Internal Revenue
bulletin

Bulletin No. 2008-45
November 10, 2008

HIGHLIGHTS OF THIS ISSUE

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

SPECIAL ANNOUNCEMENT

Announcement 2008–106, page 1137.

The announcement for the 2009 IRS Individual e-file Partnership Program solicits applications from potential partners for participation in the program. The partnership opportunities are a result of RRA 98 which authorized the IRS Commissioner to promote the benefits of and encourage the use of e-file products and services through partnerships with various entities that offer low-cost tax preparation and electronic filing of individual income tax returns for qualified taxpayers. Those applicants that are accepted into the program will have a link(s) and offer description(s) for their products and services posted to *IRS.gov* (Partners Page).

INCOME TAX

Rev. Rul. 2008–50, page 1098.

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, and other sections of the Code, tables set forth the rates for November 2008.

REG–142339–05, page 1116.

Proposed regulations under section 45D of the Code relate to how an entity serving certain targeted populations under section 45D(e)(2) can meet the requirements to be a qualified active low-income community business. A public hearing is scheduled for January 22, 2009.

REG–107318–08, page 1131.

Proposed regulations provide that the notice required under section 411(a)(11) of the Code to be provided to a participant of his or her right, if any, to defer receipt of an immediately distributable benefit must also describe the consequences of failing to defer receipt of the distribution. The regulations also provide that the applicable election period for waiving the qualified joint and survivor annuity form of benefit under section 417 is the 180-day period ending on the annuity starting date, and that a notice required to be provided under section 402(f), 411(a)(11), or 417 may be provided to a participant as much as 180 days before the annuity starting date (or, for a notice under section 402(f), the distribution date). A public hearing is scheduled for February 20, 2009.

Rev. Proc. 2008–66, page 1107.

Cost-of-living adjustments for 2009. This procedure sets forth the cost-of-living adjustments to certain items for 2009 as required under various provisions of the Code and Service guidance.

EMPLOYEE PLANS

REG–107318–08, page 1131.

Proposed regulations provide that the notice required under section 411(a)(11) of the Code to be provided to a participant of his or her right, if any, to defer receipt of an immediately distributable benefit must also describe the consequences of failing to defer receipt of the distribution. The regulations also provide that the applicable election period for waiving the qualified joint and survivor annuity form of benefit under section 417 is the 180-day period ending on the annuity starting date, and that a notice required to be provided under section 402(f), 411(a)(11), or 417 may be provided to a participant as much as 180 days before the annuity starting date (or, for a notice under section 402(f), the distribution date). A public hearing is scheduled for February 20, 2009.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

Notice 2008–102, page 1106.
2009 cost-of-living adjustments; retirement plans, etc. This notice sets forth certain cost-of-living adjustments effective January 1, 2009, applicable to the dollar limits on benefits and contributions under qualified retirement plans. Other limitations applicable to deferred compensation plans are also affected by these adjustments. This notice also contains cost-of-living adjustments for several pension-related amounts in restating the data in News Release IR–2008–118 issued October 16, 2008.

EXEMPT ORGANIZATIONS

Announcement 2008–104, page 1136.
A list is provided of organizations now classified as private foundations.

ESTATE TAX

Rev. Proc. 2008–66, page 1107.
Cost-of-living adjustments for 2009. This procedure sets forth the cost-of-living adjustments to certain items for 2009 as required under various provisions of the Code and Service guidance.

GIFT TAX

Rev. Proc. 2008–66, page 1107.
Cost-of-living adjustments for 2009. This procedure sets forth the cost-of-living adjustments to certain items for 2009 as required under various provisions of the Code and Service guidance.

EXCISE TAX

Rev. Proc. 2008–66, page 1107.
Cost-of-living adjustments for 2009. This procedure sets forth the cost-of-living adjustments to certain items for 2009 as required under various provisions of the Code and Service guidance.

ADMINISTRATIVE

T.D. 9425, page 1100.
REG–160868–04, page 1115.
Temporary and proposed regulations under section 6707A of the Code provide guidance for taxpayers against whom a penalty is assessed and who may request rescission of the penalty from the Commissioner if the violation is with respect to a reportable transaction other than a listed transaction. Notice 2005–11 superseded.

REG–128841–07, page 1124.
Proposed regulations under section 147 of the Code provide discreet new rules under the public approval requirement for tax-exempt bonds and also update certain provisions in existing regulations relating to the public approval requirement. A public hearing is scheduled for January 26, 2009.

Rev. Proc. 2008–66, page 1107.
Cost-of-living adjustments for 2009. This procedure sets forth the cost-of-living adjustments to certain items for 2009 as required under various provisions of the Code and Service guidance.

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 1.—Tax Imposed

The Service provides inflation adjustments to the tax rate tables for individuals, trusts, and estates for taxable years beginning in 2009. In addition, the amounts of certain reductions allowed against the unearned income of minor children in computing the "kiddie tax" are adjusted. Also adjusted are the amounts used to determine whether a parent may elect to report the "kiddie tax" on the parent's return. See Rev. Proc. 2008-66, page 1107.

Section 23.—Adoption Expenses

The Service provides inflation adjustments to the adoption credit allowed for the adoption of a child for taxable years beginning in 2009. The Service also provides inflation adjustments to the value used in calculating the modified adjusted gross income limitations used to determine the amount of adoption credit that is allowed in taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 24.—Child Tax Credit

The Service provides inflation adjustments for the value used in determining the amount of the credit that may be refundable for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 25A.—Hope and Lifetime Learning Credits

For taxable years beginning in 2009, the Service provides inflation adjustments for the amount of qualified tuition and related expenses that are taken into account in determining the amount of the Hope Scholarship Credit, and for the amount of a taxpayer's modified adjusted gross income that is taken into account in determining the reduction in the amount of the Hope Scholarship and Lifetime Learning Credits otherwise available. See Rev. Proc. 2008-66, page 1107.

Section 32.—Earned Income

The Service provides inflation adjustments to the limitations on the earned income credit for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 42.—Low-Income Housing Credit

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

The Service provides inflation adjustments to the amounts used to calculate the State housing credit ceiling used in determining the low-income housing credit for calendar year 2009. See Rev. Proc. 2008-66, page 1107.

Section 45A.—Indian Employment Credit

As a result of cost-of-living adjustments, the limitation on wages under section 45A regarding individuals eligible for the Indian employment credit, which was $40,000 for tax years beginning in 2008, is increased by $45,000 for tax years beginning in 2009. See Notice 2008-102, page 1106.

Section 59.—Other Definitions and Special Rules

The Service provides an inflation adjustment to the exemption amount used in computing the alternative minimum tax for a minor child subject to the "kiddie tax" for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 62.—Adjusted Gross Income Defined

The Service provides inflation adjustments to the amounts an eligible employer may pay in calendar year 2009 to certain welders and heavy equipment mechanics for rig-related expenses that are deemed substantiated under an accountable plan if paid in accordance with Rev. Proc. 2002–41, 2002–1 C.B. 1098. See Rev. Proc. 2008-66, page 1107.

Section 63.—Taxable Income Defined

The Service provides inflation adjustments to the standard deduction amounts (including the limitation in the case of certain dependents, and the additional standard deduction for the aged or blind) for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 68.—Overall Limitation on Itemized Deductions

The Service provides inflation adjustments to the overall limitation on itemized deductions for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 132.—Certain Fringe Benefits

The Service provides inflation adjustments to the limitations on the exclusion of income for a qualified transportation fringe benefit for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 135.—Income From United States Savings Bonds Used to Pay Higher Education Tuition and Fees

The Service provides inflation adjustments to the limitation on the exclusion of income from United States savings bonds for taxpayers who pay qualified higher education expenses for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 137.—Adoption Assistance Programs

The Service provides inflation adjustments to the maximum amount that can be excluded from an employee's gross income in connection with a qualified adoption assistance program for taxable years beginning in 2009. The Service also provides inflation adjustments to the amount used to calculate the modified adjusted gross income limitations used to determine the amount that can be excluded from an employee's gross income for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 146.—Volume Cap

The Service provides inflation adjustments to the amounts used to determine the State ceiling for the volume cap of private activity bonds for calendar year 2009. See Rev. Proc. 2008-66, page 1107.

Section 147.—Other Requirements Applicable to Certain Private Activity Bonds

The Service provides an inflation adjustment to the loan limit amount on agricultural bonds for first-time

farmers for calendar year 2009. See Rev. Proc. 2008-66, page 1107.

Section 148.—Arbitrage

26 CFR 1.148–5: Yield and valuation of investments.

The Service provides inflation adjustments for determining in the calendar year 2009 whether a broker's commission or similar fee with respect to the acquisition of a guaranteed investment contract or investments purchased for a yield restricted defeasance escrow is reasonable. The Service provides an inflation adjustment to the computation credit determined under section 1.148–3(d)(4) of the proposed Income Tax Regulations for bond years ending in 2009. See Rev. Proc. 2008-66, page 1107.

Section 151.—Allowance of Deductions for Personal Exemptions

The Service provides inflation adjustments to the personal exemption and to the threshold amounts of adjusted gross income above which the exemption amount phases out for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

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

The Service provides inflation adjustments to the "insubstantial benefit" guidelines for calendar year 2009. Under the guidelines, a charitable contribution is fully deductible even though the contributor receives "insubstantial benefits" from the charity. See Rev. Proc. 2008-66, page 1107.

Section 179.—Election to Expense Certain Depreciable Business Assets

The Service provides inflation adjustments to the aggregate cost of section 179 property that a taxpayer may elect to treat as an expense for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 213.—Medical, Dental, etc., Expenses

The Service provides inflation adjustments to the limitation on the amount of eligible long-term care premiums includible in the term "medical care" for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 220.—Archer MSAs

The Service provides inflation adjustments to the amounts used to determine whether a health plan is a "high deductible health plan" for purposes of determining whether an individual is eligible for a deduction for cash paid to a medical savings account for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 221.—Interest on Education Loans

The Service provides inflation adjustments to the income limitations used to determine the allowable deduction for interest on education loans for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 280G.—Golden Parachute Payments

Federal short-term, mid-term, and long-term rates are set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

Section 382.—Limitation on Net Operating Loss Carryforwards and Certain Built-In Losses Following Ownership Change

The adjusted applicable federal long-term rate is set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

Section 412.—Minimum Funding Standards

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

Section 415.—Limitations on Benefits and Contributions Under Qualified Plans

Certain cost-of-living adjustments effective January 1, 2009, applicable to the dollar limitations on benefits and contributions under qualified retirement plans are set forth. Other limitations applicable to deferred compensation plans are also affected by these adjustments. See Notice 2008-102, page 1106.

Section 467.—Certain Payments for the Use of Property or Services

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

Section 468.—Special Rules for Mining and Solid Waste Reclamation and Closing Costs

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

Section 482.—Allocation of Income and Deductions Among Taxpayers

Federal short-term, mid-term, and long-term rates are set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

Section 483.—Interest on Certain Deferred Payments

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

Section 512.—Unrelated Business Taxable Income

The Service provides an inflation adjustment to the maximum amount of annual dues that can be paid to certain agricultural or horticultural organizations without any portion being treated as unrelated trade or business income by reason of any benefits or privileges available to members for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 513.—Unrelated Trade or Business

The Service provides an inflation adjustment to the maximum cost of a "low cost article" for taxable years beginning in 2009. Funds raised through a charity's distribution of "low cost articles" will not be treated as unrelated business income to the charity. See Rev. Proc. 2008-66, page 1107.

Section 642.—Special Rules for Credits and Deductions

Federal short-term, mid-term, and long-term rates are set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

Section 807.—Rules for Certain Reserves

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

Section 846.—Discounted Unpaid Losses Defined

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

Section 877.—Expatriation to Avoid Tax

The Service provides an inflation adjustment to the amount used for calendar year 2009 to determine whether an individual's loss of United States citizenship had the avoidance of United States tax as one of its principal purposes. See Rev. Proc. 2008-66, page 1107.

Section 877A.—Tax Responsibilities of Expatriation

The Service provides an inflation adjustment to the amount that reduces the amount that would be includible in the gross income of a covered expatriate for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 911.—Citizens or Residents of the United States Living Abroad

The Service provides an inflation adjustment to the amount of foreign earned income that may be excluded from gross income for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 1274.—Determination of Issue Price in the Case of Certain Debt Instruments Issued for Property

(Also Sections 42, 280G, 382, 412, 467, 468, 482, 483, 642, 807, 846, 1288, 7520, 7872.)

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, and other sections of the Code, tables set forth the rates for November 2008.

Rev. Rul. 2008–50

This revenue ruling provides various prescribed rates for federal income tax purposes for November 2008 (the current month). Table 1 contains the short-term, mid-term, and long-term applicable federal rates (AFR) for the current month for purposes of section 1274(d) of the Internal Revenue Code. Table 2 contains the short-term, mid-term, and long-term adjusted applicable federal rates (adjusted AFR) for the current month for purposes of section 1288(b). Table 3 sets forth the adjusted federal long-term rate and the long-term tax-exempt rate described in section 382(f). Table 4 contains the appropriate percentages for determining the low-income housing credit described in section 42(b)(1) for buildings placed in service during the current month. However, under section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, and before December 31, 2013, shall not be less than 9%. Finally, Table 5 contains the federal rate for determining the present value of an annuity, an interest for life or for a term of years, or a remainder or a reversionary interest for purposes of section 7520.

REV. RUL. 2008–50 TABLE 1

Applicable Federal Rates (AFR) for November 2008

	Period for Compounding			
	Annual	*Semiannual*	*Quarterly*	*Monthly*
Short-term				
AFR	1.63%	1.62%	1.62%	1.61%
110% AFR	1.79%	1.78%	1.78%	1.77%
120% AFR	1.95%	1.94%	1.94%	1.93%
130% AFR	2.12%	2.11%	2.10%	2.10%
Mid-term				
AFR	2.97%	2.95%	2.94%	2.93%
110% AFR	3.28%	3.25%	3.24%	3.23%
120% AFR	3.57%	3.54%	3.52%	3.51%
130% AFR	3.88%	3.84%	3.82%	3.81%
150% AFR	4.48%	4.43%	4.41%	4.39%
175% AFR	5.23%	5.16%	5.13%	5.11%
Long-term				
AFR	4.24%	4.20%	4.18%	4.16%
110% AFR	4.67%	4.62%	4.59%	4.58%
120% AFR	5.10%	5.04%	5.01%	4.99%
130% AFR	5.53%	5.46%	5.42%	5.40%

REV. RUL. 2008–50 TABLE 2

Adjusted AFR for November 2008

Period for Compounding

	Annual	*Semiannual*	*Quarterly*	*Monthly*
Short-term adjusted AFR	2.20%	2.19%	2.18%	2.18%
Mid-term adjusted AFR	3.35%	3.32%	3.31%	3.30%
Long-term adjusted AFR	4.94%	4.88%	4.85%	4.83%

REV. RUL. 2008–50 TABLE 3

Rates Under Section 382 for November 2008

Adjusted federal long-term rate for the current month	4.94%
Long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months.)	4.94%

REV. RUL. 2008–50 TABLE 4

Appropriate Percentages Under Section 42(b)(1) for November 2008

Note: Under Section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, and before December 31, 2013, shall not be less than 9%.

Appropriate percentage for the 70% present value low-income housing credit	7.83%
Appropriate percentage for the 30% present value low-income housing credit	3.36%

REV. RUL. 2008–50 TABLE 5

Rate Under Section 7520 for November 2008

Applicable federal rate for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest	3.6%

Section 1288.—Treatment of Original Issue Discount on Tax-Exempt Obligations

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

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

The Service provides an inflation adjustment to the maximum amount by which the value of certain farm and other qualified real property included in a decedent's gross estate may be decreased for purposes of valuing the estate of a decedent dying in calendar year 2009. See Rev. Proc. 2008-66, page 1107.

Section 2503.—Taxable Gifts

The Service provides an inflation adjustment to the amount of gifts that may be made to a person in a calendar year without including the amount in taxable gifts for calendar year 2009. See Rev. Proc. 2008-66, page 1107.

Section 2523.—Gift to Spouse

The Service provides an inflation adjustment to the amount of gifts that may be made in a calendar year to a spouse who is not a citizen of the United States without including the amount in taxable gifts for calendar year 2009. See Rev. Proc. 2008-66, page 1107.

Section 4161.—Imposition of Tax

The Service provides an inflation adjustment to the amount of excise tax imposed for calendar year 2009 on the first sale by a manufacturer, producer, or importer of any shaft of a type used in the manufacture of certain arrows. See Rev. Proc. 2008-66, page 1107.

Section 4261.—Imposition of Tax

The Service provides inflation adjustments to the amounts of the excise taxes on passenger air transportation beginning or ending in the United States and

for each domestic segment of air transportation for calendar year 2009. See Rev. Proc. 2008-66, page 1107.

Section 6033.—Returns by Exempt Organizations

The Service provides an inflation adjustment to the amount of dues certain exempt organizations with nondeductible lobbying expenditures can charge and still be excepted from reporting requirements for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 6039F.—Notice of Large Gifts Received From Foreign Persons

The Service provides an inflation adjustment to the amount of gifts received, in a taxable year from foreign persons, that triggers a reporting requirement for a United States person for taxable years beginning in 2009. See Rev. Proc. 2008-66, page 1107.

Section 6323.—Validity and Priority Against Certain Persons

The Service provides inflation adjustments for calendar year 2009 to (1) the maximum amount of a casual sale of personal property below which a federal tax lien will not be valid against a purchaser of the property and (2) the maximum amount of a contract for the repair or improvement of certain residential property at or below which a federal tax lien will not be valid against a mechanic's lienor. See Rev. Proc. 2008-66, page 1107.

Section 6334.—Property Exempt From Levy

The Service provides inflation adjustments to the value of certain property exempt from levy (fuel, provisions, furniture, household personal effects, arms for personal use, livestock, poultry, and books and tools of a trade, business, or profession) for calendar year 2009. See Rev. Proc. 2008-66, page 1107.

Section 6601.—Interest on Underpayment, Nonpayment, or Extensions of Time for Payment, of Tax

The Service provides an inflation adjustment to the amount used to determine the amount of interest charged on a certain portion of the estate tax payable in installments for the estate of a decedent dying in calendar year 2009. See Rev. Proc. 2008-66, page 1107.

Section 6707A.—Penalty for Failure to Include Reportable Transaction Information With Return

26 CFR 301.6707A–1T: Failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction.

T.D. 9425

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 301

Section 6707A and the Failure to Include on Any Return or Statement any Information Required to be Disclosed Under Section 6011 With Respect to a Reportable Transaction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations regarding the imposition of penalties under section 6707A of the Internal Revenue Code (Code) for the failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction. The text of the temporary regulations also serves as the text of the proposed regulations (REG–160868–04) 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 September 11, 2008.

Applicability Date: For dates of applicability, see §301.6707A–1T(f).

FOR FURTHER INFORMATION CONTACT: Matthew Cooper, (202) 622–4940 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 301 under section 6707A of the Code. Section 6707A was added to the Code by section 811 of the American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1418) (AJCA), enacted on October 22, 2004. Section 6707A provides a monetary penalty for the failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction. The penalty applies to returns and statements the due date for which is after October 22, 2004, and which were not filed before that date.

The amount of the section 6707A penalty for failure to include information required under section 6011 with respect to a reportable transaction, other than a listed transaction, is $10,000 in the case of an individual, and $50,000 in any other case. If the failure is with respect to a listed transaction, the penalty is increased to $100,000 in the case of an individual, and $200,000 in any other case.

Section 6707A(d)(1) grants the Commissioner authority to rescind all or a portion of any penalty imposed under section 6707A if (1) the violation relates to a reportable transaction that is not a listed transaction and (2) rescission of the penalty would promote compliance with the requirements of the Code and effective tax administration. Section 6707A(d)(2) provides that the Commissioner's determination whether to rescind the penalty may not be reviewed in any judicial proceeding. Rev. Proc. 2007–21, 2007–9 I.R.B. 613, provides the procedures to follow to request rescission of all or any portion of a penalty assessed under section 6707A with respect to a reportable transaction other than a listed transaction.

Section 6707A(e) requires a person that is required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934, or consolidated reports with another person, to disclose in those reports for the periods specified by the Secretary, the requirement to pay the penalties set forth in section 6707A(e)(2) (for example, certain penalties under section 6662(h) and penalties under sections 6662A(c), 6707A(b)(2)), or 6707A(e)). Rev. Proc. 2005–51, 2005–2 C.B. 296, which was amplified by Rev. Proc. 2007–25, 2007–12 I.R.B. 761, describes the reports on which the disclosures must be made, the information that must be disclosed, and the deadlines by

which persons must make the disclosures on the reports to avoid additional penalties under section 6707A(e). If the person fails to disclose the requirement to pay the penalties, then section 6707A(e) requires that the failure be treated as a failure to disclose a listed transaction to which an additional section 6707A penalty applies. Because a penalty imposed under section 6707A(e) is treated as a penalty imposed with respect to a listed transaction, the penalty is not subject to rescission.

To implement the pertinent provisions of the AJCA, the Treasury Department and the IRS proposed amendments to the rules relating to the disclosure of reportable transactions by taxpayers under section 6011 (see Prop. Treas. Reg. §1.6011–4, REG–103038–05, 2006–2 C.B. 1049) and finalized those proposed regulations in T.D. 9350, 2007–38 I.R.B. 607 (72 FR 43146) published on August 3, 2007.

Sections 1.6011–4(a) and (d) generally require that a taxpayer file a disclosure statement on Form 8886, *"Reportable Transaction Disclosure Statement"* (or successor form) for each reportable transaction in which the taxpayer participated. Section 1.6011–4(e)(1) provides that a disclosure statement for a reportable transaction must be attached to the taxpayer's tax return for each taxable year for which a taxpayer participates in a reportable transaction. In addition, a disclosure statement for a reportable transaction must be attached to each amended return that reflects a taxpayer's participation in a reportable transaction. The taxpayer also must send a copy of the disclosure statement to the IRS Office of Tax Shelter Analysis (OTSA) at the same time that any disclosure statement pertaining to a particular reportable transaction is first filed. If a reportable transaction results in a loss that is carried back to a prior year, the disclosure statement for the reportable transaction must be attached to the taxpayer's application for tentative refund or amended tax return for that prior year. If a taxpayer who is a partner in a partnership, a shareholder in an S corporation, or a beneficiary of a trust receives a timely Schedule K–1, *"Partner's Share of Income, Deductions, Credits, etc.,"* less than 10 calendar days before the due date of the taxpayer's return (including extensions) and, based on receipt of the timely Schedule K–1, the taxpayer determines that the taxpayer participated in a reportable transaction, the disclosure statement will not be considered late if the taxpayer discloses the reportable transaction by filing a disclosure statement with OTSA within 60 calendar days after the due date of the taxpayer's return (including extensions).

For transactions entered into after August 2, 2007, §1.6011–4(e)(2)(i) provides that if a transaction becomes a listed transaction or a transaction of interest after the filing of a taxpayer's tax return (including an amended return) reflecting the taxpayer's participation in the listed transaction or transaction of interest and before the end of the period of limitations for assessment of tax for any taxable year in which the taxpayer participated in the listed transaction or transaction of interest, then a disclosure statement must be filed with OTSA within 90 calendar days after the date on which the transaction became a listed transaction or a transaction of interest, regardless of whether the taxpayer participated in the transaction in the year the transaction became a listed transaction or a transaction of interest.

Published guidance identifying listed transactions or transactions of interest involving estate, gift, employment, and certain excise taxes will specify the manner in which taxpayers must disclose those transactions. See §§20.6011–4; 25.6011–4; 31.6011–4; 53.6011–4; 54.6011–4; and 56.6011–4.

The Treasury Department and IRS issued Notice 2005–11, 2005–1 C.B. 493, providing interim guidance regarding the imposition and rescission of penalties under section 6707A (see §601.601(d)(2)(ii)(*b*)). Specifically, the notice stated that the IRS will impose a penalty under section 6707A with respect to each failure to disclose a reportable transaction within the time and in the form and manner provided by section 6011 and the regulations thereunder. Accordingly, a taxpayer would be subject to a penalty under section 6707A for: (1) the failure to attach an appropriate reportable transaction disclosure statement to an original or amended return; or (2) the failure to provide a copy of an appropriate disclosure statement to OTSA, if required, within the time and in the form and manner provided by section 6011 and the regulations thereunder. A taxpayer that failed to attach a reportable transaction disclosure statement to an original or amended return and failed to provide a copy of a required disclosure statement to OTSA would be subject to a single penalty under section 6707A.

Notice 2005–11 requested comments regarding the rules and standards relating to section 6707A, including the factors that should be considered in exercising the rescission authority under section 6707A(d) and how voluntary, but untimely disclosures (for example, if a taxpayer failed to make a required disclosure upon filing a return, but subsequently submits the required disclosure statement) should be treated in applying the section 6707A penalty. Since then, many have observed that there is little incentive for remedial action if a complete but delinquent disclosure statement is penalized as harshly as a complete failure to submit a disclosure statement. The Treasury Department and the IRS are currently considering whether it would be appropriate to publish a rule that would treat as timely a Form 8886 voluntarily filed prior to the date the IRS first contacts the taxpayer concerning a tax examination for the taxable period in which the taxpayer participated in the reportable transaction. Other appropriate dates by which filings must be made to qualify for relief would be considered as well. Comments are specifically requested on the necessity and appropriateness of publishing guidance addressing this issue.

Explanation of Provisions

These temporary regulations provide rules reflecting the AJCA enactment of the section 6707A penalty for the failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction.

These temporary regulations provide that a taxpayer may incur a separate penalty under section 6707A with respect to each reportable transaction that the taxpayer was required, but failed, to disclose within the time and in the form and manner required under §1.6011–4(d) and (e) or as stated in other published guidance. A taxpayer who is required to disclose a reportable transaction on a Form 8886 (or successor form) filed with a return, amended return, or application for tentative refund and who also is required to disclose the transaction on a Form 8886

(or successor form) with OTSA, is subject to only a single section 6707A penalty for failure to make either one or both of those disclosures. Additionally, these temporary regulations define "reportable transaction" and "listed transaction" by reference to the regulations under section 6011.

These temporary regulations restate the existing authority of the Secretary to prescribe the procedures to request rescission of a section 6707A penalty with respect to a nonlisted reportable transaction by revenue procedure or other guidance published in the Internal Revenue Bulletin. Rev. Proc. 2007–21 describes the procedures for requesting rescission of a penalty assessed under section 6707A, including the deadline by which a person must request rescission; the information the person must provide in the rescission request; the factors that weigh in favor of and against granting rescission; where the person must submit the rescission request; and the rules governing requests for additional information from the person requesting rescission.

These temporary regulations adopt factors mentioned in the legislative history to section 6707A that the Commissioner (or the Commissioner's delegate) should take into account during the determination whether to rescind all or a portion of any penalty imposed under section 6707A. See H.R. Conf. Rep. No. 755, 108th Cong., 2d Sess. at 599 (2004). Factors that these regulations identify as weighing in favor of rescission reflect circumstances that suggest that sustaining assessment of the penalty is against equity and good conscience.

These temporary regulations generally adopt the list of factors stated in Rev. Proc. 2007–21. One additional factor these regulations identify as weighing in favor of granting rescission is whether the penalty assessed is disproportionately larger than the tax benefit received. The factors identified in these temporary regulations do not represent an exclusive list, and no single factor will be determinative of whether to grant rescission in any particular case. Rather, the Commissioner (or the Commissioner's delegate) will consider and weigh all relevant factors, regardless of whether the factor is included in this list.

Because it is the policy of the IRS to administer penalties in a manner that promotes voluntary compliance with the tax laws, it will weigh heavily in favor of rescission if a taxpayer voluntarily files the form required under section 6011: (i) prior to the date the IRS first contacts the taxpayer (including contacts by the IRS with any partnership in which the taxpayer is a partner, any S corporation in which the taxpayer is a shareholder, or any trust in which the taxpayer is a beneficiary) concerning a tax examination for the tax period in which the taxpayer participated in the reportable transaction; and (ii) other circumstances suggest that the taxpayer did not delay filing an untimely but properly completed Form 8886 until after the IRS had taken steps to identify the taxpayer's participation in the reportable transaction in question. See IRS Policy Statement 20–1 (June 29, 2004).

The temporary regulations mirror Rev. Proc. 2007–21 in providing that a rescission request is not the appropriate forum to contest whether the elements necessary to support a penalty under section 6707A exist. That question is for the examining agent, the IRS Appeals Division, and the courts. A rescission determination is based on the premise that a violation of section 6707A exists but, nonetheless, the penalty should be rescinded (or abated). Accordingly, the temporary regulations provide that the Commissioner (or the Commissioner's delegate) will not consider whether the taxpayer in fact failed to comply with section 6011. Furthermore, the temporary regulations provide that the Commissioner (or the Commissioner's delegate) will not take into consideration doubt as to liability for, or collectibility of, the penalties in determining whether to rescind the penalty.

Additionally, these temporary regulations restate the existing authority of the Secretary to prescribe by revenue procedure or other guidance published in the Internal Revenue Bulletin the manner in which taxpayers must disclose the requirement to pay certain penalties on reports filed with the Securities and Exchange Commission. Rev. Procs. 2005–51 and 2007–25 are the current published guidance items that provide these disclosure rules and remain effective until further guidance is issued in the form of regulations or other guidance that explicitly supersedes these two documents.

Effect on other Documents

The temporary regulations supersede Notice 2005–11.

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. The temporary regulations are necessary to promote taxpayers' immediate compliance with the regulations recently finalized under section 6011 and to provide for regulatory relief in appropriate circumstances, including the additional taxpayer favorable factor of whether the penalty assessed is disproportionately larger than the tax benefit received. For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the cross-referenced notice of proposed rulemaking published in this issue of the Bulletin. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Matthew Cooper of the Office of the Associate Chief Counsel (Procedure and Administration).

* * * * *

Amendments to the Regulations

Accordingly, 26 CFR Part 301 is amended as follows:

PART 301 — PROCEDURE AND ADMINISTRATION

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

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

Par. 2. Section 301.6707A–1T is added to read as follows:

§301.6707A–1T Failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction.

(a) *In general.* Any person who fails to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction may be subject to a monetary penalty. The penalty for failure to include information with respect to a reportable transaction, other than a listed transaction, is $10,000 in the case of a natural person, and $50,000 in any other case. The penalty for failure to include information with respect to a listed transaction is $100,000 in the case of a natural person, and $200,000 in any other case. The section 6707A penalty is in addition to any other penalty that may be imposed.

(b) *Definitions*—(1) *Reportable transaction.* The term "reportable transaction" is defined in §1.6011–4(b)(1) of this chapter.

(2) *Listed transaction.* The term "listed transaction" is defined in section 6707A(c) of the Code and §1.6011–4(b)(2) of this chapter.

(c) *Assessment of the penalty*—(1) *In general.* The Internal Revenue Service (IRS) may assess a penalty under section 6707A with respect to each failure to disclose a reportable transaction within the time and in the form and manner provided by §1.6011–4(d) and (e) of this chapter or pursuant to the time, form, and manner stated in other published guidance. A taxpayer who is required to disclose a reportable transaction with a return, amended return, or application for tentative refund and who also is required to disclose the transaction on a Form 8886, *"Reportable Transaction Disclosure Statement"* (or successor form), filed with the IRS Office of Tax Shelter Analysis (OTSA), is subject to only a single section 6707A penalty for failure to make either one or both of those disclosures. If section 6011 and the regulations thereunder require a disclosure statement to be filed at the time that a return is filed, the disclosure statement is considered to be timely filed if it is filed at the same time as the return, even if the return is filed untimely after its due date.

(2) *Examples.* The rules of paragraph (c)(1) of this section are illustrated by the following examples:

Example 1. Taxpayer T is required to attach a Form 8886 to its return for the 2007 taxable year and to send a copy of the Form 8886 to OTSA at the time it files its return. Taxpayer T fails to attach the Form 8886 to its return and fails to send a copy of the Form 8886 to OTSA. Taxpayer T is subject to a single penalty under section 6707A for failure to disclose because Taxpayer T failed to comply with the disclosure requirements of section 6011. A penalty under section 6707A also would apply if Taxpayer T had failed to comply with only one of the two requirements.

Example 2. Same as *Example 1*, except that Taxpayer T also subsequently files an amended return for 2007 that reflects Taxpayer T's participation in the reportable transaction. Taxpayer T fails to attach a Form 8886 to the amended return as required by §1.6011–4(e)(1) of this chapter. Taxpayer T is subject to an additional penalty under section 6707A for failing to disclose a reportable transaction.

Example 3. In November 2009, Taxpayer U participates in a reportable transaction resulting in a loss that is carried back to 2008. Taxpayer U fails to attach a Form 8886 to its 2008 amended return claiming the loss carryback. Section 1.6011–4(e)(1) of this chapter requires Taxpayer U to attach a Form 8886 to its amended return for the 2008 taxable year. Taxpayer U is subject to a penalty under section 6707A.

Example 4. Taxpayer P participates in a nonlisted reportable transaction and is required to attach a Form 8886 to its return for the 2008 taxable year that is due on March 16, 2009. Taxpayer P timely files its return but fails to attach the Form 8886 to its return. After the due date of Taxpayer P's return and without an extension of time to file, Taxpayer P files an amended return relating to the 2008 taxable year to which Taxpayer P attaches the Form 8886. Taxpayer P is subject to a penalty under section 6707A for failure to disclose because Taxpayer P failed to comply with the disclosure requirements of section 6011 by not attaching a Form 8886 to its return for the 2008 taxable year that was timely filed on or before the due date of March 16, 2009. A penalty under section 6707A also would apply if Taxpayer P had failed to attach a Form 8886 to its amended return. Taxpayer P, nevertheless, may file a complete and proper Form 8886 and request in writing rescission of the penalties assessed within 30 days after the date the IRS sends notice and demand for payment of the penalties in accordance with Rev. Proc. 2007–21. The filing of the untimely Form 8886 will weigh heavily in favor of rescission provided that Taxpayer P files the Form 8886 prior to the date the IRS first contacts the taxpayer concerning a tax examination for the 2008 taxable year and there are no other circumstances that suggest that Taxpayer P delayed filing the Form 8886 until after the IRS had taken steps to identify Taxpayer P's participation in the reportable transaction in question.

Example 5. Shareholder V, a shareholder in an S Corporation, receives a timely Schedule K–1 *"Partner's Share of Income, Deductions, Credits, etc.,"* on April 10, 2009, and determines that she is required to attach a Form 8886 to her individual income tax return for the 2008 taxable year. Shareholder V fails to attach the Form 8886 to her 2008 individual income tax return but files a proper and complete Form 8886 with OTSA on June 12, 2009. Section 1.6011–4(e)(1) of this chapter provides that if a taxpayer who is a partner in a partnership, a shareholder in an S corporation, or a beneficiary of a trust receives a timely Schedule K–1 less than 10 calendar days before the due date of the taxpayer's return (including extensions) and, based on receipt of the timely Schedule K–1, the taxpayer determines that the taxpayer participated in a reportable transaction, the disclosure statement will not be considered late if the taxpayer discloses the reportable transaction by filing a disclosure statement with OTSA within 60 calendar days after the due date of the taxpayer's return (including extensions). Accordingly, Shareholder V is not subject to a penalty under section 6707A for failure to disclose.

Example 6. In July 2008, Taxpayer W participates in Transaction Z, a transaction that is not reportable as of April 15, 2009, the date Taxpayer W files his individual income tax return for 2008. On July 15, 2009, Transaction Z is identified as a transaction of interest. Section 1.6011–4(e)(2)(i) of this chapter provides that if a transaction that is not otherwise a reportable transaction becomes a listed transaction or a transaction of interest after the taxpayer has filed a tax return (including an amended return) reflecting the taxpayer's participation in the listed transaction or transaction of interest and before the end of the period of limitations for assessment of tax for any taxable year in which the taxpayer participated in the listed transaction or transaction of interest, then a disclosure statement must be filed with OTSA within 90 calendar days after the date on which the transaction became a listed transaction or transaction of interest, regardless of whether the taxpayer participated in the transaction in the year the transaction became a listed transaction or a transaction of interest. Taxpayer W fails to file a Form 8886 with OTSA by October 13, 2009, 90 calendar days after the date that the transaction was identified as a transaction of interest. Accordingly, Taxpayer W is subject to a penalty under section 6707A.

Example 7. Taxpayer X is required to attach a Form 8886 to its return for the 2008 taxable year with respect to participation in a listed transaction. Taxpayer X attaches the Form 8886 to its return in a timely manner. The Form 8886, however, does not describe any of the potential tax benefits expected to result from this transaction and states that information will be provided upon request. Because the Form 8886 does not describe any of the potential tax benefits expected to result from the transaction and merely provides that the information will be provided upon request, the Form 8886 filed by Taxpayer X is incomplete and does not satisfy the requirements set forth in §1.6011–4(d) of this chapter. Taxpayer X is subject to a penalty under section 6707A for failure to disclose in the appropriate manner.

(d) *Rescission authority*—(1) *In general.* The Commissioner (or the Commissioner's delegate) may rescind the section 6707A penalty if—

(i) The violation relates to a reportable transaction that is not a listed transaction, and

(ii) Rescinding the penalty would promote compliance with the requirements of the Code and effective tax administration.

(2) *Requesting rescission*. The Secretary may prescribe the procedures for a taxpayer to request rescission of a section 6707A penalty with respect to a reportable transaction other than a listed transaction by publishing a revenue procedure or other guidance in the Internal Revenue Bulletin.

(3) *Factors that weigh in favor of granting rescission.* In determining whether rescission would promote compliance with the requirements of the Code and effective tax administration, the Commissioner (or the Commissioner's delegate) will take into account the following list of factors that weigh in favor of granting rescission. This is not an exclusive list and no single factor will be determinative of whether to grant rescission in any particular case. Rather, the Commissioner (or the Commissioner's delegate) will consider and weigh all relevant factors, regardless of whether the factor is included in this list.

(i) The taxpayer, upon becoming aware that it failed to disclose a reportable transaction properly, filed a complete and proper, albeit untimely, Form 8886 (or successor form). This factor will weigh heavily in favor of rescission provided that—

(A) the taxpayer files the Form 8886 prior to the date the IRS first contacts the taxpayer (including contacts by the IRS with any partnership in which the taxpayer is a partner, any S corporation in which the taxpayer is a shareholder, or any trust in which the taxpayer is a beneficiary) concerning a tax examination for the tax period in which the taxpayer participated in the reportable transaction; and

(B) other circumstances suggest that the taxpayer did not delay filing an untimely but properly completed Form 8886 until after the IRS had taken steps to identify the taxpayer's participation in the reportable transaction in question.

(ii) The failure to disclose properly was due to an unintentional mistake of fact that existed despite the taxpayer's reasonable attempts to ascertain the correct facts with respect to the transaction.

(iii) The taxpayer has an established history of properly disclosing other reportable transactions and complying with other tax laws.

(iv) The taxpayer demonstrates that the failure to include on any return or statement any information required to be disclosed under section 6011 arose from events beyond the taxpayer's control.

(v) The taxpayer cooperates with the IRS by providing timely information with respect to the transaction at issue that the Commissioner (or the Commissioner's delegate) may request in consideration of the rescission request. In considering whether a taxpayer cooperates with the IRS, the Commissioner (or the Commissioner's delegate) will take into account whether the taxpayer meets the deadlines described in Rev. Proc. 2007–21 (or successor document) (see §601.601(d)(2)(ii)(*b*) of this chapter) for complying with requests for additional information.

(vi) Assessment of the penalty weighs against equity and good conscience, including whether the penalty is disproportionate to the tax benefit received and whether the taxpayer demonstrates that there was reasonable cause for, and the taxpayer acted in good faith with respect to, the failure to timely file or to include on any return any information required to be disclosed under section 6011. An important factor in determining reasonable cause and good faith is the extent of the taxpayer's efforts to ensure that persons who prepared the taxpayer's return were informed of the taxpayer's participation in the reportable transactions. The presence of reasonable cause, however, will not necessarily be determinative of whether to grant rescission.

(4) *Absence of favorable factors weighs against rescission*. The absence of facts establishing the factors described in paragraph (d)(3) of this section weighs against granting rescission. The absence of any one of these factors, however, will not necessarily be determinative of whether to grant rescission.

(5) *Factors not considered.* In determining whether to grant rescission, the Commissioner (or the Commissioner's delegate) will not consider doubt as to liability for, or collectibility of, the penalties.

(e) *Reports to the Securities and Exchange Commission (SEC)*—(1) *In general.* Under section 6707A(e), a taxpayer who is required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934 (or is required to file consolidated reports with another person) must disclose in periodic reports filed with the SEC the requirement to pay each of the following penalties:

(i) The penalty imposed by section 6707A(a) in the amount of $200,000 for failure to disclose a listed transaction.

(ii) The accuracy-related penalty imposed by section 6662A(a) at the 30-percent rate determined under section 6662A(c) for a reportable transaction understatement with respect to which the relevant facts affecting the tax treatment of the reportable transaction were not adequately disclosed in accordance with regulations prescribed under section 6011.

(iii) The accuracy-related penalty imposed by section 6662(a) at the 40-percent rate determined under section 6662(h) for a gross valuation misstatement, if the taxpayer (but for the exclusionary rule of section 6662A(e)(2)(C)(ii)) would have been subject to the accuracy-related penalty under section 6662A(a) at the 30-percent rate determined under section 6662A(c).

(iv) The penalty described in paragraph (e)(3) of this section for failure to disclose in periodic reports filed with the SEC the requirement to pay any of the penalties described in paragraphs (e)(1)(i) through (iii) or (e)(3) of this section.

(2) *Manner and content of disclosure*. The Secretary may prescribe the manner in which disclosure of the requirement to pay the penalties identified in paragraph (e)(1) of this section must be made on reports filed with the SEC, including identification of the specific SEC form and section thereof in which the taxpayer must make the disclosure as well as specification of the timing and contents of the disclosure, by publishing a revenue procedure or other guidance in the Internal Revenue Bulletin.

(3) *Penalty for failure to disclose in SEC filings*. Any taxpayer who is required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934 (or is required to file consolidated reports with another person) may be subject to a penalty in the amount of $200,000 for each failure to disclose the requirement to pay a penalty identified in paragraphs (e)(1)(i) through (e)(1)(iii) of this section in the manner specified by revenue procedure or other guidance published in the Internal Revenue Bulletin. The taxpayer also may be subject to an additional penalty in the amount of $200,000 for each failure to

disclose a penalty arising under this section in the manner specified by revenue procedure or other guidance published in the Internal Revenue Bulletin. The penalty provided by this paragraph is not subject to rescission as described in paragraph (d) of this section.

(f) *Effective/applicability date*—(1) The rules of this section apply to disclosure statements that are due after September 11, 2008.

(2) The applicability of this section expires on or before September 9, 2011.

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

Approved September 5, 2008.

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

(Filed by the Office of the Federal Register on September 10, 2008, 8:45 a.m., and published in the issue of the Federal Register for September 11, 2008, 73 F.R. 52784)

Section 7430.—Awarding of Costs and Certain Fees

The Service provides an inflation adjustment to the hourly limit on attorney fees incurred in calendar year 2009 that may be awarded in a judgement or settlement of an administrative or judicial proceeding concerning the determination, collection, or refund of tax, interest, or penalty. See Rev. Proc. 2008-66, page 1107.

Section 7520.—Valuation Tables

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

Section 7702B.—Treatment of Qualified Long-Term Care Insurance

The Service provides an inflation adjustment to the stated dollar amount for calendar year 2009 of the *per diem* limitation regarding periodic payments received under a qualified long-term care insurance contract or periodic payments received under a life insurance contract that are treated as paid by reason of the death of a chronically ill individual. See Rev. Proc. 2008-66, page 1107.

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

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of November 2008. See Rev. Rul. 2008-50, page 1098.

Part III. Administrative, Procedural, and Miscellaneous

2009 Limitations Adjusted As Provided in Section 415(d), etc.[1]

Notice 2008–102

Section 415 of the Internal Revenue Code (the Code) provides for dollar limitations on benefits and contributions under qualified retirement plans. Section 415 also requires that the Commissioner annually adjust these limits for cost-of-living increases. Other limitations applicable to deferred compensation plans are also affected by these adjustments. Many of the limitations will change for 2009 because the increase in the cost-of-living index met the statutory thresholds that trigger their adjustment. However, for others, the limitation will remain unchanged. For example, the limitation under § 402(g)(1) on the exclusion for elective deferrals described in § 402(g)(3) is increased from $15,500 to $16,500. This limitation affects elective deferrals to § 401(k) plans and to the Federal Government's Thrift Savings Plan, among other plans.

Cost-of-Living limits for 2009

Effective January 1, 2009, the limitation on the annual benefit under a defined benefit plan under § 415(b)(1)(A) is increased from $185,000 to $195,000. For participants who separated from service before January 1, 2009, the limitation for defined benefit plans under § 415(b)(1)(B) is computed by multiplying the participant's compensation limitation, as adjusted through 2008, by 1.0530.

The limitation for defined contribution plans under § 415(c)(1)(A) is increased from $46,000 to $49,000.

The Code provides that various other dollar amounts are to be adjusted at the same time and in the same manner as the dollar limitation of § 415(b)(1)(A). These dollar amounts and the adjusted amounts are as follows:

The limitation under § 402(g)(1) on the exclusion for elective deferrals described in § 402(g)(3) is increased from $15,500 to $16,500.

The annual compensation limit under §§ 401(a)(17), 404(l), 408(k)(3)(C), and 408(k)(6)(D)(ii) is increased from $230,000 to $245,000.

The dollar limitation under § 416(i)(1)(A)(i) concerning the definition of key employee in a top-heavy plan is increased from $150,000 to $160,000.

The dollar amount under § 409(o)(1)(C)(ii) for determining the maximum account balance in an employee stock ownership plan subject to a 5-year distribution period is increased from $935,000 to $985,000, while the dollar amount used to determine the lengthening of the 5-year distribution period is increased from $185,000 to $195,000.

The limitation used in the definition of highly compensated employee under § 414(q)(1)(B) is increased from $105,000 to $110,000.

The dollar limitation under § 414(v)(2)(B)(i) for catch-up contributions to an applicable employer plan other than a plan described in § 401(k)(11) or 408(p) for individuals aged 50 or over is increased from $5,000 to $5,500. The dollar limitation under § 414(v)(2)(B)(ii) for catch-up contributions to an applicable employer plan described in § 401(k)(11) or 408(p) for individuals aged 50 or over remains unchanged at $2,500.

The annual compensation limitation under § 401(a)(17) for eligible participants in certain governmental plans that, under the plan as in effect on July 1, 1993, allowed cost-of-living adjustments to the compensation limitation under the plan under § 401(a)(17) to be taken into account, is increased from $345,000 to $360,000.

The compensation amount under § 408(k)(2)(C) regarding simplified employee pensions (SEPs) is increased from $500 to $550.

The limitation under § 408(p)(2)(E) regarding SIMPLE retirement accounts is increased from $10,500 to $11,500.

The limitation on deferrals under § 457(e)(15) concerning deferred compensation plans of state and local governments and tax-exempt organizations is increased from $15,500 to $16,500.

The compensation amounts under § 1.61–21(f)(5)(i) of the Income Tax Regulations concerning the definition of "control employee" for fringe benefit valuation purposes is increased from $90,000 to $95,000. The compensation amount under § 1.61–21(f)(5)(iii) is increased from $185,000 to $195,000.

The limitation on wages under § 45A regarding individuals eligible for the Indian employment credit is $40,000 for tax years beginning in 2008 and will increase to $45,000 for tax years beginning in 2009. The termination date of § 45A was recently extended from December 31, 2007, to December 31, 2009, by § 314 of Division C of the Emergency Economic Stabilization Act of 2008, P.L. 110–343.

The Code also provides that several pension-related amounts are to be adjusted using the cost-of-living adjustment under § 1(f)(3). These dollar amounts and the adjustments are as follows:

The adjusted gross income limitation under § 25B(b)(1)(A) for determining the retirement savings contribution credit for taxpayers filing a joint return is increased from $32,000 to $33,000; the limitation under § 25B(b)(1)(B) is increased from $34,500 to $36,000; and the limitation under § 25B(b)(1)(C) and (D) is increased from $53,000 to $55,500.

The adjusted gross income limitation under § 25B(b)(1)(A) for determining the retirement savings contribution credit for taxpayers filing as head of household is increased from $24,000 to $24,750; the limitation under § 25B(b)(1)(B) is increased from $25,875 to $27,000; and the limitation under § 25B(b)(1)(C) and (D) is increased from $39,750 to $41,625.

The adjusted gross income limitation under § 25B(b)(1)(A) for determining the retirement savings contribution credit for all other taxpayers is increased from $16,000 to $16,500; the limitation under § 25B(b)(1)(B) is increased from $17,250 to $18,000; and the limitation under § 25B(b)(1)(C)

[1] Based on News Release IR–2008–118 dated October 16, 2008.

and (D) is increased from $26,500 to $27,750.

The deductible amount under § 219(b)(5)(A) for an individual making qualified retirement contributions remains unchanged at $5,000.

The applicable dollar amount under § 219(g)(3)(B)(i) for determining the deductible amount of an IRA contribution for taxpayers who are active participants filing a joint return or as a qualifying widow(er) is increased from $85,000 to $89,000. The applicable dollar amount under § 219(g)(3)(B)(ii) for all other taxpayers (other than married taxpayers filing separate returns) is increased from $53,000 to $55,000. The applicable dollar amount under § 219(g)(7)(A) for a taxpayer who is not an active participant but whose spouse is an active participant is increased from $159,000 to $166,000.

The adjusted gross income limitation under § 408A(c)(3)(C)(ii)(I) for determining the maximum Roth IRA contribution for taxpayers filing a joint return or as a qualifying widow(er) is increased from $159,000 to $166,000. The adjusted gross income limitation under § 408A(c)(3)(C)(ii)(II) for all other taxpayers (other than married taxpayers filing separate returns) is increased from $101,000 to $105,000.

Administrators of defined benefit or defined contribution plans that have received favorable determination letters should not request new determination letters solely because of yearly amendments to adjust maximum limitations in the plans.

Drafting Information

The principal author of this notice is John Heil of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding the data in this notice, please contact the Employee Plans' taxpayer assistance telephone service at 1–877–829–5500 (a toll-free call) between the hours of 8:30 a.m. and 4:30 p.m. Eastern time Monday through Friday. For information regarding the methodology used in arriving at the data in this notice, please e-mail Mr. Heil at *RetirementPlanQuestions@irs.gov*.

26 CFR 601.602: Tax forms and instructions.
(Also Part I, §§ 1, 23, 24, 25A, 32, 42, 59, 62, 63, 68, 132, 135, 137, 146, 147, 148, 151, 170, 179, 213, 220, 221, 512, 513, 877, 877A, 911, 2032A, 2503, 2523, 4161, 4261, 6033, 6039F, 6323, 6334, 6601, 7430, 7702B; 1.148–3, 1.148–5.)

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SECTION 1. PURPOSE

This revenue procedure sets forth inflation adjusted items for 2009.

SECTION 2. CHANGES

.01 For taxable years beginning after 2008, the $3,000 increase to the phaseout amounts of the earned income tax credit for married taxpayers filing a joint return under § 32(b)(2)(B)(iii) are adjusted for inflation. The adjusted amounts are included in the amounts shown in section 3.06(1) of this revenue procedure.

.02 Section 42(h)(3)(I) was added to the Code by section 3001, Division C, Title I, of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110–289, 122 Stat. 2654 (2008), to provide for a temporary increase in the State housing credit ceiling under § 42(h)(3)(C)(ii)(I) and (II) after any adjustments for inflation under § 42(h)(3)(H). Accordingly, for calendar years 2008 and 2009, the inflation adjusted amount under § 42(h)(3)(C)(ii)(I) is increased by $0.20, and the inflation adjusted amount under § 42(h)(3)(C)(ii)(II) is increased by ten (10) percent and rounded to the next lowest multiple of $5,000. (See section 3.07 of this revenue procedure.)

.03 Section 147(c)(2) was amended by section 15341, Title XV, Subtitle C, Part III, of the Food Conservation and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1651 (2008), to provide for an increase in the loan limits on agricultural bonds for first-time farmers. For calendar year 2008, the limit is $450,000. For calendar years after 2008, the $450,000 amount will be adjusted for inflation. (See section 3.16 of this revenue procedure.)

.04 Section 877A was added to the Code by section 301(a) of Title III of the Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110–245, 122 Stat. 1624 (2008), to provide spe-

cial rules for the treatment of property of certain individuals who are "covered expatriates," and who cease to be treated as long term residents or who relinquish their U.S. citizenship (expatriate). Pursuant to § 877A(a)(1), covered expatriates, as defined in § 877A(g)(1), are subject to income tax on the net unrealized gain in their property as if the property had been sold for its fair market value on the day before the expatriation date, as defined in § 877A(g)(3). Section 877A(a)(3) provides that the amount of gain includible in gross income under § 877A(a)(1) is reduced (but not below zero) by $600,000. For taxable years beginning in a calendar year after 2008, the $600,000 amount is adjusted for inflation. (See sections 3.26 and 3.27 of this revenue procedure.)

.05 The passenger air transportation excise taxes imposed under § 4261(b) and (c), as extended by § 2(b)(1) of the Federal Aviation Administration Extension Act of 2008, Part II, Pub. L. No. 110–330, 122 Stat. 3717 (2008), apply to transportation taken through March 31, 2009, and to amounts paid on or before March 31, 2009, for transportation beginning after that date. Accordingly, the amounts in § 4261(b) and (c) are adjusted for inflation for 2009 and are included in this revenue procedure. (See section 3.32 of this revenue procedure.)

.06 The dollar limit on contributions to funeral trusts under § 685(c) was repealed by § 9 of the Hubbard Act, Pub. L. No. 110–317, 122 Stat. 3526 (2008), for taxable years beginning after August 29, 2008. Accordingly, the dollar limitation under § 685(c) is no longer included in this revenue procedure.

SECTION 3. 2009 ADJUSTED ITEMS

.01 *Tax Rate Tables*. For taxable years beginning in 2009, the tax rate tables under § 1 are as follows:

TABLE 1 — Section 1(a) — Married Individuals Filing Joint Returns and Surviving Spouses.

If Taxable Income Is:	*The Tax Is*:
Not over $16,700	10% of the taxable income
Over $16,700 but not over $67,900	$1,670 plus 15% of the excess over $16,700
Over $67,900 but not over $137,050	$9,350 plus 25% of the excess over $67,900
Over $137,050 but not over $208,850	$26,637.50 plus 28% of the excess over $137,050
Over $208,850 but not over $372,950	$46,741.50 plus 33% of the excess over $208,850
Over $372,950	$100,894.50 plus 35% of the excess over $372,950

TABLE 2 — Section 1(b) — Heads of Households.

If Taxable Income Is:	*The Tax Is*:
Not over $11,950	10% of the taxable income
Over $11,950 but not over $45,500	$1,195 plus 15% of the excess over $11,950
Over $45,500 but not over $117,450	$6,227.50 plus 25% of the excess over $45,500
Over $117,450 but not over $190,200	$24,215 plus 28% of the excess over $117,450
Over $190,200 but not over $372,950	$44,585 plus 33% of the excess over $190,200
Over $372,950	$104,892.50 plus 35% of the excess over $372,950

TABLE 3 — Section 1(c) — Unmarried Individuals (other than Surviving Spouses and Heads of Households).

If Taxable Income Is:	*The Tax Is*:
Not over $8,350	10% of the taxable income
Over $8,350 but not over $33,950	$835 plus 15% of the excess over $8,350
Over $33,950 but not over $82,250	$4,675 plus 25% of the excess over $33,950
Over $82,250 but not over $171,550	$16,750 plus 28% of the excess over $82,250
Over $171,550 but not over $372,950	$41,754 plus 33% of the excess over $171,550
Over $372,950	$108,216 plus 35% of the excess over $372,950

TABLE 4 — Section 1(d) — Married Individuals Filing Separate Returns.

If Taxable Income Is:	*The Tax Is*:
Not over $8,350	10% of the taxable income
Over $8,350 but not over $33,950	$835 plus 15% of the excess over $8,350
Over $33,950 but not over $68,525	$4,675 plus 25% of the excess over $33,950
Over $68,525 but not over $104,425	$13,318.75 plus 28% of the excess over $68,525
Over $104,425 but not over $186,475	$23,370.75 plus 33% of the excess over $104,425
Over $186,475	$50,447.25 plus 35% of the excess over $186,475

TABLE 5 — Section 1(e) — Estates and Trusts.

If Taxable Income Is:	*The Tax Is*:
Not over $2,300	15% of the taxable income
Over $2,300 but not over $5,350	$345 plus 25% of the excess over $2,300
Over $5,350 but not over $8,200	$1,107.50 plus 28% of the excess over $5,350
Over $8,200 but not over $11,150	$1,905.50 plus 33% of the excess over $8,200
Over $11,150	$2,879 plus 35% of the excess over $11,150

.02 *Unearned Income of Minor Children Taxed as if Parent's Income (the "Kiddie Tax").* For taxable years beginning in 2009, the amount in § 1(g)(4)(A)(ii)(I), which is used to reduce the net unearned income reported on the child's return that is subject to the "kiddie tax," is $950. This amount is the same as the $950 standard deduction amount provided in section 3.10(2) of this revenue procedure. The same $950 amount is used for purposes of § 1(g)(7) (that is, to determine whether a parent may elect to include a child's gross income in the parent's gross income and to calculate the

"kiddie tax"). For example, one of the requirements for the parental election is that a child's gross income is more than the amount referenced in § 1(g)(4)(A)(ii)(I) but less than 10 times that amount; thus, a child's gross income for 2009 must be more than $950 but less than $9,500.

.03 *Adoption Credit*. For taxable years beginning in 2009, under § 23(a)(3) the credit allowed for an adoption of a child with special needs is $12,150. For taxable years beginning in 2009, under § 23(b)(1) the maximum credit allowed for other adoptions is the amount of qualified adoption expenses up to $12,150. The available adoption credit begins to phase out under § 23(b)(2)(A) for taxpayers with modified adjusted gross income in excess of $182,180 and is completely phased out for taxpayers with modified adjusted gross income of $222,180 or more. (See section 3.14 of this revenue procedure for the adjusted items relating to adoption assistance programs.)

.04 *Child Tax Credit*. For taxable years beginning in 2009, the value used in § 24(d)(1)(B)(i) to determine the amount of credit under § 24 that may be refundable is $12,550.

.05 *Hope and Lifetime Learning Credits*.

(1) For taxable years beginning in 2009, the Hope Scholarship Credit under § 25A(b)(1) is an amount equal to 100 percent of qualified tuition and related expenses not in excess of $1,200 plus 50 percent of those expenses in excess of $1,200, but not in excess of $2,400. Accordingly, the maximum Hope Scholarship Credit allowable under § 25A(b)(1) for taxable years beginning in 2009 is $1,800.

(2) For taxable years beginning in 2009, a taxpayer's modified adjusted gross income in excess of $50,000 ($100,000 for a joint return) is used to determine the reduction under § 25A(d)(2)(A)(ii) in the amount of the Hope Scholarship and Lifetime Learning Credits otherwise allowable under § 25A(a).

.06 *Earned Income Credit*.

(1) *In general*. For taxable years beginning in 2009, the following amounts are used to determine the earned income credit under § 32(b). The "earned income amount" is the amount of earned income at or above which the maximum amount of the earned income credit is allowed. The "threshold phaseout amount" is the amount of adjusted gross income (or, if greater, earned income) above which the maximum amount of the credit begins to phase out. The "completed phaseout amount" is the amount of adjusted gross income (or, if greater, earned income) at or above which no credit is allowed. The threshold phaseout amounts and the completed phaseout amounts shown in the table below for married taxpayers filing a joint return include the increase provided in § 32(b)(2)(B)(iii), as adjusted for inflation for taxable years beginning in 2009.

	Number of Qualifying Children		
Item	*One*	*Two or More*	*None*
Earned Income Amount	$ 8,950	$12,570	$ 5,970
Maximum Amount of Credit	$ 3,043	$ 5,028	$ 457
Threshold Phaseout Amount (Single, Surviving Spouse, or Head of Household)	$16,420	$16,420	$ 7,470
Completed Phaseout Amount (Single, Surviving Spouse, or Head of Household)	$35,463	$40,295	$13,440
Threshold Phaseout Amount (Married Filing Jointly)	$19,540	$19,540	$10,590
Completed Phaseout Amount (Married Filing Jointly)	$38,583	$43,415	$16,560

The instructions for the Form 1040 series provide tables showing the amount of the earned income credit for each type of taxpayer.

(2) *Excessive investment income*. For taxable years beginning in 2009, the earned income tax credit is not allowed under § 32(i) if the aggregate amount of certain investment income exceeds $3,100.

.07 *Low-Income Housing Credit*. For calendar year 2009, the amount used under § 42(h)(3)(C)(ii) to calculate the State housing credit ceiling for the low-income housing credit is the greater of (1) $2.30 multiplied by the State population, or (2) $2,665,000.

.08 *Alternative Minimum Tax Exemption for a Child Subject to the "Kiddie Tax."* For taxable years beginning in 2009, for a child to whom the § 1(g) "kiddie tax" applies, the exemption amount under §§ 55 and 59(j) for purposes of the alternative minimum tax under § 55 may not exceed the sum of (1) the child's earned income for the taxable year, plus (2) $6,700.

.09 *Transportation Mainline Pipeline Construction Industry Optional Expense Substantiation Rules for Payments to Employees under Accountable Plans*. For calendar year 2009, an eligible employer may pay certain welders and heavy equipment mechanics an amount of up to $16 per hour for rig-related expenses that is deemed substantiated under an accountable plan if paid in accordance with Rev. Proc. 2002–41, 2002–1 C.B. 1098. If the employer provides fuel or otherwise reimburses fuel expenses, up to $10 per hour is deemed substantiated if paid under Rev. Proc. 2002–41.

.10 *Standard Deduction*.

(1) *In general*. For taxable years beginning in 2009, the standard deduction amounts under § 63(c)(2) are as follows:

Filing Status	*Standard Deduction*
Married Individuals Filing Joint Returns and Surviving Spouses (§ 1(a))	$11,400
Heads of Households (§ 1(b))	$ 8,350
Unmarried Individuals (other than Surviving Spouses and Heads of Households) (§ 1(c))	$ 5,700
Married Individuals Filing Separate Returns (§ 1(d))	$ 5,700

(2) *Dependent*. For taxable years beginning in 2009, the standard deduction amount under § 63(c)(5) for an individual who may be claimed as a dependent by another taxpayer cannot exceed the greater of (1) $950, or (2) the sum of $300 and the individual's earned income.

(3) *Aged or blind*. For taxable years beginning in 2009, the additional standard deduction amount under § 63(f) for the aged or the blind is $1,100. These amounts are increased to $1,400 if the individual is also unmarried and not a surviving spouse.

.11 *Overall Limitation on Itemized Deductions*. For taxable years beginning in 2009, the "applicable amount" of adjusted gross income under § 68(b), above which the amount of otherwise allowable itemized deductions is reduced under § 68, is $166,800 (or $83,400 for a separate return filed by a married individual).

.12 *Qualified Transportation Fringe*. For taxable years beginning in 2009, the monthly limitation under § 132(f)(2)(A), regarding the aggregate fringe benefit exclusion amount for transportation in a commuter highway vehicle and any transit pass, is $120. The monthly limitation under § 132(f)(2)(B), regarding the fringe benefit exclusion amount for qualified parking, is $230.

.13 *Income from United States Savings Bonds for Taxpayers Who Pay Qualified Higher Education Expenses*. For taxable years beginning in 2009, the exclusion under § 135, regarding income from United States savings bonds for taxpayers who pay qualified higher education expenses, begins to phase out for modified adjusted gross income above $104,900 for joint returns and $69,950 for other returns. The exclusion is completely phased out for modified adjusted gross income of $134,900 or more for joint returns and $84,950 or more for other returns.

.14 *Adoption Assistance Programs*. For taxable years beginning in 2009, under § 137(a)(2) the amount that can be excluded from an employee's gross income for the adoption of a child with special needs is $12,150. For taxable years beginning in 2009, under § 137(b)(1) the maximum amount that can be excluded from an employee's gross income for the amounts paid or expenses incurred by an employer for qualified adoption expenses furnished pursuant to an adoption assistance program for other adoptions by the employee is $12,150. The amount excludable from an employee's gross income begins to phase out under § 137(b)(2)(A) for taxpayers with modified adjusted gross income in excess of $182,180 and is completely phased out for taxpayers with modified adjusted gross income of $222,180 or more. (See section 3.03 of this revenue procedure for the adjusted items relating to the adoption credit.)

.15 *Private Activity Bonds Volume Cap*. For calendar year 2009, the amounts used under § 146(d)(1) to calculate the State ceiling for the volume cap for private activity bonds is the greater of (1) $90 multiplied by the State population, or (2) $273,270,000.

.16 *Loan Limits for Agricultural Bonds*. For calendar year 2009, the loan limit amount on agricultural bonds under § 147(c)(2)(A) for first-time farmers is $469,200.

.17 *General Arbitrage Rebate Rules*. For bond years ending in 2009, the amount of the computation credit determined under § 1.148–3(d)(4) of the proposed Income Tax Regulations is $1,490.

.18 *Safe Harbor Rules for Broker Commissions on Guaranteed Investment Contracts or Investments Purchased for a Yield Restricted Defeasance Escrow*. For calendar year 2009, under § 1.148–5(e)(2)(iii)(B)(*1*), a broker's commission or similar fee for the acquisition of a guaranteed investment contract or investments purchased for a yield restricted defeasance escrow is reasonable if (1) the amount of the fee that the issuer treats as a qualified administrative cost does not exceed the lesser of (A) $35,000, and (B) 0.2 percent of the computational base (as defined in § 1.148–5(e)(2)(iii)(B)(*2*)) or, if more, $4,000; and (2) the issuer does not treat more than $99,000 in brokers' commissions or similar fees as qualified administrative costs for all guaranteed investment contracts and investments for yield restricted defeasance escrows purchased with gross proceeds of the issue.

.19 *Personal Exemption*.

(1) *Exemption amount*. For taxable years beginning in 2009, the personal exemption amount under § 151(d) is $3,650. The exemption amount for taxpayers with adjusted gross income in excess of the maximum phaseout amount is $2,433 for taxable years beginning in 2009.

(2) *Phaseout*. For taxable years beginning in 2009, the personal exemption amount begins to phase out at, and reaches the maximum phaseout amount after, the following adjusted gross income amounts:

Filing Status	*AGI – Beginning of Phaseout*	*AGI – Maximum Phaseout*
Married Individuals Filing Joint Returns and Surviving Spouses (§ 1(a))	$250,200	$372,700
Heads of Households (§ 1(b))	$208,500	$331,000
Unmarried Individuals (other than Surviving Spouses and Heads of Households) (§ 1(c))	$166,800	$289,300
Married Individuals Filing Separate Returns (§ 1(d))	$125,100	$186,350

.20 *Election to Expense Certain Depreciable Assets*. For taxable years beginning in 2009, under § 179(b)(1) the aggregate cost of any § 179 property a taxpayer may elect to treat as an expense cannot exceed $133,000. Under § 179(b)(2) the $133,000 limitation is reduced (but not below zero) by the amount by which the cost of § 179 property placed in service during the 2009 taxable year exceeds $530,000.

.21 *Eligible Long-Term Care Premiums*. For taxable years beginning in 2009, the limitations under § 213(d)(10), regarding eligible long-term care premiums includible in the term "medical care," are as follows:

Attained Age Before the Close of the Taxable Year	*Limitation on Premiums*
40 or less	$ 320
More than 40 but not more than 50	$ 600
More than 50 but not more than 60	$1,190
More than 60 but not more than 70	$3,180
More than 70	$3,980

22 *Medical Savings Accounts*.

(1) *Self-only coverage*. For taxable years beginning in 2009, the term "high deductible health plan" as defined in § 220(c)(2)(A) means, for self-only coverage, a health plan that has an annual deductible that is not less than $2,000 and not more than $3,000, and under which the annual out-of-pocket expenses required to be paid (other than for premiums) for covered benefits do not exceed $4,000.

(2) *Family coverage*. For taxable years beginning in 2009, the term "high deductible health plan" means, for family coverage, a health plan that has an annual deductible that is not less than $4,000 and not more than $6,050, and under which the annual out-of-pocket expenses required to be paid (other than for premiums) for covered benefits do not exceed $7,350.

.23 *Interest on Education Loans*. For taxable years beginning in 2009, the $2,500 maximum deduction for interest paid on qualified education loans under § 221 begins to phase out under § 221(b)(2)(B) for taxpayers with modified adjusted gross income in excess of $60,000 ($120,000 for joint returns), and is completely phased out for taxpayers with modified adjusted gross income of $75,000 or more ($150,000 or more for joint returns).

.24 *Treatment of Dues Paid to Agricultural or Horticultural Organizations*. For taxable years beginning in 2009, the limitation under § 512(d)(1), regarding the exemption of annual dues required to be paid by a member to an agricultural or horticultural organization, is $145.

.25 *Insubstantial Benefit Limitations for Contributions Associated with Charitable Fund-Raising Campaigns*.

(1) *Low cost article*. For taxable years beginning in 2009, the unrelated business income of certain exempt organizations under § 513(h)(2) does not include a "low cost article" of $9.50 or less.

(2) *Other insubstantial benefits*. For taxable years beginning in 2009, the $5, $25, and $50 guidelines in section 3 of Rev. Proc. 90–12, 1990–1 C.B. 471 (as amplified by Rev. Proc. 92–49, 1992–1 C.B. 987, and modified by Rev. Proc. 92–102, 1992–2 C.B. 579), for disregarding the value of insubstantial benefits received by a donor in return for a fully deductible charitable contribution under § 170, are $9.50, $47.50, and $95, respectively.

.26 *Expatriation to Avoid Tax*. For calendar year 2009, an individual with "average annual net income tax" of more than $145,000 for the five taxable years ending before the date of the loss of United States citizenship under § 877(a)(2)(A) is a covered expatriate for purposes of § 877A(g)(1).

.27 *Tax Responsibilities of Expatriation*. For taxable years beginning in 2009, the amount that would be includible in the gross income of a covered expatriate by reason of § 877A(a)(1) is reduced (but not below zero) by $626,000.

.28 *Foreign Earned Income Exclusion*. For taxable years beginning in 2009, the foreign earned income exclusion amount under § 911(b)(2)(D)(i) is $91,400.

.29 *Valuation of Qualified Real Property in Decedent's Gross Estate*. For an estate of a decedent dying in calendar year 2009, if the executor elects to use the special use valuation method under § 2032A for qualified real property, the aggregate decrease in the value of qualified real property resulting from electing to use § 2032A for purposes of the estate tax cannot exceed $1,000,000.

.30 *Annual Exclusion for Gifts*.

(1) For calendar year 2009, the first $13,000 of gifts to any person (other than gifts of future interests in property) are

not included in the total amount of taxable gifts under § 2503 made during that year.

(2) For calendar year 2009, the first $133,000 of gifts to a spouse who is not a citizen of the United States (other than gifts of future interests in property) are not included in the total amount of taxable gifts under §§ 2503 and 2523(i)(2) made during that year.

.31 *Tax on Arrow Shafts*. For calendar year 2009, the tax imposed under § 4161(b)(2)(A) on the first sale by the manufacturer, producer, or importer of any shaft of a type used in the manufacture of certain arrows is $0.45 per shaft.

.32 *Passenger Air Transportation Excise Tax*. For calendar year 2009, the tax under § 4261(b) on the amount paid for each domestic segment of taxable air transportation is $3.60. For calendar year 2009, the tax under § 4261(c) on any amount paid (whether within or without the United States) for any air transportation, if the transportation begins or ends in the United States, generally is $16.10. However, for a domestic segment beginning or ending in Alaska or Hawaii as described in § 4261(c)(3), the tax applies only to departures and the rate is $8.00.

.33 *Reporting Exception for Certain Exempt Organizations with Nondeductible Lobbying Expenditures*. For taxable years beginning in 2009, the annual per person, family, or entity dues limitation to qualify for the reporting exception under § 6033(e)(3) (and section 5.05 of Rev. Proc. 98–19, 1998–1 C.B. 547), regarding certain exempt organizations with nondeductible lobbying expenditures, is $101 or less.

.34 *Notice of Large Gifts Received from Foreign Persons*. For taxable years beginning in 2009, recipients of gifts from certain foreign persons may be required to report these gifts under § 6039F if the aggregate value of gifts received in a taxable year exceeds $14,139.

.35 *Persons Against Whom a Federal Tax Lien Is Not Valid*. For calendar year 2009, a federal tax lien is not valid against (1) certain purchasers under § 6323(b)(4) who purchased personal property in a casual sale for less than $1,380, or (2) a mechanic's lienor under § 6323(b)(7) that repaired or improved certain residential property if the contract price with the owner is not more than $6,880.

.36 *Property Exempt from Levy*. For calendar year 2009, the value of property exempt from levy under § 6334(a)(2) (fuel, provisions, furniture, and other household personal effects, as well as arms for personal use, livestock, and poultry) cannot exceed $8,230. The value of property exempt from levy under § 6334(a)(3) (books and tools necessary for the trade, business, or profession of the taxpayer) cannot exceed $4,120.

.37 *Interest on a Certain Portion of the Estate Tax Payable in Installments*. For an estate of a decedent dying in calendar year 2009, the dollar amount used to determine the "2-percent portion" (for purposes of calculating interest under § 6601(j)) of the estate tax extended as provided in § 6166 is $1,330,000.

.38 *Attorney Fee Awards*. For fees incurred in calendar year 2009, the attorney fee award limitation under § 7430(c)(1)(B)(iii) is $180 per hour.

.39 *Periodic Payments Received under Qualified Long-Term Care Insurance Contracts or under Certain Life Insurance Contracts*. For calendar year 2009, the stated dollar amount of the *per diem* limitation under § 7702B(d)(4), regarding periodic payments received under a qualified long-term care insurance contract or periodic payments received under a life insurance contract that are treated as paid by reason of the death of a chronically ill individual, is $280.

SECTION 4. EFFECTIVE DATE

.01 *General Rule*. Except as provided in section 4.02, this revenue procedure applies to taxable years beginning in 2009.

.02 *Calendar Year Rule*. This revenue procedure applies to transactions or events occurring in calendar year 2009 for purposes of sections 3.07 (low-income housing credit), 3.09 (transportation mainline pipeline construction industry optional expense substantiation rules for payments to employees under accountable plans), 3.15 (private activity bond volume cap), 3.16 (loan limits on agricultural bonds), 3.17 (general arbitrage rebate rules), 3.18 (safe harbor rules for broker commissions on guaranteed investment contracts or investments purchased for a yield restricted defeasance escrow), 3.26 (expatriation to avoid tax), 3.29 (valuation of qualified real property in decedent's gross estate), 3.30 (annual exclusion for gifts), 3.31 (tax on arrow shafts), 3.32 (passenger air transportation excise tax), 3.35 (persons against whom a federal tax lien is not valid), 3.36 (property exempt from levy), 3.37 (interest on a certain portion of the estate tax payable in installments), 3.38 (attorney fee awards), and 3.39 (periodic payments received under qualified long-term care insurance contracts or under certain life insurance contracts).

SECTION 5. DRAFTING INFORMATION

The principal author of this revenue procedure is Christina M. Glendening of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue procedure, contact Ms. Glendening at (202) 622–4920 (not a toll-free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

Section 6707A and the Failure to Include on Any Return or Statement Any Information Required to be Disclosed Under Section 6011 With Respect to a Reportable Transaction

REG–160868–04

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. 9425) under section 6707A of the Internal Revenue Code (Code), which provide the rules relating to the assessment of penalties under section 6707A for the failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction. The text of those temporary regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by December 10, 2008.

ADDRESSES: Send submission to: CC:PA:LPD:PR (REG–160868–04), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–160868–04), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–160868–04).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Matthew Cooper (202) 622–4940; concerning submissions of comments and requests for a public hearing, Richard Hurst (202) 622–2949 (TDD telephone) (not toll-free numbers) and his e-mail address is *Richard.A.Hurst@irscounsel.treas.gov.*

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in this issue of the Bulletin amend the Procedure and Administration Regulations (26 CFR part 301) relating to section 6707A. Section 811 of the American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1418) added section 6707A to the Code to provide a monetary penalty for the failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction. The temporary regulations set forth the rules relating to the assessment of the penalty as well as the factors that the Commissioner (or the Commissioner's delegate) will consider in deciding whether the penalty should be rescinded based on promoting compliance with the Code and effective tax administration. 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

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 they 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, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

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

Drafting Information

The principal author of these regulations is Matthew Cooper, Office of the Associate Chief Counsel (Procedure and Administration).

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301 — PROCEDURE AND ADMINISTRATION

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

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

Par. 2. Section 301.6707A–1 is added to read as follows:

§301.6707A–1 Failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction.

[The text of proposed §301.6707A–1 is the same as the text of §301.6707A–1T

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 September 10, 2008, 8:45 a.m., and published in the issue of the Federal Register for September 11, 2008, 73 F.R. 52805)

Notice of Proposed Rulemaking and Notice of Public Hearing

Targeted Populations Under Section 45D(e)(2)

REG–142339–05

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations relating to how an entity serving certain targeted populations under section 45D(e)(2) can meet the requirements to be a qualified active low-income community business. The regulations reflect changes to the law made by the American Jobs Creation Act of 2004. The regulations will affect certain taxpayers claiming the new markets tax credit. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by December 23, 2008. Outlines of topics to be discussed at the public hearing scheduled for Thursday, January 22, 2009 at 10:00 a.m. must be received by Friday, December 26, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–142339–05), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–142339–05), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS – REG–142339–05). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Julie Hanlon-Bolton, (202) 622–3040; concerning submission of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Funmi Awosika Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document amends 26 CFR part 1 to provide rules relating to certain targeted populations under section 45D(e)(2). On May 24, 2005, the Community Development Financial Institutions (CDFI) Fund published an advance notice of proposed rulemaking (ANPRM) (70 FR 29658) to seek comments from the public with respect to how targeted populations may be treated as eligible low-income communities under section 45D(e)(2). In response to the ANPRM, comments were received making various suggestions relating to the Treasury Department's definition of the term "targeted populations" and proposing amendments to the requirements to be a qualified active low-income community business under §1.45D–1. On June 30, 2006, the IRS and Treasury Department released Notice 2006–60, 2006–2 C.B. 82, which announced that §1.45D–1 would be amended to provide rules relating to how an entity meets the requirements to be a qualified active low-income community business when its activities involve certain targeted populations under section 45D(e)(2). Taxpayers may rely on Notice 2006–60 until final regulations are issued. See §601.601(d)(2)(ii)(*b*). The IRS and Treasury Department have reviewed and considered all written and electronic comments in the process of preparing the proposed regulations. This preamble to the proposed regulations describes many of the more significant comments received by the IRS and Treasury Department in response to the notice.

General Overview

Section 45D(a)(1) provides a new markets tax credit on certain credit allowance dates described in section 45D(a)(3) with respect to a qualified equity investment in a qualified community development entity (CDE) described in section 45D(c).

Section 45D(b)(1) provides that an equity investment in a CDE is a "qualified equity investment" if, among other requirements: (A) the investment is acquired by the taxpayer at its original issue (directly or through an underwriter) solely in exchange for cash; (B) substantially all of the cash is used by the CDE to make qualified low-income community investments; and (C) the investment is designated for purposes of section 45D by the CDE.

Under section 45D(b)(2), the maximum amount of equity investments issued by a CDE that may be designated by the CDE as qualified equity investments shall not exceed the portion of the new markets tax credit limitation set forth in section 45D(f)(1) that is allocated to the CDE by the Secretary under section 45D(f)(2).

Section 45D(c)(1) provides that an entity is a CDE if, among other requirements, the entity is certified by the Secretary as a CDE.

Section 45D(d)(1) provides that the term *qualified low-income community investment* means: (A) any capital or equity investment in, or loan to, any qualified active low-income community business (as defined in section 45D(d)(2)); (B) the purchase from another CDE of any loan made by the entity that is a qualified low-income community investment; (C) financial counseling and other services specified in regulations prescribed by the Secretary to businesses located in, and residents of, low-income communities; and (D) any equity investment in, or loan to, any CDE.

Under section 45D(d)(2), a qualified active low-income community business is any corporation (including a nonprofit corporation) or partnership if for such year, among other requirements, (i) at least 50 percent of the total gross income of the entity is derived from the active conduct of a qualified business within any low-income community, (ii) a substantial portion of the

use of the tangible property of the entity (whether owned or leased) is within any low-income community, and (iii) a substantial portion of the services performed for the entity by its employees are performed in any low-income community.

Under section 45D(d)(3), with certain exceptions, a qualified business is any trade or business. The rental to others of real property is a qualified business only if, among other requirements, the real property is located in a low-income community.

Section 221 of the American Jobs Creation Act of 2004 (Public Law 108–357, 118 Stat. 1418) amended section 45D(e)(2) to provide that the Secretary shall prescribe regulations under which one or more targeted populations (within the meaning of section 103(20) of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4702(20))) may be treated as low-income communities. The regulations shall include procedures for determining which entities are qualified active low-income community businesses with respect to those populations.

The term *targeted population*, as defined in 12 U.S.C. 4702(20) and 12 C.F.R. 1805.201, means individuals, or an identifiable group of individuals, including an Indian tribe, who (A) are low-income persons; or (B) otherwise lack adequate access to loans or equity investments. Under 12 U.S.C. 4702(17) as interpreted by 12 C.F.R 1805.104, the term *low-income* means having an income, adjusted for family size, of not more than (A) for metropolitan areas, 80 percent of the area median family income; and (B) for non-metropolitan areas, the greater of (i) 80 percent of the area median family income; or (ii) 80 percent of the statewide nonmetropolitan area median family income.

Section 101(a) of the Gulf Opportunity Zone Act of 2005 (Public Law 109–135, 119 Stat. 2577) added new section 1400M(1), which provides that the Gulf Opportunity Zone (GO Zone) is that portion of the Hurricane Katrina disaster area determined by the President to warrant individual or individual and public assistance from the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Act) by reason of Hurricane Katrina.

Section 1400M(2) provides that the Hurricane Katrina disaster area is an area with respect to which a major disaster has been declared by the President before September 14, 2005, under section 401 of the Act by reason of Hurricane Katrina. After determination by the President that a disaster area warrants assistance pursuant to the Act, the Federal Emergency Management Agency (FEMA) makes damage assessments. The categories for damage assessment in the wake of a hurricane are: flooded area, saturated area, limited damage, moderate damage, extensive damage, and catastrophic damage.

Under section 1400N(m)(1), a CDE shall be eligible for an allocation under section 45D(f)(2) of the increase in the new markets tax credit limitation described in section 1400N(m)(2) only if a significant mission of the CDE is the recovery and redevelopment of the GO Zone. Section 1400N(m)(2) provides that the new markets tax credit limitation otherwise determined under section 45D(f)(1) shall be increased by an amount equal to $300,000,000 for 2005 and 2006 and $400,000,000 for 2007, to be allocated among CDEs to make qualified low-income community investments within the GO Zone.

Notice 2006–60 provides rules relating to how an entity meets the requirements to be a qualified active low-income community business when its activities involve targeted populations. Targeted populations that will be treated as a low-income community are defined as individuals, or an identifiable group of individuals, including an Indian tribe, who are low-income persons or who are individuals who otherwise lack adequate access to loans or equity investments. The notice provides requirements for qualified active low-income community businesses that serve low-income targeted populations and for qualified active low-income community businesses that serve the GO Zone Targeted Population.

Summary of Comments and Explanation of Provisions

The proposed amendments to §1.45D–1 incorporate the guidance provided by Notice 2006–60 into the regulations. Unless otherwise stated, the existing rules of §1.45D–1 relating to qualified active low-income community businesses apply to businesses serving targeted populations. For example, the "reasonable expectations" safe harbor of §1.45D–1(d)(6)(i) applies to businesses serving targeted populations. That rule allows an entity to be treated as a qualified active low-income community business for the duration of the CDE's investment if the CDE reasonably expects, at the time the CDE makes the investment in, or loan to, the entity that the entity will satisfy the requirements to be a qualified active low-income community business throughout the entire period of the investment or loan. Except as discussed later in this preamble, the rules in these proposed regulations are the same as those provided in Notice 2006–60.

Sections 3.03 and 3.04 of Notice 2006–60 and the proposed amendments to §1.45D–1 include a definition of Targeted Populations, determined by the Treasury Department, that further defines the terms "low-income persons" and "individuals who otherwise lack adequate access to loans or equity investments."

Section 3.03(1) of Notice 2006–60 states that an individual shall be considered to be low-income if the individual's family income, adjusted for family size, is not more than (A) for metropolitan areas, 80 percent of the area median family income; and (B) for non-metropolitan areas, the greater of (i) 80 percent of the area median family income; or (ii) 80 percent of the statewide nonmetropolitan area median family income. A commentator requested guidance on calculating the applicable income limitation and calculating the family income. In calculating the applicable income limitation, taxpayers must rely on the annual estimates of median family income released by the Department of Housing and Urban Development (HUD) and may rely on those figures until 45 days after HUD releases a new list of income limits, or until HUD's effective date for the new list, whichever is later. For example, a taxpayer hires on January 1, 2007, a new employee who is a member of a four person family. The most recent HUD median family income estimates were released on March 19, 2007. In determining whether the employee is low-income on January 1, 2008, the taxpayer may rely on the 2007 HUD median family income estimates for a four person

family until 45 days after HUD releases a new list of income limits, or until HUD's effective date for the new list, whichever is later. The income limits are computed and listed, according to family size, by HUD for every Metropolitan Statistical Area, Primary Metropolitan Statistical Area, and nonmetropolitan county of the United States and Puerto Rico. HUD also releases income limits for the possessions of Guam and the Virgin Islands.

One commentator suggested that it would be less burdensome for a qualified active low-income community businesses to document that an individual is low-income for purposes of section 45D(e)(2) if individuals who live in a low-income community as defined in section 45D(e)(1), (3), (4), or (5) were deemed to be low-income for purposes of section 45D(e)(2). However, section 45D(e)(2) directly cross references targeted populations as defined in 12 U.S.C. 4702(20). The term *low-income* is defined in 12 U.S.C. 4702(17) to mean having an income, adjusted for family size, of not more than: for metropolitan areas, 80 percent of the area median income; and for nonmetropolitan areas, the greater of 80 percent of the area median income or 80 percent of the statewide nonmetropolitan area median income. Accordingly, the Treasury Department is not adopting the commentator's suggestion.

Some commentators suggested stricter requirements for targeted populations by increasing the 120-percent-income restriction in section 3.03(3) of Notice 2006–60 to 150 percent of municipal median income and requiring that taxpayers meet all three of the qualified active low-income community business tests set forth in sections 3.03(2)(a) and 3.04(3)(a) instead of one of the three. The commentators also suggested providing stricter requirements for the definitions of low-income persons, low-income communities, and qualified active low-income community businesses. The commentators expressed concern that Notice 2006–60 permits investments beyond low-income communities. Neither Notice 2006–60 nor the proposed regulations change the existing rules governing low-income communities. Rather, they provide guidance on how an entity serving certain targeted populations under section 45D(e)(2) can be a qualified active low-income community business. The IRS and Treasury Department believe that Notice 2006–60 and the proposed regulations appropriately implement Congressional intent to expand new market tax credit investments to low-income individuals and individuals that otherwise lack adequate access to loans or equity investments by treating targeted populations as a low-income community. Congress enacted the targeted populations provisions under section 45D(e)(2) to expand new markets tax credit investment dollars to other underserved areas. Consequently, the proposed regulations do not adopt the commentators' suggestions.

Some commentators believe that the rules in Notice 2006–60 should be broadened in scope to allow entities engaged in essential governmental functions, such as health care services to the community, to be deemed to be a qualified active low-income community business serving targeted populations. The IRS and Treasury Department do not believe that it is appropriate to provide targeted benefits to particular industries. Accordingly, the proposed regulations do not adopt this comment.

Other commentators believe that a non-profit business that is not individually owned should be able to satisfy the ownership test if at least 25 percent of the business's board is comprised of individuals who are low-income or represent a low-income targeted population. Another commentator suggested removing the 120-percent-income restriction. Concerning the rules for the GO Zone Targeted Population, one commentator suggested using parishes rather than census tracts and suggested removing or substantially reducing the percentage test for the gross income requirement. The proposed regulations do not adopt these suggestions because the IRS and Treasury Department believe that the guidance provided in Notice 2006–60 generally ensures that the businesses receiving qualified low-income community investments serve targeted populations for low-income and GO Zone populations. Finally, some commentators suggested providing geographic rules for targeted populations. Targeted populations is not a geographic concept; it is designed to provide a new markets tax credit to investors of qualified active low-income community businesses that serve targeted populations. Therefore, this comment was not adopted.

Section 3.03(2) of Notice 2006–60 provides qualified active low-income community business requirements for low-income targeted populations. Several commentators suggested that businesses that qualify and participate in other Federal programs targeted specifically to low-income individuals and families may use such participation as a proxy for meeting the targeted populations requirements. The IRS and Treasury Department have not analyzed other Federal programs to determine whether they meet the statutory requirements under section 45D(e), and it is not certain that programs currently meeting the requirements would continue to do so in the future. Moreover, the IRS and Treasury Department do not believe it is appropriate to exempt certain businesses from meeting the regulatory requirements to be a qualified active low-income community business based upon participation in other Federal programs, including those designed to aid low-income individuals and families, because these Federal programs cannot be substituted for the statutory requirements under section 45D(e). Therefore, the proposed regulations do not adopt this comment.

One commentator requested that the gross income requirement of section 3.03(2)(a)(i) of Notice 2006–60 be amended to include income from the provision of services to businesses that serve targeted populations. The comment focuses on wholesalers that sell goods to retailers that resell to low-income persons. The IRS and Treasury Department believe that such a rule would cover too broad a range of transactions and would conflict with the goal of ensuring that qualified low-income community investment dollars go directly to businesses that serve targeted populations. Accordingly, the proposed regulations do not adopt this comment.

Several commentators suggested that additional restrictions should be added to the employee requirement under sections 3.03(2)(a)(ii) and 3.04(3)(a)(ii) of Notice 2006–60. One commentator proposed that the employee should be a member of a targeted group as defined by the work opportunity tax credit under section 51. Another commentator suggested that a business should be able to satisfy the employee test only if the business pays a wage that would increase the income of the

low-income individual being hired. Still another commentator suggested that the employee requirement be satisfied only if each $25,000 in tax credit allocation results in at least one new job. Although the proposed regulations do not incorporate these suggestions at this time, the IRS and Treasury Department request comments regarding whether additional restrictions should be added to the employee requirement.

One commentator asked that the guidance provided in section 3.03(2)(b) of Notice 2006–60 on the determination of whether an employee is a low-income person be amended to provide that the determination should be made on the later of the date the employee was hired or the date the qualified low-income community investment is made. The IRS and Treasury Department believe that adopting this comment would create undue complexity. In addition, the IRS and Treasury Department do not want to provide a rule that may encourage employers to keep their employees low-income to be eligible as a qualified active low-income community business. Therefore, the proposed regulations retain the rule in Notice 2006–60 that the determination of whether an employee is a low-income person is made at the time of hire.

Sections 3.03(3)(a)(iii) and 3.04(4)(a)(iii) of Notice 2006–60 provide that the 120-percent-income restriction and the 200-percent-income restriction, respectively, do not apply to an entity located within a population census tract with a population of less than 2,000 if such tract is located in a metropolitan area and more than 75 percent of the tract is zoned for commercial or industrial use. A commentator suggested that to determine whether 75 percent of a population census tract is zoned for commercial or industrial use, the area of the population census tract should be used. In addition, the tract should be considered zoned for commercial or industrial use if commercial or industrial use is a permissible zoning use. The IRS and Treasury Department agree that these suggestions will help clarify the rule. Accordingly, the proposed regulations adopt the commentator's suggestions.

Sections 3.03(3)(b), 3.04(3)(b), and 3.04(4)(b) of Notice 2006–60 provide tests to determine whether an entity is located in a particular census tract. One commentator suggested that the percentages used for the use of tangible property test and services performed test be increased from 40 percent to 60 percent. The proposed regulations do not adopt this comment because the proposed percentages are consistent with the qualified active low-income community business requirements under §1.45D–1(d)(4)(i).

Section 3.03(4) of Notice 2006–60 provides that the rental to others of real property for low-income targeted populations that otherwise satisfies the requirements to be a qualified business will be treated as located in a low-income community if at least 50 percent of the entity's total gross income is derived from rentals to individuals who are low-income persons and/or to a qualified active low-income community business that meets the requirements for low-income targeted populations. Section 3.04(5) provides a similar rule for rental of real property for the GO Zone Targeted Population. One commentator suggested that "50 percent" be lowered to "20 percent" to mirror the definition of non-residential real property for purposes of depreciation under section 168. The IRS and Treasury Department believe that, for purposes of determining whether a business engaged in the rental of real property is located in a low-income community, it is more appropriate to adopt rules consistent with the rules governing whether an entity is a qualified active low-income community business for targeted populations. Therefore, the proposed regulations do not adopt the commentator's suggestion.

The Treasury Department has determined that an individual is considered to otherwise lack adequate access to loans or equity investments only if the individual was displaced from his or her principal residence as a result of Hurricane Katrina and/or the individual lost his or her principal source of employment as a result of Hurricane Katrina. In order to meet this definition, the individual's principal residence or principal source of employment, as applicable, must have been located in a population census tract within the GO Zone that contains one or more areas designated by FEMA as flooded, having sustained extensive damage, or having sustained catastrophic damage as a result of Hurricane Katrina. One commentator asked how taxpayers would know which population census tracts have received the relevant FEMA designations. The CDFI Fund has made this information available on its website at *www.cdfifund.gov.*

Commentators requested that the GO Zone Targeted Population be expanded to all census tracts within the GO Zone, rather than limited to only those areas designated by FEMA as flooded, having sustained extensive damage, or having sustained catastrophic damage as a result of Hurricane Katrina. The IRS and Treasury Department believe that for purposes of the increase in the limitation under section 1400N(m)(2), the new markets tax credit should only be used in the areas that were most devastated by Hurricane Katrina or are otherwise qualified as low-income communities. The IRS and Treasury Department believe that the areas that were most devastated by Hurricane Katrina are in greater need of assistance, due to lack of adequate access to loans or equity investments, than other areas within the GO Zone.

Commentators requested that the proposed regulations not limit use of the rules governing the GO Zone Targeted Population to investments made by CDEs with allocations from the increase under section 1400N(m)(2). The IRS and Treasury Department do not believe that it is appropriate to expand the ability to use the rules governing the GO Zone Targeted Population beyond investments made by CDEs with GO Zone allocations, because it would remove much needed assistance from other low-income communities within the GO Zone.

Section 1.45D–1(d)(4)(iv)(A) provides that for purposes of §1.45D–1(d)(4)(i), an entity will be treated as engaged in the active conduct of a trade or business if, at the time the CDE makes a capital or equity investment in, or loan to, the entity, the CDE reasonably expects that the entity will generate revenues (or, in the case of a nonprofit corporation, engage in an activity that furthers its purpose as a nonprofit corporation) within 3 years after the date the investment or loan is made. This "active conduct of a trade or business" safe harbor applies only for purposes of determining whether an entity is engaged in the active conduct of a trade or business and does not apply for purposes of determining whether an entity is otherwise a qualified active low-income

community business. Further, the "active conduct of a trade or business" safe harbor does not conflict with the gross-income requirement of §1.45D–1(d)(4)(i)(A) because that paragraph provides that the entity is deemed to meet the gross-income requirement if the entity meets the requirements of either §1.45D–1(d)(4)(i)(B) or (C) if "50 percent" is applied instead of "40 percent." Therefore, an entity that has no gross receipts and relies on the "active conduct of a trade or business" safe harbor of §1.45D–1(d)(4)(iv)(A) can meet the requirements to be a qualified active low-income community business by satisfying either the use of tangible property requirement of §1.45D–1(d)(4)(i)(B) or the services performed requirement of §1.45D–1(d)(4)(i)(C) at 50 percent instead of 40 percent. Several commentators requested that, in order to accommodate start-up entities, the proposed regulations provide a rule wherein a business could qualify as a qualified active low-income community business serving targeted populations if the CDE reasonably expects that the entity will generate revenues within three years after the date the investment or loan is made. If a business serving targeted populations chose to apply the gross income requirement rather than the employee requirement or the owner requirement, the commentators' suggestion could potentially allow a business to be a qualified active low-income community business for three years without having to meet any requirement. This result is clearly inappropriate. Therefore, the proposed regulations do not adopt the commentators' suggestion. In addition, the proposed regulations clarify the language in §1.45D–1(d)(4)(iv)(A) to address any confusion as to the application of the "active conduct of a trade or business" safe harbor.

Several commentators submitted comments that address subjects not within the scope of these proposed regulations. For example, comments were received addressing CDFI Fund allocation application procedures, such as minimum submission requirements, weighted scoring criteria, approval procedures, "high distress" criteria, underwriting criteria, and amendments to existing allocation agreements. These comments have been forwarded to the CDFI Fund for consideration.

Proposed Effective/Applicability Date

The rules contained in these regulations are proposed to apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**. In the meantime, taxpayers may rely on Notice 2006–60, 2006–2 C.B. 82, for designations made by the Secretary after October 22, 2004.

Request for Comments

The IRS and Treasury Department invite taxpayers to submit comments on issues relating to how an entity meets the requirements to be a qualified active low-income community business when its activities involve certain targeted populations under section 45D(e)(2). In particular, the IRS and Treasury Department encourage taxpayers to submit comments on the following issues:

1. What measure of income should be used to determine an individual's income for purposes of the definition of low-income persons in §1.45D–1(d)(9)(i)(A)? For example, should the measure of income for this purpose be the same as the measure of income used by the U.S. Census Bureau, the measure of income on the IRS Form 1040, or the measure of income in 24 CFR Part 5, which is used for certain HUD programs and other Federal programs? The IRS and Treasury Department are considering using the measure of income used by the U.S. Census Bureau to ensure a consistent comparison between the individual's family income and the applicable area median family income.

2. Should the gross income requirements in §1.45D–1(d)(9)(i)(B)(*1*)(*i*) and (ii)(C)(*1*)(*i*) be modified to include the fair market value of goods and services provided to low-income persons at reduced fees? For example, should a business that provides its services to low-income persons for half of what it charges its other customers be able to include the fair market value of the services provided to low-income persons in its calculation of gross income for purposes of the requirement in §1.45D–1(d)(9)(i)(B)(*1*)(*i*)?

3. Should additional restrictions be added to the employee requirements in §1.45D–1(d)(9)(i)(B)(*1*)(*ii*) and (ii)(C)(*1*)(*ii*)? For example, as one commentator suggested, should a requirement be added that the employee be a member of a targeted group as defined by the work opportunity tax credit? As another commentator suggested, should the employee test be satisfied only if the business pays a wage that would increase the income of the low-income individual being hired?

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 is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that the regulations provide a positive impact because, consistent with legislative intent, they allow a tax credit to be claimed in situations where it was previously unavailable without the Secretary providing for such situations in regulations. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

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

A public hearing has been scheduled for Friday, January 22, 2009 at 10 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access

restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

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

Drafting Information

The principal author of these regulations is Lauren Ross Taylor, formerly with the Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. 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 is amended by adding an entry in numerical order to read in part as follows:

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

Section 1.45D–1 also issued under 26 U.S.C. 45D(e)(2) * * *

Par. 2. Section 1.45D–1 is amended by:

1. Revising paragraph (a) to revise the entry for paragraph (h) and add new entries for (d)(9), (d)(9)(i), (d)(9)(i)(A), (d)(9)(i)(B), (d)(9)(i)(B)(*1*), (d)(9)(i)(B)(*2*), (d)(9)(i)(B)(*3*), (d)(9)(i)(C), (d)(9)(i)(C)(*1*), (d)(9)(i)(C)(*2*), (d)(9)(i)(D), (d)(9)(ii), (d)(9)(ii)(A), (d)(9)(ii)(B), (d)(9)(ii)(C), (d)(9)(ii)(C)(*1*), (d)(9)(ii)(C)(*2*), (d)(9)(ii)(C)(*2*)(*i*), (d)(9)(ii)(C)(*2*)(*ii*), (d)(9)(ii)(D), (d)(9)(ii)(D)(*1*), (d)(9)(ii)(D)(*2*), (d)(9)(ii)(E), and (h)(3).

2. Revising paragraph (d)(4)(i).

3. Adding the language "See paragraph (d)(9) of this section for rules relating to targeted populations." to the end of paragraph (d)(4)(i)(A).

4. Adding the language "See paragraph (d)(9) of this section for rules relating to targeted populations." to the end of paragraph (d)(4)(i)(B)(*1*).

5. Adding the language "See paragraph (d)(9) of this section for rules relating to targeted populations." to the end of paragraph (d)(4)(i)(C).

6. Adding a new sentence at the end of paragraph (d)(4)(iv)(A).

7. Adding new paragraph (d)(9).

8. Revising the heading for paragraph (h) and adding new paragraph (h)(3).

The additions and revisions read as follows:

§1.45D–1 New markets tax credit.

(a) * * *

(d) * * *

(9) Targeted populations.

(i) Low-income persons.

(A) Definition.

(B) Qualified active low-income community business requirements for low-income targeted populations.

(*1*) In general.

(*2*) Employee.

(*3*) Owner.

(C) 120-percent-income restriction.

(*1*) In general.

(*2*) Population census tract location.

(D) Rental of real property for low-income targeted populations.

(ii) Individuals who otherwise lack adequate access to loans or equity investments.

(A) In general.

(B) GO Zone Targeted Population.

(C) Qualified active low-income community business requirements for the GO Zone Targeted Population.

(*1*) In general.

(*2*) Location.

(*i*) In general.

(*ii*) Determination.

(D) 200-percent-income restriction.

(*1*) In general.

(*2*) Population census tract location.

(E) Rental of real property for the GO Zone Targeted Population.

* * * * *

(h) Effective/applicability dates.

(3) Targeted populations.

* * * * *

(d) * * *

(4) * * *

(i) *In general.* The term *qualified active low-income community business* means, with respect to any taxable year, a corporation (including a nonprofit corporation) or a partnership engaged in the active conduct of a qualified business (as defined in paragraph (d)(5) of this section), if the requirements of (d)(4)(i)(A), (B), (C), (D), and (E) of this section are met (or in the case of an entity serving targeted populations, if the requirements of paragraphs (d)(4)(i)(D), (E), and (d)(9)(i) or (ii) of this section are met). Solely for purposes of this section, a nonprofit corporation will be deemed to be engaged in the active conduct of a trade or business if it is engaged in an activity that furthers its purpose as a nonprofit corporation.

* * * * *

(iv) *Active conduct of a trade or business*—(A) * * * This paragraph (d)(4)(iv) applies only for purposes of determining whether an entity is engaged in the active conduct of a trade or business and does not apply for purposes of determining whether the gross-income requirement under paragraph (d)(4)(i)(A), (d)(9)(i)(B)(*1*)(*i*), or (d)(9)(ii)(C)(*1*)(*i*) of this section is satisfied.

* * * * *

(9) *Targeted populations.* As determined by the Treasury Department, for purposes of section 45D(e)(2), targeted populations that will be treated as a low-income community are individuals, or an identifiable group of individuals, including an Indian tribe, who are low-income persons as defined in paragraph (d)(9)(i) of this section or who are individuals who otherwise lack adequate access to loans or equity investments as defined in paragraph (d)(9)(ii) of this section.

(i) *Low-income persons*—(A) *Definition.* For purposes of section 45D(e)(2), an individual shall be considered to be low-income if the individual's family income, adjusted for family size, is not more than—

(*1*) For metropolitan areas, 80 percent of the area median family income; and

(*2*) For non-metropolitan areas, the greater of 80 percent of the area median family income, or 80 percent of the statewide non-metropolitan area median family income.

(B) *Qualified active low-income community business requirements for low-income targeted populations*—(*1*) *In general*. An entity will not be treated as a qualified active low-income community business for low-income targeted populations unless—

(*i*) At least 50 percent of the entity's total gross income for any taxable year is derived from sales, rentals, services, or other transactions with individuals who are low-income persons for purposes of section 45D(e)(2) and this paragraph (d)(9),

(*ii*) At least 40 percent of the entity's employees are individuals who are low-income persons for purposes of section 45D(e)(2) and this paragraph (d)(9), or

(*iii*) At least 50 percent of the entity is owned by individuals who are low-income persons for purposes of section 45D(e)(2) and this paragraph (d)(9).

(*2*) *Employee*. The determination of whether an employee is a low-income person must be made at the time the employee is hired. If the employee is a low-income person at the time of hire, that employee is considered a low-income person for purposes of section 45D(e)(2) and this paragraph (d)(9) throughout the time of employment, without regard to any increase in the employee's income after the time of hire.

(*3*) *Owner*. The determination of whether an owner is a low-income person must be made at the time the qualified low-income community investment is made. If an owner is a low-income person at the time the qualified low-income community investment is made, that owner is considered a low-income person for purposes of section 45D(e)(2) and this paragraph (d)(9) throughout the time the ownership interest is held by that owner.

(C) *120-percent-income restriction*—(*1*) *In general*—(*i*) In no case will an entity be treated as a qualified active low-income community business under paragraph (d)(9)(i) of this section if the entity is located in a population census tract for which the median family income exceeds 120 percent of—

(*A*) In the case of a tract not located within a metropolitan area, the statewide median family income, or

(*B*) In the case of a tract located within a metropolitan area, the greater of statewide median family income or metropolitan area median family income (120-percent-income restriction).

(*ii*) The 120-percent-income restriction shall not apply to an entity located within a population census tract with a population of less than 2,000 if such tract is not located in a metropolitan area.

(*iii*) The 120-percent-income restriction shall not apply to an entity located within a population census tract with a population of less than 2,000 if such tract is located in a metropolitan area and more than 75 percent of the tract is zoned for commercial or industrial use. For this purpose, the 75 percent calculation should be made using the area of the population census tract. For purposes of this paragraph (d)(9)(i)(C)(*1*)(*iii*), property for which commercial or industrial use is a permissible zoning use will be treated as zoned for commercial or industrial use.

(*2*) *Population census tract location*—(*i*) For purposes of the 120-percent-income restriction, an entity will be considered to be located in a population census tract for which the median family income exceeds 120 percent of the applicable median family income under paragraph (d)(9)(i)(C)(*1*)(*i*)(*A*) or (*B*) of this section (non-qualifying population census tract) if—

(*A*) At least 50 percent of the total gross income of the entity is derived from the active conduct of a qualified business (as defined in paragraph (d)(5) of this section) within one or more non-qualifying population census tracts (non-qualifying gross income amount);

(*B*) At least 40 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more non-qualifying population census tracts (non-qualifying tangible property usage); and

(*C*) At least 40 percent of the services performed for the entity by its employees are performed in one or more non-qualifying population census tracts (non-qualifying services performance).

(*ii*) The entity is considered to have the non-qualifying gross income amount if the entity has non-qualifying tangible property usage or non-qualifying services performance of at least 50 percent instead of 40 percent.

(*iii*) If the entity has no employees, the entity is considered to have the non-qualifying gross income amount as well as non-qualifying services performance if at least 85 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more non-qualifying population census tracts.

(D) *Rental of real property for low-income targeted populations*. The rental to others of real property for low-income targeted populations that otherwise satisfies the requirements to be a qualified business under paragraph (d)(5) of this section will be treated as located in a low-income community for purposes of paragraph (d)(5)(ii) of this section if at least 50 percent of the entity's total gross income is derived from rentals to individuals who are low-income persons for purposes of section 45D(e)(2) and this paragraph (d)(9) and/or to a qualified active low-income community business that meets the requirements for low-income targeted populations under paragraphs (d)(9)(i)(B)(*1*)(*i*) or (*ii*) and (d)(9)(i)(B)(*2*) of this section.

(ii) *Individuals who otherwise lack adequate access to loans or equity investments*—(A) *In general*. Paragraph (d)(9)(ii) of this section may be applied only with regard to qualified low-income community investments made under the increase in the new markets tax credit limitation pursuant to section 1400N(m)(2). Therefore, only CDEs with a significant mission of recovery and redevelopment of the Gulf Opportunity Zone (GO Zone) that receive an allocation from the increase described in section 1400N(m)(2) may make qualified low-income community investments from that allocation pursuant to the rules in paragraph (d)(9)(ii) of this section.

(B) *GO Zone Targeted Population*. As determined by the Treasury Department, for purposes of targeted populations under section 45D(e)(2), an individual is considered to otherwise lack adequate access to loans or equity investments only if the individual was displaced from his or her principal residence as a result of Hurricane Katrina and/or the individual lost his or her principal source of employment as a result of Hurricane Katrina (GO Zone Targeted Population). In order to meet this

definition, the individual's principal residence or principal source of employment, as applicable, must have been located in a population census tract within the GO Zone that contains one or more areas designated by the Federal Emergency Management Agency (FEMA) as flooded, having sustained extensive damage, or having sustained catastrophic damage as a result of Hurricane Katrina.

(C) *Qualified active low-income community business requirements for the GO Zone Targeted Population*—(*1*) *In general*. An entity will not be treated as a qualified active low-income community business for the GO Zone Targeted Population unless—

(*i*) At least 50 percent of the entity's total gross income for any taxable year is derived from sales, rentals, services, or other transactions with the GO Zone Targeted Population, low-income persons as defined in paragraph (d)(9)(i) of this section, or some combination thereof;

(*ii*) At least 40 percent of the entity's employees consist of the GO Zone Targeted Population, low-income persons as defined in paragraph (d)(9)(i) of this section, or some combination thereof; or

(*iii*) At least 50 percent of the entity is owned by the GO Zone Targeted Population, low-income persons as defined in paragraph (d)(9)(i) of this section, or some combination thereof.

(*2*) *Location*—(*i*) *In general*. In order to be a qualified active low-income community business under paragraph (d)(9)(ii)(C) of this section, the entity must be located in a population census tract within the GO Zone that contains one or more areas designated by FEMA as flooded, having sustained extensive damage, or having sustained catastrophic damage as a result of Hurricane Katrina (qualifying population census tract).

(*ii*) *Determination*—(*A*) For purposes of the preceding paragraph, an entity will be considered to be located in a qualifying population census tract if—

(*I*) At least 50 percent of the total gross income of the entity is derived from the active conduct of a qualified business (as defined in paragraph (d)(5) of this section) within one or more qualifying population census tracts (gross income requirement);

(*II*) At least 40 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more qualifying population census tracts (use of tangible property requirement); and

(*III*) At least 40 percent of the services performed for the entity by its employees are performed in one or more qualifying population census tracts (services performed requirement).

(*B*) The entity is deemed to satisfy the gross income requirement if the entity satisfies the use of tangible property requirement or the services performed requirement on the basis of at least 50 percent instead of 40 percent.

(*C*) If the entity has no employees, the entity is deemed to satisfy the services performed requirement as well as the gross income requirement if at least 85 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more qualifying population census tracts.

(D) *200-percent-income restriction*—(*1*) *In general*—(*i*) In no case will an entity be treated as a qualified active low-income community business under paragraph (d)(9)(ii) of this section if the entity is located in a population census tract for which the median family income exceeds 200 percent of—

(*A*) In the case of a tract not located within a metropolitan area, the statewide median family income, or

(*B*) In the case of a tract located within a metropolitan area, the greater of statewide median family income or metropolitan area median family income (200-percent-income restriction).

(*ii*) The 200-percent-income restriction shall not apply to an entity located within a population census tract with a population of less than 2,000 if such tract is not located in a metropolitan area.

(*iii*) The 200-percent-income restriction shall not apply to an entity located within a population census tract with a population of less than 2,000 if such tract is located in a metropolitan area and more than 75 percent of the tract is zoned for commercial or industrial use. For this purpose, the 75 percent calculation should be made using the area of the population census tract. For purposes of this paragraph (d)(9)(ii)(D)(*1*)(*iii*), property for which commercial or industrial use is a permissible zoning use will be treated as zoned for commercial or industrial use.

(*2*) *Population census tract location*—(*i*) For purposes of the 200-percent-income restriction, an entity will be considered to be located in a population census tract for which the median family income exceeds 200 percent of the applicable median family income under paragraph (d)(9)(ii)(D)(*1*)(*i*)(*A*) or (*B*) of this section (non-qualifying population census tract) if—

(*A*) At least 50 percent of the total gross income of the entity is derived from the active conduct of a qualified business (as defined in paragraph (d)(5) of this section) within one or more non-qualifying population census tracts (non-qualifying gross income amount);

(*B*) At least 40 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more non-qualifying population census tracts (non-qualifying tangible property usage); and

(*C*) At least 40 percent of the services performed for the entity by its employees are performed in one or more non-qualifying population census tracts (non-qualifying services performance).

(*ii*) The entity is considered to have the non-qualifying gross income amount if the entity has non-qualifying tangible property usage or non-qualifying services performance of at least 50 percent instead of 40 percent.

(*iii*) If the entity has no employees, the entity is considered to have the non-qualifying gross income amount as well as non-qualifying services performance if at least 85 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more non-qualifying population census tracts.

(E) *Rental of real property for the GO Zone Targeted Population*. The rental to others of real property for the GO Zone Targeted Population that otherwise satisfies the requirements to be a qualified business under paragraph (d)(5) of this section will be treated as located in a low-income community for purposes of paragraph (d)(5)(ii) of this section if at least 50 percent of the entity's total gross income is derived from rentals to the GO Zone Targeted Population, low-income persons as defined in paragraph (d)(9)(i) of this section and/or to a qualified active low-income community business that meets the requirements for the GO Zone Targeted Population under

paragraphs (d)(9)(ii)(C)(1)(i) or (ii) of this section.

* * * * *

(h) Effective/applicability dates * * * * * * * *

(3) *Targeted populations*. The rules in paragraph (d)(9) of this section apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**.

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

(Filed by the Office of the Federal Register on September 23, 2008, 8:45 a.m., and published in the issue of the Federal Register for September 24, 2008, 73 F.R. 54990)

Notice of Proposed Rulemaking and Notice of Public Hearing

Public Approval Guidance for Tax-Exempt Bonds

REG–128841–07

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of Proposed Rulemaking and Notice of Public Hearing.

SUMMARY: This document contains proposed regulations on the public approval requirements under section 147(f) of the Internal Revenue Code (Code) applicable to tax-exempt private activity bonds issued by State and local governments. The proposed regulations affect State and local governmental issuers of tax-exempt private activity bonds. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by December 8, 2008. Outlines of topic to be discussed at the public hearing scheduled for January 26, 2009, at 10 a.m., must be received by December 29, 2008.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–128841–07), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–128841–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–128841–07). The public hearing will be held in the Auditorium, beginning at 10 a.m., at the Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, David White, (202) 622–3980; concerning submissions of comments and the hearing, contact Funmi Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in the proposed regulations has been submitted to the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by November 10, 2008. Comments are specifically requested concerning:

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

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

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

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

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

The collection of information in this proposed regulation is in §1.147(f)–1(b). This information is required to meet the public approval requirement under section 147(f). The likely respondents are issuers of qualified private activity bonds.

Estimated total annual reporting burden: 2600 hours.

Estimated average annual burden per respondent: 1.3 hours.

Estimated number of respondents: 2,000.

Estimated frequency of responses: Not applicable (this is a third party disclosure requirement).

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

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

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) to add new §1.147(f)–1 (the "Proposed Regulations") relating to the public approval requirement for tax-exempt private activity bonds under section 147(f) of the Internal Revenue Code.

Explanation of Provisions

I. *Introduction*

In general, interest on State and local bonds is excludable from gross income under section 103 of the Internal Revenue Code of 1986 (the "Code"). Interest on a private activity bond is excludable from gross income under section 103 only if the bond meets the requirements for a "qualified bond" under section 141(e) and other applicable requirements under section 103. Section 141(e) requires that a bond meet

the public approval requirement of section 147(f), among other requirements, to be a qualified bond.

II. *Statutory predecessor and existing regulations*

The predecessor to section 147(f) was section 103(k) of the Internal Revenue Code of 1954 ("1954 Code"), which was added by the Tax Equity and Fiscal Responsibility Act of 1982, Public L. No. 97–248, 96 Stat. 324 (1982). Section 103(k) of the 1954 Code imposed a public approval requirement on industrial development bonds. Temporary Income Tax Regulations §5f.103–2 were published under section 103(k) of the 1954 Code in the **Federal Register** on May 11, 1983 (T.D. 7892, 1983–1 C.B. 30 [48 FR 21115]) (the "Existing Regulations").

In the Tax Reform Act of 1986, Public Law No. 99–514 (the "1986 Act"), Congress reorganized the tax-exempt bond provisions and largely carried forward the provisions of section 103(k) of the 1954 Code into new section 147(f) of the Code. In new section 147(f), Congress also expanded this public approval requirement to apply to all types of tax-exempt private activity bonds under section 141. The legislative history to the 1986 Act provides that "[t]he conferees intend that, to the extent not amended, all principles of present law continue to apply under the reorganized provisions." 2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II–686 (1986), 1986–3 C.B. (Vol. 4) at 686.

III. *Proposed regulations*

A. *In general*

In general, the Proposed Regulations provide updating, clarifying, and simplifying guidance on discrete aspects of the public approval requirement under section 147(f) (the "*public approval requirement*"). The Proposed Regulations provide guidance that focuses generally on the scope, content, process, and timing for reasonable public notices, public hearings, and public approvals of tax-exempt private activity bonds under section 147(f).

The Proposed Regulations provide some special rules to address certain changes to the *public approval requirement* made by the 1986 Act that expanded the application of this requirement to include all types of tax-exempt private activity bonds. The Proposed Regulations also provide guidance to simplify compliance and reduce administrative burdens on State and local governments associated with the *public approval requirement*, including guidance to recognize advances in technology and electronic communication. The Proposed Regulations also ensure that the affected public will receive reasonable public notice and an opportunity for a public hearing and that appropriate governmental units will approve a bond issue following public notice and a public hearing.

The Proposed Regulations generally do not update the portions of the Existing Regulations relating to the applicable governmental units that are required to provide public approvals for a bond issue and the applicable elected representatives of those governmental units. One special rule in the Proposed Regulations provides that only the governmental unit by or on behalf of which bonds are issued is required for certain types of financings and that no separate public approval is required by a host governmental unit with respect to the location, if any, of financed facilities due to the absence of financed facilities (for example, qualified student loan bonds under section 144(b) or qualified 501(c)(3) bonds under section 145 for working capital expenditures) or the widespread or unknown locations of the financed facilities (for example, mortgage revenue bonds). The Treasury Department and the IRS solicit public comment on whether or in what respects those portions of the Existing Regulations should be updated or modified further.

The Proposed Regulations provide that the Existing Regulations continue to apply for purposes of section 147(f) to the extent that the Existing Regulations are not inconsistent with the final version of the Proposed Regulations, the 1986 Act, or subsequent law.

B. *Content of public approval in general*

The Proposed Regulations provide updated guidance on the content of information required to be included in a reasonable public notice and public approval. The Proposed Regulations continue and modify in limited respects the existing general standard from the Existing Regulations. Under the Proposed Regulations, required information for this purpose generally includes the information described in this preamble.

The Existing Regulations require a functional description of the type and use of the facility to be financed with the bond issue. In response to public comment, the Proposed Regulations streamline this requirement to allow a general reference to the type of exempt facility bond being issued or, for other types of private activity bonds, a reference to the type of qualified bond and a general description of the type and use of the facility to be financed. (for example, an exempt facility bond for an airport under section 142(a)(1), or a qualified 501(c)(3) bond to finance a hospital).

The Existing Regulations also require the maximum stated principal amount of bonds expected to be issued for the facility. The Proposed Regulations continue this requirement.

The Existing Regulations require the name of the expected initial legal owner, operator, or manager of the facility. The Proposed Regulations modify this requirement. Under the Proposed Regulations, the name provided may be either the name of the legal owner or principal user (as defined under section 144(a)) or, alternatively, the name of the true beneficial party of interest (for example, the name of a 501(c)(3) organization, which is the sole member of a limited liability company owner).

The Existing Regulations require a general description of the prospective location of the facility by street address, or, if none, by a general description that is reasonably designed to inform the public about the location of the project. The Existing Regulations assume that bond issues finance a single capital project. The Proposed Regulations provide that, for a facility that involves multiple capital projects on the same site, or adjacent or reasonably proximate sites used for similar purposes, a consolidated description of the geographic boundaries of all such capital projects may be a sufficient description of the location.

The Proposed Regulations also modify and expand the existing definition of a "facility" to include within the scope of that defined term the principle that a facility may include multiple capital projects.

C. *Special rules for mortgage revenue bonds, qualified student loan bonds, and certain qualified 501(c)(3) bonds*

The 1986 Act extended the *public approval requirement* beyond traditional facility-focused industrial development bonds under the 1954 Code to include qualified mortgage bonds and qualified veterans mortgage bonds under section 143(a) and 143(b) of the Code (together, "mortgage revenue bonds"), qualified student loan bonds under section 144(b) of the Code, and qualified 501(c)(3) bonds under section 145 of the Code. The expansion of the *public approval requirement* to these types of bonds raises questions about the scope of information appropriately needed for public approvals for these types of bonds. Section 147(f) and congressional intent generally suggest that the *public approval requirement* must be met before the issuance of the bonds. For these types of bonds, however, certain information generally required for public approvals about specific borrowers or specific projects may be unknown before the issuance of the bonds or may be inappropriate for portfolio loan financings.

The Treasury Department and IRS realize there may have been uncertainty on how to apply certain aspects of the public approval requirement to mortgage revenue bonds, qualified student loan bonds, and qualified 501(c)(3) pooled financing bonds under section 145 after the 1986 Act in light of special characteristics of these financings (for example, the absence of financed facilities for qualified student loan bonds or the widespread or unknown locations of the facilities to be financed for mortgage revenue bonds or certain 501(c)(3) pooled bonds). Therefore, issuers of these types of bonds that made a good faith effort to comply with section 147(f) and section 5f.103–2(f)(2) of the Existing Regulations, taking into account Congressional intent and the special characteristics of these types of financings, will not be subject to audit by the IRS merely because the issuer did not include all of the information required to be included in the public notice and public approval for industrial development bonds under section 5f.103–2(f)(2) of the Existing Regulations.

The Proposed Regulations provide special rules that allow less specific information for public approvals of mortgage revenue bonds, qualified student loan bonds, and qualified 501(c)(3) bonds that finance loans described in the special rule for pooled financings under section 147(b)(4).

For mortgage revenue bonds, the Proposed Regulations generally require that reasonable public notice and public approval state the maximum stated principal amount of the bonds that will be issued to finance mortgage loans under section 143 and a general description of the geographic jurisdiction in which residences financed with proceeds of the mortgage revenue bonds will be located (for example, residences located throughout a state for an issuer with a statewide jurisdiction). No information is required on specific names of mortgage loan borrowers or specific locations of individual residences to be financed.

For qualified student loan bonds, the Proposed Regulations generally require that reasonable public notice and public approval state the maximum stated principal amount of the bonds that will be issued to finance student loans and a general description of the type of student loan program that the loans will be made under (for example, a Federally-guaranteed student loan program under the Higher Education Act of 1965 or a state supplemental student loan program). Recognizing that these bonds do not finance facilities, the Proposed Regulations do not require names of specific student loan borrowers or locations of facilities.

For qualified 501(c)(3) bonds that finance loans described in the special provision for pooled loan financings under section 147(b)(4), the Proposed Regulations provide for a two-stage public approval process. First, within the time specified in the Proposed Regulations for public approval generally, public approval must be obtained based on the stated maximum principal amount of bonds to be issued to finance such loans and a general description of the types of facility or facilities to be financed with the loans (for example, loans for hospital facilities). No statement need be made about the location of the facility or the initial user of the facility if that information is not known at that time. Second, before a loan is originated and potentially after the issue date of the issue, a supplemental public approval for that loan must be obtained based on specific information about the borrower and the particular facility to be financed with the loan, including the location of the facility. In applying the supplemental public approval requirement to specific loans, the public approval requirement applies generally as if the bonds that financed the specific loans were reissued for purposes of section 147(b). This requirement is similar to the remedial action requirement in §1.141–12(e)(2) and (f), which treats bonds as reissued for purposes of section 147 when complying with certain remedial action rules. The Treasury Department and the IRS solicit comments on whether a rule similar to the special two-stage public approval requirement for qualified 501(c)(3) bonds in pooled bond issues should apply to other types of pooled bond issues.

D. *Insubstantial and substantial deviations in public approval information*

The Proposed Regulations provide generally that a substantial deviation between information required to be conveyed in a reasonable public notice and public approval and actual information causes the issue to fail to meet the *public approval requirement*. Whether a deviation is substantial is generally based on all the facts and circumstances.

The Proposed Regulations continue and clarify a rule from the Existing Regulations that provides that insubstantial deviations in public approval information do not invalidate a public approval. Public commentators have indicated that questions often arise about what changes are substantial.

The Proposed Regulations provide two objective safe harbors under which certain changes will not be considered substantial deviations. The Proposed Regulations provide that each of the following is an insubstantial deviation: (1) a difference in the amount of proceeds used for a facility when the amount used for the facility differs from the amount the public approval stated would be used for the facility by an amount that is not more than five percent (5%) of net proceeds of the issue; and (2) a change in initial owner or principal user of a project when the new owner or principal user is a related party (as defined in §1.150–1) to the initial owner or principal

user named in the public approval on the issuance date.

The prohibition against substantial deviations has created problems when an issuer reasonably expected at the time the bonds were issued to use the bonds proceeds for the facility stated in the public approval, but later determined, as a result of unexpected events or unforeseen changes in circumstances, that the original planned use was no longer feasible or that it did not need all of the proceeds for the facility. In these circumstances, an issuer may be unable to use the bond proceeds for another purpose because the new use was not covered by the information in the public approval.

The Proposed Regulations propose a special rule for certain cases in which there is a substantial deviation between the information required to be provided in a reasonable public notice and public approval and subsequent events. This rule provides that, if certain conditions are met, an issuer can cure a substantial deviation in public approval information through a subsequent public approval. This remedial action is similar to the permitted post-issuance public approval used for remedial actions under §1.141–12(e)(2) and (f).

In general, the Proposed Regulations provide that an issuer may cure a substantial deviation if it satisfies several conditions. First, the issuer must have obtained a timely public approval for the bond issue in accordance with the *public approval requirement* and the issuer must have reasonably expected on the issue date to use the proceeds of the issue in accordance with the public approval information. Second, the issuer must encounter unexpected events or unforeseen changes in circumstances after the issue date as a result of which it determines either that it is no longer feasible or viable to use the proceeds of some or all of the bonds in the manner set forth in the original public approval, or that it did not need to use the full amount of the proceeds stated in the public approval for the facility. Third, the issuer must obtain a supplemental public approval for the bonds affected by the substantial deviation that meets the *public approval requirement* applied by treating those bonds as if they were reissued for this purpose.

E. *Reasonable public notice and public hearing*

The Proposed Regulations update and simplify the rules in the Existing Regulations on reasonable public notice and public hearings in several ways. First, in addition to the existing permitted methods for providing reasonable public notice, which include newspaper publication or television or radio broadcast, the Proposed Regulations allow a governmental unit to provide reasonable public notice of a public hearing by posting notice of the hearing electronically on its website if it regularly uses that website to inform its residents about events affecting the residents (including notice of public meetings of the governmental unit) and it offers a reasonable alternative method for obtaining this information for residents without access to computers (such as phone recordings). In addition, the Proposed Regulations define a "writing" generally to include electronic communication if permitted by the governmental unit. Thus, the public may submit electronic comments to the governmental unit if permitted by the governmental unit. The proposed regulations also reduce the time required between the reasonable public notice and public hearing from fourteen days to seven business days. These revisions recognize the current market environment and the increasing importance of electronic communication.

In addition, the Proposed Regulations expand the types of governmental units that may provide public notice in an alternative manner under a general State law on public notice procedures for public hearings to include all approving governmental units.

Finally, the Proposed Regulations allow a governmental unit to cancel a public hearing if it provides reasonable public notice of the hearing and receives no requests to participate in the hearing.

III. *Proposed effective/applicability date*

The proposed regulations will apply to bonds that are sold on or after the date of publication of final regulations in the **Federal Register** and that are subject to section 147(f).

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 is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on considerations which are summarized. In general, the proposed regulations involve an existing statutory public approval requirement for tax-exempt private activity bonds under Section 147(f) of the Internal Revenue Code, which requires reasonable public notice, a public hearing, and public approval of these bonds by certain affected State or local governmental units and which imposes certain information requirements for this purpose. These proposed regulations generally address matters regarding the scope, content, process, and timing for public notices and public hearings in connection with these public approvals. These proposed regulations will affect all issuers of tax-exempt private activity bonds, including a substantial number of small State or local governmental units. These proposed regulations are not expected to have a significant economic impact on the affected entities, however, because these proposed regulations primarily are intended to streamline, simplify, and clarify the application of the existing public approval requirement in various ways, such as by allowing certain public notices on websites to reduce costs associated with print publication of public notices, by limiting the information required for certain types of bond issues, and by providing certain safe harbors and curative ways to assist with compliance in connection with changes in bond issues. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. The IRS and the Treasury Department specifically solicit comments from any party, particularly affected small entities, on the accuracy of this certification. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Small Business Administration for comment on its impact on small governmental jurisdictions.

Comments and Public Hearing

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

All comments will be available for public inspection and copying.

A public hearing has been scheduled for January 26, 2009, beginning at 10 a.m. in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, N.W., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by December 8, 2008 and submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (a signed original and eight (8) copies) by December 29, 2008. A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these regulations are Rebecca L. Harrigal and David White, Office of Associate Chief Counsel (Financial Institutions and Products), IRS. 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 1.147(f)–1 is added to read as follows:

§1.147(f)–1. Public Approval of Private Activity Bonds.

(a) *In general*. Interest on a private activity bond is excludable from gross income under section 103(a) only if the bond meets the requirements for a qualified bond under section 141(e) and other applicable requirements under section 103. In order to be a qualified bond under section 141(e), one of the requirements that must be met is the public approval requirement under section 147(f). This section provides guidance on the public approval requirement under section 147(f). In addition, to the extent not inconsistent with this section, the Tax Reform Act of 1986 (Public Law 99–514), or subsequent law, §5f.103–2 of this chapter continues to apply for purposes of the public approval requirement under section 147(f).

(b) *Scope, content, process, and timing for public approvals*.

(1) *In general*. This paragraph (b) provides guidance on the scope, content, process, and timing required for public approval of an issue of private activity bonds under section 147(f). In general, except as otherwise provided in this section, to meet the public approval requirement under section 147(f) for an issue (as defined in §1.150–1) of private activity bonds, reasonable public notice (as defined in paragraph (c)(3) of this section) must be given in advance for a public hearing (as defined in paragraph (c)(2) of this section), a public hearing must be held, and the applicable governmental units under section 147(f)(2)(A) must provide public approval within the time set forth in paragraph (b)(8) of this section and in the manner set forth in section 147(f)(2)(B).

(2) *General rule on information required for a reasonable public notice and public approval*. Except as otherwise provided in this section, a facility (as defined in paragraph (c) of this section) to be financed with an issue is within the scope of a public approval under section 147(f) if the reasonable public notice of the public hearing and the public approval include the information set forth in paragraphs (b)(2)(i) through (iv)of this section.

(i) *The facility*. The information includes a general functional description of the type and use of the facility to be financed with the issue. For this purpose, a facility description generally is sufficient if it identifies the facility by reference to a particular category of exempt facility bond to be issued (for example, an exempt facility bond for an airport under section 142(a)(1) or an enterprise zone facility bond under section 1394(a)), or if not an exempt facility bond, by reference to another general category of private activity bond, together with accompanying information on the type and use of the facility to be financed with the issue (for example, a qualified small issue bond under section 144(b) for a manufacturing facility, a qualified 501(c)(3) bond under section 145 for a hospital facility and working capital expenditures, or a qualified mortgage bond for qualified mortgage loans for single-family housing residences under section 143).

(ii) *The maximum stated principal amount of bonds*. The information includes the maximum stated principal amount of the issue of private activity bonds to be issued to finance the facility.

(iii) *The name of the initial owner or principal user of the facility*. The information includes the name of the expected initial owner or principal user (as defined under section 144(a)) of the facility. The name provided may be either the name of the legal owner or principal user of the facility or, alternatively, the name of the true beneficial party of interest for such legal owner or user (for example, the name of a 501(c)(3) organization which is the sole member of a limited liability company owner).

(iv) *The location of the facility*. The information includes a general description of the prospective location of the facility by street address, reference to boundary streets or other geographic boundaries, or other description of the specific geographic location that is reasonably designed to inform readers of the location.

For a facility involving multiple capital projects located on the same site, or on adjacent or reasonably proximate sites with similar uses, a consolidated description of the location of those capital projects may provide a sufficient description of the location of the facility. For example, a facility for a 501(c)(3) educational entity involving multiple buildings on the entity's main urban college campus may describe the location of the facility by reference to the outside street boundaries of that campus with a reference to any noncontiguous features of that campus.

(3) *Special rule for mortgage revenue bonds*. Mortgage revenue bonds under section 143 are treated as within the scope of a public approval under paragraph (b)(2) of this section if the reasonable public notice of the public hearing and the public approval state that the bonds are to be issued under section 143, the maximum stated principal amount of mortgage revenue bonds expected to be issued, and a general description of the geographic jurisdiction in which the residences to be financed with the proceeds of the mortgage revenue bonds are expected to be located, recognizing the issuer jurisdictional limitations on such financing under section 143(c)(1)(B) (for example, residences located throughout a state for an issuer with a statewide jurisdiction or residences within a particular local geographic jurisdiction, such as within a city or county, for a local issuer). In applying paragraph (b)(2) of this section to mortgage revenue bonds, no information is required on specific names of mortgage loan borrowers or specific locations of individual residences to be financed.

(4) *Special rule for qualified student loan bonds*. Qualified student loan bonds under section 144(b) are treated as within the scope of a public approval under paragraph (b)(2) of this section if the reasonable public notice of the public hearing and the public approval state that the bonds will be issued under section 144(b), the maximum stated principal amount of qualified student loan bonds expected to be issued for qualified student loans, and a general description of the type of student loan program that the loans are to be made under (for example, a Federally-guaranteed student loan program under the Higher Education Act of 1965 or a state supplemental student loan program). In applying paragraph (b)(2) of this section to qualified student loan bonds, and recognizing that these bonds do not finance facilities, no information is required with respect to names of specific student loan borrowers or locations of facilities.

(5) *Special rule for certain qualified 501(c)(3) bonds*. Qualified 501(c)(3) bonds under section 145 to be used to finance loans described in section 147(b)(4)(B) (without regard to any election under section 147(b)(4)(A)) are treated as within the scope of a public approval under paragraph (b)(2) of this section if both of the following requirements are met—

(i) *Pre-issuance general public approval*. Within the time period defined in paragraph (b)(8) of this section, public approval is obtained after reasonable public notice of a public hearing is provided and a public hearing is held. For this purpose, a facility is treated as described in a public notice of a public hearing and public approval if the notice and public approval provide that the bonds will be qualified 501(c)(3) bonds to be used to finance loans described in section 147(b)(4)(B), the maximum stated principal amount of bonds expected to be issued to finance loans to other 501(c)(3) organizations or governmental units as described in section 147(b)(4)(B), a general description of the type of facility to be financed with such loans (for example, loans for hospital facilities or college facilities), and a statement that an additional public approval that includes specific project information will be obtained before any such loans are originated; and

(ii) *Post-issuance public approval for specific loans*. Before a loan described in section 147(b)(4)(B) is originated, a supplemental public approval for the bonds to be used to finance that loan is obtained, and that supplemental public approval meets all the requirements of section 147(f) and this section applied by treating the bonds to be used to finance such loan as if they were reissued for purpose of section 147(f) (applied without regard to this paragraph (b)(5)).

(6) *Deviations in public approval information*.

(i) *In general*. Except as otherwise provided in this paragraph (b)(6), a substantial deviation between the information required to be provided in a public notice of public hearing and public approval under paragraph (b)(2) of this section and actual information causes that issue to fail to meet the public approval requirement under section 147(f). Conversely, insubstantial deviations between information required to be provided in a notice of public hearing and public approval and actual information do not cause a failure to meet section 147(f). In general, for purposes of this paragraph (b)(6), the determination of whether a deviation is substantial is based on all the facts and circumstances. However, a change in the fundamental nature or type of a project is a substantial deviation.

(ii) *Certain insubstantial deviations in public approval information*. For purposes of this paragraph (b)(6), the following deviations are treated as insubstantial deviations:

(A) *Use of proceeds*. A deviation between the amount of proceeds of the issue that the notice of public hearing and public approval stated would be used for a facility and the amount of proceeds actually used for that facility is insubstantial if the amount of the difference does not exceed an amount equal to five percent (5%) of the net proceeds (as defined in section 150(a)(3)) of the issue.

(B) *Initial owner or principal user*. A deviation between the initial owner or principal user of the facility named in a notice of public hearing and public approval and the actual initial owner or principal user of the facility is treated as insubstantial if such parties are related parties (as defined in §1.150–1) on the issue date of the issue.

(iii) *Special rule to address certain substantial deviations in public approval information*. A substantial deviation between the information required to be conveyed in the notice of public hearing and the public approval under paragraph (b)(2) and the actual information does not cause that issue to fail to meet the public approval requirement under section 147(f) if the following requirements are met:

(A) *Original public approval and reasonable expectations*. The issuer obtained a timely public approval (as set forth in paragraph (b)(8) of this section) for the issue in accordance with section 147(f) and, on the issue date of the issue, the issuer reasonably expected there would be no substantial deviations between the informa-

tion required to be conveyed in the notice of public hearing and public approval and actual information.

(B) *Unexpected events or unforeseen changes in circumstances*. As a result of unexpected events or unforeseen changes in circumstances that arise after the issue date of the issue, the issuer determines that it cannot use some or all of the proceeds in the manner provided in the public approval either because such use is no longer feasible or viable, or because the cost of the facility was less than expected so the issuer did not need all of the proceeds specified in the public approval for the facility.

(C) *Supplemental public approval*. Before using the proceeds of the bonds that are affected by the substantial deviation for a different use, the issuer obtains a supplemental public approval for those bonds, and that supplemental public approval meets all the requirements of section 147(f) applied by treating those bonds as if they were reissued for purposes of section 147(f).

(7) *Certain timing requirements*. Except as otherwise provided in this section, a public approval of an issue under section 147(f) is timely only if the issuer obtains the public approval within one year before the issue date (as defined in section 1.150–1) of the issue. For a plan of financing described in section 147(f)(2)(C), public approval is timely for the plan of financing if the issuer obtains public approval for the plan of financing within one year before the issue date of the first issue issued under the plan of financing and the issuer issues all issues under the plan of financing within three years after the issue date of such first issue.

(c) *Definitions*—Unless otherwise stated, for purposes of this section, the following definitions apply:

(1) *Facility*. In general, for purposes of this section and section 5f.103–2, the term *facility* means one or more capital projects, including land, buildings, equipment, and other property to be financed with an issue that is located on the same site, or adjacent or proximate sites used for similar purposes, and that is subject to the public approval requirement under section 147(f). For an issue of mortgage revenue bonds under section 143 or qualified student loan bonds under section 144(b), the term *facility* means the mortgage loans or qualified student loans to be financed with the proceeds of the issue. For an issue of qualified 501(c)(3) bonds under section 145, the term *facility* means a facility, as defined in the first sentence of this paragraph (c)(1), and also includes working capital expenditures to be financed with proceeds of the issue.

(2) *Public hearing*. The term *public hearing* means a forum providing a reasonable opportunity for interested individuals to express their views, both orally and in writing, on the proposed issue of bonds and the location and nature of the proposed facility to be financed. In general, a governmental unit may select its own procedure for a public hearing, provided that interested individuals have a reasonable opportunity to express their views. Thus, a governmental unit may impose reasonable requirements on persons who wish to participate in the hearing, such as a requirement that persons desiring to speak at the hearing make a written request to speak at least 24 hours before the hearing or that they limit their oral remarks to a prescribed time. If a governmental unit provides reasonable public notice for a public hearing and receives no timely requests to participate in the hearing, then the governmental unit may cancel the hearing and, for purposes of this section, the public hearing requirement will be treated as met. For purposes of this public hearing requirement, it is unnecessary, for example, to have the applicable elected representative of the approving governmental unit present at the hearing, to submit a report on the hearing to that applicable elected representative, or to meet State administrative procedural requirements for public hearings. Except to the extent in conflict with a specific requirement of this paragraph (c)(2), compliance with State procedural requirements for public hearings generally satisfies the requirements of this paragraph (c)(2). A public hearing may be conducted by an individual appointed or employed to perform such function by the governmental unit or its agencies, or by the issuer. Thus, for example, for bonds to be issued by an authority that acts on behalf of a county, the hearing may be conducted by the authority, the county, or an appointee of either.

(3) *Reasonable public notice*. Reasonable public notice means notice that is reasonably designed to inform residents of the affected governmental units, including residents of the issuing governmental unit and the governmental unit where a facility is to be located, of the proposed issue. The notice must state the time and place for the public hearing and contain the information required under paragraph (b) of this section. Notice is presumed reasonable if given no fewer than seven (7) business days before the public hearing in one of the ways permitted by this paragraph (c)(2). Notice is treated as reasonably designed to inform affected residents of an approving governmental unit if it is given in one of the following ways:

(i) *Newspaper publication*. Public notice may be given by publication in one or more newspapers of general circulation available to the residents of the governmental unit.

(ii) *Radio or television broadcast*. Public notice may be given by radio or television broadcast to the residents of the governmental unit.

(iii) *Governmental unit website posting*. Public notice may be given by electronic posting on the approving governmental unit's website for its residents, provided that the governmental unit regularly uses that website to inform its residents about events affecting the residents (including notice of public meetings of the governmental unit) and the governmental unit offers a reasonable, publicly known alternative method for obtaining this information for residents without access to computers (such as phone recordings).

(iv) *Alternative State law public notice procedures*. Public notice may be given in a way that is permitted under a general State law for public notices for public hearings for the approving governmental unit.

(4) *Writing*. Unless specifically stated otherwise in this section, if permitted by the governmental unit, the term *writing* includes electronic communication.

(5) *Mortgage revenue bonds*. The term *mortgage revenue bonds* means qualified mortgage bonds under section 143(a) of the Code or qualified veterans' mortgage bonds under section 143(b) of the Code.

(d) *Special rule on required governmental unit approvals for certain types of financings*. In applying section 147(f)(2) and §5f.103–2(c) of this chapter, to mortgage revenue bonds under section 143, to qualified student loan bonds under section 144(b), and to the portion of an issue of qualified 501(c)(3) bonds under section 145 that finance working capital expendi-

tures, the governmental unit by or on behalf of which those types of bonds are issued is treated as the only governmental unit required to provide a public approval and no separate public approval is required by a host governmental unit with respect to the location, if any, of a financed facility.

(e) *Effective/applicability date*. Except as otherwise provided in this section, §1.147(f)–1 applies to bonds that are sold on or after the date of publication of final regulations in the Federal Register and that are subject to section 147(f).

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

(Filed by the Office of the Federal Register on September 8, 2008, 8:45 a.m., and published in the issue of the Federal Register for September 9, 2008, 73 F.R. 52220)

Notice of Proposed Rulemaking and Notice of Public Hearing

Notice to Participants of Consequences of Failing to Defer Receipt of Qualified Retirement Plan Distributions; Expansion of Applicable Election Period and Period for Notices

REG–107318–08

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of Proposed Rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations under sections 402(f), 411(a)(11), and 417 of the Internal Revenue Code (Code). The proposed regulations would provide that the notice required under section 411(a)(11) to be provided to a participant of his or her right, if any, to defer receipt of an immediately distributable benefit must also describe the consequences of failing to defer receipt of the distribution. The proposed regulations would also provide that the applicable election period for waiving the qualified joint and survivor annuity form of benefit under section 417 is the 180-day period ending on the annuity starting date, and that a notice required to be provided under section 402(f), section 411(a)(11), or section 417 may be provided to a participant as much as 180 days before the annuity starting date (or, for a notice under section 402(f), the distribution date). These regulations would affect administrators of, employers maintaining, participants in, and beneficiaries of tax-favored retirement plans.

DATES: Written or electronic comments and requests to speak at the public hearing must be received by January 7, 2009.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–107318–08), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington D.C. 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–107318–08), 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–107318–08).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Michael P. Brewer at (202) 622–6090; concerning submission of comments or to request to speak at the public hearing, Funmi Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP; Washington, DC 20224. Comments on the collection of information should be received by December 8, 2008. Comments are specifically requested concerning:

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

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

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

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

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

The collection of information in these proposed regulations is in §1.411(a)–11(c)(2) of the Income Tax Regulations. This collection of information is required to comply with the statutory notice requirements of section 411(a), and is expected to be included in the notices currently provided to employees that inform them of their rights and benefits under the plan. The likely recordkeepers are businesses or other for-profit institutions and nonprofit institutions and organizations.

Estimated total annual recordkeeping burden: 100,000 hours.

Estimated average annual burden hours per recordkeeper: 1 hour.

Estimated number of recordkeepers: 100,000.

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

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

Background

A. Notice of Consequences of Failing to Defer

Section 411(a)(11)(A) provides that, if the present value of any nonforfeitable accrued benefit exceeds $5,000, a qualified plan must provide that such benefit may not be immediately distributed without the consent of the participant. Similarly, section 203(e) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), provides that if the present value of any nonforfeitable accrued benefit with respect to a participant in a plan exceeds $5,000, the benefit may not be immediately distributed without the consent of the participant.

Section 1102(b)(1) of the Pension Protection Act of 2006 (PPA '06), 109 Public Law 280, 120 Stat. 780, instructs the Secretary of the Treasury to modify the regulations under section 411(a)(11) of the Code "to provide that the description of a participant's right, if any, to defer receipt of a distribution shall also describe the consequences of failing to defer such receipt." Section 1102(b)(2)(A) of PPA '06 provides that the modifications required by section 1102(b)(1) of PPA '06 shall apply to years beginning after December 31, 2006. Section 1102(b)(2)(B) of PPA '06, however, states that a plan shall not be treated as failing to meet the requirements of section 411(a)(11) with respect to any description of the consequences of failing to defer provided "within 90 days after the Secretary of the Treasury issues the modifications required by [section 1102(b)(1) of PPA '06] if the plan administrator makes a reasonable attempt to comply with such requirements."

Section 1.411(a)–11(c)(2)(i) states that, in order for a plan to obtain valid consent under section 411(a)(11), "so long as a benefit is immediately distributable, a participant must be informed of the right, if any, to defer receipt of the distribution." Section 1.411(a)–11(c)(4) states that a distribution is immediately distributable prior to the later of the time a participant has attained normal retirement age or age 62.

Q&A–32 of Notice 2007–7, 2007–5 I.R.B. 395, provides that a plan administrator is required to revise the notice required under section 411 to reflect the modifications made by section 1102(b) of PPA '06 for notices provided in plan years beginning after December 31, 2006. Notice 2007–7 further provides that, pursuant to section 1102(b)(2)(B) of PPA '06, a plan will not be treated as failing to meet the new requirements of section 1102(b) of PPA '06 if the plan administrator makes a reasonable attempt to comply with the new requirements with respect to a notice that is provided prior to the 90th day after the issuance of regulations reflecting the modifications required by such section 1102(b) of PPA '06. See §601.601(b)(2)(ii)(*b*).

Q&A–33 of Notice 2007–7 includes a safe harbor that would be considered a reasonable attempt to comply with the requirement in section 1102(b)(1) of PPA '06 that a description of a participant's right to defer receipt of a distribution include a description of the consequences of failing to defer. In particular, Q&A–33 provides that a description that is written in a manner reasonably calculated to be understood by the average participant and that includes the following information is a reasonable attempt to comply with the requirements of section 1102(b)(2)(B) of PPA '06: (a) in the case of a defined benefit plan, a description of how much larger benefits will be if the commencement of distributions is deferred; (b) in the case of a defined contribution plan, a description indicating the investment options available under the plan (including fees) that will be available if distributions are deferred; and (c) the portion of the summary plan description that contains any special rules that might materially affect a participant's decision to defer. For purposes of clause (a), a plan administrator can use a description that includes the financial effect of deferring distributions, as described in §1.417(a)(3)–1(d)(2)(i), based solely on the normal form of benefit.

Q&A–31 of Notice 2007–7 provides that the provisions of section 1102 apply to plan years that begin after December 31, 2006. Q&A–31 explains that this means that the new rules relating to the content of the notices apply only to notices issued in those plan years, without regard to the annuity starting date for the distributions.

B. Expansion of Applicable Election Period

Section 401(a)(11)(A)(i) provides that, except as provided in section 417, a plan that is qualified under section 401(a) must provide the accrued benefit payable to a vested participant who does not die before the annuity starting date in the form of a qualified joint and survivor annuity.

Section 417(a)(1)(A) provides that, in general, a plan satisfies section 401(a)(11) only if each participant may elect at any time during the "applicable election period" to waive the qualified joint and survivor annuity form of benefit (and to revoke the waiver), and certain other requirements are satisfied. Before PPA '06, section 417(a)(6)(A) provided that the "applicable election period" for a participant to waive the qualified joint and survivor annuity form of distribution was the 90-day period ending on the annuity starting date.

Section 1102(a)(1)(A) of PPA '06 amended section 417(a)(6)(A) by changing the 90-day "applicable election period" for electing a distribution subject to the qualified joint and survivor annuity (QJSA) rules of sections 401(a)(11) and 417 in a form other than a QJSA to a 180-day applicable election period. Section 1102(a)(2)(A) of PPA '06 made a parallel amendment to section 205(c)(7)(A) of ERISA by striking "90-day" and inserting "180-day".

Sections 1102(a)(1)(B) and 1102(a)(2)(B) of PPA '06 provide that the Secretary of the Treasury shall modify the regulations relating to section 417 of the Code and section 205 of ERISA by substituting "180 days" for "90 days" each place it appears.

Section 1102(a)(3) of PPA '06 provides that the amendments to the applicable election period apply to years beginning after December 31, 2006.

C. Expansion of Period for Notices

Section 417(a)(3)(A) of the Code and section 205(c)(3)(A) of ERISA provide that a plan must provide to each participant, "within a reasonable period of time before the annuity starting date" and consistent with such regulations as the Secretary of the Treasury may prescribe, a written explanation that describes the terms and conditions of the qualified joint

and survivor annuity and certain other information. Similarly, section 402(f)(1) provides that a plan administrator must, "within a reasonable period of time" before making an eligible rollover distribution, provide to recipients an explanation of certain tax consequences of the distribution.

Section 1102(a)(1)(B) of PPA '06 provides that the Secretary of the Treasury shall modify the regulations under sections 402(f), 411(a)(11), and 417 by substituting "180 days" for "90 days" each place it appears in §§1.402(f)–1, 1.411(a)–11(c), and 1.417(e)–1(b). Similarly, section 1102(a)(2)(B) of PPA '06 provides that the Secretary of the Treasury shall modify the regulations relating to sections 203(e) and 205 of ERISA by substituting "180 days" for "90 days" each place it appears.

Section 1102(a)(3) provides that the amendments to the notice periods apply to years beginning after December 31, 2006. Q&A–31 of Notice 2007–7 explains that the 180-day period for distributing notices applies to notices distributed in a plan year that begins after December 31, 2006.

D. Requirements under ERISA

ERISA section 203(e) is the parallel provision to section 411(a)(11) of the Code and ERISA section 205 is the ERISA parallel to section 417 of the Code. Pursuant to section 101 of Reorganization Plan No. 4 of 1978, 29 U.S.C. 1001nt (the Reorganization Plan), the Secretary of the Treasury generally has authority to issue regulations under parts 2 and 3 of subtitle B of title I of ERISA, including sections 203(e) and 205 of ERISA. Thus, the changes required by section 1102 of PPA '06 would apply as well for purposes of ERISA sections 203(e) and 205.

Explanation of Provisions

A. Notice of Consequences of Failing to Defer

These proposed regulations would provide that the notice required by section 411(a)(11) advising a participant of the right, if any, to defer receipt of a distribution must also inform the participant of the consequences of failing to defer such receipt. The proposed regulations would also provide guidance on the relevant information that must be provided to a participant in order to satisfy the requirement that the participant be notified of the consequences of failing to defer.

Specifically, these proposed regulations would require that the participant be provided a description of specified federal tax implications of failing to defer and, in the case of a defined benefit plan, a statement of the amount payable to the participant under the normal form of benefit both upon immediate commencement and when the benefit is no longer immediately distributable (that is, the later of age 62 or attainment of normal retirement age). Section 1.417(a)(3)–1(c)(2)(ii) permits a plan to provide participants with a QJSA explanation, which does not vary based on the participant's marital status, of the relative value of optional forms of benefit compared to the value of a QJSA. These proposed regulations would permit the statement of the amount payable to not be based on the participant's marital status, to the extent the plan is permitted under §1.417(a)(3)–1(c)(2)(ii) to use a QJSA explanation that does not vary based on whether the participant is married or unmarried.

The proposed regulations would also require the information in the notice to include, in the case of a defined contribution plan, a statement that some currently available investment options in the plan may not be generally available on similar terms outside the plan and contact information for obtaining additional information on the general availability outside the plan of currently available investment options in the plan. In addition, the proposed regulations would require the notice to include, in the case of a defined contribution plan, a statement that fees and expenses (including administrative or investment-related fees) outside the plan may be different from fees and expenses that apply to the participant's account and contact information for obtaining information on such fees.

The proposed regulations also include an additional category of information that must be provided relating to any provisions of the plan (and provisions of any accident or health plan maintained by the employer) that could reasonably be expected to materially affect a participant's decision whether to defer receipt of the distribution. Thus, for example, the proposed regulations would require a description of the eligibility requirements for retiree health benefits if such benefits are limited to participants who have an undistributed benefit under the employer's retirement plan.

In general, the proposed regulations would also provide that the required information regarding the consequences of a participant's failing to defer receipt of a distribution must appear together. However, the proposed regulations would permit a cross-reference to where the required information may be found in notices or other information provided or made available to the participant, as long as the notice of consequences of failing to defer includes a statement of how the referenced information may be obtained without charge and explains why the referenced information is relevant to a decision whether to defer.

B. Expansion of Applicable Election Period and Period for Notices

Consistent with sections 1102(a)(1)(A) and (1)(B) and 1102(a)(2)(A) and (2)(B) of PPA '06, the proposed regulations would both (1) expand the definition of applicable election period to up to 180 days, and (2) expand the time period for notices issued under sections 402(f), 411(a)(11), and 417 to allow the notices to be issued up to 180 days prior to the annuity starting date (or, in the case of a notice under section 402(f), the date of distribution). Specifically, the proposed regulations would substitute "180 days" for "90 days" and "180-day" for "90-day" each place those terms appear in §1.401(a)–13(g)(4)(ii), §1.401(a)–20, A–3(b)(1), A–4, A–10(a), A–16, and A–24(a)(1), §1.402(f)–1, §1.411(a)–11(c), and §1.417(e)–1(b).

Pursuant to section 101 of the Reorganization Plan, the Secretary of Treasury has the authority to issue regulations under ERISA sections 203(e) and 205. Thus, these proposed regulations that apply to sections 402(f), 411(a)(11), and 417 of the Code would apply as well for purposes of sections 203(e) and 205 of ERISA.

Proposed Effective/Applicability Date

These regulations are proposed to become effective for notices provided (and election periods beginning) on or after the first day of the first plan year beginning on or after January 1, 2010. However, in no

event will the regulations become effective for notices provided (and election periods beginning) earlier than the first day of the first plan year beginning 90 days after publication of final regulations in the **Federal Register**.

With respect to the regulations relating to the notice of consequences of failing to defer the receipt of distributions, until these regulations become effective, a plan will be treated as complying if: (1) the plan complies either with these proposed regulations or with Q&A–32 and Q&A–33 in Notice 2007–7; or (2) if the plan administrator makes a reasonable attempt to comply with the requirement that the description of a participant's right, if any, to defer receipt of a distribution shall also describe the consequences of failing to defer such receipt.

With respect to the proposed regulations relating to the expanded applicable election period and the expanded period for notices, plans may rely on these proposed regulations for notices provided (and election periods beginning) during the period beginning on the first day of the first plan year beginning on or after January 1, 2007 and ending on the effective date of final regulations.

Special Analyses

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

It is hereby certified that the collection of information contained in this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on several factors, including that the regulation merely provides guidance to implement a statutorily-required notice, and that the incremental burden in the regulation would be minimal because it only requires including additional information in notices already provided by all of the affected entities. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (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 has been scheduled for Friday, February 20, 2009, at 10 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, N.W., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT section of this preamble.

Persons who wish to present oral comments at the hearing must submit written or electronic comments by January 7, 2009, and submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (a signed original and eight (8) copies) by January 16, 2009. A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Michael P. Brewer, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the Office of Chief Counsel, IRS, and the Department of Treasury 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 as follows:

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

§1.401(a)–13; §1.401(a)–20; §1.402(f)–1; §1.411(a)–11; §1.417(e)–1 [Amended]

Par. 2. For each entry listed in the "Location" column, remove the language in the "Remove" column and add the language in the "Add" column in its place.

Location	Remove	Add
1.401(a)–13(g)(4)(ii), first sentence	90 days	180 days
1.401(a)–20, A–4, third sentence	90 days	180 days
1.401(a)–20, A–10(a), fifth and sixth sentences	90 days	180 days
1.401(a)–20, A–16, sixth sentence	90 days	180 days
1.401(a)–20, A–24(a)(1), fifth sentence	90 days	180 days
1.402(f)–1, A–2(a), first sentence	90 days	180 days

Location	Remove	Add
1.411(a)–11(c)(2)(ii)	90 days	180 days
1.411(a)–11(c)(2)(iii)(A), first sentence	90 days	180 days
1.417(e)–1(b)(3)(i)	90 days	180 days
1.417(e)–1(b)(3)(ii), first sentence	90 days	180 days
1.417(e)–1(b)(3)(iii)	90 days	180 days
1.417(e)–1(b)(3)(vi), second sentence	90 days	180 days
1.417(e)–1(b)(3)(vii)	90 days	180 days
1.417(e)–1(b)(3)(vii)	90-day	180-day

§1.411(a)–11 [Amended]

Par. 3. Section 1.411(a)–11 is amended as follows:

1. The second sentence of paragraph (c)(2)(i) is revised.

2. The second sentence of paragraph (c)(2)(iii)(B)(*3*) is revised.

3. Paragraphs (c)(2)(vi) and (h) are added.

The additions and revisions read as follows:

§1.411(a)–11 Restriction and valuation of distributions.

* * * * *

(c) * * *

(2) *Consent*—(i) * * * In addition, so long as a benefit is immediately distributable, a participant must be informed of the right, if any, to defer receipt of the distribution and of the consequences of failing to defer such receipt. * * *

* * * * *

(iii) * * *

(B) * * *

(*3*) * * * The summary described in paragraph (c)(2)(iii)(B)(*2*) of this section must advise the participant of the right, if any, to defer receipt of the distribution and of the consequences of failing to defer such receipt, must set forth a summary of the distribution options under the plan, must refer the participant to the most recent version of the notice (and, in the case of a notice provided in any document containing information in addition to the notice, must identify that document and must provide a reasonable indication of where the notice may be found in that document, such as by index reference or by section heading), and must advise the participant that, upon request, a copy of the notice will be provided without charge.

* * * * *

(vi) *Consequences of failing to defer*—(A) A notice under this paragraph (c)(2) that is required to describe the consequences of failing to defer receipt of a distribution until it is no longer immediately distributable must, to the extent applicable under the plan and in a manner designed to be easily understood, provide the participant with the information set out in paragraphs (c)(2)(vi)(A)(*1*) through (*5*) of this section and explain why it is relevant to a decision whether to defer.

(*1*) A description of the following federal tax implications of failing to defer: differences in the timing of inclusion in taxable income of an immediately commencing distribution that is not rolled over (or not eligible to be rolled over) and a distribution that is deferred until it is no longer immediately distributable (including, as applicable, differences in the taxation of distributions of designated Roth contributions within the meaning of section 402A); application of the 10% additional tax on certain distributions before age 59½ under section 72(t); and, in the case of a defined contribution plan, loss of the opportunity upon immediate commencement for future tax-favored treatment of earnings if the distribution is not rolled over (or not eligible to be rolled over) to an eligible retirement plan described in section 402(c)(8)(B).

(*2*) In the case of a defined benefit plan, a statement of the amount payable to the participant under the normal form of benefit both upon immediate commencement and upon commencement when the benefit is no longer immediately distributable (assuming no future benefit accruals). The statement need not vary based on the participant's marital status if the plan is permitted, pursuant to §1.417(a)(3)–1(c)(2)(ii), to provide a QJSA explanation that does not vary based on the participant's marital status.

(*3*) In the case of a defined contribution plan, a statement that some currently available investment options in the plan may not be generally available on similar terms outside the plan and contact information for obtaining additional information on the general availability outside the plan of currently available investment options in the plan.

(*4*) In the case of a defined contribution plan, a statement that fees and expenses (including administrative or investment-related fees) outside the plan may be different from fees and expenses that apply to the participant's account and contact information for obtaining additional information on the fees and expenses that apply to the participant's account.

(*5*) An explanation of any provisions of the plan (and provisions of an accident or health plan maintained by the employer) that could reasonably be expected to materially affect a participant's decision whether to defer receipt of the distribution. Such provisions would include, for example: plan terms under which a participant who fails to defer may lose eligibility for retiree health coverage or eligibility for early retirement subsidies or social security supplements; plan terms under which the benefit of a rehired participant who failed to defer may be adversely affected by the decision not to defer; and, in the case of a defined contribution plan, plan terms under which undistributed benefits that otherwise are nonforfeitable become forfeitable upon the participant's death.

(B) *Location of information; incorporation by reference*. In general, the information required to be provided in a notice under this paragraph (c)(2)(vi) must

appear together (for example, in a list of consequences of failing to defer). However, the notice will not be treated as failing to satisfy the requirements of this paragraph (c)(2)(vi) merely because the notice includes a cross-reference to where the required information may be found in notices or other information provided or made available to the participant, as long as the notice of consequences of failing to defer includes a statement of how the referenced information may be obtained without charge and explains why the referenced information is relevant to a decision whether to defer.

* * * * *

(h) *Consequences of Failing to Defer Effective/Applicability Date*. The provisions in paragraph (c) of this section that describe the requirement to notify participants of the consequences of failing to defer are effective for notices provided on or after the first day of the first plan year beginning on or after January 1, 2010.

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

(Filed by the Office of the Federal Register on October 8, 2008, 8:45 a.m., and published in the issue of the Federal Register for October 9, 2008, 73 F.R. 59575)

Foundations Status of Certain Organizations

Announcement 2008–104

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

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

135 Club, Bethlehem, PA
Alpha Omega of Illinois NFP, Elgin, IL
Angel Village, Inc., Hendersonville, TN
Anthony D. Amico Memorial Scholarship Fund, Plainview, NY
Art to the Nations, San Francisco, CA
Arts Creating Unity Institute, Inc., Los Angeles, CA
Aware Effectiveness, Inc., Pasadena, CA
Babylon Foundation, Inc., Los Angeles, CA
Bethany II Housing Development Corp., New York, NY
Bethel Outreach Development Center, Inc., Wilmington, DE
Beyond Excellence, Inc., Houston, TX
BMV Helping Hands, Libertyville, IL
Bridge Foundation, Sacramento, CA
Bucksport Development Corporation, Inc., Bucksport, ME
Building Independence, Inc., Chetek, WI
C Project, Freeport, NY
Carlton Manor Housing Corporation, Culver City, CA
Casa Piedra, Inc., Leominster, MA
Center for Sports and Entertainment, Ventura, CA
Children's Wildfire Fund, Shady Cove, OR
Colony Building Corp. Center, Beasley, TX
Community and Addiction Services ETC, Spokane Valley, WA
Consortium for Community Care, Inc., Calabasas, CA
Cottage Foundation, Houston, TX
C T I Training & Development NFP, Chicago, IL
Dare to Dream Foundation, Santa Monica, CA
Darsey Foundation, Inc., Bellaire, TX
Delta Center for Rural Development, Inc., Helena, AR
Dr. Albert A. Nwokeuku Foundation, Inc., Baltimore, MD
East African Health and Wellness Center, Minneapolis, MN
Education Technology & Arts, Inc. ETA, Inc., Hopkins, SC
Egypt Plantation Museum, Inc., Wharton, TX
Ezzell Resource Group, Inc., Brooklyn, NY
Family and Community Educational Services, Inc., Readyville, TN
Family Education Resource Center, Bullhead City, AZ
Family Unity International, Inc., Staten Island, NY
Fort Smith Riverfront Boxing Club, Fort Smith, AR
Fred K. Koken Foundation, Juneau, AK
Fresh Start Coaching, Pittsburgh, PA
Friends of Castillo de San Marcos National Monument, Inc., St. Augustine, FL
Golden Star Christian Community Outreach Center, Philadelphia, PA
Grundy County R-V School District Foundation, Inc., Galt, MS
Helping Our Elderly Live Better, Washington, DC
HHFA Foundation, Inc., White Plains, NY
Highly Favored Ministries, Arlington, TX
Holodec Environmental Foundation, Salt Lake City, UT
Home Quest, Inc., Egg Harbor Township, NJ
Hope for Restoration, Plano, TX
Horizon Foundation, LTD, Brookfield, WI
In Moms Arms, Long Beach, CA
Intensive Care of Youth, Jacksonville, NC
International Sailing & Boating Hall of Fame, Jensen Beach, FL
Island Community News, Inc., Kihei, HI
James Cooley Historic Foundation, San Diego, CA
Jordans Crossing, Inc., Newark, OH
Julius Boys Home, Inc., Los Angeles, CA
Kingston Community Organization for Community Concerns, Inc., Shelby, NC
Ladies of Charissa Civic Club, San Antonio, TX
Life Enrichments Center, Inc., Adult Day Services, Arlington, TX
Limbs for Life Charitable Foundation, Allendale, NJ
Living Free Health Foundation, Inc., Annandale, VA
Living Hope Outreach Ministries, Kennettt, MO
Lyon Estates, Inc., Union, MS
May the Blessings Be Foundation, Waller, TX
Melvin Lee Foundation Holistic Center, Kansas City, MO
Mentoring and More, Inc., Yorkville, IL
Meta Point, Inc., Moreno Valley, CA
Mid-Way Ministries, Canaseraga, NY
Millenium Second Chance Educational Center, Inc., Camilla, GA
Movie Foundation, Van Nuys, CA
National Association of Minority Contractors Colorado, Littleton, CO
National Network of Organ Donors, Inc., Palm Beach Gardens, FL

Need Neighborhood Education and Economic Development, Jackson, MS
New Beginnings Cultural Center, Harrisburg, PA
Nishi Kaigan Dojo, Berkeley, CA
Nutrition & Health Partnership, Inc., Wellesley, MA
One Vision Ministries, New River, AZ
Open Arms Outreach Community Center, Inc., Decatur, GA
Palm Bay High Instrumental Music Parents Association, Melbourne, FL
Play Your Game, Beaverton, OR
Positive Networking Services, Inc., Portsmouth, VA
Precious Tots Dotties Learning Academy at Fort Worth Texas, Arlington, TX
Prodigal Daughters Association, Calumet City, IL
Project Help, Inc., Latrobe, PA
Pryors Ponderosa, Inc., Lancaster, CA
Region A Connect NC Commission, Inc., Sylva, NC
Religious Without Borders Initiative, Inc., Plattsburgh, NY
Roger Hodges Ministries, Amarillo, TX
Rural Learning Center, Howard, SD
Sister to Sister II, Inc., St. Louis, MO
Spoken Word Ministries, Inc., Jackson, MS
St. Louis Women's Final Four, Inc., St. Louis, MO
STAR Flight Fund, Inc., Austin, TX
TDB Community Development Corp., Chester, VA
Teen Pregnancy Outreach Development Center Shelter, Inc., Whitesburg, GA
That So Pretty Ceramics, Austin, TX
Theatre Exile, Inc., New York, NY
Timothy Judd Foundation, Houston, TX
Travis County Development Corporation, Austin, TX
Twenty Three Middle, Inc., Newburyport, MA
Umoja Art Village, Inc., Chicago, IL
Union City Action Network, Newark, CA
Unity Fellowship Community Development Center, Detroit, MI
Unlimited Dimensions Adolescent Group Home and Learning Resource, New Orleans, LA
Village Child Group Home, Sacramento, CA
Virginia Wyche Wilson Community Development Agency, Jacksonville, FL
Vision of Missions Tabernacle CDC, Inc., Philadelphia, PA
Vision Services Group, Inc., Charlotte, NC
Whistle Away Crime, Inc., Littleton, CO
Williamson County Conservation Foundation, Inc., Round Rock, TX
Women of Destiny Ministries International, Inc., Foothill Ranch, CA
Womens Leadership Network, Laguna Beach, CA
Womens Social Impact Workshop, Inc., Philadelphia, PA
Youth Sports University, Lancaster, CA

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

Request for Applications to Participate in the 2009 IRS Individual *e-file* Partnership Program

Announcement 2008–106

The Stakeholder Partnerships, Education and Communication (SPEC) organization within the Internal Revenue Service (IRS) is continuing its efforts to establish IRS *e-file* partnerships with various entities. The IRS is seeking non-monetary e-file partnerships for Filing Season 2009. No applications for funding (monetary compensation) will be considered. A commercial business, non-profit organization, state government or local government may submit applications. Applications are not solicited from other Federal government agencies. The program is an annual program and covers the period **January 16 through October 15, 2009. All prior year partners must reapply for Filing Season 2009.**

BACKGROUND

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

Continued opportunities for growth in electronic tax administration are evident. For Filing Season 2008, the IRS received 90 million electronically filed returns, an increase of 12.4% over the previous year. Visit the IRS website, ***http://www.irs.gov***, for the most current results from market research on individual taxpayers, including demographic data and psychographic studies. This research includes attitudinal surveys, customer satisfaction surveys, Public Service communications, tracking studies and any focus group results.

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

FILING SEASON 2009

For Filing Season 2009, the IRS will continue to focus on the 1040 series income tax returns covering "IRS *e-file* Using a Tax Preparer" and "IRS *e-file* Using a Personal Computer." Additional emphasis continues to be placed on the following features: electronic signature options, Federal/State e-file, and electronic payment options for balance due and estimated payment options.

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

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

Participants are encouraged to focus on reducing the number of errors made on electronically filed returns, including those returns claiming EITC. The "EITC Assis-

tant" is an interactive web-based tool designed to help tax professionals determine whether or not their clients are eligible for EITC, and why. The "EITC Assistant" is a step taken by the IRS to maximize taxpayer participation, minimize EITC errors while increasing compliance. You can find the "EITC Assistant" on the IRS website at ***http://www.irs.gov/eitc***.

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

The IRS expects all accepted partners to market, promote and offer e-file product and services through October 15, 2009. The IRS will supply the partners with the key marketing messages that support electronic filing during the Filing Season (January through April 15, 2009) and post-Filing Season (April through October 15, 2009). These messages should be used in your promotion of electronic filing and displayed on the websites of Participants. Utilization of these messages will ensure uniformity and maximize public awareness. For additional information on the various e-file programs, features, and market research, visit the IRS website at ***http://www.irs.gov***.

Participants will receive hyperlinks from IRS.gov (Partners Page) – to the Participant's website. Potential Participants may request links for the following categories:

- e-file Solutions for Taxpayers
- Software and Other Tools for Your e-file Business
- e-file Opportunities for Financial Institutions and Employers
- Pay Your Taxes Electronically

Safeguarding Taxpayer Data

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

PARTICIPATION STANDARDS & REQUIREMENTS

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

- The Participant was actively engaged in the electronic tax preparation and filing industry in 2007 and 2008.
- The Participant will offer their tax preparation and e-file services to the individual taxpayer. The IRS will not post advertisements offering both free tax preparation and free e-file on the IRS.gov Partners Page. Promotion on IRS.gov of free services, services that include both free tax preparation and free e-filing, is reserved for Free File Alliance members only. Visit ***www.freefilealliance.org*** to find out how to become a member of the Free File Alliance or visit ***www.irs.gov*** for more details on free file.
- The Participant will market, promote and offer e-file services through October 15, 2009. The Participant should use the key marketing messages, provided by the IRS, for the promotion of Filing Season and Post Filing Season electronic filing and place them on your website.
- The Participant (Electronic Return Originator, Intermediate Service Provider, Software Developer, and Transmitter) must be in good standing with the IRS, comply with the e-file requirements stated in the IRS Revenue Procedure 2007–40 (announced in IR Bulletin 2007–26 dated June 25, 2007), current versions of Publications 1345, 1345A, 1346, 3112, and pass the annual Suitability and Participants Acceptance Testing (PATS) conducted by the IRS. You can find the IRS e-file technical publications on the IRS website at ***http://www.irs.gov***.
- **The participant will comply with requirements in Publication 1346, *Electronic Return File Specifications for Individual Income Tax Returns*, *http://www.irs.gov/taxpros/providers/article/0,,id=97974,00.html*. A new sequence (0300) is being added to capture the volumes of returns (English and Spanish) e-filed through IRS.gov with participating companies *http://www.irs.gov/efile/lists/0,,id=101223,00.html*. An indicator "A" for English returns and an indicator "S" for Spanish returns (if applicable) will be used by Participants in their record layouts. Refer to the "Record Layouts Nature of Change Page" of Publication 1346 to find more detailed information. IRS will not use the indicators to build a marketing database. In addition, the indicators will not be used to compile company-specific data or propriety data. The database will only be used to create aggregate data profiles of all users.**
- The Participant will comply with the privacy provisions of 26 U.S.C. §7216 and U.S.C.§ 6103.
- The Participant will be required to prove and display third-party certifications for the privacy/security/authenticity of its online service. The Participant's website should display the third-party certification and privacy seals. Participants must use software that will enable their websites to state their privacy practices in a standard machine-readable format that can be retrieved automatically and interpreted easily by users.
- Participants will comply with the security provisions in applicable Department of Treasury/IRS rules including, but not limited to, 31C.F.R. Part 10, IRS Rev. Proc. 2005–60, current versions of IRS Publications 1345, 1345A, and 3112, and 26 U.S.C. §7216. In addition, Participants must comply with the Federal Trade Commission's Gramm-Leach-Bliley Act to protect the security of taxpayer information. Refer to Publication 4557, *Safeguarding Taxpayer Data, a Guide for Your Business*, for guidance on various security rules and provisions that impact tax professionals. The document can be accessed at ***http://www.irs.gov***.

- **Participants must comply with IRS' new security and privacy requirements for Authorized IRS e-file Providers participating in electronic filing of individual income tax returns for the 2009 Filing Season. Some of the new requirements may apply to online filing only. A draft of the requirements exists on IRS.gov *http://www.irs.gov/efile/article/0,,id=186487,00.html*. When the requirements are finalized, they will be included in the electronic version of the 2009 Publication 1345. These new requirements will become effective January 1, 2009.**
- The Participant will offer their products and services to filers of the individual 1040 Series returns, including complex returns, balance due returns, Federal/State returns, and 1040EZ returns.
- The Participant will clearly disclose its customer service support options (including associated fees, if any) and privacy policy on the landing page of its website. Participants must provide taxpayers with a business contact point by on-line form, email, mail, facsimile or telephone number which the Participant maintains and reviews.
- **The Participant is encouraged to offer the Spanish versions for online filing and/or downloadable software.** The Participant who offers Spanish versions for online filing and/or downloadable software will have customer service support to assist Hispanic taxpayers.
- The Participant will target v-coders and individuals eligible for EITC.
- The Participant will focus on reducing the number of errors on electronically prepared returns, including those returns claiming EITC.
- The Participant will offer a variety of e-file features including the Self-Select PIN, Electronic Payment Options, Federal/State e-file, Direct Deposit of Refunds, etc.
- The Participant will be permitted only **one (1)** hyperlink on IRS.gov per category:
    - e-file Solutions for Taxpayer ***http://www.irs.gov/efile/lists/0,,id=101223,00.html***
    - Software and Other Tools for Your e-file Business ***http://www.irs.gov/efile/lists/0,,id=101225,00.html***
    - e-file Opportunities for Financial Institutions and Employers ***http://www.irs.gov/efile/lists/0,,id=101233,00.html***
    - Pay Your Taxes Electronically ***http://www.irs.gov/efile/lists/0,,id=101227,00.html***
- The Participant will provide the IRS with a description (**not to exceed 200 characters including spaces**) for each hyperlink placed on the IRS *e-file* Partners Page. The hyperlink description may describe multiple offers/services.
- The Participant will not have a URL(s) containing the word "IRS."
- The Participant will be required to supply the IRS with a link to their website in their application or **no less than ten (10) business days** before the site is expected to go live (start date of electronic filing). All sites must be examined before they can be posted on the IRS *e-file* Partners Page. The purpose of the review is to ensure each Participant's website complies with the standards and requirements set forth in this announcement.
- The Participant will adhere to the IRS *e-file* rule for registration of websites which enables IRS to more quickly identify fraud schemes, including phishing. Failure to do so could result in suspension or expulsion from participation in IRS *e-file*. For more information, visit ***http://www.irs.gov/efile/index.html***.
- The Participant will adhere to industry best practices to ensure the taxpayer return information entrusted to them is secure and the privacy of such information is maintained. In any instance where a Participant contracts with a service provider to obtain technology services, it will adhere to this standard. To the extent multiple Participants rely on a single service provider for front or back office services (not ISP services), it is even more critical that such taxpayer security and privacy be maintained with respect to others who share these services.
- A Participant's website will be functionally adequate and consistent with the Participant's offer in permitting a taxpayer to complete their return. Failure to comply may result in the Participant's removal from the Partners Page.
- Whenever taxpayers are requested or required to provide their SSN, it must be part of a secure session. Participants are not permitted to use SSNs as a requested field for registration purposes or for establishing a taxpayer account on-line.
- The Participant will display the IRS *e-file* logo on the landing page of its website. **The e-file logo should be a click-through to the IRS e-file landing page *www.irs.gov/efile***. If the e-file logo is displayed on other web pages in addition to the landing page of the Participant, the logo(s) should be a click-through to the IRS e-file landing page. The e-file logo and guidelines can be downloaded from ***http://www.irs.gov***.
- The Participant's website will not contain inappropriate content. Participant websites must meet the following criteria:
    - The site clearly relates to and complements existing information, products and services on IRS.gov.
    - The site contains relevant and useful content that will benefit our customers.
    - The site contains accurate and timely information.
    - The site provides information at no cost. The Participant will not link to sites whose primary purpose is to sell products or services (unless it is part of an approved agreement with IRS).
    - The site has an excellent overall quality and professional image.
    - The site is easy to navigate.
    - The site is a credible source for information. The site must be free of typos and errors so that it does not detract from the readability of the site.
    - The site does not exhibit hate, bias, or discrimination.
    - The site does not contain misleading or unsubstantiated claims or conflict with the mission of the IRS.

- The Participant must provide taxpayers a method to obtain the status of their tax return. Taxpayers can be directed to **"Where's My Tax Refund?"**. Taxpayers can get refund information about their Federal income tax return through the IRS' secure website 72 hours after IRS acknowledges receipt of their return. Note: the Where's My Refund? URL is *http://www.irs.gov/individuals/article/0,,id=96596,00.html*.
- The Participant will prominently display on the landing page of its website the promotion of income tax preparation and electronic filing for individuals eligible for EITC.
- The Participant is encouraged to offer a monetary incentive (reduced return preparation and electronic filing costs) to attract taxpayers.
- The Participant will disclose limitations in the forms and schedules that are likely to be needed to support their offerings. The Participant should clearly display a listing of the forms and schedules that will be offered either visible or accessible from the Participant's landing page.
- The Participant will clearly disclose a listing of the States that their software supports either visible or accessible from the Participant's landing page.
- The Participant is permitted to offer commercial products and services consistent with obtaining the positive consent of the user as described in 26 U.S.C. 7616 before offering fee-based products and services not related to tax preparation.
- The Participant will include a feature in their tax preparation software that will "time out" the session after no changes are made for a period of time consistent with best practices approved by privacy seal certification programs.
- The Participant shall report security incidents to the IRS as soon as possible but not later than one (1) hour after confirmation of the incident. For the purposes of this requirement, an event that can result in an unauthorized disclosure, misuse, modification, or destruction of taxpayer information shall be considered a reportable security incident. The instructions for submitting incident reports will be posted on *IRS.gov*. Visit *http://www.irs.gov/efile/article/0,,id=186487,00.html* for a draft of IRS' new security and privacy requirements for Authorized IRS e-file Providers.
- The Participant will submit written notification (*e.g.*, email) to the IRS of changes, additions and deletions to URLs, link descriptions, etc.
- The Participant will submit Performance Reports to the IRS Point of covering Filing Season and post Filing Season activity. The reports will cover information such as *e-file* statistics, website activity and anything else the IRS deems necessary. The IRS Point of Contact will provide written reporting instructions and requirements to accepted Participants.

PERFORMANCE STANDARDS

- The IRS will have the accepted Participant's hyperlink(s) available on the IRS website for the start of electronic filing, subject to the participant's passing of the annual Suitability, PATS testing, and website review. Hyperlinks will remain on the IRS e-file Partners Page through **October 15, 2009, or at the discretion of the IRS**.
- The IRS will randomize on a daily basis the offers of the Participants listed on the IRS *e-file* Partners Page.
- The IRS may establish a link from the IRS *e-file* Partners Page to the Free File web page and *vice versa*.
- The IRS will accept, if appropriate, the Participant's written request for changes/additions/deletions related to a URL, link description, etc.
- The IRS will review the Participant's website(s) at any time to ensure that participation requirements are met.
- The IRS will not endorse specific offerings or products, but will promote the IRS *e-file* Partners Page. A "Site Disclaimer" will be displayed upon exiting the IRS website before the user enters the Participant's website.

PARTICIPATION TERMS

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

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

APPLICATION PROCESS

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

- Provide Primary and Secondary Points of Contact (name, title, address, cell/telephone number, fax number and email address) for discussion of your application and program participation.
- Identify the Applicant's secure website.
- Identify the Applicant's tax preparation software and the States it will support.
- Identify the IRS forms and schedules that support your offering(s).
- Include the Applicant's Electronic Filer Identification Number(s) (EFIN) and/or Electronic Transmitter Identification Number (ETIN).
- Indicate if the Applicant will offer the Spanish versions for online filing and/or downloadable software. Describe customer service support for assisting Hispanic taxpayers.
- Identify the Applicant's hyperlink(s) and provide a short description **(not to exceed 200 characters including spaces)** of the services and products to be promoted on the IRS *e-file* Partners Page. In addition, the Applicant should provide the associated URL(s). **URL(s) cannot contain the word "IRS."** Indicate the category for each hyperlink:

    - e-file Solutions for Taxpayers
    - Software and Other Tools for Your e-file Business
    - e-file Opportunities for Financial Institutions and Employers

- Pay Your Taxes Electronically

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

IRS POINT OF CONTACT/APPLICATION SUBMISSION

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

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

If you wish to have a hyperlink(s) on the IRS *e-file* Partners Page for the start of electronic filing, your application must be submitted by December 10, 2008. If your application is received after the deadline, there is no guarantee that it will be accepted by the IRS.

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

APPLICATION EVALUATION

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

ACCEPTANCE/DENIAL OF APPLICATION

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

e-Help

If you have any questions related to e-products/electronic filing, you can contact the e-Help Desk toll-free at **1–866–255–0654**. The e-Help desk assistors are ready to respond to non-account related questions and issues. You can also go to ***http://www.irs.gov*** where the IRS houses a variety of information which impacts the tax professional.

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

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