Internal Revenue
bulletin

Bulletin No. 2008-40
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HIGHLIGHTS OF THIS ISSUE

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

INCOME TAX

Rev. Rul. 2008–49, page 811.

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

REG–140029–07, page 828.

Proposed regulations under section 170 of the Code provide guidance concerning the substantiation and reporting requirements for cash and noncash charitable contributions. The regulations generally revise existing regulations to implement changes to the substantiation and reporting rules made by the American Jobs Creation Act of 2004 and the Pension Protection Act of 2006.

REG–149404–07, page 839.

Proposed regulations under section 45D of the Code provide clarification of the redemption rules, the partnership redemption safe harbor, and the breadth of the reasonable expectations test. The regulations also revise and clarify certain rules relating to recapture of the new markets tax credit under section 45D. A public hearing is scheduled for December 12, 2008.

Notice 2008–77, page 814.

This notice informs trustees and middlemen of widely held fixed investment trusts (WHFITs) that the Service will not assert penalties under regulations section 1.671–5(m) with respect to calendar year 2008. The notice also informs trustees and middlemen of widely held mortgage trusts (WHMTs) that, pending future published guidance, certain modifications of mortgages held by a WHMT that has entered into a guarantee arrangement are not required to be reported under the WHFIT reporting rules.

Notice 2008–79, page 815.

This notice provides guidance relating to amendments made by certain provisions of the Housing Assistance Tax Act of 2008. The notice provides allocations of the temporary increase in volume cap, procedures for filing the carryforward elections with respect to this volume cap as well as for reporting bonds issued pursuant to this volume cap, and clarification that mortgage credit certificates may be used to refinance subprime mortgage loans and may utilize the temporary increase in volume cap. The notice provides a list of certain military installations that are eligible for an exception from income determinations of payments of the basic housing allowance. The notice also provides guidance on the temporary exception from the prohibition against federal guarantees of tax-exempt bonds for guarantees provided by Federal Home Loan Banks. Notice 88–80 modified.

(Continued on the next page)

Announcement of Declaratory Judgment Proceedings Under Section 7428 begins on page 844.
Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

Notice 2008–80, page 820.
This notice proposes a revenue procedure that would modify Rev. Proc. 2003–84, 2003–2 C.B. 1159, by providing additional criteria that must be met in order for tax-exempt bond partnerships to be eligible to make an election that enables the partners to take into account monthly the inclusions required under sections 702 and 707(c) of the Code, including specifying a minimum gain share that must be paid upon disposition of the tax-exempt obligations and providing that the tax-exempt bond partnership must provide certain partners a right, exercisable by the date that represents 80% of the weighted average maturity of the bonds, to require a sale, redemption, or other disposition of the tax-exempt bonds held by the partnership. The proposed revenue procedure would also provide certain characteristics of tax-exempt bond partnerships, including noting that the put rights or guarantees for the benefit of certain partners of these partnerships are inapplicable in certain very limited circumstances.

EMPLOYEE PLANS

T.D. 9419, page 790.
Final regulations under section 430 of the Code provide mortality tables to be used in determining present value or making any computation for purposes of applying the minimum funding requirements for single employer qualified defined benefit pension plans pursuant to changes made by the Pension Protection Act of 2006. The regulations provide generally applicable mortality tables and also provide guidance regarding an employer's request to use plan-specific mortality tables.

Rev. Proc. 2008–56, page 826.
This procedure relaxes certain restrictions that now apply to the issuance of opinion and advisory letters for new pre-approved plans under Rev. Proc. 2007–44. Those restrictions effectively limit the ability of sponsors of pre-approved plans (such as banks, insurance companies and law firms) to apply for opinion and advisory letters for new plans after March 31, 2008, and also limit the ability of adopting employers to rely on the letters issued for new plans. Rev. Proc. 2007–44 modified.

EXEMPT ORGANIZATIONS

Announcement 2008–86, page 843.
The IRS has revoked its determination that The Boston Group Charitable Foundation of Sandy, UT, and Foresters Longhorn Branch of Fort Worth, TX, qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Code.

Announcement 2008–88, page 843.
The IRS has revoked its determination that Heaven in View, Inc., of Woodbridge, VA; Pueblo of Laguna of Old Laguna, NM; Gymnastics Foundation of Maui of Kahului, HI; God Financial Plan, Inc., of Oakland, CA; Affordable Shelters, Inc., of South Gate, CA; Debt Advocate of America, Inc., of Killeen, TX; Folk Traditions Conservancy of Santa Barbara, CA; Individual Freedom Ministries Church of Orange City, FL; Gifts for Kids, Inc., of Erie, PA; Dabney & West Foundation, Inc., of Colbert, OK; Institute for the Development of Human Resources of Wilmington, DE; American Fund for Consumer Credit Counseling, Inc., of Commack, NY; Institute of Prevention and Nutritional Medicine, Inc., of Rocky Mount, NC; The Stephanie Mull Foundation For Children's Art of Portland, ME; and Arts Reach, Inc., of Rochester, NY, qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Code.

ADMINISTRATIVE

Announcement 2008–87, page 843.
This document announces the discontinuation of the publication of Legislative Cumulative Bulletins because this material is readily available on various websites much earlier than when this volume could be released for publication.

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.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 25.—Interest on Certain Home Mortgages

Guidance is provided for the issuance of mortgage credit certificates. See Notice 2008-79, page 815.

Section 42.—Low-Income Housing Credit

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

Guidance is provided for income determinations for buildings located near certain qualified military installations under section 142 for certain low-income housing tax credit projects. See Notice 2008-79, page 815.

Section 103.—Interest on State and Local Bonds

This notice provides guidance relating to amendments made by certain provisions of the Housing Assistance Tax Act of 2008. The notice provides allocations of the temporary increase in volume cap, procedures for filing the carryforward elections with respect to this volume cap as well as for reporting bonds issued pursuant to this volume cap, and clarification that mortgage credit certificates may be used to refinance subprime mortgage loans and may utilize the temporary increase in volume cap. The notice provides a list of certain military installations that are eligible for an exception from income determinations of payments of the basic housing allowance. The notice also provides guidance on the temporary exception from the prohibition against federal guarantees of tax-exempt bonds for guarantees provided by Federal Home Loan Banks. See Notice 2008-79, page 815.

Section 142.—Exempt Facility Bond

Guidance is provided for the issuance of bonds to finance residential rental projects and income determinations for buildings located near certain qualified military installations. See Notice 2008-79, page 815.

Section 143.—Mortgage Revenue Bonds: Qualified Mortgage Bond and Qualified Veterans' Mortgage Bond

Guidance is provided for the issuance of qualified mortgage revenue bonds and the refinancing of subprime mortgage loans. See Notice 2008-79, page 815.

Section 146.—Volume Cap

Guidance is provided for the allocation of the $11 billion in volume cap provided by the Housing Assistance Tax Act of 2008. See Notice 2008-79, page 815.

Section 149.—Bonds Must be Registered to be Tax Exempt; Other Requirements

Guidance is provided for the temporary exception from the prohibition against federal guarantees of tax-exempt bonds for guarantees provided by Federal Home Loan Banks. See Notice 2008-79, page 815.

Section 280G.—Golden Parachute Payments

Federal short-term, mid-term, and long-term rates are set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

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

The adjusted applicable federal long-term rate is set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

Section 412.—Minimum Funding Standards

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

Section 430.—Minimum Funding Standards for Single-Employer Defined Benefit Pension Plans

26 CFR 1.430(h)(3)–1: Mortality tables used to determine present value.

T.D. 9419

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Mortality Tables for Determining Present Value

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations providing guidance regarding the mortality tables to be used in determining present value or making any computation for purposes of applying certain pension funding requirements. These regulations affect sponsors, administrators, participants, and beneficiaries of certain retirement plans.

DATES: *Effective date:* These regulations are effective July 31, 2008.

Applicability date: Section 1.430(h)(3)–1, which provides generally applicable mortality tables for single employer defined benefit pension plans, and §1.431(c)(6)–1, which provides for the use of those mortality tables for multiemployer defined benefit pension plans, apply to plan years beginning on or after January 1, 2008. Section 1.430(h)(3)–2, which provides rules regarding the approval and use of substitute mortality tables for single employer defined benefit pension plans, applies to plan years beginning on or after January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Lauson C. Green or Linda S. F. Marshall at (202) 622–6090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 412 provides minimum funding requirements for defined benefit pension plans. The Pension Protection Act of 2006 (PPA), Public Law 109–280 (120 Stat. 780), makes extensive changes to those minimum funding requirements that generally apply for plan years beginning on or after January 1, 2008. Section 430, which was added by PPA, specifies the minimum funding requirements that apply to defined benefit plans that are not multiemployer plans.[1] Section 430(a) defines the minimum required contribution for a defined benefit plan that is not a multiemployer plan by reference to the plan's funding target for the plan year. Under section 430(d)(1), a plan's funding target for a plan year generally is the present value of all benefits accrued or earned under the plan as of the beginning of the plan year.

Section 430(h)(3) provides rules regarding the mortality tables to be used under section 430. Under section 430(h)(3)(A), except as provided in section 430(h)(3)(C) or (D), the Secretary is to prescribe by regulation mortality tables to be used in determining any present value or making any computation under section 430. Those tables are to be based on the actual experience of pension plans and projected trends in such experience. In prescribing those tables, the Secretary is required to take into account results of available independent studies of mortality of individuals covered by pension plans. This standard for issuing the mortality table under section 430(h)(3)(A) is the same as the standard for issuing updated mortality tables pursuant to the review under section 412(l)(7)(C)(ii)(III) of the mortality table used in determining a plan's current liability pursuant to section 412(l)(7)(C)(ii)(I) for plan years before the effective date of the PPA changes.

Section 430(h)(3)(C) provides rules for a plan sponsor's use of substitute mortality tables. Upon the request of a plan sponsor and approval by the Secretary, mortality tables that meet the requirements for substitute mortality tables are used in determining present value or making any computation under section 430 during the period of consecutive plan years (not to exceed 10) specified in the request. Substitute mortality tables cease to be in effect as of the earliest of the date on which there is a significant change in the participants in the plan by reason of a plan spinoff or merger or otherwise, or the date on which the plan actuary determines that those tables do not meet the requirements for substitute mortality tables. The plan sponsor's request to use substitute mortality tables is to be made at least 7 months before the first day of the first plan year for which substitute mortality tables are to apply. A request to use substitute mortality tables is deemed approved unless the Secretary denies approval for the use of those mortality tables within 180 days of the request (subject to extension of this period by mutual agreement).

Mortality tables meet the requirements for substitute mortality tables if the pension plan has a sufficient number of plan participants and the plan has been maintained for a sufficient period of time in order to have credible mortality experience, and such tables reflect the actual experience of the plan and projected trends in general mortality experience of participants in pension plans. Except as provided by the Secretary, a plan sponsor cannot use substitute mortality tables for any plan unless substitute mortality tables are established and used for each other plan maintained by the plan sponsor and the plan sponsor's controlled group.

Section 430(h)(3)(D) provides for the use of separate mortality tables with respect to certain individuals who are entitled to benefits on account of disability. These separate mortality tables are permitted to be used with respect to disabled individuals in lieu of the generally applicable mortality tables provided pursuant to section 430(h)(3)(A) or the substitute mortality tables under section 430(h)(3)(C). The Secretary is to establish separate tables for individuals with disabilities occurring in plan years beginning before January 1, 1995, and in later plan years, with the mortality tables for individuals with disabilities occurring in those later plan years applying only to individuals who are disabled within the meaning of Title II of the Social Security Act.

Section 431, which was added by PPA, specifies the minimum funding requirements that apply to multiemployer plans. Under section 431(c)(6)(B), a plan's full funding limitation cannot be less than the excess (if any) of 90 percent of the current liability of the plan (including the expected increase in current liability due to benefits accruing during the plan year) over the value of the plan's assets. Section 431(c)(6)(D)(iv)(II) provides that the Secretary may by regulation prescribe mortality tables to be used in determining a plan's current liability for purposes of section 431(c)(6). The standards for these mortality tables are the same as the standards for mortality tables to be prescribed under section 430(h)(3)(A). Section 431(c)(6)(D)(iv)(I) provides that, until mortality tables are prescribed under section 431(c)(6)(D)(iv)(II), the mortality table used in determining a plan's current liability for purposes of section 431(c)(6) is the table prescribed by the Secretary that is based on the prevailing commissioners' standard table (described in section 807(d)(5)(A)) used to determine reserves for group annuity contracts issued on January 1, 1993.

On February 2, 2007, the IRS issued final regulations under section 412(l)(7) (T.D. 9310, 2007–9 I.R.B. 601 [72 FR 4955]) setting forth mortality tables to be used in determining a plan's current liability with respect to nondisabled pension plan participants during the 2007 plan year. Those updated mortality tables were based on the tables contained in the RP–2000 Mortality Tables Report.[2] Those regulations permitted plans to use separate mortality tables for nonannuitant and annuitant periods, with different projection periods for annuitants and nonannuitants based on an estimate of the duration of the respective liabilities. Alternatively, plans were permitted to use a combined table that ap-

[1] Section 302 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) sets forth funding rules that are parallel to those in section 412 of the Internal Revenue Code (Code), and section 303 of ERISA sets forth additional funding rules for defined benefit plans (other than multiemployer plans) that are parallel to those in section 430 of the Code. Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713) and section 302 of ERISA, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these regulations for purposes of ERISA, as well as the Code. Thus, these Treasury regulations issued under section 430 of the Code apply as well for purposes of section 303 of ERISA.

[2] The RP–2000 Mortality Tables Report was released by the Society of Actuaries in July, 2000. Society of Actuaries, RP–2000 Mortality Tables Report, at *http://www.soa.org/ccm/content/research-publications/experience-studies-tools/the-rp–2000-mortality-tables/*.

plied the same mortality rates to both annuitants and nonannuitants.

On May 29, 2007, the IRS issued proposed regulations under section 430(h)(3) (REG–143601–06, 2007–24 I.R.B. 1398 [72 FR 29456]). Those proposed regulations provide guidance regarding the mortality tables to be used for purposes of applying certain defined benefit plan funding requirements, including §1.430(h)(3)–1, which provides generally applicable mortality tables, and §1.430(h)(3)–2, which provides rules regarding the approval and use of substitute mortality tables. On May 31, 2007, the IRS issued Rev. Proc. 2007–37, 2007–1 C.B. 1433, which sets forth procedures by which a plan sponsor may request approval to use substitute mortality tables in accordance with proposed §1.430(h)(3)–2, including guidelines for the construction of substitute mortality tables. See §601.601(d)(2)(ii)(*b*) of this chapter.

On January 31, 2008, the IRS issued Notice 2008–21, 2008–7 I.R.B. 431. See §601.601(d)(2)(ii)(*b*) of this chapter. Notice 2008–21 provides that, when certain pension funding regulations (including the §1.430(h)(3)–2 regulations issued under section 430(h)(3)(C) regarding substitute mortality tables) are finalized, those final regulations will not apply to plan years beginning before January 1, 2009. For plan years beginning during 2008, taxpayers must follow applicable statutory provisions and can rely on the proposed regulations for compliance with those statutory provisions. Under Notice 2008–21, the IRS will not challenge a reasonable interpretation of section 430 (taking into account the items with respect to which guidance is provided in Notice 2008–21) for plan years beginning during 2008.

Several comments were received on the proposed regulations, and no public hearing was requested or held. After consideration of the comments received, the IRS and the Treasury Department are issuing these final regulations to adopt the rules set forth in the proposed regulations with certain modifications that are noted in this preamble.

Explanation of Provisions

Generally Applicable Mortality Tables

These regulations adopt the methodology set forth in the proposed regulations that the IRS will use to establish mortality tables as provided under section 430(h)(3)(A) to be used for participants and beneficiaries to determine present value or make any computation under section 430. These mortality tables apply as well for purposes of determining the current liability of a multiemployer plan pursuant to section 431(c)(6)(D)(iv)(II). In addition, pursuant to §1.412(l)(7)–1(a), these regulations apply for purposes of determining the current liability of a plan for which application of the PPA changes to section 412 is delayed (see sections 104 through 106 of PPA). Under these regulations, mortality tables to be used with respect to disabled individuals will be provided in guidance published in the Internal Revenue Bulletin (IRB). This guidance has been issued as Notice 2008–29, 2008–12 I.R.B. 637. See §601.601(d)(2)(ii)(*b*).

The new mortality tables under section 430(h)(3)(A) are based on the tables contained in the RP–2000 Mortality Tables Report because, as with the mortality tables used under section 412(l)(7)(C)(ii), the IRS and the Treasury Department have determined that the RP–2000 mortality tables form the best available basis for predicting mortality of pension plan participants and beneficiaries (other than disabled individuals) based on pension plan experience, including expected trends. Like the mortality tables provided in the final section 412(l) regulations, the mortality tables set forth in these regulations are gender-distinct because of significant differences between expected male mortality and expected female mortality.

The mortality tables set forth in these regulations provide separate mortality rates for annuitants and nonannuitants. This distinction has been made because the RP–2000 Mortality Tables Report indicates that these two groups have significantly different mortality experience. This is particularly true at typical ages for early retirees, where the number of health-induced early retirements results in a population that has higher mortality rates than the population of currently employed individuals. While the use of separate mortality rates for these groups of individuals will likely entail changes in programming of actuarial software, the IRS and the Treasury Department believe that the improvement in accuracy resulting from the use of separate mortality tables for annuitants and nonannuitants more than offsets the added complexity.

Under these regulations, the annuitant mortality tables are applied to determine the present value of benefits for annuitants. The annuitant mortality tables are also used for nonannuitants (active employees and terminated vested participants) for the periods beginning when the nonannuitants are projected to commence receiving benefits, while the nonannuitant mortality tables are applied for the periods before nonannuitants are projected to commence receiving benefits. For any period in which an annuitant is projected to be receiving benefits, the mortality table applicable to any beneficiary of that annuitant is the annuitant mortality table.

The RP–2000 Mortality Tables Report sets forth mortality tables that reflect expected mortality as of 2000, along with projection factors that are used to reflect the impact of expected improvements in mortality. Similarly, the mortality tables set forth in these regulations are based on expected mortality as of 2000 and reflect the impact of expected improvements in mortality. The regulations permit plan sponsors to apply the projection of mortality improvement in either of two ways: through use of static tables that are updated annually to reflect expected improvements in mortality, or through use of generational tables.

The regulations set forth base tables for annuitants and nonannuitants, as well as a set of projection factors. The base tables set forth in the regulations generally provide the same rates as the RP–2000 mortality tables, except that they have been extended so that the annuitant and nonannuitant tables have mortality rates available at each age. The RP–2000 Mortality Tables Report did not develop annuitant rates before age 50 or nonannuitant rates after age 70. The extended nonannuitant tables in these regulations were created by (1) using nonannuitant rates through age 70, (2) using annuitant rates for ages over 80, and (3) blending the rates to produce a smooth transition between the two tables, using increasing fractions. The total difference be-

tween the rates at ages 70 and 80 is divided by 55; the rate at age 71 is set equal to the rate at age 70 plus 1/55 of the total difference, the age 72 rate is equal to the rate at age 71 plus 2/55 of the total difference, etc.

A similar approach was used to develop the base tables for annuitants. For male annuitants, annuitant rates from the RP–2000 Mortality Tables Report were used for ages 50 and over, nonannuitant rates from the RP–2000 Mortality Tables Report were used through age 40, and rates between ages 41 and 49 were smoothed to create a smooth transition using the same methodology as was used for the nonannuitant tables. For female annuitants, annuitant rates from the RP–2000 Mortality Tables Report were used for ages 50 and over. However, to avoid anomalous results, female nonannuitant rates were used through age 46 (rather than age 40) and, accordingly, rates were smoothed between ages 47 and 49. The smoothing methodology for the female annuitant tables was the same as that used for the male tables but, because a shorter transition period was used, the difference between the age 46 and the age 50 mortality rates was smoothed using a denominator of 10 instead of 55.

For a plan sponsor that chooses to use the generational mortality tables, the mortality rate for each particular age would be projected for each individual participant to reflect projected improvement for the period of time until the participant reaches the particular age using the applicable base table along with the projection factors provided under the regulations. These projection factors are from Mortality Projection Scale AA, which was recommended for use in the UP–94 Study[3] and in the RP–2000 Mortality Tables Report.

The static mortality tables that are permitted to be used under the regulations are constructed from the base table used for purposes of the generational mortality tables. The static mortality tables are projected from the base table for the year 2000 through the year of valuation with further projection to reflect the approximate expected duration of liabilities. The static mortality tables for annuitants under the regulations reflect projection through the year of valuation with a further projection period of 7 years, and the static mortality tables for nonannuitants under the regulations reflect projection through the year of valuation with a further projection period of 15 years. These projection periods were selected as the expected average duration of liabilities. To be consistent with the original construction of the RP–2000 mortality tables, both the static annuitant and nonannuitant tables use the rates from the projected annuitant table for ages 80 and over and from the projected nonannuitant table for ages 40 and younger (ages 44 and younger for females). For a smooth transition between the different projection periods for annuitants versus nonannuitants, the nonannuitant rates for ages 71 through 79 and the annuitant rates for ages 41 through 49 (ages 45 through 49 for females) were smoothed using the same technique as that used in constructing the base tables.

The static mortality tables that apply with respect to valuation dates occurring during 2008 are set forth in these regulations, which also include an example of how to apply the tables in that year. The mortality tables to be used for valuation dates in subsequent years will be published in the Internal Revenue Bulletin. See §601.601(d)(2)(ii)(*b*). The IRS intends to publish a notice in the near future that provides a series of tables for valuation dates occurring during 2009 through 2013.

These regulations provide an option for smaller plans that choose to use static mortality tables to use a single blended static table for all participants — in lieu of the separate tables for annuitants and nonannuitants — in order to simplify the actuarial valuation for these plans. The final regulations provide that the smaller plans to which this rule applies are plans where the total of active and inactive participants is 500 or fewer, and clarify that this participant count is determined as of the plan's valuation date. The blended table is constructed from the separate nonannuitant and annuitant tables using the nonannuitant/annuitant weighting factors published in the RP–2000 Mortality Tables Report. However, because the RP–2000 Mortality Tables Report does not provide weighting factors before age 51 or after age 69, the IRS and the Treasury Department have extended the table of weighting factors (using straight-line interpolation) for ages 41 through 50 (ages 45–50 for females) and for ages 70 through 79 in order to develop the blended table.

Since the publication of proposed regulations under sections 430(h) and 430(d), questions have arisen regarding whether small plans are required to apply mortality assumptions using the mortality tables provided under section 430(h) for the period before a participant is projected to commence receiving benefits under the plan. Final regulations under section 430(d) are expected to clarify that the mortality tables provided under section 430(h) must be used to determine present values under section 430 when mortality assumptions are applied and that, in appropriate cases, it is permissible to assume no mortality for the period before a participant is projected to commence receiving benefits under the plan.

Substitute Mortality Tables

These regulations generally adopt the methodology set forth in the proposed regulations for the development and use of substitute mortality tables upon written request of the plan sponsor and approval of the Commissioner. Pursuant to section 430(h)(3)(C), substitute mortality tables apply in lieu of the mortality tables provided under section 430(h)(3)(A) and §1.430(h)(3)–1 for purposes of making present value determinations and other computations.

Substitute mortality tables must reflect the actual mortality experience of the pension plan for which the tables are to be used, and that mortality experience must be credible. Separate mortality tables must be established for each gender under the plan, and a substitute mortality table is permitted to be established for a gender only if the plan has credible mortality experience with respect to that gender. If the mortality experience for one gender is credible but the mortality experience for the other gender is not credible, the substitute mortality tables are used for the gender that has credible mortality experience, and the mortality tables under §1.430(h)(3)–1 are used for the gender that does not have credible mortality experience. If separate mortality tables under section 430(h)(3)(D) are

[3] The UP–94 Study, prepared by the UP–94 Task Force of the Society of Actuaries, was published in the Transactions of the Society of Actuaries, Vol. XLVII (1995), p. 819.

used for certain disabled individuals under a plan, then those individuals are disregarded for all purposes with respect to substitute mortality tables under section 430(h)(3)(C). Thus, if the mortality tables under section 430(h)(3)(D) are used for certain disabled individuals under a plan, mortality experience with respect to those individuals must be excluded in determining mortality rates for substitute mortality tables with respect to a plan.

The proposed regulations provided that a substitute mortality table would be based on credible mortality experience for a gender within a plan if and only if the mortality experience were based on at least 1,000 deaths within that gender over the period covered by the experience study. The proposed regulations required that the experience study be based on mortality experience data over a 2, 3, or 4 consecutive year period, the last day of which must be less than 3 years before the first day of the first plan year for which the substitute mortality tables are to apply.

Commentators requested an expansion of this rule that would allow the plan to demonstrate credibility on the basis of divergence between the actual number of deaths and the number of deaths expected under the standard mortality tables in §1.430(h)(3)–1. The IRS and the Treasury Department have rejected this suggestion because, although such a measure of divergence may show that the standard mortality tables are not necessarily the best estimate of future mortality under the plan, the existence of this divergence does not demonstrate that a particular alternative table reflects the actual experience of the pension plans maintained by the sponsor unless the experience study data reflects a sufficient number of deaths to support the use of that alternative table.

The 1,000-death threshold in the proposed regulations was set at a level so that there is a high degree of confidence that the plan's past mortality experience will be predictive of its future mortality, and is consistent with relevant actuarial literature (see, for example, Thomas N. Herzog, *Introduction to Credibility Theory* (1999); Stuart A. Klugman, *et al.*, *Loss Models: From Data to Decisions* (2004)). A number of commentators requested that substitute mortality tables be made available to plans with fewer annual deaths. For example, one commentator requested an extension of the 4-year maximum period for the mortality experience study in order to allow a smaller plan to satisfy the 1,000-death threshold. In response to these comments, these regulations lengthen the maximum period for the experience study and provide that the experience study for purposes of demonstrating 1,000 deaths within a gender can be conducted over as long as a 5-year period. In addition, in accordance with the delegation of authority set forth in the regulations, the Commissioner may, in revenue rulings, notices or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*)), provide for further extensions of this maximum experience study period.

Development of a substitute mortality table under the regulations requires creation of a base table and identification of a base year, which are then used to determine a substitute mortality table. The base table must be developed from a study of the mortality experience of the plan using amounts-weighted data. The regulations set forth rules regarding development of amounts-weighted mortality rates for an age. The regulations provide that amounts-weighted mortality rates may be derived from amounts-weighted mortality rates for age groups. The regulations provide for grouping of ages and alternative methods of graduation in order to simplify the construction of substitute mortality tables. The regulations provide rules for determination of the base year for a substitute mortality table. These rules have been modified from the rules set forth in the proposed regulations to reflect the potential for a longer experience study period than permitted under the proposed regulations.

In general, substitute mortality tables are permitted to be used for a plan for a plan year only if, for that plan year, substitute mortality tables are also approved and used for each other pension plan subject to the requirements of section 430 that is maintained by the plan sponsor or by a member of the sponsor's controlled group. The final regulations clarify the application of this rule where plans maintained within a controlled group have different plan years. In such a case, a plan that uses substitute mortality tables for a plan year satisfies the requirement that all plans within the controlled group use substitute mortality tables for the plan year if all plans within the controlled group use substitute mortality tables for at least some portion of the plan year. Under the regulations, the use of substitute mortality tables for one plan is not prohibited merely because another plan subject to section 430 that is maintained by the plan sponsor (or by a member of the plan sponsor's controlled group) cannot use substitute mortality tables because neither the males nor the females under that plan have credible mortality experience for a plan year. Thus, if a sponsor's controlled group contains two pension plans that are subject to section 430, each of which has credible mortality experience for at least one gender, either both plans must obtain approval from the Commissioner to use substitute mortality tables or neither plan may use substitute mortality tables. By contrast, if for one of those plans neither males nor females have credible mortality experience, then the plan without credible mortality experience will not interfere with the ability of the plan with credible mortality experience to use substitute mortality tables.

Under the regulations, the requirement that the plan sponsor demonstrate the lack of credible mortality experience for both the male and female populations in other plans maintained by the plan sponsor (and by members of the plan sponsor's controlled group) for which substitute mortality tables are not used must be satisfied for each plan year for which substitute mortality tables are used. This demonstration is made for a plan population by showing that the population has not experienced at least 1,000 deaths over a time period that satisfies the requirements set forth in the regulations. In general, for each plan year in which a plan uses substitute mortality tables, the demonstration that both genders of another plan maintained by the plan sponsor do not have credible mortality experience is made by counting the number of deaths for that plan population over a 4-year period. However, if the experience study period for the experience study on which the substitute mortality tables are based is longer than 4 years, the demonstration that both genders of another plan maintained by the plan sponsor do not have credible mortality experience (that is, there are less than 1,000 deaths within each gender) must be made using a consecutive period for mortality experience that is the same length as the period of the experience

study. In either case, the period for mortality experience that is used to demonstrate lack of credible mortality experience with respect to a plan year must end less than 3 years before the first day of that plan year.

For example, a plan sponsor that requests to use substitute mortality tables for a plan for the plan year that begins January 1, 2009, using data obtained over a 4-year experience study period must show, as part of its submission to the Commissioner, that both the male and female populations in all other defined benefit plans of the plan sponsor (and of members of the plan sponsor's controlled group) that are subject to section 430 and that do not use substitute mortality tables do not have credible mortality experience using a 4-year period that ends no earlier than January 2, 2006 (that is, each gender in those plans did not experience 1,000 deaths during that 4-year period). If the plan sponsor chooses to use the 4-year period from January 1, 2004, through December 31, 2007, to demonstrate the lack of credible mortality experience for the other plans, then the plan can rely on this same data to demonstrate the lack of credible mortality experience for 2010 as well because the less-than–3-years requirement is still met with respect to the 2010 plan year. However, the plan cannot use this same data to demonstrate lack of credible mortality experience for the 2011 plan year because the last day of the experience study used for the demonstration (the January 1, 2004 - December 31, 2007 period) is too distant in time (3 or more years) from the first day of the plan year (January 1, 2011).

Although the regulations permit a plan sponsor to use a single experience study to demonstrate a lack of credible mortality experience for a plan population for multiple years, plan sponsors are encouraged to update experience studies annually as new mortality data become available for the plan population. In such a case, if an updated test reveals 1,000 or more deaths for the more recent 4-year period (or 5-year period in the case of a plan using a 5-year experience study period), the plan sponsor nonetheless will be able to continue to use substitute mortality tables for one plan year by demonstrating that the other plans in the controlled group do not have credible mortality experience based on the earlier experience study. This will give the plan sponsor sufficient time to develop substitute mortality tables for the plan population with newly credible mortality experience and to obtain the Commissioner's approval to use those tables prior to the first year substitute mortality tables are to be used for that population.

Under the regulations, a plan's substitute mortality tables must be generational mortality tables. Substitute mortality tables are determined using the base mortality tables developed from the experience study and the projection factors provided in Projection Scale AA, as set forth in §1.430(h)(3)–1(d). Under the generational mortality tables, the probability of an individual's death at a particular age is determined as the individual's base mortality rate (that is, the applicable base mortality rate from the base mortality table for the age for which the probability of death is being determined) multiplied by the mortality improvement factor. The mortality improvement factor is equal to (1 minus the projection factor for that age)^n, where n is equal to the projection period (that is, the number of years between the base year for the base mortality table and the year for which the probability of death is being determined).

The regulations require separate tables to be established for males and females under a plan. Under the regulations, separate substitute mortality tables are permitted (but not required) to be established for separate populations within a gender, such as annuitants and nonannuitants or hourly and salaried individuals. The regulations provide that separate substitute mortality tables are permitted to be used for a separate population within a gender under a plan only if all individuals of that gender in the plan are divided into separate populations, each separate population has credible mortality experience (determined in the same manner as determining whether a gender has credible mortality experience), and the separate substitute mortality table for each separate population is developed using mortality experience data for that population. For example, in the case of a plan that has credible mortality experience data for both its male hourly and male salaried populations, separate substitute mortality tables could be used for those two separate populations. However, if the plan does not have credible mortality experience for its male salaried population, it is not permissible to use substitute mortality tables for its male hourly population and the standard mortality tables described in §1.430(h)(3)–1 for its male salaried population.

The requirement that each separate population have credible mortality experience does not apply in the case of separate mortality tables that are developed for annuitant and nonannuitant populations within a gender. Thus, the regulations provide that substitute mortality tables for separate annuitant and nonannuitant populations may be used within a gender even if only one of those separate populations has credible mortality experience. Similarly, if separate populations with credible mortality experience are established within a gender, then any of those populations may be further subdivided into separate annuitant and nonannuitant subpopulations, provided that at least one of the two resulting subpopulations has credible mortality experience. In such a case, the standard mortality tables under §1.430(h)(3)–1 must be used for a resulting subpopulation that does not have credible mortality experience. For example, in the case of a plan that has credible mortality experience for both its male hourly and salaried individuals, if the male salaried annuitant population has credible mortality experience, the plan may use substitute mortality tables with respect to that population even if the standard mortality tables under §1.430(h)(3)–1 are used for the male salaried nonannuitant population (because that nonannuitant population does not have credible mortality experience). For purposes of demonstrating that an annuitant or nonannuitant population within a gender or within a separate population does not have credible mortality experience, the demonstration of lack of credible mortality experience is made on the same basis as for purposes of demonstrating a lack of credible mortality experience for a gender.

The proposed regulations provide a limited time period during which a newly acquired plan that does not use substitute mortality tables does not prevent another plan from using substitute mortality tables. The proposed regulations implied that this exception applies only where a newly acquired plan does not use substitute mortality tables (and not to the case where a plan that uses substitute mortality tables is acquired by a plan sponsor that maintains other plans for which substitute mortality

tables are not used). In response to commentator concerns, the final regulations replace the term "newly acquired plan" with the term "newly affiliated plan." Thus, the final regulations eliminate the implication that this exception is unavailable in situations in which the acquiring plan sponsor does not use substitute mortality tables for its other plans but the acquired plan uses substitute mortality tables.

Under the regulations, the use of substitute mortality tables for a plan is not prohibited merely because a newly affiliated plan does not use substitute mortality tables, but only through the last day of the plan year of the plan using substitute mortality tables that contains the last day of the transition period described in section 410(b)(6)(C)(ii) (without regard to any change in coverage during that period) for either the newly affiliated plan or the plan using substitute mortality tables, whichever is later. For the following plan year, the mortality tables prescribed under §1.430(h)(3)–1 apply with respect to the plan (and all other plans within the plan sponsor's controlled group, including the newly affiliated plan) unless approval to use substitute mortality tables has been obtained with respect to the newly affiliated plan, or the newly affiliated plan cannot use substitute mortality tables because neither the males nor the females under the plan have credible mortality experience. For example, if on September 1, 2009, a plan sponsor of a plan that uses substitute mortality tables and that has a calendar year plan year acquires a business that maintains a plan that does not use substitute mortality tables and that has a plan year that ends June 30, the maintenance of the latter plan within the controlled group will not impair the continued use of substitute mortality tables by the former plan through the end of the plan year that ends on December 31, 2011. This is because December 31, 2010, is the last day of the period described in section 410(b)(6)(C)(ii) for the plan using substitute mortality tables, June 30, 2011, is the last day of the period described in section 410(b)(6)(C)(ii) for the newly affiliated plan that does not use substitute mortality tables, and the last day of the plan year of the plan using substitute mortality tables that contains the later of those two dates is December 31, 2011. Similarly, if on September 1, 2009, a plan sponsor of a plan that uses substitute mortality tables and that has a calendar year plan year is acquired by an employer that maintains a plan that does not use substitute mortality tables and that has a plan year that ends June 30, the maintenance of the latter plan within the controlled group will not impair the continued use of substitute mortality tables by the former plan through the end of the plan year that ends on December 31, 2011.

Under the regulations, a plan is treated as a newly affiliated plan if it becomes maintained by the plan sponsor (or by a member of the plan sponsor's controlled group) in connection with a merger, acquisition, or similar transaction described in §1.410(b)–2(f). The regulations provide that a plan is also treated as a newly affiliated plan if it is established in connection with a transfer of assets and liabilities from another employer's plan in connection with a merger, acquisition, or similar transaction described in §1.410(b)–2(f).

In the case of a newly affiliated plan that does not use substitute mortality tables, the demonstration of whether credible mortality experience exists for the plan may be made by either including or excluding mortality experience data for the period prior to the date the plan becomes maintained within the controlled group that includes the plan sponsor of the plan that uses substitute mortality tables. If a plan sponsor excludes mortality experience data prior to the date the plan became maintained within the controlled group that includes the plan sponsor of the plan that uses substitute mortality tables, the exclusion must apply for all populations within the plan. For example, it is impermissible to include the data for hourly individuals for the pre-acquisition period but exclude the data for salaried individuals for that same period.

In order to demonstrate a lack of credible mortality experience with respect to a gender for a plan year, a special rule applies if the plan's mortality experience demonstration for a plan year is made by excluding mortality experience for the period prior to the date the newly affiliated plan becomes maintained within the new plan sponsor's controlled group. In such a case, an employer is permitted to demonstrate a plan's lack of credible mortality experience using an experience study period of less than four years, provided that the experience study period begins with the date the plan becomes maintained within the employer's controlled group and ends not more than one year and one day before the first day of the plan year with respect to which the lack of credible mortality experience demonstration is made.

The regulations provide rules for aggregating plans for purposes of using substitute mortality tables. Under the regulations, in order to use a set of substitute mortality tables for two or more plans, the rules set forth in the regulations are applied by treating those plans as a single plan. In such a case, the substitute mortality tables must be used for all such plans and must be based on data collected with respect to all such plans. Although plans generally are not required to be aggregated, the regulations require a plan to be aggregated with any plan that was previously spun off from that plan if one purpose of the spinoff was to avoid the use of substitute mortality tables for any of the plans involved in the spinoff.

Under the regulations, in order to use substitute mortality tables with respect to a plan, a plan sponsor must submit a written request to the Commissioner that demonstrates that those substitute mortality tables comply with applicable requirements. A request to use substitute mortality tables must state the first plan year and the term of years (not more than 10) that the tables are requested to be used. In general, substitute mortality tables cannot be used for a plan year unless the plan sponsor submits the written request to use substitute mortality tables at least 7 months prior to the first day of the first plan year for which the substitute mortality tables are to apply. However, the timing of the written request to use substitute mortality tables does not prevent a plan from using substitute mortality tables for a plan year if the written request is submitted no later than October 1, 2007. This special rule, which was provided under the proposed regulations, allowed plan sponsors sufficient time to review the proposed regulations and other guidance in order to prepare requests to use substitute mortality tables for use in 2008. In addition, the timing of the written request to use substitute mortality tables does not prevent a plan from using substitute mortality tables for a plan year that begins during 2009 if the written request is submitted no later than October 1, 2008.

This special rule allows plan sponsors sufficient time to review the final regulations in order to prepare requests to use substitute mortality tables for plan years that begin during 2009.

Under the regulations, experience data cannot be used to develop a base table if the number of individuals in the population covered by the table (for example, the male annuitants) as of the last day of the plan year before the year the request to use substitute mortality tables is made (or a reasonable estimate of that number), compared to the average number of individuals in that population over the years covered by the experience study on which the substitute mortality tables are based, reflects a difference of 20 percent or more, unless it is demonstrated to the satisfaction of the Commissioner that the experience data is accurately predictive of future mortality of that plan population (taking into account the effect of the change in individuals) after appropriate adjustments to the data are made (for example, excluding data from individuals with respect to a spun-off portion of the plan).

Under the regulations, the Commissioner may, in revenue rulings and procedures, notices or other guidance published in the IRB (see §601.601(d)(2)(ii)(*b*) of this chapter), provide additional guidance regarding the approval and use of substitute mortality tables under section 430(h)(3)(C) and related matters. The IRS intends to publish a revenue procedure in the near future that updates the requirements set forth in Rev. Proc. 2007–37 regarding approval to use substitute mortality tables to reflect the provisions of these final regulations.

In general, the Commissioner has a 180-day period to review a request for the use of substitute mortality tables. If the Commissioner does not issue a denial within this 180-day period, the request is deemed to have been approved unless the Commissioner and the plan sponsor have agreed to extend that period. The Commissioner may request additional information with respect to a submission. Failure to provide that information on a timely basis is grounds for denial of the plan sponsor's request. In addition, the Commissioner will deny a request if the request fails to meet the requirements to use substitute mortality tables or if the Commissioner determines that a substitute mortality table does not sufficiently reflect the mortality experience of the applicable plan population. One commentator suggested that the 180-day period for approval of substitute mortality tables should automatically be tolled during any period between the time additional information is requested and received, and should resume after that information is received. These regulations do not adopt this suggestion. It is anticipated that the Commissioner and the taxpayer will establish a reasonable period for the taxpayer to collect and submit the requested data and extend the 180-day period to the extent necessary.

The regulations provide rules regarding the duration of use of substitute mortality tables. Under the regulations, substitute mortality tables generally are used with respect to a plan for the term of consecutive plan years specified in the plan sponsor's written request to use such tables and approved by the Commissioner, or such shorter period prescribed by the Commissioner in the approval to use substitute mortality tables. If the term of use of a substitute mortality table ends for any reason, the mortality tables specified in §1.430(h)(3)–1 will apply with respect to the plan unless the plan sponsor has obtained approval to use substitute mortality tables for a further term. The regulations provide that a plan's substitute mortality tables cannot be used as of the earliest of the following: the second plan year following the plan year in which there is a significant change in the population covered by the substitute mortality table (generally, a change of at least 20% from the average number of individuals included in the experience study); or the plan year following the plan year in which a substitute mortality table for a plan population is no longer accurately predictive of future mortality of that population, as determined by the Commissioner or as certified by the plan's actuary to the satisfaction of the Commissioner. In addition, the regulations provide that a plan's substitute mortality tables cannot be used after the date specified in guidance published in the IRB (see §601.601(d)(2)(ii)(*b*)) pursuant to a replacement of mortality tables specified under section 430(h)(3)(A) (other than annual updates to the static mortality tables).

Effective/Applicability Date

Section 1.430(h)(3)–1, which provides generally applicable mortality tables, applies to plan years beginning on or after January 1, 2008. Section 1.430(h)(3)–2, which provides rules regarding the approval and use of substitute mortality tables, applies to plan years beginning on or after January 1, 2009. Taxpayers may rely on the provisions of §1.430(h)(3)–2 for plan years beginning during 2008. For example, taxpayers can use the exceptions contained in §1.430(h)(3)–2(d)(1) from the general rule that all controlled group members must use substitute mortality tables in order for any controlled group member to use substitute mortality tables. Because section 430(h)(3) provides that substitute mortality tables can be used only if the use of those tables is approved by the Secretary, taxpayers can use substitute mortality tables for plan years beginning during 2008 only if those mortality tables were approved by the IRS under the procedures set forth in Rev. Proc. 2007–37.

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 is hereby certified that the collection of information contained in this regulation will not have a significant economic impact on a substantial number of small entities. Pension plans of small entities generally are precluded from requesting to use substitute mortality tables pursuant to §1.430(h)(3)–2 because they will not have 1,000 deaths for a permitted population over a permissible mortality experience study period as required under §1.430(h)(3)–2(c)(1)(ii) and, thus, will not have credible mortality experience as required by the regulation. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Lauson C. Green and

Linda S. F. Marshall, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in the development of these regulations.

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Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.430(h)(3)–1 is added to read as follows:

§1.430(h)(3)–1 Mortality tables used to determine present value.

(a) *Basis for mortality tables*—(1) *In general.* This section sets forth rules for the mortality tables to be used in determining present value or making any computation under section 430. Generally applicable mortality tables for participants and beneficiaries are set forth in this section pursuant to section 430(h)(3)(A). In lieu of using the mortality tables provided under this section with respect to participants and beneficiaries, plan-specific substitute mortality tables are permitted to be used for this purpose pursuant to section 430(h)(3)(C) provided that the requirements of §1.430(h)(3)–2 are satisfied. Mortality tables that may be used with respect to disabled individuals are to be provided in guidance published in the Internal Revenue Bulletin. See §601.601(d)(2)(ii)(*b*) of this chapter.

(2) *Static tables or generational tables permitted.* The generally applicable mortality tables provided under section 430(h)(3)(A) are the static tables described in paragraph (a)(3) of this section and the generational mortality tables described in paragraph (a)(4) of this section. A plan is permitted to use either of those sets of mortality tables with respect to participants and beneficiaries pursuant to this section.

(3) *Static tables.* The static mortality tables that are permitted to be used pursuant to paragraph (a)(2) of this section are updated annually to reflect expected improvements in mortality experience as described in paragraph (c)(2) of this section. Static mortality tables that are to be used with respect to valuation dates occurring during 2008 are provided in paragraph (e) of this section. The mortality tables to be used with respect to valuation dates occurring in later years are to be provided in guidance published in the Internal Revenue Bulletin. See §601.601(d)(2)(ii)(*b*) of this chapter.

(4) *Generational mortality tables*—(i) *In general.* The generational mortality tables that are permitted to be used pursuant to paragraph (a)(2) of this section are determined pursuant to this paragraph (a)(4) using the base mortality tables and projection factors set forth in paragraph (d) of this section. Under the generational mortality tables, the probability of an individual's death at a particular age is determined as the individual's base mortality rate (that is, the applicable mortality rate from the table set forth in paragraph (d) of this section for the age for which the probability of death is being determined) multiplied by the mortality improvement factor. The mortality improvement factor is equal to $(1 - \text{projection factor for that age})^{n}$, where n is equal to the projection period. For this purpose, the projection period is the number of years between 2000 and the year for which the probability of death is being determined.

(ii) *Examples of calculation.* As an example of the use of generational mortality tables under paragraph (a)(4)(i) of this section, for purposes of determining the probability of death at age 54 for a male annuitant born in 1974, the base mortality rate is .005797, the projection factor is .020, and the projection period (the period from the year 2000 until the year the participant will attain age 54) is 28 years, so that the mortality improvement factor is .567976, and the probability of death at age 54 is .003293. Similarly, under these generational mortality tables, the probability of death at age 55 for the same male annuitant would be determined by using the base mortality rate and projection factor at age 55, and a projection period of 29 years (the period from the year 2000 until the year the participant will attain age 55). Thus, the base mortality rate is .005905, the projection factor is .019, so that the mortality improvement factor is .573325 $((1-.019)^{29})$, and the probability of death at age 55 is .003385 (.573325 times .005905). Because these generational mortality tables reflect expected improvements in mortality experience, no periodic updates are needed.

(b) *Use of the tables*—(1) *Separate tables for annuitants and nonannuitants*—(i) *In general.* Separate tables are provided for use for annuitants and nonannuitants. The nonannuitant mortality table is applied to determine the probability of survival for a nonannuitant for the period before the nonannuitant is projected to commence receiving benefits. The annuitant mortality table is applied to determine the present value of benefits for each annuitant, and for each nonannuitant for the period beginning when the nonannuitant is projected to commence receiving benefits. For purposes of this section, an annuitant means a plan participant who has commenced receiving benefits and a nonannuitant means a plan participant who has not yet commenced receiving benefits (for example, an active employee or a terminated vested participant). A participant whose benefit has partially commenced is treated as an annuitant with respect to the portion of the benefit which has commenced and a nonannuitant with respect to the balance of the benefit. In addition, for any period in which an annuitant is projected to be receiving benefits, any beneficiary with respect to that annuitant is also treated as an annuitant for purposes of this paragraph (b)(1).

(ii) *Examples of calculation.* As an example of the use of separate annuitant and nonannuitant tables under paragraph (b)(1)(i) of this section, with respect to a 45-year-old active participant who is projected to commence receiving an annuity at age 55, the funding target would be determined using the nonannuitant mortality table for the period before the participant attains age 55 (so that, if the static mortality tables are used pursuant to paragraph (a)(3) of this section, the probability of an active male participant living from age 45 to age 55 using the table that applies for a plan year beginning in 2008 is 98.61%) and the annuitant mortality table for the period ages 55 and above. Similarly, if a 45-year-old terminated vested participant is projected to commence an annuity at age 65, the funding target would be determined using the nonannuitant mortality table for

the period before the participant attains age 65 and the annuitant mortality table for ages 65 and above.

(2) *Small plan tables*. If static mortality tables are used pursuant to paragraph (a)(3) of this section, as an alternative to the separate static tables specified for annuitants and nonannuitants pursuant to paragraph (b)(1) of this section, a combined static table that applies the same mortality rates to both annuitants and nonannuitants is permitted to be used for a small plan. For this purpose, a small plan is defined as a plan with 500 or fewer participants (including both active and inactive participants) on the valuation date.

(c) *Construction of static tables*—(1) *Source of basic rates*. The static mortality tables that are used pursuant to paragraph (a)(3) of this section are based on the base mortality tables set forth in paragraph (d) of this section.

(2) *Projected mortality improvements*. The mortality rates under the base mortality tables are projected to improve using the projection factors provided in Projection Scale AA, as set forth in paragraph (d) of this section. Using these projection factors, the mortality rate for an individual at each age is determined as the individual's base mortality rate (that is, the applicable base mortality rate from the table set forth in paragraph (d) of this section for the individual at that age) multiplied by the mortality improvement factor. The mortality improvement factor is equal to (1 - projection factor for that age)^n, where n is equal to the projection period. The annuitant mortality rates for a plan year are determined using a projection period that runs from the calendar year 2000 until 7 years after the calendar year that contains the valuation date for the plan year. The nonannuitant mortality rates for a plan year are determined using a projection period that runs from the calendar year 2000 until 15 years after the calendar year that contains the valuation date for the plan year. Thus, for example, for a plan year with a January 1, 2012, valuation date, the annuitant mortality rates are determined using a projection period that runs from 2000 until 2019 (19 years) and the nonannuitant mortality rates are determined using a projection period that runs from 2000 until 2027 (27 years).

(3) *Construction of combined tables for small plans*. The combined mortality tables that are permitted to be used for small plans pursuant to paragraph (b)(2) of this section are constructed from the separate nonannuitant and annuitant tables using the weighting factors for small plans that are set forth in paragraph (d) of this section. The weighting factors are applied to develop these mortality tables using the following equation: Combined mortality rate = [nonannuitant rate * (1- weighting factor)] + [annuitant rate * weighting factor].

(d) *Base mortality tables and projection factors*. The following base mortality tables and projection factors are used to determine generational mortality tables for purposes of determining present value or making any computation under section 430 as set forth in paragraph (a)(4) of this section. In addition, the following base mortality tables and projection factors are used to determine the static mortality tables that are used for purposes of determining present value or making any computation under section 430 as set forth in paragraphs (a)(3) and (c) of this section. See §1.430(h)(3)–2(c)(3) for rules regarding the required use of the projection factors set forth in this paragraph (d) in connection with a plan-specific substitute mortality table.

Age	MALE	MALE	MALE	MALE	FEMALE	FEMALE	FEMALE	FEMALE
	Base Non-Annuitant Mortality Rates (Year 2000)	Base Annuitant Mortality Rates (Year 2000)	Scale AA Projection Factors	Weighting Factors for Small Plans	Base Non-Annuitant Mortality Rates (Year 2000)	Base Annuitant Mortality Rates (Year 2000)	Scale AA Projection Factors	Weighting Factors for Small Plans
1	0.000637	0.000637	0.020	-	0.000571	0.000571	0.020	-
2	0.000430	0.000430	0.020	-	0.000372	0.000372	0.020	-
3	0.000357	0.000357	0.020	-	0.000278	0.000278	0.020	-
4	0.000278	0.000278	0.020	-	0.000208	0.000208	0.020	-
5	0.000255	0.000255	0.020	-	0.000188	0.000188	0.020	-
6	0.000244	0.000244	0.020	-	0.000176	0.000176	0.020	-
7	0.000234	0.000234	0.020	-	0.000165	0.000165	0.020	-
8	0.000216	0.000216	0.020	-	0.000147	0.000147	0.020	-
9	0.000209	0.000209	0.020	-	0.000140	0.000140	0.020	-
10	0.000212	0.000212	0.020	-	0.000141	0.000141	0.020	-
11	0.000219	0.000219	0.020	-	0.000143	0.000143	0.020	-
12	0.000228	0.000228	0.020	-	0.000148	0.000148	0.020	-
13	0.000240	0.000240	0.020	-	0.000155	0.000155	0.020	-

Age	MALE	MALE	MALE	MALE	FEMALE	FEMALE	FEMALE	FEMALE
	Base Non-Annuitant Mortality Rates (Year 2000)	Base Annuitant Mortality Rates (Year 2000)	Scale AA Projection Factors	Weighting Factors for Small Plans	Base Non-Annuitant Mortality Rates (Year 2000)	Base Annuitant Mortality Rates (Year 2000)	Scale AA Projection Factors	Weighting Factors for Small Plans
14	0.000254	0.000254	0.019	-	0.000162	0.000162	0.018	-
15	0.000269	0.000269	0.019	-	0.000170	0.000170	0.016	-
16	0.000284	0.000284	0.019	-	0.000177	0.000177	0.015	-
17	0.000301	0.000301	0.019	-	0.000184	0.000184	0.014	-
18	0.000316	0.000316	0.019	-	0.000188	0.000188	0.014	-
19	0.000331	0.000331	0.019	-	0.000190	0.000190	0.015	-
20	0.000345	0.000345	0.019	-	0.000191	0.000191	0.016	-
21	0.000357	0.000357	0.018	-	0.000192	0.000192	0.017	-
22	0.000366	0.000366	0.017	-	0.000194	0.000194	0.017	-
23	0.000373	0.000373	0.015	-	0.000197	0.000197	0.016	-
24	0.000376	0.000376	0.013	-	0.000201	0.000201	0.015	-
25	0.000376	0.000376	0.010	-	0.000207	0.000207	0.014	-
26	0.000378	0.000378	0.006	-	0.000214	0.000214	0.012	-
27	0.000382	0.000382	0.005	-	0.000223	0.000223	0.012	-
28	0.000393	0.000393	0.005	-	0.000235	0.000235	0.012	-
29	0.000412	0.000412	0.005	-	0.000248	0.000248	0.012	-
30	0.000444	0.000444	0.005	-	0.000264	0.000264	0.010	-
31	0.000499	0.000499	0.005	-	0.000307	0.000307	0.008	-
32	0.000562	0.000562	0.005	-	0.000350	0.000350	0.008	-
33	0.000631	0.000631	0.005	-	0.000394	0.000394	0.009	-
34	0.000702	0.000702	0.005	-	0.000435	0.000435	0.010	-
35	0.000773	0.000773	0.005	-	0.000475	0.000475	0.011	-
36	0.000841	0.000841	0.005	-	0.000514	0.000514	0.012	-
37	0.000904	0.000904	0.005	-	0.000554	0.000554	0.013	-
38	0.000964	0.000964	0.006	-	0.000598	0.000598	0.014	-
39	0.001021	0.001021	0.007	-	0.000648	0.000648	0.015	-
40	0.001079	0.001079	0.008	-	0.000706	0.000706	0.015	-
41	0.001142	0.001157	0.009	0.0045	0.000774	0.000774	0.015	-
42	0.001215	0.001312	0.010	0.0091	0.000852	0.000852	0.015	-
43	0.001299	0.001545	0.011	0.0136	0.000937	0.000937	0.015	-
44	0.001397	0.001855	0.012	0.0181	0.001029	0.001029	0.015	-
45	0.001508	0.002243	0.013	0.0226	0.001124	0.001124	0.016	0.0084
46	0.001616	0.002709	0.014	0.0272	0.001223	0.001223	0.017	0.0167
47	0.001734	0.003252	0.015	0.0317	0.001326	0.001335	0.018	0.0251
48	0.001860	0.003873	0.016	0.0362	0.001434	0.001559	0.018	0.0335
49	0.001995	0.004571	0.017	0.0407	0.001550	0.001896	0.018	0.0419

Age	MALE	MALE	MALE	MALE	FEMALE	FEMALE	FEMALE	FEMALE
	Base Non-Annuitant Mortality Rates (Year 2000)	Base Annuitant Mortality Rates (Year 2000)	Scale AA Projection Factors	Weighting Factors for Small Plans	Base Non-Annuitant Mortality Rates (Year 2000)	Base Annuitant Mortality Rates (Year 2000)	Scale AA Projection Factors	Weighting Factors for Small Plans
50	0.002138	0.005347	0.018	0.0453	0.001676	0.002344	0.017	0.0502
51	0.002288	0.005528	0.019	0.0498	0.001814	0.002459	0.016	0.0586
52	0.002448	0.005644	0.020	0.0686	0.001967	0.002647	0.014	0.0744
53	0.002621	0.005722	0.020	0.0953	0.002135	0.002895	0.012	0.0947
54	0.002812	0.005797	0.020	0.1288	0.002321	0.003190	0.010	0.1189
55	0.003029	0.005905	0.019	0.2066	0.002526	0.003531	0.008	0.1897
56	0.003306	0.006124	0.018	0.3173	0.002756	0.003925	0.006	0.2857
57	0.003628	0.006444	0.017	0.3780	0.003010	0.004385	0.005	0.3403
58	0.003997	0.006895	0.016	0.4401	0.003291	0.004921	0.005	0.3878
59	0.004414	0.007485	0.016	0.4986	0.003599	0.005531	0.005	0.4360
60	0.004878	0.008196	0.016	0.5633	0.003931	0.006200	0.005	0.4954
61	0.005382	0.009001	0.015	0.6338	0.004285	0.006919	0.005	0.5805
62	0.005918	0.009915	0.015	0.7103	0.004656	0.007689	0.005	0.6598
63	0.006472	0.010951	0.014	0.7902	0.005039	0.008509	0.005	0.7520
64	0.007028	0.012117	0.014	0.8355	0.005429	0.009395	0.005	0.8043
65	0.007573	0.013419	0.014	0.8832	0.005821	0.010364	0.005	0.8552
66	0.008099	0.014868	0.013	0.9321	0.006207	0.011413	0.005	0.9118
67	0.008598	0.016460	0.013	0.9510	0.006583	0.012540	0.005	0.9367
68	0.009069	0.018200	0.014	0.9639	0.006945	0.013771	0.005	0.9523
69	0.009510	0.020105	0.014	0.9714	0.007289	0.015153	0.005	0.9627
70	0.009922	0.022206	0.015	0.9740	0.007613	0.016742	0.005	0.9661
71	0.010912	0.024570	0.015	0.9766	0.008309	0.018579	0.006	0.9695
72	0.012892	0.027281	0.015	0.9792	0.009700	0.020665	0.006	0.9729
73	0.015862	0.030387	0.015	0.9818	0.011787	0.022970	0.007	0.9763
74	0.019821	0.033900	0.015	0.9844	0.014570	0.025458	0.007	0.9797
75	0.024771	0.037834	0.014	0.9870	0.018049	0.028106	0.008	0.9830
76	0.030710	0.042169	0.014	0.9896	0.022224	0.030966	0.008	0.9864
77	0.037640	0.046906	0.013	0.9922	0.027094	0.034105	0.007	0.9898
78	0.045559	0.052123	0.012	0.9948	0.032660	0.037595	0.007	0.9932
79	0.054469	0.057927	0.011	0.9974	0.038922	0.041506	0.007	0.9966
80	0.064368	0.064368	0.010	1.0000	0.045879	0.045879	0.007	1.0000
81	0.072041	0.072041	0.009	1.0000	0.050780	0.050780	0.007	1.0000
82	0.080486	0.080486	0.008	1.0000	0.056294	0.056294	0.007	1.0000
83	0.089718	0.089718	0.008	1.0000	0.062506	0.062506	0.007	1.0000
84	0.099779	0.099779	0.007	1.0000	0.069517	0.069517	0.007	1.0000
85	0.110757	0.110757	0.007	1.0000	0.077446	0.077446	0.006	1.0000

Age	MALE	MALE	MALE	MALE	FEMALE	FEMALE	FEMALE	FEMALE
	Base Non-Annuitant Mortality Rates (Year 2000)	Base Annuitant Mortality Rates (Year 2000)	Scale AA Projection Factors	Weighting Factors for Small Plans	Base Non-Annuitant Mortality Rates (Year 2000)	Base Annuitant Mortality Rates (Year 2000)	Scale AA Projection Factors	Weighting Factors for Small Plans
86	0.122797	0.122797	0.007	1.0000	0.086376	0.086376	0.005	1.0000
87	0.136043	0.136043	0.006	1.0000	0.096337	0.096337	0.004	1.0000
88	0.150590	0.150590	0.005	1.0000	0.107303	0.107303	0.004	1.0000
89	0.166420	0.166420	0.005	1.0000	0.119154	0.119154	0.003	1.0000
90	0.183408	0.183408	0.004	1.0000	0.131682	0.131682	0.003	1.0000
91	0.199769	0.199769	0.004	1.0000	0.144604	0.144604	0.003	1.0000
92	0.216605	0.216605	0.003	1.0000	0.157618	0.157618	0.003	1.0000
93	0.233662	0.233662	0.003	1.0000	0.170433	0.170433	0.002	1.0000
94	0.250693	0.250693	0.003	1.0000	0.182799	0.182799	0.002	1.0000
95	0.267491	0.267491	0.002	1.0000	0.194509	0.194509	0.002	1.0000
96	0.283905	0.283905	0.002	1.0000	0.205379	0.205379	0.002	1.0000
97	0.299852	0.299852	0.002	1.0000	0.215240	0.215240	0.001	1.0000
98	0.315296	0.315296	0.001	1.0000	0.223947	0.223947	0.001	1.0000
99	0.330207	0.330207	0.001	1.0000	0.231387	0.231387	0.001	1.0000
100	0.344556	0.344556	0.001	1.0000	0.237467	0.237467	0.001	1.0000
101	0.358628	0.358628	0.000	1.0000	0.244834	0.244834	0.000	1.0000
102	0.371685	0.371685	0.000	1.0000	0.254498	0.254498	0.000	1.0000
103	0.383040	0.383040	0.000	1.0000	0.266044	0.266044	0.000	1.0000
104	0.392003	0.392003	0.000	1.0000	0.279055	0.279055	0.000	1.0000
105	0.397886	0.397886	0.000	1.0000	0.293116	0.293116	0.000	1.0000
106	0.400000	0.400000	0.000	1.0000	0.307811	0.307811	0.000	1.0000
107	0.400000	0.400000	0.000	1.0000	0.322725	0.322725	0.000	1.0000
108	0.400000	0.400000	0.000	1.0000	0.337441	0.337441	0.000	1.0000
109	0.400000	0.400000	0.000	1.0000	0.351544	0.351544	0.000	1.0000
110	0.400000	0.400000	0.000	1.0000	0.364617	0.364617	0.000	1.0000
111	0.400000	0.400000	0.000	1.0000	0.376246	0.376246	0.000	1.0000
112	0.400000	0.400000	0.000	1.0000	0.386015	0.386015	0.000	1.0000
113	0.400000	0.400000	0.000	1.0000	0.393507	0.393507	0.000	1.0000
114	0.400000	0.400000	0.000	1.0000	0.398308	0.398308	0.000	1.0000
115	0.400000	0.400000	0.000	1.0000	0.400000	0.400000	0.000	1.0000
116	0.400000	0.400000	0.000	1.0000	0.400000	0.400000	0.000	1.0000
117	0.400000	0.400000	0.000	1.0000	0.400000	0.400000	0.000	1.0000
118	0.400000	0.400000	0.000	1.0000	0.400000	0.400000	0.000	1.0000
119	0.400000	0.400000	0.000	1.0000	0.400000	0.400000	0.000	1.0000
120	1.000000	1.000000	0.000	1.0000	1.000000	1.000000	0.000	1.0000

(e) *Static mortality tables with respect to valuation dates occurring during 2008.* The following static mortality tables are used pursuant to paragraph (a)(3) of this section for determining present value or making any computation under section 430 with respect to valuation dates occurring during 2008.

Age	MALE	MALE	MALE	FEMALE	FEMALE	FEMALE
	Non-Annuitant Mortality Rates	Annuitant Mortality Rates	Optional Combined Table for Small Plans	Non-Annuitant Mortality Rates	Annuitant Mortality Rates	Optional Combined Table for Small Plans
1	0.000400	0.000400	0.000400	0.000359	0.000359	0.000359
2	0.000270	0.000270	0.000270	0.000234	0.000234	0.000234
3	0.000224	0.000224	0.000224	0.000175	0.000175	0.000175
4	0.000175	0.000175	0.000175	0.000131	0.000131	0.000131
5	0.000160	0.000160	0.000160	0.000118	0.000118	0.000118
6	0.000153	0.000153	0.000153	0.000111	0.000111	0.000111
7	0.000147	0.000147	0.000147	0.000104	0.000104	0.000104
8	0.000136	0.000136	0.000136	0.000092	0.000092	0.000092
9	0.000131	0.000131	0.000131	0.000088	0.000088	0.000088
10	0.000133	0.000133	0.000133	0.000089	0.000089	0.000089
11	0.000138	0.000138	0.000138	0.000090	0.000090	0.000090
12	0.000143	0.000143	0.000143	0.000093	0.000093	0.000093
13	0.000151	0.000151	0.000151	0.000097	0.000097	0.000097
14	0.000163	0.000163	0.000163	0.000107	0.000107	0.000107
15	0.000173	0.000173	0.000173	0.000117	0.000117	0.000117
16	0.000183	0.000183	0.000183	0.000125	0.000125	0.000125
17	0.000194	0.000194	0.000194	0.000133	0.000133	0.000133
18	0.000203	0.000203	0.000203	0.000136	0.000136	0.000136
19	0.000213	0.000213	0.000213	0.000134	0.000134	0.000134
20	0.000222	0.000222	0.000222	0.000132	0.000132	0.000132
21	0.000235	0.000235	0.000235	0.000129	0.000129	0.000129
22	0.000247	0.000247	0.000247	0.000131	0.000131	0.000131
23	0.000263	0.000263	0.000263	0.000136	0.000136	0.000136
24	0.000278	0.000278	0.000278	0.000142	0.000142	0.000142
25	0.000298	0.000298	0.000298	0.000150	0.000150	0.000150
26	0.000329	0.000329	0.000329	0.000162	0.000162	0.000162
27	0.000340	0.000340	0.000340	0.000169	0.000169	0.000169
28	0.000350	0.000350	0.000350	0.000178	0.000178	0.000178
29	0.000367	0.000367	0.000367	0.000188	0.000188	0.000188
30	0.000396	0.000396	0.000396	0.000210	0.000210	0.000210
31	0.000445	0.000445	0.000445	0.000255	0.000255	0.000255
32	0.000501	0.000501	0.000501	0.000291	0.000291	0.000291
33	0.000562	0.000562	0.000562	0.000320	0.000320	0.000320
34	0.000626	0.000626	0.000626	0.000345	0.000345	0.000345

Age	MALE	MALE	MALE	FEMALE	FEMALE	FEMALE
	Non-Annuitant Mortality Rates	Annuitant Mortality Rates	Optional Combined Table for Small Plans	Non-Annuitant Mortality Rates	Annuitant Mortality Rates	Optional Combined Table for Small Plans
35	0.000689	0.000689	0.000689	0.000368	0.000368	0.000368
36	0.000749	0.000749	0.000749	0.000389	0.000389	0.000389
37	0.000806	0.000806	0.000806	0.000410	0.000410	0.000410
38	0.000839	0.000839	0.000839	0.000432	0.000432	0.000432
39	0.000869	0.000869	0.000869	0.000458	0.000458	0.000458
40	0.000897	0.000897	0.000897	0.000499	0.000499	0.000499
41	0.000928	0.000955	0.000928	0.000547	0.000547	0.000547
42	0.000964	0.001070	0.000965	0.000602	0.000602	0.000602
43	0.001007	0.001243	0.001010	0.000662	0.000662	0.000662
44	0.001058	0.001474	0.001066	0.000727	0.000727	0.000727
45	0.001116	0.001763	0.001131	0.000776	0.000779	0.000776
46	0.001168	0.002109	0.001194	0.000824	0.000882	0.000825
47	0.001225	0.002513	0.001266	0.000873	0.001037	0.000877
48	0.001284	0.002975	0.001345	0.000944	0.001244	0.000954
49	0.001345	0.003495	0.001433	0.001021	0.001502	0.001041
50	0.001408	0.004072	0.001529	0.001130	0.001812	0.001164
51	0.001472	0.004146	0.001605	0.001252	0.001931	0.001292
52	0.001538	0.004168	0.001718	0.001422	0.002142	0.001476
53	0.001647	0.004226	0.001893	0.001617	0.002415	0.001693
54	0.001767	0.004281	0.002091	0.001842	0.002744	0.001949
55	0.001948	0.004428	0.002460	0.002100	0.003130	0.002295
56	0.002177	0.004663	0.002966	0.002400	0.003586	0.002739
57	0.002446	0.004983	0.003405	0.002682	0.004067	0.003153
58	0.002758	0.005413	0.003926	0.002933	0.004565	0.003566
59	0.003046	0.005876	0.004457	0.003207	0.005130	0.004045
60	0.003366	0.006435	0.005095	0.003503	0.005751	0.004617
61	0.003802	0.007175	0.005940	0.003818	0.006418	0.005327
62	0.004180	0.007904	0.006825	0.004149	0.007132	0.006117
63	0.004680	0.008864	0.007986	0.004490	0.007893	0.007049
64	0.005082	0.009807	0.009030	0.004838	0.008715	0.007956
65	0.005476	0.010861	0.010232	0.005187	0.009613	0.008972
66	0.005994	0.012218	0.011795	0.005531	0.010586	0.010140
67	0.006363	0.013527	0.013176	0.005866	0.011632	0.011267
68	0.006557	0.014731	0.014436	0.006189	0.012774	0.012460
69	0.006876	0.016273	0.016004	0.006495	0.014055	0.013773
70	0.007009	0.017702	0.017424	0.006784	0.015529	0.015233
71	0.007888	0.019586	0.019312	0.007411	0.016975	0.016683

Age	MALE	MALE	MALE	FEMALE	FEMALE	FEMALE
	Non-Annuitant Mortality Rates	Annuitant Mortality Rates	Optional Combined Table for Small Plans	Non-Annuitant Mortality Rates	Annuitant Mortality Rates	Optional Combined Table for Small Plans
72	0.009646	0.021747	0.021495	0.008666	0.018881	0.018604
73	0.012283	0.024223	0.024006	0.010548	0.020673	0.020433
74	0.015799	0.027024	0.026849	0.013058	0.022912	0.022712
75	0.020195	0.030622	0.030486	0.016195	0.024916	0.024768
76	0.025470	0.034131	0.034041	0.019959	0.027451	0.027349
77	0.031624	0.038547	0.038493	0.024351	0.030694	0.030629
78	0.038657	0.043489	0.043464	0.029370	0.033835	0.033805
79	0.046569	0.049071	0.049064	0.035017	0.037355	0.037347
80	0.055360	0.055360	0.055360	0.041291	0.041291	0.041291
81	0.062905	0.062905	0.062905	0.045702	0.045702	0.045702
82	0.071350	0.071350	0.071350	0.050664	0.050664	0.050664
83	0.079534	0.079534	0.079534	0.056255	0.056255	0.056255
84	0.089800	0.089800	0.089800	0.062565	0.062565	0.062565
85	0.099680	0.099680	0.099680	0.070761	0.070761	0.070761
86	0.110516	0.110516	0.110516	0.080120	0.080120	0.080120
87	0.124300	0.124300	0.124300	0.090716	0.090716	0.090716
88	0.139683	0.139683	0.139683	0.101042	0.101042	0.101042
89	0.154366	0.154366	0.154366	0.113903	0.113903	0.113903
90	0.172706	0.172706	0.172706	0.125879	0.125879	0.125879
91	0.188113	0.188113	0.188113	0.138232	0.138232	0.138232
92	0.207060	0.207060	0.207060	0.150672	0.150672	0.150672
93	0.223365	0.223365	0.223365	0.165391	0.165391	0.165391
94	0.239646	0.239646	0.239646	0.177391	0.177391	0.177391
95	0.259578	0.259578	0.259578	0.188755	0.188755	0.188755
96	0.275506	0.275506	0.275506	0.199303	0.199303	0.199303
97	0.290981	0.290981	0.290981	0.212034	0.212034	0.212034
98	0.310600	0.310600	0.310600	0.220611	0.220611	0.220611
99	0.325288	0.325288	0.325288	0.227940	0.227940	0.227940
100	0.339424	0.339424	0.339424	0.233930	0.233930	0.233930
101	0.358628	0.358628	0.358628	0.244834	0.244834	0.244834
102	0.371685	0.371685	0.371685	0.254498	0.254498	0.254498
103	0.383040	0.383040	0.383040	0.266044	0.266044	0.266044
104	0.392003	0.392003	0.392003	0.279055	0.279055	0.279055
105	0.397886	0.397886	0.397886	0.293116	0.293116	0.293116
106	0.400000	0.400000	0.400000	0.307811	0.307811	0.307811
107	0.400000	0.400000	0.400000	0.322725	0.322725	0.322725
108	0.400000	0.400000	0.400000	0.337441	0.337441	0.337441

Age	MALE	MALE	MALE	FEMALE	FEMALE	FEMALE
	Non-Annuitant Mortality Rates	Annuitant Mortality Rates	Optional Combined Table for Small Plans	Non-Annuitant Mortality Rates	Annuitant Mortality Rates	Optional Combined Table for Small Plans
109	0.400000	0.400000	0.400000	0.351544	0.351544	0.351544
110	0.400000	0.400000	0.400000	0.364617	0.364617	0.364617
111	0.400000	0.400000	0.400000	0.376246	0.376246	0.376246
112	0.400000	0.400000	0.400000	0.386015	0.386015	0.386015
113	0.400000	0.400000	0.400000	0.393507	0.393507	0.393507
114	0.400000	0.400000	0.400000	0.398308	0.398308	0.398308
115	0.400000	0.400000	0.400000	0.400000	0.400000	0.400000
116	0.400000	0.400000	0.400000	0.400000	0.400000	0.400000
117	0.400000	0.400000	0.400000	0.400000	0.400000	0.400000
118	0.400000	0.400000	0.400000	0.400000	0.400000	0.400000
119	0.400000	0.400000	0.400000	0.400000	0.400000	0.400000
120	1.000000	1.000000	1.000000	1.000000	1.000000	1.000000

(f) *Effective/Applicability date*. This section applies for plan years beginning on or after January 1, 2008.

Par. 3. Section 1.430(h)(3)–2 is added to read as follows:

§1.430(h)(3)–2 Plan-specific substitute mortality tables used to determine present value.

(a) *In general*. This section sets forth rules for the use of substitute mortality tables under section 430(h)(3)(C) in determining any present value or making any computation under section 430 in accordance with §1.430(h)(3)–1(a)(1). In order to use substitute mortality tables, a plan sponsor must obtain approval to use substitute mortality tables for the plan in accordance with the procedures set forth in paragraph (b) of this section. Paragraph (c) of this section sets forth rules for the development of substitute mortality tables, including guidelines for determining whether a plan has sufficient credible mortality experience to use substitute mortality tables. Paragraph (d) of this section sets forth special rules regarding the use of substitute mortality tables. The Commissioner may, in revenue rulings and procedures, notices or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter), provide additional guidance regarding approval and use of substitute mortality tables under section 430(h)(3)(C) and related matters.

(b) *Procedures for obtaining approval to use substitute mortality tables*—(1) *Written request to use substitute mortality tables*—(i) *General requirements*. In order to use substitute mortality tables, a plan sponsor must submit a written request to the Commissioner that demonstrates that those substitute mortality tables meet the requirements of section 430(h)(3)(C) and this section. This request must state the first plan year and the term of years (not more than 10) that the tables are requested to be used.

(ii) *Time for written request*—(A) *In general*. Except as provided in this paragraph (b)(1)(ii), substitute mortality tables cannot be used for a plan year unless the plan sponsor submits the written request described in paragraph (b)(1)(i) of this section at least 7 months prior to the first day of the first plan year for which the substitute mortality tables are to apply.

(B) *Special rule for requests submitted on or before October 1, 2007*. Notwithstanding the rule of paragraph (b)(1)(ii)(A) of this section, the timing of the written request described in paragraph (b)(1)(i) of this section does not prevent a plan from using substitute mortality tables for a plan year provided that the written request is submitted no later than October 1, 2007.

(C) *Special rule for requests submitted on or before October 1, 2008, with respect to plan years beginning during 2009*. Notwithstanding the rule of paragraph (b)(1)(ii)(A) of this section, the timing of the written request described in paragraph (b)(1)(i) of this section does not prevent a plan from using substitute mortality tables for a plan year that begins during 2009 provided that the written request is submitted no later than October 1, 2008.

(2) *Commissioner's review of request*—(i) *In general*. During the 180-day period that begins on the date the plan sponsor submits a request to use substitute mortality tables for a plan pursuant to this section, the Commissioner will determine whether the request to use substitute mortality tables satisfies the requirements of this section (including any published guidance issued pursuant to paragraph (a) of this section), and will either approve or deny the request. The Commissioner will deny a request if the request fails to meet the requirements of this section or if the Commissioner determines that a substitute mortality table does not sufficiently reflect the mortality experience of the applicable plan population.

(ii) *Request for additional information*. The Commissioner may request additional information with respect to the submission. Failure to provide that information on a timely basis constitutes grounds for denial of the request.

(iii) *Deemed approval*. Except as provided in paragraph (b)(2)(iv) of this sec-

tion, if the Commissioner does not issue a denial within the 180-day review period, the request is deemed to have been approved.

(iv) *Extension of time permitted*. The Commissioner and a plan sponsor may, before the expiration of the 180-day review period, agree in writing to extend that period, provided that any such agreement also specifies any revisions in the plan sponsor's request, including any change in the requested term of use of the substitute mortality tables.

(c) *Development of substitute mortality tables*—(1) *Mortality experience requirements*—(i) *In general*. Substitute mortality tables must reflect the actual mortality experience of the pension plan for which the tables are to be used and that mortality experience must be credible mortality experience as described in paragraph (c)(1)(ii) of this section. Separate mortality tables must be established for each gender under the plan, and a substitute mortality table is permitted to be established for a gender only if the plan has credible mortality experience with respect to that gender.

(ii) *Credible mortality experience*. There is credible mortality experience for a gender within a plan if and only if, over the period covered by the experience study described in paragraph (c)(2)(ii) of this section, there are at least 1,000 deaths within that gender.

(iii) *Gender without credible mortality experience*—(A) *In general*. If, for the first year for which a plan uses substitute mortality tables, one gender has credible mortality experience but the other gender does not have credible mortality experience, the substitute mortality tables are used for the gender that does have credible mortality experience and the mortality tables under §1.430(h)(3)–1 are used for the gender that does not have credible mortality experience. For a subsequent plan year, the plan sponsor may continue to use substitute mortality tables for the gender with credible mortality experience without using substitute mortality tables for the other gender only if the other gender continues to lack credible mortality experience for that subsequent plan year.

(B) *Demonstration of lack of credible mortality experience for a gender*. In general, in order to demonstrate that a gender within a plan does not have credible mortality experience for a plan year, the demonstration that the gender population within the plan has fewer than 1,000 deaths over a 4-year period must be made using a 4-year period that ends less than 3 years before the first day of that plan year. For example, if a plan uses substitute mortality tables based on credible mortality experience obtained over a 4-year experience study period for its male population and the standard mortality tables under §1.430(h)(3)–1 for its female population, there must be a demonstration that the plan's female population does not have at least 1,000 deaths in a 4-year period that ends less than 3 years before the first day of that plan year. However, if the experience study period described in paragraph (c)(2)(ii)(A) of this section exceeds 4 years then, in order to demonstrate that a gender within a plan does not have credible mortality experience for a plan year, the mortality experience of that population must be analyzed over a period that is the same length as the experience study on which the substitute mortality tables are based and that ends less than 3 years before the first day of that plan year.

(iv) *Disabled individuals*. Under section 430(h)(3)(D), separate mortality tables are permitted to be used for certain disabled individuals. If such separate mortality tables are used for those disabled individuals, then those individuals are disregarded for all purposes under this section. Thus, if the mortality tables under section 430(h)(3)(D) are used for disabled individuals under a plan, mortality experience with respect to those individuals must be excluded in developing mortality rates for substitute mortality tables under this section.

(2) *Base table and base year*—(i) *In general*. Development of a substitute mortality table under this section requires creation of a base table and identification of a base year under this paragraph (c)(2). The base table and base year are then used to determine a substitute mortality table under paragraph (c)(3) of this section.

(ii) *Experience study and base table requirements*—(A) *In general*. The base table for a plan population must be developed from an experience study of the mortality experience of that plan population that generates amounts-weighted mortality rates based on experience data for the plan that is collected over an experience study period. The minimum length of the experience study period is 2 years. The maximum length of the experience study period is 5 years, but can be extended by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter). The last day of the final year reflected in the experience data must be less than 3 years before the first day of the first plan year for which the substitute mortality tables are to apply. For example, if July 1, 2009, is the first day of the first plan year for which the substitute mortality tables will be used, then an experience study using calendar year data must include data collected for a period that ends no earlier than December 31, 2006.

(B) *Amounts-weighted mortality rates*. The amounts-weighted mortality rate for an age is equal to the quotient determined by dividing the sum of the accrued benefits (or payable benefits, in the case of individuals in pay status) for all individuals at that age at the beginning of the year who died during the year, by the sum of the accrued benefits (or payable benefits, in the case of individuals in pay status) for all individuals at that age at the beginning of the year, with appropriate adjustments for individuals who left the relevant plan population during the year for reasons other than death. Because amounts-weighted mortality rates for a plan cannot be determined without accrued (or payable) benefits, the mortality experience study used to develop a base table cannot include periods before the plan was established.

(C) *Grouping of ages*. Amounts-weighted mortality rates may be derived from amounts-weighted mortality rates for age groups. The Commissioner, in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter), may specify grouping rules (for example, 5-year age groups, except for extreme ages such as ages above 100 or below 20) and methods for developing amounts-weighted mortality rates for individual ages from amounts-weighted mortality rates initially determined for each age group.

(D) *Base table construction*. The base tables must be constructed from the amounts-weighted mortality rates determined in paragraph (c)(2)(ii)(B) of this section. The base tables must be con-

structed either directly through graduation of the amounts-weighted mortality rates or indirectly by applying a level percentage to the applicable mortality table set forth in §1.430(h)(3)–1, provided that the adjusted table sufficiently reflects the mortality experience of the plan. The Commissioner also may permit the use of other recognized mortality tables in the construction of base tables, applying a similar mortality experience standard.

(iii) *Base year requirements*. The base year is the calendar year that contains the day before the midpoint of the experience study period. If the base table is constructed by applying a level percentage to a table set forth in §1.430(h)(3)–1, then the percentage must be applied to the table under §1.430(h)(3)–1 after it has been projected to the base year using Projection Scale AA, as set forth in §1.430(h)(3)–1(d). Thus, for example, if the base year of the mortality experience study is 2005, the applicable base (year 2000) mortality rates must be projected 5 years prior to determining the level percentage to be applied to the applicable projected base (year 2000) mortality rates.

(iv) *Change in number of individuals covered by table*. Experience data cannot be used to develop a base table if the number of individuals in the population covered by the table (for example, the male annuitant population) as of the last day of the plan year before the year the request to use substitute mortality tables is made, compared to the average number of individuals in that population over the years covered by the experience study on which the substitute mortality tables are based, reflects a difference of 20 percent or more, unless it is demonstrated to the satisfaction of the Commissioner that the experience data is accurately predictive of future mortality of that plan population (taking into account the effect of the change in individuals) after appropriate adjustments to the data are made (for example, excluding data from individuals with respect to a spun-off portion of the plan). For this purpose, a reasonable estimate of the number of individuals in the population covered by the table may be used, such as the estimated number of participants and beneficiaries used for purposes of the PBGC Form 1-ES.

(3) *Determination of substitute mortality tables*—(i) *In general*. A plan's substitute mortality tables must be generational mortality tables. Substitute mortality tables are determined using the base mortality tables developed pursuant to paragraph (c)(2) of this section and the projection factors provided in Projection Scale AA, as set forth in §1.430(h)(3)–1(d). Under the generational mortality tables, the probability of an individual's death at a particular age is determined as the individual's base mortality rate (that is, the applicable mortality rate from the base mortality table for the age for which the probability of death is being determined) multiplied by the mortality improvement factor. The mortality improvement factor is equal to (1 - projection factor for that age)^n, where n is equal to the projection period (the number of years between the base year for the base mortality table and the calendar year in which the individual attains the age for which the probability of death is being determined).

(ii) *Example of calculation*. As an example of the use of generational mortality tables under paragraph (c)(3)(i) of this section, if approved substitute mortality tables are based on data collected during 2005 and 2006, the base year would be 2005 because 2005 would be the year that contains the day before the midpoint of the experience study period. If the tables show a base mortality rate of .006000 for male annuitants at age 54, the probability of death at age 54 for a male annuitant born in 1974 would be determined using the base mortality rate of .006000, the age–54 projection factor of .020 (pursuant to the Scale AA Projection Factors set forth in §1.430(h)(3)–1(d)) and a projection period of 23 years. The projection period is the number of years between the base year of 2005 and the calendar year in which the individual reaches age 54. Accordingly, the mortality improvement factor would be .628347 and the probability of death at age 54 would be .003770.

(4) *Separate tables for specified populations*—(i) *In general*. Except as provided in this paragraph (c)(4), separate substitute mortality tables are permitted to be used for separate populations within a gender under a plan only if—

(A) All individuals of that gender in the plan are divided into separate populations;

(B) Each separate population has credible mortality experience as provided in paragraph (c)(4)(iii) of this section; and

(C) The separate substitute mortality table for each separate population is developed using mortality experience data for that population.

(ii) *Annuitant and nonannuitant separate populations*. Notwithstanding paragraph (c)(4)(i)(B) of this section, substitute mortality tables for separate populations of annuitants and nonannuitants within a gender may be used even if only one of those separate populations has credible mortality experience. Similarly, if separate populations that satisfy paragraph (c)(4)(i)(B) of this section are established, then any of those populations may be further subdivided into separate annuitant and nonannuitant subpopulations, provided that at least one of the two resulting subpopulations has credible mortality experience. The standard mortality tables under §1.430(h)(3)–1 are used for a resulting subpopulation that does not have credible mortality experience. For example, in the case of a plan that has credible mortality experience for both its male hourly and salaried individuals, if the male salaried annuitant population has credible mortality experience, the plan may use substitute mortality tables with respect to that population even if the standard mortality tables under §1.430(h)(3)–1 are used for the male salaried nonannuitant population (because that nonannuitant population does not have credible mortality experience).

(iii) *Credible mortality experience for separate populations*. In determining whether a separate population within a gender has credible mortality experience, the requirements of paragraph (c)(1)(ii) of this section must be satisfied but, in applying that paragraph (c)(1)(ii), the separate population should be substituted for the particular gender. In demonstrating that an annuitant or nonannuitant population within a gender or within a separate population does not have credible mortality experience, the requirements of paragraph (c)(1)(iii) of this section must be satisfied but, in applying that paragraph, the annuitant (or nonannuitant) population should be substituted for the particular gender.

(d) *Special rules*—(1) *All plans in controlled group must use substitute mortality tables*—(i) *In general*. Except as otherwise provided in this paragraph (d)(1), substitute mortality tables are permitted to be used for a plan for a plan year only if, for

that plan year (or any portion of that plan year), substitute mortality tables are also approved and used for each other pension plan subject to the requirements of section 430 that is maintained by the sponsor and by each member of the plan sponsor's controlled group. For purposes of this section, the term *controlled group* means any group treated as a single employer under paragraph (b), (c), (m), or (o) of section 414.

(ii) *Plans without credible experience*—(A) *In general*. For the first year for which a plan uses substitute mortality tables, the use of substitute mortality tables for the plan is not prohibited merely because another plan described in paragraph (d)(1)(i) of this section cannot use substitute mortality tables because neither the males nor the females under that other plan have credible mortality experience for a plan year. For each subsequent plan year, the plan sponsor may continue to use substitute mortality tables for the plan with credible mortality experience without using substitute mortality tables for the other plan only if neither the males nor the females under that other plan have credible mortality experience for that subsequent plan year.

(B) *Analysis of mortality experience*. For each plan year in which a plan uses substitute mortality tables, in order to demonstrate that the male and female populations of another plan maintained by the plan sponsor (or by a member of the plan sponsor's controlled group) do not have credible mortality experience, the requirements of paragraph (c)(1)(iii)(B) of this section must be satisfied for that plan year. Thus, a plan is not prohibited from using substitute mortality tables for a plan year merely because another plan in the controlled group of the plan sponsor does not have at least 1,000 male deaths and does not have at least 1,000 female deaths in a 4-year period (or a period that is the length of the experience study period if the experience study period under paragraph (c)(2)(ii)(A) of this section is longer than 4 years) that ends less than 3 years before the first day of that plan year.

(iii) *Newly affiliated plans not using substitute mortality tables*—(A) *In general*. The use of substitute mortality tables for a plan is not prohibited merely because a newly affiliated plan does not use substitute mortality tables, but only through the last day of the plan year of the plan using substitute mortality tables that contains the last day of the period described in section 410(b)(6)(C)(ii) for either the newly affiliated plan or the plan using substitute mortality tables, whichever is later. Thus, for the following plan year, the mortality tables prescribed under §1.430(h)(3)–1 apply with respect to the plan (and all other plans within the plan sponsor's controlled group, including the newly affiliated plan) unless—

(*1*) Approval to use substitute mortality tables has been obtained with respect to the newly affiliated plan pursuant to paragraph (b)(1) of this section; or

(*2*) The newly affiliated plan cannot use substitute mortality tables because neither the males nor the females under the plan have credible mortality experience as described in paragraph (c)(1)(ii) of this section (as determined in accordance with the rules of paragraph (d)(1)(iv) of this section).

(B) *Definition of newly affiliated plan*. For purposes of this section, a plan is treated as a newly affiliated plan if it becomes maintained by the plan sponsor (or by a member of the plan sponsor's controlled group) in connection with a merger, acquisition, or similar transaction described in §1.410(b)–2(f). A plan also is treated as a newly affiliated plan for purposes of this section if the plan is established in connection with a transfer of assets and liabilities from another employer's plan in connection with a merger, acquisition, or similar transaction described in §1.410(b)–2(f).

(iv) *Demonstration of credible mortality experience for newly affiliated plan*—(A) *In general*. In general, in the case of a newly affiliated plan described in paragraph (d)(1)(iii) of this section, the demonstration of whether credible mortality experience exists for the plan for a plan year may be made by either including or excluding mortality experience data for the period prior to the date the plan becomes maintained by a member of the new plan sponsor's controlled group. If a plan sponsor excludes mortality experience data for the period prior to the date the plan becomes maintained within the new plan sponsor's controlled group, the exclusion must apply for all populations within the plan.

(B) *Demonstration of credible mortality experience*. Regardless of whether mortality experience data for the period prior to the date a newly affiliated plan becomes maintained within the new plan sponsor's controlled group is included or excluded for a plan year, the provisions of this section, including the demonstration of credible mortality experience in accordance with paragraph (c)(1)(ii) of this section, must be satisfied before substitute mortality tables may be used with respect to the plan. Thus, for example, the plan must meet the rule in paragraph (c)(2)(ii)(A) of this section that the base table be based on mortality experience data for the plan over a 2-year or longer consecutive period that ends less than 3 years before the first day of the plan year for which substitute mortality tables will be used.

(C) *Demonstration of lack of credible mortality experience*. In the case of a newly affiliated plan described in paragraph (d)(1)(iii) of this section, in order to demonstrate a lack of credible mortality experience with respect to a gender for a plan year, the rules of paragraph (c)(1)(iii)(B) of this section generally will apply. However, a special rule applies if the plan's mortality experience demonstration for a plan year is made by excluding mortality experience for the period prior to the date the plan becomes maintained by a member of the new plan sponsor's controlled group. In such a case, an employer is permitted to demonstrate a plan's lack of credible mortality experience using an experience study period of less than four years, provided that the experience study period begins with the date the plan becomes maintained within the sponsor's controlled group and ends not more than one year and one day before the first day of the plan year with respect to which the lack of credible mortality experience demonstration is made.

(D) *Example*. The following example illustrates the application of this paragraph (d)(1):

Example. (i) Employer A is a corporation and maintains Plan M, which has a calendar year plan year and has obtained approval to use substitute mortality tables for 10 years beginning with the plan year that begins on January 1, 2009. Employer B is a corporation and maintains Plan N, which does not use substitute mortality tables and has a calendar year plan year. On July 1, 2010, Employer A acquires 100% of the stock of Employer B.

(ii) Pursuant to paragraph (d)(1)(iii) of this section, the maintenance of Plan N within the controlled group that maintains Plan M does not impair the use

of substitute mortality tables by Plan M through the end of the plan year that ends on December 31, 2011.

(iii) Pursuant to paragraph (d)(1)(iii) of this section, beginning with the plan year that begins on January 1, 2012, Plan M continues to use substitute mortality tables only if either Plan N obtains approval to use substitute mortality tables or Employer A can demonstrate that Plan N does not have credible mortality experience. Pursuant to paragraph (d)(1)(iv)(C) of this section, Employer A is permitted to either exclude mortality experience date for the period of time before July 1, 2010 (the date Plan N became maintained with Employer A's controlled group), or include that mortality experience data for purposes of demonstrating that Plan N does not have credible mortality experience. Thus, if there is an experience study that shows that the male and female populations of Plan N each do not have 1,000 deaths during the period from July 1, 2010, through December 31, 2010, then the maintenance of Plan N within the Employer A's controlled group does not impair Plan M's use of substitute mortality tables for Plan M's 2012 plan year.

(iv) For Plan M's 2013 plan year, pursuant to paragraph (d)(1)(iv)(C) of this section, the maintenance of Plan N within Employer A's controlled group does not impair Plan M's use of substitute mortality tables if there is an experience study that shows that the male and female populations of Plan N each do not have 1,000 deaths during the period from July 1, 2010, through December 31, 2011.

(2) *Duration of use of tables*. Except as provided in paragraph (d)(4) of this section, substitute mortality tables are used with respect to a plan for the term of consecutive plan years specified in the plan sponsor's written request to use such tables under paragraph (b)(1) of this section and approved by the Commissioner, or such shorter period prescribed by the Commissioner in the approval to use substitute mortality tables. Following the end of such term of use, or following any early termination of use described in paragraph (d)(4) of this section, the mortality tables specified in §1.430(h)(3)–1 apply with respect to the plan unless approval under paragraph (b)(1) of this section has been received by the plan sponsor to use substitute mortality tables for a further term.

(3) *Aggregation*—(i) *Permissive aggregation of plans*. In order for a plan sponsor to use a set of substitute mortality tables with respect to two or more plans, the rules of this section are applied by treating those plans as a single plan. In such a case, the substitute mortality tables must be used for the aggregated plans and must be based on data collected with respect to those aggregated plans.

(ii) *Required aggregation of plans*. In general, plans are not required to be aggregated for purposes of applying the rules of this section. However, for purposes of this section, a plan is required to be aggregated with any plan that was previously spun off from that plan for purposes of this section if the Commissioner determines that one purpose of the spinoff is to avoid the use of substitute mortality tables for any of the plans that were involved in the spinoff.

(4) *Early termination of use of tables*—(i) *General rule*. A plan's substitute mortality tables cannot be used as of the earliest of—

(A) The plan year in which the plan fails to satisfy the requirements of paragraph (c)(1) of this section (regarding credible mortality experience requirements and demonstrations);

(B) The plan year in which the plan fails to satisfy the requirements of paragraph (d)(1) of this section (regarding use of substitute mortality tables by controlled group members);

(C) The second plan year following the plan year in which there is a significant change in individuals covered by the plan as described in paragraph (d)(4)(ii) of this section;

(D) The plan year following the plan year in which a substitute mortality table used for a plan population is no longer accurately predictive of future mortality of that population, as determined by the Commissioner or as certified by the plan's actuary to the satisfaction of the Commissioner; or

(E) The date specified in guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter) pursuant to a replacement of mortality tables specified under section 430(h)(3)(A) and §1.430(h)(3)–1 (other than annual updates to the static mortality tables issued pursuant to §1.430(h)(3)–1(a)(3)).

(ii) *Significant change in coverage*—(A) *Change in coverage from time of experience study*. For purposes of applying the rules of paragraph (d)(4)(i)(C) of this section, a significant change in the individuals covered by a substitute mortality table occurs if there is an increase or decrease in the number of individuals of at least 20 percent compared to the average number of individuals in that population over the years covered by the experience study on which the substitute mortality tables are based. However, a change in coverage is not treated as significant if the plan's actuary certifies in writing to the satisfaction of the Commissioner that the substitute mortality tables used for the plan population continue to be accurately predictive of future mortality of that population (taking into account the effect of the change in the population).

(B) *Change in coverage from time of certification*. For purposes of applying the rules of paragraph (d)(4)(i)(C) of this section, a significant change in the individuals covered by a substitute mortality table occurs if there is an increase or decrease in the number of individuals covered by a substitute mortality table of at least 20 percent compared to the number of individuals in a plan year for which a certification described in paragraph (d)(4)(ii)(A) of this section was made on account of a prior change in coverage. However, a change in coverage is not treated as significant if the plan's actuary certifies in writing to the satisfaction of the Commissioner that the substitute mortality tables used by the plan with respect to the covered population continue to be accurately predictive of future mortality of that population (taking into account the effect of the change in the plan population).

(e) *Effective/Applicability date*. This section applies for plan years beginning on or after January 1, 2009.

Par. 4. Section 1.431(c)(6)–1 is added to read as follows:

§1.431(c)(6)–1 Mortality tables used to determine current liability.

(a) *Mortality tables used to determine current liability*. The mortality assumptions that apply to a defined benefit plan for the plan year pursuant to section 430(h)(3)(A) and §1.430(h)(3)–1(a)(2) are used to determine a multiemployer plan's current liability for purposes of applying the rules of section 431(c)(6). A multiemployer plan is permitted to apply either the static mortality tables used pursuant to §1.430(h)(3)–1(a)(3) or generational mortality tables used pursuant to §1.430(h)(3)–1(a)(4) for this purpose. However, for this purpose, a multiemployer plan is not permitted to use substitute mortality tables under §1.430(h)(3)–2.

(b) *Effective/applicability date*. This section applies for plan years beginning on or after January 1, 2008.

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

Approved July 20, 2008.

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

(Filed by the Office of the Federal Register on July 30, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 31, 2008, 73 F.R. 44632)

Section 431.—Minimum Funding Standards for Multiemployer Plans

26 CFR 1.431(c)(6)–1: Mortality tables used to determine current liability.

Final regulations provide guidance regarding the mortality tables to be used in determining present value or making any computation for purposes of applying certain pension funding requirements. See T.D. 9419, page 790.

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

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

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

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

Section 482.—Allocation of Income and Deductions Among Taxpayers

Federal short-term, mid-term, and long-term rates are set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

Section 483.—Interest on Certain Deferred Payments

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

Section 642.—Special Rules for Credits and Deductions

Federal short-term, mid-term, and long-term rates are set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

Section 706.—Taxable Years of Partner and Partnership

26 CFR 1.706–1: Taxable years of partner and partnership.

What criteria must be met in order for tax-exempt bond partnerships to be eligible to make an election that enables the partners to take into account monthly the inclusions required under §§ 702 and 707(c) of the Code. See Notice 2008-80, page 820.

Section 807.—Rules for Certain Reserves

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

Section 846.—Discounted Unpaid Losses Defined

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

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

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

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

Rev. Rul. 2008–49

This revenue ruling provides various prescribed rates for federal income tax purposes for October 2008 (the current month). Table 1 contains the short-term, mid-term, and long-term applicable federal rates (AFR) for the current month for purposes of section 1274(d) of the Internal Revenue Code. Table 2 contains the short-term, mid-term, and long-term adjusted applicable federal rates (adjusted AFR) for the current month for purposes of section 1288(b). Table 3 sets forth the adjusted federal long-term rate and the long-term tax-exempt rate described in section 382(f). Table 4 contains the appropriate percentages for determining the low-income housing credit described in section 42(b)(2) for buildings placed in service during the current month. Finally, Table 5 contains the federal rate for determining the present value of an annuity, an interest for life or for a term of years, or a remainder or a reversionary interest for purposes of section 7520.

REV. RUL. 2008–49 TABLE 1

Applicable Federal Rates (AFR) for October 2008

	Period for Compounding			
	Annual	*Semiannual*	*Quarterly*	*Monthly*
Short-term				
AFR	2.19%	2.18%	2.17%	2.17%
110% AFR	2.41%	2.40%	2.39%	2.39%
120% AFR	2.64%	2.62%	2.61%	2.61%
130% AFR	2.85%	2.83%	2.82%	2.81%
Mid-term				
AFR	3.16%	3.14%	3.13%	3.12%
110% AFR	3.48%	3.45%	3.44%	3.43%
120% AFR	3.81%	3.77%	3.75%	3.74%
130% AFR	4.12%	4.08%	4.06%	4.05%
150% AFR	4.77%	4.71%	4.68%	4.66%
175% AFR	5.58%	5.50%	5.46%	5.44%
Long-term				
AFR	4.32%	4.27%	4.25%	4.23%
110% AFR	4.76%	4.70%	4.67%	4.65%
120% AFR	5.19%	5.12%	5.09%	5.07%
130% AFR	5.63%	5.55%	5.51%	5.49%

REV. RUL. 2008–49 TABLE 2

Adjusted AFR for October 2008

	Period for Compounding			
	Annual	*Semiannual*	*Quarterly*	*Monthly*
Short-term adjusted AFR	1.75%	1.74%	1.74%	1.73%
Mid-term adjusted AFR	2.97%	2.95%	2.94%	2.93%
Long-term adjusted AFR	4.45%	4.40%	4.38%	4.36%

REV. RUL. 2008–49 TABLE 3

Rates Under Section 382 for October 2008

Adjusted federal long-term rate for the current month	4.45%
Long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months.)	4.65%

REV. RUL. 2008–49 TABLE 4

Appropriate Percentages Under Section 42(b)(2) for October 2008

Appropriate percentage for the 70% present value low-income housing credit	7.87%
Appropriate percentage for the 30% present value low-income housing credit	3.37%

REV. RUL. 2008–49 TABLE 5

Rate Under Section 7520 for October 2008

Applicable federal rate for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest	3.8%

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

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

Section 7520.—Valuation Tables

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

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

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of October 2008. See Rev. Rul. 2008-49, page 811.

Part III. Administrative, Procedural, and Miscellaneous

Guidance Regarding WHFITs

Notice 2008–77

SECTION I: PURPOSE

This notice informs trustees and middlemen of widely held fixed investment trusts (WHFITs) that the Internal Revenue Service (Service) will not assert penalties under § 1.671–5(m) of the Income Tax Regulations with respect to calendar year 2008. This notice also informs trustees and middlemen of widely held mortgage trusts (WHMTs) that, pending future published guidance, certain modifications of mortgages held by a WHMT that has entered into a guarantee arrangement are not required to be reported under the WHFIT reporting rules.

SECTION II: BACKGROUND

A WHFIT is an arrangement classified as a trust under § 301.7701–4(c), provided that: (i) the trust is a United States person under § 7701(a)(30)(E); (ii) the beneficial owners of the trust are treated as owners under subpart E, part I, subchapter J, chapter 1 of the Code; and (iii) at least one interest in the trust is held by a middleman. See § 1.671–5(b)(22). A WHMT is a WHFIT the assets of which consist only of mortgages, regular interests in a REMIC, interests in another WHMT, reasonably required reserve funds, amounts received with respect to these assets, and during a brief initial funding period, cash and short-term contracts to purchase these assets. See § 1.671–5(b)(23).

SECTION III: PENALTY RELIEF

Section 1.671–5(n) provides that the WHFIT reporting rules are applicable January 1, 2007. The preamble to final regulations under § 1.671–5 (T.D. 9308, 2007–8 I.R.B. 523 [71 FR 78351]) (December 29, 2006) informed trustees and middlemen that the Service would not impose any penalties that would otherwise apply as a result of a failure to comply with the WHFIT reporting rules with respect to the 2007 calendar year in cases where the trustee or middleman was unable to change its information reporting systems to comply with the WHFIT reporting rules.

Recent comments received by the Service indicate that although WHFIT trustees and middlemen have taken steps to implement the WHFIT reporting rules, additional time is needed to update the computer and information systems of trustees and middlemen to fully comply with them. These commentators have requested that the Service not assert penalties under the WHFIT reporting rules with respect to the 2008 calendar year. In response to these requests, this notice informs middlemen and trustees of WHFITs that the Service will not assert penalties as a result of a failure to comply with the WHFIT reporting rules with respect to calendar year 2008.

SECTION IV: REPORTING EXCEPTION FOR CERTAIN MORTGAGE MODIFICATIONS

The Treasury Department and the Service have determined that pending the publication of future guidance certain modifications, under the circumstances described below, that are made to mortgage loans held by a WHMT need not be reported in cases where a guarantee arrangement compensates the trust or all the trust interest holders for any shortfalls that would otherwise be experienced as a result of the modification.

Specifically, this notice excepts from reporting under § 1.671–5(c)(2)(iv) of the WHFIT rules any modification made to mortgage loans held by a WHMT if all of the following conditions are satisfied:

(1) The WHMT directly holds mortgage loans that are secured by real property;

(2) The WHMT modifies a mortgage loan under circumstances that do not cause the trust to be classified other than as a trust as a result of the modification (a "Modification") (for example because the Modification does not result in there being a power to vary the investment under § 301.7701–4(c));

(3) The WHMT has entered into a guarantee arrangement that requires the guarantor to pay to the WHMT any shortfalls in payments from the mortgage loans held by the WHMT (including as a result of a Modification) to the extent that mortgage loan payments are insufficient to make required distributions to trust interest holders under the governing documents of the WHMT; and

(4) The Modification and the guarantee arrangement, taken together, are such that the stated interest rate and the aggregate amount of the principal payments paid with respect to every trust interest of the WHMT is not altered by the Modification.

Any future guidance eliminating or modifying this exception will allow reasonable time for WHMT trustees and middlemen to alter their computer and information reporting systems to comply with the change.

SECTION V: REQUEST FOR COMMENTS

The Treasury Department and the Service request comments regarding the scope and description of the reporting exception described in SECTION IV in the notice. Comments should be submitted on or before November 1, 2008, and should include a reference to Notice 2008–77. Send submissions to CC:PA:LPD:RU (Notice 2008–77), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to CC:PA:LPD:RU (Notice 2008–77), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, or sent electronically via the following email address: *Comments@irscounsel.treas.gov.* Please include the notice number 2008–77 in the subject line of any electronic communication. All materials submitted will be available for public inspection and copying.

SECTION VI: EFFECTIVE DATE

This notice is effective September 12, 2008. Trustees and middlemen may apply Section IV of this notice as of January 1, 2007.

SECTION VII: DRAFTING INFORMATION

The principal author of this notice is Faith P. Colson of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Faith P. Colson at (202) 622–3060 (not a toll-free call).

Tax-Exempt Housing Bonds and 2008 Housing Legislation

Notice 2008–79

SECTION 1. Purpose

This notice provides guidance regarding certain provisions affecting tax-exempt bonds and related matters under the Housing Assistance Tax Act of 2008, Division C of Pub. L. No. 110–289, enacted on July 30, 2008 ("2008 Housing Act"). Section 3021 of the 2008 Housing Act amends §§ 143 and 146 of the Internal Revenue Code ("Code") to provide a temporary $11 billion increase in the annual private activity bond volume cap under § 146 for qualified housing issues and to allow the use of qualified mortgage bonds to refinance certain subprime mortgage loans. (Except as otherwise provided, section references in this notice are to the Code.) This notice provides guidance on allocations, carryforwards, information reporting, and uses of this additional bond volume cap, and guidance on the use of qualified mortgage revenue bonds to refinance certain subprime mortgage loans. In addition, § 3005 of the 2008 Housing Act amends § 142(d)(2) of the Code to disregard basic housing allowance payments to military members at certain military bases for purposes of applicable low-income set-aside income limitations under § 42 and § 142. This notice lists certain affected military bases. Section 3023 of the 2008 Housing Act provides temporary authority to Federal Home Loan Banks to guarantee certain tax-exempt bonds. This notice provides guidance on tax-exempt bonds eligible for such guarantees.

SECTION 2. Background

Section 103(a) provides that interest on bonds issued by States or political subdivisions thereof is excluded from gross income upon satisfaction of certain requirements. Sections 142(a)(7) and 142(d) authorize the issuance of tax-exempt multifamily housing bonds to finance qualified residential rental projects with certain low-income set-aside limitations. Income determinations for purposes of compliance with these low-income set-aside limitations are made under § 142(d)(2)(B). Section 143 authorizes the issuance of tax-exempt qualified mortgage bonds to finance owner-occupied single-family housing mortgages upon satisfaction of a number of program requirements. Section 143(a)(2)(D) generally requires proceeds of qualified mortgage bonds to be used to originate loans within a 42-month period after the issue date of the bonds and unused proceeds remaining at the end of such 42-month period to be used to redeem bonds (the "42-month loan origination period"). Section 146 imposes an annual bond volume cap on most tax-exempt private activity bonds, including qualified mortgage bonds under § 143 and tax-exempt bonds for qualified residential rental projects under § 142(a)(7). Section 25 allows an issuer to exchange tax-exempt bond volume cap under § 146 with respect to qualified mortgage bonds under § 143 for authority to issue certain mortgage credit certificates. Section 42 provides a low-income housing tax credit for certain projects which, among other things, meet low-income set-aside limitations similar to those applicable to tax-exempt bonds for qualified residential rental projects under § 142(d). Section 42(g)(4) provides that § 142(d)(2)(B) applies for purposes of determining whether a project qualifies for the low-income housing tax credit.

SECTION 3. Allocation, Carryforward, Use, and Reporting of Additional Bond Volume Cap under § 3021(a) of the 2008 Housing Act

3.1 *General Volume Cap under § 146 of the Code*

Section 146 generally provides a unified annual state tax-exempt private activity bond volume cap for most private activity bonds and § 146(f) provides a three-year carryforward mechanism for unused bond volume cap. Section 146(d)(1) provides that the State ceiling applicable to any State for any calendar year is the greater of: (A) an amount equal to $75 multiplied by the State population, or (B) $225,000,000. Pursuant to § 103(c)(2), the term "State" includes the District of Columbia and any possession of the United States. Section 146(d)(2) provides for inflation adjustments to the amounts described in § 146(d)(1) for calendar years after 2002. Section 146(d)(4) provides for an adjustment to the bond volume cap for certain United States possessions. For purposes of this notice, this general bond volume cap or State ceiling provided to States for private activity bonds under § 146(d)(1) is referred to as "General Volume Cap" to distinguish it from "2008 Housing Act Volume Cap," as defined below.

3.2 *2008 Housing Act Volume Cap*

Section 3021(a)(1) of the 2008 Housing Act adds new § 146(d)(5) which authorizes a temporary increase in the annual State private activity bond volume cap for 2008 ("2008 Housing Act Volume Cap") for use only for bonds for "qualified housing issues" as defined below, that are issued after the date of enactment of the 2008 Housing Act and by the end of calendar year 2010. Section 146(d)(5)(A) provides that, for calendar year 2008, the State ceiling for each State shall be increased by an amount equal to $11,000,000,000 multiplied by a fraction: (i) the numerator of which is the State ceiling for the State for calendar year 2008 (determined without regard to the increase in § 146(d)(5)(A)), and (ii) the denominator of which is the sum of the State ceilings determined under clause (i) for all States. Section 146(d)(5)(B)(i) provides that the 2008 Housing Act Volume Cap may be allocated only to finance "qualified housing issues." Section 146(d)(5)(B)(ii) defines the term "qualified housing issue" as: (I) an issue for qualified residential rental projects under § 142(a)(7), or (II) a qualified mortgage issue (determined by substituting a 12-month origination period for the 42-month origination period under § 143(a)(2)(D)(i)).

3.3 *Allocation of 2008 Housing Act Volume Cap*

Interpretative questions have arisen regarding allocations of the 2008 Housing Act Volume Cap to each of the States and whether and to what extent the District of

Columbia and possessions of the United States receive allocations of the 2008 Housing Act Volume Cap. In this regard, § 103(c)(2) defines a "State" for purposes of the tax-exempt bond provisions of the Code, including § 146, as amended by the 2008 Housing Act, to include the District of Columbia and any possession of the United States. Further, in determining 2008 General Volume Cap for this purpose, although § 146(d)(4) provides an adjustment for certain possessions, this adjustment only affects the amount determined under § 146(d)(1)(A).

The following list provides the allocations of 2008 Housing Act Volume Cap to the States, the District of Columbia, and possessions of the United States. These allocations are based on the 2008 General Volume Cap, determined using the population figures provided in Notice 2008–22, 2008–8 I.R.B. 465, and reflecting the Cost-of-Living Adjustments for 2008 contained in Rev. Proc. 2007–66, 2007–45 I.R.B. 970.

Area	*Allocation*
Alabama	144,908,544
Alaska	96,550,479
American Samoa	96,550,479
Arizona	198,480,840
Arkansas	96,550,479
California	1,144,564,324
Colorado	152,225,095
Connecticut	109,665,263
Delaware	96,550,479
D.C.	96,550,479
Florida	571,487,942
Georgia	298,867,838
Guam	96,550,479
Hawaii	96,550,479
Idaho	96,550,479
Illinois	402,442,519
Indiana	198,685,435
Iowa	96,550,479
Kansas	96,550,479
Kentucky	132,810,201
Louisiana	134,429,985
Maine	96,550,479
Maryland	175,923,133
Massachusetts	201,956,503
Michigan	315,371,661
Minnesota	162,749,339
Mississippi	96,550,479
Missouri	184,066,548
Montana	96,550,479
Nebraska	96,550,479
Nevada	96,550,479
New Hampshire	96,550,479
New Jersey	271,975,917
New Mexico	96,550,479
New York	604,255,799
North Carolina	283,721,527
North Dakota	96,550,479
Northern Mariana Islands	96,550,479
Ohio	359,055,260
Oklahoma	113,266,394
Oregon	117,341,342
Pennsylvania	389,299,003
Puerto Rico	123,416,049
Rhode Island	96,550,479
South Carolina	138,015,397
South Dakota	96,550,479
Tennessee	192,780,879
Texas	748,500,523
U.S. Virgin Islands	96,550,479
Utah	96,550,479

Area	*Allocation*
Vermont	96,550,479
Virginia	241,483,115
Washington	202,541,072
West Virginia	96,550,479
Wisconsin	175,400,093
Wyoming	96,550,479
Total	11,000,000,000

3.4 *Use and Carryforward of 2008 Housing Act Volume Cap*

New § 146(f)(6), added by § 3021(a)(2) of the 2008 Housing Act, provides that any carryforwards of 2008 Housing Act Volume Cap may be used only for qualified housing issues that are issued by the end of calendar year 2010. Certain interpretive questions have arisen about allocations and carryforwards of 2008 Housing Act Volume Cap in relation to General Volume Cap.

In order to facilitate prompt and flexible use of the 2008 Housing Act Volume Cap to address challenges in the housing market within the limited time-frame provided for this purpose, the Internal Revenue Service will afford issuers flexibility in their use of 2008 Housing Act Volume Cap and in coordinating the use of this volume cap with their General Volume Cap. Accordingly, the 2008 Housing Act Volume Cap should be tracked and accounted for separately from General Volume Cap. Further, in this regard, for purposes of both initial allocations and carryforwards of 2008 Housing Act Volume Cap and General Volume Cap, including, without limitation, the "first-in, first-out" ordering rule for carryforwards of General Volume Cap under § 146(f)(3)(B), an issuer may in its discretion utilize 2008 Housing Act Volume Cap or carryforwards of 2008 Housing Act Volume Cap either before or after the use of General Volume Cap or carryforwards of General Volume Cap.

In applying § 146(f)(2) regarding identification of carryforward purposes for 2008 Housing Act Volume Cap, it is sufficient to identify such carryforwards for use for "qualified housing issues." Thus, issuers retain the flexibility to use such carryforwards for the different types of qualified housing issues as needs dictate.

Further, in order to provide flexibility, an issuer who files a proper carryforward election for 2008 Housing Act Volume Cap may assign any portion of that 2008 Housing Act Volume Cap to another eligible issuer in the state.

3.5 *Refinancing of Qualified Subprime Loans under the 2008 Housing Act*

Section 3021(b) of the 2008 Housing Act provides temporary authority under new § 143(k)(12) to refinance qualified subprime loans with qualified mortgage bonds under § 143 that are issued by the end of calendar year 2010. This provision applies to qualified mortgage bonds issued pursuant to General Volume Cap as well as 2008 Housing Act Volume Cap. Section 143(k)(12)(A) provides an exception to the new mortgage requirement under § 143(i)(1) to allow such refinancings. Section 143(k)(12)(B) provides the following special rules for such refinancings: (i) the general 42-month loan origination period under § 143(a)(2)(D)(i) is shortened to 12 months; (ii) the rule under § 143(d) limiting borrowers to those who had no ownership interest in a home in the preceding three years is inapplicable; and (iii) the purchase price limitation under § 143(e) applies based on the market value of the residence at the time of refinancing in lieu of the acquisition cost.

Section 143(k)(12)(C) defines the term "qualified subprime loan" to mean an adjustable rate single-family residential mortgage loan made after December 31, 2001 and before January 1, 2008 that the bond issuer determines would be reasonably likely to cause financial hardship to the borrower if not refinanced. For this purpose, issuers may base determinations with respect to likely financial hardship to borrowers on reasonable estimates made in good faith.

For qualified subprime loan refinancings to be funded from qualified mortgage bonds that have received an allocation of General Volume Cap (as opposed to 2008 Housing Act Volume Cap), an issuer may make proceeds of such bonds available for use for qualified subprime loan refinancings during the permitted 12-month origination period for such loans, and then either redeem bonds from unused proceeds or make such proceeds available for regular qualified mortgage loans under § 143 for the balance of the permitted 42-month origination period for such loans under the general rules for qualified mortgage bonds under § 143(a)(2)(D) before redemption of bonds from unused proceeds. Qualified mortgage bonds that receive an allocation of 2008 Housing Act Volume Cap must apply all unused proceeds to the redemption of bonds after the 12-month period as provided in § 146(d)(5)(B)(ii)(II), as added by § 3021(a) of the 2008 Housing Act.

3.6 *Information Reporting and Carryforward Elections for Use of 2008 Housing Act Volume Cap*

Subject to updated IRS information reporting forms or procedures, an issuer of a qualified housing issue that uses 2008 Housing Act Volume Cap should make the following modifications to the IRS *Information Return for Tax-Exempt Private Activity Bond Issues* on Form 8038 filed with respect to the issue:

1. Report the bond issue on Line 20c of IRS Form 8038;
2. If the bond issue is an issue described in § 142(a)(7) (relating to qualified residential rental projects), enter the following description: "2008 Housing Act Qualified Housing Issue under 142";
3. If the bond issue is a qualified mortgage issue (determined by substituting "12-month period" for "42-month

period" each place it appears in § 143(a)(2)(D)(i)), enter the following description: "2008 Housing Act Qualified Housing Issue under 143";

4. Issuers of qualified housing issues that use a carryforward of 2008 Housing Act Volume Cap should complete line 44b by attaching a copy of the IRS Carryforward Election of Unused Private Activity Bond Volume Cap on Form 8328 filed in accordance with the procedures described in this notice for the carryforward of such unused 2008 Housing Act Volume Cap.

Subject to updated IRS information reporting forms or procedures, an issuer that has unused 2008 Housing Act Volume Cap at the end of calendar year 2008 should elect this carryforward amount by filing a separate IRS Form 8328, *Carryforward Election of Unused Private Activity Bond Volume Cap*, on Form 8328 for such carryforward as modified by the following instructions:

1. Write across the top of the IRS Form 8328 the following: "Carryforward of 2008 Housing Act Volume Cap";
2. Complete Part I in accordance with the instructions on the form, except that, on line 9, under Report Number, enter "99" after the preprinted "9";
3. Complete Part II by entering the following amounts:
   a. Line 1: Indicate total 2008 Housing Act Volume Cap of the issuer as provided in this notice.
   b. Line 2: Enter the aggregate amount of qualified housing issues issued in 2008 that were taken into account for purposes of the 2008 Housing Act Volume Cap.
   c. Line 3: Enter the total amount of 2008 Housing Act Volume Cap exchanged for authority to issue mortgage credit certificates.
   d. Line 4: Skip this line.
   e. Line 5: Add lines 2 and 3.
   f. Line 6: Enter unused 2008 Housing Act Volume Cap (line 1 minus line 5).
   g. Skip lines 7 through 10j.
   h. Line 11: Enter the total carryforward amount of 2008 Housing Act Volume Cap (not to exceed line 6).
   i. Under "Purpose of Form" in the instructions, ignore references to the use of the carryforward for three calendar years. Carryforwards of 2008 Housing Act Volume Cap may only be used for bonds issued by December 31, 2010.
   j. File the IRS Form 8328 by the due date provided in the instructions.

Issuers who have both unused General Volume Cap and 2008 Housing Act Volume Cap should file separate carryforward elections for each of those carryforwards. A carryforward election for General Volume Cap should follow the instructions on IRS Form 8328 and a carryforward election for 2008 Housing Act Volume Cap should follow the instructions on IRS Form 8328 with the modifications provided in this notice.

SECTION 4. Use of 2008 Housing Act Volume Cap for Mortgage Credit Certificates

In general, mortgage credit certificates under § 25 provide Federal subsidies to borrowers in the form of Federal tax credits with respect to eligible home mortgage loans that are similar to the Federal subsidies provided through qualified mortgage loans at subsidized interest rates financed with tax-exempt qualified mortgage bonds under § 143. The program restrictions on mortgage credit certificates under § 25 are substantially identical to the program restrictions on qualified mortgage bonds under § 143. Section 25(a) allows a taxpayer a credit against income tax for any taxable year in an amount equal to the product of the certificate credit rate and the interest paid or accrued by the taxpayer during the taxable year on the remaining principal of the certified indebtedness amount.

In addition, § 25(c)(2) basically allows an issuer to elect to exchange unused tax-exempt private activity bond volume cap authority under § 146 with respect to qualified mortgage bonds under § 143 for a prescribed amount of mortgage certificate issuance authority. Section 146(n) provides that the applicable private activity bond volume cap authority of any issuer for any calendar year is reduced by the sum of the amount of qualified mortgage bonds that such issuer elects not to issue under § 25(c)(2)(A)(ii) during such year, plus the amount of any reduction in such ceiling under § 25(f) for noncompliance of such issuer for such year.

An interpretive question has arisen regarding whether an issuer may elect to exchange unused authority to issue private activity bonds with the 2008 Housing Act Volume Cap under § 146 for authority to issue mortgage credit certificates under § 25. For calendar years 2008 through 2010, in determining the amount of private activity bonds that an issuer may otherwise issue in such years, § 25(c)(2)(A)(ii) is applied by taking into account any 2008 Housing Act Volume Cap authority or carryforward of such 2008 Housing Volume Cap authority allocated to such issuer. Consequently, for calendar years 2008 through 2010 an issuer may elect to exchange such unused 2008 Housing Act Volume Cap authority under § 146 for mortgage credit certificate authority under § 25. Consistent with the requirements of new § 146(d)(5)(B)(ii)(II) added by § 3021(a) of the 2008 Housing Act, an issuer may elect to exchange 2008 Housing Act Volume Cap authority for mortgage credit certificate authority only if the indebtedness to which the mortgage credit certificate relates is incurred within 12 months of the date of the election under § 25(c)(2)(A)(ii) not to issue an amount of private activity bonds which it may otherwise issue during the calendar year under § 146.

In addition, an issuer may elect to issue mortgage credit certificates to refinance qualified subprime loans if it otherwise satisfies the requirements of § 143(k)(12), as added by § 3021(b) of the 2008 Housing Act. Any such qualified subprime loan refinancing must be incurred within 12 months after such election. Further, an issuer must make any such election with respect to such mortgage credit certificates by December 31, 2010.

SECTION 5. Information Reporting of Subprime Refinancing Loans

Issuers who issue bonds under § 143 of the Code and expect to use the proceeds for the refinancing of qualified subprime loans under § 143(k)(12), as added by § 3021 of the 2008 Housing Act, should attach a schedule to the IRS Form 8038 filed with respect to the issue that indicates the amount of proceeds that are rea-

sonably expected to be used to refinance qualified subprime loans. An issuer must comply with this information reporting requirement regardless of whether the bonds are being issued using General Volume Cap or 2008 Housing Act Volume Cap. The issuer may determine the amount of bond proceeds that it expects to use to refinance qualified subprime loans under § 143(k) based on a reasonable good faith estimate of the amount of bond proceeds expected to be used for this purpose. Issuers who do not in fact utilize the full amount indicated on the schedule to refinance qualified subprime loans are permitted to apply such unused amounts to the financing of mortgage loans otherwise eligible to be financed under § 143.

SECTION 6. Exclusion of Military Basic Housing Allowances from Income for Certain Purposes Under § 142 and § 42

In general, §§ 142(d) and 42(g) impose similar low-income set-aside restrictions on incomes of eligible residents of prescribed numbers of housing units in qualified residential rental projects and qualified low-income housing projects for purposes of eligibility for tax-exempt private activity bond financing under § 142(a)(7) and for low-income housing tax credits under § 42, respectively. In addition, § 142(d)(2)(B) applies to determinations of income both for § 142 and § 42 purposes.

Section 3005(a) of the 2008 Housing Act renumbered § 142(d)(2)(B) as § 142(d)(2)(B)(i) and added new § 142(d)(2)(B)(ii), (iii) and (iv) to the Code. Section 142(d)(2)(B)(ii) excludes military basic allowance payments under § 403 of title 37, United States Code, from income for purposes of income limitations under § 142(d)(2)(B) for certain qualified buildings. Section 142(d)(2)(B)(iii) defines a "qualified building" to mean a building located: (I) in any county in which is located a qualified military installation to which the number of members of the Armed Forces of the United States assigned to units based out of such qualified military installation, as of June 1, 2008, has increased by not less than 20 percent, as compared to such number on December 31, 2005, or (II) in any county adjacent to a county described in subclause (I). Section 142(d)(2)(B)(iv) defines a "qualified military installation" to mean any military installation or facility that has at least one thousand members of the Armed Forces of the United States assigned to it as of June 1, 2008.

The following list identifies military installations that are deemed to be qualified military installations that satisfy the 20 percent population increase requirement under § 142(d)(2)(B)(iii)(I) for purposes of the exclusion of basic housing allowance payments to military members in determining income under § 142(d)(2)(B). The Internal Revenue Service will update this list if it receives additional information indicating that other military installations should receive the same treatment. Issuers may rely on this list for income determinations made after the date of enactment of the 2008 Housing Act and before any successor list is published. The following list is not meant to be exclusive and any qualified military installation within the meaning of § 142(d)(2)(B)(iv) which satisfies the percentage requirements of § 142(d)(2)(B)(iii)(I) would be eligible to receive similar treatment regardless of its failure to be included in this list or in any future updates.

Name of Military Installation	*State*
U.S. Air Force Academy	Colorado
Fort Shafter	Hawaii
Fort Riley	Kansas
Annapolis Naval Station (including U.S. Naval Academy)	Maryland
Fort Jackson	South Carolina
Fort Bliss	Texas
Fort Hood	Texas
Dam Neck Training Center Atlantic	Virginia
Naval Station Bremerton	Washington

Section 3005(b) of the 2008 Housing Act limits the scope of application of this exclusion of basic housing allowances from income under § 142(d)(2) in a number of significant technical respects, as described therein. Further, this exclusion is inapplicable to tax-exempt bonds for qualified residential rental projects issued under § 142(a)(7) unless the project also receives low-income housing tax credits under § 42.

SECTION 7. Temporary Authority for Federal Home Loan Banks to Guarantee Tax-Exempt Bonds

Section 3023 of the 2008 Housing Act added new § 149(b)(3)(A)(iv) to provide a temporary exception to the general restriction against Federal guarantees of tax-exempt bonds under § 149(b) for certain guarantees made by Federal Home Loan Banks. In particular, new § 149(b)(3)(A)(iv) provides that this Federal guarantee restriction is inapplicable to a guarantee by a Federal Home Loan Bank made in connection with the "*original issuance*" (emphasis added) of a bond during the period beginning on the date of enactment of the 2008 Housing Act and ending on December 31, 2010 (or a renewal or extension of a guarantee so made). Section 3023(b) of the 2008 Housing Act also adds new § 149(b)(3)(E) which requires guarantees by a Federal Home Loan Bank to meet certain safety

and soundness collateral requirements as described therein.

An interpretive question has arisen regarding the meaning of an "original issuance" during the relevant period and whether both bonds for new money purposes (*e.g.*, to finance construction or acquisition costs in the first instance) and refunding bonds for refinancing purposes may be treated as originally issued during the relevant period and thereby be eligible for Federal Home Loan Bank guarantees. For this purpose, any tax-exempt bond, including a bond for new money purposes and a bond that is part of a refunding issue (as defined in § 1.150–1(d) of the Income Tax Regulations) that is issued during the relevant period may be eligible for Federal Home Loan Bank guarantees under new § 149(b)(3)(A)(iv).

SECTION 8. Effective Date

This notice is effective as of the date of enactment of the 2008 Housing Act on July 30, 2008.

SECTION 9. Effect on Other Documents

Notice 88–80, 1988–2 C.B. 396, is modified to the extent provided by Section 6 of this notice for the periods applicable under section 3005 of the 2008 Housing Act.

SECTION 10. Paperwork Reduction Act

The information collection contained in this notice has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35) under control number 1545–2119. Under the Paperwork Reduction Act, 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 OMB control number.

The collections of information in this notice are in Section 3.6 and Section 5. The information is required in order to report tax-exempt bond issues that receive allocations of the 2008 Housing Act Volume Cap, to report the carryforward of unused amounts of 2008 Housing Act Volume Cap, and to report the estimated amount of proceeds expected to be used to refinance qualified subprime loans. This information will be used to quantify the use and carryforward of 2008 Housing Act Volume Cap and the refinancing of qualified subprime loans. The collections of information are mandatory. The likely respondents are state or local governmental issuers of tax-exempt housing bonds.

We estimate the total number of respondents to be 100 and the total annual responses to be 150. We estimate it will take 2 hours to comply. Estimates of the annualized cost to respondents for the hour burdens shown are not available at this time.

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

SECTION 11. Drafting Information

The principal authors of this notice are Aviva M. Roth and Carla Young of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this notice, contact Aviva M. Roth or Carla Young at (202) 622–3980 (not a toll-free call).

Tax-Exempt Bond Partnerships: Eligibility for Monthly Closing Elections

Notice 2008–80

SECTION 1. Purpose.

In order to provide greater administrative certainty in a major short-term sector of the tax-exempt bond market in response to taxpayer requests and to promote stability in this sector of the market, the Treasury Department and the Internal Revenue Service ("IRS") propose to issue a revenue procedure substantially in the form included in section 5 of this notice. The proposed revenue procedure would modify and supersede Rev. Proc. 2003–84, 2003–2 C.B. 1159. The proposed revenue procedure would provide certain more specific eligibility criteria that partnerships that invest in tax-exempt bonds must meet to qualify for monthly closing elections to allow the partners to take into account monthly the inclusions required under §§ 702 and 707(c) of the Internal Revenue Code of 1986, as amended (the "Code"). The Treasury Department and the IRS are issuing this guidance in proposed form to afford an opportunity for public comment and to limit any potential impact on the current market.

SECTION 2. Request for Comments.

The Treasury Department and the IRS seek public comments on all aspects of the proposed revenue procedure, including comments on ways to facilitate market innovation consistent with promoting administrative certainty and sound tax policy. The Treasury Department and the IRS seek specific public comment on whether or under what circumstances the proposed revenue procedure should apply when the variable interest holder has a minimum gain share percentage of less than five percent, such as circumstances in which the variable-rate interest holders receive particular rights to control sales of underlying tax-exempt bond assets held by a tax-exempt bond partnership. The Treasury Department and the IRS also seek specific comment on whether or under what circumstances the proposed revenue procedure should be expanded to allow qualifying income from assets beyond original assets of the partnership referred to in § 4.02(3) of the proposed revenue procedure. The Treasury Department and the IRS also seek specific comment on whether or under what circumstances the proposed revenue procedure should be expanded to allow application to any other types of transactions besides the contemplated tax-exempt bond partnerships.

Before the proposed revenue procedure described in this notice is made effective, consideration will be given to any written public comments on this notice that are submitted in a timely fashion by December 15, 2008. A signed original and eight (8) copies of public comments should be sent by mail to the IRS at CC:PA:LPD:PR (reference IRS Notice 2008–80), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Public comments also may be sent electronically, via the IRS Internet site at *www.irs.gov/regs* or via the Federal eRulemaking portal at *www.regulations.gov* (reference IRS Notice 2008–80). All

comments will be available for public inspection and copying.

SECTION 3. Effective Date and Immediate Elective Reliance.

This notice is effective on September 17, 2008. The proposed revenue procedure is proposed to apply generally to tax-exempt bond partnerships with a start-up date that occurs on or after the date that is 30 days after the final revenue procedure is released to the public, subject to the special rules set forth in the effective date provisions in section 9 of the proposed revenue procedure.

At their option, eligible tax-exempt bond partnerships may rely immediately on the proposed revenue procedure to make monthly closing elections in accordance with the proposed revenue procedure effective with respect to any such monthly closing elections that are made on or after September 17, 2008. Eligible tax-exempt bond partnerships also may continue to rely on Rev. Proc. 2003–84 until the proposed revenue procedure is finalized and made effective.

SECTION 4. Drafting Information.

The principal author of this notice is Frank J. Fisher of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue procedure, contact Frank J. Fisher at (202) 622–3050 (not a toll-free call).

SECTION 5. Form of Proposed Revenue Procedure.

Set forth below is the form of the proposed revenue procedure that is proposed in this notice:

Form of Proposed Revenue Procedure

Part III

Administrative, Procedural, and Miscellaneous
26 CFR 1.706–1: Taxable years of partner and partnership.
(Also Part I, Section(s) 103, 171, 702, 704, 706, 708, 851, 852, 1275, 6001, 6031, 6229, 6231, 6233, 6698, 6722; 301.6031(a)–1, 601.105.)

Rev. Proc. 2009–XX

SECTION 1. Purpose.

In order to provide greater administrative certainty in a major short-term sector of the tax-exempt bond market in response to taxpayer requests and to promote stability in this sector of the market, this revenue procedure modifies and supersedes Rev. Proc. 2003–84, 2003–2 C.B. 1159. This revenue procedure provides certain more specific eligibility criteria that partnerships that invest in tax-exempt bonds must meet to qualify for monthly closing elections to allow the partners to take into account monthly the inclusions required under §§ 702 and 707(c) of the Internal Revenue Code of 1986, as amended (the "Code"). (Except as noted, section references in this revenue procedure are to the Code and the Income Tax Regulations.) This revenue procedure provides rules for partnership income tax reporting under § 6031 for such partnerships.

SECTION 2. Background.

This revenue procedure provides a means for certain partnerships that invest in state or local governmental debt obligations the interest on which is excludable from gross income under § 103 ("tax-exempt bonds") to elect to allow the partners to take into account monthly the inclusions required under §§ 702 and 707(c). This revenue procedure applies to certain partnerships used to create the economic equivalent of a variable-rate tax-exempt bond. To create this instrument, a sponsor that holds a tax-exempt bond may transfer the tax-exempt bond to an entity that qualifies as a partnership for federal tax purposes ("tax-exempt bond partnership"). The tax-exempt bond partnership issues two classes of equity interests: (1) interests that are entitled to a preferred variable return on its capital payable out of partnership income ("variable-rate interests"); and (2) interests that are entitled to all of the remaining income of the partnership ("inverse interests"). Owners of variable-rate interests and inverse interests are referred to as "variable-rate interest holders" and "inverse interest holders," respectively. The variable return on the variable-rate interests tracks current short-term tax-exempt bond yields. Under § 702(b), tax-exempt interest income received by a partnership retains its character when the partnership allocates the income to a partner.

Under § 706(a), a partner generally includes in income for a taxable year the partner's allocable share of items of partnership income, gain, loss, deduction, and credit for the partnership's taxable year ending within or with the partner's taxable year. A partner must also include in income for a taxable year guaranteed payments under § 707(c) that are taken into account by the partnership under its method of accounting in the partnership's taxable year ending within or with the partner's taxable year. Moreover, for each taxable year in which a partnership has income, deductions, or credits, § 6031(a) and (b) requires the partnership to file a Form 1065, *U.S. Return of Partnership Income*, and to issue Schedules K–1 (Form 1065) to each partner.

Annual inclusion of income under § 706(a) can be incompatible with the needs of money market funds and certain other investors that invest in tax-exempt bonds. To assist tax-exempt bond partnerships to meet the needs of the market for tax-exempt bonds within the requirements of the Code, the Treasury Department and the Internal Revenue Service ("IRS") are issuing this revenue procedure to allow partners in tax-exempt bond partnerships to take into account on a monthly basis their distributive shares of partnership items ("monthly closing") if the partnership has made an effective monthly closing election with the consent of all partners ("monthly closing election"). A partnership may make a monthly closing election by including a binding provision to that effect in the partnership's governing documents. A partnership that has a monthly closing election in effect for the partnership's entire taxable year and that meets the other applicable requirements is not required to file a Form 1065, *U.S. Return of Partnership Income*, or to issue Schedules K–1 (Form 1065) to its partners for the taxable year.

In the past, to resolve the annual inclusion of income problem, many tax-exempt-bond partnerships attempted to make an election under § 761(a) to be excluded from the provisions of subchapter K. A tax-exempt-bond partnership is not eligible to elect to be wholly or partially excluded from subchapter K, however, and

an attempted election has no effect. Two of the requirements for eligibility to make an election under § 761(a) are that the partners must own the partnership property as co-owners and the partners must be able to compute their income without the necessity of computing partnership taxable income. See § 1.761–2(a)(1) and (2) of the Income Tax Regulations. If a business entity (classified as a partnership) owns a tax-exempt bond and issues membership interests that apportion the benefits and burdens of that bond to its members in a manner that differs significantly from direct investment in the bond, the holders of those membership interests do not satisfy the requirement that they own the partnership property as co-owners. Cf. § 301.7701–4(c) of the Procedure and Administration Regulations. Moreover, if one class of partners has a right to partnership income that is superior to the right of another class of partners, then the net partnership income or loss allocated to the partners with inferior rights to partnership income can be determined only by computing the net income or loss of the partnership and then by reducing that net income by income allocable to partners with superior rights to partnership income. Such a partnership does not meet the requirement of § 1.761–2(a)(1) that the members of the organization be able to compute their incomes without the necessity of computing partnership income.

To assist tax-exempt-bond partnerships to meet the needs of the market for tax-exempt obligations within the requirements of the Internal Revenue Code, the IRS previously issued three revenue procedures on this topic of monthly closing elections. Rev. Proc. 2002–16, 2002–1 C.B. 572, was issued to allow money market fund partners in tax-exempt-bond partnerships to take into account on a monthly basis their distributive shares of partnership items (monthly closing) if the partnership made an effective election under that revenue procedure (monthly closing election). Rev. Proc. 2002–68, 2002–2 C.B. 753, modified and superseded Rev. Proc. 2002–16 to extend the monthly closing election to all partners in tax-exempt-bond partnerships and established certain transition rules. Rev. Proc. 2003–84 modified and superseded Rev. Proc. 2002–68 to provide certain simplified income tax reporting procedures in response to public comment. This revenue procedure modifies and supersedes Rev. Proc. 2003–84 to provide certain additional eligibility conditions and to promote greater administrative certainty.

This revenue procedure generally is intended to cover tax-exempt bond partnerships with certain common characteristics. These tax-exempt bond partnerships create variable-rate interests that have characteristics of investment grade, highly-liquid, short-term tax-exempt bonds. These features often are intended to make the variable-rate interests eligible for investment by money market funds under Rule 2a–7, 17 C.F.R. § 270.2a–7, under the Investment Company Act of 1940 ("Rule 2a–7"). The holders of the variable-rate interests generally invest a substantial majority of the capital in the partnership (for example, often 99 percent of such capital) and the holders of the inverse interests invest the balance of such capital.

In general, the variable-rate interest holders are substantially protected against risk of loss of their capital investment, plus accrued distributive shares in the partnership by short-term tender option rights (for example, seven-day demand purchase options) supported by a creditworthy liquidity provider. The liquidity provider may be an unrelated third party, an affiliate of the partnership's sponsor, or the inverse interest holder. If the liquidity provider purchases variable-rate interests under the liquidity facility, it typically has rights to reimbursement either from the inverse interest holder or from sales of partnership assets in its capacity as a partner. The variable-rate interest holders, however, typically are not fully protected against risk of loss of their capital investments because such tender options terminate if certain extraordinary events occur.

A tax-exempt bond partnership eligible for simplified reporting under this revenue procedure is a partnership whose primary purpose is to invest in a relatively fixed portfolio of investments in tax-exempt bonds, as contrasted with a partnership whose primary purpose is to engage in an active bond trading business which involves frequent trading in tax-exempt bond investments.

Tax-exempt bond partnerships have various unique features that provide broad benefits to the investing public. Tax-exempt bond partnerships efficiently respond to a need in the tax-exempt bond market to address an imbalance between the traditional preferences of State and local governments to issue long-term, fixed-rate tax-exempt bonds and the significant demands of institutional investors, particularly money market funds, to purchase high-quality, short-term, variable-rate tax-exempt bonds. Tax-exempt bond partnerships also expand the investor base in, and enhance liquidity and investor pricing to, the tax-exempt bond market.

SECTION 3. Summary of Changes.

This revenue procedure modifies and supersedes Rev. Proc. 2003–84. This section briefly summarizes the changes.

3.01 *Background*. Section 2 of this revenue procedure provides additional background regarding certain characteristics of partnerships intended to be covered by this revenue procedure.

3.02. *Additional Eligibility Conditions*. Sections 4.01(5), (6), and (7), respectively, of this revenue procedure provide additional conditions to eligibility for a partnership to make a monthly closing election under § 4.01 of this revenue procedure, including additional conditions with respect to tender option termination events, five percent minimum gain shares to the variable-interest holders, and an eighty percent weighted average bond maturity date by which variable-interest holders must have a right to realize any such gains.

3.03. *Effective Dates*. Section 9 of this revenue procedure provides effective date rules, including a general prospective effective date, a rule for certain existing partnerships which receive new capital, and certain grandfathering rules.

SECTION 4. Scope.

This revenue procedure applies to eligible partnerships under § 4.01 of this revenue procedure that make a monthly closing election under § 5 of this revenue procedure).

4.01 *Eligible Partnership*. An entity is an eligible partnership for a calendar month if all of the following conditions are met:

(1) *Test Dates for Income and Expense Test*. As of the election test date and as of every operational test date that occurs on or before the end of such calendar month, the partnership satisfies both the income

test and the expense test. The test dates are described in § 4.05 of this revenue procedure, and the income test and the expense test are described in §§ 4.02 and 4.03 of this revenue procedure, respectively.

(2) *Partnership Entity*. The entity is a partnership for federal tax purposes.

(3) *Allocations*. All allocations of income, gain, loss, deduction, and credit of the partnership are made in accordance with § 704(b).

(4) *Partnership Agreement*. A written partnership agreement (or other governing document) provides that (a) the entity is making the monthly closing election under this revenue procedure; and (b) all partners consent to the election.

(5) *Tender option termination events*. The tender option or put option rights provided to the variable-rate interest holders are subject to termination without notice upon the occurrence of one of the following events with respect to a tax-exempt bond held by the partnership: (i) a bankruptcy filing by or against a tax-exempt bond issuer; (ii) a downgrade in the credit rating of a tax-exempt bond and a downgrade in the credit rating of any guarantor of the tax-exempt bond, if applicable, to a rating or ratings, as applicable, below investment grade; (iii) a payment default on a tax-exempt bond; or (iv) a final judicial determination or a final IRS administrative determination of taxability of a tax-exempt bond for Federal income tax purposes under § 103.

(6) *Share in Appreciation*. Upon any sale or other disposition of any tax-exempt bond held by the partnership, the variable-rate interest holders shall have the right to receive a share of the gain from any such sale or other disposition in an amount equal to not less than five percent (5%) of such gain. The partnership shall pay each required gain share to the variable-rate interest holders by distributing the proceeds of the sale or other disposition within a reasonable period.

(7) *Gain Share Realization Event by 80 Percent of Remaining Weighted Average Maturity Date*. In order to provide variable-rate interest holders a reasonable opportunity to realize potential appreciation in the value of tax-exempt bonds held by a tax-exempt bond partnership, the partnership shall terminate or otherwise provide to such holders a right to require a sale, redemption, or other disposition of such tax-exempt bonds, with attendant gain share realization potential, by a date that is no later than the date that represents 80 percent of the remaining weighted average maturity of the tax-exempt bonds held by the partnership, measured from the date of the partnership's acquisition of the tax-exempt bonds, as determined generally in any reasonable manner that takes into account the parameters set forth in this § 4.01(7) (the "80 percent WAM test"). For this purpose, the weighted average maturity of applicable tax-exempt bonds generally shall be determined in a manner similar to the determination of the weighted average maturity of tax-exempt bonds under § 147(b), determined generally based on issue prices and mandatory sinking fund redemptions, with further adjustments to take into account optional redemptions at the first optional par redemption date and to take into account the partnership's date or dates of acquisition of the tax-exempt bonds. Further, any reasonable, consistently applied measure may be used to weight the bonds in lieu of issue price, if different than the partnership's acquisition price (for example, issue price, principal amount, cost, or fair market value). Further, for this purpose, a partnership may apply the 80 percent WAM test either separately on a "bond-by-bond" basis to each group of substantially identical tax-exempt bonds of the same maturity within the same "issue" (as defined in § 1.150–1(c)) held by the partnership, or collectively on a "portfolio" basis to all tax-exempt bonds held by the partnership.

4.02 *Income Test*. At least 95 percent of the partnership's gross income (computed without regard to items described in § 4.04 of this revenue procedure) is or is reasonably expected to be from the following eligible sources:

(1) *Tax-exempt Interest*. Interest on tax-exempt obligations as defined in § 1275(a)(3) and § 1.1275–1(e).

(2) *Exempt-interest Dividends*. "Exempt-interest dividends," as defined in § 852(b)(5), that are paid by a "regulated investment company" ("RIC"), as defined in § 851(a).

(3) *Gains from Eligible Source Income*. Gains from the sale, redemption, or other disposition of assets generating the income described in §§ 4.02(1) and (2) of this revenue procedure and income from the temporary investment (for a period no greater than 7 months) of the proceeds of such a disposition; but only if the assets that are sold, redeemed, or disposed are original assets of the partnership. For this purpose, an asset is an original asset of the partnership if the asset is contributed to the partnership or is acquired with capital contributed to the partnership (and not with the proceeds of the sale, redemption, or other disposition of a partnership asset).

4.03 *Expense Test*. Substantially all of the partnership's expenses and deductions (computed without regard to items described in § 4.04 of this revenue procedure) are properly allocable to the following eligible expense activities:

(1) *Expenses for Certain Income*. Producing, collecting, managing, protecting, and conserving the income described in §§ 4.02(1), (2), or (3) of this revenue procedure or the assets generating the income.

(2) *Expenses for Certain Property*. Acquiring, managing, conserving, maintaining, or disposing of property held for the production of the income described in §§ 4.02(1), (2), or (3) of this revenue procedure.

(3) *Expenses for Servicing*. Servicing the equity in the partnership.

4.04 *Exclusion*. For the purposes of §§ 4.02 and 4.03 of this revenue procedure, reasonable amounts charged to persons requesting information from the partnership under § 8.03 of this revenue procedure and the costs of collecting, managing, computing, and supplying the information are not taken into account.

4.05 *Test Dates and Test Periods*. The income test described in § 4.02 of this revenue procedure and the expense test described in § 4.03 of this revenue procedure must be satisfied both as of the first day of the first month for which the partnership's monthly closing election is effective (the "election test date") and, beginning with the fourth month after the partnership's monthly closing election becomes effective, on the last day of each month (the "operational test date"). The partnership determines whether the income test and the expense test are satisfied as of the election test date by reference to the election test period. The partnership determines whether the income test and expense test are satisfied as of each operational test date by reference to the operational test period. In applying the income and expense tests for a test period, a termination of the part-

nership under § 708(b)(1)(B) during that period is ignored.

(1) *The Election Test Period and Start-up Date*. This § 4.05(1) defines the terms "election test period" and "start-up date." The election test period differs depending upon how long the partnership has been in existence (determined from its start-up date). A partnership's "start-up date" ("start-up date") is the later of the date the entity had more than one owner and the date the entity had more than a *de minimis* amount of assets. If, on the election test date, the partnership has been in existence for at least six full calendar months, then the "election test period" is the longer of the six full calendar months preceding the election test date and the portion of the partnership's taxable year that precedes the election test date. If, on the election test date, the partnership has not been in existence for at least six full calendar months, then the "election test period" is the first six full calendar months of the partnership's existence.

(2) *The Operational Test Period*. The "operational test period" is the three-calendar-month period consisting of the calendar month within which the operational test date falls and the preceding two calendar months.

SECTION 5. Making a Monthly Closing Election.

5.01. *Manner of Making the Election*. An eligible partnership makes a monthly closing election by providing in the entity's governing documents that (a) the partnership is making a monthly closing election that is effective as provided under § 5.02 of this revenue procedure, and (b) all partners consent to the election.

5.02 *Effective Date of the Election*. The monthly closing election is effective on the later of: (a) the start-up date of the partnership (as defined in § 4.05(1) of this revenue procedure); or (b) the first day of the month in which the provision described in § 5.01 of this revenue procedure is first included in the entity's governing documents.

5.03 *Partnership Terminations under § 708(b)(1)(B)*. A termination of the partnership under § 708(b)(1)(B) does not terminate the monthly closing election and does not cause the partnership to close its books under § 1.706–1(c) other than as described in § 6 of this revenue procedure.

SECTION 6. Monthly Closing of the Books.

If, at the end of any calendar month, an eligible partnership has a monthly closing election in effect, then, with respect to each partner, the partnership must close its books as described in § 1.706–1(c)(2) as if each partner had sold its entire interest in the partnership on the last day of that month. Each partner must include in its taxable income for that month both the partner's distributive share of items described in § 702(a) with respect to the partner that were earned by the partnership since either the last closing of the books or the first day of the partnership's taxable year (whichever is later) and any guaranteed payments under § 707(c) to the partner that are taken into account by the partnership since the last closing of the books. If a partner is on a 52–53 week taxable year, then the provisions of § 1.441–2(e) apply as if the last day of the month were the last day of the partnership's taxable year.

SECTION 7. Termination of Monthly Closing Election and Re-election after Termination.

7.01. *Termination of Monthly Closing Election*. A partnership's monthly closing election terminates as of the first day of the month during which a partnership first fails to be an eligible partnership under § 4.01 of this revenue procedure.

7.02. *Consent of Commissioner for Another Election*. If the partnership's monthly closing election terminates, the partnership may not make another monthly closing election without the consent of the Commissioner.

7.03. *Revocation of Election with Commissioner's Consent*. A partnership's monthly closing election may be revoked only with the consent of the Commissioner.

SECTION 8. Reporting Requirements.

8.01. *Initial Filing Requirement*. A partnership must file an abbreviated Form 1065, *U.S. Return of Partnership Income*, for the first taxable year during which the monthly closing election was in effect. The abbreviated Form 1065 must be filed by the date that the partnership's income tax return for that taxable year would ordinarily be due and must be signed by a person with the authority to sign the partnership's Form 1065. The words "Filed in Accordance with Rev. Proc. 2009–**[INSERT NUMBER OF THIS REVENUE PROCEDURE]**" must be typed or printed across the top of the form. The partnership is required to provide only the following information on the abbreviated Form 1065:

(1) A statement that the partnership has made an election under this revenue procedure to which all present and future partners consent;

(2) Identification of the partnership by name, address, and EIN;

(3) The name, title, address, and phone number of the contact person from whom partners, beneficial owners, middlemen, and the IRS may request information about the partnership;

(4) The issue date of the partnership interests and the CUSIP (Committee on Uniform Securities Identification Procedures) number or other identification of each class of partnership interest;

(5) A statement that the entity's governing documents expressly provide that the entity is making a monthly closing election; and

(6) The effective month of the election and the start-up date of the partnership. See § 4.05(1) of this revenue procedure for a definition of the start-up date.

8.02 *Annual Filing Requirements*.

(1) *Elimination of Annual Filing Requirements*. A partnership is not required to file a Form 1065, *U.S. Return of Partnership Income*, or to issue Schedules K–1 (Form 1065) to its partners for any taxable year if the following requirements are satisfied:

(a) The partnership's monthly closing election is effective for the partnership's entire taxable year;

(b) The partnership makes the initial filing described in § 8.01 of this revenue procedure;

(c) A written partnership agreement (or other governing document) provides that (i) the entity and its partners will comply with the reporting requirements of §§ 8.02, 8.03, and 8.04 of this revenue procedure in lieu of complying with the requirements of § 6031(a) through (d); and (ii) all partners consent to such reporting; and

(d) The partnership complies with the requirements of §§ 8.03 and 8.04 of this revenue procedure.

(2) *Effect of Elimination of Annual Filing Requirement*. An entity that is not required to file a partnership return under this revenue procedure is not required to file a partnership return under § 6031(a) and, as a result, is not a partnership as defined under § 6231(a)(1). Consequently, the entity and its members will not be subject to the provisions of subchapter C of chapter 63. An abbreviated Form 1065 used to make the initial filing described in § 8.01 of this revenue procedure is not considered to be a partnership return for purposes of § 6233.

(3) *Monthly Closing Election Effective for Portion of Taxable Year*. A partnership that makes a monthly closing election that is effective after the first day of its taxable year must comply with the partnership reporting rules of § 6031(a) for that taxable year (but is still permitted to close its books on a monthly basis). If the partnership also makes the initial filing described in § 8.01 of this revenue procedure by the due date for its return for the first full taxable year during which the monthly closing election is in effect, then the partnership qualifies for elimination of annual filing requirements under § 8.01 of this revenue procedure for subsequent taxable years.

(4) *Annual Reporting Required*. Failure to qualify for the elimination of annual filing requirements under § 8.02(1) of this revenue procedure does not terminate the partnership's monthly closing election. However, a partnership that fails to satisfy all of the requirements of § 8.02(1) of this revenue procedure is required to file a complete (not abbreviated) Form 1065 and to issue Schedules K–1 (Form 1065) to its partners as required by § 6031(a). A partnership that fails to file a Form 1065 or to issue Schedules K–1 as required is subject to the applicable penalties under §§ 6698 and 6722 for failure to file a partnership return and to furnish payee statements, as well as any other applicable penalties. Moreover, if a partnership is required to file a return under § 6031(a) but fails to do so, the period of limitations on assessment of tax attributable to items of that partnership remains open indefinitely under § 6229(a).

8.03. *Requests for Information*. Within 45 days of a request by the IRS or a partner (or a beneficial owner or a nominee of a beneficial owner), the partnership must make available all the information necessary to compute a partner's taxable income, tax-exempt income, gain, loss, deduction, or credit, including sufficient information for a partner to determine the portion of the tax-exempt interest that may be subject to the alternative minimum tax and information regarding each partner's share of any bond premium amortization under § 171, any market or original issue discount, and capital gain or loss.

8.04. *Nominee and Beneficial Ownership Reporting*.

(1) If an eligible electing partnership complies with the requirements of §§ 8.02 and 8.03 of this revenue procedure, the nominee reporting requirements of § 6031(c) and the regulations thereunder do not apply. In place of those requirements, the partnership and the partners must comply with this § 8.04. See § 1.6001–1(a) and (e) for rules that apply to recordkeeping requirements.

(2) Any person on whose behalf another person holds as a nominee an interest in an eligible partnership (a beneficial owner), other than a beneficial owner for which the relevant advisor or manager agrees to comply with § 8.04(3) of this revenue procedure, shall notify the partnership of its beneficial ownership status and provide the partnership with:

(a) its name, address, and taxpayer identification number and the name, address, and taxpayer identification number of its nominee; and

(b) the name of the partnership, its CUSIP number or other information sufficient to identify the partnership interest, and the amount of the partnership interest.

(3) In the case of a group of RICs that is managed or advised by a common, or affiliated, manager or advisor (the manager), the manager may elect to be responsible for collecting, retaining, and providing the IRS upon demand the beneficial ownership information. To make such an election, the manager must provide each eligible partnership in which any of the RICs has an equity interest a statement indicating that it is responsible for collecting, retaining, and providing the IRS upon demand the beneficial ownership information that otherwise would be required to be provided directly to the eligible partnerships by the beneficial owners. In addition, the manager must provide the partnership with:

(a) its name, address, and taxpayer identification number and contact information for the person from whom the IRS can request beneficial ownership information; and

(b) the name of the partnership, its CUSIP number or other information sufficient to identify the partnership interests, and the amount of the partnership interests.

SECTION 9. Effective Date.

9.01. *In General*. Except as otherwise expressly provided, this revenue procedure applies prospectively to any tax-exempt bond partnership with a "start-up date" under § 4.05(1) of this revenue procedure (that is, generally the later of the date the entity has more than one owner or more than a *de minimis* amount of assets) that occurs on or after ***[DATE THAT IS 30 DAYS AFTER THE DATE THAT THE FINAL VERSION OF THIS DOCUMENT IS RELEASED TO THE PUBLIC]***. Further, except as otherwise expressly provided, this revenue procedure applies to any tax-exempt bond partnership without regard to its start-up date if new capital is originally contributed to the partnership on or after ***[DATE THAT IS 30 DAYS AFTER THE DATE THAT THE FINAL VERSION OF THIS DOCUMENT IS RELEASED TO THE PUBLIC]*** in an amount which has an aggregate fair market value that is greater than ten percent of the aggregate fair market value of the total assets owned by the partnership on the day before ***[DATE THAT IS 30 DAYS AFTER THE DATE THAT THE FINAL VERSION OF THIS DOCUMENT IS RELEASED TO THE PUBLIC]***. For purposes of applying the ten percent new capital test in the preceding sentence, deemed capital contributions to a reconstituted partnership as a result of a partnership termination under § 708(b)(1)(B) upon the sale or exchange of more than 50 percent of the total interests in a partnership's capital and profits within a 12-month period are disregarded. The IRS will not challenge any tax-exempt bond partnership's eligibility to use a monthly closing election on the grounds that such partnership failed to follow specific modifications made to Rev. Proc.

2003–84 by this revenue procedure with respect to additional eligibility conditions added in §§ 4.01(5), (6), or (7) of this revenue procedure (for example, the 5% minimum gain share condition) to the extent that such modifications are inapplicable to the partnership under the effective date provisions in this § 9.

9.02 *Grandfathering Rules*.

(1) *Rev. Proc. 2003–84 Grandfathering Rules*. The grandfathering rules in § 9.02 of Rev. Proc. 2003–84 continue to apply to matters covered by such grandfathering rules.

(2) *Partnerships under IRS Notice 2008–55*. In the case of a partnership that meets the requirements of § 3.8 of IRS Notice 2008–55, 2008–27 I.R.B. 11 (July 7, 2008), regarding certain partnerships that hold certain auction rate preferred stock and that have certain prescribed liquidity facilities, this revenue procedure shall apply for purposes of § 3.8 of IRS Notice 2008–55 as the successor to Rev. Proc. 2003–84, and in applying this revenue procedure to a partnership under § 3.8 of IRS Notice 2008–55, the partnership eligibility conditions in § 4.01(5) and § 4.01(7) of this revenue procedure shall be inapplicable.

SECTION 10. Effect on Other Documents.

Rev. Proc. 2003–84 is modified and superseded.

SECTION 11. Paperwork Reduction Act.

The collection of information contained in this revenue procedure, carried forward without change from Rev. Proc. 2003–84, has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1768. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. The collection of information is in section 8 of this revenue procedure. The collection of information is required to obtain a benefit, and is required to inform the Service which partnerships are making the monthly closing election. The likely respondents are businesses. The estimated total annual reporting and recordkeeping burden is 500 hours. The estimated annual burden per respondent/record keeper is 1/2 hour. The estimated number of respondents and record keepers is 1,000. The estimated annual frequency of responses (used for reporting requirements only) is once. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

SECTION 12. No Inferences on Law.

This revenue procedure provides administrative relief to address a special need in the tax-exempt bond market in furtherance of public policy. No inferences should be drawn from this revenue procedure regarding any general principle of substantive law with respect to partner status or the debt or equity character of any security.

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26 CFR 601.201: Rulings and determination letters. (Also, Part I, §§ 401; 1.401(b)–1.)

Rev. Proc. 2008–56

SECTION 1. PURPOSE

This revenue procedure modifies Rev. Proc. 2007–44, 2007–28 I.R.B. 54, with respect to certain restrictions that apply to the issuance of opinion and advisory letters for new pre-approved plans. These restrictions were included in Rev. Proc. 2007–44 primarily to ensure that the use of Service resources to administer the pre-approved plan program does not adversely affect the determination letter program. After further evaluation and consideration of comments from pre-approved plan sponsors, the Service is relaxing these restrictions. In general, the changes in this revenue procedure apply only to plans that are identical to mass submitter plans. Since the plans affected by the changes have, in effect, already been reviewed and approved, the Service is able to make the changes without reducing resources needed for the determination letter program.

SECTION 2. BACKGROUND

.01 Rev. Proc. 2007–44 provides a system of cyclical remedial amendment periods under § 401(b) of the Internal Revenue Code for amending plans qualified under § 401(a) and obtaining determination letters. Under this system, every pre-approved plan (that is, a master and prototype (M&P) or volume submitter (VS) plan) must be submitted to the Service for a new opinion or advisory letter every six years, during the one-year submission period at the beginning of the plan's six-year cycle. Pre-approved defined contribution plans have a different six-year cycle than pre-approved defined benefit plans. The cycles and submission periods are set forth in section 18 of Rev. Proc. 2007–44.

.02 After the Service issues a new opinion or advisory letter, the pre-approved plan's adopting employers must adopt the newly approved restatement of the plan within the adoption period announced by the Service. An eligible employer that adopts the restated pre-approved plan within the adoption period will have adopted the plan within the employer's six-year remedial amendment cycle. In Announcement 2008–23, 2008–14 I.R.B. 731, the Service announced that the adoption period for pre-approved defined contribution plans that have received opinion or advisory letters under the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16, ("EGTRRA") will end on April 30, 2010.

.03 Certain exceptions to the preceding rules apply to new pre-approved plans. A new pre-approved plan is one that is created after the submission period for the applicable six-year cycle. An application for an opinion or advisory letter for a new pre-approved plan that is submitted outside of the submission period within an applicable six-year cycle is filed "off-cycle." Section 20 of Rev. Proc. 2007–44 provides the following exceptions to the rules described in sections 2.01 and 2.02, above:

(1) In order for the adopting employers of a new pre-approved plan to be eligible for an applicable six-year cycle, the pre-approved plan must be submitted to the Service for an opinion or advisory letter prior to the beginning of the announced adoption period for that cycle.

(2) The opinion or advisory letter with respect to an off-cycle application is not

retroactive and may not be relied upon for the period prior to the date of submission of the application.

(3) A sponsor or practitioner that submits an application for an opinion or advisory letter within the submission period for an applicable six-year cycle may not also submit an off-cycle application for an opinion or advisory letter.

In accordance with paragraph (2), some EGTRRA opinion and advisory letters include a caveat stating that the letter is not retroactive and may not be relied upon for the period prior to the date of submission of the application.

.04 Rev. Proc. 2005–16, 2005–1 C.B. 674, which contains the Service's procedures for the issuance of opinion and advisory letters, contains rules applicable to "mass submitter" plans, that is, pre-approved plans that are submitted to the Service on a word-for-word identical basis by a minimum number of sponsoring organizations or practitioners.

SECTION 3. MODIFICATION OF REV. PROC. 2007–44

.01 Rev. Proc. 2007–44 is modified to provide the following:

(1) A sponsor or practitioner is not precluded from submitting an off-cycle application for an opinion or advisory letter on account of having also submitted an on-cycle application, provided the new application is for a plan that is word-for-word identical to a mass submitter plan that has received a favorable EGTRRA opinion or advisory letter, or for which an application for such a letter is pending, and the new application is filed according to the procedures governing mass submitter plans under Rev. Proc. 2005–16.

(2) Adopting employers of a new pre-approved plan that is word-for-word identical to a mass submitter plan will not fail to be eligible for an applicable six-year cycle merely because the pre-approved plan is submitted to the Service for an opinion or advisory letter after the beginning of the announced adoption period for that cycle. Regardless of when the application is filed or when the opinion or advisory letter is issued, however, the announced adoption period for any applicable six-year cycle will not be extended.

(3) An otherwise eligible adopting employer as described in section 17 of Rev. Proc. 2007–44 may rely on a pre-approved plan's current opinion or advisory letter to retroactively amend its plan under § 401(b) and Rev. Proc. 2007–44 by adopting the pre-approved plan within the announced adoption period for the applicable six-year cycle, regardless of whether the opinion or advisory letter application for the plan was filed off-cycle (and regardless of whether the plan is word-for-word identical to a mass submitter plan). Thus, for example, an eligible employer may rely on a pre-approved plan's EGTRRA opinion or advisory letter to retroactively amend its plan for EGTRRA and the other qualification changes listed in Notice 2004–84, 2004–2 C.B. 1030, ("the 2004 Cumulative List") by adopting the pre-approved plan within the adoption period ending on April 30, 2010, even if the application for the opinion or advisory letter for the plan was submitted off-cycle. Any EGTRRA opinion or advisory letters that have been issued with a caveat prohibiting retroactive reliance will be reissued by the Service to remove the caveat.

.02 Until further notice, the Service will continue to accept off-cycle applications for opinion or advisory letters filed by M&P and VS mass submitters for pre-approved plans that are word-for-word identical to the mass submitter's currently approved plan or to a plan of the mass submitter for which an application is currently pending with the Service. The Service will not accept applications for opinion or advisory letters for other plans submitted after the beginning of the adoption period announced by the Service for an applicable six-year cycle because there will not be sufficient time for the Service to review the plans and for employers to then adopt the plans before the end of the adoption period.

SECTION 4. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2007–44 is modified.

SECTION 5. EFFECTIVE DATE

The modification in this revenue procedure will be treated as in effect as of the effective date of Rev. Proc. 2007–44, June 13, 2007.

DRAFTING INFORMATION

The principal author of this revenue procedure is James P. Flannery of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue procedure, please contact Mr. Flannery via e-mail at *RetirementPlanQuestions@irs.gov*.

Part IV. Items of General Interest

Notice of Proposed Rulemaking

Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions

REG–140029–07

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: These proposed regulations provide guidance concerning substantiation and reporting requirements for cash and noncash charitable contributions under section 170 of the Internal Revenue Code (Code). The regulations reflect the enactment of provisions of the American Jobs Creation Act of 2004 and the Pension Protection Act of 2006. The regulations provide guidance to individuals, partnerships, and corporations that make charitable contributions, and will affect any donor claiming a deduction for a charitable contribution after the date these regulations are published as final regulations in the Federal Register.

DATES: Written or electronic comments and requests for a public hearing must be received by November 5, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–140029–07), 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–140029–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–140029–07).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Susan J. Kassell at (202) 622–5020; concerning submissions of comments and requests for a hearing, Oluwafunmilayo Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have 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 collections 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 collections of information should be received by October 6, 2008. Comments are specifically requested concerning:

Whether the proposed collections of information are 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 collections of information;

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

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

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

The collections of information in these proposed regulations are in §§1.170A–15(a) and (d)(2); 1.170A–16(a), (b), (c), (d), (e), and (f); 1.170A–17(a)(3) and (a)(7); and 1.170A–18(a)(2) and (b). These collections of information will help the IRS determine if a taxpayer is entitled to a claimed deduction for a charitable contribution. The collections of information are required to obtain a benefit. The likely respondents are individuals, partnerships, and corporations that claim a deduction for a charitable contribution.

The collections of information may vary depending on the item contributed, the amount of the deduction claimed for the contribution, and whether the taxpayer claiming the deduction is an individual, partnership, S corporation, C corporation that is a personal service corporation or closely held corporation, or other C corporation.

The following estimates are based on the information that is available to the IRS. A respondent may require more or less time, depending on the circumstances.

The estimated total annual reporting burden is 226,419 hours.

The estimated annual burden per respondent varies from 5 minutes to 4 hours, with an estimated average annual burden of slightly more than 1 hour. The estimated number of respondents is 201,920.

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 the Income Tax Regulations (26 CFR part 1) for substantiating and reporting deductions for charitable contributions under section 170 of the Internal Revenue Code. Section 170(f)(11), as added by section 883 of the American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1418) (Jobs Act), contains reporting and substantiation requirements relating to deductions for noncash charitable contributions. Under section 170(f)(11)(C), for contributions of property for which a deduction of more than $5,000 is claimed, taxpayers are re-

quired to obtain a qualified appraisal of the property. Under section 170(f)(11)(D), for contributions of property for which a deduction of more than $500,000 is claimed, taxpayers must attach a qualified appraisal of the property to the tax return on which the deduction is claimed.

For appraisals prepared with respect to returns filed on or before August 17, 2006, §1.170A–13(c) of the current regulations provides definitions of the terms "qualified appraisal" and "qualified appraiser". For appraisals prepared with respect to returns filed after August 17, 2006, section 170(f)(11)(E), as added by the Jobs Act and amended by section 1219 of the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780) (PPA), provides statutory definitions of the terms qualified appraisal and qualified appraiser.

Section 170(f)(11)(E)(i) provides that the term *qualified appraisal* means an appraisal that is (1) treated as a qualified appraisal under regulations or other guidance prescribed by the Secretary, and (2) conducted by a qualified appraiser in accordance with generally accepted appraisal standards and any regulations or other guidance prescribed by the Secretary.

Section 170(f)(11)(E)(ii) provides that the term *qualified appraiser* means an individual who (1) has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations prescribed by the Secretary, (2) regularly performs appraisals for which the individual receives compensation, and (3) meets such other requirements as may be prescribed by the Secretary in regulations or other guidance. Section 170(f)(11)(E)(iii) further provides that an individual will not be treated as a qualified appraiser unless that individual (1) demonstrates verifiable education and experience in valuing the type of property subject to the appraisal, and (2) has not been prohibited from practicing before the IRS by the Secretary under section 330(c) of Title 31 of the United States Code at any time during the 3-year period ending on the date of the appraisal.

On October 19, 2006, the IRS and the Treasury Department released Notice 2006–96, 2006–2 C.B. 902 (see §601.601(d)(2)(ii)(*b*) of this chapter), which provides transitional guidance relating to section 170(f)(11)(E) as amended by the PPA. Specifically, Notice 2006–96 provides transitional safe harbor definitions for the terms "qualified appraisal" (section 3.02(1)), "generally accepted appraisal standards" (section 3.02(2)), "appraisal designation" (section 3.03(1)), "education and experience in valuing the type of property" (section 3.03(2)), and "minimum education and experience" (section 3.03(3)). These definitions apply to contributions of property for which a deduction of more than $5,000 is claimed on returns filed after August 17, 2006. Notice 2006–96 solicited comments regarding the definitions of these terms. All comments received were considered in drafting these regulations.

Section 1216 of the PPA added section 170(f)(16), which provides that no deduction is allowed for a contribution of clothing or a household item unless the clothing or household item is in good used condition or better. Section 1217 of the PPA added section 170(f)(17), which imposes a recordkeeping requirement for all cash contributions, regardless of amount. Section 1219 of the PPA added section 6695A, which imposes penalties on appraisers in certain circumstances. Regulations implementing the penalty provisions of section 6695A will be published separately.

Section 170(f)(11)(H) authorizes the Secretary to prescribe regulations as may be necessary or appropriate to carry out the purposes of section 170(f)(11), including regulations that may provide that some or all of the requirements of section 170(f)(11) do not apply in appropriate cases. Other statutory authority to issue regulations is in sections 170(f)(11)(B), (C), (E)(i)(I) and (II), and (E)(ii)(I) and (III).

Explanation of Provisions

I. *In General*

The proposed regulations generally implement the Jobs Act and PPA changes to the substantiation and reporting rules for charitable contributions. For example, the proposed regulations implement the recordkeeping requirements imposed by the PPA for all cash contributions and the new definitions of a qualified appraisal and qualified appraiser applicable to all noncash contributions. The proposed regulations also incorporate the substantiation requirements for noncash contributions imposed by the Jobs Act on (1) a C corporation (other than a closely held corporation or a personal service corporation) claiming a deduction of more than $5,000, and (2) any taxpayer claiming a deduction in excess of $500,000.

The proposed regulations also generally incorporate many of the requirements of §1.170A–13, except to the extent §1.170A–13 is inconsistent with the Jobs Act and PPA requirements. For example, many of the requirements of §1.170A–13(c)(3) for a qualified appraisal are incorporated in proposed §1.170A–17(a); many of the "appraisal summary" requirements of §1.170A–13(c)(4) are incorporated in the required entries for a completed *Form 8283, "Noncash Charitable Contributions,"* in proposed §1.170A–16; and many of the requirements of §1.170A–13(c)(5) for a qualified appraiser are incorporated in proposed §1.170A–17(b).

The IRS and the Treasury Department may propose additional changes to the substantiation regulations in the future and hereby request comments concerning additional issues that should be addressed.

II. *Cash, check or other monetary gifts*

Proposed §1.170A–15 implements the requirements of section 170(f)(17), which was added by the PPA and provides that no deduction is allowed for any contribution of a cash, check, or other monetary gift unless the donor maintains as a record of the contribution a bank record or written communication from the donee. Compare The Check Clearing for the 21st Century Act, Public Law 108–100, 117 Stat. 1178–1180 (12 U.S.C. 5002(16) and 5003(b)), which provides guidance under the banking laws regarding substitute checks. The bank record or written communication must show the name of the donee, the date of the contribution, and the amount of the contribution.

After section 170(f)(17) was enacted, the IRS and the Treasury Department received questions and comments about the new requirements. One commenter suggested a "*de minimis* exception," under which donors of small amounts would not be required to maintain bank records or

written communications from the donee. This suggestion was not adopted in the proposed regulations because the exception would be contrary to the statute and the express language in the legislative history that the provision applies "regardless of the amount." However, there is precedent for exempting from the substantiation requirements certain types of payments for which a charitable beneficiary cannot provide a receipt, either because the charitable beneficiary has not yet been identified or because the charitable beneficiary has no firsthand knowledge of the amount of the payment. For example, a taxpayer making a contribution in the form of a transfer to a charitable remainder trust is not required to obtain the contemporaneous written acknowledgment generally required under section 170(f)(8). A similar exception is contained in the proposed regulations for monetary contributions to a charitable remainder trust of less than $250. The proposed regulations also provide an exception from the substantiation requirements for unreimbursed expenses of less than $250 incurred incident to the rendition of services to a charitable organization. Taxpayers claiming deductions for monetary contributions to a charitable remainder trust or for out of pocket expenses incurred incident to the rendition of services are advised to maintain records of the gifts or expenses.

Some commenters asked how to comply with section 170(f)(17) if a bank statement does not include the name of the donee. In this situation, a monthly bank statement and a photocopy or image obtained from the bank of the front of the check indicating the name of the donee would satisfy the provision.

III. *Revised noncash substantiation requirements*

As under current rules, the proposed regulations provide that donors who claim deductions for noncash contributions of less than $250 are required to obtain a receipt from the donee or keep reliable records. The proposed regulations provide that donors who make contributions of $250 or more but not more than $500 are required to obtain only a contemporaneous written acknowledgment, as provided under section 170(f)(8) and §1.170A–13(f), and are not required to obtain any other written records. No revisions to §1.170A–13(f) are proposed in these proposed regulations. For claimed contributions of more than $500 but not more than $5,000, the donor must obtain a contemporaneous written acknowledgment and must file a completed Form 8283 (Section A) with the return on which the deduction is claimed. For claimed contributions of more than $5,000, in addition to a contemporaneous written acknowledgment, a qualified appraisal generally is required, and either Section A or Section B of Form 8283 (depending on the type of property contributed) must be completed and filed with the return on which the deduction is claimed. For claimed contributions of more than $500,000, the donor must attach a copy of the qualified appraisal to the return. The proposed regulations also provide that the requirements for substantiation that must be submitted with a return also apply to the return for any carryover year under section 170(d).

Section 1.170A–16(c) and §1.170A–16(d) of the proposed regulations generally apply to deductions claimed for contributions of motor vehicles. Section 1.170A–16(c)(4) and §1.170A–16(d)(2)(iii) explain the substantiation requirements for contributions of motor vehicles described in section 170(f)(12)(A)(ii) (vehicles that the donee organization sells without any significant intervening use or material improvement). These substantiation requirements are in addition to the requirements imposed in section 170(f)(12), as added by section 884 of the Jobs Act.

Section 170(f)(11)(A)(ii)(II), as added by the PPA, provides that the requirements of sections 170(f)(11)(B), (C), and (D) do not apply if the donor shows that the failure to meet these requirements is due to reasonable cause and not to willful neglect. Section 170(f)(11)(H) provides that the Secretary may provide that some or all of the requirements of section 170(f)(11) do not apply in appropriate cases. The proposed regulations provide that, to satisfy the "reasonable cause" exception under section 170(f)(11)(A)(ii)(II), the donor must submit with the return a detailed explanation of why the failure to comply was due to reasonable cause and not to willful neglect, and must have timely obtained a contemporaneous written acknowledgment and a qualified appraisal, if applicable. The proposed regulations supersede §1.170A–13(c)(4)(H), which provides that a taxpayer who fails to file an appraisal summary (Form 8283) with the return is permitted to provide it within 90 days of a request from the IRS, and the deduction will be allowed if the donor's original failure to file the appraisal summary is a "good faith omission." Consistent with the Congressional purpose for enacting section 170(f)(11) of reducing valuation abuses, the IRS and the Treasury Department anticipate that the "reasonable cause" exception will be strictly construed to apply only when the donor meets the requirements for the exception as specified in the regulations.

IV. *New requirements for qualified appraisals and qualified appraisers*

New definitions of qualified appraisal and qualified appraiser, taking into account the PPA definitions of these terms in section 170(f)(11)(E), are provided in proposed §1.170A–17. Some new terms to implement these new definitions are also included.

A. *Qualified appraisal*

In proposed §1.170A–17(a), the proposed regulations provide that a *qualified appraisal* means an appraisal document that is prepared by a qualified appraiser in accordance with generally accepted appraisal standards. Generally accepted appraisal standards are defined in the proposed regulations as the substance and principles of the Uniform Standards of Professional Appraisal Practice (USPAP), as developed by the Appraisal Standards Board of the Appraisal Foundation. See Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Public Law 101–73, 103 Stat. 183 (12 U.S.C. 3331–3351). The proposed regulations are similar to section 3.02(2) of Notice 2006–96, except that the proposed regulations require compliance with the substance and principles of USPAP.

Commenters suggested requiring that appraisal documents be "in accordance with published appraisal standards of national professional appraisal credentialing organizations," including references to certain other specific standards such as the Uniform Appraisal Standards for Federal Land Acquisitions, and requiring

appraisers to include specific items in an appraisal, such as all sales of the contributed property within 18 months of the appraisal date. The IRS and the Treasury Department believe the "substance and principles of USPAP" is broad enough to include these suggestions. One commenter suggested that generally accepted appraisal standards are satisfied by an appraisal issued by a corporation or company that is regularly engaged in the business of producing appraisals, relies on the services of specialist departments, is affiliated with an auction house, dealer or association of dealers that conducts at least 100 auctions or sales per year, and regularly conducts appraisals for estate, income and/or charitable donation purposes. This suggestion was not incorporated in the proposed regulations because it does not contain any "appraisal standards."

Application of the "substance and principles of USPAP" rule provided in the proposed regulations may be illustrated by the following situation. The IRS is aware that some appraisers of historic conservation easements have stated that local ordinances restricting modifications of a façade should be disregarded because local governments do not enforce these ordinances. Under applicable substance and principles of USPAP, an appraiser must identify and analyze any known restrictions, ordinances, or similar items, and the likelihood of any modification to those restrictions, in formulating a value opinion. For example, see USPAP Standards Rules 1–2(e)(iv), 1–3(a), and 2–2(vi). An appraisal that does not take into account a local ordinance is not consistent with the substance and principles of USPAP. See also §1.170A–14(h)(3)(ii).

In addition, some commenters requested a specific reference to highest and best use in the proposed regulations. This suggestion was not incorporated in the proposed regulations because USPAP Standards Rule 1–3(b) requires an appraiser to "develop an opinion of the highest and best use of the real estate" when it is "necessary for credible assignment results in developing a market value opinion." An appraisal that does not include a development of highest and best use when required by USPAP is not consistent with the substance and principles of USPAP.

The proposed regulations also clarify the current rules. For example, the current regulations require an appraisal to be made no earlier than 60 days before the contribution date. Under the proposed regulations, the *valuation effective date*, which is the date to which the value opinion applies, generally must be the date of the contribution. In cases where the appraisal is prepared before the date of the contribution, the valuation effective date must be no earlier than 60 days before the date of the contribution and no later than the date of the contribution. The date the appraiser signs the appraisal report (appraisal report date) must be no earlier than 60 days before the date of the contribution and no later than the due date (including extensions) of the return on which the deduction is claimed or reported. As under current regulations, if the deduction is claimed for the first time on an amended return, the appraisal report date must be no later than the date the amended return is filed.

Several commenters requested clarification of when a contribution is "made" for purposes of determining the proper year of the deduction and the timeliness of the appraisal. Under §1.170A–1(b) of the current regulations, generally a contribution is made at the time delivery is effected. The IRS and the Treasury Department invite comments about when the contribution should be treated as "made" for section 170 purposes if a donor contributes a conservation easement to a qualified organization in a jurisdiction where a completed transfer requires execution, delivery, and recording of the transfer documents in the local governmental office, and the parties deliver the fully executed easement documents to the appropriate governmental office for recording in one year, but the documents are not recorded until the following year.

One commenter asked the IRS to state that an appraisal prepared by an insurance or real estate broker is not a qualified appraisal. This recommendation was not adopted in the proposed regulations because an insurance or real estate broker's appraisal, like any other appraisal, is a qualified appraisal if it meets all of the requirements for a qualified appraisal by a qualified appraiser.

B. *Qualified appraiser*

Section 1.170A–17(b) of the proposed regulations incorporates many of the requirements from the current regulations, but certain other provisions were modified. For example, the appraiser declarations required in the appraisal and on Form 8283 have been modified. In addition, the proposed regulations contain several new terms implementing the PPA requirements of a qualified appraiser under section 170(f)(11)(E)(ii) and(iii). In general, under the proposed regulations, a "qualified appraiser" must be an individual with verifiable education and experience in valuing the relevant type of property for which the appraisal is performed.

The PPA refers to two types of education and experience: Minimum education and experience in section 170(f)(11)(E)(ii)(I) to establish qualification as an appraiser generally, and verifiable education and experience in valuing the type of property subject to the appraisal in section 170(f)(11)(E)(iii)(I) to establish qualification as an appraiser for a particular appraisal. The IRS and the Treasury Department believe that it is sufficient for an appraiser to satisfy the more stringent requirement of verifiable education and experience in valuing the type of property subject to the appraisal. Satisfaction of that requirement will also satisfy the minimum education and experience requirement of section 170(f)(11)(E)(ii)(I). The proposed regulations provide that an individual has verifiable education and experience if the individual has successfully completed professional or college-level coursework in valuing the relevant type of property and has two or more years experience in valuing that type of property.

Furthermore, because significant education and experience are required to obtain a designation from a recognized professional appraiser organization, under the proposed regulations appraisers with these designations are deemed to have demonstrated sufficient verifiable education and experience. One commenter asked about the qualifications of organizations that award designations and suggested that a recognized professional appraisal organization should be one that, among other things, offers comprehensive educational programs in USPAP and principles of valuation, and requires qualification to be

demonstrated through written exams and peer reviews. The proposed regulations incorporate some of these principles in the definition of education and experience in valuing the relevant type of property.

A number of comments focused on education and experience. Several commenters suggested that an appraiser's evidence of education and experience should be required to be verifiable as provided in section 170(f)(11)(E)(iii)(I). The proposed regulations incorporate this suggestion by requiring a statement in the appraisal of the appraiser's specified education and experience in valuing the relevant type of property. The proposed regulations also require the appraiser to complete coursework in valuing the category of property that is customary in the appraisal field for an appraiser to value.

One commenter indicated that some of its appraiser employees may have significant experience but lack formal education, and suggested that "education and experience" be interpreted as "education or experience." The commenter also asked that the "education and experience" requirement be applied to a group of appraisers rather than individually. The proposed regulations do not adopt these suggestions because they are contrary to the section 170(f)(11)(E) requirement that the person who signs the appraisal report be an individual with the requisite education and experience in valuing the relevant type of property. However, the proposed regulations define education broadly to include coursework obtained in an employment context, provided it is similar to an educational program of an educational institution or a generally recognized professional appraisal organization.

Section 3.03(3)(a)(ii) of Notice 2006–96 provides that, for real estate appraisers, education and experience are sufficient if the appraiser holds a license or certificate to value the relevant type of property in the state in which the property is located. This provision was not incorporated in the proposed regulations, which set forth more specific requirements applicable to all appraisers.

Several commenters asked for a definition of "types of property" for purposes of identifying the required education and experience. More education and experience may be necessary and available for some types of property than for others. Therefore, the proposed regulations provide that the relevant type of property is determined by what is customary in the appraisal profession. The IRS and the Treasury Department request suggestions for categorizing types of property that would be helpful in determining the qualification of appraisers, for purposes of both the education and experience requirements.

The IRS and the Treasury Department believe that the term "regularly performs appraisals for which the individual receives compensation" under section 170(f)(11)(E)(ii)(II) is generally encompassed by the experience requirement of section 170(f)(11)(E)(iii)(I) and does not need to be separately met. One corporate commenter was concerned that its individual employees could never be qualified appraisers, because the corporation receives the compensation, not the individual employees. Similar comments were received from otherwise qualified individual appraisers who do not regularly receive compensation. The proposed regulations address both of these concerns by not separately stating a compensation requirement.

Expressing concerns about identity theft, some commenters requested elimination of the requirements of supplying the appraiser's taxpayer identification number on Form 8283 and in the appraisal, as currently required under §§1.170A–13(c)(3)(ii)(E) and 1.170A–13(c)(4)(ii)(I). The concern arises from appraisers who do not have a taxpayer identification number other than a social security number. The proposed regulations continue to require this information because, pursuant to §301.6109–1(a)(1)(ii)(D) of the Procedure and Administration Regulations, an appraiser may obtain an employer identification number even if the appraiser does not have employees. This number may be obtained by completing Form SS–4, *"Application for Employer Identification Number."* See Pub. 1635, *"Understanding Your Employer Identification Number."* If an appraiser is employed by a firm, the firm's employer identification number should be used.

Taxpayers are reminded that the IRS may challenge the amount of a claimed deduction, even if the donor substantiates the amount of the deduction with a qualified appraisal prepared by a qualified appraiser.

C. *Clothing and household items*

Section 1.170A–18 of the proposed regulations implements section 170(f)(16), which provides that no deduction is allowed for any contribution of clothing or a household item unless it is in good used condition or better. The purpose of this provision relates to ensuring that donated clothing and household items are "of meaningful use to charitable organizations." Joint Committee on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006" (Aug. 3, 2006). The IRS and the Treasury Department are aware that a number of charities publish donation guidelines listing items the charity will and will not accept, and believe that the guidelines are helpful in ensuring that charities receive donations of items that are of meaningful use to the charity. The IRS and the Treasury Department request comments regarding how donation guidelines published by a charity may relate to the "good used condition" requirement in section 170(f)(16).

Under the proposed regulations, no deduction is allowed unless the clothing or household item is in good used condition or better at the time of the contribution. The proposed regulations also provide that this rule does not apply to a contribution of a single item of clothing or a household item for which a donor claims a deduction of more than $500 if the donor submits a qualified appraisal with the return on which the deduction is claimed. Several commenters questioned whether a qualified appraisal is required for any contribution of an item of clothing or a household item with a claimed value over $500. If the item is not in good used condition or better and a deduction in excess of $500 is claimed, the taxpayer must obtain a qualified appraisal and file a completed Form 8283 (Section B) with the return on which the deduction is claimed. If the item is in good used condition or better and a deduction in excess of $500 is claimed, the taxpayer must file a completed Form 8283 (Section A or B depending on the type of contribution and claimed amount), but a qualified appraisal is required only if the claimed contribution amount exceeds $5,000.

If the donor claims a deduction of less than $250, §1.170A–16(a) of the proposed regulations requires that the donor obtain

a receipt from the donee or maintain reliable written records of the contribution. A reliable written record for a contribution of clothing or a household item must include a description of the condition of the item. If the donor claims a deduction of $250 or more, the donor must obtain from the donee a receipt that meets the requirements of section 170(f)(8) (contemporaneous written acknowledgment).

Proposed Effective/Applicability Date

These proposed regulations are proposed to apply to contributions occurring after the date these regulations are published as final regulations in the **Federal Register**. Taxpayers should continue to comply with the recordkeeping and return requirements in §1.170A–13 of the existing regulations to the extent those provisions are not superseded by the Jobs Act or the PPA.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. This certification is based on the belief of the IRS and the Treasury Department that these regulations reduce the burden on taxpayers by clarifying and simplifying the existing substantiation and reporting requirements for charitable contributions. Furthermore, to the extent these regulations contain requirements that may impact small entities that are not contained in the current substantiation and reporting rules, those additional requirements are based on statutory changes to the rules that are being incorporated into the regulations. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Requests for a Public Hearing

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

Drafting Information

The principal author of this regulation is Susan J. Kassell of the Office of Associate Chief Counsel (Income Tax and Accounting). Other personnel from the IRS and the Treasury Department participated in its development.

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Partial Withdrawal of Proposed Regulations

Accordingly, under the authority of 26 U.S.C. 7805, §1.170A–13 of the notice of proposed rulemaking (LR–83–87, 1988–1 C.B. 930) that was published in the **Federal Register** on Thursday May 5, 1988 (53 FR 16156) is withdrawn.

Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read as follows:

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

§1.170A–15 also issued under 26 U.S.C. 170(a)(1).

§1.170A–16 also issued under 26 U.S.C. 170(a)(1) and 170(f)(11).

§1.170A–17 also issued under 26 U.S.C. 170(a)(1) and 170(f)(11).

§1.170A–18 also issued under 26 U.S.C. 170(a)(1).

§§1.170–0 and 1.170–2 [Removed]

Par. 2. Sections 1.170–0 and 1.170–2 are removed.

§1.170A–13 [Amended]

Par. 3. In §1.170A–13, paragraphs (a)(3), (b)(3)(i)(B), (b)(4), and (d) are removed.

Par. 4. Section 1.170A–15 is added to read as follows:

§1.170A–15 Substantiation requirements for charitable contribution of a cash, check, or other monetary gift.

(a) *In general*—(1) *Bank record or written communication required.* No deduction is allowed under section 170(a) for a charitable contribution in the form of a cash, check, or other monetary gift (as described in paragraph (b)(1) of this section) unless the donor substantiates the deduction with a bank record (as described in paragraph (b)(2) of this section) or a written communication (as described in paragraph (b)(3) of this section) from the donee showing the name of the donee, the date of the contribution, and the amount of the contribution.

(2) *Additional substantiation required for contributions of $250 or more.* No deduction is allowed under section 170(a) for any contribution of $250 or more unless the donor substantiates the contribution with a contemporaneous written acknowledgment (as described in section 170(f)(8) and §1.170A–13(f)) from the donee.

(3) *Single document may be used.* The requirements of paragraphs (a)(1) and (a)(2) of this section may be met by a single document that contains all the information required by paragraphs (a)(1) and (a)(2) of this section, if the single document is obtained by the donor no later than the date prescribed by paragraph (c) of this section.

(b) *Terms*—(1) *Monetary gift* includes a transfer of a gift card redeemable for cash, and a payment made by credit card, electronic fund transfer (as described in section 5061(e)(2)), an online payment service, or payroll deduction.

(2) *Bank record* includes a statement from a financial institution, an electronic

fund transfer receipt, a canceled check, a scanned image of both sides of a canceled check obtained from a bank website, or a credit card statement.

(3) *Written communication* includes electronic mail correspondence.

(c) *Deadline for receipt of substantiation*. The substantiation described in paragraph (a) of this section must be received by the donor on or before the earlier of—

(1) The date the donor files the original return for the taxable year in which the contribution was made; or

(2) The due date (including extensions) for filing the donor's original return for that year.

(d) *Distributing organizations as donees*—(1) *In general*. The following organizations are treated as donees for purposes of section 170(f)(17) and paragraph (a) of this section, even if the organization (pursuant to the donor's instructions or otherwise) distributes the amount received to one or more organizations described in section 170(c):

(i) An organization described in section 170(c).

(ii) An organization described in 5 C.F.R. 950.105 (a Principal Combined Fund Organization for purposes of the Combined Federal Campaign) and acting in that capacity.

(2) *Contributions made by payroll deduction*. In the case of a charitable contribution made by payroll deduction, a donor is treated as meeting the requirements of section 170(f)(17) and paragraph (a) of this section if, no later than the date described in paragraph (c) of this section, the donor obtains—

(i) A pay stub, Form W–2, *"Wage and Tax Statement,"* or other employer-furnished document that sets forth the amount withheld during the taxable year for payment to a donee; and

(ii) A pledge card or other document prepared by or at the direction of the donee that shows the name of the donee.

(e) *Substantiation of out-of-pocket expenses*. Paragraph (a)(1) of this section does not apply to a donor who incurs unreimbursed expenses of less than $250 incident to the rendition of services, within the meaning of §1.170A–1(g). For substantiation of unreimbursed out-of-pocket expenses of $250 or more, see §1.170A–13(f)(10).

(f) *Charitable contributions made by partnership or S corporation*. If a partnership or an S corporation makes a charitable contribution, the partnership or S corporation is treated as the donor for purposes of section 170(f)(17) and paragraph (a) of this section.

(g) *Transfers to certain trusts*. The requirements of section 170(f)(17) and paragraph (a)(1) of this section do not apply to a transfer of a cash, check, or other monetary gift to a trust described in section 170(f)(2)(B), a charitable remainder annuity trust (as defined in section 664(d)(1)), or a charitable remainder unitrust (as defined in section 664(d)(2) or (d)(3) or §1.664–3(a)(1)(i)(b)). The requirements of section 170(f)(17) and paragraphs (a)(1) and (a)(2) of this section do apply, however, to a transfer to a pooled income fund (as defined in section 642(c)(5)). For contributions of $250 or more, see section 170(f)(8) and §1.170A–13(f)(13).

(h) *Effective/applicability date*. This section applies to contributions made after the date these regulations are published as final regulations in the **Federal Register**.

Par. 5. Section 1.170A–16 is added to read as follows:

§1.170A–16 Substantiation and reporting requirements for noncash charitable contributions.

(a) *Substantiation of charitable contributions of less than $250*—(1) *Individuals, partnerships, and certain corporations required to obtain receipt*. Except as provided in paragraph (a)(2) of this section, no deduction is allowed under section 170(a) for a noncash charitable contribution of less than $250 by an individual, partnership, S corporation, or C corporation that is a personal service corporation or closely held corporation unless the donor maintains for each contribution a receipt from the donee showing the following information:

(i) The name and address of the donee;

(ii) The date of the contribution;

(iii) A description of the property in sufficient detail under the circumstances (taking into account the value of the property) for a person who is not generally familiar with the type of property to ascertain that the described property is the contributed property; and

(iv) In the case of securities, the name of the issuer, the type of security, and whether the securities are publicly traded securities within the meaning of §1.170A–13(c)(7)(xi).

(2) *Substitution of reliable written records*—(i) *In general*. If it is impractical to obtain a receipt (for example, a donor deposits canned food at a donee's unattended drop site), the donor may satisfy the recordkeeping rules of this paragraph (a)(2)(i) by maintaining reliable written records (as described in paragraphs (a)(2)(ii) and (a)(2)(iii) of this section) for the contributed property.

(ii) *Reliable written records*. The reliability of written records is to be determined on the basis of all of the facts and circumstances of a particular case, including the contemporaneous nature of the writing evidencing the contribution.

(iii) *Contents of reliable written records*. Reliable written records must include—

(A) The information required by paragraph (a)(1) of this section;

(B) The fair market value of the property on the date the contribution was made;

(C) The method used in determining the fair market value; and

(D) In the case of a contribution of clothing or a household item as defined in §1.170A–18(c), the condition of the item.

(3) *Additional substantiation rules may apply*. For additional substantiation rules, see paragraph (f) of this section.

(b) *Substantiation of charitable contributions of $250 or more but not more than $500*. No deduction is allowed under section 170(a) for a noncash charitable contribution of $250 or more but not more than $500 unless the donor substantiates the contribution with a contemporaneous written acknowledgment (as described in section 170(f)(8) and §1.170A–13(f)).

(c) *Substantiation of charitable contributions of more than $500 but not more than $5,000*—(1) *In general*. No deduction is allowed under section 170(a) for a noncash charitable contribution of more than $500 but not more than $5,000 unless the donor substantiates the contribution with a contemporaneous written acknowledgment (as described in section 170(f)(8) and §1.170A–13(f)) and meets the applicable requirements of this section.

(2) *Individuals, partnerships, and certain corporations also required to file*

Form 8283 (Section A). No deduction is allowed under section 170(a) for a noncash charitable contribution of more than $500 but not more than $5,000 by an individual, partnership, S corporation, or C corporation that is a personal service corporation or closely held corporation unless the donor—

(i) Substantiates the contribution with a contemporaneous written acknowledgment (as described in section 170(f)(8) and §1.170A–13(f)); and

(ii) Completes Form 8283 (Section A), "Noncash Charitable Contributions" (as provided in paragraph (c)(3) of this section), or a successor form, and files it with the return on which the deduction is claimed.

(3) *Completion of Form 8283 (Section A)*. A completed Form 8283 (Section A) includes—

(i) The donor's name and taxpayer identification number (social security number if the donor is an individual or employer identification number if the donor is a partnership or corporation);

(ii) The name and address of the donee;

(iii) The date of the contribution;

(iv) The following information about the contributed property:

(A) A description of the property in sufficient detail under the circumstances (taking into account the value of the property) for a person who is not generally familiar with the type of property to ascertain that the described property is the contributed property;

(B) In the case of real or personal property, the condition of the property;

(C) In the case of securities, the name of the issuer, the type of security, and whether the securities are publicly traded securities within the meaning of §1.170A–13(c)(7)(xi); and

(D) The fair market value of the property on the date the contribution was made and the method used in determining the fair market value;

(v) The manner of acquisition (for example, by purchase, gift, bequest, inheritance, or exchange), and the approximate date of acquisition of the property by the donor (except that in the case of a contribution of publicly traded securities as defined in §1.170A–13(c)(7)(xi), a representation that the donor held the securities for more than one year is sufficient) or, if the property was created, produced, or manufactured by or for the donor, the approximate date the property was substantially completed;

(vi) The cost or other basis, adjusted as provided by section 1016, of the property (except that the cost or basis is not required for contributions of publicly traded securities (as defined in §1.170A–13(c)(7)(xi)) that if sold on the contribution date would have resulted in long term capital gain);

(vii) In the case of tangible personal property, whether the donee has certified it for a use related to the purpose or function constituting the donee's basis for exemption under section 501 (or in the case of a governmental unit, an exclusively public purpose); and

(viii) Any other information required by Form 8283 (Section A) or the instructions to Form 8283 (Section A).

(4) *Additional requirement for certain motor vehicle contributions*. In the case of a contribution of a qualified vehicle described in section 170(f)(12)(A)(ii) for which an acknowledgment under section 170(f)(12)(B)(iii) is provided to the IRS by the donee organization, the donor must attach a copy of the acknowledgment to the Form 8283 (Section A) for the return on which the deduction is claimed.

(5) *Additional substantiation rules may apply*. For additional substantiation rules, see paragraph (f) of this section.

(d) *Substantiation of charitable contributions of more than $5,000*—(1) *In general*. Except as provided in paragraph (d)(2) of this section, no deduction is allowed under section 170(a) for a noncash charitable contribution of more than $5,000 unless the donor—

(i) Substantiates the contribution with a contemporaneous written acknowledgment (as described in section 170(f)(8) and §1.170A–13(f));

(ii) Obtains a qualified appraisal (as defined in §1.170A–17(a)(1)) prepared by a qualified appraiser (as defined in §1.170A–17)(b)(1)); and

(iii) Completes Form 8283 (Section B) (as provided in paragraph (d)(3) of this section), or a successor form, and files it with the return on which the deduction is claimed.

(2) *Exception for certain noncash contributions*. A qualified appraisal is not required, and a completed Form 8283 (Section A) (containing the information required in paragraph (c)(3) of this section) meets the requirements of paragraph (d)(1)(iii) of this section for contributions of—

(i) Publicly traded securities as defined in §1.170A–13(c)(7)(xi);

(ii) Property described in section 170(e)(1)(B)(iii) (certain intellectual property);

(iii) A qualified vehicle described in section 170(f)(12)(A)(ii) for which an acknowledgment under section 170(f)(12)(B)(iii) is provided to the IRS by the donee organization and attached to the Form 8283 (Section A) by the donor; and

(iv) Property described in section 1221(a)(1) (inventory and property held by the donor primarily for sale to customers in the ordinary course of the donor's trade or business).

(3) *Completed Form 8283 (Section B)*. A completed Form 8283 (Section B) includes—

(i) The donor's name and taxpayer identification number (social security number if the donor is an individual or employer identification number if the donor is a partnership or corporation);

(ii) The donee's name, address, taxpayer identification number, and signature, the date signed by the donee, and the date the donee received the property;

(iii) The appraiser's name, address, taxpayer identification number, appraiser declaration (as described in paragraph (d)(4) of this section), signature, and the date signed by the appraiser;

(iv) The following information about the contributed property:

(A) The fair market value on the valuation effective date (as defined in §1.170A–17(a)(5)(i)).

(B) A description in sufficient detail under the circumstances (taking into account the value of the property) for a person who is not generally familiar with the type of property to ascertain that the described property is the contributed property.

(C) In the case of real or tangible personal property, the condition of the property;

(v) The manner of acquisition (for example, by purchase, gift, bequest, inheritance, or exchange), and the approximate date of acquisition of the property by the donor, or, if the property was created, produced, or manufactured by or for the

donor, the approximate date the property was substantially completed;

(vi) The cost or other basis, adjusted as provided by section 1016;

(vii) A statement explaining whether the charitable contribution was made by means of a bargain sale and, if so, the amount of any consideration received from the donee for the contribution; and

(viii) Any other information required by Form 8283 (Section B) or the instructions to Form 8283 (Section B).

(4) *Appraiser declaration*. The appraiser declaration referred to in paragraph (d)(3)(iii) of this section must include the following statement: "I understand that my appraisal will be used in connection with a return or claim for refund. I also understand that, if a substantial or gross valuation misstatement of the value of the property claimed on the return or claim for refund results from my appraisal, I may be subject to a penalty under section 6695A of the Internal Revenue Code, as well as other applicable penalties. I affirm that I have not been barred from presenting evidence or testimony before the Department of the Treasury or the Internal Revenue Service pursuant to 31 U.S.C. section 330(c)."

(5) *Donee signature*—(i) *Person authorized to sign*. The person who signs Form 8283 for the donee must be either an official authorized to sign the tax or information returns of the donee, or a person specifically authorized to sign Forms 8283 by that official. In the case of a donee that is a governmental unit, the person who signs Form 8283 for the donee must be an official of the governmental unit.

(ii) *Effect of donee signature*. The signature of the donee on Form 8283 does not represent concurrence in the appraised value of the contributed property. Rather, it represents acknowledgment of receipt of the property described in Form 8283 on the date specified in Form 8283 and that the donee understands the information reporting requirements imposed by section 6050L and §1.6050L–1.

(iii) *Certain information not required on Form 8283 before donee signs*. Before Form 8283 is signed by the donee, Form 8283 must be completed (as described in paragraph (d)(3) of this section), except that it is not required to contain the following:

(A) Information about the qualified appraiser or the appraiser declaration.

(B) The manner or date of acquisition.

(C) The cost or other basis of the property.

(D) The appraised fair market value of the contributed property.

(E) The amount claimed as a charitable contribution.

(6) *Additional substantiation rules may apply*. For additional substantiation rules, see paragraph (f) of this section.

(e) *Substantiation of noncash charitable contributions of more than $500,000*—(1) *In general*. Except as provided in paragraph (e)(2) of this section, no deduction is allowed under section 170(a) for a noncash charitable contribution of more than $500,000 unless the donor—

(i) Substantiates the contribution with a contemporaneous written acknowledgment (as described in section 170(f)(8) and §1.170A–13(f));

(ii) Obtains a qualified appraisal (as defined in §1.170A–17(a)(1)) prepared by a qualified appraiser (as defined in §1.170A–17(b)(1));

(iii) Completes (as described in paragraph (d)(3) of this section) Form 8283 (Section B) and files it with the return on which the deduction is claimed; and

(iv) Attaches the qualified appraisal of the property to the return on which the deduction is claimed.

(2) *Exception for certain noncash contributions*. For contributions of property described in paragraph (d)(2) of this section, a qualified appraisal is not required, and a completed Form 8283 (Section A) (containing the information required in paragraph (c)(3) of this section) meets the requirements of paragraph (e)(1)(iii) of this section.

(3) *Additional substantiation rules may apply*. For additional substantiation rules, see paragraph (f) of this section.

(f) *Additional substantiation requirements that may be applicable to any noncash contribution*—(1) *Signed Form 8283 furnished by donor to donee*. A donor who presents a Form 8283 to a donee for signature must furnish to the donee a copy of Form 8283 as signed by the donee.

(2) *Number of Forms 8283*—(i) *In general*. For each item of contributed property for which a Form 8283 is required under paragraphs (c), (d), or (e) of this section, a donor must attach a separate Form 8283 to the return on which the deduction for the item is claimed.

(ii) *Exception for similar items*. The donor may attach a single Form 8283 for all similar items of property (as defined in §1.170A–13(c)(7)(iii)) contributed to the same donee during the donor's taxable year, if the donor includes on Form 8283 the information required by paragraph (c)(3) or (d)(3) of this section for each item of property.

(3) *Substantiation requirements for carryovers of noncash contribution deductions*. The rules in paragraphs (c)(2)(ii), (d)(1)(iii), (d)(2), (e)(1)(iii) and (e)(1)(iv) of this section (regarding substantiation that must be submitted with a return) apply to the return for any carryover year under section 170(d).

(4) *Partners and S corporation shareholders*—(i) *Form 8283 must be provided to partners and S corporation shareholders*. If the donor is a partnership or S corporation, the donor must provide a copy of the completed Form 8283 to every partner or shareholder who receives an allocation of a charitable contribution deduction under section 170 for the property described in Form 8283.

(ii) *Partners and S corporation shareholders must attach Form 8283 to return*. A partner of a partnership or shareholder of an S corporation who receives an allocation of a deduction under section 170 for a charitable contribution of property to which paragraphs (c), (d), or (e) of this section applies must attach a copy of the partnership's or S corporation's completed Form 8283 to the return on which the deduction is claimed.

(5) *Determination of deduction amount for purposes of substantiation rules*—(i) *In general*. In determining whether the amount of a donor's deduction exceeds the amounts set forth in section 170(f)(11)(B) (noncash contributions exceeding $500), 170(f)(11)(C) (noncash contributions exceeding $5,000), or 170(f)(11)(D) (noncash contributions exceeding $500,000), the rules of paragraphs (f)(5)(ii) and (f)(5)(iii) of this section apply.

(ii) *Similar items of property must be aggregated*. Under section 170(f)(11)(F), the donor must aggregate the amount claimed as a deduction for all similar items of property (as defined in §1.170A–13(c)(7)(iii)) contributed during the taxable year. For rules re-

garding the number of qualified appraisals and Forms 8283 required if similar items of property are contributed, see §§1.170A–13(c)(3)(iv)(A) and 1.170A–13(c)(4)(iv)(B).

(iii) *For contributions of certain inventory and scientific property, excess of amount claimed over cost of goods sold taken into account.* (A) *In general.* In determining the amount of a donor's contribution of property to which section 170(e)(3) or (4) applies, the donor must take into account only the excess of the amount claimed as a deduction over the amount that would have been treated as the cost of goods sold if the donor had sold the contributed property to the donee.

(B) *Example.* The following example illustrates the rule of this paragraph (f)(5)(iii):

Example. *X* Corporation makes a contribution to which section 170(e)(3) applies of clothing for the care of the needy. The cost of the property to *X* Corporation is $5,000, and, pursuant to section 170(e)(3)(B), *X* Corporation claims a charitable contribution deduction of $8,000. The amount taken into account for purposes of determining the $5,000 threshold of paragraph (d) of this section is $3,000 ($8,000-$5,000).

(6) *Failure due to reasonable cause.* If a donor fails to meet the requirements of paragraphs (c), (d), or (e) of this section, the donor's deduction will be disallowed unless the donor establishes that the failure was due to reasonable cause and not to willful neglect. The donor may establish that the failure was due to reasonable cause and not to willful neglect only if the donor—

(i) Submits with the return a detailed explanation that the failure to meet the requirements of this section was due to reasonable cause and not to willful neglect;

(ii) Obtained a contemporaneous written acknowledgment (as required by section 170(f)(8) and §1.170A–13(f)(3)); and

(iii) Obtained a qualified appraisal (as defined by section 170(f)(11)(E)(i) and §1.170A–17(a)(1)) prepared by a qualified appraiser (as defined by section 170(f)(11)(E)(ii) and §1.170A–17(b)(1)) within the dates specified in §1.170A–17(a)(4), if required.

(7) *Additional requirement for returns claiming conservation easements for buildings in registered historic districts.* [Reserved]

(g) *Effective/applicability date.* This section applies to contributions made after the date these regulations are published as final regulations in the **Federal Register**.

Par. 6. Section 1.170A–17 is added to read as follows:

§1.170A–17 Qualified appraisal and qualified appraiser.

(a) *Qualified appraisal*—(1) *Definition.* For purposes of section 170(f)(11) and §§1.170A–16(d)(1)(ii) and 1.170A–16(e)(1)(ii), the term *qualified appraisal* means an appraisal document that is prepared by a qualified appraiser (as defined in paragraph (b)(1) of this section) in accordance with generally accepted appraisal standards (as defined in paragraph (a)(2) of this section) and otherwise complies with the requirements of this paragraph (a).

(2) *Generally accepted appraisal standards defined.* For purposes of paragraph (a)(1) of this section, *generally accepted appraisal standards* means the substance and principles of the Uniform Standards of Professional Appraisal Practice, as developed by the Appraisal Standards Board of the Appraisal Foundation.

(3) *Contents of qualified appraisal.* A qualified appraisal must include—

(i) The following information about the contributed property:

(A) A description in sufficient detail under the circumstances (taking into account the value of the property) for a person who is not generally familiar with the type of property to ascertain that the appraised property is the contributed property.

(B) In the case of real or personal tangible property, the condition of the property.

(C) The valuation effective date (as defined in paragraph (a)(5)(i) of this section).

(D) The fair market value (within the meaning of §1.170A–1(c)(2)) of the contributed property on the valuation effective date;

(ii) The terms of any agreement or understanding by or on behalf of the donor and donee that relates to the use, sale, or other disposition of the contributed property, including, for example, the terms of any agreement or understanding that—

(A) Restricts temporarily or permanently a donee's right to use or dispose of the contributed property;

(B) Reserves to, or confers upon, anyone (other than a donee or an organization participating with a donee in cooperative fundraising) any right to the income from the contributed property or to the possession of the property, including the right to vote contributed securities, to acquire the property by purchase or otherwise, or to designate the person having income, possession, or right to acquire; or

(C) Earmarks contributed property for a particular use;

(iii) The date (or expected date) of the contribution to the donee;

(iv) The following information about the appraiser:

(A) Name, address, and taxpayer identification number.

(B) Qualifications to value the type of property being valued, including the appraiser's education and experience.

(C) If the appraiser is acting in his or her capacity as a partner in a partnership, an employee of any person (whether an individual, corporation, or partnership), or an independent contractor engaged by a person other than the donor, the name, address, and taxpayer identification number of the partnership or the person who employs or engages the qualified appraiser;

(v) The signature of the appraiser and the date signed by the appraiser (appraisal report date);

(vi) The following declaration by the appraiser: "I understand that my appraisal will be used in connection with a return or claim for refund. I also understand that, if a substantial or gross valuation misstatement of the value of the property claimed on the return or claim for refund results from my appraisal, I may be subject to a penalty under section 6695A of the Internal Revenue Code, as well as other applicable penalties. I affirm that I have not been barred from presenting evidence or testimony before the Department of the Treasury or the Internal Revenue Service pursuant to 31 U.S.C. section 330(c);"

(vii) A statement that the appraisal was prepared for income tax purposes;

(viii) The method of valuation used to determine the fair market value, such as the income approach, the market-data approach, or the replacement-cost-less-depreciation approach; and

(ix) The specific basis for the valuation, such as specific comparable sales transactions or statistical sampling, including a justification for using sampling and an ex-

planation of the sampling procedure employed.

(4) *Timely appraisal report*. A qualified appraisal must be signed and dated by the qualified appraiser no earlier than 60 days before the date of the contribution and no later than—

(i) The due date (including extensions) of the return on which the deduction for the contribution is first claimed;

(ii) In the case of a donor that is a partnership or S corporation, the due date (including extensions) of the return on which the deduction for the contribution is first reported; or

(iii) In the case of a deduction first claimed on an amended return, the date on which the amended return is filed.

(5) *Valuation effective date*—(i) *Definition*. The *valuation effective date* is the date to which the value opinion applies.

(ii) *Timely valuation effective date*. For an appraisal report dated before the date of the contribution (as described in §1.170A–1(b)), the valuation effective date must be no earlier than 60 days before the date of the contribution and no later than the date of the contribution. For an appraisal report dated on or after the date of the contribution, the valuation effective date must be the date of the contribution.

(6) *Exclusion for donor knowledge of falsity*. An appraisal is not a qualified appraisal for a particular contribution, even if the requirements of this paragraph (a) are met, if a reasonable person would conclude that the donor failed to disclose or misrepresented facts that would cause the appraiser to overstate the value of the contributed property.

(7) *Number of appraisals required*. A donor must obtain a separate qualified appraisal for each item of property for which an appraisal is required under paragraphs (c), (d), or (e) of this section and that is not included in a group of similar items of property (as defined in §1.170A–13(c)(7)(iii)). For rules regarding the number of appraisals required if similar items of property are contributed, see §1.170A–13(c)(3)(iv)(A).

(8) *Prohibited appraisal fees*. The fee for a qualified appraisal cannot be based to any extent on the appraised value of the property. For example, a fee for an appraisal will be treated as based on the appraised value of the property if any part of the fee depends on the amount of the appraised value that is allowed by the IRS after an examination.

(9) *Retention of qualified appraisal*. The donor must retain the qualified appraisal for so long as it may be relevant in the administration of any internal revenue law.

(10) *Appraisal disregarded pursuant to 31 U.S.C. 330(c)*. If an appraisal is disregarded pursuant to 31 U.S.C. 330(c), it has no probative effect as to the value of the appraised property and does not satisfy the appraisal requirements of paragraphs (d) and (e) of this section, unless the appraisal and Form 8283 include the appraiser signature, the date signed by the appraiser, and the appraiser declaration described in paragraphs (a)(3)(v) and (a)(3)(vi) of this section and §§1.170A–16(d)(3)(iii) and (d)(4), and the donor had no knowledge that the signature, date, or declaration was false when the appraisal and Form 8283 were signed by the appraiser.

(11) *Partial interest*. If the contributed property is a partial interest, the appraisal must be of the partial interest.

(b) *Qualified appraiser*—(1) *Definition*. For purposes of section 170(f)(11) and §§1.170A–16(d)(1)(ii) and 1.170A–16(e)(1)(ii), the term *qualified appraiser* means an individual with verifiable education and experience in valuing the relevant type of property for which the appraisal is performed (as described in paragraphs (b)(2) through (b)(4) of this section).

(2) *Education and experience in valuing relevant type of property*. (i) *In general*. An individual is treated as having education and experience in valuing the relevant type of property within the meaning of paragraph (b)(1) of this section if, as of the date the individual signs the appraisal, the individual has—

(A) Successfully completed (for example, received a passing grade on a final examination) professional or college-level coursework (as described in paragraph (b)(2)(ii) of this section) in valuing the relevant type of property (as described in paragraph (b)(3) of this section), and has two or more years of experience in valuing the relevant type of property (as described in paragraph (b)(3) of this section); or

(B) Earned a recognized appraisal designation (as described in paragraph (b)(2)(iii) of this section) for the relevant type of property (as described in paragraph (b)(3) of this section).

(ii) *Coursework must be obtained from professional or college-level educational institution, appraisal organization, or employer educational program*. For purposes of paragraph (b)(2)(i)(A) of this section, the coursework must be obtained from—

(A) A professional or college-level educational organization described in section 170(b)(1)(A)(ii);

(B) A generally recognized professional appraisal organization that regularly offers educational programs in the principles of valuation; or

(C) An employer as part of an employee apprenticeship or educational program substantially similar to the educational programs described in paragraphs (b)(2)(ii)(A) and (B) of this section.

(iii) *Recognized appraisal designation defined*. A *recognized appraisal designation* means a designation awarded by a recognized professional appraiser organization on the basis of demonstrated competency. For example, an appraiser who has earned a designation similar to the Member of the Appraisal Institute (MAI), Senior Residential Appraiser (SRA), Senior Real Estate Appraiser (SREA), or Senior Real Property Appraiser (SRPA) membership designation has earned a recognized appraisal designation.

(3) *Relevant type of property defined*—(i) *In general*. The relevant type of property means the category of property customary in the appraisal field for an appraiser to value.

(ii) *Examples*. The following examples illustrate the rule of paragraph (b)(3)(i) of this section:

Example (1). Coursework in valuing relevant type of property. There are very few professional-level courses offered in widget appraising, and it is customary in the appraisal field for personal property appraisers to appraise widgets. Appraiser *A* has successfully completed professional-level coursework in valuing personal property generally but has completed no coursework in valuing widgets. The coursework completed by Appraiser *A* is for the relevant type of property under paragraphs (b)(2)(i) and (b)(3)(i) of this section.

Example (2). Experience in valuing relevant type of property. It is customary for professional antique appraisers to appraise antique widgets. Appraiser *A* has 2 years of experience in valuing antiques generally and is asked to appraise an antique widget. Appraiser *A* has obtained experience in valuing the relevant type of property under paragraphs (b)(2)(i) and (b)(3)(i) of this section.

Example (3). No experience in valuing relevant type of property. It is not customary for professional antique appraisers to appraise new widgets. Appraiser *A* has experience in appraising antiques generally but no experience in appraising new widgets. Appraiser *A* is asked to appraise a new widget. Appraiser *A* does not have experience in valuing the relevant type of property under paragraphs (b)(2)(i) and (b)(3)(i) of this section.

(4) *Verifiable*. For purposes of paragraph (b)(1) of this section, education and experience in valuing the relevant type of property are verifiable if the appraiser specifies in the appraisal the appraiser's education and experience in valuing the relevant type of property (as described in paragraphs (b)(2) and (b)(3) of this section), and the appraiser makes a declaration in the appraisal that, because of the appraiser's education and experience described in this paragraph (b)(4), the appraiser is qualified to make appraisals of the relevant type of property being valued.

(5) *Individuals who are not qualified appraisers*. The following individuals cannot be qualified appraisers for the appraised property:

(i) An individual who receives a fee prohibited by paragraph (a)(8) of this section.

(ii) The donor of the property.

(iii) A party to the transaction in which the donor acquired the property (for example, the individual who sold, exchanged, or gave the property to the donor, or any individual who acted as an agent for the transferor or for the donor for the sale, exchange, or gift), unless the property is contributed within 2 months of the date of acquisition and its appraised value does not exceed its acquisition price.

(iv) The donee of the property.

(v) Any individual who is either—

(A) Related (within the meaning of section 267(b)) to, or an employee of, any of the individuals described in paragraphs (b)(5)(ii), (b)(5)(iii), or (b)(5)(iv) of this section, or married to an individual who is in a relationship described in section 267(b) with any of the foregoing individuals; or

(B) An independent contractor who is regularly used as an appraiser by any of the individuals described in paragraphs (b)(5)(ii), (b)(5)(iii), or (b)(5)(iv) of this section, and who does not perform a majority of his or her appraisals for others during the taxable year.

(vi) An individual who is prohibited from practicing before the Internal Revenue Service by the Secretary under 31 U.S.C. section 330(c) at any time during the 3-year period ending on the date the appraisal is signed by the individual.

(c) *Effective/applicability date*. This section applies to contributions made after the date these regulations are published as final regulations in the **Federal Register**.

Par. 7. Section 1.170A–18 is added to read as follows:

§1.170A–18 Contributions of clothing and household items—(a) *In general*. Except as provided in paragraph (b) of this section, no deduction is allowed under section 170(a) for a contribution of clothing or a household item (as described in paragraph (c) of this section) unless—

(1) The item is in good used condition or better at the time of the contribution; and

(2) The donor meets the substantiation requirements of §1.170A–16.

(b) *Certain contributions of clothing or household items with claimed value of more than $500*. The rule described in paragraph (a)(1) of this section does not apply to a contribution of a single item of clothing or a household item for which a deduction of more than $500 is claimed, if the donor submits with the return on which the deduction is claimed a qualified appraisal (as defined in §1.170A–17(a)(1)) of the property prepared by a qualified appraiser (as defined in §1.170A–17(b)(1)) and a completed Form 8283 (Section B) (as described in §1.170A–16(d)(3)).

(c) *Definition of household items*. For purposes of section 170(f)(16) and this section, the term *household items* includes furniture, furnishings, electronics, appliances, linens, and other similar items. Food, paintings, antiques, and other objects of art, jewelry, gems, and collections are not household items.

(d) *Effective/applicability date*. This section applies to contributions made after the date these regulations are published as final regulations in the **Federal Register**.

Sherri L. Brown,
Acting Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on August 6, 2008, 8:45 a.m., and published in the issue of the Federal Register for August 7, 2008, 73 F.R. 45908)

Notice of Proposed Rulemaking and Notice of Public Hearing

Amendments to New Markets Tax Credit Regulations

REG–149404–07

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations relating to the new markets tax credit under section 45D of the Internal Revenue Code (Code). The proposed regulations revise and clarify certain rules relating to recapture of the new markets tax credit and will affect certain taxpayers claiming the new markets tax credit. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by November 10, 2008. Outlines of topics to be discussed at the public hearing scheduled for December 12, 2008, at 10:00 a.m. must be received by November 3, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–149404–07), 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–149404–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the Federal eRulemaking Portal at http://*www.regulations.gov* (IRS REG–149404–07). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Julie Hanlon-Bolton, (202) 622–7028; concerning submission of comments, the hearing, and/or to be placed

on the building access list to attend the hearing, Regina Johnson, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document amends 26 CFR part 1 to provide and clarify rules relating to the new markets tax credit under section 45D of the Code. Section 45D was added to the Code by section 121 of the Community Renewal Tax Relief Act of 2000, Public Law 106–554 (114 Stat. 2763 (2000)) and amended by section 221 of the American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1418 (2004)), section 101 of the Gulf Opportunity Zone Act of 2005, Public Law 109–135 (119 Stat. 25 (2005)), and Division A, section 102 of the Tax Relief and Health Care Act of 2006, Public Law 109–432 (120 Stat. 2922 (2006)). On December 28, 2004, the IRS and the Treasury Department published final regulations under section 45D (T.D. 9171, 2005–1 C.B. 452 [69 FR 77625]), with corrections on January 28, 2005 (70 FR 4012).

Groups and organizations representing investors, qualified community development entities, businesses, and other entities involved with the new markets tax credit program have since submitted comments requesting further guidance on the recapture of the credit. The commentators suggested that revising the final regulations to reduce recapture uncertainty would encourage investors to bring increased amounts of capital to low-income communities.

General Overview

Section 45D(a)(1) provides a new markets tax credit on a taxpayer's qualified equity investment (QEI) in a qualified community development entity (CDE). To qualify for the credit, among other requirements, substantially all of the taxpayer's cash must be used by the CDE to make qualified low-income community investments (QLICIs) pursuant to section 45D(b)(1)(B).

A CDE is any domestic corporation or partnership if, among other requirements, the primary mission of the entity is serving, or providing investment capital for, low-income communities or low-income persons pursuant to section 45D(c)(1). Section 45D(d)(1) provides that a QLICI is: (A) any capital or equity investment in, or loan to, any qualified active low-income community business (QALICB); (B) the purchase from another CDE of any loan made by the entity that is a QLICI; (C) financial counseling and other services to businesses located in, and residents of, low-income communities; and (D) any equity investment in, or loan to, any CDE. A QALICB is any corporation or partnership in which at least 50 percent of the total gross income of the entity is derived from the active conduct of a qualified business within any low-income community, provided certain other requirements are met pursuant to section 45D(d)(2).

Section 45D(g)(1) provides that, if there is a recapture event at any time during the 7-year period beginning on the date of the original issue of a QEI in a CDE, then the tax imposed by this chapter for the taxable year in which the event occurs must be increased by the credit recapture amount. Section 45D(g)(3) provides that a recapture event occurs with respect to an equity investment in a CDE if (A) such entity ceases to be a CDE, (B) the proceeds of the investment cease to be used to make QLICIs as required by section 45D(b)(1)(B), or (C) the QEI is redeemed by the CDE.

Explanation of Provisions

Redemption Safe Harbor for Partnership CDEs

Section 1.45D–1(e)(3)(iii) provides that, in the case of an equity investment that is a capital interest in a CDE that is a partnership for Federal tax purposes, a *pro rata* cash distribution by the CDE to its partners based on each partner's capital interest in the CDE during the taxable year will not be treated as a redemption for purposes of §1.45D–1(e)(2)(iii) if the distribution does not exceed the CDE's operating income for the taxable year. In addition, a non-*pro rata de minimis* cash distribution by a CDE to a partner or partners during the taxable year will not be treated as a redemption provided the distribution does not exceed the lesser of 5 percent of the CDE's operating income for that taxable year or 10 percent of the partner's capital interest in the CDE.

Commentators expressed the concern that a CDE may not be able to calculate its operating income in time to make a distribution during the taxable year. Because most CDEs will make a low estimate of operating income in order to lessen the risk of not satisfying the requirements of the redemption safe harbor, many CDEs may not distribute the entire amount of operating income during the taxable year. In response to this concern, the proposed regulations provide that, in the case of an equity investment that is a capital interest in a CDE that is a partnership for Federal tax purposes, a *pro rata* cash distribution by the CDE to its partners based on each partner's capital interest in the CDE during the taxable year will not be treated as a redemption for purposes of §1.45D–1(e)(2)(iii) if the distribution does not exceed the sum of the CDE's operating income for the taxable year and the CDE's undistributed operating income (if any) for the prior taxable year.

Additionally, for purposes of the redemption safe harbor for partnership CDEs, §1.45D–1(e)(3)(iii) defines *operating income* as the sum of (A) the CDE's taxable income as determined under section 703 (except that (*1*) the items described in section 703(a)(1) shall be aggregated with the non-separately stated tax items of the partnership; and (*2*) any gain resulting from the sale of a capital asset under section 1221(a) or section 1231 property shall not be included in taxable income); (B) deductions under section 165 (but only to the extent the losses were realized from QLICIs under §1.45D–1(d)(1)); (C) deductions under sections 167 and 168 (including the additional first-year depreciation under section 168(k)); (D) start-up expenditures amortized under section 195; and (E) organizational expenses amortized under section 709. The proposed regulations add tax-exempt income under section 103 and any other depreciation and amortization deductions under the Code to the list of Code sections that determine the amount of operating income.

Commentators have indicated that some CDEs are adding their distributive share of the deductions listed in §1.45D–1(e)(3)(iii) from another partnership to the CDE's calculation of operat-

ing income. For example, some CDEs are adding their distributive share of the amortization and depreciation deductions under sections 167 and 168 from another partnership to the CDE's calculation of operating income. The proposed regulations clarify that a CDE may rely on §1.704–1(b)(1)(vii) to determine its allocable share of the deductions listed in §1.45D–1(e)(3)(iii) from another partnership to the CDE's calculation of its operating income. Therefore, §1.704–1(b)(1)(vii) applies to treat an allocation to a partner of its share of partnership net or "bottom line" taxable income or loss as an allocation to such partner of the same share of each item of income, gain, loss, and deduction that is taken into account in computing the partner's net or "bottom line" taxable income or loss.

Termination of a Partnership CDE under Section 708(b)(1)(B)

Under section 708(b)(1)(B), a partnership is considered as terminated if within a twelve-month period there is a sale or exchange of 50 percent or more of the total interest in partnership capital and profits. Section 1.708–1(b)(4) provides, in part, that if a partnership is terminated by a sale or exchange of an interest, the following is deemed to occur: the partnership contributes all of its assets and liabilities to a new partnership in exchange for an interest in the new partnership; and, immediately thereafter, the terminated partnership distributes interests in the new partnership to the purchasing partner and the other remaining partners in proportion to their respective interests in the terminated partnership in liquidation of the terminated partnership, either for the continuation of the business by the new partnership or for its dissolution and winding up.

If the terminating partnership is a CDE, because of the deemed distribution of interests in that new partnership to the purchasing partner and the other remaining partners, a recapture event may be triggered under section 45D(g)(3)(C) and §1.45D–1(e)(2)(iii). However, because the sale of a QEI is not a recapture event under section 45D(g)(3) and because the remaining partner or partners are not being cashed out, the IRS and the Treasury Department do not believe that the sale of a QEI that causes the termination of a CDE partnership under section 708(b)(1)(B) should trigger recapture. Accordingly, the proposed regulations provide that a termination under section 708(b)(1)(B) of a CDE partnership is not a recapture event.

Reasonable Expectations

Section 1.45D–1(d)(6)(i) provides that an entity is generally treated as a QALICB for the duration of the CDE's investment in the entity if the CDE reasonably expects, at the time the CDE makes the capital or equity investment in, or loan to, the entity, that the entity will satisfy the requirements to be a QALICB under §1.45D–1(d)(4)(i) throughout the entire period of the investment or loan.

The proposed regulations clarify how the reasonable expectations rule of §1.45D–1(d)(6)(i) applies when a CDE makes an investment in or loan to another CDE. The proposed regulations provide that a CDE may rely on §1.45D–1(d)(6)(i) to treat an entity as a QALICB even if the CDE's investment in or loan to the entity is made through other CDEs under §1.45D–1(d)(1)(iv)(A).

Commentators indicated that some CDEs are unsure whether they may rely on §1.45D–1(d)(6)(i) if their investments involve the portions of business rule under section 45D(d)(2)(C), the rental to others of real property under sections 45D(d)(3)(A), and the exclusions from the definition of a qualified business under §1.45D–1(d)(5)(iii). Section 1.45D–1(d)(6)(i) already applies to all of these rules in determining whether an entity meets the requirements to be a QALICB under §1.45D–1(d)(4)(i). Nevertheless, the proposed regulations clarify that CDEs may rely on these rules when applying §1.45D–1(d)(6)(i).

Proposed Effective Date

The rules contained in these regulations are proposed to apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Request for Comments

The IRS and the Treasury Department invite taxpayers to submit comments on issues relating to this notice of proposed rulemaking. In particular, the IRS and the Treasury Department encourage taxpayers to submit comments on how to define, under §1.45D–1(d)(2)(i), the dollar amounts received by a CDE "in payment of, or for, capital, equity, or principal" that are set aside either for financial counseling and other services, for an equity investment, or as principal received on a loan. Section 1.45D–1(d)(2)(i) provides that such amounts must be reinvested by the CDE in a QLICI no later than twelve months from the date of receipt to be treated as continuously invested in a QLICI. Commentators suggested defining amounts received "in payment of, or for, capital, equity, or principal" by using the same rules and redemption safe harbor in §1.45D–1(e)(3), which defines when an investment is redeemed or otherwise cashed out by a CDE. The proposed regulations do not adopt this suggestion. The IRS and the Treasury Department believe this approach may be inappropriate because redeeming one dollar of an equity investment is a recapture event under section 45D(g)(3)(C), while failing to reinvest one dollar in a QLICI under §1.45D–1(d)(2)(i) lowers the dollar amount treated as meeting the substantially-all requirement by one dollar.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking 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 comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. Comments are requested

on all aspects of the proposed regulations. All comments will be available for public inspection and copying.

A public hearing has been scheduled for December 12, 2008, beginning at 10:00 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments by November 10, 2008. Outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by November 3, 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 Julie Hanlon-Bolton with the Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

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Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

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

1. Redesignating the paragraph (a) entries for paragraphs (e)(4), (e)(5), (e)(6), and (e)(7) as paragraphs (e)(5), (e)(6), (e)(7), and (e)(8), respectively, adding a new entry for paragraph (e)(4), and revising the entry for paragraph (h)(2).

2. Revising paragraph (d)(6)(i).

3. Revising paragraph (e)(3)(iii) introductory text.

4. Redesignating paragraphs (e)(3)(iii)(B), (e)(3)(iii)(C), (e)(3)(iii)(D), and (e)(3)(iii)(E) as paragraphs (e)(3)(iii)(C), (e)(3)(iii)(D), (e)(3)(iii)(E), and (e)(3)(iii)(F), respectively, and adding new paragraph (e)(3)(iii)(B).

5. Revising newly-designated paragraph (e)(3)(iii)(D).

6. Redesignating paragraphs (e)(4), (e)(5), (e)(6), and (e)(7) as paragraphs (e)(5), (e)(6), (e)(7), and (e)(8), respectively, and adding new paragraph (e)(4).

7. Revising the heading for paragraph (h)(2) and adding a sentence at the end of the paragraph.

The additions and revisions read as follows:

§1.45D–1 New markets tax credit.

(a) * * *

(e) * * *

(4) Section 708(b)(1)(B) termination.

* * * * *

(h) * * *

(2) Exception for certain provisions.

* * * * *

(a) * * *

(d) * * *

(6) * * * (i) * * * Except as provided in paragraph (d)(6)(ii) of this section, an entity is treated as a qualified active low-income community business for the duration of the qualified community development entity's (CDE's) investment in the entity if the CDE reasonably expects, at the time the CDE makes the capital or equity investment in, or loan to, the entity, that the entity will satisfy the requirements to be a qualified active low-income community business under paragraphs (d)(4)(i) and (d)(5) of this section (including, if applicable, portions of business under paragraph (d)(4)(iii) of this section) throughout the entire period of the investment or loan. A CDE may rely on this paragraph (d)(6)(i) to treat an entity as a qualified active low-income community business even if the CDE's investment in or loan to the entity is made through other CDEs under paragraph (d)(1)(iv)(A) of this section.

(e) * * *

(3) * * *

(iii) *Capital interest in a partnership*. In the case of an equity investment that is a capital interest in a CDE that is a partnership for Federal tax purposes, a *pro rata* cash distribution by the CDE to its partners based on each partner's capital interest in the CDE during the taxable year will not be treated as a redemption for purposes of paragraph (e)(2)(iii) of this section if the distribution does not exceed the sum of the CDE's "operating income" for the taxable year and the CDE's undistributed "operating income" (if any) for the prior taxable year. For purposes of this paragraph (e)(3)(iii), §1.704–1(b)(1)(vii) applies to treat an allocation to a partner of its share of partnership net or "bottom line" taxable income or loss as an allocation to such partner of the same share of each item of income, gain, loss, and deduction that is taken into account in computing the partner's net or "bottom line" taxable income or loss. In addition, a non-*pro rata* "*de minimis*" cash distribution by a CDE to a partner or partners during the taxable year will not be treated as a redemption. A non-*pro rata* "*de minimis*" cash distribution may not exceed the lesser of 5 percent of the CDE's "operating income" for that taxable year or 10 percent of the partner's capital interest in the CDE. For purposes of this paragraph (e)(3)(iii), with respect to any taxable year, "operating income" is the sum of:

* * * * *

(B) Tax-exempt income under section 103;

* * * * *

(D) Deductions under sections 167 and 168, including the additional first-year depreciation under section 168(k), and any other depreciation and amortization deductions under the Code;

* * * * *

(e) * * *

(4) *Section 708(b)(1)(B) termination*. A termination under section 708(b)(1)(B) of a CDE that is a partnership is not a recapture event.

* * * * *

(h) * * *

(2) *Exception for certain provisions.* * * * Paragraph (d)(6)(i) of this section as it relates to a CDE's investment under paragraph (d)(1)(iv)(A), paragraph (e)(3)(iii) of this section as it relates to the distribution of undistributed "operating income" for the prior taxable year and to the application of §1.704–1(b)(1)(vii), paragraph (e)(3)(iii)(B) of this section, paragraph (e)(3)(iii)(D) of this section as it relates to any other depreciation and amortization deductions under the Code, and paragraph (e)(4) of this section apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**.

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

(Filed by the Office of the Federal Register on August 8, 2008, 8:45 a.m., and published in the issue of the Federal Register for August 11, 2008, 73 F.R. 46572)

Deletions From Cumulative List of Organizations Contributions to Which are Deductible Under Section 170 of the Code

Announcement 2008–86

The Internal Revenue Service has revoked its determination that the organizations listed below qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1986.

Generally, the Service will not disallow deductions for contributions made to a listed organization on or before the date of announcement in the Internal Revenue Bulletin that an organization no longer qualifies. However, the Service is not precluded from disallowing a deduction for any contributions made after an organization ceases to qualify under section 170(c)(2) if the organization has not timely filed a suit for declaratory judgment under section 7428 and if the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for or was aware of the activities or omissions of the organization that brought about this revocation.

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organizations described in section 170(c)(2) that are otherwise allowable will continue to be deductible. Protection under section 7428(c) would begin on October 6, 2008, and would end on the date the court first determines that the organization is not described in section 170(c)(2) as more particularly set forth in section 7428(c)(1). For individual contributors, the maximum deduction protected is $1,000, with a husband and wife treated as one contributor. This benefit is not extended to any individual, in whole or in part, for the acts or omissions of the organization that were the basis for revocation.

The Boston Group Charitable Foundation
Sandy, UT
Foresters Longhorn Branch
Fort Worth, TX

Discontinuation of Publication of Legislative Cumulative Bulletins

Announcement 2008–87

The IRS has discontinued publication of the Legislative Cumulative Bulletins. This information is readily available on various websites much earlier than when this volume could be released for publication. Below is a list of online sources in which legislative information can be obtained.

http://thomas.loc.gov/
http://www.reginfo.gov/public/
http://uscode.house.gov/
http://www.gpoaccess.gov/fr/index.html

The last Legislative Bulletin was published for 2003 legislation because our resources no longer support its publication.

If you have any comments or questions, please contact the Tax Forms and Publications Division at *taxforms@irs.gov*, or at SE:W:CAR:MP:T, Room 6526, 1111 Constitution Avenue, NW, Washington, DC 20224.

Deletions From Cumulative List of Organizations Contributions to Which are Deductible Under Section 170 of the Code

Announcement 2008–88

The Internal Revenue Service has revoked its determination that the organizations listed below qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1986.

Generally, the Service will not disallow deductions for contributions made to a listed organization on or before the date of announcement in the Internal Revenue Bulletin that an organization no longer qualifies. However, the Service is not precluded from disallowing a deduction for any contributions made after an organization ceases to qualify under section 170(c)(2) if the organization has not timely filed a suit for declaratory judgment under section 7428 and if the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for or was aware of the activities or omissions of the organization that brought about this revocation.

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organizations described in section 170(c)(2) that are otherwise allowable will continue to be deductible. Protection under section 7428(c) would begin on October 6, 2008, and would end on the date the court first determines that the organization is not described in section 170(c)(2) as more particularly set forth in section 7428(c)(1). For individual contributors, the maximum deduction protected is $1,000, with a husband and wife treated as one contributor. This benefit is not extended to any individual, in whole or in part, for the acts or omissions of the organization that were the basis for revocation.

Heaven in View, Inc.
Woodbridge, VA
Pueblo of Laguna
Old Laguna, NM
Gymnastics Foundation of Maui
Kahului, HI

God Financial Plan, Inc.
Oakland, CA
Affordable Shelters, Inc.
South Gate, CA
Debt Advocate of America, Inc.
Killeen, TX
Folk Traditions Conservancy
Santa Barbara, CA
Individual Freedom Ministries Church
Orange City, FL
Gifts for Kids, Inc.
Erie, PA
Dabney & West Foundation, Inc.
Colbert, OK
Institute for the Development of Human Resources
Wilmington, DE
American Fund for Consumer Credit Counseling, Inc.
Commack, NY
Institute of Prevention and Nutritional Medicine, Inc.
Rocky Mount, NC
The Stephanie Mull Foundation For Children's Art
Portland, ME
Arts Reach, Inc.
Rochester, NY

Section 7428(c) Validation of Certain Contributions Made During Pendency of Declaratory Judgment Proceedings

Announcement 2008–89

This announcement serves notice to potential donors that the organization listed below has recently filed a timely declaratory judgment suit under section 7428 of the Code, challenging revocation of its status as an eligible donee under section 170(c)(2).

Protection under section 7428(c) of the Code begins on the date that the notice of revocation is published in the Internal Revenue Bulletin and ends on the date on which a court first determines that an organization is not described in section 170(c)(2), as more particularly set forth in section 7428(c)(1).

In the case of individual contributors, the maximum amount of contributions protected during this period is limited to $1,000.00, with a husband and wife being treated as one contributor. This protection is not extended to any individual who was responsible, in whole or in part, for the acts or omissions of the organization that were the basis for the revocation. This protection also applies (but without limitation as to amount) to organizations described in section 170(c)(2) which are exempt from tax under section 501(a). If the organization ultimately prevails in its declaratory judgment suit, deductibility of contributions would be subject to the normal limitations set forth under section 170.

The Dowd Foundation
Wilkes-Barre, PA
National Credit Counseling Services
Orlando, FL

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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