Internal Revenue bulletin

Bulletin No. 2008-46
November 17, 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.

INCOME TAX

T.D. 9416, page 1142.
REG–156779–06, page 1160.

Final, temporary, and proposed regulations under section 901 of the Code provide guidance relating to the determination of the amount of taxes paid for purposes of the foreign tax credit. The regulations affect taxpayers that claim direct and indirect foreign tax credits. A public hearing on the proposed regulations is scheduled for December 11, 2008.

REG–164370–05, page 1157.

Proposed regulations under section 108(e)(8) of the Code provide guidance in determining the discharge of indebtedness income of a partnership that transfers a partnership interest to a creditor in satisfaction of the partnership's indebtedness. In particular, the regulations address how the fair market value of a partnership interest transferred by the debtor partnership to the creditor in satisfaction of the partnership's indebtedness is determined. The regulations also provide that section 721 generally applies to a contribution of a partnership's indebtedness by a creditor to the partnership in exchange for an interest in the partnership. A public hearing is scheduled for February 19, 2009.

EMPLOYEE PLANS

Announcement 2008–107, page 1162.

This document solicits comments as to what should be included in implementing regulations (REG–123829–08) under the Genetic Information Nondiscrimination Act of 2008. Comments must be submitted on or before December 9, 2008.

EMPLOYMENT TAX

Notice 2008–103, page 1156.

2009 social security contribution and benefit base; domestic employee coverage threshold. The Commissioner of the Social Security Administration has announced (1) the OASDI contribution and benefit base for remuneration paid in 2009 and self-employment income earned in taxable years beginning in 2009, and (2) the domestic employee coverage threshold amount for 2009.

EXCISE TAX

Announcement 2008–103, page 1161.

This announcement provides guidance to domestic coal producers and exporters regarding the submission of claims for refund of the coal excise tax paid under section 4121 on coal exported on or after October 1, 1990, and on or before October 3, 2008. Claims must be filed by November 3, 2008.

Announcement 2008–107, page 1162.

This document solicits comments as to what should be included in implementing regulations (REG–123829–08) under the Genetic Information Nondiscrimination Act of 2008. Comments must be submitted on or before December 9, 2008.

(Continued on the next page)

Announcement of Declaratory Judgment Proceedings Under Section 7428 begins on page 1166.
Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

ADMINISTRATIVE

T.D. 9426, page 1153.
Final regulations under section 7804 of the Code amend 26 CFR 801 to clarify when quantity measures, which are not tax enforcement results, may be used in measuring organizational and employee performance.

Announcement 2008–108, page 1165.
This document provides notice of a public hearing on proposed regulations (REG–115457–08, 2008–33 I.R.B. 390) by cross-reference to temporary regulations relating to the simplification of procedures for automatic extensions of time to file certain returns. These simplified procedures are aimed at reducing overall taxpayer burden. The public hearing is scheduled for January 13, 2009.

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 901.—Taxes of Foreign Countries and of Possessions of United States

26 CFR 1.901–1: Allowance of credit for taxes.

T.D. 9416

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Determining the Amount of Taxes Paid for Purposes of Section 901

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations under section 901 of the Internal Revenue Code providing guidance relating to the determination of the amount of taxes paid for purposes of the foreign tax credit. The regulations affect taxpayers that claim direct and indirect foreign tax credits. The text of these temporary regulations also serves as the text of the proposed regulations (REG–156779–06) published in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective on July 16, 2008.

Applicability Dates: For dates of applicability, see §1.901–1T(j) and §1.901–2T(h)(2).

FOR FURTHER INFORMATION CONTACT: Michael Gilman, (202) 622–3850 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On March 30, 2007, the **Federal Register** published proposed amendments (REG–156779–06, 2007–17 I.R.B. 1015 [72 FR 15081]) to the Income Tax Regulations (26 CFR part I) under section 901 of the Internal Revenue Code (Code) relating to the amount of taxes paid for purposes of the foreign tax credit (the "2007 proposed regulations"). The 2007 proposed regulations would revise §1.901–2(e)(5) in two ways. First, for purposes of §1.901–2(e)(5), the 2007 proposed regulations would treat as a single taxpayer all foreign entities in which the same U.S. person has a direct or indirect interest of 80 percent or more (a "U.S.-owned foreign group"). Second, the 2007 proposed regulations would treat amounts paid to a foreign taxing authority as noncompulsory payments if those amounts are attributable to certain structured passive investment arrangements. The 2007 proposed regulations provide that the regulations will be effective for foreign taxes paid or accrued during taxable years of the taxpayer ending on or after the date on which the regulations are finalized.

The IRS and Treasury Department received written comments on the 2007 proposed regulations, which are discussed in this preamble. A public hearing was held on July 30, 2007. In response to written comments, the IRS and Treasury Department determined that the proposed change to §1.901–2(e)(5) relating to U.S.-owned foreign groups may lead to inappropriate results in certain cases. Accordingly, on November 19, 2007, the IRS and Treasury Department issued Notice 2007–95, 2007–49 I.R.B. 1091 (see §601.601(d)(2)(ii)(*b*)). Notice 2007–95 provided that the proposed rule for U.S.-owned foreign groups would be severed from the portion of the 2007 proposed regulations addressing the treatment of foreign payments attributable to certain structured passive investment arrangements. Notice 2007–95 further provided that the proposed rules for U.S.-owned groups would be effective for taxable years beginning after final regulations are published in the **Federal Register**.

In light of comments, the IRS and the Treasury Department believe that it is appropriate to issue new proposed and temporary regulations addressing the treatment of foreign payments attributable to structured passive investment arrangements. These new regulations make several changes to the 2007 proposed regulations to take into account comments received, while adopting without amendment substantial portions of the 2007 proposed regulations. The new temporary and proposed regulations will permit the IRS to enforce the rules relating to structured passive investment arrangements, while also allowing taxpayers a further opportunity for comment. The significant comments and revisions are described in this preamble.

Explanation of Provisions

The temporary regulations address the application of §1.901–2(e)(5) in cases in which a person claiming foreign tax credits is a party to a structured passive investment arrangement. These complex arrangements are intentionally structured to create a foreign tax liability when, removed from the elaborately engineered structure, the basic underlying business transaction generally would result in significantly less, or even no, foreign taxes. The parties use these arrangements to exploit differences between U.S. and foreign law in order to permit a person to claim a foreign tax credit for the purported foreign tax payments while also allowing the counterparty to claim a duplicative foreign tax benefit. The person claiming foreign tax credits and the counterparty share the cost of the purported foreign tax payments through the pricing of the arrangement.

The temporary regulations treat foreign payments attributable to such arrangements as noncompulsory payments under §1.901–2(e)(5) and, thus, disallow foreign tax credits for such amounts. For periods prior to the effective date of the temporary regulations, the IRS will continue to utilize all available tools under current law to challenge the U.S. tax results claimed in connection with these and other similar abusive arrangements, including the substance over form doctrine, the economic substance doctrine, debt-equity principles, tax ownership principles, other provisions

of §1.901–2, section 269, and the partnership anti-abuse rules of §1.701–2.

The temporary regulations retain the general rule in the existing regulations that a taxpayer need not alter its form of doing business or the form of any transaction in order to reduce its foreign tax liability. However, §1.901–2T(e)(5)(iv)(A) provides that, notwithstanding the general rule, an amount paid to a foreign country (a "foreign payment") is not a compulsory payment, and thus is not an amount of tax paid, if the foreign payment is attributable to a structured passive investment arrangement. For this purpose, §1.901–2T(e)(5)(iv)(B) defines a structured passive investment arrangement as an arrangement that satisfies six conditions. The six conditions consist of features that are common to arrangements that are intentionally structured to generate the foreign payment.

A. *Section 1.901–2T(e)(5)(iv)(B)(1): Special Purpose Vehicle*

The first condition provided in the 2007 proposed regulations is that the arrangement utilizes an entity that meets two requirements (an "SPV"). The first requirement is that substantially all of the gross income (for United States tax purposes) of the entity, if any, is attributable to passive investment income and substantially all of the assets of the entity are assets held to produce such passive investment income. The second requirement is that there is a purported foreign tax payment attributable to income of the entity. The purported foreign tax may be paid by the entity itself, by the owner(s) of the entity (if the entity is treated as a pass-through entity under foreign law) or by a lower-tier entity (if the lower-tier entity is treated as a pass-through entity under U.S. law).

For purposes of the first requirement, §1.901–2(e)(5)(iv)(C)(*4*) of the 2007 proposed regulations defines passive investment income as income described in section 954(c), with two modifications. The first modification excludes income of a holding company attributable to qualifying equity interests in lower-tier entities that are predominantly engaged in the active conduct of a trade or business (or that are themselves holding companies). The second modification is that passive investment income is determined by disregarding sections 954(c)(3) and 954(c)(6) and by treating income attributable to transactions with a counterparty as ineligible for the exclusions under sections 954(h) and 954(i).

One commentator recommended, in lieu of the holding company rules in the 2007 proposed regulations, applying look-through rules to income and assets of lower-tier entities similar to the rules of section 1297(c), under which a foreign corporation, if it owns at least 25 percent of the stock of another corporation, is treated as owning its proportionate share of the assets of the other corporation and receiving its proportionate share of the income of the other corporation. Alternatively, the commentator recommended that the holding company rules in the 2007 proposed regulations be modified to eliminate the requirement that substantially all of the assets of the tested entity must consist of qualified equity interests; to permit income other than dividends (for example, interest and royalties) received from a lower-tier entity that is predominantly engaged in an active business to qualify as active income; and to treat a lower-tier entity as an operating company if more than 50 percent of either its assets or its income meet the active business test. In addition, commentators suggested eliminating the requirement that the U.S. party and the counterparty must share the opportunity of gain or loss with respect to the lower-tier entity, or replacing it with a rule disqualifying the equity interest if contractual restrictions limit the counterparty's recourse against the lower-tier entity's income or assets. Finally, commentators suggested that preferred stock should be treated as a qualifying equity interest.

These comments were not adopted. The holding company exception is intended only to clarify that a joint venture arrangement is not treated as a structured passive investment arrangement solely because it is conducted through a holding company structure, not to liberalize the definition of structured passive investment arrangements. The requirement that the parties share the opportunity for gain and risk of loss with respect to the holding company's assets is intended to ensure that the arrangement between the parties is a *bona fide* joint venture. In this regard, a commentator recommended that the regulations be clarified to provide that the holding company exception is not satisfied if either the U.S. party or the counterparty is solely a creditor with respect to the entity because it either owns a hybrid instrument that is debt for U.S. tax purposes or purchases stock subject to an obligation to sell the stock back. This modification is reflected in §1.901–2T(e)(5)(iv)(C)(*5*)(*ii*) of the temporary regulations. In addition, *Example 2* of §1.901–2T(e)(5)(iv)(D) is modified to clarify that the holding company exception is not met if the counterparty's interest is acquired in a sale-repurchase transaction.

The IRS and Treasury Department recognize that under the regulations an entity conducting business through an active foreign subsidiary may fail to meet the holding company exception, even though the entity would not be treated as an SPV under the "substantially all" test if it operated the subsidiary's business directly through a branch operation. The IRS and Treasury Department believe this result is appropriate because the segregation of active business income and assets in a lower-tier entity may facilitate the use of an upper-tier entity to conduct a structured passive investment arrangement.

The IRS and Treasury Department remain concerned that taxpayers may continue to enter into structured passive investment arrangements designed to generate foreign tax credits through entities that meet the technical requirements of the holding company exception. The IRS and Treasury Department intend to monitor the use of holding companies to facilitate abusive foreign tax credit arrangements, utilize all available tools under current law to challenge the U.S. tax results claimed in connection with such arrangements (including the substance over form doctrine, the economic substance doctrine, debt-equity principles, tax ownership principles, other provisions of §1.901–2, section 269, and the partnership anti-abuse rules of §1.701–2) in appropriate cases, and to issue additional regulations modifying or eliminating the holding company exception if necessary to prevent abuse.

The second modification in the 2007 proposed regulations is that passive investment income is determined by disregarding sections 954(c)(3) and 954(c)(6) and by treating income attributable to transactions with a counterparty as ineligible for the exclusions under sections

954(h) and 954(i). The IRS and Treasury Department received a number of comments suggesting that the definition of passive investment income should be narrowed by excluding income that would be treated as non-subpart F income under section 954(c)(3) or 954(c)(6), excluding income from unrelated persons other than the counterparty, or eliminating the requirement in section 954(h) that the tested entity's activity be conducted in the entity's "home country." Other commentators suggested substituting other tests for the active financing exception in section 954(h), such as exempting financial services income as defined in section 904(d), with or without modification. For example, commentators suggested various modifications, such as excluding income derived from unrelated persons or from direct activities of employees of the tested entity; exempting any income derived from or related to transactions with customers; exempting income that would be considered attributable to an active foreign trade or business under the principles of section 864 and §1.367(a)–2T(b); or exempting income other than income from "tainted" assets such as cash or cash equivalents, stock or notes of persons related to the U.S. party or counterparty, or assets giving rise to U.S. source income. One commentator suggested that payments described in section 954(c)(3) should not be treated as passive investment income to the extent the payment was deductible under foreign law and the corresponding income inclusion by the tested entity did not result in a net increase in foreign taxes paid. This commentator suggested that the result in the U.S. borrower transaction described in *Example 2* of the 2007 proposed regulations was inappropriate since the foreign tax paid by the SPV was offset by a reduction in tax paid by the CFC borrower.

The IRS and Treasury Department carefully considered these suggestions but ultimately determined that none of the suggested approaches has significant advantages over relying on section 954(h) to determine whether income from financing activities is sufficiently active that it should be excluded from passive investment income for purposes of these regulations. Section 954(h) includes detailed requirements that ensure that the entity is predominantly engaged in the active conduct of a banking, financing or similar business and conducts substantial activity with respect to such business. In addition, the IRS and Treasury Department continue to believe it is not appropriate to exclude income described in sections 954(c)(3) and 954(c)(6) from passive investment income, because financing arrangements between related parties that are engaged in the active conduct of a trade or business are commonly used in the structured transactions that are the target of these regulations. The IRS and Treasury Department also do not believe that U.S. borrower transactions should not be considered to result in a net increase in foreign tax, since in the absence of the structured passive investment arrangement the CFC borrower would still reduce its foreign tax by reason of the interest expense deduction but the U.S. party would not claim foreign tax credits for foreign payments attributable to income in the SPV that is in substance the foreign lender's interest income. Accordingly, §1.901–2T(e)(5)(iv)(C)(*5*)(*i*) generally retains the definition of passive investment income in the 2007 proposed regulations.

However, the temporary regulations include two modifications in response to comments. First, the IRS and Treasury Department agree it is appropriate to require the entity's activities to be conducted directly by its own employees rather than by employees of affiliates, because the purpose of the SPV condition is to distinguish between active entities and those with largely passive income, and it is reasonable to require an entity engaged in an active business to conduct that business through its own employees. Accordingly, §1.901–2T(e)(5)(iv)(C)(*5*)(*i*) provides that section 954(h)(3)(E) shall not apply, and that the entity must conduct substantial activity through its own employees.

Second, the IRS and Treasury Department agree that the requirement that activities be conducted in the entity's "home country" reflects a subpart F policy that is more restrictive than necessary for purposes of these regulations. Accordingly, §1.901–2T(e)(5)(iv)(C)(*5*)(*i*) provides that for purposes of these regulations the term *home country* means any foreign country.

Concerning the requirement in §1.901–2(e)(5)(iv)(B)(*1*)(*i*) of the 2007 proposed regulations that substantially all of the gross income of the entity be passive investment income and substantially all of the entity's assets are assets held to produce such passive investment income, one commentator recommended that the regulations provide examples illustrating situations in which such requirement is met. The IRS and Treasury Department did not adopt this comment because the "substantially all" test requires evaluation of all the facts and circumstances and cannot be satisfied by reference to a specific percentage benchmark.

Several commentators requested that the regulations clarify the time at which the six conditions must be met to result in a structured passive investment arrangement. Section 1.901–2T(e)(5)(iv)(B)(*1*)(*ii*) of the temporary regulations is revised to clarify that the foreign payment must be made with respect to a U.S. tax year in which substantially all of the gross income (for U.S. tax purposes) of the entity, if any, is attributable to passive investment income and substantially all of the assets of the entity are assets held to produce such passive investment income. This clarification is intended to ensure that foreign tax credits are disallowed for foreign payments that relate primarily to passive investment income, but not for taxes that relate to active business income earned in an earlier or later year when the entity is not treated as an SPV. The regulations do not, however, require all six conditions to be met in the same tax year. For example, the regulations disallow credits for foreign payments with respect to income of an SPV even if the U.S. party acquires its interest, or a hybrid instrument is issued to the counterparty, after the foreign payments are made.

Other commentators recommended that the regulations eliminate the SPV condition and treat as noncompulsory payments only those foreign payments that directly relate to passive investment income, or with respect to which duplicative tax benefits are claimed. The IRS and Treasury Department did not adopt such an approach in the temporary regulations because of the administrative difficulty of tracing specific foreign payments to specific income or to the duplicative tax benefits. Accordingly, the temporary regulations retain the SPV condition and the approach of treating all foreign payments attributable to a structured passive investment arrangement as noncompulsory. However, the IRS and

Treasury Department recognize that an element of the arrangements intended to be covered by the regulations is that they are designed to generate duplicative tax benefits, and that some connection between the counterparty's foreign tax benefit and the U.S. party's share of the foreign payments should be a pre-condition to the finding of a structured passive investment arrangement. Accordingly, as described in section D of this preamble, the foreign tax benefit condition is revised to provide that the counterparty's foreign tax benefit must correspond to 10 percent or more of the U.S. party's share of the foreign payments or the U.S. party's share (under U.S. tax principles) of the foreign tax base used to compute such payments.

B. *Section 1.901–2T(e)(5)(iv)(B)(2): U.S. Party*

Section 1.901–2T(e)(5)(iv)(B)(*2*) of the temporary regulations adopts without change the second overall condition of the 2007 proposed regulations that a person (a "U.S. party") would be eligible to claim a credit under section 901(a) (including a credit for foreign taxes deemed paid under section 902 or 960) for all or a portion of the foreign payment if such payment were an amount of tax paid.

One commentator requested that the regulations be amended to clarify that the "U.S. party" condition must be met at the same time as the other five conditions. The temporary regulations do not include this condition because the IRS and Treasury Department believe it is inappropriate to exempt arrangements that are structured so that the U.S. party claims a credit in a taxable year or period that is not the same taxable year or period in which the counterparty is entitled to a foreign tax benefit. In addition, the IRS and Treasury Department are concerned that this modification would allow a person to acquire an interest in an SPV and claim credits with respect to purported foreign taxes paid in an earlier period by the SPV in connection with an arrangement that met the other five conditions of the regulations.

C. *Section 1.901–2T(e)(5)(iv)(B)(3): Direct Investment*

The third overall condition provided in the 2007 proposed regulations is that the foreign payment or payments are (or are expected to be) substantially greater than the amount of credits, if any, that the U.S. party would reasonably expect to be eligible to claim under section 901(a) if such U.S. party directly owned its proportionate share of the assets owned by the SPV, other than through a branch, a permanent establishment or any other arrangement (such as an agency arrangement) that would subject the income generated by its share of the assets to a net basis foreign tax. Commentators recommended several changes to the direct investment condition, several of which are adopted in the temporary regulations. First, in order to reach appropriate results in cases where more than one person owns an equity interest in the SPV for U.S. tax purposes, the temporary regulations amend the direct investment test to compare the U.S. party's proportionate share of the foreign payment made by the SPV to the amount of foreign tax the U.S. party would be eligible to credit if the U.S. party directly owned its proportionate share of the assets. Second, the temporary regulations clarify that a dual resident corporation that is an SPV meets the direct investment condition since its ownership of the passive assets is treated the same as ownership through a branch operation. Third, a commentator suggested that the direct investment test of the 2007 proposed regulations could be avoided by entering into a sale-repurchase transaction using an SPV that acquires passive assets subject to foreign withholding tax. This commentator recommended that the direct investment condition be revised to reduce the value of the U.S. party's interest by any amount advanced by the foreign counterparty that is treated as debt for U.S. tax purposes but as equity for foreign tax purposes. The IRS and Treasury Department agree that situations where the SPV's income is subject to gross basis foreign taxes raise the same foreign tax credit policy concerns as situations where the SPV's income is subject to net basis foreign taxes. The IRS and Treasury Department, however, believe the commentator's recommended solution is incomplete, since the other conditions of the regulations can be met by structures employing techniques other than sale-repurchase agreements. Accordingly, the temporary regulations provide that the U.S. party's proportionate share of the SPV's assets does not include any assets that produce income subject to gross basis withholding tax.

Several commentators recommended that the regulations include an exception for certain transactions in which the amount of the foreign payments attributable to income of an SPV does not substantially exceed the amount of foreign taxes that would have been paid by a controlled foreign corporation that owns the SPV in the absence of the arrangement. The commentators suggested that such foreign payments should not be treated as noncompulsory payments because they effectively substitute for taxes that would have been imposed on the controlled foreign corporation in the absence of the arrangement.

These comments raise the fundamental question as to the appropriate baseline to which such transactions should be compared to determine if there has been a significant increase in the total amount of foreign taxes paid. Although the IRS and Treasury Department carefully considered an exception from the definition of structured passive investment arrangements for such transactions, the IRS and Treasury Department have been unable to develop an exception that can be administered by the IRS and that does not exclude abusive cases. Accordingly, the temporary regulations do not include this exception.

D. *Section 1.901–2T(e)(5)(iv)(B)(4): Foreign Tax Benefit*

The fourth condition provided in the 2007 proposed regulations is that the arrangement is structured in such a manner that it results in a foreign tax benefit (such as a credit, deduction, loss, exemption or a similar tax benefit) for a counterparty or for a person that is related to the counterparty, but not related to the U.S. party. In response to comments, to relieve administrative burdens these regulations clarify that while the benefit must be reasonably expected, there is no requirement to show that the benefit be intended or actually realized. The temporary regulations also provide that the ability to surrender the use of a tax loss to another person is a foreign tax benefit because a foreign tax benefit need only be made available to a counterparty. See *Example 9* of §1.901–2T(e)(5)(iv)(D).

Several commentators recommended that the regulations be revised to require a causal relationship between one or more of the six conditions. For example, one commentator recommended adding a requirement that the foreign tax benefit either relate to the foreign tax paid by the SPV or result from the counterparty being treated for foreign but not U.S. tax purposes as owning an equity interest in the SPV or a portion of the SPV's assets. Another commentator suggested requiring that the inconsistent aspect of the arrangement be created or used to achieve the foreign tax benefit. Another commentator recommended requiring that the foreign tax benefit would not have been allowed or allowable "but for" the existence of one or more of the other conditions.

In response to the comments, the temporary regulations revise the "foreign tax benefit" condition to provide that the credit, deduction, loss, exemption, exclusion or other tax benefit must correspond to 10 percent or more of the U.S. party's share (for U.S. tax purposes) of the foreign payment or 10 percent or more of the foreign tax base with respect to which the U.S. party's share of the foreign payment is imposed. The revisions are intended to clarify that a joint venture that does not involve any duplication of tax benefits is not covered by the temporary regulations. At the same time, the temporary regulations provide that the duplication need not be direct. For example, while the U.S. party generally seeks to claim foreign tax credits in the United States for foreign payments attributable to income of the SPV, the counterparty's foreign tax benefit may consist of tax-exempt income corresponding to the SPV's income with respect to which foreign payments claimed as credits by the U.S. party were made and deductions or losses attributable to payments of corresponding amounts to the SPV or U.S. party. See *Example 3* of §1.901–2T(e)(5)(iv)(D).

E. *Section 1.901–2T(e)(5)(iv)(B)(5): Counterparty*

The 2007 proposed regulations define a counterparty as a person (other than the SPV) that is unrelated to the U.S. party and that (i) directly or indirectly owns 10 percent or more of the equity of the SPV under the tax laws of a foreign country in which such person is subject to tax on the basis of place of management, place of incorporation or similar criterion or otherwise subject to a net basis foreign tax or (ii) acquires 20 percent or more of the assets of the SPV under the tax laws of a foreign country in which such person is subject to tax on the basis of place of management, place of incorporation or similar criterion or otherwise subject to a net basis foreign tax.

Commentators proposed that the counterparty factor be amended to include certain related parties. Commentators noted that structured transactions engaged in by related persons under common foreign ownership present the same tax policy concerns as transactions between unrelated persons. However, these same commentators noted that structured transactions engaged in by related parties that are under common U.S. ownership do not pose the same tax policy concerns because the reduction in foreign tax liability obtained by the U.S.-controlled foreign counterparty will result in a corresponding increase in U.S. taxes when the foreign counterparty repatriates its earnings to the United States. The IRS and Treasury Department agree with these comments. Consequently, the temporary regulations amend the definition of a counterparty to include related persons, but excluding cases where the U.S. party is a U.S. corporation or individual that owns (directly or indirectly) at least 80 percent of the value of the potential counterparty and cases where at least 80 percent of the value of the U.S. party and the potential counterparty are owned (directly or indirectly) by the same U.S. corporation or individual.

Several commentators also suggested that the requirement that the counterparty own at least 10 percent (directly or indirectly) of the equity of the SPV or acquire at least 20 percent of the assets of the SPV should be revised. Some commentators proposed these thresholds be increased to 50 percent. Other commentators proposed that the ownership of all foreign parties deriving a foreign tax benefit should be aggregated to determine whether the thresholds are met. The IRS and Treasury Department agree that the regulatory conditions should be revised to better reflect that the counterparty is entitled to more than a nominal foreign tax benefit. Accordingly, the temporary regulations eliminate the percentage ownership thresholds from the counterparty definition, and modify the definition of a foreign tax benefit in §1.901–2T(e)(5)(iv)(B)(*4*), as described in section D of this preamble.

F. *Section 1.901–2T(e)(5)(iv)(B)(6): Inconsistent Treatment*

The sixth condition in the 2007 proposed regulations is that the U.S. and an applicable foreign country treat the arrangement differently under their respective tax systems. For this purpose, an applicable foreign country is any foreign country in which either the counterparty, a person related to the counterparty or the SPV is subject to net basis tax. To provide clarity and limit the scope of this factor, the 2007 proposed regulations provide that the arrangement must be subject to one of four specified types of inconsistent treatment. Specifically, the U.S. and the foreign country (or countries) must treat one or more of the following aspects of the arrangement differently, and the U.S. treatment of the inconsistent aspect must materially affect the amount of foreign tax credits claimed, or the amount of income recognized, by the U.S. party to the arrangement: (i) the classification of an entity as a corporation or other entity subject to an entity-level tax, a partnership or other flow-through entity or an entity that is disregarded for tax purposes; (ii) the characterization as debt, equity or an instrument that is disregarded for tax purposes of an instrument issued in the transaction; (iii) the proportion of the equity of the SPV (or an entity that directly or indirectly owns the SPV) that is considered to be owned directly or indirectly by the U.S. party and the counterparty; or (iv) the amount of taxable income of the SPV for one or more tax years during which the arrangement is in effect.

Commentators recommended that this condition be clarified so that the U.S. treatment of the inconsistent aspect must materially increase the amount of the U.S. party's foreign tax credits or materially decrease the U.S. party's income for U.S. tax purposes. The temporary regulations reflect this clarification. In addition, commentators requested that this factor be limited to instances when the inconsistent treatment is reasonably expected to result in a permanent difference in the U.S.

party's income or foreign tax credits. The IRS and Treasury Department believe that the revisions to the foreign tax benefit condition described in Section D of this preamble are sufficient to establish the appropriate linkage between the inconsistent U.S. and foreign law treatment and the duplicative tax benefits. Accordingly, the temporary regulations retain the inconsistent treatment factor without further changes.

One commentator also recommended that the inconsistent treatment condition be narrowed to instances where the inconsistent treatment under U.S. and foreign law related to definitions of ownership and the amount of the SPV's taxable income. The IRS and Treasury Department have not adopted this recommendation because it would cause certain types of abusive arrangements to fall outside the scope of the regulations and because differences in entity classification are features common to structured passive investment arrangements.

G. *Other Comments*

Commentators also made suggestions that did not relate to any single factor. For example, commentators also requested clarification that the foreign payments treated as noncompulsory amounts under the regulation may be deductible payments under sections 162 and 212 and reduce a foreign corporation's earnings and profits for purposes of subpart F. The IRS and Treasury Department believe that providing guidance regarding sections 162, 212, and 964 is beyond the scope of this regulation project. The usual rules for determining the deductibility of a payment and determining the earnings and profits of a foreign corporation for subpart F purposes apply.

In addition, commentators requested that foreign payments attributable to a structured passive investment arrangement be excluded from the scope of the regulations if the arrangement has a valid business purpose. Other commentators suggested that the regulations adopt a broad anti-abuse rule that would deny a foreign tax credit in any case where allowance of the credit would be inconsistent with the purpose of the foreign tax credit regime. The IRS and Treasury Department are concerned that these approaches would create uncertainty for both taxpayers and the IRS. The IRS and Treasury Department have concluded that, at this time, a targeted rule denying foreign tax credits in arrangements described in the temporary regulations is more appropriate.

H. *Other Examples*

In response to comments, the temporary regulations include more examples illustrating additional variations of the structured passive investment arrangements that are covered by the regulations. For example, new *Example 3* illustrates a U.S. borrower transaction in which a foreign lender acquires assets instead of an equity interest in the SPV and new *Example 10* illustrates a joint venture in which the counterparty's foreign tax benefits do not correspond to the U.S. party's share of the base with respect to which the foreign payment is imposed. Modifications to examples in the 2007 proposed regulations were also necessary to reflect comments received and other changes to the regulations.

I. *Effective/Applicability Dates*

The 2007 proposed regulations were proposed to be effective for foreign taxes paid or accrued during taxable years of the taxpayer ending on or after the date on which the final regulations are published in the **Federal Register**. A commentator observed that the final regulations would potentially be retroactively effective because the regulations would apply, for example, to calendar year taxpayers as of January 1 of the year in which the final regulations are published in the **Federal Register** and to taxpayers that participated in structured passive investment arrangements involving entities with taxable years that differ from the U.S. taxpayers' taxable years. Commentators also requested clarification of whether the relevant taxable year for purposes of the effective date is the taxable year of the SPV in which it pays or accrues the purported foreign taxes, or the taxable year of the U.S. taxpayer in which it claims a credit. For example, commentators observed that if the taxable year of the U.S. taxpayer in which it claims a credit is the relevant taxable year, the final regulations would apply to U.S. shareholders of controlled foreign corporations where the shareholder claims a deemed paid credit under section 902 with respect to foreign taxes paid by the foreign corporation in years prior to the effective date of the regulations. These commentators recommended that the regulations provide that the relevant taxable year is the SPV's taxable year. Commentators also recommended that the final regulations apply only to foreign taxes paid or accrued in taxable years beginning after the date the final regulations are published, or only to foreign taxes paid or accrued with respect to income accrued after the date the final regulations are published.

The IRS and Treasury Department have not adopted the recommendation to delay the effective date of these regulations to apply only in tax years beginning after the regulations are published. The IRS and Treasury Department generally believe the regulations should apply to disallow credits for foreign payments that would otherwise be eligible to be claimed as credits in taxable years ending after the regulations are published. The IRS and Treasury Department agree, however, that the regulations should not apply to foreign taxes paid or accrued by a foreign corporation in a U.S. taxable year of the foreign corporation ending prior to the effective date of the regulations, provided that such year ends prior to the first taxable year of the domestic corporate shareholder for which these regulations are first applicable.

Accordingly, the effective date for these regulations is July 16, 2008. The regulations generally apply to foreign payments that, if they were an amount of tax paid, would be considered paid or accrued by a U.S. or foreign entity in taxable years ending on or after July 16, 2008. In the case of foreign payments by a foreign corporation that has a domestic corporate shareholder, the regulations also apply to such payments that would be considered paid or accrued in the foreign corporation's U.S. taxable years ending with or within taxable years of its domestic corporate shareholder ending on or after July 16, 2008. Finally, in the case of foreign payments by a partnership, trust or estate for which any partner or beneficiary would otherwise be eligible to claim a foreign tax credit, the regulations also apply to payments that would be considered paid or accrued in taxable years ending with or within taxable years of such

partners or beneficiaries ending on or after July 16, 2008.

No inference is intended regarding the U.S. tax consequences of structured passive investment arrangements prior to the effective date of the regulations.

For periods after the effective date of the temporary regulations, the IRS and Treasury Department will continue to scrutinize other arrangements that are not covered by the regulations but are inconsistent with the purpose of the foreign tax credit. Such arrangements may include arrangements that are similar to arrangements described in the temporary regulations, but that do not meet all of the conditions included in the temporary regulations. The IRS will continue to challenge the claimed U.S. tax results in appropriate cases. In addition, the IRS and Treasury Department may issue additional regulations in the future in order to address such other arrangements.

J. *Miscellaneous Amendments*

The temporary regulations also amend §1.901–1(a) and (b) to reflect statutory changes made by the Foreign Investors Tax Act of 1966 (Public Law 89–809 (80 Stat. 1539), section 106(b)), the Tax Reform Act of 1976 (Public Law 94–455 (90 Stat. 1520), section 1901(a)(114)), and the American Jobs Creation Act of 2004 (Public Law 108–357 (118 Stat. 1418–20), section 405(b)).

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. For applicability of the Regulatory Flexibility Act, please refer to the cross-referenced notice of proposed rulemaking published elsewhere in this issue of the Bulletin. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Drafting Information

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

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Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.901–1 is amended by revising paragraphs (a) and (b) to read as follows:

§1.901–1 Allowance of credit for taxes.

(a) and (b). [Reserved]. For further guidance, see §1.901–1T(a) and (b).

* * * * *

Par. 3. Section 1.901–1T is added to read as follows:

§1.901–1T Allowance of credit for taxes (temporary).

(a) *In general*. Citizens of the United States, domestic corporations, and certain aliens resident in the United States or Puerto Rico may choose to claim a credit, as provided in section 901, against the tax imposed by chapter 1 of the Code for taxes paid or accrued to foreign countries and possessions of the United States, subject to the conditions prescribed in paragraphs (a)(1) through (a)(3) and paragraph (b) of this section.

(1) *Citizen of the United States*. A citizen of the United States, whether resident or nonresident, may claim a credit for—

(i) The amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

(ii) His share of any such taxes of a partnership of which he is a member, or of an estate or trust of which he is a beneficiary.

(2) *Domestic corporation*. A domestic corporation may claim a credit for—

(i) The amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States;

(ii) Its share of any such taxes of a partnership of which it is a member, or of an estate or trust of which it is a beneficiary; and

(iii) The taxes deemed to have been paid under section 902 or 960.

(3) *Alien resident of the United States or Puerto Rico*. Except as provided in a Presidential proclamation described in section 901(c), an alien resident of the United States, or an alien individual who is a *bona fide* resident of Puerto Rico during the entire taxable year, may claim a credit for—

(i) The amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

(ii) His share of any such taxes of a partnership of which he is a member, or of an estate or trust of which he is a beneficiary.

(b) *Limitations*. Certain Code sections, including sections 814, 901(e) through (l), 906, 907, 908, 911, 999, and 6038, limit the credit against the tax imposed by chapter 1 of the Code for certain foreign taxes.

(c) through (i) [Reserved]. For further guidance, see §1.901–1(c) through (i).

(j) *Effective/applicability date*. This section applies to taxable years beginning after July 16, 2008.

(k) *Expiration date*. The applicability of this section expires on July 15, 2011.

Par. 4. Section 1.901–2 is amended by adding paragraphs (e)(5)(iii) and (e)(5)(iv) and revising paragraph (h) to read as follows:

§1.901–2 Income, war profits, or excess profits tax paid or accrued.

* * * * *

(e) * * *

(5) * * *

(iii) and (iv) [Reserved]. For further guidance, see §1.901–2T(e)(5)(iii) and (iv).

* * * * *

(h) *Effective/applicability date*—(1) *In general*. This section and §§1.901–2A and 1.903–1 apply to taxable years beginning after November 14, 1983.

(2) [Reserved]. For further guidance, see §1.901–2T(h)(2).

Par. 5. Section 1.901–2T is added to read as follows:

§1.901–2T Income, war profits, or excess profits tax paid or accrued (temporary).

(a) through (e)(5)(ii) [Reserved]. For further guidance, see §1.901–2(a) through (e)(5)(ii).

(e)(5)(iii) [Reserved].

(iv) *Structured passive investment arrangements*—(A) *In general*. Notwithstanding §1.901–2(e)(5)(i), an amount paid to a foreign country (a "foreign payment") is not a compulsory payment, and thus is not an amount of tax paid, if the foreign payment is attributable (within the meaning of paragraph (e)(5)(iv)(B)(*1*)(*ii*) of this section) to a structured passive investment arrangement (as described in paragraph (e)(5)(iv)(B) of this section).

(B) *Conditions*. An arrangement is a structured passive investment arrangement if all of the following conditions are satisfied:

(*1*) *Special purpose vehicle (SPV)*. An entity that is part of the arrangement meets the following requirements:

(*i*) Substantially all of the gross income (for U.S. tax purposes) of the entity, if any, is passive investment income, and substantially all of the assets of the entity are assets held to produce such passive investment income. As provided in paragraph (e)(5)(iv)(C)(*5*)(*ii*) of this section, passive investment income generally does not include income of a holding company from qualified equity interests in lower-tier entities that are predominantly engaged in the active conduct of a trade or business. Thus, except as provided in paragraph (e)(5)(iv)(C)(*5*)(*ii*) of this section, qualified equity interests of a holding company in such lower-tier entities are not held to produce passive investment income and the ownership of such interests will not cause the holding company to meet the requirements of this paragraph (e)(5)(iv)(B)(*1*)(*i*).

(*ii*) There is a foreign payment attributable to income of the entity (as determined under the laws of the foreign country to which such foreign payment is made), including the entity's share of income of a lower-tier entity that is a branch or pass-through entity under the laws of such foreign country, that, if the foreign payment were an amount of tax paid, would be paid or accrued in a U.S. taxable year in which the entity meets the requirements of paragraph (e)(5)(iv)(B)(*1*)(*i*) of this section. A foreign payment attributable to income of an entity includes a foreign payment attributable to income that is required to be taken into account by an owner of the entity, if the entity is a branch or pass-through entity under the laws of such foreign country. A foreign payment attributable to income of an entity also includes a foreign payment attributable to income of a lower-tier entity that is a branch or pass-through entity for U.S. tax purposes. A foreign payment attributable to income of the entity does not include a withholding tax (within the meaning of section 901(k)(1)(B)) imposed on a distribution or payment from the entity to a U.S. party.

(*2*) *U.S. party*. A person would be eligible to claim a credit under section 901(a) (including a credit for foreign taxes deemed paid under section 902 or 960) for all or a portion of the foreign payment described in paragraph (e)(5)(iv)(B)(*1*)(*ii*) of this section if the foreign payment were an amount of tax paid.

(*3*) *Direct investment*. The U.S. party's proportionate share of the foreign payment or payments described in paragraph (e)(5)(iv)(B)(*1*)(*ii*) of this section is (or is expected to be) substantially greater than the amount of credits, if any, that the U.S. party reasonably would expect to be eligible to claim under section 901(a) for foreign taxes attributable to income generated by the U.S. party's proportionate share of the assets owned by the SPV if the U.S. party directly owned such assets. For this purpose, direct ownership shall not include ownership through a branch, a permanent establishment or any other arrangement (such as an agency arrangement or dual resident status) that would result in the income generated by the U.S. party's proportionate share of the assets being subject to tax on a net basis in the foreign country to which the payment is made. A U.S. party's proportionate share of the assets of the SPV shall be determined by reference to such U.S. party's proportionate share of the total value of all of the outstanding interests in the SPV that are held by its equity owners and creditors. A U.S. party's proportionate share of the assets of the SPV, however, shall not include any assets that produce income subject to gross basis withholding tax.

(*4*) *Foreign tax benefit*. The arrangement is reasonably expected to result in a credit, deduction, loss, exemption, exclusion or other tax benefit under the laws of a foreign country that is available to a counterparty or to a person that is related to the counterparty (determined under the principles of paragraph (e)(5)(iv)(C)(*7*) of this section by applying the tax laws of a foreign country in which the counterparty is subject to tax on a net basis). However, a foreign tax benefit is described in this paragraph (e)(5)(iv)(B)(*4*) only if any such credit corresponds to 10 percent or more of the U.S. party's share (for U.S. tax purposes) of the foreign payment referred to in paragraph (e)(5)(iv)(B)(*1*)(*ii*) of this section or if any such deduction, loss, exemption, exclusion or other tax benefit corresponds to 10 percent or more of the foreign base with respect to which the U.S. party's share (for U.S. tax purposes) of the foreign payment is imposed.

(*5*) *Counterparty*. The arrangement involves a counterparty. A counterparty is a person that, under the tax laws of a foreign country in which the person is subject to tax on the basis of place of management, place of incorporation or similar criterion or otherwise subject to a net basis tax, directly or indirectly owns or acquires equity interests in, or assets of, the SPV. However, a counterparty does not include the SPV or a person with respect to which for U.S. tax purposes the same domestic corporation, U.S. citizen or resident alien individual directly or indirectly owns more than 80 percent of the total value of the stock (or equity interests) of each of the U.S. party and such person. In addition, a counterparty does not include a person with respect to which for U.S. tax purposes the U.S. party directly or indirectly owns more than 80 percent of the total value of the stock (or equity interests), but only if the U.S. party is a domestic corporation, a U.S. citizen or a resident alien individual.

(*6*) *Inconsistent treatment*. The United States and an applicable foreign country treat one or more of the following aspects of the arrangement differently under their respective tax systems, and for one or more tax years when the arrangement is in effect either the amount of income recognized by the SPV, the U.S. party, and persons related to the U.S. party for U.S. tax purposes is materially less than the amount of income that would be recognized if the foreign tax treatment controlled for U.S. tax purposes, or the amount of credits claimed

by the U.S. party (if the foreign payment described in paragraph (e)(5)(iv)(B)(*1*)(*ii*) of this section were an amount of tax paid) is materially greater than it would be if the foreign tax treatment controlled for U.S. tax purposes:

(*i*) The classification of the SPV (or an entity that has a direct or indirect ownership interest in the SPV) as a corporation or other entity subject to an entity-level tax, a partnership or other flow-through entity or an entity that is disregarded for tax purposes.

(*ii*) The characterization as debt, equity or an instrument that is disregarded for tax purposes of an instrument issued by the SPV (or an entity that has a direct or indirect ownership interest in the SPV) to the U.S. party, the counterparty or a person related to the U.S. party or the counterparty.

(*iii*) The proportion of the equity of the SPV (or an entity that directly or indirectly owns the SPV) that is considered to be owned directly or indirectly by the U.S. party and the counterparty.

(*iv*) The amount of taxable income of the SPV for one or more tax years during which the arrangement is in effect.

(C) *Definitions*. The following definitions apply for purposes of paragraph (e)(5)(iv) of this section.

(*1*) *Applicable foreign country*. An *applicable foreign country* means each foreign country to which a foreign payment described in paragraph (e)(5)(iv)(B)(*1*)(*ii*) of this section is made or which confers a foreign tax benefit described in paragraph (e)(5)(iv)(B)(*4*) of this section.

(*2*) *Counterparty*. The term *counterparty* means a person described in paragraph (e)(5)(iv)(B)(*5*) of this section.

(*3*) *Entity*. The term *entity* includes a corporation, trust, partnership or disregarded entity described in §301.7701–2(c)(2)(i) of this chapter.

(*4*) *Indirect ownership*. Indirect ownership of stock or another equity interest (such as an interest in a partnership) shall be determined in accordance with the principles of section 958(a)(2), regardless of whether the interest is owned by a U.S. or foreign entity.

(*5*) *Passive investment income*—(*i*) *In general*. The term *passive investment income* means income described in section 954(c), as modified by this paragraph (e)(5)(iv)(C)(*5*)(*i*) and paragraph (e)(5)(iv)(C)(*5*)(*ii*) of this section. In determining whether income is described in section 954(c), paragraphs (c)(3) and (c)(6) of that section shall be disregarded, and sections 954(h) and 954(i) shall be taken into account by applying those provisions at the entity level as if the entity were a controlled foreign corporation (as defined in section 957(a)). For purposes of the preceding sentence, any income of an entity attributable to transactions that, assuming the entity is an SPV, are with a person that is a counterparty, or with persons that are related to a counterparty within the meaning of paragraph (e)(5)(iv)(B)(*4*) of this section, shall not be treated as qualified banking or financing income or as qualified insurance income, and shall not be taken into account in applying sections 954(h) and 954(i) for purposes of determining whether other income of the entity is excluded from section 954(c)(1) under section 954(h) or 954(i), but only if any such person (or a person that is related to such person within the meaning of paragraph (e)(5)(iv)(B)(*4*) of this section) is eligible for a foreign tax benefit described in paragraph (e)(5)(iv)(B)(*4*) of this section. In addition, in applying section 954(h) for purposes of this paragraph (e)(5)(iv)(C)(*5*)(*i*), section 954(h)(3)(E) shall not apply, section 954(h)(2)(A)(ii) shall be satisfied only if the entity conducts substantial activity with respect to its business through its own employees, and the term "any foreign country" shall be substituted for "home country" wherever it appears in section 954(h).

(*ii*) *Holding company exception*. Except as provided in this paragraph (e)(5)(iv)(C)(*5*)(*ii*), income of an entity that is attributable to an equity interest in a lower-tier entity is passive investment income. If the entity is a holding company and directly owns a qualified equity interest in another entity (a "lower-tier entity") that is engaged in the active conduct of a trade or business and that derives more than 50 percent of its gross income from such trade or business, then none of the entity's income attributable to such interest is passive investment income, provided that substantially all of the entity's opportunity for gain and risk of loss with respect to such interest in the lower-tier entity is shared by the U.S. party or parties (or persons that are related to a U.S. party) and, assuming the entity is an SPV, a counterparty or counterparties (or persons that are related to a counterparty). For purposes of the preceding sentence, an entity is a holding company, and is considered to be engaged in the active conduct of a trade or business and to derive more than 50 percent of its gross income from such trade or business, if substantially all of its assets consist of qualified equity interests in one or more entities, each of which is engaged in the active conduct of a trade or business and derives more than 50 percent of its gross income from such trade or business and with respect to which substantially all of the entity's opportunity for gain and risk of loss with respect to each such interest in a lower-tier entity is shared (directly or indirectly) by the U.S. party or parties (or persons that are related to a U.S. party) and, assuming the entity is an SPV, a counterparty or counterparties (or persons that are related to a counterparty). A person is not considered to share in the entity's opportunity for gain and risk of loss if its equity interest in the entity was acquired in a sale-repurchase transaction, if its interest is treated as debt for U.S. tax purposes, or if substantially all of the entity's opportunity for gain and risk of loss with respect to its interest in any lower-tier entity is borne (directly or indirectly) by the U.S. party or parties (or persons that are related to a U.S. party) or, assuming the entity is an SPV, a counterparty or counterparties (or persons that are related to a counterparty), but not both parties. For purposes of this paragraph (e)(5)(iv)(C)(*5*)(*ii*), a lower-tier entity that is engaged in a banking, financing, or similar business shall not be considered to be engaged in the active conduct of a trade or business unless the income derived by such entity would be excluded from section 954(c)(1) under section 954(h) or 954(i), determined by applying those provisions at the lower-tier entity level as if the entity were a controlled foreign corporation (as defined in section 957(a)). In addition, for purposes of the preceding sentence, any income of an entity attributable to transactions that, assuming the entity is an SPV, are with a person that is a counterparty, or with other persons that are related to a counterparty within the meaning of paragraph (e)(5)(iv)(B)(*4*) of this section, shall not be treated as qualified banking or financing income or as qualified insurance income, and shall not be taken into account in applying sections

954(h) and 954(i) for purposes of determining whether other income of the entity is excluded from section 954(c)(1) under section 954(h) or 954(i), but only if any such person (or a person that is related to such person within the meaning of paragraph (e)(5)(iv)(B)(*4*) of this section) is eligible for a foreign tax benefit described in paragraph (e)(5)(iv)(B)(*4*) of this section. In applying section 954(h) for purposes of this paragraph (e)(5)(iv)(C)(*5*)(*ii*), section 954(h)(3)(E) shall not apply, section 954(h)(2)(A)(ii) shall be satisfied only if the entity conducts substantial activity with respect to its business through its own employees, and the term "any foreign country" shall be substituted for "home country" wherever it appears in section 954(h).

(*6*) *Qualified equity interest*. With respect to an interest in a corporation, the term *qualified equity interest* means stock representing 10 percent or more of the total combined voting power of all classes of stock entitled to vote and 10 percent or more of the total value of the stock of the corporation or disregarded entity, but does not include any preferred stock (as defined in section 351(g)(3)). Similar rules shall apply to determine whether an interest in an entity other than a corporation is a qualified equity interest.

(*7*) *Related person*. Two persons are related if—

(*i*) One person directly or indirectly owns stock (or an equity interest) possessing more than 50 percent of the total value of the other person; or

(*ii*) The same person directly or indirectly owns stock (or an equity interest) possessing more than 50 percent of the total value of both persons.

(*8*) *Special purpose vehicle (SPV)*. The term *SPV* means the entity described in paragraph (e)(5)(iv)(B)(*1*) of this section.

(*9*) *U.S. party*. The term *U.S. party* means a person described in paragraph (e)(5)(iv)(B)(*2*) of this section.

(D) *Examples*. The following examples illustrate the rules of paragraph (e)(5)(iv) of this section. No inference is intended as to whether a taxpayer would be eligible to claim a credit under section 901(a) if a foreign payment were an amount of tax paid.

Example 1. U.S. borrower transaction. (i) *Facts*. A domestic corporation (USP) forms a country M corporation (Newco), contributing $1.5 billion in exchange for 100 percent of the stock of Newco. Newco, in turn, loans the $1.5 billion to a second country M corporation (FSub) wholly owned by USP. USP then sells its entire interest in Newco to a country M corporation (FP) for the original purchase price of $1.5 billion, subject to an obligation to repurchase the interest in five years for $1.5 billion. The sale has the effect of transferring ownership of the Newco stock to FP for country M tax purposes. The sale-repurchase transaction is structured in a way that qualifies as a collateralized loan for U.S. tax purposes. Therefore, USP remains the owner of the Newco stock for U.S. tax purposes. In year 1, FSub pays Newco $120 million of interest. Newco pays $36 million to country M with respect to such interest income and distributes the remaining $84 million to FP. Under country M law, the $84 million distribution is excluded from FP's income. None of FP's stock is owned, directly or indirectly, by USP or any shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Under an income tax treaty between country M and the United States, country M does not impose country M tax on interest received by U.S. residents from sources in country M.

(ii) *Result*. The $36 million payment by Newco to country M is not a compulsory payment, and thus is not an amount of tax paid because the foreign payment is attributable to a structured passive investment arrangement. First, Newco is an SPV because all of Newco's income is passive investment income described in paragraph (e)(5)(iv)(C)(*5*) of this section; Newco's only asset, a note, is held to produce such income; the payment to country M is attributable to such income; and if the payment were an amount of tax paid it would be paid or accrued in a U.S. taxable year in which Newco meets the requirements of paragraph (e)(5)(iv)(B)(*1*)(*i*) of this section. Second, if the foreign payment were treated as an amount of tax paid, USP would be deemed to pay the foreign payment under section 902(a) and, therefore, would be eligible to claim a credit for such payment under section 901(a). Third, USP would not pay any country M tax if it directly owned Newco's loan receivable. Fourth, the distribution from Newco to FP is exempt from tax under country M law, and the exempt amount corresponds to more than 10 percent of the foreign base with respect to which USP's share (which is 100 percent under U.S. tax law) of the foreign payment was imposed. Fifth, FP is a counterparty because FP owns stock of Newco under country M law and none of FP's stock is owned by USP or shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Sixth, FP is the owner of 100 percent of Newco's stock for country M tax purposes, while USP is the owner of 100 percent of Newco's stock for U.S. tax purposes, and the amount of credits claimed by USP if the payment to country M were an amount of tax paid is materially greater than it would be if, for U.S. tax purposes, FP and not USP were treated as owning 100 percent of Newco's stock. Because the payment to country M is not an amount of tax paid, USP is not deemed to pay any country M tax under section 902(a). USP has dividend income of $84 million and also has interest expense of $84 million. FSub's post–1986 undistributed earnings are reduced by $120 million of interest expense.

Example 2. U.S. borrower transaction. (i) *Facts*. The facts are the same as in *Example 1*, except that FSub is a wholly-owned subsidiary of Newco. In addition, assume FSub is engaged in the active conduct of manufacturing and selling widgets and derives more than 50 percent of its gross income from such business.

(ii) *Result*. The results are the same as in *Example 1*. Although Newco wholly owns FSub, which is engaged in the active conduct of manufacturing and selling widgets and derives more than 50 percent of its income from such business, Newco's income that is attributable to Newco's equity interest in FSub is passive investment income because the sale-repurchase transaction limits FP's interest in Newco and its assets to that of a creditor, so that substantially all of Newco's opportunity for gain and risk of loss with respect to its stock in FSub is borne by USP. See paragraph (e)(5)(iv)(C)(*5*)(*ii*) of this section. Accordingly, Newco's stock in FSub is held to produce passive investment income. Thus, Newco is an SPV because all of Newco's income is passive investment income described in paragraph (e)(5)(iv)(C)(*5*) of this section, Newco's assets are held to produce such income, the payment to country M is attributable to such income, and if the payment were an amount of tax paid it would be paid or accrued in a U.S. taxable year in which Newco meets the requirements of paragraph (e)(5)(iv)(B)(*1*)(*i*) of this section.

Example 3. U.S. borrower transaction. (i) *Facts*. (A) A domestic corporation (USP) loans $750 million to its wholly-owned domestic subsidiary (Sub). USP and Sub form a country M partnership (Partnership) to which each contributes $750 million. Partnership loans all of its $1.5 billion of capital to Issuer, a wholly-owned country M affiliate of USP, in exchange for a note and coupons providing for the payment of interest at a fixed rate over a five-year term. Partnership sells all of the coupons to Coupon Purchaser, a country N partnership owned by a country M corporation (Foreign Bank) and a wholly-owned country M subsidiary of Foreign Bank, for $300 million. At the time of the coupon sale, the fair market value of the coupons sold is $290 million and, pursuant to section 1286(b)(3), Partnership's basis allocated to the coupons sold is $290 million. Several months later and prior to any interest payments on the note, Foreign Bank and its subsidiary sell all of their interests in Coupon Purchaser to an unrelated country O corporation for $280 million. None of Foreign Bank's stock or its subsidiary's stock is owned, directly or indirectly, by USP or Sub or by any shareholders of USP or Sub that are domestic corporations, U.S. citizens, or resident alien individuals.

(B) Assume that both the United States and country M respect the sale of the coupons for tax law purposes. In the year of the coupon sale, for country M tax purposes USP's and Sub's shares of Partnership's profits total $300 million, a payment of $60 million to country M is made with respect to those profits, and Foreign Bank and its subsidiary, as partners of Coupon Purchaser, are entitled to deduct the $300 million purchase price of the coupons from their taxable income. For U.S. tax purposes, USP and Sub recognize their distributive shares of the $10 million premium income and claim a direct foreign tax credit for their distributive shares of the $60 million payment to country M. Country M imposes no additional tax when Foreign Bank and its subsidiary sell their

interests in Coupon Purchaser. Country M also does not impose country M tax on interest received by U.S. residents from sources in country M.

(ii) *Result*. The payment to country M is not a compulsory payment, and thus is not an amount of tax paid, because the foreign payment is attributable to a structured passive investment arrangement. First, Partnership is an SPV because all of Partnership's income is passive investment income described in paragraph (e)(5)(iv)(C)(*5*) of this section; Partnership's only asset, Issuer's note, is held to produce such income; the payment to country M is attributable to such income; and if the payment were an amount of tax paid, it would be paid or accrued in a U.S. taxable year in which Partnership meets the requirements of paragraph (e)(5)(iv)(B)(*1*)(*i*) of this section. Second, if the foreign payment were an amount of tax paid, USP and Sub would be eligible to claim a credit for such payment under section 901(a). Third, USP and Sub would not pay any country M tax if they directly owned Issuer's note. Fourth, for country M tax purposes, Foreign Bank and its subsidiary deduct the $300 million purchase price of the coupons and are exempt from country M tax on the $280 million received upon the sale of Coupon Purchaser, and the deduction and exemption correspond to more than 10 percent of the $300 million base with respect to which USP's and Sub's 100% share of the foreign payments was imposed. Fifth, Foreign Bank and its subsidiary are counterparties because they indirectly acquired assets of Partnership, the interest coupons on Issuer's note, and are not directly or indirectly owned by USP or Sub or shareholders of USP or Sub that are domestic corporations, U.S. citizens, or resident alien individuals. Sixth, the amount of taxable income of Partnership for one or more years is different for U.S. and country M tax purposes, and the amount of income recognized by USP and Sub for U.S. tax purposes is materially less than the amount of income they would recognize if the country M tax treatment of the coupon sale controlled for U.S. tax purposes. Because the payment to country M is not an amount of tax paid, USP and Sub are not considered to pay tax under section 901. USP and Sub have income of $10 million in the year of the coupon sale.

Example 4. *Active business; no SPV*. (i) *Facts*. A, a domestic corporation, wholly owns B, a country X corporation engaged in the manufacture and sale of widgets. On January 1, year 1, C, also a country X corporation, loans $400 million to B in exchange for an instrument that is debt for U.S. tax purposes and equity in B for country X tax purposes. As a result, C is considered to own stock of B for country X tax purposes. B loans $55 million to D, a country Y corporation wholly owned by A. In year 1, B has $166 million of net income attributable to its sales of widgets and $3.3 million of interest income attributable to the loan to D. Country Y does not impose tax on interest paid to nonresidents. B makes a payment of $50.8 million to country X with respect to B's net income. Country X does not impose tax on dividend payments between country X corporations. None of C's stock is owned, directly or indirectly, by A or by any shareholders of A that are domestic corporations, U.S. citizens, or resident alien individuals.

(ii) *Result*. B is not an SPV within the meaning of paragraph (e)(5)(iv)(B)(*1*) of this section because the amount of interest income received from D does not constitute substantially all of B's income and the $55 million note from D does not constitute substantially all of B's assets. Accordingly, the $50.8 million payment to country X is not attributable to a structured passive investment arrangement.

Example 5 . *U.S. lender transaction*. (i) *Facts*. (A) A country X corporation (Foreign Bank) contributes $2 billion to a newly-formed country X company (Newco) in exchange for all of the common stock of Newco and securities that are treated as debt of Newco for U.S. tax purposes and preferred stock of Newco for country X tax purposes. A domestic corporation (USP) contributes $1 billion to Newco in exchange for securities that are treated as preferred stock of Newco for U.S. tax purposes and debt of Newco for country X tax purposes. Newco loans the $3 billion to a wholly-owned, country X subsidiary of Foreign Bank (FSub) in return for a $3 billion, seven-year note paying interest currently. The Newco securities held by USP entitle the holder to fixed distributions of $4 million per year, and the Newco securities held by Foreign Bank entitle the holder to receive $82 million per year, payable only on maturity of the $3 billion FSub note in year 7. At the end of year 5, pursuant to a prearranged plan, Foreign Bank acquires USP's Newco securities for a prearranged price of $1 billion. Country X does not impose tax on dividends received by one country X corporation from a second country X corporation. Under an income tax treaty between country X and the United States, country X does not impose country X tax on interest received by U.S. residents from sources in country X. None of Foreign Bank's stock is owned, directly or indirectly, by USP or any shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals.

(B) In each of years 1 through 7, FSub pays Newco $124 million of interest on the $3 billion note. Newco distributes $4 million to USP in each of years 1 through 5. The distributions are deductible for country X tax purposes, and Newco pays country X $36 million with respect to $120 million of taxable income from the FSub note in each year. For U.S. tax purposes, in each year Newco's post–1986 undistributed earnings are increased by $124 million of interest income and reduced by accrued interest expense with respect to the Newco securities held by Foreign Bank.

(ii) *Result*. The $36 million payment to country X is not a compulsory payment, and thus is not an amount of tax paid, because the foreign payment is attributable to a structured passive investment arrangement. First, Newco is an SPV because all of Newco's income is passive investment income described in paragraph (e)(5)(iv)(C)(*5*) of this section; Newco's only asset, a note of FSub, is held to produce such income; the payment to country X is attributable to such income; and if the payment were an amount of tax paid it would be paid or accrued in a U.S. taxable year in which Newco meets the requirements of paragraph (e)(5)(iv)(B)(*1*)(*i*) of this section. Second, if the foreign payment were an amount of tax paid, USP would be deemed to pay its *pro rata* share of the foreign payment under section 902(a) in each of years 1 through 5 and, therefore, would be eligible to claim a credit under section 901(a). Third, USP would not pay any country X tax if it directly owned its proportionate share of Newco's assets, a note of FSub. Fourth, for country X tax purposes, Foreign Bank is eligible to receive a tax-free distribution of $82 million attributable to each of years 1 through 5, and that amount corresponds to more than 10 percent of the foreign base with respect to which USP's share of the foreign payment was imposed. Fifth, Foreign Bank is a counterparty because it owns stock of Newco for country X tax purposes and none of Foreign Bank's stock is owned, directly or indirectly, by USP or shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Sixth, the United States and country X treat various aspects of the arrangement differently, including whether the Newco securities held by Foreign Bank and USP are debt or equity. The amount of credits claimed by USP if the payment to country X were an amount of tax paid is materially greater than it would be if, for U.S. tax purposes, the securities held by USP were treated as debt or the securities held by Foreign Bank were treated as equity, and the amount of income recognized by Newco for U.S. tax purposes is materially less than the amount of income recognized for country X tax purposes. Because the payment to country X is not an amount of tax paid, USP is not deemed to pay any country X tax under section 902(a). USP has dividend income of $4 million in each of years 1 through 5.

Example 6. *Holding company; no SPV*. (i) *Facts*. A, a country X corporation, and B, a domestic corporation, each contribute $1 billion to a newly-formed country X entity (C) in exchange for stock of C. C is treated as a corporation for country X purposes and a partnership for U.S. tax purposes. C contributes $1.95 billion to a newly-formed country X corporation (D) in exchange for 100 percent of D's stock. C loans its remaining $50 million to D. Accordingly, C's sole assets are stock and debt of D. D uses the entire $2 billion to engage in the business of manufacturing and selling widgets. In year 1, D derives $300 million of income from its widget business and derives $2 million of interest income. Also in year 1, C has dividend income of $200 million and interest income of $3.2 million with respect to its investment in D. Country X does not impose tax on dividends received by one country X corporation from a second country X corporation. C makes a payment of $960,000 to country X with respect to C's net income.

(ii) *Result*. C's dividend income is not passive investment income, and C's stock in D is not held to produce such income, because C owns at least 10 percent of D and D derives more than 50 percent of its income from the active conduct of its widget business. See paragraph (e)(5)(iv)(C)(*5*)(*ii*) of this section. As a result, less than substantially all of C's income is passive investment income and less than substantially all of C's assets are held to produce passive investment income. Accordingly, C is not an SPV within the meaning of paragraph (e)(5)(iv)(B)(*1*) of this section, and the $960,000 payment to country X is not attributable to a structured passive investment arrangement.

Example 7. *Holding company; no SPV*. (i) *Facts*. The facts are the same as in *Example 6*, except that instead of loaning $50 million to D, C contributes the $50 million to E in exchange for 10 percent of the stock of E. E is a country Y corporation that is not engaged in the active conduct of a trade or business. Also in year 1, D pays no dividends to C, E pays $3.2 million in dividends to C, and C makes a payment of $960,000 to country X with respect to C's net income.

(ii) *Result*. C's dividend income attributable to its stock in E is passive investment income, and C's stock in E is held to produce such income. C's stock in D is not held to produce passive investment income because C owns at least 10 percent of D and D derives more than 50 percent of its income from the active conduct of its widget business. See paragraph (e)(5)(iv)(C)(*5*)(*ii*) of this section. As a result, less than substantially all of C's assets are held to produce passive investment income. Accordingly, C is not an SPV because it does not meet the requirements of paragraph (e)(5)(iv)(B)(*1*) of this section, and the $960,000 payment to country X is not attributable to a structured passive investment arrangement.

Example 8. Asset holding transaction. (i) *Facts*. (A) A domestic corporation (USP) contributes $6 billion of country Z debt obligations to a country Z entity (DE) in exchange for all of the class A and class B stock of DE. A corporation unrelated to USP and organized in country Z (FC) contributes $1.5 billion to DE in exchange for all of the class C stock of DE. DE uses the $1.5 billion contributed by FC to redeem USP's class B stock. The class C stock is entitled to "all" income from DE. However, FC is obligated immediately to contribute back to DE all distributions on the class C stock. USP and FC enter into—

(*1*) A contract under which USP agrees to buy after five years the class C stock for $1.5 billion; and

(*2*) An agreement under which USP agrees to pay FC periodic payments on $1.5 billion.

(B) The transaction is structured in such a way that, for U.S. tax purposes, there is a loan of $1.5 billion from FC to USP, and USP is the owner of the class C stock and the class A stock. DE is a disregarded entity for U.S. tax purposes and a corporation for country Z tax purposes. In year 1, DE earns $400 million of interest income on the country Z debt obligations. DE makes a payment to country Z of $100 million with respect to such income and distributes the remaining $300 million to FC. FC contributes the $300 million back to DE. None of FC's stock is owned, directly or indirectly, by USP or shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Country Z does not impose tax on interest income derived by U.S. residents.

(C) Country Z treats FC as the owner of the class C stock. Pursuant to country Z tax law, FC is required to report the $400 million of income with respect to the $300 million distribution from DE, but is allowed to claim credits for DE's $100 million payment to country Z. For country Z tax purposes, FC is entitled to current deductions equal to the $300 million contributed back to DE.

(ii) *Result*. The payment to country Z is not a compulsory payment, and thus is not an amount of tax paid because the payment is attributable to a structured passive investment arrangement. First, DE is an SPV because all of DE's income is passive investment income described in paragraph (e)(5)(iv)(C)(*5*) of this section; all of DE's assets are held to produce such income; the payment to country Z is attributable to such income; and if the payment were an amount of tax paid it would be paid or accrued in a U.S. taxable year in which DE meets the requirements of paragraph (e)(5)(iv)(B)(*1*)(*i*) of this section. Second, if the payment were an amount of tax paid, USP would be eligible to claim a credit for such amount under section 901(a). Third, USP would not pay any country Z tax if it directly owned DE's assets. Fourth, FC is entitled to claim a credit under country Z tax law for the payment and recognizes a deduction for the $300 million contributed to DE under country Z law. The credit claimed by FC corresponds to more than 10 percent of USP's share (for U.S. tax purposes) of the foreign payment and the deductions claimed by FC correspond to more than 10 percent of the base with respect to which USP's share of the foreign payment was imposed. Fifth, FC is a counterparty because FC is considered to own equity of DE under country Z law and none of FC's stock is owned, directly or indirectly, by USP or shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Sixth, the United States and country X treat certain aspects of the transaction differently and the amount of credits claimed by USP if the country Z payment were an amount of tax paid is materially greater than it would be if FC, rather than USP, owned the class C stock for U.S. tax purposes. Because the payment to country Z is not an amount of tax paid, USP is not considered to pay tax under section 901. USP has $400 million of interest income.

Example 9. Loss surrender. (i) *Facts*. The facts are the same as in *Example 8*, except that the deductions attributable to the arrangement contribute to a loss recognized by FC for country Z tax purposes, and pursuant to a group relief regime in country Z FC elects to surrender the loss to its country Z subsidiary.

(ii) *Result*. The results are the same as in *Example 8*. The surrender of the loss to a related party is a foreign tax benefit that corresponds to the base with respect to which USP's share of the foreign payment was imposed.

Example 10. Joint venture; no foreign tax benefit. (i) *Facts*. FC, a country X corporation, and USC, a domestic corporation, each contribute $1 billion to a newly-formed country X entity (C) in exchange for stock of C. FC and USC are entitled to equal 50% shares of C's income, gain, expense and loss. C is treated as a corporation for country X purposes and a partnership for U.S. tax purposes. In year 1, C earns $200 million of passive investment income, makes a payment to country X of $60 million with respect to that income, and distributes $70 million to each of FC and USC. Country X does not impose tax on dividends received by one country X corporation from a second country X corporation.

(ii) *Result*. FC's tax-exempt receipt of $70 million, or its 50% share of C's profits, is not a foreign tax benefit within the meaning of paragraph (e)(5)(iv)(B)(*4*) of this section, because it does not correspond to any part of the foreign base with respect to which USC's share of the foreign payment was imposed. Accordingly, the $60 million payment to country X is not attributable to a structured passive investment arrangement.

(f) through (h)(1) [Reserved]. For further guidance, see §1.901–2(f) through (h)(1).

(h)(2) This section applies to foreign payments that, if such payments were an amount of tax paid, would be considered paid or accrued under §1.901–2(f) by a U.S. or foreign person in taxable years ending on or after July 16, 2008. In the case of foreign payments by a foreign corporation that has a domestic corporate shareholder, this section also applies to such payments that, if such payments were an amount of tax paid, would be considered paid or accrued in the foreign corporation's U.S. taxable years ending with or within taxable years of its domestic corporate shareholder ending on or after July 16, 2008. In the case of foreign payments by a partnership, trust or estate with respect to which any person would be eligible to claim a credit under section 901(b) if the payment were an amount of tax paid, this section also applies to such payments that would be considered paid or accrued in U.S. taxable years of the partnership, trust or estate ending with or within taxable years of such eligible persons ending on or after July 16, 2008.

(3) *Expiration date*. The applicability of this section expires on July 15, 2011.

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

Approved June 30, 2008.

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

(Filed by the Office of the Federal Register on July 15, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 16, 2008, 73 F.R. 40727)

Section 7804.—Other Personnel

26 CFR 801.1: Balanced performance measurement system; in general.

T.D. 9426

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 801

Balanced System for Measuring Organizational and Employee Performance Within the Internal Revenue Service

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations.

SUMMARY: This document contains final regulations relating to the modification of regulations governing the IRS Balanced System for Measuring Organizational and Employee Performance. These regulations affect internal operations of the IRS and the systems that the agency employs to evaluate the performance of organizations within the IRS and individuals employed by the IRS.

DATES: *Effective Date:* These regulations are effective on October 14, 2008.

Applicability Date: For dates of applicability, see §801.8.

FOR FURTHER INFORMATION: Neil Worden, (202) 927–0900.

SUPPLEMENTARY INFORMATION:

Background

On October 17, 2005, the IRS published in the **Federal Register** proposed regulations (REG–114444–05, 2005–2 C.B. 934) at 70 FR 60256 and final and temporary regulations (T.D. 9227, 2005–2 C.B. 924) at 70 FR 60214 amending 26 CFR part 801. One written comment was received. No public hearing was requested. This document adopts, without modification, the proposed regulations as final regulations.

Summary of Comments

The commentator suggested that modification of the regulation was not needed. The commentator further suggested that the Quantity measure "number of cases closed" should never be used to evaluate IRS employees or suggest goals. The amendment of Part 801 retains the absolute prohibition on the use of quantity data to evaluate non-supervisory employees who exercise judgment with respect to tax enforcement results. The amendment allows communicating the quantity goals of an organizational unit with employees, including quantity expectations, such as the average number of case closures needed to meet the unit's goal. These communications must recognize that the facts and circumstances of each case will affect an employee's actual closures, and that the employee is not being given a quota which must be met. Accordingly, the commentator's suggestion was not adopted.

In addition, the inclusion of some outcome-neutral production data as examples of quantity measures (for example, cycle time and number or percentage of overage cases) (§801.6(c)) does not preclude an organizational unit's use of this or other outcome-neutral production data as quality measures.

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 the section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Karen F. Keller, Office of Associate Chief Counsel (General Legal Services). However, other personnel from the IRS participated in their development.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Part 801 is amended as follows:

Paragraph 1. The authority citation for Part 801 continues to read in part as follows:

Authority: 5 U.S.C. 9501 * * *

PART 801—BALANCED SYSTEM FOR MEASURING ORGANIZATIONAL AND EMPLOYEE PERFORMANCE WITHIN THE INTERNAL REVENUE SERVICE

§§801.1 through 801.7 [Removed]

Par. 2. The center heading and §§801.1, 801.2, 801.3, 801.4, 801.5, 801.6, and 801.7 are removed.

§§801.1T through 801.8T [Redesignated as §§801.1 through 801.8]

Par. 3. The center heading preceding §801.1T is removed.

Par. 4. Sections 801.1T, 801.2T, 801.3T, 801.4T, 801.5T, 801.6T, 801.7T, and 801.8T are redesignated as §§801.1, 801.2, 801.3, 801.4, 801.5, 801.6, 801.7, and 801.8 and the language "T" following the section number and "(temporary)" is removed from each section heading, respectively.

§801.1 [Amended]

Par. 5. Newly designated §801.1(a) is amended by removing the language "(Pub. L. 105–106, 112 Stat. 685, 715–716, 722)" and adding the language "(Public Law 105–106, 112 Stat. 685, 715–716, 722)" in its place.

§801.2 [Amended]

Par. 6. Newly designated §801.2 is amended by removing the language "Pub. L. 104–106, 110 Stat. 186, 679); the Government Performance and Results Act of 1993 (Pub. L. 103–62, 107 Stat. 285); and the Chief Financial Officers Act of 1990 (Pub. L. 101–576, 108 Stat. 2838)" and adding the language "(Public Law 104–106, 110 Stat. 186, 679); the Government Performance and Results Act of 1993 (Public Law 103–62, 107 Stat. 285); and the Chief Financial Officers Act of 1990 (Public Law 101–576, 108 Stat. 2838)" in its place.

§801.3 [Amended]

Par. 7. Newly designated §801.3(e)(1) and (e)(3) is amended by removing the language "§801.6T" in each location and adding the language "801.6" in its place.

§801.7 [Amended]

Par. 8. Newly designated §801.7(a) introductory text is amended by removing the language "§801.3T" and adding the language "§801.3" in its place.

Par. 9. New designated §801.8 is revised to read as follows:

§801.8 Effective/applicability dates.

The provisions of §§801.1 through 801.7 apply on or after October 17, 2005.

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

Approved October 7, 2008.

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

(Filed by the Office of the Federal Register on October 10, 2008, 8:45 a.m., and published in the issue of the Federal Register for October 14, 2008, 73 F.R. 60627)

Part III. Administrative, Procedural, and Miscellaneous

Social Security Contribution and Benefit Base for 2009

Notice 2008–103

Under authority contained in the Social Security Act ("the Act"), the Commissioner, Social Security Administration, has determined and announced (73 F.R. 64651, dated October 30, 2008) that the contribution and benefit base for remuneration paid in 2009, and self-employment income earned in taxable years beginning in 2009 is $106,800.

"Old-Law" Contribution and Benefit Base

General

The "old-law" contribution and benefit base for 2009 is $79,200. This is the base that would have been effective under the Act without the enactment of the 1977 amendments.

The "old-law" contribution and benefit base is used by:

(a) The Railroad Retirement program to determine certain tax liabilities and tier II benefits payable under that program to supplement the tier I payments which correspond to basic Social Security benefits,

(b) the Pension Benefit Guaranty Corporation to determine the maximum amount of pension guaranteed under the Employee Retirement Income Security Act (section 230(d) of the Act),

(c) Social Security to determine a year of coverage in computing the special minimum benefit, as described earlier, and

(d) Social Security to determine a year of coverage (acquired whenever earnings equal or exceed 25 percent of the "old-law" base for this purpose only) in computing benefits for persons who are also eligible to receive pensions based on employment not covered under section 210 of the Act.

Domestic Employee Coverage Threshold

General

The minimum amount a domestic worker must earn so that such earnings are covered under Social Security or Medicare is the domestic employee coverage threshold. For 2009, this threshold is $1,700. Section 3121(x) of the Internal Revenue Code provides the formula for increasing the threshold.

Computation

Under the formula, the domestic employee coverage threshold amount for 2009 shall be equal to the 1995 amount of $1,000 multiplied by the ratio of the national average wage index for 2007 to that for 1993. If the resulting amount is not a multiple of $100, it shall be rounded to the next lower multiple of $100.

Domestic Employee Coverage Threshold Amount

Multiplying the 1995 domestic employee coverage threshold amount ($1,000) by the ratio of the national average wage index for 2007 ($40,405.48) to that for 1993 ($23,132.67) produces the amount of $1,746.68. We then round this amount to $1,700. Accordingly, the domestic employee coverage threshold amount is $1,700 for 2009.

(Filed by the Office of the Federal Register on October 29, 2008, 8:45 a.m., and published in the issue of the Federal Register for October 30, 2008, 73 F.R. 64651)

Part IV. Items of General Interest

Notice of Proposed Rulemaking and Notice of Public Hearing

Section 108(e)(8) Application to Partnerships

REG–164370–05

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations relating to the application of section 108(e)(8) of the Internal Revenue Code (Code) to partnerships and their partners. These regulations provide guidance regarding the determination of discharge of indebtedness income of a partnership that transfers a partnership interest to a creditor in satisfaction of the partnership's indebtedness (debt-for-equity exchange). The proposed regulations also provide that section 721 applies to a contribution of a partnership's recourse or nonrecouse indebtedness by a creditor to the partnership in exchange for a capital or profits interest in the partnership. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by January 29, 2009. Outlines of topics to be discussed at the public hearing scheduled for February 19, 2009, must be received by January 27, 2009.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–164370–05), 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–164370–05), 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–164370–05). 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 proposed regulations, Megan A. Stoner, Office of Associate Chief Counsel (Passthroughs and Special Industries), (202) 622–3070; concerning submission of comments, the hearing, and/or placed on the building access list to attend the 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

This document contains proposed amendments to 26 CFR Part 1 under sections 108 and 721 of the Code relating to the application of section 108(e)(8) to partnerships.

Section 108(e)(8) was amended by section 896 of the American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1648), to include discharges of partnership indebtedness occurring on or after October 22, 2004. Prior to the amendment, section 108(e)(8) only applied to discharges of corporate indebtedness. Section 108(e)(8), as amended, provides that for purposes of determining income of a debtor from discharge of indebtedness (COD income), if a debtor corporation transfers stock or a debtor partnership transfers a capital or profits interest in such partnership to a creditor in satisfaction of its recourse or nonrecourse indebtedness, such corporation or partnership shall be treated as having satisfied the indebtedness with an amount of money equal to the fair market value of the stock or interest. In the case of a partnership, any COD income recognized under section 108(e)(8) shall be included in the distributive shares of the partners in the partnership immediately before such discharge.

Explanation of Provisions

1. *Valuation of Partnership Interest Transferred in Satisfaction of Partnership Debt*

Section 108(e)(8) provides that for purposes of determining COD income of a debtor partnership, the partnership shall be treated as having satisfied the indebtedness with an amount of money equal to the fair market value of the interest transferred to the creditor. The amount by which the indebtedness exceeds the fair market value of the partnership interest transferred is the amount of COD income required to be included in the distributive shares of the partners in the debtor partnership immediately before the discharge.

The IRS and the Treasury Department believe that provided certain requirements are satisfied, it is appropriate to allow the partnership and the creditor to value the partnership interest transferred to the creditor in a debt-for-equity exchange (debt-for-equity interest) based on liquidation value. For this purpose, liquidation value equals the amount of cash that the creditor would receive with respect to the debt-for-equity interest if, immediately after the transfer, the partnership sold all of its assets (including goodwill, going concern value, and any other intangibles associated with the partnership's operations) for cash equal to the fair market value of those assets, and then liquidated. If a partnership maintains capital accounts in accordance with the capital accounting rules of §1.704–1(b)(2)(iv), the amount by which the creditor's capital account is increased as a result of the debt-for-equity exchange will equal the fair market value of the indebtedness exchanged. See §1.704–1(b)(2)(iv)(*b*) and (*d*).

Accordingly, the proposed regulations provide that for purposes of applying section 108(e)(8), the fair market value of a debt-for-equity interest is the liquidation value of that debt-for-equity interest, if (i) the debtor partnership determines and maintains capital accounts of its partners in accordance with the capital accounting rules of §1.704–1(b)(2)(iv), (ii) the creditor, debtor partnership, and its partners treat the fair market value of the indebtedness as being equal to the liquidation

value of the debt-for-equity interest for purposes of determining the tax consequences of the debt-for-equity exchange, (iii) the debt-for-equity exchange is an arm's-length transaction, and (iv) subsequent to the debt-for-equity exchange, neither the partnership redeems nor any person related to the partnership purchases the debt-for-equity interest as part of a plan at the time of the debt-for-equity exchange which has as a principal purpose the avoidance of COD income by the partnership. If these conditions are not satisfied, all of the facts and circumstances are considered in determining the fair market value of the debt-for-equity interest for purposes of applying section 108(e)(8).

2. *Application of Section 721 to Debt-for-Equity Exchanges*

Generally, when property is transferred as payment on indebtedness (or in satisfaction thereof), gain or loss on the property is recognized. The IRS and the Treasury Department, however, believe that in the case of a debt-for-equity exchange, the nonrecognition rule of section 721 generally should apply to the creditor's contribution of partnership indebtedness (other than unpaid interest or accrued original issue discount) to the partnership in exchange for the partnership interest. Such a rule is consistent with the policies underlying section 721 to defer the recognition of gain or loss where persons join together to conduct joint business (including investment). Accordingly, the proposed regulations provide that with certain exceptions, section 721 applies to debt-for-equity exchanges.

The proposed regulations provide that section 721 does not apply to the transfer of a partnership interest to a creditor in satisfaction of a partnership's indebtedness for unpaid rent, royalties, or interest on indebtedness (including accrued original issue discount). Moreover, these proposed regulations do not supersede the rules under section 453B relating to dispositions of installment obligations. A separate guidance project addresses the application of section 721 to a partnership interest transferred in connection with the performance of services. See proposed regulations regarding partnership equity for services (REG–105346–03, 2005–1 C.B. 1244 [70 FR 29675]) (May 24, 2005).

3. *Creditor's Basis in Partnership Interest*

Because the proposed regulations provide that section 721 applies to a debt-for-equity exchange, the basis of the creditor's interest in the partnership is determined under section 722. Section 722 provides that the basis of an interest in a partnership acquired by a contribution of property, including money, to the partnership shall be the amount of such money and the adjusted basis of such property to the contributing partner at the time of the contribution, increased by the amount (if any) of gain recognized under section 721(b) to the contributing partner at such time.

The IRS and the Treasury Department believe that a creditor should not recognize a loss in a debt-for-equity exchange subject to section 721 in which the liquidation value of the debt-for-equity interest is less than the outstanding principal balance of the indebtedness. Rather, the creditor's basis in the debt-for-equity interest received in the debt-for-equity exchange that is subject to section 721 will be increased by the adjusted basis of the indebtedness. The IRS and the Treasury Department request comments on alternative approaches.

4. *Creditor's Holding Period in Partnership Interest*

Section 1223(1) provides, in general, that in determining the period for which the taxpayer has held property received in an exchange, there shall be included the period for which the taxpayer held the property exchanged, if the property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in the taxpayer's hands as the property exchanged. Because the basis in the debt-for-equity interest received in a debt-for-equity exchange that is subject to section 721 is the same as the creditor's basis in the debt under section 722, the debt-for-equity interest includes the creditor's holding period in the indebtedness under section 1223(1).

5. *Request for Comments*

The IRS and the Treasury Department realize that there are other issues relating to debt-for-equity exchanges that are not addressed in these proposed regulations. One issue not addressed is whether any special allocation rules of COD income should apply where partnership indebtedness owed to a preexisting partner is satisfied with the transfer of a partnership interest. Another issue is whether COD income arising from a debt-for-equity exchange should be treated as a first-tier item under §1.704–2(f)(6) for purposes of the minimum gain chargeback rules. A third issue is how the rules in the noncompensatory partnership options regulations relating to convertible debt interact with the rules in these proposed regulations under section 108(e)(8). The IRS and the Treasury Department request comments on these issues as well as other issues not addressed in these proposed regulations.

Proposed Effective Date

These regulations are proposed to apply to debt-for-equity exchanges occurring on or after the date these regulations are published as final regulations in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, 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 Public Hearing

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

A public hearing has been scheduled for February 19, 2009, beginning at 10:00 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, all 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 January 27, 2009. Outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by January 27, 2009. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the schedule of 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 Megan A. Stoner of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Proposed Amendment 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 1.108–8 is added to read as follows:

§1.108–8 Indebtedness satisfied by partnership interest.

(a) *In general*. For purposes of determining income of a debtor from discharge of indebtedness (COD income), if a debtor partnership transfers a capital or profits interest in the partnership to a creditor in satisfaction of its recourse or nonrecourse indebtedness (a debt-for-equity exchange), the partnership is treated as having satisfied the indebtedness with an amount of money equal to the fair market value of the partnership interest.

(b) *Determination of fair market value*—(1) *In general*. For purposes of paragraph (a) of this section, the fair market value of a partnership interest transferred by a debtor partnership to a creditor in satisfaction of the debtor partnership's indebtedness (debt-for-equity interest) is the liquidation value of the debt-for-equity interest, where liquidation value equals the amount of cash that the creditor would receive with respect to the debt-for-equity interest if, immediately after the transfer, the partnership sold all of its assets (including goodwill, going concern value, and any other intangibles associated with the partnership's operations) for cash equal to the fair market value of those assets and then liquidated, if—

(i) The debtor partnership determines and maintains the capital accounts of its partners in accordance with the capital accounting rules of §1.704–1(b)(2)(iv);

(ii) The creditor, debtor partnership, and its partners treat the fair market value of the indebtedness as being equal to the liquidation value of the debt-for-equity interest for purposes of determining the tax consequences of the debt-for-equity exchange;

(iii) The debt-for-equity exchange is an arm's-length transaction; and

(iv) Subsequent to the debt-for-equity exchange, neither the partnership redeems nor any person related to the partnership purchases the debt-for-equity interest as part of a plan at the time of the debt-for-equity exchange which has as a principal purpose the avoidance of COD income by the partnership.

(2) *Exception*. If the requirements in paragraph (b)(1) of this section are not satisfied, all the facts and circumstances will be considered in determining the fair market value of a debt-for-equity interest for purposes of paragraph (a) of this section.

(c) *Example*. The following example illustrates the provisions of this section:

Example. (i) AB partnership has $1,000 of outstanding indebtedness owed to C. In an arm's-length transaction, C agrees to cancel the $1,000 indebtedness in exchange (debt-for-equity exchange) for an interest (debt-for-equity interest) in AB. AB's partnership agreement provides that its partners' capital accounts will be determined and maintained in accordance with the capital accounting rules in §1.704–1(b)(2)(iv). The fair market value of the $1,000 indebtedness is $700 at the time of the debt-for-equity exchange. Under §1.704–1(b)(2)(iv)(*b*), C's capital account is increased by $700 as a result of the debt-for-equity exchange. This amount equals the liquidation value of C's debt-for-equity interest, which is the amount of cash that C would receive with respect to that interest if AB partnership sold all of its assets for cash equal to the fair market value of those assets and then liquidated. C, AB partnership, and its partners treat the fair market value of the indebtedness as being equal to the liquidation value of C's debt-for-equity interest ($700) for purposes of determining the tax consequences of the debt-for-equity exchange. Subsequent to the debt-for-equity exchange, neither AB partnership redeems nor any person related to AB partnership purchases C's debt-for-equity interest as part of a plan at the time of the debt-for-equity exchange which has as a principal purpose the avoidance of COD income by AB partnership.

(ii) Because the requirements in paragraph (b)(1) of this section are satisfied, the fair market value of C's debt-for-equity interest in AB partnership for purposes of determining AB partnership's COD income is the liquidation value of C's debt-for-equity interest, or $700. Accordingly, AB partnership is treated as satisfying the $1,000 indebtedness with $700 under section 108(e)(8).

(d) *Effective/applicability date*. This section applies to debt-for-equity exchanges occurring on or after the date that these regulations are published as final regulations in the **Federal Register**.

Par. 3. Section 1.721–1 is amended by adding paragraph (d) to read as follows:

§1.721–1 Nonrecognition of gain or loss on contribution.

* * * * *

(d) *Debt-for-equity exchange*—(1) *In general*. Except as otherwise provided in section 721 and the regulations under section 721, and notwithstanding §1.108–8(a), section 721 applies to a contribution of a partnership's recourse or nonrecourse indebtedness by a creditor to the debtor partnership in exchange for a capital or profits interest in the partnership.

(2) *Exception*. Section 721 does not apply to the transfer of a partnership interest to a creditor in satisfaction of a partnership's recourse or nonrecourse indebtedness for unpaid rent, royalties, or interest on indebtedness (including accrued original issue discount). For rules applicable to a determination of whether a partnership interest transferred to a creditor is treated as payment of interest or accrued original issue discount, see §§1.446–2(e) and 1.1275–2(a), respectively.

(3) *Effective/applicability date*. This paragraph (d) applies to debt-for-equity exchanges occurring on or after the date that these regulations are published as final regulations in the **Federal Register**.

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

(Filed by the Office of the Federal Register on October 30, 2008, 8:45 a.m., and published in the issue of the Federal Register for October 31, 2008, 73 F.R. 64903)

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations and Notice of Public Hearing

Determining the Amount of Taxes Paid for Purposes of Section 901

REG–156779–06

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing.

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9416) that provide guidance relating to the determination of the amount of taxes paid for purposes of the foreign tax credit. The regulations affect taxpayers that claim direct and indirect foreign tax credits. The text of those temporary regulations also serves as the text of these proposed regulations. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by October 14, 2008. Outlines of topics to be discussed at the public hearing scheduled for December 11, 2008, at 10 a.m. must be received by November 20, 2008.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–156779–06), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–156779–06), Courier's desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–156779–06). The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, N.W., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Michael I. Gilman, (202) 622–3850; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Regina Johnson, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in this issue of the Bulletin contain amendments to the Income Tax Regulations (26 CFR Part 1) which provide rules relating to the determination of the amount of taxes paid for purposes of the foreign tax credit. The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations. The regulations affect individuals and corporations claiming foreign tax credits.

Special Analyses

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

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. In particular, the IRS and Treasury Department continue to study arrangements in which the foreign payments attributable to income of a special purpose vehicle (SPV) do not substantially exceed the foreign taxes that would have been paid by a controlled foreign corporation that owns the SPV in the absence of the arrangement. The IRS and Treasury Department seek additional comments on how to overcome the administrative challenges of determining the amount of foreign taxes that would have been paid but for such arrangement. The IRS and Treasury Department also request comments on whether the regulations should contain additional guidance on the extent to which activities are conducted by an entity's employees or on the treatment of employees of affiliates that are seconded to, or supervised by employees of, the tested entity. Finally, the IRS and Treasury Department request comments on the clarity of the proposed regulations 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 December 11, 2008, at 10 a.m. in the Auditorium, Internal Revenue Building, 1111

Constitution Avenue, N.W., Washington, D.C. 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 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 must submit electronic or written comments by October 14, 2008, and an outline of the topics to be discussed and time to be devoted to each topic (a signed original and eight (8) copies) by November 20, 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 Michael I. Gilman, Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.901–1 is amended by revising paragraphs (a) and (b) to read as follows:

§1.901–1 Allowance of credit for taxes.

(a) and (b) [The text of proposed §1.901–2(a) and (b) is the same as the text of §1.901–1T(a) and (b) published elsewhere in this issue of the Bulletin.]

* * * * *

Par. 3. Section 1.901–2 is amended by revising paragraphs (e)(5)(iii), (e)(5)(iv), and (h)(2) to read as follows:

§1.901–2 Income, war profits, or excess profits tax paid or accrued.

* * * * *

(e) * * *

(5) * * *

(iii) and (iv) [The text of proposed §1.901–2(e)(5)(iii) and (iv) is the same as the text of §1.901–2T(e)(5)(iii) and (iv) published elsewhere in this issue of the Bulletin.]

* * * * *

(h) * * *

(2) [The text of proposed §1.901–2(h)(2) is the same as the text of §1.901–2T(h)(2) published elsewhere in this issue of the Bulletin.]

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

(Filed by the Office of the Federal Register on July 15, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 16, 2008, 73 F.R. 40792)

Exported Coal Tax Refund

Announcement 2008–103

SECTION 1. PURPOSE

This announcement provides guidance to domestic coal producers and exporters regarding the submission of claims for refund of the coal excise tax pursuant to section 114 of the Energy Improvement and Extension Act of 2008 (Act section 114). Act section 114 provides criteria for refunds of the coal excise tax paid under § 4121 on coal exported on or after October 1, 1990, and on or before October 3, 2008. These claims must be filed by November 3, 2008.

SECTION 2. DEFINITIONS

(a) The terms coal producer and exporter have the meanings set forth in subsection (d) of Act section 114.

(b) Export includes the shipment of coal to a possession of the United States.

(c) Proof of exportation means evidence that the coal was exported. Acceptable evidence that coal was exported includes—

(1) A copy of the export bill of lading issued by the delivering carrier;

(2) A certificate signed by the agent or representative of the export carrier showing actual exportation of the coal;

(3) A certificate of landing signed by a customs officer of the foreign country to which the coal is exported; or

(4) In a case in which the foreign country has no customs administration, a statement of the foreign consignee showing receipt of the coal.

(d) For purposes of subsection (a)(2)(B) of Act section 114, tax return means any return with respect to an internal revenue tax.

SECTION 3. FORM FOR CLAIM

The following rules apply to all claims for a refund under Act section 114:

(a) Claims must be filed on a paper Form 8849, *Claim for Refund of Excise Taxes*, Schedule 6, *Other Claims*, in accordance with the instructions for this form. These claims may not be filed electronically.

(b) "Exported Coal Claim" must be written at the top of Form 8849.

(c) Claims must be mailed to: Internal Revenue Service, Cincinnati, OH 45999–0002.

(d) Claims must be filed no later than November 3, 2008.

SECTION 4. INFORMATION TO BE SUBMITTED; CLAIMS BY PRODUCER

Each claim by a coal producer under Act section 114 must contain the following information with respect to the coal covered by the claim:

(a) A statement that this is a Producer claim and that the CRN (Credit Reference Number) is 382.

(b) The quarter and year for which the tax on the coal was reported on Form 720, *Quarterly Federal Excise Tax Return*.

(c) The IRS No. listed on Form 720 (IRS No. 36, 37, 38, or 39) on which the tax was reported.

(d) The amount of tax paid.

(e) The date the tax was paid.

(f) The amount of the payment allowable under subsection (a)(1) of Act section

114, determined after application of the limitations in subsections (b), (c), (g)(1), and (h) of that section.

(g) A statement that—

(1) The claimant has proof of exportation for the coal covered by the claim; or

(2) The claimant has a favorable judgment of a court of competent jurisdiction within the United States that relates to the constitutionality of any tax paid on exported coal under § 4121.

(h) If a producer has a judgment described in paragraph (g)(2) of this section, a statement that includes the caption of the case, the case docket number, the court that rendered the judgment, the date of the judgment, and a statement of the amount paid pursuant to the judgment.

(i) A statement that the claimant has no knowledge of any other entity claiming and/or receiving a credit or refund of the tax paid on the exported coal.

SECTION 5. INFORMATION TO BE SUBMITTED; CLAIMS BY EXPORTER

Each claim by an exporter under Act section 114 must contain the following information with respect to the coal covered by the claim:

(a) A statement that this is an Exporter claim and that the CRN (Credit Reference Number) is 385.

(b) The calendar quarter and year in which the coal was exported.

(c) The amount of coal exported in each quarter.

(d) The amount of the payment allowable under subsection (a)(2) of Act section 114, determined after application of the limitations in subsections (b), (c), (g)(2), and (h) of that section.

(e) A statement that the exporter had no contract or other arrangement with the producer or seller of the coal to export the coal to a third party on behalf of the producer or seller.

(f) A statement that the exporter has proof of exportation for the coal that is the subject of the claim.

(g) Proof that exporter filed a tax return on or after October 1, 1990, and on or before October 3, 2008.

(h) A statement that the exporter has no knowledge of any other entity claiming and/or receiving a credit or refund of the tax paid on the exported coal.

SECTION 6. EFFECT OF ADDITIONAL GUIDANCE

If additional guidance is issued under Act section 114, taxpayers will be permitted to amend timely filed claims. If the amendment occurs within the period specified in such additional guidance, the amended claim will be treated as a timely filed claim.

SECTION 7. PAPERWORK REDUCTION ACT

The collections of information contained in this announcement have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–2121.

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

The collections of information in this notice are in sections 4 and 5. This information is required to support payments related to the coal tax. The collections of information are required to obtain a tax benefit. The likely respondents are businesses.

The estimated total annual reporting burden is 600 hours.

The estimated annual burden per respondent is 60 hours.

The estimated number of respondents is 100.

The estimated frequency of responses is once.

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

SECTION 8. DRAFTING INFORMATION

The principal author of this announcement is Celia Gabrysh of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this announcement, contact Dennis Caranna at (601) 292–4747 (not a toll-free call).

Request for Information Regarding Sections 101 Through 104 of the Genetic Information Nondiscrimination Act of 2008

Announcement 2008–107

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 54

DEPARTMENT OF LABOR
Employee Benefits Security Administration
29 CFR Part 2590

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Centers for Medicare & Medicaid Services
CMS–4137–NC
45 CFR Parts 144, 146, and 148

AGENCIES: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Request for Information.

SUMMARY: This document is a request for comments regarding issues under sections 101 through 104 of the Genetic Information Nondiscrimination Act of 2008 (GINA). The Departments of Labor, Health and Human Services (HHS), and the Treasury (collectively, the Departments) have received inquiries from the public on a number of issues under these provisions and are welcoming public comments in advance of future rulemaking (REG–123829–08).

DATES: Comments must be submitted on or before December 9, 2008.

ADDRESSES: Written comments may be submitted to any of the addresses specified below. Any comment that is submitted to any Department will be shared with the other Departments. Please do not submit duplicates.

Department of Labor. Comments to the Department of Labor by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Email*: *E-OHPSCA.EBSA@dol.gov*.
- *Mail or Hand Delivery*: Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N–5653, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, *Attention*: GINA Comments.

Comments received by the Department of Labor will be posted without change to *www.regulations.gov* and *www.dol.gov/ebsa*, and available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, 200 Constitution Avenue, NW, Washington, DC 20210, including any personal information provided.

Department of HHS. Comments to the Department of HHS, identified by CMS–4137–NC, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail*: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–4137–NC, P.O. Box 8017, Baltimore, MD 21244–8010.
- *Hand or courier delivery*. Comments may be delivered to either 7500 Security Boulevard, Baltimore, MD 21244–1850 or Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, DC 20201. For delivery to Baltimore, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members. For delivery to Washington, because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain proof of filing by stamping in and retaining an extra copy of the comments being filed.

All submissions submitted to HHS will be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, at the headquarters for the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, MD 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (410) 786–7195.

Internal Revenue Service. Comments to the IRS, identified by REG–123829–08, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail*: CC:PA:LPD:PR (REG–123829–08), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.
- *Hand or courier delivery*: Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–123829–08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington DC 20224.

All submissions to the IRS will be open to public inspection and copying in room 1621, 1111 Constitution Avenue, NW, Washington, DC from 9 a.m. to 4 p.m.

FOR FURTHER INFORMATION CONTACT: Amy Turner, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335; Russ Weinheimer, Internal Revenue Service, Department of the Treasury, at (202) 622–6080; Adam Shaw, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (877) 267–2323 extension 61091.

CUSTOMER SERVICE INFORMATION: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws, including the nondiscrimination protections, may call the EBSA Toll-Free Hotline at 1–866–444–EBSA (3272) or visit the Department of Labor's website (*http://www.dol.gov/ebsa*). In addition, individuals may request a copy of CMS's publication entitled "Protecting Your Health Insurance Coverage" by calling 1–800–633–4227.

SUPPLEMENTARY INFORMATION:

I. Background

The Genetic Information Nondiscrimination Act of 2008 (GINA) was enacted on May 21, 2008 (Public Law 110–233). Title I of GINA amends the Employee Retirement Income Security Act of 1974 (ERISA), the Public Health Service Act (PHS Act), the Internal Revenue Code of 1986 (Code), and the Social Security Act (SSA) to prohibit discrimination in health coverage based on genetic information. Sections 101 through 104 of GINA apply to employment-based health coverage, individual market health insurance, and Medicare supplemental (MedSupp or Medigap) coverage. The new requirements were added to Part 7 of Subtitle B of Title I of ERISA, Title XXVII of the PHS Act, Subtitle K of the Code, and section 1882 of the SSA.

GINA prohibits group health plans and health insurance issuers (that is, insurance companies or health maintenance organizations (HMOs)) in the group market from using genetic information to adjust premium or contribution amounts for the group covered under the plan. Plans and issuers in the group market are still allowed to increase the premium rate for an employer based on the manifestation of a disease or disorder of an individual enrolled in the plan, but they are prohibited from using the manifested disease or disorder of one individual as genetic information about other group members to further increase the premium.

In the individual market, health insurance issuers are prohibited from using genetic information to determine individual eligibility or premium rates, although they are allowed (to the extent consistent with other provisions of law) to use information about a manifestation of a disease or disorder to determine eligibility or premium rates for an individual who is covered or would be covered by a policy. Individual market health insurance issuers are also

prohibited from using genetic information in imposing a preexisting condition exclusion, although a manifestation of a disease or disorder in an individual can be the basis for an exclusion. In the MedSupp market, GINA prohibits issuers from denying or conditioning the issuance or effectiveness of a policy (including the imposition of any exclusion of benefits based on a preexisting condition) or discriminating in the pricing of the policy based on an individual's genetic condition. However, if otherwise permitted under section 1882 of the Social Security Act, the issuer can still impose such limitations based on a manifested disease of an individual who is covered or would be covered under the policy.

GINA also prohibits group health plans and health insurance issuers in the group, individual, and MedSupp markets from requesting or requiring an individual or family member of an individual to undergo a genetic test. Plans and issuers are not precluded from obtaining and using the results of a genetic test to make a determination regarding payment, but they may only use the minimum amount of information necessary.

GINA includes a research exception under which a group health plan or a health insurance issuer in the group, individual, or MedSupp market may request (but not require) a participant or beneficiary to undergo a genetic test if the following five conditions are met:

- The request is made in writing pursuant to research that complies with 45 CFR Part 46, or equivalent Federal regulations, and any applicable State or local law or regulations for the protection of human subjects in research.
- The plan or issuer clearly indicates to each participant or beneficiary to whom the request is made that compliance is voluntary and non-compliance will have no effect on enrollment status or premium contribution amounts.
- None of the genetic information collected can be used for underwriting purposes.
- The plan or issuer notifies the appropriate Secretary in writing that it is conducting such research activities, including a description of the activities conducted.
- The plan or issuer complies with such other conditions as may be required by regulations for such activities.

Group health plans and health insurance issuers in the group, individual, and MedSupp markets are prohibited from requesting, requiring, or purchasing genetic information for underwriting purposes or prior to an individual's enrollment under a plan or policy. Plans and issuers are still allowed to collect (that is, to request, require, or purchase) health information that relates to the manifestation of a disease or disorder of an individual enrolled in a plan or who is covered by or would be covered by a policy issued in the individual or MedSupp market, and use it for permitted underwriting purposes with respect to that individual. Furthermore, an exception to the prohibition on requesting, requiring, or purchasing genetic information is included for collection of genetic information which is incidental to the request, requirement, or purchase of other information concerning an individual, provided it is not used for underwriting purposes.

GINA defines genetic information with respect to any individual as information about that individual's genetic tests, the genetic tests of family members of the individual, and the manifestation of a disease or disorder in family members of the individual. The term genetic information also includes an individual's request for, or receipt of, genetic services, but does not include information about the sex or age of any individual. Genetic services are further defined as a genetic test, genetic counseling (which includes obtaining, interpreting, or assessing genetic information), or genetic education. A genetic test is defined for purposes of Title I of GINA as an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes. The term is not meant to include an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes, or an analysis of proteins or metabolites that is directly related to a manifested disease, disorder, or pathological condition that a health care professional with appropriate training and expertise could reasonably detect. Definitions of family member and underwriting purposes are also included, as well as provisions clarifying that references to genetic information concerning an individual include the genetic information of a fetus carried by a pregnant woman and of an embryo legally held by an individual utilizing an assisted reproductive technology.

The provisions of GINA are effective with respect to group health plans and health insurance issuers in the group market for plan years beginning after May 21, 2009. For health insurance issuers in the individual market, the provisions are effective with respect to health insurance coverage sold, issued, renewed, in effect, or operated in the individual market after May 21, 2009. For MedSupp coverage, States must incorporate the GINA provisions into their regulatory programs no later than July 1, 2009.

II. Solicitation of Comments

A. Comments Regarding Economic Analysis, Paperwork Reduction Act, and Regulatory Flexibility Act

Executive Order 12866 requires an assessment of the costs and benefits of a significant rulemaking action and the alternatives considered, using the guidance provided by the Office of Management and Budget. These costs and benefits are not limited to the Federal government, but pertain to the affected public as a whole. Under Executive Order 12866, a determination must be made whether implementation of GINA sections 101 through 104 will be economically significant. A rule that has an annual effect on the economy of $100 million or more is considered economically significant.

In addition, the Regulatory Flexibility Act may require the preparation of an analysis of the economic impact on small entities of proposed rules and regulatory alternatives. An analysis under the Regulatory Flexibility Act must generally include, among other things, an estimate of the number of small entities subject to the regulations (for this purpose, plans, employers, and issuers and, in some contexts small governmental entities), the expense of the reporting and other compliance requirements (including the expense of using professional expertise), and a description of any significant regulatory alternatives considered that would accomplish the stated objectives of the statute and min-

imize the impact on small entities. The Departments seek additional information from small entities regarding any special problems they might encounter in implementing the requirements of sections 101 through 104 of GINA and any regulatory guidance that might minimize those problems.

The Paperwork Reduction Act requires an estimate of how many "respondents" will be required to comply with any "collection of information" aspects of the regulations and how much time and cost will be incurred as a result. A collection of information includes record-keeping, reporting to governmental agencies, and third-party disclosures.

The Departments are requesting comments that may contribute to the analyses that will be performed under these requirements, both generally and with respect to the following specific areas:

(i) What policies, procedures, or practices of group health plans and health insurance issuers may be impacted by regulations under GINA? What direct or indirect costs would result? What direct or indirect benefits would result? Which stakeholders will be impacted by such benefits and costs?

(ii) Are there unique costs and benefits for small employers or small plans? What special consideration, if any, is needed for small employers or small plans?

B. Comments Regarding Regulatory Guidance

The Departments are seeking comments to aid in the development of regulations regarding sections 101 through 104 of GINA. To assist interested parties in responding, this request for information describes specific areas in which the Departments are particularly interested; however, the Departments also request comments and suggestions concerning any area or issue pertinent to the development of regulations.

Specific Areas in Which the Departments Are Interested Include the Following:

1. To what extent do group health plans and health insurance issuers currently use genetic information, such as family medical history, and for what purposes? For example, is genetic information currently used for group rating purposes, or for purposes of a wellness program that otherwise complies with HIPAA's nondiscrimination requirements?

2. How do plans and issuers currently obtain genetic information (for example, through health risk assessments, the Medical Information Bureau, or other entities under common control)?

3. Under what circumstances do plans or issuers currently request or require an individual to take a genetic test?

4. Under what circumstances do plans or issuers currently ask for the results of a genetic test in order to make a determination regarding payment of benefits? What is the minimum amount of information necessary for a plan or issuer to make a determination under such circumstances?

5. What types of research do plans or issuers currently conduct or support using genetic tests?

6. Would a model notice be helpful to facilitate disclosure to plan participants and beneficiaries regarding a plan's or issuer's use of the research exception? In this regard, what information would be most helpful to participants and beneficiaries?

7. Similarly, would a model form be helpful for reporting to the Departments by a plan or issuer claiming the research exception? In this regard, what information should plans and issuers report?

8. When might genetic information be collected incidentally?

9. What terms or provisions (such as genetic information, genetic test, genetic services, or underwriting) would require additional clarification to facilitate compliance? What specific clarifications would be helpful?

Signed at Washington, DC this 4th day of June, 2008.

Alan Tawshunsky,
Deputy Division Counsel/ Deputy Associate Chief Counsel, Tax Exempt and Government Entities, Internal Revenue Service, Department of the Treasury.

Signed at Washington, DC this 5th day of June, 2008.

W. Thomas Reeder,
Benefits Tax Counsel, Department of the Treasury.

Signed at Washington, DC this 2nd day of October, 2008.

Bradford P. Campbell,
Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

Dated June 30, 2008.

Kerry Weems,
Acting Administrator, Centers for Medicare & Medicaid Services.

(Filed by the Office of the Federal Register on October 9, 2008, 8:45 a.m., and published in the issue of the Federal Register for October 10, 2008, 73 F.R. 60208)

Extension of Time for Filing Returns; Hearing

Announcement 2008–108

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: This document provides notice of a public hearing on proposed regulations (REG–115457–08, 2008–33 I.R.B. 390) by cross-reference to temporary regulations relating to the simplification of procedures for automatic extensions of time to file certain returns. These simplified procedures are aimed at reducing overall taxpayer burden.

DATES: The public hearing is being held on Tuesday, January 13, 2009, at 10 a.m. The IRS must receive outlines of the topics

to be discussed at the public hearing by Tuesday, December 9, 2008.

ADDRESSES: The public hearing is being held in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW, Washington, DC 20224. Send submissions to CC:PA:LPD:PR (REG–115457–08), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday to CC:PA:LPD:PR (REG–115457–08), 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–115457–08).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Matthew P. Howard (202) 622–4910; concerning submissions of comments, the hearing and/or to be placed on the building access list to attend the hearing, Oluwafunmilayo Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

The subject of the public hearing is the notice of proposed rulemaking by cross-reference to temporary regulations (REG–115457–08) that was published in the **Federal Register** on Tuesday, July 1, 2008 (73 FR 37389).

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing that submitted written comments must submit an outline of the topics to be addressed and the amount of time to be denoted to each topic (Signed original and eight (8) copies) by December 9, 2008.

A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing or in the Freedom of Information Reading Room (FOIA RR) (Room 1621) which is located at the 11th and Pennsylvania Avenue, NW, entrance, 1111 Constitution Avenue, NW, Washington, DC.

Because of access restrictions, the IRS will not admit visitors 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 document.

LaNita Van Dyke,
Chief, Publications and Regulations Branch,
Legal Processing Division,
Associate Chief Counsel
(Procedure and Administration).

(Filed by the Office of the Federal Register on October 27, 2008, 8:45 a.m., and published in the issue of the Federal Register for October 28, 2008, 73 F.R. 63913)

Notice of Disposition of Declaratory Judgment Proceedings Under Section 7428

Announcement 2008–109

This announcement serves notice to donors that on October 17, 2008, the United States Tax Court entered a stipulated decision that the organization listed below is recognized as an organization described in section 501(c)(3), is exempt from tax under section 501(a), and is an organization described in section 170(c)(2).

Chaim Ministries, Inc.
Los Alamitos, CA

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

Numerical Finding List[1]

Bulletins 2008–27 through 2008–46

Announcements:

2008-62, 2008-27 I.R.B. *74*
2008-63, 2008-28 I.R.B. *114*
2008-64, 2008-28 I.R.B. *114*
2008-65, 2008-31 I.R.B. *279*
2008-66, 2008-29 I.R.B. *164*
2008-67, 2008-29 I.R.B. *164*
2008-68, 2008-30 I.R.B. *244*
2008-69, 2008-32 I.R.B. *318*
2008-70, 2008-32 I.R.B. *318*
2008-71, 2008-32 I.R.B. *321*
2008-72, 2008-32 I.R.B. *321*
2008-73, 2008-33 I.R.B. *391*
2008-74, 2008-33 I.R.B. *392*
2008-75, 2008-33 I.R.B. *392*
2008-76, 2008-33 I.R.B. *393*
2008-77, 2008-33 I.R.B. *394*
2008-78, 2008-34 I.R.B. *453*
2008-79, 2008-35 I.R.B. *568*
2008-80, 2008-37 I.R.B. *706*
2008-81, 2008-37 I.R.B. *706*
2008-82, 2008-37 I.R.B. *708*
2008-83, 2008-37 I.R.B. *709*
2008-84, 2008-38 I.R.B. *748*
2008-85, 2008-38 I.R.B. *749*
2008-86, 2008-40 I.R.B. *843*
2008-87, 2008-40 I.R.B. *843*
2008-88, 2008-40 I.R.B. *843*
2008-89, 2008-40 I.R.B. *844*
2008-90, 2008-41 I.R.B. *896*
2008-91, 2008-42 I.R.B. *963*
2008-92, 2008-42 I.R.B. *963*
2008-93, 2008-41 I.R.B. *896*
2008-94, 2008-42 I.R.B. *964*
2008-95, 2008-42 I.R.B. *964*
2008-96, 2008-43 I.R.B. *1010*
2008-97, 2008-43 I.R.B. *1010*
2008-98, 2008-44 I.R.B. *1087*
2008-99, 2008-44 I.R.B. *1089*
2008-100, 2008-44 I.R.B. *1090*
2008-101, 2008-44 I.R.B. *1090*
2008-102, 2008-43 I.R.B. *1011*
2008-103, 2008-46 I.R.B. *1161*
2008-104, 2008-45 I.R.B. *1136*
2008-106, 2008-45 I.R.B. *1137*
2008-107, 2008-46 I.R.B. *1162*
2008-108, 2008-46 I.R.B. *1165*
2008-109, 2008-46 I.R.B. *1166*

Court Decisions:

2087, 2008-41 I.R.B. *845*

Notices:

2008-55, 2008-27 I.R.B. *11*
2008-56, 2008-28 I.R.B. *79*
2008-57, 2008-28 I.R.B. *80*
2008-58, 2008-28 I.R.B. *81*
2008-59, 2008-29 I.R.B. *123*
2008-60, 2008-30 I.R.B. *178*
2008-61, 2008-30 I.R.B. *180*
2008-62, 2008-29 I.R.B. *130*
2008-63, 2008-31 I.R.B. *261*
2008-64, 2008-31 I.R.B. *268*
2008-65, 2008-30 I.R.B. *182*
2008-66, 2008-31 I.R.B. *270*
2008-67, 2008-32 I.R.B. *307*
2008-68, 2008-34 I.R.B. *418*
2008-69, 2008-34 I.R.B. *419*
2008-70, 2008-36 I.R.B. *575*
2008-71, 2008-35 I.R.B. *462*
2008-72, 2008-43 I.R.B. *998*
2008-73, 2008-38 I.R.B. *717*
2008-74, 2008-38 I.R.B. *718*
2008-75, 2008-38 I.R.B. *719*
2008-76, 2008-39 I.R.B. *768*
2008-77, 2008-40 I.R.B. *814*
2008-78, 2008-41 I.R.B. *851*
2008-79, 2008-40 I.R.B. *815*
2008-80, 2008-40 I.R.B. *820*
2008-81, 2008-41 I.R.B. *852*
2008-82, 2008-41 I.R.B. *853*
2008-83, 2008-42 I.R.B. *905*
2008-84, 2008-41 I.R.B. *855*
2008-85, 2008-42 I.R.B. *905*
2008-86, 2008-42 I.R.B. *925*
2008-87, 2008-42 I.R.B. *930*
2008-88, 2008-42 I.R.B. *933*
2008-89, 2008-43 I.R.B. *999*
2008-90, 2008-43 I.R.B. *1000*
2008-91, 2008-43 I.R.B. *1001*
2008-92, 2008-43 I.R.B. *1001*
2008-93, 2008-43 I.R.B. *1002*
2008-94, 2008-44 I.R.B. *1070*
2008-95, 2008-44 I.R.B. *1076*
2008-96, 2008-44 I.R.B. *1077*
2008-97, 2008-44 I.R.B. *1080*
2008-98, 2008-44 I.R.B. *1080*
2008-100, 2008-44 I.R.B. *1081*
2008-101, 2008-44 I.R.B. *1082*
2008-102, 2008-45 I.R.B. *1106*
2008-103, 2008-46 I.R.B. *1156*

Proposed Regulations:

REG-209006-89, 2008-41 I.R.B. *867*
REG-157711-02, 2008-44 I.R.B. *1087*
REG-143544-04, 2008-42 I.R.B. *947*
REG-160868-04, 2008-45 I.R.B. *1115*

Proposed Regulations— Continued:

REG-161695-04, 2008-37 I.R.B. *699*
REG-164965-04, 2008-34 I.R.B. *450*
REG-142339-05, 2008-45 I.R.B. *1116*
REG-143453-05, 2008-32 I.R.B. *310*
REG-146895-05, 2008-37 I.R.B. *700*
REG-155087-05, 2008-38 I.R.B. *726*
REG-164370-05, 2008-46 I.R.B. *1157*
REG-142680-06, 2008-35 I.R.B. *565*
REG-156779-06, 2008-46 I.R.B. *1160*
REG-120476-07, 2008-36 I.R.B. *679*
REG-120844-07, 2008-39 I.R.B. *770*
REG-128841-07, 2008-45 I.R.B. *1124*
REG-129243-07, 2008-27 I.R.B. *32*
REG-138355-07, 2008-32 I.R.B. *311*
REG-140029-07, 2008-40 I.R.B. *828*
REG-142040-07, 2008-34 I.R.B. *451*
REG-142333-07, 2008-43 I.R.B. *1008*
REG-149404-07, 2008-40 I.R.B. *839*
REG-149405-07, 2008-27 I.R.B. *73*
REG-100464-08, 2008-32 I.R.B. *313*
REG-101258-08, 2008-28 I.R.B. *111*
REG-102122-08, 2008-31 I.R.B. *278*
REG-102822-08, 2008-38 I.R.B. *744*
REG-103146-08, 2008-37 I.R.B. *701*
REG-106251-08, 2008-39 I.R.B. *774*
REG-107318-08, 2008-45 I.R.B. *1131*
REG-115457-08, 2008-33 I.R.B. *390*
REG-121698-08, 2008-29 I.R.B. *163*

Revenue Procedures:

2008-32, 2008-28 I.R.B. *82*
2008-33, 2008-28 I.R.B. *93*
2008-34, 2008-27 I.R.B. *13*
2008-35, 2008-29 I.R.B. *132*
2008-36, 2008-33 I.R.B. *340*
2008-37, 2008-29 I.R.B. *137*
2008-38, 2008-29 I.R.B. *139*
2008-39, 2008-29 I.R.B. *143*
2008-40, 2008-29 I.R.B. *151*
2008-41, 2008-29 I.R.B. *155*
2008-42, 2008-29 I.R.B. *160*
2008-43, 2008-30 I.R.B. *186*
2008-44, 2008-30 I.R.B. *187*
2008-45, 2008-30 I.R.B. *224*
2008-46, 2008-30 I.R.B. *238*
2008-47, 2008-31 I.R.B. *272*
2008-48, 2008-36 I.R.B. *586*
2008-49, 2008-34 I.R.B. *423*
2008-50, 2008-35 I.R.B. *464*
2008-51, 2008-35 I.R.B. *562*
2008-52, 2008-36 I.R.B. *587*
2008-53, 2008-36 I.R.B. *678*
2008-54, 2008-38 I.R.B. *722*
2008-55, 2008-39 I.R.B. *768*
2008-56, 2008-40 I.R.B. *826*

[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2008–1 through 2008–26 is in Internal Revenue Bulletin 2008–26, dated June 30, 2008.

Revenue Procedures— Continued:

2008-57, 2008-41 I.R.B. *855*
2008-58, 2008-41 I.R.B. *856*
2008-59, 2008-41 I.R.B. *857*
2008-60, 2008-43 I.R.B. *1006*
2008-61, 2008-42 I.R.B. *934*
2008-62, 2008-42 I.R.B. *935*
2008-63, 2008-42 I.R.B. *946*
2008-65, 2008-44 I.R.B. *1082*
2008-66, 2008-45 I.R.B. *1107*

Revenue Rulings:

2008-32, 2008-27 I.R.B. *6*
2008-33, 2008-27 I.R.B. *8*
2008-34, 2008-28 I.R.B. *76*
2008-35, 2008-29 I.R.B. *116*
2008-36, 2008-30 I.R.B. *165*
2008-37, 2008-28 I.R.B. *77*
2008-38, 2008-31 I.R.B. *249*
2008-39, 2008-31 I.R.B. *252*
2008-40, 2008-30 I.R.B. *166*
2008-41, 2008-30 I.R.B. *170*
2008-42, 2008-30 I.R.B. *175*
2008-43, 2008-31 I.R.B. *258*
2008-44, 2008-32 I.R.B. *292*
2008-45, 2008-34 I.R.B. *403*
2008-46, 2008-36 I.R.B. *572*
2008-47, 2008-39 I.R.B. *760*
2008-48, 2008-38 I.R.B. *713*
2008-49, 2008-40 I.R.B. *811*
2008-50, 2008-45 I.R.B. *1098*

Social Security Contribution and Benefit Base; Domestic Employee Coverage Threshold:

2008-103, 2008-46 I.R.B. *1156*

Treasury Decisions:

9401, 2008-27 I.R.B. *1*
9402, 2008-31 I.R.B. *254*
9403, 2008-32 I.R.B. *285*
9404, 2008-32 I.R.B. *280*
9405, 2008-32 I.R.B. *293*
9406, 2008-32 I.R.B. *287*
9407, 2008-33 I.R.B. *330*
9408, 2008-33 I.R.B. *323*
9409, 2008-29 I.R.B. *118*
9410, 2008-34 I.R.B. *414*
9411, 2008-34 I.R.B. *398*
9412, 2008-37 I.R.B. *687*
9413, 2008-34 I.R.B. *404*
9414, 2008-35 I.R.B. *454*
9415, 2008-36 I.R.B. *570*
9416, 2008-46 I.R.B. *1142*
9417, 2008-37 I.R.B. *693*
9418, 2008-38 I.R.B. *713*
9419, 2008-40 I.R.B. *790*
9420, 2008-39 I.R.B. *750*
9421, 2008-39 I.R.B. *755*

Treasury Decisions— Continued:

9422, 2008-42 I.R.B. *898*
9423, 2008-43 I.R.B. *966*
9424, 2008-44 I.R.B. *1012*
9425, 2008-45 I.R.B. *1100*
9426, 2008-46 I.R.B. *1153*

Finding List of Current Actions on Previously Published Items[1]

Bulletins 2008–27 through 2008–46

Announcements:

2008-19
Superseded by
Ann. 2008-95, 2008-42 I.R.B. *964*

2008-64
Corrected by
Ann. 2008-71, 2008-32 I.R.B. *321*

2008-72
Corrected by
Ann. 2008-78, 2008-34 I.R.B. *453*

Notices:

88-80
Modified by
Notice 2008-79, 2008-40 I.R.B. *815*

99-48
Superseded by
Rev. Proc. 2008-40, 2008-29 I.R.B. *151*

2000-9
Obsoleted by
Rev. Proc. 2008-41, 2008-29 I.R.B. *155*

2004-2
Amplified by
Notice 2008-59, 2008-29 I.R.B. *123*

2004-50
Amplified by
Notice 2008-59, 2008-29 I.R.B. *123*

2005-11
Superseded by
T.D. 9425, 2008-45 I.R.B. *1100*

2005-91
Obsoleted by
T.D. 9422, 2008-42 I.R.B. *898*

2006-88
Modified and superseded by
Notice 2008-60, 2008-30 I.R.B. *178*

2007-22
Amplified by
Notice 2008-59, 2008-29 I.R.B. *123*

2007-36
Clarified, modified, and amplified by
Rev. Proc. 2008-54, 2008-38 I.R.B. *722*

2007-52
Updated and amplified by
Notice 2008-96, 2008-44 I.R.B. *1077*

2007-53
Updated by
Notice 2008-97, 2008-44 I.R.B. *1080*

Notices— Continued:

2008-41
Amended and supplemented by
Notice 2008-88, 2008-42 I.R.B. *933*

Proposed Regulations:

REG-161695-04
Corrected by
Ann. 2008-92, 2008-42 I.R.B. *963*

REG-143453-05
Hearing cancelled by
Ann. 2008-96, 2008-43 I.R.B. *1010*

REG-129243-07
Corrected by
Ann. 2008-75, 2008-33 I.R.B. *392*

REG-151135-07
Hearing scheduled by
Ann. 2008-64, 2008-28 I.R.B. *114*

REG-101258-08
Corrected by
Ann. 2008-73, 2008-33 I.R.B. *391*

REG-103146-08
Hearing scheduled by
Ann. 2008-102, 2008-43 I.R.B. *1011*

REG-115457-08
Hearing scheduled by
Ann. 2008-108, 2008-46 I.R.B. *1165*

Revenue Procedures:

92-25
Superseded by
Rev. Proc. 2008-41, 2008-29 I.R.B. *155*

92-83
Obsoleted by
Rev. Proc. 2008-37, 2008-29 I.R.B. *137*

2001-10
Section 6.02(1)(a) modified and amplified by
Rev. Proc. 2008-52, 2008-36 I.R.B. *587*

2001-42
Superseded by
Rev. Proc. 2008-39, 2008-29 I.R.B. *143*

2002-9
Clarified, modified, amplified, and superseded by
Rev. Proc. 2008-52, 2008-36 I.R.B. *587*
Modified and amplified by
Rev. Proc. 2008-43, 2008-30 I.R.B. *186*

2002-28
Section 7.02(1)(a) modified and amplified by
Rev. Proc. 2008-52, 2008-36 I.R.B. *587*

2002-64
Superseded by
Rev. Proc. 2008-55, 2008-39 I.R.B. *768*

Revenue Procedures— Continued:

2005-29
Superseded by
Rev. Proc. 2008-49, 2008-34 I.R.B. *423*

2006-27
Modified and superseded by
Rev. Proc. 2008-50, 2008-35 I.R.B. *464*

2006-29
Superseded by
Rev. Proc. 2008-34, 2008-27 I.R.B. *13*

2006-34
Superseded by
Rev. Proc. 2008-44, 2008-30 I.R.B. *187*

2007-14
Superseded by
Rev. Proc. 2008-52, 2008-36 I.R.B. *587*

2007-19
Superseded by
Rev. Proc. 2008-39, 2008-29 I.R.B. *143*

2007-37
Updated by
Rev. Proc. 2008-62, 2008-42 I.R.B. *935*

2007-42
Superseded by
Rev. Proc. 2008-32, 2008-28 I.R.B. *82*

2007-43
Superseded by
Rev. Proc. 2008-33, 2008-28 I.R.B. *93*

2007-44
Modified by
Rev. Proc. 2008-56, 2008-40 I.R.B. *826*

2007-49
Section 3 modified and superseded by
Rev. Proc. 2008-50, 2008-35 I.R.B. *464*

2007-50
Superseded by
Rev. Proc. 2008-36, 2008-33 I.R.B. *340*

2007-63
Superseded by
Rev. Proc. 2008-59, 2008-41 I.R.B. *857*

2007-66
Modified and superseded by
Rev. Proc. 2008-54, 2008-38 I.R.B. *722*

2007-70
Modified by
Ann. 2008-63, 2008-28 I.R.B. *114*

2007-72
Amplified and superseded by
Rev. Proc. 2008-47, 2008-31 I.R.B. *272*

[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2008–1 through 2008–26 is in Internal Revenue Bulletin 2008–26, dated June 30, 2008.

Revenue Procedures— Continued:

2008-3
Modified and amplified by
Rev. Proc. 2008-61, 2008-42 I.R.B. *934*

2008-12
Modified and superseded by
Rev. Proc. 2008-35, 2008-29 I.R.B. *132*

2008-43
Modified by
Rev. Proc. 2008-52, 2008-36 I.R.B. *587*

2008-52
Modified by
Ann. 2008-84, 2008-38 I.R.B. *748*

Revenue Rulings:

67-213
Amplified by
Rev. Rul. 2008-40, 2008-30 I.R.B. *166*

71-234
Modified by
Rev. Proc. 2008-43, 2008-30 I.R.B. *186*

76-273
Obsoleted by
T.D. 9414, 2008-35 I.R.B. *454*

77-480
Modified by
Rev. Proc. 2008-43, 2008-30 I.R.B. *186*

82-105
Obsoleted by
T.D. 9414, 2008-35 I.R.B. *454*

91-17
Amplified by
Rev. Proc. 2008-41, 2008-29 I.R.B. *155*
Rev. Proc. 2008-42, 2008-29 I.R.B. *160*
Superseded in part by
Rev. Proc. 2008-40, 2008-29 I.R.B. *151*

2005-6
Amplified by
Rev. Proc. 2008-38, 2008-29 I.R.B. *139*

2006-57
Modified by
Notice 2008-74, 2008-38 I.R.B. *718*

2008-12
Amplified by
Rev. Rul. 2008-38, 2008-31 I.R.B. *249*
Clarified by
Ann. 2008-65, 2008-31 I.R.B. *279*

Treasury Decisions:

8073
Corrected by
Ann. 2008-99, 2008-44 I.R.B. *1089*

Treasury Decisions— Continued:

9391
Corrected by
Ann. 2008-74, 2008-33 I.R.B. *392*

9417
Corrected by
Ann. 2008-91, 2008-42 I.R.B. *963*

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