Internal Revenue bulletin

Bulletin No. 2008-17
April 28, 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

Ct. D. 2085, page 828.

Itemized deductions, certain federal taxable income. The Supreme Court holds that investment advisory fees generally are subject to the 2% floor when incurred by a trust. **Knight, Trustee of William L. Rudkin Testamentary Trust v. Commissioner of Internal Revenue.**

T.D. 9388, page 832.
REG–143468–07, page 848.

Final, temporary, and proposed regulations under section 7701 of the Code add an entity to the list of foreign business entities that are always classified as corporations. This entity is not eligible to check the box to change its classification.

REG–119518–07, page 844.

Proposed regulations under section 162 of the Code provide guidance regarding the deduction for deemed living expenses while away from home for a state legislator who makes an election under section 162(h).

EMPLOYEE PLANS

REG–110136–07, page 838.

Proposed regulations under section 4980F of the Code provide guidance relating to a plan amendment that is permitted to be effective before the plan amendment's applicable amendment date. The regulations would also reflect certain amendments made to section 4980F by the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780). A public hearing is scheduled for July 10, 2008.

Notice 2008–45, page 835.

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

EXEMPT ORGANIZATIONS

Announcement 2008–37, page 850.

A list is provided of organizations now classified as private foundations.

ADMINISTRATIVE

T.D. 9388, page 832.
REG–143468–07, page 848.

Final, temporary, and proposed regulations under section 7701 of the Code add an entity to the list of foreign business entities that are always classified as corporations. This entity is not eligible to check the box to change its classification.

(Continued on the next page)

Finding Lists begin on page ii.
Index for January through April begins on page vi.

Department of the Treasury
Internal Revenue Service

Announcement 2008–34, page 849.

This document provides notice of a public hearing on proposed regulations (REG–133300–07, 2007–49 I.R.B. 1140) under sections 401(k), 401(m), 402(c), 411(a), 414(w), and 4979(f) of the Code relating to automatic contribution arrangements. The regulations will affect administrators of, employers maintaining, participants in, and beneficiaries of eligible plans that include an automatic contribution arrangement under sections 401(k)(13), 401(m)(12), or 414(w). A public hearing is scheduled for May 19, 2008.

Announcement 2008–35, page 849.

This document contains a correction to final regulations (T.D. 9386, 2008–16 I.R.B. 788) concerning the availability and character of a loss deduction under section 165 of the Code for losses sustained from abandoned stock or other securities.

Announcement 2008–38, page 851.

This document contains a correction to final regulations (T.D. 8697, 1997–1 C.B. 215) that classify certain business organizations under an elective regime.

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 63.—Taxable Income Defined

Ct. D. 2085

SUPREME COURT OF THE UNITED STATES

No. 06–1286

KNIGHT, TRUSTEE OF WILLIAM L. RUDKIN TESTAMENTARY TRUST v. COMMISSIONER OF INTERNAL REVENUE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

January 16, 2008

Syllabus

Individuals may subtract from their federal taxable income certain itemized deductions, 26 U. S. C. §63(d), but only to the extent the deductions exceed 2% of adjusted gross income, §67(a). A trust may also take such deductions subject to the 2% floor, §67(e), except that when the relevant cost is "paid or incurred in connection with the administration of the . . . trust" and "would not have been incurred if the property were not held in such trust," the cost may be deducted without regard to the floor, §67(e)(1). After petitioner Knight (Trustee), the trustee of a testamentary trust (Trust), hired the Warfield firm to advise as to Trust investments, the Trust deducted in full on its fiduciary income tax return the investment advisory fees paid to Warfield. Respondent Commissioner found the fees subject to the 2% floor and therefore allowed the deduction only to the extent the fees exceeded 2% of the Trust's adjusted gross income. The Tax Court decided for the Commissioner, and the Second Circuit affirmed, holding that because such fees were costs of a type that *could* be incurred if the property were held individually rather than in trust, their deduction by the Trust was subject to the 2% floor.

Held: Investment advisory fees generally are subject to the 2% floor when incurred by a trust. Pp. 5–13.

(a) In asking whether a particular type of cost incurred by a trust "would *not* have been incurred" if the property were held by an individual, §67(e)(1) excepts from the 2% floor only those costs that it would be uncommon (or unusual, or unlikely) for such a hypothetical individual to incur. The question whether a trust-related expense is fully deductible turns on a prediction about what would happen if a fact were changed—specifically, if the property were held by an individual rather than by a trust. Predictions are based on what would customarily or commonly occur. Thus, in the context of making such a prediction, when there is uncertainty about the answer, the word "would" is best read to express concepts such as custom, habit, natural disposition, or probability. Although the statutory text does not expressly ask whether expenses are "customarily" incurred outside of trusts, that is the direct import of the language in context. The Second Circuit's approach, which asks whether the cost at issue *could* have been incurred by an individual, flies in the face of the statutory language. Had Congress intended the Court of Appeals' reading, it easily could have replaced "would" with "could" in §67(e)(1), and presumably would have. The Trustee's argument that the proper inquiry is whether a particular expense of a particular trust was caused by the fact that the property was held in trust fails because the statute by its terms does not establish a straightforward causation test, but instead looks to the counterfactual question whether an *individual* would have incurred such costs in the *absence* of a trust. Further, under the Trustee's approach, *every* trust-related expense would be fully deductible, thus allowing the exception to the 2% floor in §67(e)(1) to swallow the general rule. Pp. 5–10.

(b) The Trust's investment advisory fees are subject to the 2% floor. The Trustee—who has the burden of establishing entitlement to the deduction, see, *e.g., INDOPCO, Inc.* v. *Commissioner*, 503 U. S. 79, 84—has not demonstrated that it is uncommon or unusual for individuals to hire an investment adviser. His argument is that individuals cannot incur trust investment advisory fees, not that individuals do not commonly incur investment advisory fees. Indeed, his essential point is that he engaged an investment adviser because of his fiduciary duties under Connecticut law, which requires a trustee to invest and manage trust assets "as a prudent investor would." This prudent investor standard plainly does not refer to a prudent *trustee,* but looks instead to what a prudent investor with the same investment objectives handling his own affairs would do—*i.e.*, a prudent individual investor. Because a hypothetical prudent investor in petitioner's position would reasonably have solicited investment advice, it is quite difficult to say that the investment advisory fees "would not have been incurred"—*i.e.,* that it would be unusual or uncommon for such fees to have been incurred—if the property were held by an individual investor with the same objectives as the Trust in handling his own affairs. While Congress's decision to phrase the pertinent inquiry in terms of a prediction about a hypothetical situation inevitably entails some uncertainty, that is no excuse for judicial amendment of the statute. The Code elsewhere poses similar questions, see, *e.g.,* §§162(a), 212, and the inquiry is in any event what §67(e)(1) requires. Although some trust-related investment advisory fees may be fully deductible if an investment adviser were to impose a special, additional charge applicable only to its fiduciary accounts, there is nothing in the record to suggest that Warfield did so, or treated the Trust any differently than it would have treated an individual with similar objectives, because of the Trustee's fiduciary obligations. Nor does the Trust assert that its investment objectives or balancing of competing interests were so distinctive that any comparison with those of an individual investor would be improper. Pp. 10–13.

467 F. 3d 149, affirmed.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 06–1286

MICHAEL J. KNIGHT, TRUSTEE OF THE WILLIAM L. RUDKIN TESTAMENTARY TRUST, PETITIONER v. COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

January 16, 2008

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under the Internal Revenue Code, individuals may subtract from their taxable income certain itemized deductions, but only to the extent the deductions exceed 2% of adjusted gross income. A trust may also claim those deductions, also subject to the 2% floor, except that costs incurred in the administration of the trust, which would not have been incurred if the trust property were not held by a trust, may be deducted without regard to the floor. In the case of individuals, investment advisory fees are subject to the 2% floor; the question presented is whether such fees are also subject to the floor when incurred by a trust. We hold that they are and therefore affirm the judgment below, albeit for different reasons than those given by the Court of Appeals.

I

The Internal Revenue Code imposes a tax on the "taxable income" of both individuals and trusts. 26 U. S. C. §1(a). The Code instructs that the calculation of taxable income begins with a determination of "gross income," capaciously defined as "all income from whatever source derived." §61(a). "Adjusted gross income" is then calculated by subtracting from gross income certain "above-the line" deductions, such as trade and business expenses and losses from the sale or exchange of property. §62(a). Finally, taxable income is calculated by subtracting from adjusted gross income "itemized deductions"—also known as "below-the-line" deductions—defined as all allowable deductions other than the "above-the-line" deductions identified in §62(a) and the deduction for personal exemptions allowed under §151 (2000 ed. and Supp. V). §63(d) (2000 ed.).

Before the passage of the Tax Reform Act of 1986, 100 Stat. 2085, below-the-line deductions were deductible in full. This system resulted in significant complexity and potential for abuse, requiring "extensive [taxpayer] recordkeeping with regard to what commonly are small expenditures," as well as "significant administrative and enforcement problems for the Internal Revenue Service." H. R. Rep. No. 99–426, p. 109 (1985).

In response, Congress enacted what is known as the "2% floor" by adding §67 to the Code. Section 67(a) provides that "the miscellaneous itemized deductions for any taxable year shall be allowed only to the extent that the aggregate of such deductions exceeds 2 percent of adjusted gross income." The term "miscellaneous itemized deductions" is defined to include all itemized deductions other than certain ones specified in §67(b). Investment advisory fees are deductible pursuant to 26 U. S. C. §212. Because §212 is not listed in §67(b) as one of the categories of expenses that may be deducted in full, such fees are "miscellaneous itemized deductions" subject to the 2% floor. 26 CFR §1.67–1T(a)(1)(ii) (2007).

Section 67(e) makes the 2% floor generally applicable not only to individuals but also to estates and trusts,[1] with one exception relevant here. Under this exception, "the adjusted gross income of an estate or trust shall be computed in the same manner as in the case of an individual, except that . . . the deductions for costs which are paid or incurred in connection with the administration of the estate or trust and which would not have been incurred if the property were not held in such trust or estate . . . shall be treated as allowable" and not subject to the 2% floor. §67(e)(1).

Petitioner Michael J. Knight is the trustee of the William L. Rudkin Testamentary Trust, established in the State of Connecticut in 1967. In 2000, the Trustee hired Warfield Associates, Inc., to provide advice with respect to investing the Trust's assets. At the beginning of the tax year, the Trust held approximately $2.9 million in marketable securities, and it paid Warfield $22,241 in investment advisory fees for the year. On its fiduciary income tax return for 2000, the Trust reported total income of $624,816, and it deducted in full the investment advisory fees paid to Warfield. After conducting an audit, respondent Commissioner of Internal Revenue found that these investment advisory fees were miscellaneous itemized deductions subject to the 2% floor. The Commissioner therefore allowed the Trust to deduct the investment advisory fees, which were the only claimed deductions subject to the floor, only to the extent that they exceeded 2% of the Trust's adjusted gross income. The discrepancy resulted in a tax deficiency of $4,448.

The Trust filed a petition in the United States Tax Court seeking review of the assessed deficiency. It argued that the Trustee's fiduciary duty to act as a "prudent investor" under the Connecticut Uniform Prudent Investor Act, Conn. Gen. Stat. §§45a–541a to 45a–541*l* (2007),[2] required the Trustee to obtain investment advisory services, and therefore to pay investment advisory fees. The Trust argued that such fees are accordingly unique to trusts and therefore fully deductible under 26 U. S. C. §67(e)(1). The Tax Court rejected this argument, holding that §67(e)(1) allows full deductibility only for expenses that are not commonly incurred outside the trust setting. Because investment advisory fees are commonly incurred by individuals, the Tax Court held that they are subject to the 2% floor when incurred by a trust. *Rudkin Testamentary Trust* v. *Commissioner*, 124 T. C. 304, 309–311 (2005).

The Trust appealed to the United States Court of Appeals for the Second Circuit.

[1] Because this case is only about trusts, we generally refer to trusts throughout, but the analysis applies equally to estates.

[2] Forty-four States and the District of Columbia have adopted versions of the Uniform Prudent Investor Act. See 7B U. L. A. 1–2 (2006) (listing States that have enacted the Uniform Prudent Investor Act). Five of the remaining six States have adopted their own versions of the prudent investor standard. See Del. Code Ann., Tit. 12, §3302 (1995 ed. and 2006 Supp.); Ga. Code Ann. §53–12–287 (1997); La. Stat. Ann. §9:2127 (West 2005); Md. Est. & Trusts Code Ann. §15–114 (Lexis 2001); S. D. Codified Laws §55–5–6 (2004). Kentucky, the only remaining State, applies the prudent investor standard only in certain circumstances. See Ky. Rev. Stat. Ann. §286.3–277 (Lexis 2007 Cum. Supp.); §§386.454(1), 386.502 (Supp. 2007).

The Court of Appeals concluded that, in determining whether costs such as investment advisory fees are fully deductible or subject to the 2% floor, §67(e) "directs the inquiry toward the counterfactual condition of assets held individually instead of in trust," and requires "an objective determination of whether the particular cost is one that is peculiar to trusts and one that individuals are incapable of incurring." 467 F. 3d 149, 155, 156 (2006). The court held that because investment advisory fees were "costs of a type that *could* be incurred if the property were held individually rather than in trust," deduction of such fees by the Trust was subject to the 2% floor. *Id.*, at 155–156.

The Courts of Appeals are divided on the question presented. The Sixth Circuit has held that investment advisory fees are fully deductible. *O'Neill* v. *Commissioner*, 994 F. 2d 302, 304 (1993). In contrast, both the Fourth and Federal Circuits have held that such fees are subject to the 2% floor, because they are "commonly" or "customarily" incurred outside of trusts. See *Scott* v. *United States*, 328 F. 3d 132, 140 (CA4 2003); *Mellon Bank, N. A. United States*, 265 F. 3d 1275, 1281 (CA Fed. 2001). The Court of Appeals below came to the same conclusion, but as noted announced a more exacting test, allowing" full deduction only for those costs that *could not* have been incurred by an individual property owner." 467 F. 3d, at 156 (emphasis added). We granted the Trustee's petition for certiorari to resolve the conflict, 551 U. S. __ (2007), and now affirm.

II

We start, as always, with the language of the statute." *Williams* v. *Taylor*, 529 U. S. 420, 431 (2000). Section 67(e) sets forth a general rule: "[T]he adjusted gross income of [a] . . . trust shall be computed in the same manner as in the case of an individual." That is, trusts can ordinarily deduct costs subject to the same 2% floor that applies to individuals' deductions. Section 67(e) provides for an exception to the 2% floor when two conditions are met. First, the relevant cost must be "paid or incurred in connection with the administration of the . . . trust." §67(e)(1). Second, the cost must be one "which would not have been incurred if the property were not held in such trust." *Ibid.* In applying the statute, the Court of Appeals below asked whether the cost at issue *could* have been individuals' deductions. Section 67(e) provides for an exception to the 2% floor when two conditions are met. First, the relevant cost must be "paid or incurred in connection with the administration of the . . . trust." §67(e)(1). Second, the cost must be one "which would not have been incurred if the property were not held in such trust." *Ibid.*

In applying the statute, the Court of Appeals below asked whether the cost at issue *could* have been incurred by an individual.[3] This approach flies in the face of the statutory language. The provision at issue asks whether the costs "would not have been incurred if the property were not held" in trust, *ibid.*, not, as the Court of Appeals would have it, whether the costs "could not have been incurred" in such a case, 467 F. 3d, at 156. The fact that an individual could not do something is one reason he would not, but not the only possible reason. If Congress had intended the Court of Appeals' reading, it easily could have replaced "would" in the statute with "could," and presumably would have. The fact that it did not adopt this readily available and apparent alternative strongly supports rejecting the Court of Appeals' reading.[4]

Moreover, if the Court of Appeals' reading were correct, it is not clear why Congress would have included in the statute the first clause of §67(e)(1). If the only costs that are fully deductible are those that *could* not be incurred outside the trust context—that is, that could *only* be incurred by trusts—then there would be no reason to place the further condition on full deductibility that the costs be "paid or incurred in connection with the administration of the . . . trust," §67(e)(1). We can think of no expense that could be incurred exclusively by a trust but would nevertheless *not* be "paid or incurred in connection with" its administration.

The Trustee argues that the exception in §67(e)(1) "establishes a straightforward causation test." Brief for Petitioner 22. The proper inquiry, the Trustee contends, is "whether a particular expense of a particular trust or estate was caused by the fact that the property was held in the trust or estate." *Ibid.* Investment advisory fees incurred by a trust, the argument goes, meet this test because these costs are caused by the trustee's obligation "to obtain advice on investing trust assets in compliance with the Trustees' particular fiduciary duties." *Ibid.* We reject this reading as well.

On the Trustee's view, the statute operates only to distinguish costs that are incurred by virtue of a trustee's fiduciary duties from those that are not. But all (or nearly all) of a trust's expenses are incurred because the trustee has a duty to incur them; otherwise, there would be no reason for the trust to incur the expense in the first place. See G. Bogert & G. Bogert, Law of Trusts and Trustees §801, p. 134 (2d rev. ed. 1981) ("[T]he payment for expenses must be reasonably necessary to facilitate administration of the trust"). As an example of a type of trust-related expense that would be subject to the 2% floor, the Trustee offers "expenses for routine maintenance of real property" held by a trust. Brief for Petitioner 23. But such costs would appear to be fully deductible under the Trustee's own reading, because a trustee is obligated to incur maintenance expenses in light of the fiduciary duty to maintain trust property. See 1 Restatement (Second) of Trusts §176, p. 381 (1957) ("The trustee is under a duty to the ben-

[3] The Solicitor General embraces this position in this Court, arguing that the Court of Appeals' approach represents the best reading of the statute and establishes an easily administrable rule. See Brief for Respondent 17–20, 22. Indeed, after the Court of Appeals' decision, the Commissioner adopted that court's reading of the statute in a proposed regulation. See Section 67 Limitations on Estates or Trusts, 72 Fed. Reg. 41243, 41245 (2007) (notice of proposed rulemaking) (a trust-related cost is exempted from the 2% floor only if "an individual *could not* have incurred that cost in connection with property not held in an estate or trust" (emphasis added)). The Government did not advance this argument before the Court of Appeals. See Brief for Appellee in No. 05–5151–AG (CA2), pp. 3–4, 22–24. In fact, the notice of proposed rulemaking appears to be the first time the Government has ever taken this position, and we are the first Court to which the argument has been made in a brief. See Brief for United States in *Mellon Bank* v. *United States*, No. 01–5015 (CA Fed.), p. 27 ("[I]f a trust-related administrative expense is also customarily or habitually incurred outside of trusts, then it is subject to the two-percent floor"); Brief for United States in *Scott* v. *United States*, No. 02–1464 (CA4), p. 27 (same).

[4] In pressing the Court of Appeals' approach, the Solicitor General argues that "to say that a team would not have won the game if it were not for the quarterback's outstanding play is to say that the team could not have won without the quarterback." Brief for Respondent 19. But the Solicitor General simply posits the truth of a proposition—that the team would not have won the game if it were not for the quarterback's outstanding play—and then states its equivalent. The statute, in contrast, does not posit any proposition. Rather, it asks a question: whether a particular cost *would* have been incurred if the property were held by an individual instead of a trust.

eficiary to use reasonable care and skill to preserve the trust property").

Indeed, the Trustee's formulation of its argument is circular: "Trust investment advice fees are caused by the fact the property is held in trust." Brief for Petitioner 19. But "trust investment advice fees" are only aptly described as such because the property is held in trust; the statute asks whether such costs would be incurred by an individual if the property were not. Even when there is a clearly analogous category of costs that would be incurred by individuals, the Trustee's reading would exempt most or all trust costs as fully deductible merely because they derive from a trustee's fiduciary duty. Adding the modifier "trust" to costs that otherwise would be incurred by an individual surely cannot be enough to escape the 2% floor.

What is more, if the Trustee's position were correct, then only the first clause of §67(e)(1)—providing that the cost be "incurred in connection with the administration of the . . . trust"—would be necessary. The statute's second, limiting condition—that the cost also be one "which would not have been incurred if the property were not held in such trust"—would do no work; we see no difference in saying, on the one hand, that costs are "caused by" the fact that the property is held in trust and, on the other, that costs are incurred "in connection with the administration" of the trust. Thus, accepting the Trustee's approach "would render part of the statute entirely superfluous, something we are loath to do." *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 166 (2004).

The Trustee's reading is further undermined by our inclination, "[i]n construing provisions . . . in which a general statement of policy is qualified by an exception, [to] read the exception narrowly in order to preserve the primary operation of the provision." *Commissioner* v. *Clark*, 489 U. S. 726, 739 (1989). As we have said, §67(e) sets forth a general rule for purposes of the 2% floor established in §67(a): "For purposes of this section, the adjusted gross income of an estate or trust shall be computed in the same manner as in the case of an individual." Under the Trustee's reading, §67(e)(1)'s exception would swallow the general rule; most (if not all) expenses incurred by a trust would be fully deductible. "Given that Congress has enacted a general rule . . . , we should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception." *Ibid.*

More to the point, the statute by its terms does not "establis[h] a straightforward causation test," Brief for Petitioner 22, but rather invites a hypothetical inquiry into the treatment of the property were it held outside a trust. The statute does not ask whether a cost was incurred *because* the property is held by a trust; it asks whether a particular cost "would not have been incurred if the property were not held in such trust," §67(e)(1). "Far from examining the nature of the cost at issue from the perspective of whether it was caused by the trustee's duties, the statute instead looks to the counterfactual question of whether *individuals* would have incurred such costs in the *absence* of a trust." Brief for Respondent 9.

This brings us to the test adopted by the Fourth and Federal Circuits: Costs incurred by trusts that escape the 2% floor are those that would not "commonly" or "customarily" be incurred by individuals. See *Scott*, 328 F. 3d, at 140 ("Put simply, trust-related administrative expenses are subject to the 2% floor if they constitute expenses commonly incurred by individual taxpayers"); *Mellon Bank*, 265 F. 3d, at 1281 (§67(e) "treats as fully deductible only those trust-related administrative expenses that are unique to the administration of a trust and not customarily incurred outside of trusts"). The Solicitor General also accepts this view as an alternative reading of the statute. See Brief for Respondent 20–21. We agree with this approach.

The question whether a trust-related expense is fully deductible turns on a prediction about what would happen if a fact were changed—specifically, if the property were held by an individual rather than by a trust. In the context of making such a prediction, when there is uncertainty about the answer, the word "would" is best read as "express[ing] concepts such as custom, habit, natural disposition, or probability." *Scott*, *supra*, at 139. See Webster's Third New International Dictionary 2637–2638 (1993); American Heritage Dictionary 2042, 2059 (3d ed. 1996). The Trustee objects that the statutory text "does not ask whether expenses are 'customarily' incurred outside of trusts," Reply Brief for Petitioner 15, but that is the direct import of the language in context. The text requires determining what would happen if a fact were changed; such an exercise necessarily entails a prediction; and predictions are based on what would customarily or commonly occur. Thus, in asking whether a particular type of cost "would *not* have been incurred" if the property were held by an individual, §67(e)(1) excepts from the 2% floor only those costs that it would be *un*common (or unusual, or unlikely) for such a hypothetical individual to incur.

III

Having decided on the proper reading of §67(e)(1), we come to the application of the statute to the particular question in this case: whether investment advisory fees incurred by a trust escape the 2% floor.

It is not uncommon or unusual for individuals to hire an investment adviser. Certainly the Trustee, who has the burden of establishing its entitlement to the deduction, has not demonstrated that it is. See *INDOPCO, Inc.* v. *Commissioner*, 503 U. S. 79, 84 (1992) (noting the "'familiar rule' that 'an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer'" (quoting *Interstate Transit Lines* v. *Commissioner*, 319 U. S. 590, 593 (1943))); Tax Court Rule 142(a)(1) (stating that the "burden of proof shall be upon the petitioner," with certain exceptions not relevant here). The Trustee's argument is that individuals cannot incur trust investment advisory fees, not that individuals do not commonly incur investment advisory fees.

Indeed, the essential point of the Trustee's argument is that he engaged an investment adviser because of his fiduciary duties under Connecticut's Uniform Prudent Investor Act, Conn. Gen. Stat. §45a–541a(a) (2007). The Act eponymously requires trustees to follow the "prudent investor rule." See n. 2, *supra*. To satisfy this standard, a trustee must "invest and manage trust assets *as a prudent investor would*, by considering the purposes, terms, distribution requirements and other circumstances of the trust. "§45a–541b(a) (emphasis added). The prudent investor standard plainly does not refer to a prudent *trustee*; it would not be very helpful to explain that a trustee should act as a prudent trustee would. Rather, the standard looks to what a prudent investor with the same investment objectives handling his own affairs would do—*i.e.*, a prudent individual investor. See Restatement (Third) of Trusts (Prudent Investor Rule) Reporter's Notes on §227, p. 58 (1990) ("The prudent investor rule of this Section has its origins in the dictum of Harvard College v. Amory, 9 Pick. (26 Mass.) 446, 461 (1830), stating that trustees must 'observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested'"). See also, *e.g.*, *In re Musser's Estate*, 341 Pa. 1, 9–10, 17 A. 2d 411, 415 (1941) (noting the "general rule" that "a trustee must exercise such prudence and diligence in conducting the affairs of the trust as men of average diligence and discretion would employ in their own affairs"). And we have no reason to doubt the Trustee's claim that a hypothetical prudent investor in his position would have solicited investment advice, just as he did. Having accepted all this, it is quite difficult to say that investment advisory fees" would not have been incurred"—that is, that it would be unusual or uncommon for such fees to have been incurred—if the property were held by an individual investor with the same objectives as the Trust in handling his own affairs.

We appreciate that the inquiry into what is common may not be as easy in other cases, particularly given the absence of regulatory guidance. But once you depart in the name of ease of administration from the language chosen by Congress, there is more than one way to skin the cat: The Trustee raises administrability concerns in support of his causation test, Reply Brief for Petitioner 6, but so does the Government in explaining why it prefers the Court of Appeals' approach to the one it has successfully advanced before the Tax Court and two Federal Circuits. Congress's decision to phrase the pertinent inquiry in terms of a prediction about a hypothetical situation inevitably entails some uncertainty, but that is no excuse for judicial amendment of the statute. The Code elsewhere poses similar questions—such as whether expenses are "ordinary," see §§162(a), 212; see also *Deputy, Administratrix* v. *Du Pont*, 308 U. S. 488, 495 (1940) (noting that "[o]rdinary has the connotation of normal, usual, or customary")—and the inquiry is in any event what §67(e)(1) requires.

As the Solicitor General concedes, some trust-related investment advisory fees may be fully deductible "if an investment advisor were to impose a special, additional charge applicable only to its fiduciary accounts." Brief for Respondent 25. There is nothing in the record, however, to suggest that Warfield charged the Trustee anything extra, or treated the Trust any differently than it would have treated an individual with similar objectives, because of the Trustee's fiduciary obligations. See App. 24–27. It is conceivable, moreover, that a trust may have an unusual investment objective, or may require a specialized balancing of the interests of various parties, such that a reasonable comparison with individual investors would be improper. In such a case, the incremental cost of expert advice beyond what would normally be required for the ordinary taxpayer would not be subject to the 2% floor. Here, however, the Trust has not asserted that its investment objective or its requisite balancing of competing interests was distinctive. Accordingly, we conclude that the investment advisory fees incurred by the Trust are subject to the 2% floor.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Section 7701.—Definitions

26 CFR 301.7701–2: Business entities; definitions.

T.D. 9388

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 301

Classification of Certain Foreign Entities

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains temporary and final regulations relating to certain business entities included on the list of foreign business entities that are always classified as corporations for Federal tax purposes. The regulations are needed to make the Federal tax classification of Bulgarian public limited liability companies consistent with the Federal tax classification of public limited liability companies organized in other countries of the European Economic Area. The regulations will affect persons owning an interest in a Bulgarian aktsionerno druzhestvo on or after January 1, 2007. The text of the temporary regulations serves as the text of the proposed regulations (REG–143468–07) set forth in the notice of proposed rulemaking on this subject in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective on March 21, 2008.

Applicability Date: For the dates of applicability of these regulations, see §301.7701–2T(e)(7).

FOR FURTHER INFORMATION CONTACT: S. James Hawes, (202) 622–3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The IRS and the Treasury Department issued final regulations concerning the Federal tax classification of entities under section 7701 of the Internal Revenue Code on December 18, 1996. See T.D. 8697, 1997–1 C.B. 215 [61 FR 66584] and §§301.7701–1 through 301.7701–3. Under those regulations, a business entity that is not specifically classified as a corporation can elect its classification for Federal tax purposes under certain circumstances. Section 301.7701–2(b)(8) provides a list of certain foreign business entities that are nevertheless always classified as corporations for Federal tax purposes. This list is known as the *per se* corporation list. The foreign business entities on this list are referred to as *per se* corporations. Recent changes in European law require the IRS and the Treasury Department to amend the *per se* list. See §601.601(d)(2)(ii)(*b*).

On October 8, 2001, the Council of the European Union adopted Council Regulation 2157/2001 (2001 Official Journal of the European Communities, L 294/1) (the EU Regulation) to provide for a new business entity called the European public limited liability company, which is also known as a Societas Europaea or SE. The EU Regulation entered into force October 8, 2004. The EU Regulation provides general rules that govern the formation and operation of an SE. With respect to many issues, however, the EU Regulation defers to the laws of the country in which the SE has its registered office. An SE must have a registered office in one of the Member States of the European Economic Area, which includes Norway, Iceland, Liechtenstein, and every country in the European Union. For further background, see T.D. 9197, 2005–1 C.B. 985 [70 FR 19697] and Notice 2004–68, 2004–2 C.B. 706. See §601.601(d)(2)(ii)(*b*).

The IRS and the Treasury Department stated in Notice 2004–68 that the SE is properly classified as a *per se* corporation for Federal tax purposes. Consequently, the IRS and the Treasury Department issued regulations modifying §301.7701–2(b)(8) to include the SE on the *per se* corporation list. Those regulations included certain public limited liability companies organized in Member States that did not already appear on the *per se* list. See T.D. 9197 and T.D. 9235, 2006–1 C.B. 338 [70 FR 74658]. With the entry of Bulgaria into the European Union on January 1, 2007, an SE can now have its registered office in Bulgaria.

Explanation of Provisions

Bulgaria's SE is called an aktsionerno druzhestvo. The IRS and the Treasury Department stated in Notice 2007–10, 2007–4 I.R.B. 354, that §301.7701–2(b)(8) would be modified to include the aktsionerno druzhestvo on the *per se* corporation list. The temporary regulations in this document make that modification. In accordance with Notice 2007–10, these regulations will be effective for any Bulgarian aktsionerno druzhestvo formed on or after January 1, 2007.

Notice 2007–10 also stated that the regulations would be effective for any Bulgarian aktsionerno druzhestvo formed before January 1, 2007, upon a 50 percent or greater change of ownership in such entity subsequent to that date. See section 7805(b)(1)(C) and §601.601(d)(2)(ii)(*b*). The temporary regulations therefore provide that a Bulgarian aktsionerno druzhestvo formed before January 1, 2007, will become a *per se* corporation on the date that, in the aggregate, a 50 percent or more interest in the entity is owned by a person or persons who were not owners of the entity as of January 1, 2007. In the case of a partnership, an interest means a capital or profits interest. In the case of a corporation, an interest means an equity interest in the entity measured by vote or value.

The standard provided by these temporary regulations for determining the application of the regulations to a Bulgarian aktsionerno druzhestvo formed before January 1, 2007, clarifies the standard described in Notice 2007–10 and the standard to be applied with respect to entities listed in §301.7701–2(b)(8), including those entities listed in T.D. 8697, T.D. 9197, and T.D. 9235. Comments are requested with respect to this clarification.

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 has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. Chapter 5) does not apply to this regulation. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the notice of proposed rulemaking published in this issue of the Bulletin. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact.

Drafting Information

The principal author of these regulations is S. James Hawes of the Office of Associate Chief Counsel (International); however, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

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

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

Par. 2. Section 301.7701–2(b)(8)(vi) and (e)(7) are added and the paragraph heading for paragraph (e) is revised to read as follows:

§301.7701–2 Business entities; definitions.

* * * * *

(b) * * *

(8) * * *

(vi) [Reserved]. For further guidance, see §301.7701–2T(b)(8)(vi).

* * * * *

(e) *Effective/applicability date.* * * *

(7) [Reserved]. For further guidance, see §301.7701–2T(e)(7).

Par. 3. Section 301.7701–2T is added to read as follows:

§301.7701–2T Business entities; definitions (temporary).

(a) through (b)(8)(v) [Reserved]. For further guidance, see §301.7701–2(a) through (b)(8)(v).

(b)(8)(vi) *Certain European entities.* The following business entity formed in the following jurisdiction:

Bulgaria, Aktsionerno Druzhestvo.

(c) through (e)(6) [Reserved]. For further guidance, see §301.7701–2(c) through (e)(6).

(7) The reference to the Bulgarian entity in paragraph (b)(8)(vi) of this section applies to such entities formed on or after January 1, 2007, and to any such entity formed before such date from the date that, in the aggregate, a 50 percent or more interest in such entity is owned by any person or persons who were not owners of the entity as of January 1, 2007. For purposes of the preceding sentence, the term *interest* means—

(i) In the case of a partnership, a capital or profits interest; and

(ii) In the case of a corporation, an equity interest measured by vote or value.

(8) *Expiration date.* The applicability of this section expires on or before March 18, 2011.

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

Approved March 12, 2008.

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

(Filed by the Office of the Federal Register on March 20, 2008, 8:45 a.m., and published in the issue of the Federal Register for March 21, 2008, 73 F.R. 15064)

Part III. Administrative, Procedural, and Miscellaneous

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

Notice 2008–45

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

CORPORATE BOND WEIGHTED AVERAGE INTEREST RATE

Sections 412(b)(5)(B)(ii) and 412(l)(7)(C)(i), as amended by the Pension Funding Equity Act of 2004 and by the Pension Protection Act of 2006 (PPA), provide that the interest rates used to calculate current liability and to determine the required contribution under § 412(l) for plan years beginning in 2004 through 2007 must be within a permissible range based on the weighted average of the rates of interest on amounts invested conservatively in long term investment grade corporate bonds during the 4-year period ending on the last day before the beginning of the plan year.

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

The composite corporate bond rate for March 2008 is 6.46 percent. Pursuant to Notice 2004–34, the Service has determined this rate as the average of the monthly yields for the included corporate bond indices for that month.

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

For Plan Years Beginning in		Corporate Bond Weighted Average	Permissible Range	
Month	*Year*		90% to	100%
April	2008	5.99	5.39	5.99

YIELD CURVE AND SEGMENT RATES

Generally for plan years beginning after 2007 (except for delayed effective dates for certain plans under sections 104, 105, and 106 of PPA), § 430 of the Code specifies the minimum funding requirements that apply to single employer plans pursuant to § 412. Section 430(h)(2) specifies the interest rates that must be used to determine a plan's target normal cost and funding target. Under this provision, present value is generally determined using three 24-month average interest rates ("segment rates"), each of which applies to cash flows during specified periods. However, an election may be made under § 430(h)(2)(D)(ii) to use the monthly yield curve in place of the segment rates. For plan years beginning in 2008 and 2009, a transitional rule under § 430(h)(2)(G) provides that the segment rates are blended with the corporate bond weighted average as specified above. An election may be made under § 430(h)(2)(G)(iv) to use the segment rates without applying the transitional rule.

Notice 2007–81, 2007–44 I.R.B. 899, provides guidelines for determining the monthly corporate bond yield curve, the 24-month average corporate bond segment rates, and the funding transitional segment rates used to compute the target normal cost and the funding target. Pursuant to Notice 2007–81, the monthly corporate bond yield curve derived from March 2008 data is in Table I at the end of this notice. The spot first, second, and third segment rates for the month of March 2008 are, respectively, 4.28, 6.38, and 6.99. The three 24-month average corporate bond segment rates applicable for April 2008 under the election of § 430(h)(2)(G)(iv) are as follows:

First Segment	Second Segment	Third Segment
5.20	5.99	6.52

The transitional segment rates under § 430(h)(2)(G) applicable for April 2008, taking into account the corporate bond weighted average of 5.99 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2008	5.73	5.99	6.17

30-YEAR TREASURY SECURITIES INTEREST RATES

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

The rate of interest on 30-year Treasury securities for March 2008 is 4.39 percent. The Service has determined this rate as the monthly average of the daily determination of yield on the 30-year Treasury bond maturing in February 2038.

Generally for plan years beginning after 2007, § 431 specifies the minimum funding requirements that apply to multiemployer plans pursuant to § 412. Section 431(c)(6)(B) specifies a minimum amount for the full-funding limitation described in section 431(c)(6)(A), based on the plan's current liability. Section 431(c)(6)(E)(ii)(I) provides that the interest rate used to calculate current liability for this purpose must be no more than 5 percent above and no more than 10 percent below the weighted average of the rates of interest on 30-year Treasury securities during the four-year period ending on the last day before the beginning of the plan year. Notice 88–73, 1988–2 C.B. 383, provides guidelines for determining the weighted average interest rate. The following rates were determined for plan years beginning in the month shown below.

For Plan Years Beginning in		30-Year Treasury Weighted Average	Permissible Range		
Month	*Year*		90%	to	105%
April	2008	4.78	4.30		5.02

MINIMUM PRESENT VALUE SEGMENT RATES

Generally for plan years beginning after December 31, 2007, the applicable interest rates under § 417(e)(3)(D) are segment rates computed without regard to a 24-month average. For plan years beginning in 2008 through 2011, the applicable interest rate is the monthly spot segment rate blended with the applicable rate under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning in 2007. Notice 2007–81 provides guidelines for determining the minimum present value segment rates. Pursuant to that notice, the minimum present value transitional segment rates determined for March 2008, taking into account the March 2008 30-year Treasury rate of 4.39 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2008	4.37	4.79	4.91

DRAFTING INFORMATION

The principal author of this notice is Tony Montanaro of the Employee Plans, Tax Exempt and Government Entities Division. Mr. Montanaro may be e-mailed at *RetirementPlanQuestions@irs.gov*.

Table I

Monthly Yield Curve for March 2008

Maturity	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*
0.5	3.36	20.5	6.85	40.5	7.01	60.5	7.06	80.5	7.09
1.0	3.59	21.0	6.86	41.0	7.01	61.0	7.06	81.0	7.09
1.5	3.81	21.5	6.86	41.5	7.01	61.5	7.07	81.5	7.09
2.0	4.03	22.0	6.87	42.0	7.01	62.0	7.07	82.0	7.09
2.5	4.23	22.5	6.87	42.5	7.01	62.5	7.07	82.5	7.09
3.0	4.42	23.0	6.88	43.0	7.02	63.0	7.07	83.0	7.10
3.5	4.60	23.5	6.89	43.5	7.02	63.5	7.07	83.5	7.10
4.0	4.77	24.0	6.89	44.0	7.02	64.0	7.07	84.0	7.10
4.5	4.93	24.5	6.90	44.5	7.02	64.5	7.07	84.5	7.10
5.0	5.09	25.0	6.90	45.0	7.02	65.0	7.07	85.0	7.10
5.5	5.24	25.5	6.90	45.5	7.02	65.5	7.07	85.5	7.10
6.0	5.38	26.0	6.91	46.0	7.03	66.0	7.07	86.0	7.10
6.5	5.52	26.5	6.91	46.5	7.03	66.5	7.07	86.5	7.10
7.0	5.65	27.0	6.92	47.0	7.03	67.0	7.07	87.0	7.10
7.5	5.77	27.5	6.92	47.5	7.03	67.5	7.08	87.5	7.10
8.0	5.88	28.0	6.93	48.0	7.03	68.0	7.08	88.0	7.10
8.5	5.98	28.5	6.93	48.5	7.03	68.5	7.08	88.5	7.10
9.0	6.08	29.0	6.94	49.0	7.04	69.0	7.08	89.0	7.10
9.5	6.16	29.5	6.94	49.5	7.04	69.5	7.08	89.5	7.10
10.0	6.24	30.0	6.94	50.0	7.04	70.0	7.08	90.0	7.10
10.5	6.32	30.5	6.95	50.5	7.04	70.5	7.08	90.5	7.10
11.0	6.38	31.0	6.95	51.0	7.04	71.0	7.08	91.0	7.10
11.5	6.44	31.5	6.96	51.5	7.04	71.5	7.08	91.5	7.10
12.0	6.49	32.0	6.96	52.0	7.04	72.0	7.08	92.0	7.10
12.5	6.54	32.5	6.96	52.5	7.05	72.5	7.08	92.5	7.10
13.0	6.58	33.0	6.97	53.0	7.05	73.0	7.08	93.0	7.10
13.5	6.62	33.5	6.97	53.5	7.05	73.5	7.08	93.5	7.10
14.0	6.65	34.0	6.97	54.0	7.05	74.0	7.08	94.0	7.11
14.5	6.68	34.5	6.97	54.5	7.05	74.5	7.09	94.5	7.11
15.0	6.71	35.0	6.98	55.0	7.05	75.0	7.09	95.0	7.11
15.5	6.73	35.5	6.98	55.5	7.05	75.5	7.09	95.5	7.11
16.0	6.75	36.0	6.98	56.0	7.05	76.0	7.09	96.0	7.11
16.5	6.77	36.5	6.99	56.5	7.06	76.5	7.09	96.5	7.11
17.0	6.78	37.0	6.99	57.0	7.06	77.0	7.09	97.0	7.11
17.5	6.79	37.5	6.99	57.5	7.06	77.5	7.09	97.5	7.11
18.0	6.81	38.0	6.99	58.0	7.06	78.0	7.09	98.0	7.11
18.5	6.82	38.5	7.00	58.5	7.06	78.5	7.09	98.5	7.11
19.0	6.83	39.0	7.00	59.0	7.06	79.0	7.09	99.0	7.11
19.5	6.83	39.5	7.00	59.5	7.06	79.5	7.09	99.5	7.11
20.0	6.84	40.0	7.00	60.0	7.06	80.0	7.09	100.0	7.11

Part IV. Items of General Interest

Notice of Proposed Rulemaking and Notice of Public Hearing

Notice Requirements for Certain Pension Plan Amendments Significantly Reducing the Rate of Future Benefit Accrual

REG–110136–07

AGENCY: Internal Revenue Service (IRS), Department of the Treasury.

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

SUMMARY: This document contains proposed regulations that would provide guidance relating to the application of section 4980F of the Internal Revenue Code to a plan amendment that is permitted to reduce benefits accrued before the plan amendment's applicable amendment date. These regulations would also reflect certain amendments made to section 4980F by the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780). These proposed regulations would affect sponsors, administrators, participants, and beneficiaries of pension plans. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by June 19, 2008. Outlines of topics to be discussed at the public hearing scheduled for July 10, 2008, at 10 a.m. must be received by June 20, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–110136–07), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday, between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–110136–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, or sent via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–110136–07). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, N.W., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Pamela R. Kinard, at (202) 622–6060; concerning submission of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard A. Hurst, *Richard.A.Hurst@irscounsel.treas.gov*, or (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information referenced in this notice of proposed rulemaking were previously reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–1780, in conjunction with the Treasury Decision (T.D. 9052, 2003–1 C.B. 879), relating to Notice of Significant Reduction in the Rate of Future Benefit Accrual, published on April 9, 2003 in the **Federal Register** (68 FR 17277). There are no proposals for substantive changes to this collection of information.

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

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

Background

Overview

This document contains proposed amendments to 26 CFR parts 1 and 54 under section 4980F of the Internal Revenue Code (Code). Section 4980F sets forth the requirements for providing notice to certain affected persons when a plan significantly reduces future benefit accruals. A notice required under section 4980F of the Code or the parallel rules in section 204(h) of the Employee Retirement Income Security Act of 1974 (ERISA) is referred to as a "section 204(h) notice." These proposed regulations would set forth timing rules for providing a section 204(h) notice for a plan amendment that is permitted to be effective before the applicable amendment date. In addition, the regulations provide guidance relating to changes made in section 4980F by the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780) (PPA '06).

Section 411(d)(6) Protected Benefits

Section 411(d)(6)(A) provides that a plan is treated as not satisfying the requirements of section 411 if the accrued benefit of a participant is decreased by an amendment of the plan. There are certain exceptions to this general rule. For example, amendments described in section 412(d)(2) (section 412(c)(8) for plan years beginning before January 1, 2008) of the Code or section 4281 of ERISA. Section 204(g) of ERISA contains parallel rules to section 411(d)(6) of the Code.

Notice Requirements for Significant Reduction in the Rate of Future Benefit Accruals

Section 4980F imposes an excise tax when a plan administrator fails to provide timely notice of a plan amendment that provides for a significant reduction in the rate of future benefit accrual. For this purpose, the elimination or reduction of an early retirement benefit or retirement-type subsidy is treated as having the effect of reducing the rate of future benefit accrual. Section 4980F(e)(3) provides that, except as provided in regulations, the notice must be provided within a "reasonable time" before the effective date of the plan amendment. Section 204(h) of ERISA contains parallel rules to section 4980F of the Code.

For both section 204(g) and section 204(h) of ERISA, the Secretary of the Treasury has interpretive authority over the subject matter addressed in these regulations for purposes of ERISA, as well as the Code. Pursuant to section 101(a) of Reorganization Plan No. 4 of 1978, 29 U.S.C. 1001nt, the Secretary of the Treasury generally has the authority to issue regulations under parts 2 and 3 of subtitle B of title I of ERISA, including section 204(g) and (h) of ERISA. Thus, these proposed Treasury regulations under section 4980F of the Code would apply as well for purposes of section 204(h) of ERISA.

Notice Requirements Relating to Plan Amendments Affecting Benefits for Prior Service

Section 412(d)(2) of the Code (section 412(c)(8) for plan years beginning before January 1, 2008) provides special rules relating to retroactive plan amendments. Rev. Proc. 94–42, 1994–1 C.B. 717, see §601.601(d)(2)(ii)(*b*), sets forth procedures under which a plan sponsor may file notice with and obtain approval from the Secretary of the Treasury for a retroactive amendment described in section 412(d)(2) that reduces accrued benefits. Section 4 of Rev. Proc. 94–42 provides guidance relating to the written notice that must be provided to affected parties regarding the application for approval of a retroactive plan amendment to reduce accrued benefits under section 412(d)(2) (a "section 412(d)(2) written notice"). The content requirements of a section 412(d)(2) written notice include a description of the plan amendment and its effect, including the range in reduction of accrued benefits of participants, beneficiaries, and alternate payees.

Section 212(a) of PPA '06 added section 432 of the Code, which provides rules relating to multiemployer plans that are in endangered or critical status. Under certain circumstances, a plan may adopt a plan amendment that reduces previously accrued benefits. Section 432(e)(8)(C) requires a plan to provide notice of the plan amendment to affected parties at least 30 days before the general effective date of the reduction. The notice must include information that is sufficient for participants and beneficiaries to understand the effect of any reduction on their benefits and a description of the possible rights and remedies of plan participants and beneficiaries.

Section 113(a)(1)(B) of PPA '06 added Code section 436, providing rules limiting benefits and benefit accruals for single-employer plans with certain funding shortfalls. Section 101(j) of ERISA generally requires the plan administrator to provide a written notice to plan participants and beneficiaries within 30 days after the plan becomes subject to this benefit limitation.

Section 4244A of ERISA provides that a multiemployer plan in reorganization is permitted to adopt an amendment reducing or eliminating certain accrued benefits (increases adopted within the prior 5 years) attributable to employer contributions under the plan. Under section 4244A(b)(2) of ERISA, an amendment is not permitted to reduce or eliminate benefits unless notice is given to plan participants, beneficiaries, and other affected persons at least 6 months before the first day of the plan year in which the amendment reducing benefits is adopted. The notice must include certain information, including explaining the rights and remedies of participants and beneficiaries under the plan and informing the recipients that if contributions under the plan are not increased, accrued benefits under the plan for certain participants and beneficiaries will be reduced or an excise tax will be imposed on employers.

Section 4245 of ERISA provides rules relating to suspension of benefits under insolvent multiemployer plans. If benefit payments under the plan exceed the resource benefit level for the plan year, the payment of benefits must be suspended to the extent necessary to reduce such payments to the greater of the resource benefit level or the level of basic benefits. Section 4245(e) of ERISA provides that certain plans in reorganization must provide notice to plan participants and beneficiaries that certain non-basic benefit payments will be suspended.

Section 4281 of ERISA provides rules relating to benefits under certain multiemployer terminated plans. Section 4281(c) of ERISA provides that if the value of nonforfeitable benefits exceeds the value of the plan assets, the plan must be amended to reduce benefits in excess of nonforfeitable benefits arising from increases adopted within the prior 5 years, or the level that can be provided by plan assets, if greater. The regulations at 29 CFR 4281.32 provide that a plan sponsor must notify the Pension Benefit Guaranty Corporation (PBGC) and plan participants and beneficiaries of a plan amendment reducing benefits pursuant to section 4281(c) of ERISA. The notice must be provided no later than the earlier of 45 days after the amendment reducing benefits is adopted or the date of the first reduced benefit payment. Paragraph (e) of 29 CFR 4281.32 sets forth the content requirements applicable to a notice of benefit reduction.

Additional Provisions of Pension Protection Act of 2006

Section 402 of PPA '06 provides special funding rules for plans maintained by an employer that is a commercial passenger airline or the principal business of which is providing catering services to a commercial passenger airline. Section 402(h)(4) of PPA '06 provides that in the case of a plan amendment adopted in order to comply with the rules in section 402 of PPA '06, any notice required under section 4980F(e) of the Code (or section 204(h) of ERISA) must be provided within 15 days of the effective date of the plan amendment. Section 402 of PPA '06 generally applies to amendments made pursuant to section 402 of PPA '06 for plan years ending after the date of enactment of PPA '06 (August 17, 2006).

Section 502(c) of PPA '06 amended section 4980F(e)(1) of the Code (and section 204(h) of ERISA) to add as a recipient of a section 204(h) notice any employer that has an obligation to contribute to the plan. This new disclosure requirement is effective for plan years beginning after December 31, 2007.

Section 1107 of PPA '06 provides that any plan amendment made pursuant to any PPA '06 change may be retroactively effective, and, except as provided by the Secretary of the Treasury, does not violate the anti-cutback rules of section 411(d)(6) of the Code (or section 204(g) of ERISA) if, in addition to satisfying the conditions specified in section 1107(b)(2) of PPA '06, the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2009 (January 1, 2011, with respect to governmental plans).

Explanation of Provisions

PPA '06 Rules

These proposed regulations would add contributing employers to the list of persons to whom a section 204(h) notice must be provided. A contributing employer is defined in the proposed regulations as an employer that has an obligation to contribute to a plan (within the meaning of section 4212(a) of ERISA). This requirement to give section 204(h) notice to contributing employers was added to reflect section 502(c)(2) of PPA '06. This requirement would only apply to amendments adopted in plan years beginning after December 31, 2007.

The regulations would also add a special timing rule to reflect section 402 of PPA '06. For certain plans maintained by an employer that is a commercial passenger airline or the principal business of which is providing catering services to a commercial passenger airline, section 204(h) notice must be provided at least 15 days before the effective date of the amendment.[1]

Plan Amendments Reflecting a Change in Statutorily Mandated Minimum Present Value Rules

Section 417(e)(3) provides that, in distributing the present value of an accrued benefit to a plan participant, the present value of the benefit is not permitted to be less than the present value using the applicable mortality table and the applicable interest rate, as defined in section 417(e)(3)(B) and (C), respectively. Section 302(b) of PPA '06 amended section 417(e)(3) to provide new actuarial assumptions for calculating the minimum present value of a participant's accrued benefit. Plan sponsors have asked whether a plan amendment to reflect the change in these section 417(e)(3) statutory actuarial assumptions would trigger the requirement to provide a section 204(h) notice. Revenue Ruling 2007–67, 2007–48 I.R.B. 1047, see §601.601(d)(2)(ii)(*b*), which includes guidance on plan amendments regarding the new interest rate and mortality table under section 417(e)(3), states that certain amendments to reflect the new interest rate or mortality table for an annuity starting date in 2008 or later would not violate the anti-cutback rules of section 411(d)(6). The proposed regulations would provide that a reduced single-sum distribution resulting from an amendment to a traditional defined benefit plan to substitute the prescribed actuarial assumptions under section 417(e)(3), as amended by PPA '06, for the pre-PPA '06 actuarial assumptions under section 417(e)(3) does not require a section 204(h) notice.

Interaction of the Section 204(h) Notice Timing Rules with Plan Amendments that Have a Retroactive Effective Date

Section 1.411(d)–3(a)(1) generally provides that a plan is not a qualified plan if a plan amendment decreases the accrued benefit of any plan participant. These rules are generally based on the applicable amendment date, which is defined in §1.411(d)–3(g)(4) as the later of the effective date of the amendment or the date the amendment is adopted. While the general rule under §1.411(d)–3(a)(1) prohibits plan amendments that reduce a plan participant's accrued benefit, certain exceptions exist. These exceptions include amendments permitted under sections 412(d)(2), 418D, and 418E of the Code, section 4281 of ERISA, and section 1107 of PPA '06. The proposed regulations would provide a conforming amendment to §1.411(d)–3(a)(1) to reference the rules at section 1107 of PPA '06.

The proposed regulations generally state that the effective date of an amendment that is permitted to be adopted retroactively is the date the amendment is put into effect on an operational basis, so that a section 204(h) notice must nevertheless generally be provided at least 45 days before the date the amendment is effective (15 days for multiemployer plans). The proposed regulations would add special timing rules for when a section 204(h) notice must be provided to recipients with respect to a section 204(h) amendment[2] that is permitted to reduce benefits accrued before the plan amendment's applicable amendment date. Specifically, for purposes of section 1107(b)(2)(A) of PPA '06, the proposed regulations would clarify that the date on which such a plan amendment is effective is the first day that the plan is operated as if the amendment were in effect. Thus, a section 204(h) notice must generally be provided at least 45 days (15 days for a multiemployer plan) before the amendment is effective (even though the amendment is not adopted until a later date). Except to the extent a special timing rule is set forth in these regulations, a determination of whether a section 204(h) notice is required in connection with an amendment made pursuant to section 1107 of PPA '06 should be made in accordance with the general standards set forth in §54.4980F–1, Q&As–5, 6, 7, and 8.

The proposed regulations provide a special timing rule for section 204(h) amendments to an applicable defined benefit plan as defined in section 411(a)(13)(C)(i). The regulations provide that for any section 204(h) notice that is required to be provided in connection with an amendment to an applicable defined benefit plan within the meaning of section 411(a)(13)(C)(i) that is first effective before January 1, 2009, and that limits the amount of the distribution to the account balance as permitted under section 411(a)(13)(A), the notice will not fail to be timely if provided at least 30 days before the date the amendment is first effective. This special timing rule reflects the 30-day timing rule described in Notice 2007–6, 2007–3 I.R.B. 272, see §601.601(d)(2)(ii)(*b*), which provides transitional guidance on the requirements of sections 411(a)(13) and 411(b)(5) of the Code.[3] The proposed regulations would permit a plan amendment to an applicable defined benefit plan within the meaning of section 411(a)(13)(C)(i) to use this special timing rule through the end of 2008. Thereafter, the general 45-day timing rule would apply to such amendments.

Interaction of Section 204(h) Notice Requirements with Other Notice Requirements Relating to Plan Amendments

As explained earlier in this preamble, under the heading "Notice Requirements Relating to Plan Amendments Affecting

[1] This timing rule is consistent with the Joint Committee on Taxation's Technical Explanation to section 402 of PPA '06, which states that the section 204(h) notice must be provided at least 15 days before the effective date of the plan amendment. *See* Joint Committee on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006" (JCX–38–06), August 3, 2006, 109th Cong., 2nd Sess. 87 (2006).

[2] A section 204(h) amendment is defined in Q&A–4(b) of §54.4980F–1 of the Treasury Regulations as an amendment for which section 204(h) notice is required.

[3] Section B.4 of Notice 2007–6 provides that, in the case of a plan amendment that is permitted to reduce benefit accruals, a section 204(h) notice must be provided at least 30 days before the amendment is effective. This rule would require the notice to be provided at least 30 days before the earliest date on which the plan is operated in accordance with the amendment.

Benefits for Prior Service," both the Code and ERISA include a number of notice requirements for plan amendments that are permitted to reduce or eliminate accrued benefits. These notice requirements are in addition to the notice requirements under section 4980F of the Code and section 204(h) of ERISA. To eliminate the need for a plan to provide multiple notices with substantially the same function and information to affected persons, these proposed regulations would provide that if a plan provides one of these notices in accordance with the applicable standards for such notices, the plan will be treated as having complied with the requirement to provide a section 204(h) notice with respect to a section 204(h) amendment. Under the proposed regulations, this treatment would apply to the following notices:

- A notice required under Rev. Proc. 94–42 relating to retroactive plan amendments that reduce accrued benefits described in section 412(d)(2);

- A notice required under section 101(j) of ERISA if an amendment is adopted to comply with the benefit limitation requirements of section 436 of the Code (section 206(g) of ERISA);

- A notice required under 4244A(b) of ERISA for an amendment that reduces or eliminates accrued benefits attributable to employer contributions with respect to a multiemployer plan in reorganization;

- A notice required under section 4245(e) of ERISA, relating to the effects of the insolvency status for a multiemployer plan; and

- A notice required under section 4281 of ERISA and 29 CFR 4281.32 for an amendment of a multiemployer plan reducing benefits pursuant to section 4281(c) of ERISA.

Timing and Content Rules for Multiemployer Plans in Endangered or Critical Status

Section 432, relating to multiemployer plans that are in endangered or critical status (as defined in section 432(b)), permits a plan amendment to be adopted that reduces prior accruals under certain circumstances. With respect to any such amendment for a plan that is in critical status, section 432(e)(8)(C) requires notice of the plan amendment. Notice under section 432(e)(8)(C) must be provided at least 30 days before the general effective date of the reduction. Section 432(e)(8)(C) requires the notice to include information that is sufficient for participants and beneficiaries to understand the effect of any reduction on their benefits and a description of the possible rights and remedies of participants and beneficiaries, including contact information for the Department of Labor for further assistance and information where appropriate.

As discussed in this preamble under the heading "Interaction of the Section 204(h) Timing Rules with Plan Amendments that Have a Retroactive Effective Date," PPA '06 requires that notice be given 30 days before the general effective date for an amendment to a plan in critical status under section 432(e)(8)(C). Q&A–9(c) of §54.4980F–1 of the Treasury Regulations provides that a section 204(h) amendment made in the case of a multiemployer plan must be provided at least 15 days before the effective date of the amendment. Compliance with the 30-day timing rule of section 432(e)(8)(C) notice would thus also satisfy this 15-day timing rule. These proposed regulations also include a rule under which the content of a notice under 432(e)(8)(C) would also satisfy the content requirements for a section 204(h) notice. As a result, under these proposed regulations, any notice for a multiemployer plan in critical status that satisfies the timing and content requirements under section 432(e)(8)(C) would be treated as satisfying the timing and content requirements of a section 204(h) notice.

However, in the case of an amendment to which section 432 applies for a multiemployer plan in endangered status, the normal timing and content rules for a section 204(h) notice under section 4980F would apply (so that any required section 204(h) notice must be provided at least 15 days before the effective date).

Delegation of Authority to the Commissioner

The proposed regulations would also delegate to the Commissioner of the Internal Revenue Service the authority to publish revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter) under section 4980F of the Code (which would also apply to section 204(h) of ERISA) that the Commissioner determines to be necessary or appropriate with respect to a section 204(h) amendment that applies with respect to benefits accrued before the applicable amendment date but that does not violate section 411(d)(6) of the Code. This delegation of authority provides the Commissioner with greater flexibility to develop special rules to address the limited circumstances in which Congress permits a plan to be amended to reduce benefits accrued before the adoption date of the plan amendment. This delegation of authority also extends to circumstances in which a section 204(h) amendment may require another notice in addition to a section 204(h) notice, regardless of whether that amendment reduces benefits accrued before the adoption date of the amendment. Often these notices must provide content requirements similar to a section 204(h) notice. This delegation would permit the Commissioner to treat plans providing these other notices as having complied with the requirement to provide a section 204(h) notice, thus eliminating unnecessary overlap in the administration of plans.

Proposed Effective Dates

These regulations are generally proposed to be applicable to section 204(h) amendments that are effective on or after January 1, 2008. However, for any section 204(h) amendment that is adopted after the effective date of the amendment, the clarification of the effective date of the amendment in these proposed regulations is applicable to those amendments that are effective on or after July 1, 2008. In addition, for any amendment to which the proposed regulations would otherwise apply, no inference is intended as to when a section 204(h) notice must be provided if the amendment is effective before July 1, 2008.

As described in this preamble under the heading "Interaction of the Section 204(h) Notice Timing Rules with Plan Amendments that Have a Retroactive Effective Date," with respect to any section 204(h) amendment to a lump sum-based benefit formula (or any other amendment adopted pursuant to section 701 of PPA '06), the special rules under the proposed regulations relating to an amendment that applies with respect to benefits accrued before the applicable amendment date apply to amendments adopted after December 21, 2006 (the date on which Notice 2007–6 was published). However, the special 30-day timing rule for providing a section 204(h) notice applies to such amendments effective on or after December 21, 2006, and not later than December 31, 2008. With respect to the rule relating to adding contributing employers to the list of section 204(h) recipients, the effective date is proposed to apply to section 204(h) amendments adopted in plan years beginning after December 31, 2007.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation. It is hereby certified that the collection of information in this regulation would not have a significant impact on a substantial number of small entities. This certification is based on the fact that this regulation only provides guidance on how to satisfy existing collection of information requirements. Accordingly, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

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

A public hearing has been scheduled for July 10, 2008, beginning at 10 a.m. in the Auditorium, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by June 19, 2008 and an outline of the topics to be discussed and the amount of time to be devoted to each topic (a signed original and eight (8) copies) by June 20, 2008. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Pamela R. Kinard, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 54 are proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.411(d)–3 is amended by revising the first sentence of paragraph (a)(1) to read as follows:

§1.411(d)–3 Section 411(d)(6) protected benefits.

(a) *Protection of accrued benefits*—(1) *General rule*. Under section 411(d)(6)(A), a plan is not a qualified plan (and a trust forming a part of such plan is not a qualified trust) if a plan amendment decreases the accrued benefit of any plan participant, except as provided in section 412(d)(2) (section 412(c)(8) for plan years beginning before January 1, 2008), section 4281 of the Employee Retirement Income Security Act of 1974 as amended (ERISA), or other applicable law (see, for example, sections 418D and 418E of the Internal Revenue Code, and section 1107 of the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780, 1063)). * * *

* * * * *

PART 54—PENSION EXCISE TAXES

Par. 3. The authority citation for part 54 continues to read in part as follows:

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

Section 54.4980F–1 also issued under 26 U.S.C. 4980F and section 1107 of the Pension Protection Act of 2006, Public Law 109–780 (120 Stat. 780). * * *

Par. 4. Section 54.4980F–1 is amended by:

1. Revising the second sentence of A–1(a).
2. Redesignating A–8(d) as A–8(e) and adding new A–8(d).
3. Revising the first sentence of A–9(a), A–9(b), and A–9(c), and revising A–9(d)(1).
4. Adding A–9(f) and A–9(g).
5. Revising the first sentence of A–10(a).
6. Revising A–11(a)(1) and adding A–11(a)(7).
7. Adding A–18(a)(4) and A–18(a)(5).
8. Revising A–18(b)(1) and adding (b)(3)(i), (b)(3)(ii), and (b)(3)(iii).

These additions and revisions read as follows:

§54.4980F–1 Notice requirements for certain pension plan amendments significantly reducing the rate of future benefit accrual.

* * * * *

A–1. (a) *Requirements of Internal Revenue Code section 4980F(e) and ERISA section 204(h).* * * * The notice is required to be provided to plan participants and alternate payees who are applicable individuals (as defined in Q&A–10 of this section), to certain employee organizations, and to contributing employers (as described in Q&A–10 of this section).

* * * * *

A–8. * * *

(d) *Plan amendments reflecting a change in statutorily mandated minimum present value rules.* If a defined benefit plan offers a distribution to which the minimum present value rules of section 417(e)(3) apply (other than a payment to which section 411(a)(13)(A) applies), and the plan is amended to reflect the changes to the applicable interest and mortality assumptions in section 417(e)(3) made by PPA '06 (and no change is made in the dates on which the payment will be made), no section 204(h) notice is required to be provided.

* * * * *

A–9. (a) *45-day general rule*. Except as otherwise provided in this Q&A–9, section 204(h) notice must be provided at least 45 days before the effective date of any section 204(h) amendment. * * *

(b) *15-day rule for small plans.* Except for amendments described in paragraphs (d)(2) and (g) of this Q&A–9, section 204(h) notice must be provided at least 15 days before the effective date of any section 204(h) amendment in the case of a small plan. * * *

(c) *15-day rule for multiemployer plans.* Except for amendments described in paragraphs (d)(2) and (g) of this Q&A–9, section 204(h) notice must be provided at least 15 days before the effective date of any section 204(h) amendment in the case of a multiemployer plan. * * *

(d) *Special timing rule for business transactions*—(1) *15-day rule for section 204(h) amendment in connection with an acquisition or disposition.* Except for amendments described in paragraphs (d)(2) and (g) of this Q&A–9, if a section 204(h) amendment is adopted in connection with an acquisition or disposition, section 204(h) notice must be provided at least 15 days before the effective date of the section 204(h) amendment.

* * * * *

(f) *Special timing rule for certain plans maintained by commercial airlines.* See section 402 of the Pension Protection Act of 2006, Public Law 109–780 (120 Stat. 780) (PPA '06) for a special rule that applies to certain plans maintained by an employer that is a commercial passenger airline or the principal business of which is providing catering services to a commercial passenger airline. Under this special rule, section 204(h) notice must be provided at least 15 days before the effective date of the amendment.

(g) *Special timing rules relating to certain section 411(d)(6) plan amendments*—(1) *Plan amendments permitted to reduce prior accruals.* This paragraph (g) generally provides special rules with respect to a plan amendment that would not violate section 411(d)(6) even if the amendment applies with respect to benefits accrued before the applicable amendment date. Thus, for example, this paragraph (g) applies to amendments that are permitted to be effective retroactively under section 412(d)(2) (section 412(c)(8) for plan years beginning before January 1, 2008), 418D, or 418E of the Code, section 4281 of ERISA, or section 1107 of PPA '06. See, generally, §1.411(d)–3(a)(1).

(2) *General timing rule for amendments to which this paragraph (g) applies.* For an amendment to which this paragraph (g) applies, the amendment is effective on the first date on which the plan is operated as if the amendment were in effect. Thus, except as otherwise provided in this paragraph (g), a section 204(h) notice for an amendment to which paragraph (a) of this section applies that is adopted after the effective date of the amendment must be provided, with respect to any applicable individual, at least 45 days before (or such other date as may apply under paragraphs (b), (c), (d), or (f) of this Q&A–9) the date the amendment is effective.

(3) *Special rules for section 204(h) notices provided in connection with other disclosure requirements*—(i) *In general.* Notwithstanding the requirements in this Q&A–9 and Q&A–11 of this section, if a plan provides one of the notices in paragraph (g)(3)(ii) of this Q&A–9 in accordance with the applicable timing and content rules for such notice, the plan is treated as providing a section 204(h) notice with respect to a section 204(h) amendment and is treated as satisfying the timing rules of this Q&A–9 and the content rules of paragraphs (a)(3), (4), and (6) of Q&A–11 of this section.

(ii) *Notice requirements.* The notices in this paragraph (g)(3)(ii) are —

(A) A notice required under any revenue ruling, notice, or other guidance published under the authority of the Commissioner in the Internal Revenue Bulletin to affected parties in connection with a retroactive plan amendment described in section 412(d)(2) (section 412(c)(8) for plan years beginning before January 1, 2008);

(B) A notice required under section 101(j) of ERISA if an amendment is adopted to comply with the benefit limitation requirements of section 206(g) of ERISA (section 436 of the Code);

(C) A notice required under 4244A(b) of ERISA for an amendment that reduces or eliminates accrued benefits attributable to employer contributions with respect to a multiemployer plan in reorganization;

(D) A notice required under section 4245(e) of ERISA, relating to the effects of the insolvency status for a multiemployer plan; and

(E) A notice required under section 4281 of ERISA for an amendment of a multiemployer plan reducing benefits pursuant to section 4281(c) of ERISA.

(4) *Delegation of authority to Commissioner.* The Commissioner may provide special rules under section 4980F, in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter), that the Commissioner determines to be necessary or appropriate with respect to a section 204(h) amendment—

(i) that applies to benefits accrued before the applicable amendment date but that does not violate section 411(d)(6) or

(ii) for which there is a required notice with timing and content requirements similar to a section 204(h) notice.

* * * * *

A–10. (a) *In general.* Section 204(h) notice must be provided to each applicable individual, to each employee organization representing participants who are applicable individuals, and, for plan years beginning after December 31, 2007, to each employer that has an obligation to contribute (within the meaning of section 4212(a) of ERISA) to the plan.* * *

* * * * *

A–11. (a) *Explanation of notice requirement*—(1) *In general*. Section 204(h) notice must include sufficient information to allow applicable individuals to understand the effect of the plan amendment. In order to satisfy this rule, a plan administrator providing section 204(h) notice must generally satisfy paragraphs (a)(2), (3), (4), (5), and (6) of this Q&A–11. See paragraph (a)(7) of this Q&A–11 for a special rule relating to section 204(h) notices provided in connection with a notice required under section 432(e)(8)(C). See paragraph (g)(3) of Q&A–9 of this section for special rules relating to section 204(h) notices provided in connection with certain other written notices. See also paragraph (g)(4) of Q&A–9 of this section for a delegation of authority to the Commissioner to provide special rules.

* * * * *

(7) *Information in section 204(h) notice provided in connection with a notice required under section 432(e)(8)(C)*. The information required in a notice under section 432(e)(8)(C) is treated as satisfying the content requirements of paragraphs (a)(3), (4), and (6) of this Q&A–11 for a section 204(h) notice.

* * * * *

A–18. (a) * * *

(4) *Special effective date for certain section 204(h) amendments made by plans of commercial airlines*. Section 402 of PPA '06 applies to section 204(h) amendments adopted in plan years ending after August 17, 2006.

(5) *Special effective date for rule relating to contributing employers*. Section 502 of PPA '06, which amended section 4980F(e)(1) of the Code, applies to section 204(h) amendments adopted in plan years beginning after December 31, 2007.

(b) *Regulatory effective date*—(1) *General effective date*. Except as otherwise provided in this paragraph (b), section 4980F and section 204(h) of ERISA, as amended by EGTRRA, apply to plan amendments taking effect on or after June 7, 2001 (statutory effective date), which is the date of enactment of EGTRRA.

* * * * *

(3) *Effective dates for Q&A–9(g)(1), (g)(3), and (g)(4) and Q&A–11(a)(7)*—(i) *General effective date*. Except as provided in Q&A–18(b)(3)(ii) or (b)(3)(iii) of this section, the rules in Q&A–9(g)(1), (g)(3), and (g)(4) and Q&A–11(a)(7) of this section apply to amendments that are effective on or after January 1, 2008.

(ii) *Effective date for Q&A–9(g)(2)*. Except as provided in Q&A–18(b)(3)(iii) of this section, the rules in Q&A–9(g)(2) of this section apply to amendments that are effective on or after July 1, 2008.

(iii) *Special rules for section 204(h) amendments to applicable defined benefit plan*. Notwithstanding paragraph (b)(3)(i) or (b)(3)(ii) of this Q&A–18, with respect to any section 204(h) notice provided in connection with a section 204(h) amendment to an applicable defined benefit plan within the meaning of section 411(a)(13)(C)(i) to limit distributions as permitted under section 411(a)(13)(A) for distributions made after August 17, 2006, that is made pursuant to section 701 of PPA '06, the special rules in paragraphs (g)(1) and (2) of Q&A–9 of this section apply to amendments made effective after December 21, 2006. For such an amendment that is effective not later than December 31, 2008, section 204(h) notice does not fail to be timely if the notice is provided at least 30 days, rather than 45 days, before the date that the amendment is first effective.

* * * * *

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

(Filed by the Office of the Federal Register on March 20, 2008, 8:45 a.m., and published in the issue of the Federal Register for March 21, 2008, 73 F.R. 15101)

Notice of Proposed Rulemaking

Travel Expenses of State Legislators

REG–119518–07

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to travel expenses of state legislators while away from home. The regulations affect eligible state legislators who make the election under section 162(h) of the Internal Revenue Code (Code). The regulations are necessary to clarify the amount of travel expenses that may be deducted by a state legislator who makes the election under section 162(h).

DATES: Written (paper or electronic) comments or a request for a public hearing must be received by June 30, 2008.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–119518–07), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–119518–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–119518–07).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, R. Matthew Kelley, (202) 622–7900; concerning submission of comments or a request for a hearing, Kelly Banks, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by May 30, 2008. Comments are specifically requested concerning:

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

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

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

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

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

The collection of information in these proposed regulations is in §1.162–24(e). This collection of information will help the IRS determine if a taxpayer may make an election under section 162(h). The collection of information is required to obtain a benefit.

The estimated burden is 30 minutes.

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

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

Background

This document contains proposed amendments to 26 CFR part 1 and 26 CFR part 301, relating to travel expenses of state legislators while away from home.

Section 162(a)(2) provides that a taxpayer generally is allowed a deduction for ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business, including traveling expenses while away from home.

Section 162(h) provides that an eligible individual who is a state legislator at any time during the taxable year may make an election under section 162(h) (an electing legislator). Under section 162(h)(4), the election is not available to any legislator whose place of residence within the legislative district represented by the legislator is 50 or fewer miles from the state capitol building.

As a result of making the election for a taxable year, under section 162(h)(1)(A) an electing legislator's place of residence within the district represented by the legislator is treated as the legislator's home. In addition, under section 162(h)(1)(B) an electing legislator is deemed to have expended for living expenses (in connection with the trade or business of being a legislator), on each legislative day of the electing legislator, the greater of the amount generally allowable for the day (i) to employees of the legislator's state for *per diem* while away from home, to the extent the amount does not exceed 110 percent of the amount described in (ii); or (ii) to employees of the executive branch of the Federal government for *per diem* while traveling away from home in the United States. Finally, under section 162(h)(1)(C) an electing legislator is deemed to be away from home in the pursuit of a trade or business on each legislative day.

Section 162(h)(2) defines a legislative day for an electing legislator as any day on which (A) the legislature is in session (including any day in which the legislature is not in session for a period of 4 consecutive days or less), or (B) the legislature is not in session but the physical presence of the electing legislator is formally recorded at a meeting of a committee of the legislature.

Section 301.9100–4T(a) of the Procedure and Administration Regulations provides that a legislator makes the election under section 162(h) by attaching a statement to the legislator's income tax return (or amended return) for the taxable year for which the election is effective. The statement must include the following information: (1) the taxpayer's name, address, and taxpayer identification number; (2) a statement that the taxpayer is making an election under section 162(h); and (3) information establishing that the taxpayer is entitled to make the election. A legislator must make the election by the due date for filing the return (including extensions). Under §301.9100–4T(g), a legislator may revoke an election only with the consent of the Commissioner. Consent is requested by filing an application with the service center where the election was filed. The application must include the following information: (1) the taxpayer's name, address, and taxpayer identification number; (2) a statement that the taxpayer is revoking an election under section 162(h) for a specified year; and (3) a statement explaining why the taxpayer seeks to revoke the election.

Rev. Rul. 82–33, 1982–1 C.B. 28, (see §601.601(d)(2)(ii)(*b*)) holds that (1) an electing legislator's tax home for all legislative travel, including travel between sessions, is the legislator's place of residence within the legislative district represented by the legislator; (2) the term "living expenses" for purposes of section 162(h) includes expenses for lodging, meals, laundry, and other incidental expenses but does not include expenses for travel fares, local transportation, or telephone calls; (3) a legislative day includes the days of any period for which the legislature is not in session for 4 consecutive days or less, without extension for Saturdays, Sundays, or holidays; (4) for purposes of section 162(h)(1)(B)(ii), the amount generally allowable to employees of the executive branch of the Federal government for *per diem* while traveling away from home in the United States is the *per diem* amount for the particular city in which the state capitol is located; and (5) any amount deductible by an electing legislator for deemed living expenses under section 162(h) is in addition to any other amount deductible under section 162(a) for other expenses incurred while traveling away from home.

An electing legislator's deduction under section 162(h) for deemed living expenses is reduced by the amount of any reimbursement received for the expenses that is not included in the legislator's gross income.

Section 1.62–1T(e)(4) provides rules regarding the allocation between meals and lodging of unreimbursed expenses of state legislators. Section 274(n) provides rules regarding the limitations on the amount allowable as a deduction for expenses for or allocable to meals.

Explanation of Provisions

The proposed regulations incorporate the holdings of Rev. Rul. 82–33, which will be obsoleted when the proposed regulations are issued as final regulations. The proposed regulations further provide that a taxpayer becomes a state legislator on the day the taxpayer is sworn into office and ceases to be a state legislator on the day following the day on which the taxpayer's term in office ends. The proposed regulations provide that the legislature of which an electing legislator is a member is in session when the members of the legislature are expected to attend and participate as an assembled body of the legislature, whether or not the electing legislator actually attends. The proposed regulations also provide that a legislator's legislative days include a day on which the legislator's attendance at a meeting of a committee of the legislature is formally recorded. A committee of the legislature is defined as a group that consists solely of members of the legislature charged with conducting business of the legislature. The proposed regulations further provide that a legislator's legislative days include any day that is not otherwise a legislative day if the legislator's attendance at a session of the legislature on that day is formally recorded. An example in the proposed regulations illustrates that if the members of the legislature are not expected to attend and participate as an assembled body on a day, then the legislature is not in session on that day; however, that day is a legislative day for those members whose actual attendance on that day is formally recorded.

The proposed regulations incorporate the current rules in §301.9100–4T for making and revoking the election under section 162(h). The regulations propose to amend §301.9100–4T by removing these rules from that section.

Effective/Applicability Date

The regulations are proposed to apply to expenses deemed expended under section 162(h) after the date the regulations are published as final regulations in the **Federal Register**.

Effect on Other Documents

When the proposed regulations are published as final regulations, Rev. Rul. 82–33 will be obsoleted.

Special Analyses

This notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations 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, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

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

Drafting Information

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

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry to read in part as follows:

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

§1.162–24 also issued under 26 U.S.C. 162(h). * * *

Par. 2. Section 1.162–24 is added to read as follows:

§1.162–24 Travel expenses of state legislators.

(a) *In general.* For purposes of section 162(a), in the case of any taxpayer who is a state legislator at any time during the taxable year and who makes an election under section 162(h) for the taxable year—

(1) The taxpayer's place of residence within the legislative district represented by the taxpayer is the taxpayer's home for that taxable year;

(2) The taxpayer is deemed to have expended for living expenses (in connection with the taxpayer's trade or business as a legislator) an amount equal to the sum of the amounts determined by multiplying each legislative day of the taxpayer during the taxable year by the greater of—

(i) The amount generally allowable with respect to that day to employees of the state of which the taxpayer is a legislator for *per diem* while away from home, to the extent the amount does not exceed 110 percent of the amount described in paragraph (a)(2)(ii) of this section; or

(ii) The Federal *per diem* with respect to that day for the taxpayer's state capital; and

(3) The taxpayer is deemed to be away from home in the pursuit of a trade or business on each legislative day.

(b) *Legislative day.* For purposes of section 162(h)(1) and this section, for any taxpayer who makes an election under section 162(h), a legislative day is any day on which the taxpayer is a state legislator and—

(1) The legislature is in session;

(2) The legislature is not in session for a period that is not longer than 4 consecutive days, without extension for Saturdays, Sundays, or holidays;

(3) The taxpayer's attendance at a meeting of a committee of the legislature is formally recorded; or

(4) The taxpayer's attendance at any session of the legislature that only a limited number of members are expected to attend (such as a *"pro forma"* session), on any day not described in paragraph (b)(1) or (b)(2) of this section, is formally recorded.

(c) *Fifty mile rule*. Section 162(h) and this section do not apply to any taxpayer who is a state legislator and whose place of residence within the legislative district represented by the taxpayer is 50 or fewer miles from the capitol building of the state. For purposes of this paragraph (c), the distance between the taxpayer's place of residence within the legislative district represented by the taxpayer and the capitol building of the state is the shortest of the more commonly traveled routes between the two points.

(d) *Definitions and special rules*. The following definitions apply for purposes of section 162(h) and this section.

(1) *State legislator*. A taxpayer becomes a state legislator on the day the taxpayer is sworn into office and ceases to be a state legislator on the day following the day on which the taxpayer's term in office ends.

(2) *Living expenses*. Living expenses include lodging, meals, and incidental expenses. *Incidental expenses* has the same meaning as in 41 CFR 300–3.1.

(3) *In session*—(i) *In general*. For purposes of this section, the legislature of which a taxpayer is a member is in session on any day if, at any time during that day, the members of the legislature are expected to attend and participate as an assembled body of the legislature.

(ii) *Examples*. The following examples illustrate the rules of this paragraph (d)(3):

Example 1. B is a member of the legislature of State X. On Day 1, the State X legislature is convened and the members of the legislature generally are expected to attend and participate. On Day 1, the State X legislature is in session within the meaning of paragraph (d)(3)(i) of this section. B does not attend the session of the State X legislature on Day 1. However, Day 1 is a legislative day for B for purposes of section 162(h)(2)(A) and paragraph (b)(1) of this section.

Example 2. C, D, and E are members of the legislature of State X. On Day 2, the State X legislature is convened for a limited session in which not all members of the legislature are expected to attend and participate. C and D are the only members who are called to, and do, attend the limited session on Day 2, and their attendance at the session is formally recorded. E is not called and does not attend. Day 2 is not a day described in paragraph (b)(2) of this section. On Day 2, the State X legislature is not in session within the meaning of paragraph (d)(3)(i) of this section. Day 2 is a legislative day as to C and D under section 162(h)(2)(B) and paragraph (b)(4) of this section. Day 2 is not a legislative day as to C and D under section 162(h)(2)(A) and paragraph (b)(1) of this section. Day 2 is not a legislative day as to E under sections 162(h)(2)(A) and (h)(2)(B) and paragraphs (b)(1) and (b)(4) of this section.

(4) *Committee of the legislature*. A committee of the legislature is any group consisting solely of legislators charged with conducting business of the legislature. Committees of the legislature include, but are not limited to, committees to which the legislature refers bills for consideration, committees that the legislature has authorized to conduct inquiries into matters of public concern, and committees charged with the internal administration of the legislature. For purposes of this section, groups that are not considered committees of the legislature include, but are not limited to, groups that promote particular issues, raise campaign funds, or are caucuses of members of a political party.

(5) *Federal per diem*. The Federal *per diem* for any city and day is the maximum amount allowable to employees of the executive branch of the Federal government for living expenses while away from home in pursuit of a trade or business in that city on that day. See 5 U.S.C. 5702 and the regulations under that section.

(e) *Election*—(1) *Time for making election*. A taxpayer's election under section 162(h) must be made for each taxable year for which the election is to be in effect and must be made no later than the due date (including extensions) of the taxpayer's Federal income tax return for the taxable year.

(2) *Manner of making election*. A taxpayer makes an election under section 162(h) by attaching a statement to the taxpayer's income tax return for the taxable year for which the election is made. The statement must include—

(i) The taxpayer's name, address, and taxpayer identification number;

(ii) A statement that the taxpayer is making an election under section 162(h); and

(iii) Information establishing that the taxpayer is a state legislator entitled to make the election, for example, a statement identifying the taxpayer's state and legislative district and representing that the taxpayer's place of residence in the legislative district is not 50 or fewer miles from the state capitol building.

(3) *Revocation of election*. An election under section 162(h) may be revoked only with the consent of the Commissioner. An application for consent to revoke an election must be signed by the taxpayer and filed with the submission processing center with which the election was filed, and must include—

(i) The taxpayer's name, address, and taxpayer identification number;

(ii) A statement that the taxpayer is revoking an election under section 162(h) for a specified year; and

(iii) A statement explaining why the taxpayer seeks to revoke the election.

(f) *Effect of election on otherwise deductible expenses for travel away from home*—(1) *Legislative days*—(i) *Living expenses*. For any legislative day for which an election under section 162(h) and this section is in effect, the amount of an electing taxpayer's living expenses while away from home is the greater of the amount of the living expenses—

(A) Specified in paragraph (a)(2) of this section in connection with the trade or business of being a legislator; or

(B) Otherwise allowable under section 162(a)(2) in the pursuit of any other trade or business of the taxpayer.

(ii) *Other expenses*. For any legislative day for which an election under section 162(h) and this section is in effect, the amount of an electing taxpayer's expenses (other than living expenses) for travel away from home is the sum of the substantiated expenses, such as expenses for travel fares, telephone calls, and local transportation, that are otherwise deductible under section 162(a)(2) in the pursuit of any trade or business of the taxpayer.

(2) *Non-legislative days*. For any day that is not a legislative day, the amount of an electing taxpayer's expenses (including amounts for living expenses) for travel away from home is the sum of the substantiated expenses that are otherwise de-

ductible under section 162(a)(2) in the pursuit of any trade or business of the taxpayer.

(g) *Cross references*. See §1.62–1T(e)(4) for rules regarding allocation of unreimbursed expenses of state legislators and section 274(n) for limitations on the amount allowable as a deduction for expenses for or allocable to meals.

(h) *Effective/applicability date*. This section applies to expenses deemed expended under section 162(h) after the date these regulations are published as final regulations in the **Federal Register**.

Part 301—PROCEDURE AND ADMINISTRATION

Par. 3. The authority citation for part 301 continues to read as follows:

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

§301.9100–4T [Amended]

Par. 4. Section 301.9100–4T is amended by removing from the table in paragraph (a)(1) the language relating to section 127(a) of the Economic Recovery Tax Act of 1981 and removing paragraph (a)(2)(iv).

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

(Filed by the Office of the Federal Register on March 28, 2008, 8:45 a.m., and published in the issue of the Federal Register for March 31, 2008, 73 F.R. 16797)

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

Classification of Certain Foreign Entities

REG–143468–07

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: In this issue of the Bulletin, the IRS and the Treasury Department are issuing temporary and final regulations (T.D. 9388) relating to certain business entities included on the list of foreign business entities that are always classified as corporations for Federal tax purposes. The regulations are needed to make the Federal tax classification of Bulgarian public limited liability companies consistent with the Federal tax classification of public limited liability companies organized in other countries of the European Economic Area. They will affect persons owning an interest in a Bulgarian aktsionerno druzhestvo on or after January 1, 2007. The text of the temporary regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by June 19, 2008.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–143468–07), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–143468–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–143468–07).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, S. James Hawes, (202) 622–3860; concerning submissions of comments, Kelly Banks, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in this issue of the Bulletin amend and revise 26 CFR part 301 relating to section 7701 of the Internal Revenue Code. The temporary regulations add certain business entities to the list of foreign business entities that are always classified as corporations for Federal tax purposes. The preamble to the temporary regulations explains both the temporary regulations and these proposed regulations.

Special Analyses

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

Comments and Request for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the Internal Revenue Service (IRS). The IRS and the Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Proposed Effective Date

The regulations proposed in this document would be applicable for entities existing on or after March 21, 2008.

Drafting Information

The principal author of these proposed regulations is S. James Hawes of the Office of Associate Chief Counsel (International); however, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Proposed Amendments to the Regulations

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

PART 301—PROCEDURE AND ADMINISTRATION

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

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

Par. 2. Section 301.7701–2 is amended by revising paragraphs (b)(8)(vi) and (e)(7) to read as follows:

§301.7701–2 Business entities; definitions.

* * * * *

(b) * * *

(8) * * *

(vi) [The text of the proposed amendment to §301.7701–2(b)(8)(vi) is the same as the text of §301.7701–2T(b)(8)(vi) published elsewhere in this issue of the Bulletin.]

* * * * *

(e) * * *

(7) [The text of the proposed amendment to §301.7701–2(e)(7) is the same as the text of §301.7701–2T(e)(7) published elsewhere in this issue of the Bulletin.]

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

(Filed by the Office of the Federal Register on March 20, 2008, 8:45 a.m., and published in the issue of the Federal Register for March 21, 2008, 73 F.R. 15107)

Automatic Contribution Arrangements; Hearing

Announcement 2008–34

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: This document provides notice of public hearing on a notice of proposed rulemaking (REG–133300–07, 2007–49 I.R.B. 1140) under sections 401(k), 401(m), 402(c), 411(a), 414(w), and 4979(f) of the Internal Revenue Code relating to automatic contribution arrangements. These proposed regulations will affect administrators of, employers maintaining, participants in, and beneficiaries of eligible plans that include an automatic contribution arrangement under section 401(k)(13), 401(m)(12), or 414(w).

DATES: The public hearing is being held on Monday, May 19, 2008, at 10 a.m. The IRS must receive outlines of the topics to be discussed at the hearing by Monday, April 28, 2008.

ADDRESSES: The public hearing is being held in the auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Send submissions to: CC:PA:LPD:PR (REG–133300–07), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–133300–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit electronic outlines of oral comments via the Federal eRulemaking Portal at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, R. Lisa Mojiri-Azad, Dana Barry or William D. Gibbs at (202) 622–6060; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard A. Hurst at *Richard.A.Hurst@irscounsel.treas.gov* or (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is the notice of proposed rulemaking (REG–133300–07) that was published in the **Federal Register** on Thursday, November 8, 2007 (72 FR 63144).

Persons, who wish to present oral comments at the hearing that submitted written comments, must submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (signed original and eight (8) copies) by April 28, 2008.

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

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

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

(Filed by the Office of the Federal Register on March 27, 2008, 8:45 a.m., and published in the issue of the Federal Register for March 28, 2008, 73 F.R. 16610)

Abandonment of Stock or Other Securities; Correction

Announcement 2008–35

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations; Correction.

SUMMARY: This document contains a correction to final regulations (T.D. 9386, 2008–16 I.R.B. 788) that were published in the **Federal Register** on Wednesday, March 12, 2008 (73 FR 13124) concerning the availability and character of a loss deduction under section 165 of the Internal Revenue Code for losses sustained from abandoned stock or other securities. These regulations clarify the tax treatment of losses from abandoned securities, and affect any taxpayer claiming a deduction for a loss from abandoned securities.

DATES: The correction is effective March 25, 2008.

FOR FURTHER INFORMATION CONTACT: Sean M. Dwyer at (202)

622–5020 or Peter C. Meisel at (202) 622–7750 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (T.D. 9386) that are the subject of the correction are under section 165 of the Internal Revenue Code.

Need for Correction

As published, final regulations (T.D. 9386) contain an error that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the final regulations (T.D. 9386), which were the subject of FR Doc. E8–4862, is corrected as follows:

On page 13124, column 2, in the preamble, under the paragraph heading "Background", the language "A statement in the preamble to the proposed regulations requires clarification. The preamble described section 165(g)(3) as providing an exception from capital loss treatment for certain worthless securities in a domestic corporation affiliated with the taxpayer. Section 165(g)(3) provides an exception from capital loss treatment for a taxpayer that is a domestic corporation that owns certain worthless securities of a domestic or foreign corporation affiliated with the taxpayer. See §1.165–5(d)(1) of the Income Tax Regulations." is inserted as a second paragraph.

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

(Filed by the Office of the Federal Register on March 24, 2008, 8:45 a.m., and published in the issue of the Federal Register for March 25, 2008, 73 F.R. 15668)

Foundations Status of Certain Organizations

Announcement 2008–37

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

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

Aboutsmilesworld, Ltd., East Setauket, NY
Applied Inventions, Miami, FL
Art of Music Project, Inc., Sturgeon Bay, WI
Baltimore Family Resources, Inc., Timonium, MD
Bethel Foundation & Subsidiaries, Inc., Vidalia, LA
Betty Harris Homes, Inc., Philadelphia, PA
Camp Fund-to-Brush, Inc., Pembroke Pines, FL
Center of Tomorrows Future, Inc., Heuvelton, NY
Charitable Association for Relief and Education International, Matthews, NC
Cherokee County YMCA, Jacksonville, FL
Chinatown Learning Center, Philadelphia, PA
Connecticut Maritime Foundation, Inc., Stonington, CT
Empowerment Through Exposure, Annandale, VA
Esperanza Para la Familia, Inc., Stafford, TX
Family Enrichment Resource Center, Inc., Eureka, MO
FHC Gosnold Grove Corporation, Falmouth, MA
Freedom House One, Peoria, IL
Freeman Housing Human Services, Inc., Brooklyn, NY
Fremont Economic Adjustment Corporation, St. Anthony, ID
Friends of Paraguay Foundation, Inc., Stratford, CT
Full Circle Empowerment Center, Chattanooga, TN
Gifts Help to Heal, Birmingham, AL
Great Urban Commission, Inc., Corona, NY
Home Sweets Home, Inc., Los Angeles, CA
Hunterbrook Ridge at Fieldhome, Inc., Yorktown Heights, NY
Johnnies Care, Inc., Warren, AR
Lamb Down Ministries, Greenwell Springs, LA
Lasallian Association of Miguel Schools, Washington, DC
Light for the Nations, Inc., Gardnerville, NV
Mack East Community Center, Detroit, MI
Manjula Arts and Theatre, Inc., San Jose, CA
Metro Family Services & Resources, Inc., Buford, GA
Moore House, Inc., Baltimore, MD
New Hopewell Community Outreach, Inc., Bernice, LA
One Family at a Time / Love Academy, Incorporated, Milwaukee, WI
Ont Art, Pomona, CA
Order Sons of Italy in America Housing Corp., Bellmore, NY
Pathways to Family Communication, Inc., Fayetteville, NC
Pine Foundation, Inc., Lone Tree, CO
Poteet Community Commodity, Poteet, TX
Project Star, Inc., Apopka, FL
Praise & Worship Outreach for the Poor, Sawyerville, AL
Pyramid Health Network, Montclair, NJ
Quality Tech Employment Services, Inc., Brooklyn, NY
Riverflow, Inc., Gary, IN
Seek Ye First the Kingdom of God Ministries, American Canyon, CA
Society of Non Profit Public Relations, Taylorsville, NC
Spirit of Religious Charity, Inc., Gastonia, NC
Stallions of Honor, Inc., Riverside, CA
Synergy Project, Richmond, VA
Three Suns, Cutbank, MT
True Fellowship Community Development, Inc., Detroit, MI
Turentine Twins Quarter Horse Ranch, Inc., Indianapolis, IN
United Enterprises Development Corporation, Kansas City, MO
Universal Housing Development Corporation, St. Louis, MO
Unlimited Goals Foundation, Tenino, WA
Veritas Dei, Silver Spring, MD

Walter Adams Community Development Corporation, Bronx, NY
Youth and Family Impact, Inc., Columbus, OH
Youth for a Violence Free Community, Carson, CA

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

Simplification of Entity Classification Rules; Correction

Announcement 2008–38

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains a correction to final regulations (T.D. 8697, 1997–1 C.B. 215) that were published in the **Federal Register** on Wednesday, December 18, 1996 (61 FR 66584). The final regulations classify certain business organizations under an elective regime.

DATES: This correction is effective April 4, 2008, and is applicable on January 1, 1997.

FOR FURTHER INFORMATION CONTACT: Stephen J. Hawes, (202) 622–3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (T.D. 8697) that is the subject of this correction is under section 7701 of the Internal Revenue Code.

Need for Correction

As published, T.D. 8697 contains an error that may prove to be misleading and is in need of clarification.

* * * * *

Correction of Publication

Accordingly, 26 CFR part 301 is corrected by making the following correcting amendment:

PART 301—PROCEDURE AND ADMINISTATION

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

Authority: 26 USC 7805 * * *

Par. 2. Section 301.7701–2(b)(8)(i) is amended by revising the entry for “Romania, Societe pe Actiuni” to read as follows:

§301.7701–2 Business entities; definitions.

* * * * *

(b) * * *

(8) * * * (i) * * *

Romania, Societate pe Actiuni

* * * * *

Cynthia E. Grigsby,
Senior Federal Register Liaison Officer, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

(Filed by the Office of the Federal Register on April 3, 2008, 8:45 a.m., and published in the issue of the Federal Register for April 4, 2008, 73 F.R. 18442)

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2007–27 through 2007–52 is in Internal Revenue Bulletin 2007–52, dated December 26, 2007.

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Key to Abbreviations:

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

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