

HIGHLIGHTS OF THIS ISSUE

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

INCOME TAX

T.D. 9409, page 118.

REG-121698-08, page 163.

Final, temporary, and proposed regulations under section 7216 of the Code update the rules regarding disclosures of tax return information by tax return preparers, providing an exception allowing a U.S. tax return preparer to obtain consent from a taxpayer to disclose a taxpayer's social security number (SSN) to a non-U.S. tax return preparer when the U.S. preparer makes the disclosure through the use of an "adequate data protection safeguard," the non-U.S. preparer receives the SSN via an "adequate data protection safeguard," and the U.S. preparer verifies the maintenance of the adequate data protection safeguards in the request for the taxpayer's consent. The regulations also provide clarification that the general SSN masking rule and the exception thereto apply only to consents related to returns in the Form 1040 series, and clarification regarding U.S. preparers on temporary travel status. The regulations are applicable to disclosures of tax return information occurring on or after January 1, 2009. A public hearing on the proposed regulations is scheduled for October 6, 2008.

Notice 2008-59, page 123.

This notice provides guidance on questions and answers regarding Health Savings Accounts (HSAs) that have not previously been addressed in published guidance. Notices 2004-2, 2004-50, and 2007-22 amplified.

Rev. Proc. 2008-35, page 132.

This procedure modifies and supersedes Rev. Proc. 2008-12, 2008-5 I.R.B. 368, which provided guidance to tax return preparers regarding the format and content of consents to use and consents to disclose tax return information with respect to taxpayers filing a return in the Form 1040 series (e.g., Form

1040NR, Form 1040A, or Form 1040EZ) under regulations section 301.7216-3, and also provided specific requirements for electronic signatures when a taxpayer executes an electronic consent to the use or disclosure of the taxpayer's tax return information. This procedure modifies Rev. Proc. 2008-12 to include the description of an "adequate data security safeguard," provide mandatory consent language for use in a consent when an unmasked or unredacted SSN is to be disclosed outside the U.S., add an example of valid consent in the context of SSN disclosure outside of the U.S., and provide other minor clarifications. Rev. Proc. 2008-12 modified and superseded.

Rev. Proc. 2008-37, page 137.

This procedure provides issuers with the terms and procedures for requesting, pursuant to regulations section 1.148-3(i), a recovery of overpayments of arbitrage rebate, penalty in lieu of rebate, and yield reduction paid to the United States under section 148 of the Code. The procedure also establishes a deadline of no later than two years after the final computation date with respect to an issue for the filing of these requests and provides a transitional period of two years from the publication of this procedure for requests relating to issues for which the final computation date has already occurred. Finally, this procedure clarifies that similar requests for overpayments for bond issues governed by the temporary regulations published in the Federal Register on May 18, 1992, will be treated in the same manner as requests for recovery of overpayments made under section 1.148-3(i). Rev. Proc. 92-83 obsolete.

(Continued on the next page)

Announcement of Declaratory Judgment Proceedings Under Section 7428 begins on page 164.
Finding Lists begin on page ii.



EMPLOYEE PLANS

Notice 2008-62, page 130.

This notice provides that the Treasury Department and the IRS anticipate proposing regulations that will address, among other things, when an arrangement in which an employee or independent contractor receives recurring part-year compensation over an extended period, such as a 12-month payment schedule, does not constitute deferred compensation for purposes of section 457(f) of the Code. Until further guidance is issued, taxpayers may rely on the rule described in section II of this notice beginning with the first taxable year that includes July 1, 2008.

EXEMPT ORGANIZATIONS

Announcement 2008-66, page 164.

The IRS has revoked its determination that Human Progress, Inc., of Redlands, CA; Petty Foundation of Calumet City, IL; American Indian Services, Inc., of Minneapolis, MN; The Foundation of Port Monmouth, NJ; Larry & Bladie Dye Foundation of Covington, TN; Catherine Desaintphalle Smith Family Foundation of San Rafael, CA; and Bonnemort Foundation of Salt Lake City, UT, qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Code.

ESTATE TAX

Rev. Rul. 2008-35, page 116.

Transfer tax valuation of interest in restricted management account. This ruling addresses whether an interest in a restricted management account (RMA) will be valued for transfer tax purposes without any reduction or discount for the restrictions imposed by the RMA agreement.

GIFT TAX

Rev. Rul. 2008-35, page 116.

Transfer tax valuation of interest in restricted management account. This ruling addresses whether an interest in a restricted management account (RMA) will be valued for transfer tax purposes without any reduction or discount for the restrictions imposed by the RMA agreement.

ADMINISTRATIVE

T.D. 9409, page 118.

REG-121698-08, page 163.

Final, temporary, and proposed regulations under section 7216 of the Code update the rules regarding disclosures of tax return information by tax return preparers, providing an exception

allowing a U.S. tax return preparer to obtain consent from a taxpayer to disclose a taxpayer's social security number (SSN) to a non-U.S. tax return preparer when the U.S. preparer makes the disclosure through the use of an "adequate data protection safeguard," the non-U.S. preparer receives the SSN via an "adequate data protection safeguard," and the U.S. preparer verifies the maintenance of the adequate data protection safeguards in the request for the taxpayer's consent. The regulations also provide clarification that the general SSN masking rule and the exception thereto apply only to consents related to returns in the Form 1040 series, and clarification regarding U.S. preparers on temporary travel status. The regulations are applicable to disclosures of tax return information occurring on or after January 1, 2009. A public hearing on the proposed regulations is scheduled for October 6, 2008.

Rev. Proc. 2008-38, page 139.

Life insurance contracts; qualified additional benefits; closing agreement. This document provides a procedure by which an issuer of a life insurance contract may remedy a failure to account for charges for qualified additional benefits (QABs) under the expense charge rule of section 7702(c)(3)(B)(ii) of the Code. Rev. Rul. 2005-6 amplified.

Rev. Proc. 2008-39, page 143.

Life insurance contracts, modified endowment contracts (MECs); closing agreement. This document provides a procedure by which an issuer of a life insurance contract may remedy an inadvertent non-egregious failure to comply with the modified endowment contract rules under section 7702A of the Code. Rev. Procs. 2001-42 and 2007-19 superseded.

Rev. Proc. 2008-40, page 151.

Life insurance contracts; closing agreement. This document provides a procedure by which an issuer of a life insurance contract may remedy the failure of one or more contracts to meet the definition of a life insurance contract under section 7702(a) or to satisfy the requirements of section 101(f) of the Code. Rev. Rul. 91-17 superseded in part. Notice 99-48 superseded.

Rev. Proc. 2008-41, page 155.

Life insurance; variable contracts, closing agreement. This document provides a procedure by which an issuer of a variable contract may remedy an inadvertent failure of a variable contract to satisfy the diversification requirements of section 817(h) of the Code. Rev. Rul. 91-17 amplified. Rev. Proc. 92-25 superseded. Notice 2000-9 obsolete.

Rev. Proc. 2008-42, page 160.

Life insurance contracts; automatic waiver. This document provides a procedure by which an issuer of a life insurance contract may automatically obtain a waiver, under section 7702(f)(8) or section 101(f)(3)(H) of the Code, for certain reasonable errors that caused the contract to fail to satisfy the requirements of section 7702 or section 101(f), as applicable. Rev. Rul. 91-17 amplified.

The IRS Mission

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

the tax law with integrity and fairness to all.

Introduction

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

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

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

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

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

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.

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

Part II.—Treaties and Tax Legislation.

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

Part III.—Administrative, Procedural, and Miscellaneous.

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

Part IV.—Items of General Interest.

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

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

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

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

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

Section 101.—Certain Death Benefits

A revenue procedure provides a procedure by which an issuer of a life insurance contract may automatically obtain a waiver, under section 7702(f)(8) or section 101(f)(3)(H) of the Internal Revenue Code, for certain reasonable errors that caused the contract to fail to satisfy the requirements of section 7702 or section 101(f), as applicable. Rev. Rul. 91-17, 1991-1 C.B. 190, is amplified. See Rev. Proc. 2008-42, page 160.

Section 817.—Treatment of Variable Contracts

26 CFR 1.817-5: Diversification requirements for variable annuity, endowment, and life insurance contracts.

A revenue procedure provides a procedure by which an issuer of a variable contract may remedy an inadvertent failure of a variable contract to satisfy the diversification requirements of section 817(h) of the Internal Revenue Code. Rev. Rul. 91-17, 1991-1 C.B. 190, is amplified; Rev. Proc. 92-25, 1992-1 C.B. 741, is superseded; Notice 2000-9, 2000-1 C.B. 449, is obsolete. See Rev. Proc. 2008-41, page 155.

Section 2031.—Definition of Gross Estate

26 CFR 20.2031-1: Definition of gross estate; valuation of property.

This revenue ruling addresses whether an interest in a restricted management account (RMA) will be valued for transfer tax purposes without any reduction or discount for the restrictions imposed by the RMA agreement. See Rev. Rul. 2008-35, page 116.

Section 2036.—Transfers With Retained Life Estate

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

This revenue ruling addresses whether an interest in a restricted management account (RMA) will be valued for transfer tax purposes without any reduction or discount for the restrictions imposed by the RMA agreement. See Rev. Rul. 2008-35, page 116.

Section 2512.—Valuation of Gifts

26 CFR 25.2512-1: Valuation of property; in general.

This revenue ruling addresses whether an interest in a restricted management account (RMA) will be valued for transfer tax purposes without any reduction or discount for the restrictions imposed by the RMA agreement. See Rev. Rul. 2008-35, page 116.

26 CFR 25.2512-1: Valuation of property; in general.

(Also Sections 2031, 2036, 2703; 20.2031-1, 20.2036-1, 25.2703-1.)

Transfer tax valuation of interest in restricted management account. This ruling addresses whether an interest in a restricted management account (RMA) will be valued for transfer tax purposes without any reduction or discount for the restrictions imposed by the RMA agreement.

Rev. Rul. 2008-35

ISSUE

In determining the value for federal gift and estate tax purposes of any part or all of a restricted management account (RMA), do the restrictions imposed by the RMA agreement result in a value that is less than the full fair market value of the assets in the RMA?

FACTS

In year 1, A, as the Depositor, enters into an agreement with *Bank M* pursuant to which A agrees to deposit marketable securities and cash into an account described as an RMA with *Bank M*. A was advised that the terms of the RMA were designed to enhance the investment performance of the portfolio by allowing *Bank M* and any investment advisor appointed by *Bank M* to maximize the portfolio's long term performance without the risk of withdrawal of assets from the RMA before the expiration of the selected term of the RMA. *Bank M* agreed to accept a reduced investment management fee because *Bank M* was guaranteed a fee over the fixed term of the RMA.

During the term of the agreement, *Bank M* will manage the RMA and have complete discretion regarding investment of the assets held in the RMA. A will retain a property interest under applicable law in the assets held within the RMA and *Bank M* has no property rights with respect to assets in the account. All dividends, interest, and other income earned within the RMA is to be retained and reinvested, and no distributions of income or principal may be made from the RMA during the agreement term, except as otherwise noted in the agreement. The Depositor may nominate an investment advisor to be appointed by *Bank M*, but *Bank M* will have the power to select and replace the investment advisor during the term of the agreement. The agreement provides that it shall terminate on the fifth anniversary of the date of its execution. However, the term may be extended at any time by the Depositor, with the consent of *Bank M*. On the expiration of the term of the agreement, the assets in the RMA are to be paid to the Depositor or to the Depositor's legal representative if the Depositor is no longer living.

During the term of the agreement, the Depositor, with the consent of *Bank M*, may assign or transfer all or any part of the RMA to a permitted transferee, defined in the agreement as a spouse, parent, or descendant of the Depositor, or to the estate or a trust for the benefit of a permitted transferee. If the Depositor exercises the assignment power with respect to only a part of the RMA, *Bank M* will create a separate RMA in the name of the designated transferee, and will select the assets (equal in value to the amount designated by the Depositor) to be transferred to the separate RMA. The terms of the agreement will apply to the new RMA, the recipient of the new RMA will be bound by the terms of the agreement, and the recipient will become the Depositor of the new RMA for purposes of the agreement. The recipient, as the new Depositor, will have a property interest under applicable law in the assets held within the new RMA. The RMA agreement is binding on the new Depositor's heirs, successors, transferees, executors and administrators.

All securities in the RMA requiring registration are to be inscribed in the name of *Bank M's* nominee and negotiability is to be provided by *Bank M* as custodian. *Bank M* issues Forms 1099 to *A* with respect to income generated by assets held within the RMA. Purchasers of securities from the RMA are not subject to the restrictions imposed by the RMA agreement.

A funds the RMA in Year 1 with marketable securities and cash having a total fair market value of \$50x. In Year 2, when the total fair market value of the assets held in the RMA is \$60x, *A* assigns one-sixth of the RMA to *A's* child, *B*. In accordance with the terms of the agreement, *Bank M* establishes a new RMA with *B* designated as the Depositor, selects assets held in *A's* RMA then having a fair market value of \$10x, and transfers those assets to *B's* RMA. The new RMA is subject to the terms of the same agreement and will terminate at the same time as specified in the agreement, unless *B*, as the Depositor of the new RMA, extends the termination date of that RMA.

In Year 3 with *Bank M's* consent, *A* extends the term of *A's* RMA to Year 7. *A* dies in Year 4. At the time of *A's* death, the fair market value of the assets held in *A's* RMA is \$55x.

LAW

Section 2501 imposes a tax on the transfer of property by gift by an individual. Section 2511(a) provides that the tax imposed by section 2501 applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 2512(a) provides that if a gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. Section 25.2512-1 of the Gift Tax Regulations provides that the value of the transferred property is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of the relevant facts.

Section 2031(a) provides that the value of the gross estate of a decedent includes the value at the date of death of all property, real or personal, tangible or intangible, wherever situated. Section

20.2031-1(b) of the Estate Tax Regulations provides that, in general, the value of every item of property includible in the decedent's gross estate is its fair market value at the time of the decedent's death, which is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. Section 20.2031-2(g) provides that if the decedent holds a trading account with a broker, all securities belonging to the decedent and held by the broker at the date of death must be included at their fair market value as of the applicable valuation date, even if pledged to secure a debt. Similarly, under section 20.2031-5, the amount of cash belonging to the decedent at the date of death, whether in the possession of the decedent or another person, or deposited with a bank, is included in the gross estate.

Section 2036(a) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life, or for any period not ascertainable without reference to his death, or for any period which does not in fact end before his death — (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 2703(a)(2) provides that, for federal estate, gift, and generation-skipping transfer tax purposes, the value of any property shall be determined without regard to any restriction on the right to sell or use such property. Under section 2703(b), section 2703(a)(2) does not apply to a restriction (1) that is a *bona fide* business arrangement; (2) that is not a device to transfer property to members of the decedent's family for less than full and adequate consideration in money or money's worth; and (3) whose terms are comparable to similar arrangements entered into by persons in an arm's length transaction. Section 25.2703-1(b)(2) confirms that each of the three requirements

described in section 2703(b) must be independently satisfied for a right or restriction to meet this exception. Although Congress, in enacting section 2703, focused primarily on below-market buy-sell agreements, the legislative history of that section confirms that it is to have a broad application. Section 25.2703-1(a)(3) further clarifies that a right or restriction may be contained in a partnership agreement, articles of incorporation, corporate bylaws, a shareholders' agreement, or any other agreement, or may be implicit in the capital structure of an entity.

The willing buyer-willing seller test, applicable for both estate and gift tax purposes, is an objective test to be applied without reference to a specific donor, decedent, or his or her beneficiaries. In *Smith ex. rel. Estate of Smith v. United States*, 391 F.3d 621, 628 (5th Cir. 2004), the court concluded that, in determining the estate tax value of retirement accounts that could not be sold, "[a]pplying the [willing buyer-willing seller] test appropriately . . . entails looking at what a hypothetical buyer would pay for the assets in the Retirement Accounts." Accordingly, no discount was allowed for the anticipated income tax that would be incurred if the assets were distributed to the account beneficiaries. See also *Estate of Kahn v. Commissioner*, 125 T.C. 227, 237-240 (2005) (reaching a similar conclusion and denying a marketability discount with respect to an individual retirement account).

ANALYSIS

The fair market value of all property transferred during life or owned at death by *A*, including marketable securities and cash, is the amount subject to transfer tax, even if that property is held in an account with a broker, deposited with a bank, or in the possession of another person. The interposition of the RMA agreement to manage *A's* assets, reduces neither the fair market value of the transferred property for gift tax purposes nor the fair market value of the property included in *A's* gross estate for estate tax purposes. *A* at all times retains a property interest under applicable law in the assets in the RMA, and *Bank M* has no such interest in any of the assets. Notwithstanding the restrictions on *A's* ability to withdraw assets from the RMA and on *A's* ability to terminate or

transfer an interest in the RMA (in this case, to anyone other than the natural objects of A's bounty), A remains the sole and outright owner of the assets in the RMA and the income from those assets. A has not changed the nature of A's property by entering into the RMA agreement. Consequently, A's assets held in the RMA constitute the property to be valued for gift and estate tax purposes.

In substance, the RMA agreement is a management contract between the owner of property and the person agreeing to serve as the property manager. Any restrictions imposed by the RMA agreement relate primarily to the performance of the management contract (e.g., by establishing and ensuring a long-term investment horizon to be pursued by the manager, and an appropriate fee in light of this circumstance), rather than to substantive restrictions on the underlying assets held in the RMA. Any restrictions on the ability to withdraw assets, terminate the agreement, or transfer interests in the RMA do not impact the price at which those assets would change hands between a willing buyer and a willing seller and, thus, do not affect the value of the assets in the RMA. In this regard, the RMA is comparable to the retirement fund and the individual retirement account at issue in the *Smith* and *Kahn* cases, above, in which the fair market value of assets within a particular type of account was held to not be affected by the value of those assets in the hands of the ultimate beneficiary. Further, the situation presented with respect to A's RMA is similar to that presented where the owner of a parcel of rental real estate enters into a contract with a property manager relating to the management of that property. The existence of the management contract has no effect on the fair market value of the real property subject to that contract.

In addition to the above analysis under sections 2511, 2512, and 2031, other Internal Revenue Code sections apply in determining that the amount subject to federal transfer tax is the fair market value of the assets in the RMA. Specifically, section 2036 applies to A's retained interest in the assets of the RMA and section 2703(a)(2) applies to disregard the restrictions on the sale or use of property for federal transfer tax valuation purposes. Further, to the extent A has the ability to terminate the rela-

tionship with *Bank M* under state law principles of agency, the amount subject to federal transfer tax is the fair market value of the assets in the RMA.

HOLDINGS

The fair market value of an interest in an RMA for gift and estate tax purposes is determined based on the fair market value of the assets held in the RMA without any reduction or discount to reflect restrictions imposed by the RMA agreement on the transfer of any part or all of the RMA or on the use of the assets held in the RMA. Accordingly, A's gift to B in Year 2 is valued at \$10X, the full fair market value of the assets transferred into B's separate RMA. Similarly, the amount to be included in A's gross estate for estate tax purposes with respect to the RMA is \$55X, the full fair market value of the assets in the RMA at A's death.

DRAFTING INFORMATION

The principal author of this revenue ruling is Karlene M. Lesho of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue ruling, contact Ms. Lesho at (202) 622-3090 (not a toll-free call).

Section 2703.—Certain Rights and Restrictions Disregarded

26 CFR 25.2703-1: *Property subject to restrictive arrangements.*

This revenue ruling addresses whether an interest in a restricted management account (RMA) will be valued for transfer tax purposes without any reduction or discount for the restrictions imposed by the RMA agreement. See Rev. Rul. 2008-35, page 116.

Section 7121.—Closing Agreements

26 CFR 301.7121-1: *Closing agreements.*

A revenue procedure provides a procedure by which an issuer of a life insurance contract may remedy a failure to account for charges for qualified additional benefits (QABs) under the expense charge rule of section 7702(c)(3)(B)(ii) of the Internal Revenue Code. Rev. Rul. 2005-6, 2005-1 C.B. 471, is amplified. See Rev. Proc. 2008-38, page 139.

A revenue procedure provides a procedure by which an issuer of a life insurance contract may remedy an inadvertent non-egregious failure to comply with the modified endowment contract rules under section 7702A of the Internal Revenue Code. Rev. Proc. 2001-42, 2001-2 C.B. 212, and Rev. Proc. 2007-19, 2007-1 C.B. 515, are superseded. See Rev. Proc. 2008-39, page 143.

A revenue procedure provides a procedure by which an issuer of a life insurance contract may remedy the failure of one or more contracts to meet the definition of a life insurance contract under section 7702(a) or to satisfy the requirements of section 101(f) of the Internal Revenue Code. Rev. Rul. 91-17, 1991-1 C.B. 190, is superseded in part; Notice 99-48, 1999-2 C.B. 429, is superseded. See Rev. Proc. 2008-40, page 151.

A revenue procedure provides a procedure by which an issuer of a variable contract may remedy an inadvertent failure of a variable contract to satisfy the diversification requirements of section 817(h) of the Internal Revenue Code. Rev. Rul. 91-17, 1991-1 C.B. 190, is amplified; Rev. Proc. 92-25, 1992-1 C.B. 741, is superseded; Notice 2000-9, 2000-1 C.B. 449, is obsolete. See Rev. Proc. 2008-41, page 155.

Section 7216.—Disclosure or Use of Information by Preparers of Returns

26 CFR 301.7216-3T: *Disclosure or use permitted only with the taxpayer's consent (temporary).*

T.D. 9409

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 301

Amendments to the Section 7216 Regulations—Disclosure or Use of Information by Preparers of Returns

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations that provide rules relating to the disclosure and use of tax return information by tax return preparers. These regulations provide updated

guidance regarding the disclosure of a taxpayer's social security number to a tax return preparer located outside of the United States. The text of these regulations also serves as the text of the proposed regulations (REG-121698-08) set forth in the notice of proposed rulemaking on this subject in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective on July 2, 2008.

Applicability Date: See §301.7216-3T(d).

FOR FURTHER INFORMATION CONTACT: Lawrence E. Mack, (202) 622-4940 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends 26 CFR part 301 to provide modified rules relating to the ability of a tax return preparer located within the United States to disclose a taxpayer's social security number constituting tax return information with the taxpayer's consent to a tax return preparer located outside of the United States. In the accompanying and cross-referenced notice of proposed rulemaking, the Treasury Department and IRS request comments on the proposed rule from all interested persons.

On December 8, 2005, the Treasury Department and IRS published a notice of proposed rulemaking (REG-137243-02, 2006-1 C.B. 317) in the **Federal Register** (70 FR 72954) proposing amendments to the regulations under section 7216 (regarding the use or disclosure of tax return information by income tax return preparers). On January 3, 2008, the Treasury Department and IRS issued final regulations under section 7216 (T.D. 9375, 2008-5 I.R.B. 344) applicable to disclosures or uses of tax return information occurring on or after January 1, 2009. Thus, T.D. 9375 replaces previously issued final regulations that remain applicable to disclosures or uses of tax return information occurring prior to January 1, 2009.

T.D. 9375 included the revision of §301.7216-3(b)(4), which, for disclosures and uses of tax return information occurring on or after January 1, 2009, provides that an income tax return preparer located in the United States may not disclose the taxpayer's social security number (SSN)

to a tax return preparer located outside of the United States even if the taxpayer consents to the disclosure. These temporary regulations modify the rules under §301.7216-3(b)(4).

Explanation of Provisions

The Treasury Department and IRS are amending the regulations under section 7216 applicable to disclosures and uses of tax return information occurring on or after January 1, 2009, to provide a limited exception to the general rule that an income tax return preparer located in the United States may not disclose a taxpayer's SSN to a tax return preparer located outside of the United States. Section 301.7216-3(b)(4) provides that a tax return preparer located within the United States, including any territory or possession of the United States, may not obtain consent to disclose a taxpayer's SSN to a tax return preparer located outside of the United States or any territory or possession of the United States. Thus, with one exception, if a tax return preparer located within the United States obtains consent from a taxpayer to disclose tax return information to another tax return preparer located outside of the United States, as provided under §§301.7216-3(a)(3)(i)(D), 301.7216-2(c)(2) and 301.7216-2(d), the tax return preparer located in the United States may not disclose the taxpayer's SSN, and must redact or otherwise mask the taxpayer's SSN before the tax return information is disclosed outside of the United States. The exception is limited to the circumstance in which a tax return preparer located inside the United States initially receives the SSN from a tax return preparer located outside the United States and the preparer within the United States retransmits the SSN to the preparer that provided the SSN. When a taxpayer-client requests that a tax return preparer within the United States transfer the return preparation engagement to a tax return preparer located outside the United States, the preparer still must redact or otherwise mask the taxpayer's SSN before the information is disclosed and, in this situation, it will be incumbent upon the taxpayer to provide the SSN directly to the tax return preparer located abroad.

The revisions containing the SSN disclosure prohibition in §301.7216-3(b)(4)

were explained in the preamble to the final regulations. The regulation was adopted in light of factors including: 1) the fact that it is not necessary for tax return preparers to disclose certain taxpayer identifying information to other tax return preparers who are assisting them in preparing a return; 2) the important role an SSN plays in the tax administration process, and the heightened potential for misuse when an SSN is readily associated with confidential information, such as tax return information; and 3) the heightened concern about the theft of taxpayer identifying information resulting from disclosures outside the United States.

Upon further consideration, the Treasury Department and IRS have concluded that §301.7216-3(b)(4) can be amended to provide flexibility to allow a tax return preparer within the United States to disclose an SSN with the taxpayer's consent to a tax return preparer located outside of the United States if both tax return preparers have sufficient data security programs and procedures in operation to protect such important confidential information from misuse or unauthorized access or disclosure. These measures will significantly reduce the security risks associated with the disclosure of this information outside of the United States. Although SSN security is the primary focus of these regulations, the flexibility provided by these regulations will enable qualified tax return preparers to address situations in which there is a need for a tax return preparer in the United States to disclose an SSN to a tax return preparer located outside of the United States, as appropriate under the circumstances. This includes, but is not limited to, situations in which the tax return preparer located outside of the United States is a signing tax return preparer or requires an unredacted SSN to file a return on behalf of a taxpayer, the tax return preparer located outside the United States may need a copy of the entire return, including the taxpayer's SSN (for example, to assist an expatriated U.S. taxpayer secure treaty benefits from the relevant foreign government), or the taxpayer prefers that the tax return preparer located within the United States disclose the taxpayer's SSN to the tax return preparer located outside the United States (for example, because the taxpayer concludes that the data security protection provided by the tax return preparer in the United States and the

tax return preparer located outside of the United States is sound).

In light of these considerations, the Treasury Department and IRS, pursuant to these temporary regulations, amend the regulations contained in T.D. 9375 (applicable to disclosures and uses of tax return information on or after January 1, 2009) to include an exception to §301.7216-3(b)(4). The exception in §301.7216-3T(b)(4)(ii) provides that a tax return preparer located within the United States, including any territory or possession of the United States, may obtain consent to disclose the taxpayer's SSN to a tax return preparer located outside of the United States or any territory or possession of the United States if the tax return preparer discloses the SSN through the use of an "adequate data protection safeguard" as described in guidance published in the Internal Revenue Bulletin and verifies the maintenance of the adequate data protection safeguards in the request for the taxpayer's consent pursuant to the specifications described in guidance published in the Internal Revenue Bulletin. The exception authorizes only those preparers with an adequate data protection safeguard in operation to request a taxpayer's consent to disclose an SSN to a preparer located outside the United States that also has an adequate data protection safeguard. The Treasury Department and IRS anticipate that requiring tax return preparers that seek a taxpayer's consent to disclose an SSN to a tax return preparer located abroad to maintain adequate data security would provide the further benefit of enhancing the level of security of any data transfer, including the data transfer of the taxpayer's SSN, while providing additional flexibility to address situations in which there is a reason or need to disclose an SSN to a tax return preparer located abroad. Tax return preparers without an adequate data protection safeguard, or those preparers with an adequate data protection safeguard that seek to disclose an SSN to a tax return preparer located abroad that does not have an adequate data protection safeguard, must continue to comply with the general rule in §301.7216-3T(b)(4)(i), and are still required to mask any SSN prior to disclosure to a tax return preparer located outside the United States, or any territory or possession of the United States, even if

the taxpayer has consented to disclosure of an SSN.

Revenue Procedure 2008-35, published concurrently with these regulations, provides the relevant guidance regarding the exception in §301.7216-3T(b)(4)(ii) to the general rule requiring SSN masking. Section 4.07 of Revenue Procedure 2008-35 provides guidance regarding the requirements for an adequate data protection safeguard. Pursuant to Section 4.07, an "adequate data protection safeguard" is a data security program, policy and practice that meets or conforms to one of the following privacy or data security frameworks:

(1) The United States Department of Commerce "safe harbor" framework for data protection (or successor program);

(2) A foreign law data protection safeguard that includes a security component, for example, the European Commission's Directive on Data Protection;

(3) A framework that complies with the requirements of a financial or similar industry-specific standard that is generally accepted as best practices for technology and security related to that industry, for example, the BITS (Financial Services Roundtable) Financial Institution Shared Assessment Program;

(4) The requirements of the AICPA/CICA Privacy Framework;

(5) The requirements of the most recent version of IRS Publication 1075, *Tax Information Security Guidelines for Federal, State and Local Agencies and Entities*; or

(6) Any other data security framework that provides the same level of privacy protection as contemplated by one or more of the frameworks described in (1) through (5).

Section 4.04(1)(e)(ii) of Revenue Procedure 2008-35 provides guidance regarding mandatory language that must be included in each request for consent provided to an individual taxpayer by the tax return preparer that seeks consent to disclose an SSN to a return preparer located outside the United States or its territories or possessions. See §601.601(d)(2)(ii)(b).

These regulations clarify that the rule in §301.7216-3T(b)(4) applies only to a tax return preparer's request for consent to disclose tax return information, including an SSN, from a taxpayer filing a return in the Form 1040 series, for example, Form 1040, Form 1040NR, Form 1040A,

or Form 1040EZ. Also, the regulations clarify that a tax return preparer located outside of the United States does not include a tax return preparer who is continuously and regularly employed in the United States or any territory or possession of the United States and who is in a temporary travel status outside of the United States. This clarification is necessary to avoid disruption of the performance of the duties of employees of tax return preparers based in the United States who are on a temporary travel assignment in a location outside of the United States.

The Treasury Department and IRS also conclude that the addition of the exception in §301.7216-3T(b)(4)(ii) appropriately balances concerns regarding safeguarding of sensitive tax return information and identity theft against the tax return preparers' needs for disclosing SSNs and a taxpayer's right to control access to his or her SSN. In a separate notice of proposed rulemaking published with these temporary regulations, the Treasury Department and IRS request comments on the proposed rules, as well as the guidance regarding the requirements for an adequate data protection safeguard in Section 4.07 of Revenue Procedure 2008-35.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations because they are interpretive regulations. Because these regulations are necessary to provide tax return preparers and taxpayers with immediate guidance on the application of the section 7216 rules regarding SSN masking requirements, particularly in light of the January 1, 2009 applicability date provided by the recently promulgated section 7216 regulations contained in T.D. 9375, and as these regulations are intended to provide a limited exception to, and relief from, the rule requiring SSN masking in all instances where tax return information is disclosed to a tax return preparer located outside of the United States and its territories and possessions, good cause would otherwise exist for dispens-

ing with notice and public comment pursuant to 5 U.S.C. 553(b) and (c). For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the cross-referenced notice of proposed rule-making published in this issue of the Bulletin. Pursuant to section 7805(f) of the Internal Revenue Code, these temporary regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Lawrence E. Mack, Office of the Associate Chief Counsel (Procedure and Administration).

* * * * *

Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding an entry in numerical order to read as follows:

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

Section 301.7216-3T also issued under 26 U.S.C. 7216 * * *

Paragraph 2. Section 301.7216-3 is amended by revising paragraph (b)(4) to read as follows:

§301.7216-3 Disclosure or use permitted only with the taxpayer's consent.

* * * * *

(b) * * *

(4) [Reserved]. For further guidance, see §301.7216-3T(b)(4).

* * * * *

Paragraph 3. Section 301.7216-3T is added to read as follows:

§301.7216-3T Disclosure or use permitted only with the taxpayer's consent (temporary).

(a) [Reserved]. For further guidance, see §301.7216-3(a).

(b) *Timing requirements and limitations*—(1) through (3) [Reserved]. For

further guidance, see §301.7216-3(b)(1) through (3).

(4) *No consent to the disclosure of a taxpayer's social security number to a return preparer outside of the United States with respect to a taxpayers filing a return in the Form 1040 Series*—(i) *In general.* Except as provided in paragraph (ii), a tax return preparer located within the United States, including any territory or possession of the United States, may not obtain consent to disclose the taxpayer's social security number (SSN) with respect to taxpayers filing a return in the Form 1040 Series, for example, Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ, to a tax return preparer located outside of the United States or any territory or possession of the United States. Thus, if a tax return preparer located within the United States (including any territory or possession of the United States) obtains consent from an individual taxpayer to disclose tax return information to another tax return preparer located outside of the United States, as provided under §§301.7216-2(c) and 301.7216-2(d), the tax return preparer located in the United States may not disclose the taxpayer's SSN, and the tax return preparer must redact or otherwise mask the taxpayer's SSN before the tax return information is disclosed outside of the United States. If a tax return preparer located within the United States initially receives or obtains a taxpayer's SSN from another tax return preparer located outside of the United States, however, the tax return preparer within the United States may, without consent, retransmit the taxpayer's SSN to the tax return preparer located outside the United States that initially provided the SSN to the tax return preparer located within the United States. For purposes of this section, a tax return preparer located outside of the United States does not include a tax return preparer who is continuously and regularly employed in the United States or any territory or possession of the United States and who is in a temporary travel status outside of the United States.

(ii) *Exception.* A tax return preparer located within the United States, including any territory or possession of the United States, may obtain consent to disclose the taxpayer's SSN to a tax return preparer located outside of the United States or any territory or possession of the United States

where the tax return preparer within the United States discloses the SSN to a tax return preparer outside of the United States through the use of an adequate data protection safeguard as defined by the Secretary in guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(b) of this chapter) and verifies the maintenance of the adequate data protection safeguards in the request for the taxpayer's consent pursuant to the specifications described by the Secretary in guidance published in the Internal Revenue Bulletin.

(b)(5) and (c) [Reserved]. For further guidance, see §301.7216-3(b)(5) and (c).

(d) *Effective/applicability date.* This section applies to disclosures or uses of tax return information occurring on or after January 1, 2009. The applicability of this section expires on July 1, 2011.

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

Approved June 25, 2008.

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

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

Section 7702.—Life Insurance Contract Defined

A revenue procedure provides a procedure by which an issuer of a life insurance contract may remedy a failure to account for charges for qualified additional benefits (QABs) under the expense charge rule of section 7702(c)(3)(B)(ii) of the Internal Revenue Code. Rev. Rul. 2005-6, 2005-1 C.B. 471, is amplified. See Rev. Proc. 2008-38, page 139.

A revenue procedure provides a procedure by which an issuer of a life insurance contract may remedy the failure of one or more contracts to meet the definition of a life insurance contract under section 7702(a) or to satisfy the requirements of section 101(f) of the Internal Revenue Code. Rev. Rul. 91-17, 1991-1 C.B. 190, is superseded in part; Notice 99-48, 1999-2 C.B. 429, is superseded. See Rev. Proc. 2008-40, page 151.

A revenue procedure provides a procedure by which an issuer of a life insurance contract may automatically obtain a waiver, under section 7702(f)(8) or section 101(f)(3)(H) of the Internal Revenue Code, for certain reasonable errors that caused the contract

to fail to satisfy the requirements of section 7702 or section 101(f), as applicable. Rev. Rul. 91-17, 1991-1 C.B. 190, is amplified. See Rev. Proc. 2008-42, page 160.

Section 7702A.—Modified Endowment Contract Defined

A revenue procedure provides a procedure by which an issuer of a life insurance contract may

remedy a failure to account for charges for qualified additional benefits (QABs) under the expense charge rule of section 7702(c)(3)(B)(ii) of the Internal Revenue Code. Rev. Rul. 2005-6, 2005-1 C.B. 471, is amplified. See Rev. Proc. 2008-38, page 139.

A revenue procedure provides a procedure by which an issuer of a life insurance contract may remedy an inadvertent non-egregious failure to comply with the modified endowment contract rules under section 7702A of the Internal Revenue Code. Rev.

Proc. 2001-42, 2001-2 C.B. 212, and Rev. Proc. 2007-19, 2007-1 C.B. 515, are superseded. See Rev. Proc. 2008-39, page 143.

Part III. Administrative, Procedural, and Miscellaneous

Health Savings Accounts

Notice 2008-59

PURPOSE

This notice provides guidance on Health Savings Accounts.

BACKGROUND

Section 1201 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, added § 223 to the Internal Revenue Code to permit eligible individuals to establish Health Savings Accounts (HSAs) for taxable years beginning after December 31, 2003. The Health Opportunity Patient Empowerment Act of 2006, Pub. L. No.

109-432 (HOPE Act), amended § 223 of the Code effective generally for taxable years after December 31, 2006.

Notice 2004-2, 2004-1 C.B. 269, and Notice 2004-50, 2004-2 C.B. 196, provide guidance on HSAs in question and answer format. This notice addresses additional questions relating to HSAs.

TABLE OF CONTENTS

The following is an outline of the questions and answers covered in this notice.

DEFINITIONS

I. ELIGIBLE INDIVIDUALS

- Q&A-1. Payment of HDHP premiums by an HRA not disqualifying coverage
- Q&A-2. Disqualifying benefits before HDHP minimum deductible satisfied
- Q&A-3. Employer reimbursement of medical expenses before HDHP minimum deductible satisfied
- Q&A-4. HDHP with embedded deductibles and post-deductible HRA or health FSA
- Q&A-5. Eligible for Medicare Part D and contributions to HSA
- Q&A-6. Enrolled in Medicare Part D and contributions to HSA
- Q&A-7. HDHP and other high deductible coverage
- Q&A-8. HDHP and HRA or health FSA that reimburses family members before minimum HDHP deductible satisfied
- Q&A-9. Disregarded coverage or preventive care through Department of Veterans Affairs
- Q&A-10. Access to health care that is free or at charges below fair market value
- Q&A-11. Family HDHP coverage and dependents with disqualifying coverage

II. HIGH DEDUCTIBLE HEALTH PLANS

- Q&A-12. Changing from family HDHP to self-only HDHP
- Q&A-13. Different deductibles for specific benefits
- Q&A-14. Benefits limited to hospitalization or in-patient care
- Q&A-15. Expenses that apply towards meeting deductible

III. CONTRIBUTIONS

- Q&A-16. Contribution limits for individuals with family coverage and dependents with non-permitted coverage
- Q&A-17. Contribution limits for married couples with different types of HDHP coverage
- Q&A-18. Contribution limits for married couples who each have family HDHP coverage
- Q&A-19. Contribution limits for months when covered by an HDHP
- Q&A-20. Rollovers from an existing HSA to a new HSA
- Q&A-21. Employer contributions for prior year
- Q&A-22. Catch-up contributions for spouses
- Q&A-23. Employer contributions to an employee who was never an eligible individual
- Q&A-24. Error resulting in excess contributions
- Q&A-25. Employer contributions to an employee who ceases to be an eligible individual

Q&A-26. Employer contributions to HSA of employee's spouse

IV. DISTRIBUTIONS

Q&A-27. Debit cards

Q&A-28. Third party authorization

Q&A-29. Payment of Medicare Part D premiums

Q&A-30. Medicare premiums for spouse

Q&A-31. Continuation coverage premiums

Q&A-32. Premiums for a dependent receiving unemployment benefits

Q&A-33. Expenses for a child claimed as a dependent by another

V. PROHIBITED TRANSACTIONS

Q&A-34. Borrowing from HSA

Q&A-35. Loan from trustee to HSA

Q&A-36. Pledging HSA as security for a loan

Q&A-37. Consequences for entering into a prohibited transaction

VI. ESTABLISHING AN HSA

Q&A-38. When an HSA is established

Q&A-39. Not treating as established before state law considers HSA established

Q&A-40. Establishment date for rollovers

Q&A-41. Establishment date for successive HSAs

VII. ADMINISTRATION

Q&A-42. Reporting HSA administration and maintenance fees withdrawn by the trustee from an HSA

DEFINITIONS

The following definitions apply for purposes of this notice.

Eligible individual means an individual who: (1) is covered by a high deductible health plan (HDHP); (2) is not also covered by any other health plan that is not an HDHP (with certain exceptions for plans providing certain types of limited coverage); (3) is not enrolled in Medicare; and (4) may not be claimed as a dependent on another person's tax return. See § 223(c)(1).

Limited-purpose health flexible spending arrangement (FSA) means a health FSA described in a cafeteria plan that only pays or reimburses permitted coverage benefits (as defined in § 223(c)(1)(B)), such as vision care, dental care or preventive care (as defined for purposes of § 223(c)(2)(C)). See Prop. Treas. Reg. § 1.125-5(m)(3).

Limited-purpose health reimbursement arrangement (HRA) means an HRA that only pays or reimburses permitted coverage benefits (as defined in § 223(c)(1)(B)), such as vision care, dental care or preven-

tive care. See Rev. Rul. 2004-45, 2004-1 C.B. 971.

Post-deductible health FSA means a health FSA in a cafeteria plan that only pays or reimburses medical expenses (as defined in § 213(d)) for preventive care or medical expenses incurred after the minimum annual HDHP deductible under § 223(c)(2)(A)(i) is satisfied. No medical expenses incurred before the annual HDHP deductible is satisfied may be reimbursed by a post-deductible FSA, regardless of whether the HDHP covers the expense or whether the deductible is later satisfied. See Prop. Treas. Reg. § 1.125-5(m)(4).

Post-deductible HRA means an HRA that only pays or reimburses medical expenses (as defined in § 213(d)) for preventive care or medical expenses incurred after the minimum annual HDHP deductible under § 223(c)(2)(A)(i) is satisfied. No medical expenses incurred before the annual HDHP deductible is satisfied may be reimbursed by a post-deductible HRA, regardless of whether the HDHP covers the

expense or whether the deductible is later satisfied. See Rev. Rul. 2004-45.

QUESTIONS AND ANSWERS

I. ELIGIBLE INDIVIDUALS

Q-1. Does an individual fail to be an eligible individual, as defined in § 223(c)(1), merely because the individual is covered by an HRA which, in addition to paying and reimbursing expenses for vision, dental and preventive care, pays and reimburses premiums for coverage by an accident and health plan?

A-1. No. An individual who is otherwise an eligible individual does not fail to be an eligible individual merely because the individual is covered by an HRA which, in addition to paying and reimbursing expenses for vision, dental and preventive care, pays and reimburses premiums for coverage by an accident and health plan. See Notice 2002-45, 2002-2 C.B. 93, and Rev. Rul. 2002-41, 2002-2 C.B. 75, for guidance on HRAs.

Example. In 2008, Employer A provides an HRA which reimburses any § 213(d) medical expense incurred by an employee, employee's spouse and de-

pendents. For 2009, Employer A amends the HRA to limit its benefits to expenses for vision care, dental care, and preventive care and to pay the employee's share of the premiums for the employer-sponsored HDHP. During 2009, A's employees are otherwise eligible individuals.

For 2009, Employer A's employees are eligible individuals even if covered by the HRA.

Q-2. If an individual is covered under a plan that pays for medical expenses incurred before the minimum HDHP deductible is satisfied and the coverage is not permitted insurance under § 223(c)(3), disregarded coverage under § 223(c)(1)(B)(ii) or preventive care under § 223(c)(2)(C), is that individual an eligible individual as defined in § 223(c)(1)?

A-2. No. To be an eligible individual, an individual must be covered by an HDHP and by no other health plan that provides coverage other than disregarded coverage under § 223(c)(1)(B) or preventive care under § 223(c)(2)(C). See Rev. Rul. 2004-45.

Example. Individual B is covered by an HDHP. In addition, Individual B is covered by a "mini-med" plan that provides the following benefits: a fixed amount per day of hospitalization; a fixed amount per office visit with a physician; a fixed amount per out-patient treatment at a hospital; a fixed amount per ambulance use; and coverage for expenses relating to the treatment of a specified list of diseases.

Although the fixed amount per day of hospitalization benefit and specified disease benefit are allowed in addition to the HDHP as permitted insurance, the other benefits are not disregarded coverage or preventive care and, thus, Individual B is not an eligible individual who can contribute to an HSA.

Q-3. If an employee is covered by an HDHP and the employer pays or reimburses some or all of the employee's medical expenses incurred before the minimum HDHP deductible is satisfied (other than disregarded coverage under § 223(c)(1)(B) or preventive care under § 223(c)(2)(C)), is the employee an eligible individual under § 223(c)(1)?

A-3. No. To be an eligible individual, an individual must be covered by an HDHP and no other health plan except disregarded coverage or preventive care. If at any time, an employer pays or reimburses, directly or indirectly, all or part of employees' medical expenses below the minimum HDHP deductible under § 223(c)(2)(A) (other than for disregarded coverage or preventive care) the employees are not eligible to contribute to an HSA.

Example 1. For 2008, an HDHP with self-only coverage has an annual deductible of \$2,500. The

employee pays the first \$250 of covered medical expenses below the deductible. The employer reimburses the next \$1,350 of covered medical expenses below the deductible. The employee is responsible for the last \$900 of covered medical expenses below the deductible. The \$1,350 of medical expenses paid or reimbursed by the employer is not a contribution to an HSA and not disregarded coverage or preventive care.

An employee covered by this type of plan is not an eligible individual under § 223(c)(1) because the employee has disqualifying coverage from a plan that is not an HDHP.

Example 2. For 2008, an HDHP with self-only coverage has an annual deductible of \$4,500. The employee pays the first \$1,100 of covered medical expenses below the deductible. The employer reimburses the next \$3,400 of covered medical expenses below the deductible. The \$3,400 of medical expenses paid or reimbursed by the employer is not a contribution to an HSA and not disregarded coverage or preventive care.

An employee covered by this type of plan is an eligible individual under § 223(c)(1) because the employee is responsible for the minimum annual deductible under § 223(c)(2)(A).

Q-4(a). If an individual has family HDHP coverage under which benefits are paid once the entire family incurs a minimum amount of covered expenses (an umbrella deductible), but which also provides benefits to each individual if that individual incurs expenses in excess of the minimum family HDHP deductible in § 223(c)(2)(A)(i)(II) (the embedded individual deductible), does the individual fail to be an eligible individual merely because of the embedded individual deductible?

A-4(a). No, the individual does not fail to be an eligible individual merely because of an embedded individual deductible that is no less than the minimum family HDHP deductible in § 223(c)(2)(A)(i)(II).

Q-4(b). May a post-deductible HRA or post-deductible health FSA pay or reimburse qualified medical expenses of an individual with family HDHP coverage once the minimum annual deductible in § 223(c)(2)(A)(i)(II) for family HDHP coverage has been satisfied?

A-4(b). Yes, a post-deductible HRA or post-deductible health FSA may pay or reimburse qualified medical expenses of an individual with family HDHP coverage incurred at any time after the minimum annual deductible in § 223(c)(2)(A)(i)(II) for family HDHP coverage has been satisfied.

Example. In 2008, a family with family HDHP coverage has an umbrella deductible of \$3,500, and an embedded individual deductible of \$2,200. A post-deductible HRA reimburses § 213(d) medical expenses incurred after \$2,200 of medical expenses covered by the HDHP have been incurred.

The covered individuals, if otherwise eligible, are eligible individuals.

Q-5. Does an individual fail to be an eligible individual merely because the individual is eligible for, but not enrolled in, Medicare Part D (or any other Medicare benefit)?

A-5. No. However, an individual is not an eligible individual under § 223(c)(1) in any month during which such individual is both eligible for benefits under Medicare and enrolled to receive benefits under Medicare. See also Notice 2004-50, Q&A-2 and Q&A-3, regarding Medicare Parts A and B.

Q-6. Does an individual fail to be an eligible individual merely because the individual is enrolled in Medicare Part D, or any other Medicare benefit?

A-6. Yes. Under § 223(b)(7), an individual who is enrolled in Medicare is not an eligible individual in any month during which the individual is enrolled in Medicare. See also Q&A-29 of this notice regarding paying Medicare premiums with funds in an HSA.

Q-7. May an otherwise eligible individual covered by an HDHP as defined in § 223(c)(2) also be covered by a health plan that is not an HDHP with a deductible equal to or greater than the statutory minimum HDHP deductible?

A-7. Yes, as long as the deductible of the other coverage equals or exceeds the statutory minimum HDHP deductible, the individual remains an eligible individual.

Example. An otherwise eligible individual has self-only HDHP coverage from January 1 through December 31, 2008, with a deductible of \$2,500 and a life-time limit on benefits of \$1,000,000. In addition to the HDHP, the individual has self-only health plan coverage with a \$1,000,000 deductible and a \$2,000,000 life-time limit on benefits.

The individual is an eligible individual.

Q-8. Is an individual with family HDHP coverage who is also covered by a post-deductible HRA or post-deductible health FSA an eligible individual under § 223(c)(1) if the post-deductible HRA or post-deductible health FSA reimburses § 213(d) medical expenses of a spouse or dependent incurred before the minimum family HDHP deductible under § 223(c)(2)(A)(i)(II) has been satisfied?

A-8. No. If an individual with family HDHP coverage is covered by a post-deductible HRA or post-deductible health FSA that reimburses the § 213(d) medical expenses of any covered individual before

the minimum family HDHP deductible under § 223(c)(2)(A)(i)(II) has been satisfied, that individual is not an eligible individual under § 223(c)(1).

Example 1. Employee C has family HDHP coverage. Employee C's spouse and children (but not Employee C) are also covered by non-HDHP family coverage provided by the spouse's employer. Employee C and Employee C's spouse and children are also covered by a post-deductible health FSA. The health FSA pays for unreimbursed medical expenses of the spouse and child without regard to the satisfaction of the deductible of the family HDHP.

Because the health FSA covering Employee C reimburses medical expenses before the minimum family HDHP deductible is satisfied, Employee C is not an eligible individual.

Example 2. Same facts as *Example 1*, except the health FSA does not cover Employee C. Employee C is an eligible individual.

Q-9. Is an individual an eligible individual if he or she is eligible for medical benefits through the Department of Veterans Affairs (VA) but only receives medical care that is disregarded coverage or preventive care from the VA and is otherwise an eligible individual?

A-9. Yes. Although an individual actually receiving medical benefits from the VA at any time in the previous three months is generally not an eligible individual, this rule does not apply if the medical benefits consist solely of disregarded coverage or preventive care.

Q-10. Is an otherwise eligible individual who has access to free health care or health care at charges below fair market value from a clinic on an employer's premises an eligible individual under § 223(c)(1)?

A-10. An individual will not fail to be an eligible individual under § 223(c)(1)(A) merely because the individual has access to free health care or health care at charges below fair market value from an employer's on-site clinic if the clinic does not provide significant benefits in the nature of medical care (in addition to disregarded coverage or preventive care).

Example 1. A manufacturing plant operates an on-site clinic that provides the following free health care for employees: (1) physicals and immunizations; (2) injecting antigens provided by employees (e.g., performing allergy injections); (3) a variety of aspirin and other nonprescription pain relievers; and (4) treatment for injuries caused by accidents at the plant.

The clinic does not provide significant benefits in the nature of medical care in addition to disregarded coverage or preventive care.

Example 2. A hospital permits its employees to receive care at its facilities for all of their medical needs. For employees without health insurance, the hospital provides medical care at no charge. For

employees who have health insurance, the hospital waives all deductibles and co-pays.

Because the hospital provides significant care in the nature of medical services, the hospital's employees are not eligible individuals under § 223(c)(1)(A).

Q-11. If an otherwise eligible individual under § 223(c)(1) has family HDHP coverage that covers dependents, and the dependents have other, disqualifying, non-HDHP coverage, is the individual an eligible individual?

A-11. Yes. See also Rev. Rul. 2005-25, 2005-1 C.B. 971. See Q&A-16 of this notice regarding the contribution limit.

II. HIGH DEDUCTIBLE HEALTH PLANS

Q-12. If an individual switches from a family HDHP to a self-only HDHP, does the individual fail to be an eligible individual during the period of self-only coverage merely because the self-only HDHP, for the purpose of satisfying the self-only deductible, takes into account expenses incurred while the individual had family HDHP coverage?

A-12. A self-only HDHP may use any reasonable method to allocate the covered expenses incurred during the period of family coverage for the purpose of satisfying the deductible for self-only coverage. For example, subject to state law requirements, the plan may allocate to the self-only deductible only the expenses incurred by that individual. Alternatively, the plan may allocate the expenses incurred during family HDHP coverage on a *per-capita* basis according to the number of persons covered by the family HDHP. If the family deductible was satisfied before the change to self-only coverage, the plan may also treat the individual as having satisfied the self-only deductible for that plan year. In all cases, each expense must be allocated on a reasonable and consistent basis and, except in the case of COBRA continuation coverage, each expense may be allocated to only one individual, and the plan year must be 12 months. For individuals switching from self-only HDHP coverage to family HDHP coverage, see Notice 2004-50, Q&A-23. If COBRA continuation coverage is required to be made available, the HDHP must comply with the requirements of Q&A-2 of § 54.4980B-5 for those individuals receiving COBRA continuation coverage.

Example 1. Employer D offers its employees a calendar year health plan otherwise qualifying as an HDHP. Employee E and E's spouse are covered by Employer D's family coverage HDHP with a \$6,000 deductible. Employee E incurs \$2,500 in covered expenses; Employee E's spouse incurs \$2,000 in covered expenses. On July 1, Employee E and Employee E's spouse each change to self-only HDHP coverage with a \$3,000 deductible and Employee E's spouse is no longer covered under the plan.

For the period from July 1 through December 31, the plan may credit Employee E's self-only deductible with either: (1) \$2,500 (the actual amount of expenses Employee E incurred under family coverage), or (2) \$2,250 (\$4,500/2), Employee E's *per-capita* share of expenses incurred by the two individuals covered by family coverage. In this case the HDHP must credit Employee E's spouse with at least \$2,000 toward the satisfaction of the deductible; the HDHP also complies with the requirements of Q&A-2 of § 54.4980B-5 by crediting Employee E's spouse with \$2,250 toward the satisfaction of the deductible.

Example 2. The same facts as *Example 1*, except that Employee E's spouse is entitled to elect, and elects, COBRA continuation coverage under the HDHP. In this case, the HDHP must comply with the requirements of Q&A-2 of § 54.4980B-5.

Example 3. The same facts as *Example 2*, except that the amounts incurred by Employee E and Employee E's spouse are reversed: Employee E incurred \$2,000 of medical expenses and Employee E's spouse incurred \$2,500.

If the HDHP credits Employee E's spouse with \$2,250 toward the satisfaction of the deductible, this would not satisfy the requirements of Q&A-2 of § 54.4980B-5. Employee E's spouse must be credited with at least \$2,500 toward the satisfaction of the deductible to comply with the requirements of Q&A-2 of § 54.4980B-5.

Example 4. Employer F offers its employees a calendar year health plan, otherwise qualifying as an HDHP. As of January 1, 2008, Employee G, and Employee G's spouse and child are covered by Employer F's family coverage HDHP with a \$6,000 deductible. From January 1 through September 30, 2008, Employee G incurs \$2,500 in covered expenses; Employee G's spouse incurs \$500 in covered expenses, and Employee G's child incurs \$3,000 in covered expenses. Employee G and spouse are divorced, effective October 1, 2008. On that date, Employee G changes to self-only HDHP coverage with a \$3,000 deductible and the child and ex-spouse elect COBRA continuation coverage in Employer F's family HDHP coverage.

The plan may (1) credit Employee G's individual deductible with \$2,500 and reduce the expenses allocated to the child and ex-spouse in family coverage by \$2,500; or (2) credit Employee G's self-only deductible with \$2,000 and reduce the expenses allocated to the child and ex-spouse by \$2,000 (allocating one-third of the \$6,000 in expenses to Employee G's individual deductible and two-thirds of the \$6,000 in expenses to the former spouse and child remaining in family coverage). Coverage of the child and former spouse is COBRA continuation coverage. However, if the *pro rata* allocation of expenses of the family to the child and former spouse were less than the actual expenses incurred by the child and former

spouse, then allocation of only the ratable share of the family expenses would not comply with the requirements of Q&A-2 of § 54.4980B-5; (3) credit Employee G with no expenses and continue to credit the child and ex-spouse with all expenses incurred under family coverage; or (4) treat Employee G as having satisfied the \$3,000 individual deductible while treating the former spouse and child as having satisfied the \$6,000 family deductible.

Q-13. If a health plan imposes a separate or higher deductible for specific benefits, are amounts paid by covered individuals to satisfy the separate or higher deductible treated as out-of-pocket expenses under § 223(c)(2)(A)?

A-13. If significant other benefits remain available under the plan in addition to the specific benefits subject to the separate or higher deductible, amounts paid to satisfy the separate or higher deductible are not treated as out-of-pocket expenses under § 223(c)(2)(A).

Example. In 2008, a self-only health plan with a \$3,000 deductible imposes a lifetime limit of \$1,000,000 on reimbursements for covered benefits. The plan pays 100 percent of covered expenses after the \$3,000 deductible is satisfied. Although the plan provides benefits for substance abuse treatment, the substance abuse treatment benefits are subject to a separate \$5,000 deductible, and these benefits are limited to \$10,000, after the separate deductible is satisfied.

The plan is an HDHP and no expense incurred by a covered individual other than the \$3,000 general deductible is treated as an out-of-pocket expense under § 223(c)(2)(A).

Q-14. If a health plan meeting the minimum deductible of § 223(c)(2)(A) restricts benefits to expenses for hospitalization or in-patient care, is the plan an HDHP?

A-14. No. A plan must provide significant benefits to be an HDHP. A plan may also be designed with reasonable benefit restrictions limiting the plan's covered benefits. See Notice 2004-50, Q&A-15. However, if a plan only provides benefits for expenses of hospitalization or in-patient care, significant other benefits do not remain available under the plan in addition to the benefits subject to exclusion. Therefore, any expenses incurred by a covered individual after satisfying the deductible are treated as out-of-pocket expenses under § 223(c)(2)(A).

Example. In 2008, a self-only health plan with a \$2,000 deductible includes a \$3,000,000 lifetime limit on covered benefits. Generally, the plan only provides benefits for medical services provided while a covered individual is admitted to a hospital as an overnight patient or provided at a "same day" surgery facility. A same day surgery facility does not include a hospital emergency room, a trauma center, a physician's office or a clinic. Covered medical services

for individuals admitted to a hospital or same day surgery facility include room accommodations, miscellaneous medical services and supplies necessary for treatment, primary surgery, pathology charges and the administration of anesthesia while at the hospital or center, and charges by the primary attending physician for one visit per day while at the hospital. In addition, the plan provides: an organ transplant benefit, a hospice care benefit, and home health care visits. The home health care benefit is subject to a 60 visit per year limit, and must be in connection with the hospitalization. The plan also pays for certain preventive care screening and ambulance service. The plan pays for no visits to physician's offices nor any other out-patient care other than those noted above. The maximum dollar amount that the covered individual pays for covered benefits under the plan for 2008 is \$5,500.

The restriction of benefits to medical services provided while the covered individual is admitted to a hospital or at a same day surgery facility is not reasonable because significant other benefits do not remain available under the plan after application of the restriction. Any expenses incurred by a covered individual for out-patient care or visits to physician's offices are treated as out-of-pocket expenses under § 223(c)(2)(A). Because the plan maximum for amounts paid by a covered individual does not restrict payments for those out-of-pocket expenses, the plan fails to qualify as an HDHP.

Q-15. What medical expenses may be taken into account in determining when the HDHP deductible is satisfied for purposes of a post-deductible HRA or post-deductible health FSA?

A-15. Only medical expenses described in § 213(d) and covered by the HDHP may be taken into account in determining whether the HDHP deductible, or the minimum deductible in § 223(c)(2)(A)(i), has been satisfied. For example, if the HDHP does not cover chiropractic care, expenses incurred for chiropractic care do not count toward satisfying the HDHP deductible or the minimum deductible in § 223(c)(2)(A)(i). For self-only HDHP coverage, only the covered medical expenses of the covered individual count toward satisfying the HDHP deductible or the minimum deductible in § 223(c)(2)(A)(i)(I).

Example. In 2008, an individual, spouse and child have family HDHP coverage with a \$2,500 deductible. The HDHP does not provide benefits for vision or dental care. They are also covered by a combination limited purpose/post-deductible HRA that pays or reimburses § 213(d) medical expenses incurred by each family member after the family incurs \$2,500 in covered medical expenses, and pays or reimburses vision and dental expenses before and after the HDHP deductible is satisfied. On February 15, 2008, the family incurs \$2,500 in vision and dental expenses that are reimbursed by the HRA. On March 17, 2008, the family then incurs \$400 in expenses covered by the HDHP (but for the deductible).

The family must incur an additional \$2,100 in covered medical expenses before the HDHP deductible is satisfied.

The HRA may not reimburse the family for the \$400 of expenses because the family had not incurred \$2,500 in covered expenses when the \$400 was incurred.

III. CONTRIBUTIONS

Q-16. How do the maximum annual HSA contribution limits apply to an eligible individual with family HDHP coverage for the entire year if the family HDHP covers spouses or dependent children who also have coverage by a non-HDHP, Medicare, or Medicaid?

A-16. The eligible individual may contribute the § 223(b)(2)(B) statutory maximum for family coverage. Other coverage of dependent children or spouses does not affect the individual's contribution limit, except that if the spouse is not an otherwise eligible individual, no part of the HSA contribution can be allocated to the spouse.

Q-17. How do the maximum annual HSA contribution limits apply to a married couple if both spouses are eligible individuals and one spouse has self-only HDHP coverage and the other spouse has family HDHP coverage?

A-17. The maximum annual HSA contribution limit for a married couple if one spouse has family HDHP coverage and the other spouse has self-only HDHP coverage is the § 223(b)(2)(B) statutory maximum for family coverage. The contribution limit is divided between the spouses by agreement. See § 223(b)(5) and Notice 2004-50, Q&A-32. This is the result regardless of whether the family HDHP coverage includes the spouse with self-only HDHP coverage. See Notice 2004-2, Q&A-15. If only one spouse is an eligible individual, see Rev. Rul. 2005-25.

Example. For 2008, H and W are married. Both are 40 years old. H and W are otherwise eligible individuals. H has self-only HDHP coverage. W has an HDHP with family coverage for W and their two children.

The combined contribution limit for H and W is \$5,800, which is the § 223(b)(2)(B) statutory contribution limit for 2008. H and W divide the \$5,800 contribution limit between them by agreement.

Q-18. How do the maximum annual HSA contribution limits apply to a married couple if both spouses are eligible individuals and each spouse has family HDHP coverage that does not cover the other spouse?

A-18. The maximum HSA contribution limit for a married couple where both spouses have family HDHP coverage is the § 223(b)(2)(B) statutory maximum. This rule applies regardless of whether each spouse's family coverage covers the other spouse. The contribution limit is divided between the spouses by agreement.

Example. In 2008, H, who is 37, and W, who is 32, are married with two dependent children. H has HDHP family coverage for H and their two children with an annual deductible of \$3,000. W has HDHP family coverage for W and their two children with a deductible of \$3,500.

The combined contribution limit for H and W is \$5,800, the maximum annual contribution limit. H and W divide the \$5,800 contribution limit between them by agreement.

Q-19. May an individual who ceases to be an eligible individual during a year still contribute to an HSA with respect to the months of the year when the individual was an eligible individual?

A-19. Yes. An individual who ceases to be an eligible individual may, until the date for filing the federal income tax return (without extensions) for the year, make HSA contributions with respect to the months of the year when the individual was an eligible individual.

Example. J has a self-only HDHP, and is an eligible individual for the first four months of 2008. J has until April 15, 2009 (the date for filing the 2008 return, without extensions) to contribute $4/12 \times \$2,900$ (\$967) to an HSA.

Q-20. May an individual who is not an eligible individual make a rollover contribution from his or her existing HSA to a new HSA?

A-20. Yes.

Q-21. May employer contributions to employees' HSAs made between January 1 and the date for filing the employee's return, without extensions, be allocated to the prior year?

A-21. Yes. For employer contributions (including salary reduction contributions) made between January 1 and the date for filing the employees' federal income tax return without extension, the employer must notify the HSA trustee or custodian if the contributions relate to the prior year. The employer must also inform the employee of the designation. However, the contributions designated as made for the prior year are still reported in box 12 with code W on the employees' Form W-2 for the year in which the contributions are actually made.

Example. In January 2009, Employer K contributes \$500 to each employee's HSA and notifies the HSA trustee (and provides a statement to the employees) that the contributions are for 2008. Subsequently, in 2009, Employer K contributes \$250 to each employee's HSA on March 31, June 30, September 30 and December 31. For each employee whose HSA received these contributions, Employer K reports a total contribution of \$1,500 in box 12 with code W on the Form W-2 for 2009.

In completing the Form 8889 for 2008, to compute Employer K's contributions, the employees add the \$500 to any employer contributions reported in box 12, code W on the 2008 Form W-2. In completing the Form 8889 for 2009, the employees subtract the \$500 from the box 12 code W amount on the 2009 Form W-2 and add to the remaining \$1,000 any contributions for 2009 made by Employer K between January 1, 2009 and his or her filing date without extensions. See Instructions to Form 8889.

Q-22. If a husband and wife are each eligible to make catch-up contributions under § 223(b)(3), must each spouse contribute their catch-up contributions to their own HSA?

A-22. Yes. An individual who is eligible to make catch-up contributions may only make such contributions to his or her own HSA. See also Notice 2004-50, Q&A-32. If both spouses are eligible for the catch-up contribution, each spouse must make catch-up contributions to his or her own HSA.

Q-23. If an employer contributes to the account of an employee who was never an eligible individual, can the employer recoup the amounts?

A-23. If the employee was never an eligible individual under § 223(c)(1), then no HSA ever existed and the employer may correct the error. At the employer's option, the employer may request that the financial institution return the amounts to the employer. However, if the employer does not recover the amounts by the end of the taxable year, then the amounts must be included as gross income and wages on the employee's Form W-2 for the year during which the employer made the contributions.

Example 1. In February 2008, Employer L contributed \$500 to an account of Employee M, reasonably believing the account to be an HSA. In July 2008, Employer L first learned that Employee M's account is not an HSA because Employee M has never been an eligible individual under § 223(c).

Employer L may request that the financial institution holding Employee M's account return the balance of the account (\$500 plus earnings less administration fees directly paid from the account) to Employer L. If Employer L does not receive the balance of the account, Employer L must include the

amounts in Employee M's gross income and wages on his Form W-2 for 2008.

Example 2. The same facts as *Example 1*, except Employer L first discovers the mistake in July 2009. Employer L issues a corrected 2008 Form W-2 for Employee M, and Employee M files an amended federal income tax return for 2008.

Q-24. If an employer contributes amounts to an employee's HSA that exceed the maximum annual contribution allowed in § 223(b) due to an error, can the employer recoup the excess amounts?

A-24. If the employer contributes amounts to an employee's HSA that exceed the maximum annual contribution allowed in § 223(b) due to an error, the employer may correct the error. In that case, at the employer's option, the employer may request that the financial institution return the excess amounts to the employer. Alternatively, if the employer does not recover the amounts, then the amounts must be included as gross income and wages on the employee's Form W-2 for the year during which the employer made contributions. If, however, amounts contributed are less than or equal to the maximum annual contribution allowed in § 223(b), the employer may not recoup any amount from the employee's HSA.

Q-25. If an employer contributes to the HSA of an employee who ceases to be an eligible individual during a year, can the employer recoup amounts that the employer contributed after the employee ceased to be an eligible individual?

A-25. No. Employers generally cannot recoup amounts from an HSA other than as discussed above in Q&A-23 and Q&A-24. See Notice 2004-50, Q&A-82.

Example. Employee N was an eligible individual on January 1, 2008. On April 1, 2008, Employee N is no longer an eligible individual because Employee N's spouse enrolled in a general purpose health FSA that covers all family members. Employee N first realizes that he is no longer eligible on July 17, 2008, at which time Employee N informs Employer O to cease HSA contributions.

Employer O's contributions into Employee N's HSA between April 1, 2008 and July 17, 2008 cannot be recouped by Employer O because Employee N has a nonforfeitable interest in his HSA. Employee N is responsible for determining if the contributions exceed the maximum annual contribution limit in § 223(b), and for withdrawing the excess contribution and the income attributable to the excess contribution and including both in gross income.

Q-26. Are employer contributions to the HSA of an employee's spouse (who is not an employee of this employer) ex-

cluded from the employee's gross income and wages?

A-26. No. The exclusion under § 106(d)(1) is limited to contributions by an employer to the HSA of an employee who is an eligible individual. Any contribution by an employer to the HSA of a non-employee (e.g., a spouse of an employee or any other individual), including salary reduction amounts made through a § 125 cafeteria plan, must be included in the gross income and wages of the employee.

IV. DISTRIBUTIONS

Q-27. May an HSA be administered through a debit card that restricts payments and reimbursements to health care?

A-27. Yes, if the funds in the HSA are otherwise readily available. For example, in addition to the restricted debit card, the HSA account beneficiary must also be able to access the funds other than by purchasing health care with the debit card, such as through online transfers, withdrawals from automatic teller machines or check writing. Employers must notify employees that other access to the funds is available. See also Notice 2004-50, Q&A-77 and Q&A-79.

Q-28. May an HSA account beneficiary authorize someone else to withdraw funds from his or her HSA?

A-28. Yes. Although an HSA is an individual account, an HSA account beneficiary can designate other individuals to withdraw funds pursuant to the procedures of the trustee or custodian of the HSA. Distributions are subject to tax if they are not used to pay for qualified medical expenses for the HSA account beneficiary, the account beneficiary's spouse, or dependents. See Notice 2004-2, Q&A-25. But see Q&A-34, Q&A-35 and Q&A-36 of this notice regarding prohibited transactions.

Q-29. If the account beneficiary has attained age 65, are Medicare Part D premiums qualified medical expenses?

A-29. Yes. If an account beneficiary has attained age 65, premiums for Medicare Part D for the account beneficiary, the account beneficiary's spouse, or the account beneficiary's dependents are qualified medical expenses. See also Notice 2004-2, Q&A-27, and Notice 2004-50, Q&A-4 and Q&A-45, regarding Medicare Parts A and B. See Q&A-6 of this no-

tice regarding eligibility of Medicare enrollees to contribute to an HSA.

Q-30. If the account beneficiary has not attained age 65, are Medicare premiums for coverage of an account beneficiary's spouse (who has attained age 65) qualified medical expenses?

A-30. No. If the account beneficiary has not attained age 65, Medicare premiums are generally not qualified medical expenses.

Q-31. Are premiums for continuation coverage required under Federal law for the spouse or dependent of an account beneficiary qualified medical expenses?

A-31. Yes. Although qualified medical expenses generally exclude payments for insurance, § 223(d)(2)(C)(i) provides an exception for the expense of coverage under a health plan during any period of continuation coverage.

Q-32. Are premiums for health coverage for a spouse or dependent during a period when the spouse or dependent is receiving unemployment compensation under any Federal or state law qualified medical expenses?

A-32. Yes. Although qualified medical expenses generally exclude payments for insurance, § 223(d)(2)(C)(iii) provides an exception for the expense of coverage under a health plan during a period in which an individual is receiving unemployment compensation under any Federal or state law.

Q-33. Do qualified medical expenses for HSA purposes include the § 213(d) medical expenses incurred by an account beneficiary's child who is claimed as a dependent by the account beneficiary's former spouse?

A-33. [RESERVED].

V. PROHIBITED TRANSACTIONS

Q-34. If an account beneficiary borrows funds from his or her HSA, is this a prohibited transaction under § 4975?

A-34. Yes. An HSA is a plan as defined in § 4975(e)(1)(E). An HSA account beneficiary is a disqualified person under § 4975(e)(2). A loan or extension of credit between a plan and a disqualified person is a prohibited transaction. Section 4975(c)(1)(B). Thus, any direct or indirect extension of credit between the account beneficiary and his or her HSA is a prohibited transaction.

Q-35. If a trustee of an HSA lends money to the HSA, is this a prohibited transaction under § 4975?

A-35. Yes. An HSA is a plan as defined in § 4975(e)(1)(E). An HSA trustee is a disqualified person under § 4975(e)(2). A loan or extension of credit between a plan and a disqualified person is a prohibited transaction. Section 4975(c)(1)(B). Thus, any direct or indirect extension of credit between the HSA trustee and the HSA is a prohibited transaction.

Example 1. Bank X is the trustee of an HSA. Bank X extends a line of credit to the HSA. The line of credit is a prohibited transaction under § 4975.

Example 2. Bank Y is the trustee of an HSA. The account beneficiary accesses the funds in the HSA through a debit card. In addition, Bank Y extends a line of credit to the account beneficiary, which is not secured by the account beneficiary's HSA, and amounts in the HSA cannot be used to repay the line of credit.

The line of credit is not a prohibited transaction.

Q-36. If an account beneficiary pledges his or her HSA as security for a loan, is this a prohibited transaction under § 4975?

A-36. Yes. An HSA is a plan as defined in § 4975(e)(1)(E). An HSA account beneficiary is a disqualified person under § 4975(e)(2). A loan or extension of credit between a plan and a disqualified person is a prohibited transaction. Section 4975(c)(1)(B). Thus, any direct or indirect extension of credit between the account beneficiary and his or her HSA is a prohibited transaction.

Example. Individual P is an account beneficiary of an HSA. Bank Z is the trustee of the HSA. Bank Z extends to Individual P a line of credit secured by the HSA.

The pledge securing the line of credit is a prohibited transaction under § 4975.

Q-37. What are the consequences if account beneficiaries or other disqualified persons enter into a prohibited transaction with an HSA?

A-37. Section 223(e)(2) provides that rules similar to the rules of §§ 408(e)(2) and (4) apply to HSAs. Therefore, account beneficiaries may not enter into "prohibited transactions" with an HSA (e.g., the account beneficiary may not sell, exchange, or lease property, borrow or lend money, pledge the HSA, furnish goods, services or facilities, transfer to or use by or for the benefit of himself/herself any assets of the HSA, etc.). If an account beneficiary engages in a prohibited transaction with his or her HSA the

sanction, in general, is disqualification of the account. Thus, the HSA stops being an HSA as of the first day of the taxable year of the prohibited transaction. The assets of the beneficiary's account are deemed distributed, and the appropriate taxes, including the 10 percent additional tax under § 223(f)(4) for distributions not used for qualified medical expenses, apply.

If the employer sponsoring the account (or other disqualified person) is the party engaging in a prohibited transaction, then the employer (or other party) is liable for the excise tax, but the account beneficiary is not.

VI. ESTABLISHING AN HSA

Q-38. When is an HSA established?

A-38. An HSA is an exempt trust established through a written governing instrument under state law. Section 223(d)(1). State trust law determines when an HSA is established. Most state trust laws require that for a trust to exist, an asset must be held in trust; thus, most state trust laws require that a trust must be funded to be established. Whether the account beneficiary's signature is required to establish the trust also depends on state law.

Q-39. May a trustee treat an HSA as established before the date of establishment determined under state law, such as the date when HDHP coverage began?

A-39. No. But see Q&A-40 and Q&A-41 of this notice concerning the establishment date for HSAs in connection with rollovers, or where a previous HSA was established.

Q-40. When is an HSA established if the funds in the HSA were rolled over or transferred from an Archer MSA or another HSA?

A-40. An HSA that is funded by amounts rolled over or transferred from an Archer MSA or another HSA is established as of the date the prior account was established. Qualified HSA distributions under § 106(e) or qualified HSA funding distributions under § 408(d)(9) do not affect the HSA establishment date. See also Notice 2004-2, Q&A-23.

Example. An account beneficiary established an Archer MSA on October 17, 2000. On May 13, 2004, the account beneficiary rolled the entire amount held in the Archer MSA into an HSA. On January 1, 2008, the account beneficiary has the HSA trustee make a

direct transfer of the entire HSA to an HSA with a new trustee.

The establishment date of the HSA with the new trustee is October 17, 2000.

Q-41. On what date is an HSA established if the account beneficiary had previously established an HSA?

A-41. If an account beneficiary establishes an HSA, and later establishes another HSA, any later HSA is deemed to be established when the first HSA was established if the account beneficiary has an HSA with a balance greater than zero at any time during the 18-month period ending on the date the later HSA is established.

Example 1. An account beneficiary established an HSA on March 1, 2007. On June 15, 2007, he withdrew all the funds from the HSA, resulting in a zero balance. On November 21, 2008, he established a second HSA.

Because the second HSA was established within 18 months of June 15, 2007, the second HSA is deemed to be established on March 1, 2007.

Example 2. The same facts as *Example 1*, except that the account beneficiary establishes a third HSA on January 1, 2009. On that date, the second HSA has a balance greater than zero.

The third HSA is deemed to be established on March 1, 2007.

VII. ADMINISTRATION

Q-42. How are HSA administration and maintenance fees withdrawn by the trustee from an HSA reported by the trustee?

A-42. HSA administration and maintenance fees withdrawn by the trustee are reflected on the Form 5498-SA in the fair market value of the HSA at the end of the taxable year. These fees are not reported as distributions from the HSA.

EFFECT ON OTHER DOCUMENTS

Notice 2004-2, 2004-1 C.B. 269, Notice 2004-50, 2004-2 C.B. 196, and Notice 2007-22, 2007-10 I.R.B. 670, are amplified.

DRAFTING INFORMATION

The principal author of this notice is Leslie R. Paul of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Ms. Paul at (202) 622-6080 (not a toll-free call).

Interim Guidance on the Application of § 457(f) to Certain Recurring Part-Year Compensation

Notice 2008-62

This notice describes a rule that the Treasury Department and the Internal Revenue Service (IRS) anticipate will be included in regulations to be proposed under § 457(f) of the Internal Revenue Code.

The regulations to be proposed are expected to address certain types of arrangements involving recurring part-year compensation, including common arrangements involving public school employees who provide services during a 10-month school year and elect to be paid ratably over 12 months. It is expected that the regulations would provide that if certain conditions described below are satisfied, § 457(f) would not apply to such arrangements. It is also expected that a conforming change will be proposed for regulations under § 409A, so that § 409A also will not apply to such arrangements if such conditions are met.

Section II of this notice describes the rule expected to be included in the proposed regulations. Taxpayers may immediately rely on the rule described in section II of this notice.

SECTION I. BACKGROUND

Section 131 of the Revenue Act of 1978, Public Law 95-600 (92 Stat. 2779), added § 457 to the Internal Revenue Code of 1954. On July 11, 2003, final regulations under § 457 (T.D. 9075, 2003-2 C.B. 608) were published in the **Federal Register** (68 FR 41230) (2003 § 457 regulations). The 2003 § 457 regulations provide guidance on deferred compensation plans of tax-exempt entities and state and local governments, including plans that are subject to § 457(f). Compensation deferred by participants under ineligible § 457(f) plans of tax-exempt entities and state and local governments, including public schools, is generally included in the participant's gross income for the first taxable year in which the compensation is not subject to a substantial risk of forfeiture.

In Notice 2007-62, 2007-32 I.R.B. 331, the Treasury Department and the IRS

announced their intention to issue guidance under § 457, including providing guidance on the definitions of a *bona fide* severance pay plan under § 457(e)(11) and a substantial risk of forfeiture under § 457(f)(1)(B). This guidance will also address other topics under § 457(f), including the particular types of arrangements that are subject to § 457(f).

Section 885 of the American Jobs Creation Act of 2004, Public Law 108-357 (118 Stat. 1418), added § 409A to the Internal Revenue Code. Section 409A generally provides that, unless certain requirements are met, 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.

On April 17, 2007, final regulations under § 409A were published in the **Federal Register** (T.D. 9321, 2007-19 I.R.B. 1123 [73 FR 19234]). The § 409A final regulations provide guidance regarding the definition of a nonqualified deferred compensation plan subject to § 409A and set forth the requirements to comply with the rules governing deferral elections and payment timing under § 409A. The final regulations are applicable for taxable years beginning on or after January 1, 2009. See Notice 2007-86, 2007-46 I.R.B. 990.

SECTION II. GUIDANCE REGARDING RECURRING PART-YEAR COMPENSATION

The Treasury Department and the IRS anticipate that the regulations to be proposed under § 457(f) will specify that an arrangement in which an employee or independent contractor receives recurring part-year compensation (as defined in §1.409A-2(a)(14)) does not provide for deferred compensation for purposes of § 457(f) if: (1) the arrangement does not defer payment of any of the recurring part-year compensation beyond the last day of the 13th month following the beginning of the service period and (2) does not defer from one taxable year to the next taxable year the payment of more than the applicable dollar amount under § 402(g)(1)(B) in effect for the calendar year in which the service period begins (\$15,500 for 2008).

In a typical case of a school teacher, the recurring part-year compensation consists of the compensation the teacher earns during a service period consisting of a school year comprising 9 or 10 months that begins in one calendar year and ends in the next calendar year. Under a common arrangement, the school system pays all of its teachers (or allows individual teachers to elect to be paid) based upon a 12-month payment schedule, so that some of the compensation that the teacher earns for working during one calendar year is paid in the next calendar year at or after the end of the school year. Under the anticipated rule in this situation, none of the compensation paid to a teacher would be deferred compensation if the amount the teacher earns during the first calendar year that is paid in the second calendar year does not exceed the dollar amount under § 402(g)(1)(B) applicable for the first calendar year (\$15,500 for 2008).

For example, assume a school district employee works during a school year that begins on August 1, 2008 and ends on May 31, 2009 (a 10-month school year). Assume further that the employee is paid over the 12-month period beginning August 1, 2008 (either because the school system pays over a 12-month period or because the employee may elect to be paid over the 12-month period and has made such an election). Under these facts and circumstances, the arrangement would not provide for deferred compensation for purposes of § 457(f) unless the employee earns more than \$186,000 for the school year. Since five months of the school year are in 2008 and five months are in 2009, an employee whose salary for the school year is \$186,000 earns \$93,000 in 2008 and \$93,000 in 2009. Under the 12-month payment schedule, the employee receives \$77,500 in 2008, and \$108,500 in 2009. Because the amount the employee earns during 2008 that is paid in 2009 (\$93,000 - \$77,500, or \$15,500) does not exceed the applicable dollar amount under § 402(g)(1)(B) for 2008 (\$15,500), the arrangement would not provide for deferred compensation for purposes of § 457(f).

Similarly, a school district employee working during a school year that begins on September 1, 2008 and ends on June 30, 2009 (a 10-month school year), that paid the employee over the 12 month period beginning September 1, 2008, would

not provide for deferred compensation for purposes of § 457(f) if the employee earns less than \$232,500 for the school year. Since four months of the school year are in 2008 and six months are in 2009, an employee whose salary for the school year is \$232,500 earns \$93,000 in 2008 and \$139,500 in 2009. Under the 12-month payment schedule, the employee receives \$77,500 in 2008 and \$155,000 in 2009. Because the amount the employee earns during 2008 that is paid in 2009 (\$93,000 - \$77,500, or \$15,500) does not exceed the applicable dollar amount under § 402(g)(1)(B) for 2008 (\$15,500), the arrangement would not provide for deferred compensation for purposes of § 457(f).

The Treasury Department and the IRS also anticipate that a change to the regulations under § 409A will be proposed, which would provide that the arrangement described in the first paragraph of section II of this notice is not a nonqualified deferred compensation plan for purposes of § 409A (including an arrangement that is not covered by § 457(f) because the service recipient is not an eligible employer under § 457(e)(1)). However, the proposed regulations are not expected to affect the application of any other Code provisions or federal tax doctrines that may affect the taxation of these arrangements.

The Treasury Department and the IRS anticipate that these rules should exclude from coverage under §§ 457(f) and 409A most arrangements for public school teachers and other school-year employees under which they are permitted to annualize school-year compensation (whether or not they are given individual elections).

SECTION III. EFFECTIVE DATE AND RELIANCE

Until further guidance is issued, taxpayers may rely on the rule described in section II of this notice for purposes of both §§ 457(f) and 409A beginning with the first taxable year that includes July 1, 2008.

SECTION IV. DRAFTING INFORMATION

The principal authors of this notice are Pamela R. Kinard and Stephen Tackney of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information

regarding this notice, contact Ms. Kinard at (202) 622-6060 regarding § 457(f) and Mr. Tackney at (202) 927-9639 regarding § 409A (not toll-free numbers).

26 CFR 301.7216-3: Disclosure or use permitted only with the taxpayer's consent. (Also: Sections 7216, 6713.)

Rev. Proc. 2008-35

SECTION 1. PURPOSE

This revenue procedure provides guidance to tax return preparers regarding the format and content of consents to disclose and consents to use tax return information with respect to taxpayers filing a return in the Form 1040 series, *e.g.*, Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ, under section 301.7216-3 of the Regulations on Procedure and Administration (26 CFR Part 301). This revenue procedure also provides specific requirements for electronic signatures when a taxpayer executes an electronic consent to the disclosure or use of the taxpayer's tax return information. This revenue procedure modifies and supersedes Revenue Procedure 2008-12, 2008-5 I.R.B. 368, to provide guidance pursuant to section 301.7216-3T(b)(4)(ii).

SECTION 2. BACKGROUND

.01 In general, section 7216(a) of the Internal Revenue Code imposes criminal penalties on tax return preparers who knowingly or recklessly make unauthorized disclosures or uses of information furnished in connection with the preparation of an income tax return. A violation of section 7216 is a misdemeanor, with a maximum penalty of up to one year imprisonment or a fine of not more than \$1,000, or both, together with the costs of prosecution. Section 7216(b) establishes exceptions to the general rule in section 7216(a) and also authorizes the Secretary to promulgate regulations prescribing additional permitted disclosures and uses.

.02 Section 6713(a) prescribes a related civil penalty for unauthorized disclosures or uses of information furnished in connection with the preparation of an income tax return. The penalty for violating section

6713 is \$250 for each disclosure or use, not to exceed a total of \$10,000 for a calendar year. Section 6713(b) provides that the exceptions in section 7216(b) also apply to section 6713.

.03 Section 301.7216-3 provides that, unless section 7216 or §301.7216-2 specifically permits the disclosure or use of tax return information, a tax return preparer may not disclose or use a taxpayer's tax return information prior to obtaining a consent from the taxpayer. Section 301.7216-3(a) provides that consent must be knowing and voluntary. Section 301.7216-3(a)(3)(i) prescribes the form and content requirements that all consents to disclose or use must include. Sections 301.7216-3(b) and 301.7216-3T(b) provide timing requirements and other limitations upon consents to disclose or use tax return information. Section 301.7216-3T(b)(4) provides a limitation upon consents to disclose a taxpayer's social security number to a tax return preparer located outside of the United States.

.04 Section 301.7216-3(a)(3)(ii) provides that the Secretary may, by publication in the Internal Revenue Bulletin, prescribe additional requirements for tax return preparers regarding the format and content of consents to disclose and consents to use tax return information with respect to taxpayers filing a return in the Form 1040 series, as well as the requirements for a valid signature on an electronic consent under section 7216. Section 301.7216-3T(b)(4)(ii) provides that the Secretary may, by publication in the Internal Revenue Bulletin, describe the requirements of an "adequate data protection safeguard" for purposes of removing the limitation upon consents to disclose a taxpayer's social security number to a tax return preparer located outside of the United States. This revenue procedure provides additional consent format and content requirements and defines an "adequate data protection safeguard."

SECTION 3. SCOPE

This revenue procedure applies to all tax return preparers, as defined in §301.7216-1(b)(2), who seek consent to disclose or use tax return information pursuant to §§301.7216-3 and 301.7216-3T with respect to taxpayers who file a return in the Form 1040 series, *e.g.*, Form 1040,

Form 1040NR, Form 1040A, or Form 1040EZ.

SECTION 4. FORM AND CONTENT OF A CONSENT TO DISCLOSE OR A CONSENT TO USE FORM 1040 TAX RETURN INFORMATION

.01 Separate Written Document. Except as provided by §301.7216-3(c)(1) (special rule for multiple disclosures or uses within a single consent form), and described in section 4.05, below, a taxpayer's consent to each separate disclosure or use of tax return information must be contained on a separate written document, which can be furnished on paper or electronically. For example, the separate written document may be provided as an attachment to an engagement letter furnished to the taxpayer.

.02 A consent furnished to the taxpayer on paper must be provided on one or more sheets of 8½ inch by 11 inch or larger paper. All of the text on each sheet of paper must pertain solely to the disclosure or use the consent authorizes, and the sheet or sheets, together, must contain all the elements described in section 4.04 and, if applicable, comply with section 4.06. All of the text on each sheet of paper must also be in at least 12-point type (no more than 12 characters per inch).

.03 An electronic consent must be provided on one or more computer screens. All of the text placed by the preparer on each screen must pertain solely to the disclosure or use of tax return information authorized by the consent, except for computer navigation tools. The text of the consent must meet the following specifications: the size of the text must be at least the same size as, or larger than, the normal or standard body text used by the website or software package for direction, communications or instructions and there must be sufficient contrast between the text and background colors. In addition, each screen or, together, the screens must—

(1) contain all the elements described in section 4.04 and, if applicable, comply with section 4.06,

(2) be able to be signed as required by section 5 and dated by the taxpayer,

(3) be able to be formatted in a readable and printer-friendly manner.

.04 Requirements for Every Consent. In addition to the requirements provided in

§301.7216-3, consents to disclose or use Form 1040 series tax return information must satisfy the following requirements—

(1) Mandatory statements in the consent. The following statements must be included in a consent under the circumstances described below, except that a tax return preparer may substitute the preparer's name where "we" or "our" is used.

(a) Consent to disclose tax return information in context other than tax preparation or auxiliary services. Unless a tax return preparer is obtaining a taxpayer's consent to disclose the taxpayer's tax return information to another tax return preparer for the purpose of performing services that assist in the preparation of, or provide auxiliary services (as defined in §301.7216-1(b)(2)(ii)) in connection with the preparation of, the tax return of the taxpayer, any consent to disclose tax return information must contain the following statements in the following sequence:

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot disclose, without your consent, your tax return information to third parties for purposes other than the preparation and filing of your tax return. If you consent to the disclosure of your tax return information, Federal law may not protect your tax return information from further use or distribution.

You are not required to complete this form. If we obtain your signature on this form by conditioning our services on your consent, your consent will not be valid. If you agree to the disclosure of your tax return information, your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

(b) Consent to disclose tax return information in tax preparation or auxiliary services context. If a tax return preparer is otherwise required to obtain a taxpayer's consent to disclose the taxpayer's tax return information to another tax return preparer for the purpose of performing services that assist in the preparation of, or provide auxiliary services (as defined in §301.7216-1(b)(2)(ii)) in connection with the preparation of, the tax return of the taxpayer, any consent to disclose tax return information must contain the following statements in the following sequence:

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot disclose, without your consent, your tax return information to third parties for purposes other than the preparation and filing of your tax return and, in certain limited circumstances, for purposes involving tax return preparation. If you consent to the disclosure of your tax return information, Federal law may not protect your tax return information from further use or distribution.

You are not required to complete this form. Because our ability to disclose your tax return information to another tax return preparer affects the service that we provide to you and its cost, we may decline to provide you with service or change the terms of service that we provide to you if you do not sign this form. If you agree to the disclosure of your tax return information, your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

(c) Consent to use. All consents to use tax return information must contain the following statements in the following sequence:

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot use, without your consent, your tax return information for purposes other than the preparation and filing of your tax return.

You are not required to complete this form. If we obtain your signature on this form by conditioning our services on your consent, your consent will not be valid. Your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

(d) All consents must contain the following statement:

If you believe your tax return information has been disclosed or used improperly in a manner unauthorized by law or without your permission, you may contact the Treasury Inspector General for Tax Administration (TIGTA) by telephone at 1-800-366-4484, or by email at complaints@tigta.treas.gov.

(e) Mandatory statement in any consent to disclose tax return information to a tax return preparer located outside of

the United States. If a tax return preparer to whom the tax return information is to be disclosed is located outside of the United States, the taxpayer's consent under §301.7216-3 prior to any disclosure is required. See §§ 301.7216-3(a)(3)(i)(D), 301.7216-2(c) and (d).

(i) If the tax return information to be disclosed does not include the taxpayer's social security number, or if the social security number is fully masked or otherwise redacted, consents for disclosure of tax return information to a tax return preparer outside of the United States must contain the following statement:

This consent to disclose may result in your tax return information being disclosed to a tax return preparer located outside the United States.

(ii) If the tax return information to be disclosed includes the taxpayer's social security number, or if the social security number is not fully masked or otherwise redacted, pursuant to the limitations of §301.7216-3T(b)(4) and section 4.07, consents for disclosure of the taxpayer's tax return information including a social security number to a tax return preparer outside of the United States must contain the following statement:

This consent to disclose may result in your tax return information being disclosed to a tax return preparer located outside the United States, *including your personally identifiable information such as your Social Security Number ("SSN")*. Both the tax return preparer in the United States that will disclose your SSN and the tax return preparer located outside the United States which will receive your SSN maintain an adequate data protection safeguard (as required by the regulations under 26 U.S.C. Section 7216) to protect privacy and prevent unauthorized access of tax return information. If you consent to the disclosure of your tax return information, Federal agencies may not be able to enforce U.S. laws that protect the privacy of your tax return information against a tax return preparer located outside of the U.S. to which the information is disclosed.

(2) Affirmative consent. All consents must require the taxpayer's affirmative consent to a tax return preparer's disclosure or use of tax return information. A consent that requires the taxpayer to re-

move or “deselect” disclosures or uses that the taxpayer does not wish to be made, *i.e.*, an “opt-out” consent, is not permitted.

(3) Signature. All consents to disclose or use tax return information must be signed by the taxpayer.

(a) For consents on paper, the taxpayer’s consent to a disclosure or use must contain the taxpayer’s signature.

(b) For electronic consents, a taxpayer must sign the consent by any method prescribed in section 5, below.

(4) Incomplete consents. A tax return preparer shall not present a consent form with blank spaces related to the purpose of the consent to the taxpayer for signature.

.05 Special rule for multiple disclosures within a single consent form or multiple uses within a single consent form. Section 301.7216–3(c)(1) provides that a taxpayer may consent to multiple uses within the same written document, or multiple disclosures within the same written document. Multiple disclosure consents and multiple use consents must provide the taxpayer with the opportunity, within the separate written document, to affirmatively select each separate disclosure or use. Further, the taxpayer must be provided the information in section 4.04 for each separate disclosure or use. The mandatory statements required in section 4.04(1) relating to use or disclosure need only be stated once in a multiple disclosure or multiple use consent.

.06 Disclosure of entire return. If, under §301.7216–3(c)(2), a consent authorizes the disclosure of a copy of the taxpayer’s entire tax return or all information contained within a return, the consent must provide that the taxpayer has the ability to request a more limited disclosure of tax return information as the taxpayer may direct.

.07 Adequate data protection safeguard. Pursuant to §301.7216–3T(b)(4), a tax return preparer located within the United States, including any territory or possession of the United States, may disclose a taxpayer’s SSN to a tax return preparer located outside of the United States or any territory or possession of the United States with the taxpayer’s consent only when both the tax return preparer located within the United States and the tax return preparer located outside of the United States

maintain an adequate data protection safeguard at the time the taxpayer’s consent is obtained and when making the disclosure. An “adequate data protection safeguard” is a security program, policy and practice that has been approved by management and implemented that includes administrative, technical and physical safeguards to protect tax return information from misuse or unauthorized access or disclosure and that meets or conforms to one of the following privacy or data security frameworks:

(1) The United States Department of Commerce “safe harbor” framework for data protection (or successor program);

(2) A foreign law data protection safeguard that includes a security component, *e.g.*, the European Commission’s Directive on Data Protection;

(3) A framework that complies with the requirements of a financial or similar industry-specific standard that is generally accepted as best practices for technology and security related to that industry, *e.g.*, the BITS (Financial Services Roundtable) Financial Institution Shared Assessment Program;

(4) The requirements of the AICPA/CICA Privacy Framework;

(5) The requirements of the most recent version of IRS Publication 1075, *Tax Information Security Guidelines for Federal, State and Local Agencies and Entities*; or

(6) Any other data security framework that provides the same level of privacy protection as contemplated by one or more of the frameworks described in (1) through (5).

SECTION 5. ELECTRONIC SIGNATURES

.01 If a taxpayer furnishes consent to disclose or use tax return information electronically, the taxpayer must furnish the tax return preparer with an electronic signature that will verify that the taxpayer consented to the disclosure or use. The regulations under §301.7216–3(a) require that the consent be knowing and voluntary. Therefore, for an electronic consent to be valid, it must be furnished in a manner that ensures affirmative, knowing consent to each disclosure or use.

.02 A tax return preparer seeking to obtain a taxpayer’s consent to the disclosure or use of tax return information electronically must obtain the taxpayer’s signature on the consent in one of the following manners:

(a) Assign a personal identification number (PIN) that is at least 5 characters long to the taxpayer. To consent to the disclosure or use of the taxpayer’s tax return information, the taxpayer may type in the pre-assigned PIN as the taxpayer’s signature authorizing the disclosure or use. A PIN may not be automatically furnished by the software so that the taxpayer only has to click a button for consent to be furnished. The taxpayer must affirmatively enter the PIN for the electronic signature to be valid;

(b) Have the taxpayer type in the taxpayer’s name and then hit “enter” to authorize the consent. The software must not automatically furnish the taxpayer’s name so that the taxpayer only has to click a button to consent. The taxpayer must affirmatively type the taxpayer’s name for the electronic consent to be valid; or

(c) Any other manner in which the taxpayer affirmatively enters 5 or more characters that are unique to that taxpayer that are used by the tax return preparer to verify the taxpayer’s identity. For example, entry of a response to a question regarding a shared secret could be the type of information by which the taxpayer authorizes disclosure or use of tax return information.

SECTION 6. EXAMPLES

.01 The application of this revenue procedure is illustrated by the following examples:

(1) *Example 1.* Preparer P offers tax preparation services over the Internet. P wishes to use information the taxpayer provides during tax preparation of the taxpayer’s Form 1040 to generate targeted banner advertisements (*i.e.*, electronic advertisements appearing on the computer screen based on the taxpayer’s tax return information). In the course of advertising services and products, P wishes also to disclose to other third parties information that the taxpayer provides.

(a) P posts, in pertinent part, the following consent on the computer screen for taxpayers to indicate approval. If a taxpayer does not indicate approval, the tax return preparation software does not permit the taxpayer to use the software.

PRIVACY STATEMENT

Your privacy is very important to us at P. We are providing this statement to inform you about the types of information we collect from you, and how we may disclose or use that information in connection with the services we provide. This Privacy Statement describes the privacy practices of our company as required by applicable laws. . . . During the course of providing our services to you, we may offer you various other services that may be of interest to you based on our determination of your needs through analysis of your data. Your use of the services we offer constitutes a consent to our disclosure of tax information to the service providers. If at any time you wish to limit your receipt of promotional offers based upon information you provide, you may call us at the following. . . .

(b) Beneath this Privacy Statement, the following acknowledgment line appears next to two button images stating "yes" and "no:"

"I have read the Privacy Statement and agree to it by clicking here."

(c) If the taxpayer clicks "no," a message appears on the screen informing the taxpayer that tax return preparation will not proceed without the taxpayer agreeing to the company's Privacy Statement.

(d) P has failed to comply with the requirements of §301.7216-3 and this revenue procedure. P has attempted to obtain consent from the taxpayer by making the use of the program contingent on the taxpayer's consent to P's disclosure and use of the taxpayer's tax return information for purposes other than tax preparation (e.g., for use in displaying targeted banner advertisement). Thus, the consent is not voluntary, as required by §301.7216-3(a). P has also failed to identify the tax return information that it will disclose or use, as required by §301.7216-3(a)(3)(C), to identify the purposes of the disclosures and uses, as required by section §301.7216-3(a)(3)(B), and to the extent that P intends to disclose the entire return based on the consent, P's consent has not provided that the taxpayer has the ability to request a more limited disclosure of tax return information as the taxpayer may direct as required by section 4.06. The single document attempts to have the taxpayer consent to both disclosures and uses, in violation of section 4.05. P has not used the mandatory statements required by section 4.04(1). The consent is not signed by the taxpayer because P has not provided a means for the taxpayer to electronically sign the consent in a form authorized by section 5. Finally, the consent is not dated as required by section 4.03(2).

(2) *Example 2.* Preparer Q offers tax preparation services over the Internet and wishes to use targeted

banner advertisements during tax return preparation. Q contracts with Bank A regarding the advertisement of Individual Retirement Accounts (IRAs). Preparer Q displays advertisements to the taxpayer only if the taxpayer's tax return information indicates that the services are relevant to the taxpayer (i.e., they are targeted banner advertisements). A taxpayer using Q's software must enter a password to begin the process of preparing a return.

(a) Before the taxpayer starts providing tax return information, the following screen appears on Q's tax preparation program.

CONSENT TO USE OF TAX RETURN INFORMATION

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot use, without your consent, your tax return information for purposes other than the preparation and filing of your tax return.

You are not required to complete this form. If we obtain your signature on this form by conditioning our services on your consent, your consent will not be valid. Your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

For your convenience, Q has entered into arrangements with certain banks regarding the provision of Individual Retirement Accounts (IRAs). To determine whether this service may be of interest to you, Q will need to use your tax return information.

If you would like Q to use your tax return information to determine whether this service is relevant to you while we are preparing your return, please check the corresponding box if you are interested, provide the information requested below, and sign and date this consent to the use of your tax return information.

I, [INSERT NAME] authorize Q to use the information I provide to Q during the preparation of my tax return for 2006 to determine whether to offer me an opportunity to invest in an IRA.

Signature: [INSERT SIGNATURE AS PRESCRIBED UNDER SECTION 5]

Date: [INSERT DATE]

If you believe your tax return information has been disclosed or used improperly in a manner unauthorized by law or without your permission, you may contact the Treasury Inspector General for Tax Administration (TIGTA) by telephone at 1-800-366-4484, or by email at complaints@tigta.treas.gov.

(b) If the taxpayer selects the consent above, the taxpayer is directed to print the screen. Later, after the taxpayer has entered data to prepare his or her 2006 tax return, the following screen is displayed:

CONSENT TO DISCLOSURE OF TAX RETURN INFORMATION

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot disclose, without your consent, your tax return information to third parties for purposes other than the preparation and filing of your tax return. If you consent to the disclosure of your tax return information, Federal law may not protect your tax return information from further use or distribution.

You are not required to complete this form. If we obtain your signature on this form by conditioning our services on your consent, your consent will not be valid. If you agree to the disclosure of your tax return information, your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

You have indicated that you are interested in obtaining information on IRAs. To provide you with this information, Q must forward your tax return information, as indicated below, to the bank that provides this service.

If you would like Q to disclose your tax return information to the bank providing this service, please check the corresponding box for the service in which you are interested, provide the information requested below, and sign and date your consent to the disclosure of your tax return information.

I, [INSERT NAME], authorize Q to disclose to Bank A that portion of my tax return information for 2006 that is necessary for Bank A to contact me and provide information on obtaining an IRA or altering my contribution to an IRA for 2006.

Signature: [INSERT SIGNATURE AS PRESCRIBED UNDER SECTION 5]

Date: [INSERT DATE]

If you believe your tax return information has been disclosed or used improperly in a manner unauthorized by law or without your permission, you may contact the Treasury Inspector General for Tax Administration (TIGTA) by telephone at 1-800-366-4484, or by email at complaints@tigta.treas.gov.

If the taxpayer consents to the disclosure of the tax return information using the screen above, the taxpayer is directed to print the screen. Q will then transmit only that portion of the taxpayer's tax return information for 2006 that is necessary for the bank authorized in the consent, Bank A, to provide the service.

(c) These two consent documents, above, satisfy the requirements of §301.7216-3(c) and this revenue procedure for the disclosure or use of the information provided therein for the specific purposes stated.

(3) *Example 3.* Large corporation C employs 200 expatriated employees who work in Belgium. Preparer R, located in the United States, prepares individual income tax returns for C's expatriated workers pursuant to a corporate plan for executive tax return preparation. Preparer R is affiliated with Preparer F, located in Belgium. Pursuant to the corporate plan for executive tax return preparation, Preparer R plans to provide the expatriated employees' tax return information, including the expatriated employees' SSNs, located on Preparer R's U.S. based data servers to Preparer F who then plans to meet with the expatriated employees to prepare those employees' 2008 individual income tax returns. Preparer R obtains information electronically from various sources in anticipation of providing the information to Preparer F. Preparer R developed, adopted and incorporated into its operations a data privacy program which meets the requirements of the AICPA/CICA Privacy Framework. Preparer F also developed, adopted and incorporated into its operations a data privacy program and Preparer F's data privacy program is subject to the European Commission's Directive on Data Protection. The data privacy programs adopted by Preparer R and Preparer F are in operation at the time all consents to disclose are obtained by Preparer R and disclosures are made by Preparer R to Preparer F.

(a) Before transmitting or sending any expatriated employee's SSN to Preparer F, Preparer R provides the expatriated employee (taxpayer) with the following document.

CONSENT TO DISCLOSURE OF TAX RETURN INFORMATION

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot disclose, without your consent, your tax return information to third parties for purposes other than the preparation and filing of your tax return and, in certain limited circumstances, for purposes involving tax return preparation. If you consent to the disclosure of your tax return information, Federal law may not protect your tax return information from further use or distribution.

You are not required to complete this form. Because our ability to disclose your tax return information to another tax return preparer affects the service that we provide to you and its cost, we may decline to provide you with service or change the terms of service that we provide to you if you do not sign this form. If you agree to the disclosure of your tax return information, your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

This consent to disclose may result in your tax return information being disclosed to a tax return preparer located outside the United States, *including your personally identifiable information such as your Social Security Number ("SSN")*. Both the tax return preparer in the United States that will disclose your SSN and the tax return preparer located outside the United States which will receive your SSN maintain an adequate data protection safeguard (as required by the regulations under 26 U.S.C. Section 7216) to protect privacy and prevent unauthorized access of tax return information. If you consent to the disclosure of your tax return information, Federal agencies may not be able to enforce U.S. laws that protect the privacy of your tax return information against a tax return preparer located outside of the U.S. to which the information is disclosed.

If you agree to allow Preparer R to disclose your tax return information, including your SSN, to Preparer F for purposes of providing assistance in the preparation of your 2008 individual income tax return, please check the box below, provide the information requested below, and sign and date your consent to the disclosure of your tax return information.

I, [INSERT NAME], authorize Preparer R to disclose to Preparer F my tax return information including my SSN to allow Preparer F to assist in the preparation of my 2008 individual income tax return.

Signature:

Date: [INSERT DATE]

If you believe your tax return information has been disclosed or used improperly in a manner unauthorized by law or without your permission, you may contact the Treasury Inspector General for Tax Administration (TIGTA) by telephone at 1-800-366-4484, or by email at complaints@tigta.treas.gov.

The taxpayer provides consent by checking the box and signing and dating the consent form. Preparer R then provides a copy of the signed and dated consent form to the taxpayer, and then transmits the taxpayer's tax return information to Preparer F for processing of taxpayer's 2008 individual income tax return.

(b) The consent above satisfies the requirements of §§ 301.7216-3, 301.7216-3T and this revenue procedure for the disclosure of the information provided therein for the specific purpose stated.

SECTION 7. EFFECT ON OTHER DOCUMENTS

.01 Rev. Proc. 2008-12, 2008-5 I.R.B. 368, is modified and superseded.

SECTION 8. EFFECTIVE DATE

This revenue procedure is effective on January 1, 2009.

SECTION 9. DRAFTING INFORMATION

The principal author of this revenue procedure is Lawrence Mack of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue procedure, contact

Lawrence Mack at (202) 622-4940 (not a toll-free call).

26 CFR 601.601: Rules and regulations.
(Also Part I, §§ 103; 148; 1.148-3, 1.148-13T.)

Rev. Proc. 2008-37

SECTION 1. PURPOSE

In general, this revenue procedure provides guidance to issuers of tax-exempt bonds regarding the terms and procedures for claims for recovery of overpayments under § 1.148-3(i) of the Income Tax Regulations of amounts paid to the United States with respect to the arbitrage rebate requirement under § 148(f) of the Internal Revenue Code, the penalty in lieu of rebate provisions under § 148(f)(4)(C)(vii) and (viii), or the yield reduction payment provision under § 1.148-5(c) for purposes of the arbitrage investment restrictions generally under § 148. This revenue procedure also establishes a deadline for claims for these recoveries of overpayments which requires that issuers file these claims by no later than the date that is two years after the final computation date with respect to the applicable issue of bonds under § 1.148-3(e)(2), or two years from July 1, 2008, for an issue of bonds whose final computation date is on or before June 24, 2008. Further, this revenue procedure provides that claims for recovery of overpayments of rebate or penalty in lieu of rebate with respect to bonds that are subject to § 1.148-13T of the temporary Income Tax Regulations published in the Federal Register on May 18, 1992 (T.D. 8418, 1992-1 C.B. 29 [57 Fed. Reg. 20971]) (the *1992 regulations*) will be treated in the same manner as claims for recovery of overpayments made under § 1.148-3(i).

SECTION 2. BACKGROUND

.01 Under § 103(a) and (b)(2), the exclusion from gross income of interest on any State or local bond does not apply to interest on an arbitrage bond within the meaning of § 148.

.02 Section 148(f)(1) generally provides that a bond that is part of an issue shall be treated as an arbitrage bond unless the issuer pays to the United States the arbitrage rebate amounts described in

§ 148(f)(2) for the issue (*rebate*) in accordance with § 148(f)(3).

.03 Section 148(f)(3) provides, in part, that, except to the extent provided by the Secretary, rebate must be paid in installments that are made at least once every five years. The last installment must be made no later than 60 days after the day on which the last bond of the issue is discharged.

.04 Sections 148(f)(4)(C)(vii) and (viii) permit issuers of certain construction issues to elect to pay a penalty in lieu of rebate (*penalty*) in the manner and amount described in § 148(f)(4)(C)(vii) and (viii).

.05 Section 1.148-5(c)(1) permits issuers to pay yield reduction payments that may be taken into account in determining the yield on an issue for arbitrage purposes under § 148 (*yield reduction*) in the circumstances and manner described in § 1.148-5(c).

.06 Section 1.148-13T of the 1992 regulations provides rules for recovering an overpayment of rebate or penalty in lieu of rebate with respect to certain bonds issued before July 1, 1993. Under § 1.148-13T(a) and (c)(1) of the 1992 regulations, an issuer may recover an overpayment of rebate or penalty to the extent that recovery on the date requested would not result in an additional rebate amount as of the date requested if the issuer proves to the satisfaction of the Commissioner that the overpayment occurred and was paid as a result of a mistake.

.07 Section 1.148-3(i)(1) provides that, in general, an issuer may recover an overpayment of rebate by establishing to the satisfaction of the Commissioner that the overpayment occurred. An overpayment is the excess of the amount paid over the sum of the “rebate amount” (as defined in § 1.148-3(b)), as of the most recent “computation date” (as defined in § 1.148-3(e)) and all amounts that are otherwise required to be paid under § 148 as of the date the recovery is requested.

.08 In general, overpayments of penalty and yield reduction are treated in the same manner as overpayments of rebate. See generally §§ 1.148-3(i)(1), 1.148-7(k)(3), and 1.148-5(c)(1) and (2).

.09 In Rev. Proc. 92-83, 1992-2 C.B. 487, the Internal Revenue Service (the *Service*) sets forth procedures for claims for recovery of overpayments of rebate.

.10 In Announcement 2001-115, 2001-2 C.B. 539, the Service announced

that Form 8038-R, *Request for Recovery of Overpayments Under Arbitrage Rebate Provisions*, replaces the procedures set forth in Rev. Proc. 92-83.

.11 Under 26 U.S.C. § 7422, in general, a civil action may not be commenced against the United States to recover any internal revenue tax, any applicable penalty or “any sum alleged to have been excessive or in any manner wrongly collected” until a claim for refund has been duly filed according to the provisions of law in that regard. The Service has determined that this provision applies to claims with respect to overpayments of rebate, penalty, and yield reduction because the amount of any such overpayment is covered within the “any sum” language of § 7422. *Cf. United States v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511 (2008).

SECTION 3. PROCEDURE FOR FILING CLAIMS FOR RECOVERY OF OVERPAYMENT OF REBATE, PENALTY, AND YIELD REDUCTION

.01 *Form 8038-R*. This section sets forth terms and procedures for filing claims for recovery of an overpayment of rebate, penalty, or yield reduction with respect to an issue (an *overpayment amount*). In order to receive any recovery of an overpayment amount, an issuer must duly file a claim for recovery of an overpayment amount (a *refund claim*) on the then-applicable form (*form*) and at the then-applicable place of filing, as announced by the Service from time to time. Presently, a refund claim shall be made by completing Form 8038-R and filing the form and any attachments thereto with the Internal Revenue Service, Ogden Submission Processing Center, Ogden, Utah, 84201 (*Ogden Center*).

.02 *Filing Deadline for Refund Claims on Overpayment Amounts*. Except as provided in section 6.02, the form for making a refund claim for an overpayment amount must be filed by an issuer no later than the date that is two years after the final computation date for the applicable issue of bonds under § 1.148-3(e)(2).

.03 *Processing a Refund Claim*. This section 3.03 describes the present procedures that the Service will employ in processing refund claims on overpayment amounts. These procedures may be refined or revised as necessary, without

affecting the issuer's responsibilities under this revenue procedure, by publication in the Internal Revenue Manual.

(1) The Ogden Center will determine whether the issuer has satisfied the following initial processing requirements: (i) that the form has been completed according to the instructions for the form and includes the required attachments; (ii) that the issuer has previously submitted rebate, penalty, or yield reduction payments accompanied by one or more Forms 8038-T (*Arbitrage Rebate, Yield Reduction and Penalty in Lieu of Arbitrage Rebate*) with respect to the issue in question; and (iii) the amount previously submitted as rebate, penalty, or yield reduction payments is greater than or equal to the overpayment amounts stated in the refund claim. If the initial processing requirements are satisfied, the Ogden Center will promptly forward a copy of the refund claim to the Service's Office of Tax Exempt Bonds, Compliance and Program Management (*TEB CPM*) for further processing. If the Ogden Center concludes that the initial processing requirements are not satisfied, the Ogden Center will notify the issuer by telephone or letter (the *Ogden Notification*) describing any requirements that have not been satisfied. If the issuer fails to file a supplement satisfying the initial processing requirements within 45 days starting on the date of the Ogden Notification, the Ogden Center will forward the refund claim to TEB CPM for issuance of a Refund Claim Rejection letter. Any refiling must be within the period for filing the form in section 3.02 of this procedure.

(2) TEB CPM will review the processing requirements and determine whether an overpayment occurred and the amount of the overpayment that an issuer may recover as follows:

(a) *Refund Claim Approval.* If TEB CPM determines that the correct amount of overpayment is equal to or greater than the overpayment amounts on the refund claim, TEB CPM will notify the issuer in writing of the approval and will authorize a refund for the entirety of the requested overpayment amounts.

(b) *Refund Claim Rejection.* TEB CPM may reject a refund claim based on an issuer's failure to follow the procedures for refund claims set forth in section 3.03(1) of this revenue procedure or an issuer's fail-

ure to provide sufficient information to enable TEB CPM to determine that an overpayment occurred. The issuer may resubmit a refund claim in compliance with the initial processing requirements provided that any such resubmission is made by the filing deadlines set forth in sections 3.02 and 6.02 of this revenue procedure. A refund claim that is rejected on the basis of a procedural deficiency or incomplete information is not a Refund Claim Denial under section 3.03(2)(c) of this revenue procedure.

(c) *Refund Claim Denial.* Excluding rejections of refund claims for procedural deficiencies or incomplete information, as described in section 3.03(2)(b) of this revenue procedure, TEB CPM may deny a refund claim, in full or in part, on the following grounds: (i) the correct amount of overpayment is less than the requested overpayment amounts, or (ii) no overpayment occurred. If TEB CPM makes a preliminary determination that a refund claim should be denied, TEB CPM will notify the issuer in writing that it may submit additional information to support the refund claim or participate in a conference or both. Any additional information must be submitted within 21 days of the later of either the notification to allow additional information in support of the refund claim or the conference. If the issuer fails to submit additional information within the 21-day period to support the refund claim to the satisfaction of TEB CPM, or TEB CPM still disagrees that an overpayment occurred, TEB CPM will issue, by certified or registered mail, a formal letter to the issuer stating that the refund claim is denied (a *Refund Claim Denial*), subject only to the issuer's appeal right, as described in section 3.04 of this revenue procedure. The Refund Claim Denial letter will explain the reasons for the determination to deny the refund claim and inform the issuer of its right to request from the Office of Appeals an administrative appeal of the denial pursuant to Revenue Procedure 2006-40, 2006-2 C.B. 694, as subsequently amended, supplemented, or superseded. If an appeal is not requested within 30 days of the date of the Refund Claim Denial letter, then the Refund Claim Denial becomes final, as of the date of issuance of the Refund Claim Denial letter

by certified or registered mail, and the issuer may not refile the refund claim thereafter.

.04 Appeals. An issuer is entitled to appeal a Refund Claim Denial to the Office of Appeals pursuant to section 3.01 of Rev. Proc. 2006-40, as subsequently amended, supplemented, or superseded.

SECTION 4. EFFECT ON OTHER DOCUMENTS

This revenue procedure obsoletes Rev. Proc. 92-83.

SECTION 5. AMENDMENT TO REGULATIONS

The Service and the Department of the Treasury expect to issue regulations under § 148 and § 1.148-3(i) to provide that a claim for recovery of an overpayment of rebate, penalty, or yield reduction must be filed with the Commissioner by no later than two years after the final computation date of the issue of bonds to which the refund claim relates.

SECTION 6. EFFECTIVE DATE

.01 *In General.* Except as provided in Section 6.02, this revenue procedure applies to refund claims arising from an issue of bonds for which the final computation date is after June 24, 2008.

.02 *Transition Rule.* For refund claims arising from an issue of bonds for which the final computation date is on or before June 24, 2008 the two year period in section 3.02 begins on July 1, 2008.

SECTION 7. PAPERWORK REDUCTION ACT

The collection of information contained in section 3 of this revenue procedure has been previously reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545-1750.

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.

SECTION 8. DRAFTING INFORMATION

The principal authors of the revenue procedure are Christopher C. Woodin, Tax Exempt Bonds, Compliance and Program Management, and Timothy L. Jones, Office of Chief Counsel (Financial Institutions and Products), Internal Revenue Service. For further information regarding this revenue procedure, contact Mr. Woodin at 202–283–9780 or Mr. Jones at 202–622–3980 (not toll-free numbers).

26 CFR 301.7121–1: Closing agreements.
(Also Part I, §§ 7702, 7702A.)

Rev. Proc. 2008–38

SECTION 1. PURPOSE

This revenue procedure provides a procedure by which an issuer of a life insurance contract may remedy a failure to account for charges for qualified additional benefits (QABs) under the expense charge rule of § 7702(c)(3)(B)(ii) of the Internal Revenue Code. Rev. Rul. 2005–6, 2005–1 C.B. 471, is amplified.

SECTION 2. BACKGROUND

.01 Definition of a life insurance contract.

(1) Section 7702(a) provides that, for a contract to qualify as a life insurance contract for Federal income tax purposes, the contract must be a life insurance contract under the applicable law and must either—

(a) satisfy the cash value accumulation test of § 7702(b), or

(b) both meet the guideline premium requirements of § 7702(c) and fall within the cash value corridor of § 7702(d).

(2) A contract meets the cash value accumulation test of § 7702(b) if, by the terms of the contract, the cash surrender value of the contract may not at any time exceed the net single premium that would have to be paid at that time to fund future benefits under the contract.

(3) A contract meets the guideline premium requirements of § 7702(c) if the sum of the premiums paid under the contract does not at any time exceed the guideline premium limitation as of that time. The

guideline premium limitation as of any date is the greater of the guideline single premium, or the sum of the guideline level premiums to that date. The guideline single premium is the premium that would be required on the date the contract is issued to fund the future benefits under the contract.

(4) A contract falls within the cash value corridor of § 7702(d) if the death benefit under the contract at any time is not less than the applicable percentage of the cash surrender value, based on the table set forth in § 7702(d)(2).

(5) Section 7702 is effective for contracts issued after December 31, 1984, in tax years ending after that date.

.02 Definition of a modified endowment contract (MEC).

(1) Section 7702A(a) provides that a life insurance contract is a MEC if the contract—

(a) is entered into on or after June 21, 1988, and fails to meet the 7-pay test of § 7702A(b), or

(b) is received in exchange for a contract described in paragraph (a) of this section 2.02(1).

(2) A contract fails to meet the 7-pay test if the accumulated amount paid under the contract at any time during the first 7 contract years exceeds the sum of the net level premiums that would have to be paid on or before such time if the contract were to provide for paid-up future benefits after the payment of 7 level annual premiums.

(3) Section 72(e)(12) provides that, for purposes of determining amounts includible in gross income, all MECs issued by the same company to the same contract holder during any calendar year are treated as one MEC.

.03 Accounting for charges for QABs. Section 7702(f)(5) identifies five categories of benefits as QABs: guaranteed insurability; accidental death or disability benefit; family term coverage; disability waiver benefit; or other benefits prescribed under regulations. These benefits are not treated as future benefits under the contract, but charges for the benefits are treated as future benefits. For purposes of the cash value accumulation test of § 7702(b), § 7702(b)(2)(B) requires that charges for QABs be accounted for using the expense charge rule of § 7702(c)(3)(B)(ii), rather than the mortality charge rule of § 7702(c)(3)(B)(i).

Section 7702A(c)(1) requires that the same rule be used for purposes of the 7-pay test as well. Although § 7702 is silent on the treatment of charges for QABs for purposes of applying the guideline premium requirements, Rev. Rul. 2005–6 concludes that charges for such benefits are to be taken into account under the expense charge rule of § 7702(c)(3)(B)(ii) for that purpose as well.

.04 Authority to enter into closing agreements. Under § 7121, the Secretary is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any period. Such agreement is generally final and conclusive, except upon a showing of fraud, malfeasance, or misrepresentation of a material fact.

.05 Correction procedure for QABs. Rev. Rul. 2005–6 sets forth three alternatives for issuers whose compliance systems do not currently account for charges for QABs under the expense charge rule of § 7702(c)(3)(B)(ii):

(1) Alternative A provides that, if an issuer's compliance system does not properly account for charges for QABs but no contracts have failed to satisfy the requirements of § 7702(a) as a result of the system's deficiency, the issuer may correct its compliance system to account for those charges using the expense charge rule without contacting the Internal Revenue Service (Service).

(2) Alternative B provides a correction procedure for closing agreements that were requested on or before February 7, 2006.

(3) Alternative C provides that an issuer whose compliance system does not properly account for charges for QABs may request a closing agreement under terms and conditions that are enumerated in Rev. Rul. 2005–6.

.06 Changes to correction procedure. In Notice 2007–15, 2007–1 C.B. 503, the Service requested comments as to how various correction procedures — including those for improper accounting for charges for QABs under Rev. Rul. 2005–6 — may be improved. This revenue procedure incorporates a number of changes that taxpayers suggested in response to Notice 2007–15. Most significantly, this revenue procedure sets forth a model closing agree-

ment and explains in more detail the terms and conditions that apply under Alternative C of Rev. Rul. 2005-6.

SECTION 3. SCOPE

This revenue procedure applies to any issuer of one or more contracts that failed to meet the definition of a life insurance contract under § 7702(a) or to meet the requirements of § 7702A by reason of a compliance system that does not account for charges for QABs under the expense charge rule of § 7702(c)(3)(B)(ii). For this purpose, the term “issuer” means any company that issues a contract that is intended to satisfy the definition of a life insurance contract under § 7702. The term also includes a company that insures a contract

holder under a contract originally issued by another company.

SECTION 4. PROCEDURE

.01 Request for a ruling. An issuer that seeks relief under this revenue procedure must submit a request for a ruling that meets the requirements of Rev. Proc. 2008-1, 2008-1 I.R.B. 1 (or any successor). Additionally, the submission must contain an exhibit setting forth the policy number for each contract for which relief is requested.

.02 Closing Agreement. The issuer also must submit a proposed closing agreement, in triplicate, executed by the issuer, in the same form as the model closing agreement in section 5 of this revenue

procedure. The amount shown in Section 1(A) of the proposed closing agreement is the amount required to be paid (determined under section 4.03 of this revenue procedure) for all of the contracts covered by the agreement.

.03 Determination of amount required to be paid. The amount required to be paid is based on the aggregate number of contracts for which relief is requested, as set forth in the following schedule:

Number of Contracts	Amount Due
20 or fewer	\$1,500.00
21 to 50	\$2,000.00
51 to 100	\$5,000.00
101 to 500	\$10,000.00
501 to 1,000	\$16,000.00
1,001 to 5,000	\$30,000.00
5,001 to 10,000	\$40,000.00
Over 10,000	\$50,000.00

.04 Payment of amount. The issuer is required to pay the amount determined under section 4.03 of this revenue procedure within 60 days of the date of execution of the closing agreement by the Service. Payment shall be made by check payable to the “United States Treasury” delivered, together with a fully executed copy of the closing agreement, to Internal Revenue Service, Receipt & Control Stop 31, 201 W. Rivercenter Blvd., Covington, KY 41011.

.05 Correction of contracts and compliance system. With respect to each contract that is in force on the effective date of the closing agreement, the issuer must bring the contract into compliance with § 7702 (or § 7702A, as applicable), either by increasing the contract’s death benefit

or returning the contract’s excess premiums and earnings thereon to the contract holder. The issuer also must correct its compliance system to account properly for charges for QABs as provided in Rev. Rul. 2005-6. The issuer must take the corrective action required under this section 4.05 within 90 days of the date of execution of the closing agreement by the Service.

.06 Representations. The submission must include representations to the effect that the issuer is within the scope of section 3 of this revenue procedure and that the amount due to the Service under the closing agreement is computed correctly under section 4.03. The representations must be executed under penalties of perjury by an appropriate party (as set forth in section 7.01 of Rev. Proc. 2008-1 (or its succes-

sor)). The issuer must retain documentation available for audit to support the representations.

.07 Electronic Submissions. The exhibit required under section 4.01 of this revenue procedure may be submitted to the Service electronically, in read-only format, on a CD-ROM. Adobe Portable Document format is a suitable format. Other formats may be arranged on a case-by-case basis. The issuer must provide a total of three CD-ROMs, one for each of the three copies of the closing agreement. *See* Notice 2005-35, 2005-1 C.B. 1087.

SECTION 5. MODEL CLOSING AGREEMENT

CLOSING AGREEMENT AS TO FINAL DETERMINATION
COVERING SPECIFIC MATTERS
UNDER REV. PROC. 2008–38

THIS CLOSING AGREEMENT (“Agreement”) is made pursuant to § 7121 of the Internal Revenue Code (the “Code”) by and between *[Insert Taxpayer name, address and EIN]* (“Taxpayer”) and the Commissioner of Internal Revenue (the “Service”).

WHEREAS,

A. Taxpayer is the issuer of one or more contracts that were intended to qualify as life insurance contracts under § 7702 *[:that were not intended to be treated as modified endowment contracts under § 7702A;]* and that provided qualified additional benefits (QABs) within the meaning of § 7702(f)(5).

B. Pursuant to Rev. Proc. 2008–38, 2008–29 I.R.B. 139, the Service under certain circumstances will waive civil penalties for failure of a taxpayer to satisfy the reporting, withholding and/or deposit requirements for income received or deemed received under § 7702(g).

C. By letter dated *[Insert date]*, Taxpayer submitted to the Service, pursuant to Rev. Proc. 2008–1, 2008–1 I.R.B.1 *[or successor Rev. Proc., if applicable]*, a request for this Agreement covering *[Insert number]* life insurance contracts identified in Exhibit A attached to this Agreement (the “Contracts”).

D. Taxpayer intended that each of the Contracts meet the definition of a life insurance contract under § 7702 *[and not be a modified endowment contract under § 7702A]*. Taxpayer, however, maintained a compliance system for the contracts that did not account properly for charges for qualified additional benefits (QABs) under § 7702(c)(3)(B)(ii). As a result, the Contracts identified in Exhibit A failed to satisfy the requirements of § 7702 or § 7702A.

E. Taxpayer represents that the errors described in D above qualify the Taxpayer for the remedy described in Rev. Proc. 2008–38.

F. Taxpayer represents that the amount determined under section 4.03 of Rev. Proc. 2008–38 is \$ *[Insert amount]*. Taxpayer represents that this amount has been computed correctly under the provisions of Rev. Proc. 2008–38.

G. Taxpayer represents that it has corrected its compliance system, or will correct the compliance system within the time limit prescribed in Section 1(F), to account properly for charges for QABs.

H. To ensure that the Contracts satisfy the requirements of § 7702 *[and § 7702A, if applicable]*, Taxpayer and the Service have entered into this Agreement.

NOW THEREFORE IT IS HEREBY FURTHER DETERMINED AND AGREED BETWEEN TAXPAYER AND THE SERVICE AS FOLLOWS:

1. In consideration for the agreement of the Service as set forth in Section 2 below, Taxpayer agrees as follows:

- (A) To pay the Service the amount of \$ *[Insert amount]* at the time and in the manner described in Section 3 below.
- (B) The amount paid pursuant to Section 1(A) above is not deductible, nor is such amount refundable, subject to credit or offset, or otherwise recoverable from the Service.
- (C) For purposes of Taxpayer’s complying with its reporting and withholding obligations under the Code,
 - (i) neither the investment in the contract for purposes of § 72, nor the premiums paid for purposes of § 7702, on any Contract can be increased by any portion of the amount set forth in Section 1(A) above. If any such increases are made, they are entitled to no effect.
 - (ii) neither the investment in the contract for purposes of § 72, nor the premiums paid, for purposes of § 7702, on any Contract can be increased by any portion of the amount which Taxpayer represents to be the income on the contract for all of the Contracts in the aggregate. If any such increases are made, they are entitled to no effect.
- (D) With respect to each Contract that is in force on the effective date of this Agreement, to the extent necessary in order to bring such Contract into compliance with § 7702 *[and § 7702A, if applicable]*:
 - (i) If the sum of the premiums paid as of the effective date of this Agreement exceeds the amount necessary to keep the Contracts in compliance with the requirements of § 7702 *[and § 7702A, if applicable]*, Taxpayer will take the following corrective action:

- (a) Increase the death benefit to not less than an amount that will ensure compliance with § 7702 [*and § 7702A, if applicable*], or
- (b) Refund to the Contract holder the amount of such excess with interest; or
- (ii) If the sum of the premiums paid as of the effective date of this Agreement does not exceed the amount necessary to keep the contracts in compliance with the requirements of § 7702 [*and § 7702A, if applicable*], Taxpayer will take no corrective action.
- (E) With respect to any Contract which terminated by reason of the death of the insured (i) prior to the date this Agreement is executed by the Service and (ii) at a time when the premiums paid exceeded the guideline premium limitation for the Contract, Taxpayer will pay the Contract holder or the Contract holder's estate such excess with interest.
- (F) Taxpayer represents that it, if it has not already done so, will correct its compliance system within 90 days of the effective date of this Agreement to account properly for charges for QABs.

2. In consideration of the agreement of Taxpayer set forth in Section 1 above, the Service agrees as follows:

- (A) To treat each Contract that is still in force as of the effective date of this Agreement as having satisfied the requirements of § 7702 [*and § 7702A, if applicable*], during the period from the date of issuance of the Contract through and including the latest of (i) the date this Agreement is executed by the Service, (ii) the date of any corrective action described in Section 1(D) above, or (iii) the date of any corrective action described in Section 1(F) above;
- (B) To treat each Contract that terminated prior to the effective date of this Agreement as having satisfied the requirements of § 7702 [*and § 7702A, if applicable*] during the period from date of issuance of the Contract through and including the date of the Contract's termination;
- (C) To treat the failures described above, and any corrective action described in Section 1(D) or 1(E) above, as having no effect on the date the Contract was issued, entered into, or purchased for purposes of any provision of the Code or the regulations thereunder;
- (D) To treat any amount paid to any beneficiary prior to the effective date of this Agreement under a Contract by reason of the death of the insured as paid under a life insurance contract for purposes of the exclusion from gross income under § 101(a)(1);
- (E) To waive civil penalties for failure of Taxpayer to satisfy the reporting, withholding, or deposit requirements that would be applicable but for the relief otherwise provided by this Agreement; and
- (F) To treat no portion of the amount described in Section 1(A) above as income to the Contract holders.

3. Any action required of Taxpayer in Section 1(D) or 1(E) above shall be taken by Taxpayer no later than 90 days after the date of execution of this Agreement by the Service. Payment of the amount described in Section 1(A) above shall be made within 60 days after the date of execution of this Agreement by the Service by check payable to the "United States Treasury" delivered together with a copy of this executed Agreement, to Internal Revenue Service, Receipt & Control Stop 31, 201 W. Rivercenter Blvd., Covington, KY 41011.

4. This Agreement is, and shall be construed as being, for the benefit of Taxpayer. Contract holders covered by this Agreement are intended beneficiaries of this Agreement. This Agreement shall not be construed as creating any liability of Taxpayer to the Contract holders.

5. Neither the Service nor Taxpayer shall endeavor by litigation or other means to attack the validity of this Agreement.

6. This Agreement may not be cited or relied upon as precedent in the disposition of any other matter.

NOW THIS CLOSING AGREEMENT FURTHER WITNESSETH, that the Service and Taxpayer mutually agree that the matters so determined shall be final and conclusive, except as follows:

- 1. The matter to which this Agreement relates may be reopened in the event of fraud, malfeasance, or misrepresentation of material facts set forth herein.
- 2. This Agreement is subject to sections of the Code that expressly provide that effect be given to their provisions (including any stated exception for Code § 7122) notwithstanding any other law or rule of law.
- 3. To the extent this Agreement relates to any tax period after the date on which it is executed, it is subject to any law, enacted after such date, that applies to that tax period.

IN WITNESS WHEREOF, the parties have subscribed their names in triplicate. By signing, the above parties certify that they have read and agreed to the terms of this document.

[Insert Taxpayer name]

Date Signed: _____

By: _____

Title: _____

COMMISSIONER OF INTERNAL REVENUE

Date Signed: _____

By: _____

Title: _____

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective July 21, 2008, the date of its publication in the Internal Revenue Bulletin.

SECTION 7. EFFECT ON OTHER DOCUMENTS

Rev. Rul. 2005-6 is amplified to provide terms and conditions and a model closing agreement for use by taxpayers seeking the relief described in Alternative C.

SECTION 8. PAPERWORK REDUCTION ACT

The collections of information in this revenue procedure have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1752.

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

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

DRAFTING INFORMATION

The principal author of this revenue procedure is Katherine A. Hossofsky of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact Branch 4 of that office at (202) 622-3970 (not a toll-free call).

26 CFR 301.7121-1: Closing agreements.
(Also Part I, § 7702A.)

Rev. Proc. 2008-39

SECTION 1. PURPOSE

This revenue procedure provides a procedure by which an issuer of a life insurance contract may remedy an inadvertent non-egregious failure to comply with the modified endowment contract rules under § 7702A of the Internal Revenue Code. Rev. Proc. 2001-42, 2001-2 C.B. 212, and Rev. Proc. 2007-19, 2007-1 C.B. 515, are superseded.

SECTION 2. BACKGROUND

.01 *Definition of a modified endowment contract (MEC).*

(1) Section 7702A(a) provides that a life insurance contract is a MEC if the contract—

(a) is entered into on or after June 21, 1988, and fails to meet the 7-pay test of § 7702A(b), or

(b) is received in exchange for a contract described in paragraph (a) of this section 2.01(1).

(2) A contract fails to meet the 7-pay test if the accumulated amount paid under the contract at any time during the first 7 contract years exceeds the sum of the net level premiums which would have to be paid on or before such time if the contract were to provide for paid-up future benefits (as defined in §§ 7702A(c)(3) and 7702(f)(4)) after the payment of 7 level annual premiums.

(3) Section 72(e)(12) provides that, for purposes of determining amounts includible in gross income, all MECs issued by the same company to the same contract holder during any calendar year are treated as one MEC.

.02 *Tax treatment of amounts received under a MEC.* Section 72(e)(10) provides that a MEC is subject to the rules of § 72(e)(2)(B), which tax non-annuity distributions on an income-out-first basis, and the rules of § 72(e)(4)(A) (as modified by §§ 72(e)(10)(A)(ii) and 72(e)(10)(B)), which generally deem loans and assignments or pledges of any portion of the value of a MEC to be non-annuity distributions. Moreover, under § 72(v), the portion of any annuity or non-annuity distribution received under a MEC that is includible in gross income is subject to a 10% additional tax unless the distribution is made on or after the date on which the taxpayer attains age 59½, is attributable to the taxpayer's becoming disabled (within the meaning of § 72(m)(7)), or is part of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the taxpayer or the joint lives (or joint life expectancies) of such taxpayer and the taxpayer's beneficiary.

.03 *Authority to enter into closing agreements.* Under § 7121, the Secretary is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any period. Such agreement is generally final and conclusive, except upon a showing of fraud, malfeasance, or misrepresentation of a material fact.

.04 *Correction procedure for inadvertent MECs.* Rev. Proc. 2001-42 set forth circumstances under which the Internal Revenue Service (Service) would enter into closing agreements under which life insurance contracts would be treated as if they were not MECs, notwithstanding inadvertent non-egregious failures to comply with the rules of § 7702A. Under Rev. Proc. 2001-42, an issuer was required

to provide information about the contracts that were subject to the closing agreement, including a template for each contract setting forth the cumulative amounts paid under the contract, the contract's cumulative 7-pay premium, the overage, if any, for each contract year, the earnings rate applicable for each contract year, and the overage earnings for each contract year. In addition, the issuer was required to pay under the closing agreement an amount based on the contract's overage, overage earnings, and tax and interest thereon. Rev. Proc. 2001-42 was modified and amplified by Rev. Proc. 2007-19, primarily to use indices that are more accessible to taxpayers than those previously required to be used and to permit the submission of information in an electronic format.

.05 Changes to correction procedure. In Notice 2007-15, 2007-1 C.B. 503, the Service requested comments as to how various correction procedures — including those for inadvertent MECs under Rev. Proc. 2001-42 — may be improved. This revenue procedure incorporates a number of changes that taxpayers suggested in response to Notice 2007-15. Significant changes include providing an alternative computation of the amount required to be paid under a closing agreement with regard to an inadvertent MEC, eliminating certain informational items that must be submitted, and revising some language of the model closing agreement.

SECTION 3. DEFINITIONS

The following definitions and rules apply solely for purposes of this revenue procedure.

.01 Testing period. The 7-year period described in § 7702A(b) or such additional period as may be required under § 7702A(c)(3) if a contract undergoes a material change.

.02 Amount paid. The amount paid (as defined in § 7702A(e)(1)) under a contract in any contract year (as defined in

§ 7702A(e)(2)) equals the premiums paid for the contract during the year, reduced by amounts to which § 72(e) applies (determined without regard to § 72(e)(4)(A)) but not including amounts includible in gross income. For this purpose, premiums paid do not include—

(1) any portion of any premium paid during the contract year that is returned (with interest) to the contract holder within 60 days after the end of the contract year in order to comply with the 7-pay test, or

(2) the cash surrender value (as defined in § 7702(f)(2)(A)) of another life insurance contract (other than a contract that fails the 7-pay test) exchanged for the contract.

.03 7-pay premium.

(1) *In general.* Except as otherwise provided in section 3.03(2) of this revenue procedure, the 7-pay premium for a contract is the net level premium (computed in accordance with the rules in § 7702A(c)) that would have to be paid for the contract if the contract were to provide for paid up future benefits after the payment of 7 level annual premiums.

(2) *7-pay premium for a contract that undergoes a material change.* If a contract (other than a contract that fails the 7-pay test) is materially changed, the contract is treated as newly issued on the date of the material change and the 7-pay premium for the changed contract is an amount equal to the excess, if any, of—

(a) the net level premium (computed in accordance with the rules in § 7702A(c)) that would have to be paid for the changed contract if the contract were to provide for paid up future benefits after the payment of 7 level annual premiums, over

(b) a proportionate share of the cash surrender value (as defined in section 3.04 of this revenue procedure) under the contract.

.04 Proportionate share of cash surrender value. The proportionate share of the cash surrender value of a contract is the amount obtained by multiplying—

(1) the cash surrender value (as defined in § 7702(f)(2)(A)) of the contract, by

(2) a fraction, the numerator of which is the net level premium (computed in accordance with the rules in § 7702A(c)) that would have to be paid for the changed or new contract if such contract were to provide for paid up future benefits after the payment of 7 level annual premiums, and the denominator of which is the net single premium (determined using the rules in § 7702) for such contract at that time.

.05 Overage. A contract's overage is the amount of the excess, if any, of—

(1) the sum of amounts paid under the contract during the testing period for the contract year and all prior contract years, over

(2) the sum of the 7-pay premiums for the contract year and all prior contract years of the testing period.

.06 Overage earnings. The overage earnings for a contract year is the amount obtained by multiplying—

(1) the sum of a contract's overage for the contract year and its cumulative overage earnings for all prior contract years, by—

(2) the earnings rate set forth in section 3.07 of this revenue procedure.

.07 Earnings rates.

(1) *Contracts other than variable contracts.* Except as otherwise provided in sections 3.07(3) and 3.07(8) of this revenue procedure, the earnings rate applicable to a contract year is the general account total return (as defined in section 3.07(2) of this revenue procedure) for the calendar year in which the contract year begins.

(2) *General account total return.*

(a) *Pre-2008 contract years.* The general account total return applicable to a contract year that begins before January 1, 2008, is the rate set forth in the following table for the calendar year in which the contract year begins.

Year	General Account Total Return
1988	10.2%
1989	9.7%
1990	9.8%
1991	9.2%
1992	8.6%
1993	7.5%
1994	8.3%
1995	7.8%
1996	7.7%
1997	7.6%
1998	6.9%
1999	7.4%
2000	8.0%
2001	7.5%
2002	7.2%
2003	6.2%
2004	6.1%
2005	5.6%
2006	6.0%
2007	6.0%

(b) *Post-2007 contract years.* The general account total return applicable to a contract year that begins after December 31, 2007, is the arithmetic average (weighted on a 50–50 basis) of the following two rates:

(i) Moody’s Seasoned Corporate Aaa Bond Yield, frequency annual, or any successor thereto; and

(ii) Moody’s Seasoned Corporate Baa Bond Yield, frequency annual, or any successor thereto. Both rates are publicly available at www.federalreserve.gov. Thus, for example, under this methodology the general account total return for 2007 is $(5.555833 + 6.4825)/2 = 6.0191665 = 6.0\%$.

(3) *Variable contracts described in § 817(d).*

(a) *Pre-2008 contract years.* The earnings rate applicable to a contract year that begins before January 1, 2008, is the rate set forth in the following table for the calendar year in which the contract year begins.

Year	Variable Contracts Earnings Rate
1988	13.5%
1989	17.4%
1990	1.4%
1991	25.4%
1992	5.9%
1993	13.9%
1994	-1.0%
1995	23.0%
1996	14.3%
1997	17.8%
1998	19.7%
1999	12.8%
2000	-5.5%
2001	-7.1%
2002	-14.1%
2003	19.6%
2004	6.9%
2005	2.1%
2006	10.0%
2007	3.6%

(b) *Post-2007 contract years.* Except as otherwise provided in section 3.07(8) of

this revenue procedure, the earnings rate applicable to a contract year that begins

after December 31, 2007, is equal to the sum of—

(i) 10 percent of the general account total return (as defined in section 3.07(2) of this revenue procedure), and

(ii) 90 percent of the separate account total return (as defined in section 3.07(4) of this revenue procedure) for the calendar year in which the contract year begins.

(4) *Separate account total return.* Except as otherwise provided in section 3.07(8) of this revenue procedure, the separate account total return equals—

(a) 75 percent of the equity fund total return (as defined in section 3.07(5) of this revenue procedure), plus

(b) 25 percent of the bond fund total return (as defined in section 3.07(6) of this revenue procedure), less

(c) 1.1 percentage point.

(5) *Equity fund total return.* The equity fund total return equals—

(a) the calendar year percentage return (as defined in section 3.07(7) of this revenue procedure) represented by the end-of-year values of the Standard and Poor's (S&P) 500 Total Return Index, with daily dividend reinvestment, or any successor thereto, less

(b) 1.5 percentage point.

(6) *Bond fund total return.* The bond fund total return equals—

(a) the calendar year percentage return (as defined in section 3.07(7) of this revenue procedure) represented by the end-of-year values of the Merrill Lynch U.S. Corporate Master Index (C0A0), or any successor thereto, less

(b) 1.0 percentage point.

The Merrill Lynch U.S. Corporate Master Index (C0A0) is publicly available at www.mlindex.ml.com. Under this methodology, the bond fund total return for 2007 is $(1689.135-1614.188) / 1614.188 - .01 = 3.64301$ percent.

(7) *Calendar year percentage return.* The calendar year percentage return for an index described in section 3.07(5) or section 3.07(6) of this revenue procedure is calculated by—

(a) dividing the end-of-year value of the index for the calendar year by the end-of-year value of the index for the immediately preceding calendar year, and

(b) subtracting 1 from the result obtained under paragraph (a) of this section 3.07(7).

(8) *Incomplete calendar year.* If the general account total return or the separate account total return for a calendar year

cannot be determined because the calendar year in which the contract year begins has not ended, then the earnings rate for the contract year (or portion thereof) is determined using the general account total return and, if applicable, the average separate account total return, for the 3 calendar years immediately preceding the calendar year in which the contract year begins.

.08 *Proportionate share of average earnings allocable to taxable distributions.* The proportionate share of average earnings allocable to taxable distributions under a contract is the amount obtained by multiplying—

(1) the total amount of the taxable distributions under the contract, by

(2) a fraction, the numerator of which is the contract's cumulative average earnings and the denominator of which is the total income on the contract.

.09 *Total income on a contract.* The total income on a contract as of any date is an amount equal to the excess, if any, of—

(1) the contract's cash surrender value (as defined in § 7702(f)(2)(A)) on such date, over

(2) the premiums paid under the contract before such date, reduced by amounts to which § 72(e) applies (determined without regard to § 72(e)(4)(A)) but not including amounts includible in the contract holder's gross income.

.10 *Distribution frequency factor.* The distribution frequency factor for a contract is—

(1) .8, if—

(a) the interest rate with respect to any portion of a policy loan that could be made under the contract at any time (including policy loans that could be made after a contractually specified date in the future) is guaranteed not to exceed the sum of:

(i) 1 percentage point, plus

(ii) the rate at which earnings are credited to the portion of the contract's cash surrender value (as defined in § 7702(f)(2)(A)) that is allocable to such portion of the policy loan; or

(b) the contract holder has an option to make a partial withdrawal of the contract's cash surrender value that reduces the death benefit (as defined in § 7702(f)(3)) under the contract by less than an amount determined by multiplying—

(i) the death benefit under the contract immediately before the withdrawal, by (ii) the percentage obtained by divid-

ing the withdrawn amount by the contract's cash surrender value (as defined in § 7702(f)(2)(A)) immediately before the withdrawal; and

(2) .5 for all other contracts.

.11 *Applicable percentage.*

(1) *In general.* The applicable percentage for a contract is—

(a) 15%, if the death benefit under the contract is less than \$50,000,

(b) 28%, if the death benefit under the contract is equal to or exceeds \$50,000 but is less than \$180,000, and

(c) 36%, if the death benefit under the contract is equal to or exceeds \$180,000.

(2) *Determination of amount of death benefit.* For purposes of determining the applicable percentage, the death benefit under the contract is the death benefit (as defined in § 7702(f)(3)) as of any date within 120 days of the date of the request for closing agreement, or the last day the contract is in force.

.12 *Reported amount.* The reported amount for a contract is the amount that—

(1) the issuer reports on a timely filed information return as includible in the contract holder's gross income, or

(2) the contract holder includes in gross income on a timely filed income tax return.

.13 *Aggregation of contracts.* All MECs issued by the same issuer to the same contract holder during any calendar year are treated as one MEC.

SECTION 4. SCOPE

.01 *Applicability.* Except as provided in section 4.02, this revenue procedure applies to any issuer of one or more life insurance contracts that desires to remedy the inadvertent non-egregious failure of contracts to comply with the requirements of § 7702A. For this purpose, the term "issuer" means any company that issues a contract that is intended to satisfy the definition of a life insurance contract under § 7702 and comply with the MEC rules under § 7702A. The term also includes a company that insures a contract holder under a contract originally issued by another company.

.02 *Inapplicability.* The Service may exclude a contract from the correction mechanism provided under this revenue procedure if the contract's status as a MEC resulted from a failure to comply with the requirements of § 7702A that—

(1) is attributable to one or more defective interpretations or positions that the Service determines to be a significant feature of a program to sell investment oriented contracts, or

(2) arises where the controlling statutory provision, as supplemented by any legislative history or guidance published by the Service, is clear on its face and the Service determines that failure to follow the provision results in a significant increase in the investment orientation of a contract.

.03 *Example.* Pursuant to section 4.02 of this revenue procedure, the Service generally will not apply the correction mechanism under this revenue procedure to a MEC if the contract provides for paid-up future benefits after the payment of less than 7 level annual premiums.

SECTION 5. PROCEDURE

.01 *Request for a ruling.* An issuer that seeks relief under this revenue procedure must submit a request for a ruling that meets the requirements of Rev. Proc. 2008-1, 2008-1 I.R.B. 1 (or any successor). Additionally, the submission must contain the following information:

(1) the policy number for each contract;
 (2) a description of the defect[s] that caused the contract[s] to fail to comply with the 7-pay test, including an explanation of how and why the defect[s] arose; and

(3) a description of the administrative procedures the issuer has implemented to ensure that none of its contracts will inadvertently fail the 7-pay test in the future.

.02 *Closing agreement.* The issuer also must submit a proposed closing agreement, in triplicate, executed by the issuer, in the same form as the model closing agreement in section 6 of this revenue procedure. The amount shown in Section 1(A) of the proposed closing agreement is the amount required to be paid (determined under section 5.03 of this revenue procedure) for all of the contracts covered by the agreement.

.03 *Determination of amount required to be paid with regard to a contract.* The amount required to be paid with regard to a contract under this section 5.03 is either the amount determined based on overage earnings under section 5.03(1) or, at the election of the issuer, the amount determined based on overage under section 5.03(2).

(1) *Amount determined based on overage earnings.*

(a) *In general.* Except as provided in section 5.03(1)(b) of this revenue procedure, the amount determined based on overage earnings under this section 5.03(1) is the sum of—

(i) the income tax (determined using, in lieu of the contract holder's actual tax rate, the applicable percentage for the contract under section 3.11 of this revenue procedure) and the additional tax under § 72(v) with regard to amounts (other than reported amounts (as defined in section 3.12 of this revenue procedure)) received (or deemed received) under the contract during the period commencing with the date 2 years before the date on which the contract first failed to satisfy the MEC rules and ending on the effective date of the closing agreement;

(ii) any interest computed under § 6621(a)(2) as if the amounts determined under section 5.03(1)(a)(i) of this revenue procedure are underpayments by the contract holder[s] for the tax year[s] in which the amounts are received (or deemed received); and

(iii) an amount, not less than \$0, obtained by multiplying— (A) the excess, if any, of the contract's cumulative overage earnings over the proportionate share of overage earnings allocable to taxable distributions under the contract, by

(B) the applicable percentage for the contract, and by

(C) the distribution frequency factor for the contract under section 3.10 of this revenue procedure.

(b) *Special rule for contracts with de minimis overage earnings.* If the overage

earnings of a contract at all times during the testing period do not exceed \$100, then the amount determined under this section 5.03(1) of this revenue procedure is determined without regard to paragraphs (i) and (ii) of section 5.03(1)(a) of this revenue procedure.

(2) *Amount determined based on overage.* An issuer may elect to pay an amount equal to 100% of the overage as defined in section 3.05 of this revenue procedure, rather than the amount determined under section 5.03(1)(a) of this revenue procedure based on overage earnings with respect to a contract.

(3) *Examples of the determination of the amount required to be paid with regard to a contract.*

(a) *Example 1.* A, an individual, purchases a life insurance contract other than a contract described in sections 3.07(3) or 4.02 of this revenue procedure. The death benefit of the contract exceeds \$180,000 on every day within 120 days of the date of the request for closing agreement. The net level premium (assuming paid-up future benefits after seven annual premium payments) for the contract is \$10,490. The contract provides that, within 60 days after the end of a contract year, the issuer will return (with interest) the amount of any excess premium that would cause the contract to be a MEC under § 7702A.

The interest rate on all portions of any policy loans will always exceed the rate at which interest is credited to the contract's associated cash value by more than 1 percentage point. A partial withdrawal of the cash surrender value (within the meaning of § 7702(f)(2)(A)) always reduces the death benefit by an amount not less than the amount determined by multiplying the death benefit immediately before the withdrawal by the percentage obtained by dividing the withdrawn amount by the cash surrender value immediately before the withdrawal.

A pays a premium of \$10,000 when the contract is issued on January 1, 2001. At the beginning of each of the next 6 contract years, A pays additional premiums of \$10,750, \$10,800, \$10,700, \$11,500, \$11,000, and \$10,000, respectively. Due to an inadvertent error, the issuer fails to return any of the excess premiums.

The issuer desires to enter into a closing agreement to remedy the failure to comply with § 7702A. The issuer prepares the following template with regard to the contract.

Contract Year	Cumulative Amounts Paid	Cumulative 7-pay Premium	Overage	Earnings Rate	Overage Earnings
1 (2001)	10,000	10,490	0	7.5%	0
2 (2002)	20,750	20,980	0	7.2%	0
3 (2003)	31,550	31,470	80	6.2%	4.96
4 (2004)	42,250	41,960	290	6.1%	17.99

Contract Year	Cumulative Amounts Paid	Cumulative 7-pay Premium	Overage	Earnings Rate	Overage Earnings
5 (2005)	53,750	52,450	1,300	5.6%	74.09
6 (2006)	64,750	62,940	1,810	6.0%	114.42
7 (2007)	74,750	73,430	1,320	6.0%	91.89

Prior to A's payment of the \$10,800 premium at the beginning of contract year 3, the cumulative premiums paid for the contract do not exceed the contract's cumulative 7-pay premiums. Therefore, there are no overage earnings in contract years 1 and 2.

Upon payment of the \$10,800 premium at the beginning of contract year 3, however, the cumulative amount paid for the contract (\$31,550) exceeds the contract's cumulative 7-pay premiums (\$31,470) by \$80. As the earnings rate for the calendar year in which contract year 3 begins is 6.2%, the contract's overage earnings for contract year 3 equal \$4.96 ($\$80 \times 6.2\%$).

For contract year 4, the overage is \$290 ($\$42,250 - \$41,960$). The cumulative overage earnings for all prior contract years equal \$4.96. The earnings rate is 6.1%. The overage earnings for contract year 4 equal \$17.99 ($(\$290 + \$4.96) \times 6.1\%$).

For contract year 5, the overage is \$1,300 ($\$53,750 - \$52,450$). The cumulative overage earnings for all prior contract years equal \$22.95 ($\$4.96 + \17.99). The earnings rate is 5.6%. The overage earnings for contract year 5 equal \$74.09 ($(\$1,300 + \$22.95) \times 5.6\%$).

For contract year 6, the overage is \$1,810 ($\$64,750 - \$62,940$). The cumulative overage earnings for all prior contract years equal \$97.04 ($\$4.96 + \$17.99 + \74.09). The earnings rate is 6.0%. The overage earnings for contract year 6 equal \$114.42 ($(\$1,810 + \$97.04) \times 6.0\%$).

For contract year 7, the overage is \$1,320 ($\$74,750 - \$73,430$). The cumulative overage earnings for all prior contract years equal \$211.46 ($\$4.96 + \$17.99 + \$74.09 + \114.42). The earnings rate is 6.0%. The overage earnings for contract year 7 equal \$91.89 ($(\$1,320 + \$211.46) \times 6.0\%$).

The cumulative overage earnings for the contract equal \$303.35 ($\$4.96 + \$17.99 + \$74.09 + \$114.42 + \91.89). Under sections 3.10 and 3.11 of this revenue procedure, the distribution frequency factor is .5 and the applicable percentage is 36%. Accordingly, the amount determined based on overage earnings under section 5.03(1) of this revenue procedure is \$54.60 ($\$303.35 \times .5 \times 36\%$).

The amount determined based on overage under section 5.03(2) of this revenue procedure is equal to 100% of the overage, or \$1,320. The issuer may elect to pay either this amount or the amount determined under section 5.03(1) of this revenue procedure (\$54.60) under the terms of the closing agreement with regard to the contract.

(b) *Example 2.* The facts are the same as in *Example 1* except that, at the beginning of contract year 5, A receives \$3,000 as a policy loan. The contract's cash value (within the meaning of § 72(e)(3)(A)(i)) immediately prior to the loan is \$58,500, which exceeds A's investment in the contract (\$53,750) by \$4,750. Each year A pays the interest on the policy loan. The

issuer does not file a timely information return with regard to the deemed distribution resulting from the policy loan and A does not include the distribution in gross income reported on the income tax return for the taxable years in which the deemed distribution is received. The total income on the contract (as defined in section 3.09 of this revenue procedure) is \$14,500.

The amount determined based on overage earnings under section 5.03(1) of this revenue procedure is the sum of—

(1) an amount equal to the income tax (determined using an applicable percentage of 36%) and the additional tax under § 72(v) with regard to the \$3,000 deemed distribution in contract year 5;

(2) interest computed under § 6621(a)(2) as if the amounts determined under (1) were underpayments for the taxable year in which the distributions are deemed to have occurred; and

(3) 36% of \$120.30, which is the excess of the contract's cumulative overage earnings over the proportionate share of the overage earnings allocable to taxable distributions (\$303.35 - \$62.76), multiplied by the distribution frequency factor (.5). (The proportionate share of overage earnings allocable to taxable distributions is obtained by multiplying the total amount of the taxable distribution under the contract (\$3,000), by a fraction, the numerator of which is the contract's cumulative overage earnings (\$303.35) and the denominator of which is the total income on the contract (\$14,500).)

The amount determined based on overage under section 5.03(2) of this revenue procedure is equal to 100% of the overage, or \$1,320. The issuer may elect to pay either this amount or the amount determined under section 5.03(1) of this revenue procedure under the terms of the closing agreement with regard to the contract.

.04 Payment of amount. The issuer is required to pay the amount determined under section 5.03 of this revenue procedure within 60 days of the date of execution of the closing agreement by the Service. Payment shall be made by check payable to the "United States Treasury" delivered, together with a fully executed copy of the closing agreement, to Internal Revenue Service, Receipt & Control Stop 31, 201 W. Rivercenter Blvd., Covington, KY 41011.

.05 Correction of contracts.

(1) *General rules.* If, on the date of the execution of the closing agreement by the Service, the testing period (as defined in section 3.01 of this revenue procedure) for

a contract has more than 90 days remaining, then the issuer must bring the contract into compliance with § 7702A. The issuer may bring a contract into compliance with § 7702A either by either increasing the contract's death benefit or returning the contract's excess premiums and earnings thereon to the contract holder. The issuer shall take the corrective action required under this section 5.05(1) of this revenue procedure within 90 days of the date of execution of the closing agreement by the Service.

(2) *No corrective action required if Service executes closing agreement on a date within ninety (90) days of the expiration of testing period.* If the testing period for a contract expires on or before the date within 90 days of the execution of the closing agreement by the Service, then the issuer is not required to take any corrective action under section 5.05(1) of this revenue procedure.

.06 Representations. The submission must include representations to the effect that the issuer is within the scope of section 4 of this revenue procedure and that amount due to the Service under the closing agreement is computed correctly under section 5.03(1) or (2) of this revenue procedure, as applicable. The representations must be executed under penalties of perjury by an appropriate party (as set forth in section 7.01 of Rev. Proc. 2008-1 (or its successor)). The issuer must retain documentation available for audit to support the representations.

.07 Electronic submissions. The information required under section 5.01(1) of this revenue procedure may be submitted to the Service electronically, in read-only format, on a CD-ROM. Adobe Portable Document format is a suitable format. Other formats may be arranged on a case-by-case basis. The issuer must provide a total of three CD-ROMs, one for each of the three copies of the closing agreement.

SECTION 6. MODEL CLOSING
AGREEMENT

Effective as of date executed by Internal
Revenue Service _____

CLOSING AGREEMENT AS TO FINAL DETERMINATION
COVERING SPECIFIC MATTERS
UNDER SECTION 7702A

THIS CLOSING AGREEMENT (“Agreement”) is made pursuant to § 7121 of the Internal Revenue Code (the “Code”) by and between *[Insert Taxpayer name, address, and EIN]* (“Taxpayer”) and the Commissioner of Internal Revenue (the “Service”).

WHEREAS,

A. Taxpayer is the issuer of one or more life insurance contracts under § 7702.

B. Pursuant to Rev. Proc. 2008–39, 2008–29 I.R.B. 143, an issuer under certain circumstances may remedy an inadvertent non-egregious failure to comply with the modified endowment contract rules under § 7702A.

C. By letter dated *[Insert date]*, Taxpayer submitted to the Service, pursuant to Rev. Proc. 2008–1, 2008–1 I.R.B. 1 *[or successor Rev. Proc., if applicable]*, a request for this Agreement covering *[Insert number]* modified endowment contracts identified on Exhibit A attached to this Agreement (the “Contracts”).

D. Taxpayer intended that each of the Contracts not be a modified endowment contract under § 7702A. Taxpayer represents that the Contract[s] is [are] not described in Sec. 4.02 of Rev. Proc. 2008–39 and that the Contracts identified on Exhibit A are eligible for relief under Rev. Proc. 2008–39.

E. Taxpayer represents that the amount determined under Sec. 5.03 of Rev. Proc. 2008–39 is \$ *[Insert amount]*. Taxpayer represents that this amount has been computed correctly under the provisions of Rev. Proc. 2008–39.

F. To ensure that the Contract[s] is [are] not treated as [a] modified endowment contract[s], Taxpayer and the Service have entered into this Agreement.

NOW THEREFORE IT IS HEREBY FURTHER DETERMINED AND AGREED BETWEEN TAXPAYER AND THE SERVICE AS FOLLOWS:

1. In consideration for the agreement of the Service as set forth in Section 2 below, Taxpayer agrees as follows:

- (A) Taxpayer will pay to the Service the amount of \$ *[Insert amount]* at the time and in the manner described in Section 3 below.
- (B) The amount paid pursuant to Section 1(A) above is not deductible by Taxpayer, nor is such amount refundable, subject to credit or offset, or otherwise recoverable by Taxpayer from the Service.
- (C) For purposes of Taxpayer’s complying with its reporting and withholding obligations under the Code,
 - (i) neither the investment in the contract for purposes of § 72, nor the premiums paid for purposes of § 7702, on any Contract can be increased by any portion of the amount set forth in Section 1(A) above. If any such increases are made, they are entitled to no effect.
 - (ii) neither the investment in the contract for purposes of § 72, nor the premiums paid, for purposes of § 7702, on any Contract can be increased by any portion of the amount which Taxpayer represents to be the income on the contract for all of the Contracts in the aggregate. If any such increases are made, they are entitled to no effect.
- (D) To bring Contract[s] for which the testing period (as defined in Sec. 3.01 of Rev. Proc. 2008–39) will not have expired on or before the date 90 days after the execution of this Agreement into compliance with § 7702A, either by an increase in death benefit[s] or the return of the excess premiums and earnings thereon to the Contract holder[s].

2. In consideration of the agreement of Taxpayer set forth in Section 1 above, the Service agrees as follows:

- (A) To treat each Contract as having satisfied the requirements of § 7702A during the period from the date of issuance of the Contract through and including the later of—
 - (i) date of the execution of this Agreement, and
 - (ii) the date of the corrective actions described in Section 1(D) above;

- (B) To treat the corrective action described in Section 1(D) above as having no effect on the date the Contract was issued, entered into, or purchased for purposes of any provision of the Code or the regulations thereunder;
- (C) To waive civil penalties for failure of Taxpayer to satisfy the reporting, withholding, and/or deposit requirements for income subject to tax under § 72(e)(10) that was received or deemed received by a Contract holder under a Contract in a calendar year ending prior to the date of execution of this Agreement; and
- (D) To treat no portion of the amount described in Section 1(A) above as income to the Contract holders.

3. The actions required of Taxpayer in Section 1(D) above shall be taken by Taxpayer no later than 90 days after the date of execution of this Agreement by the Service. Payment of the amount described in Section 1(A) above shall be made within 60 days of the date of execution of this Agreement by the Service by check payable to the "United States Treasury," delivered together with a copy of this executed Agreement to Internal Revenue Service, Receipt & Control Stop 31, 201 W. Rivercenter Blvd., Covington, KY 41011.

4. This Agreement is, and shall be construed as being, for the benefit of Taxpayer. The Contract holders covered by this Agreement are intended beneficiaries of this Agreement. This Agreement shall not be construed as creating any liability of an issuer to the Contract holders.

5. Neither the Service nor Taxpayer shall endeavor by litigation or other means to attack the validity of this Agreement.

6. This Agreement may not be cited or relied upon as precedent in the disposition of any other matter.

NOW THIS CLOSING AGREEMENT FURTHER WITNESSETH, that Taxpayer and the Service mutually agree that the matters so determined shall be final and conclusive, except as follows:

1. The matter to which this Agreement relates may be reopened in the event of fraud, malfeasance, or misrepresentation of material facts set forth herein.

2. This Agreement is subject to sections of the Code that expressly provide that effect be given to their provisions (including any stated exception for Code § 7122) notwithstanding any other law or rule of law.

3. To the extent this Agreement relates to any tax period after the date on which it is executed, it is subject to any law, enacted after such date, that applies to that tax period.

IN WITNESS WHEREOF, the parties have subscribed their names in triplicate. By signing, the above parties certify that they have read and agreed to the terms of this document.

Date Signed: _____

[Insert Taxpayer name]
 By: _____
 Title: _____

Date Signed: _____

COMMISSIONER OF INTERNAL REVENUE
 By: _____
 Title: _____

SECTION 7. EFFECTIVE DATE

This revenue procedure is effective July 21, 2008, the date of its publication in the Internal Revenue Bulletin.

SECTION 8. EFFECT ON OTHER DOCUMENTS

This revenue procedure supersedes Rev. Proc. 2001-42 and Rev. Proc. 2007-19.

SECTION 9. PAPERWORK REDUCTION ACT

The collections of information in this revenue procedure have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1752.

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

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

DRAFTING INFORMATION

The principal author of this revenue procedure is Katherine A. Hossofsky of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue

procedure, contact Branch 4 of that office at (202) 622-3970 (not a toll-free call).

26 CFR 301.7121-1: Closing agreements.
(Also Part I, Section 7702.)

Rev. Proc. 2008-40

SECTION 1. PURPOSE

This revenue procedure provides a procedure by which an issuer of a life insurance contract may remedy the failure of one or more contracts to meet the definition of a life insurance contract under § 7702(a) or to satisfy the requirements of § 101(f) of the Internal Revenue Code. Rev. Rul. 91-17, 1991-1 C.B. 190, is superseded in part; Notice 99-48, 1999-2 C.B. 429, is superseded.

SECTION 2. BACKGROUND

.01 Definition of a life insurance contract.

(1) Section 7702(a) provides that, for a contract to qualify as a life insurance contract for Federal income tax purposes, the contract must be a life insurance contract under the applicable law and must either—

(a) satisfy the cash value accumulation test of § 7702(b), or

(b) both meet the guideline premium requirements of § 7702(c) and fall within the cash value corridor of § 7702(d).

(2) A contract meets the cash value accumulation test of § 7702(b) if, by the terms of the contract, the cash surrender value of the contract may not at any time exceed the net single premium that would have to be paid at that time to fund future benefits under the contract.

(3) A contract meets the guideline premium requirements of § 7702(c) if the sum of the premiums paid under the contract does not at any time exceed the guideline premium limitation as of that time. The guideline premium limitation as of any date is the greater of the guideline single premium, or the sum of the guideline level premiums to that date. The guideline single premium is the premium that would be required on the date the contract is issued to fund the future benefits under the contract.

(4) A contract falls within the cash value corridor of § 7702(d) if the death

benefit under the contract at any time is not less than the applicable percentage of the cash surrender value, based on the table set forth in § 7702(d)(2).

(5) Section 7702 is effective for contracts issued after December 31, 1984, in tax years ending after that date.

.02 Tax treatment of a contract that does not meet the requirements of § 7702(a). Section 7702(g)(1)(A) provides that if at any time a contract that is a life insurance contract under the applicable law does not meet the definition of a life insurance contract under § 7702(a), the income on the contract for any taxable year of the policyholder is treated as ordinary income received or accrued by the policyholder during such year. Further, § 7702(g)(1)(C) provides that if, during any taxable year of the policyholder, a contract that is a life insurance contract under the applicable law ceases to meet the definition of a life insurance contract under § 7702(a), the income on the contract for all prior taxable years is treated as received or accrued during the taxable year in which such cessation occurs.

.03 Definition and treatment of a flexible premium life insurance contract. A flexible premium life insurance contract is a life insurance contract that provides for the payment of one or more premiums that are not fixed by the insurer as to both timing and amount. Section 101(f) provides that any amount paid by reason of the death of the insured under a flexible premium life insurance contract is excluded from gross income only if the contract satisfies either (1) the guideline premium limitation and the applicable percentage of cash value test of § 101(f)(1)(A)(i) and (ii), or (2) the cash value test of § 101(f)(1)(B). The limitations of § 101(f) generally apply to contracts issued before January 1, 1985.

.04 Recordkeeping, reporting, withholding, and deposit requirements for failed contracts. The issuer of a contract that fails to satisfy the requirements of § 7702(a) or § 101(f) may have recordkeeping, reporting, withholding, and deposit obligations.

An issuer that fails to meet these obligations also may be subject to penalties. See Rev. Rul. 91-17 (concerning failures to satisfy the requirements of § 7702(a)).

.05 Authority to enter into closing agreements. Under § 7121, the Secretary is authorized to enter into an agreement

in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any period. Such an agreement is generally final and conclusive, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact.

.06 Correction procedure for failures to satisfy the requirements of § 7702(a).

Rev. Rul. 91-17, concludes that if a contract fails to meet the definition of a life insurance contract under § 7702(a), then the holder of the contract is deemed to have received a nonperiodic distribution as ordinary income under § 7702(g) or (h), and the issuer is subject to the recordkeeping, reporting, withholding, and deposit requirements applicable to nonperiodic distributions. In addition, Rev. Rul. 91-17 states that the Internal Revenue Service (Service) will waive civil penalties for an issuer's failure to satisfy those requirements if, prior to June 3, 1991, the issuer requested and, in a timely fashion, executed a closing agreement under which the issuer agreed to pay a specified amount. Notice 99-48, indicated that since June 3, 1991, the Service has continued to exercise its authority under § 7121 to enter into closing agreements as set out in Rev. Rul. 91-17. Notice 99-48 also set forth the rates to be used for the purpose of computing the amount due pursuant to such a closing agreement. As a matter of practice, the Service has entered into closing agreements to address contracts that failed to satisfy the requirements of § 101(f), as well.

.07 Changes to correction procedures. In Notice 2007-15, 2007-1 C.B. 503, the Service requested comments as to how various correction procedures — including those for correcting the failure of a contract to satisfy the requirements of § 7702(a) — may be improved. This revenue procedure incorporates a number of changes that taxpayers suggested in response to Notice 2007-15. Most significantly, this revenue procedure (1) sets forth a model closing agreement for issuers that seek relief, and (2) provides alternative calculations of the amount due under the closing agreement.

SECTION 3. SCOPE

This revenue procedure applies to any issuer of one or more contracts that qual-

ified as life insurance contracts under the applicable law, but otherwise failed to meet the definition of a life insurance contract under § 7702(a) or to meet the requirements of § 101(f). For purposes of this revenue procedure, the term “issuer” is any company that issues a contract that is intended to satisfy the definition of a life insurance contract under § 7702 or § 101(f). The term also includes a company that insures a contract holder under a contract originally issued by another company.

SECTION 4. PROCEDURE

.01 *Request for ruling.* An issuer that seeks relief under this revenue procedure must submit a request for a ruling that meets the requirements of Rev. Proc. 2008–1, 2008–1 I.R.B. 1 (or any successor). Additionally, the submission must contain the following information:

- (1) the policy number for each contract;
- (2) a description of the defects that caused the contracts to fail to comply with § 7702 or § 101(f); and
- (3) a description of the administrative procedures the issuer has implemented to prevent additional failures to meet the requirements of § 7702 or § 101(f) in the future.

.02 *Closing agreement.* In the case of a failure to meet the guideline premium requirements of § 7702(c), the issuer must submit a proposed closing agreement, in triplicate, executed by the issuer, in the same form as the model closing agreement in section 5 of this revenue procedure. The amount shown in Section 1(A) of the proposed closing agreement is the amount required to be paid (as determined under section 4.03 of this revenue procedure) for all of the contracts covered by the agreement. In the case of any other failure, the issuer may propose amendments to the proposed closing agreement set forth in section 5 of this revenue procedure, including the amount required to be paid, as appropriate on a case-by-case basis.

.03 *Determination of amount required to be paid with regard to a contract.*

(1) *In general.* The amount required to be paid with regard to a contract under this section 4.03 of this revenue procedure depends on the amount of excess earnings with respect to the contract. For a contract with excess earnings greater

than \$5,000, the amount required to be paid is the amount determined based on income on the contract under section 4.03(2) of this revenue procedure; for a contract with excess earnings less than or equal to \$5,000, the amount required to be paid is the amount determined based on excess earnings under section 4.03(3) of this revenue procedure. In lieu of the amount determined under section 4.03(2) or section 4.03(3) of this revenue procedure, however, the issuer may elect to pay the amount determined based on excess premiums under section 4.03(4) of this revenue procedure.

(2) *Amount determined based on income on the contract.* The amount required to be paid with regard to a contract with excess earnings greater than \$5,000 is the amount determined based on income on the contract. This amount is equal to (i) the amount of tax that would have been owed by the contract holder if the contract holder were treated as receiving the income on the contract, plus (ii) any interest with regard to such tax. For this purpose, the income on the contract is determined in the manner set forth in section 4.03(5)(a) of this revenue procedure; the tax rate is assumed to equal the applicable percentage for the contract determined under section 3.11 of Rev. Proc. 2008–39, page 143, this Bulletin; and the amount of interest is the amount computed under § 6621(a)(2) as if the amounts treated as received by the contract holder as income on the contract caused underpayments of tax in the appropriate years.

(3) *Amount determined based on excess earnings.* The amount required to be paid with regard to a contract with excess earnings less than or equal to \$5,000 is the amount determined based on excess earnings. This amount is equal to the amount of tax that would have been owed by the contract holder if the contract holder were treated as receiving the excess earnings on the contract. For this purpose, the excess earnings on the contract is the amount determined under section 4.03(5)(b) of this revenue procedure; the tax rate is assumed to equal the applicable percentage for the contract determined under section 3.11 of Rev. Proc. 2008–39, and the amount of interest is the amount computed under § 6621(a)(2) as if the amounts treated as received by the contract holder as excess

earnings caused underpayments of tax in the appropriate years.

(4) *Amount determined based on excess premiums.* In lieu of the amount determined based on income on the contract set forth in section 4.03(2) of this revenue procedure or the amount determined based on excess earnings set forth in section 4.03(3) of this revenue procedure, as applicable, an issuer may elect to pay an amount with regard to a contract equal to 100% of the excess premiums as defined in section 4.03(5)(c) of this revenue procedure.

(5) *Definitions.*

(a) *Income on the contract.* The income on the contract is the amount determined with regard to the contract under § 7702(g)(1)(B).

(b) *Excess earnings.* The excess earnings for a contract is equal to the amount obtained by multiplying—

(i) the sum of a contract’s excess premiums for a contract year and its cumulative excess earnings for all prior contract years, by

(ii) the applicable earnings rate as set forth in section 3.07 of Rev. Proc. 2008–39. (For contract years before 1988, the applicable earnings rate is the rate determined in a manner consistent with the formulas set forth in section 3.07 of Rev. Proc. 2008–39 for contract years after 2007.)

(c) *Excess premiums.* The excess premiums with regard to a contract is equal to the highest amount by which the total premiums paid under the contract exceed the guideline premium limitations under § 7702(c) at any time the contract is in force.

.04 *Payment of amount.* The issuer is required to pay the amount determined under section 4.03 of this revenue procedure within 60 days of the date of execution of the closing agreement by the Service. Payment shall be made by check payable to the “United States Treasury” delivered, together with a fully executed copy of the closing agreement, to Internal Revenue Service, Receipt & Control Stop 31, 201 W. Rivercenter Blvd., Covington, KY 41011.

.05 *Correction of contracts.* With respect to each contract that is in force on the effective date of the closing agreement, to the extent necessary to bring the contract into compliance with § 7702, the issuer is

required, no later than 90 days after the date of execution of the closing agreement with the Service, either (1) to increase the death benefit to not less than an amount that will ensure compliance with § 7702 or § 101(f), as applicable, or (2) to refund to the contract holder the excess of the sum of the premiums paid as of the effective date of the closing agreement over the guideline premium limitation as of that date. If the sum of the premiums paid does not exceed the guideline premium limitation, no corrective action is necessary.

.06 *Required representations.* The submission must include representations to the effect that (1) the issuer is within the

scope of section 3 of this revenue procedure; (2) the issuer properly computed the amount required to be paid with regard to the contracts in accordance with section 4.03 of this revenue procedure; and (3) the issuer has brought the contracts into compliance with the requirements of § 7702 or § 101(f), as applicable, or will do so within the time period specified in the model closing agreement set forth in section 5 of this revenue procedure. The representations must be executed under penalties of perjury by an appropriate party (as set forth in section 7.01 of Rev. Proc. 2008–1 (or its successor). The issuer must retain

documentation available for audit to support the representations.

.07 *Electronic submissions.* The information required under section 4.01 of this revenue procedure may be submitted to the Service electronically, in read-only format, on a CD-ROM. Adobe Portable Document format is a suitable format. Other formats may be arranged on a case-by-case basis. The issuer must provide a total of three CD-ROMs, one for each of the three copies of the closing agreement.

SECTION 5. MODEL CLOSING AGREEMENT

Effective as of date executed by Internal Revenue Service _____

CLOSING AGREEMENT AS TO FINAL DETERMINATION COVERING SPECIFIC MATTERS UNDER § 7702 *[Insert “or § 101(f)” if applicable]*

THIS CLOSING AGREEMENT (“Agreement”) is made pursuant to § 7121 of the Internal Revenue Code (the “Code”) by and between *[Insert Taxpayer name, address and EIN number]* (“Taxpayer”) and the Commissioner of Internal Revenue (the “Service”).

WHEREAS,

A. Taxpayer is the issuer of one or more contracts that were intended to qualify as life insurance contracts under § 7702 *[Insert “or § 101(f)” if applicable]*. For each contract, however, Taxpayer accepted and retained premiums that exceeded the contract’s guideline premium limitations. As a result, the contract[s] failed to satisfy the requirements of § 7702 *[Insert “or § 101(f)” if applicable]*.

B. Pursuant to Rev. Proc. 2008–40, 2008–29 I.R.B. 151, the Service under certain circumstances will waive civil penalties for failure of a taxpayer to satisfy the recordkeeping, reporting, withholding, or deposit requirements for income received or deemed received under § 7702(g).

C. By letter dated *[Insert date]* Taxpayer submitted to the Service, pursuant to Rev. Proc. 2008–1, 2008–1 I.R.B. 1 *[or successor if applicable]*, a request for this Agreement covering *[Insert number]* of Taxpayer’s life insurance contracts identified on Exhibit A attached to this Agreement (the “Contracts”).

D. Taxpayer represents that the failure[s] described in A above are eligible for relief under Rev. Proc. 2008–40.

E. Taxpayer represents that the amount determined under section 4.03 of Rev. Proc. 2008–40 is \$ *[Insert amount]*. Taxpayer represents that this amount has been computed correctly under the provisions of Rev. Proc. 2008–40.

F. To ensure that the Contracts satisfy the requirements of § 7702(a) *[Insert “or § 101(f)” if applicable]*, Taxpayer and the Service have entered into this Agreement.

NOW THEREFORE IT IS HEREBY FURTHER DETERMINED AND AGREED BETWEEN TAXPAYER AND THE SERVICE AS FOLLOWS:

1. In consideration for the agreement of the Service as set forth in Section 2 below, Taxpayer agrees as follows:

- (A) To pay the Service the amount of \$ *[Insert amount]* at the time and in the manner described in Section 3 below.
- (B) The amount paid pursuant to Section 1(A) above is not deductible, nor is such amount refundable, subject to credit or offset, or otherwise recoverable from the Service.
- (C) For purposes of complying with Taxpayer’s reporting and withholding obligations under the Code,

- (i) neither the investment in the contract for purposes of § 72, nor the premiums paid, for purposes of § 7702 **[Insert “or § 101(f)” if applicable]**, on any Contract can be increased by any portion of the amount set forth in Section 1(A) above. If any such increases are made, they are entitled to no effect.
 - (ii) neither the investment in the contract, for purposes of § 72, nor the premiums paid, for purposes of § 7702 **[Insert “or § 101(f)” if applicable]**, on any Contract can be increased by any portion of the amount which Taxpayer represents to be the income on the contract for all of the Contracts in the aggregate. If any such increases are made, they are entitled to no effect.
- (D) With respect to each Contract that is in force on the effective date of this Agreement, to the extent necessary in order to bring such Contract into compliance with § 7702 **[Insert “or § 101(f)” if applicable]**, no later than 90 days after the date of execution of this Agreement by the Service:
- (i) If the sum of the premiums paid as of the effective date of this Agreement exceeds the guideline premium limitation as of such date, Taxpayer will take the following corrective action:
 - (a) Increase the death benefit to not less than an amount that will ensure compliance with § 7702 **[Insert “or § 101(f)” if applicable]**, or
 - (b) Refund to the Contract holder the amount of such excess, with interest at the Contract’s interest crediting rate; or
 - (ii) If the sum of the premiums paid as of the effective date of this Agreement does not exceed the guideline premium limitation of § 7702 **[insert “or § 101(f)” if applicable]** as of such date, to take no corrective action.
- (E) With respect to any Contract which terminated by reason of the death of the insured (i) prior to the date this Agreement is executed by the Service and Taxpayer and (ii) at a time when the premiums paid exceeded the amounts necessary to keep the Contracts in compliance with the requirements of § 7702 **[Insert “or § 101(f)” if applicable]** guideline premium limitation for the Contract, Taxpayer will pay the Contract holder, or the Contract holder’s estate, the amount of such excess with interest.

2. In consideration of the agreement of Taxpayer set forth in Section 1 above, the Service agrees as follows:

- (A) To treat each Contract that is still in force as of the effective date of this Agreement as having satisfied the requirements of § 7702 **[Insert “or § 101(f)” if applicable]** during the period from the date of issuance of the Contract through and including the later of (i) the date of the execution of this Agreement by the Service or (ii) the date of corrective action described in Section 1(D) with respect to that Contract;
- (B) To treat each Contract that terminated prior to the effective date of this Agreement as having satisfied the requirements of § 7702 **[Insert “or § 101(f)” if applicable]** during the period from date of issuance of the Contract through and including the date of the Contract’s termination;
- (C) To treat the failure(s) described above, and any corrective action described in Section 1(D) or 1(E) above, as having no effect on the date the Contract was issued, entered into, or purchased for purposes of any provision of the Code or regulations thereunder;
- (D) To treat any amount paid prior to the effective date of this Agreement to any beneficiary under a Contract by reason of the death of the insured as paid under a life insurance contract for purposes of the exclusion from gross income under § 101(a)(1);
- (E) To waive civil penalties for failure of Taxpayer to satisfy the reporting, withholding, or deposit requirements for income deemed received by Contract holders due to the Contract’s failure to satisfy the requirements of § 7702 **[Insert “or 101(f)” if applicable]**; and
- (F) To treat no portion of the amount described in Section 1(A) above as income to the Contract holders.

3. Any action required of Taxpayer in Section 1(D) or 1(E) above shall be taken by Taxpayer no later than 90 days after the date of execution of this Agreement by the Service. Payment of the amount described in Section 1(A) above shall be made within 60 days after the date of execution of this Agreement by the Service by check payable to the “United States Treasury,” delivered together with a copy of this executed Agreement, to Internal Revenue Service, Receipt & Control Stop 31, 201 W. Rivercenter Blvd., Covington, KY 41011.

4. This Agreement is, and shall be construed as being, for the benefit of Taxpayer. Contract holders of the Contracts covered by this Agreement are intended beneficiaries of this Agreement. This Agreement shall not be construed as creating any liability of Taxpayer to the Contract holders.

5. Neither the Service nor Taxpayer shall endeavor by litigation or other means to attack the validity of this Agreement.

6. This Agreement may not be cited or relied upon as precedent in the disposition of any other matter.

NOW THIS CLOSING AGREEMENT FURTHER WITNESSETH, that the Service and Taxpayer mutually agree that the matters so determined shall be final and conclusive, except as follows:

1. The matter to which this Agreement relates may be reopened in the event of fraud, malfeasance, or misrepresentation of material facts set forth herein.

2. This Agreement is subject to sections of the Code that expressly provide that effect be given to their provisions (including any stated exception for Code § 7122) notwithstanding any other law or rule of law.

3. To the extent this Agreement relates to any tax period after the date on which it is executed, it is subject to any law, enacted after such date, that applies to that tax period.

IN WITNESS WHEREOF, the parties have subscribed their names in triplicate. By signing, the above parties certify that they have read and agreed to the terms of this document.

[Insert Taxpayer name]

Date Signed: _____

By: _____

Title: _____

COMMISSIONER OF INTERNAL REVENUE

Date Signed: _____

By: _____

Title: _____

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective July 21, 2008, the date of its publication in the Internal Revenue Bulletin.

long as their contents may become material in the administration of any internal revenue law. Generally tax returns and return information are confidential, as required by 26 U.S.C. 6103.

92-25, 1992-1 C.B. 741, is superseded; Notice 2000-9, 2000-1 C.B. 449, is obsolete.

SECTION 7. EFFECT ON OTHER DOCUMENTS

Rev. Rul. 91-17, 1991-1 C.B. 190, is superseded in part to set forth new terms and conditions under which the Service will enter into a closing agreement to remedy the failure of a contract to qualify as a life insurance contract; Notice 99-48 is superseded.

DRAFTING INFORMATION

The principal author of this revenue procedure is Melissa S. Luxner of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact Branch 4 of that office at (202) 622-3970 (not a toll-free call).

SECTION 2. BACKGROUND

.01 *Definition and tax treatment of a variable contract.*

(1) Section 817(d) defines the term “variable contract” to mean a contract that (a) provides for the allocation of all or part of the amounts received under the contract to an account that, pursuant to state law or regulations, is segregated from the general asset accounts of the company, and (b) provides for the payment of annuities, or is a life insurance contract, or provides for funding of insurance on retired lives. In the case of an annuity contract or a contract that provides funding of insurance on retired lives, the amounts paid in or the amounts paid out are required to reflect the investment return and the market value of the segregated asset account. In the case of a life insurance contract, the amount of the death benefit (or the period of coverage) must be adjusted on the basis of the investment return and the market value of the segregated asset account.

SECTION 8. PAPERWORK REDUCTION ACT

The collections of information in this revenue procedure have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1752.

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

Books and records relating to a collection of information must be retained as

26 CFR 301.7121-1: Closing agreements. (Also Part I, Section 817; 1.817-5.)

Rev. Proc. 2008-41

SECTION 1. PURPOSE

This revenue procedure provides a procedure by which an issuer of a variable contract may remedy an inadvertent failure of a variable contract to satisfy the diversification requirements of § 817(h) of the Internal Revenue Code. Rev. Rul. 91-17, 1991-1 C.B. 190, is amplified; Rev. Proc.

(2) Section 817(h) of the Code provides that a variable contract (other than a pension plan contract) based on a segregated

asset account shall not be treated as an annuity, endowment, or life insurance contract if the investments made by the account are not adequately diversified in accordance with regulations prescribed by the Secretary.

(3) Section 1.817-5(a)(1) provides that a variable contract is treated as based on a segregated asset account for a calendar quarter period if amounts received under the contract (or earnings thereon) are allocated to the account at any time during the period. Section 1.817-5(e) of the Income Tax Regulations provides that a “segregated asset account” consists of all assets the investment return and market value of each of which must be allocated in an identical manner to any variable contract invested in any of such assets. Section 1.817-5(g) illustrates the application of this provision.

(4) Section 1.817-5(a) provides that, if a variable contract that is a life insurance contract under applicable law is not treated as a life insurance or endowment contract under § 7702(a), the income on the contract for any taxable year of the policyholder is treated as ordinary income received or accrued by the policyholder during such year in accordance with § 7702(g) and (h). Likewise, if a variable contract is not treated as an annuity contract under § 72, the regulation provides that the income on the contract for any taxable year of the policyholder shall be treated as ordinary income received or accrued by the policyholder during such year in the same manner as a life insurance or endowment contract under § 7702(g) and (h).

.02 Diversification requirements.

(1) Section 1.817-5(b)(1) provides that the investments of a segregated asset account are adequately diversified for purposes of § 817(h) only if—

(a) No more than 55% of the value of the total assets of the account is represented by any one investment;

(b) No more than 70% of the value of the total assets of the account is represented by any two investments;

(c) No more than 80% of the value of the total assets of the account is represented by any three investments, and

(d) No more than 90% of the value of the total assets of the account is represented by any four investments.

For purposes of § 1.817-5, all securities of the same issuer, all interests in the same

real property project, and all interests in the same commodity are each treated as a single investment. In the case of government securities, each government agency or instrumentality is treated as a separate issuer.

(2) Section 817(h)(2) provides a safe harbor under which the investments of a segregated asset account are adequately diversified for purposes of § 817(h) if (a) the account meets the requirements of § 851(b)(3), and (b) no more than 55% of the value of the total assets of the account are assets described in § 851(b)(3)(A)(i) (*i.e.*, cash, cash items (including receivables), Government securities, and securities of other regulated investment companies).

(3) Under § 1.817-5(c)(1), a segregated asset account that satisfies the requirements of § 1.817-5(b) as of the last day of any calendar quarter period (or within 30 days after that last day) is considered adequately diversified for that period.

.03 Recordkeeping, reporting, withholding, and deposit requirements for nondiversified contracts.

An issuer of a variable contract that fails to satisfy the requirements of § 817(h) may have recordkeeping, reporting, withholding, and deposit obligations. An issuer that fails to meet these obligations also may be subject to penalties. *See* Rev. Rul. 91-17.

.04 Authority to enter into closing agreements. Under § 7121, the Secretary is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any period. Such agreement is generally final and conclusive, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact.

.05 Correction procedure for failure to satisfy the diversification requirements of § 817(h).

(1) Section 1.817-5(a)(2) provides that, in the event of an inadvertent failure to diversify, the investments of a segregated asset account are nevertheless treated as satisfying the diversification requirements of § 1.817-5(b) for one or more periods if —

(a) the issuer or holder of the variable contract shows that the failure to satisfy the diversification requirements was inadvertent;

(b) the investments of the account satisfy the diversification requirements within a reasonable item after discovery of the failure; and

(c) the issuer or holder agrees to make such adjustments or pay such amounts as the Commissioner may require.

For this purpose (and for purposes of this revenue procedure), income on the contract is computed under § 7702(g)(1)(B), without regard to § 7702(g)(1)(C), and is computed using the period or periods of nondiversification instead of the “taxable year” referred to in § 7702(g)(1)(B). Thus, for example, income attributable to each segregated asset account on which a contract is based (including accounts that at all times were adequately diversified) is included in the computation of income on the contract.

(2) Rev. Proc. 92-25, 1992-1 C.B. 741, set forth the procedure by which an issuer of a variable contract could request the relief described in § 1.817-5(a)(2) with regard to an inadvertent failure to satisfy the diversification requirements of § 817(h). Among the requirements set forth in Rev. Proc. 92-25 was a requirement that the issuer pay an amount under the closing agreement based on all the income on the annuity contracts that invested in the nondiversified accounts, including income with regard to accounts that were adequately diversified.

(3) Notice 2000-9, 2000-1 C.B. 449, reminded issuers of variable annuity contracts that the special rules of § 817(h)(3) and § 1.817-5(b)(3), concerning diversification of accounts with respect to variable life insurance contracts, do not apply with respect to variable annuity contracts. Notice 2000-9 provided a one-time procedure to cure diversification failures that resulted from a misapplication of that rule. That procedure applied to requests for closing agreement relief that were received on or before August 1, 2000.

.06 Changes to correction procedure. In Notice 2007-15, 2007-7 I.R.B. 503, the Service requested comments as to how various correction procedures — including those for inadvertent failures to satisfy the diversification requirements of § 817(h) — may be improved. This revenue procedure incorporates a number of changes that taxpayers suggested in response to Notice 2007-15. Most significantly, this revenue procedure (1) updates the model closing

agreement set forth in Rev. Proc. 92-25, and (2) provides both an alternative computation of the amount due under the closing agreement and an overall limit on the amount that must be paid.

SECTION 3. SCOPE

This revenue procedure applies to any issuer of a variable contract that inadvertently failed to satisfy the diversification requirements of § 817(h), provided the issuer is entitled to relief under § 1.817-5(a)(2). For purposes of this revenue procedure, the term “issuer” is any company that issues a contract that is a variable contract under § 817(d) and is intended to satisfy the diversification requirements of § 817(h). The term also includes a company that insures a contract holder under a contract originally issued by another company.

SECTION 4. PROCEDURE

.01 Request for ruling. An issuer that seeks relief under this revenue procedure must submit a request for a ruling that meets the requirements of Rev. Proc. 2008-1, 2008-1 I.R.B. 1 (or any successor). Additionally, the submission must —

(1) identify the period or periods during which the investments of the segregated asset account did not satisfy the diversification requirements;

(2) show that the failure to diversify was inadvertent;

(3) demonstrate that the investments of the account were brought into compliance with the diversification requirements within a reasonable time after discovery of the failure; and

(4) if the amount required to be paid is determined under section 4.03(2) of this revenue procedure, describe the method used to compute the amount of income that all holders of contracts based on the account would be treated as receiving during the period or periods of nondiversification if the account were not treated as adequately diversified under § 1.817-5(a)(2). (This computation is to be made without regard to contracts that were completely surrendered during the nondiversification period.) Otherwise, indicate whether the amount required to be paid was determined under section 4.03(3) or section 4.04(4) of this revenue procedure.

.02 Closing agreement. The issuer must also submit a proposed closing agreement, in triplicate, executed by the issuer, using the model closing agreement in section 6 of this revenue procedure. The amount shown in Section 1(A) of the proposed closing agreement is the amount determined under section 4.03 of this revenue procedure for all of the contracts covered by the agreement.

.03 Determination of amount required to be paid.

(1) *In general.* Except as provided in section 4.03(4) of this revenue procedure, the issuer must remit to the Service the lesser of the amount determined based on income on the contracts under section 4.03(2) of this revenue procedure, or the amount determined based on the amount by which the segregated asset account was nondiversified under section 4.03(3) of this revenue procedure.

(2) *Amount determined based on income on the contracts.* The amount required to be paid based on income on the contracts is the sum of the following amounts for variable annuity contracts and for variable life insurance or endowment contracts, as applicable:

(a) With regard to variable annuity contracts, an amount equal to the sum of —

(i) 20% of income on annuity contracts from which payments have not been made as of the end of the period; plus

(ii) 15% of income on annuity contracts from which payments have been made as of the end of the period; plus

(iii) any interest computed under § 6621(a)(2) as if the amounts determined under sections 4.03(2)(a)(i) and (ii) of this revenue procedure were underpayments by the contract holders for their tax year(s) containing the period(s) of nondiversification; and

(b) With regard to variable life insurance or endowment contracts, an amount equal to the sum of —

(i) 28% of the income on the contracts; plus

(ii) any interest computed under § 6621(a)(2) as if the amount determined under section 4.03(2)(b)(i) of this revenue procedure were an underpayment by the contract holders for their tax year(s) containing the period(s) of nondiversification.

(3) *Amount determined based on the amount by which the segregated asset account was nondiversified.* The amount

determined based on the amount by which the segregated asset account was non-diversified is an amount equal to 100% of the amount by which the account's interest in a single investment exceeded the applicable limitation of § 1.817-5(b). Thus, for example, if a segregated asset account's investment in a single security exceeded both the 55% limitation of § 1.817-5(b)(1)(i)(A) and the 70% limitation of § 1.817-5(b)(1)(i)(B), the amount determined under this section 4.03(3) is the total amount by which the investment would need to be reduced in order to satisfy both requirements and comply with the rules of § 817(h) and § 1.817-5(b). This amount is determined as of the 30th day after the last day of each calendar quarter for which the segregated asset account was not diversified. If nondiversification spans multiple calendar quarters, the amount payable under this section is based on the calendar quarter that produces the highest amount.

(4) *Limitation on amount required to be paid.* Notwithstanding section 4.03(2) or section 4.03(3) of this revenue procedure, as applicable, the amount required to be paid shall not exceed the lesser of \$5,000,000 or 5% of the total asset value of the segregated asset account on the 30th day after the last day of each calendar quarter for which the segregated asset account was not diversified. If nondiversification spans multiple calendar quarters, the amount payable under this section is based on the calendar quarter that produces the highest amount. The limitation applies on a per segregated asset account basis, and is not increased by any interest computed under § 6621(a)(2).

.04 Payment of amount. The issuer is required to pay the amount determined under section 4.03 of this revenue procedure within 60 days of the date of execution of the closing agreement by the Service. Payment shall be made by check payable to the “United States Treasury” delivered, together with a fully executed copy of the closing agreement, to Internal Revenue Service, Receipt & Control Stop 31, 201 W. Rivercenter Blvd., Covington, KY 41011.

.05 Correction of contracts. The issuer is required to have satisfied the requirements of § 817(h) and § 1.817-5(b) of the regulations within a reasonable time after

the discovery of the failure to satisfy those requirements.

.06 *Required representations.* The submission must include representations to the effect that (1) the issuer is within the scope of section 3 of this revenue procedure; (2) the issuer properly computed the amount required to be paid with regard to the contracts in accordance with section 4.03 of this revenue procedure; and (3) the issuer has brought the contracts into com-

pliance with the requirements of § 817(h) and § 1.817-5(b) of the regulations. The representations must be executed under penalties of perjury by an appropriate party (as set forth in section 7.01 of Rev. Proc. 2008-1 (or its successor)). The issuer must retain documentation available for audit to support the representations.

.07 *Electronic submission.* The information required under this revenue procedure may be submitted to the Service

electronically, in read-only format, on a CD-ROM. Adobe Portable Document is a suitable format. Other formats may be arranged on a case-by-case basis. The issuer must provide a total of three CD-ROMs, one for each of the three copies of the closing agreement.

SECTION 6. MODEL CLOSING AGREEMENT

Effective as of date executed by Internal Revenue Service _____

CLOSING AGREEMENT AS TO FINAL DETERMINATION COVERING SPECIFIC MATTERS UNDER SECTION 817(h)

THIS CLOSING AGREEMENT (“Agreement”) is made pursuant to section 7121 of the Internal Revenue Code (the “Code”), by and between *[Insert Taxpayer name, address and EIN]* (“Taxpayer”) and the Commissioner of Internal Revenue (the “Service”).

WHEREAS,

A. Taxpayer is the issuer of one or more variable contracts, as defined in § 817(d) (without regard to § 817(h)) (the “Contracts”), which are based, in whole or in part, on a segregated asset account (the “Account”) and that provides for the allocation of amounts received under the variable contracts to the Account.

B. Pursuant to Rev. Proc. 2008-41, 2008-29 I.R.B. 155, the Service may treat the investments of a segregated asset account on which a variable contract is based as satisfying the diversification requirements of § 817(h) and § 1.817-5(b) of the Income Tax Regulations for periods during which there was an inadvertent failure to diversify.

C. By letter dated *[Insert date]* Taxpayer submitted to the Service, pursuant to Rev. Proc. 2008-1, 2008-1 I.R.B. 1 *[or successor, if applicable]* and Rev. Proc. 2008-41 a request for this Closing Agreement that *[Insert account name]* (the Account) be treated as adequately diversified under § 817(h) for the period *[Insert period of nondiversification]* (“the period of nondiversification”).

D. Taxpayer represents that the failure of the Account to satisfy the requirements of § 817(h) is eligible for relief under Rev. Proc. 2008-41.

E. Taxpayer represents that the failure of the investments in the Account to satisfy the requirements of § 1.817-5(b) was discovered on *[Insert date]*, and the investments came into compliance with those requirements on *[Insert date]*.

F. Taxpayer represents that the amount determined under section *[Insert 4.03(2), (3) or (4), as appropriate]* of Rev. Proc. 2008-41 is \$ *[Insert amount]*. Taxpayer represents that this amount has been computed correctly under the provisions of Rev. Proc. 2008-41.

G. To ensure that variable contracts that provide for the allocation of amounts received thereunder to Account are treated as annuity, endowment, or life insurance contracts, as applicable, Taxpayer and the Service have entered into this Agreement.

NOW THEREFORE IT IS HEREBY DETERMINED AND AGREED BETWEEN TAXPAYER AND THE SERVICE AS FOLLOWS:

1. In consideration for the agreement of the Service as set forth in section 2 below, Taxpayer agrees as follows:

- (A) Taxpayer will pay the Service \$ *[Insert amount]* at the time and manner described in section 3 below.
- (B) The amount paid pursuant to section 1(A) above is not deductible by Taxpayer, nor is such amount refundable, subject to credit or offset, or otherwise recoverable from the Service;
- (C) For purposes of Taxpayer’s complying with its reporting and withholding obligations under the Code,
 - (i) neither the investment in the contract for purposes of § 72, nor the premiums paid for purposes of section § 7702 on any Contract can be increased by any portion of the amount set for the in section 1(A) above. If any such increases are made, they are entitled to no effect.

- (ii) neither the investment in the contract for purposes of § 72, nor the premiums paid, for purposes of § 7702 on any Contract can be increased by any portion of the amount which Taxpayer represents to be the income on the contract for all of the Contracts in the aggregate. If any such increases are made, they are entitled to no effect.

2. In consideration of the agreement of Taxpayer set forth in Section 1 above, the Service agrees as follows:

- (A) To treat the investments of the Account as adequately diversified for purposes of § 817(h) during the period of nondiversification;
- (B) To treat no portion of the amount described in Section 1(A) above as income to the Contract holders;
- (C) To treat the failure(s) described above, and any corrective action described in Section 1(A) above, as having no effect on the date the Contracts were issued, entered into or purchased for purposes of any provision of the Code or regulations thereunder; and
- (D) To waive civil penalties for failure of Taxpayer to satisfy the reporting, withholding, or deposit requirements for income deemed received by Contract holders due to the Contracts' failure to satisfy the requirements of § 817.

3. Payment of the amount described in Section 1(A) above shall be made within 60 days of the date of execution of this Agreement by the Service. This payment must be made by check payable to the "United States Treasury," delivered, together with a copy of this executed Agreement, to Internal Revenue Service Center, Receipt & Control Stop 31, 201 W. Rivercenter Blvd., Covington, KY 41011.

4. This Agreement is, and shall be construed as being, for the benefit of Taxpayer. Holders of contracts based on the Account are intended beneficiaries of this Agreement. This Agreement shall not be construed as creating any liability of Taxpayer to the holders of the contracts based on the Account.

5. Neither the Service nor Taxpayer shall endeavor by litigation or other means to attack the validity of this Agreement.

6. This Agreement may not be cited or relied upon as precedent in the disposition of any other matter.

NOW THIS CLOSING AGREEMENT FURTHER WITNESSETH, that the Service and Taxpayer mutually agree that the matters so determined shall be final and conclusive, except as follows:

1. The matter to which this Agreement relates may be reopened in the event of fraud, malfeasance, or misrepresentation of material facts set forth herein.

2. This Agreement is subject to sections of the Code that expressly provide that effect be given to their provisions (including any stated exception for Code § 7122) notwithstanding any other law or rule of law.

3. To the extent this Agreement relates to any tax period after the date on which it is executed, it is subject to any law, enacted after such date, that applies to that tax period.

IN WITNESS WHEREOF, the parties have subscribed their names in triplicate. By signing, the above parties certify that they have read and agreed to the terms of this document.

[Insert Taxpayer name]

Date Signed: _____

By: _____

Title: _____

COMMISSIONER OF INTERNAL REVENUE

Date Signed: _____

By: _____

Title: _____

SECTION 7. EFFECTIVE DATE

This revenue procedure is effective July 21, 2008, the date of its publication in the Internal Revenue Bulletin.

SECTION 8. EFFECT ON OTHER DOCUMENTS

Rev. Rul. 91-17, 1991-1 C.B. 190, is amplified to provide terms and conditions and a model closing agreement for use by taxpayers seeking the relief described in § 1.817-5(a)(2) of the regulations; Rev.

Proc. 92-25, 1992-1 C.B. 741, is superseded; Notice 2000-9, 2000-1 C.B. 449, is obsolete.

SECTION 9. PAPERWORK REDUCTION ACT

The collections of information in this revenue procedure have been reviewed

and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1752.

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

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

DRAFTING INFORMATION

The principal author of this revenue procedure is Melissa S. Luxner of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact Branch 4 of that office at (202) 622-3970 (not a toll-free call).

26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.
(Also Part 1, §§ 101, 7702.)

Rev. Proc. 2008-42

SECTION 1. PURPOSE

This revenue procedure provides a procedure by which an issuer of a life insurance contract may automatically obtain a waiver, under § 7702(f)(8) or § 101(f)(3)(H) of the Internal Revenue Code, for certain reasonable errors that caused the contract to fail to satisfy the requirements of § 7702 or § 101(f), as applicable. Rev. Rul. 91-17, 1991-1 C.B. 190, is amplified.

SECTION 2. BACKGROUND

.01 Definition of a life insurance contract.

(1) Section 7702(a) provides that, for a contract to qualify as a life insurance contract for Federal income tax purposes, the contract must be a life insurance contract under the applicable law and must either—

(a) satisfy the cash value accumulation test of § 7702(b), or

(b) both meet the guideline premium requirements of § 7702(c) and fall within the cash value corridor of § 7702(d).

(2) A contract meets the cash value accumulation test of § 7702(b) if, by the terms of the contract, the cash surrender value of the contract may not at any time exceed the net single premium that would have to be paid at that time to fund future benefits under the contract.

(3) A contract meets the guideline premium requirements of § 7702(c) if the sum of the premiums paid under the contract does not at any time exceed the guideline premium limitation as of that time. The guideline premium limitation as of any date is the greater of the guideline single premium, or the sum of the guideline level premiums to that date. The guideline single premium is the premium that would be required on the date the contract is issued to fund the future benefits under the contract.

(4) A contract falls within the cash value corridor of § 7702(d) if the death benefit under the contract at any time is not less than the applicable percentage of the cash surrender value, based on the table set forth in § 7702(d)(2).

(5) Section 7702 is effective for contracts issued after December 31, 1984, in tax years ending after that date.

.02 Definition and tax treatment of a flexible premium life insurance contract. A flexible premium life insurance contract is a life insurance contract that provides for the payment of one or more premiums that are not fixed by the insurer as to both timing and amount. Section 101(f) provides that any amount paid by reason of the death of the insured under a flexible premium life insurance contract is excluded from gross income only if the contract satisfies either (1) the guideline premium limitation and the applicable percentage of cash value test of § 101(f)(1)(A)(i) and (ii), or (2) the cash value test of § 101(f)(1)(B). The limitations of § 101(f) generally apply to contracts issued before January 1, 1985.

.03 Correction procedure for reasonable errors. Section 7702(f)(8) provides that if a taxpayer establishes to the satisfaction of the Secretary that the requirements of § 7702(a) for any contract year were not satisfied due to reasonable error, and rea-

sonable steps are being taken to remedy the error, the Secretary may waive the failure to satisfy those requirements. The Internal Revenue Service (Service) may waive civil penalties for failure to satisfy the reporting, withholding, and deposit requirements for income deemed received under § 7702(g) and (h), as well. *See* Rev. Rul. 91-17. Section 101(f)(3)(H) provides similar authority for the Secretary to waive the failure to satisfy the requirements of § 101(f). In order to request a waiver under § 7702(f)(8) or § 101(f)(3)(H), a taxpayer generally must request a letter ruling from the Service under the procedures set forth in Rev. Proc. 2008-1, 2008-1 I.R.B. 1 (or any successor).

.04 Changes to correction procedure. In Notice 2007-15, 2007-1 C.B. 503, the Service requested comments as to how various correction procedures — including those for obtaining a waiver with respect to errors that are reasonable within the meaning of § 7702(f)(8) or § 101(f)(3)(H) — may be improved. This revenue procedure incorporates a number of changes that taxpayers suggested in response to Notice 2007-15. Specifically, this revenue procedure provides a simplified procedure under which a taxpayer may obtain a waiver for a limited class of errors under these provisions without incurring the cost of requesting a letter ruling.

SECTION 3. SCOPE

.01 In general. This revenue procedure applies to any issuer of a life insurance contract that failed to satisfy the requirements of § 7702 or § 101(f), as applicable, due to an eligible reasonable error, provided reasonable steps are taken to remedy the error.

.02 Issuer. For purposes of this revenue procedure, the term “issuer” is any company that issues a contract that is intended to satisfy the requirements of § 7702 or § 101(f). The term also includes a company that insures a contract holder under a contract originally issued by another company.

.03 Eligible reasonable error. An eligible reasonable error for purposes of this revenue procedure exists if: (1) the issuer has compliance procedures with specific, clearly articulated provisions that if followed would have prevented the contract from failing to satisfy the requirements of

§ 7702 or § 101(f); (2) an employee or independent contractor of the issuer acted, or failed to act, in accordance with the compliance procedures; and (3) such act or failure to act was inadvertent, and was the sole reason that the contract failed to satisfy the requirements of either § 7702 or § 101(f). Thus, for example, the term eligible reasonable error includes an employee's incorrect recording of the age or gender of the insured, or of the incorrect amount or time of payment of the insured's premium payment.

.04 *Reasonable steps to remedy.* The requirement that reasonable steps be taken to remedy the eligible reasonable error is satisfied for purposes of this revenue procedure if the issuer refunds excess premium with interest and/or increases the death benefit on the contract no later than the date on which the issuer files the federal income tax return to which the tax return attachment described in section 4.03 of this revenue procedure is affixed. The remedy required under this section 3.04 of this revenue procedure does not include changes to the issuer's compliance procedures, since the definition of an eligible reasonable error under section 3.03 of this revenue procedure requires that the system already have specific, clearly articulated procedures that if followed would have prevented the error.

.05 *Non-eligible errors.* Although the automatic waiver provided under this revenue procedure is not available with respect to an error that is not described in section 3.03 of this revenue procedure, relief may be available under other correction procedures. For example, neither a defective legal interpretation nor a computer programming error would satisfy the requirement of section 3.03(1) of this revenue procedure that the issuer's compliance procedures, if followed, would have prevented the error. If such an error is reasonable, however, the issuer may request a waiver by letter ruling under the procedures set forth in Rev. Proc. 2008-1 (or any successor). In addition, errors that are not reasonable may be eligible for correction by closing agreement under the procedure set forth in Rev. Proc. 2008-40, page 151, this Bulletin.

SECTION 4. PROCEDURE

.01 *Automatic waiver.* The failure of one or more life insurance contracts to satisfy the requirements of § 7702 or § 101(f), as applicable, due to reasonable error will be treated as waived pursuant to the authority of § 7702(f)(8) or § 101(f)(3)(H), as applicable, provided the issuer (1) is within the scope of section 3.01 of this revenue procedure, and (2) files both the waiver statement described in section 4.02 and the tax return attachment described in section 4.03 of this revenue procedure.

.02 *Waiver statement.* An automatic waiver for a reasonable error described in section 3 of this revenue procedure is available to an issuer only if it files with the Service, in duplicate, a statement entitled "Automatic Waiver Request under Rev. Proc. 2008-42" in which the issuer (1) provides a brief description of the error and the steps taken to remedy the error; (2) lists the policy numbers of the life insurance contracts for which it seeks an automatic waiver; and (3) provides the representations described in section 4.04 of this revenue procedure. This statement should be signed and dated, and submitted to the Commissioner of Internal Revenue, Attn: CC:FIP:4, Room 3550, 1111 Constitution Avenue, NW, Washington, DC 20224, no later than the date on which the issuer files the federal income tax return to which the tax return attachment described in section 4.03 of this revenue procedure is affixed.

.03 *Tax return attachment.* In addition, the issuer must attach to its timely-filed (including extensions) Federal income tax return, for the taxable year during which the issuer relies upon this revenue procedure to obtain a § 101(f)(3)(H) or § 7702(f)(8) waiver, a statement that reads: "Issuer has submitted an Automatic Waiver Request under section 4.02 of Rev. Proc. 2008-42 for certain errors that caused one or more life insurance contracts it issued to fail to comply with § 7702(f)(8) or § 101(f) of the Internal Revenue Code. An issuer filing its return electronically should attach this statement as an Adobe Portable Document format (PDF) file named "Rev. Proc. 2008-42."

.04 *Representations.* The waiver statement required under section 4.02 of this revenue procedure must include representations to the effect that the issuer is within

the scope of section 3 of this revenue procedure and that the issuer is otherwise entitled to the requested waiver. The representations must be executed under penalties of perjury by an appropriate party (as set forth in section 7.01 of Rev. Proc. 2008-1 (or its successor)). The issuer must retain documentation available for audit to support the representations.

.05 *Electronic submissions.* The waiver statement required under section 4.02 of this revenue procedure may be submitted to the Service electronically, in read-only format, on a CD-ROM. Adobe Portable Document format is a suitable format. Other formats may be arranged on a case-by-case basis. The issuer must provide a total of two CD-ROMs.

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective July 21, 2008, the date of its publication in the Internal Revenue Bulletin.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Rev. Rul. 91-17, 1991-1 C.B. 190, is amplified to provide an automatic procedure by which an issuer of a life insurance contract may automatically obtain a waiver for certain reasonable errors that caused the contract to fail to satisfy the requirements of § 7702 or § 101, as applicable.

SECTION 7. PAPERWORK REDUCTION ACT

The collections of information in this revenue procedure have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1752.

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

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

DRAFTING INFORMATION

The principal author of this revenue procedure is Josephine H. Firehock of the

Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue pro-

cedure, contact Branch 4 of that office at (202) 622-3970 (not a toll-free call).

Part IV. Items of General Interest

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

Amendments to the Section 7216 Regulations—Disclosure or Use of Information by Preparers of Returns

REG-121698-08

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9409) that provide updated guidance affecting tax return preparers regarding the disclosure of a taxpayer's social security number to a tax return preparer located outside of the United States in order to provide an exception allowing such disclosure with the taxpayer's consent in limited circumstances. The text of those temporary regulations also serves as the text of these proposed regulations. This document invites comments from the public on these regulations, and provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by September 30, 2008. Outlines of topics to be discussed at the public hearing scheduled for October 6, 2008 at 10 a.m. must be received by September 15, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-121698-08), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 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-121698-08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, D.C., or sent electronically, via the Federal eRulemaking

Portal at www.regulations.gov (IRS REG-121698-08).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Lawrence E. Mack, (202) 622-4940; concerning the submissions of comments and requests for hearing, Funmi Taylor, (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains proposed amendments to 26 CFR part 301 under section 7216 to provide modified rules relating to the ability of a tax return preparer located within the United States to disclose a taxpayer's social security number ("SSN") constituting tax return information with the taxpayer's consent to a tax return preparer located outside of the United States. Simultaneously with the publication of this notice of proposed rulemaking, temporary regulations are published in this issue of the Bulletin amending 26 CFR part 301. Those regulations provide a limited exception to the general rule prohibiting a return preparer from obtaining a taxpayer's consent to disclose the taxpayer's SSN to a tax return preparer located outside of the United States. The limited exception provides that a tax return preparer within the United States may disclose an SSN with the taxpayer's consent to a tax return preparer located outside of the United States when both the tax return preparer located within the United States and the tax return preparer located outside of the United States maintain an "adequate data protection safeguard" and the tax return preparer located within the United States verifies the maintenance of the adequate data protection safeguards in the request for the taxpayer's consent. Those regulations also clarify that the general prohibition regarding disclosure of SSNs applies only to those taxpayers filing a return in the Form 1040 Series, for example, Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ. The text of those regulations also serves as the

text of these regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

Special Analyses

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

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules, how they can be made easier to understand, and the administrability of the rules in the proposed regulations, as well as the accompanying guidance published in Revenue Procedure 2008-35. All comments will be available for public inspection and copying.

A public hearing has been scheduled for October 6, 2008, beginning at 10 a.m. in the NYU Room (room 2615) of the Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building

access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written comments by September 30, 2008 and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by September 15, 2008. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the schedule of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Lawrence E. Mack, Office of the Associate Chief Counsel (Procedure & Administration).

* * * * *

Proposed Amendments to the Regulations

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

PART 301—PROCEDURE AND ADMINISTRATION

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

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

Paragraph 2. Section 301.7216-3 is amended by revising paragraph (b)(4) to read as follows:

§301.7216-3 Disclosure or use permitted only with the taxpayer's consent.

* * * * *

(b) * * *

(4) [The text of proposed §301.7216-3(b)(4) is the same as the

text for §301.7216-3T(b)(4), published elsewhere in this issue of the Bulletin.]

* * * * *

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

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

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

Announcement 2008-66

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

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

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organizations described in section 170(c)(2) that are otherwise allowable will continue to

be deductible. Protection under section 7428(c) would begin on July 21, 2008, and would end on the date the court first determines that the organization is not described in section 170(c)(2) as more particularly set forth in section 7428(c)(1). For individual contributors, the maximum deduction protected is \$1,000, with a husband and wife treated as one contributor. This benefit is not extended to any individual, in whole or in part, for the acts or omissions of the organization that were the basis for revocation.

Human Progress, Inc.
Redlands, CA
Petty Foundation
Calumet City, IL
American Indian Services, Inc.
Minneapolis, MN
The Foundation
Port Monmouth, NJ
Larry & Bladie Dye Foundation
Covington, TN
Catherine Desaintphalle Smith Family
Foundation
San Rafael, CA
Bonnemort Foundation
Salt Lake City, UT

Notice of Disposition of Declaratory Judgment Proceedings Under Section 7428

Announcement 2008-67

This announcement serves notice to donors that on March 20, 2007, the United States Tax Court entered stipulated decision. The organization listed below is not recognized as an organization described in section 501(c)(3) and is not exempt from tax under section 501(a) and is not an organization described in section 170(c)(2).

The Jonathan Drier Foundation
Paradise Valley, AZ

Definition of Terms

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

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

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

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

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A

and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

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

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

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance

of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

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

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

Abbreviations

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

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.

ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel’s Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.

PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

Numerical Finding List¹

Bulletins 2008–27 through 2008–29

Announcements:

2008-62, 2008-27 I.R.B. 74
2008-63, 2008-28 I.R.B. 114
2008-64, 2008-28 I.R.B. 114
2008-66, 2008-29 I.R.B. 164
2008-67, 2008-29 I.R.B. 164

Notices:

2008-55, 2008-27 I.R.B. 11
2008-56, 2008-28 I.R.B. 79
2008-57, 2008-28 I.R.B. 80
2008-58, 2008-28 I.R.B. 81
2008-59, 2008-29 I.R.B. 123
2008-62, 2008-29 I.R.B. 130

Proposed Regulations:

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

Revenue Procedures:

2008-32, 2008-28 I.R.B. 82
2008-33, 2008-28 I.R.B. 93
2008-34, 2008-27 I.R.B. 13
2008-35, 2008-29 I.R.B. 132
2008-37, 2008-29 I.R.B. 137
2008-38, 2008-29 I.R.B. 139
2008-39, 2008-29 I.R.B. 143
2008-40, 2008-29 I.R.B. 151
2008-41, 2008-29 I.R.B. 155
2008-42, 2008-29 I.R.B. 160

Revenue Rulings:

2008-32, 2008-27 I.R.B. 6
2008-33, 2008-27 I.R.B. 8
2008-34, 2008-28 I.R.B. 76
2008-35, 2008-29 I.R.B. 116
2008-37, 2008-28 I.R.B. 77

Treasury Decisions:

9401, 2008-27 I.R.B. 1
9409, 2008-29 I.R.B. 118

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

Finding List of Current Actions on Previously Published Items¹

Bulletins 2008–27 through 2008–29

Notices:

99-48

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

2000-9

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

2004-2

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

2004-50

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

2007-22

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

Proposed Regulations:

REG-151135-07

Hearing scheduled by
Ann. 2008-64, 2008-28 I.R.B. 114

Revenue Procedures:

92-25

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

92-83

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

2001-42

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

2006-29

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

2007-19

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

2007-42

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

2007-43

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

2007-70

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

Revenue Procedures— Continued:

2008-12

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

Revenue Rulings:

91-17

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

2005-6

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

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



**U.S. GOVERNMENT
PRINTING OFFICE**
KEEPING AMERICA INFORMED

Order Processing Code:
3465

Easy Secure Internet:
bookstore.gpo.gov

**Internal Revenue Cumulative Bulletins
Publications and Subscription Order Form**

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

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

Publications

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

Subscriptions

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

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

Standing Order Service*

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

Qty.	Standing Order	Title
	ZIRSC	Internal Revenue Cumulative Bulletins

Authorization

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

VISA MasterCard Discover/NOVUS American Express

Superintendent of Documents (SOD) Deposit Account

Authorizing signature (Standing orders not valid unless signed.)

Please print or type your name.

Daytime phone number (_____) _____

SuDocs Deposit Account

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

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



Check method of payment:

- Check payable to Superintendent of Documents
- SOD Deposit Account -
- VISA MasterCard Discover/Novus American Express

(expiration date)

Thank you for your Order!

Authorizing signature 06/06

Company or personal name (Please type or print)

Additional address/attention line

Street address

City, State, Zip Code

E-mail address

Daytime phone including area code

Purchase order number (optional)

***Standing Order Service**

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

You will receive written acknowledgement for each item you choose to receive by Standing Order Service.

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

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

INTERNAL REVENUE BULLETIN

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

CUMULATIVE BULLETINS

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

ACCESS THE INTERNAL REVENUE BULLETIN ON THE INTERNET

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

INTERNAL REVENUE BULLETINS ON CD-ROM

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

HOW TO ORDER

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

WE WELCOME COMMENTS ABOUT THE INTERNAL REVENUE BULLETIN

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

Internal Revenue Service
Washington, DC 20224

Official Business
Penalty for Private Use, \$300