Internal Revenue bulletin

Bulletin No. 2008-47
November 24, 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

Rev. Rul. 2008–51, page 1171.

2008 base period T-bill rate. The "base period T-bill rate" for the period ending September 30, 2008, is published as required by section 995(f) of the Code.

T.D. 9428, page 1174.

Final regulations under section 1367 of the Code provide rules regarding the definition of open account debt and the adjustments in basis of any indebtedness of an S corporation to a shareholder for shareholder advances and repayments on advances of open account debt. The regulations affect shareholders of S corporations and are necessary to provide guidance needed to comply with the applicable tax law.

T.D. 9429, page 1167.

Final regulations under section 141 of the Code provide guidance relating to the standards for treating payments in lieu of taxes as generally applicable taxes for purposes of the private security or payment test.

Notice 2008–99, page 1194.

This notice identifies a transaction, and substantially similar transactions, as transactions of interest for purposes of regulations section 1.6011–4(b)(6) and sections 6111 and 6112 of the Code. In the transaction, a sale or other disposition of all the interests in a charitable remainder trust (subsequent to the contribution of appreciated assets to and their reinvestment by the trust) results in the grantor or other noncharitable recipient receiving the value of the grantor or other noncharitable recipient's trust interest and claiming to recognize little or no taxable gain.

Rev. Proc. 2008–64, page 1195.

This procedure provides guidance under section 301 of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat. 3765 (EESA). EESA section 301 provides that the treatment of gain or loss from the sale or exchange of any applicable preferred stock by any applicable financial institution is treated as ordinary income or loss, where applicable preferred stock refers to certain preferred stock in Fannie Mae or Freddie Mac. This procedure primarily addresses transactions in which the applicable financial institution is a partner in a partnership which held the applicable preferred stock.

EMPLOYEE PLANS

T.D. 9427, page 1179.

Final regulations under section 9811 of the Code provide guidance on the requirements for group health plans offering benefits for hospital stays in connection with childbirth to provide benefits for at least a 48-hour stay for vaginal deliveries and for at least a 96-hour stay for deliveries by cesarean section.

EXCISE TAX

T.D. 9427, page 1179.

Final regulations under section 9811 of the Code provide guidance on the requirements for group health plans offering benefits for hospital stays in connection with childbirth to provide benefits for at least a 48-hour stay for vaginal deliveries and for at least a 96-hour stay for deliveries by cesarean section.

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Announcement of Declaratory Judgment Proceedings Under Section 7428 begins on page 1199.
Announcements of Disbarments and Suspensions begin on page 1199.
Finding Lists begin on page ii.
Index for July through November begins on page vi.

Department of the Treasury
Internal Revenue Service

ADMINISTRATIVE

Notice 2008–99, page 1194.

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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 141.—Private Activity Bond; Qualified Bond

26 CFR 1.141–4: Private security or payment test.

T.D. 9429

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Treatment of Payments in Lieu of Taxes Under Section 141

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations which modify the standards for treating certain payments in lieu of taxes or other tax equivalency payments (PILOTs) as generally applicable taxes for purposes of the private security or payment test under section 141 of the Internal Revenue Code (Code). This action is being taken in order to provide issuers of tax-exempt bonds with guidance on whether PILOTs are eligible to be treated as generally applicable taxes for this purpose. The regulations affect State and local governmental issuers of tax-exempt bonds.

DATES: *Effective Date:* These regulations are effective on October 24, 2008.

Applicabilitys Dates: For dates of applicability, see §1.141–15(k).

FOR FURTHER INFORMATION CONTACT: Carla Young at (202) 622–3980 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends the Income Tax Regulations (26 CFR part 1) under section 141 to modify and clarify the standards for treating PILOTs as generally applicable taxes for purposes of the private security or payment test under section 141.

Final regulations under section 141 were published in the **Federal Register** on January 16, 1997 (T.D. 8712, 1997–1 C.B. 15 [62 FR 2275]) (1997 Regulations), to provide comprehensive guidance on most aspects of the private activity bond restrictions. On October 19, 2006, the IRS published a notice of proposed rulemaking in the **Federal Register** (REG–136806–06, 2006–2 C.B. 950 [71 FR 61693]) (Proposed Regulations) regarding the standards for treating PILOTs as generally applicable taxes for purposes of the private security or payment test under section 141. In the Proposed Regulations, the Treasury Department and the IRS solicited public comments and invited interested parties to a public hearing scheduled for February 13, 2007. On January 30, 2007, the Treasury Department and the IRS cancelled the public hearing because no requests to speak at the hearing were received, and published a notice of such cancellation in the **Federal Register** (Published in the IRB as Announcement 2007–19, 2007–7 I.R.B. 521 [72 FR 4220]).

The Treasury Department and the IRS received a number of written comments on the Proposed Regulations. After consideration of the written comments, the Proposed Regulations are adopted, with revisions, as final regulations by this Treasury decision (Final Regulations). The revisions are discussed in the preamble.

Explanation of Provisions

I. *Introduction*

In general, interest on State and local governmental bonds is excludable from gross income under section 103 of the Code. Interest on a private activity bond, other than a qualified bond under section 141(e), is not excludable from gross income. Section 141(a) classifies a bond as a private activity bond if it is part of an issue that meets both the private business use test under section 141(b)(1) (private business use test) and the private security or payment test under section 141(b)(2) (private payment test). In addition, section 141(a) independently treats a bond as a private activity bond if it is part of an issue that meets the private loan test under section 141(c).

Section 141(b)(2) provides generally that an issue meets the private payment test if the payment of the debt service on more than 10 percent of the proceeds of such issue is (under the terms of such issue or any underlying arrangement) directly or indirectly (1) secured by any interest in property used or to be used for a private business use, or payments in respect of such property, or (2) to be derived from payments (whether or not to the issuer) in respect of property, or borrowed money, used or to be used for a private business use.

II. *Private Payment Test in General*

Sections 1.141–4(c) and 1.141–4(d) of the 1997 Regulations provide general rules for purposes of application of the private payment test. Private payments generally include any payments made, directly or indirectly, by any nongovernmental person that is a private business user of proceeds during a period of private business use and any payments made with respect to property financed with proceeds of an issue during a period of private business use, whether or not made by a private business user. In addition, private payments include property and payments in respect of property that are used or to be used for private business use to the extent that any interest in that property or payments serves as security for the payment of debt service on an issue.

III. *Generally Applicable Taxes Exception*

Section 1.141–4(e) of the 1997 Regulations provides an exception to the otherwise broad scope of payments taken into account under the private payment test in the case of generally applicable taxes. Thus, §1.141–4(e)(1) provides that for purposes of the private security or payment test, generally applicable taxes are not taken into account (that is, are not payments from a nongovernmental person and are not payments in respect of property used for a private business use). In general, the purpose of the generally

applicable taxes exception is to allow eligible tax payments made with respect to property or services to be used to pay debt service on an issue without causing private payments. For this purpose, §1.141–4(e)(2) of the 1997 Regulations defines a generally applicable tax to mean an enforced contribution exacted pursuant to legislative authority in the exercise of the taxing power that is imposed and collected for the purpose of raising revenue to be used for governmental purposes. To qualify as a generally applicable tax, a tax must have a uniform rate that is applied to all persons of the same classification in the appropriate jurisdiction, and the tax must have a generally applicable manner of determination and collection.

Section 1.141–4(e)(4)(i) provides that a tax does not have a generally applicable manner of determination and collection to the extent that one or more taxpayers make any impermissible agreements relating to the payment of those taxes. Section 1.141–4(e)(4)(ii) and (iii) of the 1997 Regulations set forth permissible and impermissible agreements for this purpose. An example of a permissible agreement that does not cause a tax to fail to have a generally applicable manner of determination and collection includes an agreement to reduce or limit the amount of taxes collected to further a *bona fide* governmental purpose. For example, an agreement to abate taxes to encourage a property owner to rehabilitate property in a distressed area is a permissible agreement.

Section 1.141–4(e)(3) of the 1997 Regulations provides that a payment does not qualify as a generally applicable tax if it is a special charge for a special privilege granted or service rendered. This provision further provides that special assessments paid by property owners benefiting from financed improvements are not generally applicable taxes. This provision includes an example that a tax or PILOT that is limited to the property or persons benefited by an improvement is not a generally applicable tax.

The Proposed Regulations generally did not address the special charge limitation on generally applicable taxes. Commentators suggested clarifying the scope of this special charge limitation and its application in the context of PILOTs.

The Final Regulations clarify and illustrate the scope of the special charge limitation on generally applicable taxes. The Final Regulations provide that a special charge includes a payment for a special privilege granted or regulatory function (for example, a license fee), a service rendered (for example, a sanitation services fee), a use of property (for example, rent), or a payment in the nature of a special assessment to finance capital improvements that is imposed on a limited class of persons based on benefits received from the capital improvements financed with the assessment. The Final Regulations illustrate that a special assessment to finance infrastructure improvements in a new industrial park (such as sidewalks, streets, streetlights, and utility infrastructure improvements) that is imposed on a limited class of persons composed of property owners within the industrial park who benefit from those improvements is a special charge. The Final Regulations also illustrate that, by contrast, an otherwise-qualified generally applicable tax (for example, a generally applicable *ad valorem* tax on all real property within a governmental taxing jurisdiction) or an eligible PILOT that is based on such a generally applicable tax is not treated as a special charge merely because the taxes or PILOTs received are used for governmental or public purposes in a manner that benefits particular property owners.

IV. *Certain Payments in Lieu of Taxes Treated as* Generally Applicable Taxes

Section 1.141–4(e)(5) of the 1997 Regulations treats PILOTs as generally applicable taxes if: (1) The payments are commensurate with and not greater than the amounts imposed by the statute for a tax of general application; and (2) The payments are designated for a public purpose and are not special charges (as described in §1.141–4(e)(3)). Section 1.141–4(e)(5) of the 1997 Regulations further provides an example which states that a PILOT made in consideration for the use of property financed with tax-exempt bonds is treated as a special charge.

The Proposed Regulations proposed to clarify and to tighten the commensurate standard for PILOTs to better ensure a reasonably close relationship between eligible PILOTs and generally applicable taxes. In particular, the Proposed Regulations proposed to define the commensurate standard to provide generally that an eligible PILOT payment must represent a fixed percentage of, or reflect a fixed adjustment to, the amount of generally applicable taxes in each year, based on comparable current valuation assessments. Commentators suggested that the proposed commensurate standard was unduly restrictive and suggested allowing fixed-payment PILOTs. The Treasury Department and the IRS decline to adopt this suggestion to allow fixed-payment PILOTs. The Final Regulations generally continue the approach to the commensurate standard in the Proposed Regulations because the Treasury Department and the IRS continue to believe that this approach will better ensure a reasonably close relationship between eligible PILOTs and generally applicable taxes.

The Final Regulations refine the commensurate standard in certain technical respects in response to public comments. The Proposed Regulations proposed to permit only a single change in the measure of a PILOT in relation to an underlying generally applicable tax following completion of the development of the subject property. Commentators suggested allowing broader flexibility for phased adjustments to PILOTs during the development, construction, or initial start-up period of the property. The Final Regulations adopt this comment.

The Proposed Regulations also proposed to treat any payment based in any way on debt service on an issue as impermissible under the commensurate standard. Commentators suggested that this limitation is overly broad and could prohibit any use of PILOTs to pay debt service on an issue. The Final Regulations do not prohibit any use of PILOTs to pay debt service on an issue, but provide that a PILOT is not commensurate with a generally applicable tax if the PILOT is set at a fixed dollar amount (for example, fixed debt service on a bond issue) that cannot vary with changes in the level of the generally applicable tax on which it is based.

Section 1.141–4(e)(5) of the 1997 Regulations and the Proposed Regulations require designation of PILOTs for a "public purpose." Section 1.141–4(e)(2) of the 1997 Regulations requires use of generally applicable taxes for "governmental purposes." These references to

the designation of PILOTs for a public purpose and to the use of generally applicable taxes for governmental purposes were intended to refer to the same standard. In this regard, longstanding Revenue Rulings on the definition of generally applicable taxes under section 164 on which the section 141 definition was based have consistently required the use of generally applicable taxes for "public or governmental purposes." See, for example, Rev. Rul. 71–49, 1971–1 C.B. 103; Rev. Rul. 61–152, 1961–2 C.B. 42 (see §601.601(d)(2)(ii)(*b*)). To clarify the intended uniform standard for the use of generally applicable taxes and eligible PILOTs, the Final Regulations adopt consistent terminology to state this uniform standard.

The 1997 Regulations and the Proposed Regulations require "designation" of eligible PILOTs for public purposes. Commentators suggested clarifying this designation principle to require "application" of PILOTs for public purposes or to deem PILOTs as duly designated upon commingling with other governmental taxes or revenues. In response to this comment, the Final Regulations require use of an eligible PILOT for governmental or public purposes for which the underlying generally applicable tax on which it is based may be used.

The Proposed Regulations proposed to eliminate the example in the last sentence of §1.141–4(e)(5)(ii) of the 1997 Regulations, which illustrated that a PILOT made in consideration of the use of property financed with tax-exempt bonds is treated as a special charge. Most commentators supported this proposed change and one commentator objected to this proposed change. The Final Regulations remove this example, but address the issue raised in this example separately in clarifying guidance on the "special charge" limitation on generally applicable taxes under §1.141–4(e)(3). A payment made "in consideration for the use of property" is more properly characterized as rent or an installment sale payment for the use of property. The Final Regulations clarify that, among other special charges, a payment for the use of property (for example, rent) is treated as a special charge under §1.141–4(e)(3). Further, the reference to tax-exempt bond financing in the referenced example caused confusion because the presence or absence of tax-exempt bond financing properly is irrelevant to the determination of whether a payment, in substance, is in the nature of a special charge for the use of property or a generally applicable tax. The above-described revision with respect to the referenced example represents a technical clarification rather than a substantive change.

Effective/Applicability Dates

The Proposed Regulations were published on October 19, 2006, and were proposed to apply to bonds sold on or after February 16, 2007. This proposed effective date was intended to accommodate completion of bond issues for projects in progress under the 1997 Regulations. Commentators indicated that the proposed effective date of the Proposed Regulations was insufficient to accommodate completion of bond issues for projects substantially in progress. Commentators also requested transitional relief for refundings of bonds issued before the effective date of the Proposed Regulations.

The Final Regulations generally apply to bonds sold on or after October 24, 2008.

In response to public comments, the Final Regulations provide a transitional rule for refundings. Under this transitional rule, the 1997 Regulations may continue to be applied to certain refundings of bonds that were sold before the dates of applicability of the Final Regulations if they meet a prescribed weighted average maturity test set forth in the Final Regulations.

In addition, in response to public comments, the Final Regulations also provide a transitional rule for certain bonds for projects substantially in progress at the time of the promulgation of the Proposed Regulations. Under this transitional rule, the 1997 Regulations may continue to be applied to certain bonds issued within a prescribed time to finance certain projects that meet prescribed conditions set forth in the Final Regulations.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedures 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, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Carla Young and James Polfer, Office of Chief Counsel (Financial Institutions and Products). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX

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

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

Par. 2. Section 1.141–0 is amended by adding a new entry for §1.141–15(k) to read as follows:

§1.141–0 Table of contents.

* * * * *

§1.141–15 Effective dates.

* * * * *

(k) Effective/applicability dates for certain regulations relating to generally applicable taxes and payments in lieu of tax.

* * * * *

Par. 3. Section 1.141–4 is amended by:

1. Paragraph (e)(2) the first sentence is revised.

2. Paragraphs (e)(3), (e)(5), (e)(5)(i), (e)(5)(ii) are revised and adding new paragraphs (e)(5)(iii) and (e)(5)(iv).

The revisions and additions read as follows:

§1.141–4 Private Security or Payment Test.

* * * * *

(e) * * *

(2) * * * A generally applicable tax is an enforced contribution exacted pursuant to legislative authority in the exercise of the taxing power that is imposed and collected for the purpose of raising revenue to be used for governmental or public purposes. * * *

(3) *Special charges*. A special charge (as defined in this paragraph (e)(3)) is not a generally applicable tax. For this purpose, a special charge means a payment for a special privilege granted or regulatory function (for example, a license fee), a service rendered (for example, a sanitation services fee), a use of property (for example, rent), or a payment in the nature of a special assessment to finance capital improvements that is imposed on a limited class of persons based on benefits received from the capital improvements financed with the assessment. Thus, a special assessment to finance infrastructure improvements in a new industrial park (such as sidewalks, streets, streetlights, and utility infrastructure improvements) that is imposed on a limited class of persons composed of property owners within the industrial park who benefit from those improvements is a special charge. By contrast, an otherwise qualified generally applicable tax (such as a generally applicable *ad valorem* tax on all real property within a governmental taxing jurisdiction) or an eligible PILOT under paragraph (e)(5) of this section that is based on such a generally applicable tax is not treated as a special charge merely because the taxes or PILOTs received are used for governmental or public purposes in a manner which benefits particular property owners.

* * * * *

(5) *Payments in lieu of taxes*. A tax equivalency payment or other payment in lieu of a tax ("PILOT") is treated as a generally applicable tax if it meets the requirements of paragraphs (e)(5)(i) through (iv) of this section—

(i) *Maximum amount limited by underlying generally applicable tax*. The PILOT is not greater than the amount imposed by a statute for a generally applicable tax in each year.

(ii) *Commensurate with a generally applicable tax*. The PILOT is commensurate with the amount imposed by a statute for a generally applicable tax in each year under the commensurate standard set forth in this paragraph (e)(5)(ii). For this purpose, except as otherwise provided in this paragraph (e)(5)(ii), a PILOT is commensurate with a generally applicable tax only if it is equal to a fixed percentage of the generally applicable tax that would otherwise apply in each year or it reflects a fixed adjustment to the generally applicable tax that would otherwise apply in each year. A PILOT based on a property tax does not fail to be commensurate with the property tax as a result of changes in the level of the percentage of or adjustment to that property tax for a reasonable phase-in period ending when the subject property is placed in service (as defined in §1.150–2(c)). A PILOT based on a property tax must take into account the current assessed value of the property for property tax purposes for each year in which the PILOT is paid and that assessed value must be determined in the same manner and with the same frequency as property subject to the property tax. A PILOT is not commensurate with a generally applicable tax, however, if the PILOT is set at a fixed dollar amount (for example, fixed debt service on a bond issue) that cannot vary with changes in the level of the generally applicable tax on which it is based.

(iii) *Use of PILOTs for governmental or public purposes*. The PILOT is to be used for governmental or public purposes for which the generally applicable tax on which it is based may be used.

(iv) *No special charges*. The PILOT is not a special charge under paragraph (e)(3) of this section.

* * * * *

Par. 4. Section 1.141–15 is amended by adding paragraph (k) to read as follows:

§1.141–15 Effective Dates.

* * * * *

(k) *Effective/applicability dates for certain regulations relating to generally applicable taxes and payments in lieu of tax*—(1) *In general*. Except as otherwise provided in paragraphs (k)(2) and (k)(3) of this section, revised §§1.141–4(e)(2), 1.141–4(e)(3) and 1.141–4(e)(5) apply to bonds sold on or after October 24, 2008, that are otherwise subject to the 1997 Regulations (defined in paragraph (b)(1) of this section).

(2) *Transitional rule for certain refundings*. Paragraph (k)(1) does not apply to bonds that are issued to refund bonds if—

(i) Either—

(A) The refunded bonds (or the original bonds in a series of refundings) were sold before October 24, 2008, or

(B) The refunded bonds (or the original bonds in a series of refundings) satisfied the transitional rule for projects substantially in progress under paragraph (k)(3) of this section; and

(ii) The weighted average maturity of the refunding bonds does not exceed the remaining weighted average maturity of the refunded bonds.

(3) *Transitional rule for certain projects substantially in progress*. Paragraph (k)(1) of this section does not apply to bonds issued for projects for which all of the following requirements are met:

(i) A governmental person (as defined in §1.141–1) took official action evidencing its preliminary approval of the project before October 19, 2006, and the plan of finance for the project in place at that time contemplated financing the project with tax-exempt bonds to be paid or secured by PILOTs.

(ii) Before October 19, 2006, significant expenditures were paid or incurred with respect to the project or a contract was entered into to pay or incur significant expenditures with respect to the project.

(iii) The bonds for the project (excluding refunding bonds) are issued on or before December 31, 2009.

Steven Miller,
Deputy Commissioner for Services and Enforcement.

Approved October 16, 2008.

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

(Filed by the Office of the Federal Register on October 20, 2008, 4:15 p.m., and published in the issue of the Federal Register for October 24, 2008, 73 F.R. 63372)

Section 582.—Bad Debts, Losses, and Gains With Respect to Securities Held by Financial Institutions

Application of section 301 of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat. 3765, in situations where the applicable financial institution is a partner in a partnership which held the applicable preferred stock. See Rev. Proc. 2008-64, page 1195.

Section 702.—Income and Credits of Partner

Application of section 301 of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat. 3765, in situations where the applicable financial institution is a partner in a partnership which held the applicable preferred stock. See Rev. Proc. 2008-64, page 1195.

Section 995.—Taxation of DISC Income to Shareholders

2008 base period T-bill rate. The "base period T-bill rate" for the period ending September 30, 2008, is published as required by section 995(f) of the Code.

Rev. Rul. 2008–51

Section 995(f)(1) of the Internal Revenue Code provides that a shareholder of a DISC shall pay interest each taxable year in an amount equal to the product of the shareholder's DISC-related deferred tax liability for the year and the "base period T-bill rate." Under section 995(f)(4), the base period T-bill rate is the annual rate of interest determined by the Secretary to be equivalent to the average of the 1-year constant maturity Treasury yields, as published by the Board of Governors of the Federal Reserve System, for the 1-year period ending on September 30 of the calendar year ending with (or of the most recent calendar year ending before) the close of the taxable year of the shareholder. The base period T-bill rate for the period ending September 30, 2008, is 2.48 percent.

Pursuant to section 6222 of the Code, interest must be compounded daily. The table below provides factors for compounding the base period T-bill rate daily for any number of days in the shareholder's taxable year (including a 52–53 week accounting period) for the 2008 base period T-bill rate. To compute the amount of the interest charge for the shareholder's taxable year, multiply the amount of the shareholder's DISC-related deferred tax liability (as defined in section 995(f)(2)) for that year by the base period T-bill rate factor corresponding to the number of days in the shareholder's taxable year for which the interest charge is being computed. Generally, one would use the factor for 365 days. One would use a different factor only if the shareholder's taxable year for which the interest charge being determined is a short taxable year, if the shareholder uses the 52–53 week taxable year, or if the shareholder's taxable year is a leap year.

For the base period T-bill rates for the periods ending in prior years, see Rev. Rul. 2007–64, 2007–45 I.R.B. 953; Rev. Rul. 2006–54, 2006–2 C.B. 834; Rev. Rul. 2005–70, 2005–2 C.B. 919; Rev. Rul. 2004–99, 2004–2 C.B. 720; Rev. Rul. 2003–2, 2003–1 C.B. 251; Rev. Rul. 2002–68, 2002–2 C.B. 808; Rev. Rul. 2001–56, 2001–2 C.B. 500; and Rev. Rul. 2000–52, 2000–2 C.B. 516.

DRAFTING INFORMATION

The principal author of this revenue ruling is Teresa B. Hughes of the Office of Associate Chief Counsel (International). For further information regarding this revenue ruling, contact Teresa B. Hughes at (202) 622–3850 (not a toll-free call).

2008 ANNUAL RATE, COMPOUNDED DAILY

2.480 PERCENT

DAYS	FACTOR
1	.000067760
2	.000135524
3	.000203292
4	.000271066
5	.000338844
6	.000406626
7	.000474413
8	.000542205
9	.000610001
10	.000677802

2008 ANNUAL RATE, COMPOUNDED DAILY

2.480 PERCENT

DAYS	FACTOR
11	.000745608
12	.000813418
13	.000881233
14	.000949052
15	.001016876
16	.001084704
17	.001152537
18	.001220375
19	.001288217
20	.001356064
21	.001423915
22	.001491771
23	.001559632
24	.001627497
25	.001695367
26	.001763242
27	.001831121
28	.001899004
29	.001966893
30	.002034785
31	.002102683
32	.002170585
33	.002238492
34	.002306403
35	.002374319
36	.002442239
37	.002510164
38	.002578094
39	.002646028
40	.002713967
41	.002781910
42	.002849858
43	.002917811
44	.002985768
45	.003053730
46	.003121697
47	.003189668
48	.003257643
49	.003325624
50	.003393609

2008 ANNUAL RATE, COMPOUNDED DAILY

2.480 PERCENT

DAYS	FACTOR
51	.003461598
52	.003529592
53	.003597591
54	.003665594
55	.003733602
56	.003801615
57	.003869632
58	.003937654
59	.004005680
60	.004073711
61	.004141747
62	.004209787
63	.004277832
64	.004345881
65	.004413935
66	.004481994
67	.004550057
68	.004618125
69	.004686197
70	.004754275
71	.004822356
72	.004890443
73	.004958534
74	.005026629
75	.005094729
76	.005162834
77	.005230943
78	.005299057
79	.005367176
80	.005435299
81	.005503427
82	.005571560
83	.005639697
84	.005707838
85	.005775985
86	.005844136
87	.005912291
88	.005980451
89	.006048616
90	.006116786

2008 ANNUAL RATE, COMPOUNDED DAILY

2.480 PERCENT

DAYS	FACTOR
91	.006184960
92	.006253138
93	.006321322
94	.006389510
95	.006457702
96	.006525899
97	.006594101
98	.006662307
99	.006730518
100	.006798734
101	.006866954
102	.006935179
103	.007003408
104	.007071643
105	.007139881
106	.007208125
107	.007276373
108	.007344625
109	.007412883
110	.007481144
111	.007549411
112	.007617682
113	.007685958
114	.007754238
115	.007822523
116	.007890813
117	.007959107
118	.008027406
119	.008095709
120	.008164017
121	.008232330
122	.008300648
123	.008368970
124	.008437296
125	.008505627
126	.008573963
127	.008642304
128	.008710649
129	.008778999
130	.008847353

2008 ANNUAL RATE, COMPOUNDED DAILY

2.480 PERCENT

DAYS	FACTOR
131	.008915712
132	.008984076
133	.009052444
134	.009120817
135	.009189195
136	.009257577
137	.009325964
138	.009394355
139	.009462752
140	.009531152
141	.009599558
142	.009667968
143	.009736382
144	.009804802
145	.009873226
146	.009941654
147	.010010087
148	.010078525
149	.010146968
150	.010215415
151	.010283867
152	.010352323
153	.010420784
154	.010489250
155	.010557720
156	.010626195
157	.010694674
158	.010763159
159	.010831648
160	.010900141
161	.010968639
162	.011037142
163	.011105649
164	.011174162
165	.011242678
166	.011311200
167	.011379726
168	.011448256
169	.011516792
170	.011585332

2008 ANNUAL RATE, COMPOUNDED DAILY 2.480 PERCENT		2008 ANNUAL RATE, COMPOUNDED DAILY 2.480 PERCENT		2008 ANNUAL RATE, COMPOUNDED DAILY 2.480 PERCENT	
DAYS	FACTOR	DAYS	FACTOR	DAYS	FACTOR
171	.011653876	211	.014399471	251	.017152518
172	.011722425	212	.014468206	252	.017221440
173	.011790979	213	.014536946	253	.017290366
174	.011859538	214	.014605691	254	.017359297
175	.011928101	215	.014674440	255	.017428233
176	.011996669	216	.014743194	256	.017497173
177	.012065241	217	.014811953	257	.017566119
178	.012133818	218	.014880716	258	.017635068
179	.012202400	219	.014949484	259	.017704023
180	.012270986	220	.015018256	260	.017772982
181	.012339577	221	.015087033	261	.017841946
182	.012408173	222	.015155815	262	.017910915
183	.012476773	223	.015224602	263	.017979888
184	.012545378	224	.015293393	264	.018048866
185	.012613988	225	.015362189	265	.018117848
186	.012682602	226	.015430989	266	.018186835
187	.012751221	227	.015499794	267	.018255827
188	.012819845	228	.015568604	268	.018324824
189	.012888473	229	.015637419	269	.018393825
190	.012957106	230	.015706238	270	.018462831
191	.013025743	231	.015775062	271	.018531842
192	.013094386	232	.015843890	272	.018600857
193	.013163032	233	.015912723	273	.018669877
194	.013231684	234	.015981561	274	.018738901
195	.013300340	235	.016050404	275	.018807931
196	.013369001	236	.016119251	276	.018876965
197	.013437666	237	.016188103	277	.018946003
198	.013506336	238	.016256959	278	.019015047
199	.013575011	239	.016325820	279	.019084095
200	.013643691	240	.016394686	280	.019153147
201	.013712375	241	.016463556	281	.019222205
202	.013781063	242	.016532432	282	.019291267
203	.013849757	243	.016601311	283	.019360334
204	.013918455	244	.016670196	284	.019429405
205	.013987157	245	.016739085	285	.019498481
206	.014055865	246	.016807979	286	.019567562
207	.014124577	247	.016876877	287	.019636647
208	.014193293	248	.016945780	288	.019705737
209	.014262015	249	.017014688	289	.019774832
210	.014330741	250	.017083601	290	.019843932

2008 ANNUAL RATE, COMPOUNDED DAILY

2.480 PERCENT

DAYS	FACTOR
291	.019913036
292	.019982145
293	.020051258
294	.020120377
295	.020189499
296	.020258627
297	.020327759
298	.020396896
299	.020466038
300	.020535184
301	.020604335
302	.020673491
303	.020742651
304	.020811816
305	.020880986
306	.020950161
307	.021019340
308	.021088524
309	.021157712
310	.021226905
311	.021296103
312	.021365306
313	.021434513
314	.021503725
315	.021572942
316	.021642163
317	.021711389
318	.021780620
319	.021849855
320	.021919095
321	.021988340
322	.022057590
323	.022126844
324	.022196103
325	.022265366
326	.022334634
327	.022403907
328	.022473185
329	.022542467
330	.022611754

2008 ANNUAL RATE, COMPOUNDED DAILY

2.480 PERCENT

DAYS	FACTOR
331	.022681046
332	.022750343
333	.022819644
334	.022888949
335	.022958260
336	.023027575
337	.023096895
338	.023166220
339	.023235549
340	.023304883
341	.023374222
342	.023443565
343	.023512913
344	.023582266
345	.023651623
346	.023720986
347	.023790352
348	.023859724
349	.023929100
350	.023998481
351	.024067867
352	.024137257
353	.024206653
354	.024276052
355	.024345457
356	.024414866
357	.024484280
358	.024553699
359	.024623122
360	.024692550
361	.024761983
362	.024831420
363	.024900862
364	.024970309
365	.025039760
366	.025109217
367	.025178678
368	.025248143
369	.025317614
370	.025387089
371	.025456569

Section 1367.—Adjustments to Basis of Stock of Shareholders, etc.

26 CFR 1.1367–2: Adjustments to basis of indebtedness to shareholder.

T.D. 9428

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Section 1367 Regarding Open Account Debt

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the treatment of open account debt between S corporations and their shareholders. These final regulations provide rules regarding the definition of open account debt and the adjustments in basis of any indebtedness of an S corporation to a shareholder under section 1367(b)(2) of the Internal Revenue Code (Code) for shareholder advances and repayments on advances of open account debt. The regulations affect shareholders of S corporations and are necessary to provide guidance needed to comply with the applicable tax law.

DATES: *Effective Date:* These regulations are effective on October 20, 2008.

Applicability Date: For dates of applicability, see §1.1367–3.

FOR FURTHER INFORMATION CONTACT: Stacy L. Short or Deane M. Burke, (202) 622–3070 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends §1.1367–2 of the Income Tax Regulations (26 CFR part 1) regarding the definition of open account debt and adjustments in basis of indebtedness for shareholder advances and repayments on advances of open account debt.

Section 1367(a)(1) provides that the basis of each shareholder's stock in an

S corporation is increased by the shareholder's *pro rata* share of the S corporation's income (separately and nonseparately computed items of income) and the excess of the deductions for depletion over the basis of the property subject to depletion. Section 1367(a)(2) provides that the basis of each shareholder's stock in the S corporation is decreased by the shareholder's distributions not includible in income of the shareholder by reason of section 1368 (nontaxable distributions), and the shareholder's *pro rata* share of the losses and deductions (separately and nonseparately computed losses), any expense of the corporation that is not deductible and not properly chargeable to capital account, and certain deductions for depletion for any oil and gas property held by the S corporation. Under section 1367(b)(2)(A), if for any taxable year the amounts specified in section 1367(a)(2) (other than distributions) exceed the amount which reduces the shareholder's basis to zero, such excess losses and deductions shall be applied to reduce (but not below zero) the shareholder's basis in any indebtedness of the S corporation to the shareholder. Section 1367(b)(2)(B) provides that if a shareholder's basis in indebtedness is reduced for any taxable year, any net increase (the amount by which the items described in section 1367(a)(1) exceed the items described in section 1367(a)(2)) for any subsequent taxable year is applied to restore the reduction in basis in indebtedness before any of the excess is used to increase basis in stock.

On January 3, 1994, the Treasury Department and the IRS published final regulations under section 1367 of the Code (T.D. 8508, 1994–1 C.B. 219 [59 FR 12], amended on December 22, 1999 (T.D. 8852, 2000–1 C.B. 253 [64 FR 71641])). Those final regulations relate, in part, to adjustments to basis in both stock of shareholders and indebtedness of an S corporation to its shareholders. Section 1.1367–2 of the Income Tax Regulations provides specific rules for required adjustments (reductions and restorations) to basis in any indebtedness of an S corporation to a shareholder. Section 1.1367–2(a) also provides that for purposes of adjustments to basis of indebtedness to shareholders, shareholder advances not evidenced by separate written instruments and repayments on the advances (open account debt) are treated as a single indebtedness. The basis adjustment rules under the final regulations apply to all indebtedness of an S corporation to a shareholder, whether the indebtedness is evidenced by a written instrument or is open account debt. Taxpayers should also remember that all advances to an S corporation by a shareholder are subject to the general tax principles for debt, whether evidenced by a written instrument or not.

On August 25, 2005, the Tax Court issued its decision in *Brooks v. Commissioner*, TC Memo. 2005–204, involving open account debt. Under its interpretation of §1.1367–2, the court in *Brooks* held "that the basis of the open account indebtedness is properly computed by netting at the close of the year advances of open account debt during the year and repayments of open account debt during the year." This allowed the taxpayer in *Brooks* to defer indefinitely the recognition of income on any repayment of his open account debt over the several years during which the taxpayer and the S corporation made advances and repayments, respectively.

On April 12, 2007, the Treasury Department and the IRS published a notice of proposed rulemaking and a notice of public hearing (REG–144859–04, 2007–20 I.R.B. 1245) in the **Federal Register** (72 FR 18417) proposing amendments to the regulations relating to the treatment of open account debt between S corporations and their shareholders. A public hearing on the proposed regulations was scheduled for July 31, 2007, but was cancelled because no one requested to speak. However, comments responding to the proposed regulations were received. After consideration of these comments, the proposed regulations are adopted as revised by this Treasury decision. These final regulations generally retain the provisions of the proposed regulations with the modifications discussed in the preamble.

Summary of Comments and Explanation of Revisions

1. *Need for Regulatory Change*

All of the comments received in response to the proposed regulations suggested that the regulations were overly broad and should be withdrawn. Two commentators suggested that amending the regulations for open account debt is not an appropriate approach for the Treasury Department and the IRS to address concerns regarding transactions similar to that in *Brooks*. Instead, the commentators asserted, such concerns should be addressed through established judicial doctrines such as substance over form, business purpose, sham transaction, and economic substance. One commentator alternatively recommended a narrowly tailored anti-abuse rule targeting open account debt instead of broader rules that would apply to all such debt.

The Treasury Department and the IRS continue to believe that regulatory guidance on open account debt is necessary. The Treasury Department and the IRS believe that the treatment of open account debt as interpreted in *Brooks* permits tax consequences that are inconsistent with the original purpose of §1.1367–2 and is not conducive to sound tax administration. Neither established judicial doctrines alone nor a narrowly tailored anti-abuse rule suggested by the commentators would adequately address these concerns, though the Treasury Department and the IRS continue to recognize the applicability of the judicial doctrines in appropriate cases in addition to these final regulations.

2. *Aggregate Principal Threshold Amount*

The proposed regulations defined open account debt as shareholder advances not evidenced by separate written instruments for which the principal amount of the aggregate advances (net of repayments on advances) did not exceed $10,000 per shareholder at the close of any day during the S corporation's taxable year. Shareholders were required to determine for open account debt purposes whether shareholder advances and repayments on the advances exceeded the $10,000 aggregate principal threshold on any day during the S corporation's taxable year. To make such a determination, shareholders were required to maintain a "running balance" of shareholder advances and repayments on advances, and the outstanding principal amount of the open account debt. If the resulting aggregate principal of the running balance exceeded $10,000 at the close of any day during the S corporation's taxable

year, the entire principal amount of the indebtedness would no longer constitute open account debt effective at the close of that day.

Commentators suggested that the proposed regulations' aggregate principal threshold of $10,000 was too low for most businesses. One commentator asserted that establishing any aggregate principal threshold dollar amount for open account debt in final regulations would be arbitrary and would impose a certain compliance burden on smaller businesses. However, that commentator also suggested that increasing the aggregate principal threshold dollar amount would mitigate the compliance burden. The commentators suggested that if the final regulations adopt any threshold dollar amount for open account debt, such a threshold amount should be increased to an amount ranging from $100,000 to $1 million.

After considering the comments on the aggregate principal threshold dollar amount, and on recognizing customary business practices as noted by the commentators, the Treasury Department and the IRS have concluded that the aggregate principal threshold dollar amount for open account debt should be increased and that other changes are necessary. Therefore, the final regulations adopt a $25,000 aggregate principal threshold amount per shareholder for open account debt. For example, an S corporation with ten shareholders could receive up to $250,000 of open account debt as long as no single shareholder advanced more than $25,000. The Treasury Department and the IRS believe that the $25,000 threshold, together with certain other changes noted below, balances concerns over deferral potential with normal business practices. Under the final regulations, for any particular shareholder advances and repayments on those advances for which, as of the specified determination date, the aggregate principal balance exceeds the $25,000 aggregate principal threshold amount will no longer constitute open account debt, but instead will be treated as debt evidenced by a separate written instrument subject to the basis adjustment and repayment accounting rules applicable to S corporation shareholder debt generally.

As noted in the preamble to the proposed regulations, the $10,000 aggregate principal threshold amount for open account debt for purposes of §1.1367–2 was modeled after section 7872(c)(3) and the *de minimis* exception for corporation-shareholder loans in §1.7872–9 of the proposed regulations. However, the Treasury Department and the IRS do not believe it is necessary that the threshold amount for open account debt be modeled after the rules under §1.7872–9 regarding corporate-shareholder loans. Nevertheless, despite the $25,000 threshold amount for open account debt in these final regulations, the provisions under section 7872 and related regulations for corporate-shareholder loans in excess of $10,000 separately apply to open account debt in excess of $10,000 for each advance if the corporation is not obligated to pay a market rate of interest on the advances.

3. *Monitoring the Aggregate Principal Threshold Amount*

The proposed regulations effectively required day-to-day monitoring of open account debt. For purposes of determining compliance with the aggregate principal threshold amount for open account debt, the shareholder was required to maintain a daily running balance of shareholder advances and repayments on such advances, and the outstanding principal amount of the open account debt. Some of the commentators suggested that the daily monitoring requirement would impose an unreasonable burden on shareholders and recommended that the running balance requirement be tested quarterly, annually or when the corporation maintains and updates its other books and records. One commentator described the practice by many closely held corporations of reconciling and accounting only once a year and noted that only then would such an S corporation and its shareholder(s) know what payments are legitimately charged to the corporation as opposed to those appropriately charged to the shareholder(s).

Another commentator suggested that with daily monitoring, a maximum threshold rule for open account debt is too harsh for shareholders insofar as it immediately changes the treatment of such debt the principal balance of which exceeds the threshold by a single cent on any day, resulting in a "cliff" effect. The commentator suggested that in order to mitigate this "cliff" effect, the final regulations should adopt a second prong to the aggregate principal threshold amount test so that advances would fail to meet the definition of open account debt only if both the aggregate principal of the running balance exceeded the applicable aggregate principal threshold dollar amount on any given day of the year and the balance at the end of the year exceeded the average of the daily balances throughout the year. The commentator provided examples of intended beneficiaries of such an "averaging" rule, for example, shareholders who need to advance their S corporation more funds on a short-time basis but end the year with an outstanding principal amount of the open account debt below the threshold level.

After careful consideration of these comments, the Treasury Department and the IRS have concluded that extending the period for which a shareholder determines whether shareholder advances and repayments exceed the aggregate principal threshold dollar amount for open account debt would reduce both the complexity of the regulations and any perceived burden on shareholders in making such determinations. In addition, such a modified rule should alleviate concerns over any potential "cliff" effect resulting from a day-to-day determination of threshold amount as required in the proposed regulations. The Treasury Department and the IRS also recognize that shareholder advances made to an S corporation and subsequently repaid during the same taxable year of the S corporation are not available for inclusion in the shareholder's basis in the indebtedness for purposes of passing through additional losses to the shareholder at the end of the taxable year.

Therefore, the final regulations do not adopt a daily determination of whether shareholder advances and repayments on the advances exceed the $25,000 threshold amount. Instead, the final regulations provide that a determination of whether the threshold balance of $25,000 is exceeded will be made at the end of the taxable year of the S corporation. Under these final regulations, however, if open account debt is disposed of in whole or in part before the end of the S corporation's taxable year, the determination of whether the advances and repayments have exceeded the designated aggregate principal threshold amount must

be made immediately before the disposition of the debt during that taxable year. Moreover, if a shareholder with open account debt is no longer a shareholder at the end of the S corporation's taxable year, the determination must be made immediately before the shareholder's interest in the S corporation is terminated.

4. *Character of Income/Gain Recognition*

One of the commentators suggested that the final regulations address the issue of how to characterize any income or gain that is recognized upon repayment of both open account debt and indebtedness evidenced by a written instrument. While recognizing the commentators' concerns, the Treasury Department and the IRS believe that the characterization issue is beyond the scope of these final regulations. However, the Treasury Department and the IRS intend to continue considering the characterization issue.

5. *Effective Date Operation*

The effective date in the proposed regulations provided that the proposed rules for open account debt applied to any shareholder advances to the S corporation made on or after the date the regulations were published as final regulations and repayments on those advances by the S corporation. Thus, all open account debt (net of repayments) prior to the publication of the final regulation was outside the scope of the proposed regulations, irrespective of the outstanding principal amount.

One of the commentators believed that the effective date language in the proposed regulations was subject to two interpretations. Under the first interpretation, the rules under these final regulations (New Rules) would apply only to open account debt created on or after the effective date, that is, shareholder advances made on or after the effective date and repayments on those same advances. The rules under the prior final regulations (as contained in the 26 CFR edition revised April 1, 2007) (Old Rules) would apply to open account debt created before the effective date, that is, shareholder advances with respect to pre-effective date open account debt and repayments on those prior advances. Accordingly, a shareholder could have open account debt, subject to the Old Rules, and open account debt, subject to the New Rules, to which new shareholder advances and repayments on those advances could be made after the effective date.

Under the second interpretation, a shareholder could not make additional advances with respect to open account debt created before the effective date but could receive repayments on that debt under the Old Rules. Accordingly, the New Rules would apply to all shareholder advances on and after the effective date, as well as repayments on those advances, and the Old Rules would apply only to repayments on pre-effective date open account debt.

The Treasury Department and the IRS intend that the rules under these final regulations (New Rules) apply to any and all shareholder advances made on and after the effective date. The rules under these final regulations (New Rules) also apply to repayments on such advances. However, if a shareholder has open account debt (net of prior repayments in the taxable year) outstanding prior to the effective date of these final regulations, the rules under the prior final regulations (Old Rules) apply to any repayments on such pre-effective date open account debt. Accordingly, that pre-effective date open account debt will not be subject to any aggregate principal threshold dollar amount. The shareholder may not make additional advances with respect to the pre-effective date open account debt (because all shareholder advances made on or after the effective date of these final regulations constitute new open account debt subject to these final regulations).

For instance, assume that the effective date of these final regulations falls within the taxable year of shareholder A's S corporation. Also assume that, at the beginning of the S corporation's taxable year, A will have existing open account debt with an outstanding principal balance of $12,000. Assume further that A will make an additional advance of $3,000 to and will receive a $2,000 repayment from his S corporation prior to the effective date. Thus, as of the effective date, A will have existing open account debt with an outstanding principal balance of $13,000 (A would net the pre-effective date advance and repayment for the taxable year and combine that net advance of $1,000 with the $12,000 outstanding aggregate principal balance of the then existing open account debt). This $13,000 pre-effective date open account debt would not be subject to these final regulations and, thus, would not be subject to any aggregate principal threshold dollar amount and would be repaid under the rules of the prior final regulations. If, on or after the effective date of these final regulations, A were to both make an advance of $5,000 to his S corporation and receive a $1,000 repayment on that advance, the advance and repayment would constitute separate new open account debt subject to the rules under these final regulations.

Shareholders also have the option to apply these rules to shareholder advances to the S corporation and repayments on those advances by the S corporation made before the effective date of these regulations. Using the example above, A would have the option to net the $5,000 advance and $1,000 repayment.

Effective/Applicability Date

The regulations apply to any and all shareholder advances to the S corporation made on or after October 20, 2008, and repayments on those advances by the S corporation.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Because these 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, the notice of proposed rulemaking that preceded 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 authors of these final regulations are Stacy L. Short and Deane M. Burke 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.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Section 1.1367–2 also issued under 26 U.S.C. 1367(b)(2).* * *

Par. 2. Section 1.1367–2 is amended as follows:

1. Paragraph (a) is revised.
2. Paragraphs (c)(2) and (d)(1) are revised.
3. Paragraph (d)(2) is redesignated as paragraph (d)(3) and new paragraph (d)(2) is added.
4. Paragraph (e) is amended by adding *Examples 6, 7* and *8*.

The revisions and additions read as follows:

§1.1367–2 Adjustments to basis of indebtedness to shareholder.

(a) *In general*—(1) *Adjustments under section 1367*. This section provides rules relating to adjustments required by subchapter S to the basis of indebtedness (including open account debt as described in paragraph (a)(2) of this section) of an S corporation to a shareholder. The basis of indebtedness of the S corporation to a shareholder is reduced as provided in paragraph (b) of this section and restored as provided in paragraph (c) of this section in accordance with the timing rules in paragraph (d) of this section.

(2) *Open Account Debt*—(i) *General rule*. The term *open account debt* means shareholder advances not evidenced by separate written instruments and repayments on the advances, the aggregate outstanding principal of which does not exceed $25,000 of indebtedness of the S corporation to the shareholder at the close of the S corporation's taxable year. Advances and repayments on open account debt are treated as a single indebtedness.

(ii) *Exception*. If the shareholder advances not evidenced by a separate written instrument, net of repayments, exceeds an aggregate outstanding principal amount of $25,000 at the close of the S corporation's taxable year, for any subsequent taxable year the aggregate principal amount of that indebtedness is treated in the same manner as indebtedness evidenced by a separate written instrument for purposes of this section. For any subsequent taxable year, that indebtedness is not open account debt and is subject to all basis adjustment rules applicable to basis of indebtedness of an S corporation to a shareholder in this section.

* * * * *

(c) * * *

(2) *Multiple indebtedness*. If a shareholder holds more than one indebtedness (including any open account debt and any debt treated as a single indebtedness under paragraph (a)(2)(ii) of this section) as of the beginning of an S corporation's taxable year, any net increase is applied first to restore the reduction of basis in any indebtedness repaid (in whole or in part) in that taxable year to the extent necessary to offset any gain that would otherwise be realized on the repayment. Any remaining net increase is applied to restore each outstanding indebtedness (including any open account debt and any debt treated as a single indebtedness under paragraph (a)(2)(ii) of this section) in proportion to the amount that the basis of each outstanding indebtedness has been reduced under section 1367(b)(2)(A) and paragraph (b) of this section and not restored under section 1367(b)(2)(B) and this paragraph (c).

(d) *Time at which adjustments to basis of indebtedness are effective*—(1) *In general*. The amounts of the adjustments to basis of indebtedness (including open account debt) provided in section 1367(b)(2) and this section are determined as of the close of the S corporation's taxable year, and the adjustments are generally effective as of the close of the S corporation's taxable year. However, if the shareholder is not a shareholder in the S corporation at that time, these adjustments are effective immediately before the shareholder terminates his or her interest in the S corporation. Except as provided in paragraph (d)(2) of this section, if a debt is disposed of or repaid in whole or in part before the close of the taxable year, the basis of that indebtedness is restored under paragraph (c) of this section, effective immediately before the disposition or the first repayment on the debt during the taxable year. To the extent any indebtedness of the S corporation to the shareholder is disposed of or repaid (in whole or in part) during the taxable year and the shareholder's basis in that indebtedness has been reduced under paragraph (b) of this section and is not restored completely under paragraph (c) of this section, the disposition or repayment is a recognition event effective immediately before the indebtedness is disposed of or repaid (in whole or in part).

(2) *Open account debt*—(i) *In general*. All advances and repayments on open account debt (as described in paragraph (a)(2)(i) of this section) during the S corporation's taxable year are netted at the close of the S corporation's taxable year to determine the amount of any net advance or net repayment. The net advance or net repayment is combined with the outstanding aggregate principal balance of the existing open account debt and that amount is carried forward to the beginning of the subsequent taxable year as the outstanding aggregate principal amount of the open account debt (unless the aggregate principal amount meets the exception defined in paragraph (a)(2)(ii) of this section at the close of the taxable year). However, if the shareholder in the S corporation is not a shareholder of the S corporation at the close of the S corporation's taxable year, such advances and repayments on open account debt are netted, and the basis of that indebtedness is restored under paragraph (c) of this section, effective immediately before the shareholder terminates his or her interest in the S corporation. If any open account debt is disposed of before or upon the close of the taxable year, the disposition is effective at the close of the S corporation's taxable year, and all advances and repayments are netted immediately prior to the disposition and the basis of that indebtedness is restored under paragraph (c) of this section, effective at the close of the S corporation's taxable year.

(ii) *Exception*. Shareholder indebtedness that is open account debt at the beginning of the taxable year but meets the exception defined in paragraph (a)(2)(ii) of

this section at the close of the taxable year, adjustments to the basis of the indebtedness for that taxable year follow the provisions for open account debt. The resulting aggregate principal amount of indebtedness is treated as the principal amount of a debt evidenced by a separate written instrument for any subsequent taxable year, and is no longer subject to the open account debt provisions of this section.

* * * * *

(e) * * *

Example 6. The $25,000 aggregate principal amount applies to each shareholder. (i) A and B have been the two shareholders in Corporation S since 2000. As of the end of the 2008 taxable year, the bases of A's and B's stock are both zero. On June 1, 2009, A advances S $16,000, which is not evidenced by a written instrument. On August 1, 2009, B advances S $22,000, which is not evidenced by a written instrument. Both the $16,000 advance and the $22,000 advance are open account debt and remain outstanding at those amounts during 2009. There is no net increase under paragraph (c) of this section in year 2009.

(ii) At the close of the 2009 taxable year, A's open account debt does not exceed $25,000. A therefore carries forward to the beginning of the 2010 taxable year the $16,000 as open account debt.

(iii) At the close of the 2009 taxable year, B's open account debt does not exceed $25,000. B therefore carries forward to the beginning of the 2010 taxable year the $22,000 as open account debt.

Example 7. Treatment of open account debt. (i) The facts are the same as in *Example 6*, in addition to which, on December 31, 2009, A's basis in the open account debt is reduced under paragraph (b) of this section to $8,000. On April 1, 2010, S repays A $4,000 of the open account indebtedness. On September 1, 2010, A advances S an additional $1,000, which is not evidenced by a written instrument. There is no net increase under paragraph (c) of this section in year 2010.

(ii) The $4,000 April repayment S makes to A and A's $1,000 September advance are netted to result in a net repayment of $3,000 for the taxable year on A's $16,000 open account debt carried forward from 2009. Because there is no net increase in 2010, no basis of indebtedness is restored for the 2010 taxable year, and A realizes $1,500 of income on the $3,000 net repayment at the close of the 2010 taxable year.

(iii) At close of the 2010 taxable year, A's open account debt does not exceed $25,000. The net repayment of $3,000 for the taxable year on A's $16,000 open account debt carried forward from 2009, leaves A with an open account debt of $13,000 to carry forward as open account debt to the beginning of the 2011 taxable year.

Example 8. Treatment of shareholder indebtedness not evidenced by a written instrument which exceeds $25,000. (i) The facts are the same as in *Example 7*, in addition to which, on February 1, 2011, S repays $5,000 of the open account debt and on March 1, 2011, A advances S $20,000, which is not evidenced by a written instrument.

(ii) At the close of the 2010 taxable year, A has an open account debt of $13,000 to carry forward as open account debt to the beginning of the 2011 taxable year.

(iii) The 2011 advances and repayments are netted to result in a net advance of $15,000 on A's $13,000 open account debt carried forward from 2010, increasing A's open account debt to $28,000 as of the close of the 2011 taxable year. Because A's open account debt exceeds $25,000, for any subsequent taxable year the $28,000 indebtedness will be treated in the same manner as indebtedness evidenced by a separate written instrument for the purposes of this section. Because there is no net increase in 2011, no basis of indebtedness is restored for the 2011 taxable year.

Par. 3. Section 1.1367–3 is revised to read as follows:

§1.1367–3 Effective/Applicability date.

Section 1.1367–2(a), (c)(2), (d)(2), and (e) *Example 6*, *Example 7*, and *Example 8* apply to any shareholder advances to the S corporation made on or after October 20, 2008, and repayments on those advances by the S corporation. The rules that apply with respect to shareholder advances to the S corporation made before October 20, 2008, are contained in §1.1367–3 in effect prior to October 20, 2008. (See 26 CFR part 1 revised as of April 1, 2007.) Shareholders have the option to apply these rules to shareholder advances to the S corporation made before October 20, 2008, and repayments on those advances by the S corporation.

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

Approved September 25, 2008.

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

(Filed by the Office of the Federal Register on October 17, 2008, 8:45 a.m., and published in the issue of the Federal Register for October 20, 2008, 73 F.R. 62199)

Section 6011.—General Requirement of Return, Statement, or List

The Internal Revenue Service and the Treasury Department are aware of a type of transaction, identified in this notice as a transaction of interest, in which a sale or other disposition of all interests in a charitable remainder trust (subsequent to the contribution of appreciated assets to and their reinvestment by the trust), results in the grantor or other noncharitable recipient receiving the value of that person's trust interest while claiming to recognize little or no taxable gain. See Notice 2008-99, page 1194.

Section 6111.—Disclosure of Reportable Transactions

The Internal Revenue Service and the Treasury Department are aware of a type of transaction, identified in this notice as a transaction of interest, in which a sale or other disposition of all interests in a charitable remainder trust (subsequent to the contribution of appreciated assets to and their reinvestment by the trust), results in the grantor or other noncharitable recipient receiving the value of that person's trust interest while claiming to recognize little or no taxable gain. See Notice 2008-99, page 1194.

Section 6112.—Material Advisors of Reportable Transactions Must Keep Lists of Advisees, etc.

The Internal Revenue Service and the Treasury Department are aware of a type of transaction, identified in this notice as a transaction of interest, in which a sale or other disposition of all interests in a charitable remainder trust (subsequent to the contribution of appreciated assets to and their reinvestment by the trust), results in the grantor or other noncharitable recipient receiving the value of that person's trust interest while claiming to recognize little or no taxable gain. See Notice 2008-99, page 1194.

Section 9811.—Standards Relating to Benefits for Mothers and Newborns

26 CFR 54.9811–1: Standards relating to benefits for mothers and newborns.

T.D. 9427

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
45 CFR Parts 146 and 148

Final Rules for Group Health Plans and Health Insurance Issuers Under the Newborns' and Mothers' Health Protection Act

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: Final rules.

SUMMARY: This document contains final rules for group health plans and health insurance issuers concerning hospital lengths of stay for mothers and newborns following childbirth pursuant to the Newborns' and Mothers' Health Protection Act of 1996 and the Taxpayer Relief Act of 1997.

DATES: *Effective Date:* These final regulations are effective December 19, 2008.

Applicability Dates: Group market rules. These final regulations for the group market apply to group health plans and group health insurance issuers for plan years beginning on or after January 1, 2009.

Individual market rules. These final regulations for the individual market apply with respect to health insurance coverage offered, sold, issued, renewed, in effect, or operated in the individual market on or after January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Amy Turner or Beth Baum, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335; Russ Weinheimer, Internal Revenue Service, Department of the Treasury, at (202) 622–6080; or 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 copies of Department of Labor publications concerning health care laws may request copies by calling the EBSA Toll-Free Hotline at 1–866–444–EBSA (3272) or may request a copy of CMS's publication entitled "Protecting Your Health Insurance Coverage" by calling 1–800–633–4227. These regulations as well as other information on the Newborns' and Mothers' Health Protection Act and other health care laws are also available on the Department of Labor's website (*http://www.dol.gov/ebsa*), including the interactive web pages, Health *E*laws.

SUPPLEMENTARY INFORMATION:

I. Background

The Newborns' and Mothers' Health Protection Act of 1996 (Newborns' Act), Public Law 104–204, was enacted on September 26, 1996. The rules contained in this document implement changes made to the Employee Retirement Income Security Act of 1974 (ERISA) and the Public Health Service Act (PHS Act) made by the Newborns' Act, and parallel changes to the Internal Revenue Code of 1986 (Code) enacted as part of the Taxpayer Relief Act of 1997 (TRA '97). The Newborns' Act was enacted to provide protections for mothers and their newborn children with regard to hospital lengths of stay following childbirth. Interim final rules implementing the group and individual market provisions of the Newborns' Act were published in the **Federal Register** on October 27, 1998 (63 FR 57546) (the interim final rules).

These regulations being published today in the **Federal Register** finalize the interim final rules. The final regulations implementing the group market provisions of the Newborns' Act are issued jointly by the Secretaries of the Treasury, Labor, and HHS.[1] The individual market final regulations are issued solely by HHS.[2]

II. Overview of the Regulations

Section 9811 of the Code, section 711 of ERISA, and sections 2704 and 2751 of the PHS Act (the Newborns' Act provisions) provide a general rule under which a group health plan and a health insurance issuer may not restrict mothers' and newborns' benefits for a hospital length of stay in connection with childbirth to less than 48 hours following a vaginal delivery or 96 hours following a delivery by cesarean section. The interim final rule—

- Provided that the attending provider makes the determination that an admission is in connection with childbirth;
- Determined when the hospital stay begins for purposes of application of the general rule;
- Provided an exception to the 48-hour (or 96-hour) general rule if the attending provider decides, in consultation with the mother, to discharge the mother or her newborn earlier;
- Clarified the application of authorization and precertification requirements with respect to the 48-hour (or 96-hour) stay;
- Explained the application of benefit restrictions and cost-sharing rules with respect to the 48-hour (or 96-hour) stay;
- Clarified the prohibitions with respect to a plan or issuer offering mothers incentives or disincentives to encourage less than the 48-hour (or 96-hour) stay;
- Clarified the prohibitions against incentives and penalties with respect to attending providers; and
- Included the statutory notice provisions under ERISA and the PHS Act.

In general, these final regulations do not change the interim final rules. However, the text of these final regulations incorporates a clarifying statement from the preamble of the interim final rules that the definition of attending provider does not include a plan, hospital, managed care organization, or other issuer. The text also makes a small clarification with respect to state law applicability.

In addition, these final regulations make minor clarifications to the notice requirements for nonfederal governmental plans. The interim final rules specified that the notice of post-childbirth hospitalization benefits must be included in the plan

[1] 26 CFR §54.9811–1, 29 CFR §2590.711, 45 CFR §146.130.

[2] 45 CFR §148.170.

document that described plan benefits to participants and beneficiaries. These final regulations specify that any notice a nonfederal governmental plan must provide under these regulations can be included either in the plan document that describes benefits, or in the type of document the plan generally uses to inform participants and beneficiaries of plan benefit changes. These final regulations also specify that any time a plan distributes one or both of these documents after providing the initial notice, the applicable statement must appear in one or both of these documents.

Hospital Length of Stay

The interim final rules and these final regulations provide that when a delivery occurs in the hospital, the stay begins at the time of delivery (or, in the case of multiple births, at the time of the last delivery) rather than at the time of admission or onset of labor. Also, the interim final rules and these final regulations provide that when a delivery occurs outside of the hospital, the stay begins at the time the mother or newborn is admitted (rather than at the time of delivery).

Some comments expressed concern that this rule somehow required birthing centers or other non-hospital facilities to extend the right to stay to more than 24 hours. These comments noted that such extended stays may violate local regulations or otherwise conflict with the operations of such facilities. The statute and these final regulations do not require hospitals or other facilities to provide particular lengths of stay, but instead require group health plans and health insurance issuers to provide benefits for particular hospital lengths of stay.

A comment recommended that if a delivery was planned for outside of a hospital, any following admission in response to complications resulting from that delivery should be excluded from the provisions providing for particular lengths of stay. These final regulations do not distinguish between a delivery that was planned for outside of the hospital and other deliveries occurring outside of a hospital.

Definition of Attending Provider

The mandatory coverage period provisions are not violated if the attending provider, in consultation with the mother, decides to discharge the mother or newborn earlier. Under the interim final rules and these final regulations, the attending provider is defined by a functional analysis of state licensure rules and the actual performance of care. Under this definition, the attending provider is restricted to an individual who is licensed under applicable state law to provide maternal or pediatric care and who is directly responsible for providing such care to a mother or newborn child. While the preamble to the interim final rules noted that this definition could include a nurse midwife or physician assistant, the regulation itself does not provide a list of titles or positions that qualify as attending providers.

Some comments requested that additional titles, such as pediatric nurse practitioners, or nurse practitioners, be specifically mentioned in the definition. While positions with these titles may meet the definition in many cases, as noted above, the language of the regulation takes a functional approach and does not provide a list of titles or positions that qualify as attending providers. This functional approach is more useful in addressing who the attending provider is on an ongoing basis, as specific position titles and responsibilities may vary from location to location as well as over time.

It was also suggested that the text of the final regulations incorporate a clarifying statement from the preamble of the interim final rules that the definition of attending provider does not include a plan, hospital, managed care organization, or other issuer. These final regulations adopt this suggestion.

Compensation of Attending Provider

Several comments addressed the provisions in the interim final rules that relate to the compensation of physicians and other attending providers. These provisions prohibit plans and issuers from penalizing attending providers who provide care in accordance with the regulations, and prohibit plans and issuers from inducing attending providers to provide care in a manner that is inconsistent with the regulations. At the same time, the statute specifies that plans and issuers are still free to negotiate with attending providers the level and type of compensation for care furnished in accordance with the regulations.

The comments requested greater specificity in the final regulations for distinguishing between the types of compensation arrangements that are permissible under the negotiation provision and those that are impermissible under the prohibitions against penalties and inducements. One comment suggested that it is clear that a bonus arrangement for obstetricians and gynecologists contingent on the percentage of discharges within 24 hours would not be permitted. The comment requested confirmation that arrangements with a more general focus would be permitted, such as a global payment for prenatal care and childbirth, or a bonus for a multi-specialty group including obstetricians and gynecologists based on the utilization for all patients served by the group. Another comment expressed a concern about whether capitated arrangements are consistent with the hospital length-of-stay requirements.

The Departments devoted considerable resources over a sustained period of time to develop rules that provide greater specificity for distinguishing between negotiated compensation arrangements that would give attending providers an incentive to deliver health care services efficiently and arrangements that could give providers an incentive to discharge patients in contravention of the statute and regulations. The great variety, complexity, and mutability of such arrangements[3] would have required extensive rules that at best were likely to impose heavy administrative costs and yet were still of only marginal value in clarifying what arrangements would be permissible. For this reason, the rules on compensation arrangements for attending providers are adopted unchanged from the interim final rules.

[3] Broad classes of examples include fee-for-service, capitation, productivity-based salary, incentive contracting, blended systems, prospective versus post-service payment, etc. See *e.g.*, *Theory and Practice in the Design of Physician Payment Incentives*, James C. Robinson (University of California, Berkley), The Milbank Quarterly, Vol. 79, No. 2, 2001; *Regulation of Managed Care Incentive Payments to Physicians*, Stephen Latham (Boston University School of Law), 22 Am. J.L. & Med. 399; *Blended Payment Methods in Physician Organizations Under Managed Care*, James C. Robinson, JAMA 1999;282:1258–1263; *The Alignment and Blending of Payment Incentives Within Physician Organizations*, JC Robinson, SM Shortell, R Li, LP Casalino, T Rundall, Health Services Research Vol. 39, Issue 5, pages 1589–1606, Oct. 2004.

The final regulations do not attempt to provide guidance on this issue through examples. Certainly the bonus arrangement described in one comment, based on the percentage of discharges within 24 hours, violates the prohibition against providing inducements for early discharge. Such an example is not included in the final regulations to avoid the inference that anything less blatant would be permissible. Examples of less blatant arrangements could be similarly misleading, whether the conclusion was that the arrangement was permissible or impermissible, since there are bound to be differences between arrangements that would have been described in the regulations and any actual arrangement for an attending provider, and in some cases even minor differences could change the result.

Authorization and Precertification

The interim final rules and these final regulations provide, under paragraph (a), that a group health plan or a health insurance issuer may not require a physician or other health care provider to obtain authorization from the plan or issuer to prescribe a hospital length of stay that is subject to the general rule.

Under paragraph (b) of the interim final rules and these final regulations, a plan or issuer may not restrict benefits for part of a stay that is subject to the general rule in a way that is less favorable than a prior portion of the stay. An example in the interim final rules and these final regulations illustrates that a plan or issuer is precluded from requiring a covered individual to obtain precertification for any portion of a hospital stay that is subject to the general rule if precertification is not required for any preceding portion of the stay. However, the interim final rules do not prevent a plan or issuer from requiring precertification for any portion of a stay after 48 hours (or 96 hours), or from requiring precertification for an entire stay.

Under paragraph (c) of the interim final rules and these final regulations, a plan or issuer may not increase an individual's coinsurance for any later portion of a 48-hour (or 96-hour) hospital stay. An example in the interim final rules and these final regulations illustrates that plans and issuers may vary cost-sharing in certain circumstances, provided the cost-sharing rate is consistent throughout the 48-hour (or 96-hour) hospital length of stay.

One comment asked whether less favorable cost sharing for the 48-hour (or 96-hour) stay can be applied to covered individuals who fail to give advance notice or notice upon admission for the services or providers related to the stay, if such a penalty applies in other hospitalization situations. This issue was addressed in Example 2 of paragraph (c)(3) of the interim final rules. This example is repeated in the final regulations and illustrates that a plan may require advance notice for services or providers related to hospital length of stay in connection with childbirth, in order for a covered individual to obtain more favorable cost sharing under the plan or coverage. Such requirements may not be used to deny an individual benefits for any portion of the 48-hour (or 96-hour) stay based on a determination of medical necessity or appropriateness. Any variance in cost-sharing related to compliance with a plan's or an issuer's advance notice requirements must be applied consistently throughout the 48-hour (or 96-hour) stay. Under the principles set forth in the rule and illustrated in this example, a plan or issuer could generally apply less favorable cost sharing towards the hospital length of stay in connection with childbirth of an individual who failed to satisfy the plan's advance notice requirements, to the extent permissible under the preexisting condition rules in 26 CFR 54.9801–3, 29 CFR 2590.701–3, and 45 CFR 146.111 and 148.120.[4]

Notice Requirements under ERISA and the PHS Act

This section of the final regulations addresses the Newborns' Act notice requirements under ERISA and the PHS Act. The interim final rules, and these final regulations, contain different notice provisions for ERISA-covered group health plans, nonfederal governmental plans, and health insurance issuers in the individual market. ERISA-covered group health plans are required to comply with the ERISA notice regulations, whether insured or self-insured. Nonfederal governmental plans and health insurance issuers in the individual market are required to comply with the PHS Act notice regulations. Because there are fundamental differences between the types of entities regulated under ERISA as compared to the PHS Act, and in the structure of the two acts, the notice requirements in the ERISA regulations and PHS Act regulations differ.

Notice Requirements under ERISA. The interim final rules and these final regulations require group health plans that are subject to ERISA to comply with summary plan description (SPD) disclosure requirements at 29 CFR 2520.102–3(u). The SPD rules generally require that participants and beneficiaries in a group health plan be furnished an SPD to apprise them of their rights and obligations. The rules also prescribe the content of the SPD and the manner and timing in which participants and beneficiaries are to be notified of any material modification to the terms of the plan or any change in the information required to be included in the SPD.

In November 2000, the Department of Labor finalized the SPD content regulation (65 FR 70241) requiring that all group health plans (including insured plans not subject to the federal Newborns' Act) provide language in the SPD that describes the federal or state law requirements applicable to the plan or any health insurance coverage offered under the plan relating to hospital lengths of stay in connection with childbirth for the mother or newborn child. If federal law applies in some areas in which the plan operates and state law applies in other areas, the SPD should describe the different areas and the federal or state law requirements applicable in each. Model language for plans subject to the federal Newborns' Act's requirements is included in the SPD content regulation. This change became applicable as of the first day of the second plan year beginning on or after January 22, 2001.

Some comments asked for clarification about whether the notice can be provided through electronic media, as an alternative to traditional paper disclosure. Under ERISA, the notice can be provided through electronic media if the plan com-

[4] In order to avoid imposing an impermissible preexisting condition exclusion, plans and group health insurance issuers that require individuals to notify the plan or issuer of pregnancy within a certain amount of time (for example, within the first trimester) must waive or modify the notice requirement for individuals who enroll in the plan after the time notice was required. This also applies to individual market issuers with respect to federally eligible individuals they are required to enroll.

plies with ERISA's electronic disclosure rules in 29 CFR 2520.104b–1.

Some comments requested that the rules require plans to provide information to patients and providers regarding who has legal oversight with respect to the Newborns' Act and who to contact in the event of a violation. However, this concern is already addressed by current regulation. Under 29 CFR 2520.102–3(t)(1) of the SPD content rules, ERISA plans are required to provide a statement of ERISA rights in the SPD. Among other things, this provision requires ERISA-covered plans to provide information on the enforcement of a participant or beneficiary's rights and who to contact if there are any questions about the plan.

Notice Requirements under the PHS Act. *Nonfederal governmental plans*. The Newborns' Act requires nonfederal governmental plans to comply with the Newborns' Act notice requirements under section 711(d) of ERISA as if section 711(d) applied to such plans.

The interim final rules and these final regulations require plans that are subject to the federal Newborns' Act requirements to provide a notice with specific language describing the federal requirements. Under the interim final rules and these final regulations, if federal law applies in some areas in which the plan operates and state law applies in others, the plan must provide the appropriate notice to each participant and beneficiary who is covered by federal law.

Several comments on the interim final rules objected that specific language was required for the disclosure statement, and suggested that the regulation instead should have provided guidelines for plans to base their own language on (such as language that comports with the Department of Labor's sample language). However, requiring specific language ensures the substantive adequacy of the notices. Additionally, because many plans presumably have already incorporated that mandatory language into their documents since the effective date of the interim final rules, continuing to require that language is the simplest approach.

As in the interim final rules, these final regulations require nonfederal governmental plans to provide notice not later than 60 days after the first day of the plan year following the effective date, regardless of whether the plan had already provided notice under the Department of Labor standards. This takes into account the fundamental differences between the nonfederal governmental plans regulated under the PHS Act and the types of entities regulated under ERISA. However, with respect to the requirement that notice be provided within that 60-day period, the final regulations include an exception for plans with regard to participants and beneficiaries for whom the plan has already provided notices in accordance with the interim final regulations that are consistent with these final regulations (such as self-insured nonfederal governmental plans that are subject to the federal Newborns' Act requirements and that have already provided such notices).

Health insurance issuers in the individual market. The Newborns' Act requires health insurance issuers in the individual market to comply with the Newborns' Act notice requirements under section 711(d) of ERISA as if section 711(d) applied to such issuers. Thus, the interim final rules and these final regulations require individual market health insurance issuers that provide benefits for hospital lengths of stay in connection with childbirth to include, in the insurance contract, a rider, or equivalent amendment to the contract, specific language that notifies policyholders of their rights under the Newborns' Act. The interim final rules and these final regulations also require such issuers to provide this notice not later than a specific time frame that is within a few months after the effective date of the regulations.

Several comments on the interim final rules objected that specific language was required for the disclosure statement and suggested instead there should be guidelines for issuers to base their own language on. However, requiring specific language ensures the substantive adequacy of the notices. Additionally, because issuers presumably have already incorporated that language into their documents since the effective date of the interim final rules, continuing to require that same language is the simplest approach.

These final regulations retain the notice exception in the interim final rules for issuers that are subject only to state insurance law requirements regarding hospital lengths of stay following childbirth.

Applicability in States

The statute and the interim final rules include an exception to the Newborns' Act requirements for health insurance coverage in certain states. Specifically, the Newborns' Act and the interim final rules do not apply with respect to health insurance coverage if there is a state law that meets any of the criteria[5] that follow:

- The state law requires health insurance coverage to provide at least a 48-hour (or 96-hour) hospital length of stay in connection with childbirth;
- The state law requires health insurance coverage to provide for maternity and pediatric care in accordance with guidelines established by the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, or any other established professional medical association; or
- The state law requires that decisions regarding the appropriate hospital length of stay in connection with childbirth be left to the attending provider in consultation with the mother. The interim final rules and these final regulations clarify that state laws that require the decision to be made by the attending provider with the consent of the mother satisfy this criterion.

Although this exception applies with respect to insured group health plans, it does not apply with respect to a group health plan to the extent the plan provides benefits for hospital lengths of stay in connection with childbirth other than through health insurance coverage. Accordingly, self-insured plans in all states generally are required to comply with the federal requirements (except those nonfederal governmental plans that have opted out of the PHS Act requirements).

These final regulations repeat the statute and the interim final rules with one

[5] HHS has the responsibility to enforce the federal Newborns' Act with regard to issuers in states that do not have one of the three types of state laws described in the Newborns' Act. As of the publication of these final regulations, the only state in which HHS is enforcing the Newborns' Act with respect to issuers is Wisconsin.

clarification. With respect to the second criterion above (professional guidelines), the statute only addresses the period following a vaginal delivery or a caesarean section. Accordingly, although guidelines issued by professional medical associations such as the American College of Obstetricians and Gynecologists (ACOG) cover a spectrum of care both before and after childbirth, the only relevant guidelines for this purpose are those pertaining to care following childbirth. Therefore, the final rules include an express clarification that State law need only require coverage in accordance with professional guidelines that deal with care following childbirth. Guidelines relating to other issues are not relevant for this purpose.

One comment to the interim final rules supported the criteria used in those rules for determining whether the federal Newborns' Act applies in a given state. However, another comment objected to the fact that issuers in states that have enacted one of the three types of state laws described in the federal Newborns' Act would arguably be exempt from several of the federal Act's requirements, such as the prohibitions on offering incentives to providers to induce them to provide care in a manner inconsistent with the Act. This comment asked us to reconsider whether the regulations should provide such a broad exception from the federal Act's requirements in such states. The statutory language does not require state law to include all the federal provisions, such as the anti-incentive provisions, in order for health insurance coverage in that state to be excepted from the federal requirements. In light of this flexibility, these final regulations retain the exception from the interim final rules.

Applicability Date

These final rules apply to group health plans, and health insurance issuers offering group health insurance coverage, for plan years beginning on or after January 1, 2009. The final rules for the individual market apply with respect to health insurance coverage offered, sold, issued, renewed, in effect, or operated in the individual market on or after January 1, 2009. Until the applicability date for this regulation, plans and issuers are required to continue to comply with the corresponding sections of the regulations previously published in the **Federal Register** (63 FR 57546) and other applicable regulations.

III. Economic Impact and Paperwork Burden

Summary — Department of Labor and Department of Health and Human Services

The Newborns' Act provisions generally prohibit group health plans and group health insurance issuers from limiting hospital lengths of stay in connection with childbirth to less than 48 hours for vaginal deliveries and 96 hours for cesarean sections and from requiring a health care practitioner to obtain preauthorization for such stays. For insured coverage, the Newborns' Act allows any state law, meeting one of three criteria, to take its place. The Departments have crafted these regulations to secure the Act's protections in as economically efficient a manner as possible, and believe that the economic benefits of the regulations justify their costs.[6]

The primary economic benefits associated with securing these minimum lengths of stay derive from the reduction in complications linked to premature discharge of mothers and newborns. Complications that are easily treated and readily identifiable, like excessive bleeding and infection in new mothers and dehydration and hyperbilirubinemia in their newborns, are common causes for readmission following a premature discharge. These complications and the subsequent readmissions are expensive and cause avoidable suffering for mothers and their newborns.

By eliminating the need to obtain preauthorization for affected stays, the Act provides affected individuals with increased access to the health care system. Increased access fosters timelier and fuller medical care, better health outcomes, and improved quality of life. This is especially true for certain individuals affected by the Newborns' Act provisions. For example, lower-income individuals, when denied coverage for the full length of stay, are more likely to forego care for financial reasons. When adverse health outcomes result, costs for the individual and the plan are high. For these individuals especially, this requirement is more likely to mean receiving timely, quality postnatal care, and living healthier lives.

Any mandate to increase the richness of health benefits, however, adds to the cost of health coverage. Plans can mitigate costs by increasing cost-sharing or by reducing non-mandated benefits. This in turn shifts the economic burden of the regulation to plan participants, and may induce some employers and employees, as well as those in the individual insurance market, to drop coverage. The cost of enacting federal minimum stay regulation is estimated to fall between $139 and $279 million annually.[7] However, as this constitutes a small fraction of one percent of total health care expenditures, it would most likely be a small, possibly negligible, factor in most employers' decisions to offer health coverage and individuals' decisions to enroll.

While the interim final regulations clarified several provisions within the statute, this action serves primarily to provide the certainty associated with a final rule for the regulated community, as well as update the cost of the regulation, adjusting for changes in the landscape of the community. Because these regulations are being published several years after the Newborns' Act's passage and minimal interpretation of the statutory language was required, the regulatory implementation costs should be negligible. Costs of the final regulation are detailed below in the section entitled "Unified Analysis of Costs and Benefits." Benefits of the regulation are also discussed in that section at length, although because the benefits primarily involve quality of life improvements, the Departments have not attempted to quantify them. They do, however, believe them to be sufficiently large so as to justify the cost of the regulation.

[6] The Newborns' Act still requires that insured plans disclose a notice outlining participants' rights regarding hospital lengths of stay related to childbirth. Nonetheless, final regulations related to that notice were published separately (see 65 FR 70266, Nov. 21, 2000) and so those costs are not included herein.

[7] The vast majority of this cost is attributable to the impact of the statute. ($14 million is the upper bound cost attributable to the exercise of regulatory discretion.) Moreover, there are no increased costs attributable to any new exercise of regulatory discretion in the final rule. Instead, the final rule repeats the interpretations of the interim final rule. Any increased costs over the 1998 estimate in the interim final rules are attributable to economic factors, such as increased cost of care (from 1996 to 2007 dollars), increased number of births, and increased number of participants and beneficiaries covered by self-insured plans to which the regulations apply.

Executive Order 12866 — Department of Labor and Department of Health and Human Services

Under Executive Order 12866, the Departments must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, it has been determined that this action is "economically significant" and is subject to OMB review under Section 3(f) of the Executive Order. Consistent with the Executive Order, the Departments have assessed the costs and benefits of this action. The Departments' assessment, and the analysis underlying the assessment, is detailed below. The Departments performed a comprehensive, unified analysis to estimate the costs and benefits attributable to the regulations for purposes of compliance with Executive Order 12866, the Regulatory Flexibility Act, and the Paperwork Reduction Act.

These final regulations are needed to provide certainty for the affected community, as well as clarify the economic burden that the Newborns' Act will place on health plans and their participants. The Departments believe that this regulation's benefits will justify its costs. This belief is grounded in the assessment of costs and benefits that is summarized earlier and detailed below.

Regulatory Flexibility Act — Department of Labor and Department of Health and Human Services

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a final rule will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires that the agency present a final regulatory flexibility analysis (FRFA) at the time of the publication of the notice of final rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

Because the 1998 rules were issued as interim final rules and not as a notice of proposed rulemaking, the RFA did not apply and the Departments were not required to either certify that the rule would not have a significant impact on a substantial number of small entities or conduct a regulatory flexibility analysis. The Departments nonetheless crafted those regulations in careful consideration of effects on small entities, and conducted an analysis of the likely impact of the rules on small entities. This analysis was detailed in the preamble to the interim final rule.

For purposes of this discussion, the Departments consider a small entity to be an employee benefit plan with fewer than 100 participants. Pursuant to the authority of section 104(a)(3) of ERISA, the Department of Labor has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41. 2520.104–46 and 2520.104b–10, certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans covering fewer than 100 participants and which satisfy certain other requirements.

Further, while some small plans are maintained by large employers, most are maintained by small employers. Both small and large plans may enlist small third party service providers to perform administrative functions, but it is generally understood that third party service providers shift their costs to their plan clients in the form of fees. Thus, the Departments believe that assessing the impact of this final rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (5 U.S.C. 631 *et seq.*). The Department of Labor solicited comments on the use of this standard for evaluating the impact of the proposed regulations on small entities. No comments were received with respect to this standard.

The Departments believe that the final regulation will not have a significant economic impact on a substantial number of small entities. The direct costs of restricting short stay policies is estimated to fall between $15 million and $31 million for small plans which amount to a per-participant cost of between nine and nineteen dollars for those plans affected, or a small fraction of one percent of total small plan expenditures.[8]

The Departments estimate that prior to the Act, 115,000 small plans with 1.6 million participants would have restricted lengths of stay in connection with childbirth or required preauthorization for such stays.[9] While this represents just 5 percent of all small plans, the Departments believe

[8] Departments' estimates using the 2005 Medical Expenditures Panel Survey Household Component (MEPS-HC), the 2006 Medical Expenditures Panel Survey Insurance Component (MEPS-IC) and the National Centers for Disease Control and Prevention (CDC) National Hospital Discharge Survey: 2005 Annual Summary with Detailed Diagnosis and Procedure Data determined that of participants affected by the regulation, 11 percent were enrolled in small plans. Costs born by small plans were 11 percent of all costs.

[9] Estimates are based on the 2006 MEPS-IC. It should be noted, however, that the Pregnancy Discrimination Act of 1978 allows firms with less than 15 employees that offer health insurance to exclude maternity care. The 2000 Mercer/Foster Higgins National Survey of Employer Sponsored Health Plans found that 7 percent of firms with 10–24 employees did not offer such benefits, but the survey did not examine smaller firms. Rough estimates by the Departments suggest that the share of firms with 9 or fewer employees that offer health benefits but exclude maternity benefits is 21 percent. As the cost of these benefits rises, this share is likely to increase which, while having a small effect on the number of participants affected by the regulation, might significantly decrease the number of small plans affected by the regulation.

it may represent a substantial number of small entities.

Paperwork Reduction Act — Department of Labor and Department of Health and Human Services

1. Department of Labor

These rules contain no new information collection requirements that are subject to review and approval by OMB under the Paperwork Reduction Act of 1995 (Public Law 104–13, 44 U.S.C. Chapter 35). The Department of Labor reported the information collection burdens associated with the Newborns' Act in the interim rules (Interim Rules Amending ERISA Disclosure Requirements for Group Health Plans) implementing section 711(d) of ERISA that were published in the Federal Register on April 8, 1997 (62 FR 16979). OMB approved the information collection under OMB Control Number 1210–0039, expiring on March 31, 2010.

2. Department of Health and Human Services

These rules contain no new information collection requirements that are subject to review and approval by OMB under the Paperwork Reduction Act of 1995 (Public Law 104–13, 44 U.S.C. Chapter 35). HHS reported the information collection burdens associated with the Newborns' Act in the interim rules (Information Collection Requirements Referenced in HIPAA for the Group Market, Supporting Regulations 45 CFR 146), published in the **Federal Register** on April 8, 1997. These collection requirements were approved under OMB Control Number 0938–0702, expiring on August 31, 2009.

Special Analyses — Department of the Treasury

Notwithstanding the determinations of the Departments of Labor and of Health and Human Services, for purposes of the Department of the Treasury it has been determined that this Treasury decision is not a significant regulatory action. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these Treasury regulations, and, because these regulations do not impose a collection of information on small entities, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Congressional Review Act

These regulations are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and have been transmitted to Congress and the Comptroller General for review. These regulations, however, are considered a "major rule," as that term is defined in 5 U.S.C. 804, because they are likely to result in an annual effect on the economy of $100 million or more.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4), as well as Executive Order 12875, these regulations do not include any federal mandate that may result in expenditures by state, local, or tribal governments,[10] however, they include mandates which may impose an annual burden of $100 million or more on the private sector, updated annually for inflation. After applying the most current gross domestic product implicit price deflator in 2008, that threshold is approximately $130 million.

Federalism Statement Under Executive Order 13132 — Department of Labor and Department of Health and Human Services

Executive Order 13132 outlines fundamental principles of federalism. It requires adherence to specific criteria by federal agencies in formulating and implementing policies that have "substantial direct effects" on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials, and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the regulation.

In the Departments' view, these final regulations have federalism implications because they may have substantial direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. However, in the Departments' view, the federalism implications of these final regulations are substantially mitigated because, with respect to health insurance issuers, all but one of the States have requirements that prescribe benefits for hospital lengths of stay in connection with childbirth that satisfy the Newborns' Act hospital length of stay requirements.

In general, through section 514, ERISA supersedes State laws to the extent that they relate to any covered employee benefit plan, but preserves State laws that regulate insurance. At the same time, however, ERISA prohibits States from regulating a plan as an insurance company. HIPAA added a new section to ERISA (as well as to the PHS Act and the Code) narrowly preempting State requirements for issuers of group health insurance coverage.[11] HIPAA's conference report states that the conferees intended only the narrowest preemption of State laws with regard to health insurance issuers. H.R. Conf. Rep. No. 736, 104th Cong. 2d Session 205 (1996).

The Newborns' Act also added a new section to ERISA (and to the PHS Act and the Code) which provides that the federal requirements applicable to group health plans and health insurance issuers concerning hospital lengths of stay for mothers and newborns following childbirth do not apply if State law meets one

[10] Nonfederal governmental plans can opt-out of these requirements and it was assumed that those States that had rules in place that supplanted the Newborns' Act (that is, all States except one) would.

[11] The Newborns' Act was incorporated into the administrative framework established by HIPAA.

or more of three specific criteria in the statute.[12] The accompanying conference report states that it is the intent of the conferees that States may impose more favorable requirements for the treatment of maternity coverage under health insurance coverage than required by the Newborns' Act. H.R. Conf. Rep. No. 104–812, 104th Cong. 2d Session 88 (1996).

Guidance conveying the Newborns' Act hospital length of stay requirements was published in the **Federal Register** on October 27, 1998 (63 FR 57546). These final regulations clarify and implement the statute's minimum standards and do not significantly reduce the discretion given the States by the statute. Moreover, the Departments understand that all but one State have requirements that prescribe benefits for hospital lengths of stay in connection with childbirth that satisfy the Newborns' Act requirements.

The Newborns' Act modified HIPAA's framework to provide that the States have primary responsibility for enforcement of the provisions of the Newborns' Act as they pertain to issuers, but that the Secretary of Health and Human Services must enforce any provision that a State fails to substantially enforce. To date, CMS enforces the Newborns' Act hospital length of stay requirements in only one State. When exercising its responsibility to enforce the Newborns' Act provisions, CMS works cooperatively with the State for the purpose of addressing the State's concerns and avoiding conflicts with the exercise of State authority. CMS has developed procedures to implement its enforcement responsibilities, and to afford the States the maximum opportunity to enforce the Newborns' Act requirements in the first instance. CMS procedures address the handling of reports that States may not be enforcing the Newborns' Act requirements, and the mechanism for allocating responsibility between the States and CMS. In compliance with Executive Order 13132's requirement that agencies examine closely any policies that may have federalism implications or limit the policymaking discretion of the States, the Department of Labor and CMS have consulted and worked cooperatively with affected State and local officials.

For example, the Departments sought and received input from State insurance regulators and the National Association of Insurance Commissioners (NAIC). The NAIC is a non-profit corporation established by the insurance commissioners of the 50 States, the District of Columbia, and the four U.S. territories. In most States the insurance commissioner is appointed by the governor; in approximately 14 States, the insurance commissioner is an elected official. Among other activities, it provides a forum for the development of uniform policy when uniformity is appropriate. Its members meet, discuss and offer solutions to mutual problems. The NAIC sponsors quarterly meetings to provide a forum for the exchange of ideas and in-depth consideration of insurance issues by regulators, industry representatives and consumers. CMS and Department of Labor staff have consistently attended these quarterly meetings to listen to the views of the State insurance departments.

In addition, the Departments informally consulted with the NAIC in developing the interim final regulations. Through the NAIC, the Departments sought and received the input of State insurance departments regarding preemption of State laws, applicability of the Newborns' Act provisions, and certain insurance industry definitions (*e.g.*, attending provider). In general, these final regulations do not change the interim final rules. Significantly, the Departments received only eleven formal comment letters on the interim final regulation, none of which were from or on behalf of the NAIC or any of the States.

The Departments have also cooperated with the States in several ongoing outreach initiatives, through which information is shared among federal regulators, State regulators and the regulated community. In particular, the Department of Labor has established a Health Benefits Education Campaign with more than 70 partners, including CMS, NAIC and many business and consumer groups. CMS has sponsored conferences with the States — the Consumer Outreach and Advocacy conferences in March 1999 and June 2000, and the Implementation and Enforcement of HIPAA National State-Federal Conferences in August 1999, 2000, 2001, 2002, and 2003. Furthermore, both the Department of Labor and CMS websites offer links to important State websites and other resources, facilitating coordination between the State and federal regulators and the regulated community.

Throughout the process of developing these regulations, to the extent feasible within the specific preemption provisions of HIPAA and the Newborns' Act, the Departments have attempted to balance the States' interests in regulating health insurance issuers, and Congress' intent to provide uniform minimum protections to consumers in every State. By doing so, it is the Departments' view that they have complied with the requirements of Executive Order 13132.

Pursuant to the requirements set forth in Section 8(a) of Executive Order 13132, and by the signatures affixed to these final regulations, the Departments certify that the Employee Benefits Security Administration and the Centers for Medicare & Medicaid Services have complied with the requirements of Executive Order 13132 for the attached Final Regulations for Group Health Plans and Health Insurance Issuers Under the Newborns' and Mothers' Health Protection Act (RIN 1210–AA63 and RIN 0938–AI17), in a meaningful and timely manner.

Unified Analysis of Costs and Benefits

1. Introduction

The Newborns' Act's provisions generally prohibit group health plans and health insurance issuers from: 1) limiting hospital lengths of stay in connection with childbirth to less than 48 hours for vaginal deliveries and 96 hours for cesarean sections, and 2) requiring preauthorization for the 48/96 hour stays. The primary effect and intent of the provision is to reduce postpartum complications associated with premature discharge.

[12] The federal requirements concerning hospital lengths of stay in connection with childbirth do not apply with respect to health insurance coverage if state law requires (1) such coverage to provide for at least a 48 hour hospital length of stay following a vaginal delivery and at least a 96 hour length of stay following a delivery by cesarean section, (2) such coverage to provide for maternity and pediatric care in accordance with guidelines established by the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, or other established professional medical associations, or (3) in connection with such coverage for maternity care, that the hospital length of stay for such care is left to the decision of (or is required to be made by) the attending provider in consultation with the mother.

These regulations draw on the Departments' authority to clarify and interpret the Newborns' Act's statutory provisions in order to secure the protections intended by Congress for newborns and mothers. The Departments crafted them to satisfy this mandate in as economically efficient a manner as possible, and believe that the economic benefits of the regulations justify their costs. This conclusion takes into account both the effect of the statute and the impact of the discretion exercised in the regulations.

This regulation is needed to clarify and interpret the Newborns' Act provisions under section 711 of ERISA, sections 2704 and 2751 of the PHS Act, and section 9811 of the Internal Revenue Code and to ensure that group health plans and health insurance issuers subject to these rules do not impermissibly restrict benefits or require preauthorization for 48-hour or 96-hour hospital lengths of stay in connection with childbirth.

2. Costs and Benefits of the Statute

The Departments provide qualitative assessments of the nature of the costs and benefits that are expected to derive from the statutory provisions of the Newborns' Act. In addition, the Departments provide summaries of any credible, empirical estimates of these effects that are available.

In order to determine how many plan participants could benefit from the Newborns' Act provision, the Departments considered the estimated 2.8 million births in 2005 by women with private health insurance.[13] Of these, approximately 55.0 percent are assumed to be normal, healthy deliveries, and therefore eligible for early discharge.[14] Because legislation has been passed in every state but Wisconsin, the Departments limited their analysis to participants in self-insured group health plans throughout the country and all health plans within Wisconsin. Finally, because Health Maintenance Organizations (HMOs) have traditionally had more aggressive short-stay policies, the share of workers enrolled in HMOs versus commercial plans was taken into account as were the share of those plans with short-stay policies.[15]

Based on these assumptions, approximately 328,000 births or roughly 22 percent of healthy births by privately insured women would be affected by the provision.[16] If each woman then stayed the maximum period outlined in the statute, approximately 348,000 additional days of hospital care would be required.[17] Assuming hospitals charge $800 per day for postpartum care, the annual cost of the provision would be $279 million: $1.7 million of which would be attributable to the individual market in Wisconsin; the remaining $276.9 million would be attributable to the group market in Wisconsin and self-funded plans throughout the country. However, because the statute does not require a 48 or 96-hour stay, but instead gives the decision-making authority to the attending physician in consultation with the mother, it is expected that not all of these births will result in additional hospital time. If only one-half of affected mothers had their stays extended by the full amount, the annual cost of the provision would be $139 million, less than $1 million of which would be attributable to the individual market of Wisconsin.[18]

While the Departments estimate that the cost of the NMHPA is as much as $279 million annually, health plans are estimated to have spent more than $775 billion in 2007 to cover approximately 201.7 million privately insured individuals.[19] Therefore, the upper estimate of the costs under the Newborns' Act's provisions represent a very small fraction of one percent of total health plan expenditures.

Moreover, the cost of this provision is likely to decline in the future, despite increases in overall health care spending. Since the statute was passed, there has been a significant increase in the number of cesarean births, compared to vaginal births. While traditionally cesarean births are associated with higher risk, an increasing number of women are now electing to have the procedure.[20] Women who elect to have a cesarean would presumably have a lower risk than those for whom the procedure is required and therefore may not re-

[13] Departments' estimate based on the 2005 MEPS-HC and the 2005 CDC Survey.

[14] The CDC reported that of the 4.0 million births in 2005, 2.2 million, or 55.0 percent of those newborns were categorized as without any illness or risk-related diagnosis (*e.g.*, jaundice, respiratory distress, disorders relating to short gestation and low birth weight). No data are available on whether health of newborns varies by mothers' insurance status, although insured mothers are more likely to receive prenatal care and this would be expected to positively affect the share of "healthy" births (see Susan Egerter *et al*, "Timing of Insurance Coverage and Use of Prenatal Care Among Low-Income Women," *American Journal of Public Health*, v. 92(3): 423–427).

[15] Julie A. Gazmararian & Jeffrey Koplan found in, "Length-of-Stay After Delivery: Managed Care versus Fee for Service," *Health Affairs*, v. 15(4): 74–80, that 35.9 percent of enrollees in commercial plans were discharged within one day after delivery compared to 57.7 percent from commercial HMOs. The shares of individuals enrolled in HMOs at self-insured and fully-insured plans were taken from the 2007 Kaiser Family Foundation's Survey of Employer Sponsored Insurance.

[16] The number of women age 10–54 with private insurance was estimated using the 2005 MEPS-HC. Fertility rates for different age brackets were taken from the 2005 CDC National Hospital Discharge Survey and were interacted with the number of privately insured women to ascertain the number of births by insured women. This was then interacted with the share of infants that were born healthy, as reported in the 2005 CDC report, to determine the number of healthy births to privately-insured women.

To restrict the number of privately-insured woman having healthy births to those with ESI, the share of all privately insured women, age 10–54, that had ESI was taken from the 2007 March CPS and interacted with the above number. To then discern the number of births that would be covered by the regulation, the 2006 MEPS-IC was used to ascertain the share of employees in ESI that were in self-insured plans that had maternal coverage. This number was further interacted by the share of employees in the share of those employees in HMO versus non-HMO health plans as provided by the 2007 Kaiser Family Foundation's Employer Health Benefits Survey.

Interacting all of these numbers results in the 328,000 number cited in the text.

[17] Based on 1995 discharge rates, approximately 94 percent of the 328,000 births required one additional day to meet the maximum period outlined by the statute; 6 percent required two additional days.

[18] The Congressional Budget Office (CBO) analyzed Senate proposal S.969, which was an earlier version of the Newborns' Act. CBO estimated 900,000 insured births had stays shorter than the minimum specified in the bill, which would result in 400,000 additional inpatient days and an additional 200,000 additional out-patient visits at an annual cost of $360 million in 2007 dollars (or $800 for each additional day of inpatient care; $200 for outpatient care). The Departments' estimate is significantly less, primarily due to: 1) a large number of states either clarifying existing policies for short-stay deliveries or enacting new ones which supersede the federal statute for all but self-insured plans; and 2) the CBO estimates included costs for follow-up visits, a requirement that was dropped from the federal statute.

[19] The Departments' estimate is based on the Office of the Actuary at the Centers for Medicare & Medicaid Services (CMS) projected measure of total personal health expenditures by private health insurance in 2007.

[20] The share of all births that are cesarean rose from 20.7 percent in 1996 to an estimated 31.3 percent in 2005 (CDC (2005). "National Hospital Discharge Survey" *Vital and Health Statistics*, Series 13 (162)). A study by Health Grades Inc. found a 36.6 percent increase in the number of "patient choice" cesarean sections between 2001 and 2003.

quire the prescribed 96-hour recovery period detailed in the statute.[21] If this trend continues, the burden of this statute should lessen.

The primary statutory economic benefits associated with the Newborns' Act's provisions derive from an increase in access to health plan coverage for postpartum care and monitoring of mothers and their newborns. Individuals without coverage for this care and monitoring are less likely to remain in the hospital for fear of incurring expenses that must be paid for 'out-of-pocket.' Lower-income individuals are more likely to forego care not covered by their insurance. Foregoing this care and monitoring increases the risk of adverse health outcomes, which in turn generates higher medical costs. Much of these costs may be shifted to public funding sources (and therefore to taxpayers) or to other payers.[22]

Foregoing appropriate care can also negatively affect the quality of life. Improved access to health coverage for mothers and newborns will lead to more appropriate medical care and monitoring, better health outcomes, and improved quality of life.[23] Denied coverage, individuals must choose whether to pay for the extra day(s) in the hospital and potentially suffer economic hardship or forego the care and monitoring, creating a risk of an adverse health outcome. Gaining coverage will sometimes mean receiving high quality care and living healthier lives.[24]

The provisions of the Newborns' Act and its regulation generally apply to both group health plans and health insurance issuers. While the costs of the Newborns' Act are substantial, economic theory predicts that issuers will pass their costs of compliance back to plans, and that plans may shift some or all of issuers' and their own costs of compliance to participants either through increases in premiums, increased cost-sharing, or reducing the richness of non-mandated health benefits.[25]

While 74 million individuals are enrolled in group or private health plans, only 15 million individuals are enrolled in plans that had policies affected by the Newborns' Act. Of these, only 328,000 individuals are expected to be annually directly impacted and receive additional coverage they were previously denied or restricted for 48 or 96-hour hospital stays following childbirth. Though these benefits are received by a small number of plan enrollees, the costs are distributed broadly among all plan participants. As a result, the cost of the Newborns' Act per individual enrollee is expected to be minimal — between 9 and 19 dollars per person for those enrolled in affected plans.[26] While it is possible that some enrollees on the margin will decline coverage in response to cost increases, the number of those acting in such a manner is expected to be negligible. As such, the benefits of this statute are believed to justify its costs.

3. Costs and Benefits of the Rules Applicable to the Newborns' Act

The interim final rule clarified when a stay begins under the Newborns' Act. Prior to this, private health plans could use the expectant mother's admittance time to determine the required stay, an assumption that consistently reduced the number of women experiencing stays less than those prescribed by the statute by 5 per-

[21] Most research comparing complication rates of cesarean to vaginal births focus on those women who previously had a cesarean section, as insufficient data are available to compare initial vaginal versus initial elected cesarean deliveries. As such, it is difficult to discern how the medically advisable stay of an elected cesarean section compares to that of an uncomplicated vaginal birth. However, there is much agreement that emergency cesarean sections, which typically follow a lengthy labor, are far more dangerous to mother and child than the elected variety. Given the Newborns' Act's prescribed 96-hour stays for cesarean births when elected cesareans comprised a smaller share of all cesareans, it would be reasonable to expect that the stays for elected cesareans may fall over time.

[22] For more information on health choices of lower-income individuals, see: Trude, Sally (2003). "Patient Cost Sharing: How Much is Too Much," *Health System Change Issue Brief*, no. 72 (December).

[23] For more detailed information, see: O'Brien, Ellen (2003). "Employer Benefits from Workers' Health Insurance," *Milbank Quarterly*, Vol. 1 No. 1. O'Brien provides an extensive analysis of the literature on benefits accruing to employers from offering health benefits and the costs to employers of unhealthy employees, as well as information on studies demonstrating that poor health may be related to lower productivity. In particular, she discusses studies that have examined the effects on workplace productivity of specific health conditions and shows that poor health reduces workers' productivity at work, and that effective health care treatments can reduce productivity losses and may even pay for themselves in terms of increased productivity.

[24] Research on the benefits of longer stays has been somewhat mixed. Some studies show short-stays to be correlated with decreased follow-up care and increased re-hospitalization, particularly for low-income families, which will ultimately increase societal costs (for further discussion, see: Galbraith, Alison A. *et al.* (2003) "Newborn Early Discharge Revisited: Are California Newborns Receiving Recommended Postnatal Services?" *Pediatrics*, vol. 111 (2): p. 364–371; Lock, Michael & Joel G. Ray. (1999) "Higher Neonatal Morbidity after Routine Hospital Discharge: Are We Sending Newborns Home Too Early?" *Canadian Medical Association Journal*, vol. 161 (3): p. 249–253; Malkin, Jesse D. *et al.* (2003) "Postpartum Length of Stay and Newborn Health: A Cost-Effectiveness Analysis," *Pediatrics*, vol. 111 (4): p. 316–322).

Since the statutes have been in place, other studies have argued that higher re-hospitalization rates found in short-stay newborns are due to more frequent post-stay evaluations in the four days following birth, considered the critical window for ascertaining newborn health, as mandated in health plans. Once new regulations were passed extending stays, health plans reduced their follow-up care policies and newborns were less likely to be examined in the days following discharge. This could result in an increase in costs. (For further discussion, see: Hyman, David A. (2001) "What Lessons Should We Learn from Drive-Through Deliveries?" *Pediatrics*, vol. 107 (2): 406–408; Madden, Jeanne M. *et al*. (2002) "Effects of a Law Against Early Postpartum Discharges on Newborn Follow-up, Adverse Events, and HMO Expenditures," *New England Journal of Medicine*, vol. 347 (25): p. 2031–2038; Madden, Jeanne M. *et al.* (2004) "Length-of-Stay Policies and Ascertainment of Postdischarge Problems in Newborns," *Pediatrics*, vol. 113 (1): p. 42–49.)

The Departments believe, however, that because most of the complications of newborns manifest themselves within the immediate 48 hours following birth, special protection much be given to that period. Moreover, since the decision to discharge the patients will be made by the doctor, in consultation with the mother, many of the concerns posed by those who oppose extended stays will be factored into that decision. As such, the Departments believe that the Newborns' Act will improve the health and welfare of mothers and newborns.

[25] The voluntary nature of the employment-based health benefit system in conjunction with the open and dynamic character of labor markets make explicit as well as implicit negotiations on compensation a key determinant of the prevalence of employee benefits coverage. It is likely that 80% to 100% of the cost of employee benefits is borne by workers through reduced wages (See for example: Jonathan Gruber and Alan B. Krueger, "The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers Compensation Insurance," *Tax Policy and Economy* (1991); Jonathan Gruber, "The Incidence of Mandated Maternity Benefits," *American Economic Review*, Vol. 84 (June 1994), pp. 622–641; Lawrence H. Summers, "Some Simple Economics of Mandated Benefits," *American Economic Review*, Vol. 79, No. 2 (May 1989); Louise Sheiner, "Health Care Costs, Wages, and Aging," Federal Reserve Board of Governors working paper, April 1999; and Edward Montgomery, Kathryn Shaw, and Mary Ellen Benedict, "Pensions and Wages: An Hedonic Price Theory Approach," *International Economic Review*, Vol. 33 No. 1, Feb. 1992). The prevalence of benefits is therefore largely dependent on the efficacy of this exchange. If workers perceive that there is the potential for inappropriate denial of benefits they will discount their value to adjust for this risk. This discount drives a wedge in the compensation negotiation, limiting its efficiency. With workers unwilling to bear the full cost of the benefit, fewer benefits will be provided. The extent to which workers perceive a federal regulation supported by enforcement authority to improve the security and quality of benefits, the differential between the employers' costs and workers' willingness to accept wage offsets is minimized.

[26] The total cost of the regulation was calculated by estimating the number of additional days in the hospital that short-stay deliveries would require under the statute. This number was then multiplied by $800, to reflect the per day hospitalization cost of a mother (this was a CBO number indexed to 2007 dollars). Having calculated the total cost of the regulation at $279 million (and a lower bound of $139 million), these numbers were then divided by the number of participants in affected health plans (a total of 15 million) to get an upper ($19) and lower bound ($9) of the per-participant cost of the regulation.

cent.[27] By clarifying this assumption in the interim final rule, the number of stays that would have been shorter than 48/96 hours increased by approximately 16,000 for all plans, and by approximately 2,000 for small plans. This in turn raised the direct costs to health plans by 5 percent (from $265 to $279 million for the upper bound for all plans and from $29 to $31 million for small plans). However, because it can take several hours for certain conditions to present themselves, such as jaundice and dehydration, the additional hours of hospital supervision — gained by generally not using an expectant mother's admittance time as the start of a stay — can be critical. Therefore, the benefits of this clarification should justify this additional cost.

The regulation also defines that for births occurring outside of a hospital, stays begin once the mother or newborn is admitted as a hospital inpatient in connection with childbirth, as defined by the attending provider. The Departments lack any firm basis for quantifying the number of individuals likely to be affected by this provision, and therefore are unable to quantify the increase in costs and benefits. However, given the special and narrow circumstances to which this provision applies, costs and benefits are expected to be small.

Statutory Authority

The Department of the Treasury final rule is adopted pursuant to the authority contained in sections 7805 and 9833 of the Code (26 U.S.C. 7805, 9833).

The Department of Labor final rule is adopted pursuant to the authority contained in 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c, sec. 101(g), Public Law 104–191, 110 Stat. 1936; sec. 401(b), Public Law 105–200, 112 Stat. 645 (42 U.S.C. 651 note); Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003).

The Department of Heath and Human Services final rule is adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended by Public Law 104–191, 110 Stat. 1936, Public Law 104–204, 110 Stat. 2935 and Public Law 105–277, 112 Stat. 2681–436.

Accounting Statement

In accordance with OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a–4.pdf*), in the table below, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this final rule. This table provides our best estimate for the annual costs associated with enacting the federal minimum stay final regulation.

Accounting Statement: Classification of Estimated Expenditures, CY2008 (in Millions)		
Category	**Cost Estimates**	
Annualized Monetized Costs	**Low** **$139.30**	**High** **$278.50**

* * * * *

Adoption of Amendments to the Regulations

Internal Revenue Service
26 CFR Chapter I

Accordingly, 26 CFR Part 54 is amended as follows:

PART 54—PENSION EXCISE TAXES

Paragraph 1. The authority citation for part 54 is amended by adding an entry for §54.9811–1 in numerical order and by removing the entry for §54.9811–1T to read in part as follows:

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

Section 54.9811–1 also issued under 26 U.S.C. 9833. * * *

§54.9801–1 [Amended]

Par. 2. Section 54.9801–1(a) is amended by removing the language "54.9811–1T" and adding "54.9811–1" in its place.

§54.9801–2 [Amended]

Par. 3. In §54.9801–2, the introductory paragraph before the definitions is amended by removing the language "54.9811–1T" and adding "54.9811–1" in its place.

Par. 4. Section 54.9811–1 is added to read as follows:

§54.9811–1 Standards relating to benefits for mothers and newborns.

(a) *Hospital length of stay*—(1) *General rule*. Except as provided in paragraph (a)(5) of this section, a group health plan that provides benefits for a hospital length of stay in connection with childbirth for a mother or her newborn may not restrict benefits for the stay to less than—

(i) 48 hours following a vaginal delivery; or

(ii) 96 hours following a delivery by cesarean section.

(2) *When stay begins*—(i) *Delivery in a hospital*. If delivery occurs in a hospital, the hospital length of stay for the mother or newborn child begins at the time of delivery (or in the case of multiple births, at the time of the last delivery).

(ii) *Delivery outside a hospital*. If delivery occurs outside a hospital, the hospital length of stay begins at the time the mother or newborn is admitted as a hospital inpatient in connection with childbirth. The determination of whether an admission is in connection with childbirth is a medical decision to be made by the attending provider.

[27] Departments' estimate based on the CDC's 2005 Survey, Tables 37 and 42. The Departments looked at the share of stays that would be labeled "short" for both mothers and newborns in 1995 (before any part of the statute was enforced) and found that the share of newborns with a "short stay" was 5 percent higher. It was therefore assumed that starting the clock at the birth of a child would increase the number of "short stays" by 5 percent.

(3) *Examples*. The rules of paragraphs (a)(1) and (2) of this section are illustrated by the following examples. In each example, the group health plan provides benefits for hospital lengths of stay in connection with childbirth and is subject to the requirements of this section, as follows:

Example 1. (i) *Facts*. A pregnant woman covered under a group health plan goes into labor and is admitted to the hospital at 10 p.m. on June 11. She gives birth by vaginal delivery at 6 a.m. on June 12.

(ii) *Conclusion*. In this *Example 1*, the 48-hour period described in paragraph (a)(1)(i) of this section ends at 6 a.m. on June 14.

Example 2. (i) *Facts*. A woman covered under a group health plan gives birth at home by vaginal delivery. After the delivery, the woman begins bleeding excessively in connection with the childbirth and is admitted to the hospital for treatment of the excessive bleeding at 7 p.m. on October 1.

(ii) *Conclusion*. In this *Example 2*, the 48-hour period described in paragraph (a)(1)(i) of this section ends at 7 p.m. on October 3.

Example 3. (i) *Facts*. A woman covered under a group health plan gives birth by vaginal delivery at home. The child later develops pneumonia and is admitted to the hospital. The attending provider determines that the admission is not in connection with childbirth.

(ii) *Conclusion*. In this *Example 3*, the hospital length-of-stay requirements of this section do not apply to the child's admission to the hospital because the admission is not in connection with childbirth.

(4) *Authorization not required*—(i) *In general*. A plan may not require that a physician or other health care provider obtain authorization from the plan, or from a health insurance issuer offering health insurance coverage under the plan, for prescribing the hospital length of stay specified in paragraph (a)(1) of this section. (See also paragraphs (b)(2) and (c)(3) of this section for rules and examples regarding other authorization and certain notice requirements.)

(ii) *Example*. The rule of this paragraph (a)(4) is illustrated by the following example:

Example. (i) *Facts*. In the case of a delivery by cesarean section, a group health plan subject to the requirements of this section automatically provides benefits for any hospital length of stay of up to 72 hours. For any longer stay, the plan requires an attending provider to complete a certificate of medical necessity. The plan then makes a determination, based on the certificate of medical necessity, whether a longer stay is medically necessary.

(ii) *Conclusion*. In this *Example*, the requirement that an attending provider complete a certificate of medical necessity to obtain authorization for the period between 72 hours and 96 hours following a delivery by cesarean section is prohibited by this paragraph (a)(4).

(5) *Exceptions*—(i) *Discharge of mother*. If a decision to discharge a mother earlier than the period specified in paragraph (a)(1) of this section is made by an attending provider, in consultation with the mother, the requirements of paragraph (a)(1) of this section do not apply for any period after the discharge.

(ii) *Discharge of newborn*. If a decision to discharge a newborn child earlier than the period specified in paragraph (a)(1) of this section is made by an attending provider, in consultation with the mother (or the newborn's authorized representative), the requirements of paragraph (a)(1) of this section do not apply for any period after the discharge.

(iii) *Attending provider defined*. For purposes of this section, attending provider means an individual who is licensed under applicable state law to provide maternity or pediatric care and who is directly responsible for providing maternity or pediatric care to a mother or newborn child. Therefore, a plan, hospital, managed care organization, or other issuer is not an attending provider.

(iv) *Example*. The rules of this paragraph (a)(5) are illustrated by the following example:

Example. (i) *Facts*. A pregnant woman covered under a group health plan subject to the requirements of this section goes into labor and is admitted to a hospital. She gives birth by cesarean section. On the third day after the delivery, the attending provider for the mother consults with the mother, and the attending provider for the newborn consults with the mother regarding the newborn. The attending providers authorize the early discharge of both the mother and the newborn. Both are discharged approximately 72 hours after the delivery. The plan pays for the 72-hour hospital stays.

(ii) *Conclusion*. In this *Example*, the requirements of this paragraph (a) have been satisfied with respect to the mother and the newborn. If either is readmitted, the hospital stay for the readmission is not subject to this section.

(b) *Prohibitions*—(1) *With respect to mothers*—(i) *In general*. A group health plan may not—

(A) Deny a mother or her newborn child eligibility or continued eligibility to enroll or renew coverage under the terms of the plan solely to avoid the requirements of this section; or

(B) Provide payments (including payments-in-kind) or rebates to a mother to encourage her to accept less than the minimum protections available under this section.

(ii) *Examples*. The rules of this paragraph (b)(1) are illustrated by the following examples. In each example, the group health plan is subject to the requirements of this section, as follows:

Example 1. (i) *Facts*. A group health plan provides benefits for at least a 48-hour hospital length of stay following a vaginal delivery. If a mother and newborn covered under the plan are discharged within 24 hours after the delivery, the plan will waive the copayment and deductible.

(ii) *Conclusion*. In this *Example 1*, because waiver of the copayment and deductible is in the nature of a rebate that the mother would not receive if she and her newborn remained in the hospital, it is prohibited by this paragraph (b)(1). (In addition, the plan violates paragraph (b)(2) of this section because, in effect, no copayment or deductible is required for the first portion of the stay and a double copayment and a deductible are required for the second portion of the stay.)

Example 2. (i) *Facts*. A group health plan provides benefits for at least a 48-hour hospital length of stay following a vaginal delivery. In the event that a mother and her newborn are discharged earlier than 48 hours and the discharges occur after consultation with the mother in accordance with the requirements of paragraph (a)(5) of this section, the plan provides for a follow-up visit by a nurse within 48 hours after the discharges to provide certain services that the mother and her newborn would otherwise receive in the hospital.

(ii) *Conclusion*. In this *Example 2*, because the follow-up visit does not provide any services beyond what the mother and her newborn would receive in the hospital, coverage for the follow-up visit is not prohibited by this paragraph (b)(1).

(2) *With respect to benefit restrictions*—(i) *In general*. Subject to paragraph (c)(3) of this section, a group health plan may not restrict the benefits for any portion of a hospital length of stay specified in paragraph (a) of this section in a manner that is less favorable than the benefits provided for any preceding portion of the stay.

(ii) *Example*. The rules of this paragraph (b)(2) are illustrated by the following example:

Example. (i) *Facts*. A group health plan subject to the requirements of this section provides benefits for hospital lengths of stay in connection with childbirth. In the case of a delivery by cesarean section, the plan automatically pays for the first 48 hours. With respect to each succeeding 24-hour period, the participant or beneficiary must call the plan to obtain precertification from a utilization reviewer, who determines if an additional 24-hour period is medically necessary. If this approval is not obtained, the plan will not provide benefits for any succeeding 24-hour period.

(ii) *Conclusion*. In this *Example*, the requirement to obtain precertification for the two 24-hour periods immediately following the initial 48-hour stay is prohibited by this paragraph (b)(2) because benefits for the latter part of the stay are restricted in a manner that is less favorable than benefits for a preceding portion

of the stay. (However, this section does not prohibit a plan from requiring precertification for any period after the first 96 hours.) In addition, the requirement to obtain precertification from the plan based on medical necessity for a hospital length of stay within the 96-hour period would also violate paragraph (a) of this section.

(3) *With respect to attending providers*. A group health plan may not directly or indirectly—

(i) Penalize (for example, take disciplinary action against or retaliate against), or otherwise reduce or limit the compensation of, an attending provider because the provider furnished care to a participant or beneficiary in accordance with this section; or

(ii) Provide monetary or other incentives to an attending provider to induce the provider to furnish care to a participant or beneficiary in a manner inconsistent with this section, including providing any incentive that could induce an attending provider to discharge a mother or newborn earlier than 48 hours (or 96 hours) after delivery.

(c) *Construction*. With respect to this section, the following rules of construction apply:

(1) *Hospital stays not mandatory*. This section does not require a mother to—

(i) Give birth in a hospital; or

(ii) Stay in the hospital for a fixed period of time following the birth of her child.

(2) *Hospital stay benefits not mandated*. This section does not apply to any group health plan that does not provide benefits for hospital lengths of stay in connection with childbirth for a mother or her newborn child.

(3) *Cost-sharing rules*—(i) *In general*. This section does not prevent a group health plan from imposing deductibles, coinsurance, or other cost-sharing in relation to benefits for hospital lengths of stay in connection with childbirth for a mother or a newborn under the plan or coverage, except that the coinsurance or other cost-sharing for any portion of the hospital length of stay specified in paragraph (a) of this section may not be greater than that for any preceding portion of the stay.

(ii) *Examples*. The rules of this paragraph (c)(3) are illustrated by the following examples. In each example, the group health plan is subject to the requirements of this section, as follows:

Example 1. (i) *Facts*. A group health plan provides benefits for at least a 48-hour hospital length of stay in connection with vaginal deliveries. The plan covers 80 percent of the cost of the stay for the first 24-hour period and 50 percent of the cost of the stay for the second 24-hour period. Thus, the coinsurance paid by the patient increases from 20 percent to 50 percent after 24 hours.

(ii) *Conclusion*. In this *Example 1*, the plan violates the rules of this paragraph (c)(3) because coinsurance for the second 24-hour period of the 48-hour stay is greater than that for the preceding portion of the stay. (In addition, the plan also violates the similar rule in paragraph (b)(2) of this section.)

Example 2. (i) *Facts*. A group health plan generally covers 70 percent of the cost of a hospital length of stay in connection with childbirth. However, the plan will cover 80 percent of the cost of the stay if the participant or beneficiary notifies the plan of the pregnancy in advance of admission and uses whatever hospital the plan may designate.

(ii) *Conclusion*. In this *Example 2*, the plan does not violate the rules of this paragraph (c)(3) because the level of benefits provided (70 percent or 80 percent) is consistent throughout the 48-hour (or 96-hour) hospital length of stay required under paragraph (a) of this section. (In addition, the plan does not violate the rules in paragraph (a)(4) or (b)(2) of this section.)

(4) *Compensation of attending provider*. This section does not prevent a group health plan from negotiating with an attending provider the level and type of compensation for care furnished in accordance with this section (including paragraph (b) of this section).

(d) *Notice requirement*. See 29 CFR 2520.102–3(u) for rules relating to a disclosure requirement imposed under section 711(d) of ERISA (29 U.S.C. 1181) on certain group health plans that provide benefits for hospital lengths of stay in connection with childbirth.

(e) *Applicability in certain states*—(1) *Health insurance coverage*. The requirements of section 9811 and this section do not apply with respect to health insurance coverage offered in connection with a group health plan if there is a state law regulating the coverage that meets any of the following criteria:

(i) The state law requires the coverage to provide for at least a 48-hour hospital length of stay following a vaginal delivery and at least a 96-hour hospital length of stay following a delivery by cesarean section.

(ii) The state law requires the coverage to provide for maternity and pediatric care in accordance with guidelines that relate to care following childbirth established by the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, or any other established professional medical association.

(iii) The state law requires, in connection with the coverage for maternity care, that the hospital length of stay for such care is left to the decision of (or is required to be made by) the attending provider in consultation with the mother. State laws that require the decision to be made by the attending provider with the consent of the mother satisfy the criterion of this paragraph (e)(1)(iii).

(2) *Group health plans*—(i) *Fully-insured plans*. For a group health plan that provides benefits solely through health insurance coverage, if the state law regulating the health insurance coverage meets any of the criteria in paragraph (e)(1) of this section, then the requirements of section 9811 and this section do not apply.

(ii) *Self-insured plans*. For a group health plan that provides all benefits for hospital lengths of stay in connection with childbirth other than through health insurance coverage, the requirements of section 9811 and this section apply.

(iii) *Partially-insured plans*. For a group health plan that provides some benefits through health insurance coverage, if the state law regulating the health insurance coverage meets any of the criteria in paragraph (e)(1) of this section, then the requirements of section 9811 and this section apply only to the extent the plan provides benefits for hospital lengths of stay in connection with childbirth other than through health insurance coverage.

(3) *Preemption provisions under section 731(a) of ERISA*. See 29 CFR 2590.711(e)(3) for a rule providing that the preemption provisions contained in section 731(a)(1) of ERISA and 29 CFR 2590.731(a) do not supersede a state law if the state law is described in paragraph (e)(1) of 29 CFR 2590.711 (which is substantially similar to paragraph (e)(1) of this section).

(4) *Examples*. The rules of this paragraph (e) are illustrated by the following examples:

Example 1. (i) *Facts*. A group health plan buys group health insurance coverage in a state that requires that the coverage provide for at least a 48-hour hospital length of stay following a vaginal delivery and at least a 96-hour hospital length of stay following a delivery by cesarean section.

(ii) *Conclusion*. In this *Example 1*, the coverage is subject to state law, and the requirements of section 9811 and this section do not apply.

Example 2. (i) *Facts*. A self-insured group health plan covers hospital lengths of stay in connection with childbirth in a state that requires health insurance coverage to provide for maternity and pediatric care in accordance with guidelines that relate to care following childbirth established by the American College of Obstetricians and Gynecologists and the American Academy of Pediatrics.

(ii) *Conclusion*. In this *Example 2*, even though the state law satisfies the criterion of paragraph (e)(1)(ii) of this section, because the plan provides benefits for hospital lengths of stay in connection with childbirth other than through health insurance coverage, the plan is subject to the requirements of section 9811 and this section.

(f) *Effective/applicability date*. This section applies to group health plans for plan years beginning on or after January 1, 2009.

§54.9811–1T [Removed]

Par. 5. Section 54.9811–1T is removed.

§54.9831–1 [Amended]

Par. 6. Section 54.9831–1(b) is amended by removing the language "54.9811–1T" and adding "54.9811–1" in its place.

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Approved September 23, 2008.

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

(Filed by the Office of the Federal Register on October 17, 2008, 8:45 a.m., and published in the issue of the Federal Register for October 20, 2008, 73 F.R. 62409)

Part III. Administrative, Procedural, and Miscellaneous

Transaction of Interest—Potential for Avoidance of Tax Through Sale of Charitable Remainder Trust Interests

Notice 2008–99

The Internal Revenue Service and the Treasury Department are aware of a type of transaction, described below, in which a sale or other disposition of all interests in a charitable remainder trust (subsequent to the contribution of appreciated assets to and their reinvestment by the trust), results in the grantor or other noncharitable recipient receiving the value of that person's trust interest while claiming to recognize little or no taxable gain. The IRS and Treasury Department believe this transaction has the potential for tax avoidance or evasion, but lack enough information to determine whether the transaction should be identified specifically as a tax avoidance transaction. This notice identifies this transaction and substantially similar transactions as transactions of interest for purposes of § 1.6011–4(b)(6) of the Income Tax Regulations and §§ 6111 and 6112 of the Internal Revenue Code. This notice also alerts persons involved in these transactions to certain responsibilities that may arise from their involvement.

FACTS

In one variation of the transaction, Grantor creates a charitable remainder trust (Trust) and contributes appreciated assets (Appreciated Assets) to Trust. Grantor retains an annuity or unitrust interest (term interest) in Trust and designates an organization described in §§ 170(c), 2055(a) and 2522(a) (Charity) as the remainder beneficiary. Charity may, but need not, be controlled by Grantor; Grantor may, but need not, reserve the right to change the Charity designated as the remainder beneficiary. Next, Trust sells or liquidates the Appreciated Assets and reinvests the net proceeds in other assets (New Assets) such as money market funds, marketable securities, and/or other assets, often to acquire a diversified portfolio. Because a charitable remainder trust generally is a tax-exempt entity under § 664, Trust's sale of the Appreciated Assets is exempt from income tax, and Trust's basis in the New Assets is the price Trust pays for those New Assets. Some portion of Trust's ordinary income and capital gains may become taxable to Grantor as the periodic annuity or unitrust payments are made by Trust in accordance with the rules of § 664 and the regulations thereunder. Next, Grantor and Charity, in a transaction they claim is described in § 1001(e)(3), sell or otherwise dispose of their respective interests in Trust to X, an unrelated third party, for an amount that approximates the fair market value of the assets of the trust, including the New Assets. Trust then terminates, and the assets of Trust, including the New Assets, are distributed to X.

Grantor takes the following positions regarding the tax consequences of this transaction. Grantor claims a charitable deduction for the portion of the fair market value of the Appreciated Assets as of the date of their contribution to Trust that is attributable to the remainder interest. Grantor claims to recognize no gain from the Trust's sale or liquidation of the Appreciated Assets. When Grantor and Charity sell their respective interests in Trust to X, Grantor and Charity take the position that they have sold the entire interest in Trust within the meaning of § 1001(e)(3). Because the entire interest in Trust is sold, Grantor claims that § 1001(e)(1), which disregards basis in the case of a sale of a term interest, does not apply to the transaction. Grantor also takes the position that, under § 1001(a) and related provisions, the gain on the sale of Grantor's term interest is computed by taking into account the portion of uniform basis allocable to Grantor's term interest under §1.1014–5 and § 1.1015–1(b), and that this uniform basis is derived from the basis of the New Assets rather than the basis of the Appreciated Assets.

The transaction may use trusts with circumstances that vary from the situation described in the facts of this notice. In some variations, a net income with make-up provision charitable remainder unitrust (NIMCRUT) may be used as Trust, Trust may have been in existence for some time prior to the sale of Trust interests, the Appreciated Assets already may be in Trust prior to the commencement of the transaction, the recipient and seller of the term interest may be the Grantor and/or another person, or Grantor may contribute the Appreciated Assets to a partnership or other passthrough entity and then contribute the interest in the entity to Trust.

A result of the claimed tax treatment of the transaction is that the gain on the sale of the Appreciated Assets is never taxed, even though the Grantor receives the Grantor's share of the appreciated fair market value of those assets. The IRS and Treasury Department are not concerned about the mere creation and funding of a charitable remainder trust and/or the trust's reinvestment of the contributed appreciated property, and such events alone do not constitute the transaction subject to this notice.

However, the IRS and Treasury Department are concerned about the manipulation of the uniform basis rules to avoid tax on gain from the sale or other disposition of appreciated assets. Accordingly, the type of transaction described in this notice includes a coordinated sale or other coordinated disposition of the respective interests of the Grantor or other noncharitable recipient and the Charity in a charitable remainder trust in a transaction claimed to be described in § 1001(e)(3), subsequent to the contribution of appreciated assets and the trust's reinvestment of those assets. In particular, the IRS and Treasury Department are concerned about Grantor's claim to an increased basis in the term interest coupled with the termination of the Trust in a single coordinated transaction under § 1001(e) to avoid tax on gain from the sale or other disposition of the Appreciated Assets.

TRANSACTION OF INTEREST

Effective Date

Transactions that are the same as, or substantially similar to, the transaction described in this notice are identified as transactions of interest for purposes of § 1.6011–4(b)(6) and §§ 6111 and 6112 effective October 31, 2008, the date this

notice was released to the public. Persons entering into these transactions on or after November 2, 2006, must disclose the transaction as described in § 1.6011–4. Material advisors who make a tax statement on or after November 2, 2006, with respect to transactions entered into on or after November 2, 2006, have disclosure and list maintenance obligations under §§ 6111 and 6112. See § 1.6011–4(h) and §§ 301.6111–3(i) and 301.6112–1(g) of the Procedure and Administration Regulations.

Independent of their classification as transactions of interest, transactions that are the same as, or substantially similar to, the transaction described in this notice already may be subject to the requirements of §§ 6011, 6111, or 6112, or the regulations thereunder. When the IRS and Treasury Department have gathered enough information to make an informed decision as to whether this transaction is a tax avoidance type of transaction, the IRS and Treasury Department may take one or more actions, including removing the transaction from the transactions of interest category in published guidance, designating the transaction as a listed transaction, or providing a new category of reportable transaction.

Participation

Under § 1.6011–4(c)(3)(i)(E), each recipient of the term interest and Trust are participants in this transaction for each year in which their respective tax returns reflect tax consequences or a tax strategy described in this notice. Charity is not a participant if it sold or otherwise disposed of its interest in Trust on or prior to October 31, 2008. For interests sold or otherwise disposed of after October 31, 2008, under § 1.6011–4(c)(3)(i)(E), Charity is a participant for the first year for which Charity's tax return reflects or is required to reflect the sale or other disposition of Charity's interest in Trust. In general, Charity is required to report the sale or other disposition of its interest in Trust on its return for the year of the sale or other disposition. See § 6033 and § 1.6033–2(a)(ii). Therefore, in general, Charity will be a participant for the year in which charity sells or otherwise disposes of its interest in Trust.

Time for Disclosure

See §1.6011–4(e) and § 301.6111–3(e).

Material Advisor Threshold Amount

The threshold amounts in § 301.6111–3(b)(3)(i)(B) are reduced to $5,000.

Penalties

Persons required to disclose these transactions under § 1.6011–4 who fail to do so may be subject to the penalty under § 6707A. Persons required to disclose these transactions under § 6111 who fail to do so may be subject to the penalty under § 6707(a). Persons required to maintain lists of advisees under § 6112 who fail to do so (or who fail to provide such lists when requested by the IRS) may be subject to the penalty under § 6708(a). In addition, the IRS may impose other penalties on parties involved in these transactions or substantially similar transactions, including the accuracy-related penalty under § 6662 or § 6662A.

REQUESTING COMMENTS

The IRS and Treasury Department are aware of concerns expressed by commentators regarding this transaction of interest. The IRS and Treasury Department share these concerns and are requesting written comments on how the transaction might be addressed in published guidance. One approach might involve issuing regulations under the authority of § 643(a)(7) to address the uniform basis rules under §§ 1014 and 1015 and the regulations thereunder.

Comments should be submitted by January 31, 2009, to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2008–99), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. to 4:00 p.m. to: CC:PA:LPD:PR (Notice 2008–99), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC. Comments also may be submitted electronically via the following email address: *Notice.Comments@irscounsel.treas.gov*. Please include "Notice 2008–99" in the subject line of any electronic submissions. All comments received will be open to public inspection and copying.

DRAFTING INFORMATION

The principal author of this notice is Allison Carmody of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact Ms. Carmody at (202) 622–3070 (not a toll-free call).

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26 CFR 601.601: Rules and regulations.
(Also Part I, §§ 582, 702, 1221.)

Rev. Proc. 2008–64

SECTION 1. PURPOSE

This revenue procedure provides guidance under section 301 of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, Division A § 301, 122 Stat. 3765 (EESA[1]). EESA § 301 treats as ordinary income or loss certain gain or loss recognized by banks and certain other financial institutions on the sale or exchange of preferred stock of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). EESA § 301 also grants the Secretary of the Treasury authority to issue guidance as necessary to carry out the purposes of that section.

SECTION 2. BACKGROUND

.01 Before September 2008, many banks and bank holding companies invested in the preferred stock of Fannie Mae and Freddie Mac. Many institutions invested directly in the preferred stock. Others invested indirectly—for example, through corporate subsidiaries that are not banks or through adjustable rate preferred interests in certain trusts designed to be

[1] Only the first of the statute's three divisions is the Emergency Economic Stabilization Act of 2008. Each of the other two divisions has its own section 301, both of which are unrelated to EESA § 301.

treated as partnerships for federal income tax purposes.

.02 Generally, under section 582(c)(1) of the Internal Revenue Code, the sale or exchange of a bond, debenture, note, and other evidence of indebtedness by banks and certain other financial institutions is not considered a sale or exchange of a capital asset. Common stock and preferred stock are not evidences of indebtedness for federal income tax purposes and, therefore, banks and these other financial institutions generally treat gain or loss from these instruments as capital.

.03 Under section 702(a) and (b) of the Code, gain and loss from sales of capital assets are separately stated by a partnership, and the character of gain or loss included in a partner's distributive share is determined as if the item were realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership. The partnership tax rules, however, do not generally treat partners as holding the assets held by their partnerships.

.04 EESA § 301(a) provides, "[G]ain or loss from the sale or exchange of any *applicable preferred stock* by any *applicable financial institution* shall be treated as ordinary income or loss" (emphasis added). Applicable preferred stock and applicable financial institution are defined in EESA § 301(b) and (c).

.05 EESA § 301(b) defines "applicable preferred stock" as—

any stock—

(1) which is preferred stock in—

(A) the Federal National Mortgage Association, established pursuant to the Federal National Mortgage Association Charter Act (12 U.S.C. 1716 *et seq.*), or

(B) the Federal Home Loan Mortgage Corporation, established pursuant to the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1451 *et seq.*), and

(2) which—

(A) was held by the applicable financial institution on September 6, 2008, or

(B) was sold or exchanged by the applicable financial institution on or after January 1, 2008, and before September 7, 2008.

.06 For purposes of this revenue procedure, the term "qualified preferred stock" (QPS) means any stock that is described in EESA § 301(b)(1), regardless of whether the stock satisfies EESA § 301(b)(2).

.07 EESA § 301(c) provides—

For purposes of [EESA § 301]:

(1) IN GENERAL.—Except as provided in [EESA § 301(c)(2)], the term "applicable financial institution" means—

(A) a financial institution referred to in section 582(c)(2) of the Internal Revenue Code of 1986, or

(B) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(1))).

(2) SPECIAL RULES FOR CERTAIN SALES.—In the case of—

(A) a sale or exchange described in [EESA § 301(b)(2)(B)], an entity shall be treated as an applicable financial institution only if it was an entity described in [EESA § 301(c)(1)(A) or (B)] at the time of the sale or exchange, and

(B) a sale or exchange after September 6, 2008, of preferred stock described in [EESA § 301(b)(2)(A)], an entity shall be treated as an applicable financial institution only if it was an entity described in [EESA § 301(c)(1)(A) or (B)] at all times during the period beginning on September 6, 2008, and ending on the date of the sale or exchange of the preferred stock.

.08 EESA § 301(d) authorizes administrative extension of the application of EESA § 301 to all, or a portion, of the gain or loss from certain transactions. In addition, under EESA § 301(e), "The Secretary of the Treasury or the Secretary's delegate may prescribe such guidance, rules, or regulations as are necessary to carry out the purposes of [EESA § 301]." Sections 3 through 7 of this revenue procedure exercise the authority that is granted by EESA § 301(d) and (e).

SECTION 3. SALE OR EXCHANGE OF QUALIFIED PREFERRED STOCK BY A PARTNERSHIP IN WHICH AN APPLICABLE FINANCIAL INSTITUTION IS A PARTNER

.01 *Scope*. This section applies if either all of the requirements in Paragraph (1) of this Subsection, or all of the requirements in Paragraph (2) of this Subsection, are satisfied.

(1) *Sale or exchange on or after January 1, 2008, and before September 7, 2008.*

(a) A partnership sold or exchanged QPS on or after January 1, 2008, and before September 7, 2008 (the Transaction);

(b) The taxpayer was a partner in the partnership on the date of the Transaction; and

(c) The taxpayer was an applicable financial institution (or a Subsidiary described in Section 6.01(1)(b)–(d) of this revenue procedure) on the date of the Transaction and at all times thereafter through the earlier of—

(i) The closing of the partnership's tax year in which the Transaction occurred; or

(ii) The date on which the partnership's tax year in which the Transaction occurred closed with respect to the taxpayer.

(2) *Sale or exchange after September 6, 2008.*

(a) A partnership sold or exchanged QPS after September 6, 2008 (the Transaction);

(b) The partnership held the QPS on September 6, 2008, and at all times thereafter until the Transaction;

(c) The taxpayer was a partner in the partnership on September 6, 2008, and at all times thereafter through the date of the Transaction**;** and

(d) The taxpayer was an applicable financial institution (or a Subsidiary described in Section 6.01(2)(b)–(e) of this revenue procedure) on September 6, 2008, and at all times thereafter through the earlier of—

(i) The closing of the partnership's tax year in which the Transaction occurred; or

(ii) The date on which the partnership's tax year in which the Transaction occurred closed with respect to the taxpayer.

.02 *Application*.

(1) The taxpayer's distributive share of the gain or loss on the Transaction is treated by EESA § 301 as ordinary income or loss.

(2) Section 3.02(1) of this revenue procedure does not apply to the extent that the taxpayer's interest in gain or loss on the sale or exchange of the QPS that was sold or exchanged in the Transaction increased after September 6, 2008, including as a result of—

(a) The taxpayer's acquisition of additional partnership interests;

(b) Changes in the manner in which partners share in such gains and losses; or

(c) Disproportionate distributions of cash or other property to other partners by the partnership.

(3) The limitation in Section 3.02(2)(a) of this revenue procedure does not apply to the extent the taxpayer acquired an additional partnership interest as transferred basis property within the meaning of section 7701(a)(43) of the Code from a person that—

(a) Held the partnership interest on September 6, 2008, and at all times thereafter until the transfer of the partnership interest to the taxpayer; and

(b) Was an applicable financial institution for this entire period.

.03 *Reporting Requirements.* In accordance with existing requirements, the partnership must separately state on its information returns gain or loss attributable to the sale or exchange of QPS. *See* § 1.702–1(a)(8)(ii) of the Income Tax Regulations.

SECTION 4. SALE OR EXCHANGE BY AN APPLICABLE FINANCIAL INSTITUTION OF AN INTEREST IN CERTAIN PARTNERSHIPS

.01 *Scope*. This section applies if either all of the requirements in Paragraph (1) of this Subsection, or all of the requirements in Paragraph (2) of this Subsection, are satisfied.

(1) *Sale or exchange on or after January 1, 2008, and before September 7, 2008.*

(a) A partner (the taxpayer) sold or exchanged a partnership interest on or after January 1, 2008, and before September 7, 2008 (the Transaction);

(b) The taxpayer was an applicable financial institution (or a Subsidiary described in Section 6.01(1)(b)–(d) of this revenue procedure) on the date of the Transaction; and

(c) At the time of the Transaction, at least 95 percent in value of the partnership's assets consisted of QPS and cash or cash equivalents.

(2) *Sale or exchange after September 6, 2008.*

(a) A partner (the taxpayer) sold or exchanged a partnership interest after September 6, 2008 (the Transaction);

(b) On September 6, 2008, and at all times thereafter through the date of the Transaction, the taxpayer was an applicable financial institution (or a Subsidiary described in Section 6.01(2)(b)–(e) of this revenue procedure) and a partner in the partnership; and

(c) On September 6, 2008, and at all times thereafter through the date of the Transaction, at least 95 percent in value of the partnership's assets consisted of QPS and cash or cash equivalents.

.02 *Application*.

(1) Gain or loss on the Transaction is treated by EESA § 301 as ordinary income or loss. (Neither EESA § 301 nor this revenue procedure causes QPS to be described in section 751(c) or (d) of the Code.)

(2) Section 4.02(1) of this revenue procedure does not apply to the extent that there was an increase after September 6, 2008, in the taxpayer's indirect interest in QPS, including as a result of—

(a) The taxpayer's acquisition of additional partnership interests;

(b) Changes in the taxpayer's interest in partnership income, loss or capital;

(c) The acquisition by the partnership of additional QPS; or

(d) Disproportionate distributions of other property or cash to other partners by the partnership.

(3) The limitation in Section 4.02(2)(a) of this revenue procedure does not apply to the extent the taxpayer acquired an additional partnership interest as transferred basis property within the meaning of section 7701(a)(43) of the Code from a person that—

(a) Held the partnership interest on September 6, 2008, and at all times thereafter until the transfer of the partnership interest to the taxpayer; and

(b) Was an applicable financial institution for this entire period.

SECTION 5. DISTRIBUTION OF QUALIFIED PREFERRED STOCK BY CERTAIN PARTNERSHIPS TO A PARTNER THAT IS AN APPLICABLE FINANCIAL INSTITUTION

.01 *Scope*. This section applies if all of the following are satisfied:

(1) After September 6, 2008, a partner (the taxpayer) acquired QPS as a result of a distribution from a partnership (the Acquisition);

(2) The partnership held the QPS on September 6, 2008, and at all times thereafter until the distribution to the taxpayer;

(3) On September 6, 2008, and at all times thereafter until the partnership made the distribution to the taxpayer, at least 95 percent in value of the partnership's assets consisted of QPS and cash or cash equivalents; and

(4) On September 6, 2008, and at all times thereafter until the Acquisition, the taxpayer was an applicable financial institution (or a Subsidiary described in Section 6.01(2)(b)–(e) of this revenue procedure) and was a partner of the partnership.

.02 *Application*.

(1) Solely for purposes of EESA § 301, the taxpayer is treated as having held on September 6, 2008, the QPS described in Section 5.01(1) of this revenue procedure. (Neither EESA § 301 nor this revenue procedure causes QPS to be described in section 751(c) or (d) of the Code.)

(2) Section 5.02(1) of this revenue procedure does not apply to QPS that is received by the taxpayer from the partnership after September 6, 2008, to the extent that receipt of the QPS is as a result of a change or increase after September 6, 2008, in the taxpayer's partnership interest, including as a result of—

(a) The taxpayer's acquisition of additional partnership interests;

(b) Changes in the manner in which partners share in rights to distributions of QPS; or

(c) Disproportionate distributions to other partners by the partnership of other property or cash.

(3) The limitation in Section 5.02(2)(a) of this revenue procedure does not apply to the extent the taxpayer acquired additional partnership interests as transferred basis property within the meaning of section 7701(a)(43) of the Code from a person that—

(a) Held the partnership interest on September 6, 2008, and at all times thereafter until the transfer of the partnership interest to the taxpayer and

(b) Was an applicable financial institution for this entire period.

SECTION 6. SALE OR EXCHANGE OF QUALIFIED PREFERRED STOCK BY CERTAIN SUBSIDIARIES OF APPLICABLE FINANCIAL INSTITUTIONS

.01 *Scope*. This section applies if either all of the requirements in Paragraph (1) of this Subsection, or all of the requirements in Paragraph (2) of this Subsection, are satisfied.

(1) *Sale or exchange on or after January 1, 2008, and before September 7, 2008.*

(a) A corporation for state law or federal tax law purposes (the Subsidiary) sold or exchanged QPS on or after January 1, 2008, and before September 7, 2008 (the Transaction);

(b) At the time of the Transaction, the Subsidiary was owned (in whole or in part, directly or indirectly) by another corporation that was a financial institution referred to in section 582(c)(2)(A)(i) or (ii) (Financial Institution);

(c) In the calendar quarter in which the Transaction occurred, the assets of the Subsidiary were consolidated with the assets of the Financial Institution on a line-by-line basis on the Consolidated Reports of Condition and Income and their supporting schedules (the call report) that the Financial Institution filed with its federal bank supervisory authorities; and

(d) The Subsidiary and the Financial Institution joined in the filing of a federal income tax return on which gain or loss from the Transaction was reported.

(2) *Sale or exchange after September 6, 2008.*

(a) A corporation for state law or federal tax law purposes (the Subsidiary) sold or exchanged QPS after September 6, 2008 (the Transaction);

(b) On September 6, 2008, and at all times thereafter until the Transaction, the Subsidiary held the QPS that was the subject of the Transaction;

(c) On September 6, 2008, and at all times thereafter until immediately after the Transaction, the Subsidiary was owned (in whole or in part, directly or indirectly) by another corporation that was a financial institution referred to in section 582(c)(2)(A)(i) or (ii) (Financial Institution);

(d) In every calendar quarter that both ends after September 6, 2008, and begins on or before the date of the Transaction, the assets of the Subsidiary were consolidated with the assets of the Financial Institution on a line-by-line basis on the Consolidated Reports of Condition and Income and their supporting schedules (the call report) that the Financial Institution filed with its federal bank supervisory authorities; and

(e) The Subsidiary and the Financial Institution joined in filing the same federal income tax return(s) for each taxable year of the Subsidiary and the Financial Institution that included all, or any portion, of the period beginning on September 7, 2008, and extending through and including the date of the Transaction.

.02 *Application*. EESA § 301 treats the Subsidiary's gain or loss on the Transaction as ordinary income or loss.

SECTION 7. SALE OR EXCHANGE BY A TAXPAYER OF QUALIFIED PREFERRED STOCK THE BASIS OF WHICH IN THE TAXPAYER'S HANDS IS DETERMINED BY REFERENCE TO THE BASIS OF THAT STOCK IN THE HANDS OF THE PERSON THAT HAD TRANSFERRED IT TO THE TAXPAYER

.01 *Scope*. This section applies if all of the following are satisfied:

(1) The taxpayer acquired QPS after September 6, 2008 (the Acquisition);

(2) The Acquisition was a transaction in which the taxpayer's basis in the QPS was determined by reference to the basis of the QPS in the hands of the person (the Transferor) that transferred the QPS to the taxpayer (that is, the QPS is "transferred basis property" within the meaning of section 7701(a)(43) of the Code);

(3) The Transferor held the QPS on September 6, 2008; and

(4) On September 6, 2008, and at all times thereafter until the QPS was transferred to the taxpayer, if the Transferor had sold the QPS, the character of gain or loss on the sale would have been governed by EESA § 301, either because the Transferor was an applicable financial institution for that entire time period or because the sale would have been described in Section 6.01(2) of this revenue procedure.

.02 *Application*. Solely for purposes of EESA § 301, the taxpayer is treated as having held on September 6, 2008, the QPS that it acquired in the Acquisition.

SECTION 8. EFFECTIVE DATE

.01 This revenue procedure is effective for Transactions (as defined in Sections 3, 4, and 6 of this revenue procedure), and Acquisitions (as defined in Sections 5 and 7 of this revenue procedure), that occur after October 29, 2008.

.02 In addition, a taxpayer may apply this revenue procedure to Transactions (as defined in Sections 3, 4, and 6 of this revenue procedure) that occur on or after January 1, 2008, and on or before October 29, 2008, and to Acquisitions (as defined in Sections 5 and 7 of this revenue procedure) that occur after September 6, 2008, and on or before October 29, 2008, but only if the taxpayer applies this revenue procedure consistently to all Transactions and Acquisitions described in this Section 8.02.

SECTION 9. CONTACT INFORMATION

For further information regarding this revenue procedure, contact Ms. Stacy L. Short of the Office of the Associate Chief Counsel (Passthroughs and Special Industries) at (202) 622–3070 (not a toll-free call).

SECTION 10. REQUEST FOR COMMENTS

Comments should be submitted by December 15, 2008, to: Internal Revenue Service, CC:PA:LPD:PR (Revenue Procedure 2008–64), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Alternatively, comments may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: Internal Revenue Service, CC:PA:LPD:PR (Revenue Procedure 2008–64), Courier's Desk, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the following email address: *Notice.Comments@irscounsel.treas.gov*. Please include "Revenue Procedure 2008–64" in the subject line of any electronic submissions. All comments received will be open to public inspection and copying.

Part IV. Items of General Interest

Notice of Disposition of Declaratory Judgment Proceedings Under Section 7428

Announcement 2008–112

This announcement serves notice to donors that on October 30, 2008, the United States Tax Court entered an order dismissing the case involving the below-referenced organization with prejudice. The organization listed below is not recognized as an organization described in section 501(c)(3) and is not exempt from tax under section 501(a) and is not an organization described in section 170(c)(2).

Family Home Providers, Inc.
Cumming, GA

Announcement of Disciplinary Sanctions From the Office of Professional Responsibility

Announcement 2008-113

The Office of Professional Responsibility (OPR) announces recent disciplinary sanctions involving attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and appraisers. These individuals are subject to the regulations governing practice before the Internal Revenue Service (IRS), which are set out in Title 31, Code of Federal Regulations, Part 10, and which are published in pamphlet form as Treasury Department Circular No. 230. The regulations prescribe the duties and restrictions relating to such practice and prescribe the disciplinary sanctions for violating the regulations.

The disciplinary sanctions to be imposed for violation of the regulations are:

Disbarred from practice before the IRS—An individual who is disbarred is not eligible to represent taxpayers before the IRS.

Suspended from practice before the IRS—An individual who is suspended is not eligible to represent taxpayers before the IRS during the term of the suspension.

Censured in practice before the IRS—Censure is a public reprimand. Unlike disbarment or suspension, censure does not affect an individual's eligibility to represent taxpayers before the IRS, but OPR may subject the individual's future representations to conditions designed to promote high standards of conduct.

Monetary penalty—A monetary penalty may be imposed on an individual who engages in conduct subject to sanction or on an employer, firm, or entity if the individual was acting on its behalf and if it knew, or reasonably should have known, of the individual's conduct.

Disqualification of appraiser—An appraiser who is disqualified is barred from presenting evidence or testimony in any administrative proceeding before the Department of the Treasury or the IRS.

Under the regulations, attorneys, certified public accountants, enrolled agents, enrolled actuaries, and enrolled retirement plan agents may not assist, or accept assistance from, individuals who are suspended or disbarred with respect to matters constituting practice (*i.e.*, representation) before the IRS, and they may not aid or abet suspended or disbarred individuals to practice before the IRS.

Disciplinary sanctions are described in these terms:

Disbarred by decision after hearing, Suspended by decision after hearing, Censured by decision after hearing, Monetary penalty imposed after hearing, and Disqualified after hearing—An administrative law judge (ALJ) conducted an evidentiary hearing upon OPR's complaint alleging violation of the regulations and issued a decision imposing one of these sanctions. After 30 days from the issuance of the decision, in the absence of an appeal, the ALJ's decision became the final agency decision.

Disbarred by default decision, Suspended by default decision, Censured by default decision, Monetary penalty imposed by default decision, and Disqualified by default decision—An ALJ, after finding that no answer to OPR's complaint had been filed, granted OPR's motion for a default judgment and issued a decision imposing one of these sanctions.

Disbarment by decision on appeal, Suspended by decision on appeal, Censured by decision on appeal, Monetary penalty imposed by decision on appeal, and Disqualified by decision on appeal—The decision of the ALJ was appealed to the agency appeal authority, acting as the delegate of the Secretary of the Treasury, and the appeal authority issued a decision imposing one of these sanctions.

Disbarred by consent, Suspended by consent, Censured by consent, Monetary penalty imposed by consent, and Disqualified by consent—In lieu of a disciplinary proceeding being instituted or continued, an individual offered a consent to one of these sanctions and OPR accepted the offer. Typically, an offer of consent will provide for: suspension for an indefinite term; conditions that the individual must observe during the suspension; and the individual's opportunity, after a stated number of months, to file with OPR a petition for reinstatement affirming compliance with the terms of the consent and affirming current eligibility to practice (*i.e.*, an active professional license or active enrollment status). An enrolled agent or an enrolled retirement plan agent may also offer to resign in order to avoid a disciplinary proceeding.

Suspended by decision in expedited proceeding, Suspended by default decision in expedited proceeding, Suspended by consent in expedited proceeding—OPR instituted an expedited

proceeding for suspension (based on certain limited grounds, including loss of a professional license and criminal convictions).

OPR has authority to disclose the grounds for disciplinary sanctions in these situations: (1) an ALJ or the Secretary's delegate on appeal has issued a decision on or after September 26, 2007, which was the effective date of amendments to the regulations that permit making such decisions publicly available; (2) the individual has settled a disciplinary case by signing OPR's "consent to sanction" form, which requires consenting individuals to admit to one or more violations of the regulations and to consent to the disclosure of the individual's own return information related to the admitted violations (for example, failure to file Federal income tax returns); or (3) OPR has issued a decision in an expedited proceeding for suspension.

Announcements of disciplinary sanctions appear in the Internal Revenue Bulletin at the earliest practicable date. The sanctions announced below are alphabetized first by the names of states and second by the last names of individuals. Unless otherwise indicated, section numbers (*e.g.*, § 10.51) refer to the regulations.

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
Arizona				
Tempe	Larson, Lowell T.	CPA	Suspended by consent for admitted violations of § 10.51 (failure to make Federal income tax returns)	Indefinite from May 1, 2008
Tucson	Riley, Jr., Joseph H.	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (suspension of attorney license)	Indefinite from September 22, 2008
Glendale	Ware, Dion C.	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (suspension of attorney license)	Indefinite from September 22, 2008
California				
Alameda	Hove, Richard E.	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (attorney disbarment)	Indefinite from July 28, 2008
Oakland	Silva, David A.	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (suspension of attorney license)	Indefinite from September 12, 2008
Colorado				
Denver	Chamberlain, Sarah C.	Enrolled Agent	Suspended by consent for admitted violations of § 10.51 (failure to file timely Federal income tax returns)	Indefinite from June 1, 2008

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
Florida				
Clearwater	Da Fonte, Richard J.	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (attorney disbarment)	Indefinite from September 22, 2008
Daytona Beach	Ellis, Jr., Armistead W.	Attorney	Suspended by ALJ default decision for violation of § 10.51 (failure to timely file Federal income tax returns)	Indefinite from July 14, 2008
Flagler Beach	Mancino, Christopher T.	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (suspension of attorney license)	Indefinite from September 22, 2008
Delray Beach	Mills, Gary M.	Attorney	Suspended by decision in expedited proceeding under § 10.82 (conviction under 18 U.S.C. § 1349, conspiracy to commit bank fraud)	Indefinite from September 12, 2008
Georgia				
Oxford	Pope, Russell W.	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (suspension of attorney license)	Indefinite from September 22, 2008
Illinois				
Highland Park	Grosky, David S.	Attorney	Suspended by decision in expedited proceeding under § 10.82 (conviction under 18 U.S.C. § 1341, mail fraud, and 18 U.S.C. § 1343, wire fraud)	Indefinite from April 1, 2008
Kansas				
Oakley	Stewart, Charles G.	Attorney	Suspended by ALJ default decision for violation of § 10.51 (failure to timely file Federal income tax returns)	Indefinite from September 19, 2008
Kentucky				
Morehead	Quesinberry, Dana Lea B.	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (suspension of attorney license)	Indefinite from September 19, 2008

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
Massachusetts				
Oxford	Desautels, III, Raymond A.	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (attorney disbarment)	Indefinite from September 19, 2008
Malden	Williams, Lewdorsey	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (attorney disbarment)	Indefinite from September 19, 2008
Springfield	Winniman, Steven L.	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (attorney disbarment)	Indefinite from September 19, 2008
Michigan				
Beverly Hills	Kashef, Cyrus R.	Attorney	Suspended by consent for admitted violations of § 10.51 (failure to file timely Federal income tax returns)	Indefinite from October 21, 2008
East Lansing	McComb, Karen B.	CPA	Suspended by consent for admitted violations of § 10.51 (failure to file timely Federal income tax returns)	Indefinite from September 9, 2008
Dearborn	Nunu, Abraham N.	CPA	Suspended by default decision in expedited proceeding under § 10.82 (conviction under 26 U.S.C. § 7206(1), filing false income tax return)	Indefinite from September 17, 2008
New Jersey				
Lakewood	Cheek, Russell G.	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (attorney disbarment)	Indefinite from September 19, 2008
	Levy, Roger A., See New York			

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
New York				
East Hampton	Gittleson, June	Enrolled Agent	Suspended by ALJ default decision for violation of § 10.51 (failure to timely file Federal income tax returns)	Indefinite from September 19, 2008
Hillsdale	Levy, Roger A.	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (suspension of attorney license in New Jersey)	Indefinite from September 19, 2008
East Northport	Shaw, Gary S.	Attorney	Suspended by default decision in expedited proceeding under § 10.82 (attorney disbarment)	Indefinite from September 19, 2008
Medford	Vernoia, Douglas	CPA	Suspended by decision in expedited proceeding under § 10.82 (conviction under 18 U.S.C. § 371, conspiracy to commit bank frand and make false statements in loan applications to financial institutions; and, 18 U.S.C. § 1344, bank fraud)	Indefinite from September 17, 2008
North Carolina				
Charlotte	Greene, Daniel E.	CPA	Suspended by default decision in expedited proceeding under § 10.82 (revocation of CPA license)	Indefinite from September 19, 2008
Fayetteville	Patterson, Carl P.	CPA	Suspended by default decision in expedited proceeding under § 10.82 (revocation of CPA license)	Indefinite from September 19, 2008
Hillsborough	Whitling, Dennis A.	CPA	Suspended by decision in expedited proceeding under § 10.82 (revocation of CPA license)	Indefinite from October 6, 2008

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
Pennsylvania				
Springfield	Marinelli, Nicholas	Enrolled Agent	Suspended by default decision in expedited proceeding under § 10.82 (conviction under 18 U.S.C. § 287 & 2 (filing false claims and aiding and abetting)	Indefinite from September 19, 2008

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

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Key to Abbreviations:

Ann	Announcement
CD	Court Decision
DO	Delegation Order
EO	Executive Order
PL	Public Law
PTE	Prohibited Transaction Exemption
RP	Revenue Procedure
RR	Revenue Ruling
SPR	Statement of Procedural Rules
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TD	Treasury Decision
TDO	Treasury Department Order

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26 CFR 1.512(a)–5T, amended; effective dates and other issues arising under the employee benefit provisions of the Tax Reform Act of 1984; correction to TD 8073 (Ann 99) 44, *1089*

26 CFR 20.2036–1, amended; 20.2039–1, amended; grantor retained interest trusts, application of sections 2036 and 2039 (TD 9414) 35, *454*

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26 CFR 1.40–1, revised; 1.40–2, added; 1.40A–1, added; 40.0–1, amended; 40.6302(c)–1, amended; 48.0–1, amended; 48.0–4, added; 48.4041–0, amended; 48.4041–18, –20, removed and reserved; 48.4041–19, revised; 48.4081–1, –2, –3, amended; 48.4081–6, removed and reserved; 48.4082–4, amended; 48.4101–1, amended; 48.6426–1 thru –7, added; 48.6427–8, amended; 48.6427–12, added; alcohol fuel and biodiesel, renewable diesel, alternative fuel, diesel-water fuel emulsion, taxable fuel definitions, excise tax returns (REG–155087–05) 38, *726*
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26 CFR 54.4980B–0, B–2, G–1, G–3, G–4, amended; 54.4980D–1, E–1, G–6, G–7, added; employer comparable contributions to health savings accounts under section 4980G, and requirement of return for filing the excise tax under section 4980B, 4980D, 4980E or 4980G (REG–120476–07) 36, *680*
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26 CFR 1.512(a)–5T, amended; effective dates and other issues arising under the employee benefit provisions of the Tax Reform Act of 1984; correction to TD 8073 (Ann 99) 44, *1089*
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26 CFR 25.6060–1, added; 25.6107–1, added; 25.6109–1, added; 25.6694–1 thru –4, added; 25.6695–1, added; 25.6696–1, added; 25.7701–1, added; 26.6060–1, added; 26.6107–1, added; 26.6109–1, added; 26.6694–1 thru –4, added; 26.6695–1, added; 26.6696–1, added; 26.7701–1, added; tax return preparer penalties under sections 6694 and 6695 (REG–129243–07) 27, *32*
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