

## **HIGHLIGHTS OF THIS ISSUE**

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

### **INCOME TAX**

#### **T.D. 9411, page 398.**

#### **REG-164965-04, page 450.**

Final, temporary, and proposed regulations under sections 195, 248, and 709 of the Code provide guidance for making elections to amortize expenses.

#### **T.D. 9413, page 404.**

Final regulations under section 468B of the Code provide rules relating to the taxation of the income earned on escrow accounts, trusts, and other funds used during deferred exchanges of like-kind property. The regulations also provide rules under section 7872 regarding below-market loans to facilitators of these exchanges.

#### **REG-142040-07, page 451.**

Proposed regulations under sections 401(a)(9) and 403(b) of the Code permit a governmental plan to comply with the required minimum distribution rules by using a reasonable and good faith interpretation of the statute.

#### **Notice 2008-68, page 418.**

This notice provides guidance relating to the energy credit under section 48 of the Code for fuel cells (fuel cell credit) and microturbines (microturbine credit).

### **EMPLOYEE PLANS**

#### **Rev. Rul. 2008-45, page 403.**

**Exclusive benefit rule; transfer of plan sponsorship; controlled groups.** This ruling provides that the exclusive benefit rule of section 401(a) of the Code is violated if the sponsorship

of a qualified retirement plan is transferred from an employer to an unrelated taxpayer and the transfer is not in connection with a transfer of business assets or operations from the employer to the unrelated taxpayer.

#### **REG-142040-07, page 451.**

Proposed regulations under sections 401(a)(9) and 403(b) of the Code permit a governmental plan to comply with the required minimum distribution rules by using a reasonable and good faith interpretation of the statute.

#### **Notice 2008-69, page 419.**

#### **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 August 2008; the 24-month average segment rates; the funding transitional segment rates applicable for August 2008; and the minimum present value transitional rates for July 2008.

### **ADMINISTRATIVE**

#### **T.D. 9410, page 414.**

Final regulations relating to the discharge of liens under section 7425 of the Code and return of wrongfully levied-upon property under section 6343 clarify that such notices and claims should be sent to the IRS official and office specified in the relevant IRS publications.

#### **Rev. Proc. 2008-49, page 423.**

This procedure contains the latest revision of Publication 1516, *Specifications for Filing Form 8596, Information Return for Federal Contracts, Electronically*. Rev. Proc. 2005-29 superseded.

**(Continued on the next page)**

Finding Lists begin on page ii.

Index for July through August begins on page iv.



**Announcement 2008-78, page 453.**

This document contains a correction to an announcement published in I.R.B. 2008-32 (Announcement 2007-72, 2008-32 I.R.B. 321) for section 7428(c) validation of certain contributions made during pendency of declaratory judgment proceedings. The announcement number should read: **Announcement 2008-72.**

# 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 48.—Energy Credit

A notice provides guidance under section 48 of the Internal Revenue Code for property qualifying for the fuel cell credit and the microturbine credit. See Notice 2008-68, page 418.

## Section 195.—Start-up Expenditures

26 CFR 1.195-1: Election to amortize start-up expenditures.

### T.D. 9411

#### DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

#### Elections Regarding Start-up Expenditures, Corporation Organizational Expenditures, and Partnership Organizational Expenses

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations relating to elections to deduct start-up expenditures under section 195 of the Internal Revenue Code (Code), organizational expenditures of corporations under section 248, and organizational expenses of partnerships under section 709. The American Jobs Creation Act of 2004 amended these three sections of the Code to provide similar rules for deducting these types of expenses that are paid or incurred after October 22, 2004. The regulations affect taxpayers that pay or incur these expenses and provide guidance on how to elect to deduct the expenses in accordance with the new rules. The text of these temporary regulations also serves as the text of the proposed regulations (REG-164965-04) set forth in the notice of proposed rulemaking on this subject in this issue of the Bulletin.

**DATES: Effective Date:** These regulations are effective on July 8, 2008.

**Applicability Dates:** For dates of applicability, see §§1.195-1T(d), 1.248-1T(f), and 1.709-1T(b)(5).

**FOR FURTHER INFORMATION CONTACT:** Grace Matuszeski, (202) 622-7900 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

#### Background

This document amends the Income Tax Regulations (26 CFR Part 1) under sections 195, 248, and 709 of the Code to reflect amendments made by section 902 of the American Jobs Creation Act of 2004 (Public Law 108-357, 118 Stat. 1418) (the Act). The amendments made by section 902 of the Act are effective for amounts paid or incurred after October 22, 2004, the date of the enactment of the Act.

As amended by section 902(a) of the Act, section 195(b) allows an electing taxpayer to deduct, in the taxable year in which the taxpayer begins an active trade or business, an amount equal to the lesser of (1) the amount of the start-up expenditures that relate to the active trade or business, or (2) \$5,000, reduced (but not below zero) by the amount by which the start-up expenditures exceed \$50,000. The remainder of the start-up expenditures is deductible ratably over the 180-month period beginning with the month in which the active trade or business begins.

As amended by section 902(b) of the Act, section 248(a) allows an electing corporation to deduct, in the taxable year in which the corporation begins business, an amount equal to the lesser of (1) the amount of the organizational expenditures of the corporation, or (2) \$5,000, reduced (but not below zero) by the amount by which the organizational expenditures exceed \$50,000. The remainder of the organizational expenditures is deductible ratably over the 180-month period beginning with the month in which the corporation begins business.

As amended by section 902(c) of the Act, section 709(b) allows an electing

partnership to deduct, in the taxable year in which the partnership begins business, an amount equal to the lesser of (1) the amount of the organizational expenses of the partnership, or (2) \$5,000, reduced (but not below zero) by the amount by which the organizational expenses exceed \$50,000. The remainder of the organizational expenses is deductible ratably over the 180-month period beginning with the month in which the partnership begins business.

#### Explanation of Provisions

This Treasury decision revises the regulations under sections 195, 248, and 709 to reflect the amendments made by section 902 of the Act. This Treasury decision also updates the manner in which taxpayers elect to deduct costs under sections 195, 248, and 709. Under these regulations, taxpayers are no longer required to file a separate election statement to deduct costs under sections 195, 248, and 709. The manner of filing these elections is changed because of various electronic return filing initiatives and in acknowledgment that the vast majority of taxpayers that incur costs that may be deducted under sections 195, 248, and 709 elect to deduct those costs. The change also reduces the administrative burden of making the elections.

The temporary regulations under sections 195, 248, and 709 apply to expenditures paid or incurred after September 8, 2008. However, taxpayers may apply all the provisions of these regulations to expenditures paid or incurred under sections 195, 248, and 709 after October 22, 2004, provided the period of limitations on assessment of tax has not expired for the year the election under section 195, 248, or 709 is deemed made. Expenditures paid or incurred on or before October 22, 2004, may be amortized over a period of not less than 60 months as provided for under prior law.

#### Temporary Regulations Under Section 195

Section 195(a) provides that, except as otherwise provided in section 195, no deduction shall be allowed for start-up ex-

penditures. Under section 195(b)(1), a taxpayer may elect to deduct start-up expenditures as provided in sections 195(b)(1)(A) and (B). Section 195(b)(1)(A) allows an electing taxpayer to deduct start-up expenditures in the year in which the active trade or business to which the expenditures relates begins. The amount that may be deducted under section 195(b)(1)(A) in that year is the lesser of the amount of the start-up expenditures or \$5,000, reduced (but not below zero) by the amount by which the start-up expenditures exceed \$50,000. Any start-up expenditures that are not deductible under section 195(b)(1)(A) may be deducted by the taxpayer under section 195(b)(1)(B) ratably over the 180-month period beginning with the month in which the active trade or business begins. All start-up expenditures incurred by the taxpayer that relate to the active trade or business are considered in determining whether the start-up expenditures exceed \$50,000, including expenditures incurred on or before October 22, 2004.

For start-up expenditures as defined in section 195(c)(1) paid or incurred after September 8, 2008, the temporary regulations under section 195 provide that a taxpayer is deemed to make an election under section 195(b) to deduct start-up expenditures for the taxable year in which the active trade or business to which the expenditures relates begins. Therefore, under the temporary regulations a taxpayer is no longer required to attach a statement to the return or specifically identify the deducted amount as start-up expenditures for the election under section 195(b) to be effective. A taxpayer may choose to forgo the deemed election by clearly electing to capitalize its start-up expenditures on a timely filed Federal income tax return (including extensions) for the taxable year in which the active trade or business begins. The election to capitalize start-up expenditures is made in accordance with the form and instructions used by the taxpayer to file its Federal income tax return. An election either to deduct start-up expenditures under section 195(b) or to capitalize start-up expenditures is irrevocable and applies to all start-up expenditures of the taxpayer that are related to the active trade or business.

In general, a change in the characterization of an item as a start-up expendi-

ture, or a change in the determination of the taxable year in which the active trade or business begins, will be treated as a change in method of accounting with a section 481(a) adjustment.

#### *Temporary Regulations Under Section 248*

In general, the organizational expenditures of a corporation are not deductible except as provided in section 248. Under section 248(a), a corporation may elect to deduct organizational expenditures as provided in sections 248(a)(1)(A) and (B). Section 248(a)(1)(A) allows an electing corporation to deduct organizational expenditures in the year in which the corporation begins business. The amount that may be deducted under section 248(a)(1)(A) in that year is the lesser of the amount of the organizational expenditures of the corporation or \$5,000, reduced (but not below zero) by the amount by which the organizational expenditures exceed \$50,000. Any organizational expenditures that are not deductible under section 248(a)(1)(A) may be deducted by the corporation under section 248(a)(1)(B) ratably over the 180-month period beginning with the month in which the corporation begins business. All organizational expenditures incurred by the corporation are considered in determining whether the organizational expenditures exceed \$50,000, including expenditures incurred on or before October 22, 2004.

For organizational expenditures as defined in section 248(b) and §1.248-1(b) paid or incurred after September 8, 2008, the temporary regulations under section 248 provide that a corporation is deemed to make an election under section 248(a) to deduct organizational expenditures for the taxable year in which the corporation begins business. Therefore, under the temporary regulations a corporation is no longer required to attach a statement to the return or specifically identify the deducted amount as organizational expenditures for the election under section 248(a) to be effective. A corporation may choose to forgo the deemed election by clearly electing to capitalize its organizational expenditures on a timely filed Federal income tax return (including extensions) for the taxable year in which the corporation begins business. The election to capitalize organiza-

tional expenditures is made in accordance with the form and instructions used by the corporation to file its Federal income tax return. An election either to deduct organizational expenditures under section 248(a) or to capitalize organizational expenditures is irrevocable and applies to all organizational expenditures of the corporation.

In general, a change in the characterization of an item as an organizational expenditure, or a change in the determination of the taxable year in which the corporation begins business, will be treated as a change in method of accounting with a section 481(a) adjustment.

#### *Temporary Regulations Under Section 709*

Section 709(a) provides that, except as otherwise provided in section 709(b), no deduction shall be allowed for organizational expenses. Under section 709(b), a partnership may elect to deduct organizational expenses as provided in section 709(b)(1)(A) and (B). Section 709(b)(1)(A) allows an electing partnership to deduct organizational expenses in the year in which the partnership begins business. The amount that may be deducted under section 709(b)(1)(A) in that year is the lesser of the amount of the organizational expenses of the partnership or \$5,000, reduced (but not below zero) by the amount by which the organizational expenses exceed \$50,000. Any organizational expenses that are not deductible under section 709(b)(1)(A) may be deducted by the partnership under section 709(b)(1)(B) ratably over the 180-month period beginning with the month in which the partnership begins business. All organizational expenses incurred by the partnership are considered in determining whether the organizational expenses exceed \$50,000, including expenses incurred on or before October 22, 2004.

For organizational expenses as defined in section 709(b)(3) and §1.709-2(a) paid or incurred after September 8, 2008, the temporary regulations under section 709 provide that a partnership is deemed to make an election under section 709(b) to deduct organizational expenses for the taxable year in which the partnership begins business. Therefore, under the temporary regulations a partnership is no longer

required to attach a statement to the return or specifically identify the deducted amount as organizational expenses for the election under section 709(b) to be effective. A partnership may choose to forgo the deemed election by clearly electing to capitalize its organizational expenses on a timely filed Federal income tax return (including extensions) for the taxable year in which the partnership begins business. The election to capitalize organizational expenses is made in accordance with the form and instructions used by the partnership to file its Federal income tax return. An election either to deduct organizational expenses under section 709(b) or to capitalize organizational expenses is irrevocable and applies to all organizational expenses of the partnership.

In general, a change in the characterization of an item as an organizational expense, or a change in the determination of the taxable year in which the partnership begins business, will be treated as a change in method of accounting with a section 481(a) adjustment.

#### Examples

The temporary regulations under sections 195, 248, and 709 contain examples that illustrate how the election is made, how to calculate the amount of the deduction that is allowed in the year in which the election is made, and how to effect subsequent redeterminations in the characterization of an item or the year in which the trade or business begins.

#### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Please refer to the cross-referenced notice of proposed rulemaking published elsewhere in this issue of the Bulletin for applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6). Pursuant to section 7805(f) of the Code, these final and temporary regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

#### Drafting Information

The principal author of these regulations is Grace Matuszeski of the Office of the Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

\* \* \* \* \*

#### Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

##### PART 1—INCOME TAXES

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

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

Par. 2. Section 1.195-1 is revised to read as follows:

*§1.195-1 Election to amortize start-up expenditures.*

[Reserved]. For further guidance, see §1.195-1T.

Par. 3. Section 1.195-1T is added to read as follows:

*§1.195-1T Election to amortize start-up expenditures (temporary).*

(a) *In general.* Under section 195(b), a taxpayer may elect to amortize start-up expenditures as defined in section 195(c)(1). In the taxable year in which a taxpayer begins an active trade or business, an electing taxpayer may deduct an amount equal to the lesser of the amount of the start-up expenditures that relate to the active trade or business, or \$5,000 (reduced (but not below zero) by the amount by which the start-up expenditures exceed \$50,000). The remainder of the start-up expenditures is deductible ratably over the 180-month period beginning with the month in which the active trade or business begins. All start-up expenditures that relate to the active trade or business are considered in determining whether the start-up expenditures exceed \$50,000, including expenditures incurred on or before October 22, 2004.

(b) *Time and manner of making election.* A taxpayer is deemed to have made an election under section 195(b) to amortize start-up expenditures as defined in section 195(c)(1) for the taxable year in which

the active trade or business to which the expenditures relates begins. A taxpayer may choose to forgo the deemed election by clearly electing to capitalize its start-up expenditures on a timely filed Federal income tax return (including extensions) for the taxable year in which the active trade or business to which the expenditures relates begins. The election either to amortize start-up expenditures under section 195(b) or to capitalize start-up expenditures is irrevocable and applies to all start-up expenditures that are related to the active trade or business. A change in the characterization of an item as a start-up expenditure is a change in method of accounting to which sections 446 and 481(a) apply if the taxpayer treated the item consistently for two or more taxable years. A change in the determination of the taxable year in which the active trade or business begins also is treated as a change in method of accounting if the taxpayer amortized start-up expenditures for two or more taxable years.

(c) *Examples.* The following examples illustrate the application of this section:

*Example 1. Expenditures of \$5,000 or less.* Corporation X, a calendar year taxpayer, incurs \$3,000 of start-up expenditures after October 22, 2004, that relate to an active trade or business that begins on July 1, 2009. Under paragraph (b) of this section, Corporation X is deemed to have elected to deduct start-up expenditures under section 195(b) in 2009. Therefore, Corporation X may deduct the entire amount of the start-up expenditures in 2009, the taxable year in which the active trade or business begins.

*Example 2. Expenditures of more than \$5,000 but less than or equal to \$50,000.* The facts are the same as in *Example 1* except that Corporation X incurs start-up expenditures of \$41,000. Under paragraph (b) of this section, Corporation X is deemed to have elected to deduct start-up expenditures under section 195(b) in 2009. Therefore, Corporation X may deduct \$5,000 and the portion of the remaining \$36,000 that is allocable to July through December of 2009 ( $\$36,000/180 \times 6 = \$1,200$ ) in 2009, the taxable year in which the active trade or business begins.

*Example 3. Subsequent change in the characterization of an item.* The facts are the same as in *Example 2* except that Corporation X determines in 2011 that Corporation X incurred \$10,000 for an additional start-up expenditure erroneously deducted in 2009 under section 162 as a business expense. Under paragraph (b) of this section, Corporation X is deemed to have elected to amortize start-up expenditures under section 195(b) in 2009, including the additional \$10,000 of start-up expenditures. Corporation X is using an impermissible method of accounting for the additional \$10,000 of start-up expenditures and must change its method under §1.446-1(e) and the applicable general administrative procedures in effect in 2011.

*Example 4. Subsequent redetermination of year in which business begins.* The facts are the same

as in *Example 2* except that, in 2010, Corporation X deducted the start-up expenditures allocable to January through December of 2010 ( $\$36,000/180 \times 12 = \$2,400$ ). In addition, in 2011 it is determined that Corporation X actually began business in 2010. Under paragraph (b) of this section, Corporation X is deemed to have elected to deduct start-up expenditures under section 195(b) in 2010. Corporation X impermissibly deducted start-up expenditures in 2009, and incorrectly determined the amount of start-up expenditures deducted in 2010. Therefore, Corporation X is using an impermissible method of accounting for the start-up expenditures and must change its method under §1.446-1(e) and the applicable general administrative procedures in effect in 2011.

*Example 5. Expenditures of more than \$50,000 but less than or equal to \$55,000.* The facts are the same as in *Example 1* except that Corporation X incurs start-up expenditures of \$54,500. Under paragraph (b) of this section, Corporation X is deemed to have elected to deduct start-up expenditures under section 195(b) in 2009. Therefore, Corporation X may deduct \$500 ( $\$5,000 - 4,500$ ) and the portion of the remaining \$54,000 that is allocable to July through December of 2009 ( $\$54,000/180 \times 6 = \$1,800$ ) in 2009, the taxable year in which the active trade or business begins.

*Example 6. Expenditures of more than \$55,000.* The facts are the same as in *Example 1* except that Corporation X incurs start-up expenditures of \$450,000. Under paragraph (b) of this section, Corporation X is deemed to have elected to deduct start-up expenditures under section 195(b) in 2009. Therefore, Corporation X may deduct the amounts allocable to July through December of 2009 ( $\$450,000/180 \times 6 = \$15,000$ ) in 2009, the taxable year in which the active trade or business begins.

(d) *Effective/applicability date.* This section applies to start-up expenditures paid or incurred after September 8, 2008. However, taxpayers may apply all the provisions of this section to start-up expenditures paid or incurred after October 22, 2004, provided that the period of limitations on assessment of tax for the year the election under paragraph (b) of this section is deemed made has not expired. Otherwise, for start-up expenditures paid or incurred prior to September 8, 2008, see §1.195-1 in effect prior to that date (§1.195-1 as contained in 26 CFR part 1 edition revised as of April 1, 2008).

(e) *Expiration date.* This section expires on July 6, 2011.

Par. 4. Section 1.248-1 is amended by revising paragraphs (a) and (c), and adding paragraphs (d), (e), (f), and (g) to read as follows:

*§1.248-1 Election to amortize organizational expenditures.*

(a) [Reserved]. For further guidance, see §1.248-1T(a).

\* \* \* \* \*

(c) through (g) [Reserved]. For further guidance, see §1.248-1T(c) through (g).

Par. 5. Section 1.248-1T is added to read as follows:

*§1.248-1T Election to amortize organizational expenditures (temporary).*

(a) *In general.* Under section 248(a), a corporation may elect to amortize organizational expenditures as defined in section 248(b) and §1.248-1(b). In the taxable year in which a corporation begins business, an electing corporation may deduct an amount equal to the lesser of the amount of the organizational expenditures of the corporation, or \$5,000 (reduced (but not below zero) by the amount by which the organizational expenditures exceed \$50,000). The remainder of the organizational expenditures is deducted ratably over the 180-month period beginning with the month in which the corporation begins business. All organizational expenditures of the corporation are considered in determining whether the organizational expenditures exceed \$50,000, including expenditures incurred on or before October 22, 2004.

(b) [Reserved]. For further guidance, see §1.248-1(b).

(c) *Time and manner of making election.* A corporation is deemed to have made an election under section 248(a) to amortize organizational expenditures as defined in section 248(b) and §1.248-1(b) for the taxable year in which the corporation begins business. A corporation may choose to forgo the deemed election by clearly electing to capitalize its organizational expenditures on a timely filed Federal income tax return (including extensions) for the taxable year in which the corporation begins business. The election either to amortize organizational expenditures under section 248(a) or to capitalize organizational expenditures is irrevocable and applies to all organizational expenditures of the corporation. A change in the characterization of an item as an organizational expenditure is a change in method

of accounting to which sections 446 and 481(a) apply if the corporation treated the item consistently for two or more taxable years. A change in the determination of the taxable year in which the corporation begins business also is treated as a change in method of accounting if the corporation amortized organizational expenditures for two or more taxable years.

(d) *Determination of when corporation begins business.* The deduction allowed under section 248 must be spread over a period beginning with the month in which the corporation begins business. The determination of the date the corporation begins business presents a question of fact which must be determined in each case in light of all the circumstances of the particular case. The words "begins business," however, do not have the same meaning as "in existence." Ordinarily, a corporation begins business when it starts the business operations for which it was organized; a corporation comes into existence on the date of its incorporation. Mere organizational activities, such as the obtaining of the corporate charter, are not alone sufficient to show the beginning of business. If the activities of the corporation have advanced to the extent necessary to establish the nature of its business operations, however, it will be deemed to have begun business. For example, the acquisition of operating assets which are necessary to the type of business contemplated may constitute the beginning of business.

(e) *Examples.* The following examples illustrate the application of this section:

*Example 1. Expenditures of \$5,000 or less.* Corporation X, a calendar year taxpayer, incurs \$3,000 of organizational expenditures after October 22, 2004, and begins business on July 1, 2009. Under paragraph (c) of this section, Corporation X is deemed to have elected to deduct organizational expenditures under section 248(a) in 2009. Therefore, Corporation X may deduct the entire amount of the organizational expenditures in 2009, the taxable year in which Corporation X begins business.

*Example 2. Expenditures of more than \$5,000 but less than or equal to \$50,000.* The facts are the same as in *Example 1* except that Corporation X incurs organizational expenditures of \$41,000. Under paragraph (c) of this section, Corporation X is deemed to have elected to deduct organizational expenditures under section 248(a) in 2009. Therefore, Corporation X may deduct \$5,000 and the portion of the remaining \$36,000 that is allocable to July through December of 2009 ( $\$36,000/180 \times 6 = \$1,200$ ) in 2009, the taxable year in which Corporation X begins business.

*Example 3. Subsequent change in the characterization of an item.* The facts are the same as in



*Example 2* except that Corporation X determines in 2011 that Corporation X incurred \$10,000 for an additional organizational expenditure erroneously deducted in 2009 under section 162 as a business expense. Under paragraph (c) of this section, Corporation X is deemed to have elected to amortize organizational expenditures under section 248(a) in 2009, including the additional \$10,000 of organizational expenditures. Corporation X is using an impermissible method of accounting for the additional \$10,000 of organizational expenditures and must change its method under §1.446-1(e) and the applicable general administrative procedures in effect in 2011.

*Example 4. Subsequent redetermination of year in which business begins.* The facts are the same as in *Example 2* except that, in 2010, Corporation X deducted the organizational expenditures allocable to January through December of 2010 ( $\$36,000/180 \times 12 = \$2,400$ ). In addition, in 2011 it is determined that Corporation X actually began business in 2010. Under paragraph (c) of this section, Corporation X is deemed to have elected to deduct organizational expenditures under section 248(a) in 2010. Corporation X impermissibly deducted organizational expenditures in 2009, and incorrectly determined the amount of organizational expenditures deducted in 2010. Therefore, Corporation X is using an impermissible method of accounting for the organizational expenditures and must change its method under §1.446-1(e) and the applicable general administrative procedures in effect in 2011.

*Example 5. Expenditures of more than \$50,000 but less than or equal to \$55,000.* The facts are the same as in *Example 1* except that Corporation X incurs organizational expenditures of \$54,500. Under paragraph (c) of this section, Corporation X is deemed to have elected to deduct organizational expenditures under section 248(a) in 2009. Therefore, Corporation X may deduct \$500 ( $\$5,000 - 4,500$ ) and the portion of the remaining \$54,000 that is allocable to July through December of 2009 ( $\$54,000/180 \times 6 = \$1,800$ ) in 2009, the taxable year in which Corporation X begins business.

*Example 6. Expenditures of more than \$55,000.* The facts are the same as in *Example 1* except that Corporation X incurs organizational expenditures of \$450,000. Under paragraph (c) of this section, Corporation X is deemed to have elected to deduct organizational expenditures under section 248(a) in 2009. Therefore, Corporation X may deduct the amounts allocable to July through December of 2009 ( $\$450,000/180 \times 6 = \$15,000$ ) in 2009, the taxable year in which Corporation X begins business.

(f) *Effective/applicability date.* This section applies to organizational expenditures paid or incurred after September 8, 2008. However, taxpayers may apply all the provisions of this section to organizational expenditures paid or incurred after October 22, 2004, provided that the period of limitations on assessment of tax for the year the election under paragraph (c) of this section is deemed made has not expired. Otherwise, for organizational expenditures paid or incurred prior to September 8, 2008, see §1.248-1 in effect

prior to that date (§1.248-1 as contained in 26 CFR part 1 edition revised as of April 1, 2008).

(g) *Expiration date.* This section expires on July 6, 2011.

Par. 6. Section 1.709-1 is amended by revising paragraph (b) and removing paragraph (c) to read as follows:

*§1.709-1 Treatment of organization and syndication costs.*

\* \* \* \* \*

(b) [Reserved]. For further guidance, see §1.709-1T.

Par. 7. Section 1.709-1T is added to read as follows:

*§1.709-1T Treatment of organizational expenses and syndication costs (temporary).*

(a) [Reserved]. For further guidance, see §1.709-1(a).

(b) *Election to amortize organizational expenses—(1) In general.* Under section 709(b), a partnership may elect to amortize organizational expenses as defined in section 709(b)(3) and §1.709-2(a). In the taxable year in which a partnership begins business, an electing partnership may deduct an amount equal to the lesser of the amount of the organizational expenses of the partnership, or \$5,000 (reduced (but not below zero) by the amount by which the organizational expenses exceed \$50,000). The remainder of the organizational expenses is deductible ratably over the 180-month period beginning with the month in which the partnership begins business. All organizational expenses of the partnership are considered in determining whether the organizational expenses exceed \$50,000, including expenses incurred on or before October 22, 2004.

(2) *Time and manner of making election.* A partnership is deemed to have made an election under section 709(b) to amortize organizational expenses as defined in section 709(b)(3) and §1.709-2(a) for the taxable year in which the partnership begins business. A partnership may choose to forgo the deemed election by clearly electing to capitalize its organizational expenses on a timely filed Federal income tax return (including extensions) for the taxable year in which the partnership begins business. The election either to amortize organizational expenses under

section 709(b) or to capitalize organizational expenses is irrevocable and applies to all organizational expenses of the partnership. A change in the characterization of an item as an organizational expense is a change in method of accounting to which sections 446 and 481(a) apply if the partnership treated the item consistently for two or more taxable years. A change in the determination of the taxable year in which the partnership begins business also is treated as a change in method of accounting if the partnership amortized organizational expenses for two or more taxable years.

(3) *Liquidation of partnership.* If there is a winding up and complete liquidation of the partnership prior to the end of the amortization period, the unamortized amount of organizational expenses is a partnership deduction in its final taxable year to the extent provided under section 165 (relating to losses). However, there is no partnership deduction with respect to its capitalized syndication expenses.

(4) *Examples.* The following examples illustrate the application of this section:

*Example 1. Expenditures of \$5,000 or less.* Partnership X, a calendar year taxpayer, incurs \$3,000 of organizational expenses after October 22, 2004, and begins business on July 1, 2009. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to deduct organizational expenses under section 709(b) in 2009. Therefore, Partnership X may deduct the entire amount of the organizational expenses in 2009, the taxable year in which Partnership X begins business.

*Example 2. Expenditures of more than \$5,000 but less than or equal to \$50,000.* The facts are the same as in *Example 1* except that Partnership X incurs organizational expenses of \$41,000. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to deduct organizational expenses under section 709(b) in 2009. Therefore, Partnership X may deduct \$5,000 and the portion of the remaining \$36,000 that is allocable to July through December of 2009 ( $\$36,000/180 \times 6 = \$1,200$ ) in 2009, the taxable year in which Partnership X begins business.

*Example 3. Subsequent change in the characterization of an item.* The facts are the same as in *Example 2* except that Partnership X realizes in 2011 that Partnership X incurred \$10,000 for an additional organizational expense erroneously deducted in 2009 under section 162 as a business expense. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to amortize organizational expenses under section 709(b) in 2009, including the additional \$10,000 of organizational expenses. Partnership X is using an impermissible method of accounting for the additional \$10,000 of organizational expenses and must change its method under §1.446-1(e) and the applicable general administrative procedures in effect in 2011.

*Example 4. Subsequent redetermination of year in which business begins.* The facts are the same as in *Example 2* except that, in 2010, Partnership X deducted the organizational expenses allocable to January through December of 2010 (\$36,000/180 x 12 = \$2,400). In addition, in 2011 it is determined that Partnership X actually began business in 2010. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to deduct organizational expenses under section 709(b) in 2010. Partnership X impermissibly deducted organizational expenses in 2009, and incorrectly determined the amount of organizational expenses deducted in 2010. Therefore, Partnership X is using an impermissible method of accounting for the organizational expenses and must change its method under §1.446-1(e) and the applicable general administrative procedures in effect in 2011.

*Example 5. Expenditures of more than \$50,000 but less than or equal to \$55,000.* The facts are the same as in *Example 1* except that Partnership X incurs organizational expenses of \$54,500. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to deduct organizational expenses under section 709(b) in 2009. Therefore, Partnership X may deduct \$500 (\$5,000 - 4,500) and the portion of the remaining \$54,000 that is allocable to July through December of 2009 (\$54,000/180 x 6 = \$1,800) in 2009, the taxable year in which Partnership X begins business.

*Example 6. Expenditures of more than \$55,000.* The facts are the same as in *Example 1* except that Partnership X incurs organizational expenses of \$450,000. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to deduct organizational expenses under section 709(b) in 2009. Therefore, Partnership X may deduct the amounts allocable to July through December of 2009 (\$450,000/180 x 6 = \$15,000) in 2009, the taxable year in which Partnership X begins business.

(5) *Effective/applicability date.* This section applies to organizational expenses paid or incurred after September 8, 2008. However, taxpayers may apply all the provisions of this section to organizational expenses paid or incurred after October 22, 2004, provided that the period of limitations on assessment of tax for the year the election under paragraph (b)(2) of this section is deemed made has not expired. Otherwise, for organizational expenses paid or incurred prior to September 8, 2008, see §1.709-1 in effect prior to that date (§1.709-1 as contained in 26 CFR part 1 edition revised as of April 1, 2008).

(6) *Expiration date.* This section expires on July 6, 2011.

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

Approved June 30, 2008.

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

(Filed by the Office of the Federal Register on July 7, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 8, 2008, 73 F.R. 38910)

## Section 248.—Organizational Expenditures

Final, temporary, and proposed regulations provide guidance for making elections to amortize expenses under sections 195, 248, and 709 of the Code. See T.D. 9411, page 398.

Final, temporary, and proposed regulations provide guidance for making elections to amortize expenses under sections 195, 248, and 709 of the Code. See REG-164965-04, page 450.

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

A subsidiary will no longer be treated as an employer with respect to employees of the controlled group when it is no longer a member of the controlled group. See Rev. Rul. 2008-45, page 403.

Proposed regulations under sections 401(a)(9) and 403(b) of the Code permit a governmental plan to comply with the required minimum distribution rules by using a reasonable and good faith interpretation of the statute. See REG-142040-07, page 451.

26 CFR 1.401-1: *Qualified pension, profit-sharing, and stock bonus plans.*  
(Also, § 414.)

**Exclusive benefit rule; transfer of plan sponsorship; controlled groups.** This ruling provides that the exclusive benefit rule of section 401(a) of the Code is violated if the sponsorship of a qualified retirement plan is transferred from an employer to an unrelated taxpayer and the transfer is not in connection with a transfer of business assets or operations from the employer to the unrelated taxpayer.

### Rev. Rul. 2008-45

#### ISSUE

Is the exclusive benefit rule of § 401(a) of the Internal Revenue Code (“Code”) violated if the sponsorship of a qualified retirement plan is transferred from an employer to an unrelated taxpayer and the

transfer of the sponsorship of the plan is not in connection with a transfer of business assets, operations, or employees from the employer to the unrelated taxpayer?

#### FACTS

Corporation A maintains an underfunded defined benefit plan with no ongoing accrual of benefits. Corporation A transfers sponsorship of the plan to Subsidiary B, a wholly-owned subsidiary of Corporation A. Subsidiary B does not maintain any trade or business, has no employees, and has nominal assets. As part of the transfer, the plan document is amended to substitute Subsidiary B as the plan sponsor and to provide for Subsidiary B to assume Corporation A’s responsibilities under the plan.

In connection with the transfer of the plan sponsorship, Corporation A also transfers cash and marketable securities to Subsidiary B. The amount of the transferred assets is equal to the amount of the plan’s underfunding, as determined with reference to specified actuarial assumptions, plus an additional margin.

Shortly after the sponsorship of the plan and these assets are transferred to Subsidiary B, ownership of at least 80% of Subsidiary B’s stock is transferred to Corporation C, an unrelated corporation. After this transaction, Subsidiary B is no longer a member of the Corporation A controlled group, within the meaning of § 414(b) of the Code, but instead is a member of the Corporation C controlled group. The transaction is not in connection with the transfer of business assets (other than cash or marketable securities transferred to Subsidiary B), operations, or employees from Corporation A’s controlled group to Corporation C’s controlled group. The only business risk or opportunity in the transaction for Corporation C is to profit from the acquisition and operation of the plan.

#### LAW

Section 401(a) provides that, in order to be qualified under that section, a stock bonus, pension, or profit-sharing plan of an employer must be for the exclusive benefit of its employees or their beneficiaries. Consistent with this exclusive benefit rule of § 401(a), § 1.401-1(a)(2)(i) of the Income Tax Regulations provides,

in part, that a qualified pension plan is a definite written program and arrangement which is established and maintained by an employer to provide for the livelihood of employees or their beneficiaries after the retirement of the employees. Similarly, § 1.401-1(a)(3)(ii) requires that a qualified plan be established by an employer for the exclusive benefit of its employees or their beneficiaries in order to be qualified.

Section 414(a) provides that, in the case in which the employer maintains a plan of a predecessor employer, service for such predecessor is treated as service for the employer.

Section 414(b) provides that, for specified purposes, including § 401, all employees of all corporations which are members of a controlled group of corporations are treated as employed by a single employer.

#### ANALYSIS

Unlike other situations where the sponsorship of a plan is transferred in connection with the acquisition of business assets or operations, Subsidiary B does not maintain a business and its assets only compensate Corporation C for assuming Corporation A's responsibility under the plan to make contributions to the plan. Therefore, any profit or loss to Corporation C resulting from the transaction would be solely from the use of the assets that are transferred to its controlled group in connection with the acquisition and operation of the plan.

In accordance with § 414(b), all employees of all corporations which are members of a controlled group of corporations are treated as employed by a single employer. Accordingly, even though Subsidiary B has no employees of its own, it is treated as an employer with respect to the employees of the Corporation A controlled group while it is part of that controlled group. For purposes of the exclusive benefit rule of § 401(a), however, Subsidiary B will no longer be treated as an employer with respect to the employees of the Corporation A controlled group when it is no longer a member of that controlled group.

This result is not affected by § 414(a). Section 414(a) provides that if an employer maintains a plan of a predecessor employer, then service for such predecessor is treated as service for the employer. By its terms, § 414(a) applies only to an

“employer” and does not create employer status for a taxpayer that is not otherwise an employer.

Accordingly, when Subsidiary B is no longer a member of the Corporation A controlled group, the plan does not satisfy the exclusive benefit rule of § 401(a) because it is not maintained by an employer to provide retirement benefits for its employees and their beneficiaries. This conclusion would be the same even if the new controlled group has some employees covered by the plan after the transaction, or some business assets or operations are transferred, where substantially all the business risks and opportunities under the transaction are those associated with the transfer of the sponsorship of the plan.

#### HOLDING

The exclusive benefit rule of § 401(a) is violated if the sponsorship of a qualified retirement plan is transferred from an employer to an unrelated taxpayer and the transfer of the sponsorship of the plan is not in connection with a transfer of business assets, operations, or employees from the employer to the unrelated taxpayer.

This ruling does not address any federal income tax consequences other than those specifically addressed herein.

#### DRAFTING INFORMATION

The principal author of this revenue ruling is Robert M. Walsh of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue ruling, please call the Employee Plans taxpayer assistance number between 8:30 a.m. and 4:30 p.m. Eastern time, Monday through Friday at (877) 829-5500 (a toll-free number) or email Mr. Walsh at [RetirementPlanQuestions@irs.gov](mailto:RetirementPlanQuestions@irs.gov).

### Section 403.—Taxation of Employee Annuities

Proposed regulations under sections 401(a)(9) and 403(b) of the Code permit a governmental plan to comply with the required minimum distribution rules by using a reasonable and good faith interpretation of the statute. See REG-142040-07, page 451.

### Section 414.—Definitions and Special Rules

A subsidiary will no longer be treated as an employer with respect to employees of the controlled group when it is no longer a member of the controlled group. See Rev. Rul. 2008-45, page 403.

### Section 468B.—Special Rules for Designated Settlement Funds

26 CFR 1.468B-6: Escrow accounts, trusts, and other funds used during deferred exchanges of like-kind property under section 1031(a)(3).

#### T.D. 9413

### DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR part 1

### Escrow Accounts, Trusts, and Other Funds Used During Deferred Exchanges of Like-Kind Property

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 468B of the Internal Revenue Code (Code). The regulations provide rules regarding the taxation of income earned on escrow accounts, trusts, and other funds used during deferred like-kind exchanges of property, and final regulations under section 7872 regarding below-market loans to facilitators of these exchanges. The regulations affect taxpayers that engage in deferred like-kind exchanges and escrow holders, trustees, qualified intermediaries, and others that hold funds during deferred like-kind exchanges.

DATES: *Effective Date:* These regulations are effective July 10, 2008.

*Applicability Dates:* For dates of applicability, see §§1.468B-6(f), 1.7872-5(d), and 1.7872-16(g).

FOR FURTHER INFORMATION CONTACT: Concerning the final regulations under section 468B, Jeffrey T. Rodrick, (202) 622-4930;

concerning the final regulations under section 7872, David B. Silber, (202) 622-3930 (not toll-free numbers).

## SUPPLEMENTARY INFORMATION:

### Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) regarding the taxation of qualified escrow accounts, qualified trusts, and other escrow accounts, trusts, or funds used during section 1031 deferred exchanges of like-kind property, and of below-market loans to facilitators of these exchanges, under sections 468B(g) and 7872.

On February 7, 2006, a partial withdrawal of notice of proposed rulemaking, a notice of proposed rulemaking, and notice of public hearing were published in the **Federal Register** (REG-209619-93 and REG-113365-04, 2006-1 C.B. 580 [71 FR 6231]). A public hearing was held on June 6, 2006. A revised Initial Regulatory Flexibility Analysis (IRFA) for REG-113365-04 was published in the **Federal Register** on March 20, 2007 (72 FR 13055). Written and electronic comments responding to the notice of proposed rulemaking and the revised IRFA were received. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision. The comments and amendments are discussed below.

### Explanation of Provisions and Summary of Comments

#### 1. Definitions

The proposed regulations define *exchange funds* as relinquished property, cash, or cash equivalent that secures an obligation of the transferee to transfer replacement property, or proceeds from a transfer of relinquished property. A commentator suggested that the definition of exchange funds as relinquished property, cash, or cash equivalent that secures an obligation of the transferee to transfer replacement property should be deleted as confusing and unnecessary, because it is irrelevant whether amounts held in a qualified account or fund secure or are intended to secure the obligations of the transferee. The final regulations do not adopt this comment. This definition of

exchange funds is necessary because it encompasses transactions contemplated in §1.1031(k)-1(g)(3) in which, for example, a transferee of the relinquished property pays a deposit before the property is transferred, or a transferee of the relinquished property agrees to transfer replacement property and deposits funds to secure the obligations of the transferee (see §1.468B-6(e), *Example 1*). The definition is an alternative to the definition of exchange funds as proceeds from a transfer of relinquished property, and does not create a requirement that exchange funds must secure the obligations of a transferee.

The proposed regulations define *transactional expenses* as the usual and customary expenses paid or incurred in connection with a deferred exchange, including the cost of land surveys, appraisals, title examinations, termite inspections, transfer taxes and recording fees. A commentator suggested that transactional expenses should be defined by reference to §1.1031(k)-1(g)(7), which provides that “transactional items” are those items that relate to the disposition of the relinquished property or to the acquisition of replacement property and appear under local standards in the typical closing statements as the responsibility of a buyer or seller, such as commissions, prorated taxes, recording or transfer taxes, and title company fees. Therefore, for consistency, the final regulations provide that *transactional expenses* means transactional items described in §1.1031(k)-1(g)(7)(ii). The final regulations retain special rules to determine whether fees paid to an exchange facilitator are transactional expenses.

#### 2. Taxable Year of Receipt of Income

The proposed regulations omit an example in proposed regulations issued in 1999 that concluded that interest on a taxpayer’s exchange funds is taxable in the year earned or credited rather than in a later year when the interest is paid. A commentator requested that the final regulations include a similar example. An example in the final regulations has been revised to illustrate this result.

Commentators suggested that the example in §1.7872-16 of the proposed regulations conflicts with the constructive receipt rules of §1.1031(k)-1(g)(6) because it posits that amounts are paid as

compensation to the exchange facilitator, and are retransferred as imputed interest to the taxpayer, before the end of the exchange period. The final regulations do not adopt this comment. The example illustrates the mechanics of section 7872 in imputing interest and treating a corresponding amount as deemed compensation in the case of a compensation-related loan. This treatment is not inconsistent with §1.1031(k)-1(g), which merely provides rules of administrative convenience under which, if certain requirements are satisfied, a taxpayer is deemed not to actually or constructively receive exchange funds or to have an agency relationship with an exchange facilitator solely for purposes of obtaining nonrecognition treatment under section 1031. For other taxation purposes, such as determining the timing for including earnings or imputed amounts in income, general tax principles apply, including timing principles under sections 7872 and 451. See §1.1031(k)-1(n).

#### 3. Earnings Attributable to Exchange Funds

The proposed regulations provide that exchange funds are treated, generally, as loaned by a taxpayer to an exchange facilitator, and the exchange facilitator takes into account all items of income, deduction, and credit. If, however, the escrow agreement, trust agreement, or exchange agreement specifies that all the earnings attributable to exchange funds are payable to the taxpayer, the exchange funds are not treated as loaned from the taxpayer to the exchange facilitator, and the taxpayer takes into account all items of income, deduction, and credit attributable to the exchange funds. If an exchange facilitator commingles taxpayers’ exchange funds (whether or not a taxpayer’s funds are held in a separate account) all earnings attributable to a taxpayer’s exchange funds are treated as paid to the taxpayer if all of the earnings of the commingled funds, allocable on a *pro rata* basis to a taxpayer, are paid to the taxpayer.

##### a. Separately identified accounts

Commentators noted that many exchange facilitators have a corporate relationship with the institution in which the exchange facilitator deposits exchange

funds on behalf of taxpayers and questioned whether, in addition to the stated earnings of the account in which the exchange funds are deposited, a portion of the earnings the depository institution receives in the ordinary course of investing customer deposits as part of its trade or business operations should be treated as earnings attributable to exchange funds if the depository institution is part of the same corporate group as the exchange facilitator. One group of commentators noted that it is common business practice for a depository institution in the same corporate group as an exchange facilitator to credit a portion of its revenues to the exchange facilitator based on the amount of exchange funds deposited by the exchange facilitator with the depository institution, and suggested that these types of internal credits should be treated as earnings attributable to exchange funds. However, other commentators argued that these internal credits are similar to payments a depository institution may make to an unrelated exchange facilitator for depositing funds with the depository institution and therefore, should not be treated as earnings attributable to exchange funds solely because the exchange facilitator is related to the depository institution. Some commentators noted that an exchange facilitator that maintains a master account that includes individual sub-accounts in taxpayers' names and taxpayer identification numbers (TIN) may earn additional interest in excess of the interest paid on the sub-accounts, based on the amounts the exchange facilitator deposits. To clarify what constitutes earnings attributable to the exchange funds, one commentator recommended that the final regulations provide that if exchange funds are held in a segregated account for the benefit of the taxpayer, only the earnings on the segregated account will be considered earnings attributable to the exchange funds. The commentator suggested that this rule would provide a simple, clear definition.

In response to these comments, the final regulations provide that, if exchange funds are held with a depository institution in an account (including a sub-account) that is separately identified with a taxpayer's name and TIN, only the earnings on the account are treated as earnings attributable to the exchange funds. The final regulations provide examples to illustrate the applica-

tion of this rule to exchange facilitators related to depository institutions and to master/sub-account arrangements.

#### b. *Commingled accounts*

A commentator opined that the proposed rules for allocating earnings in a commingled account are confusing because the rules apply "whether or not the taxpayer's funds are in a segregated account." The commentator stated that, as a result, it is unclear whether all funds an exchange facilitator deposits in a specific depository institution constitute one commingled account, even if the funds are maintained in separate accounts and derive from financial transactions unrelated to exchange funds. The final regulations clarify that separate accounts maintained in the names and TINs of unrelated taxpayers do not constitute a commingled account.

#### c. *Administrative fees*

Commentators suggested that fees paid by a bank to a related exchange facilitator should be treated as earnings attributable to exchange funds. Other commentators stated that these fees are compensation for administrative services provided and are not earnings attributable to the funds. The final regulations do not treat these fees as earnings attributable to exchange funds. Fees for administrative services provided by exchange facilitators to depository institutions represent compensation for services provided by the exchange facilitator as opposed to earnings on the exchange funds.

### 4. *Loan Treatment*

#### a. *Characterization as loan*

Commentators opined that exchange funds should not be treated as loaned from the taxpayer to the exchange facilitator because an exchange facilitator's relationship with the taxpayer is primarily that of a fiduciary. A commentator suggested that exchange facilitators are similar to mortgage or payroll processing servicers that maintain interest-bearing escrow accounts. The commentator also argued that the receipt of exchange funds by an exchange facilitator is not a compensation-related loan because the amount

of interest required to be imputed would be higher for a greater amount of funds or longer exchange period, although the exchange facilitator would provide no additional services. Another commentator noted that other transactions in which payment is made before services are provided, such as pre-payments to contractors, are not treated as loans. The commentator asserted that the transaction between an exchange facilitator and its customer is an installment sale rather than a loan. Other commentators argued that treating exchange funds as loaned is inconsistent with the regulations under section 1031, which generally require that a taxpayer must not have any benefit of the exchange funds during the exchange period to avoid actual or constructive receipt. Other commentators agreed that an exchange facilitator's use of exchange funds properly may be characterized as a compensation-related loan.

The final regulations retain the general rule that money held by an exchange facilitator in a deferred exchange is treated as loaned by the taxpayer to the exchange facilitator. When an exchange facilitator benefits from the use of the taxpayer's exchange funds, characterizing the exchange funds as having been loaned from the taxpayer to the exchange facilitator is consistent with the substance of the transaction and with the definition of loan in the legislative history of section 7872. See H.R. Rep. 98-861 at 1018 (1984).

#### b. *Application of section 7872*

Under the proposed regulations, an exchange facilitator loan must be tested under section 7872 to determine whether it is a below-market loan for purposes of that section. The proposed regulations further provide that a taxpayer must use a special 182-day applicable Federal rate (AFR) to test whether an exchange facilitator loan is a below-market loan. If an exchange facilitator loan is a below-market loan, the loan is treated as a compensation-related loan that is not exempt from section 7872 as a loan without significant tax effect.

Commentators opined that these transactions should not be subject to section 7872 for reasons including the lack of a significant tax effect, exceptions provided under sections 483 and 1274 for short-term loans, the general exemption from section

7872 for certain accounts or withdrawable shares with a bank, the costs of complying with section 7872, and the lack of a tax avoidance purpose.

One suggestion submitted by commentators to mitigate the impact of section 7872 on smaller transactions was the adoption of a rule that would exempt certain exchange facilitator loans from section 7872. The final regulations include an exemption from section 7872 for exchange facilitator loans of \$2 million or less while preserving the application of section 7872 for larger transactions. This exemption amount may be increased in future published guidance. The exemption is limited to loans that are 6 months or less in duration.

### c. *Special AFR*

One group of commentators believed that the special AFR in the proposed regulations is unreasonably high and suggested a more appropriate test rate would be a demand deposit rate. Other commentators suggested that the special AFR rate in the proposed regulations was appropriate.

For purposes of section 7872, the test rate allowed under section 1274(d)(1)(D) must be calculated by reference to United States Treasury obligations, not demand deposit rates. See footnote 5 of H.R. Conf. Rep. No. 99-250 at 15 (1985). However, in response to these comments, the final regulations use a 91-day rate, which is the investment rate on a 13-week (generally, 91-day) Treasury bill determined on the issue date that is the same as the date the exchange facilitator loan is made or, if the two dates are not the same, the issue date that most closely precedes the date that the exchange facilitator loan is made. This rate is based on semi-annual compounding and may be found at [www.treasurydirect.gov/RI/OFBills](http://www.treasurydirect.gov/RI/OFBills). Also, in recognition that the short-term AFR may be lower than the 91-day rate, the final regulations provide that taxpayers must apply the lower of the 91-day rate or the short-term AFR when testing or imputing payments on an exchange facilitator loan under section 7872.

### 5. *Effective/Applicability Date*

Commentators requested that the final regulations apply to exchange agreements entered into, rather than transfers of property made, after the publication of final

regulations. Alternatively, commentators requested that the applicability of the final regulations be deferred to allow exchange facilitators sufficient time to make changes to accounting, control, and reporting systems and to revise exchange agreements to comply with the final regulations.

In response to these comments, the final regulations apply to transfers of relinquished property made, and to exchange facilitator loans issued, on or after October 8, 2008. For transfers of relinquished property made by taxpayers after August 16, 1986, but before October 8, 2008, the IRS will not challenge a reasonable, consistently applied method of taxation for earnings attributable to exchange funds.

### **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. A final regulatory flexibility analysis has been prepared for this final regulation under 5 U.S.C. 604. The analysis is set forth below under the heading "Final Regulatory Flexibility Analysis." Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### **Final Regulatory Flexibility Analysis**

#### *Succinct Statement of the Need for, and Objectives of, the Final Regulations*

These final regulations are issued under the authority of sections 7805, 468B(g), and 7872. Section 468B(g) provides that nothing in any provision of law shall be construed as providing that an escrow account, settlement fund, or similar fund is not subject to current income tax and that the Secretary shall prescribe regulations providing for the taxation of such accounts or funds whether as a grantor trust or otherwise.

The final regulations provide that exchange funds are treated, generally, as loaned by a taxpayer to an exchange facilitator, and the exchange facilitator takes into account all items of income, deduction, and credit. If, however, the escrow

agreement, trust agreement, or exchange agreement specifies that all the earnings attributable to exchange funds are payable to the taxpayer, the exchange funds are not treated as loaned from the taxpayer to the exchange facilitator, and the taxpayer takes into account all items of income, deduction, and credit attributable to the exchange funds. The final regulations are intended to provide greater certainty, enhance administrability, and ensure consistent treatment of taxpayers. The final regulations contain amendments to ease the economic impact of the final regulations on small businesses.

#### *Summary of Significant Issues Raised by Public Comments in Response to the Initial Regulatory Flexibility Analysis, Assessment of Issues, and Statement of Changes Made to the Proposed Regulations as a Result of Comments*

##### a. *Administrative burden resulting from loan characterization*

Under the final regulations, if exchange funds are treated as loaned by the taxpayer to an exchange facilitator, interest generally is imputed to the taxpayer under section 7872 unless the exchange facilitator pays sufficient interest. If a loan between the taxpayer and the exchange facilitator does not provide for sufficient interest and the loan is not otherwise exempt from section 7872, interest income is imputed to the taxpayer. Therefore, exchange facilitators must keep records of the amount of income paid to a taxpayer and may be required to report the income on Forms 1099. The revised IRFA estimated that most small businesses subject to the proposed regulations currently maintain records of the amount of income paid to the taxpayer and report the payments on Forms 1099. The revised IRFA concluded that the proposed regulations should not increase significantly the compliance burden associated with keeping records and reporting income paid to the taxpayer, based on the expectation that the proposed regulations may have the effect of increasing the amount exchange facilitators report, but not result in a significant increase in the number of forms generated. The revised IRFA requested additional comments to assist in quantifying any additional recordkeeping burdens and accounting costs that may result.

A commentator responded that the proposed regulations impose new and different reporting requirements than those that currently apply to qualified intermediaries (QI) because QIs must determine if the regulations apply to a particular transaction and may be required to report imputed interest. The commentator provided a study (updated in a follow-up submission) that concludes that the incremental workload to comply with the proposed regulations is substantial and the software needed to comply with the recordkeeping requirements is not available at a cost affordable to many small businesses. The study offers suggestions to mitigate these effects that include providing an exception to section 7872 for certain transactions, revising the special AFR, and including a transition period. The final regulations incorporate all of these suggestions.

The study also suggested that the average daily balance calculations required under the proposed regulations create substantial administrative burdens and should be deleted. The final regulations do not adopt this comment. The final regulations do not require average daily balance calculations, but provide an example utilizing an average daily balance calculation as only one acceptable method to determine the earnings of a commingled account that are attributable to a taxpayer's exchange funds. No other comments were received quantifying a compliance burden resulting from the proposed regulations. A commentator advised that the amount of additional time or expense that would result from the application of the proposed regulations could not be quantified yet. However, commentators requested that the applicability of the final regulations be delayed to allow exchange facilitators sufficient time to make required changes to accounting, control, and reporting systems and to revise exchange agreements. In response to these comments, the final regulations apply to transfers of relinquished property made, and to exchange facilitator loans issued, on or after October 8, 2008.

#### b. *Economic impact of loan characterization*

Commentators on the proposed regulations asserted that the loan characterization rules will cause a large number of small businesses to suffer a substantial revenue

loss and to fail or reduce their workforces. They claimed that small business QIs would be disproportionately affected because these QIs predominantly apply a business model that would place them at a disadvantage under the proposed regulations. Commentators stated that if businesses are required to impute interest on exchange funds, taxpayers will demand that this interest be paid to them. To compensate for this loss of revenue, these commentators claim that small businesses will be required to change their business practices to pay all income to the taxpayer and to charge higher fees, while large, bank-affiliated QIs generally will be unaffected. The revised IRFA requested specific comments to assist in quantifying the number of businesses that would change their business model as a result of the proposed regulations and the effect a change in business model would have on revenues or profits. No comments quantifying this effect were received.

The revised IRFA also requested specific comments on the appropriateness and nature of a rule that would reduce the economic impact of the regulations on small businesses by exempting certain exchange transactions most likely to be engaged in by small businesses from loan treatment. For this purpose, the revised IRFA requested information on the average duration of exchange transactions and the average dollar amount of exchange funds.

A commentator responded that in its QI business 76 percent of exchange transactions closed within 60 days and 80 percent of exchange transactions involved less than \$250,000 of exchange funds. This commentator advocated rules that would exempt from section 7872 transactions that either involved exchange funds of less than \$250,000 or remained open for less than 60 days.

Another commentator cited the minimal revenue impact of allowing interest retained by a QI to escape income inclusion to the taxpayer as a reason supporting exempting certain deferred like-kind exchange transactions. Because compensation paid to a QI must be capitalized as an acquisition cost of the replacement property, the commentator asserted that there is only a timing mismatch for the taxpayer if current exclusion is not allowed, and that given the relatively short time period dur-

ing which interest accrues in typical section 1031 transactions, any revenue impact of the proposed regulations would be outweighed by the increased compliance burden on taxpayers. This commentator suggested that two separate rules, one which exempts transactions of a certain amount (\$1 million) and another which exempts transactions of short duration (less than 90 days), are necessary because the available data suggests that there is no correlation between the size of the deposited exchange funds and the length of time the funds stay on deposit. This commentator also requested that any exemption amounts be adjusted for inflation.

In response to these comments, the final regulations provide an exemption from section 7872 for exchange transactions in which the amount of exchange funds treated as loaned does not exceed \$2 million and the funds are held for 6 months or less. This exemption amount may be increased in future published guidance. Based upon comments received the \$2 million amount is expected to exempt from the application of section 7872 most deferred exchange transactions handled by small business exchange facilitators.

#### c. *Special AFR*

The proposed regulations provide a special AFR, equal to the investment rate on a 182-day Treasury bill, to test whether an exchange facilitator loan pays sufficient interest as required by section 7872. The special AFR was expected to result in fewer transactions requiring the imputation of interest to taxpayers than the short-term AFR, thus reducing the economic impact on small businesses. However, comments on the proposed regulations claimed that the special AFR is unrealistically high and inappropriate for these transactions. In order to determine an appropriate rate for testing exchange facilitator loans for sufficient interest, the revised IRFA requested specific comments identifying the rate of return typically earned by small business QIs on exchange funds and the interest rate QIs typically pay to taxpayers, and solicited suggestions for an appropriate rate.

A commentator responded that the rate of return earned by a QI will vary depending on the total amount of funds the QI aggregates, the market in which the QI

operates, the QI's reputation and relationship with a depository institution, and the QI's choice of investment vehicle. Thus, the commentator advised that it is difficult to ascertain the rate of return earned by a small business QI on exchange funds. The commentator stated that quantifying the interest rate that QIs typically pay to taxpayers likewise is difficult because many factors influence it.

Another commentator responding to the revised IRFA argued that the 182-day rate is inappropriate to test whether exchange facilitator loans bear sufficient interest under section 7872 because exchange funds held by a depository institution are demand deposits and rarely are held for 180 days. This commentator identified three potential alternative rates to the 182-day rate for a special AFR: (1) a rate based on national demand deposit rates; (2) a rate that is 10 percent of an established rate such as the Federal Funds rate; and (3) an average of the minimum demand deposit savings rates offered by several banks in a QI's home office region. Although this commentator recognized the administrative burdens of publishing one of these alternative rates, the commentator believed these alternatives more readily reflected the economic reality of exchange fund transactions than the 182-day rate.

In response to these comments and comments on the proposed regulations, in lieu of the 182-day rate, the final regulations provide a special AFR that is the investment rate on a 13-week (generally, 91-day) Treasury bill. In addition, because the short-term AFR may be lower than the 91-day rate, the final regulations provide that taxpayers must apply the lower of the 91-day rate or the short-term AFR when testing for sufficient interest under section 7872.

#### *d. Earnings attributable to exchange funds*

The proposed regulations provide that a taxpayer's exchange funds are not treated as loaned if all the earnings attributable to the exchange funds are paid to the taxpayer but do not define the term "earnings attributable to the exchange funds." Commentators have asserted that the lack of specificity results in disparate treatment of bank-affiliated QIs and independent QIs because of their different business models

and places the independent QIs, many of which are small businesses, at an economic disadvantage.

Commentators advised that a portion of the earnings of a depository institution may be credited to an exchange facilitator based on the total amount of exchange funds the exchange facilitator deposits when the exchange facilitator and the depository institution (generally large businesses) are part of the same corporate group. The commentators opined that the proposed regulations do not, but should, treat this credit as earnings attributable to the exchange funds on which it is calculated.

Another commentator noted that depository institutions also may pay fees to unrelated exchange facilitators, including small businesses, for depositing exchange funds. Furthermore, other commentators described a business model used by some independent QIs, including some small businesses, in which a QI deposits the exchange funds of multiple taxpayers in sub-accounts under a master account that earns interest in addition to the interest credited to the sub-accounts. The amount of the additional interest credited to the QI is based on the total amount of exchange funds the QI deposits. Commentators have expressed concern that the proposed regulations treat this additional interest as earnings attributable to the individual taxpayers' exchange funds, but do not similarly treat earnings credited to a related QI based on total amount deposited.

The commentators claim that as a result of this treatment independent QIs will be forced to pay the additional interest that is attributable to exchange funds to taxpayers to avoid loan treatment, and thus will be required to correspondingly raise fees to compensate for lost profits. They assert that because bank-affiliated QIs earn profits by means of credits that are not attributed to exchange funds, bank-affiliated QIs will not be required to raise fees, creating an economic disparity between similarly situated bank-affiliated QIs and independent QIs.

In response to these comments, the final regulations provide a definitive test for determining earnings attributable to a taxpayer's exchange funds when an exchange facilitator holds all of the taxpayer's exchange funds in a separately identified account (or sub-account) under that tax-

payer's name and TIN. Under this rule, the earnings attributable to the taxpayer's exchange funds include only the earnings on the separately identified account. This rule equalizes the treatment of independent, small business exchange facilitators and large exchange facilitators by providing that neither earnings of a depository institution that are credited to a related exchange facilitator nor the additional interest paid in connection with a master account are treated as earnings attributable to exchange funds when a taxpayer's exchange funds are held in a separately identified account (or sub-account).

#### *Description and Estimate of the Number of Small Businesses to Which the Final Regulations Will Apply*

The final regulations affect exchange facilitators that hold exchange funds for taxpayers engaging in deferred exchanges of like-kind property. The revised IRFA concludes that the applicable size standard for determining what constitutes a small business for purposes of the proposed regulations is \$2 million in annual gross receipts, the SBA's definition of a small business for North American Industry Classification System (NAICS) code 531390, and estimates that there are approximately 325 businesses (mostly QIs) that are full-time exchange facilitators.

The revised IRFA requested additional information on the number of small businesses engaged in the QI industry, and requested specific comments from QIs engaged exclusively in that business indicating whether their annual gross receipts are \$2 million or less, or more than \$2 million. A commentator advised that the number of QIs is very large, but many QIs do not identify themselves as such or engage in that business full-time. The commentator reported that the annual gross receipts of its QI business are well below \$2 million. Another commentator opined that the information requested could not be quantified. No other comments were received on the number of small businesses in the industry or the general appropriateness of the size standard. Therefore, the estimate of approximately 325 businesses that are full-time exchange facilitators, the applicable size standard for determining what constitutes a small business with respect to these regulations of \$2 million in annual



gross receipts, and the conclusion that a significant portion of the QI industry consists of small businesses under this standard, are unchanged.

*Description of Compliance Requirements and Estimate of the Classes of Small Businesses That Will Be Subject to the Compliance Requirements*

As discussed, under current law exchange facilitators must keep records of the amount of income paid to taxpayers and may be required to report the income on Forms 1099. The final regulations provide that if the exchange funds are treated as loaned from the taxpayer to the QI and the loan is a below-market loan that does not qualify for an exemption from section 7872, income is deemed transferred to the exchange facilitator as compensation and retransferred to the taxpayer as interest. The exchange facilitator has income from the imputed compensation and an offsetting deduction for the interest deemed paid to the taxpayer.

The final regulations provide an exemption from section 7872 for exchange facilitator loans that do not exceed \$2 million and provide that this exemption amount may be increased in future published guidance. Based on available data, this exemption from section 7872 is expected to apply to the majority of exchange transactions engaged in by small business exchange facilitators. Additionally, the final regulations revise the special AFR that determines whether a loan pays sufficient interest, which should reduce the number of transactions in which interest is imputed. Therefore, for most small businesses the final regulations are not expected to increase significantly the compliance burden associated with keeping records and reporting income paid to the taxpayer.

*Actions to Minimize the Significant Economic Impact on Small Businesses and Reasons for Selecting Alternatives Reflected in the Final Regulations and for Rejecting Other Significant Alternatives*

The final regulations provide a reasonable balance between the statutory requirements of sections 468B and 7872, the economic impact of a strict application of those provisions, and the need to provide clear and administrable rules. The inclusion of a \$2 million exemption from

section 7872, the adjustment of the special AFR, and the delayed applicability date reflect a judgment that the revenue effects are small and are outweighed by the compliance burden and other economic impacts of the regulations on small businesses.

**Drafting Information**

The principal authors of these regulations are Jeffrey T. Rodrick of the Office of Associate Chief Counsel (Income Tax & Accounting) and David B. Silber of the Office of Associate Chief Counsel (Financial Institutions & Products). However, other personnel from the IRS and the Treasury Department participated in their development.

\* \* \* \* \*

**Adoption of Amendments to the Regulations**

Accordingly, 26 CFR part 1 is amended as follows:

**PART 1—INCOME TAXES**

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

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

Section 1.468B-6 also issued under 26 U.S.C. 468B(g). \* \* \*

Section 1.7872-5 also issued under 26 U.S.C. 7872. \* \* \*

Section 1.7872-16 also issued under 26 U.S.C. 7872. \* \* \*

Par. 2. Section 1.468B-0 is amended by adding entries for §1.468B-6 to read as follows:

*§1.468B-0 Table of Contents*

\* \* \* \* \*

*§1.468B-6 Escrow accounts, trusts, and other funds used during deferred exchanges of like-kind property under section 1031(a)(3).*

- (a) Scope.
- (b) Definitions.
  - (1) In general.
  - (2) Exchange funds.
  - (3) Exchange facilitator.
  - (4) Transactional expenses.
    - (i) In general.
    - (ii) Special rule for certain fees for exchange facilitator services.

- (c) Taxation of exchange funds.
  - (1) Exchange funds generally treated as loaned to an exchange facilitator.
  - (2) Exchange funds not treated as loaned to an exchange facilitator.
    - (i) Scope.
    - (ii) Earnings attributable to the taxpayer's exchange funds.
      - (A) Separately identified account.
      - (B) Allocation of earnings in commingled accounts.
      - (C) Transactional expenses.
    - (iii) Treatment of the taxpayer.
    - (d) Information reporting requirements.
    - (e) Examples.
    - (f) Effective/applicability dates.
      - (1) In general.
      - (2) Transition rule.

\* \* \* \* \*

Par. 3. Section 1.468B-6 is added to read as follows:

*§1.468B-6 Escrow accounts, trusts, and other funds used during deferred exchanges of like-kind property under section 1031(a)(3).*

(a) *Scope.* This section provides rules under section 468B(g) relating to the current taxation of escrow accounts, trusts, and other funds used during deferred exchanges.

(b) *Definitions.* The definitions in this paragraph (b) apply for purposes of this section.

(1) *In general.* *Deferred exchange, escrow agreement, escrow holder, exchange agreement, qualified escrow account, qualified intermediary, qualified trust, relinquished property, replacement property, taxpayer, trust agreement, and trustee* have the same meanings as in §1.1031(k)-1; deferred exchange also includes any exchange intended to qualify as a deferred exchange, and qualified intermediary also includes any person or entity intended by a taxpayer to be a qualified intermediary within the meaning of §1.1031(k)-1(g)(4).

(2) *Exchange funds.* *Exchange funds* means relinquished property, cash, or cash equivalent that secures an obligation of a transferee to transfer replacement property, or proceeds from a transfer of relinquished property, held in a qualified escrow account, qualified trust, or other escrow account, trust, or fund in a deferred exchange.

(3) *Exchange facilitator.* *Exchange facilitator* means a qualified intermediary, transferee, escrow holder, trustee, or other party that holds exchange funds for a taxpayer in a deferred exchange pursuant to an escrow agreement, trust agreement, or exchange agreement.

(4) *Transactional expenses*—(i) *In general.* Except as provided in paragraph (b)(4)(ii) of this section, *transactional expenses* means transactional items within the meaning of §1.1031(k)-1(g)(7)(ii).

(ii) *Special rule for certain fees for exchange facilitator services.* The fee for the services of an exchange facilitator is not a transactional expense unless the escrow agreement, trust agreement, or exchange agreement, as applicable, provides that—

(A) The amount of the fee payable to the exchange facilitator is fixed on or before the date of the transfer of the relinquished property by the taxpayer (either by stating the fee as a fixed dollar amount in the agreement or determining the fee by a formula, the result of which is known on or before the transfer of the relinquished property by the taxpayer); and

(B) The amount of the fee is payable by the taxpayer regardless of whether the earnings attributable to the exchange funds are sufficient to pay the fee.

(c) *Taxation of exchange funds*—(1) *Exchange funds generally treated as loaned to an exchange facilitator.* Except as provided in paragraph (c)(2) of this section, exchange funds are treated as loaned from a taxpayer to an exchange facilitator (exchange facilitator loan). If a transaction is treated as an exchange facilitator loan under this paragraph (c)(1), the exchange facilitator must take into account all items of income, deduction, and credit (including capital gains and losses) attributable to the exchange funds. See §1.7872-16 to determine if an exchange facilitator loan is a below-market loan for purposes of section 7872 and §1.7872-5(b)(16) to determine if an exchange facilitator loan is exempt from section 7872.

(2) *Exchange funds not treated as loaned to an exchange facilitator*—(i) *Scope.* This paragraph (c)(2) applies if, in accordance with an escrow agreement, trust agreement, or exchange agreement, as applicable, all the earnings attributable to a taxpayer's exchange funds are paid to the taxpayer.

(ii) *Earnings attributable to the taxpayer's exchange funds*—(A) *Separately identified account.* If an exchange facilitator holds all of the taxpayer's exchange funds in a separately identified account, the earnings credited to that account are deemed to be all the earnings attributable to the taxpayer's exchange funds for purposes of paragraph (c)(2)(i) of this section. In general, a separately identified account is an account established under the taxpayer's name and taxpayer identification number with a depository institution. For purposes of paragraph (c)(2)(i) of this section, a sub-account will be treated as a separately identified account if the master account under which the sub-account is created is established with a depository institution, the depository institution identifies the sub-account by the taxpayer's name and taxpayer identification number, and the depository institution specifically credits earnings to the sub-account.

(B) *Allocation of earnings in commingled accounts.* If an exchange facilitator commingles (for investment or otherwise) the taxpayer's exchange funds with other funds or assets, all the earnings attributable to the taxpayer's exchange funds are paid to the taxpayer if all of the earnings attributable to the commingled funds or assets that are allocable on a *pro-rata* basis (using a reasonable method that takes into account the time that the exchange funds are in the commingled account, actual rate or rates of return, and the respective account balances) to the taxpayer's exchange funds either are paid to the taxpayer or are treated as paid to the taxpayer under paragraph (c)(2)(ii)(C) of this section.

(C) *Transactional expenses.* Any payment from the taxpayer's exchange funds, or from the earnings attributable to the taxpayer's exchange funds, for a transactional expense of the taxpayer (as defined in paragraph (b)(4) of this section) is treated as first paid to the taxpayer and then paid by the taxpayer to the recipient.

(iii) *Treatment of the taxpayer.* If this paragraph (c)(2) applies, exchange funds are not treated as loaned from a taxpayer to an exchange facilitator. The taxpayer must take into account all items of income, deduction, and credit (including capital gains and losses) attributable to the exchange funds.

(d) *Information reporting requirements.* A payor (as defined in §1.6041-1) must

report the income attributable to exchange funds to the extent required by the information reporting provisions of subpart B, Part III, subchapter A, chapter 61, Subtitle F of the Internal Revenue Code, and the regulations under those provisions. See §1.6041-1(f) for rules relating to the amount to be reported when fees, expenses or commissions owed by a payee to a third party are deducted from a payment.

(e) *Examples.* The provisions of this section are illustrated by the following examples in which T is a taxpayer that uses a calendar taxable year and the cash receipts and disbursements method of accounting. The examples are as follows:

*Example 1. All earnings attributable to exchange funds paid to taxpayer.* (i) T enters into a deferred exchange with R. The sales agreement provides that T will transfer property (the relinquished property) to R and R will transfer replacement property to T. R's obligation to transfer replacement property to T is secured by cash equal to the fair market value of the relinquished property, which R will deposit into a qualified escrow account that T establishes with B, a depository institution. T enters into an escrow agreement with B that provides that all the earnings attributable to the exchange funds will be paid to T.

(ii) On November 1, 2008, T transfers property to R and R deposits \$2,100,000 in T's qualified escrow account with B. Between November 1 and December 31, 2008, B credits T's account with \$14,000 of interest. During January 2009, B credits T's account with \$7,000 of interest. On February 1, 2009, R transfers replacement property worth \$2,100,000 to T and B pays \$2,100,000 from the qualified escrow account to R. Additionally, on February 1, 2009, B pays the \$21,000 of interest to T.

(iii) Under paragraph (b) of this section, the \$2,100,000 deposited with B constitutes exchange funds and B is an exchange facilitator. Because all the earnings attributable to the exchange funds are paid to T in accordance with the escrow agreement, paragraph (c)(2) of this section applies. The exchange funds are not treated as loaned from T to B. T must take into account in computing T's income tax liability for 2008 the \$14,000 of earnings credited to the qualified escrow account in 2008 and for 2009 the \$7,000 of earnings credited to the qualified escrow account in 2009.

*Example 2. Payment of transactional expenses from earnings.* (i) The facts are the same as in *Example 1*, except that the escrow agreement provides that, prior to paying the earnings to T, B may deduct any amounts B has paid to third parties for T's transactional expenses. B pays a third party \$350 on behalf of T for a survey of the replacement property. After deducting \$350 from the earnings attributable to T's qualified escrow account, B pays T the remainder (\$20,650) of the earnings.

(ii) Under paragraph (b)(4) of this section, the cost of the survey is a transactional expense. Under paragraph (c)(2)(ii)(C) of this section, the \$350 that B pays for the survey is treated as first paid to T and then from T to the third party. Therefore, all the earnings attributable to T's exchange funds are paid or treated

as paid to T in accordance with the escrow agreement, and paragraph (c)(2) of this section applies. The exchange funds are not treated as loaned from T to B, and T must take into account in computing T's income tax liability the \$21,000 of earnings credited to the qualified escrow account.

*Example 3. Earnings retained by exchange facilitator as compensation for services.* (i) The facts are the same as in *Example 1*, except that the escrow agreement provides that B also may deduct any outstanding fees owed by T for B's services in facilitating the deferred exchange. In accordance with paragraph (b)(4)(ii) of this section, the escrow agreement provides for a fixed fee of \$1,200 for B's services, which is payable by T regardless of the amount of earnings attributable to the exchange funds. Because the earnings on the exchange funds in this case exceed \$1,200, B retains \$1,200 as the unpaid portion of its fee and pays T the remainder (\$19,800) of the earnings.

(ii) Under paragraph (b)(4) of this section, B's fee is treated as a transactional expense. Under paragraph (c)(2)(ii)(C) of this section, the \$1,200 that B retains for its fee is treated as first paid to T and then from T to B. Therefore, all the earnings attributable to T's exchange funds are paid or treated as paid to T in accordance with the escrow agreement, and paragraph (c)(2) of this section applies. The exchange funds are not treated as loaned from T to B, and T must take into account in computing T's income tax liability the \$21,000 of earnings credited to the qualified escrow account.

*Example 4. Exchange funds deposited by exchange facilitator with related depository institution in account in taxpayer's name.* (i) The facts are the same as in *Example 1* except that, instead of entering into an escrow agreement, T enters into an exchange agreement with QI, a qualified intermediary. The exchange agreement provides that R will pay \$2,100,000 to QI, QI will deposit \$2,100,000 into an account with a depository institution under T's name and taxpayer identification number (TIN), and all the earnings attributable to the account will be paid to T.

(ii) On May 1, 2008, T transfers property to QI, QI transfers the property to R, R delivers \$2,100,000 to QI, and QI deposits \$2,100,000 into a money market account with depository institution B under T's name and TIN. B and QI are members of the same consolidated group of corporations within the meaning of section 1501. Between May 1 and September 1, 2008, the account earns \$28,000 of interest at the stated rate established by B. During the period May 1 to September 1, 2008, B invests T's exchange funds and earns \$40,000. On September 1, 2008, QI uses \$2,100,000 of the funds in the account to purchase replacement property identified by T and transfers the replacement property to T. B pays to T the \$28,000 of interest earned on the money market account at the stated rate.

(iii) Under paragraph (b) of this section, the \$2,100,000 QI receives from R for the relinquished property is exchange funds and QI is an exchange facilitator. B is not an exchange facilitator. T has not entered into an escrow agreement, trust agreement, or exchange agreement with B, and QI, not B, holds the exchange funds on behalf of T. Under paragraph (c)(2)(ii)(A) of this section, the \$40,000 B earns from investing T's exchange funds are not treated as earnings attributable to T's exchange funds. Because all the earnings attributable to T's exchange funds are paid to T in accordance with the exchange agreement, paragraph (c)(2) of this section applies. The exchange funds are not treated as loaned from T to QI, and T must take into account in computing T's income tax liability for 2008 the \$28,000 of interest earned on the money market account.

*Example 5. Earnings of related depository institution credited to exchange facilitator.* (i) The facts are the same as in *Example 4*, except that at the end of each taxable year, B credits a portion of its earnings on deposits to QI. The amount credited is based on the total amount of exchange funds QI has deposited with B during the year. At the end of the 2008 taxable year, B credits \$152,500 of B's earnings to QI.

(ii) Under paragraph (c)(2)(ii)(A) of this section, no part of the \$152,500 credited by B to QI is earnings attributable to T's exchange funds. Therefore, all of the earnings attributable to the exchange funds are paid to T in accordance with the exchange agreement, and paragraph (c)(2) of this section applies. The exchange funds are not treated as loaned from T to QI, and T must take into account in computing T's income tax liability for 2008 the \$28,000 of interest earned on T's account.

*Example 6. Exchange funds deposited by exchange facilitator with unrelated depository institution in sub-account in taxpayer's name.* (i) The facts are the same as in *Example 4*, except that QI and B are unrelated and the money market account in which QI deposits the \$2,100,000 received from T is a sub-account within a master account QI maintains with B in QI's name and TIN. The master account includes other sub-accounts, each in the name and TIN of a taxpayer that has entered into an exchange agreement with QI, into which QI deposits each taxpayer's exchange funds. Each month, B transfers to QI's master account an additional amount of interest based upon the average daily balance of all exchange funds within the master account during the month. At the end of the 2008 taxable year, B has credited \$152,500 of additional interest to QI.

(ii) Under paragraph (c)(2)(ii)(A) of this section, no part of the \$152,500 credited by B to QI is earnings attributable to T's exchange funds. Therefore, all of the earnings attributable to the exchange funds are paid to T in accordance with the exchange agreement, and paragraph (c)(2) of this section applies. The exchange funds are not treated as loaned from T to QI, and T must take into account in computing T's in-

come tax liability for 2008 the \$28,000 of interest earned on T's account.

*Example 7. Marketing fee paid to exchange facilitator.* (i) The facts are the same as in *Example 4*, except that at the end of each taxable year, B pays a marketing fee to QI for using B as its depository institution for exchange funds. The amount of the fee is based on the total amount of exchange funds QI has deposited with B during the year.

(ii) Under paragraph (c)(2)(ii)(A) of this section, no part of the marketing fee that B pays to QI is earnings attributable to T's exchange funds. Therefore, all of the earnings attributable to the exchange funds are paid to T in accordance with the exchange agreement, and paragraph (c)(2) of this section applies. The exchange funds are not treated as loaned from T to QI, and T must take into account in computing T's income tax liability for 2008 the \$28,000 of interest earned on T's account.

*Example 8. Stated rate of interest on account less than earnings attributable to exchange funds.* (i) The facts are the same as in *Example 4*, except that the exchange agreement provides only that QI will pay T a stated rate of interest. QI invests the exchange funds and earns \$40,000. The exchange funds earn \$28,000 at the stated rate of interest, and QI pays the \$28,000 to T.

(ii) Paragraph (c)(1) of this section applies and the exchange funds are treated as loaned from T to QI. QI must take into account in computing QI's income tax liability all items of income, deduction, and credit (including capital gains and losses) attributable to the exchange funds. Paragraph (c)(2) of this section does not apply because QI does not pay all the earnings attributable to the exchange funds to T. See §§ 1.7872-5 and 1.7872-16 for rules relating to exchange facilitator loans.

*Example 9. All earnings attributable to commingled exchange funds paid to taxpayer.* (i) The facts are the same as in *Example 4*, except that the exchange agreement does not specify how the \$2,100,000 QI receives from R must be invested.

(ii) On May 1, 2008, QI deposits the \$2,100,000 with B in a pre-existing interest-bearing account under QI's name and TIN. The account has a total balance of \$5,275,000 immediately thereafter. On the last day of each month between May and September, 2008, the account earns interest as follows: \$17,583 in May, \$17,642 in June, \$18,756 in July, and \$17,472 in August. On July 11, 2008, QI deposits \$500,000 in the account. On August 15, 2008, QI withdraws \$1,175,000 from the account.

(iii) QI calculates T's *pro-rata* share of the earnings allocable to the \$2,100,000 based on the actual return, the average daily principal balances, and a 30-day month convention, as follows:

Month	Account's Avg. Daily Bal.	T's Avg. Daily Bal.	T's Share*	Monthly Interest	T's End. Bal.**
May	\$5,275,000	\$2,100,000	39.8%	\$17,583	\$2,106,998
June	\$5,292,583	\$2,106,998	39.8%	\$17,642	\$2,114,020
July	\$5,643,558	\$2,114,020	37.5%	\$18,756	\$2,121,054
August	\$5,035,647	\$2,121,054	42.1%	\$17,472	\$2,128,410

\* T's Average Daily Balance ÷ Account's Average Daily Balance  
\*\*T's beginning balance + [(T's share)(Monthly Interest)]

(iv) On September 1, 2008, QI uses \$2,100,000 of the funds to purchase replacement property identified by T and transfers the property to T. QI pays \$28,410, the earnings of the account allocated to T's exchange funds, to T.

(v) Because QI uses a reasonable method to calculate the *pro-rata* share of account earnings allocable to T's exchange funds in accordance with paragraph (c)(2)(ii)(B) of this section, and pays all those earnings to T, paragraph (c)(2) of this section applies. The exchange funds are not treated as loaned from T to QI. T must take into account in computing T's income tax liability for 2008 the \$28,410 of earnings attributable to T's exchange funds.

(f) *Effective/applicability dates*—(1) *In general*. This section applies to transfers of relinquished property made by taxpayers on or after October 8, 2008.

(2) *Transition rule*. With respect to transfers of relinquished property made by taxpayers after August 16, 1986, but before October 8, 2008, the Internal Revenue Service will not challenge a reasonable, consistently applied method of taxation for income attributable to exchange funds.

Par. 4. Section 1.1031(k)–1 is amended by adding a sentence at the end of paragraph (h)(2) to read as follows:

*§1.1031(k)–1 Treatment of deferred exchanges.*

\*\*\*\*\*

(h) \*\*\*

(2) \*\*\* For rules under section 468B(g) relating to the current taxation of qualified escrow accounts, qualified trusts, and other escrow accounts, trusts, and funds used during deferred exchanges of like-kind property, see §1.468B–6.

\*\*\*\*\*

Par. 5. Section 1.7872–5 is added to read as follows:

*§1.7872–5 Exempted loans.*

(a) *In general*—(1) *General rule*. Except as provided in paragraph (a)(2) of this section, notwithstanding any other provision of section 7872 and the regulations

under that section, section 7872 does not apply to the loans listed in paragraph (b) of this section because the interest arrangements do not have a significant effect on the Federal tax liability of the borrower or the lender.

(2) *No exemption for tax avoidance loans*. If a taxpayer structures a transaction to be a loan described in paragraph (b) of this section and one of the principal purposes of so structuring the transaction is the avoidance of Federal tax, then the transaction will be recharacterized as a tax avoidance loan as defined in section 7872(c)(1)(D).

(b) *List of exemptions*. Except as provided in paragraph (a) of this section, the following transactions are exempt from section 7872:

(1) through (15) [Reserved]. For further guidance, see §1.7872–5T(b)(1) through (15).

(16) An exchange facilitator loan (within the meaning of §1.468B–6(c)(1)) if the amount of the exchange funds (as defined in §1.468B–6(b)(2)) treated as loaned does not exceed \$2,000,000 and the duration of the loan is 6 months or less. The Commissioner may increase this \$2,000,000 loan exemption amount in published guidance of general applicability, see §601.601(d)(2) of this chapter.

(c) [Reserved]. For further guidance, see §1.7872–5T(c).

(d) *Effective/applicability date*. This section applies to exchange facilitator loans issued on or after October 8, 2008.

Par. 6. Section 1.7872–16 is added to read as follows:

*§1.7872–16 Loans to an exchange facilitator under §1.468B–6.*

(a) *Exchange facilitator loans*. This section provides rules in applying section 7872 to an exchange facilitator loan (within the meaning of §1.468B–6(c)(1)). For purposes of this section, the terms

*deferred exchange, exchange agreement, exchange facilitator, exchange funds, qualified intermediary, replacement property, and taxpayer* have the same meanings as in §1.468B–6(b).

(b) *Treatment as demand loans*. For purposes of section 7872, except as provided in paragraph (d) of this section, an exchange facilitator loan is a demand loan.

(c) *Treatment as compensation-related loans*. If an exchange facilitator loan is a below-market loan, the loan is a compensation-related loan under section 7872(c)(1)(B).

(d) *Applicable Federal rate (AFR) for exchange facilitator loans*. For purposes of section 7872, in the case of an exchange facilitator loan, the applicable Federal rate is the lower of the short-term AFR in effect under section 1274(d)(1) (as of the day on which the loan is made), compounded semiannually, or the 91-day rate. For purposes of the preceding sentence, the 91-day rate is equal to the investment rate on a 13-week (generally 91-day) Treasury bill with an issue date that is the same as the date that the exchange facilitator loan is made or, if the two dates are not the same, with an issue date that most closely precedes the date that the exchange facilitator loan is made.

(e) *Use of approximate method permitted*. The taxpayer and exchange facilitator may use the approximate method to determine the amount of forgone interest on any exchange facilitator loan.

(f) *Exemption for certain below-market exchange facilitator loans*. If an exchange facilitator loan is a below-market loan, the loan is not eligible for the exemptions from section 7872 listed under §1.7872–5T. However, the loan may be eligible for the exemption from section 7872 under §1.7872–5(b)(16) (relating to exchange facilitator loans in which the amount treated as loaned does not exceed \$2,000,000).

(g) *Effective/applicability date.* This section applies to exchange facilitator loans issued on or after October 8, 2008.

(h) *Example.* The provisions of this section are illustrated by the following example:

*Example.* (i) T enters into a deferred exchange with QI, a qualified intermediary. The exchange is governed by an exchange agreement. The exchange funds held by QI pursuant to the exchange agreement are treated as loaned to QI under §1.468B-6(c)(1). The loan between T and QI is an exchange facilitator loan. The exchange agreement between T and QI provides that no earnings will be paid to T. On December 1, 2008, T transfers property to QI, QI transfers the property to a purchaser for \$2,100,000, and QI deposits \$2,100,000 in a money market account. On March 1, 2009, QI uses \$2,100,000 of the funds in the account to purchase replacement property identified by T, and transfers the replacement property to T. The amount loaned for purposes of section 7872 is \$2,100,000 and the loan is outstanding for three months. For purposes of section 7872, under paragraph (d) of this section, T uses the 91-day rate, which is 4 percent, compounded semi-annually. T uses the approximate method for purposes of section 7872.

(ii) Under paragraphs (b) and (c) of this section, the loan from T to QI is a compensation-related demand loan. Because there is no interest payable on the loan from T to QI, the loan is a below-market loan under section 7872. The loan is not exempt under §1.7872-5(b)(16) because the amount treated as loaned exceeds \$2,000,000. Under section 7872(e)(2), the amount of forgone interest on the loan for 2008 is \$7000 ( $\$2,100,000 \times .04/2 \times 1/6$ ). Under section 7872(e)(2), the amount of forgone interest for 2009 is \$14,000 ( $\$2,100,000 \times .04/2 \times 2/6$ ). The \$7,000 for 2008 is deemed transferred as compensation by T to QI and retransferred as interest by QI to T on December 31, 2008. The \$14,000 for 2009 is deemed transferred as compensation by T to QI and retransferred as interest by QI to T on March 1, 2009.

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

Approved July 2, 2008.

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

(Filed by the Office of the Federal Register on July 9, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 10, 2008, 73 F.R. 39614)

## Section 709.—Treatment of Organization and Syndication Fees

Final, temporary, and proposed regulations provide guidance for making elections to amortize expenses under sections 195, 248, and 709 of the Code. See T.D. 9411, page 398.

Final, temporary, and proposed regulations provide guidance for making elections to amortize expenses under sections 195, 248, and 709 of the Code. See REG-164965-04, page 450.

## Section 1031.—Exchange of Property Held for Productive Use or Investment

26 CFR 1.1031(k)-1: *Treatment of deferred exchanges.*

Final regulations provide rules relating to the current taxation of qualified escrow accounts, qualified trusts, and other escrow accounts, trusts, and funds used during deferred exchanges of like-kind property. See T.D. 9413, page 404.

## Section 6343.—Authority to Release Levy and Return Property

26 CFR 301.6343-2: *Return of wrongfully levied upon property.*

### T.D. 9410

## DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 301

### Change to Office to Which Notices of Nonjudicial Sale and Requests for Return of Wrongfully Levied Property Must Be Sent

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and removal of temporary regulations.

SUMMARY: This document contains final regulations relating to the discharge of liens under section 7425 and return of wrongfully levied upon property under section 6343 of the Internal Revenue Code (Code) of 1986. These regulations revise regulations currently published under sections 7425 and 6343. These regulations clarify that such notices and claims should be sent to the IRS official and office specified in the relevant IRS publications. The regulations will affect parties seeking to provide the IRS with notice of a

nonjudicial foreclosure sale and parties making administrative requests for return of wrongfully levied property.

**DATES:** *Effective Date:* These regulations are effective on July 8, 2008.

*Applicability Date:* See §§301.6343-2 and 301.7425-3.

FOR FURTHER INFORMATION CONTACT: Robin M. Ferguson, (202) 622-3630 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

### Background

This document contains final regulations amending the Procedure and Administration Regulations (26 CFR part 301) relating to the giving of notice of nonjudicial sales under section 7425(b) of the Code. This document also contains final regulations amending the Procedure and Administration Regulations relating to requests for return of wrongfully levied property under section 6343(b) of the Code. On July 20, 2007, temporary regulations (T.D. 9344, 2007-36 I.R.B. 535) were published in the **Federal Register** (72 FR 39737). A notice of proposed rulemaking (REG-148951-05, 2007-36 I.R.B. 550) cross-referencing the temporary regulations was published in the **Federal Register** on the same day (72 FR 39771). No written comments were received from the public in response to the notice of proposed rulemaking. No public hearing was requested, scheduled or held. The proposed regulations are adopted as amended by this Treasury decision, and the corresponding temporary regulations are removed.

For notices of nonjudicial foreclosure sale under Section 7425(b) and requests for return of property wrongfully levied upon under Section 6343(b), the existing regulations direct the notices and requests to be sent to the “district director (marked for the attention of the Chief, Special Procedures Staff).” The offices of the district director and Special Procedures were eliminated by the IRS reorganization implemented pursuant to the IRS Restructuring and Reform Act of 1998, Public Law 105-206 (RRA 1998), creating uncertainty as to the timeliness of notices and requests under these provisions.

## Comments on the Proposed Regulations

None.

## Modifications of the Proposed Regulations

None, other than minor grammatical revisions.

## Effective/Applicability Date

These regulations are effective on July 8, 2008.

## Special Analyses

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

## Drafting Information

The principal author of these regulations is Robin M. Ferguson, Office of Associate Chief Counsel (Procedure and Administration).

\* \* \* \* \*

## Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

### PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

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

Par. 2. Section 301.6343-2 is amended as follows:

1. Paragraphs (a)(1) introductory text and (b) introductory text are revised.

2. Paragraph (e) is revised.

The revisions read as follows:

#### *§301.6343-2 Return of wrongfully levied upon property.*

(a) *Return of property*— (1) *General rule.* If the Internal Revenue Service (IRS) determines that property has been wrongfully levied upon, the IRS may return—

\* \* \* \* \*

(b) *Request for return of property.* A written request for the return of property wrongfully levied upon must be given to the IRS official, office and address specified in IRS Publication 4528, “*Making an Administrative Wrongful Levy Claim Under Internal Revenue Code (IRC) Section 6343(b)*,” or any successor publication. The relevant IRS publications may be downloaded from the IRS internet site at *www.irs.gov*. Under this section, a request for the return of property wrongfully levied upon is not effective if it is given to an office other than the office listed in the relevant publication. The written request must contain the following information—

\* \* \* \* \*

(e) *Effective/applicability date.* These regulations are effective on July 8, 2008.

#### **§301.6343-2T [REMOVED].**

Par. 3. Section 301.6343-2T is removed.

Par. 4. Section 301.7425-3 is amended as follows:

1. Paragraphs (a)(1), (b)(1), (b)(2), (c)(1), (d)(2), (d)(3), and (d)(4) are revised.

2. Paragraph (a)(2)(iii) *Example 2* is amended by removing the language “district director” and adding the language “IRS” in its place wherever it appears.

3. Paragraph (e) is revised.

The revisions and additions read as follows:

#### *§301.7425-3 Discharge of liens; special rules.*

(a) *Notice of sale requirements*—(1) *In general.* Except in the case of the sale of perishable goods described in paragraph (c) of this section, a notice (as described in

paragraph (d) of this section) of a nonjudicial sale shall be given, in writing by registered or certified mail or by personal service, not less than 25 days prior to the date of sale (determined under the provisions of §301.7425-2(b)), to the Internal Revenue Service (IRS) official, office and address specified in IRS Publication 786, “*Instructions for Preparing a Notice of Nonjudicial Sale of Property and Application for Consent to Sale*,” or any successor publication. The relevant IRS publications may be downloaded from the IRS internet site at *www.irs.gov*. Under this section, a notice of sale is not effective if it is given to an office other than the office listed in the relevant publication. The provisions of sections 7502 (relating to timely mailing treated as timely filing) and 7503 (relating to time for performance of acts where the last day falls on Saturday, Sunday, or a legal holiday) apply in the case of notices required to be made under this paragraph.

\* \* \* \* \*

(b) *Consent to sale*—(1) *In general.* Notwithstanding the notice of sale provisions of paragraph (a) of this section, a nonjudicial sale of property shall discharge or divest the property of the lien and title of the United States if the IRS consents to the sale of the property free of the lien or title. Pursuant to section 7425(c)(2), where adequate protection is afforded the lien or title of the United States, the IRS may, in its discretion, consent with respect to the sale of property in appropriate cases. Such consent shall be effective only if given in writing and shall be subject to such limitations and conditions as the IRS may require. However, the IRS may not consent to a sale of property under this section after the date of sale, as determined under §301.7425-2(b). For provisions relating to the authority of the IRS to release a lien or discharge property subject to a tax lien, see section 6325 and the section 6325 regulations.

(2) *Application for consent.* Any person desiring the IRS’s consent to sell property free of a tax lien or a title derived from the enforcement of a tax lien of the United States in the property shall submit to the IRS, at the office and address specified in the relevant IRS publications, a written application, in triplicate, declaring that it is made under penalties of perjury, and requesting that such consent be given. The

application shall contain the information required in the case of a notice of sale, as set forth in paragraph (d)(1) of this section, and, in addition, shall contain a statement of the reasons why the consent is desired.

(c) *Sale of perishable goods.*—(1) *In general.* A notice (as described in paragraph (d) of this section) of a nonjudicial sale of perishable goods (as defined in paragraph (c)(2) of this section) shall be given in writing, by registered or certified mail or delivered by personal service, at any time before the sale, to the IRS official and office specified in the relevant IRS publications, at the address specified in such publications. Under this section, a notice of sale is not effective if it is given to an office other than the office listed in the relevant publication. If a notice of a nonjudicial sale is timely given in the manner described in this paragraph, the nonjudicial sale shall discharge or divest the tax lien, or a title derived from the enforcement of a tax lien, of the United States in the property. The provisions of sections 7502 (relating to timely mailing treated as timely filing) and 7503 (relating to time for performance of acts where the last day falls on Saturday, Sunday, or a legal holiday) apply in the case of notices required to be made under this paragraph. The seller of the perishable goods shall hold the proceeds (exclusive of costs) of the sale as a fund, for not less than 30 days after the date of the sale, subject to the liens and claims of the United States, in the same manner and with the same priority as the liens and claims of the United States had with respect to the property sold. If the seller fails to hold the proceeds of the sale in accordance with the provisions of this paragraph and if the IRS asserts a claim to the proceeds within 30 days after the date of sale, the seller shall be personally liable to the United States for an amount equal to the value of the interest of the United States in the fund. However, even if the proceeds of the sale are not so held by the seller, but all the other provisions of this paragraph are satisfied, the buyer of the property at the sale takes the property free of the liens and claims of the United States. In the event of a postponement of the scheduled sale of perishable goods, the seller is not required to no-

tify the IRS of the postponement. For provisions relating to the authority of the IRS to release a lien or discharge property subject to a tax lien, see section 6325 and the regulations.

\* \* \* \* \*

(d) \* \* \*

(2) *Inadequate notice.* Except as otherwise provided in this paragraph, a notice of sale described in paragraph (a) of this section that does not contain the information described in paragraph (d)(1) of this section shall be considered inadequate by the IRS. If the IRS determines that the notice is inadequate, the IRS will give written notification of the items of information which are inadequate to the person who submitted the notice. A notice of sale that does not contain the name and address of the person submitting such notice shall be considered to be inadequate for all purposes without notification of any specific inadequacy. In any case where a notice of sale does not contain the information required under paragraph (d)(1)(ii) of this section with respect to a Notice of Federal Tax Lien, the IRS may give written notification of such omission without specification of any other inadequacy and such notice of sale shall be considered inadequate for all purposes. In the event the IRS gives notification that the notice of sale is inadequate, a notice complying with the provisions of this section (including the requirement that the notice be given not less than 25 days prior to the sale in the case of a notice described in paragraph (a) of this section) must be given. However, in accordance with the provisions of paragraph (b)(1) of this section, in such a case the IRS may, in its discretion, consent to the sale of the property free of the lien or title of the United States even though notice of the sale is given less than 25 days prior to the sale. In any case where the person who submitted a timely notice, which indicates his name and address, does not receive more than 5 days prior to the date of sale written notification from the IRS that the notice is inadequate, the notice shall be considered adequate for purposes of this section.

(3) *Acknowledgment of notice.* If a notice of sale described in paragraph (a) or

(c) of this section is submitted in duplicate to the IRS with a written request that receipt of the notice be acknowledged and returned to the person giving the notice, this request will be honored by the IRS. The acknowledgment by the IRS will indicate the date and time of the receipt of the notice.

(4) *Disclosure of adequacy of notice.* The IRS is authorized to disclose, to any person who has a proper interest, whether an adequate notice of sale was given under paragraph (d)(1) of this section. Any person desiring this information should submit to the IRS a written request that clearly describes the property sold or to be sold, identifies the applicable notice of lien, gives the reasons for requesting the information, and states the name and address of the person making the request. The request should be submitted to the IRS official, office and address specified in IRS Publication 4235, “*Collection Advisory Group Addresses*,” or any successor publication. The relevant IRS publications may be downloaded from the IRS internet site at [www.irs.gov](http://www.irs.gov).

(e) *Effective/applicability date.* These regulations are effective on July 8, 2008.

#### §301.7425–3T [REMOVED].

Par. 5. Section 301.7425–3T is removed.

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

Approved June 30, 2008.

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

(Filed by the Office of the Federal Register on July 7, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 8, 2008, 73 F.R. 38915)

## Section 7425.—Discharge of Liens

Final regulations clarify that notices of nonjudicial sale should be sent to the IRS official and office specified in current IRS publications. See T.D. 9410, page 414.

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

Final regulations provide rules relating to the treatment of exchange facilitator loans as below-market loans. See T.D. 9413, page 404.

*26 CFR 1.7872-5: Exempted loans.*

*26 CFR 1.7872-16: Loans to an exchange facilitator under §1.468B-6.*



# Part III. Administrative, Procedural, and Miscellaneous

## Energy Credit for Qualified Fuel Cell Property and Qualified Microturbine Property

### Notice 2008-68

#### SECTION 1. PURPOSE

This notice sets forth interim guidance pending the issuance of regulations relating to the energy credit under § 48 of the Internal Revenue Code (Code) for fuel cells (fuel cell credit) and microturbines (microturbine credit).

#### SECTION 2. BACKGROUND

Section 46 of the Code provides that the amount of the investment credit for any taxable year includes the energy credit. Section 48(a)(1) of the Code provides that the energy credit for a taxable year is the energy percentage of the basis of each energy property placed in service during the taxable year.

Section 1336 of the Energy Policy Act of 2005, Pub. L. No. 109-58, amended § 48 to add qualified fuel cell property and qualified microturbine property to the list of property that can qualify for the energy credit. The amendment also provides that the energy percentage is 30 percent for qualified fuel cell property and 10 percent for qualified microturbine property.

#### SECTION 3. DEFINITIONS, ETC.

.01 *Definitions.* The following definitions apply for purposes of this notice:

(1) *Qualified fuel cell property.* Qualified fuel cell property is a fuel cell power plant that satisfies the following conditions:

(a) The plant has a nameplate capacity of at least 0.5 kilowatt of electricity using an electrochemical process.

(b) The plant has an electricity-only generation efficiency greater than 30 percent.

(c) The plant is within the credit period as determined under section 3.03 of this notice.

(2) *Qualified fuel cell energy property.* Qualified fuel cell energy property is qual-

ified fuel cell property that satisfies the requirements of section 3.02 of this notice.

(3) *Qualified microturbine property.* Qualified microturbine property is a stationary microturbine power plant that satisfies the following conditions:

(a) The plant has a nameplate capacity of less than 2,000 kilowatts.

(b) The plant has an electricity-only generation efficiency of not less than 26 percent at International Standard Organization (ISO) conditions.

(c) The plant is within the credit period as determined under section 3.03 of this notice.

(4) *Qualified microturbine energy property.* Qualified microturbine energy property is qualified microturbine property that satisfies the requirements of section 3.02 of this notice.

(5) *Fuel cell power plant.* A fuel cell power plant is an integrated system comprised of a fuel cell stack assembly and associated balance of plant components which converts a fuel into electricity using electrochemical means.

(6) *Stationary microturbine power plant.* A stationary microturbine power plant is an integrated system comprised of a gas turbine engine, a combustor, a recuperator or regenerator, a generator or alternator, and associated balance of plant components that converts a fuel into electricity and thermal energy. A stationary microturbine power plant also includes all secondary components located between the existing infrastructure for fuel delivery and the existing infrastructure for power distribution, including equipment and controls for meeting relevant power standards, such as voltage, frequency and power factors.

(7) *Nameplate capacity.* Nameplate capacity is the maximum electrical output of a generator as rated by the manufacturer. In the case of a fuel cell power plant, nameplate capacity is determined at the normal operating conditions designated by the manufacturer. In the case of a stationary microturbine power plant, nameplate capacity is determined at ISO conditions.

.02 *Qualification as Energy Property.* Qualified fuel cell property and qualified microturbine property are energy property for which an energy credit is allowable

only if the following conditions are satisfied:

(1) Depreciation (or amortization in lieu of depreciation) is allowable to the taxpayer with respect to the property.

(2) The construction, reconstruction, or erection of the property is completed by the taxpayer or the property is acquired by and its original use begins with the taxpayer.

(3) The property meets all applicable quality and performance standards in regulations prescribed under § 48 after consultation with the Secretary of Energy. Any such standard will not apply to property acquired before the date on which the standard is published in the Federal Register.

(4) Except as otherwise provided in this section 3.02(4), the property is not public utility property (as defined in § 46(f)(5) as in effect on November 4, 1990). This condition does not apply to qualified fuel cell property or qualified microturbine property that is used predominantly in the trade or business of the furnishing or sale of telephone service or telegraph service (other than international telegraph service) and such property may qualify for the energy credit even if it is public utility property.

.03 *Credit period.* The credit period for purposes of sections 3.01(1) and 3.01(3) of this notice is the period after December 31, 2005, and before January 1, 2009. The extent to which a fuel cell power plant or a stationary microturbine power plant is within the credit period is determined under the rules of § 48(m) as in effect on November 4, 1990.

.04 *Cross References to Applicable Regulations.* The following provisions of the Income Tax Regulations (26 CFR Part 1) apply for purposes of this notice:

(1) *Original use.* Whether the original use of property begins with the taxpayer is determined under the principles of § 1.48-2.

(2) *Depreciation.* Whether depreciation (or amortization in lieu of depreciation) is allowable to the taxpayer with respect to property is determined under the principles of § 1.48-1(b).

(3) *Placed in service.* The year in which property is placed in service is determined under the principles of § 1.46-3(d).

(4) *Basis of property.* The basis of property is determined under the principles of § 1.46–3(a) and (c).

#### SECTION 4. COMPUTATION OF CREDIT

.01 *In General.* The fuel cell credit for a taxable year is 30 percent of the basis of the qualified fuel cell energy property placed in service during the tax year. The microturbine credit for a taxable year is 10 percent of the basis of the qualified microturbine energy property placed in service during the tax year.

.02 *Limitation of the Credit.* The fuel cell credit for a taxable year cannot exceed \$500 for each 0.5 kilowatt of capacity of qualified fuel cell energy property placed in service during the tax year. The microturbine credit for a taxable year cannot exceed an amount equal to \$200 for each kilowatt of capacity of qualified microturbine energy property placed in service during the tax year.

.03 *Coordination with Other Credits.* The fuel cell credit and the microturbine credit are not allowed for that portion of the basis of a fuel cell power plant or stationary microturbine power plant which also qualifies for the rehabilitation credit under § 47(a). In addition, the credits are not allowed with respect to a fuel cell power plant or a stationary microturbine power plant for a taxable year if a credit under section 45 is allowed for the taxable year or any prior year for the electricity produced by such power plant.

.04 *Reduction for Subsidized Energy Financing and Private Activity Bonds.* The fuel cell credit and microturbine credit are reduced if the property qualifying for the credit is financed by subsidized energy financing or private activity bonds. Section 48(a)(4) provides rules for determining the amount of such reduction. For purposes of § 48(a)(4), subsidized energy financing does not include a grant includible in gross income under § 61, a nontaxable government grant, or a credit against state or local taxes.

#### SECTION 5. RULES RELATING TO THE AVAILABILITY OF THE FUEL CELL CREDIT

.01 *Leased Facility.* The fuel cell credit is allowed to the lessor of qualified fuel

cell energy property if depreciation (or amortization in lieu of depreciation) is allowable to the lessor with respect to the property. The lessee of qualified fuel cell property generally may not claim the fuel cell credit for such property.

.02 *Mobile Plant.* The fuel cell credit is allowed with respect to a taxpayer's mobile fuel cell power plant if the plant satisfies the conditions of sections 3.01(1) and section 3.02 of this notice.

.03 *Generation Efficiency.* The electricity-only generation efficiency of a fuel cell power plant may be determined in accordance with the standards of ANSI/ASME PTC 50–2002 Fuel Cell Power Systems Performance or equivalent testing procedures under normal operating conditions using the lower heating value of the primary fuel.

#### SECTION 6. RULES RELATING TO THE AVAILABILITY OF THE MICROTURBINE CREDIT

.01 *Leased Facility.* The microturbine credit is allowed to the lessor of qualified microturbine energy property if depreciation (or amortization in lieu of depreciation) is allowable to the lessor with respect to the property. The lessee of qualified fuel cell property generally may not claim the microturbine credit for such property.

.02 *Installation Costs.* Installation costs included in the basis of qualified microturbine energy property under the principles of § 1.46–3(a) and (c) are eligible for the microturbine credit.

.03 *Generation Efficiency.* The electricity-only generation efficiency of a stationary microturbine power plant may be determined in accordance with the standards of ASME PTC 22–2005 Gas Turbines or equivalent testing procedures under ISO conditions using the lower heating value of the primary fuel.

.04 *ISO Conditions.* ISO conditions for purposes of determining the generation efficiency and nameplate capacity of a stationary microturbine power plant are 59 degrees Fahrenheit, 60 percent relative humidity, and 14.696 psia.

#### SECTION 7. RECORDKEEPING

Section 6001 provides that every person liable for any tax imposed by the Code, or for the collection thereof, must

keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe. The books and records required by § 6001 must be kept at all times available for inspection by authorized internal revenue officers or employees, and must be retained so long as the contents thereof may become material in the administration of any internal revenue law. In order to satisfy the recordkeeping requirements of § 6001 and the regulations thereunder, a taxpayer that claims the fuel cell credit or the microturbine credit must retain adequate books and records so that, for any taxable year, it can be verified from those books and records that the property with respect to which the credit is claimed satisfies the applicable requirements of § 48 and this notice.

#### SECTION 8. EFFECTIVE DATE

This notice is effective for property placed in service after August 25, 2008. Taxpayers may apply the provisions of this notice with respect to property placed in service after December 31, 2005, and on or before January 1, 2009.

#### SECTION 9. DRAFTING AND CONTACT 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.

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

#### **Notice 2008–69**

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 Pension 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 corpo-

rate 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 July 2008 is 6.79 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%
August	2008	6.07	5.46	6.07

**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 July 2008 data is in Table I at the end of this notice. The spot first, second, and third segment rates for the month of July 2008 are, respectively, 5.16, 6.88, and 7.04. The three 24-month average corporate bond segment rates applicable for August 2008 under the election of § 430(h)(2)(G)(iv) are as follows:

First Segment	Second Segment	Third Segment
5.08	6.06	6.55

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

bond weighted average of 6.07 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2008	5.74	6.07	6.23

**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 July 2008 is 4.57 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%	105%
August	2008	4.73	4.25	4.96

**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 July 2008, taking into account the July 2008 30-year Treasury rate of 4.57 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2008	4.69	5.03	5.06

**DRAFTING INFORMATION**

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Tax Exempt and Government Entities Division. Mr. Montanaro may be e-mailed at [RetirementPlanQuestions@irs.gov](mailto:RetirementPlanQuestions@irs.gov).

**Table I**

## Monthly Yield Curve for July 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	3.63	20.5	7.09	40.5	7.03	60.5	7.02	80.5	7.01
1.0	4.16	21.0	7.09	41.0	7.03	61.0	7.02	81.0	7.01
1.5	4.62	21.5	7.08	41.5	7.03	61.5	7.02	81.5	7.01
2.0	5.00	22.0	7.08	42.0	7.03	62.0	7.02	82.0	7.01
2.5	5.28	22.5	7.08	42.5	7.03	62.5	7.02	82.5	7.01
3.0	5.49	23.0	7.07	43.0	7.03	63.0	7.02	83.0	7.01
3.5	5.65	23.5	7.07	43.5	7.03	63.5	7.02	83.5	7.01
4.0	5.79	24.0	7.07	44.0	7.03	64.0	7.02	84.0	7.01
4.5	5.91	24.5	7.06	44.5	7.03	64.5	7.02	84.5	7.01
5.0	6.02	25.0	7.06	45.0	7.03	65.0	7.02	85.0	7.01
5.5	6.12	25.5	7.06	45.5	7.03	65.5	7.02	85.5	7.01
6.0	6.22	26.0	7.06	46.0	7.03	66.0	7.02	86.0	7.01
6.5	6.32	26.5	7.05	46.5	7.03	66.5	7.02	86.5	7.01
7.0	6.41	27.0	7.05	47.0	7.03	67.0	7.02	87.0	7.01
7.5	6.49	27.5	7.05	47.5	7.03	67.5	7.02	87.5	7.01
8.0	6.57	28.0	7.05	48.0	7.03	68.0	7.02	88.0	7.01
8.5	6.65	28.5	7.05	48.5	7.03	68.5	7.02	88.5	7.01
9.0	6.71	29.0	7.05	49.0	7.03	69.0	7.02	89.0	7.01
9.5	6.78	29.5	7.05	49.5	7.03	69.5	7.02	89.5	7.01
10.0	6.83	30.0	7.05	50.0	7.03	70.0	7.02	90.0	7.01
10.5	6.88	30.5	7.04	50.5	7.03	70.5	7.02	90.5	7.01
11.0	6.92	31.0	7.04	51.0	7.02	71.0	7.02	91.0	7.01
11.5	6.96	31.5	7.04	51.5	7.02	71.5	7.02	91.5	7.01
12.0	6.99	32.0	7.04	52.0	7.02	72.0	7.02	92.0	7.01
12.5	7.02	32.5	7.04	52.5	7.02	72.5	7.02	92.5	7.01
13.0	7.04	33.0	7.04	53.0	7.02	73.0	7.02	93.0	7.01
13.5	7.06	33.5	7.04	53.5	7.02	73.5	7.02	93.5	7.01
14.0	7.08	34.0	7.04	54.0	7.02	74.0	7.02	94.0	7.01
14.5	7.09	34.5	7.04	54.5	7.02	74.5	7.02	94.5	7.01
15.0	7.10	35.0	7.04	55.0	7.02	75.0	7.02	95.0	7.01
15.5	7.10	35.5	7.04	55.5	7.02	75.5	7.02	95.5	7.01
16.0	7.11	36.0	7.04	56.0	7.02	76.0	7.02	96.0	7.01
16.5	7.11	36.5	7.04	56.5	7.02	76.5	7.02	96.5	7.01
17.0	7.11	37.0	7.04	57.0	7.02	77.0	7.01	97.0	7.01
17.5	7.11	37.5	7.04	57.5	7.02	77.5	7.01	97.5	7.01
18.0	7.11	38.0	7.04	58.0	7.02	78.0	7.01	98.0	7.01
18.5	7.10	38.5	7.03	58.5	7.02	78.5	7.01	98.5	7.01
19.0	7.10	39.0	7.03	59.0	7.02	79.0	7.01	99.0	7.01
19.5	7.10	39.5	7.03	59.5	7.02	79.5	7.01	99.5	7.01
20.0	7.09	40.0	7.03	60.0	7.02	80.0	7.01	100.0	7.01

**Note.** This revenue procedure will be reproduced as the next revision of IRS Publication 1516, Specifications for Filing Form 8596, Information Return for Federal Contracts, Electronically.

Use this revenue procedure to prepare Tax Year 2008 and prior year information returns for submission to Internal Revenue Service (IRS) electronically using the Filing Information Returns Electronically (FIRE) System.

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## **Part A. General**

### **Sec. 1. Purpose**

**.01** Section 6050M of the Internal Revenue Code, which was added by section 1522 of the Tax Reform Act of 1986 (Public Law 99–514) and amended by section 1015(f) of the Technical and Miscellaneous Revenue Act of 1988 (Public Law 100–647), requires Federal Executive Agencies to file an information return with the Internal Revenue Service (IRS) reporting the name, address and Taxpayer Identification Number (TIN) of each person and/or corporation with whom the agency enters into a contract, together with any other information required by Treasury regulations. Such reporting is required when the contract amount equals or exceeds \$25,000.00 including any amendments to the original contract.

**.02** The purpose of this revenue procedure is to provide the specifications for filing Form 8596, Information Return for Federal Contracts, Electronically, and Form 8596-A, Quarterly Transmittal of Information Returns for Federal Contracts, with IRS Enterprise Computing Center-Martinsburg (IRS/ECC-MTB) electronically through the Filing Information Returns Electronically (FIRE) System.

**.03** This revenue procedure applies to Federal Executive Agencies, United States Postal Service and the Postal Rate Commission with respect to reporting their contracts and contract amendments where the net value of the contract exceeds \$25,000.00. Federal Executive Agencies generally must report contracts in excess of \$25,000.00 to the Federal Procurement Data Center (FPDC) and therefore are permitted to make an election to have the FPDC file with the Internal Revenue Service on their behalf. If the election is made by the Federal Executive Agency, it must be made by the head of the Agency (or his or her delegate). The agency must not file directly with IRS. See Part A, Section 5. Please read this Revenue Procedure carefully.

**.04** This Revenue Procedure supersedes Rev. Proc. 2005–29, reprinted as Publication 1516 (Rev. 5–2005), Specifications for Filing Forms 8596, Information Return for Federal Contracts, Electronically. Use this Revenue Procedure for filing Forms 8596 electronically for the quarter beginning January 2009.

### **Sec. 2. Nature of Changes**

**.01** IRS/ECC-MTB no longer accepts any form of magnetic media. Electronic filing through the FIRE System is the only method to report information returns to IRS/ECC-MTB.

**.02** 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.

**.03** Three fields were deleted from the Transmitter “T” Record and are no longer required, The deleted fields are Replacement Alpha Character, positions 21–22, Electronic File Name for a Replacement File, positions 396–410 and Transmitter’s Media Number, 411–416. Contact E-mail Address was expanded to fifty positions, 359–408. Positions 21–29 and 409–416 are blank.

**.04** Three fields were deleted from the Payer “A” Record and are no longer required. The deleted fields are Original File Indicator, position 48, Replacement File Indicator, position 49, and Correction File Indicator, position 50. Positions 48–50 are blank.

### **Sec. 3. Where to File and How to Contact the IRS Enterprise Computing Center-Martinsburg**

**.01** All information returns filed electronically are processed at IRS/ECC-MTB. Files containing information returns and requests for IRS electronic filing information should be sent to the following address:

IRS-Enterprise Computing Center-MTB  
Information Reporting Program  
230 Murall Drive  
Kearneysville, WV 25430

**.02** Telephone inquiries for the Information Reporting Program Customer Service Section may be made between 8:30 a.m. and 4:30 p.m. Eastern time, Monday through Friday.

**.03** The telephone numbers for electronic submissions inquiries are:

## Information Reporting Program Customer Service Section

TOLL-FREE 1-866-455-7438 or outside the U.S. 1-304-263-8700  
e-mail at [mccirp@irs.gov](mailto:mccirp@irs.gov)

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

Toll-free — 877-477-0572 — Fax Machine  
Outside the U.S. use 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](http://www.irs.gov) — IRS website access to forms

### Sec. 4. 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 should be filed no matter how many types of returns the transmitter will be submitting electronically. For example, if a transmitter plans to file Forms 8596, one Form 4419 should be submitted. If, at a later date, another type of form (Forms 1098, 1099, 5498 and W-2G) is to be filed, the transmitter does not need to submit a new Form 4419.

**Note: EXCEPTIONS — An additional Form 4419 is required for filing each of the following types of returns: Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, and Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips. See the 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. Forms may be obtained by calling 1-800-TAX-FORM (1-800-829-3676). The form is also available on the IRS website at [www.irs.gov](http://www.irs.gov). This form may be photocopied.

.03 Upon approval, a five-character alpha/numeric Transmitter Control Code (TCC) will be assigned and included in an approval letter. The TCC **must** be coded in the Transmitter "T" Record. IRS/ECC-MTB uses the TCC to identify payers/transmitters and to track their files through the processing system.

.04 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.

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

- (a) The payer has discontinued filing electronically for two consecutive years. The payer's TCC may have been reassigned by IRS/ECC-MTB. Payers who are aware that their TCC will no longer be used are requested to notify IRS/ECC-MTB so these numbers may be reassigned.
- (b) The payer's files were transmitted in the past by a service bureau using the service bureau's TCC, but now the payer has computer equipment compatible with that of IRS/ECC-MTB and wishes to prepare his or her own files. The payer must request a TCC by filing Form 4419.

.06 If **any** of the information (name, TIN or address) on 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.

.07 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. 5. Filing Requirements

.01 The requirements for Federal Contracts are governed by section 6011(e)(2)(A) and section 6050M of the Internal Revenue Code and Regulation section 1.6050M-1. The term Federal Executive Agency means: (1) any Executive Agency (as defined in Section 105 of title 5, United States Code) other than the General Accounting Office; (2) any military department as defined in section 102 of such title; and (3) the United States Postal Service and the Postal Rate Commission. A Federal Executive Agency that files 250 or more reportable contracts during a one year period, must file Form 8596 on an electronic file for each quarter of that one year period.



- .02** The information returns required by this section with respect to contracts of a Federal Executive Agency entered into on or after January 1, 1989, must be filed on a quarterly basis for the calendar quarters ending on the last day of March, June, September, and December, on or before the last day of the month following that quarter for which the returns are being made.
- .03** The information returns required by this section may be made in one submission or in multiple submissions.
- .04** If a Federal Executive Agency has reasonable expectations to enter into fewer than 250 reportable contracts during a one year period, the agency may file paper Forms 8596 and 8596-A with the IRS Kansas City Service Center, Kansas City, MO 64999-2222.
- .05 Election to have the Director of the Federal Procurement Data Center file returns on behalf of an agency.** Except for the U.S. Postal Service and the Postal Rate Commission, a Federal Executive Agency may elect to have the Director of the Federal Procurement Data Center (FPDC) file the required returns with IRS on behalf of the agency. The agency must comply with the requirements of the Federal Procurement Data System (FPDS) in submitting the information and must not file with the Internal Revenue Service.
- .06** In order to make this election, the head of a Federal Executive Agency (or his or her delegate) shall attach a signed statement to its submission to the FPDC for that quarter stating the following:
- (a) The Director of the FPDC (or his or her delegate) is authorized to submit the required returns on behalf of the agency for contracts for that quarter in accordance with an election under 26 CFR, section 1.6050M-1(d)(5).
  - (b) Under the penalties of perjury, the official has examined the information submitted by the agency to the FPDC who will submit the returns to IRS. The official certifies that information to be, to the best of his or her knowledge and belief, an accurate compilation of agency records maintained in the normal course of business for the purpose of making true, correct, and complete returns as required by section 6050M.
- .07** An agency that elects to have the FPDC file its returns must not submit those same returns to the IRS.
- .08** If a contract is increased by more than \$25,000.00 under one action, the action should be treated as a new contract and reported to IRS for the calendar quarter in which the increase occurs. This could occur through the exercise of an option contained in a basic or initial contract or under any other rule of contract law, expressed or implied, when the amount of money or other property obligated under the contract is increased by \$25,000.00
- .09 Special rules to filing requirements are as follows:**
- (a) If a subcontract is entered into by the Small Business Administration (SBA) under a prime contract between SBA and a procuring Federal agency pursuant to section 8(a) of the Small Business Act, the procuring agency, not the SBA, will be required to file Forms 8596 and 8596-A.
  - (b) A Federal Supply Schedule Contract or an Automated Data Processing Schedule Contract entered into by the General Services Administration (GSA), or a scheduled contract entered into by the Department of Veterans Affairs (VA) on behalf of one or more Federal Executive Agencies, is not to be reported by the GSA or VA at the time of execution. When a Federal Executive Agency, including the GSA or the VA, places an order under a schedule contract, the Federal Executive Agency must file Forms 8596 and 8596-A.
- .10 Exceptions:** The following are not required to be reported under section 6050M:
- (a) Any contract action of \$25,000.00 or less;
  - (b) Any contract which provides that all amounts payable under the contract by a Federal Executive Agency will be paid on or before the 120th day following the date of the contract action and for which it is reasonable to expect that all amounts will be so paid;
  - (c) A license granted by a Federal Executive Agency;
  - (d) An obligation of a contractor (other than a Federal Executive Agency) to a subcontractor;
  - (e) Debt instruments of the U.S. Government or a Federal agency, such as Treasury Notes, Treasury Bonds, Treasury Bills, U.S. Savings Bonds, or similar instruments;
  - (f) An obligation of a Federal Executive Agency to lend money, lease property to someone, or sell property;
  - (g) A blanket purchase agreement. However, when an order is placed under a blanket purchase agreement, a contract then exists and Forms 8596 and 8596-A must be filed;
  - (h) Any contract with a contractor who, in making the agreement, is acting in his or her capacity as an employee of a Federal Executive Agency (e.g., any contract of employment under which the employee is paid wages subject to Federal income tax withholding);
  - (i) Any contract between a Federal Executive Agency and another Federal Governmental unit or any subsidiary agency;
  - (j) Any contract with a foreign government or agency or any subsidiary agency;
  - (k) Any contract with a state or local government or agency or any subsidiary agency;
  - (l) Any contract with a person who is not required to have a Taxpayer Identification Number (TIN), such as a nonresident alien, foreign corporation or foreign partnership, any of which does not have income effectively connected with the conduct of a trade or business in the United States and does not have an office or place of business as a fiscal or paying agent in the United States;
  - (m) Certain confidential or classified contracts that meet the requirements of section 6050M(e);

(n) Any contract that provides that all payments made after the 120th day after the date of the contract action will be made by someone other than a Federal Executive Agency or an agent of such an agency. For example, a contract under which the contractor will collect amounts owed to a Federal Executive Agency for the agency's debtor and will remit to the Federal Executive Agency the money collected less an amount for the contractor's consideration under the contract;

(o) Contracts entered into using nonappropriated funds.

.11 All paper Forms 8596 and 8596-A for both original and corrected returns should be filed with the IRS Kansas City Service Center, Kansas City, MO 64999-2222. Forms 8596 and 8596-A may be obtained by calling 1-800-TAX-FORM (1-800-829-3676).

## Sec. 6. Filing of Information Returns For Federal Contracts

.01 Paper information returns must be sent to the IRS Kansas City Service Center using Form 8596 and Form 8596-A. **Returns filed on paper forms must not be sent to the IRS/ECC-MTB.**

.02 If a Federal Executive Agency elects to have the FPDC make returns on its behalf, the FPDC shall mail or fax a copy of that agency's signed statement, making the election, to IRS/ECC-MTB for that agency for that quarter. (See Part A, Sec. 3.)

.03 **The transmitter must not report the same information on paper forms that is reported electronically.** If parts of the returns are reported on paper and part electronically, the transmitter must be sure that duplicate information is not included on both. This does not mean that corrected documents should not be filed. If a return has been prepared and submitted improperly, a corrected return must be filed as soon as possible. See Part A, Sec. 8 for requirements and instructions on filing corrected returns.

.04 Agencies are required to retain a copy of the information returns filed with IRS for at least three years or have the ability to reconstruct the data.

## Sec. 7. Filing Dates

.01 The information returns required by this section must be filed on a quarterly basis for the calendar quarters as follows:

<u>QUARTER</u>	<u>DUE DATE</u>
January, February, March	April 30
April, May, June	July 31
July, August, September	October 31
October, November, December	January 31

.02 The director of the FPDC (or his or her delegate) shall submit the required return quarterly to IRS on or before the earlier date of:

(a) 45 days following the date that the contract information is required to be submitted to the FPDC, or

(b) 90 days following the end of the calendar quarter for which the election is made, except that, if the calendar quarter ends September 30, 105 days following the end of that quarter.

.03 If any due date falls on a Saturday, Sunday, or legal holiday, the filing deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday.

## Sec. 8. How to File Corrected Returns

- A **correction** 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.
- **DO NOT SEND YOUR ENTIRE FILE AGAIN.** Only send the information returns in need of correction.
- Information returns omitted from the original file **must not** be coded as corrections. Submit them under a separate Payer "A" Record as original returns.
- Before creating your correction file, review the following guidelines chart carefully.

.01 When corrections are necessary, they must be filed in the next filing quarter. If the entire file that was submitted electronically was in error, the IRS/ECC-MTB should be contacted immediately. (See Part A, Sec. 3 for the address.)

.02 Corrections should be filed **as soon as possible**. All fields must be completed with the correct information, not just the data fields needing correction. Submit corrections only for the returns filed in error, not the entire file. Furnish corrected statements to recipients as soon as possible.

**Note: Do NOT resubmit your entire file as corrections. This will result in duplicate filing and erroneous notices may be sent to payees. Submit only those returns which need to be corrected.**

**.03** There are numerous types of errors, and in some cases, more than one transaction may be required to correct the initial error. If the original return was filed as an aggregate, the filers must consider this in filing corrected returns.

**.04** Corrected returns may be included on the same file as original returns; however, separate Payer “A” Records are required. If filers discover that certain information returns were omitted on their original file, they must not code these documents as corrections. The file must be coded and submitted as originals.

**.05** Review the chart that follows. Errors normally fall under one of the two categories listed. Next to each type of error is a list of instructions on how to file the corrected return.

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**Guidelines for Filing Corrected Returns Electronically**

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Error Made on the Original Return	How To File the Corrected Return
<b>One transaction is required to make the following corrections properly. (See Note.)</b>	
<b><u>ERROR TYPE 1</u></b>	<b><u>CORRECTION</u></b>
<p><b>1.</b> Original return was filed with one or more of the following errors:</p> <p style="margin-left: 20px;"><b>(a)</b> Incorrect dollar amount in the Payee “B” Record</p> <p style="margin-left: 20px;"><b>(b)</b> Incorrect payee address</p>	<p><b>A.</b> Prepare a new file. The first record on the file will be the Transmitter “T” Record.</p> <p><b>B.</b> Make a separate “A” Record for each payer being reported. The information in the “A” Record will be <b>exactly</b> the same as it was in the original submission.</p> <p><b>C.</b> The Payee “B” Records must show the correct record information as well as a Corrected Return Indicator Code of “G” in Field Position 6.</p> <p><b>D.</b> Corrected returns submitted to IRS/ECC-MTB using “G” coded “B” Records may be on the same file as those returns submitted without the “G” coded “B” Records; however, <b>separate “A” Records are required.</b></p> <p><b>E.</b> Prepare a separate “C” Record for each payer being reported.</p> <p><b>F.</b> The last record on the file will be the End of Transmission “F” Record.</p>

---

File layout one step corrections

Transmitter “T” Record	Payer “A” Record	“G” coded Payee “B” Record	“G” coded Payee “B” Record	End of Payer “C” Record	End of Transmission “F” Record
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## Guidelines for Filing Corrected Returns Electronically

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Error Made on the Original Return

How To File the Corrected Return

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**Two (2) separate transactions 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.**

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### ERROR TYPE 2

### CORRECTION

1. Original return was filed with one or more of the following errors:
- (a) No payee TIN (SSN, EIN, ITIN)
  - (b) Incorrect payee TIN
  - (c) Incorrect payee name *and address*

Transaction 1: Identify incorrect returns

- A. Prepare a new file. The first record on the file will be the Transmitter "T" Record. Make a separate "A" Record for each type of return and each payer being reported. The information in the "A" Record will be **exactly** the same as it was in the original submission.
- B. The Payee "B" Records must contain **exactly the same** information as submitted previously, **except**, insert a Corrected Return Indicator Code of "G" in Field Position 6 of the "B" Records, and enter "0" (zeros) in all payment amounts.
- C. Corrected returns submitted to IRS/ECC-MTB using "G" coded "B" Records may be on the same file as those returns submitted with a "C" code; **however, separate "A" Records are required.**
- D. Prepare a separate "C" Record for each type of return and each payer being reported.
- E. Continue with Transaction 2 to complete the correction.

**Transaction 2: Report the correct information.**

- A. Make a separate "A" Record for each type of return and each payer being reported.
  - B. The Payee "B" Records must show the correct information as well as a Corrected Return Indicator Code of "C" in Field Position 6.
  - C. Corrected returns submitted to IRS/ECC-MTB using "C" coded "B" Records may be on the same file as those returns submitted with "G" codes; **however, separate "A" Records are required.**
  - D. Prepare a separate "C" Record for each type of return and each payer being reported.
  - E. The last record on the file will be the End of Transmission "F" Record.
-

File layout **two** step corrections

Transmitter "T" Record	Payer "A" Record	"G" coded Payee "B" Record	"G" coded Payee "B" Record	End of Payer "C" Record	Payer "A" Record
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"C" coded Payee "B" Record	"C" coded Payee "B" Record	End of Payer "C" Record	End of Transmission "F" Record
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**Note :** If a filer is correcting the name and/or TIN in addition to any errors listed in item 2 of the chart, two transactions will be required. If a filer is reporting "G" coded, "C" coded, and/or "Non-coded" (original) returns on the same file, each category must be reported under separate "A" Records.

## Sec. 9. Taxpayer Identification Numbers

**.01** Contractors are required to furnish Taxpayer Identification Numbers (TINs) to the agency under section 6109 of the Internal Revenue Code.

**.02** The contractor's TIN and name combination is used to associate information returns reported to IRS with corresponding information on tax returns. It is imperative that the **correct** Social Security Number (SSN) or Employer Identification Number (EIN) for contractors be provided to IRS. **Do not enter hyphens or alpha characters.** Entering all zeros, ones, twos, etc., will have the effect of an incorrect TIN.

**.03** IRS validates the SSN by using the Name Control of the surname of the individual who has been assigned this number. For this reason, the surname should be provided in the Payee Name Line and/or the Name Control in positions 7–10 of the Payee "B" Record. It is imperative to provide correct information for IRS to validate the SSN. IRS validates an EIN by using the name control of the business to which the EIN has been assigned. If an EIN is reported for a contractor, the correct business name should be provided in the First Payee Name Line and/or Name Control in positions 7–10 of the Payee "B" Record.

**.04** For sole proprietors, the owner's name (not the doing business as (DBA) name) must appear in the Payee Name Line. The TIN for a sole proprietor may be either an EIN or SSN.

**.05** The TIN to be furnished to IRS depends primarily upon the manner in which the account is maintained or set up on the agency's record. The payer and payee names and TINs should be consistent with the names and numbers used on other tax returns. The TIN must be that of the contractor. If the contract is recorded in more than one name, the transmitter must furnish the TIN and name of one of the contractors. The TIN provided must be associated with the name of the contractor provided in the First Payee Name Line of the Payee "B" Record.

## Sec. 10. State Abbreviations

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

State	Code	State	Code	State	Code
Alabama	AL	Kentucky	KY	No. Mariana Islands	MP
Alaska	AK	Louisiana	LA	Ohio	OH
American Samoa	AS	Maine	ME	Oklahoma	OK
Arizona	AZ	Marshall Islands	MH	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
Kansas	KS				

**.02** Filers must adhere to the city, state, and ZIP Code format for U.S. addresses in the “B” Record. This also includes American Samoa, Federated States of Micronesia, Guam, Marshall Islands, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

**.03** For foreign country addresses, filers may use a 51 position free format which should include city, province or state, postal code, and name of country in this order. This is allowable only if a “1” (one) appears in the Foreign Country Indicator, Field Position 247 of the “B” Record.

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

**EXAMPLE:**

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

### Sec. 1. General

**.01** Electronic filing of Form 8596 returns, originals, corrections, and replacements is offered as an alternative to paper filing. There is no minimum of number of forms filing requirement; therefore, any number of forms may be filed electronically. 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** 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.

**.04** Files submitted to IRS/ECC-MTB electronically must be in standard ASCII code.

.05 If a Federal Executive Agency elects to have the FPDC make returns on its behalf, the FPDC shall mail or fax a copy of that agency's signed statement, making the election, to IRS/ECC-MTB (see Part A, Sec. 3.)

.06 See Part C, Record Format Specifications and Record Layouts.

## Sec. 2. Electronic Filing Approval Procedure

.01 Filers must obtain a Transmitter Control Code (TCC) prior to submitting files electronically. Filers who currently have a TCC may use their assigned TCC for electronic filing. Refer to Part A, Sec. 4, for information on how to obtain a TCC.

.02 Once a TCC is obtained, electronic filers assign their own user ID, password and Personal Identification Number (PIN) and do not need prior or special approval. See Part B, Sec. 4 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/numeric characters consisting of at least 1 uppercase, 1 lowercase, and 1 numeric. However, filers who forget their password or PIN, can call **toll-free 1-866-455-7438** for assistance. The FIRE System may require users to change their passwords on a yearly basis. However, users can change their passwords at any time from the Main Menu.

## Sec. 3. 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 time by calling **toll-free at 1-866-455-7438**.

.02 **The FIRE System will be down from 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 file name(s). Files submitted electronically will be assigned a new unique file name by the FIRE System. The file name assigned by the FIRE System will consist of submission type (ORIG [original], CORR [correction], 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 44444, the IRS assigned file name would be ORIG.44444.0001. **Record the file name.** This information will be needed by IRS/ECC-MTB to identify the file, if assistance is required.

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

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

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

**Note: Corrections should only be made to 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 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. 4. PIN Requirements

.01 The user will be prompted to create a PIN consisting of 10 numeric characters when establishing their initial logon name and password.

.02 The PIN is required each time an ORIGINAL, CORRECTION, or REPLACEMENT file is sent electronically and is permission to release the 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** for assistance.

.03 If the file is good, it is released for mainline processing after 10 calendar days from receipt. Contact us **toll-free at 1-866-455-7438** within this 10-day period if there is a reason the file should not be released for further processing. If the file is unacceptable, follow normal replacement procedures.

## Sec. 5. Electronic Filing Specifications

.01 The FIRE System is designed exclusively for the filing of Forms 1042-S, 1098, 1099, 5498, 8027, 8596, and W-2G.

.02 A transmitter must have a TCC (see Part A, Sec. 4) before a file can be transmitted.

.03 After 1–2 business days, the results of the electronic transmission will be e-mailed to you providing you supply 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](mailto:fire@irs.gov) and [irs.e-helpmail@irs.gov](mailto: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 to determine what the errors are in your file.

## Sec. 6. Connecting to the FIRE System

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

.02 Filers should turn off their pop-up blocking software before transmitting their files.

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

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

.05 Your browser must be set to receive “cookies”. Cookies are used to preserve your User ID status.

**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 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).

Read the bulletin(s) and/or “**Click here to continue**”.

### **Uploading your file to the FIRE System**

At Menu Options:

Click “**Send Information Returns**”

Enter your **TCC**:

Enter your **TIN**:

Click “**Submit**”.

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 transmitters regarding their transmission. Update as appropriate and/or Click “**Accept**”.



## Uploading your file to the FIRE System

**Note: Please ensure that the e-mail is accurate so that the correct person receives the e-mail and it does not return to us undeliverable. If you are using SPAM filtering software, please configure it to allow an e-mail from [fire@irs.gov](mailto:fire@irs.gov) and [irs.e-helpmail@irs.gov](mailto:irs.e-helpmail@irs.gov).**

Click one of the following:

*Original File*

*Correction File*

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

- **Electronic Replacement** (file was originally transmitted on this system)  
Click the file to be replaced.
- **Mag Media Replacement** (file was originally sent on some type of magnetic media)  
Enter the alpha character from the letter (L-2494) that was returned. It is located on the top right on the letter under "Refer Reply To:" For example, if the letter indicates TCC 44444A, the alpha code that would be entered is "A". Click "**Submit**".

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.**

If you have more files to upload for that TCC:

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

Click "**Main Menu**".

<p><b>It is your responsibility to check the acceptability of your file; therefore, be sure to check back into the system in 1-2 business days using the CHECK FILE STATUS option.</b></p>
--

## Checking your FILE STATUS

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, not 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 below.

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".

## Checking your FILE STATUS

**“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. 7. Common Problems and Questions Associated with Electronic Filing**

IRS/ECC-MTB encourages filers to verify the format and content of each type of record to ensure the accuracy of the data. This may eliminate the need for IRS/ECC-MTB to request replacement files. This may be important for those payers who have either had their files prepared by a service bureau or who have purchased software packages.

**Filers who engage a service bureau to transmit their files on their behalf should be careful not to report duplicate data, which may generate penalty notices.**

This section lists some of the problems most frequently encountered with electronic files submitted to IRS/ECC-MTB. These problems may result in IRS/ECC-MTB requesting replacement files.

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### **1. Transmitter does not check the FIRE System to determine file acceptability.**

The results of your file transfer are posted to the FIRE System within two 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, not 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.

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### **2. SPAM filters are not set to receive e-mail from [fire@irs.gov](mailto:fire@irs.gov) and [irs.e-helpmail@irs.gov](mailto: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](mailto:fire@irs.gov) and [irs.e-helpmail@irs.gov](mailto:irs.e-helpmail@irs.gov).*

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### **3. Incorrect e-mail provided.**

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

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### **4. Incorrect file is not replaced timely.**

If your file is bad, correct the file and timely resubmit as a replacement.

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### **5. 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.

---

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

Once a file has been transmitted, you cannot send a replacement file unless CHECK FILE STATUS indicates the file is bad (1–2 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** to see if this is a possibility.

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### **7. Transmitter sends an original file that is good, and then sends a correction file for the entire file even though there are only a few changes.**

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

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### **8. File is formatted as EBCDIC.**

All files submitted electronically must be in standard ASCII code.

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

When sending the file electronically, you will need to enter the EIN 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.

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

Call us as soon as possible **toll-free at 1-866-455-7438**. 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.**

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## Part C. Record Format Specifications and Record Layouts

### Sec. 1. General

.01 The specifications contained in this part of the Revenue Procedure define the required formation and contents of the records to be included in the electronic files.

.02 A provision is made in the “B” Records for entries which are optional. If the field is not used, enter blanks to maintain a fixed record length of 750 positions. Each field description explains the intended use of specific field positions.

### Sec. 2. Transmitter “T” Record — General Field Descriptions

.01 The Transmitter “T” Record identifies the entity transmitting the electronic file and contains information which is critical if it is necessary for IRS/ECC-MTB to contact the filer.

.02 The Transmitter “T” Record is the first record on each file and is followed by a Payer “A” Record. A file format diagram is located at the end of Part C. A replacement file will be requested by IRS/ECC-MTB if the “T” Record is not present.

.03 For all fields marked “**Required**”, the transmitter must provide the information described under Description and Remarks. For those fields not marked “**Required**”, a transmitter must allow for the field, but may be instructed to enter blanks or zeros in the indicated field positions and for the indicated length.

.04 All records must be a fixed length of 750 positions.

.05 All alpha characters entered in the “T” Record must be upper-case, except e-mail addresses which may be case sensitive. **Do not** use punctuation in the name and address fields.

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**Record Name: Transmitter “T” Record**

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Field Position	Field Title	Length	Description and Remarks
1	Record Type	1	<b>Required.</b> Enter “T”.
2–5	Payment Year	4	<b>Required.</b> Enter the 4-digit year in which the contract is signed.
6	Type of Return	1	<b>Required.</b> Enter “G”.
7–15	Transmitter’s TIN	9	<b>Required.</b> Must be the valid nine-digit number TIN assigned by IRS to the Federal Executive Agency. Do not enter hyphens or alpha characters. Entering all zeros, ones, twos, etc., will have the effect of an incorrect TIN.
16–20	Transmitter Control Code	5	<b>Required.</b> Enter the five-character alpha/numeric Transmitter Control Code (TCC) assigned by IRS/ECC-MTB. A TCC must be obtained to file data within this program.
21–29	Blank	9	Enter blanks.
30–69	Transmitter Name	40	<b>Required.</b> Enter the name of the transmitter in the manner in which it is used in normal business. If someone other than the Federal Agency is transmitting data, enter the name of the transmitter. The name of the transmitter <b>must</b> be consistent through the entire file. Left-justify and fill unused positions with blanks.

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**Record Name: Transmitter "T" Record (Continued)**

<b>Field Position</b>	<b>Field Title</b>	<b>Length</b>	<b>Description and Remarks</b>
70-109	Transmitter Name (Continuation)	40	Enter any additional information that may be part of the name. Left-justify information and fill unused positions with blanks.
<b>Note: All the information "Required" in Field Positions 110 thru 280 MUST contain the address information where correspondence relating to problems can be sent.</b>			
110-149	Agency Name	40	<b>Required.</b> Enter the name of the agency to be associated with the address where correspondence should be sent.
150-189	Agency Name (Continuation)	40	Enter any additional information that may be part of the name of the company where correspondence should be sent.
190-229	Agency Mailing Address	40	<b>Required.</b> Enter the mailing address where correspondence should be sent.
230-269	Agency City	40	<b>Required.</b> Enter the city, town, or post office where correspondence should be sent.
270-271	Agency State	2	<b>Required.</b> Enter the valid U.S. Postal Service state abbreviation for states. Refer to the chart of valid state codes in Part A, Sec. 10.
272-280	Agency ZIP Code	9	<b>Required.</b> Enter the valid nine-digit ZIP Code assigned by the U.S. Postal Service. If only the first five digits are known, left-justify information and fill unused positions with blanks.
281-303	Blank	23	Enter blanks.
304-343	Contact Name	40	<b>Required.</b> Enter the name of the person to be contacted if IRS/ECC-MTB encounters problems with the file.
344-358	Contact Phone Number & Extension	15	<b>Required.</b> Enter the telephone number of the person to contact regarding electronic files. Omit extension hyphens. If no extension is available, left-justify information and fill unused positions with blanks. For example, the IRS/ECC-MTB Customer Service Section telephone number of 866-455-7438 with an extension of 52345 would be 866455743852345.
359-408	Contact E-mail Address	50	<b>Required if available.</b> Enter the e-mail address of the person to contact regarding electronic files. Left-justify information. If no e-mail address is available, enter blanks.
409-499	Blank	91	Enter blanks.
500-507	Record Sequence Number	8	<b>Required.</b> 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 zeros in the field. For example, the "T" record sequence number would appear as "00000001" in the field, the first "A" record would be "00000002", the first "B" record, "00000003", the second "B" record, "00000004" and so on until you reach the final record of the file, the "F" record.
508-748	Blank	241	Enter blanks.
749-750	Blank	2	Enter blanks, or carriage return/line feed (CR/LF) characters.

### Sec. 3 Transmitter “T” Record — Record Layout

Record Type	Payment Year	Type of Return	Transmitter’s TIN	Transmitter Control Code	Blank
1	2–5	6	7–15	16–20	21–29

Transmitter Name	Transmitter Name (Contd.)	Agency Name	Agency Name (Contd.)	Agency Mailing Address
30–69	70–109	110–149	150–189	190–229

Agency City	Agency State	Agency ZIP Code	Blank	Contact Name	Contact Phone Number & Extension	Contact E-mail Address
230–269	270–271	272–280	281–303	304–343	344–358	359–408

Blank	Record Sequence Number	Blank	Blank or CR/LF
409–499	500–507	508–748	749–750

### Sec. 4. Payer “A” Record — General Field Descriptions

.01 The Payer “A” Record identifies the payer of the file and provides parameters for the succeeding Payee “B” Records. IRS computer programs rely on the absolute relationship between the parameters and data fields in the “A” Record and the data fields in the “B” Record to which they apply.

.02 All records must be a fixed length of 750 positions.

.03 An “A” Record may be blocked with “B” Records; however, the initial record on a file must be a Transmitter “T” Record followed by a Payer “A” Record. IRS/ECC-MTB will accept an “A” Record after a “C” Record.

.04 The number of “A” Records appearing on the file will depend on the number of agencies being reported. A separate “A” Record is required for each agency followed by the Payee “B” Records for the agency. Each set of “B” Records is followed by a summary “C” Record. If more than one agency is being reported on a file, an “A” Record may follow a “C” Record (i.e., The “A”, “B”, and “C” Records for one agency may be followed by “A”, “B”, and “C” Records for the next agency, etc.).

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

.06 For all fields marked “**Required**”, the transmitter must provide the information described under Description and Remarks. For those fields not marked “**Required**”, a transmitter must allow for the field, but may be instructed to enter blanks or zeros in the indicated file position(s) and for the indicated length.

#### Record Name: Payer “A” Record

Field Position	Field Title	Length	Description and Remarks
1	Record Type	1	<b>Required.</b> Enter “A”.
2–5	Payment Year	4	<b>Required.</b> Enter the 4-digit year in which the contract is signed.
6–11	Blank	6	Enter blanks.
12–20	Payer’s Taxpayer Identification Number (TIN)	9	<b>Required.</b> Must be the <b>valid</b> nine-digit Taxpayer Identification Number assigned to the Federal Executive Agency. <b>Do not enter blanks, hyphens, or alpha characters.</b> All zeros, ones, twos, etc., will have the effect of an incorrect TIN.

**Record Name: Payer "A" Record (Continued)**

<b>Field Position</b>	<b>Field Title</b>	<b>Length</b>	<b>Description and Remarks</b>
21–24	Payer Name Control	4	Generally, the Name Control is the first four characters of the payer's name. The word "the" should be disregarded when it is the first word of the name, unless the name contains only two words. This field should be left blank if the name control is not determinable.
25–26	Blank	2	Enter blanks.
27	Type of Return	1	<b>Required.</b> Enter "G".
28	Amount Indicator	1	<b>Required.</b> Enter "8".
29–51	Blank	23	Enter blanks.
52	Foreign Entity Indicator	1	Enter a "1" (one) if the payer is a foreign entity and income is paid by the foreign entity to a U.S. resident. If the payer is not a foreign entity, enter a blank.
53–92	First Payer Name Line	40	<b>Required.</b> Enter the name of the Federal Agency whose TIN appears in positions 12–20 of the "A" Record. The name of the agency must be entered in the manner in which it is used in normal business. Any extraneous information must be deleted. Left-justify information, and fill unused positions with blanks.
93–132	Second Payer Name Line	40	<b>Required.</b> Enter the name and title of the person to whom requests for an offset against any unpaid tax liability of the contractor can be sent. If necessary, please abbreviate.
133	Blank	1	Enter blank.
134–173	Payer Shipping Address	40	<b>Required.</b> Enter the address of the person to whom requests for an offset against any unpaid tax liability of the contract can be sent. The street address should include number, street, apartment or suite number (or P.O. Box if mail is not delivered to a street address). Left-justify and fill with blanks.

**For U.S. addresses,** the payer city, state, and ZIP Code must be reported as a 40, 2, and 9 position field, respectively. **Filers must adhere to the correct format for the payer city, state, and ZIP Code.**

**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. When reporting a foreign address, the Foreign Entity Indicator in position 52 must contain a "1" (one).

174–213	Payer City	40	<b>Required.</b> Enter the city of the person to whom requests for an offset against any unpaid tax liability of the contractor can be sent. Left-justify and fill with blanks.
214–215	Payer State	2	<b>Required.</b> Enter the valid U.S. Postal Service state abbreviations for states. Refer to the chart of valid state abbreviations in Part A, Sec. 10.
216–224	Payer ZIP Code	9	<b>Required.</b> Enter the valid nine-digit ZIP Code assigned by the U.S. Postal Service. If only the first five digits are known, left-justify information and fill the unused positions with blanks.
225–239	Payer's Phone Number & Extension	15	Enter the payer's telephone number and extension.
240–499	Blank	260	Enter blanks.

**Record Name: Payer "A" Record (Continued)**

Field Position	Field Title	Length	Description and Remarks
500-507	Record Sequence Number	8	<b>Required.</b> 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 zeros in the field. For example, the "T" record sequence number would appear as "00000001" in the field, the first "A" record would be "00000002", the first "B" record, "00000003", the second "B" record, "00000004" and so on until you reach the final record of the file, the "F" record.
508-748	Blank	241	Enter blanks.
749-750	Blank	2	Enter blanks or carriage return/line feed (CR/LF) characters.

**Sec. 5. Payer "A" Record — Record Layout**

Record Type	Payment Year	Blank	Payer's TIN	Payer Name Control	Blank
1	2-5	6-11	12-20	21-24	25-26

Type of Return	Amount Indicator	Blank	Foreign Entity Indicator	First Payer Name Line
27	28	29-51	52	53-92

Second Payer Name Line	Blank	Payer Shipping Address	Payer City	Payer State	Payer ZIP Code	Payer's Phone & Extension
93-132	133	134-173	174-213	214-215	216-224	225-239

Blank	Record Sequence Number	Blank	Blank or CR/LF
240-499	500-507	508-748	749-750

**Sec. 6. Payee "B" Record — General Field Descriptions**

**.01** The Payee "B" Record contains payment information from the individual contracts. When filing information documents electronically, the format for the Payee "B" Records will remain constant.

**.02** All records must be a fixed length of 750 positions.

**.03** The following specifications include a field in the payee records called "Name Control" in which the first four characters of the payee's surname are to be entered by the filer.

(a) If filers are unable to determine the first four characters of the surname, the Name Control Field may be left blank. Compliance with the following will facilitate IRS computer programs in identifying the correct name control:

- (1) The surname of the payee whose TIN is shown in the "B" Record should always appear first. If, however, the records have been developed using the first name first, the filer must leave a blank space between the first and last names.
- (2) In the case of multiple payees, only the surname of the payee whose TIN (SSN, EIN or ITIN) is shown in the "B" Record must be present in the First Payee Name Line. Surnames of any other payees may be entered in the Second Payee Name Line.

.04 For all fields marked “**Required**”, the transmitter must provide the information described under Description and Remarks. For those fields not marked “**Required**”, the transmitter must allow for the field, but may be instructed to enter blanks or zeros in the indicated field position(s) and for the indicated length.

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

.06 Decimal points (.) cannot be used to indicate dollars and cents.

.07 **IRS strongly encourages filers to review data for accuracy before submission to facilitate the collection of delinquent federal tax liabilities from contractors. Filers should be especially careful that names, TINs, and income amounts are correct.**

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**Record Name: Payee “B” Record**

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Field Position	Field Title	Length	Description and Remarks
1	Record Type	1	<b>Required.</b> Enter “B”.
2–5	Payment Year	4	<b>Required.</b> Enter the 4-digit year in which the contract is signed.
6	Corrected Return Indicator (See Note.)	1	<b>Required for corrections only.</b> Indicates a corrected return.
		<u>Code</u>	<u>Definition</u>
		G	If this is a one-transaction correction or the first of a two-transaction correction.
		C	If this is the second transaction of a two transaction correction.
		Blank	If this is not a return being submitted to correct information already processed by IRS.

**Note: C, G, and non-coded records must be reported using separate Payer “A” Records. Refer to Part A, Sec. 8, for specific instructions on how to file corrected returns.**

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7–10	Name Control	4	If determinable, enter the first four (4) characters of the surname of the person whose TIN is being reported in positions 12–20 of the “B” Record; otherwise, enter blanks. This usually is the contractor. Surnames of less than four (4) characters should be left-justified, filling the unused positions with blanks. Special characters and imbedded blanks should be removed. In the case of a business, other than a sole proprietorship, use the first four significant characters of the business name. Disregard the word “the” when it is the first word of the name, unless there are only two words in the name. A dash (-) and an ampersand (&) are the only acceptable special characters. Surname prefixes are considered part of the surname, e.g., for Van Elm, the name control would be VANE.
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**Note: Imbedded blanks, extraneous words, titles, and special characters (i.e., Mr., Mrs., Dr., period [.] , apostrophe [']) should be removed from the Payee Name Lines. This information may be dropped during subsequent processing at IRS/ECC-MTB. A dash (-) and an ampersand (&) are the only acceptable special characters.**

The following examples may be helpful to filers in developing the Name Control:

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<u>Name</u>	<u>Name Control</u>
Individuals:	
Jane <b>B</b> rown	BROW
John A. <b>L</b> ee	LEE*
James P. <b>E</b> n, Sr.	EN*
John <b>O</b> 'Neil	ONEI

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**Record Name: Payee "B" Record (Continued)**

<b>Field Position</b>	<b>Field Title</b>	<b>Length</b>	<b>Description and Remarks</b>
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<u>Name</u>	<u>Name Control</u>
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Individuals:

Mary <b>Van Buren</b>	VANB
Juan <b>De Jesus</b>	DEJE
Gloria A. <b>El-Roy</b>	EL-R
Mr. John <b>Smith</b>	SMIT
Joe <b>McCarthy</b>	MCCA
Pedro <b>Torres-Lopes</b> **	TORR
Maria <b>Lopez</b> Moreno**	LOPE
Binh To <b>La</b>	LA*
Nhat Thi <b>Pham</b>	PHAM
Mark <b>D'Allesandro</b>	DALL

Corporations:

The <b>First</b> National Bank	FIRS
<b>The Hideaway</b>	THEH
<b>A&amp;B Cafe</b>	A&BC
<b>11TH</b> Street Inc.	11TH

Sole Proprietor:

Mark <b>Hemlock</b> DBA The Sunshine Club	HEML
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Partnership:

Robert <b>Aspen</b> and Bess Willow	ASPE
Harold <b>Fir</b> , Bruce Elm, and Joyce Spruce et al Ptr	FIR*

Estate:

Frank <b>White</b> Estate	WHIT
Estate of Sheila <b>Blue</b>	BLUE

Trusts and Fiduciaries:

<b>Daisy</b> Corporation Employee Benefit Trust	DAIS
Trust FBO The <b>Cherryblossom</b> Society	CHER

Exempt Organizations:

<b>Laborer's</b> Union, AFL-CIO	LABO
<b>St. Bernard's</b> Methodist Church Bldg. Fund	STBE

\*Name Controls of less than four (4) significant characters must be left-justified and blank-filled.

\*\*For Hispanic names, when two last names are shown for an individual, derive the name control from the first last name.

11	Type of TIN	1	This field is used to identify the Taxpayer Identification Number (TIN) in positions 12–20 as either an Employer Identification Number (EIN), a Social Security Number (SSN), or an Individual Taxpayer Identification Number (ITIN). Enter the appropriate code from the following table:
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**Record Name: Payee "B" Record (Continued)**

<b>Field Position</b>	<b>Field Title</b>	<b>Length</b>	<b>Description and Remarks</b>															
			<table border="1"> <thead> <tr> <th><u>Code</u></th> <th><u>Type of TIN</u></th> <th><u>Type of Account</u></th> </tr> </thead> <tbody> <tr> <td>1</td> <td>EIN</td> <td>A business, organization, sole proprietor, or other entity</td> </tr> <tr> <td>2</td> <td>SSN</td> <td>An individual, including a sole proprietor or</td> </tr> <tr> <td>2</td> <td>ITIN</td> <td>An individual required to have a taxpayer identification number, but who is not eligible to obtain an SSN</td> </tr> <tr> <td>Blank</td> <td>N/A</td> <td>If the type of TIN is not determinable, enter a blank.</td> </tr> </tbody> </table>	<u>Code</u>	<u>Type of TIN</u>	<u>Type of Account</u>	1	EIN	A business, organization, sole proprietor, or other entity	2	SSN	An individual, including a sole proprietor or	2	ITIN	An individual required to have a taxpayer identification number, but who is not eligible to obtain an SSN	Blank	N/A	If the type of TIN is not determinable, enter a blank.
<u>Code</u>	<u>Type of TIN</u>	<u>Type of Account</u>																
1	EIN	A business, organization, sole proprietor, or other entity																
2	SSN	An individual, including a sole proprietor or																
2	ITIN	An individual required to have a taxpayer identification number, but who is not eligible to obtain an SSN																
Blank	N/A	If the type of TIN is not determinable, enter a blank.																
12–20	Contractor's Taxpayer Identification Number (TIN)	9	<b>Required.</b> Enter the nine-digit Taxpayer Identification Number of the contractor (SSN, ITIN, or EIN). If an identification number has been applied for but not received, <b>enter blanks. Do not enter hyphens or alpha characters.</b> All zeros, ones, twos, etc., will have the effect of an incorrect TIN. If the TIN is not available, enter blanks.															
21–29	Common Parent's Taxpayer Identification Number (TIN)	9	<b>Required.</b> If applicable, enter the valid nine-digit number assigned to the contractor's common parent; otherwise, <b>enter blanks. Do not enter hyphens or alpha characters.</b> All zeros, ones, twos, etc., will have the effect of an incorrect TIN.															
30–54	Blank	25	Enter blanks.															
55–138	Zero	84	<b>Required.</b> Enter zeros.															
139–150	Total Amount Obligated Under Contract	12	<b>Required.</b> The amount reported in this field represents Total Amount Obligated Under the Contract. The Under Contract amount must be entered in <b>U.S. dollars and cents.</b> Dollar signs, commas, decimal points, or negative payments are not acceptable. Amount obligated must be right-justified and unused positions must be zero filled.															
151–198	Zero	48	<b>Required.</b> Enter zeros.															
199–246	Blank	48	Enter blanks.															
247	Foreign Country Indicator	1	<b>If the address of the payee is in a foreign country, enter a "1" (one) in this field; otherwise, enter blank.</b> When filers use this indicator, they may use a free format for the payee city, state, and ZIP Code. Address information must not appear in the First or Second Payee Name Lines.															
248–287	First Payee Name Line	40	<b>Required.</b> Enter the name of the contractor (preferably surname first) whose Taxpayer Identification Number (TIN) was provided in positions 12–20 of the "B" Record. Left-justify and fill unused positions with blanks. If more space is required for the name, utilize the Second Payee Name Line Field. If there are multiple payees, only the name of the payee whose TIN has been provided should be entered in this field. The names of the other payees may be entered in the Second Payee Name Line Field. If reporting information for a sole proprietor, the individual's name <b>must always</b> be present on the First Payee Name Line. The use of the business name is optional in the Second Payee Name Line Field.															

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**Record Name: Payee “B” Record (Continued)**

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<b>Field Position</b>	<b>Field Title</b>	<b>Length</b>	<b>Description and Remarks</b>
288–327	Second Payee Name Line	40	If there are multiple payees, (e.g., partners or joint owners), use this field for those names not associated with the TIN provided in positions 12–20 of the “B” Record or if not enough space was provided in the First Payee Name Line, continue the name in this field ( <b>See Notes</b> ). <b>Do not enter address information.</b> It is important that filers provide as much payee information to IRS/ECC-MTB as possible to identify the payee associated with the TIN. Left-justify and fill unused positions with blanks.

**Note 1: End First Payee Name Line with a full word. Do not split words. Begin Second Payee Name Line with the next sequential word.**

**Note 2: If applicable, enter the business name of the sole proprietor in this field.**

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328–367	Blank	40	Enter blanks.
368–407	Payee Mailing Address	40	<b>Required.</b> Enter the mailing address of the contractor. The street address should include number, street, apartment or suite number (or P.O. Box if mail is not delivered to street address). Left-justify information and fill unused positions with blanks. This field <b>must not</b> contain any data other than the payee’s mailing address.

**For U.S. addresses,** the payee city, state, and ZIP Code must be reported as a 40, 2, and 9 position field, respectively. **Filers must adhere to the correct format for the payee city, state, and ZIP Code.**

**For foreign addresses,** filers may use the payee 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. When reporting a foreign address, the Foreign Country Indicator in position 247 must contain a “1” (one).

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408–447	Blank	40	Enter blanks.
448–487	Payee City	40	<b>Required.</b> Enter the city, town, or post office. Left-justify information and fill the unused positions with blanks. Enter APO or FPO if applicable. Do not enter state and ZIP Code information in this field.
488–489	Payee State	2	<b>Required.</b> Enter the valid U.S. Postal Service state abbreviations for states or the appropriate postal identifier (AA, AE, or AP) described in Part A, Sec. 10.
490–498	Payee ZIP Code	9	<b>Required.</b> Enter the valid nine-digit ZIP Code assigned by the U.S. Postal Service. If only the first five digits are known, left-justify information and fill the unused positions with blanks. For foreign countries, alpha characters are acceptable as long as the filer has entered a “1” (one) in the Foreign Country Indicator, located in position 247 of the “B” Record.
499	Blank	1	Enter blank.

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**Record Name: Payee "B" Record (Continued)**

<b>Field Position</b>	<b>Field Title</b>	<b>Length</b>	<b>Description and Remarks</b>
500-507	Record Sequence Number	8	<b>Required.</b> 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 zeros in the field. For example, the "T" record sequence number would appear as "00000001" in the field, the first "A" record would be "00000002", the first "B" record, "00000003", the second "B" record, "00000004" and so on until you reach the final record of the file, the "F" record.
508-544	Blank	37	Enter blanks.
545	Filing Quarter	1	<b>Required.</b> Enter quarter; i.e., 1, 2, 3, or 4. See the chart below to determine the appropriate quarter.  <b>Quarter</b> 1.....January, February, March 2.....April, May, June 3.....July, August, September 4.....October, November, December
546-553	Blank	8	Enter blanks.
554-568	Contract Number	15	<b>Required (if available).</b> Enter the contract number assigned by the Federal Executive Agency. Left-justify and fill the unused positions with blanks.
569	Blank	1	Enter blank.
570-573	Contract Modification Number	4	<b>Required (if available).</b> Enter the number assigned to the contract or order to designate a modification or termination. If this field is not utilized, enter blanks.
574	Blank	1	Enter blank.
575-589	Contract Office Order Number	15	<b>Required (if available).</b> Enter the number assigned by the contracting office. Left-justify and fill the unused positions with blanks.
590	Blank	1	Enter blank.
591-594	Reporting Agency Code	4	<b>Required.</b> Enter the four-digit agency and sub-agency code.
595	Blank	1	Enter blank.
596-600	Contract Office Number	5	<b>Required (if available).</b> Enter the number assigned by the Federal Executive Agency that identifies the purchasing or contracting office.
601	Blank	1	Enter blank.
602-609	Date of Contract Action	8	<b>Required.</b> Enter the date of the action. Use YYYYMMDD (e.g., 20080214).
610	Blank	1	Enter blank.
611-618	Contract Completion Date	8	<b>Required.</b> Enter the expected date of completion of contract such as the contract delivery date under the contract schedule. Use YYYYMMDD. If completion date is not available, enter blanks.

**Record Name: Payee "B" Record (Continued)**

Field Position	Field Title	Length	Description and Remarks
619-658	Name of Common Parent	40	<b>Required (if applicable).</b> If the contractor is a member of an affiliated group of corporations that files its income tax returns on a consolidated basis, enter the name of the common parent of the affiliated group. The name entered should match the EIN in positions 21-29. If this field is not utilized, enter blanks.
659-748	Blank	90	Enter blanks.
749-750	Blank	2	Enter blanks or carriage return line feed (CR/LF) characters.

**Sec. 7. Payee "B" Record — Record Layout**

Record Type	Payment Year	Corrected Return Indicator	Name Control	Type of TIN	Contractor's Taxpayer Identification Number (TIN)
1	2-5	6	7-10	11	12-20

Common Parent's Taxpayer Identification Number (TIN)	Blank	Zero	Total Amount Obligated Under Contract	Zero	Blank	Foreign Country Indicator
21-29	30-54	55-138	139-150	151-198	199-246	247

First Payee Name Line	Second Payee Name Line	Blank	Payee Mailing Address	Blank	Payee City	Payee State	Payee ZIP Code
248-287	288-327	328-367	368-407	408-447	448-487	488-489	490-498

Blank	Record Sequence Number	Blank	Filing Quarter	Blank	Contract Number	Blank	Contract Modification Number
499	500-507	508-544	545	546-553	554-568	569	570-573

Blank	Contract Office Order Number	Blank	Reporting Agency Code	Blank	Contract Office Number	Blank
574	575-589	590	591-594	595	596-600	601

Date of Contract Action	Blank	Contract Completion Date	Name of Common Parent	Blank	Blank or CR/LF
602-609	610	611-618	619-658	659-748	749-750

## Sec. 8. End of Payer “C” Record — General Field Descriptions and Record Layout

.01 The End of Payer “C” Record is a fixed record length of 750 positions.

.02 The control total field is 18 positions in length.

.03 The End of Payer “C” Record is a summary record for a given payer.

.04 The “C” Record will contain the total number of payees and total of the payment amounts of a given payer. The “C” Record must be written after the last Payee “B” Record for a given payer. For each “A” Record and group of “B” Records on the file, there must be a corresponding “C” Record.

.05 Payers/Transmitters should verify the accuracy of the totals since data with missing or incorrect “C” Records will require a replacement.

### Record Name: End of Payer “C” Record

Field Position	Field Title	Length	Description and Remarks
1	Record Type	1	<b>Required.</b> Enter “C”.
2-9	Number of Payees	8	<b>Required.</b> Enter the total number of “B” Records covered by the preceding “A” Record. Right-justify information and fill unused positions with zeros.
10-15	Blank	6	Enter blanks.
16-141	Zero	126	Enter zeros.
142-159	Control Total	18	<b>Required.</b> Enter the total amount paid to contractors for all contracts present in the preceding Payee “B” Records. The Control Total must be entered in <b>U.S. dollars and cents</b> . Dollar signs, commas, decimal points, or negative payments are not acceptable. Total must be right-justified and unused positions must be zero filled.
160-231	Zero	72	Enter zeros.
232-499	Blank	268	Enter blanks.
500-507	Record Sequence Number	8	<b>Required.</b> 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 zeros in the field. For example, the “T” record sequence number would appear as “00000001” in the field, the first “A” record would be “00000002”, the first “B” record, “00000003”, the second “B” record, “00000004” and so on until you reach the final record of the file, the “F” record.
508-748	Blank	241	Enter blanks.
749-750	Blank	2	Enter blanks, or carriage return/line feed (CR/LF) characters.

**End of Payer “C” Record — Record Layout**

Record Type	Number of Payees	Blank	Zero	Control Total	Zero
1	2–9	10–15	16–141	142–159	160–231

Blank	Record Sequence Number	Blank	Blank or CR/LF
232–499	500–507	508–748	749–750

**Sec. 9. End of Transmission “F” Record — General Field Descriptions and Record Layout**

- .01 The end of transmission “F” record is a fixed record length of 750 positions.
- .02 The “F” Record is a summary of the number of payers in the entire file.
- .03 This record should be written after the last “C” Record of the entire file.

**Record Name: End of Transmission “F” Record**

Field Position	Field Title	Length	Description and Remarks
1	Record Type	1	<b>Required.</b> Enter “F”.
2–9	Number of “A” Records	8	Enter the total number of Payer “A” Records in the entire file (right-justify and zero fill) or enter all zeros.
10–30	Zero	21	Enter zeros.
31–499	Blank	469	Enter blanks.
500–507	Record Sequence Number	8	<b>Required.</b> 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 zeros in the field. For example, the “T” record sequence number would appear as “00000001” in the field, the first “A” record would be “00000002”, the first “B” record, “00000003”, the second “B” record, “00000004” and so on until you reach the final record of the file, the “F” record.
508–748	Blank	241	Enter blanks.
749–750	Blank	2	Enter blanks or carriage return/line feed (CR/LF) characters.

**End of Transmission “F” Record — Record Layout**

Record Type	Number of “A” Records	Zero	Blank	Record Sequence Number	Blank	Blank or CR/LF
1	2–9	10–30	31–499	500–507	508–748	749–750

# File Format

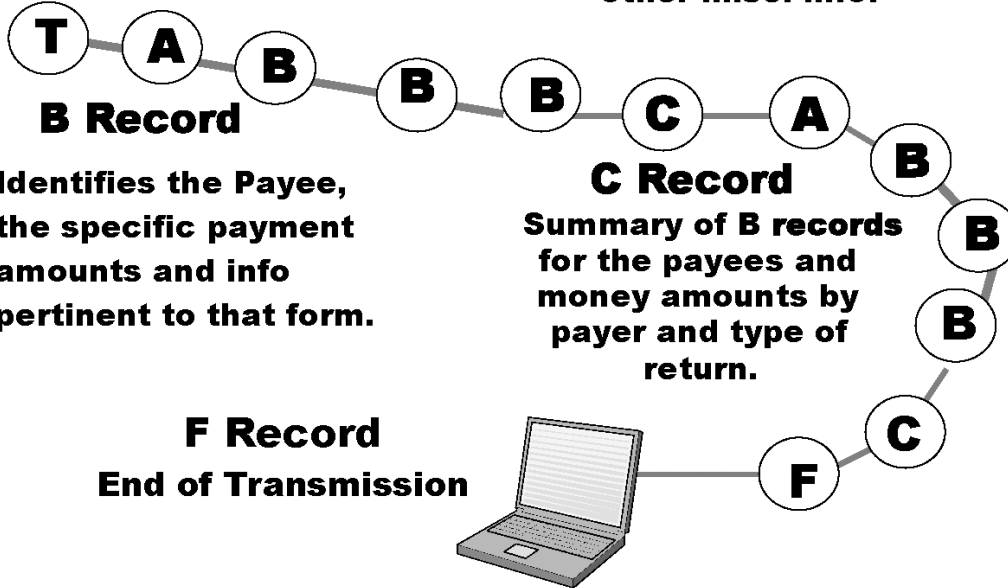
Each record must be 750 positions.

## T Record

Identifies the Transmitter of electronic file.

## A Record

Identifies the Payer (the institution or person making payments), the type of document being reported, & other misc. info.



## B Record

Identifies the Payee, the specific payment amounts and info pertinent to that form.

## C Record

Summary of B records for the payees and money amounts by payer and type of return.

**F Record**  
End of Transmission



## Part IV. Items of General Interest

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

### Elections Regarding Start-up Expenditures, Corporation Organizational Expenditures, and Partnership Organizational Expenses

#### REG-164965-04

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9411) relating to the elections to deduct start-up expenditures under section 195 of the Internal Revenue Code (Code), organizational expenditures of corporations under section 248, and organizational expenses of partnerships under section 709. The American Jobs Creation Act of 2004 amended these three sections of the Code to provide similar rules for deducting these types of expenses that are paid or incurred after October 22, 2004. The regulations affect taxpayers that pay or incur these expenses and provide guidance on how to elect to deduct the expenses in accordance with the new rules. The text of those temporary regulations also serves as the text of these proposed regulations.

DATES: Comments or a request for a public hearing must be received by October 6, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-164965-04), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-164965-04), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically

via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (IRS REG-164965-04).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Grace Matuszeski, (202) 622-7900; concerning submission of comments or a request for a public hearing, Richard Hurst, at [Richard.A.Hurst@irs.counsel.treas.gov](mailto:Richard.A.Hurst@irs.counsel.treas.gov) or (202) 622-7180 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### Background and Explanation of Provisions

Temporary regulations in this issue of the Bulletin amend the Income Tax Regulations (26 CFR Part 1) to implement the changes to sections 195, 248, and 709 of the Code made by section 902 of the American Jobs Creation Act of 2004, Public Law 108-357 (118 Stat. 1418). The text of those temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the amendments.

##### Special Analyses

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

##### Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted

timely to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing will be scheduled if requested in writing by any person that timely submits comments. If a public hearing is scheduled, notice of the date, time and place for the hearing will be published in the **Federal Register**.

##### Drafting Information

The principal author of these regulations is Grace Matuszeski of the Office of the Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

\* \* \* \* \*

##### Proposed Amendments to the Regulations

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

##### PART 1—INCOME TAXES

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

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

Par. 2. Section 1.195-1 is revised to read as follows:

*§1.195-1 Election to amortize start-up expenditures.*

[The text of this section is the same as the text of §1.195-1T(a) through (d) published elsewhere in this issue of the Bulletin.]

Par. 3. Section 1.248-1 is amended by revising paragraphs (a) and (c), and adding paragraphs (d) through (f), to read as follows:

*§1.248-1 Election to amortize organizational expenditures.*

(a) [The text of this proposed amendment to §1.248-1(a) is the same as the text of §1.248-1T(a) published elsewhere in this issue of the Bulletin.]

\* \* \* \* \*

(c) through (f) [The text of these proposed amendments to §1.248-1(c) through (f) are the same as the text of §1.248-1T(c) through (f) published elsewhere in this issue of the Bulletin.]

Par. 4. Section 1.709-1 is amended by revising the section heading and paragraph (b) to read as follows:

*§1.709-1 Treatment of organizational expenses and syndication costs.*

\* \* \* \* \*

(b) [The text of this proposed amendment to §1.709-1(b) is the same as the text of §1.709-1T(b)(1) through (b)(5) published elsewhere in this issue of the Bulletin.]

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

(Filed by the Office of the Federal Register on July 7, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 8, 2008, 73 F.R. 38940)

## Notice of Proposed Rulemaking

### Reasonable Good Faith Interpretation of Required Minimum Distribution Rules by Governmental Plans

#### REG-142040-07

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under sections 401(a)(9) and 403(b) of the Internal Revenue Code (Code) to permit a governmental plan to comply with the required minimum distribution rules by using a reasonable and good faith interpretation of the statute. These proposed regulations will affect administrators of, employers maintaining, participants in, and beneficiaries of governmental plans.

DATES: Written or electronic comments and requests for a public hearing must be received by October 8, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-142040-07), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-142040-07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C., or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-142040-07).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Cathy V. Pastor or Michael P. Brewer at (202) 622-6090 (not a toll-free number); concerning submission of comments or to request a public hearing, [Richard.A.Hurst@irscounsel.treas.gov](mailto:Richard.A.Hurst@irscounsel.treas.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

This document contains proposed amendments to regulations under sections 401(a)(9) and 403(b) of the Code. Section 401(a)(9) provides required minimum distribution rules for a qualified trust under section 401(a). In general, under these rules, distribution of each participant's entire interest must begin by April 1 of the calendar year following the later of (1) the calendar year in which the participant attains age 70½ or (2) the calendar year in which the participant retires ("the required beginning date"). If the entire interest of the participant is not distributed by the required beginning date, then section 401(a)(9)(A) provides that the entire interest of the participant must be distributed beginning not later than the required beginning date, in accordance with regulations, over the life of the participant or lives of the participant and a designated beneficiary (or over a period not extending beyond the life expectancy of the participant or the life expectancy of the participant and a designated beneficiary). Section 401(a)(9)(B) provides the required minimum distribution rules after the death of the participant.

IRAs described in section 408, section 403(b) plans, and eligible deferred compensation plans under section 457(b), also are subject to the required minimum

distribution rules of section 401(a)(9) pursuant to sections 408(a)(6) and (b)(3), 403(b)(10), and 457(d)(2), respectively, and the regulations under those sections.

In 2002, the IRS and the Treasury Department published final regulations under sections 401(a)(9), 403(b), and 408 in the **Federal Register** (T.D. 8987, 2002-1 C.B. 852 [67 FR 18987]). Section 1.401(a)(9)-1, A-2(a), provides that the final regulations apply for purposes of determining required minimum distributions for calendar years beginning on or after January 1, 2003. The rules for defined benefit plans and annuities were included in a temporary regulation, §1.401(a)(9)-6T, as well as in a proposed regulation (67 FR 18834) in order to allow taxpayers to comment on the rules.

In 2004, the IRS and the Treasury Department replaced the temporary regulations with final regulations under §1.401(a)(9)-6 (T.D. 9130, 2004-1 C.B. 1082 [69 FR 33288]). The final regulations contain a "grandfather rule" in Q&A-16, which provides that annuity distribution options provided under the terms of a governmental plan (within the meaning section 414(d)) as in effect on April 17, 2002, are treated as satisfying the requirements of section 401(a)(9) if they satisfy a reasonable and good faith interpretation of the provisions of section 401(a)(9). In addition, Q&A-17 provides that, for distributions from any defined benefit plan or annuity contract during 2003, 2004, and 2005, the payments could satisfy a reasonable and good faith interpretation of section 401(a)(9) in lieu of §1.401(a)(9)-6. For governmental plans, §1.401(a)(9)-6, Q&A-17, extended this reasonable good faith standard to the end of the calendar year that contains the 90<sup>th</sup> day after the opening of the first legislative session of the legislative body with the authority to amend the plan that begins on or after June 15, 2004, if such 90<sup>th</sup> day is later than December 31, 2005.

In 2003, the IRS and the Treasury Department published final regulations under section 457(b) in the **Federal Register** (T.D. 9075, 2003-2 C.B. 608 [68 FR 41230]). These regulations included §1.457-6(d), which provides that a section 457(b) eligible plan must meet the requirements of section 401(a)(9) and the regulations under that section.

In 2007, the IRS and the Treasury Department published final regulations under section 403(b) in the **Federal Register** (T.D. 9340, 2007–36 I.R.B. 487 [72 FR 41128]). These regulations, which become effective for tax years beginning after December 31, 2008, included §1.403(b)–6(e)(1), which provides that a section 403(b) contract must meet the requirements of section 401(a)(9). Section 1.403(b)–6(e)(2) provides, with certain exceptions, that section 403(b) contracts apply the section 401(a)(9) required minimum distribution rules in accordance with §1.408–8.

Section 1.408–8, Q&A–1, provides, with certain exceptions, that in order to satisfy section 401(a)(9) for purposes of determining required minimum distributions, the rules of §§1.401(a)(9)–1 through 1.401(a)(9)–9 must be applied.

Section 823 of the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780), instructs the Secretary of the Treasury to issue regulations under which, for all years to which section 401(a)(9) applies, a governmental plan, within the meaning of section 414(d), shall be treated as having complied with section 401(a)(9) if such plan complies with a reasonable good faith interpretation of section 401(a)(9).

### Explanation of Provisions

The proposed regulations would amend the regulations under section 401(a)(9) to treat a governmental plan, within the meaning of section 414(d), as having complied with the rules of section 401(a)(9) if the governmental plan applies a reasonable and good faith interpretation of section 401(a)(9). The same rule would apply to an eligible 457(b) plan maintained by a government. In addition, this rule would apply to a section 403(b) contract that is part of a governmental plan, and the regulations under section 403(b) would be amended accordingly. The proposed regulations would also make conforming amendments to the regulations under section 401(a)(9) that eliminate other special rules for governmental plans which would be rendered superfluous with this change.

### Proposed Effective/Applicability Date

These regulations are proposed to be applied to all years for which section 401(a)(9) applies.

### Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because §§1.401(a)(9)–1 and 1.403(b)–6 would not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (one signed and eight (8) copies) or electronic comments that are submitted timely to the IRS. All comments will be available for public inspection and copying. A public hearing will be scheduled if a request to speak is submitted in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the public hearing will be published in the **Federal Register**.

### Drafting Information

The principal authors of these regulations are Michael P. Brewer and Cathy V. Pastor, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in the development of these regulations.

\* \* \* \* \*

### Proposed Amendments to the Regulations

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

#### PART 1—INCOME TAXES

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

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

Par. 2. Section 1.401(a)(9)–1 is amended by adding a new paragraph (d) to A–2 as follows:

#### *§1.401(a)(9)–1 Minimum distribution requirement in general.*

\* \* \* \* \*

A–2. \* \* \* (d) *Special rule for governmental plans.* Notwithstanding anything to the contrary in this A–2, a governmental plan (within the meaning of section 414(d)), or an eligible governmental plan described in §1.457–2(f), is treated as having complied with section 401(a)(9) for all years to which section 401(a)(9) applies to the plan if the plan complies with a reasonable and good faith interpretation of section 401(a)(9).

#### **§1.401(a)(9)–6 [Amended]**

Par. 3. Section 1.401(a)(9)–6 is amended by:

1. Removing Q&A–16.
2. Redesignating Q&A–17 as Q&A–16.
3. Removing the word “A–16” and adding “A–15” in the newly-designated A–16.
4. Removing the last sentence of the newly-designated A–16.

Par. 4. Section 1.403(b)–6 is amended by:

1. Revising the last sentence of paragraph (e)(2).
2. Adding a new paragraph (e)(8).

The revisions and addition are as follows:

#### *§1.403(b)–6 Timing of distributions and benefits.*

\* \* \* \* \*

(e) *Minimum required distributions for eligible plans.*

\* \* \* \* \*

(2) \* \* \* Consequently, except as otherwise provided in this paragraph (e), the

distribution rules in section 401(a)(9) are applied to section 403(b) contracts in accordance with the provisions in §1.408-8 for purposes of determining required minimum distributions.

\* \* \* \* \*

(8) *Special rule for governmental plans.* A section 403(b) contract that is part of a governmental plan (within the meaning of section 414(d)) is treated as having complied with section 401(a)(9) for all years to which section 401(a)(9) applies to the contract, if the contract complies with a reasonable and good faith interpretation of section 401(a)(9).

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

(Filed by the Office of the Federal Register on July 9, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 10, 2008, 73 F.R. 39630)

## **Section 7428(c) Validation of Certain Contributions Made During Pendency of Declaratory Judgment Proceedings; Correction**

### **Announcement 2008-78**

**ACTION:** Correction to an announcement regarding section 7428(c).

**SUMMARY:** This document contains a correction to the announcement regarding section 7428(c) Validation of Certain Contributions Made During Pendency of Declaratory Judgment Proceedings, on page 321 of I.R.B. 2008-32, dated August 11, 2008.

**FOR FURTHER INFORMATION CONTACT:** Harrel Johnson (816) 503-4265.

## **SUPPLEMENTARY INFORMATION:**

### **Need for Correction**

As published, an announcement contains an error that may prove to be misleading and is in need of clarification.

### **Correction of Publication**

Accordingly, the publication of an announcement is corrected as follows:

On page 321, the announcement heading should read:

**Section 7428(c) Validation of Certain Contributions Made During Pendency of Declaratory Judgment Proceedings  
Announcement 2008-72**

# 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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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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