that ordinarily apply are more appropriate for a particular accounting method change. It is not intended that under this proposal the IRS would change its policy concerning the circumstances in which it will approve a request for modified terms and conditions. Taxpayers should be aware that it is only in rare situations that the IRS agrees to a taxpayer's request for terms and conditions different from those prescribed in published guidance.

To give the IRS adequate time to consider the request prior to the due date of the taxpayer's tax return for the requested taxable year of change, the IRS expects to require taxpayers to file Form 3115 by the last day of the ninth month of the requested taxable year of change, without the possibility of relief for late requests under section 301.9100 of the Regulations on Procedure and Administration. However, the IRS intends to consider an otherwise qualified request filed after the last day of the ninth month of a taxable year and before the beginning of the succeeding taxable year a timely filed request for the succeeding taxable year.

Under the proposal, in cases where the IRS agrees to the modified term and condition or the waiver of certain scope limitations, any consent would be granted under the standard consent process, generally with audit protection and without ruling protection. That is, no ruling letter would be issued; the IRS would simply issue a waiver that permits the taxpayer to utilize the standard consent process to make the change with the modified term and condition or with a waiver of the scope limitation. In appropriate cases, the IRS would limit audit protection where the taxpayer previously received audit protection for the same item under the standard consent process.

### C. Letter Ruling Consent Process

The IRS recognizes that some taxpayers who seek to change an accounting method may want the certainty of a letter ruling issued by the IRS national office concerning the propriety of a requested method of accounting. Under the proposal, a taxpayer that seeks a change in accounting method other than a change that is specifically identified in Rev. Proc. 2002-9 (or any successor), or other automatic consent guidance, may request a letter ruling under Rev. Proc. 2007-1, 2007-1 I.R.B. 1, (or its successor). The IRS would apply Rev. Proc. 2007-1 (or its successor) and Rev. Proc. 2007-3, 2007-1 I.R.B. 108, (or its successor) in determining whether to rule on a request filed under the letter ruling consent process.

The IRS is concerned that requests for accounting method changes made under the existing advance consent process often are not as well developed as requests for letter rulings generally. Under this proposal, a taxpayer utilizing the letter ruling consent process must submit a fully developed request, and that request would be subject to the same standard of factual and legal development as a request for a letter ruling generally. Under this proposal, a letter ruling request would include, among other information, a complete statement of facts, copies of documents pertinent to the transaction, statements of supporting and contrary authorities, examples of the application of the new method to the taxpayer's

transaction and a completed Form 3115 as an attachment to the letter ruling request. As provided in Rev. Proc. 2007-1, taxpayers must provide any additional information requested by the IRS and, if a taxpayer does not submit the information within 21 calendar days from the date of the request, the letter ruling request would be closed and the taxpayer would be notified in writing.

Requests made under this letter ruling consent process would be subject to the generally applicable user fee imposed on letter ruling requests, and not the user fee currently imposed in the existing advance consent process. Further, the IRS intends to require taxpayers to submit letter ruling consent requests by the last day of the ninth month of the requested taxable year of change, without the possibility of relief for late requests under section 301.9100 of the Regulations on Procedure and Administration. However, the IRS intends to consider an otherwise qualified letter ruling request filed after the last day of the ninth month of a taxable year and before the beginning of the succeeding taxable year a timely filed letter ruling request for the succeeding taxable year.

If the IRS national office rules favorably on the letter ruling request, it also would grant the taxpayer consent under section 446(e) to change its method of accounting for the item that is the subject of the letter ruling request. Audit protection and ruling protection would apply.

### D. Pilot Program

The IRS intends to implement any changes to the accounting method change process on a pilot basis before making permanent changes to the process. The IRS expects to open the pilot program to all taxpayers making an accounting method change within a specified pilot period. During the pilot period, the IRS will continue to evaluate the process. The IRS emphasizes that this notice does not establish a pilot program. The IRS will consider public comments received in response to this notice before establishing a pilot program in separate guidance. In the meantime, taxpayers must continue to follow the existing procedures (*e.g.*, Rev.

Proc. 97-27 and Rev. Proc. 2002-9) for obtaining consent to change an accounting method.

### REQUEST FOR COMMENTS

The proposal contained in this notice is one way, but not the only way, that the accounting method change process could be modified to improve efficiencies and reduce delays both for taxpayers and the IRS. The IRS requests public comments on this proposal and any other suggestions for modifying and improving the accounting method change process. Any modification to the accounting method change process will not become effective until the IRS considers any public comments received and publishes additional guidance announcing changes to the process.

Written submissions in response to this notice should be submitted no later than January 18, 2008, to Internal Revenue Service, CC:PA:LPD:RU (Notice 2007-88), room 5203, P.O. 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:RU (Notice 2007-88), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224. Alternatively, submissions may be submitted via the Internet at [Notice.Comments@irs.counsel.treas.gov](mailto:Notice.Comments@irs.counsel.treas.gov) in which case "Notice 2007-88" should be in the subject line. All submissions will be available for public inspection and copying in their entirety. Therefore, submissions received by the IRS should not include taxpayer-specific information of a confidential nature. Submissions should include the name and telephone number of a person to contact.

### DRAFTING INFORMATION

The principal authors of this notice are Andrew J. Keyso and Brenda D. Wilson of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this notice, contact Mr. Keyso or Ms. Wilson at (202) 622-4800 (not a toll-free call).



# Reporting and Wage Withholding Under Internal Revenue Code § 409A

## Notice 2007-89

### I. PURPOSE

This notice provides guidance to employers and payers on their reporting and wage withholding requirements for calendar year 2007 with respect to amounts includible in gross income under § 409A of the Internal Revenue Code. This notice also provides guidance to employers and payers on their reporting requirements with respect to all deferrals of compensation under § 409A of the Internal Revenue Code for 2007. This notice does not affect the application of § 3121(v)(2) or an employer's reporting obligations under § 31.3121(v)(2)-1 of the Employment Tax Regulations. In addition, this notice provides guidance to service providers on their income tax reporting and tax payment requirements with respect to amounts includible in gross income under § 409A for 2007. Generally, these requirements for 2007 reflect an extension to 2007 tax years of the guidance provided in Notice 2006-100 applicable to 2005 and 2006 tax years.

### II. BACKGROUND

#### A. The American Jobs Creation Act of 2004

Section 885 of the American Jobs Creation Act of 2004, Pub. Law No. 108-357, 118 Stat. 1418 (the Act), added § 409A, which provides, *inter alia*, that all amounts deferred under a nonqualified deferred compensation plan for all taxable years are currently includible in gross income to the extent not subject to a substantial risk of forfeiture and not previously included in gross income, unless certain requirements are met. Section 885(b) of the Act amended the Code to impose the following reporting and wage withholding requirements with respect to deferrals of compensation within the meaning of § 409A.

- The Act amended §§ 6041 and 6051 to require that an employer or payer report all deferrals for the year under a nonqualified deferred compensation

plan on a Form W-2 (*Wage and Tax Statement*) or a Form 1099-MISC (*Miscellaneous Income*), regardless of whether such deferred compensation is includible in gross income under § 409A(a).

- The Act amended § 3401(a) to provide that the term "wages" includes any amount includible in the gross income of an employee under § 409A.
- The Act amended § 6041 to require that a payer report amounts includible in gross income under § 409A that are not treated as wages under § 3401(a).

#### B. Notice 2005-1

On December 20, 2004, the IRS issued Notice 2005-1, 2005-1 C.B. 274, which provides guidance with respect to the application of § 409A. Additionally, in accordance with the amendments made by § 885(b) of the Act, Notice 2005-1 provides the following with respect to reporting and wage withholding requirements for deferred amounts:

- An employer reports to an employee the total amount of deferrals for the year under a nonqualified deferred compensation plan in box 12 of Form W-2 using code Y. See Q&A-29.
- An employer reports amounts includible in gross income under § 409A and in wages under § 3401(a) in box 1 of Form W-2 as wages paid to the employee during the year and subject to income tax withholding. An employer also reports such amounts in box 12 of Form W-2 using code Z. See Q&A-33.
- A payer reports to a nonemployee the total amount of deferrals for the year under a nonqualified deferred compensation plan in box 15a of Form 1099-MISC. See Q&A-30.
- A payer reports amounts includible in gross income under § 409A and not treated as wages under § 3401(a) as nonemployee compensation in box 7 of Form 1099-MISC. A payer also reports such amounts in box 15b of Form 1099-MISC. See Q&A-35.

### C. Final Regulations

On April 10, 2007, the IRS issued final regulations (T.D. 9321, 2007-14 I.R.B. 865) regarding the application of § 409A, applicable for taxable years beginning on or after January 1, 2008. See 72 Fed. Reg. 19234 (April 17, 2007). The regulations generally incorporate and expand on the guidance provided in Notice 2005-1. Under Notice 2007-86, 2007-46 I.R.B. 990 (November 13, 2007), taxpayers generally are not required to comply with the final regulations until January 1, 2009, but taxpayers may rely on the final regulations for periods before January 1, 2009. The final regulations generally supersede Notice 2005-1 for periods beginning after 2008. However, the regulations do not address reporting and withholding requirements, and accordingly do not supersede Notice 2005-1, Q&A-24 through Q&A-38, which address those issues. See Preamble to the Final Regulations, Effect on Other Documents, 72 Fed. Reg. 19275.

### D. Notice 2006-100

On November 30, 2006, the IRS issued Notice 2006-100, 2006-51 I.R.B. 1109, which provided guidance to employers and payers on their reporting and withholding obligations with respect to deferrals of compensation and amounts includible in gross income under § 409A during calendar years 2005 and 2006. The notice permanently waived employers' and payers' reporting requirements under §§ 6041 and 6051 for calendar years 2005 and 2006 with respect to annual deferrals of compensation within the meaning of § 409A (Form W-2, Box 12, Code Y and Form 1099, Box 15a). The notice also provided guidance regarding the calculation of amounts includible in income under § 409A, and the application of the employer and payer reporting and withholding requirements for such amounts under § 409A (Form W-2, Box 12, Code Z and Form 1099, Box 15b).

### III. INTERIM EMPLOYER AND PAYER REPORTING AND WAGE WITHHOLDING PROVISIONS

This section provides guidance on employers' and payers' reporting and wage withholding requirements for calendar year 2007.

## A. 2007 Annual Deferrals

### 1. Amounts Reportable on Form W-2

For calendar year 2007, an employer is not required to report amounts deferred during the year under a nonqualified deferred compensation plan subject to § 409A in box 12 of Form W-2 using code Y.

### 2. Amounts Reportable on Form 1099-MISC

For calendar year 2007, a payer is not required to report amounts deferred during the year under a nonqualified deferred compensation plan subject to § 409A in box 15a of Form 1099-MISC.

## B. 2007 Reporting and Withholding on Amounts Includible in Gross Income under § 409A

Section 3401(a) provides that for income tax withholding purposes the term “wages” includes any amount includible in gross income of an employee under § 409A, and payment of such amount is treated as having been made in the taxable year in which the amount is includible in gross income. Thus, for calendar year 2007, an employer must treat amounts includible in gross income under § 409A as wages for income tax withholding purposes. An employer is required to report such amounts as wages paid on line 2 of Form 941, *Employer's QUARTERLY Federal Tax Return*, and in box 1 of Form W-2. An employer must also report such amounts as § 409A income in box 12 of Form W-2 using code Z. Amounts includible in gross income under section § 409A are supplemental wages for purposes of determining the amount of income tax required to be deducted and withheld under § 3402(a), regardless of whether the employer has paid the employee any regular wages during the calendar year of the payment. See Publication 15 for the withholding rules with respect to supplemental wages. The amount required to be withheld is not increased on account of the additional income taxes imposed under § 409A(a)(1)(B). Employees should thus be aware that estimated tax payments may be required to avoid penalties under § 6654.

For nonemployees, § 6041(g)(2) requires a payer to report to a nonemployee any amount that is includible in gross income under § 409A that is not treated as wages under § 3401(a). Thus, for calendar year 2007, a payer must report amounts includible in gross income under § 409A and not treated as wages under § 3401(a) as nonemployee compensation in box 7 of Form 1099-MISC. A payer must also report such amounts as § 409A income in box 15b of Form 1099-MISC.

### 1. Calculation of Amounts Includible in Income under § 409A(a) — In General

Section 409A(a)(1)(A)(i) provides that if at any time during a taxable year a nonqualified deferred compensation plan fails to meet the requirements of § 409A(a)(2), (3) or (4), all compensation deferred under the plan for the taxable year and all preceding taxable years shall be includible in gross income for the taxable year to the extent not subject to a substantial risk of forfeiture and not previously included in gross income. Accordingly, for purposes of this notice, the amount includible in gross income under § 409A(a) and required to be reported by the employer or payer equals the portion of the total amount deferred under the plan that, as of December 31, 2007, is not subject to a substantial risk of forfeiture as defined in Notice 2005-1, Q&A-6, or the final regulations, and has not been included in income in a previous year, plus any amounts of deferred compensation paid or made available to the service provider under the plan during the calendar year 2007. For purposes of this paragraph, an employer or payer may treat an amount as previously included in income if properly reported by the employer or payer on a 2005 or 2006 Form W-2, Form 1099-MISC, or Form W-2c or corrected Form 1099-MISC. Thus, amounts properly reported on a 2005 or 2006 Form W-2 or Form 1099-MISC, or Form W-2c or corrected Form 1099-MISC should not be reported again on a 2007 Form W-2 or Form 1099-MISC. For the definition of a plan, including the plan aggregation rules, see Notice 2005-1, Q&A-9, and § 1.409A-1(c).

Amounts includible in gross income under § 409A(a) include only amounts deferred that are subject to § 409A. Accord-

ingly, for purposes of this section III.B.1., references to amounts deferred under a plan, including references to account balances, refer solely to amounts deferred that are subject to § 409A and not, for example, to amounts deferred that were earned and vested prior to January 1, 2005 and that are not otherwise subject to § 409A due to the application of the effective date provisions. For rules regarding the application of the effective date provisions of § 409A to nonqualified deferred compensation plans, see § 1.409A-6.

The provisions of this notice addressing the calculation of the amounts includible in income are intended as interim guidance only. The Treasury Department and the IRS are currently formulating general guidance with respect to the calculation of the amounts includible in income, as well as other related issues. For information regarding the submission of comments on these topics, see section V. of this notice.

### 2. Wage Payment Date of Amounts Includible in Income under § 409A(a)

Amounts includible in gross income under § 409A(a) in 2007 that are either actually or constructively received (disregarding the application of § 409A) by an employee during the calendar year 2007, are considered a payment of wages by the employer when received by the employee for purposes of withholding, depositing, and reporting the income tax at source on wages under § 3401(a).

Amounts includible in gross income under § 409A(a) in 2007 that are neither actually nor constructively received (disregarding the application of § 409A) by the employee during the calendar year 2007, are treated as a payment of wages on December 31, 2007 for purposes of withholding, depositing, and reporting the income tax at source on wages under § 3401(a). If as of December 31, 2007 the employer does not withhold income tax from the employee on such wages, or withholds less than the amount of income taxes required to be withheld under § 3402 from the employee, the employee will receive credit under § 31 for 2007 if the employer follows one of two possible options. Under the first option, notwithstanding § 31.6205-1(c)(4), the employer withholds or recovers from the employee the amount of the undercollection after

December 31, 2007 and before February 1, 2008, and reports as wages for the quarter ending December 31, 2007 such amounts that were neither actually nor constructively received but are includible in income under § 409A on Form 941 for that quarter and in box 1 of the employee's Form W-2 for 2007. Under the second option, the employer pays the income tax withholding liability on behalf of the employee (without deduction from the employee's wages or other reimbursement by the employee), and reports the gross amount of wages and the income tax withholding liability for the quarter ending December 31, 2007 as including such amounts that were neither actually nor constructively received but are includible in income under § 409A, as well as the Federal Insurance Contributions Act, Federal Unemployment Tax Act, and income tax withholding wages resulting from paying the income tax on the employee's behalf, on Form 941 and Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*, and in box 1 of the employee's Form W-2 for 2007. See Rev. Rul. 58-113, 1958-1 C.B. 362 and Rev. Rul. 86-14, 1986-1 C.B. 304, for methods of computing gross wages when paying employment taxes on behalf of an employee. In addition, for purposes of the deposit requirements associated with such wages, if the income tax withholding liability with respect to such wages is paid to the IRS by the due date of the Form 941 for the quarter ending December 31, 2007 on which the wages are reported, then the amount of income tax withholding liability will be considered to have been deposited in accordance with the rules of § 31.6302-1(c). Thus, penalties for failure to deposit taxes under § 6656 will not be imposed with respect to such amount.

### **3. 2007 Amounts Includible in Income under § 409A(a)**

The following sections provide guidance for calculating the total amount deferred under the plan as of December 31, 2007 for purposes of determining the amount required to be included in gross income under § 409A(a) in accordance with the rules described in section III.B.1. of this notice.

#### **a. Account Balance Plans**

For a plan that is an account balance plan as defined in § 1.409A-1(c)(2)(i)(A) or (B), the amount deferred as of December 31, 2007 equals the amount that would be treated as an amount deferred under § 31.3121(v)(2)-1(c)(1) on December 31, 2007 if the entire account balance under such plan (including all principal amounts, adjusted for income, gain or loss credited to the service provider's account) as of December 31, 2007 were treated as a principal amount credited to the service provider's account on December 31, 2007. These same calculation rules apply for purposes of determining the amount reported on Form 1099-MISC for calendar year 2007 with respect to a nonemployee participating in an account balance plan. For purposes of this section, a plan described in § 1.409A-1(c)(2)(i)(A) (elective account balance plan) is not aggregated with a plan described in § 1.409A-1(c)(2)(i)(B) (non-elective account balance plan).

#### **b. Nonaccount Balance Plans — Amounts that are Reasonably Ascertainable**

For a plan that is a nonaccount balance plan as defined in § 1.409A-1(c)(2)(i)(C), where the amount deferred is reasonably ascertainable within the meaning of § 31.3121(v)(2)-1(e)(4), the amount deferred as of December 31, 2007 equals the present value of all future payments to which the service provider has obtained a legally binding right as of December 31, 2007, calculated in accordance with § 31.3121(v)(2)-1(c)(2) as if the service provider had obtained all of such rights on December 31, 2007. Section 31.3121(v)(2)-1(e)(4)(i)(B) provides that an amount deferred is considered reasonably ascertainable on the first date on which the amount, form, and commencement date of the benefit payments attributable to the amount deferred are known, and the only actuarial or other assumptions regarding future events or circumstances needed to determine the amount deferred are interest and mortality. An amount does not fail to be reasonably ascertainable if alternative forms or commencement dates are available that provide an actuarially equivalent benefit to the normal benefit commencing at the

normal commencement date. In addition, an amount deferred does not fail to be reasonably ascertainable on a date merely because the exact amount of the benefit payable cannot readily be calculated on that date or merely because the exact amount of the benefit payable depends on future changes in the cost of living. If the exact amount of the benefit payable depends on future changes in the cost of living, the amount deferred must be determined using a reasonable assumption as to the future changes in the cost of living. These same rules apply for purposes of determining the amount reported on Form 1099-MISC for calendar year 2007 with respect to a nonemployee participating in a nonaccount balance plan.

#### **c. Amounts Deferred Under Stock Rights Covered by § 409A**

For a plan that provides stock rights as defined in § 1.409A-1(c)(2)(i)(H), the amount deferred as of December 31, 2007 equals the amount that the service provider would be required to include in income if the stock rights were immediately exercisable and exercised on December 31, 2007. In general, this will mean with respect to a stock right outstanding as of December 31, 2007, the amount deferred as of December 31, 2007 equals the fair market value of the underlying stock less the sum of the exercise price and any amount paid by the service provider for the stock right.

#### **d. Other Deferred Amounts**

For all deferred amounts not addressed in section III.B.2.a., b., or c. of this notice, the amount deferred as of December 31, 2007 must be determined under a reasonable, good faith application of a reasonable, good faith method. For this purpose, a reasonable, good faith application of a reasonable, good faith method generally must reflect reasonable, good faith assumptions with respect to any contingencies as to the timing or amount of any payment. Generally, the use of an assumption with respect to a contingency that results in the amount deferred being the lowest potential value of the future payment will be presumed not to be a reasonable, good faith assumption unless clear and convincing evidence demonstrates that the assumption is reasonable. For example, where a payment may be made in more than one form,

the assumption that the payment will be made in the least valuable form will be presumed not to be a reasonable, good faith assumption unless clear and convincing evidence demonstrates otherwise. The assumptions concerning time and form of payment set out in § 1.409A-6(a)(3)(i) (relating to calculation of the grandfathered benefit in a nonaccount balance plan) will constitute reasonable, good faith assumptions for this purpose. If a portion of a deferred amount can be calculated under section III.B.2.a., b., or c. of this notice, a reasonable, good faith method of calculation will in fact be a combination of two methods. The method applicable under section III.B.2.a., b., or c. of this notice must be applied to the portion, and the balance of the deferred amount must be determined under a reasonable good faith method.

#### **4. Amounts Includible in Income under § 409A(b)**

Section 409A(b)(1) provides generally that in the case of assets set aside (directly or indirectly) in a trust (or other arrangement determined by the Secretary) for purposes of paying deferred compensation under a nonqualified deferred compensation plan, such assets shall be treated as property transferred in connection with the performance of services for purposes of § 83 whether or not such assets are available to satisfy claims of general creditors at the time set aside if such assets (or such trust or other arrangement) are located outside of the United States, or at the time transferred if such assets (or such trust or other arrangement) are subsequently transferred outside of the United States.

Section 409A(b)(2) provides that in the case of compensation deferred under a nonqualified deferred compensation plan, there is a transfer of property within the meaning of § 83 with respect to such compensation as of the earlier of the date on which the plan first provides that assets will become restricted to the provision of benefits under the plan in connection with a change in the employer's financial health, or the date on which assets are so restricted, whether or not such assets are available to satisfy claims of general creditors.

Section 409A(b)(3) provides that if, during a restricted period with respect to a single-employer defined benefit pension

plan, assets are set aside or reserved in, or transferred to, a trust or other arrangement for purposes of paying deferred compensation for an applicable covered employee under a nonqualified deferred compensation plan of the plan sponsor or a member of its controlled group, or a nonqualified deferred compensation plan of the plan sponsor or a member of its controlled group provides that assets will become restricted to the provision of benefits, or assets are so restricted, in connection with such restricted period (or similar financial measure determined by the Secretary), the assets are treated as a transfer of property for purposes of § 83 whether or not such assets are available to satisfy claims of general creditors.

Section 409A(b)(4) provides that for each taxable year that assets treated as transferred under § 409A(b) remain set aside in a trust or other arrangement subject to § 409A(b)(1) or (2), any increase in value in, or earnings with respect to, such assets shall be treated as an additional transfer of property under this subsection (to the extent not previously included in income).

Notice 2006-33, 2006-1 C.B. 754, April 10, 2006, provides transition guidance related to the application of § 409A(b) to certain arrangements outstanding as of March 21, 2006. Under that relief, amounts transferred to trusts under the arrangement on or before March 21, 2006 that triggered the income inclusion and additional taxes under § 409A(b), or arrangements that otherwise triggered the income inclusion and additional taxes under § 409A(b) on or before March 21, 2006, generally are treated as not having triggered the inclusion or additional tax provisions of § 409A(b), provided that the arrangements become compliant with § 409A(b) by January 1, 2008. Section VI of Notice 2007-78, 2007-41 I.R.B. 780, and Notice 2007-86 provide that such relief is not extended beyond December 31, 2007 and nothing in this notice is intended to modify or extend that relief.

However, where amounts have been transferred to a trust under an arrangement that triggers the income inclusion and additional taxes under § 409A(b), or the arrangement otherwise triggers the income inclusion and additional taxes under § 409A(b), and the transfer is not eligible for the relief in Notice 2006-33 (for ex-

ample because the transfer occurred after March 21, 2006 or the arrangement is not made compliant with § 409A(b) by January 1, 2008), employers and payers must make a reasonable, good faith application of a reasonable, good faith method to determine the amount includible in income for purposes of reporting. In addition, employers must treat the amount as wages for purposes of § 3401. Amounts includible in income under § 409A(b) that are not eligible for the relief in Notice 2006-33 are treated as wages paid on the date the deemed transfer of property under § 83 described in § 409A(b) would be required to be included in income under the rules of § 83, for purposes of withholding, depositing and reporting the income tax at source on wages under § 3401(a). For amounts includible in income under § 409A(b) that were eligible for the relief in Notice 2006-33 ("grace period assets") but are includible in income under § 409A(b) because the arrangement is not made compliant with § 409A(b) on or before December 31, 2007, Notice 2007-78 provides that the date of the deemed transfer of property is January 1, 2008.

#### **C. Protection from Future Additional Reporting or Withholding for 2007**

An employer or payer who complies with the rules of this notice regarding computing amounts includible in gross income under § 409A and withholding and reporting for calendar year 2007 will not be liable for additional income tax withholding or penalties, or be required to file a subsequent corrected information return or furnish a corrected payee statement, as a result of future published guidance with respect to the computation of amounts includible in gross income under § 409A. If it is subsequently determined that the employer did not apply the rules of this notice in determining amounts includible in gross income under § 409A and in wages under § 3401(a) for calendar year 2007, any recalculation of these amounts will result in additional liability for income tax withholding under § 3403 for these years, plus any applicable penalties. In addition, an employer or payer who does not apply the rules of this notice in determining amounts includible in gross income under § 409A and in wages under § 3401(a) for calendar year 2007 will be required to file an

original or a corrected information return and furnish an original or a corrected payee statement. For purposes of determining any amount includible in income under § 409A in a subsequent year, an amount will not be treated as previously included in income unless the amount has been reported appropriately on an information return and payee statement, or has been included in income by the service provider in a previous year.

#### **IV. SERVICE PROVIDER REQUIREMENTS WITH RESPECT TO AMOUNTS INCLUDIBLE IN GROSS INCOME UNDER § 409A**

This section provides guidance on service providers' income tax reporting and tax payment requirements for calendar year 2007 with respect to deferrals of compensation that are includible in gross income under § 409A.

##### **A. Amounts Required to be Included in Income**

A service provider must report as income and pay any taxes due relating to amounts includible in gross income under § 409A for calendar year 2007. For purposes of determining the amount required to be included in income under § 409A, the same standards apply to a service provider as apply to an employer or payer when calculating the amount required to be reported as income, provided that an amount is treated as previously included in income only if the amount has been included in the service provider's income in a previous taxable year (regardless of whether reported on a Form W-2 or 1099-MISC). Accordingly, an employee or other service provider must calculate the amounts required to be included in gross income under the same methods and standards as set forth in section III. Whether a service provider has complied with the requirements of this notice is determined independently of whether the employer or payer has complied with the requirements of this notice. Thus, if the service provider includes in income the same amount reported by the employer or payer, the service provider has not necessarily complied with the terms of this notice.

If the service provider does not report and pay taxes due with respect to amounts includible in gross income under § 409A for calendar year 2007 in accordance with the guidance contained in this notice, the IRS may assert additional income taxes and penalties under §§ 6651(a)(1) and (2), 6654, and 6662 if it is determined that the amount of taxes reported and paid for calendar year 2007 was underreported or underpaid. Interest imposed under Chapter 67 of the Code will apply to any underpayments of tax resulting from a service provider's failure to include amounts includible in gross income under § 409A for calendar year 2007. For purposes of determining the amount includible in income under § 409A in a subsequent year, the service provider may treat an amount as previously included in income only if the service provider has actually and properly included the amount in gross income in a previous year.

##### **B. Calculation of Additional Tax under § 409A(a)(1)(B)(i)(I)**

Section 409A(a)(1)(B)(i)(I) provides that if compensation is required to be included in gross income under § 409A(a)(1)(A), the tax imposed on such income is increased by the sum of two additional taxes equal to the amount of interest determined under § 409A(a)(1)(B)(ii) plus an amount equal to 20% of the compensation which is required to be included in gross income. Section 409A(a)(1)(B)(ii) provides that the amount of interest is the amount of interest at the underpayment rate plus 1 percentage point on the underpayments that would have occurred had the deferred compensation been includible in gross income for the taxable year in which first deferred or, if later, the first taxable year in which such deferred compensation is not subject to a substantial risk of forfeiture.

Section 885(d)(1) of the Act provides that § 409A generally applies to amounts deferred after December 31, 2004. Section 885(d)(2)(B) of the Act provides that amounts deferred in taxable years beginning before January 1, 2005, shall be treated as amounts deferred in a taxable year beginning on or after such date if the plan under which the deferral is made is materially modified after October 3, 2004. Accordingly, for purposes of the

calculation of the additional tax under § 409A(a)(1)(B)(ii), taxpayers may treat amounts deferred under a plan that were originally deferred on or before January 1, 2005 but became subject to § 409A due to the material modification of the plan after October 3, 2004 as deferred on January 1, 2005.

#### **V. REQUEST FOR COMMENTS**

The provisions of this notice are intended as interim guidance only. The Treasury Department and the IRS are currently formulating general guidance with respect to the income inclusion requirements, the additional taxes, and the reporting and withholding requirements of § 409A. The Treasury Department and the IRS request comments on all aspects of these requirements, including but not limited to the topics addressed in this notice.

Comments must be submitted by February 13, 2008. All materials submitted will be available for public inspection and copying.

Comments may be submitted to Internal Revenue Service, CC:PA:LPD:RU (Notice 2007-89), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may also be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier's Desk at 1111 Constitution Avenue, NW, Washington, DC 20224, Attn: CC:PA:LPD:RU (Notice 2007-89), Room 5203. Submissions may also be sent electronically via the internet to the following email address: [Notice.comments@irscounsel.treas.gov](mailto:Notice.comments@irscounsel.treas.gov). Include the notice number (Notice 2007-89) in the subject line.

#### **VI. EFFECT ON OTHER DOCUMENTS**

Notice 2005-1 is modified. Notice 2006-100 is not affected by this notice.

#### **VII. EFFECTIVE DATE**

This notice is effective with respect to employers' and payers' reporting and wage withholding requirements and with respect to service providers' filing requirements and tax payment obligations relating to amounts includible in gross income under § 409A for calendar year 2007.

## VIII. DRAFTING INFORMATION

The principal author of this notice is Don M. Parkinson of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), although other Treasury and IRS officials participated in its development. For further information on the provisions of this notice addressing the calculation of the amount includible in income under § 409A, contact Stephen Tackney at (202) 927-9639; for further information on other provisions of this notice, including the reporting and withholding provisions contained in this notice, contact Mr. Parkinson at (202) 622-6040 (not toll-free numbers).

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### Security Under Section 6166 Elections

#### Notice 2007-90

##### PURPOSE

The purpose of this notice is to alert taxpayers, tax practitioners, executors and other persons who represent estates, that, in light of a recent Tax Court decision, the Internal Revenue Service is changing its policy and now will determine on a case-by-case basis whether security will be required when a qualifying estate elects under Internal Revenue Code section 6166 to pay all or a part of the estate tax in installments. This notice invites comments from the public regarding the relevant factors and appropriate standards for determining whether security is deemed to be necessary (and thus will be required) to protect the government's interest in obtaining full payment of the estate tax and interest thereon when that liability is deferred under section 6166.

##### BACKGROUND

Under section 6166, an estate that meets all of the requirements of the statute may elect to pay the estate tax attributable to the decedent's interest in a closely held business in up to 10 equal, annual installments. The first of those annual payments must be made by the 5<sup>th</sup> anniversary of the due date (determined without regard to any extension) of the estate tax liability that is

not deferred under section 6166. An estate qualifies for a section 6166 election if the value of the decedent's interest in the closely held business exceeds 35 percent of the adjusted gross estate, the decedent was a United States citizen or resident at the time of his or her death, and the estate made the election by attaching a full and complete notice of election with a timely filed federal estate tax return. I.R.C. § 6166(a) and (d). If the estate qualifies for the election, the estate pays a reduced rate of interest on the portion of estate tax deferred under section 6166; that interest is payable annually during the entire deferral period, and in most instances, interest only is paid during the first four years of the deferral period. I.R.C. §§ 6166(f) and 6601(j). The deferred tax is payable in no more than ten equal annual installments, beginning on a date that is not more than five years after the due date of the Federal estate tax return, which is generally nine months from the date of death. I.R.C. §§ 6166(a)(1) and (3).

Under section 6324(a), a general federal estate tax lien arises upon the decedent's date of death and attaches for ten years to all assets of the gross estate (except those used to pay certain expenses). This general federal estate tax lien may not be extended beyond the ten-year period following the date of death. As a result, when an estate qualifies and elects under section 6166 to pay estate tax over a period of up to 14 years, the government's interest in the deferred estate tax is secured by the general federal estate tax lien for only the first nine years and three months of the installment payment period. (Although the lien runs from the date of death, the installment payment period generally runs from the normal payment due date, nine months after the date of death, thus reducing the time the general lien protects the government to nine years and three months). During the final four years and nine months of the 14-year installment payment period, the government's interest is no longer secured by the general estate tax lien. In most cases, approximately one-half of the total deferred estate tax still remains to be paid during that final, unsecured portion of the deferral period.

Sections 6166(k)(1) and 6165, however, permit the IRS to require a surety bond (not exceeding double the amount with respect to which the extension is

granted) from an estate to ensure payment of the deferred estate tax to be paid in installments under section 6166. In lieu of the requirement to post a surety bond, the executor may elect to grant the IRS a special extended estate tax lien (in the amount of the deferred amount plus any interest, additional amount, addition to tax, assessable penalty, and costs attributable to the deferred amount) to secure the government's interest. I.R.C. §§ 6166(k)(2) and 6324A. This special lien does not expire until the earlier of the date the estate tax is paid in full or the tax becomes uncollectible. I.R.C. §§ 6324A(d)(2), 6502, and 6503(d).

In March 2000, the Treasury Inspector General for Tax Administration recommended, in report 2000-30-059 "The Internal Revenue Service Can Improve the Estate Tax Collection Process," that the IRS protect the government's interest in estate tax deferred under section 6166. In 2002 in response to that report, the IRS implemented a policy requiring a surety bond, or in the alternative, a section 6324A special lien, as a prerequisite to making the section 6166 election. On April 12, 2007, in *Estate of Roski v. Commissioner*, 128 T.C. 113 (2007), the Tax Court held that the IRS had abused its discretion by requiring that all estates electing to pay the estate tax in installments under section 6166 must provide a bond (or alternatively a special lien). The court found that it was Congress's intent that the IRS determine, on a case-by-case basis, that the government's interest is at risk prior to requiring security from an estate electing to pay the estate tax in installments under section 6166.

##### INTERIM PROVISIONS

The Treasury Department and the IRS are in the process of establishing standards to be applied on a case-by-case basis in the future to identify those estates making an election under section 6166 in which the government's interest in the deferred estate tax and the interest thereon is deemed to be sufficiently at risk to justify the requirement of a bond or special lien. The Treasury Department and the IRS intend to issue regulations implementing those standards and related procedures. Until those regulations are issued, however, the IRS will evaluate the factors described below and all other relevant facts to determine on

a case-by-case basis whether, at any time and from time to time during the deferral period, the government's interest in the estate tax deferred under section 6166 and interest thereon is sufficiently at risk to justify the requirement of a bond or special lien.

In order to determine whether the government's interest in the deferred tax is adequately secured up to the amount allowed under sections 6165 and 6324A, the IRS will consider information contained in the estate tax return, attachments to the return, information obtained during examination in audited cases, and any other relevant information described in paragraphs 1 through 3 of the discussion of the factors to be considered. Estates that have filed returns that do not contain adequate information to make this determination may be contacted and required to provide additional financial information to the IRS for purposes of making this determination. The IRS may terminate an estate's election for failure to respond to such requests within a reasonable timeframe. If, after this individual evaluation and analysis, the IRS determines there is a sufficient credit risk regarding the government's collection of the estate tax payments deferred under section 6166 and the interest thereon, the IRS will notify the estate that it must provide a bond or elect to provide a section 6324A special lien in lieu of a bond. If the estate then refuses to provide a bond or a section 6324A special lien, the IRS will terminate the estate's section 6166 election. The estate may then seek reconsideration of the termination by the Office of Appeals and, if the Office of Appeals upholds the IRS's determination, the estate then will have the opportunity to petition the Tax Court under section 7479 for a declaratory judgment with regard to whether its section 6166 election may be continued. I.R.C. § 7479; Rev. Proc. 2005-33, 2005-1 C.B. 1231.

The factors the IRS will consider in determining whether deferred installment payments of estate tax under section 6166 pose a sufficient credit risk to the government to justify the requirement of a bond or special lien are described below. In making this determination, the IRS will consider all relevant facts and circumstances, in addition to the factors identified in the following, non-exclusive list. No single

factor will be determinative, and not all factors may be relevant to every estate.

1. *Duration and stability of the business.* This factor considers the nature of the closely held business on which the estate tax is deferred under section 6166 and of the assets of that business, the relevant market factors that will impact the business's future success, its recent financial history, and the experience of its management, in an effort to predict the likelihood of its success and survival through the deferred payment period. Facts relevant to this factor are likely to appear primarily in the appraisal and the financial statements that accompany the estate tax return. Information regarding any outstanding liens, judgments, or pending or anticipated lawsuits or other claims against the business, if any, that are not disclosed in that documentation should be provided by the estate with the election. The estate may be required to furnish such information in response to an inquiry by the IRS.

2. *Ability to pay the installments of tax and interest timely.* This factor considers how the estate expects to be able to make the annual payments of tax and interest as due, and the objective likelihood of realizing that expectation. Facts relevant to this factor may include the nature of the business's significant assets and liabilities, and the business's cash flow (both historical and anticipated). If not sufficiently disclosed in the documents attached to the estate tax return, the estate should submit relevant information with the election under section 6166. The estate may be required to furnish such information in response to an inquiry by the IRS.

3. *Compliance history.* This factor addresses the business's history regarding compliance with all federal tax payment and tax filing requirements, in an effort to determine whether the business and its management respect and comply with all tax requirements on a regular basis. This factor also addresses the estate's compliance history with respect to federal tax payment and filing requirements. The estate may use a sworn affidavit or other probative documents to provide this information.

This notice is applicable to each estate: (1) that timely elects to pay the estate tax in installments under section 6166 and that timely files a return on or after November 13, 2007; (2) whose return was being clas-

sified, surveyed or audited by the IRS as of April 12, 2007; or (3) that is currently in the deferred payment period but that has not yet provided a bond or special lien if (a) the general federal estate tax lien will expire within two years from November 13, 2007 or (b) the IRS reasonably believes that the government's interest in collecting the deferred estate tax and interest thereon in full is sufficiently at risk to require a bond or special lien.

## REQUEST FOR COMMENTS

The Treasury Department and the IRS intend to issue regulations regarding the appropriate standards to be applied by the IRS in exercising its discretion with regard to whether a bond or special lien will be required in order to avoid an IRS termination of an estate's election under section 6166, and invite interested persons to submit comments regarding such standards and possible alternatives to a bond or special lien for providing security under section 6166.

In particular, comments are requested with regard to the following issues:

1. What factors, in addition to or in place of those stated above, should the IRS use in determining whether to require security from an estate electing to pay the estate tax in installments under section 6166?

2. How often during the section 6166 installment payment period (or on what occurrences) should the IRS reevaluate whether the estate poses a sufficient credit risk to the government's collection of the deferred estate tax and related interest to justify the requirement of a bond or special lien?

3. What facts evident from a review of the estate tax return are likely to be reasonably accurate predictors of either a future default in or full payment of the deferred tax payments and related interest?

4. What additional financial information should the IRS require from an estate to assist in making the determination as to whether the estate poses a sufficient credit risk to the government with regard to the deferred estate tax and interest thereon to justify requiring a bond or special lien?

5. For purposes of sections 6165 and 6166(k), should the IRS define a surety bond under section 7101 to also include other forms of security, and, if so, what other forms of security, such as certain ir-

revocable letters of credit from reputable financial institutions or United States Treasury Bonds, should be so included?

Comments are encouraged to be submitted by January 14, 2008, to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2007-90), room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Submissions may be hand delivered Monday through Friday between the hours of

8 a.m. and 4 p.m. to: CC:PA:LPD:PR (Notice 2007-90), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit electronic comments directly to the IRS e-mail address: [notice.comments@irs.counsel.treas.gov](mailto:notice.comments@irs.counsel.treas.gov). Please include "Notice 2007-90" in the subject line of any electronic communication.

#### DRAFTING INFORMATION

The principal author of this notice is Laura Urich Daly of the Office of Associate Chief Counsel (Procedure and Administration). For further information regarding this notice, contact Laura Urich Daly at (202) 622-3600 (not a toll-free call).



## Part IV. Items of General Interest

### Notice of Proposed Rulemaking and Notice of Public Hearing

#### Withholding Procedures Under Section 1441 for Certain Distributions to Which Section 302 Applies

##### REG-140206-06

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations regarding a withholding agent's obligation to withhold and report tax under Chapter 3 of the Internal Revenue Code when there is a distribution in redemption of stock of a corporation that is actively traded on an established financial market. Specifically, the proposed regulations provide an escrow procedure that a withholding agent must apply while making the determination under section 302 as to whether the distribution in redemption of the stock held by a foreign shareholder is treated as a dividend subject to withholding, or a distribution in part or full payment in exchange for stock. These regulations would affect corporations that are actively traded on an established financial market and their shareholders. This document also provides a notice of public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by January 16, 2008. Outlines of topics to be discussed at the public hearing scheduled for February 6, 2008 at 10 a.m. must be received by January 16, 2008.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG-140206-06), 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-140206-06), Courier's Desk, Internal Revenue Service, 1111 Constitution

Avenue, NW, Washington, DC, or sent electronically, via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (IRS REG-140206-06). The public hearing will be held in room 2140, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Kathryn Holman, (202) 622-3440 (not a toll-free number); concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, email [Richard.A.Hurst@irs.counsel.treas.gov](mailto:Richard.A.Hurst@irs.counsel.treas.gov).

#### SUPPLEMENTARY INFORMATION:

##### Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the **Office of Management and Budget**, Attn: Desk Office 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 January 16, 2008. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, 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 collections of information may be minimized, including through the application of automated collection techniques

or other forms of information technology; and

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

The collection of information in these proposed regulations is in §1.1441-3(c)(5)(iii). This information is required to allow a U.S. financial institution that is applying the escrow procedure to properly comply with its withholding and reporting obligations under sections 1441, 1442 and 1443 in the case of a distribution made by a corporation with respect to its stock that is actively traded on an established financial market and that requires a determination under section 302 as to whether the distribution is treated as a dividend or a distribution in part or full payment in exchange for stock. The collection of information is mandatory and the respondents are nonresident aliens and foreign corporations.

Estimated total annual reporting burden: 1400 hours.

The estimated annual burden per respondent: 2 hours.

Estimated number of respondents: 700.

Estimated annual frequency of responses: 5 times.

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 proposed regulations, REG-140206-06, provide guidance regarding the withholding and reporting obligations of a withholding agent under Chapter 3 of the Internal Revenue Code (Code) in the case of a distribution in redemption of the stock of a corporation that is actively traded on an established financial market within the meaning of §1.1092(d)-1 (publicly traded). In general the proposed regulations contemplate

a transaction where a publicly traded corporation offers to purchase stock from its shareholders (a self tender), where the amount of stock purchased and the shareholders involved in the transaction (the participating shareholders) depend on a number of factors, including each shareholder's willingness to sell some or all of its stock, and the terms set forth in the offer. The regulations would also apply to transactions described in section 304(a)(2).

In the case of a self-tender, a corporation may purchase stock from some or all of its shareholders and, as a result, each participating shareholder's percentage ownership interest in the corporation may increase, decrease, or remain the same. Although the corporation's self tender offer is denominated as an offer to purchase shares, the tax consequences to the corporation and any participating shareholder of the payment to such a shareholder, as described in this preamble, depend on several factors. Further, where the participating shareholder is a foreign person, withholding under Chapter 3 of the Code may or may not be required.

Sections 1441 and 1442 and §1.1441-1(b)(1) generally require a person that makes a payment of an "amount subject to withholding" to a beneficial owner that is a foreign person to deduct and withhold 30 percent of the payment unless the payor can reliably associate the payment with documentation upon which the payor can rely to treat the payment as made to a beneficial owner that is a U.S. person or as made to a beneficial owner that is a foreign person entitled to a reduced rate of withholding under the Code, regulations or an income tax treaty.

Section 1.1441-2(a) provides that the term *amounts subject to withholding* means amounts from sources within the United States that constitute fixed or determinable annual or periodical income (FDAP) described in §1.1441-2(b) or other amounts subject to withholding described in §1.1441-2(c).

Section 1.1441-2(b)(1) provides that FDAP includes all income described in section 61 of the Code, unless the item of income is described in §1.1441-2(b)(2). Section 1.1441-2(b)(2)(i) generally excludes from FDAP gains derived from the sale of property. Thus, a distribution to a shareholder that is treated as gain from

the sale of stock is excluded from FDAP. Further, to the extent a distribution is a return of capital, it is not gross income under section 61, and thus also is not FDAP.

Section 302 provides rules for determining when a distribution in redemption of stock is treated as a distribution in part or full payment in exchange for stock. That section generally requires a comparison of a shareholder's overall interest in the corporation before the distribution and its overall interest in such corporation after the distribution. See section 302(b). In conducting the comparison, the constructive ownership rules of section 318 generally apply. If the shareholder's interest in the corporation has been sufficiently reduced, then the distribution is treated as a payment in exchange for the shareholder's stock under section 302(a). If the shareholder's interest in the corporation has not been sufficiently reduced, the tax consequences of the distribution are determined under section 301, and such distribution is a dividend to the shareholder to the extent the distribution is out of the distributing corporation's earnings and profits, then applied against and reduce the adjusted basis of the stock, and finally treated as gain from the sale or exchange of property. See section 301(c).

When a publicly held corporation makes a distribution in redemption of its stock, a determination must be made under section 302 with respect to each shareholder as to whether the redemption is treated as a distribution of property to which section 301 applies (potentially constituting a dividend in whole or in part) or as a distribution in part or full payment in exchange for stock. However, the information necessary for each shareholder to make such a determination generally is not available until after the transaction is completed because the redemption of stock held by other shareholders must be taken into account. Further, because of the application of the constructive ownership rules of section 318, when a distribution is made to a foreign shareholder, a withholding agent will often not be in the best position to make a determination as to whether the distribution to the foreign shareholder should be treated as a payment in exchange for the shareholder's stock or a dividend.

There are two revenue rulings that consider the issue of whether the interest of a

shareholder in a publicly held corporation has been sufficiently reduced as a result of a distribution to effect exchange treatment under section 302(a).

In Rev. Rul. 76-385, 1976-2 C.B. 92, see §601.601(d)(2)(ii)(b), the IRS ruled that a shareholder who actually and constructively owned 0.000118% of a publicly traded corporation's stock before a redemption, but only constructively owned 0.0001081% after the redemption, had experienced a "meaningful reduction in proportionate interest" in the corporation under the principles of *United States v. Davis*, 397 U.S. 301 (1970), rehearing denied, 397 U.S. 107 (1970). The shareholder's interest in the corporation after the redemption therefore was approximately 96.7% of the shareholder's interest before the redemption, taking constructive ownership into account. Nevertheless, the reduction was considered meaningful, and so the distribution to the shareholder was treated as not essentially equivalent to a dividend under section 302(b)(1) and as a payment in exchange for the shareholder's stock under section 302(a).

Consistent with Rev. Rul. 76-385, in Rev. Rul. 81-289, 1981-2 C.B. 82, see §601.601(d)(2)(ii)(b), the IRS ruled that a shareholder who owned 0.2% of the common stock of a publicly traded company before a redemption, and 0.2% of the common stock in the company after the redemption, did not satisfy the "meaningful reduction" standard of *United States v. Davis*, and that the redemption did not qualify for exchange treatment under section 302(a).

Under the analysis adopted in these revenue rulings, each minority shareholder who participates in a self tender must compute its percentage ownership of the total outstanding stock of the corporation before and after the transaction. If after the transaction the shareholder's percentage ownership is less than it was before the transaction, the shareholder generally has experienced a "meaningful reduction" in the shareholder's proportionate interest in the corporation, and the transaction, at least with respect to that shareholder, is considered a distribution in exchange for the stock under section 302(a) and not a distribution of property to which section 301 applies. This result occurs even if another participating shareholder in the same self tender experiences no change

or an increase in its percentage ownership of the corporation, and, therefore, is considered to receive a distribution of property to which section 301 applies. See also section 302(b)(2), (3), and (4).

Section 1.1441-3(c) requires a corporation making a distribution with respect to its stock to a foreign shareholder, as well as any intermediary (such as a broker) making a payment of such a distribution, to withhold on the entire amount of the distribution, unless it elects to reduce the amount of withholding under §1.1441-3(c). Section 1.1441-3(c)(2)(i)(B) provides that a distributing corporation or intermediary may elect to not withhold on a distribution to the extent it represents a distribution in part or full payment in exchange for stock. Section 1.1441-3(c)(2)(i) provides that a corporation or intermediary makes the election by reducing the amount of withholding at the time that the payment is made. However, a withholding agent cannot avail itself of this election unless it knows the extent to which a distribution represents a payment in exchange for stock under section 302(a). As previously noted, in the context of a distribution in redemption of stock held in a publicly traded corporation, the withholding agent generally will not have this information unless, at the time of the redemption, it has obtained information from each participating shareholder regarding actual and constructive ownership of stock for purposes of the foregoing analysis.

The Treasury Department and the IRS are aware that, in the context of transactions involving distributions in redemption of stock held by foreign persons where such stock is actively traded on an established financial market, the means of compliance with sections 1441, 1442, and 1443 is varied. The Treasury Department and the IRS believe that the discretion permitted by the current regulations, and the resulting different treatment of similar transactions is not appropriate. Accordingly, these proposed regulations provide the procedure (“escrow procedure”) to be followed by U.S. withholding agents to satisfy the withholding, reporting and deposit requirements of the regulations under sections 1441, 1442, and 1443 with respect to any payment of a corporate distribution in redemption of stock made to

a foreign account holder with respect to certain self tenders.

### *Explanation of Provisions*

The proposed regulations set forth an escrow procedure for withholding agents to follow in the case of a payment made after December 31, 2008 of a corporate distribution in redemption of stock that is actively traded on an established financial market within the meaning of §1.1092(d)-1 (section 302 payment).

In general, the proposed regulations require a U.S. financial institution (withholding agent) to set aside in an escrow account 30 percent (or the applicable dividend rate provided under a treaty) of the amount of the section 302 payment. The withholding agent is then required to provide information to the foreign beneficial owner regarding the distribution, including the total number of the distributing corporation’s shares outstanding before and after the distribution. The withholding agent must also provide a written statement explaining the conditions under which the section 302 payment will be treated as a dividend or a payment in exchange for stock (including an explanation of the constructive ownership rules under section 318). In the written explanation provided to the foreign beneficial owner, the withholding agent must request that the beneficial owner provide a written certification to the withholding agent within 60 days as to whether the distribution is either a dividend or a payment in exchange for stock.

The certification to be provided by the foreign beneficial owner must contain, among other requirements, the beneficial owner’s name and account number, a certification that the distribution is a payment in exchange for stock or is a dividend, and the number of shares actually and constructively owned by the beneficial owner before and after the distribution. The beneficial owner’s certification must be signed under penalties of perjury.

A withholding agent may generally rely on a certification received from a foreign beneficial owner in determining its section 1441 obligations with respect to payments for such beneficial owner’s stock. However, if the withholding agent knows or has reason to know that the certification is

unreliable or incorrect, or the withholding agent does not receive a certification from a foreign beneficial owner, the withholding agent is required to treat the amount set aside in escrow as tax withheld on the 61<sup>st</sup> day, and deposit that amount pursuant to the applicable regulations.

Although a qualified intermediary (QI) may, and a withholding foreign partnership and a withholding foreign trust (WP/WT) must, assume primary withholding responsibility under section 1441 and receive payments without any withholding by the U.S. financial institution, under the proposed regulations, in the case of a section 302 payment, the QI or WP/WT cannot assume primary withholding responsibility and receive the payment in gross. The QI or WP/WT must apply the procedure described in this preamble and provide the U.S. financial institution with a withholding statement that details the appropriate rate of withholding and information reporting for amounts paid to the QI or WP/WT. In addition, if there is a chain of QIs or WPs/WTs this procedure must be followed at each level in the chain. The U.S. financial institution shall treat beneficial owners that are U.S. non-exempt recipients, and that hold stock in the distributing corporation through QIs, WPs/WTs, NQIs and flow-throughs, in accordance with the section 302 payment certifications obtained from those U.S. non-exempt recipients and shall instruct foreign intermediaries and foreign flow-through entities to do the same.

These proposed regulations would apply for redemptions of stock that are made after December 31, 2008. However, a withholding agent may, at its option, rely on these proposed regulations for a redemption of stock that occurs before January 1, 2009.

The Treasury Department and the IRS are aware that withholding agents serve various customer bases: some may maintain accounts for a small number of account holders, others may maintain accounts for a much greater number of account holders. Comments are requested on alternatives to the escrow procedure described in this proposed regulation for withholding agents that maintain accounts for large numbers of customers.

## Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required.

It has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

These regulations impose a collection of information on small entities, and the Regulatory Flexibility Act (5 U.S.C. chapter 6) applies. This rule regulates securities brokerages that have foreign customers that respond to a tender offer by a U.S. publicly traded corporation to purchase some of its stock from its shareholders. The Small Business Administration (SBA) has established size standards for types of economic activities which are classified based on the North American Industry Classification Codes (NAICS). The regulations specifying size standards are set forth in Title 13, Code of Federal Regulations, part 121 (13 CFR part 121), Small Business Size Regulations. The NAICS Code for a small securities brokerage is specified at 13 CFR 121.201. Pursuant to subsector 523120 of the NAICS, a small securities brokerage is one with receipts of less than 6.5 million dollars. According to NAICS 523120, U.S. Census Bureau, Statistics of U.S. Business (2002), there are a total of 7,886 securities brokerages of which 7,113 generate revenue less than \$5 million and 224 generate revenue between \$5 million and \$10 million. It is estimated that 7,213 of the securities brokerages are considered small businesses. The IRS requests information regarding the number of transactions these small securities brokerages engage in each year involving self tenders by public corporations. In the case of a tender offer by a publicly held corporation, it is estimated that a brokerage clerk would spend two hours preparing the paperwork and verifying the computations required to accurately withhold with respect to foreign customers. According to the Bureau of Labor Statistics, the mean hourly wage of a brokerage clerk is \$18.34, so it is estimated that it will cost a small securities brokerage \$36.68 per transaction. This cost is not significant when compared to the annual revenue of the small securities broker-

age. Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §605, the Chief Counsel certifies that this rule will not have a significant economic impact on a substantial number of small entities. The IRS invites specific comments on the economic impact of compliance from members of the public who believe there will be a significant economic impact on small businesses that are regulated by this rule. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

## 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 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 has been scheduled for February 6, 2008, beginning at 10 a.m. in room 2140 of the Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the 12<sup>th</sup> street 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 electronic or written comments, 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 January 16, 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 proposed regulations is Kathryn Holman, Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

\* \* \* \* \*

## Proposed Amendments to the Regulations

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

### Part 1—INCOME TAXES

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

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

Par. 2. Section 1.1441-3 is amended as follows:

1. A sentence is added at the end of paragraph (c)(2)(i)(B).
2. Paragraph (c)(5) is added.
3. A sentence is added at the end of paragraph (d)(1).

The additions read as follows.

*§1.1441-3 Determination of amounts to be withheld.*

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(i) \* \* \*

(B) \* \* \* The preceding sentence shall not apply to a public section 302 distribution to which paragraph (c)(5) applies.

\* \* \* \* \*

(5) *Special rules for certain distributions to which section 302 applies—(i) Withholding responsibility—(A) General rule.* A corporation that makes a public section 302 distribution, or any intermediary (described in §1.1441-1(c)(13)) making a payment of such a distribution, is required to withhold under section 1441, 1442 or 1443 on the entire amount of the distribution unless the provisions of paragraph (c)(5)(iii) of this section have been applied. The provisions of paragraph

(c)(2)(i)(B) or (d)(1) of this section do not apply to a public section 302 distribution.

(B) *Effective/applicability date.* The rules of this paragraph (c)(5) apply to public section 302 distributions made after December 31, 2008.

(ii) *Definitions.* Solely for purposes of this paragraph (c)(5), the following definitions shall apply:

(A) *Public section 302 distribution* means a distribution by a corporation in redemption of its stock for which there is an established financial market within the meaning of §1.1092(d)-1.

(B) *Section 302 payment* means payment of a public section 302 distribution.

(C) *Distributing corporation* means a corporation making or treated as making a public section 302 distribution.

(iii) *Escrow procedure*—(A) *Application*—(1) *In general.* The escrow procedure in this paragraph (c)(5)(iii) may be applied only by an intermediary (described in §1.1441-1(c)(13)) that is a U.S. financial institution. A U.S. financial institution making a section 302 payment to a foreign account holder, and applying this escrow procedure, is not required to withhold on the entire amount of a section 302 payment under the general rule of paragraph (c)(5)(i).

(B) *Escrow account*—(1) *In general.* A U.S. financial institution shall set aside in an escrow account on the date it receives a section 302 payment from a distributing corporation with respect to stock of a foreign account holder 30 percent (or the applicable dividend rate provided by a tax treaty for a qualifying foreign account holder) of the amount and shall credit the foreign account holder's account with the balance of the section 302 payment.

(2) *Qualified intermediaries.* The amount set aside, under paragraph (c)(5)(iii)(B)(1) of this section shall include 30 percent (or the applicable dividend rate provided by a treaty) of the amount paid to any qualified intermediary (QI) (whether or not the QI has assumed primary withholding responsibility) and to any withholding foreign partnership or withholding foreign trust (WP/WT).

(C) *Request for section 302 payment certification.* On or before the date it receives the section 302 payment, the U.S. financial institution shall provide the following information and instructions, in writing, to the foreign beneficial owner—

(1) The total number of distributing corporation's shares outstanding before and after the public section 302 distribution;

(2) An explanation of the conditions under which the section 302 payment will be treated as a dividend or a payment in exchange for stock for Federal income tax purposes (including an explanation of any applicable constructive ownership rules); and

(3) A request that the beneficial owner of the account provide a certification (section 302 payment certification), within 60 days of the section 302 payment, stating whether the section 302 payment is either a dividend or a payment in exchange for stock under the Internal Revenue Code.

(D) *Content of section 302 payment certification.* The section 302 payment certification must include the following information:

(1) The beneficial owner's name and account number.

(2) The distributing corporation's name.

(3) The total shares of the distributing corporation outstanding immediately before and immediately after the public section 302 distribution.

(4) A certification from the beneficial owner that either—

(i) The section 302 payment is a payment in exchange for stock because the beneficial owner's proportionate interest has been reduced but not completely terminated;

(ii) The section 302 payment is a payment in exchange for stock because the beneficial owner's interest in the distributing corporation is completely terminated; or

(iii) The section 302 payment is a dividend.

(5) With respect to the certifications in paragraph (c)(5)(iii)(D)(4)(i) and (ii) of this section, the number of shares actually and constructively owned by the beneficial owner before and after the distribution and the beneficial owner's percentage ownership before and after the distribution.

(6) A penalties of perjury statement.

(7) The signature of the beneficial owner and date of signature.

(E) *Receipt of section 302 payment certification*—(1) *Payment in exchange for stock.* If, within the 60-day period described in paragraph (c)(5)(iii)(C)(3), the U.S. financial institution receives from

the foreign beneficial owner a section 302 payment certification stating that the section 302 payment is a payment in exchange for stock, and if the U.S. financial institution does not know or have reason to know that the information in the section 302 payment certification is unreliable or incorrect, the U.S. financial institution shall credit the account with the amount set aside with respect to the beneficial owner who provides the certification. The entire amount paid (including the amount initially set aside) shall be reported as capital gains on Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding.*

(2) *Unreliable or incorrect exchange certification.* If the U.S. financial institution knows or has reason to know that the information in the section 302 payment certification is unreliable or incorrect, the U.S. financial institution shall treat the payment as a payment for which no section 302 payment certification has been received and shall follow the withholding and reporting procedures in paragraph (c)(5)(iii)(E)(4) of this section.

(3) *Dividend.* If, within the 60-day period, the U.S. financial institution receives a section 302 payment certification from the foreign beneficial owner stating that the section 302 payment is a dividend, the U.S. financial institution shall treat the amount set aside as tax withheld as of the time it receives the section 302 payment certification, and shall deposit that amount pursuant to the applicable regulations. The entire amount paid shall be reported on Form 1042-S as dividends.

(4) *No timely certification received.* If, within the 60-day period, the U.S. financial institution does not receive a section 302 payment certification, or is treated under paragraph (c)(5)(iii)(E)(2) of this section as not receiving a section 302 payment certification, the U.S. financial institution shall treat the amount set aside as tax withheld as of the 61st day, and shall deposit that amount pursuant to the applicable regulations. The entire amount paid shall be reported on Form 1042-S as dividends.

(5) *Late certification.* If, after the 60-day period has expired, the U.S. financial institution receives a section 302 payment certification from a foreign beneficial owner that the section 302 payment is a payment in exchange for stock and the conditions stated in §1.1461-2(a) are

satisfied, the U.S. financial institution may apply the refund or offset procedures of that paragraph.

(6) *Determination of incorrect treatment.* If, after the 60-day period has expired, the U.S. financial institution determines that the section 302 payment was incorrectly treated as a distribution in exchange for stock, the procedures set forth regarding underwithholding in §1.1461-2(b) are applicable.

(7) *Undocumented beneficial owners.* The U.S. financial institution shall withhold at 30 percent on the entire amount paid to a beneficial owner that is not properly documented under §§1.1441-1, 1.1441-5, etc. and that is presumed to be a foreign person, whether or not the U.S. financial institution has received a section 302 payment certification from such beneficial owner. The U.S. financial institution shall report the entire amount paid on Form 1042-S as dividends.

(F) *Amounts in excess of section 302 payment.* If the amount the U.S. financial institution credits to the account of the foreign beneficial owner from the escrow account includes an amount in excess of the section 302 payment, such as interest accrued on the escrowed funds, the U.S. financial institution shall report and withhold on such excess amount in accordance with the rules under Chapter 3 of the Internal Revenue Code.

(G) *U.S. non-exempt recipients.* The U.S. financial institution shall treat beneficial owners that are U.S. non-exempt recipients, and that hold stock in the distributing corporation through QIs, WPs/WTs, NQIs and flow-throughs, in accordance with the section 302 payment certifications obtained from those U.S. non-exempt recipients and shall instruct foreign intermediaries and foreign flow-through entities to do the same.

(H) *Notice to distributing corporation.* The U.S. financial institution shall notify the distributing corporation, in writing, by the filing date of Form 1042-S, of the aggregate amount of the section 302 payment that the U.S. financial institution has reported on Forms 1042-S as capital gains, and the aggregate amount of the section 302 payment that it has reported on Forms 1042-S as dividends.

(I) *Application of Escrow Procedure to Qualified Intermediaries.* As provided in paragraph (c)(5)(iii)(A) of this sec-

tion, only the U.S. financial institution may establish an escrow account and the amounts set aside in the escrow account shall include 30 percent (or the applicable treaty rate applicable to dividends) on payments made to a direct account holder that is a QI (including a QI that has assumed primary withholding responsibility). Under the procedure described in paragraph (c)(5)(iii)(I)(3), a QI shall provide the U.S. financial institution with a withholding statement as required in the QI Agreement. If there is a chain of QIs, each QI in the chain shall apply the procedure. The procedures described in this paragraph (I) shall be applied to withholding foreign partnerships and withholding foreign trusts within the meaning of §§1.1441-5(c)(2) and (e)(5)(v), respectively, in the same manner as the procedures apply to a QI.

(1) *Request for section 302 payment certification.* The U.S. financial institution shall provide the information and instructions described in paragraph (c)(5)(iii)(C) of this section to the QI, and the QI shall provide the same information and instructions to its account holders including account holders that are U.S. non-exempt recipients.

(2) *Content of section 302 payment certification.* The content of the section 302 payment certification shall include the information described in paragraph (c)(5)(iii)(D) of this section.

(3) *Receipt of section 302 payment certification—(i) Payment in exchange for stock.* If, within the 60-day period described in paragraph (c)(5)(iii)(C), the QI receives from the beneficial owner a section 302 payment certification stating that the section 302 payment is a payment in exchange for stock and if the QI does not know or have reason to know that the information in the section 302 payment certification is unreliable or incorrect, the QI shall reflect such treatment in its withholding statement provided to the U.S. financial institution, and, based upon the withholding statement, the U.S. financial institution shall release payment from its escrow and the QI shall credit the beneficial owner's account with the amount set aside by the U.S. financial institution with respect to the beneficial owner who provided the certification. The entire amount paid (including the amount initially set

aside) shall be reported on the QI's pooled basis Form 1042-S as capital gains.

(ii) *Unreliable or incorrect exchange certification.* If the QI knows or has reason to know that the information in the section 302 payment certification is unreliable or incorrect, the QI shall treat the payment as a payment for which no section 302 payment certification has been received and shall follow the withholding and reporting procedures in paragraph (c)(5)(iii)(I)(3)(iv) of this section.

(iii) *Dividend.* If, within the 60-day period, QI receives a section 302 payment certification stating that the section 302 payment is a dividend, the QI shall reflect such treatment in its withholding statement and shall treat the payment as a dividend for purposes of its reporting and withholding responsibilities under the QI agreement. The entire amount paid shall be reported on its pooled basis Form 1042-S as dividends.

(iv) *No timely certification received.* If, within the 60-day period, the QI does not receive a section 302 payment certification, or is treated under paragraph (c)(5)(iii)(I)(3)(ii) of this section as not receiving a section 302 payment certification, the QI shall reflect such treatment in its withholding statement provided to the U.S. financial institution and shall treat the payment as a dividend for purposes of its reporting and withholding responsibilities under the QI agreement. The entire amount paid shall be reported on its pooled basis Form 1042-S as dividends.

(v) *Late certification.* If, after the 60-day period has expired, the QI receives a section 302 payment certification from a beneficial owner that the section 302 payment is a payment in exchange for stock and the conditions stated in the QI agreement regarding the refund and offset procedures are satisfied, the QI may apply such refund or offset procedures.

(vi) *Determination of incorrect treatment.* If, after the 60-day period has expired, the QI determines that the section 302 payment was incorrectly treated as a distribution in exchange for stock, the procedures set forth regarding adjustments for underwithholding in the QI agreement are applicable.

(vii) *Undocumented beneficial owners.* The QI shall withhold at 30 percent on the entire amount paid to a beneficial owner that is not properly documented and that is

presumed to be a foreign person, whether or not the QI has received a section 302 payment certification from such beneficial owner. The QI shall report the entire amount paid on its pooled basis Form 1042-S as dividends.

(4) *U.S. non-exempt recipients.* The QI shall treat direct account holders that are U.S. non-exempt recipients, and that hold stock in the distributing corporation, in accordance with the section 302 payment certifications obtained from those U.S. non-exempt recipients and shall instruct foreign intermediaries and foreign flow-through entities to do the same.

(J) *Intermediaries that are not qualified intermediaries.* If the U.S. financial institution has an account holder that is an intermediary that is not a QI ("NQI"), the U.S. financial institution shall apply the rules of paragraph (c)(5)(iii)(J)(1) through (4) of this section. Where the provisions of this paragraph (J) refer only to the U.S. financial institution, they shall apply in the same manner to a QI or WP/WT and where they refer to an NQI, they shall apply in the same manner to a flow-through that is not a WP or WT.

(I) The U.S. financial institution shall provide the information and instructions described in paragraph (c)(5)(iii)(C) of this section to the NQI and the NQI shall provide the same information and instructions to its account holders.

(2) The content of the section 302 payment certification shall include the information described in paragraph (c)(5)(iii)(D) of this section.

(3) The NQI shall provide the section 302 payment certification to the U.S. financial institution together with the otherwise required documentation and a withholding statement made in accordance with the section 302 payment certification.

(4) The U.S. financial institution shall treat the section 302 payment as a dividend or a payment in exchange for stock based on the information and documentation provided to it under paragraph (c)(5)(iii)(J)(3) of this section. The U.S. financial institution shall withhold and report on a specific payee basis in accordance with this information.

(d) \* \* \* (1) \* \* \* This paragraph does not apply to a public section 302 distribution to which paragraph (c)(5) applies.

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

(Filed by the Office of the Federal Register on October 16, 2007, 8:45 a.m., and published in the issue of the Federal Register for October 17, 2007, 72 F.R. 58781)

## Notice of Proposed Rulemaking

### Compensation for Labor or Personal Services: Artists and Athletes

#### REG-114125-07

AGENCY: Internal Revenue Service  
(IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed changes to existing final regulations regarding the source of compensation for labor or personal services. The proposed changes are needed to clarify the determination of source of compensation of a person, including an artist or athlete, who is compensated for labor or personal services performed at specific events. These proposed regulations affect such an individual.

DATE: Written or electronic comments and requests for a public hearing must be received by January 14, 2008.

ADDRESSES: Send submissions to:  
CC:PA:LPD:PR (REG-114125-07),  
room 5203, Internal Revenue Service,  
PO Box 7604, Ben Franklin Station,  
Washington, DC 20044. Submissions  
may be hand-delivered Monday  
through Friday between the hours of  
8 a.m. and 4 p.m. to: CC:PA:LPD:PR  
(REG-114125-07), 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-114125-07).

FOR FURTHER INFORMATION  
CONTACT: Concerning the proposed  
regulations, David Bergkuist at (202)  
622-3850; concerning the submissions

of comments and requests for a hearing,  
Regina Johnson at (202) 622-7180 (not  
toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### Background

This document contains proposed amendments under 26 CFR part 1 under section 861 of the Internal Revenue Code (Code). On July 14, 2005, final regulations that revised and amended §1.861-4 were published in the **Federal Register** (70 FR 40663) as T.D. 9212, 2005-2 C.B. 429. In these final regulations, §1.861-4(b)(2)(ii)(C)(3) was reserved with respect to compensation for labor or personal services performed partly within and partly without the United States by an artist or an athlete who is an employee.

Section 861(a)(3) of the Internal Revenue Code provides that, subject to certain exceptions, compensation for labor or personal services performed in the United States is gross income from sources within the United States. See also §1.861-4(a) of the regulations. Section 862(a)(3) of the Code provides that compensation for labor or personal services performed without the United States is gross income from sources without the United States. Section 1.861-4(b) provides rules for determining the source of compensation for labor or personal services performed partly within and partly without the United States. Section 1.861-4(b)(2)(i) provides rules for determining the source of compensation for labor or personal services performed partly within and partly without the United States by an individual other than as an employee. Section 1.861-4(b)(2)(ii) provides rules for determining the source of compensation for labor or personal services performed partly within and partly without the United States by an individual as an employee.

Under §1.861-4(b)(2)(ii), if an individual performs labor or personal services as an employee, the source of the individual's compensation is generally determined on a time basis, with certain fringe benefits sourced on a geographic basis. An individual may determine the source of his or her compensation as an employee for labor or personal services performed partly within and partly without the United States

under an alternative basis if the individual establishes to the satisfaction of the Commissioner that, under the facts and circumstances of the particular case, the alternative basis more properly determines the source of the compensation than the general rules of §1.861-4(b)(2)(ii). See §1.861-4(b)(2)(ii)(C)(I)(i). In addition, the Commissioner may, under the facts and circumstances of the particular case, determine the source of compensation that is received by an individual as an employee under an alternative basis if such compensation is not for a specific time period, provided that the Commissioner's alternative basis determines the source of compensation in a more reasonable manner than the basis used by the individual.

The final regulations at §1.861-4(b)(2)(ii)(C)(3) provided a reservation with respect to the source of compensation for labor or personal services performed partly within and partly without the United States by an artist or athlete who is an employee. The preamble of T.D. 9212 indicated that it was intended that the rule for artists and athletes who are employees, when issued, would require such individuals to determine the proper source of their compensation for labor or personal services on the basis that most correctly reflects the proper source of income under the facts and circumstances of the particular case, consistent with current law.

### Explanation of Provisions

The proposed regulations would set forth a new "events basis" rule in §1.861-4(b)(2)(ii)(G) and make certain other clarifying changes to the existing final regulations. The proposed regulations also would remove §1.861-4(b)(2)(ii)(C)(3), which reserved with respect to artists and athletes.

The amount of income received by a person, including an individual who is an artist or an athlete, that is properly treated as compensation from the performance of labor or personal services is determined based on all of the facts and circumstances of the particular case. Proposed §1.861-4(b)(2)(ii)(G) specifies that the amount of compensation for labor or personal services determined on an event basis is the amount of the person's compensation which, based on the facts and

circumstances, is attributable to the labor or personal services performed at the location of a specific event.

The IRS and the Treasury Department have determined that the proper source of compensation received by a person, including an individual who is an artist or athlete, specifically for performing labor or personal services at an event is the location of the event. A basis that purports to determine the source of compensation from the performance of labor or personal services at a specific event, whether on a time basis or otherwise, by taking into account the location of labor or personal services performed in preparation for the performance of labor or personal services at the specific event will generally not be the basis that most correctly determines the source of the compensation. This rule applies to situations covered by §1.861-4(a) and (b).

Under §1.861-4(a), the source of compensation for labor or personal services performed wholly within the United States is generally from sources within the United States. Therefore, if a person, including an individual who is an artist or an athlete, is specifically compensated for performing labor or personal services at an event in the United States, the source of such compensation is wholly within the United States because the labor or personal services were performed wholly at an event within the United States. The proposed regulations state that a basis that purports to determine the source of such income on a time basis by taking into account the location of labor or personal services performed in preparation for the performance of labor or personal services at the specific event will generally not be a more reasonable basis for determining source of the compensation. The proposed regulations add an example to §1.861-4(c) to illustrate the application of this rule.

Section 1.861-4(b) applies to instances in which a person is compensated for performing labor or personal services at multiple events, only some of which are within the United States, and at least a portion of the person's compensation cannot be specifically attributed to the person's performance of labor or personal services at a specific location. If the person is not an individual who is compensated as an employee, the source of compensation for labor or personal services is determined on

the basis that most correctly reflects the proper source of that income under the facts and circumstances of the particular case. See §1.861-4(b)(1) and (2)(i). If a person is compensated specifically for labor or personal services performed at multiple events, the basis that most correctly reflects the proper source of that income under the facts and circumstances of the particular case will generally be the location of the events. In addition, a basis that purports to determine the source of such income on a time basis by taking into account the location of labor or personal services performed in preparation for the performance of labor or personal services at the specific event will generally not be the basis that most correctly reflects the proper source of the compensation under proposed §1.861-4(b)(2)(ii)(G).

The Commissioner may, under the facts and circumstances of the particular case, determine the source of compensation that is received by an individual as an employee under an alternative basis if such compensation is not for a specific time period, provided that the Commissioner's alternative basis determines the source of compensation in a more reasonable manner than the basis used by the individual. Compensation specifically for labor or personal services performed at a specific event is not compensation for a specific time period. The basis that most correctly reflects the proper source of that income will generally be the location of the event under proposed §1.861-4(b)(2)(ii)(G). In addition, a basis that purports to determine the source of such income on a facts and circumstances basis by taking into account the location of labor or personal services performed in preparation for the performance of labor or personal services at the specific event will generally not more properly determine the source of the compensation under proposed §1.861-4(b)(2)(ii)(G).

These proposed regulations provide examples to illustrate the event basis for determining the source of compensation of an individual, including an artist or athlete, who is compensated specifically for performing labor or personal services at an event.

The revisions to §1.861-4(b)(1), (b)(2)(i), and (b)(ii)(C)(I)(i) and (ii) which refer to the event basis; the revisions in §1.861-4(b)(2)(ii)(C)(3), (b)(2)(ii)(E),



and (b)(2)(ii)(F), (b)(2)(ii)(G), and (c); and new *Examples 7 through 11* of §1.861-4(c) would be effective for taxable years beginning after the date final regulations are published in the **Federal Register**.

### Special Analysis

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. Because these regulations do not impose a collection of information on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### Comments and Requests for 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 comment that is submitted timely to the IRS. The Treasury Department and the IRS 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 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 a public hearing will be published in the **Federal Register**.

### Drafting Information

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

\* \* \* \* \*

### Proposed Amendments to the Regulations

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

#### PART 1—INCOME TAXES

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

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

Par. 2. Section 1.861-4 is amended by:

1. Removing the heading for paragraph (b)(1)(i).

2. Redesignating paragraph (b)(1)(i) as paragraph (b)(1).

3. In the last sentence of newly designated paragraph (b)(1), adding the language “or on the event basis as defined in paragraph (b)(2)(ii)(G) of this section,” after the language “paragraph (b)(2)(ii)(E) of this section.”

4. In the last sentence of paragraph (b)(2)(i), adding the language “or on the event basis as defined in paragraph (b)(2)(ii)(G) of this section,” after the language “paragraph (b)(2)(ii)(E) of this section.”

5. In the first sentence of paragraph (b)(2)(ii)(C)(J)(i), adding the language “, including an event basis as defined in paragraph (b)(2)(ii)(G) of this section,” after the language “alternative basis” wherever the language “alternative basis” appears in the sentence.

6. In the first sentence of paragraph (b)(2)(ii)(C)(J)(ii), adding the language “event basis as defined in paragraph (b)(2)(ii)(G) of this section or other” after the language “partly without the United States under an”.

7. Removing paragraph (b)(2)(ii)(C)(3).

8. In the first sentence of paragraph (b)(2)(ii)(E), removing the language “individual’s” and adding the language “person’s” in its place, removing the language “individual” and adding the language “person” in its place, and removing the language “his or hers” and adding the language “such person’s” in its place.

9. In the second sentence of paragraph (b)(2)(ii)(F), removing the language “an individual” and adding the language “a person” in its place.

10. Redesignating paragraphs (c) and (d) as new paragraphs (d) and (e), respectively.

11. Redesignating paragraph (b)(2)(ii)(G) as new paragraph (c).

12. Adding a new paragraph (b)(2)(ii)(G).

13. In the introductory language of newly-designated paragraph (c), removing the language “paragraph (b)(2)(ii)” and adding the language “section” in its place.

14. Adding new *Examples 7, 8, 9, and 10* to newly-designated paragraph (c).

15. Redesignating paragraph (b)(1)(ii) *Example*, as new *Example 11* in newly-designated paragraph (c), revising the paragraph heading and removing paragraph (b)(1)(ii).

16. Adding a new sentence at the end of newly-designated paragraph (e) and revising the paragraph heading.

The additions read as follows:

*§1.861-4 Compensation for labor or personal services.*

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(ii) \* \* \*

(G) *Event basis*. The amount of compensation for labor or personal services determined on an event basis is the amount of the person’s compensation which, based on the facts and circumstances, is attributable to the labor or personal services performed at the location of a specific event. The source of compensation for labor or personal services determined on an event basis is the location of the specific event. A basis that purports to determine the source of compensation from the performance of labor or personal services at a specific event, whether on a time basis or otherwise, by taking into account the location of labor or personal services performed in preparation for the performance of labor or personal services at the specific event will generally not be the basis that most correctly determines the source of the compensation.

(c) *Examples*. \* \* \*

*Example 7*. P, a citizen and resident of Country A, is paid by Company Z to make a presentation in the United States in 2009. In 2010, Company Z pays P to make 10 presentations, four of which are in the United States and six of which are outside the United States. P is compensated separately by Company Z for each presentation. For some presentations P receives a flat fee from Company Z. For the remaining presentations P receives compensation that is based on a formula. Under the facts and circumstances of the particular case, the source of the compensation

for each presentation is most correctly reflected on an event basis, as defined in paragraph (b)(2)(ii)(G) of this section. Because P is compensated separately for each presentation, the source of P's compensation from Company Z for the 2009 presentation within the United States and the four 2010 presentations in the United States will be from sources in the United States. The amounts will be determined based on the flat fee or the formula as contractually determined.

*Example 8. (i) Facts.* Group B, a Country N corporation, is a musical group. All of the members of Group B are citizens and residents of Country N. Group B has an employment arrangement with Corp Y, a Country N corporation, to perform as directed by Corp Y. Corp Y and a tour promoter enter into a contract to provide the services of Group B to perform in musical concerts in the United States and Country M during a 45-day period. Under the contract, Group B performs concerts in 15 cities, 10 of which are in the United States. Prior to entering the United States, Group B spends 60 days rehearsing and preparing in Country N. Under the contract with Corp Y, Group B receives a flat fee of \$10,000,000 for performing in all 15 cities. The fee is based on expected revenues from the musical concerts. Each concert is expected to require a similar amount and type of labor or personal services by Group B. At the end of the tour, an analysis of the revenues from all of the concerts shows that 80% of the total revenues from the tour were from the performances within the United States.

(ii) *Analysis.* Under the facts and circumstances basis of paragraph (b)(1) of this section, the source of the compensation received under the contract is most correctly reflected on an event basis, as defined in paragraph (b)(2)(ii)(G) of this section, with amounts determined based on the relative gross receipts attributable to the performances within and without the United States. Thus, of the \$10,000,000 of compensation included in Group B's gross income, \$8,000,000 (\$10,000,000 X .80) is attributable to labor or personal services performed by Group B within the United States and \$2,000,000 (\$10,000,000 X .20) is attributable to the labor or personal services performed by Group B without the United States.

*Example 9. (i) Facts.* A, a citizen and resident of Country M, is an employee of Corp X, a Country M corporation. During 2008, Corp X is contractually obligated to provide A's services to perform in a specific athletic event in the United States. Under A's employment contract with Corp X, A is required to perform at a professional level that requires training and other preparation prior to the event. A undertakes all of this preparation in Country M. Solely as a result of A's performance at the athletic event in the United States, A receives \$2,000,000 from Corp X.

(ii) *Analysis.* The entire \$2,000,000 received by A for performing labor or personal services at the athletic event in the United States is income from sources within the United States on an event basis as defined in paragraph (b)(2)(ii)(G) of this section. A's compensation is attributable entirely to labor or personal services performed within the United States at the athletic event. It is inappropriate to conclude that the source of A's compensation for labor or personal services is performed partly within and partly without the United States simply because A's preparation for the athletic event involved activities in Country M.

*Example 10. (i) Facts.* X, a citizen and resident of Country M, is employed under a standard player's contract by a professional sports team (Team) that plays its games both within and without the United States during its season. The term of the contract is for twelve months beginning on October 1. Under the contract, X's salary could be paid in semi-monthly installments beginning with the first game of the regular season and ending with the final game played by the Team. Alternatively, because the regular playing season was shorter than the one-year period covered by the contract, X had the option to receive his salary over a twelve-month period. X elected this option. In addition, during the period of this employment contract, X, as an employee of Team, was required to practice at the direction of the Team as well as to participate in games. During 2008, X participated in all practices and games of Team and received a salary. Team qualified for postseason games in 2008. X also received in 2008 additional amounts for playing in preseason and postseason games for the Team.

(ii) *Analysis.* The salary paid to X by the Team is considered to be personal services compensation of X that X received as an employee of the Team. The source of this compensation within the United States is determined under the time basis method described in paragraph (b)(2)(ii)(A) of this section and accordingly is determined based upon the number of days X performed services for the Team within the United States during 2008 over the total number of days that X performed services for the Team during 2008. The source of the additional amounts X received for playing in preseason and postseason games is determined under the event basis method described in paragraph (b)(2)(ii)(G) of this section and accordingly is determined based on the location where each such preseason or postseason game was played.

*Example 11. \* \* \**

\* \* \* \* \*

(e) *Effective/applicability date.*  
\* \* \* The revisions in paragraphs (b)(1), (b)(2)(i), and (b)(2)(ii)(C)(1)(i) and (ii) of this section which refer to the event basis; the revisions of paragraphs (b)(2)(ii)(C)(3), (b)(2)(ii)(E), (b)(2)(ii)(F), (b)(2)(ii)(G), and (c) of this section; and *Examples 7 through 11* of paragraph (c) of this section apply to taxable years beginning after the date final regulations are published in the **Federal Register**.

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

(Filed by the Office of the Federal Register on October 16, 2007, 8:45 a.m., and published in the issue of the Federal Register for October 17, 2007, 72 F.R. 58787)

# Announcement of Disciplinary Actions Involving Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries — Reinstatements, Suspensions, Censures, Disbarments, and Resignations

## Announcement 2007-104

Under Title 31, Code of Federal Regulations, Part 10, attorneys, certified public accountants, enrolled agents, and enrolled actuaries may not accept assistance from, or assist, any person who is under disbarment or suspension from practice before the Internal Revenue Service if the assistance relates to a matter constituting practice before the Internal Revenue Service

and may not knowingly aid or abet another person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person.

To enable attorneys, certified public accountants, enrolled agents, and enrolled actuaries to identify persons to whom these restrictions apply, the Director, Of-

fice of Professional Responsibility, will announce in the Internal Revenue Bulletin their names, their city and state, their professional designation, the effective date of disciplinary action, and the period of suspension. This announcement will appear in the weekly Bulletin at the earliest practicable date after such action and will

continue to appear in the weekly Bulletins for five successive weeks.

## Reinstatement To Practice Before the Internal Revenue Service

Under Title 31, Code of Federal Regulations, Part 10, The Director, Office of Professional Responsibility, may entertain a petition for reinstatement for any attor-

ney, certified public accountant, enrolled agent, or enrolled actuary censured, suspended, or disbarred, from practice before the Internal Revenue Service.

The following individuals' eligibility to practice before the Internal Revenue Service has been restored:

Name	Address	Designation	Date of Reinstatement
Dotson, Lewis S.	Mattoon, IL	Attorney	April 8, 2007
Adams, Jr., Joseph T.	Philadelphia, PA	Enrolled Agent	July 30, 2007
Cramer, George C.	Chicago, IL	CPA	July 30, 2007
Garlikov, Mark B.	Dayton, OH	Attorney	July 30, 2007
Grant, Elaine C.	Woodway, WA	Enrolled Agent	July 30, 2007
Rubesh, Leland	Gillette, WY	CPA	July 30, 2007
Schawe, Rudolph B.	Brenham, TX	Enrolled Agent	July 30, 2007
Sobel, Herbert L.	Elkins Park, PA	CPA	July 30, 2007
Welch, Frank G.	Stamford, CT	CPA	July 30, 2007
Ferguson, Charles E.	Naples, FL	CPA	July 31, 2007
Lim, Edgar E.	St. Louis, MO	Attorney	July 31, 2007
Sneathen, Lowell D.	Orange, CA	CPA	August 30, 2007
Smith, David B.	Kettering, OH	Enrolled Agent	September 9, 2007
Young, Ronald B.	Fairfield, CT	CPA	September 9, 2007
Sheiman, Alan P.	Sherman Oaks, CA	Enrolled Agent	September 14, 2007
DiSiena, Frank E.	Somers, NY	CPA	September 19, 2007
Leggio, Joseph J.	Katonah, NY	CPA	September 24, 2007

# Consent Suspensions From Practice Before the Internal Revenue Service

Under Title 31, Code of Federal Regulations, Part 10, an attorney, certified public accountant, enrolled agent, or enrolled actuary, in order to avoid the institution or conclusion of a proceeding for his or her disbarment or suspension from practice before the Internal Revenue Service,

may offer his or her consent to suspension from such practice. The Director, Office of Professional Responsibility, in his discretion, may suspend an attorney, certified public accountant, enrolled agent, or enrolled actuary in accordance with the consent offered.

The following individuals have been placed under consent suspension from practice before the Internal Revenue Service:

Name	Address	Designation	Date of Suspension
Hunter, Richard	Moweaqua, IL	Enrolled Agent	Indefinite from July 16, 2007
Sheehy, William J.	Northville, MI	Attorney	Indefinite from July 16, 2007
Szwyd, Edward R.	Housatonic, MA	CPA	Indefinite from July 16, 2007
Lettieri, Louis E.	Red Bank, NJ	CPA	Indefinite from August 1, 2007
Stein, Jerold A.	Alpharetta, GA	CPA	Indefinite from August 1, 2007
Tutino, Philip R.	East Hampton, NY	CPA	Indefinite from August 1, 2007
Dorr, Mark A.	Gillette, WY	CPA	Indefinite from August 7, 2007
Nelson, Carole S.	Riverside, CA	Enrolled Agent	Indefinite from August 8, 2007
Siegel, Herbert	New City, NY	CPA	Indefinite from August 10, 2007
Taylor, Linda W.	Las Vegas, NV	CPA	Indefinite from August 15, 2007
Finkelstein, Meyer	Staten Island, NY	CPA	Indefinite from August 15, 2007
Schenck, Thomas M.	Tampa, FL	CPA	Indefinite from August 20, 2007

Name	Address	Designation	Date of Suspension
Shah, Sudhir P.	Richardson, TX	CPA	Indefinite from August 20, 2007
Bender, Elmer P.	Missoula, MT	CPA	Indefinite from August 31, 2007
Tselepis, John	Jarrettsville, MD	CPA	Indefinite from September 5, 2007
Perez, Ricardo L.	Cedar Lake, IN	CPA	Indefinite from September 10, 2007
Golden, Roberta A.	Framington, MA	Attorney	Indefinite from September 13, 2007
Ward, Thomas R.	St. Louis Park, MN	Attorney	Indefinite from September 13, 2007

## Expedited Suspensions From Practice Before the Internal Revenue Service

Under Title 31, Code of Federal Regulations, Part 10, the Director, Office of Professional Responsibility, is authorized to immediately suspend from practice before the Internal Revenue Service any practitioner who, within five years from the date

the expedited proceeding is instituted (1) has had a license to practice as an attorney, certified public accountant, or actuary suspended or revoked for cause or (2) has been convicted of certain crimes.

The following individuals have been placed under suspension from practice before the Internal Revenue Service by virtue of the expedited proceeding provisions:

Name	Address	Designation	Date of Suspension
Murphy, John F.	Wellsboro, PA	Attorney	Indefinite from June 28, 2007
Aakre, Steven K.	Hawley, MN	Attorney	Indefinite from July 11, 2007
Brogan, Jane K.	York, NE	Attorney	Indefinite from July 11, 2007
Clark, Clifford A.	Raleigh, NC	CPA	Indefinite from July 11, 2007
Downing, Jr., Eugene W.	Arlington, MA	Attorney	Indefinite from July 11, 2007

Name	Address	Designation	Date of Suspension
Kahn, Arthur M.	Woodstock, NY	Attorney	Indefinite from July 11, 2007
Kossmeyer, Carl F.	Town and Country, MO	CPA	Indefinite from July 11, 2007
Lee, John C.	Charlotte, NC	Attorney	Indefinite from July 11, 2007
McAvoy, Donald L.	Windermere, FL	CPA	Indefinite from July 11, 2007
McCabe, Edwin A.	Gloucester, MA	Attorney	Indefinite from July 11, 2007
O'Donnell, Judith R.	Westborough, MA	Attorney	Indefinite from July 11, 2007
Taylor, John G.	Lincoln, NE	Attorney	Indefinite from July 11, 2007
Turner, D. Scott	Mooresville, NC	Attorney	Indefinite from July 11, 2007
Csaszar, James J.	Columbus, OH	CPA	Indefinite from July 13, 2007
Fischer, Mark W.	Boulder, CO	Attorney	Indefinite from July 16, 2007
Behunin, Michael N.	Sandy, UT	Attorney	Indefinite from August 8, 2007
Carpenter, Jr., Darwin R.	Melbourne, FL	CPA	Indefinite from August 23, 2007
Gresham, James L.	Broken Arrow, OK	CPA	Indefinite from August 23, 2007
Krezminski, Allen D.	Milwaukee, WI	Attorney	Indefinite from August 23, 2007
Neary, Hugh M.	Ottumwa, IA	Attorney	Indefinite from August 23, 2007

Name	Address	Designation	Date of Suspension
Weiss, Randy A.	Potomac, MD	Attorney	Indefinite from August 23, 2007
Whiddon, Edward L.	Houston, TX	CPA	Indefinite from August 23, 2007
Hazen, Robert D.	Lindon, UT	CPA	Indefinite from August 29, 2007
Schafer, III, Harry J.	Edmond, OK	CPA	Indefinite from September 6, 2007
Pullin, Wendy F.	San Antonio, TX	CPA	Indefinite from September 24, 2007

## Suspensions From Practice Before the Internal Revenue Service After Notice and an Opportunity for a Proceeding

Under Title 31, Code of Federal Regulations, Part 10, after notice and an opportunity for a proceeding before an ad-

ministrative law judge, the following individuals have been placed under suspension

from practice before the Internal Revenue Service:

Name	Address	Designation	Effective Date
Newton, Douglas M.	Fernandina Beach, FL	CPA	Indefinite from June 4, 2007
Snell, Barry A.	Santa Monica, CA	CPA	Indefinite from June 6, 2007
Khoury, Naif S.	Fort Smith, AR	Attorney	Indefinite from June 14, 2007
Bukovac, Jane	Alexandria, VA	Enrolled Agent	Indefinite from June 29, 2007
Kreke, David J.	Bartelso, IL	Enrolled Agent	Indefinite from July 12, 2007
Dunkley, John D.	San Antonio, TX	Enrolled Agent	Indefinite from July 27, 2007

# Disbarments From Practice Before the Internal Revenue Service After Notice and an Opportunity for a Proceeding

Under Title 31, Code of Federal Regulations, Part 10, after notice and an oppor-

tunity for a proceeding before an administrative law judge, the following individu-

als have been disbarred from practice before the Internal Revenue Service:

Name	Address	Designation	Effective Date
Ruocchio, Robert	Havertown, PA	CPA	June 11, 2007
Turner, John S.	Paradise, CA	Enrolled Agent	June 15, 2007
Johnson, Ted R.	Frankfort, IN	Attorney	July 30, 2007
Ayers, Dani D.	Kelseyville, CA	Enrolled Agent	August 6, 2007

## Request for Applications to Participate in the 2008 IRS Individual e-file Partnership Program

### Announcement 2007-106

The Stakeholder Partnerships, Education and Communication (SPEC) organization within the Internal Revenue Service (IRS) is continuing its efforts to establish IRS *e-file* partnerships with various entities. The IRS is seeking non-monetary e-file partnerships for Filing Season 2008. No applications for funding (monetary compensation) will be considered. A commercial business, non-profit organization, state government or local government may submit applications. Applications are not solicited from other Federal government agencies. The program is an annual program and covers the period **January through October 15, 2008**. **All prior year partners must reapply for Filing Season 2008.**

#### BACKGROUND

The IRS Restructuring and Reform Act of 1998 (RRA 98) authorized the IRS Commissioner to promote the benefits of and encourage the use of e-file services. RRA 98 enables the IRS to enter into non-monetary partnerships with businesses to offer low cost income tax preparation and electronic filing for qualified taxpayers.

Continued opportunities for growth in electronic tax administration are evident. For Filing Season 2007, the IRS received

80 million electronically filed returns, an increase of 9% over the previous year. Visit the IRS web site, <http://www.irs.gov>, for the most current results from market research on individual taxpayers, including demographic data and psychographic studies. This research includes attitudinal surveys, customer satisfaction surveys, Public Service communications, tracking studies and any focus group results.

The IRS accepts many forms and schedules for electronic filing. Visit the IRS.gov for a complete listing of accepted forms and schedules.

#### FILING SEASON 2008

For Filing Season 2008, the IRS will continue to focus on the 1040 series income tax returns covering “IRS *e-file* Using a Tax Preparer” and “IRS *e-file* Using a Personal Computer.” Additional emphasis continues to be placed on the following features: electronic signature options, Federal/State e-file, and electronic payment options for balance due and estimated payment options.

A major area of emphasis is to reach those taxpayers who continue to file computer prepared paper returns (v-code). Research indicates that the number of v-code returns continues to increase (76% of all v-code returns are prepared by paid preparers). Emphasis should be placed on converting v-code filers to electronically file their returns through advertising the benefits of e-file.

Participants should also reach those individuals eligible for the Earned Income Tax Credit (EITC). It's important to note that military families may qualify for EITC since supplemental payments and combat

pay are exempt from the income calculations.

Participants are encouraged to focus on reducing the number of errors made on electronically filed returns, including those returns claiming EITC. The “EITC Assistant” is an interactive web-based tool designed to help tax professionals determine whether or not their clients are eligible for EITC, and why. The “EITC Assistant” is a step taken by the IRS to maximize taxpayer participation, minimize EITC errors while increasing compliance. You can find the “EITC Assistant” on the IRS web site at <http://www.irs.gov/eitc>.

The Hispanic population is the fastest growing minority segment in the U.S. Participants are encouraged to market their e-file services to this segment of the population and offer the Spanish versions for online filing and/or downloadable software.

The IRS expects all accepted partners to market, promote and offer e-file product and services through October 15, 2008. The IRS will supply the partners with the key marketing messages that support electronic filing during the Filing Season (January through April 15, 2008) and post-Filing Season (April through October 15, 2008). These messages should be used in your promotion of electronic filing and displayed on the web sites of Participants. Utilization of these messages will ensure uniformity and maximize public awareness. For additional information on the various e-file programs, features, and market research, visit the IRS web site at <http://www.irs.gov>.

Participants will receive hyperlinks from IRS.gov (Partners Page) — to the



Participant's web site. Potential Participants may request links for the following categories:

- IRS *e-file* Partners for Taxpayers
- IRS *e-file* Partners for Tax Professionals
- IRS *e-file* Partners for Financial Institutions/Employers
- IRS *e-file* Partners for Credit Card Payment Options

### Safeguarding Taxpayer Data

The security of taxpayer accounts and personal information is a top priority for the IRS. Tax professionals must implement safeguards to protect taxpayer's data. It is not only the law, but it is good business practice, as it increases customer confidence and trust. Refer to Publication 4557, *Safeguarding Taxpayer Data, A Guide for Your Business*, which describes the various security provisions and rules that impact tax professionals. The document assists tax professionals in understanding their requirements for protecting the privacy and confidentiality of taxpayer data, and provides guidance on the implementing the necessary security controls within their business to satisfy these requirements. Publication 4557 can be accessed at <http://www.irs.gov>.

### PARTICIPATION STANDARDS & REQUIREMENTS

Participants will abide by the following standards and requirements, if applicable:

- The Participant was actively engaged in the electronic tax preparation and filing industry in 2006 and 2007.
- The Participant will offer their tax preparation and e-file services to the individual taxpayer. The IRS will not post advertisements offering both free tax preparation and free e-file on the IRS.gov Partners Page. Promotion on IRS.gov of free services, services that include both free tax preparation and free e-filing, is reserved for Free File Alliance members only. Visit [www.freefilealliance.org](http://www.freefilealliance.org) to find out how to become a member of the Free File Alliance or visit [www.irs.gov](http://www.irs.gov) for more details on free file.
- The Participant will market, promote and offer e-file services through October 15, 2008. The Participant should

use the key marketing messages, provided by the IRS, for the promotion of Filing Season and Post Filing Season electronic filing and place them on your web site.

- The Participant (Electronic Return Originator, Intermediate Service Provider, Software Developer, and Transmitter) must be in good standing with the IRS, comply with the e-file requirements stated in the IRS Revenue Procedure 2007-40 (announced in IR Bulletin 2007-26 dated June 25, 2007), current versions of Publications 1345, 1345A, 3112, and pass the annual Suitability and Participants Acceptance Testing (PATS) conducted by the IRS. You can find the IRS e-file technical publications on the IRS web site at <http://www.irs.gov>.
- The Participant will comply with the privacy provisions of 26 U.S.C. § 7216 and U.S.C. § 6103.
- The Participant will be required to prove and display third-party certifications for the privacy/security/authenticity of its online service. The Participant's web site should display the third-party certification and privacy seals. Participants must use software that will enable their web sites to state their privacy practices in a standard machine-readable format that can be retrieved automatically and interpreted easily by users.
- Participants will comply with the security provisions in applicable Department of Treasury/IRS rules including, but not limited to, 31 C.F.R. Part 10, IRS Rev. Proc. 2005-60, current versions of IRS Publications 1345, 1345A, and 3112, and 26 U.S.C. § 7216. In addition, Participants must comply with the Federal Trade Commission's Gramm-Leach-Bliley Act to protect the security of taxpayer information. Refer to Publication 4557, *Safeguarding Taxpayer Data, A Guide for Your Business*, for guidance on various security rules and provisions that impact tax professionals. The document can be accessed at <http://www.irs.gov>.
- The Participant will offer their products and services to filers of the individual 1040 Series returns, including complex returns, balance due returns,

Federal/State returns, and 1040EZ returns.

- The Participant will clearly disclose its customer service support options (including associated fees, if any) and privacy policy on the landing page of its web site. Participants must provide taxpayers with a business contact point by on-line form, email, mail, facsimile or telephone number which the Participant maintains and reviews.
- **The Participant is encouraged to offer the Spanish versions for online filing and/or downloadable software.** The Participant who offers Spanish versions for online filing and/or downloadable software will have customer service support to assist Hispanic taxpayers.
- The Participant will target v-coders and individuals eligible for EITC.
- The Participant will focus on reducing the number of errors on electronically prepared returns, including those returns claiming EITC.
- The Participant will offer a variety of e-file features including the Self-Select PIN, Electronic Payment Options, Federal/State e-file, Direct Deposit of Refunds, etc.
- The Participant will be permitted only **one (1)** hyperlink on the IRS *e-file* Partners Page per category:
  - IRS *e-file* Partners for Taxpayer
  - IRS *e-file* Partners for Tax Professionals
  - IRS *e-file* Partners for Financial Institutions/Employers
  - IRS *e-file* Partners for Electronic Payment Options
- The Participant will provide the IRS with a description (**not to exceed 200 characters including spaces**) for each hyperlink placed on the IRS *e-file* Partners Page. The hyperlink description may describe multiple offers/services.
- The Participant will not have a URL(s) containing the word "IRS."
- The Participant will be required to supply the IRS with a link to their web site in their application or **no less than ten (10) business days** before the site is expected to go live (start date of electronic filing). All sites must be examined before they can be posted on the IRS *e-file* Partners Page. The purpose

of the review is to ensure each Participant's web site complies with the standards and requirements set forth in this announcement.

- The Participant will adhere to the IRS *e-file* rule for registration of web sites which enables IRS to more quickly identify fraud schemes, including phishing. Failure to do so could result in suspension or expulsion from participation in IRS *e-file*. For more information, visit <http://www.irs.gov/efile/index.html>.
- The Participant will adhere to industry best practices to ensure the taxpayer return information entrusted to them is secure and the privacy of such information is maintained. In any instance where a Participant contracts with a service provider to obtain technology services, it will adhere to this standard. To the extent multiple Participants rely on a single service provider for front or back office services (not ISP services), it is even more critical that such taxpayer security and privacy be maintained with respect to others who share these services.
- A Participant's web site will be functionally adequate and consistent with the Participant's offer in permitting a taxpayer to complete their return. Failure to comply may result in the Participant's removal from the Partners Page.
- Whenever taxpayers are requested or required to provide their SSN, it must be part of a secure session. Participants are not permitted to use SSNs as a requested field for registration purposes or for establishing a taxpayer account on-line.
- The Participant will display the IRS *e-file* logo on the landing page of its web site. **The e-file logo should be a click-through to the IRS e-file landing page [www.irs.gov/efile](http://www.irs.gov/efile).** If the e-file logo is displayed on other web pages in addition to the landing page of the Participant, the logo(s) should be a click-through to the IRS e-file landing page. The e-file logo and guidelines can be downloaded from <http://www.irs.gov>.
- The Participant's web site will not contain inappropriate content. Participant web sites must meet the following criteria:

- The site clearly relates to and complements existing information, products and services on IRS.gov.
- The site contains relevant and useful content that will benefit our customers.
- The site contains accurate and timely information.
- The site provides information at no cost. The Participant will not link to sites whose primary purpose is to sell products or services (unless it is part of an approved agreement with IRS).
- The site has an excellent overall quality and professional image.
- The site is easy to navigate.
- The site is a credible source for information. The site must be free of typos and errors so that it does not detract from the readability of the site.
- The site does not exhibit hate, bias, or discrimination.
- The site does not contain misleading or unsubstantiated claims or conflict with the mission of the IRS.
- The Participant must provide taxpayers a method to obtain the status of their tax return. Taxpayers can be directed to **"Where's My Tax Refund?"** located on the Homepage of the IRS web site at <http://www.irs.gov>.
- The Participant will prominently display on the landing page of its web site the promotion of income tax preparation and electronic filing for individuals eligible for EITC.
- The Participant is encouraged to offer a monetary incentive (reduced return preparation and electronic filing costs) to attract taxpayers.
- The Participant will disclose limitations in the forms and schedules that are likely to be needed to support their offerings. The Participant should clearly display a listing of the forms and schedules that will be offered either visible or accessible from the Participant's landing page.
- The Participant will clearly disclose a listing of the States that their software supports either visible or accessible from the Participant's landing page.
- The Participant is permitted to offer commercial products and services

consistent with obtaining the positive consent of the user as described in 26 U.S.C. 7616 before offering fee-based products and services not related to tax preparation.

- The Participant will include a feature in their tax preparation software that will "time out" the session after no changes are made for a period of time consistent with best practices approved by privacy seal certification programs.
- The Participant that learns of an inappropriate disclosure of a taxpayer's return information to an unauthorized Person must report the unauthorized disclosure to the IRS immediately but no later than five (5) hours after detection; and immediately shut down its program at the time of detection.
- The Participant will submit written notification (*e.g.*, email) to the IRS of changes, additions and deletions to URLs, link descriptions, etc.
- The Participant will submit Performance Reports to the IRS Point of Contact covering Filing Season and post Filing Season activity. The reports will cover information such as e-file statistics, web site activity and anything else the IRS deems necessary. The IRS Point of Contact will provide written reporting instructions and requirements to accepted Participants.

## PERFORMANCE STANDARDS

- The IRS will have the accepted Participant's hyperlink(s) available on the IRS web site for the start of electronic filing, subject to the participant's passing of the annual Suitability, PATS testing, and web site review. Hyperlinks will remain on the IRS *e-file* Partners Page through **October 15, 2008, or at the discretion of the IRS.**
- The IRS will randomize on a daily basis the offers of the Participants listed on the IRS *e-file* Partners Page.
- The IRS may establish a link from the IRS *e-file* Partners Page to the Free File web page and *vice versa*.
- The IRS will accept, if appropriate, the Participant's written request for changes/additions/deletions to a URL, link description, etc.
- The IRS will review the Participant's web site(s) at any time to ensure that participation requirements are met.

- The IRS will not endorse specific offerings or products, but will promote the IRS *e-file* Partners Page. A “Site Disclaimer” will be displayed upon exiting the IRS web site before the user enters the Participant’s web site.

## PARTICIPATION TERMS

The IRS Individual *e-file* Partnership Program is an annual program, and all prospective Participants, including returning Participants, must reapply each year following the guidelines in the Internal Revenue Bulletin announcement advertised on <http://www.irs.gov>. If the IRS determines that the Participant is not meeting the “Participation Standards & Requirements,” the IRS may terminate its partnership with the Participant and remove the participant’s hyperlink(s) from the IRS *e-file* Partners Page.

- The Participant will notify the IRS immediately if it wishes to terminate its partnership with the IRS. The notification should be submitted through email to the IRS Point of Contact or sent to the Point of Contact’s address indicated below in “IRS Point of Contact/Application Submission.”

## APPLICATION PROCESS

Applications should contain the following information, **if applicable**:

- Provide Primary and Secondary Points of Contact (name, title, address, cell/telephone number, fax number and email address) for discussion of your application and program participation.
- Identify the Applicant’s secure web site.
- Identify the Applicant’s tax preparation software and the States it will support.
- Identify the IRS forms and schedules that support your offering(s).
- Include the Applicant’s Electronic Filer Identification Number(s) (EFIN) and/or Electronic Transmitter Identification Number (ETIN).
- Indicate if the Applicant will offer the Spanish versions for online filing and/or downloadable software. Describe customer service support for assisting Hispanic taxpayers.

- Identify the Applicant’s hyperlink(s) and provide a short description (**not to exceed 200 characters including spaces**) of the services and products to be promoted on the IRS *e-file* Partners Page. In addition, the Applicant should provide the associated URL(s). **The URL(s) cannot contain the word “IRS.”** Indicate the category for each hyperlink:

- IRS *e-file* Partners for Taxpayers
- IRS *e-file* Partners for Tax Professionals
- IRS *e-file* Partners for Financial Institutions/Employers
- IRS *e-file* Partners for Electronic Payment Options

- Identify the Applicant’s third party administrators (*i.e.*, VeriSign, Thawte, Truste) that certify the privacy/security/authenticity of its online service and provide certification that the Applicant’s current status is active and in good standing.
- Identify the Applicant’s communication vehicle(s) (*i.e.*, web site, marketing/promotional products, etc.) to market and promote your products and services and IRS *e-file*. Describe the incentives, discounts, offers, benefits to taxpayers or other specific approaches to increase *e-file* volumes.
- Describe steps the Applicant will take to reach taxpayers that claim EITC. This can include marketing/promotional efforts, monetary incentives (reduced return preparation and electronic filing costs).
- Describe steps the Applicant will take to reduce errors on electronically filed returns, including those returns claiming EITC.
- Certify the Applicant’s compliance with the privacy and disclosure provisions of 26 U.S.C. 7216 and 26 U.S.C. 6103.
- Certify the Applicant’s compliance with the Federal Trade Commission’s Gramm-Leach-Bliley (GLB) Act of 1999, Financial Privacy Rule and Safeguard Rules.

## IRS POINT OF CONTACT/APPLICATION SUBMISSION

Applications to participate in the IRS Individual *e-file* Partnership Program should be submitted as a Word document through email at [\\*Wle-filepartners@irs.gov](mailto:*Wle-filepartners@irs.gov). (Please make sure there is an asterisk (\*) before the WI (Wage and Investment) when submitting an application.) An application may also be sent to:

Internal Revenue Service  
5000 Ellin Road  
Lanham, MD 20706  
Attention: Karen Bradley C4-132  
SE:W:CAR:SPEC:FO:IMS

**If you wish to have a hyperlink(s) on the IRS *e-file* Partners Page for the start of electronic filing, your application must be submitted by December 13, 2007.** If your application is received after the deadline, there is no guarantee that it will be accepted by the IRS.

Any questions regarding the development of applications, the submission of Performance Reports, or any other type of contact for this program should be directed to Karen Bradley at (202) 283-7034 or through email to [\\*Wle-filepartners@irs.gov](mailto:*Wle-filepartners@irs.gov). Please make sure there is an asterisk (\*) before the WI (Wage and Investment) for any type of email contact.

## APPLICATION EVALUATION

All applications will be evaluated based on the required information provided to the IRS and the applicant’s ability to fulfill their responsibilities. Prior year performance will also be considered when evaluating applications from returning partners.

## ACCEPTANCE/DENIAL OF APPLICATION

If your application is accepted, you will receive written notification from the IRS. If your application is denied, you will receive written notification from the IRS with an explanation of the denial.

## e-Help

If you have any questions related to e-products/electronic filing, you can

contact the e-Help Desk toll-free at **1-866-255-0654**. The e-Help desk assistants are ready to respond to non-account

related questions and issues. You can also go to <http://www.irs.gov> where the IRS

houses a variety of information which impacts the tax professional.

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

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



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