

HIGHLIGHTS OF THIS ISSUE

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

INCOME TAX

Rev. Rul. 2008-36, page 165.

Low-income housing credit; satisfactory bond; "bond factor" amounts for the period January through September 2008. This ruling provides the monthly bond factor amounts to be used by taxpayers who dispose of qualified low-income buildings or interests therein during the period January through September 2008.

Rev. Rul. 2008-41, page 170.

Charitable remainder trust (CRT). This ruling provides taxpayers with guidelines on dividing a charitable remainder trust into two or more separate and equal CRTs without violating the provisions of section 664 of the Code. It also provides that, if the division of the CRT is made in accordance with the situations described in the ruling, (i) the division is not a sale, exchange, or other disposition producing gain or loss, the basis under section 1015 of each separate trust's share of each asset is the same share of the basis of that asset in the hands of the trust immediately before the division of the trust, and, under section 1223, each separate trust's holding period for an asset transferred to it by the original trust includes the holding period of the asset as held by the original trust immediately before the division, (ii) the division of the CRT does not terminate under section 507(a)(1) the CRT's status as a trust described in, and subject to, the private foundation provisions of section 4947(a)(2), or result in the imposition of an excise tax under section 507(c), (iii) the division of the CRT does not constitute an act of self-dealing under section 4941, and (iv) the division of the CRT does not constitute a taxable expenditure under section 4945.

Rev. Rul. 2008-42, page 175.

S corporation; life insurance contract; accumulated adjustments account (AAA). This ruling, under section 1368 of the Code, outlines the effects of premiums paid by an S corporation on an employer-owned life insurance contract and the benefits received by reason of death of the insured on its AAA.

Notice 2008-60, page 178.

This notice provides guidance under section 45 of the Code for the credit for electricity produced from certain renewable resources. Notice 2006-88 modified and superseded.

Notice 2008-61, page 180.

This notice provides for the suspension of certain requirements under section 42 of the Code for low-income housing credit projects in the United States in order to provide emergency housing relief needed as a result of the devastation caused by severe storms, tornadoes, and flooding in Wisconsin beginning on June 5, 2008.

Rev. Proc. 2008-43, page 186.

This procedure announces that the Service generally will view a rolling average method that is used to value inventories for financial accounting purposes as clearly reflecting income for federal income tax purposes. The procedure provides two safe harbors under which a taxpayer's rolling average method will be deemed to clearly reflect income. Rev. Ruls. 71-234 and 77-480 modified. Rev. Proc. 2002-9 modified and amplified.

Rev. Proc. 2008-45, page 224.

Sample inter vivos nongrantor and grantor charitable lead unitrusts (CLUTs) forms. This procedure contains sample forms for inter vivos nongrantor and grantor charitable lead unitrusts. The procedure also contains annotations to the sample trusts and alternate provisions that may be integrated into the sample trusts.

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Announcements of Disbarments and Suspensions begin on page 244.
Finding Lists begin on page ii.
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Rev. Proc. 2008-46, page 238.

Sample testamentary charitable lead unitrust (CLUT) form. This procedure contains a sample form, annotations, and alternate provisions for a testamentary charitable lead unitrust.

EMPLOYEE PLANS

Rev. Rul. 2008-40, page 166.

Transfer of amounts; nonqualified foreign trust; transition relief. This ruling provides that the transfer of amounts from a trust under a plan qualified under section 401(a) of the Code to a nonqualified foreign trust is treated as a distribution from the transferor plan. The ruling also holds that a transfer of assets and liabilities from a plan qualified under section 401(a) of the Code to a plan that satisfies section 1165 of the Puerto Rico Code is also treated as a distribution from the transferor plan. Rev. Rul. 67-213 amplified.

Notice 2008-65, page 182.

Weighted average interest rate update; corporate bond indices; 30-year Treasury securities; segment rates. This notice contains updates for the corporate bond weighted average interest rate for plan years beginning in July 2008; the 24-month average segment rates; the funding transitional segment rates applicable for July 2008; and the minimum present value transitional rates for June 2008.

EXEMPT ORGANIZATIONS

Rev. Rul. 2008-41, page 170.

Charitable remainder trust (CRT). This ruling provides taxpayers with guidelines on dividing a charitable remainder trust into two or more separate and equal CRTs without violating the provisions of section 664 of the Code. It also provides that, if the division of the CRT is made in accordance with the situations described in the ruling, (i) the division is not a sale, exchange, or other disposition producing gain or loss, the basis under section 1015 of each separate trust's share of each asset is the same share of the basis of that asset in the hands of the trust immediately before the division of the trust, and, under section 1223, each separate trust's holding period for an asset transferred to it by the original trust includes the holding period of the asset as held by the original trust immediately before the division, (ii) the division of the CRT does not terminate under section 507(a)(1) the CRT's status as a trust described in, and subject to, the private foundation provisions of section 4947(a)(2), or result in the imposition of an excise tax under section 507(c), (iii) the division of the CRT does not constitute an act of self-dealing under section 4941, and (iv) the division of the CRT does not constitute a taxable expenditure under section 4945.

ESTATE TAX

Rev. Proc. 2008-45, page 224.

Sample inter vivos nongrantor and grantor charitable lead unitrusts (CLUTs) forms. This procedure contains sample forms for inter vivos nongrantor and grantor charitable lead unitrusts. The procedure also contains annotations to the sample trusts and alternate provisions that may be integrated into the sample trusts.

Rev. Proc. 2008-46, page 238.

Sample testamentary charitable lead unitrust (CLUT) form. This procedure contains a sample form, annotations, and alternate provisions for a testamentary charitable lead unitrust.

GIFT TAX

Rev. Proc. 2008-45, page 224.

Sample inter vivos nongrantor and grantor charitable lead unitrusts (CLUTs) forms. This procedure contains sample forms for inter vivos nongrantor and grantor charitable lead unitrusts. The procedure also contains annotations to the sample trusts and alternate provisions that may be integrated into the sample trusts.

EXCISE TAX

Rev. Rul. 2008-41, page 170.

Charitable remainder trust (CRT). This ruling provides taxpayers with guidelines on dividing a charitable remainder trust into two or more separate and equal CRTs without violating the provisions of section 664 of the Code. It also provides that, if the division of the CRT is made in accordance with the situations described in the ruling, (i) the division is not a sale, exchange, or other disposition producing gain or loss, the basis under section 1015 of each separate trust's share of each asset is the same share of the basis of that asset in the hands of the trust immediately before the division of the trust, and, under section 1223, each separate trust's holding period for an asset transferred to it by the original trust includes the holding period of the asset as held by the original trust immediately before the division, (ii) the division of the CRT does not terminate under section 507(a)(1) the CRT's status as a trust described in, and subject to, the private foundation provisions of section 4947(a)(2), or result in the imposition of an excise tax under section 507(c), (iii) the division of the CRT does not constitute an act of self-dealing under section 4941, and (iv) the division of the CRT does not constitute a taxable expenditure under section 4945.

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ADMINISTRATIVE

Rev. Proc. 2008–44, page 187.

This procedure provides specifications for filing Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, electronically. The procedure will be reproduced as the current revision of Publication 1187. Rev. Proc. 2006–34 superseded.

The IRS Mission

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

the tax law with integrity and fairness to all.

Introduction

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

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

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

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

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

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.

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

Part II.—Treaties and Tax Legislation.

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

Part III.—Administrative, Procedural, and Miscellaneous.

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

Part IV.—Items of General Interest.

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

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

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

Section 42.—Low-Income Housing Credit

Low-income housing credit; satisfactory bond; “bond factor” amounts for the period January through September 2008. This ruling provides the monthly bond factor amounts to be used by taxpayers who dispose of qualified low-income buildings or interests therein during the period January through September 2008.

Rev. Rul. 2008-36

In Rev. Rul. 90-60, 1990-2 C.B. 3, the Internal Revenue Service provided

guidance to taxpayers concerning the general methodology used by the Treasury Department in computing the bond factor amounts used in calculating the amount of bond considered satisfactory by the Secretary under § 42(j)(6) of the Internal Revenue Code. It further announced that the Secretary would publish in the Internal Revenue Bulletin a table of bond factor amounts for dispositions occurring during each calendar month.

Rev. Proc. 99-11, 1999-1 C.B. 275, established a collateral program as an alternative to providing a surety bond for taxpayers to avoid or defer recapture of the low-income housing tax credits under

§ 42(j)(6). Under this program, taxpayers may establish a Treasury Direct Account and pledge certain United States Treasury securities to the Internal Revenue Service as security.

This revenue ruling provides in Table 1 the bond factor amounts for calculating the amount of bond considered satisfactory under § 42(j)(6) or the amount of United States Treasury securities to pledge in a Treasury Direct Account under Rev. Proc. 99-11 for dispositions of qualified low income buildings or interests therein during the period January through September 2008.

Table 1 Rev. Rul. 2008-36 Monthly Bond Factor Amounts for Dispositions Expressed As a Percentage of Total Credits											
	Calendar Year Building Placed in Service or, if Section 42(f)(1) Election Was Made, the Succeeding Calendar Year										
Month of Disposition	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Jan '08	16.41	30.70	43.23	54.19	63.81	65.42	67.35	69.63	72.14	74.79	77.33
Feb '08	16.41	30.70	43.23	54.19	63.81	65.27	67.19	69.46	71.96	74.59	77.11
Mar '08	16.41	30.70	43.23	54.19	63.81	65.12	67.04	69.29	71.78	74.39	76.89
Apr '08	15.52	29.04	40.88	51.24	60.35	60.86	62.02	63.47	65.09	66.79	68.34
May '08	15.52	29.04	40.88	51.24	60.35	60.73	61.89	63.33	64.95	66.63	68.17
Jun '08	15.52	29.04	40.88	51.24	60.35	60.60	61.76	63.19	64.80	66.47	68.01
Jul '08	14.71	27.53	38.76	48.58	57.21	56.78	57.30	58.04	58.93	59.85	60.63
Aug '08	14.71	27.53	38.76	48.58	57.21	56.67	57.18	57.93	58.81	59.73	60.50
Sep '08	14.71	27.53	38.76	48.58	57.21	56.56	57.07	57.82	58.69	59.60	60.37

Table 1 (cont'd)
Rev. Rul. 2008-36
Monthly Bond Factor Amounts for Dispositions Expressed
As a Percentage of Total Credits

Month of Disposition	Calendar Year Building Placed in Service or, if Section 42(f)(1) Election Was Made, the Succeeding Calendar Year									
	2005	2006	2007	2008						
Jan '08	79.56	81.57	83.59	83.98						
Feb '08	79.31	81.30	83.27	83.98						
Mar '08	79.07	81.05	82.99	83.98						
Apr '08	69.59	70.64	71.69	72.55						
May '08	69.41	70.47	71.53	72.55						
Jun '08	69.25	70.31	71.39	72.55						
Jul '08	61.14	61.49	61.90	62.68						
Aug '08	61.01	61.38	61.82	62.68						
Sep '08	60.89	61.27	61.74	62.68						

For a list of bond factor amounts applicable to dispositions occurring during other calendar years, see: Rev. Rul. 98-3, 1998-1 C.B. 248; Rev. Rul. 2001-2, 2001-1 C.B. 255; Rev. Rul. 2001-53, 2001-2 C.B. 488; Rev. Rul. 2002-72, 2002-2 C.B. 759; Rev. Rul. 2003-117, 2003-2 C.B. 1051; Rev. Rul. 2004-100, 2004-2 C.B. 718; Rev. Rul. 2005-67, 2005-2 C.B. 771; Rev. Rul. 2006-51, 2006-2 C.B. 632; and Rev. Rul. 2007-62, 2007-41 I.R.B. 767.

DRAFTING INFORMATION

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

Section 45.—Electricity Produced From Certain Renewable Resources, etc.

A notice, modifying Notice 2006-88, provides guidance under section 45 of the Internal Revenue Code for electricity produced from certain renewable resources. See Notice 2008-60, page 178.

Section 170.—Charitable, etc., Contributions and Gifts

26 CFR 1.170A-6: Charitable contribution in trust.

Sample inter vivos charitable lead unitrusts. This revenue procedure contains sample declarations of trust for nongrantor and grantor charitable lead unitrusts. This revenue procedure also contains annotations to the sample trusts and alternate provisions that may be integrated into the sample trusts. See Rev. Proc. 2008-45, page 224.

Section 401.—Qualified Pension, Profit-Sharing, and Stock Bonus Plans

(Also, §§ 402, 404A, 410, 414, 933, 7805; 26 CFR 1.410(b)-6, 1.414(l)-1, 1.933-1, 301.7805-1.)

Transfer of amounts; nonqualified foreign trust; transition relief. This ruling provides that the transfer of amounts from a trust under a plan qualified under section 401(a) of the Code to a nonqualified foreign trust is treated as a distribution from the transferor plan. The ruling also holds that a transfer of assets and liabilities from a plan qualified under section 401(a) of the Code to a plan that satisfies section 1165 of the Puerto Rico Code is also treated as a distribution from the transferor plan. Rev. Rul. 67-213 amplified.

Rev. Rul. 2008-40

ISSUES

1. Whether a transfer of amounts from a trust under a plan qualified under § 401(a) of the Internal Revenue Code¹ to a non-qualified foreign trust is treated as a distribution.

2. Whether this result is different if the transferee plan satisfies the requirements of section 1165(a) of the Puerto Rico Internal Revenue Code and is described in section 1022(i)(1) of the Employee Retirement Income Security Act of 1974.

FACTS

Situation 1. An employer maintains two retirement plans, Plan A and Plan B, each of which is funded through a trust. Plan A is a qualified plan under § 401(a). Plan A covers employees of the employer who perform all of their services within the United States and employees who perform all of their services within Country X. The Plan A trust is created and organized within the United States, and is classified as a U.S. person under § 7701(a)(30)(E). Plan B covers only Country X employees who perform all of their services within Country X, and is maintained for the exclusive purpose of providing retirement benefits to those employees. The Plan B trust is created and organized under the laws of

¹ For purposes of this revenue ruling, unless otherwise indicated, all section references are to the U.S. Internal Revenue Code of 1986, as amended.

Country X, and is classified as a foreign trust under § 7701(a)(31)(B). Plan B is not a qualified plan under § 401(a) (and would not satisfy the qualification requirements of § 401(a) even if the Plan B trust were a domestic trust). Plans A and B are each amended to provide for the assets and liabilities held in the Plan A trust on behalf of the Country X employees who perform all of their services within Country X to be transferred from the Plan A trust to the Plan B trust. There is no income tax treaty in force between the United States and Country X.

Situation 2. An employer maintains two retirement plans, Plan C and Plan D, each of which is funded through a trust. Plan C is a qualified plan under § 401(a) of the Internal Revenue Code, and also satisfies the requirements of section 1165(a) of the Puerto Rico Internal Revenue Code (Puerto Rico Code). Plan C covers both employees of the employer who perform all of their services within the United States and employees who are *bona fide* residents of Puerto Rico who perform all of their services within Puerto Rico. The Plan C trust is created and organized within the United States, and is classified as a U.S. person under § 7701(a)(30)(E). Plan D is a plan described in section 1022(i)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) that satisfies the requirements of section 1165(a) of the Puerto Rico Code, but does not satisfy the requirements of § 401(a) of the Internal Revenue Code (and would not satisfy § 401(a) even if the Plan D trust were a domestic trust). Plan D covers only *bona fide* residents of Puerto Rico who perform all of their services for the employer within Puerto Rico, and is maintained for the exclusive purpose of providing retirement benefits to those employees. The Plan D trust is created and organized under the laws of Puerto Rico, and is classified as a foreign trust under § 7701(a)(31)(B). Plans C and D are each amended to provide for the assets and liabilities held in the Plan C trust on behalf of *bona fide* residents of Puerto Rico who perform all of their services within Puerto Rico to be transferred from the Plan C trust to the Plan D trust.

LAW

Section 401(a) provides that a trust created or organized in the United States and forming a part of a stock bonus, pension, or profit-sharing plan that satisfies the requirements set out in § 401(a) constitutes a qualified trust. Section 501(a) provides that a trust described in § 401(a) is exempt from tax under Subtitle A.

Section 401(a)(7) provides that a trust is not a qualified trust unless the plan of which it is part satisfies the requirements of § 411 (relating to minimum vesting standards). Section 411(d)(6)(A) provides that a plan is not a qualified plan if an employee's accrued benefit is decreased by any amendment of the plan, and § 1.411(d)-3(a)(1) of the Income Tax Regulations provides that a plan is not a qualified plan (and a trust forming a part of such plan is not a qualified trust) if a plan amendment decreases the accrued benefit of any plan participant. For this purpose, a plan amendment includes any changes to the terms of a plan. Section 1.411(d)-3(a)(2)(i) provides that, for purposes of determining whether or not any participant's accrued benefit is decreased, amendments to all the provisions of a plan affecting, directly or indirectly, the computation of accrued benefits are taken into account. Section 1.411(d)-4, Q&A-3(a)(1), provides that § 411(d)(6) protected benefits may not be eliminated by reason of a transfer or any transaction amending or having the effect of amending a plan to transfer benefits. Section 411(d)(6)(D) and paragraph (b) of § 1.411(d)-4, Q&A-3, provide an exception for elective transfers between qualified defined contribution plans, provided certain requirements are met.

Under § 401(a)(11)(B)(iii), the qualified joint and survivor annuity (QJSA) requirements of § 417 do not apply to certain defined contribution plans. Under § 401(a)(11)(B)(iii)(III), in order for a defined contribution plan to not be subject to the QJSA requirements for a participant, the plan cannot be a direct or indirect transferee of a plan that is subject to the QJSA requirements with respect to assets and liabilities that were transferred with respect to the participant.

Section 401(a)(12) provides that a trust is not qualified under § 401(a) unless the plan of which such trust is a part provides

that, in the case of any merger or consolidation with, or transfer of assets or liabilities to, any other plan, each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he or she would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). Section 414(l) requires a plan to satisfy this minimum benefit requirement and also provides rules for how plan assets must be allocated. Regulations under § 414(l) treat a transfer of assets and liabilities from one plan to another as a combination of events that is fundamentally the same as a spinoff of a plan from the transferor plan followed by a merger of the spun off plan with the transferee plan. See §§ 1.414(l)-1(o), 1.414(l)-1(b)(4), and 1.414(l)-1(b)(2). Thus, as is the case for a plan that results from the merger of two plans, a transferee plan is a continuation of the transferor plan with regard to transferred assets and liabilities.

Section 402(a) provides that a participant's interest in a trust forming part of a qualified plan is includible in gross income in the taxable year in which it is distributed from the trust.

Section 402(c) describes rules applicable to rollovers from exempt trusts. An eligible rollover distribution is excluded from income if, among other requirements, the distribution is rolled over to an eligible retirement plan. Section 402(c)(8)(B) defines "eligible retirement plan" to mean (i) an individual retirement account described in § 408(a); (ii) an individual retirement annuity described in § 408(b); (iii) a qualified trust, *i.e.*, an employees' trust described in § 401(a) that is exempt from tax under § 501(a); (iv) an annuity plan described in § 403(a); (v) an eligible deferred compensation plan described in § 457(b) which is maintained by an eligible employer described in § 457(e)(1)(A); or (vi) an annuity contract described in § 403(b).

Section 402(d) provides that, for purposes of subsections (a), (b), and (c) of § 402, a stock bonus, pension, or profit-sharing trust that would qualify for exemption from tax under § 501(a) except for the fact that it is a trust created or organized outside the United States is treated as if it were a trust exempt from tax under § 501(a).

Section 404(a)(4) provides that, if a stock bonus, pension, or profit-sharing trust would qualify for exemption under § 501(a) except for the fact that it is a trust created or organized outside the United States, contributions to such a trust by an employer that is a resident, or corporation, or other entity of the United States, shall be deductible under the preceding paragraphs of § 404(a).

Under § 404A(e) and (f), a qualified funded plan is a written plan of an employer for deferring the receipt of compensation if: the plan is for the exclusive benefit of the employer's employees or their beneficiaries; 90 percent or more of the amounts taken into account for the taxable year under the plan are attributable to services performed by nonresident aliens and the compensation for which is not subject to tax under Chapter 1 of the Code; the employer elects to have section 404A apply to the plan; and the plan is not a funded reserve plan.

Section 933(1) generally provides that, in the case of an individual who is a *bona fide* resident of Puerto Rico during the entire taxable year, income derived from sources within Puerto Rico (except amounts received for services performed as an employee of the United States or any agency thereof) is excluded from gross income and is exempt from tax under subtitle A of the Internal Revenue Code of 1986, as amended. See § 937(a) and the regulations thereunder for rules for determining whether an individual is a *bona fide* resident of any of the possessions of the United States, including Puerto Rico.

Section 937(b)(1) generally provides that rules similar to the rules for determining whether income is income from sources within the United States apply for purposes of determining whether income is from sources within a possession.

For purposes of determining the source of pension payments from a qualified trust under § 401(a), the portion of each payment that is attributable to employer contributions with respect to services rendered within the United States is treated as income from sources within the United States and the portion that is attributable to employer contributions with respect to services rendered outside the United States is treated as income from sources without the United States. For rules regarding the treatment of earnings and accretions

with respect to contributions of either the employer or the employee, see Rev. Rul. 79-388, 1979-2 C.B. 270, and Rev. Proc. 2004-37, 2004-1 C.B. 1099. See also *Clayton v. United States*, 33 Fed. Cl. 628 (1995), *aff'd without published opinion*, 91 F.3d 170 (Fed. Cir.), *cert. denied*, 519 U.S. 1040 (1996).

Section 1022(i)(1) of ERISA provides that, for purposes of § 501(a), any trust forming part of a pension, profit-sharing, or stock bonus plan all the participants of which are residents of Puerto Rico is treated as an organization described in § 401(a), and therefore generally exempt from income taxation, if the trust both forms part of a pension, profit-sharing, or stock bonus plan and is exempt from income tax under the laws of Puerto Rico. For purposes of section 1022(i) of ERISA, a resident of Puerto Rico is either a *bona fide* resident of Puerto Rico or a person who performs labor or services primarily within Puerto Rico, regardless of residence for other purposes, and a participant is a current employee who is not excluded under the eligibility provisions of the plan. Section 1.501(a)-1(e). Section 1022(i)(1) of ERISA does not extend qualified status under § 401(a) to a plan, favorable tax treatment under § 402(a) for distributions to participants, or favorable treatment under § 404(a) for employer contributions.

Section 1022(i)(2)(A) of ERISA provides that if the administrator of a pension, profit-sharing, or stock bonus plan that is created or organized in Puerto Rico elects, at such time and in such manner as the Secretary of the Treasury may require, to have the provisions of, and amendments made by, Title II of ERISA apply, then, for plan years beginning after the date of election, any trust forming a part of the plan is treated as a trust created or organized in the United States for purposes of § 401(a) of the Internal Revenue Code. Section 1.401(a)-50 provides that plans created or organized in Puerto Rico whose administrators have made the election referred to in section 1022(i)(2) of ERISA are to be treated as trusts created or organized in the United States for purposes of § 401(a). Thus, in contrast to a plan under section 1022(i)(1) of ERISA, a plan for which an election under section 1022(i)(2) has been made is treated as a qualified plan for purposes of §§ 401(a), 402(a), and 404(a), even though the trust is created and orga-

nized in Puerto Rico and is classified as a foreign trust under § 7701(a)(31)(B).

Under the Puerto Rico Code, any retirement plan that covers Puerto Rican employees must satisfy the requirements of section 1165(a) of the Puerto Rico Code. Section 1165(a) of the Puerto Rico Code contains rules similar to the qualification requirements of § 401(a). However, there are many significant differences between the two sets of requirements, such as different definitions of a highly compensated employee, so that there are circumstances under which a plan sponsor may not be able to design a retirement plan that is assured of being able to satisfy both sets of requirements.

Revenue Ruling 67-213, 1967-2 C.B. 149, holds that, where the interests of participants are transferred from a trust forming part of one qualified plan to a trust forming part of another qualified plan, no amounts are considered distributed or made available to the participants by reason of the transfer.

Revenue Ruling 94-76, 1994-2 C.B. 46, describes a transfer of participant accounts from a § 401(a) qualified money purchase pension plan to a § 401(a) qualified profit-sharing plan that permitted distribution upon events that would not have been permitted under a qualified pension plan. The revenue ruling notes that, under the regulations issued under § 414(l), a transfer is the same as a merger of assets and liabilities of a qualified money purchase pension plan with the assets and liabilities of a qualified profit-sharing plan. Accordingly, the revenue ruling holds that the transfer does not divest the assets and liabilities of the money purchase pension plan of their attributes as pension plan assets and liabilities and that the transferee plan is disqualified if the transferred amounts fail to remain subject to the restrictions on distributions applicable to a qualified money purchase pension plan.

ANALYSIS

A transfer of assets and liabilities from one plan to another that constitutes a continuation of the transferor plan with regard to the transferred assets and liabilities is not a distribution of benefits. A non-qualified plan cannot be a continuation of a qualified plan. Accordingly, the hold-

ing described in Rev. Rul. 67-213 for a transfer from one qualified plan to another does not apply to a transfer from a qualified plan to a nonqualified plan. Under the facts in this revenue ruling (including the fact that the nonqualified plan is maintained for the exclusive purpose of providing benefits to participants or beneficiaries), the transfer is a distribution of the participant's or beneficiary's beneficial interest in the transferor plan. Any such distribution would result in disqualification of the transferor plan if the distribution failed to satisfy the applicable qualification requirements (e.g., if any participant was not eligible for a distribution or if the transfer impermissibly eliminated rights protected under § 411(d)(6)).

Section 402(c)(8) lists the types of arrangements that constitute eligible retirement plans for purposes of excluding eligible rollover distributions from income under § 402(c), which does not include nonqualified foreign trusts. Section 402(d) provides that a nonqualified foreign trust is nonetheless treated as qualified under § 501(a) for purposes of § 402(c)(8) if it satisfies all of the qualification requirements of § 401(a) other than having a U.S. trust. Accordingly, a distribution to a nonqualified foreign trust is excluded from income under § 402(c) only if it is rolled over to a trust described in § 402(d).

Under the facts of Situation 1, the transfer of the assets and liabilities of the Country X employees from the Plan A trust to the Plan B trust is treated as a distribution from Plan A. In the case of a Plan B participant or beneficiary who is a non-resident alien, the portion of the distribution sourced to the United States (i.e., the earnings and accretions) is subject to 30-percent withholding under §§ 871(a) and 1441(a) unless the distribution is exempt under § 871(f) (relating to annuities from plans under which at least 90 percent of the employees are citizens or residents of the United States). In the case of a participant or beneficiary who is a resident alien (e.g., a green-card holder) or a U.S. citizen, the distribution is includible in the gross income of the participant or beneficiary to the extent applicable under §§ 402 and 72 (i.e., the distribution is includible in the gross income of the participant except to the extent it consists of investment in the contract).

Under the facts of Situation 2, the transfer of assets and liabilities of the Puerto Rican employees to the Plan D trust is treated as a distribution from the Plan C trust. If the distribution fails to satisfy the applicable qualification requirements, the distribution will result in disqualification of the transferor plan and is generally includible in the gross income of the participant or beneficiary to the extent applicable under §§ 402 and 72. In the case of a Plan D participant who is a *bona fide* resident of Puerto Rico (within the meaning of § 937(a)) who has performed all of his or her services for the employer in Puerto Rico, the source of the distribution for purposes of § 933 is based on the source of plan contributions and the source of earnings and accretions with respect to plan contributions. Accordingly, in Situation 2, with respect to the distribution from Plan C that results from the transfer, the portion of the distribution that is attributable to employer contributions to the plan is treated as income from sources within Puerto Rico, and the portion that represents earnings and accretions with respect to contributions of either the employer or the employee is treated as income from sources within the United States. Subsequent distributions to the employee from Plan D that are attributable to contributions made by the employer, along with post-transfer earnings and accretions with respect to employer or employee contributions, will be treated entirely as income from sources within Puerto Rico for purposes of § 933 provided that the Plan D trust remains a Puerto Rico trust and all of the employee's subsequent services covered by Plan D are performed within Puerto Rico.

By contrast, a transfer from a qualified plan to a plan that has made an election under section 1022(i)(2) of ERISA is not treated as a distribution from the transferor plan because a plan that has made an election under section 1022(i)(2) of ERISA is treated as a qualified plan for purposes of § 401(a). This conclusion only applies if the transfer is not part of a series of transfers or amendments under which assets and liabilities are subsequently transferred to a nonqualified plan.

For purposes of this revenue ruling, a transfer includes a transaction that is structured as a merger or consolidation.

HOLDINGS

1. A transfer of amounts from a trust under a plan qualified under § 401(a) to a nonqualified foreign trust is treated as a distribution from the transferor plan.

2. A transfer of assets and liabilities from a qualified plan to a plan that satisfies section 1165 of the Puerto Rico Code is also treated as a distribution from the transferor plan, even if the plan is described in section 1022(i)(1) of ERISA.

TRANSITION RELIEF

1. *Transfers to certain foreign plans before October 1, 2008.* With regard to a transfer from a qualified plan to a plan that would be a qualified funded plan under § 404A(f)(1) if the employer were to elect to have § 404A apply to the plan, the holdings in this revenue ruling are not effective for a transfer made before October 1, 2008.

2. *Transfers to plans under section 1022(i)(1) of ERISA.* With regard to a transfer from a qualified plan to a plan described in section 1022(i)(1) of ERISA ("section 1022(i)(1) transferee plan") that would satisfy the requirements of § 414(l) but for the fact that the transferee trust is not a qualified trust within the meaning of § 401(a), the holdings in this revenue ruling are not effective for the transfer if the date of transfer is before January 1, 2011. In the case of a transfer to a section 1022(i)(1) plan with respect to which the holdings in this revenue ruling are not effective under the preceding sentence, the transfer is not treated as a distribution from the transferor plan and the transfer will not be treated as causing the transferor plan to fail to satisfy the requirements of § 401(a) solely on account of the holdings in this revenue ruling.

3. *Application of § 933 to distributions from section 1022(i)(1) transferee plans.* For purposes of § 933, the portion of each distribution from a section 1022(i)(1) transferee plan that is attributable to amounts that were transferred from a qualified plan before January 1, 2011, will be treated as income from sources within Puerto Rico.

4. *Application of section 410(b) to U.S. plans of employers with excluded Puerto Rico employees.* (a) *Background.* Section 410(b) requires the sponsor of a

qualified plan to include all employees in testing coverage regardless of whether the employees benefit under the plan. Section 410(b)(3) provides certain exceptions to this coverage requirement, such as § 410(b)(3)(C) which permits the exclusion of nonresident aliens who receive no U.S.-sourced earned income from the employer. However, employees in possessions of the United States, such as Puerto Rico, are not excluded from coverage testing under § 410(b)(3)(C) because they generally are not nonresident aliens. Section 410(b) also precludes the aggregation of a nonqualified plan, such as a plan qualified only under the Puerto Rico Code, with a qualified plan for purposes of testing coverage.

(b) *Relief.* In accordance with § 7805(b), employees participating under a section 1022(i)(1) transferee plan may be treated as excludable employees for purposes of applying § 410(b) with respect to the transferor plan for plan years beginning prior to January 1, 2011. This relief is only available if either: (1) the U.S. plan would satisfy the requirements of § 410(b) if the U.S. plan and the section 1022(i)(1) transferee plan were aggregated for testing purposes, and the U.S. plan by itself would satisfy the average deferral percentage test of § 401(k)(3) (disregarding subparagraph § 401(k)(3)(A)(i)) and the average contribution percentage test of § 401(m), if applicable; or (2) in the case of a defined contribution plan that provides for contributions other than elective contributions (as defined in § 1.401(k)-6), for employees benefiting under the section 1022(i)(1) transferee plan, the rate of such contributions following the date of the transfer is not reduced from the rate of such contributions under the transferor plan prior to the date of transfer.

EFFECT ON OTHER GUIDANCE

Rev. Rul. 67-213 is amplified.

DRAFTING INFORMATION

The principal author of this revenue ruling is Diane S. Bloom. For further information regarding this revenue ruling, please contact Ms. Bloom at RetirementPlanQuestions@irs.gov; for information regarding the sourcing of distributions under this revenue ruling,

please contact Quyen P. Huynh at (202) 622-3880 (not a toll-free number).

Section 402.—Taxability of Beneficiary of Employees' Trust

Whether, in the instance of participating in a section 1022(i)(1) transferee plan, transferred amounts will be treated as a distribution. See Rev. Rul. 2008-40, page 166.

Section 404A.—Deduction for Certain Foreign Deferred Compensation Plans

Whether amounts transferred to a 404A plan from a qualified plan under 401(a) before October 1, 2008, are treated as distributions. See Rev. Rul. 2008-40, page 166.

Section 410.—Minimum Participation Standards

26 CFR 1.410(b)-6: Excludable employees.

Whether, in the instance of a section 1022(i)(1) transferee plan, relief will be granted for purposes of applying section 410(b) coverage. See Rev. Rul. 2008-40, page 166.

Section 414.—Definitions and Special Rules

26 CFR 1.411(l)-1: Mergers and consolidations of plans or transfers of plan assets.

Whether there was a transfer of plan assets or liabilities that would be considered as a combination of separate mergers and spinoffs. See Rev. Rul. 2008-40, page 166.

Section 507.—Termination of Private Foundation Status

This revenue ruling provides taxpayers with guidelines on dividing a charitable remainder trust (CRT) into two or more separate and equal CRTs without violating the provisions of § 664. It also provides rulings involving §§ 507, 1015, 1223, 4941, 4945, and 4947. See Rev. Rul. 2008-41, page 170.

Section 642.—Special Rules for Credits and Deductions

26 CFR 1.642(c)-1: Unlimited deduction for amounts paid for a charitable purpose.

Sample inter vivos charitable lead unitrusts. This revenue procedure contains sample declarations of trust for nongrantor and grantor charitable lead unitrusts. This revenue procedure also contains annotations to the sample trusts and alternate provisions that may be integrated into the sample trusts. See Rev. Proc. 2008-45, page 224.

Sample testamentary charitable lead unitrust. This revenue procedure contains a sample declaration of trust for a testamentary charitable lead unitrust. This revenue procedure also contains annotations to the sample trust and alternate provisions that may be integrated into the sample trust. See Rev. Proc. 2008-46, page 238.

Section 664.—Charitable Remainder Trusts

(Also: §§ 507, 1015, 1223, 4941, 4945, 4947.)

Charitable remainder trust (CRT). This ruling provides taxpayers with guidelines on dividing a charitable remainder trust into two or more separate and equal CRTs without violating the provisions of section 664 of the Code. It also provides that, if the division of the CRT is made in accordance with the situations described in the ruling, (i) the division is not a sale, exchange, or other disposition producing gain or loss, the basis under section 1015 of each separate trust's share of each asset is the same share of the basis of that asset in the hands of the trust immediately before the division of the trust, and, under section 1223, each separate trust's holding period for an asset transferred to it by the original trust includes the holding period of the asset as held by the original trust immediately before the division, (ii) the division of the CRT does not terminate under section 507(a)(1) the CRT's status as a trust described in, and subject to, the private foundation provisions of section 4947(a)(2), or result in the imposition of an excise tax under section 507(c), (iii) the division of the CRT does not constitute an act of self-dealing under section 4941, and (iv) the division of the CRT does not constitute a taxable expenditure under section 4945.

ISSUES

Under the facts of this revenue ruling:

(1) Does the *pro rata* division of a trust that qualifies as a charitable remainder trust (CRT) under § 664(d) of the Internal Revenue Code into two or more separate trusts cause the trust or any of the separate trusts to fail to qualify as a CRT under § 664(d)?

(2) When a trust that qualifies as a CRT under § 664(d) is divided *pro rata* into two or more separate trusts, is the basis under § 1015 of each separate trust's share of each asset the same share of the basis of that asset in the hands of the trust immediately before the division of the trust, and, under § 1223, does each separate trust's holding period for an asset transferred to it by the original trust include the holding period of the asset as held by the original trust immediately before the division?

(3) Does the *pro rata* division of a trust that qualifies as a CRT under § 664(d) into two or more separate trusts terminate under § 507(a)(1) the trust's status as a trust described in, and subject to, the private foundation provisions of § 4947(a)(2), and result in the imposition of an excise tax under § 507(c)?

(4) When a trust that qualifies as a CRT under § 664(d) is divided *pro rata* into two or more separate trusts, does the division constitute an act of self-dealing under § 4941?

(5) When a trust that qualifies as a CRT under § 664(d) is divided *pro rata* into two or more separate trusts, does the division constitute a taxable expenditure under § 4945?

FACTS

Situation 1. Trust qualifies as either a charitable remainder annuity trust (CRAT) described in § 664(d)(1) or a charitable remainder unitrust (CRUT) described in § 664(d)(2). Under the terms of Trust, two or more individuals (recipients) are each entitled to an equal share of the annuity or unitrust amount, payable annually, during the recipient's lifetime, and upon the death of one recipient, each surviving recipient becomes entitled for life to an equal share of the deceased recipient's annuity or unitrust amount. Thus, the last surviving re-

ipient becomes entitled to the entire annuity or unitrust amount for his or her life. Upon the death of the last surviving recipient, the assets of Trust are to be distributed to one or more charitable organizations described in § 170(c) (remainder beneficiaries).

Trust has not committed any act (or failure to act) in the past giving rise to liability for tax under chapter 42 (Private Foundations and Certain Other Tax-Exempt Organizations). Moreover, Trust has made no distributions to charitable beneficiaries.

The state court having jurisdiction over Trust has approved a *pro rata* division of Trust into as many separate and equal trusts as are necessary to provide one such separate trust for each recipient living at the time of the division, with each separate trust being intended to qualify as the same type of CRT (*i.e.*, CRAT, CRUT, net income CRUT with makeup) as Trust. Either the court's order or the trust agreement itself incorporates the provisions described in these facts that will govern the separate trusts.

The separate trusts may have different trustees. To carry out the division of Trust into separate trusts, each asset of Trust is divided equally among and transferred to the separate trusts. For purposes of determining the character of distributions to the recipient of each separate trust, each separate trust upon the division of Trust is deemed to have an equal share of Trust's income in each tier described in § 664(b) and, similarly, on each subsequent consolidation of separate trusts by reason of the death of a recipient, the income in each tier of the consolidated trust is the sum of the income in that tier formerly attributed to the trusts being combined. The recipients pay all the costs associated with the division of Trust into separate trusts, including (i) legal fees relating to the court proceeding, and (ii) the administrative costs of the creation and funding of the separate trusts.

Each of the separate trusts has the same governing provisions as Trust, except that: (i) immediately after the division of Trust, each separate trust has only one recipient, and each recipient is the annuity or unitrust recipient of only one of the separate trusts (that recipient's separate trust); (ii) each separate trust is administered and invested independently by its trustee(s); (iii) upon the death of the recipient, each asset of that recipient's separate trust is to

be divided on a *pro rata* basis and transferred to the separate trusts of the surviving recipient(s), and the annuity amount payable to the recipient of each such separate CRAT is thereby increased by an equal share of the deceased recipient's annuity amount (the unitrust amount of each separate CRUT is similarly increased as a result of the augmentation of the CRUT's corpus, and each separate CRUT incorporates the requirements of § 1.664-3(b) of the Income Tax Regulations with respect to the subsequent computation of the unitrust amount from that trust); and (iv) upon the death of the last surviving recipient, that recipient's separate trust (being the only separate trust remaining) terminates, and the assets are distributed to the remainder beneficiaries.

The remainder beneficiaries of Trust are the remainder beneficiaries of each of the separate trusts and are entitled to the same (total) remainder interest after the division of Trust as before. In addition, each recipient is entitled to receive from his or her separate trust the same annuity or unitrust amount as the recipient was entitled to receive under the terms of Trust. Because the annual net fair market value of the assets in each of the separate trusts may vary from one another due to differing investment strategies of the separate trusts, in situations where Trust is a CRUT, the amount of the unitrust payments from each separate CRUT may vary over time, both from year to year and among the separate CRUTs. Nevertheless, the unitrust percentage of each separate CRUT remains the same as each recipient's share of the unitrust percentage under the terms of Trust, and the recipients and the remainder beneficiaries are entitled to the same benefits after the division of Trust as before.

For example, assume Trust is a CRUT. Under the terms of Trust, X, Y, and Z are entitled to share equally the annual payments of a 15 percent unitrust amount (5 percent each) while all three are living, and upon the death of one recipient, the surviving recipients are entitled to the deceased recipient's share. Thus, if X dies first, the surviving recipients (Y and Z) are entitled to share equally in the annual payments of the 15 percent unitrust amount (7.5 percent each) while both are living. Thereafter, if Y predeceases Z, then upon the death of Y, Z is entitled to receive annual payments of

the entire 15 percent unitrust amount for life. Upon the division of Trust, three separate trusts are created (one for each of X, Y, and Z) and each of the separate trusts holds one-third of the assets of Trust. X, Y, and Z are each entitled to annual payments of a 15 percent unitrust amount from his or her separate trust (15 percent of one-third of the assets is equivalent to 5 percent of all the assets of Trust). After the division of Trust and upon the death of X, each asset of X's separate trust is divided on a *pro rata* basis and transferred to Y and Z's separate trusts. Y and Z each remain entitled to annual payments of a 15 percent unitrust amount from his or her respective separate trust, each of which is now funded with the equivalent of one-half the assets of Trust (15 percent of one-half of the assets is equivalent to 7.5 percent of all the assets of Trust). Upon the death of Y, the assets of Y's separate trust are transferred to Z's separate trust, and Z remains entitled to annual payments of a 15 percent unitrust amount from Z's separate trust. These are the same interests to which X, Y, and Z would have been entitled under the terms of Trust if Trust had not been divided into separate trusts.

Situation 2. The facts are the same as in *Situation 1* except that Trust has only two recipients who are U.S. citizens married to each other but in the process of obtaining a divorce, and, instead of the provision described in (iii) of *Situation 1*, each separate trust in *Situation 2* has governing provisions providing that upon the death of the recipient, that recipient's separate trust terminates and the assets of that separate trust then are distributed to the remainder beneficiaries. Because the remainder beneficiaries of Trust (and thus of each separate trust) receive a distribution of one-half of the assets of Trust upon the death of the first spouse to die and the remaining half of the assets upon the death of the surviving spouse (rather than a distribution of all of the assets of Trust upon the later death of the surviving recipient), the value of the remainder payable to the remainder beneficiaries as a result of the division of Trust into separate trusts may be larger than the present value of that interest as computed at the creation of Trust; no additional charitable deduction is permitted, however.

Each recipient (spouse) is entitled to receive from his or her separate trust the same share of the annuity or unitrust

amount as the recipient was entitled to receive under the terms of Trust. However, each spouse relinquishes all interests in Trust to which he or she would have been entitled by reason of having survived the other (survivorship right).

LAW AND ANALYSIS

Issue 1. Qualification of Trusts under § 664(d)

Section 664(d)(1) provides that a CRAT is a trust:

(A) from which a sum certain (which is not less than 5 percent or more than 50 percent of the initial net fair market value of all property placed in trust) is to be paid, not less often than annually, to one or more persons (at least one of which is not an organization described in § 170(c) and, in the case of individuals, only to an individual who is living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals;

(B) from which no amount other than the payments described in § 664(d)(1)(A) and qualified gratuitous transfers described in § 664(d)(1)(C) may be paid to or for the use of any person other than an organization described in § 170(c);

(C) the remainder interest of which (following the termination of the payments described in § 664(d)(1)(A)), is to be transferred to, or for the use of, an organization described in § 170(c) or is to be retained by the trust for such a use or, to the extent the remainder interest is in qualified employer securities (as defined in § 664(g)(4)), all or part of such securities are to be transferred to an employee stock ownership plan (as defined in § 4975(e)(7)) in a qualified gratuitous transfer (as defined in § 664(g)); and

(D) the remainder interest of which has a value (determined under § 7520) that is at least 10 percent of the initial net fair market value of all property placed in trust.

Section 664(d)(2) provides that a CRUT is a trust:

(A) from which a fixed percentage (which is not less than 5 percent nor more than 50 percent) of the net fair market value of its assets, valued annually, is to be paid, not less often than annually, to one or more persons (at least one of which is not an organization described in § 170(c)

and, in the case of individuals, only to an individual who is living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals;

(B) from which no amount other than the payments described in § 664(d)(2)(A) and qualified gratuitous transfers described in § 664(d)(2)(C) may be paid to or for the use of any person other than an organization described in § 170(c);

(C) the remainder interest of which (following the termination of the payments described in § 664(d)(2)(A)), is to be transferred to, or for the use of, an organization described in § 170(c) or is to be retained by the trust for such a use or, to the extent the remainder interest is in qualified employer securities (as defined in § 664(g)(4)), all or part of such securities are to be transferred to an employee stock ownership plan (as defined in § 4975(e)(7)) in a qualified gratuitous transfer (as defined in § 664(g)); and

(D) the remainder interest of which, with respect to each contribution of property to the trust, has a value (determined under § 7520) that is at least 10 percent of the net fair market value of such property as of the date such property is contributed to the trust.

Section 1.664-1(a)(4) provides, in part, that in order for a trust to be a CRT, it must meet the definition of and function exclusively as a CRT from the creation of the trust.

Section 1.664-2(b) provides that a trust is not a CRAT unless its governing instrument provides that no additional contributions may be made to the CRAT after the initial contribution.

Section 1.664-3(b) provides that a trust is not a CRUT unless its governing instrument either prohibits additional contributions to the trust after the initial contribution or provides that the rules in § 1.664-3(b)(1) and (2) must be satisfied with regard to each additional contribution, if any.

To carry out the division of Trust in *Situation 1* and *Situation 2*, each asset of Trust is divided on a *pro rata* basis (in these cases, equally) among and distributed to the separate trusts. Each of the separate trusts has the same governing provisions as Trust, with the exceptions noted above, and the same recipients and remainder beneficiaries, collectively, as

Trust. In *Situation 1*, after the division of Trust into separate trusts, the total annuity amount or unitrust percentage to be paid annually by the separate trusts remains the same as under the terms of Trust. Each recipient and remainder beneficiary essentially has the same beneficial interest after the division as before. A transfer of the assets from a deceased recipient's separate trust to the separate trust(s) of the surviving recipient(s) in *Situation 1* is not treated as a transferred remainder interest that would violate § 664(d)(1)(C) or § 664(d)(2)(C), and is not treated as a prohibited additional contribution to a CRAT under § 1.664-2(b). In *Situation 2*, after the division of Trust into separate trusts, the total annuity amount or unitrust percentage to be paid annually remains the same as it was under the terms of Trust, with the exception of the survivorship right to the annuity or unitrust payments the recipients relinquish. Consequently, in *Situation 1* and *Situation 2*, the division of Trust into separate trusts does not cause Trust or any of the separate trusts to fail to qualify as a CRT under § 664(d).

Issue 2. Basis and Holding Period of Assets

Section 1015(b) provides that, if property is acquired by a transfer in trust (other than by a transfer in trust by a gift, bequest, or devise) after December 31, 1920, the basis shall be the same as it would be in the hands of the grantor, increased by the amount of gain, or decreased by the amount of loss, recognized by the grantor on such a transfer in trust under the law applicable to the year in which the transfer was made. Section 1.1015-2(a)(1) provides that, if the taxpayer acquired property by such a transfer in trust, this basis rule applies whether the property is in the hands of the trustee or the beneficiary, and whether the property was acquired before, upon, or after termination of the trust and distribution of the property.

Section 1223(2) provides that, in determining the period for which the taxpayer has held property, however acquired, there shall be included the period during which the property was held by another person if, under chapter 1 (Normal Taxes and Surtaxes), the property has, for purposes of determining gain or loss from a sale or exchange, the same basis, in whole or in part,

in the taxpayer's hands as it would have in the hands of the other person.

In *Situation 1* and *Situation 2*, the *pro rata* division of Trust into separate trusts is not a sale, exchange, or other disposition producing gain or loss. Pursuant to § 1015(b), in *Situation 1* and *Situation 2*, the basis of each separate trust's share of each asset immediately after the division of Trust is the same share of the basis of that asset in the hands of Trust immediately before the division. Furthermore, pursuant to § 1223(2), each separate trust's holding period of each asset transferred to it by Trust includes the holding period of the asset as held by Trust immediately before the division. Similarly, upon the death of a recipient and the consolidation of the assets of the deceased recipient's separate trust into the separate trust(s) of the surviving recipient(s) in *Situation 1*, each separate trust of a surviving recipient receives the same share of each asset of the deceased recipient's separate trust and of the basis of each asset in the hands of the deceased recipient's separate trust immediately before the consolidation, and the holding period of each asset transferred to a separate trust of a surviving recipient includes the holding period of the asset as held by the deceased recipient's separate trust immediately before the consolidation.

Issue 3. Status as Trust Subject to Private Foundation Rules of § 4947(a)(2) and Imposition of § 507(c) Excise Tax

Section 4947(a)(2) and § 53.4947-1(c) of the Foundation and Similar Excise Taxes Regulations provide that split-interest trusts generally are subject to the provisions of § 507 (among other provisions) in the same manner as if such trusts were private foundations, but, under § 4947(a)(2)(A), not with respect to any amounts payable under the terms of such trust to income beneficiaries, unless a deduction was allowed for those amounts under §§ 170(f)(2)(B), 2055(e)(2)(B), or 2522(e)(2)(B). Both CRATs and CRUTs are split-interest trusts for this purpose and are, thus, subject to the rules of § 507(a).

Section 507(a) provides that, except as provided in § 507(b), a private foundation's tax status shall be terminated only if (1) the organization notifies the Secretary of its intent to terminate its status as a private foundation, or (2) it is involun-

tarily terminated by the Secretary due to willful repeated acts (or failures to act), or a willful and flagrant act (or failure to act), giving rise to chapter 42 liability. See § 1.507-1(a)(1) and § 1.507-1(b)(1) regarding filing the notice of termination. Upon such a termination, § 507(c) imposes a termination tax that generally equals the lower of the "aggregate tax benefit" (as defined in § 507(d)) resulting from the tax exempt status of the terminating foundation or the fair market value of that foundation's net assets.

Section 507(b)(2) provides that, in the case of the transfer of assets of any private foundation to another private foundation pursuant to any liquidation, merger, redemption, recapitalization, or other adjustment, organization, or reorganization, the transferee foundation is not treated as a newly created organization.

Section 1.507-1(b)(6) generally confirms that, if a private foundation transfers all or part of its assets to one or more other private foundations pursuant to a transfer described in §§ 507(b)(2) and 1.507-3(c), such transferor foundation will not have terminated its private foundation status under § 507(a)(1).

Section 1.507-3(a)(1) and (2) provide, in substance, that in a § 507(b)(2) transfer of assets from one private foundation to one or more other private foundations, no transferee private foundation shall be treated as a newly created organization, but instead shall succeed to the transferor's aggregate tax benefit within the meaning of § 507(d).

Section 1.507-3(c)(1) generally provides that, as used in § 507(b)(2), the term "other adjustment, organization or reorganization" shall include any partial liquidation or any other significant disposition of assets to one or more private foundations.

Section 1.507-3(c)(2)(ii) provides that the term a "significant disposition of assets" includes the transfer of a total of 25 percent or more of the fair market value (as of the beginning of the taxable year, or of the first taxable year in which any of a series of dispositions was made) of the net assets of the foundation to one or more private foundations. Such disposition may be made for a single year or in a series of related dispositions over more than one year.

Section 1.507-4(b) provides that the excise tax on termination of private foun-

dation status under § 507(c) generally does not apply to a transfer of assets pursuant to § 507(b)(2).

In *Situation 1* and *Situation 2*, the separate trusts have the same governing provisions as Trust, with the exceptions noted above, and collectively, the same recipients, remainder beneficiaries, and assets as Trust. In addition, each recipient and remainder beneficiary is entitled to the same benefits both before and after the division of Trust, with the exceptions noted above. Further, in both *Situation 1* and *Situation 2*, Trust transfers all of its assets to the separate trusts pursuant to a transfer described in § 507(b)(2). Thus, in *Situation 1* and *Situation 2*, Trust has not terminated its private foundation status under § 507(a)(1) as a result of the division of Trust (or a subsequent consolidation of the separate trusts arising from the death of a recipient in *Situation 1*), because no notice of termination was filed or was required to be filed. See § 1.507-1(b)(6). Accordingly, the excise tax imposed under § 507(c) does not apply.

Issue 4. Act of Self-Dealing under § 4941

Section 4947(a)(2) and § 53.4947-1(c)(1)(ii) provide that split-interest trusts generally are subject to the provisions of § 4941 (among other provisions) in the same manner as if such trusts were private foundations, but, under § 4947(a)(2)(A), not with respect to any amounts payable under the terms of such trust to income beneficiaries, unless a deduction was allowed for those amounts under §§ 170(f)(2)(B), 2055(e)(2)(B), or 2522(e)(2)(B). Both CRATs and CRUTs are split-interest trusts for this purpose and are, thus, subject to the rules of § 4941.

Section 4941(a)(1) imposes an excise tax on each act of self-dealing between a disqualified person and a private foundation.

Section 4941(d)(1)(A) provides that the term “self-dealing” includes any direct or indirect sale or exchange, or leasing, between a private foundation and a disqualified person.

Section 4941(d)(1)(E) provides that the term “self-dealing” includes any direct or indirect transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation.

Section 4946(a)(1)(A), (B), and (D) defines the term “disqualified person” with respect to a private foundation as including (among others) a substantial contributor to the private foundation, a foundation manager, and a member of the family of a substantial contributor or foundation manager.

Section 4947(a)(2)(A) and § 53.4947-1(c)(2) provide that annuity or unitrust amounts payable to the recipients under the terms of a charitable remainder split-interest trust are not subject to § 4941.

In *Situation 1* and *Situation 2*, the recipients might be disqualified persons with respect to Trust under § 4946. The only interest that the recipients have in Trust is the right to the payment of the annuity or unitrust amount under § 664(d)(1) or (2), respectively. As a result of the division of Trust in *Situation 1* and *Situation 2*, each separate trust holds a *pro rata* (in these cases, equal) share of each asset of Trust, and each recipient receives his or her annuity or unitrust payment from only one of the separate trusts. The annuity or unitrust payments a recipient receives from his or her separate trust remains equivalent to the recipient’s share of the annuity or unitrust payments under the terms of Trust, with the exception of the survivorship right to the annuity or unitrust payments each recipient relinquishes in *Situation 2*.

Thus, upon the division of Trust in *Situation 1* and *Situation 2*, the recipients are insulated from self-dealing with respect to their annuity or unitrust interests. Because of the *pro rata* (equal) distributions to the separate trusts, none of the disqualified persons, if any, receive any additional interest in the assets of Trust, and no self-dealing transaction occurs within the meaning of § 4941(d). The remainder interest of Trust remains preserved exclusively for charitable interests, and there is no increase in the annuity or unitrust amount at the expense of the charitable interest. Additionally, the *pro rata* division of the assets of Trust among the separate trusts in *Situation 1* and *Situation 2* is not a sale or exchange and, therefore, is not a sale or exchange between a private foundation and a disqualified person. All legal and other expenses and costs incident to the division of Trust are paid by the recipients. *Situation 1* and *Situation 2* involve no other transactions with the recipients that affect the principal of Trust; accordingly,

no self-dealing transaction occurs by reason of the division of Trust in either *Situation 1* or *Situation 2*, or by reason of a subsequent consolidation of the separate trusts arising from the death of a recipient in *Situation 1*.

Issue 5. Taxable Expenditures under § 4945

Section 4947(a)(2) and § 53.4947-1(c) provide that split-interest trusts generally are subject to the provisions of § 4945 (among other provisions) in the same manner as if such trusts were private foundations, but, under § 4947(a)(2)(A), not with respect to any amounts payable under the terms of such trust to income beneficiaries, unless a deduction was allowed for those amounts under §§ 170(f)(2)(B), 2055(e)(2)(B), or 2522(e)(2)(B). Both CRATs and CRUTs are split-interest trusts for this purpose and are, thus, subject to the rules of § 4945.

Section 4945 imposes an excise tax on each taxable expenditure described in § 4945(d) made by a private foundation.

Section 4945(d)(4) provides that a taxable expenditure includes any amount paid or incurred by a private foundation as a grant to an organization unless the private foundation exercises expenditure responsibility with respect to such grant in accordance with § 4945(h).

Section 53.4945-5(b)(7) confirms that §§ 1.507-3(a)(7), 1.507-3(a)(8)(ii)(f), and 1.507-3(a)(9) govern the extent to which the expenditure responsibility rules contained in § 4945(d)(4) and (h) apply to transfers of assets described in § 507(b)(2).

Section 1.507-3(a)(7) provides, in part, that, except as provided in § 1.507-3(a)(9), if the transferor has disposed of all of its assets, then during any period in which the transferor has no assets, § 4945(d)(4) and (h) shall not apply to the transferee or the transferor with respect to any “expenditure responsibility” grants made by the transferor.

Section 1.507-3(a)(9) provides, in part, that if a private foundation transfers all of its net assets to one or more private foundations which are effectively controlled (within the meaning of § 1.482-1(a)(3)), directly or indirectly, by the same person or persons which effectively controlled the transferor private foundation, then for certain purposes, such a transferee private

foundation shall be treated as if it were the transferor.

Rev. Rul. 2002–28, 2002–1 C.B. 941, provides, in part, that, once a private foundation distributes all of its assets to one or more other effectively controlled private foundations under a plan of dissolution, the obligation to exercise expenditure responsibility under § 4945(h) with respect to the transfers made by the transferor foundation passes from that foundation to the transferee foundation(s).

Section 4945(d)(5) provides that a taxable expenditure includes any amount paid or incurred by a private foundation for a non-charitable purpose.

Section 53.4945–6(b)(2) provides that expenditures for unreasonable administrative expenses will ordinarily be taxable expenditures under § 4945(d)(5).

The transfers of Trust's assets to the separate trusts in *Situation 1* and *Situation 2* are not expenditures that require expenditure responsibility by Trust, pursuant either to § 1.507–3(a)(9) (if Trust and the separate trust are controlled by the same person or persons) or § 1.507–3(a)(7) (if Trust and the separate trust are not controlled by the same person or persons). Because Trust made no prior distributions for which expenditure responsibility is required, the separate trusts assume no preexisting expenditure responsibility from Trust under § 1.507–3(a)(9). A similar analysis applies regarding a subsequent consolidation of the separate trusts arising from the death of a recipient in *Situation 1*. Thus, in *Situation 1* and *Situation 2*, Trust is not required to exercise "expenditure responsibility" under § 4945(d) and (h) with respect to the assets transferred to the separate trusts.

HOLDINGS

Under the facts of this revenue ruling:

(1) In *Situation 1* and *Situation 2*, the *pro rata* division of a trust that qualifies as a CRT under § 664(d) into two or more separate trusts does not cause the trust or any of the separate trusts to fail to qualify as a CRT under § 664(d).

(2) In *Situation 1* and *Situation 2*, where a trust that qualifies as a CRT under § 664(d) is divided *pro rata* into two or more separate trusts, the division is not a sale, exchange, or other disposition producing gain or loss, the basis under § 1015

of each separate trust's share of each asset is the same share of the basis of that asset in the hands of the trust immediately before the division of the trust, and, under § 1223, each separate trust's holding period for an asset transferred to it by the original trust includes the holding period of the asset as held by the original trust immediately before the division.

(3) In *Situation 1* and *Situation 2*, the *pro rata* division of a trust that qualifies as a CRT under § 664(d) into two or more separate trusts does not terminate under § 507(a)(1) the trust's status as a trust described in, and subject to, the private foundation provisions of § 4947(a)(2), and does not result in the imposition of an excise tax under § 507(c).

(4) In *Situation 1* and *Situation 2*, where a trust that qualifies as a CRT under § 664(d) is divided *pro rata* into two or more separate trusts, the division does not constitute an act of self-dealing under § 4941.

(5) In *Situation 1* and *Situation 2*, where a trust that qualifies as a CRT under § 664(d) is divided *pro rata* into two or more separate trusts, the division does not constitute a taxable expenditure under § 4945.

DRAFTING INFORMATION

The principal authors of this revenue ruling are Megan A. Stoner of the Office of Associate Chief Counsel (Passthroughs & Special Industries) and Ward L. Thomas of the Office of the Commissioner (Tax Exempt & Government Entities) Exempt Organizations Ruling Division. For further information regarding this revenue ruling, contact Ms. Stoner with respect to issues 1 and 2 at (202) 622–3070 (not a toll-free call) and contact Mr. Thomas with respect to issues 3–5 at (202) 283–8913 (not a toll-free call).

Section 933.—Income From Sources Within Puerto Rico

26 CFR 1.933–1: Exclusion of certain income from sources within Puerto Rico.

Whether distributions from a section 1022(i)(1) transferee plan are granted special transition relief under section 933. See Rev. Rul. 2008–40, page 166.

Section 1015.—Basis of Property Acquired by Gifts and Transfers in Trust

This revenue ruling provides taxpayers with guidelines on dividing a charitable remainder trust (CRT) into two or more separate and equal CRTs without violating the provisions of § 664. It also provides rulings involving §§ 507, 1015, 1223, 4941, 4945, and 4947. See Rev. Rul. 2008–41, page 170.

Section 1223.—Holding Period of Property

This revenue ruling provides taxpayers with guidelines on dividing a charitable remainder trust (CRT) into two or more separate and equal CRTs without violating the provisions of § 664. It also provides rulings involving §§ 507, 1015, 1223, 4941, 4945, and 4947. See Rev. Rul. 2008–41, page 170.

Section 1368.—Distributions

26 CFR 1.1368–2: Accumulated adjustments account.

(Also: §§ 101, 264, 1.264–1.)

S corporation; life insurance contract; accumulated adjustments account (AAA). This ruling, under section 1368 of the Code, outlines the effects of premiums paid by an S corporation on an employer-owned life insurance contract and the benefits received by reason of death of the insured on its AAA.

Rev. Rul. 2008–42

ISSUES

(1) Do premiums paid by an S corporation on an employer-owned life insurance contract, of which the S corporation is directly or indirectly a beneficiary, reduce the S corporation's accumulated adjustments account (AAA)?

(2) Do the benefits received by reason of the death of the insured from an employer-owned life insurance contract that meets an exception under § 101(j)(2) increase an S corporation's AAA?

FACTS

X is a corporation that has a valid S election in effect. X purchases an employer-owned life insurance contract on the life of one of its employees in order

to cover expenses the company would incur as a result of the death of the employee (also known as a key-man policy). The employee is a highly compensated employee of X. X pays all of the premiums for the policy. X is a beneficiary of the policy. At the end of the taxable year, X has subchapter C accumulated earnings and profits (E&P).

LAW AND ANALYSIS

Section 101(a)(1) provides that gross income does not include amounts received under a life insurance contract, if such amounts are paid by reason of the death of the insured.

Section 101(j)(1) provides that death benefits from employer-owned life insurance contracts shall be taxable, in excess of premiums and other amounts paid, unless the employer-owned life insurance contract meets one of the exceptions provided under § 101(j)(2).

Section 101(j)(2)(A) provides that § 101(j)(1) shall not apply to any amount received by reason of the death of an insured who, with respect to an applicable policyholder (i) was an employee at any time during the 12-month period before the insured's death, or (ii) is, at the time the contract is issued a director, a highly compensated employee within the meaning of § 414(q) (without regard to paragraph (1)(B)(ii) thereof), or a highly compensated individual within the meaning of § 105(h)(5), except that "35 percent" shall be substituted for "25 percent" in subparagraph (C) thereof.

Section 264(a)(1) provides that no deduction is allowed for premiums paid on any life insurance policy, or endowment or annuity contract, if the taxpayer is directly or indirectly a beneficiary under the policy or contract.

Section 1.264-1(a) provides that the premiums paid for life insurance on the life of any officer, employee, or person financially interested in a business carried on by the taxpayer are not deductible where the taxpayer is directly or indirectly a beneficiary of the policy.

Section 1.1366-1(a)(2)(viii) provides that for the purposes of subchapter S, tax-exempt income is income that is permanently excludible from gross income in all circumstances in which the applicable provision of the Code applies and provides

as an example that income that is excludible from gross income under § 101 (certain death benefits) is tax-exempt income.

Section 1368(e)(1)(A) provides that the term "accumulated adjustments account" means an account of the S corporation which is adjusted for the S period in a manner similar to the adjustments under § 1367 (except that no adjustment shall be made for income (and related expenses) which is exempt from tax under Title 26 and the phrase "(but not below zero)" shall be disregarded in § 1367(a)(2)).

Section 1.1368-2 provides for the calculation and maintenance of the AAA. The AAA is an account of the S corporation and is not apportioned among shareholders. The AAA is generally increased by the items of income described in § 1366(a)(1)(A), other than income that is exempt from tax, and any nonseparately computed income determined under § 1366(a)(1)(B). The AAA is generally decreased by the items of loss or deduction described in § 1366(a)(1)(A), any nonseparately computed loss determined under § 1366(a)(1)(B), and any nondeductible expense not properly chargeable to a capital account other than expenses related to tax-exempt income.

An S corporation's AAA tracks the amount of undistributed income that has been taxed to the shareholders, similar to the manner in which E&P generally tracks a C corporation's undistributed income. The AAA is the mechanism that allows previously taxed but undistributed income to be distributed tax-free to S corporation shareholders to the extent of the shareholders' basis in their stock.

HOLDINGS

(1) Premiums paid by an S corporation on an employer-owned life insurance contract, of which the S corporation is directly or indirectly a beneficiary, do not reduce the S corporation's AAA.

(2) The benefits received by reason of the death of the insured from an employer-owned life insurance contract that meets an exception under § 101(j)(2) do not increase the S corporation's AAA.

DRAFTING INFORMATION

The principal author of this revenue ruling is Vishal R. Amin of the Office of

Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue ruling, contact Vishal R. Amin at (202) 622-3060 (not a toll-free call).

Section 2055.—Transfers for Public, Charitable, and Religious Uses

26 CFR 20.2055-2: Transfers not exclusively for charitable purposes.

Sample inter vivos charitable lead unitrusts.

This revenue procedure contains sample declarations of trust for nongrantor and grantor charitable lead unitrusts. This revenue procedure also contains annotations to the sample trusts and alternate provisions that may be integrated into the sample trusts. See Rev. Proc. 2008-45, page 224.

Sample testamentary charitable lead unitrust.

This revenue procedure contains a sample declaration of trust for a testamentary charitable lead unitrust. This revenue procedure also contains annotations to the sample trust and alternate provisions that may be integrated into the sample trust. See Rev. Proc. 2008-46, page 238.

Section 2522.—Charitable and Similar Gifts

26 CFR 25.2522(c)-3: Transfers not exclusively for charitable, etc., purposes in the case of gifts made after July 31, 1969.

Sample inter vivos charitable lead unitrusts.

This revenue procedure contains sample declarations of trust for nongrantor and grantor charitable lead unitrusts. This revenue procedure also contains annotations to the sample trusts and alternate provisions that may be integrated into the sample trusts. See Rev. Proc. 2008-45, page 224.

Section 4941.—Taxes on Self-Dealing

This revenue ruling provides taxpayers with guidelines on dividing a charitable remainder trust (CRT) into two or more separate and equal CRTs without violating the provisions of § 664. It also provides rulings involving §§ 507, 1015, 1223, 4941, 4945, and 4947. See Rev. Rul. 2008-41, page 170.

Section 4945.—Taxes on Taxable Expenditures

This revenue ruling provides taxpayers with guidelines on dividing a charitable remainder trust (CRT)

into two or more separate and equal CRTs without violating the provisions of § 664. It also provides rulings involving §§ 507, 1015, 1223, 4941, 4945, and 4947. See Rev. Rul. 2008-41, page 170.

Section 4947.—Application of Taxes to Certain Nonexempt Trusts

This revenue ruling provides taxpayers with guidelines on dividing a charitable remainder trust (CRT) into two or more separate and equal CRTs without vi-

olating the provisions of § 664. It also provides rulings involving §§ 507, 1015, 1223, 4941, 4945, and 4947. See Rev. Rul. 2008-41, page 170.

Section 7805.—Rules and Regulations

26 CFR 301.7805-1: Rules and regulations.

Whether, in the instance of a section 1022(i)(1) transferee plan, relief will be granted for purposes

of applying section 410(b) coverage. See Rev. Rul. 2008-40, page 166.

Part III. Administrative, Procedural, and Miscellaneous

Electricity Produced From Certain Renewable Resources, etc.

Notice 2008–60

SECTION 1. PURPOSE

This notice sets forth interim guidance, pending the issuance of regulations, regarding the tax credit under § 45 of the Internal Revenue Code for electricity produced from certain renewable resources. This notice modifies Notice 2006–88, 2006–2 C.B. 686, which set forth interim guidance regarding the tax credit under § 45 for electricity produced from open-loop biomass. This notice supersedes Notice 2006–88, as modified, by republishing the guidance contained in that notice with the following modifications: (1) the guidance relating to the simultaneous sale and purchase of electricity is not included; and (2) the guidance is modified to reflect legislative changes since Notice 2006–88 was published. The Service will continue the no rule policy announced in section 3.05 of Notice 2006–88.

This notice also provides guidance on the provisions in § 45 of the Code involving a sale to an unrelated person. The guidance for sales to unrelated persons applies with respect to electricity produced from any qualified energy resource and with respect to refined coal and Indian coal.

SECTION 2. BACKGROUND

.01 *In General.* Section 710 of the American Jobs Creation Act of 2004 (P.L. 108–357) amended § 45 to add open-loop biomass to the definition of qualified energy resources and to add open-loop biomass facilities to the definition of qualified facilities. Section 1301 of the Energy Tax Incentives Act of 2005 (P.L. 109–58) added “any nonhazardous lignin waste material” to the definition of open-loop biomass and extended the deadline for placing open-loop biomass facilities in service to December 31, 2007. Section 402(b) of the Gulf Opportunity Zone Act of 2005 (P.L. 109–135) amended the definition of open-loop biomass to include “any lignin material.” Section 201 of the Tax

Relief and Health Care Act of 2006 (P.L. 109–432) extended the deadline for placing open-loop biomass facilities in service to December 31, 2008. Section 7(b)(1) of the Tax Technical Corrections Act of 2007 (P.L. 110–172) eliminated the requirement that open-loop biomass be segregated from other waste materials. As a result of these statutory changes, the Internal Revenue Service has received requests for guidance on the § 45 tax credit for electricity produced from open-loop biomass.

Section 38(a) provides for a general business tax credit that includes the amount of the current year business credit. Section 38(b)(8) provides that the amount of the current year business credit includes the renewable electricity production credit under § 45(a).

Section 45(a) provides that the renewable electricity production credit for a taxable year is 1.5 cents (adjusted for inflation) for each kilowatt hour of electricity that the taxpayer (1) produces from qualified energy resources at a qualified facility during the 10-year period beginning on the date the facility was originally placed in service, and (2) sells to an unrelated person during the taxable year. Both sections 45(e)(8), for refined coal, and 45(e)(10), for Indian coal, limit the credit under those provisions to coal that is sold to an unrelated person. Section 45(e)(4) defines related persons. Section 45J provides a tax credit for electricity production from advanced nuclear power facilities and, in language identical to that in § 45(a), limits the credit to electricity sold to an unrelated person. Section 45J(e) provides, in part, that rules similar to section 45(e)(4) shall apply for purposes of section 45J.

Notice 2006–40, 2006–1 C.B. 855, provides guidance under § 45J concerning sales to unrelated persons. Notice 2006–40 provides that electricity will be treated as sold to an unrelated person if the ultimate purchaser of the electricity is not related to the person that produces the electricity. Therefore, the requirement of a sale to an unrelated person will be treated as satisfied for purposes of § 45J if the producer sells the electricity to a related person for resale by the related person to a person that is not related to the producer.

.02 *Open-Loop Biomass.*

(1) *In General.* Section 45(c)(1)(C) provides that the term qualified energy resources includes open-loop biomass. Section 45(c)(3)(A), as amended by section 7(b)(1) of the Tax Technical Correction Act of 2007, defines the term “open-loop biomass” to mean—

(a) any agricultural livestock (including bovine, swine, poultry, and sheep) manure and litter, including wood shavings, straw, rice hulls, and other bedding material for the disposition of manure (agricultural livestock waste nutrients); or

(b) any solid, nonhazardous, cellulosic waste material or any lignin material which is derived from—

(i) any of the following forest-related resources: mill and harvesting residues, precommercial thinnings, slash, and brush;

(ii) solid wood waste materials, including waste pallets, crates, dunnage, manufacturing and construction wood wastes, and landscape or right-of-way tree trimmings; or

(iii) agricultural sources, including orchard tree crops, vineyards, grain, legumes, sugar, and other crop by-products or residues.

(2) *Exclusions.* The term “open-loop biomass” does not include the following:

(a) manufacturing or construction wood waste that has been pressure treated, chemically treated, or painted;

(b) municipal solid waste as defined in § 45(c)(6);

(c) gas derived from the biodegradation of solid waste;

(d) paper products that are commonly recycled (for example, office paper, newspaper, paperboard, and cardboard);

(e) closed-loop biomass as defined in § 45(c)(2); or

(f) biomass cofired with fossil fuel in excess of the minimum amount of fossil fuel necessary for startup and flame stabilization.

.03 *Qualified Open-Loop Biomass Facilities.* Section 45(d)(3)(A) provides, in the case of a facility using open-loop biomass to produce electricity (an open-loop biomass facility), that a qualified facility (a qualified open-loop biomass facility) is any facility that is owned by the taxpayer and that—

(i) in the case of a facility using agricultural livestock waste nutrients, is originally placed in service after October 22, 2004, and before January 1, 2009, and has a nameplate capacity rating of not less than 150 kilowatts, or

(ii) in the case of any other facility, is originally placed in service before January 1, 2009.

.04 *Credit Rate.* Section 45(b)(4)(A) provides that the credit rate for electricity produced at a qualified open-loop biomass facility is one-half the amount in effect under § 45(a)(1) for the calendar year in which the electricity is sold.

.05 *Credit Period.*

(1) *Facilities placed in service after August 8, 2005.* For qualified open-loop biomass facilities placed in service after August 8, 2005, § 45(b)(4)(B)(iii) provides that the 10-year credit period in § 45(a)(2)(A)(ii) applies.

(2) *Facilities placed in service after October 21, 2004, and on or before August 8, 2005.* For qualified open-loop biomass facilities placed in service after October 21, 2004, and on or before August 8, 2005, § 45(b)(4)(B)(i) provides that the § 45 credit is determined by substituting the 5-year period beginning on the date the facility was originally placed in service for the 10-year credit period in § 45(a)(2)(A)(ii).

(3) *Facilities placed in service before October 22, 2004.* For facilities placed in service before October 22, 2004, § 45(b)(4)(B)(ii) provides that the § 45 credit is determined by substituting the 5-year period beginning on January 1, 2005, for the 10 year credit period in § 45(a)(2)(A)(ii).

.06 *Credit Eligibility.* If the owner of a qualified open-loop biomass facility is not the producer of the electricity, § 45(d)(3)(B) provides that the person eligible for the credit allowable under § 45(a) is the lessee or the operator of such facility.

SECTION 3. RULES RELATING TO OPEN-LOOP BIOMASS

.01 *Components of Facility.*

(1) *In general.* For purposes of § 45(d)(3), an open-loop biomass facility is a power plant consisting of all components necessary for the production of electricity from open-loop biomass (and, if applicable, other energy sources). Thus,

a qualified open-loop biomass facility includes all burners and boilers (whether or not burning open-loop biomass), any handling and delivery equipment that supplies fuel directly to and is integrated with such burners and boilers, steam headers, turbines, generators, and all other depreciable property necessary to the production of electricity. The facility does not include (i) property used for the collection, processing, or storage of open-loop biomass before its use in the production of electricity, (ii) transformers or other property used in the transmission of electricity after its production, or (iii) ancillary site improvements, such as roadways and fencing, that are not necessary to the production of electricity. Each power plant that is operated as a separate integrated unit is treated as a separate facility for purposes of § 45(d)(3).

(2) *Cogeneration.* A facility using open-loop biomass to produce both electric energy and useful thermal energy, such as heat or steam, through the sequential use of energy (cogeneration) may be a qualified open-loop biomass facility.

(3) *Addition or improvement to an existing facility.* An open-loop biomass facility will not be treated as originally placed in service after October 22, 2004, if more than 20 percent of the facility's total value (the cost of the new property plus the value of the used property) is attributable to property placed in service on or before October 22, 2004. Similarly, an open-loop biomass facility will not be treated as originally placed in service after August 8, 2005, if more than 20 percent of the facility's total value (the cost of the new property plus the value of the used property) is attributable to property placed in service on or before August 8, 2005.

(4) *Example.* The following example illustrates the application of section 3.01 of this notice:

Example. A power plant using fossil fuel was originally placed in service before October 22, 2004. The power plant consists of a burner, a boiler, a steam header, a turbine, and a generator. After October 22, 2004, one new burner and boiler using open-loop biomass are added to the power plant. The new burner and boiler are connected to the existing steam header, turbine, and generator in the power plant. Under section 3.01(1) of this notice, the open-loop biomass facility consists of the entire power plant that is operated as a separate integrated unit and includes both the existing power plant and the new burner and boiler. The fair market value of the existing power plant on the date the new burner and boiler are placed

in service exceeds 20 percent of the facility's total value (the cost of the new burner and boiler plus the value of the used property). Under section 3.01(3) of this notice, the facility will not be treated as originally placed in service after October 22, 2004. Accordingly, § 45(b)(4)(B)(ii) applies and the credit period for the facility is the 5-year period beginning on January 1, 2005.

.02 *Cofiring.*

(1) *In general.* Electricity produced from open-loop biomass that is cofired with fuels other than fossil fuels may qualify for the § 45 credit. Electricity produced from the other fuel may separately qualify for the § 45 credit if the other fuel meets the definition of a qualified energy resource under § 45(c) and the facility is placed in service during the period specified in § 45(d) for that qualified energy resource.

(2) *Cofiring with agricultural livestock waste nutrients.* If open-loop biomass other than agricultural livestock waste nutrients is cofired with agricultural livestock waste nutrients at a facility placed in service on or before October 22, 2004, electricity produced from the open-loop biomass other than agricultural livestock waste nutrients may qualify for the § 45 credit because the facility is placed in service before January 1, 2009 (the generally applicable placed-in-service deadline for purposes of determining whether electricity produced from open-loop biomass qualifies for the § 45 credit). The electricity produced from agricultural livestock waste nutrients does not qualify for the § 45 credit because the facility is not placed in service after October 22, 2004, and before January 1, 2009 (the placed-in-service period for purposes of determining whether electricity produced from agricultural livestock waste nutrients qualifies for the § 45 credit).

(3) *Cofiring with fossil fuel for startup and flame stabilization.* Electricity produced from open-loop biomass that is cofired with fossil fuel may qualify for the § 45 credit, but biomass will qualify as open-loop biomass only if the amount of fossil fuel used is the minimum necessary for startup and flame stabilization. See § 45(c)(3)(A) and section 2.02(2)(f) of this notice. If open-loop biomass is cofired with the minimum amount of fossil fuel necessary for startup and flame stabilization, only the electricity produced from the open-loop biomass can qualify for the credit. The electricity produced

from the fossil fuel used for startup and flame stabilization does not qualify for the credit. In addition, if biomass (other than closed-loop biomass) is cofired with fossil fuel in excess of the minimum amount of fossil fuel necessary for startup and flame stabilization, the biomass is not open-loop biomass and the electricity produced from the biomass does not qualify for the § 45 credit.

.03 Rules Relating to Sales of Commingled Electricity.

(1) *Sales of Commingled Electricity.* If a taxpayer produces electricity from both open-loop biomass and other fuels and sells part or all of the electricity produced to an unrelated party, only the applicable percentage of the electricity sold to the unrelated party is treated as electricity produced from open-loop biomass. The applicable percentage for this purpose is the percentage of the thermal content of all fuels used to produce the electricity that is thermal content from open-loop biomass. Electricity is treated as produced from both open-loop biomass and other fuels to the extent (i) open-loop biomass and other fuels are commingled during combustion, (ii) steam produced from the combustion of open-loop biomass and from the combustion of other fuels is commingled before or during the production of the electricity, and (iii) electricity produced from open-loop biomass and from other fuels is commingled before transmission to the purchaser.

(2) *Example.* The following example illustrates the application of section 3.03 of this notice:

Example. A qualified facility at a paper mill produces 100 kilowatt hours of electricity per day. At all times, 25 percent of the thermal content of the fuels used in the facility is from open-loop biomass and the remainder is from other fuels. The facility uses separate boilers for the combustion of the open-loop biomass and the combustion of other fuels, but the steam from both boilers is commingled during the production of electricity. The entire electric output of the facility is sold to a public utility. Only 25 kilowatt hours (25 percent of 100 kilowatt hours) will be treated as electricity produced from open-loop biomass.

.04 Wood Bark And Lignin. Open-loop biomass includes wood bark and lignin material recovered from spent pulping liquors.

.05 No Rule Area. The Service will not issue private letter rulings regarding § 45 as it relates to open-loop biomass. In addition, the Service will not rule on

any issues under Subchapter K for partnerships claiming the credit under § 45. See Rev. Proc. 2007-65, 2007-45 I.R.B. 967, as revised by Announcement 2007-112, 2007-50 I.R.B. 1175.

SECTION 4. SALE TO UNRELATED PERSON

The credit under § 45 is allowed only for (1) electricity that the taxpayer produces from qualified energy resources and sells to an unrelated person, (2) refined coal that the taxpayer produces and sells to an unrelated person, and (3) Indian coal that the taxpayer produces and sells to an unrelated person. Electricity or coal will be treated as sold to an unrelated person for these purposes if the ultimate purchaser of the electricity or coal is not related to the person that produces the electricity or coal. The requirement of a sale to an unrelated person will be treated as satisfied in these circumstances if the producer sells the electricity or coal to a related person for resale by the related person to a person that is not related to the producer. For purposes of determining whether a person is related to the producer of the electricity or coal, see § 45(e)(4).

SECTION 5. EFFECTIVE DATE

The effective date of this Notice 2008-60 is the same as Notice 2006-88. However, any modifications made by this notice to Notice 2006-88 will not be applied adversely to taxpayers for electricity produced before July 28, 2008.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Notice 2006-88 is modified and as modified is superseded.

SECTION 7. DRAFTING INFORMATION

The principal author of this notice is Philip Tiegerman of the Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury participated in its development. For further information regarding this notice, contact Mr. Tiegerman at (202) 622-3110 (not a toll-free call).

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

Notice 2008-61

The Internal Revenue Service is suspending certain requirements under § 42 of the Internal Revenue Code for low-income housing credit projects in the United States to provide emergency housing relief needed as a result of the devastation caused by severe storms, tornadoes, and flooding in Wisconsin beginning on June 5, 2008. This relief is being granted pursuant to the Service's authority under § 42(n) and § 1.42-13(a) of the Income Tax Regulations.

BACKGROUND

On June 14, 2008, the President declared a major disaster for the State of Wisconsin. This declaration was made under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5206 (2000 and Supp. II 2002). Subsequently, the Federal Emergency Management Agency (FEMA) designated jurisdictions for Individual Assistance. The State of Wisconsin has requested that the Service allow owners of low-income housing credit projects to provide temporary housing in vacant units to individuals who resided in jurisdictions designated for Individual Assistance in Wisconsin and who have been displaced because their residences were destroyed or damaged as a result of the devastation caused by the severe storms, tornadoes, and flooding. Based upon this request and because of the widespread damage to housing caused by the severe storms, tornadoes, and flooding, the Service has determined that the Wisconsin Housing and Economic Development Authority (Authority) may provide approval to project owners to provide temporary emergency housing for displaced individuals in accordance with this notice.

I. SUSPENSION OF INCOME LIMITATIONS

The Service has determined that it is appropriate to temporarily suspend certain

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

II. STATUS OF UNITS

A. Units in the first year of the credit period

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

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

During the temporary housing period established by the Authority, the status of a vacant unit (that is, market-rate or low-income for purposes of § 42 or never previously occupied) after the first year of the credit period that becomes temporarily occupied by a displaced individual remains the same as the unit's status before the displaced individual moves in. Displaced individuals temporarily occupying vacant units will not be treated as low-income tenants under § 42(i)(3)(A)(ii). However, even if it houses a displaced individual, a low-income or market rate unit that was vacant before the effective date of this notice will continue to be treated as a vacant low-income or market rate unit. Similarly, a unit that was never previously occupied before the effective date of this notice will continue to be treated as a unit that has never been previously occupied even if it houses a displaced individual. Thus, the fact that a vacant unit becomes occupied by a displaced individual will not affect the building's applicable fraction under § 42(c)(1)(B) for purposes of determining the building's qualified basis, nor will it affect the 20–50 test or 40–60

test of § 42(g)(1). If the income of occupants in low-income units exceeds 140 percent of the applicable income limitation, the temporary occupancy of a unit by a displaced individual will not cause application of the available unit rule under § 42(g)(2)(D)(ii). In addition, the project owner is not required during the temporary housing period to make attempts to rent to low-income individuals the low-income units that house displaced individuals.

III. SUSPENSION OF NON-TRANSIENT REQUIREMENTS

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

IV. OTHER REQUIREMENTS

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

(1) Major Disaster Area

The displaced individual must have resided in a Wisconsin jurisdiction designated for Individual Assistance by FEMA as a result of the severe storms, tornadoes, and flooding in Wisconsin beginning on June 5, 2008.

(2) Approval of the Wisconsin Housing and Economic Development Authority

The project owner must obtain approval from the Authority for the relief described in this notice. The Authority will determine the appropriate period of temporary

housing for each project, not to extend beyond July 31, 2009.

(3) Certifications and Recordkeeping

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

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

(4) Rent Restrictions

Rents for the low-income units that house displaced individuals must not exceed the existing rent-restricted rates for the low-income units established under § 42(g)(2).

(5) Protection of Existing Tenants

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

EFFECTIVE DATE

This notice is effective June 14, 2008 (the date of the President's major disaster declarations as a result of the severe storms, tornadoes, and flooding in Wisconsin beginning on June 5, 2008).

PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–2107.

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

The collection of information in this notice is in the section titled "OTHER REQUIREMENTS" under "(3) Certifications and Recordkeeping." This information is required to enable the Service to verify whether individuals are displaced as a result of the devastation caused by severe storms, tornadoes, and flooding in Wisconsin beginning on June 5, 2008, and thus warrant temporary housing in vacant low-income housing credit units. The collection of information is required to obtain a benefit. The likely respondents are individuals and businesses.

The estimated total annual recordkeeping burden is 125 hours.

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

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

DRAFTING INFORMATION

The principal author of this notice is David Selig of the Office of the Associate Chief Counsel (Passthroughs and Special

Industries). For further information regarding this notice, contact Mr. Selig at (202) 622-3040 (not a toll-free call).

Update for Weighted Average Interest Rates, Yield Curves, and Segment Rates

Notice 2008-65

This notice provides guidance as to the corporate bond weighted average interest rate and the permissible range of interest rates specified under § 412(b)(5)(B)(ii)(II) of the Internal Revenue Code as in effect for plan years beginning before 2008. It also provides guidance on the corporate bond monthly yield curve (and the corresponding spot segment rates), the 24-month average segment rates, and the funding transitional segment rates under § 430(h)(2). In addition, this notice provides guidance as to the interest rate on 30-year Treasury securities under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning before 2008, the 30-year Treasury weighted average rate under § 431(c)(6)(E)(ii)(I), and the minimum present value segment rates under § 417(e)(3)(D) as in effect for plan years beginning after 2007.

CORPORATE BOND WEIGHTED AVERAGE INTEREST RATE

Sections 412(b)(5)(B)(ii) and 412(l)(7)(C)(i), as amended by the Pen-

sion Funding Equity Act of 2004 and by the Pension Protection Act of 2006 (PPA), provide that the interest rates used to calculate current liability and to determine the required contribution under § 412(l) for plan years beginning in 2004 through 2007 must be within a permissible range based on the weighted average of the rates of interest on amounts invested conservatively in long term investment grade corporate bonds during the 4-year period ending on the last day before the beginning of the plan year.

Notice 2004-34, 2004-1 C.B. 848, provides guidelines for determining the corporate bond weighted average interest rate and the resulting permissible range of interest rates used to calculate current liability. That notice establishes that the corporate bond weighted average is based on the monthly composite corporate bond rate derived from designated corporate bond indices. The methodology for determining the monthly composite corporate bond rate as set forth in Notice 2004-34 continues to apply in determining that rate. See Notice 2006-75, 2006-2 C.B. 366.

The composite corporate bond rate for June 2008 is 6.69 percent. Pursuant to Notice 2004-34, the Service has determined this rate as the average of the monthly yields for the included corporate bond indices for that month.

The following corporate bond weighted average interest rate was determined for plan years beginning in the month shown below.

For Plan Years Beginning in		Corporate Bond Weighted Average	Permissible Range	
Month	Year		90%	100%
July	2008	6.04	5.44	6.04

YIELD CURVE AND SEGMENT RATES

Generally for plan years beginning after 2007 (except for delayed effective dates for certain plans under sections 104, 105, and 106 of PPA), § 430 of the Code specifies the minimum funding requirements that apply to single employer plans pursuant to § 412. Section 430(h)(2) specifies the interest rates that must be used to determine a plan's target normal cost and funding target. Under this provision,

present value is generally determined using three 24-month average interest rates ("segment rates"), each of which applies to cash flows during specified periods. However, an election may be made under § 430(h)(2)(D)(ii) to use the monthly yield curve in place of the segment rates. For plan years beginning in 2008 and 2009, a transitional rule under § 430(h)(2)(G) provides that the segment rates are blended with the corporate bond weighted average as specified above. An election may be

made under § 430(h)(2)(G)(iv) to use the segment rates without applying the transitional rule.

Notice 2007-81, 2007-44 I.R.B. 899, provides guidelines for determining the monthly corporate bond yield curve, the 24-month average corporate bond segment rates, and the funding transitional segment rates used to compute the target normal cost and the funding target. Pursuant to Notice 2007-81, the monthly corporate bond yield curve derived from June 2008

data is in Table I at the end of this notice. The spot first, second, and third segment rates for the month of June 2008 are, re-

spectively, 4.99, 6.64, and 6.95. The three 24-month average corporate bond segment rates applicable for July 2008 under

the election of § 430(h)(2)(G)(iv) are as follows:

First Segment	Second Segment	Third Segment
5.10	6.03	6.54

The transitional segment rates under § 430(h)(2)(G) applicable for July 2008, taking into account the corporate bond

weighted average of 6.04 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2008	5.73	6.04	6.21

30-YEAR TREASURY SECURITIES INTEREST RATES

Section 417(e)(3)(A)(ii)(II) (prior to amendment by PPA) defines the applicable interest rate, which must be used for purposes of determining the minimum present value of a participant's benefit under § 417(e)(1) and (2), as the annual rate of interest on 30-year Treasury securities for the month before the date of distribution or such other time as the Secretary may by regulations prescribe. Section 1.417(e)-1(d)(3) of the Income Tax Regulations provides that the applicable interest rate for a month is the annual

rate of interest on 30-year Treasury securities as specified by the Commissioner for that month in revenue rulings, notices or other guidance published in the Internal Revenue Bulletin.

The rate of interest on 30-year Treasury securities for June 2008 is 4.69 percent. The Service has determined this rate as the monthly average of the daily determination of yield on the 30-year Treasury bond maturing in February 2038.

Generally for plan years beginning after 2007, § 431 specifies the minimum funding requirements that apply to multiemployer plans pursuant to § 412. Section 431(c)(6)(B) specifies a minimum

amount for the full-funding limitation described in section 431(c)(6)(A), based on the plan's current liability. Section 431(c)(6)(E)(ii)(I) provides that the interest rate used to calculate current liability for this purpose must be no more than 5 percent above and no more than 10 percent below the weighted average of the rates of interest on 30-year Treasury securities during the four-year period ending on the last day before the beginning of the plan year. Notice 88-73, 1988-2 C.B. 383, provides guidelines for determining the weighted average interest rate. The following rates were determined for plan years beginning in the month shown below.

For Plan Years Beginning in		30-Year Treasury Weighted Average	Permissible Range		
<i>Month</i>	<i>Year</i>		90%	to	105%
July	2008	4.74	4.27		4.98

MINIMUM PRESENT VALUE SEGMENT RATES

Generally for plan years beginning after December 31, 2007, the applicable interest rates under § 417(e)(3)(D) are segment rates computed without regard to a

24-month average. For plan years beginning in 2008 through 2011, the applicable interest rate is the monthly spot segment rate blended with the applicable rate under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning in 2007. Notice 2007-81 provides guidelines for determin-

ing the minimum present value segment rates. Pursuant to that notice, the minimum present value transitional segment rates determined for June 2008, taking into account the June 2008 30-year Treasury rate of 4.69 stated above, are as follows:

<u>For Plan Years Beginning in</u>	<u>First Segment</u>	<u>Second Segment</u>	<u>Third Segment</u>
2008	4.75	5.08	5.14

DRAFTING INFORMATION

The principal author of this notice is Tony Montanaro of the Employee Plans,

Tax Exempt and Government Entities Division. Mr. Montanaro may be e-mailed at *RetirementPlanQuestions@irs.gov*.

Table I

Monthly Yield Curve for June 2008

<i>Maturity</i>	<i>Yield</i>	<i>Maturity</i>	<i>Yield</i>	<i>Maturity</i>	<i>Yield</i>	<i>Maturity</i>	<i>Yield</i>	<i>Maturity</i>	<i>Yield</i>
0.5	3.44	20.5	6.95	40.5	6.95	60.5	6.96	80.5	6.96
1.0	4.03	21.0	6.95	41.0	6.95	61.0	6.96	81.0	6.96
1.5	4.54	21.5	6.95	41.5	6.95	61.5	6.96	81.5	6.96
2.0	4.93	22.0	6.95	42.0	6.95	62.0	6.96	82.0	6.96
2.5	5.19	22.5	6.95	42.5	6.95	62.5	6.96	82.5	6.96
3.0	5.36	23.0	6.94	43.0	6.95	63.0	6.96	83.0	6.96
3.5	5.47	23.5	6.94	43.5	6.95	63.5	6.96	83.5	6.96
4.0	5.55	24.0	6.94	44.0	6.95	64.0	6.96	84.0	6.96
4.5	5.63	24.5	6.94	44.5	6.95	64.5	6.96	84.5	6.96
5.0	5.71	25.0	6.94	45.0	6.95	65.0	6.96	85.0	6.96
5.5	5.79	25.5	6.94	45.5	6.95	65.5	6.96	85.5	6.96
6.0	5.87	26.0	6.94	46.0	6.95	66.0	6.96	86.0	6.96
6.5	5.96	26.5	6.94	46.5	6.95	66.5	6.96	86.5	6.96
7.0	6.05	27.0	6.94	47.0	6.95	67.0	6.96	87.0	6.96
7.5	6.15	27.5	6.94	47.5	6.95	67.5	6.96	87.5	6.96
8.0	6.24	28.0	6.94	48.0	6.95	68.0	6.96	88.0	6.96
8.5	6.32	28.5	6.94	48.5	6.95	68.5	6.96	88.5	6.96
9.0	6.40	29.0	6.94	49.0	6.95	69.0	6.96	89.0	6.96
9.5	6.48	29.5	6.94	49.5	6.95	69.5	6.96	89.5	6.96
10.0	6.55	30.0	6.94	50.0	6.95	70.0	6.96	90.0	6.96
10.5	6.61	30.5	6.94	50.5	6.95	70.5	6.96	90.5	6.96
11.0	6.66	31.0	6.94	51.0	6.95	71.0	6.96	91.0	6.96
11.5	6.71	31.5	6.94	51.5	6.95	71.5	6.96	91.5	6.96
12.0	6.76	32.0	6.94	52.0	6.95	72.0	6.96	92.0	6.96
12.5	6.80	32.5	6.94	52.5	6.95	72.5	6.96	92.5	6.96
13.0	6.83	33.0	6.94	53.0	6.95	73.0	6.96	93.0	6.96
13.5	6.86	33.5	6.94	53.5	6.95	73.5	6.96	93.5	6.96
14.0	6.88	34.0	6.94	54.0	6.95	74.0	6.96	94.0	6.96
14.5	6.90	34.5	6.95	54.5	6.95	74.5	6.96	94.5	6.96
15.0	6.91	35.0	6.95	55.0	6.95	75.0	6.96	95.0	6.96
15.5	6.92	35.5	6.95	55.5	6.95	75.5	6.96	95.5	6.96
16.0	6.93	36.0	6.95	56.0	6.95	76.0	6.96	96.0	6.96
16.5	6.94	36.5	6.95	56.5	6.96	76.5	6.96	96.5	6.96
17.0	6.94	37.0	6.95	57.0	6.96	77.0	6.96	97.0	6.96
17.5	6.95	37.5	6.95	57.5	6.96	77.5	6.96	97.5	6.96
18.0	6.95	38.0	6.95	58.0	6.96	78.0	6.96	98.0	6.96
18.5	6.95	38.5	6.95	58.5	6.96	78.5	6.96	98.5	6.96
19.0	6.95	39.0	6.95	59.0	6.96	79.0	6.96	99.0	6.96
19.5	6.95	39.5	6.95	59.5	6.96	79.5	6.96	99.5	6.96
20.0	6.95	40.0	6.95	60.0	6.96	80.0	6.96	100.0	6.96

Rev. Proc. 2008-43

SECTION 1. PURPOSE

The Internal Revenue Service traditionally viewed rolling-average inventory valuation as a method of accounting that does not clearly reflect income, especially when inventory is held for several years or costs fluctuate substantially. See Rev. Rul. 71-234, 1971-1 C.B. 148, and Rev. Rul. 77-480, 1977-2 C.B. 186.

However, many industries consider the rolling-average method an accurate estimate of costs and use a rolling-average method for financial statement purposes. The Service recognizes that using a rolling-average for financial statement purposes can produce an accurate approximation of costs. Therefore, this revenue procedure announces that the Service generally will view a rolling-average method that is used to value inventories for financial accounting purposes as clearly reflecting income for federal income tax purposes. However, if inventory is held for several years or costs fluctuate substantially, a rolling-average cost method may or may not clearly reflect income, depending on the particular facts and circumstances. This revenue procedure provides two safe harbors under which a taxpayer's financial accounting rolling-average method will be deemed to clearly reflect income for federal income tax purposes. If a taxpayer does not use a rolling-average method for financial accounting purposes then the rolling-average method may not accurately determine costs or clearly reflect income for federal income tax purposes.

This revenue procedure also provides the procedures by which a taxpayer may obtain automatic consent to change to a rolling-average method. A taxpayer that complies with all the applicable provisions of this revenue procedure has obtained the consent of the Commissioner to change its method of accounting under § 446(e) of the Internal Revenue Code and the regulations thereunder.

SECTION 2. BACKGROUND

.01 Section 446(a) provides that taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes income in keeping its books.

.02 Sections 446(e) and 1.446-1(e)(2) of the Income Tax Regulations state that, except as otherwise provided, a taxpayer must secure the consent of the Commissioner before changing a method of accounting for federal income tax purposes. Section 1.446-1(e)(3)(ii) authorizes the Commissioner to prescribe administrative procedures setting forth the limitations, terms, and conditions necessary to permit a taxpayer to obtain consent to change a method of accounting.

.03 Rev. Proc. 2002-9, 2002-1 C.B. 327 (as modified and clarified by Announcement 2002-17, 2002-1 C.B. 561, modified and amplified by Rev. Proc. 2002-19, 2002-1 C.B. 696, and amplified, clarified, and modified by Rev. Proc. 2002-54, 2002-2 C.B. 432), provides procedures for a taxpayer to obtain automatic consent of the Commissioner to change to a method of accounting described in the Appendix of Rev. Proc. 2002-9.

.04 Section 471 provides that inventories must be taken on such basis as the Secretary may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting income.

.05 Section 1.471-2(c) permits merchants and manufacturers to value inventories at either (1) cost, or (2) cost or market, whichever is lower (LCM). When applying one of these valuation methods, a taxpayer uses a cost-flow assumption, such as first-in, first-out (FIFO) or last-in, first-out (LIFO), to identify the items in ending inventories.

.06 Section 472(a) provides that a taxpayer may use the LIFO inventory method. Under § 472(b)(2), a taxpayer using the LIFO inventory method must value its goods at cost.

.07 Section 1.471-3(b) defines the cost of merchandise purchased since the beginning of the taxable year as the invoice price less trade or other discounts, except strictly cash discounts approximating a fair interest rate, which a taxpayer may or may not deduct at the taxpayer's option, provided

the taxpayer does so consistently. Transportation and other necessary charges incurred in acquiring possession of the goods are added to this net invoice price.

.08 In the case of merchandise produced by the taxpayer, § 1.471-3(c) defines cost as (1) the cost of raw materials and supplies entering into or consumed in connection with the product, (2) expenditures for direct labor, and (3) indirect production costs incident to and necessary for the production of the particular article, including an appropriate portion of management expenses, but not including any cost of selling or return on capital. See §§ 1.263A-1 and 1.263A-2 for more specific rules regarding the treatment of production costs.

.09 Section 1.471-3(d) provides that in any industry in which the usual rules for computation of cost of production are inapplicable, cost may be approximated upon a basis that is reasonable and in conformity with established trade practice in that industry.

SECTION 3. SCOPE

This revenue procedure applies to a taxpayer that is required to account for inventories under § 471 and uses a rolling-average method to value those inventories for financial accounting purposes.

SECTION 4. ROLLING-AVERAGE METHOD SAFE HARBORS

.01 *In general.* A taxpayer's use of the rolling-average method it uses for financial accounting purposes to value inventories for federal income tax purposes will be deemed to clearly reflect income if—

(1) The taxpayer recomputes the rolling average cost of an inventory item on one of the following bases:

(A) Each time the taxpayer purchases or produces an additional unit or units of that item; or

(B) On a regular basis but no less frequently than once per month; and

(2) The taxpayer satisfies one of the following conditions:

(A) The variance percentage, as determined under section 4.02 of this revenue procedure, does not exceed one percent; or

(B) The entire inventory of a taxpayer's trade or business turns at least four times per year, as determined under section 4.03 of this revenue procedure.

.02 *Determination of variance percentage.* The variance percentage is determined by—

(1) Subtracting the cost of the ending inventory of the trade or business computed using the taxpayer's rolling-average method from the cost of the ending inventory of the trade or business computed using either the FIFO method or the specific identification method to determine the variance; and then

(2) Dividing the variance by the aggregate rolling-average cost of the inventory.

.03 *Determination of inventory turns.* The number of times that the entire inventory of a taxpayer's trade or business turns during a taxable year is equal to the cost of goods sold divided by average inventory (average of beginning and ending inventory). A taxpayer that uses a LIFO cost-flow assumption for tax purposes must calculate inventory turns using rolling-average cost and a FIFO cost-flow assumption.

SECTION 5. PROCEDURES FOR CHANGING METHOD OF ACCOUNTING

.01 Taxpayers are granted the consent of the Commissioner to change to a rolling-average method of accounting permitted under section 4 of this revenue procedure in accordance with the applicable provisions of Rev. Proc. 2002-9 or any successor, subject to the following modifications:

(1) The scope limitation in section 4.02(6) of Rev. Proc. 2002-9 does not apply to the change to a rolling-average method in the taxpayer's first or second taxable year ending on or after December 31, 2007; and

(2) The designated automatic accounting method change number for changes in method of accounting made pursuant to this revenue procedure is No. 114.

.02 A taxpayer changing to a rolling-average method of accounting must use a cut-off method unless the taxpayer's books and records contain sufficient information to compute a § 481(a) adjustment, in which case the taxpayer may choose to implement the change with a § 481(a) adjustment as provided in sections 5.03 and 5.04 of Rev. Proc. 2002-9.

SECTION 6. AUDIT PROTECTION

A taxpayer's use of a rolling-average method of accounting in accordance with section 4 of this revenue procedure on a federal income tax return filed before June 25, 2008, will not be raised as an issue by the Service. Moreover, if a taxpayer's use of a rolling-average method in accordance with section 4 of this revenue procedure on a federal income tax return filed before June 25, 2008, is an issue under consideration in examination, appeals, or before the Tax Court, the Service will not further pursue the issue.

NOTE:

Following is a list of related instructions and forms for filing Form 1042-S Electronically:

- **Current Instructions for Form 1042-S**
- **Form 4419 — Application for Filing Information Returns Electronically (FIRE)**
- **Form 8508 — Request for Waiver From Filing Information Returns Electronically**
- **Form 8809 — Application for Extension of Time To File Information Returns**
- **Publication 515 — Withholding of Tax on Nonresident Aliens and Foreign Entities (for general information and explanation of tax law associated with Form 1042-S)**
- **Publication 901 — U.S. Tax Treaties**

The Internal Revenue Service (IRS), Enterprise Computing Center at Martinsburg (ECC-MTB) encourages filers to make copies of the blank forms in the back of this publication for future use. These forms can also be obtained by calling 1-800-TAX-FORM (1-800-829-3676). You can also download forms and publications from the IRS Web Site at www.irs.gov.

SECTION 7. EFFECT ON OTHER DOCUMENTS

Rev. Rul. 71-234, 1971-1 C.B. 148, and Rev. Rul. 77-480, 1977-2 C.B. 186, are modified to permit taxpayers to use a rolling-average method of accounting for inventories as provided under this revenue procedure. Rev. Proc. 2002-9 is modified and amplified to include in the APPENDIX the automatic change provided in this revenue procedure.

SECTION 8. EFFECTIVE DATE

This revenue procedure is effective for taxable years ending on or after December 31, 2007.

DRAFTING INFORMATION

The principal author of this revenue procedure is Leo F. Nolan II of the office of the Associate Chief Counsel (Income Tax and Accounting). For further information regarding this revenue procedure, contact Mr. Nolan at (202) 622-4970 (not a toll-free call).

IMPORTANT NOTES:

For tax year 2008 forms filed in calendar year 2009, IRS/ECC-MTB will no longer accept tape cartridges. Electronic filing will be the ONLY acceptable method for filing Form 1042-S at IRS/ECC-MTB. IRS/ECC-MTB offers an Internet connection at <http://fire.irs.gov> for electronic filing. The Filing Information Returns Electronically (FIRE) System will be down the last week of December through the first week January for upgrading. It is not operational during this time for submissions.

THE RECORD LENGTH FOR ALL RECORDS WAS INCREASED TO 820 POSITIONS. THE RECIPIENT "Q" RECORD HAS NUMEROUS CHANGES. PLEASE REVIEW PART C CAREFULLY BEFORE SUBMITTING YOUR FILE.

Rev. Proc. 2008-44

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Use this Revenue Procedure to prepare Tax Year 2008 and prior year information returns for submission to Internal Revenue Service (IRS) electronically.

This Revenue Procedure is not revised every year. Updates will be printed as needed in the Internal Revenue Bulletin. General Instructions for Form 1042-S are revised every year. Be sure to consult current instructions when preparing Form 1042-S.

Part A. General

Revenue Procedures are generally revised annually to reflect legislative and form changes. Comments concerning this Revenue Procedure, or suggestions for making it more helpful, can be addressed to:

Internal Revenue Service
Enterprise Computing Center — Martinsburg
Attn: Information Reporting Program
230 Murall Drive
Kearneysville, WV 25430

Sec. 1. Purpose

.01 The purpose of this Revenue Procedure is to provide the specifications for filing Form 1042-S with IRS/ECC-MTB electronically through the FIRE (Filing Information Returns Electronically) System. This Revenue Procedure must be used to prepare current and prior year information returns **filed beginning January 1, 2009, and received by IRS/ECC-MTB or postmarked by December 31, 2009.**

.02 Generally, the box names on the paper Form 1042-S correspond with the fields used to file electronically; however, if discrepancies occur, the instructions in this Revenue Procedure govern.

.03 This Revenue Procedure supersedes Rev. Proc. 2006–34 published as Publication 1187, Specifications for Filing Form 1042-S, Foreign Person’s U.S. Source Income Subject to Withholding, Electronically or Magnetically.

.04 Refer to Part A, Sec.12, for definitions of terms used in this publication.

.05 Specifications for filing Forms W-2, Wage and Tax Statements, electronically are available from the Social Security Administration (SSA) **only**. Filers can call 1–800–SSA–6270 to obtain the telephone number of the SSA Employer Service Liaison Officer for their area.

.06 IRS/ECC-MTB does **not** process Forms W-2. Forms W-2 must be sent to SSA. IRS/ECC-MTB does, however, process waiver requests (Form 8508) and extension of time to file requests (Form 8809) for Forms W-2 and requests for an extension of time to provide the employee copies of Forms W-2.

.07 The following Revenue Procedures and publications provide more detailed filing procedures for certain information returns:

- (a) Instructions for Form 1042-S.
- (b) Publication 1179, General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, W-2G and 1042-S.
- (c) Publication 1239, Specifications for Filing Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips, Electronically.
- (d) Publication 1220, Specifications for Filing Forms 1098, 1099, 5498, and W-2G Electronically.
- (e) Publication 3609, Filing Information Returns Electronically (FIRE)

Sec. 2. Nature of Changes—Current Year (Tax Year 2008)

Editorial changes of a clarifying nature have been made throughout this publication. Please read the entire publication carefully.

.01 *The record length for all records, T, W, Q, C, and F was increased to 820 positions. Please review Part C carefully before formatting and submitting your file.*

.02 IRS/ECC-MTB no longer accepts any form of magnetic media. Electronic filing through the FIRE System is the only method to report Form 1042-S to IRS/ECC-MTB.

.03 Title of Publication 1187 was changed to reflect the elimination of magnetic media filing.

.04 Form 4804, Transmittal of Information Returns Reported Magnetically, is obsolete. This form was only required for magnetic media reporting which is no longer a valid method of reporting information returns.

.05 Test procedures have been eliminated from Part A since tape cartridges will not be acceptable after December 1, 2008. Electronic filing specifications, Part B, Sec. 3 details testing procedures for electronic files.

.06 Form 8809, Application for Extension of Time To File Information Returns, is available as a fill-in form on the FIRE System and is highly encouraged in lieu of the paper Form 8809. (See Part D, Sec. 1.)

.07 Several sections have been deleted due to the elimination of magnetic media filing and others combined for greater clarity. Please review the entire Publication for all relevant changes.

.08 Part A, Sec. 9, Amended Returns, has extensive revisions. A chart was added detailing the one and two step amended process.

.09 Part A, Sec. 8, .10 was expanded to give detailed instruction on how to report "UNKNOWN RECIPIENT".

.10 For the Withholding Agent "W" Record, additional instructions were added to the Return Type Indicator field and Postal or ZIP Code field.

.11 For the End of Transmission "F" Record, Media Count, positions 5–7, was eliminated. Positions 5–810 are reserved.

.12 *Major format changes were made to the Recipient "Q" Record. New fields were added and others were moved to new locations within the record. Please review Part C carefully before formatting and submitting your file.*

Sec. 3. Where To File and How to Contact the IRS, Enterprise Computing Center at Martinsburg

.01 All information returns filed electronically are processed at IRS/ECC-MTB. General inquiries concerning the filing of 1042-S Forms should be sent to the following address:

IRS–Enterprise Computing Center — Martinsburg
Attn: 1042-S Reporting
230 Murall Drive
Kearneysville, WV 25430

.02 All requests for an extension of time to file information returns with IRS/ECC-MTB or to the recipients, and requests for undue hardship waivers filed on Form 8508, are sent to the following address:

IRS–Enterprise Computing Center — Martinsburg
Information Reporting Program
Attn: Extension of Time Coordinator
240 Murall Drive
Kearneysville, WV 25430

.03 The telephone numbers for electronic filing inquiries are:

Information Reporting Program Customer Service Section

TOLL-FREE 1-866-455-7438 or
Outside the U.S. 304-263-8700
email at mccirp@irs.gov

304-267-3367 — TDD
(Telecommunication Device for the Deaf)

Fax Machine
Toll-free within the U.S. — 877-477-0572
Outside the U.S. — 304-264-5602

Electronic Filing — FIRE System
<http://fire.irs.gov>

TO OBTAIN FORMS:
1-800-TAX-FORM (1-800-829-3676)

www.irs.gov — IRS Web Site access to forms and publications.

.04 Current Instructions for Form 1042-S have been included in the Publication 1187 for your convenience. The Form 1042-T is used only to transmit Copy A of **paper** Forms 1042-S. If filing paper returns, follow the mailing instructions on Form 1042-T and submit the paper returns to the Ogden Service Center, P.O. Box 409101, Ogden, UT 84409.

.05 Requests for paper Form 1042-S should be made by calling the IRS toll-free number **1-800-TAX-FORM (1-800-829-3676)** or via the IRS Web Site at www.irs.gov.

.06 Questions pertaining to electronic filing of Forms W-2 **must** be directed to the Social Security Administration (SSA). Filers can call 1-800-772-6270 to obtain the telephone number of the SSA Employer Service Liaison Officer for their area.

.07 Filers **should not** contact IRS/ECC-MTB if they have received a penalty notice and need additional information or are requesting an abatement of the penalty. A penalty notice contains an IRS representative's name and/or telephone number for contact purposes; or, the filer may be instructed to respond in writing to the address provided. IRS/ECC-MTB does **not** issue penalty notices and does **not** have the authority to abate penalties. For penalty information, refer to the Penalty section of the current Instructions for Form 1042-S.

.08 A taxpayer or authorized representative may request a copy of a tax return, including Form W-2 filed with a return, by submitting Form 4506, Request for Copy of Tax Return, to IRS. This form may be obtained by calling **1-800-TAX-FORM (1-800-829-3676)**. For any questions regarding this form, call 215-516-2000 and select option 1. This is not a toll-free number.

.09 Electronic Products and Support Services, Information Reporting Branch, Customer Service Section (IRB/CSS), answers electronic, paper filing, and tax law questions from the payer community relating to the correct preparation and filing of business information returns (Forms 1096, 1098, 1099, 5498, 8027, and W-2G). **IRB/CSS also answers questions relating to the electronic filing of Forms 1042-S. Call toll-free 1-800-455-7438 for specific information on 1042-S filing.** Inquiries dealing with backup withholding and reasonable cause requirements due to missing and incorrect taxpayer identification numbers are also addressed by IRB/CSS. Assistance is available year-round to payers, transmitters, and employers nationwide, Monday through Friday, 8:30 a.m. to 4:30 p.m. Eastern Standard Time, by calling toll-free **1-866-455-7438** or via e-mail at mccirp@irs.gov. Do not include SSNs or EINs on e-mails since this is not a secure line. The Telecommunications Device for the Deaf (TDD) toll number is **304-267-3367**. Call as soon as questions arise to avoid the busy filing seasons. Recipients of information returns (payees) should continue to contact 1-800-829-1040 with any questions on how to report the information returns data on their tax returns.

Note: The Customer Service Section does not answer tax law questions concerning the requirements for withholding of tax on payments of U.S. source income to foreign persons under Chapter 3 of the Code. If you need such assistance, you may call 215-516-2000 and select option 1 (not a toll-free number) or write to: Philadelphia Internal Revenue Service, International Section, P.O. Box 920, Bensalem, PA 19020-8518.

Sec. 4. Filing and Retention Requirements

.01 The regulations under section 6011(e)(2)(A) of the Internal Revenue Code provide that any person, including a corporation, partnership, individual, estate, and trust, who is required to file 250 or more information returns must file such returns electronically. Withholding agents who meet the threshold of 250 or more Forms 1042-S are required to submit their information electronically.

Note: Even though filers with less than 250 information returns are not required to submit the information returns electronically and may submit them on paper, IRS/ECC-MTB encourages filers to transmit those information returns electronically.

.02 These requirements apply separately to both originals and amended records filed electronically.

.03 All filing requirements that follow apply individually to each reporting entity as defined by its separate Taxpayer Identification Number (TIN), [Social Security Number (SSN), Employer Identification Number (EIN), Individual Taxpayer Identification Number (ITIN), or Qualified Intermediary Employer Identification Number (QI-EIN), Withholding Foreign Partnership Employer Identification Number (WP-EIN), Withholding Foreign Trust Employer Identification Number (WT-EIN)]. For example, if a corporation with several branches or locations uses the same EIN, the corporation must aggregate the total volume of returns to be filed for that EIN and apply the filing requirements to each type of return accordingly.

.04 The above requirements do not apply if the filer establishes hardship (see Part D, Sec. 5).

.05 Current and prior year data must be submitted in separate electronic transmissions. Each tax year must be a separate electronic file.

.06 Filers who have prepared their information returns in advance of the due date should submit this information to IRS/ECC-MTB no earlier than January 1 of the year the return is due.

.07 Do not report duplicate information. If a filer submits returns electronically, identical paper documents must not be filed. Duplicate filing will result in penalty notices being sent to recipients.

.08 Withholding agents should retain a copy of the information returns filed with IRS/ECC-MTB or have the ability to reconstruct the data for at least 3 years from the due date of the returns.

Sec. 5. Vendor List

.01 IRS/ECC-MTB prepares a list of vendors who support electronic filing. The Vendor List (Pub. 1582) contains the names of service bureaus that will produce or submit files for electronic filing. It also contains the names of vendors who provide software packages for payers who wish to produce electronic files on their own computer systems. This list is compiled as a courtesy and in no way implies IRS/ECC-MTB approval or endorsement.

.02 If filers engage a service bureau to prepare files on their behalf, the filers must not also report this data, as it will create a duplicate filing situation which may cause penalty notices to be generated.

.03 The Vendor List, Publication 1582, is updated periodically. The most recent revision is available on the IRS website at www.irs.gov. For an additional list of software providers, log on to www.irs.gov and go to the [Approved IRS e-file for Business Providers](#) link.

.04 A vendor, who offers a software package, or has the capability to electronically file information returns for customers, and who would like to be included in Publication 1582 must submit a letter or e-mail to IRS/ECC-MTB. The request should include:

- (a) Company name
- (b) Address (include city, state, and ZIP code)
- (c) Telephone and FAX number (include area code)
- (d) E-mail address
- (e) Contact person
- (f) Website
- (g) Type(s) of service provided (e.g., service bureau and/or software)
- (h) Method of filing (only electronic filing is acceptable)
- (i) Type(s) of return(s)

Sec. 6. Form 4419, Application for Filing Information Returns Electronically (FIRE)

.01 Transmitters are required to submit Form 4419, Application for Filing Information Returns Electronically (FIRE), to request authorization to file information returns with IRS/ECC-MTB. A single Form 4419 may be filed. IRS/ECC-MTB encourages transmitters who file for multiple withholding agents or qualified intermediaries to submit one application and to use the assigned Transmitter Control Code (TCC) for all. Please make sure you submit your electronic files using the correct TCC.

Note: EXCEPTIONS — An additional Form 4419 is required for filing Forms 1098, 1099, 5498 and W-2G and Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips. See back of Form 4419 for detailed instructions.

.02 Electronically filed returns may not be submitted to IRS/ECC-MTB until the application has been approved. Please read the instructions on the back of Form 4419 carefully. A Form 4419 is included in the Publication 1187 for the filer's use. This form may be photocopied. Additional forms may be obtained by calling 1-800-TAX-FORM (1-800-829-3676). The form is also available at www.irs.gov.

.03 Upon approval, a five-character alpha/numeric Transmitter Control Code (TCC) beginning with the digits "22" will be assigned and included in an approval letter. The TCC **must** be coded in the Transmitter "T" Record. If a transmitter uses more than one TCC to file, each TCC must be reported on a separate electronic transmission.

.04 If **any** of the information (name, TIN or address) on the Form 4419 changes, please notify IRS/ECC-MTB in writing so the IRS/ECC-MTB database can be updated. The transmitter should include the TCC in all correspondence.

.05 Form 4419 may be submitted anytime during the year; however, it **must** be submitted to IRS/ECC-MTB at least 30 days before the due date of the return(s) for current year processing. This will allow IRS/ECC-MTB the minimum amount of time necessary to process and respond to applications. Form 4419 may be faxed to IRS/ECC-MTB toll-free within the U.S. at 877-477-0572. In the event that computer equipment or software is not compatible with IRS/ECC-MTB, a waiver may be requested to file returns on paper documents.

.06 IRS/ECC-MTB encourages a transmitter who files for multiple withholding agents to submit one application and to use the assigned TCC for all withholding agents.

.07 If a withholding agent's files are prepared by a service bureau, it may not be necessary for the withholding agent to submit an application to obtain a TCC. Some service bureaus will produce files, code their own TCC on the file, and send it to IRS/ECC-MTB for the withholding agent. Other service bureaus will prepare electronic files for the withholding agent to submit directly to IRS/ECC-MTB. These service bureaus may require the withholding agent to obtain a TCC to be coded in the Transmitter "T" Record. Withholding agents should contact their service bureaus for further information.

.08 Once a transmitter is approved to file electronically, it is not necessary to reapply each year **unless**:

(a) The withholding agent has discontinued filing electronically for two consecutive years; the withholding agent's TCC may have been reassigned by IRS/ECC-MTB. Withholding agents who are aware that the TCC assigned will no longer be used are requested to notify IRS/ECC-MTB so these numbers may be reassigned; **or**

(b) The withholding agent's electronic files were transmitted in the past by a service bureau using the service bureau's TCC, but now the withholding agent has computer equipment compatible with that of IRS/ECC-MTB and wishes to prepare his or her own files. The withholding agent must request a TCC by filing Form 4419.

.09 One Form 4419 may be submitted per TIN. Multiple TCCs will only be issued to withholding agents with multiple TINs. Only one TCC will be issued per TIN unless the filer has checked the application for the following forms in addition to the Form 1042-S: Forms 1098, 1099, 5498, W-2G, and/or 8027. A separate TCC will be assigned for these forms.

.10 Approval to file does not imply endorsement by IRS/ECC-MTB of any computer software or of the quality of tax preparation services provided by a service bureau or software vendor.

Sec. 7. Due Dates

.01 The due dates for filing paper returns with IRS also applies to electronic filing of Form 1042-S which is on a calendar year basis.

.02 Form 1042-S filed electronically must be submitted to IRS/ECC-MTB on or before March 15.

.03 If any due date falls on a Saturday, Sunday, or legal holiday, the return or statement is considered timely if filed or furnished on the next day that is not a Saturday, Sunday, or legal holiday.

.04 Statements to recipients must be mailed on or before March 15.

Sec. 8. Validation of Information Returns at IRS Service Center

.01 The accuracy of data reported on Form 1042-S will now be reviewed and validated at the IRS Service Center. All fields indicated as "**Required**" in the record layouts in Part C **must** contain **valid information**. If the Service identifies an error, you will be notified and required to provide correct information.

.02 Know your recipient! See Notice 2006-35, 2006-1 C.B. 708, for know-your-customer rules.

.03 The tax rate entered must be a valid tax rate based on the Internal Revenue Code or on a valid treaty article. The valid treaty rate is based on the recipient's country of residence for tax purposes. The rate selected must be justified by the appropriate treaty. A valid Tax Rate Table can be found in the Instructions for Forms 1042-S.

.04 The Gross Income amount field must reflect pretax income. The Gross Income amount is the total income paid before any deduction of tax at source.

.05 If a qualified intermediary, withholding foreign partnership, or withholding foreign trust is acting as such, either as a withholding agent or as a recipient, the TIN reported must be a QI-EIN, WP-EIN, or WT-EIN and must begin with "98". See definition of QI in the Instructions for Form 1042-S.

.06 Country Codes used must be valid codes taken from the Country Code Table. Generally, the use of "OC" or "UC" will generate an error condition. If a recipient is claiming treaty benefits, the Country Code can never be "OC" or "UC".

.07 If a recipient is an "UNKNOWN RECIPIENT" or "WITHHOLDING RATE POOL", no address should be present. These are the only two situations where a street address is not required.

.08 A U.S. TIN for a recipient is now generally required, particularly for most treaty benefits. The exceptions are very limited and are listed in the current Instructions for Form 1042-S.

.09 Apply the following formula to determine U.S. Federal Tax Withheld (field positions 48-59 of the "Q" Record). All field positions described below are in the "Q" Record.

Income Codes (15–19)

Gross Income Paid (6–17)
– Withholding Allowance (18–29)
= Net Income Amount (30–41)
X Tax Rate (42–45)
= U.S. Federal Tax Withheld (359–370)

All other Income Codes

Gross Income Paid (6–17)
X Tax Rate (42–45)
= U.S. Federal Tax Withheld (359–370)

.10 The following is how to correctly report an Unknown Recipient. All entries are in the Recipient “Q” Record.

- (a) Tax Rate (positions 42–45) must be 3000.
- (b) Exemption Code (positions 46–47) is 00.
- (c) Recipient Code (positions 92–93) is 20.
- (d) Recipient’s Name Line-1 (positions 94–133) must have “UNKNOWN” or “UNKNOWN RECIPIENT”
- (e) Recipient’s Name Line-2 (positions 134–173) must be blank.
- (f) Recipient’s address (positions 214–337) must be blank.
- (g) Recipient’s Country Code (positions 338–339) is UC.

.11 When making a payment to an international organization (e.g., United Nations) or a tax-exempt organization under IRC 501(a), use Country Code “OC”. Use “UC” only when you have an “Unknown Recipient”.

.12 When using Exemption Code 4, the Recipient Country of Residence Code for Tax Purposes MUST be a VALID treaty country (e.g., if tax resident of Northern Ireland use United Kingdom). Do not use Exemption Code 4 unless a reduction or exemption of tax is based on a treaty claim.

.13 Generally, payments under Income Codes 06 and 08 are not exempt from withholding, however, certain exceptions apply. See the current Instructions for Form 1042-S.

.14 If income is from gambling winnings (Income Code 28) or is not specified (Income Code 50), the tax rate must generally be 30%. This type of income is only exempt from withholding at source if the exemption is based on a tax treaty that has an “Other Income” article.

.15 If Income Code 20 (Earnings as Artist or Athlete) is used, the Recipient Code must be 09. Do not use Recipient Code 01 (Individual), 02 (Corporation), or 03 (Partnership). Generally, the tax rate cannot be reduced even if a treaty may apply.

.16 When paying scholarship and fellowship grants (Income Code 15), the Recipient’s Country of Residence for Tax Purposes must be identified and cannot be “OC” or “UC”. Grants that are exempt under Code Section 117 are no longer required to be reported on Form 1042-S.

Note: Grants that are exempt under Code 117 include only amounts provided for tuition, fees, books, and supplies to a qualified student. Amounts provided for room and board can only be exempted under a tax treaty and must be reported on Form 1042-S whether exempt from tax or not.

.17 If a student is receiving compensation (Income Code 19) or a teacher or a researcher is receiving compensation (Income Code 18), all or part of which is exempted from tax under a tax treaty, the Country of Residence for Tax Purposes must be identified and cannot be “OC” or “UC”.

Sec. 9. Amended Returns

.01 If you filed a Form 1042-S with the IRS and later discovered an error on the filing, you must send an amended 1042-S as soon as possible.

Note: If any information you correct on Form(s) 1042-S changes the information previously reported on Form 1042, you must also correct the Form 1042 by filing an amended return.

.02 The electronic filing requirement of information returns of 250 or more applies separately to both original and amended returns.

E If a withholding agent has 100 Forms 1042-S to be amended, they can be filed on paper because they fall
X under the 250 threshold. However, if the withholding agent has 300 Forms 1042-S to be amended, they must
A be filed electronically because they exceed the 250 threshold. If for some reason a withholding agent cannot
M file the 300 amended returns electronically, to avoid penalties, a request for a waiver must be submitted
P before filing on paper. If a waiver is approved for original documents, any amended returns for the same
L type of return will be covered under this waiver.
E

.03 Amended returns should be filed **as soon as possible**. Amended returns filed after August 1 may be subject to the maximum penalty of \$50 per return. Amended returns filed by August 1 may be subject to a lesser penalty. For information on penalties, refer to the Penalty section of the current Instructions for Form 1042-S. However, if a withholding agent discovers errors after August 1, the withholding agent is still required to file amended returns or be subject to a penalty for intentional disregard of the filing requirements. If a record is incorrect, all fields on that record must be completed with the correct information. Submit amended returns only for the returns filed in error. Do not submit the entire file. Furnish amended statements to recipients as soon as possible.

Note: Do not include original returns and amended returns on the same electronic file.

.04 If filers discover that certain information returns were omitted on their original file, they must **not** code these documents as amended returns. The file must be coded and submitted as an original file.

.05 Prior year data, original and amended, **must** be filed according to the requirements of this Revenue Procedure. If submitting prior year amended returns, use the record format for the current year and submit in separate transmission. However, use the actual year designation of the amended return in Field Positions 2–5 of the “T” Record. A separate electronic transmission must be made for each tax year.

.06 In general, filers should submit amended returns for returns filed within the last 3 calendar years.

.07 All paper returns, whether original or amended, must be filed with IRS, Ogden Service Center, P.O. Box 409101, Ogden, UT 84409.

.08 The “Q” Record provides a 20-position field (positions 72–91) for the recipient’s account number assigned by the withholding agent. This number will help identify the appropriate incorrect return if more than one return is filed for a particular payee. This number should appear on the initial return and on the amended return in order to identify and process the amended return properly.

Do not enter a TIN in this field.

.09 The record sequence for filing amended returns is the same as for original returns.

.10 Following is a chart showing the steps to be taken for amending Form 1042-S:

Guidelines for Filing Amended Returns Electronically

One transaction is required to make the following corrections properly.

<i>Error Made on the Original Return</i>	<i>How To File the Amended Return</i>
<u>ERROR TYPE 1</u>	<u>CORRECTION</u>
<p>I. Original return was filed with one or more of the following errors:</p> <p>(a) Incorrect money amount</p> <p>(b) Incorrect codes and/or check boxes</p> <p>(c) Incorrect address</p> <p>(d) Form 1042-S submitted in error — should not have been submitted</p> <p>Note 1: If the 1042-S was submitted in error then all fields must be exactly the same as the original record except that all money amounts will be zero.</p>	<p>A. Prepare a new file. The first record on the file will be the Transmitter “T” Record.</p> <p>B. Make a separate “W” Record with a Return Type Indicator of “1” (1 = Amended) in field position 2.</p> <p>C. The Recipient “Q” Records must show the correct record information with a Return Type Indicator of “1” for amended in field position 2. (See Note 1.)</p> <p>D. Prepare a separate Reconciliation “C” Record summarizing the preceding amended “Q” Records.</p> <p>E. The last record on the file will be the End of Transmission “F” Record.</p>

File layout one step corrections

<i>Transmitter “T” Record</i>	<i>Amended coded Withholding Agent “W” Record</i>	<i>Amended coded Recipient “Q” Record</i>	<i>Amended coded Recipient “Q” Record</i>	<i>Reconciliation “C” Record</i>	<i>End of Transmission “F” Record</i>
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Guidelines for Filing Amended Returns Electronically (Continued)

Two (2) separate transactions (files) are required to make the following corrections properly. Follow the directions for both Transactions 1 and 2. DO NOT use the two step correction process to correct money amounts.

Error Made on the Original Return

How To File the Amended Return

ERROR TYPE 2

CORRECTION

1. Original "Q" Records were filed with one or more of the following errors:

Transaction 1: Identify incorrect returns.

- (a) No Recipient TIN (SSN, EIN, ITIN, QI-EIN)
- (b) Incorrect Recipient TIN
- (c) Incorrect Recipient name
- (d) Incorrect Recipient name and address

- A. Prepare a new file. The first record on the file will be the Transmitter "T" Record.
- B. Make a separate "W" Record for each withholding agent being reported. The information in the "W" Record will be **exactly** the same as it was in the original submission except for the Return Type Indicator of "1" (1 = Amended) in field position 2. (See Note 2.)
- C. The Recipient "Q" Records must contain **exactly the same** information as submitted previously, **except**, insert the Amended Return Indicator Code of "1" in Field Position 2 of the "Q" Records, and enter "0" (zeros) in all payment amounts. (See Note 2.)
- D. Prepare a separate Reconciliation "C" Record for each withholding agent being reported.
- E. Continue with Transaction 2 to complete the correction.
- F. The last record on the file will be the End of Transmission "F" Record.

Note 2: The Record Sequence Number will be different since this is a counter number and is unique to each file.

Note 3: Do not include amended returns and original returns on the same electronic file.

Transaction 2: Report the correct information.

- A. Prepare a new file. The first record on the file will be the Transmitter "T" Record.
- B. Make a separate "W" Record for each withholding agent being reported.
- C. The Recipient "Q" Records must show the correct information.
- D. Prepare a separate Reconciliation "C" Record for each withholding agent being reported.
- E. The last record on the file will be the End of Transmission "F" Record.

File layouts two step corrections

FILE 1

Transmitter "T" Record	Amended coded Withholding Agent "W" Record	Amended coded Recipient "Q" Record	Amended coded Recipient "Q" Record	Amended coded Recipient "Q" Record	Reconciliation "C" Record	End of Transmission "F" Record
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FILE 2

Transmitter "T" Record	Withholding Agent "W" Record	Recipient "Q" Record	Recipient "Q" Record	Recipient "Q" Record	Reconciliation "C" Record	End of Transmission "F" Record
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.11 When correcting the Withholding Agent "W" Record follow the two step correction process. When the "W" Record is being corrected then **every** Recipient "Q" Record reported under that incorrect "W" record must be amended by zero filling all the amount fields as described in the Transaction 1 step.

.12 For information on when an amended Form 1042 is required, refer to the current Form 1042 Instructions.

Sec. 10. Taxpayer Identification Number (TIN)

.01 Section 6109 of the Internal Revenue Code establishes the general requirements under which a person is required to furnish a U.S. TIN to the person obligated to file the information return.

.02 The Withholding Agent must provide its EIN, QI-EIN, WP-EIN or WT-EIN as appropriate, in the "W" Record and "T" Record if the Withholding Agent is also the transmitter.

.03 A recipient U.S. TIN (SSN, ITIN, EIN, QI-EIN, WP-EIN, WT-EIN) must be provided on every "Q" Record when:

- (a) Tax rate is less than 30% (See the current Instructions for Form 1042-S for exceptions)
- (b) Income is effectively connected with the conduct of a trade or business in the United States
- (c) Recipient claims tax treaty benefits (generally)
- (d) Recipient is a Qualified Intermediary
- (e) An NRA individual is claiming exemption from withholding on independent personal services
- (f) Other situations may apply, see Publication 515

.04 In the event the recipient does not have a U.S. TIN, the withholding agent should advise the recipient to take the necessary steps to apply for one.

.05 The recipient's U.S. TIN and name combination are used to associate information returns reported to IRS/ECC-MTB with corresponding information on recipients' tax returns. It is imperative that **correct** U.S. Taxpayer Identification Numbers (TINs) for recipients be provided to IRS/ECC-MTB. **Do not enter hyphens or alpha characters.** Entering all zeros, ones, twos, etc., will have the effect of an incorrect TIN.

.06 The withholding agent and recipient names with associated TINs should be consistent with the names and TINs used on other tax returns.

Note: A withholding agent must have a valid EIN, QI-EIN, WP-EIN, and/or WT-EIN. It is no longer valid for a withholding agent to use SSNs and ITINs.

Sec. 11. Effect on Paper Returns and Statements to Recipients

.01 Electronic reporting of Form 1042-S eliminates the need to submit paper documents to the IRS. **CAUTION: Do not send Copy A of the paper forms to IRS for any forms filed electronically.** This will result in duplicate filing.

.02 Withholding agents are responsible for providing statements to the recipients as outlined in the current Instructions for Form 1042-S. Refer to those instructions for filing Form 1042-S on paper with the IRS and furnishing statements to recipients.

.03 Statements to recipients should be clear and legible. If the official IRS form is not used, the filer must adhere to the specifications and guidelines in Publication 1179, General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, W-2G and 1042-S.

.04 The address for filing paper Forms 1042-S and Form 1042 is: Ogden Service Center, P.O. Box 409101, Ogden, UT 84409. Do **NOT** send paper Forms 1042-S or 1042 to IRS/ECC-MTB.

Sec. 12. Definition of Terms

Element	Description
Amended Return	An amended return is an information return submitted by the transmitter to amend an information return that was previously submitted to and processed by IRS/ECC-MTB, but contained erroneous information.

Element	Description
Beneficial Owner	The beneficial owner of income is, generally, the person who is required under U.S. tax principles to include the income in gross income on a tax return. For additional information and special conditions see Definitions in the current Instructions for Form 1042-S.
Employer Identification Number (EIN)	A nine-digit number assigned by IRS for Federal tax reporting purposes.
Electronic Filing	Submission of information returns electronically via the Internet. See Part B of this publication for specific information on electronic filing.
File	For purposes of this Revenue Procedure, a file consists of one Transmitter "T" Record at the beginning of the file, a Withholding Agent "W" Record, followed by the Recipient "Q" Record(s), a Reconciliation "C" Record summarizing the number of preceding "Q" Records and total of preceding money fields. Follow with any additional "W", "Q", and "C" Record sequences as needed. The last record on the file will be the End of Transmission "F" Record. Nothing should be reported after the End of Transmission "F" Record.
Filer	Person (may be withholding agent and/or transmitter) submitting information returns to IRS.
Filing Year	The calendar year in which the information returns are being submitted to IRS.
Flow-Through Entity	A flow-through entity is a foreign partnership (other than a withholding foreign partnership) or a foreign simple or grantor trust (other than a withholding foreign trust). For any payments for which a reduced rate of withholding under an income tax treaty is claimed, any entity is considered to be a flow-through entity if it is considered to be fiscally transparent under IRC Section 894 with respect to the payment by an interest holder's jurisdiction.
Foreign Person	A foreign person includes a nonresident alien individual, a foreign corporation, a foreign partnership, a foreign trust, a foreign estate, and any other person who is not a U.S. person. The term also includes a foreign branch or office of a U.S. financial institution or U.S. clearing organization if the foreign branch is a Qualified Intermediary. Generally, a payment to a U.S. branch of a foreign institution is a payment to a foreign person.
Gross Income	Gross income includes income from all sources, except certain items expressly excluded by statute. Gross income is the starting point for computing adjusted gross income and taxable income.
Individual Taxpayer Identification Number (ITIN)	A nine-digit number issued by IRS to individuals who are required to have a U.S. taxpayer identification number for tax purposes but are not eligible to obtain a Social Security Number (SSN). ITIN may be used for tax purposes only.
Information Return	The vehicle for withholding agents to submit required tax information about a recipient to IRS. For this Revenue Procedure, it is information about a foreign person's U.S. source income subject to withholding, and the information return is Form 1042-S.
Intermediary	An intermediary is a person who acts as a custodian, broker, nominee, or otherwise as an agent for another person, regardless of whether that other person is the beneficial owner of the amount paid, a flow-through entity, or another intermediary.
Nonqualified Intermediary (NQI)	A Nonqualified Intermediary is a foreign intermediary who is not a U.S. person and that is not a Qualified Intermediary.
Payer	A payer is the person for whom the withholding agent acts as a paying agent pursuant to an agreement whereby the withholding agent agrees to withhold and report a payment.
Presumption Rules	The presumption rules are those rules prescribed under Chapter 3 and Chapter 61 of the Internal Revenue Code that a withholding agent must follow to determine the status of a beneficial owner as a U.S. or foreign person when it cannot reliably associate a payment with valid documentation.

Element	Description
Pro-Rata Basis Reporting	If the withholding agent has agreed that an NQI may provide information allocating a payment to its account holders under the provisions of Regulations section 1.1441-1(e)(3)(iv)(D), and the NQI fails to allocate the payment in a withholding rate pool to the specific recipients in the pool, the withholding agent must file a Form 1042-S for each recipient on a pro-rata basis.
Qualified Intermediary (QI)	A Qualified Intermediary is a foreign intermediary who is a party to a withholding agreement with the IRS, in which it agrees to comply with the relevant terms of Chapters 3 and 61 of the Internal Revenue Code <i>and is in a country with approved know-your-customer rules.</i> See Notice 2006-35, 2006-1 C.B. 708.
Qualified Intermediary Employer Identification	A nine-digit number assigned by IRS to a QI for Federal tax reporting purposes. A QI-EIN is only to be used when a QI is acting as a qualified intermediary.
Recipient	Person (nonresident alien individual, fiduciary, foreign partnership, foreign corporation, Qualified Intermediary, Withholding Rate Pool, or other foreign entity) who receives payments from a withholding agent as a beneficial owner or as a qualified intermediary acting on behalf of a beneficial owner. A non-qualified intermediary cannot be a recipient.
Replacement File	A replacement file is an information return file sent by the filer at the request of IRS/ECC-MTB because of certain errors encountered while processing the filer's original submission.
Service Bureau	Person or organization with whom the withholding agent has a contract to prepare and/or submit information return files to IRS/ECC-MTB. A parent company submitting data for a subsidiary is not considered a service bureau.
Social Security Number (SSN)	A nine-digit number assigned by Social Security Administration to an individual for wage and tax reporting purposes.
Special Character	Any character that is not a numeric, an alpha, or a blank.
Taxpayer Identification Number (TIN)	Refers to either an Employer Identification Number (EIN), Social Security Number (SSN), Individual Taxpayer Identification Number (ITIN), or a Qualified Intermediary Employer Identification Number (QI-EIN).
Tax Year	The year in which payments were made by a withholding agent to a recipient.
Transmitter	Refers to the person or organization submitting file(s) electronically. The transmitter may be the payer, agent of the payer, or withholding agent.
Transmitter Control Code (TCC)	A five-character alpha/numeric number assigned by IRS/ECC-MTB to the transmitter prior to filing electronically. An application Form 4419 must be filed with IRS/ECC-MTB to receive this number. This number is inserted in the Transmitter "T" Record (field positions 190-194) of the file and must be present before the file can be processed. Transmitter Control Codes assigned to 1042-S filers will always begin with "22" .
Unknown Recipient	For this Revenue Procedure, an unknown recipient is a recipient for whom no documentation has been received by a withholding agent or intermediary or for which documentation received cannot be reliably associated. This includes incomplete documentation. An unknown recipient is always subject to withholding at the maximum applicable rate. No reduction of or exemption from tax may be applied <u>under any circumstances.</u>
Vendor	Vendors include service bureaus that produce information return files on electronic files for withholding agents. Vendors also include companies that provide software for those who wish to produce their own electronic files.

Element**Description**

Withholding Agent

Any person, U.S. or foreign, who has control, receipt, or custody of an amount subject to withholding or who can disburse or make payments of an amount subject to withholding. The withholding agent may be an individual, corporation, partnership, trust, association, or any other entity. The term withholding agent also includes, but is not limited to, a qualified intermediary, a nonqualified intermediary, a withholding foreign partnership, a withholding foreign trust, a flow-through entity, a U.S. branch of a foreign insurance company or foreign bank that is treated as a U.S. person, and an authorized foreign agent. A person may be a withholding agent under U.S. law even if there is no requirement to withhold from a payment or even if another person has already withheld the required amount from a payment.

Withholding Foreign Partnership (WP) or Withholding Foreign Trust (WT)

A foreign partnership or trust that has entered into a withholding or Withholding Foreign Trust agreement with the IRS in which it agrees to assume primary withholding responsibility for all payments that are made to it for its partners, beneficiaries, or owners.

Sec. 13. State Abbreviations

.01 The following state and U.S. territory abbreviations are to be used when developing the state code portion of address fields. This table provides state and territory abbreviations.

State	Code	State	Code	State	Code
Alabama	AL	Kansas	KS	No. Mariana Islands	MP
Alaska	AK	Kentucky	KY	Ohio	OH
American Samoa	AS	Louisiana	LA	Oklahoma	OK
Arizona	AZ	Maine	ME	Oregon	OR
Arkansas	AR	Maryland	MD	Pennsylvania	PA
California	CA	Massachusetts	MA	Puerto Rico	PR
Colorado	CO	Michigan	MI	Rhode Island	RI
Connecticut	CT	Minnesota	MN	South Carolina	SC
Delaware	DE	Mississippi	MS	South Dakota	SD
District of Columbia	DC	Missouri	MO	Tennessee	TN
Federated States of Micronesia	FM	Montana	MT	Texas	TX
Florida	FL	Nebraska	NE	Utah	UT
Georgia	GA	Nevada	NV	Vermont	VT
Guam	GU	New Hampshire	NH	Virginia	VA
Hawaii	HI	New Jersey	NJ	U.S. Virgin Islands	VI
Idaho	ID	New Mexico	NM	Washington	WA
Illinois	IL	New York	NY	West Virginia	WV
Indiana	IN	North Carolina	NC	Wisconsin	WI
Iowa	IA	North Dakota	ND	Wyoming	WY

.02 When reporting APO/FPO addresses use the following format:

EXAMPLE:

Recipient Name	PVT Willard J. Doe
Mailing Address	Company F, PSC Box 100 167 Infantry REGT
Recipient City	APO (or FPO)
Recipient State	AE, AA, or AP*
Recipient ZIP Code	098010100

*AE is the designation for ZIPs beginning with 090–098, AA for ZIP 340, and AP for ZIPs 962–966.

Part B. Electronic Filing Specifications

Note: *The FIRE System DOES NOT provide fill-in forms, except for Form 8809, Application for Extension of Time To File Information Returns.* Filers must program files according to the Record Layout Specifications contained in this publication. For a list of software providers, log on to www.irs.gov and go to the [Approved IRS e-file for Business Providers link](#). Also, see Part A, Sec. 5 .03.

Sec. 1. General

.01 Electronic filing of Form 1042-S (originals, amended and replacement files) is a reporting method for filers submitting 250 or more 1042-S Forms. Payers who are under the filing threshold requirement, are encouraged to file electronically.

.02 All electronic filing of information returns are received at IRS/ECC-MTB via the FIRE (Filing Information Returns Electronically) System. To connect to the FIRE System, point your browser to <http://fire.irs.gov>. The system is designed to support the electronic filing of information returns only.

.03 For files submitted on the FIRE System, it is the responsibility of the filer to check the status of your file within 5 business days to verify the results of your transmission. IRS/ECC-MTB will no longer mail error reports to filers for files that are bad. Information about the errors including the number of errors, a description and the first occurrence will be provided on the FIRE System. If additional information is needed to understand the errors, the filer can call toll-free 1–866–455–7438 or outside the U.S. at 304–263–8700.

.04 The electronic filing of information returns is not affiliated with any other IRS electronic filing programs. Filers must obtain separate approval to participate in each of them. Only inquiries concerning electronic filing of information returns should be directed to IRS/ECC-MTB.

.05 Files submitted to IRS/ECC-MTB electronically must be in standard ASCII code. Do not send paper forms with the same information as electronically submitted files. This would create duplicate reporting resulting in penalty notices. See Part C, Record Format Specifications and Record Layouts.

.06 *Form 8809, Application for Extension of Time To File Information Returns, is available as a fill-in form via the FIRE System.* If you do not already have a User ID and password refer to Section 7. At the Main Menu, click “Extension of Time Request” and then click “Fill-in Extension Form”. This option is only used to request an automatic 30-day extension and must be completed by the due date of the return for each payer requesting an extension. Print the approval page for your records. Refer to Part D for additional details.

Sec. 2. Electronic Filing Approval Procedure

.01 Filers must obtain, or already have, a Transmitter Control Code (TCC) assigned prior to submitting files electronically. Refer to Part A, Sec. 6, for information on how to obtain a TCC.

.02 Once a TCC is obtained, electronic filers assign their own user ID, password and PIN (Personal Identification Number) and do not need prior or special approval. See Part B, Sec. 5, for more information on the PIN.

.03 If a filer is submitting files for more than one TCC, it is not necessary to create a separate logon and password for each TCC.

.04 For all passwords, it is the user’s responsibility to remember the password and not allow the password to be compromised. Passwords are user assigned at first logon and must be 8 alpha/numerics containing at least 1 uppercase, 1 lowercase, and 1 numeric. However, filers who forget their password or PIN, can call at **toll-free 1–866–455–7438 or outside the U.S. at 304–263–8700** for assistance. Users can change their passwords at any time from the main menu. The FIRE System may require users to change their passwords on a yearly basis.

Sec. 3. Test Files

.01 Filers are not required to submit a test file; however, the submission of a test file is encouraged for all new electronic filers to test hardware and software. If filers wish to submit an electronic test file, it **must** be submitted to IRS/ECC-MTB **no earlier than** November 1 of the current year, and **no later than** February 15, of the filing year.

.02 IRS/ECC-MTB strongly encourages all electronic filers to submit a test. The test file must consist of a sample of each type of record:

- (a) Transmitter “T” Record
- (b) Withholding Agent “W” Record
- (c) Multiple Recipient “Q” Records (**at least 11 recommended**)
- (d) Reconciliation “C” Record
- (e) End of Transmission “F” Record

.03 Use the Test Indicator “**TEST**” (upper case) in Field Positions 195–198 of the “T” Record to show this is a test file.

.04 IRS/ECC-MTB will check the file to ensure it meets the specifications of this Revenue Procedure. For current filers, sending a test file will provide the opportunity to ensure their software reflects all required programming changes. Filers are reminded that not all validity, consistency, or math error tests will be conducted.

.05 Filers who encounter problems while transmitting the electronic test file can contact IRS/ECC-MTB **toll-free at 1-866-455-7438 or outside the U.S. at 304-263-8700** for assistance.

.06 Within 5 days after your file has been sent, you will be notified via e-mail as to the acceptability of your file if you provide a valid e-mail address on the “Verify Your Filing Information” screen. If you are using e-mail filtering software, configure your software to accept e-mail from fire@irs.gov and irs.e-helpmail@irs.gov. If the file is bad or you have not received an e-mail, within 5 days, the filer must return to <http://fire.irs.gov> to determine what the errors are in the file by clicking on CHECK FILE STATUS.

Sec. 4. Electronic Submissions

.01 Electronically filed information may be submitted to IRS/ECC-MTB 24 hours a day, 7 days a week. Technical assistance will be available Monday through Friday between 8:30 a.m. and 4:30 p.m. Eastern Standard Time by calling **toll-free at 1-866-455-7438 or outside the U.S. at 304-263-8700**.

.02 **The FIRE System will be down during the last week of December through the first week of January.** This allows IRS/ECC-MTB to update its system to reflect current year changes.

.03 If you are sending files larger than 10,000 records electronically, data compression is encouraged. If you are considering sending files larger than 5 million records, please contact IRS/ECC-MTB for specifics. WinZip and PKZip are the only acceptable compression packages. IRS/ECC-MTB cannot accept self-extracting zip files or compressed files containing multiple files. The time required to transmit information returns electronically will vary depending upon the type of connection to the Internet and if data compression is used. **The time required to transmit a file can be reduced by as much as 95 percent by using compression.**

.04 Transmitters may create files using self assigned files name(s). Files submitted electronically will be assigned a new unique file name by the FIRE System. The filename assigned by the FIRE System will consist of submission type (TEST, ORIG [original], AMEN [*amended return*], and REPL [replacement]), the filer’s TCC and a four-digit number sequence. The sequence number will be incremented for every file sent. For example, if it is your first original file for the calendar year and your TCC is 22000, the IRS assigned filename would be ORIG.22000.0001. **Record the filename.** This information will be needed by IRS/ECC-MTB to identify the file, if assistance is required.

.05 If a file was submitted timely and is bad, the filer will have up to 60 days from the day the file was transmitted to transmit an acceptable file. If an acceptable file is not received within 60 days, the payer could be subject to late filing penalties.

.06 The following definitions have been provided to help distinguish between an amended return and a replacement:

- An **amended return** is an information return submitted by the transmitter to correct an information return that was previously submitted to and processed by IRS/ECC-MTB, but contained erroneous information. (**See Note.**)

Note: Amended returns should only be submitted for records that have been submitted incorrectly, not the entire file.

- A **replacement** is an information return file sent by the filer because the CHECK FILE STATUS option on the FIRE System indicated the original/amended file was bad. After the necessary changes have been made, the file must be transmitted through the FIRE System. (**See Note.**)

Note: Filers should never transmit anything to IRS/ECC-MTB as a “Replacement” file unless the CHECK FILE STATUS option on the FIRE System indicates the file is bad.

.07 The TCC in the Transmitter “T” Record must be the TCC used to transmit the file; otherwise, the file will be considered an error.

Sec. 5. PIN Requirements

.01 User will be prompted to create a PIN consisting of 10 numerics when establishing their initial logon name and password.

.02 The PIN is required each time an ORIGINAL, AMENDED, or REPLACEMENT file is sent electronically and is permission to release the file. It is not needed for a TEST file. An authorized agent may enter their PIN, however, the payer is responsible for the accuracy of the returns. The payer will be liable for penalties for failure to comply with filing requirements. If you forget your PIN, please call **toll-free at 1-866-455-7438 or outside the U.S. at 304-263-8700** for assistance.

Sec. 6. Electronic Filing Specifications

.01 The FIRE System is designed exclusively for the filing of Forms 1042-S, 1098, 1099, 5498, 8027, and W-2G.

.02 A transmitter must have a TCC (see Part A, Sec. 6) before a file can be transmitted.

.03 Within 5 days, the results of the electronic transmission will be e-mailed to you providing you provide an accurate e-mail address on the "Verify Your Filing Information" screen. If you are using e-mail filtering software, configure your software to accept e-mail from fire@irs.gov and irs.e-helpmail@irs.gov. If after receiving the e-mail it indicates that your file is bad, you must log into the FIRE System and go to the CHECK FILE STATUS area of the FIRE System to determine what the errors are in your file.

Sec. 7. Connecting to the FIRE System

.01 Point your browser to <http://fire.irs.gov> to connect to the FIRE System.

.02 Before connecting, have your TCC and TIN available.

.03 Your browser must support SSL 128-bit encryption.

First time connection to the FIRE System (If you have logged on previously, skip to Subsequent Connections to the FIRE System.)

Click "***Create New Account***".

Fill out the registration form and click "***Submit***".

Enter your ***User ID*** (most users logon with their first and last name).

Enter and verify your ***password*** (the password is user assigned and must be 8 alpha/numerics, containing at least 1 uppercase, 1 lowercase and 1 numeric). FIRE may require you to change the password once a year.

Click "***Create***".

If you receive the message "***Account Created***", click "***OK***".

Enter and verify your 10-digit self-assigned PIN (Personal Identification Number).

Click "***Submit***".

If you receive the message "***Your PIN has been successfully created!***", click "***OK***".

Read the bulletin(s) and/or click "***Click here to continue***".

Subsequent connections to the FIRE System

Click "***Log On***".

Enter your ***User ID*** (most users logon with their first and last name).

Enter your ***password*** (the password is user assigned and is case sensitive).

Uploading your file to the FIRE System

At Menu Options:

Click "***Send Information Returns***".

Enter your ***TCC***:

Enter your ***TIN***:

Click "***Submit***".

Uploading your file to the FIRE System

The system will then display the company name, address, city, state, ZIP Code, telephone number, contact and e-mail address. This information will be used to e-mail the transmitter regarding this transmission. Please verify your e-mail address is correct as this will be increasingly used to contact filers in the future. Update as appropriate and/or Click "**Accept**".
Click one of the following:

Original File

Amended File

Test File (This option will only be available November 1 through February 15.)

Replacement File (Click on the file to be replaced.)

Enter your 10-digit PIN.

Click "**Submit**".

Click "**Browse**" to locate the file and open it.

Click "**Upload**".

When the upload is complete, the screen will display the total bytes received and tell you the name of the file you just uploaded. Record this information.

If you have more files to upload for that TCC:

Click "**File Another?**"; otherwise,

Click "**Main Menu**".

If you do not receive an e-mail in 5 business days or your e-mail indicates the file is bad, log back into the FIRE System and click on CHECK FILE STATUS to view the results of your file.

Checking your FILE STATUS

At the Main Menu:

Click "**Check File Status**".

Enter your **TCC**:

Enter your **TIN**:

Click "**Search**".

If "Results" indicate:

"Good, Not Released" and you agree with the "Count of Payees", you are finished with this file. The file will automatically be released after 10 calendar days unless you contact us within this timeframe.

"Good, Released" — File has been released to our mainline processing.

"Bad" — Correct the errors and timely resubmit the file as a "replacement".

"Not yet processed" — File has been received, but we do not have results available yet. Please check back in a few days.

Click on the desired file for a detailed report of your transmission.

When you are finished, click on **Main Menu**.

Click "**Log Out**".

Close your Web Browser.

Sec. 8. Common Submission Problems and Questions

.01 Publication 1187 is a format document, **not** a tax law document. Therefore, this publication cannot provide for all possible reporting situations. For any given record entry, it is the responsibility of the filer to make sure that the relevant tax law is applied to the record entry being made.

FORMAT ERRORS

1. Incorrect TIN indicator in the “W” Record.

Be careful that the correct TIN Indicator is used. A U.S. withholding agent always has an EIN. Only a foreign withholding agent that has entered into a Qualified Intermediary agreement with the IRS can have a QI-EIN. If the withholding agent is a foreign company, then a foreign address must be entered in the withholding agent address fields.

2. Blank or invalid information in the Withholding Agent’s name and address fields.

The IRS error correction process requires that the “W” Record be checked for validity before the “Q” Record can be corrected. Please ensure that the withholding agent’s Name, EIN, Street Address, City and State or Country is present along with the appropriate Postal or ZIP Code. Withholding Agent’s Name Line-1 **must** contain the withholding agent’s name.

3. Missing Recipient TIN in the “Q” Record.

A Recipient TIN **must** be present in order to allow a reduction or exemption from withholding at the 30% tax rate. The only major exceptions to this rule involve payments of portfolio interest, dividends, and certain royalty payments. If the recipient doesn’t have a TIN, one must be applied for and provided to the withholding agent before a reduction or exemption of withholding is allowed.

4. Invalid recipient name and address information.

The recipient name entered in Recipient’s Name Line-1 must be the same name shown on the withholding certification document provided to and retained by the withholding agent. Recipient’s Street Line-1 should only show the official street address. Use Recipient’s Street Line-2 for additional internal distribution information such as mail stop numbers or attention information. Follow the instructions for entry of foreign postal codes, cities and countries. Do not input all information in the City field. Use the appropriate fields and codes.

5. Incorrect use of Recipient Code 20 (Unknown Recipient).

This Recipient Code may be used **only** if no withholding certification document has been provided to and retained by the withholding agent, or the withholding certification document provided to and retained has been determined by the withholding agent to be incomplete or otherwise unreliable. If Recipient Code 20 is used then Recipient Name Line-1 must contain the words “UNKNOWN RECIPIENT” and the other name and address fields must be blank.

6. Incorrect use of Recipient Code 20 and the Tax Rate and U.S. Tax Withheld fields.

If Recipient Code 20 is used, the Tax Rate and the U.S. Tax Withheld must always be 30%. Exemption Code 04 (treaty exemption) **CANNOT BE USED**.

7. Incorrect use of Country Codes in the “Q” Record.

There are 3 places in the “Q” Record where country information must be entered. Generally, the information entered in these three fields should be consistent. The country list in the Instructions for Form 1042-S is comprehensive. **Do not** use any code that isn’t on the list. Read the instructions for Form 1042-S regarding the use of “OC” and “UC”. **Do not** use these two codes under any circumstance other than those specifically indicated in the Instruction for Form 1042-S.

8. Incorrect reporting of Tax Rates in the “Q” Record.

A valid Tax Rate Table can be found in the Instructions for Forms 1042-S. Please refer to table and only use the tax rates listed. “Blended rates” are not allowed. If a tax rate for a given recipient changes during the year, two “Q” Records must be submitted.

9. Total amounts reported in the “C” Record do not equal the total amounts reported in the “Q” Records.

The total Gross Income and U.S. Tax Withheld reported in the “Q” Record must equal the Total Gross Income and Total U.S. Tax Withheld reported in the corresponding “C” Record.

.02 The following are the major errors associated with electronic filing:

NON-FORMAT ERRORS

1. SPAM filters are not set to receive e-mail from fire@irs.gov and irs.e-helpmail@irs.gov.

If you want to receive e-mails concerning your files, processing results, reminders and notices, set your SPAM filter to receive e-mail from fire@irs.gov and irs.e-helpmail@irs.gov.

2. Incorrect e-mail provided.

When the "Verify Your Filing Information" screen is displayed, make sure your correct e-mail is displayed. If not, please update with the correct e-mail.

3. Transmitter does not check the FIRE System to determine why the file is bad.

The results of your file transfer are posted to the FIRE System within five business days. If the correct e-mail address was provided on the "Verify Your Filing Information" screen when the file was sent, an e-mail will be sent regarding your FILE STATUS. If the results in the e-mail indicate "Good, Released" and you agree with the "Count of Payees", then you are finished with this file. If you have any other results, please follow the instructions in the Check File Status option. If the file contains errors, you can get an online listing of the errors. Date received and number of payee records are also displayed. If the file is good, but you do not want the file processed, you must contact IRS/ECC-MTB within 10 calendar days from the transmission of your file.

4. Transmitter uses the TCC assigned for filing 1098, 1099, 5498 or W-2G Forms.

Use your Form 1042-S TCC which begins with "22" to transmit your 1042-S file, otherwise, it will be automatically considered an error.

5. Incorrect file is not replaced timely.

If we have advised you your file is bad, correct the file and timely resubmit as a replacement.

6. Transmitter compresses several files into one.

Only compress one file at a time. For example, if you have 10 uncompressed files to send, compress each file separately and send 10 separate compressed files.

7. Transmitter sends a file and CHECK FILE STATUS indicates that the file is good, but the transmitter wants to send a replacement or amended file to replace the original/amended/replacement file.

Once a file has been transmitted, you cannot send a replacement file unless CHECK FILE STATUS indicates the file is bad (5 business days after file was transmitted). If you do not want us to process the file, you must first contact us **toll-free at 1-866-455-7438 or outside the U.S. at 304-263-8700** to see if this is a possibility.

8. Transmitter sends an original file that is good, and then sends an amended file for the entire file even though there are only a few changes.

The amended file, containing the proper coding, should only contain the records needing correction, not the entire file.

9. File is formatted as EBCDIC.

All files submitted electronically must be in standard ASCII code.

10. Transmitter has one TCC number, but is filing for multiple companies, which TIN should be used when logging into the system to send the file?

When sending the file electronically, you will need to enter the TIN of the company assigned to the TCC. When you upload the file, it will contain the TINs for the other companies that you are filing for. This is the information that will be passed forward.

11. Transmitter sent the wrong file, what should be done?

Call us as soon as possible **toll-free at 1-866-455-7438 or outside the U.S. at 304-263-8700**. We may be able to stop the file before it has been processed. **Please do not send a replacement for a file that is marked as a good file.**

Part C. Record Format Specifications and Record Layouts

Sec. 1. Transmitter "T" Record

.01 This record identifies the entity preparing and transmitting the file. The transmitter and the withholding agent may be the same, but they need not be.

.02 The first record of a file **MUST** be a Transmitter "T" Record. The "T" Record must appear on each electronic file; otherwise, a replacement file may be requested.

.03 *The "T" Record is a fixed length of 820 positions.*

.04 All alpha characters entered in the "T" Record must be upper case.

Note 1: For all fields marked "Required", the transmitter must provide the information described under Description and Remarks. If required fields are not completed in accordance with these instructions, IRS will contact you to request a replace-

ment file. For those fields not marked **Required**, a transmitter must allow for the field, but may be instructed to enter blanks or zeroes in the indicated field position(s) and for the indicated length. *All records have a fixed length of 820 positions.*

Note 2: A copy of the current Instructions for Form 1042-S for this revision of the Publication 1187 is included at the end of this publication. These instructions should be used for the proper coding of each field in this record where applicable. The instructions are updated each year as required. *Since Publication 1187 may not be revised every year, be sure to use the most current instructions.*

Note 3: Valid characters for all name and address fields are alpha, numeric, blank, ampersand (&), hyphen (-), comma (,), apostrophe ('), forward slash (/), pound sign (#), period (.), and the percent (%). The percent [% (used as “in care of”)] is valid in the first position only.

Record Name: Transmitter “T” Record			
Field Positions	Field Title	Length	Description and Remarks
1	Record Type	1	Required. Enter “T”.
2–5	Tax Year	4	Required. Enter year for which income and withholding are being reported.
6–14	Transmitter’s Taxpayer Identification Number (TIN)	9	Required. Enter the Taxpayer Identification Number of the Transmitter. This can be a Social Security Number (SSN), Individual Taxpayer Identification Number (ITIN), Employer Identification Number (EIN) or Qualified Intermediary Number (QI-EIN). DO NOT ENTER blanks, hyphens or alpha characters. A TIN consisting of all the same digits (e.g., 11111111) is not acceptable.
15–54	Transmitter’s Name	40	Required. Enter name of transmitter of file. Abbreviate if necessary to fit 40-character limit. Omit punctuation if possible. Left-justify and blank fill.
Note: Do not use special characters in names or addresses that are unique to a language other than English. For example: å = A, æ = A, ü = U, Ø = O, ñ = N, etc.			
55–94	Transmitter’s Address	40	Required. Enter full mailing address of the transmitter. This will include number, street, and apartment or suite number (P.O. Box can be used if mail is not delivered to street address). Abbreviate as needed to fit 40-character limit. Omit punctuation if possible. Left-justify and blank fill.
95–114	City	20	Required. Enter the city or town (or other locality name) of transmitter. If applicable, enter APO or FPO only. Left-justify and blank fill.
115–116	State Code	2	Required if U.S. Transmitter. Enter only the two-alpha State Code. DO NOT spell out the state name. See State Code Table Part A, Sec. 13.
117–118	Province Code	2	Required if Foreign Country Code is “CA” (Canada). Enter only the two-alpha character Province Code as shown in the Province Code table. DO NOT spell out the Province Name. If foreign country other than Canada, blank fill.
	Province Code	Province	
	AB	Alberta	
	BC	British Columbia	
	MB	Manitoba	
	NB	New Brunswick	
	NL	Newfoundland and Labrador	
	NS	Nova Scotia	
	NT	Northwest Territories	
	NU	Nunavut	
	ON	Ontario	
	PE	Prince Edward Island	
	QC	Quebec	
	SK	Saskatchewan	
	YK	Yukon Territory	

Record Name: Transmitter "T" Record

Field Positions	Field Title	Length	Description and Remarks
119-120	Country Code	2	Required if Foreign Transmitter. If Country Code is present, State Code field MUST be blank. Enter only the two-alpha Country Code from the Country Code table. DO NOT spell out the Country Name.
Note: COUNTRY CODES: The list of country codes provided in the current Instructions for Form 1042-S includes all internationally recognized country codes and must be used to ensure the proper coding of the Country Code field. This list is updated each year as required. Do not enter U.S. in the Country Code field.			
121-129	Postal or ZIP Code	9	Required. Enter up to nine numeric characters for all U.S. addresses (including territories, possessions and APO/FPO). For foreign addresses enter the alpha/numeric foreign postal code, if applicable. Enter this code in the left most position and blank fill the remaining positions. DO NOT use hyphens or blanks between numbers or letters (e.g., if the postal code is written as A6B 3C5 input as A6B3C5). Left-justify.
130-169	Contact Name	40	Required. Enter the name of the person to contact if any questions should arise with the transmission.
170-189	Contact Telephone Number	20	Required. Enter the contact person's telephone number, and extension, if applicable. If foreign, provide appropriate codes for overseas calls. Left-justify.
190-194	Transmitter Control Code (TCC)	5	Required. Enter the five-character alpha/numeric TCC assigned ONLY for Form 1042-S reporting. (The first two numbers will always be 22 .) <i>All alpha characters must be upper case.</i>
195-198	Test Indicator	4	Required if this is a test file. Enter the word "TEST". Otherwise, enter blanks.
199	Prior Year Indicator	1	Required. Enter a "P" only if reporting prior year data; otherwise, enter blank. Do not enter a "P" for current year information.
200-810	<i>Reserved</i>	<i>611</i>	<i>Enter blanks.</i>
811-818	<i>Record Sequence Number</i>	<i>8</i>	Required. <i>Enter the number of the record as it appears within your file. The record sequence number for the "T" record will always be "1" (one), since it is the first record on your file and you can have only one "T" record in a file. Each record, thereafter, must be incremented by one in ascending numerical sequence, i.e., 2, 3, 4, etc. Right-justify numbers with leading zeroes in the field. For example, the "T" record sequence number would appear as "00000001" in the field, the first "W" record would be "00000002", the first "Q" record, "00000003", the second "Q" record, "00000004" and so on until you reach the final record of the file, the "F" record.</i>
819-820	<i>Blank or Carriage Return Line Feed</i>	<i>2</i>	<i>Enter blanks or carriage return line feed (CR/LF) characters.</i>

Transmitter "T" Record Layout

Record Type	Tax Year	Transmitter's TIN	Transmitter's Name	Transmitter's Address	City	State Code	Province Code
1	2-5	6-14	15-54	55-94	95-114	115-116	117-118

Country Code	Postal or ZIP Code	Contact Name	Contact Telephone Number	TCC	Test Indicator	Prior Year Indicator	<i>Reserved</i>	<i>Record Sequence Number</i>	<i>Blank or Carriage Return Line Feed</i>
119–120	121–129	130–169	170–189	190–194	195–198	199	200–810	811–818	819–820

Sec. 2. Withholding Agent “W” Record

.01 The “W” Record identifies the Withholding Agent.

.02 Enter a “W” Record after the initial “T” Record on the file, followed by the Recipient “Q” Records, and a Reconciliation “C” Record. Do **not** report for a withholding agent if there are no corresponding Recipient “Q” records.

.03 Several “W” Records for different Withholding Agents may appear on the same Transmitter’s File.

.04 *Each “W” Record is a fixed length of 820 positions.*

.05 All alpha characters entered in the “W” Record must be uppercase.

Note 1: For all fields marked “Required”, the transmitter must provide the information described under Description and Remarks. If required fields are not completed in accordance with these instructions, your file may not process correctly. For those fields not marked “Required”, a transmitter must allow for the field, but may be instructed to enter blanks or zeroes in the indicated field position(s) and for the indicated length. All records have a fixed length of 820 positions.

Note 2: A copy of the current Instructions for Form 1042-S for this revision of the Publication 1187 is included at the end of this publication. These instructions should be used for the proper coding of each field in this record where applicable. The list of country codes in the instructions includes all recognized country codes and MUST be used for coding. The instructions are updated each year as required. Since Publication 1187 may not be revised every year, be sure to use the most current instructions.

Note 3: Valid characters for all name and address fields are alpha, numeric, blank, ampersand (&), hyphen (-), comma (,), apostrophe (’), forward slash (/), pound sign (#), period (.), and the percent (%). The percent [% (used as “in care of”)] is valid in the first position only.

Record Name: Withholding Agent “W” Record			
Field Positions	Field Title	Length	Description and Remarks
1	Record Type	1	Required. Enter “W”.
2	Return Type Indicator	1	Required. Enter the one position value below to identify whether the record is Original or Amended. <i>If submitting a replacement file, use the same indicator as the file being replaced(e.g., if you are replacing an amended file the indicator would be 1).</i> Do not enter a blank or alpha character. Acceptable Values are: • 0 (Zero) = Original • 1 = Amended
3	Pro Rata Basis Reporting	1	Required. Enter the one position value below to identify if reporting on a Pro Rata Basis. Acceptable Values are: • 0 (Zero) = Not Pro Rata • 1 = Pro Rata Basis Reporting
4–12	Withholding Agent’s EIN	9	Required. Enter the nine-digit Employer Identification Number of the Withholding Agent. Do NOT enter blanks, hyphens or alpha characters. An EIN consisting of all the same digits (e.g., 111111111) is not acceptable. Do NOT enter the recipient’s TIN in this field.

Record Name: Withholding Agent "W" Record

Field Positions	Field Title	Length	Description and Remarks
Note: See current Instructions for Form 1042-S to determine when a Qualified Intermediary, Withholding Foreign Partnership, or Withholding Foreign Trust must provide its QI-EIN, WP-EIN or WT-EIN in this field.			
13	Withholding Agent's EIN Indicator	1	Required. Enter the Withholding Agent's EIN indicator from the following values: <ul style="list-style-type: none"> • 0 = EIN • 1 = QI-EIN, WP-EIN, WT-EIN • 2 = NQI-EIN
Note: Use EIN indicator 1 only if the Withholding Agent's EIN begins with "98" AND the Withholding Agent's City, State and Country Code fields indicate that the Withholding Agent is <u>not</u> a U.S. withholding agent.			
14-53	Withholding Agent's Name Line-1	40	Required. Enter the Withholding Agent's Name as established when filing for the EIN or QI-EIN which appears in position 4-12 of the "W" Record. Left-justify and blank fill.
Note: Do not use special characters in names or addresses that are unique to a language other than English. For example: å = A, æ = A, ü = U, Ø = O, ñ = N, etc.			
54-93	Withholding Agent's Name Line-2	40	Enter supplementary withholding agent's name information; otherwise, enter blanks. Use this line for additional names (e.g., partners or joint owners), for trade names, stage names, aliases or titles. Also use this line for "care of" or "via". See Note 3 at the beginning of the "W" Record.
94-133	Withholding Agent's Name Line-3	40	See above.
134-173	Withholding Agent's Street Line-1	40	Required. Enter the mailing address of the withholding agent. Street address should include number, street, and apartment or suite number (or P.O. Box if mail is not delivered to street address). Abbreviate as needed. Left-justify and blank fill.
174-213	Withholding Agent's Street Line-2	40	Enter supplementary withholding agent street address information. Otherwise, blank fill.
214-253	Withholding Agent's City	40	Required. Enter the city or town (or other locality name). Enter APO or FPO only if applicable. Do not enter a foreign postal code in the city field. Left-justify and blank fill.
254-255	Withholding Agent's State Code	2	Required if Withholding Agent has a U.S. address. Enter the two-character State Code abbreviation. If not a U.S. state, territory or APO/FPO identifiers, blank fill. Do not use any of the two character Country Codes in the State Code field.
Note: If the withholding agent has a U.S. address, leave the country code in positions 258-259 blank.			
256-257	Withholding Agent's Province Code	2	Required if Foreign Country Code is "CA" (Canada). Enter only the two-alpha character Province Code as shown in the Province Code Table. See "T" record positions 117-118 for Province Code Table. DO NOT spell out the Province Name. If foreign country other than Canada, blank fill.
258-259	Withholding Agent's Country Code	2	Required if QI or NQI or other foreign withholding agent. Enter only the two-alpha Country Code from the Country Code Table. DO NOT spell out the Country Name.
Note: COUNTRY CODES: The list of country codes provided in the current Instructions for Form 1042-S includes all internationally recognized country codes and MUST be used to ensure the proper coding of the Country Code field. This list is updated each year as required. Do not enter U.S. in the Country Code field.			

Record Name: Withholding Agent "W" Record

Field Positions	Field Title	Length	Description and Remarks
260–268	Postal or ZIP Code	9	Required. Enter up to nine numeric characters for all U.S. addresses (including territories, possessions and APO/FPO). For foreign addresses enter the alpha/numeric foreign postal code, if applicable. Enter this code in the left most position and blank fill the remaining positions. DO NOT use hyphens or blanks between numbers or letters (e.g., if the postal code is written as A6B 3C5 input as A6B3C5.) Left-justify.
269–272	Tax Year	4	Required. Enter the four-digit year of the current tax year unless you entered a "P" in the Prior Year Indicator Field of the "T" Record. All recipient "Q" Records must report payments for this year only. Different tax years may not appear on the same file.
273–317	Withholding Agent Contact Name	45	Required. Enter the name of the person IRS can contact if questions arise concerning this filing. Left-justify and blank fill the remaining positions.
318–362	Withholding Agent's Department Title	45	Required. Enter the title of the contact person or the dept. which can handle inquiries concerning this filing. Left-justify and blank fill the remaining positions.
363–382	Contact Telephone Number and Extension	20	Required. Enter the telephone number of a person to contact regarding electronic files. Omit hyphens. If no extension is available, left-justify and fill unused positions with blanks. If foreign, provide appropriate codes for overseas call.
383	Final Return Indicator	1	Required. Enter the one position value below to indicate whether you will be filing Forms 1042-S in the future. <ul style="list-style-type: none"> • 0 (Zero) = will be filing • 1 = will not be filing
384–810	<i>Reserved</i>	427	<i>Enter blanks.</i>
811–818	Record Sequence Number	8	Required. Enter the number of the record as it appears within your file. The record sequence number for the "T" record will always be "1" (one), since it is the first record on your file and you can have only one "T" record in a file. Each record, thereafter, must be incremented by one in ascending numerical sequence, i.e., 2, 3, 4, etc. Right-justify numbers with leading zeroes in the field. For example, the "T" record sequence number would appear as "00000001" in the field, the first "W" record would be "00000002", the first "Q" record, "00000003", the second "Q" record, "00000004" and so on until you reach the final record of the file, the "F" record.
819–820	Blank or Carriage Return Line Feed	2	<i>Enter blanks or carriage return line feed (CR/LF) characters.</i>

Withholding Agent "W" Record Layout

Record Type	Return Type Indicator	Pro Rata Basis Reporting	Withholding Agent's EIN	Withholding Agent's EIN Indicator	Withholding Agent's Name Line-1	Withholding Agent's Name Line-2
1	2	3	4–12	13	14–53	54–93

Withholding Agent's Name Line-3	Withholding Agent's Street Line-1	Withholding Agent's Street Line-2	Withholding Agent's City	Withholding Agent's State Code	Withholding Agent's Province Code	Withholding Agent's Country Code
94-133	134-173	174-213	214-253	254-255	256-257	258-259

Postal or ZIP Code	Tax Year	Withholding Agent Contact Name	Withholding Agent's Department Title	Contact Telephone Number and Extension	Final Return Indicator
260-268	269-272	273-317	318-362	363-382	383

<i>Reserved</i>	<i>Record Sequence Number</i>	<i>Blank or Carriage Return Line Feed</i>
384-810	811-818	819-820

Sec. 3. Recipient "Q" Record

.01 The "Q" Record contains name and address information for the Recipient of Income, Non-Qualified Intermediary or Flow-Through Entity if appropriate, Payer, and all data concerning the income paid and tax withheld that is required to be reported under U.S. law. Each Recipient "Q" Record is treated as if it were a separate Form 1042-S.

.02 Since the "Q" Record is restricted to one type of income and one tax rate, under certain circumstances it may be necessary to submit more than one "Q" Record for the same recipient. Failure to provide multiple Recipient "Q" Records when necessary may generate math computation errors during processing. This will result in IRS contacting you for correct information.

.03 Following are some of the circumstances when more than one "Q" Record for a recipient would be required:

- (a) Different types of income. For example, Recipient X derived income from Capital Gains (Income Code 09) and Industrial Royalties (Income Code 10). A separate "Q" Record must be reported for each Income Code, providing Gross Income Paid and U.S. Federal Tax Withheld pertaining to that Income Code.
- (b) Change in Country Code during the year. For example, the Withholding Agent received notification via Form W-8BEN that the recipient's country of residence for tax purposes changed from country X to country Y. A separate "Q" Record must be reported for each Country Code providing Gross Income Paid, Tax Rate, U.S. Federal Tax Withheld and Exemption Code, if any. The amounts reported must be based on each country.
- (c) Change in a country's tax treaty rate during the year. For example, effective April 1, country X changes its tax treaty rate from 10% to 20%. A separate "Q" Record must be reported for each of the tax rates. Provide the Gross Income Paid, Tax Rate, and U.S. Federal Tax Withheld under each tax rate.

.04 All recipient "Q" Records for a particular Withholding Agent must be written after the corresponding Withholding Agent "W" Record, followed by a Reconciliation "C" Record, and before the "W" Record for another Withholding Agent begins.

.05 All alpha characters entered in the "Q" Record must be upper case.

.06 *The "Q" Record is a fixed length of 820 positions.*

.07 Report income and tax withheld in whole dollars only. Round up or down as appropriate. To round off amounts to the nearest whole dollar, drop amounts under 50 cents and increase to the next whole dollar amounts of 50 to 99 cents. If you have to add two or more amounts to figure the amount to be reported, include cents when adding and only round off the total figure to be reported. **DO NOT** enter cents.

Note 1: For all fields marked "Required", the transmitter must provide the information described under Description and Remarks. If required fields are not completed in accordance with these instructions, IRS will contact you to request a replacement file. For those fields not marked "Required", a transmitter must allow for the field, but may be instructed to enter blanks or zeroes in the indicated field position(s) and for the indicated length. All records have a fixed length of 820 positions.

Note 2: A copy of the current Instructions for Form 1042-S for this revision of the Publication 1187 is included at the end of this publication. These instructions should be used for the proper coding of each field in this record where applicable. The list of country codes in the instructions includes all recognized country codes and MUST be used for coding. The instructions are updated each year as required. Since Publication 1187 may not be revised every year, be sure to use the most current instructions.

Note 3: Valid characters for all name and address fields are alpha, numeric, blank, ampersand (&), hyphen (-), comma (,), apostrophe ('), forward slash (/), pound sign (#), period (.), and the percent (%). The percent [% (used as “in care of”)] is valid in the first position only.

Record Name: Recipient “Q” Record			
Field Positions	Field Title	Length	Description and Remarks
1	Record Type	1	Required. Enter “Q”.
2	Return Type Indicator	1	Required. Enter the one position value below to identify whether the record is Original or Amended. <i>If submitting a replacement file, use the same indicator as the file being replaced (e.g., if you are replacing an amended file, the indicator would be 1).</i> Must be the same value as in the “W” Record. Values are: <ul style="list-style-type: none"> • 0 (Zero) = Original • 1 = Amended
3	Pro Rata Basis Reporting	1	Required. Enter the one position value below to identify whether reporting Pro Rata Basis. Must be the same value as in the “W” Record. Values are: <ul style="list-style-type: none"> • 0 (Zero) = Not Pro Rata • 1 = Pro Rata Basis Reporting
4–5	Income Code	2	Required. Enter the two-position value EXACTLY as it appears from the income code table. The Income Code must accurately reflect the type of income paid. DO NOT enter blanks or 00 (zeroes).
Note: Refer to the current Instructions for Form 1042-S for more information.			
6–17	Gross Income	12	Required. Enter the gross income amount in whole dollars only, rounding to the nearest dollar (do not enter cents). For example, report \$600.75 as 000000000601. An income amount of zero cannot be shown. Numeric only, right-justify and zero fill.
Note: Do not report negative amounts in any amount field.			
18–29	Withholding Allowance	12	Used with Income Codes 15 through 19 ONLY. Enter the withholding allowance amount in whole dollars only, rounding to the nearest dollar (do not enter cents). Numeric only, right-justify and zero fill. Otherwise, enter blanks.
30–41	Net Income	12	Required if Dollar Amount is Entered in Withholding Allowance Field. Enter the net income in whole dollars only, rounding to the nearest dollar (do not enter cents). An amount other than zero must be shown. Numeric only, right-justify and zero fill. Otherwise, enter blanks.
42–45	Tax Rate	4	Required. Enter the correct Tax Rate applicable to the income in gross income field or net income field, as appropriate. Enter the Tax Rate as a 2-digit whole number and 2-digit decimal (e.g., Enter 39.6% as 3960, 15% as 1500 or 6% as 0600). See Note below.
Note: The correct Tax Rate must be entered, even if withholding was at a lesser rate. See the current Instructions for Form 1042-S.			
46–47	Exemption Code	2	Required. Read Carefully. <ul style="list-style-type: none"> • If the tax rate entered is 0%, enter the appropriate exemption code “01” through “09” from the current Instructions for Form 1042-S. • If the tax rate entered is 1% through 30%, enter “00”. • If the tax rate entered is 33% or higher, blank fill. DO NOT enter “00”. See the current Instructions for Form 1042-S for circumstances under which Exemption Code “99” must be used.

Record Name: Recipient “Q” Record

Field Positions	Field Title	Length	Description and Remarks
Note: If an incorrect amount of tax was withheld, report the amount that was actually withheld and use the correct tax rate in field positions 42–45.			
48–49	Recipient’s Country of Residence Code for Tax Purposes	2	Required. Enter the two-character Country Code for which the recipient is a resident for tax purposes and on which the tax treaty benefits are based, whether or not you are applying a tax treaty benefit to this payment. The rate of tax withheld is determined by this code.
Note: Do not enter U.S. in the Country Code field. Enter “OC” (other country) <u>only</u> when the country of residence does not appear on the list or the payment is made to an international organization.			
50–59	Reserved	10	Enter blanks.
60–71	Amount Repaid	12	This field should be completed only if: <ul style="list-style-type: none"> • you repaid a recipient an amount that was over-withheld and you are going to reimburse yourself by reducing, by the amount of tax actually repaid, the amount of any deposit made for a payment period in the calendar year following calendar year of withholding. Otherwise, enter blanks.
72–91	Recipient Account Number	20	Enter the account number assigned by the withholding agent to the recipient. Do not enter the recipient’s U.S. or foreign TIN. If account numbers are NOT assigned, then blank fill. This field may contain numeric, alpha characters, blanks or hyphens. Left-justify and blank fill.
92–93	Recipient Code	2	Required. Enter the appropriate Recipient Code. Refer to the list of appropriate codes in the current Instructions for Form 1042-S. No other codes or values are valid.
Note: If recipient code “20” is used then Recipient’s Name Line-1 must be “UNKNOWN” or “UNKNOWN RECIPIENT” and Recipient’s Name Lines 2 and 3 must be BLANK. The tax rate must be 30%.			
94–133	Recipient’s Name Line-1	40	Required. Provide the complete name of the recipient. If the recipient has a U.S. TIN, enter the name as established when applying for the TIN. If recipient code “20” is used then “UNKNOWN” or “UNKNOWN RECIPIENT” must be entered and Recipient’s Name Lines 2 and 3 must be blank. See current Instructions for Form 1042-S for specifics on “UNKNOWN RECIPIENT” and “WITHHOLDING RATE POOL”. See Note 3 at the beginning of the “Q” Record.
Note 1: A Non-Qualified Intermediary (NQI) can NEVER be entered as the recipient.			
Note 2: Do not use special characters in names or addresses that are unique to a language other than English. For example: å = A, æ = A, ü = U, Ø = O, ñ = N, etc.			
134–173	Recipient’s Name Line-2	40	Enter supplementary recipient name information including titles; otherwise, enter blanks. Use this line for additional names (e.g., partners or joint owners), for trade names, stage names, aliases or titles. Also use this line for “care of”, “Attn.” or “via”. See Note 3 at the beginning of the “Q” Record.
174–213	Recipient’s Name Line-3	40	See above.
214–253	Recipient’s Street Line-1	40	Required. Enter the mailing address of the recipient. Street address should include number, street, apartment, or suite number (or P.O. Box if mail is not delivered to street address). Abbreviate as needed. Left-justify and blank fill. See Note 3 at the beginning of the “Q” Record.
254–293	Recipient’s Street Line-2	40	Enter supplementary recipient street address information. If a P.O. Box is used in addition to a street address enter it here; otherwise, blank fill.
294–333	Recipient’s City	40	Required. Enter the city or town (or other locality name). Enter APO or FPO only, if applicable. Do not enter a foreign postal code in the city field. Left-justify and blank fill.

Record Name: Recipient "Q" Record

Field Positions	Field Title	Length	Description and Remarks
334–335	Recipient's State	2	Required if U.S. address. Enter the two-character State Code abbreviation. If no U.S. state, territory or APO/FPO identifier is applicable then blank fill. Do not use any of the two character Country Codes in the State Code Field.
Note: If the recipient has a U.S. address, leave the province code in positions 336–337 and country code in positions 338–339 blank.			
336–337	Recipient's Province Code	2	Required if Recipient Country Code in positions 338–339 is "CA". Enter only the two-alpha character Province Code as shown in the Province Code Table. See "T" record positions 117–118 for Province Code Table. DO NOT spell out the Province Name. If foreign country other than Canada, blank fill.
338–339	Recipient's Country Code	2	Required if the recipient has a foreign address. Enter the two-character Country Code abbreviation.
Note 1: If the state code is entered in positions 334–335, leave this field blank.			
Note 2: COUNTRY CODES: The list of country codes provided in the current Instructions for Form 1042-S includes all internationally recognized country codes and MUST be used to ensure the proper coding of the Country Code field. This list is updated each year as required.			
Note 3: Enter "UC" (unknown country) only if the payment is to an unknown recipient. If you are making a payment to a QI or QI withholding rate pool, enter the country code of the QI.			
340–348	Postal or ZIP Code	9	Required. Enter up to nine numeric characters for all U.S. addresses (including territories, possessions and APO/FPO). For foreign addresses enter the alpha/numeric foreign postal code, if applicable. Enter this code in the left most position and blank fill the remaining positions. DO NOT use hyphens or blanks between numbers or letters (e.g., if the postal code is written as A6B 3C5 input as A6B3C5.) Left-justify.
349–357	Recipient's U.S. TIN	9	Enter the recipient's nine-digit U.S. Taxpayer Identification Number (TIN). DO NOT enter hyphens or alpha characters. If TIN is not required under regulations, blank fill. A TIN consisting of all the same digits (e.g., 11111111) is not acceptable.
Note: U.S. TINs are now required for most recipients. See current Instructions for Form 1042-S.			
358	Recipient's U.S. TIN Type	1	Required. Enter the recipient's U.S. TIN type indicator from the following values: <ul style="list-style-type: none"> • 0 (Zero) = No TIN required • 1 = SSN/ITIN • 2 = EIN • 3 = QI-EIN, WP-EIN, WT-EIN <p style="text-align: center;">See current Instructions for Form 1042-S for when a TIN is not required.</p>
359–370	U.S. Tax Withheld	12	Required. Enter the U.S. Federal tax withheld by you. Enter the amount in whole dollars, rounding to the nearest dollar (do not enter cents). For example, report \$600.25 as 00000000600. Numeric only, right-justify and zero fill. If there was no withholding, zero fill.
Note: If the U.S. tax withheld was either under or over reported, see Field Position 761 of the "Q" Record.			
371–382	Withholding By Other Agents	12	Required. If you are a withholding agent reporting Form 1042-S information that has already been subject to withholding by another withholding agent, enter the amount withheld by the other agent. Enter the amount in whole dollars, rounding to the nearest dollar (do not enter cents). For example, report \$600.25 as 00000000600. Numeric only, right-justify and zero fill. If there was no withholding, zero fill.

Record Name: Recipient “Q” Record

Field Positions	Field Title	Length	Description and Remarks
383–394	Total Withholding Credit	12	Required. Enter the aggregate amount of tax withheld by you and any other withholding agent in whole dollars, rounding to the nearest dollar (do not enter cents). For example, report \$600.25 as 000000000600. Numeric only, right-justify and zero fill. If there was no withholding, zero fill.
395–400	Reserved	6	Enter blanks.
401–440	NQI/FLW-THR/PTP Name Line-1	40	Provide the complete name of the NQI/FLW-THR or PTP Entity. It is very important that the complete name of the NQI/FLW-THR or PTP entity be provided. Left-justify and blank fill. See Note 3 at the beginning of the “Q” Record.
Note 1: If you are a nominee that is the withholding agent under Code Section 1446, enter the Publicly Traded Partnership’s (PTP) name and other information in the NQI/FLW-THR fields; positions 401–666.			
Note 2: All NQI/FLW-THR fields are REQUIRED if the NQI/FLW-THR entity is involved in the payment structure WITH THE EXCEPTION OF THE NQI/FLW-THR TIN.			
441–480	NQI/FLW-THR/PTP Name Line-2	40	Enter supplementary information; otherwise, enter blanks. Use this line for additional names (e.g., partners or joint owners), for trade names, stage names, aliases or titles. Also use this line for “care of” or “via”. See Note 3 at the beginning of the “Q” Record.
481–520	NQI/FLW-THR/PTP Name Line-3	40	See above.
521–522	Reserved	2	Enter blanks.
523–562	NQI/FLW-THR/PTP Street Line-1	40	Enter the mailing address of the NQI/FLW-THR or PTP entity. Street address should include number, street, apartment, or suite number (or P.O. Box if mail is not delivered to street address). Abbreviate as needed. Left-justify and blank fill.
563–602	NQI/FLW-THR/PTP Street Line-2	40	Enter supplementary NQI/FLW-THR or PTP entity street address information; otherwise, blank fill.
603–642	NQI/FLW-THR/PTP City	40	Enter the city or town (or other locality name). Left-justify and blank fill.
643–644	NQI/FLW-THR/PTP State Code	2	Enter the two-alpha character state code (see table Part A, Sec. 13). If a state code or APO/FPO is not applicable then blank fill.
645–646	NQI/FLW-THR/PTP Province Code	2	Enter the two-alpha character Province Code abbreviation, if applicable. See “T” record positions 117–118.
647–648	NQI/FLW-THR/PTP Country Code	2	Enter the two-character Country Code abbreviation, where the NQI/FLW-THR or PTP is located. Enter blanks if the NQI/FLW-THR or PTP has a U.S. address.
649–657	NQI/FLW-THR/PTP Postal Code or ZIP Code	9	Enter the alpha/numeric foreign postal code or U.S. ZIP Code for all U.S. addresses including territories, possessions and APO/FPO. Enter the code in the left most position and blank fill the remaining positions. DO NOT use hyphens or blanks between numbers or letters. (e.g., if the postal code written as A6B 3C5 input as A6B3C5.) Left-justify.
658–666	NQI/FLW-THR/PTP U.S. TIN	9	Enter the NQI/FLW-THR or PTP nine-digit U.S. Taxpayer Identification Number (TIN), if any. Do NOT enter hyphens or alpha characters.

Record Name: Recipient "Q" Record

Field Positions	Field Title	Length	Description and Remarks
667-706	Payer's Name	40	Enter the name of the Payer of Income if different from the Withholding Agent. Abbreviate as needed. If Withholding Agent and Payer are the same, blank fill.
707-715	Payer's U.S. TIN	9	Enter the Payer's U.S. Taxpayer Identification Number if there is an entry in the Payer Name Field; otherwise, leave blank.
716-727	State Income Tax Withheld	12	If State Tax has been withheld, enter that amount, in whole dollars (do not enter cents). Right-justify and zero fill. If no entry, zero fill.
728-737	Payer's State Tax Number	10	Enter the employer's state I.D. number assigned by the state.
738-739	Payer's State Code	2	Enter the two-character State Code abbreviation.
740-760	Special Data Entries	21	This field may be used for the filer's own purposes, (e.g., Do Not Mail). If this field is not used, enter blanks.
761	U.S. Tax Withheld Indicator	1	<p>Required. Indicate if the U.S. tax withheld was correct or incorrect using the following values:</p> <ul style="list-style-type: none"> • 0 = Correctly reported • 1 = Over withheld • 2 = Under withheld
<i>Note: Please refer to U.S. Tax Withheld positions 359-370.</i>			
762-783	Recipient's Foreign Tax I.D. Number	22	Enter the recipient's identifying number, if any, used in the country of residence for tax purposes. Left-justify and fill unused positions with blanks.
784-810	Reserved	27	Enter blanks.
811-818	Record Sequence Number	8	<p>Required. Enter the number of the record as it appears within your file. The record sequence number for the "T" record will always be "1" (one), since it is the first record on your file and you can have only one "T" record in a file. Each record, thereafter, must be incremented by one in ascending numerical sequence, i.e., 2, 3, 4, etc. Right-justify numbers with leading zeroes in the field. For example, the "T" record sequence number would appear as "00000001" in the field, the first "W" record would be "00000002", the first "Q" record, "00000003", the second "Q" record, "00000004" and so on until you reach the final record of the file, the "F" record.</p>
819-820	Blank or Carriage Return Line Feed	2	Enter blanks or carriage return line feed (CR/LF) characters.

Recipient "Q" Record Layout

Record Type	Return Type Indicator	Pro Rata Basis Reporting	Income Code	Gross Income	Withholding Allowance	Net Income	Tax Rate	Exemption Code
1	2	3	4-5	6-17	18-29	30-41	42-45	46-47

Recipient's Country of Residence Code for Tax Purposes	Reserved	Amount Repaid	Recipient Account Number	Recipient Code	Recipient's Name Line-1	Recipient's Name Line-2	Recipient's Name Line-3
48-49	50-59	60-71	72-91	92-93	94-133	134-173	174-213

Recipient's Street Line-1	Recipient's Street Line-2	Recipient's City	Recipient's State	Recipient's Province Code	Recipient's Country Code	Postal or ZIP Code	Recipient's U.S. TIN
214-253	254-293	294-333	334-335	336-337	338-339	340-348	349-357

Recipient's U.S. TIN Type	U.S. Federal Tax Withheld	Withholding By Other Agents	Total Withholding Credit	Reserved	NQI/FLW-THR/PTP Name Line-1	NQI/FLW-THR/PTP Name Line-2	NQI/FLW-THR/PTP Name Line-3
358	359-370	371-382	383-394	395-400	401-440	441-480	481-520

Reserved	NQI/FLW-THR/PTP Street Line-1	NQI/FLW-THR/PTP Street Line-2	NQI/FLW-THR/PTP City	NQI/FLW-THR/PTP State Code	NQI/FLW-THR/PTP Province Code
521-522	523-562	563-602	603-642	643-644	645-646

NQI/FLW-THR/PTP Country Code	NQI/FLW-THR/PTP Postal Code or ZIP Code	NQI/FLW-THR/PTP U.S. TIN	Payer's Name	Payer's U.S. TIN	State Income Tax Withheld	Payer's State Tax Number
647-648	649-657	658-666	667-706	707-715	716-727	728-737

Payer's State Code	Special Data Entries	U.S. Tax Withheld Indicator	Recipient's Foreign Tax I.D. Number	Reserved	Record Sequence Number	Blank or Carriage Return Line Feed
738-739	740-760	761	762-783	784-810	811-818	819-820

Sec. 4. Reconciliation "C" Record

.01 The "C" Record is a fixed record length of 820 positions and all positions listed are **required**. The "C" Record is a summary of the number of "Q" Records for each Withholding Agent, Gross Amount Paid, and Total U.S. Tax Withheld.

.02 This record will be written after the last "Q" Record filed for a given withholding agent. For each "W" Record and group of "Q" Records on the file, there must be a corresponding "C" Record.

.03 All alpha characters entered in the "C" Record must be upper case.

.04 The "C" Record is a fixed length of 820 positions.

Record Name: Reconciliation "C" Record

Field Positions	Field Title	Length	Description and Remarks
1	Record Type	1	Required. Enter "C".
2-9	Total "Q" Records	8	Required. Enter the total number of "Q" Records for this withholding agent. Right-justify and zero fill. Do not enter all zeros. For example, 53 "Q" records are entered as 00000053. See Part A, Sec. 4, Filing and Retention Requirements.
10-15	Blank	6	Enter blanks.
16-30	Total Gross Amount Paid	15	Required. Enter the total gross income amount in whole dollars (do not enter cents.) For example report \$600.00 as 000000000000600. An income amount other than zero must be shown. Right-justify and zero fill.

Record Name: Reconciliation "C" Record

Field Positions	Field Title	Length	Description and Remarks
31-45	Total U.S. Tax Withheld	15	Required. Enter the total U.S. Federal tax withheld amount in whole dollars (do not enter cents.) For example report \$600.00 as 000000000000600. Right-justify and zero fill.
46-810	<i>Reserved</i>	765	<i>Enter blanks.</i>
811-818	<i>Record Sequence Number</i>	8	Required. Enter the number of the record as it appears within your file. The record sequence number for the "T" record will always be "1" (one), since it is the first record on your file and you can have only one "T" record in a file. Each record, thereafter, must be incremented by one in ascending numerical sequence, i.e., 2, 3, 4, etc. Right-justify numbers with leading zeroes in the field. For example, the "T" record sequence number would appear as "00000001" in the field, the first "W" record would be "00000002", the first "Q" record, "00000003", the second "Q" record, "00000004" and so on until you reach the final record of the file, the "F" record.
819-820	<i>Blank or Carriage Return Line Feed</i>	2	<i>Enter blanks or carriage return line feed (CR/LF) characters.</i>

Reconciliation "C" Record Layout

Record Type	Total "Q" Records	Blank	Total Gross Amount Paid	Total U.S. Tax Withheld	<i>Reserved</i>	<i>Record Sequence Number</i>	<i>Blank or Carriage Return Line Feed</i>
1	2-9	10-15	16-30	31-45	46-810	811-818	819-820

Sec. 5. End of Transmission "F" Record

.01 The "F" Record is a fixed record length of 820 positions and all positions listed are **required**. The "F" Record is a summary of the number of withholding agents and media count in the entire file.

.02 This record will be written after the last "C" Record of the entire file. End the file with an End of Transmission "F" Record. No data will be read after the "F" Record. Only a "C" Record may precede the "F" Record.

.03 All alpha characters entered in the "F" Record must be upper case.

.04 *The "F" Record is a fixed length of 820 positions.*

Record Name: End of Transmission "F" Record

Field Positions	Field Title	Length	Description and Remarks
1	Record Type	1	Required. Enter "F".
2-4	Withholding Agent Count	3	Required. Enter the total number of withholding agents on this file. This count must be the same as the total number of "W" records. Right-justify and zero fill.
5-810	<i>Reserved</i>	806	<i>Enter blanks.</i>

Record Name: End of Transmission "F" Record

Field Positions	Field Title	Length	Description and Remarks
811–818	Record Sequence Number	8	Required. Enter the number of the record as it appears within your file. The record sequence number for the "T" record will always be "1" (one), since it is the first record on your file and you can have only one "T" record in a file. Each record, thereafter, must be incremented by one in ascending numerical sequence, i.e., 2, 3, 4, etc. Right-justify numbers with leading zeroes in the field. For example, the "T" record sequence number would appear as "00000001" in the field, the first "W" record would be "00000002", the first "Q" record, "00000003", the second "Q" record, "00000004" and so on until you reach the final record of the file, the "F" record.
819–820	Blank or Carriage Return Line Feed	2	Enter blanks or carriage return line feed (CR/LF) characters.

End of Transmission "F" Record Layout

Record Type	Withholding Agent Count	Reserved	Record Sequence Number	Blank or Carriage Return Line Feed
1	2–4	5–810	811–818	819–820

Part D. Extensions of Time and Waivers

Sec. 1. General — Extensions

.01 An extension of time to file may be requested for Form 1042-S.

.02 Submit Form 8809, Application for Extension of Time To File Information Returns, to IRS/ECC-MTB at the address listed in .09 of this section. This form may be used to request an extension of time to file Form 1042-S submitted on paper or electronically to the IRS. Use a separate Form 8809 for each method of filing information returns you intend to use, i.e., paper or electronically.

.03 *The fill-in Form 8809 may be completed online via the FIRE System. (See Part B, Sec. 7, for instructions on connecting to the FIRE System.) At the Main Menu, click "Extension of Time Request" and then click "Fill-in Extension Form". This option is only used to request an automatic 30-day extension. If you are requesting an additional extension, you must submit a paper Form 8809. Requests for an additional extension of time to file information returns are not automatically granted. Requests for additional time are granted only in cases of extreme hardship or catastrophic event. The IRS will only send a letter of explanation approving or denying your additional extension request. (Refer to .12 of this Section.)*

.04 To be considered, an extension request must be postmarked, transmitted or completed online by the due date of the returns; otherwise, the request will be denied. (See Part A, Sec. 7.) If requesting an extension of time to file several types of forms, use one Form 8809; however, Form 8809 or file must be postmarked no later than the earliest due date. For example, if requesting an extension of time to file both Forms 1099-INT and 1042-S, submit Form 8809 on or before February 28, 2009.

.05 **As soon as it is apparent** that a 30-day extension of time to file is needed, an extension request should be submitted. It may take up to 30 days for IRS/ECC-MTB to respond to an extension request. IRS/ECC-MTB does not begin processing extension requests until January. **Extensions completed online via the FIRE System receive instant results.**

.06 Under certain circumstances, a request for an extension of time may be denied. When a denial letter is received, any additional or necessary information may be resubmitted within 20 days.

.07 Requesting an extension of time for multiple withholding agents (**10 or less**) may be done by completing the online fill-in form via the FIRE System or mailing Form 8809 and attaching a list of the withholding agent names and associated TINs (EIN or SSN). Each withholding agent must be completed online or included in the listing to ensure an extension is recorded for all withholding agents. Form 8809 may be computer-generated or photocopied. Be sure to use the most recently updated version and include all the pertinent information.

Note: IRS encourages the withholding agent/transmitter community to utilize the online fill-in form in lieu of the paper Form 8809.

.08 Withholding agents/transmitters requesting an extension of time to file for **10 or more payers** are **required** to submit the extension online via the fill-in form or in a file electronically (see Sec. 3, for the record layout).

.09 All requests for an extension of time filed on Form 8809 should be sent using the following address:

IRS-Enterprise Computing Center at Martinsburg
Information Reporting Program
Attn: Extension of Time Coordinator
240 Murall Drive
Kearneysville, WV 25430

Note: Due to the large volume of mail received by IRS/ECC-MTB and the time factor involved in processing Extension of Time (EOT) requests, it is imperative that the attention line be present on all envelopes or packages containing Form 8809.

.10 Requests for extensions of time to file postmarked by the United States Postal Service on or before the due date of the returns, and delivered by United States mail to IRS/ECC-MTB after the due date, are treated as timely under the “timely mailing as timely filing” rule. A similar rule applies to designated private delivery services (PDSs). Notice 97–26, 1997–1 C.B. 388, provides rules for determining the date that is treated as the postmark date. For items delivered by a non-designated Private Delivery Service (PDS), the actual date of receipt by IRS/ECC-MTB will be used as the filing date. For items delivered by a designated PDS, but through a type of service not designated in Notice 2004–83, 2004–2 C.B. 1030, the actual date of receipt by IRS/ECC-MTB will be used as the filing date. The timely mailing rule also applies to furnishing statements to recipients and participants.

.11 Transmitters requesting an extension of time for multiple withholding agents will receive one approval letter, accompanied by a list of withholding agents covered under that approval.

.12 If an additional extension of time is needed, a second Form 8809 or file must be filed by the initial extended due date. Check line 7 on the form to indicate that an additional extension is being requested. A second 30-day extension will be approved only in cases of extreme hardship or catastrophic event. **If requesting a second 30-day extension of time, submit the information return files as soon as prepared. Do not wait for IRS/ECC-MTB’s response to your second extension request.**

.13 If an extension request is approved, the approval letter should be kept on file. **DO NOT** send the approval letter or copy of the approval letter to IRS/ECC-MTB or to the Ogden Service Center where the paper Forms 1042-S are filed.

.14 Request an extension for only one tax year.

.15 A signature is not required when requesting a 30-day extension. If a second 30-day extension is requested the Form 8809 **must** be signed.

.16 Failure to properly complete and sign Form 8809 may cause delays in processing the request or result in a denial. Carefully read and follow the instructions on the back of Form 8809.

.17 Form 8809 may be obtained by calling **1-800-TAX-FORM (1-800-829-3676)**. The form is also available at www.irs.gov.

Sec. 2. Specifications for Filing Extensions of Time Electronically

.01 The specifications in Sec. 3 include the required 200-byte record layout for extensions of time to file requests submitted electronically. Also included are the instructions for the information that is to be entered in the record. **Filers are advised to read this section in its entirety to ensure proper filing.**

.02 If a filer does not have an IRS/ECC-MTB assigned Transmitter Control Code (TCC), Form 4419, Application for Filing Information Returns Electronically (FIRE), **must** be submitted to obtain a TCC. This number **must** be used to submit an extension request electronically. (See Part A, Sec. 6.)

.03 For extension requests filed via an electronic file, the transmitter must fax Form 8809 or send an e-mail through the FIRE System (fire@irs.gov and irs.e-helpmail@irs.gov) the same day as the transmission. The e-mail should contain the same information as the Form 8809 in order to mail a response, check the record count and form types in the file. The e-mail option is only used to request the automatic 30-day extension. If you are requesting an additional extension, you must fax a signed Form 8809 the same day as the transmission. Be sure to include the reason an additional extension is needed.

.04 **Transmitters submitting an extension of time via an electronic file should not submit a list of withholding agents names and TINs with Form 8809 or e-mail this information since this information is included on the electronic file. However, Line 6 of Form 8809 must be completed or the total number of records on the extension file must be included within the e-mail. The fill-in Form 8809 cannot be used in lieu of the paper Form 8809 for electronic files.**

.05 Do not submit extension requests filed electronically before January 3.

Sec. 3. Record Layout — Extension of Time

.01 Positions 6 through 188 of the following record should contain information about the withholding agent for whom the extension of time to file is being requested. Do not enter transmitter information in these fields. **Only one TCC may be present in a file.**

Record Layout for Extension of Time							
Field Positions	Field Title	Length	Description and Remarks				
1–5	Transmitter Control Code	5	Required. Enter the five-digit Transmitter Control Code (TCC) issued by IRS. Only one TCC per file is acceptable.				
6–14	Withholding Agent's TIN	9	Required. Must be the valid nine-digit TIN assigned to the withholding agent. Do not enter blanks, hyphens or alpha characters. All zeros, ones, twos, etc., will have the effect of an incorrect TIN. For foreign entities that are not required to have a TIN, this field may be blank; however, the Foreign Entity Indicator, position 187, must be set to "X."				
15–54	Withholding Agent's Name	40	Required. Enter the name of the withholding agent whose TIN appears in positions 6–14. Left-justify information and fill unused positions with blanks.				
55–94	Second Withholding Agent's Name	40	If additional space is needed, this field may be used to continue name line information (e.g., c/o First National Bank); otherwise, enter blanks.				
95–134	Withholding Agent's Address	40	Required. Enter the withholding agent's address. Street address should include number, street, apartment or suite number (or PO Box if mail is not delivered to a street address).				
135–174	Withholding Agent's City	40	Required. Enter withholding agent's city, town, or post office.				
Note: For foreign addresses, filers may use the payer city, state, and ZIP Code as a continuous 51-position field. Enter information in the following order: city, province or state, postal code, and the name of the country.							
175–176	Withholding Agent's State	2	Required. Enter the withholding agent's valid U.S. Postal Service state abbreviation. (Refer to Part A, Sec. 13.)				
177–185	Withholding Agent's ZIP Code	9	Required. Enter withholding agent's ZIP Code. If using a five-digit ZIP Code, left-justify information and fill unused positions with blanks.				
186	Document Indicator	1	Required. Enter the appropriate document code that indicates the form for which you are requesting an extension of time. <table border="0"> <tr> <td style="text-align: center;"><u>Code</u></td> <td style="text-align: center;"><u>Document</u></td> </tr> <tr> <td style="text-align: center;">4</td> <td style="text-align: center;">1042-S</td> </tr> </table>	<u>Code</u>	<u>Document</u>	4	1042-S
<u>Code</u>	<u>Document</u>						
4	1042-S						
187	Foreign Entity Indicator	1	Enter "X" if the withholding agent is a foreign entity. Note: A foreign entity is not required to have a TIN.				
188	Recipient Request Indicator	1	Enter "X" if the extension request is to furnish statements to the recipients of the information return.				
Note: A separate file is required for this type of extension request. A file must either contain all blanks or all X's in this field.							
189–198	Blank	10	Enter blanks.				
199–200	Blank	2	Enter blanks or carriage return/line feed (CR/LF) characters.				

Extension of Time Record Layout

Transmitter Control Code	Withholding Agent's TIN	Withholding Agent's Name	Second Withholding Agent's Name	Withholding Agent's Address	Withholding Agent's City
1–5	6–14	15–54	55–94	95–134	135–174

Withholding Agent's State	Withholding Agent's ZIP Code	Document Indicator	Foreign Entity Indicator	Recipient Request Indicator	Blank	Blank or CR/LF
175–176	177–185	186	187	188	189–198	199–200

Sec. 4. Extension of Time for Recipient Copies of Information Returns

.01 Request an **extension of time to furnish the statements to recipients** of Form 1042-S by submitting a letter to IRS/ECC-MTB at the address listed in Part D, Sec. 1.09. The letter should contain the following information:

- (a) Withholding Agent's name
- (b) TIN
- (c) Address
- (d) Type of return
- (e) Specify that the extension request is to provide statements to recipients
- (f) Reason for delay
- (g) Signature of withholding agent or duly authorized person.

.02 Requests for an extension of time to furnish statements to recipients of Form 1042-S are not automatically approved; however, if approved, generally an extension will allow a maximum of 30 additional days from the due date. The request must be postmarked by the date on which the statements are due to the recipients.

.03 Generally, only the withholding agent may sign the letter requesting the extension for recipient copies. A transmitter must have a contractual agreement with the withholding agents to submit extension requests on their behalf. This should be stated in your letter of request for recipient copy extensions. If you are requesting an extension for multiple withholding agents electronically, you must use the format specifications in Sec. 3.

.04 Requests for a recipient extension of time to file for more than 10 withholding agents are required to be submitted electronically. (See Sec. 3, for record layout.)

.05 The fill-in Form 8809 extension option cannot be used to request an extension to furnish statements to recipients.

Sec. 5. Form 8508, Request for Waiver From Filing Information Returns Electronically

.01 If a withholding agent is required to file electronically but fails to do so and does not have an approved waiver on record, the withholding agent will be subject to a penalty of \$50 per return in excess of 250 unless reasonable cause is established. (For penalty information, refer to the Penalty Section of the *General Instructions for Form 1042-S*.)

.02 If withholding agents are required to file original or amended returns electronically, but such filing would create an undue hardship, they may request a waiver from these filing requirements by submitting Form 8508, Request for Waiver From Filing Information Returns Electronically, to IRS/ECC-MTB. Form 8508 can be obtained on the IRS Website at www.irs.gov or by calling toll-free 1-800-829-3676.

.03 Even though a withholding agent may submit as many as 249 amended returns on paper, IRS/ECC-MTB encourages electronic filing of amended returns. Once the 250 threshold has been met, filers are required to submit any returns of 250 or more electronically. However, if a waiver for original documents is approved, any amended returns for the same type of returns will be covered under this waiver.

.04 Generally, only the withholding agent may sign Form 8508. A transmitter may sign if given power of attorney; however, a letter signed by the payer stating this fact must be attached to Form 8508.

.05 A transmitter must submit a separate Form 8508 for each withholding agent. Do not submit a list of withholding agents.

.06 All information requested on Form 8508 must be provided to IRS/ECC-MTB for the request to be processed.

.07 The waiver, if approved, will provide exemption from the electronic filing requirement for the current tax year only. Withholding agents may not apply for a waiver for more than one tax year.

.08 Form 8508 may be photocopied or computer-generated as long as it contains all the information requested on the original form.

.09 Filers are encouraged to submit Form 8508 to IRS/ECC-MTB at least 45 days before the due date of the returns. Generally, IRS/ECC-MTB does not process waiver requests until January. Waiver requests received prior to January are processed on a first come, first served basis.

.10 All requests for a waiver should be sent using the following address:

IRS-Enterprise Computing Center — Martinsburg
Information Reporting Program
240 Murall Drive
Kearneysville, WV 25430

.11 Waivers are evaluated on a case-by-case basis and are approved or denied based on criteria set forth in the regulations under section 6011(e) of the Internal Revenue Code. The transmitter must allow a minimum of 30 days for IRS/ECC-MTB to respond to a waiver request.

.12 If a waiver request is approved, keep the approval letter on file. **DO NOT** send a copy of the approved waiver to the Ogden Service Center.

.13 An approved waiver only applies to the requirement for filing Form 1042-S electronically. The withholding agent must timely file information returns on the official IRS paper forms or an acceptable substitute form with the Ogden Service Center.

26 CFR 601.201: Rulings and determination letters.

(Also: §§ 170, 642(c), 2055, 2522, 1.642(c)-1, 1.170A-6, 20.2055-2, 25.2522(c)-3.)

Rev. Proc. 2008-45

SECTION 1. PURPOSE

This revenue procedure contains annotated sample declarations of trust and alternate provisions that meet the requirements for an inter vivos charitable lead unitrust (CLUT) providing for unitrust payments payable to one or more charitable beneficiaries for the unitrust period followed by the distribution of trust assets to one or more noncharitable remaindermen.

SECTION 2. BACKGROUND

The Internal Revenue Service (Service) is issuing sample forms for CLUTs; annotations and alternate sample provisions are included as further guidance. In addition to the sample trust instruments for inter vivos CLUTs that are included in this revenue procedure, a sample is provided in a separate revenue procedure for a testamentary CLUT (see Rev. Proc. 2008-46).

SECTION 3. SCOPE

A CLUT is an irrevocable split-interest trust that provides for a specified amount to be paid to one or more charitable beneficiaries during the term of the trust. The principal remaining in the trust at the end of the term is paid over to, or held in a continuing trust for, a noncharitable beneficiary or beneficiaries identified in the trust. If the terms of a CLUT created during the donor's life satisfy the applicable statutory and regulatory requirements, a gift of the charitable lead unitrust interest will qualify for the gift tax charitable deduction under § 2522(c)(2)(B) and/or the estate tax charitable deduction under § 2055(e)(2)(B). In certain cases, the gift of the unitrust interest may also qualify for the income tax charitable deduction under § 170(a). The value of the remainder interest is a taxable gift by the donor at the time of the donor's contribution to the trust.

There are two types of inter vivos CLUTs: a "nongrantor CLUT" and a "grantor CLUT." The income tax consequences are different for each. A nongrantor CLUT is subject to the provisions of part I, subchapter J of chapter 1 of subtitle A of the Internal Revenue Code (Code). Under the provisions of part I of subchapter J, a nongrantor CLUT is allowed a deduction under § 642(c)(1) in determining its taxable income for any amount of gross income paid for purposes specified in § 170(c). Generally, the donor is not entitled to any income tax charitable deduction.

Section 4 of this revenue procedure provides a sample declaration of trust for a nongrantor CLUT with a term of years unitrust period that is created by an individual who is a citizen or resident of the United States. Section 5 of this revenue procedure provides annotations to the provisions of the sample trust. Section 6 of this revenue procedure provides samples of certain alternate provisions concerning: (.01) a unitrust period for the life of one individual; (.02) retention of the right to substitute the charitable lead beneficiary; (.03) apportionment of the unitrust amount in the discretion of the trustee; and (.04) designation of an alternate charitable beneficiary in the trust instrument. If a trust is substantially similar to the sample trust in section 4 of this revenue procedure or properly integrates one or more alternate provisions from section 6 into a document substantially similar to the sample trust in section 4, is a valid trust under

applicable local law, and operates in a manner consistent with the terms of the instrument, and if all other deductibility requirements are satisfied, the value of the charitable lead interest will be deductible under § 2522(c)(2)(B) and/or § 2055(e)(2)(B) and payments of the unitrust amount to the charitable lead beneficiary will be deductible from the gross income of the trust to the extent provided by § 642(c)(1). In addition, a nongrantor CLUT will qualify for the safe harbor created under this revenue procedure if the trust satisfies all of the requirements set forth in the preceding sentence, except that it defines the unitrust amount as a varying percentage amount for which the value is ascertainable at the creation of the trust and/or provides for a different disposition of trust assets upon the termination of the unitrust period.

A CLUT is a grantor CLUT if the donor, who is a citizen or resident of the United States, is treated as the owner of the entire CLUT under subpart E, part I of subchapter J, chapter 1, subtitle A. The value of the charitable lead unitrust interest in a grantor CLUT may be deductible by the donor under § 170(a) for the year in which the donor made the contribution to the trust, provided that the other requirements of § 170(f)(2)(B) and the regulations thereunder are satisfied. During the term of the grantor CLUT, all trust income and capital gains are taxed to the donor and the donor is entitled to no further charitable deduction for income tax purposes as the charitable unitrust payments are made to charitable organizations each year.

Section 7 of this revenue procedure provides a sample declaration of trust for a grantor CLUT that is created by an individual who is a citizen or resident of the United States. Section 8 of this revenue procedure provides annotations to the provisions of the sample trust. Section 9 of this revenue procedure provides samples of certain alternate provisions concerning: (.01) a unitrust period for the life of one individual; (.02) retention of the right to substitute the charitable lead beneficiary; (.03) apportionment of the unitrust amount in the discretion of the trustee; and (.04) designation of an alternate charitable beneficiary in the trust instrument. If a trust is substantially similar to the sample trust in section 7 of this revenue procedure or properly integrates one or more alternate provisions from section 9 into a document substantially similar to the sample trust in section 7, is a valid trust under applicable local law, and operates in a manner consistent with the terms of the instrument, and if all other requirements for deductibility are satisfied, the value of the charitable lead unitrust interest will be deductible under §§ 170(a), 2522(c)(2)(B) and/or 2055(e)(2)(B). In addition, a grantor CLUT will qualify for the safe harbor created under this revenue procedure if the trust satisfies all of the requirements set forth in the preceding sentence, except that it: (i) reflects the choice of a different power or provision sufficient to make the donor the owner of the entire CLUT under subpart E, part I, subchapter J, chapter 1, subtitle A, provided that the power or provision selected is consistent with the requirements of a CLUT; (ii) defines the unitrust amount as a varying percentage amount for which the value is ascertainable at the creation of the trust; and/or (iii) provides for a different disposition of trust assets upon the termination of the unitrust period.

Except as provided above, a trust that contains substantive provisions in addition to those provided in section 4 or section 7 of this revenue procedure (other than properly integrated alternate provisions from section 6 or section 9, respectively, of this revenue procedure or provisions necessary to establish a valid trust under applicable local law that are not inconsistent with the applicable federal tax requirements), or that omits any of the provisions of section 4 or section 7 of this revenue procedure (unless an alternate provision from section 6 or section 9, respectively, of this revenue procedure is properly integrated), will not necessarily be ineligible for the relevant charitable deduction(s), but neither will that trust (or contributions to it) be assured of qualification for the appropriate charitable deductions. The Service generally will not issue a letter ruling on whether an inter vivos CLUT created by an individual qualifies for income, estate, and/or gift tax charitable deductions. The Service, however, generally will issue letter rulings relating to the tax consequences of the inclusion in a CLUT of substantive trust provisions other than those contained in sections 4, 6, 7, and 9 of this revenue procedure.

SECTION 4. SAMPLE INTER VIVOS NONGRANTOR CHARITABLE LEAD UNITRUST

On this _____ day of _____, 20____, I, _____ (hereinafter “the Donor”), desiring to establish a charitable lead unitrust within the meaning of Rev. Proc. 2008–45, hereby enter into this trust agreement with _____ as the initial trustee (hereinafter “the Trustee”). This trust shall be known as the _____ Nongrantor Charitable Lead Unitrust. All references to “section” or “§” in this instrument shall refer to the Internal Revenue Code of 1986, 26 U.S.C. § 1, *et seq.*

1. *Funding of Trust.* The Donor hereby transfers and irrevocably assigns to the Trustee on the above date the property described in Schedule A, and the Trustee accepts the property and agrees to hold, manage, and distribute the property under the terms set forth in this trust instrument.

2. *Payment of Unitrust Amount.* For each taxable year of the trust during the unitrust period, the Trustee shall pay to [*designated charitable recipient*] a unitrust amount equal to [*number representing the annual unitrust percentage to be paid to the designated charitable recipient*] percent of the net fair market value of the assets of the trust, valued as of the first day of each taxable year of the trust (hereinafter “the valuation date”). If [*designated charitable recipient*] is not an organization described in §§ 170(c), 2055(a), and 2522(a) at the time any payment is to be made to it, the Trustee shall instead distribute such payments to one or more organizations described in §§ 170(c), 2055(a), and 2522(a) as the Trustee shall select, and in such proportions as the Trustee shall decide, from time to time, in the Trustee’s sole discretion. The term “the Charitable Organization” shall be used herein to refer collectively to the organization(s) then constituting the charitable recipient, whether named in this paragraph or subsequently selected as the substitute charitable recipient. During the trust term, no payment shall be made to any person other than the Charitable Organization. The unitrust period is a term of [*number of years of unitrust period*] years. The first day of the unitrust period shall be the date property is first transferred to the trust, and the last day of the unitrust period shall be the day preceding the [*ordinal number corresponding*

to the length of the unitrust period] anniversary of that date. The unitrust amount shall be paid in equal quarterly installments at the end of each calendar quarter from income and, to the extent income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal. If for any year the net fair market value of the trust assets is incorrectly determined, then within a reasonable period after the correct value is finally determined, the Trustee shall pay to the Charitable Organization (in the case of an undervaluation) or receive from the Charitable Organization (in the case of an overvaluation) an amount equal to the difference between the unitrust amount(s) properly payable and the unitrust amount(s) actually paid.

3. *Proration of Unitrust Amount.* For a short taxable year and for the taxable year during which the unitrust period ends, the Trustee shall prorate on a daily basis for the number of days of the unitrust period in that year, the unitrust amount described in paragraph 2, or, if an additional contribution is made to the trust, the unitrust amount described in paragraph 5.

4. *Distribution Upon Termination of Unitrust Period.* At the termination of the unitrust period, the Trustee shall distribute all of the then remaining principal and income of the trust (other than any amount due to the Charitable Organization under the provisions above) to [remainder beneficiary].

5. *Additional Contributions.* If any additional contributions are made to the trust after the initial contribution, the unitrust amount for the year in which any additional contribution is made shall be [same percentage used in paragraph 2] percent of the sum of (a) the net fair market value of the trust assets as of the valuation date (excluding the assets so added and any post-contribution income from, and appreciation on, such assets during that year) and (b) for each additional contribution during the year, the fair market value of the assets so added as of the valuation date (including any post-contribution income from, and appreciation on, such assets through the valuation date) multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period. In a taxable year in which an additional contribution is made on or after the valuation date, the assets so added shall be valued as of the date of contribution, without regard to any post-contribution income or appreciation, rather than as of the valuation date.

6. *Prohibited Transactions.* The Trustee shall not engage in any act of self-dealing within the meaning of § 4941(d), as modified by § 4947(a)(2), and shall not make any taxable expenditures within the meaning of § 4945(d), as modified by § 4947(a)(2). The Trustee shall not retain any excess business holdings that would subject the trust to tax under § 4943, as modified by §§ 4947(a)(2) and 4947(b)(3). In addition, the Trustee shall not acquire any assets that would subject the trust to tax under § 4944, as modified by §§ 4947(a)(2) and 4947(b)(3), or retain assets which, if acquired by the Trustee, would subject the Trustee to tax under § 4944, as modified by §§ 4947(a)(2) and 4947(b)(3).

7. *Taxable Year.* The taxable year of the trust shall be the calendar year.

8. *Governing Law.* The operation of the trust shall be governed by the laws of the State of _____. However, the Trustee is prohibited from exercising any power or discretion granted under said laws that would be inconsistent with the requirements for the charitable deductions available to a charitable lead unitrust or for contributions to a charitable lead unitrust.

9. *Limited Power of Amendment.* This trust is irrevocable. However, the Trustee shall have the power, acting alone, to amend the trust from time to time in any manner required for the sole purpose of ensuring that the unitrust interest passing to the Charitable Organization is a unitrust interest under §§ 2055(e)(2)(B) and 2522(c)(2)(B) and the regulations thereunder and that payments of the unitrust amount to the Charitable Organization will be deductible from the gross income of the trust to the extent provided by § 642(c)(1) and the regulations thereunder.

10. *Investment of Trust Assets.* Except as provided in paragraph 6 herein, nothing in this trust instrument shall be construed to restrict the Trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

11. *Retained Powers and Interests.* Notwithstanding any other provision of this trust instrument to the contrary, no person shall hold any power or possess any interest that would cause the Donor to be treated as the owner of any portion of the trust under the provisions of subpart E, part I, subchapter J, chapter 1, subtitle A of the Internal Revenue Code.

SECTION 5. ANNOTATIONS REGARDING SAMPLE INTER VIVOS NONGRANTOR CHARITABLE LEAD UNITRUST

.01 *Annotations for Introductory Paragraph and Paragraph 1, Funding of Trust, of the Sample Trust in Section 4.*

- (1) *Types of charitable lead trusts.* An inter vivos charitable lead trust may be established as either a grantor charitable lead trust or a nongrantor charitable lead trust. The sample trust in section 4 is an example of a nongrantor charitable lead trust. The sample trust in section 7 is an example of a grantor charitable lead trust.
- (2) *Income taxation of nongrantor charitable lead trusts.* A nongrantor CLUT is a complex trust that is taxable as a separate entity under the provisions of subchapter J of the Code. The trustee of the trust must apply for a tax identification number for the trust.

- (3) *Deduction under § 642(c)(1) available for amounts paid for a charitable purpose.* Under § 642(c)(1), a nongrantor CLUT is allowed a deduction in computing its taxable income for any amount of gross income, without limitation, that under the terms of the trust instrument is paid for a purpose specified in § 170(c) (determined without regard to § 170(c)(2)(A)) during the taxable year. This deduction is in lieu of the charitable deduction allowed by § 170. Section 642(c)(1) and § 1.642(c)-1(a). An amount paid to a corporation, trust, or community chest, fund, or foundation otherwise described in § 170(c)(2) shall be considered paid for a purpose described in § 170(c) even though the corporation, trust, or community chest, fund, or foundation is not created or organized in the United States, any state, the District of Columbia, or any possession of the United States. Section 1.642(c)-1(a)(2). With regard to amounts of income paid to the charitable beneficiary after the close of the taxable year in which the income was received (but on or before the last day of the next succeeding taxable year), the trustee of a nongrantor CLUT may elect to take the charitable deduction for that payment for the year in which the income was received, rather than for the year in which the payment was made. Section 642(c)(1). The election is made by filing a statement with the income tax return for the taxable year in which the charitable contribution is treated as paid. See § 1.642(c)-1(b).
- (4) *Charitable lead beneficiary requirements.* A deduction is allowed under § 642(c)(1) for any amount of the gross income of a nongrantor CLUT that is paid for a purpose specified in § 170(c). Note that the class of permissible charitable recipients for obtaining a deduction under § 642(c)(1) differs from the class of permissible charitable recipients for obtaining a deduction under § 170(a). Compare § 170(c) and § 1.642(c)-1(a)(2).
- (5) *Unrelated business taxable income.* Under § 681, a nongrantor charitable lead trust's deduction under § 642(c)(1) is disallowed in any year to the extent that the deduction is allocable to the trust's unrelated business taxable income, as defined in § 512, for that taxable year. See § 1.681(a)-2. However, a partial deduction is allowed under § 512(b)(11) for amounts allocable to unrelated business taxable income. Section 512(b)(11). See § 512(b)(12) and § 1.681(a)-2(a).
- (6) *Computation of estate and gift tax charitable deductions.* In general, the estate and gift tax charitable deductions available under §§ 2055(e)(2)(B) and 2522(c)(2)(B) with respect to contributions to a CLUT are equal to the present value of the unitrust interest. Sections 20.2055-2(f)(1) and 25.2522(c)-3(d)(1). Section 7520 requires that a unitrust interest must be valued using tables published by the Service. The method for valuing a charitable lead unitrust interest is set forth in the regulations. See §§ 20.7520-2 and 25.7520-2.
- (7) *Trustee provisions.* The trust instrument may name alternate or successor trustees and/or may include a process for the appointment of unnamed alternate or successor trustees. In addition, the trust instrument may contain certain administrative provisions relating to the trustee's duties and powers.
- (8) *Identity of donor.* For purposes of qualification under this revenue procedure, the donor may be an individual or a husband and wife. Appropriate adjustments should be made to the introductory paragraph if a husband and wife are the donors. Terms such as "grantor" or "settlor" may be substituted for "donor."

.02 Annotations for Paragraph 2, Payment of Unitrust Amount, of the Sample Trust in Section 4.

- (1) *Unitrust interest.* To qualify for the applicable estate and gift tax charitable deductions, a nongrantor CLUT must provide for the payment of a unitrust amount at least annually to a qualified charitable organization for each year during the unitrust period. See §§ 2055(e)(2)(B) and 2522(c)(2)(B). A unitrust interest is the right pursuant to the instrument of transfer to receive payment, not less often than annually, of a fixed percentage of the net fair market value, determined annually, of the property that funds the unitrust interest. Payments of a unitrust interest may be paid for a specified term or for the life or lives of certain individuals, each of whom must be living at the date of the transfer and can be ascertained as of such date. Sections 20.2055-2(e)(2)(vii)(a) and 25.2522(c)-3(c)(2)(vii)(a). See section 5.02(4) for a discussion of the permissible term of a nongrantor CLUT. An interest is a unitrust interest only if it is a unitrust interest in every respect. For example, if an interest is expressed as the right to receive an annual payment from a trust equal to the lesser of a sum certain or a fixed percentage of the net fair market value of the trust assets (determined annually), the interest is not a unitrust interest. Sections 20.2055-2(e)(2)(vii)(b) and 25.2522(c)-3(c)(2)(vii)(b). See Rev. Rul. 77-300, 1977-2 C.B. 352. In addition, an interest is not a unitrust interest if the trustee has the discretion to commute and prepay the interest prior to the termination of the unitrust period. Rev. Rul. 88-27, 1988-1 C.B. 331. If a charitable interest in the form of a unitrust interest is in trust and the present value of the charitable interest on the date of gift exceeds 60 percent of the aggregate value of all amounts in the trust, the charitable interest will not be considered a unitrust interest unless the governing instrument of the trust prohibits the acquisition and retention of assets that would give rise to a tax under § 4943 or 4944, as modified by §§ 4947(a)(2) and 4947(b)(3). Section 4947(b)(3) and § 53.4947-2(b)(1)(i). See §§ 20.2055-2(e)(2)(vii)(f) and 25.2522(c)-3(c)(2)(vii)(f). These prohibitions are contained in the sample trust in section 4. See section 5.06 for a further discussion of the 60 percent test.
- (2) *Payment requirements.* CLUTs are not subject to any minimum or maximum payout requirements. The governing instrument of a CLUT must provide for the payment to a charitable organization, not less often than annually, of a fixed percentage of the net fair market value of the assets of the trust, valued annually. Alternatively, the governing instrument of a CLUT may provide for a unitrust amount that is initially stated as a fixed percentage amount but increases or decreases during the

unitrust period, provided that the value of the unitrust interest is ascertainable at the time the trust is funded. The unitrust payments may be made in cash or in kind. If the trustee distributes appreciated property in satisfaction of the required unitrust payment, the trust will realize capital gain on the assets distributed to satisfy part or all of the unitrust payment and the trust will be allowed a § 642(c)(1) deduction for the realized capital gains. Rev. Rul. 83-75, 1983-1 C.B. 114.

- (3) *Rule against perpetuities.* An interest payable for a specified term of years may qualify as a unitrust interest even if the governing instrument contains a savings clause intended to ensure compliance with a rule against perpetuities. However, any such savings clause must utilize a period of vesting of not more than 21 years after the deaths of measuring lives who are selected to maximize, rather than limit, the term of the trust. Sections 20.2055-2(e)(2)(vii)(a) and 25.2522(c)-3(c)(2)(vii)(a).
- (4) *Permissible term.* Paragraph 2, Payment of Unitrust Amount, of the sample trust in section 4 provides for payment of the unitrust amount for a specified term of years. Alternatively, the trust instrument may provide for payment of the unitrust amount for the life or lives of one or more measuring lives or for the life or lives of one or more measuring lives plus a term of years. Rev. Rul. 85-49, 1985-1 C.B. 330. Only one or more of the following individuals may be used as measuring lives: the donor, the donor's spouse, and an individual who, with respect to all remainder beneficiaries (other than charitable organizations described in § 170, 2055, or 2522), is either a lineal ancestor or the spouse of a lineal ancestor of those beneficiaries. Each person used as a measuring life for the unitrust period must be living on the date assets are transferred to the trust. Sections 20.2055-2(e)(2)(vii)(a) and 25.2522(c)-3(c)(2)(vii)(a). See section 6.01 for an alternate provision that provides for a unitrust period based on the life of an individual.
- (5) *Permissible recipients.* A CLUT must have one or more charitable lead beneficiaries. The failure to designate a specific charitable beneficiary will not preclude the donor from receiving a charitable deduction if the trust instrument provides for the selection by the trustee of a charitable beneficiary described in §§ 170(c), 2055(a), and 2522(a). Rev. Rul. 78-101, 1978-1 C.B. 301. If it is determined that a deduction under § 2055(a) will not be necessary in any event, all references to § 2055(a) in the trust instrument may be deleted. Note that if the donor is serving as trustee of the trust, the trustee's power to select the charitable beneficiaries will cause the gift of the unitrust interest to be incomplete for gift tax purposes and will cause some or all of the trust property (depending on the date of the donor's death) to be included in the donor's gross estate. See §§ 2035(a), 2036(a)(2), and 2038(a)(1) and § 25.2511-2(c). Further note that if the charitable beneficiary is a private foundation and the donor is an officer or director of the private foundation or possesses certain decision making authority in the private foundation, some or all of the trust property may be included in the donor's gross estate. See § 2036(a)(2). See section 6.02 for an alternate provision that provides for a donor's retained right to substitute the charitable beneficiary. See section 6.03 for an alternate provision that provides the trustee with the power to apportion the unitrust amount among charitable beneficiaries. See section 6.04 for an alternate provision that provides for the designation of an alternate charitable beneficiary in the trust instrument.
- (6) *Payment of unitrust amount in installments.* Paragraph 2, Payment of Unitrust Amount, of the sample trust in section 4 specifies that the unitrust amount is to be paid in equal quarterly installments at the end of each calendar quarter. Alternatively, the trust instrument may specify that the unitrust amount is to be paid in annual or other equal or unequal installments throughout the year. See §§ 20.2055-2(e)(2)(vii)(a) and 25.2522(c)-3(c)(2)(vii)(a). The amount of the charitable deduction will be affected by the frequency of the payment, by whether the installments are equal or unequal, and by whether each installment is payable at the beginning or end of the period. See §§ 25.2512-5 and 20.2031-7.
- (7) *Excess income.* Trust income in excess of the amount required to pay the unitrust amount may be retained by the trust or distributed currently to the charitable beneficiary. The sample trust in section 4 provides for the retention of excess income by the trust. If, instead, the governing instrument of a nongrantor charitable lead trust provides for the payment of excess income to or for the use of the charitable beneficiary, no additional estate or gift tax charitable deductions are available for the excess amounts of income distributed to the charitable beneficiary. See §§ 20.2055-2(e)(2)(vii)(d) and 25.2522(c)-3(c)(2)(vii)(d). However, the trust is entitled to a charitable income tax deduction under § 642(c)(1) for any amounts of excess income paid to the charitable beneficiary. See Situation 2 of Rev. Rul. 88-82, 1988-2 C.B. 336, for the gift tax consequences of the payment of excess income to a noncharitable beneficiary. See section 5.06 for the private foundation rules applicable to charitable lead trusts.
- (8) *Payment of part of unitrust for private purposes.* In general, no part of a charitable lead unitrust interest may be payable for a private purpose before the expiration of all charitable lead unitrust interests. However, there are two exceptions to this rule. The first exception arises when the amount payable for a private purpose is in the form of a unitrust interest and the trust's governing instrument does not provide for any preference or priority in the payment of the private unitrust as opposed to the charitable unitrust. The second exception arises when, under the trust's governing instrument, the amount that may be paid for a private purpose is payable only from a group of assets that is devoted exclusively to private purposes and to which § 4947(a)(2) is inapplicable by reason of § 4947(a)(2)(B). Note that an amount is not deemed to have been paid for a private purpose if it was paid for full and adequate consideration in money or money's worth. Sections 20.2055-2(e)(2)(vii)(e) and 25.2522(c)-3(c)(2)(vii)(e). See section 5.06 for the private foundation rules applicable to charitable lead trusts.
- (9) *Valuation date.* Paragraph 2, Payment of Unitrust Amount, of the sample trust in section 4 specifies that the net fair market value of trust assets is to be valued as of the first day of each taxable year of the trust. However, the value of the trust assets may be determined on any one date during the taxable year of the trust, or by taking the average of valuations made on

more than one date during the taxable year of the trust, so long as the same valuation date or dates and the same valuation methods are used each year. If the governing instrument does not specify the valuation date or dates, the trustee must select the date or dates and indicate the selection on the first Form 1041, *U.S. Income Tax Return for Estates and Trusts*, that the trust must file. Sections 20.2055-2(e)(2)(vii)(a) and 25.2522(c)-3(c)(2)(vii)(a). Note that if the valuation date is a date other than the first day of each taxable year of the trust, it may be necessary to modify the provisions in the sample trust regarding: (i) the timing of the payment of the unitrust amount; (ii) the proration of the unitrust amount in a short taxable year and the last taxable year of the unitrust period; and (iii) additional contributions.

- (10) *Ordering rules.* A provision in the governing instrument of a charitable lead trust that provides for the payment to charity to consist of different classes of income determined on a non *pro rata* basis will not be respected because such a provision does not have economic effect independent of the income tax consequences of the payment. See § 1.642(c)-3(b)(2) and (3).

.03 Annotation for Paragraph 3, Proration of Unitrust Amount, of the Sample Trust in Section 4.

- (1) *Prorating the unitrust amount.* Paragraph 3, Proration of Unitrust Amount, of the sample trust in section 4 provides for the proration of the unitrust amount in any short taxable year, including the last year of the unitrust period.

.04 Annotation for Paragraph 4, Distribution Upon Termination of Unitrust Period, of the Sample Trust in Section 4.

- (1) *Generation-skipping transfer tax.* The generation-skipping transfer (GST) tax may apply if a CLUT has or may have a skip person, as defined in § 2613(a), as a remainder beneficiary. Under § 2651(f)(3), a charitable organization is deemed to be in the same generation as the donor to a charitable lead trust. Therefore, the GST potential of a charitable lead trust is dependent upon whether any noncharitable beneficiary is a skip person. GST tax liability is determined by multiplying the taxable amount by the applicable rate. The applicable rate is the inclusion ratio multiplied by the maximum federal estate tax rate. Section 2641(a). Note that the rules set forth in § 2642(e) for determining the inclusion ratio of certain charitable lead trusts do not apply to CLUTs.

.05 Annotation for Paragraph 5, Additional Contributions, of the Sample Trust in Section 4.

- (1) *Identity of additional contributors.* For purposes of qualification under this revenue procedure, only a donor or a donor's estate may make an additional contribution to the trust. See section 5.01(8) of this revenue procedure for examples of who may be a donor of a CLUT.
- (2) *Option to prohibit additional contributions.* Paragraph 5, Additional Contributions, of the sample trust in section 4 provides rules for determining the unitrust amount payable in a year during which an additional contribution is made to the trust. However, paragraph 5 of the trust instrument may instead be drafted to prohibit contributions to the trust after the initial contribution.
- (3) *Proration of additional contributions.* Paragraph 5, Additional Contributions, of the sample trust in section 4 provides a formula for determining the unitrust amount in each year that an additional contribution is made to the CLUT. The formula incorporates a proration provision for additions made in a short taxable year.
- (4) *Valuation date in year of additional contribution.* Paragraph 2, Payment of Unitrust Amount, of the sample trust in section 4 specifies a January 1 valuation date for the trust. The formula contained in paragraph 5, Additional Contributions, of the sample trust may be used when January 1 or any other single date during the taxable year is selected as the valuation date for a CLUT. Note, however, that if a single date other than January 1 is selected as the valuation date for a CLUT, the formulas in both paragraphs 2 and 5 of the sample trust for computing the unitrust amount will be deficient unless the trust instrument addresses the possibility that the unitrust period may end before the valuation date, for instance, by providing that in a year in which the unitrust period ends before the valuation date, the valuation date for purposes of paragraph 2 and paragraph 5 shall be the last day of the unitrust period. In addition, if the trust instrument is drafted to provide for the valuation of trust assets by averaging the valuations as of multiple specified dates during the trust year, the additional contributions formula must be modified.

.06 Annotation for Paragraph 6, Prohibited Transactions, of the Sample Trust in Section 4.

- (1) *Prohibitions against certain investments and excess business holdings.* Prohibitions against retaining any excess business holdings within the meaning of § 4943, as modified by §§ 4947(a)(2) and 4947(b)(3), and against investments that jeopardize the exempt purpose of the trust within the meaning of § 4944, as modified by §§ 4947(a)(2) and 4947(b)(3), are generally required. The sample trust in section 4 contains prohibitions against §§ 4943 and 4944 transactions. If the present value of the charitable interest does not exceed 60 percent of the aggregate value of all amounts in the trust, the trust instrument does not provide for the payment of any of the income interest to a noncharitable beneficiary, and the trust instrument does not provide for the payment of excess income to a noncharitable beneficiary, the references to §§ 4943 and 4944 may

be removed from the trust instrument. Section 4947(b)(3) and § 53.4947-2(b)(1)(i). See §§ 20.2055-2(e)(2)(vii)(f) and 25.2522(c)-3(c)(2)(vii)(f). See section 5.02(7) for a discussion of the payment of excess trust income to a noncharitable beneficiary. See section 5.02(8) for a discussion of the payment of part of the unitrust for a private purpose.

.07 Annotation for paragraph 7, Taxable Year, of the Sample Trust in Section 4.

- (1) *Calendar year.* The taxable year of a charitable lead trust must be a calendar year. Section 644(a).

.08 Annotation for paragraph 10, Investment of Trust Assets, of the Sample Trust in Section 4.

- (1) *Capital gains.* Gains from the sale or exchange of capital assets may be allocated to the income or the principal of the trust. If the governing instrument is silent, capital gains are allocated in accordance with local law. Even if gains are allocated to principal, they will be deductible under § 642(c)(1) if they are paid to the charitable beneficiary as part of a charitable unitrust payment. Rev. Rul. 83-75, 1983-1 C.B. 114.

.09 Annotation for paragraph 11, Retained Powers and Interests, of the Sample Trust in Section 4.

- (1) *Trust not a grantor trust.* Paragraph 11, Retained Powers and Interests, of the sample trust in section 4 prohibits any person from holding any power or possessing any interest that would cause the donor to be treated as the owner of the trust under subpart E, part I, subchapter J, chapter 1, subtitle A of the Code. This prohibition should be included only in nongrantor charitable lead trusts. See section 7 for a sample grantor CLUT.

SECTION 6. ALTERNATE PROVISIONS FOR SAMPLE INTER VIVOS NONGRANTOR CHARITABLE LEAD UNITRUST

.01 Unitrust Period for the Life of One Individual.

- (1) *Explanation.* As an alternative to establishing a CLUT for a term of years, the trust instrument of a nongrantor CLUT may provide for payment of the unitrust amount for the life or lives of an individual or individuals. However, only one or more of the following individuals may be used as measuring lives: the donor, the donor's spouse, and an individual who, with respect to all remainder beneficiaries (other than charitable organizations described in § 170, 2055, or 2522), is either a lineal ancestor or the spouse of a lineal ancestor of those beneficiaries. A trust will satisfy the requirement that each measuring life is a lineal ancestor (or the spouse of a lineal ancestor) of all noncharitable remainder beneficiaries if there is a less than 15 percent probability at the time of the contribution to the trust that individuals who are not lineal descendants of an individual who is a measuring life will receive any trust principal. The probability must be computed under the applicable tables in § 20.2031-7. Sections 20.2055-2(e)(2)(vii)(a) and 25.2522(c)-3(c)(2)(vii)(a).
- (2) *Instruction for use.* Replace the fifth and sixth sentences of paragraph 2, Payment of Unitrust Amount, of the sample trust in section 4 with the following sentences:

The unitrust period is the lifetime of [*designated measuring life*]. The first day of the unitrust period shall be the date property is first transferred to the trust and the last day of the unitrust period shall be the date of death of [*designated measuring life*].

.02 Retention of the Right to Substitute the Charitable Lead Beneficiary.

- (1) *Explanation.* The donor to a nongrantor CLUT may retain the right to substitute another charitable beneficiary for the charitable beneficiary named in the trust instrument. Note, however, that the retention of this right will cause the gift of the unitrust interest to be incomplete for gift tax purposes and will cause some or all of the trust property (depending upon the date of the donor's death) to be included in the donor's gross estate. See §§ 2035(a), 2036(a)(2), and 2038(a)(1) and § 25.2511-2(c).
- (2) *Instruction for use.* Replace the third sentence of paragraph 2, Payment of Unitrust Amount, of the sample trust in section 4 with the following two sentences:

Notwithstanding the preceding sentences, the Donor reserves the right to designate as the charitable recipient, at any time and from time to time, in lieu of [*designated charitable recipient*], one or more organizations described in §§ 170(c), 2055(a), and 2522(a) and shall make any such designation by giving written notice to the Trustee. The term "the Charitable Organization" shall be used herein to refer collectively to the organization(s) then constituting the charitable recipient, whether named in this paragraph or subsequently selected as the substitute charitable recipient.

.03 Apportionment of the Unitrust Amount in the Discretion of the Trustee.

- (1) *Explanation.* The donor or the trustee of a nongrantor charitable lead trust may be granted the power to apportion the unitrust payment from time to time among a class of qualifying charitable beneficiaries. See § 674(b)(4). A power to apportion the unitrust amount among a class of qualifying charitable beneficiaries that is retained by the donor or the donor's spouse will not cause the donor to be treated as the owner of the trust for income tax purposes. Section 674(b)(4). Note, however, that a retained power of apportionment by the donor, but not the donor's spouse, will cause the gift of the unitrust interest to be incomplete for gift tax purposes and will cause some or all of the trust property to be included in the donor's gross estate. See §§ 2035(a), 2036(a)(2), and 2038(a)(1) and § 25.2511-2(c).
- (2) *Instruction for use.* Replace the first three sentences of paragraph 2, Payment of Unitrust Amount, of the sample trust in section 4 with the following two sentences:

For each taxable year of the trust during the unitrust period, the Trustee shall pay to one or more members of a class comprised of organizations described in §§ 170(c), 2055(a), and 2522(a) (hereinafter, collectively "the Charitable Organization") a unitrust amount equal to [number representing the annual unitrust percentage to be paid to the Charitable Organization] percent of the net fair market value of the assets of the trust, valued as of the first day of each taxable year of the trust (hereinafter "the valuation date"). The Trustee may pay the unitrust amount to one or more members of the class, in equal or unequal shares, as the Trustee, in the Trustee's sole discretion, from time to time may deem advisable.

.04 Designation of an Alternate Charitable Beneficiary in the Trust Instrument.

- (1) *Explanation.* The sample trust in section 4 provides that, in the event the charitable beneficiary designated in the trust instrument is not an organization described in §§ 170(c), 2055(a), and 2522(a) at the time any payment is to be made to it, the trustee shall distribute such payments to one or more organizations described in §§ 170(c), 2055(a), and 2522(a) as the trustee shall select. As an alternative, the trust instrument may specifically designate one or more alternate charitable beneficiaries.
- (2) *Instruction for use.* Replace the second sentence in paragraph 2, Payment of Unitrust Amount, of the sample trust in section 4 with the following two sentences:

If [designated charitable recipient] is not an organization described in §§ 170(c), 2055(a), and 2522(a) at the time any payment is to be made to it, the Trustee shall instead distribute such payments to [designated substitute charitable recipient]. If neither [designated charitable recipient] nor [designated substitute charitable recipient] is an organization described in §§ 170(c), 2055(a), and 2522(a) at the time any payment is to be made to it, the Trustee shall distribute such payments to one or more organizations described in §§ 170(c), 2055(a), and 2522(a) as the Trustee shall select, and in such proportions as the Trustee shall decide, from time to time, in the Trustee's sole discretion.

SECTION 7. SAMPLE INTER VIVOS GRANTOR CHARITABLE LEAD UNITRUST

On this _____ day of _____, 20____, I, _____ (hereinafter "the Donor"), desiring to establish a charitable lead unitrust within the meaning of Rev. Proc. 2008-45, hereby enter into this trust agreement with _____ as the initial trustee (hereinafter "the Trustee"). This trust shall be known as the _____ Grantor Charitable Lead Unitrust. All references to "section" or "§" in this instrument shall refer to the Internal Revenue Code of 1986, 26 U.S.C. § 1, *et seq.*

1. *Funding of Trust.* The Donor hereby transfers and irrevocably assigns to the Trustee on the above date, the property described in Schedule A, and the Trustee accepts the property and agrees to hold, manage, and distribute the property under the terms set forth in this trust instrument.

2. *Payment of Unitrust Amount.* For each taxable year of the trust during the unitrust period, the Trustee shall pay to [designated charitable recipient] a unitrust amount equal to [number representing the annual unitrust percentage to be paid to the designated charitable recipient] percent of the assets of the trust, valued as of the first day of each taxable year of the trust (hereinafter "the valuation date"). If [designated charitable recipient] is not an organization described in §§ 170(c), 2055(a), and 2522(a) at the time any payment is to be made to it, the Trustee shall instead distribute such payments to one or more organizations described in §§ 170(c), 2055(a), and 2522(a) as the Trustee shall select, and in such proportions as the Trustee shall decide, from time to time, in the Trustee's sole discretion. The term "the Charitable Organization" shall be used herein to refer collectively to the organization(s) then constituting the charitable recipient, whether named in this paragraph or subsequently selected as the substitute charitable recipient. During the trust term, no payment shall be made to any person other than the Charitable Organization. The unitrust period is a term of [number of years of unitrust period] years. The first day of the unitrust period shall be the date property is first transferred to the trust, and the last day of the unitrust period shall be the day preceding the [ordinal number corresponding to the length of the unitrust period] anniversary of that date. The unitrust amount shall be paid in equal quarterly installments at the end of each calendar quarter from income and, to the extent income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal. If for any year the net fair market value of the trust assets is incorrectly determined, then within a reasonable period after the correct value is finally determined, the Trustee shall pay to the Charitable Organization (in the case of

an undervaluation) or receive from the Charitable Organization (in the case of an overvaluation) an amount equal to the difference between the unitrust amount(s) properly payable and the unitrust amount(s) actually paid.

3. *Proration of Unitrust Amount.* For a short taxable year, including the taxable year during which the unitrust period ends, the Trustee shall prorate on a daily basis for the number of days of the unitrust period in that year, the unitrust amount described in paragraph 2, or, if an additional contribution is made to the trust, the unitrust amount described in paragraph 5.

4. *Distribution Upon Termination of Unitrust Period.* At the termination of the unitrust period, the Trustee shall distribute all of the then remaining principal and income of the trust (other than any amount due to the Charitable Organization under the provisions above) to [remainder beneficiary].

5. *Additional Contributions.* If any additional contributions are made to the trust after the initial contribution, the unitrust amount for the year in which any additional contribution is made shall be [same percentage used in paragraph 2] percent of the sum of (a) the net fair market value of the trust assets as of the valuation date (excluding the assets so added and any post-contribution income from, and appreciation on, such assets during that year) and (b) for each additional contribution during the year, the fair market value of the assets so added as of the valuation date (including any post-contribution income from, and appreciation on, such assets through the valuation date) multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period. In a taxable year in which an additional contribution is made on or after the valuation date, the assets so added shall be valued as of the date of contribution, without regard to any post-contribution income or appreciation, rather than as of the valuation date.

6. *Prohibited Transactions.* The Trustee shall not engage in any act of self-dealing within the meaning of § 4941(d), as modified by § 4947(a)(2), and shall not make any taxable expenditures within the meaning of § 4945(d), as modified by § 4947(a)(2). The Trustee shall not retain any excess business holdings that would subject the trust to tax under § 4943, as modified by §§ 4947(a)(2) and 4947(b)(3). In addition, the Trustee shall not acquire any assets that would subject the trust to tax under § 4944, as modified by §§ 4947(a)(2) and 4947(b)(3), or retain assets which, if acquired by the Trustee, would subject the Trustee to tax under § 4944, as modified by §§ 4947(a)(2) and 4947(b)(3).

7. *Taxable Year.* The taxable year of the trust shall be the calendar year.

8. *Governing Law.* The operation of the trust shall be governed by the laws of the State of _____. However, the Trustee is prohibited from exercising any power or discretion granted under said laws that would be inconsistent with the requirements for the charitable deductions available for contributions to a charitable lead unitrust.

9. *Limited Power of Amendment.* This trust is irrevocable. However, the Trustee shall have the power, acting alone, to amend the trust from time to time in any manner required for the sole purpose of ensuring that the unitrust interest passing to the Charitable Organization is a unitrust interest under §§ 170(f)(2)(B), 2055(e)(2)(B), and 2522(c)(2)(B) and the regulations thereunder.

10. *Investment of Trust Assets.* Except as provided in paragraph 6 herein, nothing in this trust instrument shall be construed to restrict the Trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

11. *Retained Powers and Interests.* During the Donor's life, [individual other than the donor, the trustee, or a disqualified person as defined in § 4946(a)(1)] shall have the right, exercisable only in a nonfiduciary capacity and without the consent or approval of any person acting in a fiduciary capacity, to acquire any property held in the trust by substituting other property of equivalent value.

SECTION 8. ANNOTATIONS REGARDING SAMPLE INTER VIVOS GRANTOR CHARITABLE LEAD UNITRUST

.01 Annotations for Introductory Paragraph and Paragraph 1, Funding of Trust, of the Sample Trust in Section 7.

- (1) *Types of charitable lead trusts.* An inter vivos charitable lead trust may be established as either a grantor charitable lead trust or a nongrantor charitable lead trust. The sample trust in section 7 is an example of a grantor charitable lead trust. The sample trust in section 4 is an example of a nongrantor charitable lead trust. In order for the donor to a charitable lead trust to claim an income tax charitable deduction under § 170(a) for the year of the donor's contribution to the trust, the trust must be structured as a grantor charitable lead trust. See § 170(f)(2)(B). The rules governing grantor charitable lead trusts are similar to those relating to nongrantor charitable lead trusts. The most significant difference is the income tax treatment of the trust income. A charitable lead trust is a grantor charitable lead trust if the donor to the trust is treated as the owner of the entire trust for income tax purposes. See section 8.09 for a discussion of the types of powers that may be used to create a grantor charitable lead trust.
- (2) *Income taxation of grantor charitable lead trusts.* The donor to a grantor charitable lead unitrust may claim a federal income tax charitable deduction under § 170(a) for the year in which assets are irrevocably transferred to the trust. During the charitable lead unitrust period, the donor is taxed on all income earned by the trust and does not receive any charitable deduction under § 170 for the unitrust payments to the charitable beneficiary as they are made. In addition, the trust does

not receive a charitable deduction under § 642(c)(1). See § 1.671-4 for the income tax reporting requirements for a grantor charitable lead unitrust.

- (3) *Income tax deductibility limitations.* The donor to a grantor charitable lead trust may claim an income tax charitable deduction under § 170(a) equal to the present value of all future payments that are to be made to the charitable beneficiary. Section 1.170A-6(c). However, a contribution of a charitable income interest in property for which a deduction is allowable under § 170(a) is considered to be made “for the use of” rather than “to” a charitable organization. Section 1.170A-8(a)(2). Because the charitable lead interest of a grantor charitable lead trust is considered to be made “for the use of” the charitable beneficiary, the income tax charitable deduction available to an individual taxpayer is generally limited as set forth in § 170(b)(1)(B) to 30 percent of the taxpayer’s contribution base as defined in § 170(b)(1)(G). However, if the property contributed to the CLUT is capital gain property as defined in § 170(b)(1)(C)(iv), the individual taxpayer’s income tax charitable deduction generally is limited as set forth in § 170(b)(1)(D) to 20 percent of the taxpayer’s contribution base. Section 170(b)(1)(D). See §§ 1.170A-8(c) and (d). In addition, the amount of a charitable contribution of certain types of property may be reduced under § 170(e). See § 1.170A-4.
- (4) *Charitable lead beneficiary requirements.* A deduction is allowed under § 170(a) for contributions to a grantor CLUT only if the charitable lead beneficiary is an organization described in § 170(c). Note that the class of permissible charitable recipients for obtaining a deduction under § 170(a) differs from the class of permissible charitable recipients for obtaining a deduction under § 642(c)(1). Compare § 170(c) and § 1.642(c)-(1)(a)(2).
- (5) *Computation of charitable deduction.* In general, the income, estate, and gift tax charitable deductions available under §§ 170(a), 2055(e)(2)(B), and 2522(c)(2)(B) with respect to contributions to a CLUT are equal to the present value of the unitrust interest. Sections 1.170A-6(c)(3)(ii), 20.2055-2(f)(1), and 25.2522(c)-3(d)(1). Section 7520 generally requires that a unitrust interest must be valued using tables published by the Service. The method for valuing a charitable lead unitrust interest is set forth in the regulations. See §§ 1.7520-2, 20.7520-2, and 25.7520-2. If, however, the circumstances surrounding the transfer to a charitable lead trust suggest that the charitable beneficiary might not receive the beneficial enjoyment of the unitrust interest, an income tax deduction will be allowed only for the minimum possible amount that the charity will receive. Section 1.170A-6(c)(3)(iii). If at any time the donor ceases to be treated as the owner of the trust under subpart E, part I, subchapter J, chapter 1, subtitle A of the Code, the donor shall be considered to have received an amount of income equal to the amount of any deduction the donor received under § 170(a) for the contribution to the trust, reduced by the discounted value (as of the date of the contribution to the trust) of all amounts of income earned by the trust and taxable to the donor before the time that the donor ceased to be treated as the owner of the trust under subpart E, part I, subchapter J, chapter 1, subtitle A of the Code. Section 170(f)(2)(B).
- (6) *Trustee provisions.* The trust instrument may name alternate or successor trustees and/or may include a process for the appointment of unnamed alternate or successor trustees. In addition, the trust instrument may contain certain other administrative provisions relating to the trustee’s duties and powers.
- (7) *Identity of donor.* For purposes of qualification under this revenue procedure, the donor to a charitable lead unitrust may be an individual or a husband and wife. Appropriate adjustments should be made to the introductory paragraph if a husband and wife are the donors. Terms such as “grantor” or “settlor” may be substituted for “donor.”

.02 Annotations for Paragraph 2, Payment of Unitrust Amount, of the Sample Trust in Section 7.

- (1) *Unitrust interest.* To qualify for the applicable charitable deductions, a grantor CLUT must provide for the payment of a unitrust amount at least annually to a qualified charitable organization for each year during the unitrust period. See §§ 170(c), 2055(e)(2)(B), and 2522(c)(2)(B). A unitrust interest is the right pursuant to the instrument of transfer to receive payment, not less often than annually, of a fixed percentage of the net fair market value, determined annually, of the property that funds the unitrust interest. Payments of a unitrust interest may be paid for a specified term or for the life or lives of certain individuals, each of whom must be living at the date of the transfer and can be ascertained as of such date. Sections 20.2055-2(e)(2)(vii)(a) and 25.2522(c)-3(c)(2)(vii)(a). See section 8.02(4) for a discussion of the permissible term of a grantor CLUT. An interest is a unitrust interest only if it is a unitrust interest in every respect. For example, if an interest is expressed as the right to receive an annual payment from a trust equal to the lesser of a sum certain or a fixed percentage of the net fair market value of the trust assets (determined annually), the interest is not a unitrust interest. See §§ 1.170A-6(c)(2)(ii)(B), 20.2055-2(e)(2)(vii)(b), and 25.2522(c)-3(c)(2)(vii)(b). See Rev. Rul. 77-300, 1977-2 C.B. 352. In addition, an interest is not a unitrust interest if the trustee has the discretion to commute and prepay the interest prior to the termination of the unitrust period. Rev. Rul. 88-27, 1988-1 C.B. 331. If a charitable interest in the form of a unitrust interest is in trust and the present value of the charitable interest on the date of gift exceeds 60 percent of the aggregate value of all amounts in the trust, the charitable interest will not be considered a unitrust interest unless the governing instrument of the trust prohibits the acquisition and retention of assets that would give rise to a tax under § 4943 or 4944, as modified by §§ 4947(a)(2) and 4947(b)(3). Section 4947(b)(3)(A) and § 53.4947-2(b)(1)(i). See §§ 1.170A-6(c)(2)(ii)(E), 20.2055-2(e)(2)(vii)(f), and 25.2522(c)-3(c)(2)(vii)(f). These prohibitions are contained in the sample trust in section 7. See section 8.06 for a further discussion of the 60 percent test.

- (2) *Payment requirements.* CLUTs are not subject to any minimum or maximum payout requirements. The governing instrument of a CLUT must provide for the payment to a charitable organization, not less often than annually, of a fixed percentage of the net fair market value of the assets of the trust, valued annually. Alternatively, the governing instrument of a CLUT may provide for a unitrust amount that is initially stated as a fixed percentage amount but increases or decreases during the unitrust period, provided that the value of the unitrust interest is ascertainable at the time the trust is funded. The unitrust payments may be made in cash or in kind. If the trustee distributes appreciated property in satisfaction of the required unitrust payment, the donor will realize capital gain on the assets distributed to satisfy part or all of the unitrust payment.
- (3) *Rule against perpetuities.* An interest payable for a specified term of years may qualify as a unitrust interest even if the governing instrument contains a savings clause intended to ensure compliance with a rule against perpetuities. However, any such savings clause must utilize a period of vesting of not more than 21 years after the deaths of measuring lives who are selected to maximize, rather than limit, the term of the trust. Sections 1.170A-6(c)(2)(ii)(A), 20.2055-2(e)(2)(vii)(a), and 25.2522(c)-3(c)(2)(vii)(a).
- (4) *Permissible term.* Paragraph 2, Payment of Unitrust Amount, of the sample trust in section 7 provides for payment of the unitrust amount for a specified term of years. Alternatively, the trust instrument may provide for payment of the unitrust amount for the life or lives of one or more measuring lives or for the life or lives of one or more measuring lives plus a term of years. Rev. Rul. 85-49, 1985-1 C.B. 330. Only one or more of the following individuals may be used as measuring lives: the donor, the donor's spouse, and an individual who, with respect to all remainder beneficiaries (other than charitable organizations described in § 170, 2055, or 2522), is either a lineal ancestor or the spouse of a lineal ancestor of those beneficiaries. Each person used as a measuring life for the unitrust period must be living on the date assets are transferred to the trust. Sections 1.170A-6(c)(2)(ii)(A), 20.2055-2(e)(2)(vii)(a) and 25.2522(c)-3(c)(2)(vii)(a). See section 9.01 for an alternate provision that provides for a unitrust period based on the life of an individual.
- (5) *Permissible recipients.* A CLUT must have one or more charitable lead beneficiaries. The failure to designate a specific charitable beneficiary will not preclude the donor from receiving a charitable deduction if the trust instrument provides for the selection by the trustee of a charitable beneficiary described in §§ 170(c), 2055(a), and 2522(a). Rev. Rul. 78-101, 1978-1 C.B. 301. If it is determined that a deduction under § 2055(a) will not be necessary in any event, all references to § 2055(a) in the trust instrument may be deleted. Note that if the donor is serving as trustee of the trust, the trustee's power to select the charitable beneficiaries will cause the gift of the unitrust interest to be incomplete for gift tax purposes and will cause some or all of the trust property (depending on the date of the donor's death) to be included in the donor's gross estate. See §§ 2035(a), 2036(a)(2), and 2038(a)(1), and § 25.2511-2(c). Further note that if the charitable beneficiary is a private foundation and the donor is an officer or director of the private foundation or possesses certain decision making authority in the private foundation, some or all of the trust property may be included in the donor's gross estate. See § 2036(a)(2). See section 9.02 for an alternate provision that provides for a donor's retained right to substitute the charitable beneficiary. See section 9.03 for an alternate provision that provides the trustee with the power to apportion the unitrust amount among charitable beneficiaries. See section 9.04 for an alternate provision that provides for the designation of an alternate charitable beneficiary in the trust instrument.
- (6) *Payment of unitrust amount in installments.* Paragraph 2, Payment of Unitrust Amount, of the sample trust in section 7 specifies that the unitrust amount is to be paid in equal quarterly installments at the end of each calendar quarter. Alternatively, the trust instrument may specify that the unitrust amount is to be paid in annual or other equal or unequal installments throughout the year. See §§ 1.170A-6(c)(2)(ii)(A), 20.2055-2(e)(2)(vii)(a), and 25.2522(c)-3(c)(2)(vii)(a). The amount of the charitable deduction will be affected by the frequency of the payment, by whether the installments are equal or unequal, and by whether each installment is payable at the beginning or end of the period. See §§ 1.170A-6, 25.2512-5, and 20.2031-7.
- (7) *Excess income.* Trust income in excess of the amount required to pay the unitrust amount may be retained by the trust or distributed to the charitable beneficiary. The sample trust in section 7 provides for the retention of excess income by the trust. If, instead, the governing instrument of a grantor charitable lead trust provides for the payment of excess income to or for the use of the charitable beneficiary, the donor will receive an income tax charitable deduction each year for amounts paid to a charitable beneficiary to the extent that such amounts exceed the unitrust amount. Section 1.170A-6(d)(2)(ii). However, the donor is not entitled to any additional estate or gift tax charitable deductions for the excess amounts of income distributed to the charitable beneficiary. See §§ 20.2055-2(e)(2)(vii)(d) and 25.2522(c)-3(c)(2)(vii)(d). See Situation 2 of Rev. Rul. 88-82, 1988-2 C.B. 336, for the gift tax consequences of the payment of excess income to a noncharitable beneficiary. See section 8.06 for the private foundation rules applicable to charitable lead trusts.
- (8) *Payment of part of unitrust for private purposes.* In general, no part of a charitable lead unitrust interest may be payable for a private purpose before the expiration of all charitable lead unitrust interests. However, there are two exceptions to this rule. The first exception arises when the amount payable for a private purpose is in the form of a unitrust interest and the trust's governing instrument does not provide for any preference or priority in the payment of the private unitrust as opposed to the charitable unitrust. The second exception arises when, under the trust's governing instrument, the amount that may be paid for a private purpose is payable only from a group of assets that is devoted exclusively to private purposes and to which § 4947(a)(2) is inapplicable by reason of § 4947(a)(2)(B). Note that an amount is not deemed to have

been paid for a private purpose if it was paid for full and adequate consideration in money or money's worth. Sections 1.170A-6(c)(2)(ii)(E), 20.2055-2(e)(2)(vii)(e), and 25.2522(c)-3(c)(2)(vii)(e). See section 8.06 for the private foundation rules applicable to charitable lead trusts.

- (9) *Valuation date.* Paragraph 2, Payment of Unitrust Amount, of the sample trust in section 7 specifies that the net fair market value of trust assets is to be valued as of the first day of each taxable year of the trust. However, the value of the trust assets may be determined on any one date during the taxable year of the trust, or by taking the average of valuations made on more than one date during the taxable year of the trust, so long as the same valuation date or dates and the same valuation methods are used each year. If the governing instrument does not specify the valuation date or dates, the trustee must select the date or dates and indicate the selection on the first Form 1041, *U.S. Income Tax Return for Estates and Trusts*, that the trust must file. Sections 1.170A-6(c)(2)(ii)(A), 20.2055-2(e)(2)(vii)(a), and 25.2522(c)-3(c)(2)(vii)(a). Note that if the valuation date is a date other than the first day of each taxable year of the trust, it may be necessary to modify the provisions in the sample trust regarding: (i) the timing of the payment of the unitrust amount; (ii) the proration of the unitrust amount in a short taxable year and the last taxable year of the unitrust period; and (iii) additional contributions.

.03 Annotation for Paragraph 3, Proration of Unitrust Amount, of the Sample Trust in Section 7.

- (1) *Prorating the unitrust amount.* Paragraph 3, Proration of Unitrust Amount, of the sample trust in section 7 provides for the proration of the unitrust amount in any short taxable year, including the last year of the unitrust period.

.04 Annotation for Paragraph 4, Distribution Upon Termination of Unitrust Period, of the Sample Trust in Section 7.

- (1) *Generation-skipping transfer tax.* The GST tax may apply if a CLUT has or may have a skip person, as defined in § 2613(a), as a remainder beneficiary. Under § 2651(f)(3), a charitable organization is deemed to be in the same generation as the donor of a charitable lead trust. Therefore, the GST potential of a charitable lead trust is dependent upon whether any noncharitable beneficiary is a skip person. GST tax liability is determined by multiplying the taxable amount by the applicable rate. The applicable rate is the inclusion ratio multiplied by the maximum federal estate tax rate. Section 2641(a). Note that the rules set forth in § 2642(e) for determining the inclusion ratio of certain charitable lead trusts do not apply to CLUTs.

.05 Annotation for Paragraph 5, Additional Contributions, of the Sample Trust in Section 7.

- (1) *Identity of additional contributors.* For purposes of qualification under this revenue procedure, only a donor or a donor's estate may make an additional contribution to the trust. See section 8.01(7) of this revenue procedure for examples of who may be a donor of a CLUT.
- (2) *Option to prohibit additional contributions.* Paragraph 5, Additional Contributions, of the sample trust in section 7 provides rules for determining the unitrust amount payable in a year during which an additional contribution is made to the trust. However, paragraph 5 of the trust instrument may instead be drafted to prohibit contributions to the trust after the initial contribution.
- (3) *Proration of additional contributions.* Paragraph 5, Additional Contributions, of the sample trust in section 7 provides a formula for determining the unitrust amount in each year that an additional contribution is made to the CLUT. The formula incorporates a proration provision for additions made in a short taxable year.
- (4) *Valuation date in year of additional contribution.* Paragraph 2, Payment of Unitrust Amount, of the sample trust in section 7 specifies a January 1 valuation date for the trust. The formula contained in paragraph 5, Additional Contributions, of the sample trust may be used when January 1 or any other single date during the taxable year is selected as the valuation date for a CLUT. Note, however, that if a single date other than January 1 is selected as the valuation date for a CLUT, the formulas in both paragraphs 2 and 5 of the sample trust for computing the unitrust amount will be deficient unless the trust instrument addresses the possibility that the unitrust period may end before the valuation date, for instance, by providing that in a year in which the unitrust period ends before the valuation date, the valuation date for purposes of paragraph 2 and paragraph 5 shall be the last day of the unitrust period. In addition, if the trust instrument is drafted to provide for the valuation of trust assets by averaging the valuations as of multiple specified dates during the trust year, the additional contributions formula must be modified.

.06 Annotation for Paragraph 6, Prohibited Transactions, of the Sample Trust in Section 7.

- (1) *Prohibitions against certain investments and excess business holdings.* Prohibitions against retaining any excess business holdings within the meaning of § 4943, as modified by §§ 4947(a)(2) and 4947(b)(3), and against investments that jeopardize the exempt purpose of the trust within the meaning of § 4944, as modified by §§ 4947(a)(2) and 4947(b)(3) are generally required. The sample trust in section 7 contains prohibitions against §§ 4943 and 4944 transactions. If the present

value of the charitable interest does not exceed 60 percent of the aggregate value of all amounts in the trust, the trust instrument does not provide for the payment of any of the income interest to a noncharitable beneficiary, and the trust instrument does not provide for the payment of excess income to a noncharitable beneficiary, the references to §§ 4943 and 4944 may be removed from the trust instrument. Section 4947(b)(3)(A) and § 53.4947-2(b)(1)(i). See §§ 1.170A-6(c)(2)(ii)(E), 20.2055-2(e)(2)(vii)(f), and 25.2522(c)-3(c)(2)(vii)(f). See section 8.02(7) for a discussion of the payment of excess trust income to a noncharitable beneficiary. See section 8.02(8) for a discussion of the payment of part of the unitrust for a private purpose.

.07 Annotation for paragraph 7, Taxable Year, of the Sample Trust in Section 7.

- (1) *Calendar year.* The taxable year of a charitable lead trust must be a calendar year. Section 644(a).

.08 Annotation for paragraph 10, Investment of Trust Assets, of the Sample Trust in Section 7.

- (1) *Capital gains.* Gains from the sale or exchange of capital assets may be allocated to the income or the principal of the trust. If the governing instrument is silent, capital gains are allocated in accordance with local law.

.09 Annotation for Paragraph 11, Retained Powers and Interests, of the Sample Trust in Section 7.

- (1) *Power to substitute trust assets.* The donor to a CLUT may claim an income tax charitable deduction under § 170(a) if the donor is treated as the owner of the entire CLUT under the provisions of subpart E, part I, subchapter J, chapter 1, subtitle A of the Code. Paragraph 11, Retained Powers and Interests, of the sample trust in section 7 creates a grantor CLUT through the use of a power to substitute trust assets under § 675(4) that is held by a person other than the donor, the trustee, or a disqualified person as defined in § 4946(a)(1), and is exercisable only in a nonfiduciary capacity. The circumstances surrounding the administration of a CLUT will determine whether a § 675(4) substitution power is exercised in a fiduciary or nonfiduciary capacity. This is a question of fact. Note, that the exercise of a § 675(4) power may result in an act of self-dealing under § 4941.
- (2) *Other powers or provisions to create a grantor trust.* As noted above, the sample trust in section 7 includes a § 675(4) power that is held by someone other than donor, the trustee, or a disqualified person as defined in § 4946(a)(1), and that may be exercised only in a nonfiduciary capacity. The CLUT instrument may instead incorporate a power or provision, other than the one provided in the sample trust in section 7, that will cause the donor to be treated as the owner of the entire CLUT under the provisions of subpart E, part I, subchapter J, chapter 1, subtitle A of the Code. See § 671 *et seq.* However, practitioners should exercise caution when choosing a particular power or provision because certain methods of creating a grantor trust may have unforeseen tax consequences.

SECTION 9. ALTERNATE PROVISIONS FOR SAMPLE INTER VIVOS GRANTOR CHARITABLE LEAD UNITRUST

.01 Unitrust Period for the Life of One Individual.

- (1) *Explanation.* As an alternative to establishing a CLUT for a term of years, the trust instrument of a grantor CLUT may provide for payment of the unitrust amount for the life or lives of an individual or individuals. However, only one or more of the following individuals may be used as measuring lives: the donor, the donor's spouse, and an individual who, with respect to all remainder beneficiaries (other than charitable organizations described in § 170, 2055, or 2522), is either a lineal ancestor or the spouse of a lineal ancestor of those beneficiaries. A trust will satisfy the requirement that each measuring life is a lineal ancestor (or the spouse of a lineal ancestor) of all noncharitable remainder beneficiaries if there is a less than 15 percent probability at the time of the contribution to the trust that individuals who are not lineal descendants of an individual who is a measuring life will receive any trust principal. The probability must be computed under the applicable tables in § 20.2031-7. Sections 1.170A-6(c)(2)(ii)(A), 20.2055-2(e)(2)(vii)(a), and 25.2522(c)-3(c)(2)(vii)(a).
- (2) *Instruction for use.* Replace the fifth and sixth sentences of paragraph 2, Payment of Unitrust Amount, of the sample trust in section 7 with the following sentences:
The unitrust period is the lifetime of [*designated measuring life*]. The first day of the unitrust period shall be the date property is first transferred to the trust, and the last day of the unitrust period shall be the date of death of [*designated measuring life*].

.02 Retention of the Right to Substitute the Charitable Lead Beneficiary.

- (1) *Explanation.* The donor to a grantor CLUT may retain the right to substitute another charitable beneficiary for the charitable beneficiary named in the trust instrument and still claim a deduction under § 170(a) in the year of the transfer to the CLUT.

Note, however, that the retention of this right will cause the gift of the unitrust interest to be incomplete for gift tax purposes and will cause some or all of the trust property (depending on the date of the donor's death) to be included in the donor's gross estate. See §§ 2035, 2036(a)(2), and 2038(a)(1) and § 25.2511-2(c). See section 8.01(3) for a discussion of the income tax deductibility limitations applicable to contributions to a grantor CLUT.

- (2) *Instruction for use.* Replace the third sentence of paragraph 2, Payment of Unitrust Amount, of the sample trust in section 7 with the following two sentences:

Notwithstanding the preceding sentences, the Donor reserves the right to designate as the charitable recipient, at any time and from time to time, in lieu of [*designated charitable recipient named above*], one or more organizations described in §§ 170(c), 2055(a), and 2522(a) and shall make any such designation by giving written notice to the Trustee. The term "the Charitable Organization" shall be used herein to refer collectively to the organization(s) then constituting the charitable recipient, whether named in this paragraph or subsequently selected as the substitute charitable recipient.

.03 Apportionment of the Unitrust Amount in the Discretion of the Trustee.

- (1) *Explanation.* The donor or the trustee of a grantor charitable lead trust may be granted the power to apportion the unitrust payment from time to time among a class of qualifying charitable beneficiaries. Note that a retained power of apportionment by the donor will cause the gift of the unitrust interest to be incomplete for gift tax purposes and will cause some or all of the trust property to be included in the donor's gross estate. See §§ 2035(a), 2036(a)(2), and 2038(a)(1), and § 25.2511-2(c).
- (2) *Instruction for use.* Replace the first three sentences of paragraph 2, Payment of Unitrust Amount, of the sample trust in section 7 with the following two sentences:

For each taxable year of the trust during the unitrust period, the Trustee shall pay to one or more members of a class comprised of organizations described in §§ 170(c), 2055(a), and 2522(a) (hereinafter, collectively "the Charitable Organization") a unitrust amount equal to [*number representing the annual unitrust percentage to be paid to the Charitable Organization*] percent of the net fair market value of the assets of the trust, valued as of the first day of each taxable year of the trust (hereinafter the "valuation date"). The Trustee may pay the unitrust amount to one or more members of the class, in equal or unequal shares, as the Trustee, in the Trustee's sole discretion, from time to time may deem advisable.

.04 Designation of an Alternate Charitable Beneficiary in the Trust Instrument.

- (1) *Explanation.* The sample trust in section 7 provides that, if the charitable beneficiary designated in the trust instrument is not an organization described in §§ 170(c), 2055(a), and 2522(a) at the time any payment is to be made to it, the trustee shall distribute such payments to one or more organizations described in §§ 170(c), 2055(a), and 2522(a) as the trustee shall select. As an alternative, the trust instrument may specifically designate one or more alternate charitable beneficiaries. See section 8.01(3) for a discussion of the income tax deductibility limitations applicable to contributions to a grantor CLUT.
- (2) *Instruction for use.* Replace the second sentence in paragraph 2, Payment of Unitrust Amount, of the sample trust in section 7 with the following two sentences:

If [*designated charitable recipient*] is not an organization described in §§ 170(c), 2055(a), and 2522(a) at the time any payment is to be made to it, the Trustee shall instead distribute such payments to [*designated substitute charitable recipient*]. If neither [*designated charitable recipient*] nor [*designated substitute charitable recipient*] is an organization described in §§ 170(c), 2055(a), and 2522(a) at the time any payment is to be made to it, the Trustee shall distribute such payments to one or more organizations described in §§ 170(c), 2055(a), and 2522(a) as the Trustee shall select, and in such proportions as the Trustee shall decide, from time to time, in the Trustee's sole discretion.

SECTION 10. DRAFTING INFORMATION

The principal author of this revenue procedure is Stephanie N. Bland of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue procedure, contact Stephanie N. Bland at (202) 622-3130 or James F. Hogan at (202) 622-3090.

Rev. Proc. 2008-46

SECTION 1. PURPOSE

This revenue procedure contains an annotated sample declaration of trust and alternate provisions that meet the requirements for a testamentary charitable lead unitrust (CLUT) providing for unitrust payments payable to one or more charitable beneficiaries for the unitrust period followed by the distribution of trust assets to one or more noncharitable remaindermen.

SECTION 2. BACKGROUND

The Internal Revenue Service (Service) is issuing sample forms for CLUTs; annotations and alternate sample provisions are included as further guidance. In addition to the sample trust instrument for a testamentary CLUT that is included in this revenue procedure, samples are provided in a separate revenue procedure for grantor and nongrantor inter vivos CLUTs (see Rev. Proc. 2008-45).

SECTION 3. SCOPE

A CLUT is an irrevocable split-interest trust that provides for a specified amount to be paid to one or more charitable beneficiaries during the term of the trust. The principal remaining in the trust at the end of the term is paid over to, or held in a continuing trust for, a noncharitable beneficiary or beneficiaries identified in the trust. If the terms of a CLUT created on the decedent's death satisfy the applicable statutory and regulatory requirements, the value of the charitable lead unitrust interest will be deductible by the decedent's estate under § 2055(e)(2)(B) and payments of the unitrust amount to the charitable lead beneficiary will be deductible from the gross income of the trust to the extent provided by § 642(c)(1).

A testamentary CLUT is subject to the provisions of part I, subchapter J of chapter 1 of subtitle A of the Internal Revenue Code (Code). Under the provisions of part I of subchapter J, a CLUT is allowed a deduction under § 642(c)(1) in determining its taxable income for any amount of gross income paid for purposes specified in § 170(c).

Section 4 of this revenue procedure provides a sample declaration of trust for a testamentary CLUT with a term of years unitrust period that is created by a decedent who was a citizen or resident of the United States. Section 5 of this revenue procedure provides annotations to the provisions of the sample trust. Section 6 of this revenue procedure provides samples of certain alternate provisions concerning: (.01) a unitrust period for the life of one individual; (.02) apportionment of the unitrust amount in the discretion of the trustee; and (.03) designation of an alternate charitable beneficiary in the trust instrument. If a trust is substantially similar to the sample trust in section 4 of this revenue procedure or properly integrates one or more alternate provisions from section 6 into a document substantially similar to the sample trust in section 4, is a valid trust under applicable local law, and operates in a manner consistent with the terms of the instrument, and if all other deductibility requirements are satisfied, the value of the charitable lead interest will be deductible by the decedent's estate under § 2055(e)(2)(B) and payments of the unitrust amount to the charitable lead beneficiary will be deductible from the gross income of the trust to the extent provided by § 642(c)(1). In addition, a testamentary CLUT will qualify for the safe harbor created under this revenue procedure if the trust satisfies all of the requirements set forth in the preceding sentence, except that it defines the unitrust amount as a varying percentage amount for which the value is ascertainable at the creation of the trust and/or provides for a different disposition of trust assets upon the termination of the unitrust period.

Except as provided above, a trust that contains substantive provisions in addition to those provided in section 4 of this revenue procedure (other than properly integrated alternate provisions from section 6 of this revenue procedure or provisions necessary to establish a valid trust under applicable local law that are not inconsistent with the applicable federal tax requirements), or that omits any of the provisions of section 4 of this revenue procedure (unless an alternate provision from section 6 of this revenue procedure is properly integrated), will not necessarily be ineligible for the relevant charitable deduction(s), but neither will that trust (or contributions to it) be assured of qualification for the appropriate charitable deductions. The Service generally will not issue a letter ruling on whether a testamentary CLUT qualifies for income and estate tax charitable deductions. The Service, however, generally will issue letter rulings relating to the tax consequences of the inclusion in a CLUT of substantive trust provisions other than those contained in sections 4 and 6 of this revenue procedure.

SECTION 4. SAMPLE TESTAMENTARY CHARITABLE LEAD UNITRUST

I give, devise, and bequeath [*property bequeathed*] to my Trustee in trust to be administered under this provision. I intend this bequest to establish a charitable lead unitrust, within the meaning of Rev. Proc. 2008-46. This trust shall be known as the _____ Charitable Lead Unitrust, and I hereby designate _____ as the initial trustee (hereinafter "the Trustee"). All references to "section" or "§" in this instrument shall refer to the Internal Revenue Code of 1986, 26 U.S.C. § 1, *et seq.*

1. *Payment of Unitrust Amount.* For each taxable year of the trust during the unitrust period, the Trustee shall pay to [designated charitable recipient] a unitrust amount equal to [number representing the annual unitrust percentage to be paid to the designated charitable recipient] percent of the net fair market value of the assets of the trust, valued as of the first day of each taxable year of the trust (hereinafter “the valuation date”). If [designated charitable recipient] is not an organization described in §§ 170(c) and 2055(a) at the time any payment is to be made to it, the Trustee shall instead distribute such payments to one or more organizations described in §§ 170(c) and 2055(a) as the Trustee shall select, and in such proportions as the Trustee shall decide, from time to time, in the Trustee’s sole discretion. The term “the Charitable Organization” shall be used herein to refer collectively to the organization(s) then constituting the charitable recipient, whether named in this paragraph or subsequently selected as the substitute charitable recipient. During the trust term, no payment shall be made to any person other than the Charitable Organization. The unitrust period is a term of [number of years of unitrust period] years. The first day of the unitrust period shall be the date of my death, and the last day of the unitrust period shall be the day preceding the [ordinal number corresponding to the length of the unitrust period] anniversary of that date. The unitrust amount shall be paid in equal quarterly installments at the end of each calendar quarter from income and, to the extent income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal. If for any year the net fair market value of the trust assets is incorrectly determined, then within a reasonable period after the correct value is finally determined, the Trustee shall pay to the Charitable Organization (in the case of an undervaluation) or receive from the Charitable Organization (in the case of an overvaluation) an amount equal to the difference between the unitrust amount(s) properly payable and the unitrust amount(s) actually paid.

2. *Deferral Provision.* The obligation to pay the unitrust amount shall commence with the date of my death, but payment of the unitrust amount may be deferred from this date until the end of the taxable year in which the trust is completely funded. Within a reasonable time after the end of the taxable year in which the trust is completely funded, the Trustee must pay to the Charitable Organization the difference between any unitrust amounts actually paid and the unitrust amounts payable, plus interest. The interest for any period shall be computed at the § 7520 rate of interest in effect for the date of my death. All interest shall be compounded annually.

3. *Proration of Unitrust Amount.* For any short taxable year, including the taxable year in which the unitrust period ends, the Trustee shall prorate the unitrust amount on a daily basis for the number of days of the unitrust period in that taxable year.

4. *Distribution Upon Termination of Unitrust Period.* At the termination of the unitrust period, the Trustee shall distribute all of the then remaining principal and income of the trust (other than any amount due to the Charitable Organization under the provisions above) to [remainder beneficiary].

5. *Additional Contributions.* No additional contributions shall be made to the trust after the initial contribution. The initial contribution, however, shall be deemed to consist of all property passing to the trust by reason of my death.

6. *Prohibited Transactions.* The Trustee shall not engage in any act of self-dealing within the meaning of § 4941(d), as modified by § 4947(a)(2), and shall not make any taxable expenditures within the meaning of § 4945(d), as modified by § 4947(a)(2). The Trustee shall not retain any excess business holdings that would subject the trust to tax under § 4943, as modified by §§ 4947(a)(2) and 4947(b)(3). In addition, the Trustee shall not acquire any assets that would subject the trust to tax under § 4944, as modified by §§ 4947(a)(2) and 4947(b)(3), or retain assets which, if acquired by the Trustee, would subject the Trustee to tax under § 4944, as modified by §§ 4947(a)(2) and 4947(b)(3).

7. *Taxable Year.* The taxable year of the trust shall be the calendar year.

8. *Governing Law.* The operation of the trust shall be governed by the laws of the State of _____. However, the Trustee is prohibited from exercising any power or discretion granted under said laws that would be inconsistent with the requirements for the charitable deductions available to a charitable lead unitrust or for contributions to a charitable lead unitrust.

9. *Limited Power of Amendment.* This trust is irrevocable. However, the Trustee shall have the power, acting alone, to amend the trust from time to time in any manner required for the sole purpose of ensuring that the unitrust interest passing to the Charitable Organization is a unitrust interest under § 2055(e)(2)(B) and the regulations thereunder and that payments of the unitrust amount to the Charitable Organization will be deductible from the gross income of the trust to the extent provided by § 642(c)(1) and the regulations thereunder.

10. *Investment of Trust Assets.* Except as provided in paragraph 6 herein, nothing in this trust instrument shall be construed to restrict the Trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

SECTION 5. ANNOTATIONS REGARDING SAMPLE TESTAMENTARY CHARITABLE LEAD UNITRUST

.01 Annotations for Introductory Paragraph of the Sample Trust.

- (1) *Income taxation of testamentary charitable lead trusts.* A testamentary CLUT is a complex trust that is taxable as a separate entity under the provisions of subchapter J of the Code. The trustee of the trust must apply for a tax identification number for the trust.

- (2) *Deduction under § 642(c)(1) available for amounts paid for a charitable purpose.* Under § 642(c)(1), a testamentary CLUT is allowed a deduction in computing its taxable income for any amount of gross income, without limitation, that under the terms of the trust instrument is paid for a purpose specified in § 170(c) (determined without regard to § 170(c)(2)(A)) during the taxable year. Section 642(c)(1) and § 1.642(c)-1(a). An amount paid to a corporation, trust, or community chest, fund, or foundation otherwise described in § 170(c)(2) shall be considered paid for a purpose described in § 170(c) even though the corporation, trust, or community chest, fund, or foundation is not created or organized in the United States, any state, the District of Columbia, or any possession of the United States. Section 1.642(c)-1(a)(2). With regard to amounts of income paid to the charitable beneficiary after the close of the taxable year in which the income was received (but on or before the last day of the next succeeding taxable year), the trustee of a testamentary CLUT may elect to take the charitable deduction for that payment for the year in which the income was received, rather than for the year in which the payment was made. Section 642(c)(1). The election is made by filing a statement with the income tax return for the taxable year in which the charitable contribution is treated as paid. See § 1.642(c)-1(b).
- (3) *Charitable lead beneficiary requirements.* A deduction is allowed under § 642(c)(1) for any amount of the gross income of a testamentary CLUT that is paid for a purpose specified in § 170(c). Note that the class of permissible charitable recipients for obtaining a deduction under § 642(c)(1) differs from the class of permissible charitable recipients for obtaining a deduction under § 170(a). Compare § 170(c) and § 1.642(c)-1(a)(2).
- (4) *Unrelated business taxable income.* Under § 681, a testamentary charitable lead trust's deduction under § 642(c)(1) is disallowed in any year to the extent that the deduction is allocable to the trust's unrelated business taxable income, as defined in § 512, for that taxable year. See § 1.681(a)-2. However, a partial deduction is allowed under § 512(b)(11) for amounts allocable to unrelated business taxable income. Section 512(b)(11). See § 512(b)(12) and § 1.681(a)-2(a).
- (5) *Computation of estate tax charitable deduction.* In general, the estate tax charitable deduction available under § 2055(e)(2)(B) with respect to contributions to a CLUT is equal to the present value of the unitrust interest. Section 20.2055-2(f)(1). Section 7520 requires that a unitrust interest must be valued using tables published by the Service. The method for valuing a charitable lead unitrust interest is set forth in the regulations. See § 20.7520-2. If estate or other death taxes are paid from the assets used to fund a testamentary CLUT, the amount deductible under § 2055 is the amount that passes to charity, reduced by the amount of estate or death taxes paid. Section 2055(c).
- (6) *Trustee provisions.* The trust instrument may name alternate or successor trustees and/or may include a process for the appointment of unnamed alternate or successor trustees. In addition, the trust instrument may contain certain administrative provisions relating to the trustee's duties and powers.

.02 Annotations for Paragraph 1, Payment of Unitrust Amount, of the Sample Trust.

- (1) *Unitrust interest.* To qualify for an estate tax charitable deduction, a CLUT must provide for the payment of a unitrust amount at least annually to a qualified charitable organization for each year during the unitrust period. See § 2055(e)(2)(B). A unitrust interest is the right pursuant to the instrument of transfer to receive payment, not less often than annually, of a fixed percentage of the net fair market value, determined annually, of the property that funds the unitrust interest. Payments of a unitrust interest may be paid for a specified term or for the life or lives of certain individuals, each of whom must be living at the date of the decedent's death and can be ascertained as of such date. Section 20.2055-2(e)(2)(vii)(a). See section 5.02(4) for a discussion of the permissible term of a testamentary CLUT. An interest is a unitrust interest only if it is a unitrust interest in every respect. For example, if an interest is expressed as the right to receive an annual payment from a trust equal to the lesser of a sum certain or a fixed percentage of the net fair market value of the trust assets (determined annually), the interest is not a unitrust interest. Section 20.2055-2(e)(2)(vii)(b). See Rev. Rul. 77-300, 1977-2 C.B. 352. In addition, an interest is not a unitrust interest if the trustee has the discretion to commute and prepay the interest prior to the termination of the unitrust period. Rev. Rul. 88-27, 1988-1 C.B. 331. If a charitable interest in the form of a unitrust interest is in trust and the present value of the charitable interest on the appropriate valuation date exceeds 60 percent of the aggregate value of all amounts in the trust, the charitable interest will not be considered a unitrust interest unless the governing instrument of the trust prohibits the acquisition and retention of assets that would give rise to a tax under § 4943 or 4944, as modified by §§ 4947(a)(2) and 4947(b)(3). Section 4947(b)(3)(A) and § 53.4947-2(b)(1)(i). See § 20.2055-2(e)(2)(vii)(f). These prohibitions are contained in the sample trust. See section 5.07 for a further discussion of the 60 percent test.
- (2) *Payment requirements.* CLUTs are not subject to any minimum or maximum payout requirements. The governing instrument of a CLUT must provide for the payment to a charitable organization, not less often than annually, of a fixed percentage of the net fair market value of the assets of the trust, valued annually. Alternatively, the governing instrument of a CLUT may provide for a unitrust amount that is initially stated as a fixed percentage amount but increases or decreases during the unitrust period, provided that the value of the unitrust interest is ascertainable at the time of the decedent's death. The unitrust payments may be made in cash or in kind. If the trustee distributes appreciated property in satisfaction of the required unitrust payment, the trust will realize capital gain on the assets distributed to satisfy part or all of the unitrust payment and the trust will be allowed a § 642(c)(1) deduction for the realized capital gains. Rev. Rul. 83-75, 1983-1 C.B. 114. See

section 5.03 for a discussion of the deferral of the requirement to pay the unitrust amount until the end of the taxable year in which the trust is completely funded.

- (3) *Rule against perpetuities.* An interest payable for a specified term of years may qualify as a unitrust interest even if the governing instrument contains a savings clause intended to ensure compliance with a rule against perpetuities. However, any such savings clause must utilize a period of vesting of not more than 21 years after the deaths of measuring lives who are selected to maximize, rather than limit, the term of the trust. Section 20.2055-2(e)(2)(vii)(a).
- (4) *Permissible term.* Paragraph 1, Payment of Unitrust Amount, of the sample trust provides for payment of the unitrust amount for a specified term of years. Alternatively, the trust instrument may provide for payment of the unitrust amount for the life or lives of one or more measuring lives or for the life or lives of one or more measuring lives plus a term of years. Rev. Rul. 85-49, 1985-1 C.B. 330. Only one or more of the following individuals may be used as measuring lives: the decedent's spouse and an individual who, with respect to all remainder beneficiaries (other than charitable organizations described in § 170 or 2055), is either a lineal ancestor or the spouse of a lineal ancestor of those beneficiaries. Each person used as a measuring life for the unitrust period must be living on the decedent's date of death. Section 20.2055-2(e)(2)(vii)(a). See section 6.01 for an alternate provision that provides for a unitrust period based on the life of an individual.
- (5) *Permissible recipients.* A CLUT must have one or more charitable lead beneficiaries. The failure to designate a specific charitable beneficiary will not preclude the decedent's estate from receiving a charitable deduction if the trust instrument provides for the selection by the trustee of a charitable beneficiary described in §§ 170(c) and 2055(a). Rev. Rul. 78-101, 1978-1 C.B. 301. See section 6.02 for an alternate provision that provides the trustee with the power to apportion the unitrust amount among charitable beneficiaries. See section 6.03 for an alternate provision that provides for the designation of an alternate charitable beneficiary in the trust instrument.
- (6) *Payment of unitrust amount in installments.* Paragraph 1, Payment of Unitrust Amount, of the sample trust specifies that the unitrust amount is to be paid in equal quarterly installments at the end of each calendar quarter. Alternatively, the trust instrument may specify that the unitrust amount is to be paid in annual or other equal or unequal installments throughout the year. See § 20.2055-2(e)(2)(vii)(a). The amount of the charitable deduction will be affected by the frequency of the payment, by whether the installments are equal or unequal, and by whether each installment is payable at the beginning or end of the period. See § 20.2031-7.
- (7) *Excess income.* Trust income in excess of the amount required to pay the unitrust amount may be retained by the trust or distributed currently to the charitable beneficiary. The sample trust provides for the retention of excess income by the trust. If, instead, the governing instrument provides for the payment of excess income to or for the use of the charitable beneficiary, no additional estate tax charitable deduction is available for the excess amounts of income distributed to the charitable beneficiary. See § 20.2055-2(e)(2)(vii)(d). However, the trust is entitled to a charitable income tax deduction under § 642(c)(1) for any amounts of excess income paid to the charitable beneficiary. See Situation 2 of Rev. Rul. 88-82, 1988-2 C.B. 336, for the transfer tax consequences of the payment of excess income to a noncharitable beneficiary. See section 5.07 for the private foundation rules applicable to charitable lead trusts.
- (8) *Payment of part of unitrust for private purposes.* In general, no part of a charitable lead unitrust interest may be payable for a private purpose before the expiration of all charitable lead unitrust interests. However, there are two exceptions to this rule. The first exception arises when the amount payable for a private purpose is in the form of a unitrust interest and the trust's governing instrument does not provide for any preference or priority in the payment of the private unitrust as opposed to the charitable unitrust. The second exception arises when, under the trust's governing instrument, the amount that may be paid for a private purpose is payable only from a group of assets that is devoted exclusively to private purposes and to which § 4947(a)(2) is inapplicable by reason of § 4947(a)(2)(B). Note that an amount is not deemed to have been paid for a private purpose if it was paid for full and adequate consideration in money or money's worth. Section 20.2055-2(e)(2)(vii)(e). See section 5.07 for the private foundation rules applicable to charitable lead trusts.
- (9) *Valuation date.* Paragraph 1, Payment of Unitrust Amount, of the sample trust specifies that the net fair market value of trust assets is to be valued as of the first day of each taxable year of the trust. However, the value of the trust assets may be determined on any one date during the taxable year of the trust, or by taking the average of valuations made on more than one date during the taxable year of the trust, so long as the same valuation date or dates and the same valuation methods are used each year. If the governing instrument does not specify the valuation date or dates, the trustee must select the date or dates and indicate the selection on the first Form 1041, *U.S. Income Tax Return for Estates and Trusts*, that the trust must file. Section 20.2055-2(e)(2)(vii)(a). Note that if the valuation date is a date other than the first day of each taxable year of the trust, it may be necessary to modify the provisions in the sample trust regarding (i) the timing of the payment of the unitrust amount and (ii) the proration of the unitrust amount in a short taxable year and the last taxable year of the unitrust period.
- (10) *Ordering rules.* A provision in the governing instrument of a charitable lead trust that provides for the payment to charity to consist of different classes of income determined on a non *pro rata* basis will not be respected because such a provision does not have economic effect independent of the income tax consequences of the payment. See § 1.642(c)-3(b)(2) and (3).

.03 Annotations for Paragraph 2, Deferral Provision, of the Sample Trust.

- (1) *Deferral of requirement to pay unitrust amount.* The deferral provision in paragraph 2 of the sample trust authorizes the trustee to defer the payment of the unitrust amount until the end of the taxable year of the trust in which the trust is completely funded.
- (2) *Interest on unitrust payments.* The deferral provision in paragraph 2 of the sample trust provides for the payment of interest, compounded annually, with respect to any underpayment of the unitrust amount during the period of estate administration. The sample trust requires that interest be computed at the § 7520 rate in effect on the date of the decedent's death. To the extent that interest payable under state law exceeds the applicable § 7520 rate, the payment of interest at the rate prescribed by state law will be deemed to satisfy the interest payment requirement set forth in the trust instrument.

.04 Annotation for Paragraph 3, Proration of Unitrust Amount, of the Sample Trust.

- (1) *Prorating the unitrust amount.* Paragraph 3, Proration of Unitrust Amount, of the sample trust provides for the proration of the unitrust amount in any short taxable year, including the last year of the unitrust period.

.05 Annotation for Paragraph 4, Distribution Upon Termination of Unitrust Period, of the Sample Trust.

- (1) *Generation-skipping transfer tax.* The generation-skipping transfer (GST) tax may apply if a CLUT has or may have a skip person, as defined in § 2613(a), as a remainder beneficiary. Under § 2651(f)(3), a charitable organization is deemed to be in the same generation as the decedent/donor of a charitable lead trust. Therefore, the GST potential of a charitable lead trust is dependent upon whether any noncharitable beneficiary is a skip person. GST tax liability is determined by multiplying the taxable amount by the applicable rate. The applicable rate is the inclusion ratio multiplied by the maximum federal estate tax rate. Section 2641(a). Note that the rules set forth in § 2642(e) for determining the inclusion ratio of certain charitable lead trusts do not apply to CLUTs.

.06 Annotation for Paragraph 5, Additional Contributions, of the Sample Trust.

- (1) *Additions to the trust.* For purposes of qualification under this revenue procedure, the trust instrument must contain a provision that prohibits additional contributions. A CLUT that permits additional contributions will not qualify for safe harbor treatment under this revenue procedure.

.07 Annotation for Paragraph 6, Prohibited Transactions, of the Sample Trust.

- (1) *Prohibitions against certain investments and excess business holdings.* Prohibitions against retaining any excess business holdings within the meaning of § 4943, as modified by §§ 4947(a)(2) and 4947(b)(3), and against investments that jeopardize the exempt purpose of the trust within the meaning of § 4944, as modified by §§ 4947(a)(2) and 4947(b)(3), are generally required. The sample trust contains prohibitions against §§ 4943 and 4944 transactions. If the present value of the charitable interest does not exceed 60 percent of the aggregate value of all amounts in the trust, the trust instrument does not provide for the payment of any of the income interest to a noncharitable beneficiary, and the trust instrument does not provide for the payment of excess income to a noncharitable beneficiary, the references to §§ 4943 and 4944 may be removed from the trust instrument. Section 4947(b)(3) and §§ 53.4947-2(b)(1)(i) and 20.2055-2(e)(2)(vii)(f). See section 5.02(7) for a discussion of the payment of excess trust income to a noncharitable beneficiary. See section 5.02(8) for a discussion of the payment of part of the unitrust for a private purpose.

.08 Annotation for paragraph 7, Taxable Year, of the Sample Trust.

- (1) *Calendar year.* The taxable year of a charitable lead trust must be a calendar year. Section 644(a).

.09 Annotation for paragraph 10, Investment of Trust Assets, of the Sample Trust.

- (1) *Capital gains.* Gains from the sale or exchange of capital assets may be allocated to the income or the principal of the trust. If the governing instrument is silent, capital gains are allocated in accordance with local law. Even if gains are allocated to principal, they will be deductible under § 642(c)(1) if they are paid to the charitable beneficiary as part of a charitable unitrust payment. Rev. Rul. 83-75, 1983-1 C.B. 114.

SECTION 6. ALTERNATE PROVISIONS FOR SAMPLE TESTAMENTARY CHARITABLE LEAD UNITRUST

.01 Unitrust Period for the Life of One Individual.

- (1) *Explanation.* As an alternative to establishing a CLUT for a term of years, the trust instrument of a testamentary CLUT may provide for payment of the unitrust amount for the life or lives of an individual or individuals. However, only one or more of the following individuals may be used as measuring lives: the decedent's spouse and an individual who, with respect to all remainder beneficiaries (other than charitable organizations described in § 170 or 2055), is either a lineal ancestor or the spouse of a lineal ancestor of those beneficiaries. A trust will satisfy the requirement that each measuring life is a lineal ancestor (or the spouse of a lineal ancestor) of all noncharitable remainder beneficiaries if on the decedent's date of death there is a less than 15 percent probability that individuals who are not lineal descendants of an individual who is a measuring life will receive any trust principal. The probability must be computed under the applicable tables in § 20.2031-7. Section 20.2055-2(e)(2)(vii)(a).
- (2) *Instruction for use.* Replace the fifth and sixth sentences of paragraph 1, Payment of Unitrust Amount, of the sample trust with the following sentences:

The unitrust period is the lifetime of [*designated measuring life*]. The first day of the unitrust period shall be the date of my death, and the last day of the unitrust period shall be the date of death of [*designated measuring life*].

.02 Apportionment of the Unitrust Amount in the Discretion of the Trustee.

- (1) *Explanation.* The trustee of a testamentary charitable lead trust may be granted the power to apportion the unitrust payment from time to time among a class of qualifying charitable beneficiaries. See §674(b)(4).
- (2) *Instruction for use.* Replace the first three sentences of paragraph 1, Payment of Unitrust Amount, of the sample trust with the following two sentences:

For each taxable year of the trust during the unitrust period, the Trustee shall pay to one or more members of a class comprised of organizations described in §§ 170(c) and 2055(a) (hereinafter, collectively “the Charitable Organization”) a unitrust amount equal to [*number representing the annual unitrust percentage to be paid to the Charitable Organization*] percent of the net fair market value of the assets of the trust, valued as of the first day of each taxable year of the trust (hereinafter “the valuation date”). The Trustee may pay the unitrust amount to one or more members of the class, in equal or unequal shares, as the Trustee, in the Trustee's sole discretion, from time to time may deem advisable.

.03 Designation of an Alternate Charitable Beneficiary in the Trust Instrument.

- (1) *Explanation.* The sample trust provides that, in the event the charitable beneficiary designated in the trust instrument is not an organization described in §§ 170(c) and 2055(a) at the time any payment is to be made to it, the trustee shall distribute such payments to one or more organizations described in §§ 170(c) and 2055(a) as the trustee shall select. As an alternative, the trust instrument may specifically designate one or more alternate charitable beneficiaries.
- (2) *Instruction for use.* Replace the second sentence in paragraph 1, Payment of Unitrust Amount, of the sample trust with the following two sentences:

If [*designated charitable recipient*] is not an organization described in §§ 170(c) and 2055(a) at the time any payment is to be made to it, the Trustee shall instead distribute such payments to [*designated substitute charitable recipient*]. If neither [*designated charitable recipient*] nor [*designated substitute charitable recipient*] is an organization described in §§ 170(c) and 2055(a) at the time any payment is to be made to it, the Trustee shall distribute such payments to one or more organizations described in §§ 170(c) and 2055(a) as the Trustee shall select, and in such proportions as the Trustee shall decide, from time to time, in the Trustee's sole discretion.

SECTION 7. DRAFTING INFORMATION

The principal author of this revenue procedure is Stephanie N. Bland of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue procedure, contact Stephanie N. Bland at (202) 622-3130 or James F. Hogan at (202) 622-3090.

Part IV. Items of General Interest

Announcement of Disciplinary Sanctions From the Office of Professional Responsibility

Announcement 2008-68

The Office of Professional Responsibility (OPR) announces recent disciplinary sanctions involving attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and appraisers. These individuals are subject to the regulations governing practice before the Internal Revenue Service (IRS), which are set out in Title 31, Code of Federal Regulations, Part 10, and which are published in pamphlet form as Treasury Department Circular No. 230. The regulations prescribe the duties and restrictions relating to such practice and prescribe the disciplinary sanctions for violating the regulations.

The disciplinary sanctions to be imposed for violation of the regulations are:

Disbarred from practice before the IRS—An individual who is disbarred is not eligible to represent taxpayers before the IRS.

Suspended from practice before the IRS—An individual who is suspended is not eligible to represent taxpayers before the IRS during the term of the suspension.

Censured in practice before the IRS—Censure is a public reprimand. Unlike disbarment or suspension, censure does not affect an individual's eligibility to represent taxpayers before the IRS, but OPR may subject the individual's future representations to conditions designed to promote high standards of conduct.

Monetary penalty—A monetary penalty may be imposed on an individual who engages in conduct subject to sanction or on an employer, firm, or entity if the individual was acting on its behalf and if it knew, or reasonably should have known, of the individual's conduct.

Disqualification of appraiser—An appraiser who is disqualified is barred from presenting evidence or testimony in any administrative proceeding before the Department of the Treasury or the IRS.

Under the regulations, attorneys, certified public accountants, enrolled agents, enrolled actuaries, and enrolled retirement

plan agents may not assist, or accept assistance from, individuals who are suspended or disbarred with respect to matters constituting practice (*i.e.*, representation) before the IRS, and they may not aid or abet suspended or disbarred individuals to practice before the IRS.

Disciplinary sanctions are described in these terms:

Disbarred by decision after hearing, Suspended by decision after hearing, Censured by decision after hearing, Monetary penalty imposed after hearing, and Disqualified after hearing—An administrative law judge (ALJ) conducted an evidentiary hearing upon OPR's complaint alleging violation of the regulations and issued a decision imposing one of these sanctions. After 30 days from the issuance of the decision, in the absence of an appeal, the ALJ's decision became the final agency decision.

Disbarred by default decision, Suspended by default decision, Censured by default decision, Monetary penalty imposed by default decision, and Disqualified by default decision—An ALJ, after finding that no answer to OPR's complaint had been filed, granted OPR's motion for a default judgment and issued a decision imposing one of these sanctions.

Disbarment by decision on appeal, Suspended by decision on appeal, Censured by decision on appeal, Monetary penalty imposed by decision on appeal, and Disqualified by decision on appeal—The decision of the ALJ was appealed to the agency appeal authority, acting as the delegate of the Secretary of the Treasury, and the appeal authority issued a decision imposing one of these sanctions.

Disbarred by consent, Suspended by consent, Censured by consent, Monetary penalty imposed by consent, and Disqualified by consent—In lieu of a disciplinary proceeding being instituted or continued, an individual offered a consent to one of these sanctions and OPR

accepted the offer. Typically, an offer of consent will provide for: suspension for an indefinite term; conditions that the individual must observe during the suspension; and the individual's opportunity, after a stated number of months, to file with OPR a petition for reinstatement affirming compliance with the terms of the consent and affirming current eligibility to practice (*i.e.*, an active professional license or active enrollment status). An enrolled agent or an enrolled retirement plan agent may also offer to resign in order to avoid a disciplinary proceeding.

Suspended by decision in expedited proceeding, Suspended by default decision in expedited proceeding, Suspended by consent in expedited proceeding—OPR instituted an expedited proceeding for suspension (based on certain limited grounds, including loss of a professional license and criminal convictions).

OPR has authority to disclose the grounds for disciplinary sanctions in these situations: (1) an ALJ or the Secretary's delegate on appeal has issued a decision on or after September 26, 2007, which was the effective date of amendments to the regulations that permit making such decisions publicly available; (2) the individual has settled a disciplinary case by signing OPR's "consent to sanction" form, which requires consenting individuals to admit to one or more violations of the regulations and to consent to the disclosure of the individual's own return information related to the admitted violations (for example, failure to file Federal income tax returns); or (3) OPR has issued a decision in an expedited proceeding for suspension.

Announcements of disciplinary sanctions appear in the Internal Revenue Bulletin at the earliest practicable date. The sanctions announced below are alphabetized first by the names of states and second by the last names of individuals. Unless otherwise indicated, section numbers (*e.g.*, §10.51) refer to the regulations.

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
California				
Bakersfield	Baisden, Lowell A.	CPA	Suspended by decision in expedited proceeding under §10.82 (revocation of CPA license)	Indefinite from June 10, 2008
Trabuco Canyon	Mattila, William J.	CPA	Suspended by default decision in expedited proceeding under §10.82 (revocation of CPA license)	Indefinite from April 25, 2008
Connecticut				
Stamford	Richichi, Joseph	Attorney	Suspended by decision in expedited proceeding under §10.82 (conviction under 26 U.S.C. §7201, tax evasion)	Indefinite from June 18, 2008
Georgia				
	Bernhard, Matthew B., See New Jersey			
Illinois				
	Fifer, Micheal L., See Michigan			
Chicago	Gregory, Edward A.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (attorney disbarment)	Indefinite from June 3, 2008
	Nasharr, III, Anthony J.	Attorney	Suspended by consent	Indefinite from June 16, 2008
Naperville	Holman, James W.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (suspension of attorney license)	Indefinite from April 25, 2008
Indiana				
Gary	Harris, Willie	Attorney	Suspended by default decision in expedited proceeding under §10.82 (conviction under 18 U.S.C. §1343 and 2, wire fraud, 18 U.S.C. §371, conspiracy to commit theft of government funds, and 26 U.S.C. §7206, willfully filing false tax return)	Indefinite from April 24, 2008

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
Michigan				
Canton	Fifer, Michael L.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (attorney disbarment in Illinois)	Indefinite from May 13, 2008
New Jersey				
Livingston	Rhoades, Robert W.	Attorney	Suspended by decision in expedited proceeding under §10.82 (attorney disbarment)	Indefinite from June 16, 2008
Florham Park	Lambert, Bernard	Attorney	Suspended by decision in expedited proceeding under §10.82 (attorney disbarment)	Indefinite from June 18, 2008
Newark	Bernhard, Matthew B.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (attorney disbarment in Georgia)	Indefinite from June 3, 2008
Somerspoint	Gindhart, Joseph G.	Attorney	Suspended by consent	Indefinite from June 16, 2008
New Mexico				
Clovis	Harrison, Lloyd W.	CPA	Suspended by decision in expedited proceeding under §10.82 (revocation of CPA license)	Indefinite from June 2, 2008
New York				
Bronx	Shemin, Paul S.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (attorney disbarment)	Indefinite from June 18, 2008
New City	Fox, Hyman B.	CPA	Suspended by default decision in expedited proceeding under §10.82 (conviction under 18 U.S.C. §371, conspiracy to commit tax fraud, 26 U.S.C. 7201, tax evasion, and 18 U.S.C. §1347, health care fraud)	Indefinite from May 15, 2008
North Dakota				
Dickinson	Buresh, Eugene F.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (attorney disbarment)	Indefinite from June 2, 2008

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
North Dakota (Continued)				
Steele	Nemec, Talisa A.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (suspension of attorney license)	Indefinite from June 2, 2008
Oklahoma				
Oklahoma City	Vaughn, Jr., Robert M.	Attorney	Suspended by consent	Indefinite from April 1, 2008
Pennsylvania				
Harrisburg	Hopstetter, Robert A.	Attorney	Suspended by consent	Indefinite from April 15, 2008
Wynnewood	Goldner, Andrew P.	CPA	Suspended by decision in expedited proceeding under §10.82 (revocation of CPA license)	Indefinite from May 20, 2008
Rhode Island				
Smithfield	Kalmer, Irwin	CPA	Suspended by decision in expedited proceeding under §10.82 (conviction under 26 U.S.C. §7206(1), willfully making and subscribing a false income tax return)	Indefinite from May 23, 2008
South Carolina				
Columbia	Paulin, Michael A.	CPA	Suspended by decision in expedited proceeding under §10.82 (revocation of CPA license)	Indefinite from June 2, 2008
Pawleys Island	Wicker, Rex E.	CPA	Suspended by default decision in expedited proceeding under §10.82 (suspension of CPA license)	Indefinite from May 20, 2008
Spartanburg	Tullis, Rodman C.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (attorney disbarment)	Indefinite from June 2, 2008
Tennessee				
Chattanooga	Crutchfield, William W.	Attorney	Suspended by decision in expedited proceeding under §10.82 (attorney disbarment)	Indefinite from May 20, 2008

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
Tennessee (Continued)				
Dunlap	Bessling, Warren A.	Enrolled Agent	Suspended by consent	Indefinite from April 15, 2008
Texas				
Dallas	Tidemann, Patricia J.	Enrolled Agent	Resigned pursuant to §10.61 in lieu of a proceeding being instituted or continued	Indefinite from June 11, 2008
Utah				
Layton	Oliver, D. Bruce	Attorney	Suspended by default decision in expedited proceeding under §10.82 (suspension of attorney license)	Indefinite from June 2, 2008
Virginia				
Chesterfield	Connelly, Colin C.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (revocation of attorney license)	Indefinite from June 2, 2008
Norfolk	Scialdone, Claude M.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (suspension of attorney license)	Indefinite from June 2, 2008
Roanoke	Adkins, Jr., Henry L.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (revocation of attorney license)	Indefinite from June 2, 2008
West Virginia				
Williamson	Ward, Lafe P.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (annulment of attorney license)	Indefinite from June 2, 2008
Wisconsin				
Wauwatosa	Grade, Daniel R.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (revocation of attorney license)	Indefinite from May 20, 2008

Definition of Terms

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

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

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

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

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A

and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

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

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

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance

of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

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

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

Abbreviations

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

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.

ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel’s Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.

PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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¹ A cumulative list of 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.

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Key to Abbreviations:

Ann	Announcement
CD	Court Decision
DO	Delegation Order
EO	Executive Order
PL	Public Law
PTE	Prohibited Transaction Exemption
RP	Revenue Procedure
RR	Revenue Ruling
SPR	Statement of Procedural Rules
TC	Tax Convention
TD	Treasury Decision
TDO	Treasury Department Order

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