Internal Revenue
bulletin

Bulletin No. 2012-15
April 9, 2012

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. 2012–12, page 748.

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. The March 2012 Applicable Federal Rate is modified to correct the annual long-term adjusted Applicable Federal Rate and the long-term tax-exempt rate for ownership changes. Rev. Rul. 2012–9 modified.

T.D. 9576, page 723.

Final regulations under section 901 of the Code provide guidance relating to the determination of who is considered to pay a foreign income tax for purposes of the foreign tax credit. Notice 2007–95 obsoleted in part.

T.D. 9577, page 730.
REG–132736–11, page 793.

Final and temporary regulations under section 909 of the Code provide guidance addressing situations in which foreign income taxes have been separated from the related income. Notice 2010–92 obsoleted.

REG–124791–11, page 791.

Proposed regulations under section 6109 of the Code provide guidance on the eligibility of the tax preparers to obtain or renew a preparer tax identification number (PTIN).

EMPLOYEE PLANS

T.D. 9575, page 749.

Final regulations under section 9815 of the Code provide guidance regarding disclosure of the summary of benefits and coverage and the uniform glossary for group health plans and health insurance coverage in the group and individual markets under the Patient Protection and Affordable Care Act. This document implements the disclosure requirements to help plans and individuals better understand their health coverage, as well as other coverage options.

EXEMPT ORGANIZATIONS

Announcement 2012–15, page 794.

The IRS has revoked its determination that Budget Right Debt Management, Inc., of Maitland, FL; Budget Right Debt Management, Inc., of Lake Mary, FL; Columbus Building Association of Kingsville Texas of Kingsville, TX; Garment Industry Day Care Center of Chinatown, Inc., of New York, NY; and Renewal Ministries, Inc., of Spring, TX, qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Code.

ESTATE TAX

REG–124791–11, page 791.

Proposed regulations under section 6109 of the Code provide guidance on the eligibility of the tax preparers to obtain or renew a preparer tax identification number (PTIN).

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

GIFT TAX

REG–124791–11, page 791.
Proposed regulations under section 6109 of the Code provide guidance on the eligibility of the tax preparers to obtain or renew a preparer tax identification number (PTIN).

EMPLOYMENT TAX

REG–124791–11, page 791.
Proposed regulations under section 6109 of the Code provide guidance on the eligibility of the tax preparers to obtain or renew a preparer tax identification number (PTIN).

SELF-EMPLOYMENT TAX

REG–124791–11, page 791.
Proposed regulations under section 6109 of the Code provide guidance on the eligibility of the tax preparers to obtain or renew a preparer tax identification number (PTIN).

EXCISE TAX

T.D. 9575, page 749.
Final regulations under section 9815 of the Code provide guidance regarding disclosure of the summary of benefits and coverage and the uniform glossary for group health plans and health insurance coverage in the group and individual markets under the Patient Protection and Affordable Care Act. This document implements the disclosure requirements to help plans and individuals better understand their health coverage, as well as other coverage options.

REG–124791–11, page 791.
Proposed regulations under section 6109 of the Code provide guidance on the eligibility of the tax preparers to obtain or renew a preparer tax identification number (PTIN).

ADMINISTRATIVE

REG–124791–11, page 791.
Proposed regulations under section 6109 of the Code provide guidance on the eligibility of the tax preparers to obtain or renew a preparer tax identification number (PTIN).

Notice 2012–25, page 789.
This notice invites the public to submit recommendations for items that should be included on the 2012-2013 Guidance Priority list.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the 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 382.—Limitation on Net Operating Loss Carryforwards and Certain Built-In Losses Following Ownership Change

The March 2012 Applicable Federal Rate is modified to correct the annual long-term adjusted Applicable Federal Rate and the long-term tax-exempt rate for ownership changes. See Rev. Rul. 2012-12, page 748.

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

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

T.D. 9576

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Definition of a Taxpayer

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final Income Tax Regulations which provide guidance relating to the determination of who is considered to pay a foreign income tax for purposes of the foreign tax credit. These regulations provide rules for identifying the person with legal liability to pay the foreign income tax in certain circumstances. These regulations affect taxpayers claiming foreign tax credits.

DATES: *Effective Date:* These regulations are effective on February 14, 2012.

Applicability Dates: For dates of applicability, see §1.901–2(h)(4).

FOR FURTHER INFORMATION CONTACT: Suzanne M. Walsh, (202) 622–3850 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

I. *Section 901 Regulations*

On August 4, 2006, the **Federal Register** published proposed regulations (REG–124152–06, 2006–2 C.B. 368 [71 FR 44240]) under section 901 of the Internal Revenue Code concerning the determination of the person who paid a foreign income tax for foreign tax credit purposes (2006 proposed regulations). The 2006 proposed regulations would address the inappropriate separation of foreign income taxes from the income on which the tax was imposed in certain circumstances. In particular, the 2006 proposed regulations would provide guidance under §1.901–2(f) relating to the person on whom foreign law imposes legal liability for tax, including in the case of taxes imposed on the income of foreign consolidated groups and entities that have different classifications for U.S. and foreign tax law purposes.

The Treasury Department and the IRS received written comments on the 2006 proposed regulations and held a public hearing on October 13, 2006. All comments are available at *www.regulations.gov* or upon request. In Notice 2007–95, 2007–2 C.B. 1091 (December 3, 2007)), the Treasury Department and the IRS announced that when issued, the final regulations will be effective for taxable years beginning after the final regulations are published in the **Federal Register**. This Treasury decision adopts, in part, the 2006 proposed regulations with the changes discussed in this preamble.

II. *Section 909 and Notice 2010–92*

Section 909 was enacted as part of legislation commonly referred to as the Education Jobs and Medicaid Assistance Act (EJMAA) on August 10, 2010 (Public Law 111–226, 124 Stat. 2389 (2010)). Section 909 was enacted to address concerns about the inappropriate separation of foreign income taxes and related income.

Section 909 provides that there is a foreign tax credit splitting event if a foreign income tax is paid or accrued by a taxpayer or section 902 corporation and the related income is, or will be, taken into account by a covered person with respect to such taxpayer or section 902 corporation. In such a case, the tax is suspended until the taxable year in which the related income is taken into account by the payor of the tax or, if the payor is a section 902 corporation, by a section 902 shareholder of the section 902 corporation.

On December 6, 2010, the Treasury Department and the IRS issued Notice 2010–92, 2010–52 I.R.B. 916, (December 6, 2010)), which primarily addresses the application of section 909 to foreign income taxes paid or accrued by a section 902 corporation in taxable years beginning on or before December 31, 2010 (pre–2011 taxable years). The notice provides rules for determining whether foreign income taxes paid or accrued by a section 902 corporation in pre–2011 taxable years (pre–2011 taxes) are suspended under section 909 in taxable years beginning after December 31, 2010 (post–2010 taxable years) of a section 902 corporation. It also identifies an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events in pre–2011 taxable years (pre–2011 splitter arrangements) and provides guidance on determining the amount of related income and pre–2011 taxes paid or accrued with respect to pre–2011 splitter arrangements. The pre–2011 splitter arrangements are reverse hybrid structures, certain foreign consolidated groups, disregarded debt structures in the context of group relief and other loss-sharing regimes, and two classes of hybrid instruments. The notice states that future guidance will provide that foreign tax credit splitting events in post–2010 taxable years will at least include all of the pre–2011 splitter arrangements. The notice also states that the Treasury Department and the IRS do not intend to finalize the portion of the 2006 proposed regulations relating to the determination of the person who paid a foreign income tax with respect to the income of a reverse

hybrid. See Prop. §1.901–2(f)(2)(iii). Temporary regulations under section 909 are published elsewhere in this issue of the Bulletin.

Summary of Comments and Explanation of Revisions

I. *In General*

In response to written comments on the 2006 proposed regulations and in light of the enactment of section 909, the Treasury Department and the IRS have determined that it is appropriate to finalize certain portions of the 2006 proposed regulations. These final regulations revise several of the proposed rules to take into account comments received. Other portions of those regulations are adopted without amendment. The Treasury Department and the IRS have also determined that the remaining portions of the 2006 proposed regulations should be withdrawn. The Treasury Department and the IRS, however, are continuing to consider whether and to what extent to revise or clarify the general rule that tax is considered paid by the person who has legal liability under foreign law for the tax. For example, the Treasury Department and the IRS are continuing to study whether it is appropriate to provide a special rule for determining who has legal liability in the case of a withholding tax imposed on an amount of income that is considered received by different persons for U.S. and foreign tax purposes, as in the case of certain sale-repurchase transactions.

II. *Taxes Imposed on Combined Income*

Section 1.901–2(f)(2) of the 2006 proposed regulations addresses the application of the legal liability rule to foreign consolidated groups and other combined income regimes, including those in which the regime imposes joint and several liability in the U.S. sense, those in which the regime treats subsidiaries as branches of the parent corporation (or otherwise attributes income of subsidiaries to the parent corporation), and those in which some of the group members have limited obligations, or even no obligation, to pay the consolidated tax. Section 1.901–2(f)(2)(i) of the 2006 proposed regulations provides that the foreign tax must be apportioned among the persons whose income is included in the combined base *pro rata* based on each person's portion of the combined income, as computed under foreign law. Because failure to allocate appropriately the consolidated tax among the members of the group may result in the separation of foreign income tax from the related income as described in section 909, comments recommended that the proposed rules be finalized in lieu of treating these arrangements as foreign tax credit splitting events under section 909, which would require suspension of split tax until the related income is taken into account. The Treasury Department and the IRS agree with the comments, and accordingly, §1.901–2(f)(3)(i) of the final regulations adopts with minor modifications Prop. §1.901–2(f)(2)(i). As these regulations are generally effective for foreign taxes paid or accrued during taxable years beginning after February 14, 2012, a foreign tax credit splitting event will not occur with respect to foreign taxes paid or accrued on combined income in such years. However, with respect to foreign income taxes paid or accrued on combined income during taxable years beginning after December 31, 2010, and on or before February 14, 2012, temporary regulations under section 909 provide that a foreign tax credit splitting event occurs to the extent that a taxpayer does not allocate the foreign consolidated tax liability among the members of the foreign consolidated group based on each member's share of the consolidated taxable income included in the foreign tax base under the principles of §1.901–2(f)(3) prior to its amendment by this Treasury decision.

One comment recommended that combined income subject to preferential tax rates should be allocated only to group members with that type of income, in order to more closely match the tax with the related income. The Treasury Department and the IRS agree with this comment, and §1.901–2(f)(3)(i) of the final regulations provides that combined income with respect to each foreign tax that is imposed on a combined basis, and combined income subject to tax exemption or preferential tax rates, is computed separately, and the tax on that combined income base is allocated separately.

Section 1.901–2(f)(2)(ii) of the 2006 proposed regulations provides that for purposes of §1.901–2(f)(2) of the 2006 proposed regulations, foreign tax is imposed on the combined income of two or more persons if such persons compute their taxable income on a combined basis under foreign law. Foreign tax is considered to be imposed on the combined income of two or more persons even if the combined income is computed under foreign law by attributing to one such person (for example, the foreign parent of a foreign consolidated group) the income of other such persons. However, foreign tax is not considered to be imposed on the combined income of two or more persons solely because foreign law: (1) permits one person to surrender a net loss to another person pursuant to a group relief or similar regime; (2) requires a shareholder of a corporation to include in income amounts attributable to taxes imposed on the corporation with respect to distributed earnings, pursuant to an integrated tax system that allows the shareholder a credit for such taxes; or (3) requires a shareholder to include, pursuant to an anti-deferral regime (similar to subpart F of the Internal Revenue Code (sections 951 through 965)), income attributable to the shareholder's interest in the corporation.

The final regulations adopt §1.901–2(f)(2)(ii) of the 2006 proposed regulations with several modifications in response to comments. Section 1.901–2(f)(3)(ii) of the final regulations provides that tax is considered to be computed on a combined basis if two or more persons that would otherwise be subject to foreign tax on their separate taxable incomes add their items of income, gain, deduction, and loss to compute a single consolidated taxable income amount for foreign tax purposes. In addition, foreign tax is not considered to be imposed on the combined income of two or more persons if, because one or more of such persons is a fiscally transparent entity under foreign law, only one of such persons is subject to tax under foreign law (even if two or more of such persons are corporations for U.S. tax purposes). The regulations include additional illustrations clarifying that foreign tax is not considered to be imposed on combined income solely because foreign law: (1) reallocates income from one person to a related person under foreign transfer pricing provisions; (2) requires a person to take into account a distributive share of taxable income of

an entity that is a partnership or other fiscally transparent entity for foreign tax law purposes; or (3) requires a person to take all or part of the income of an entity that is a corporation for U.S. tax purposes into account because foreign law treats the entity as a branch or fiscally transparent entity (a reverse hybrid). A reverse hybrid does not include an entity that is treated under foreign law as a branch or fiscally transparent entity solely for purposes of calculating combined income of a foreign consolidated group.

One comment requested clarification that the exclusions from the definition of a combined income base (for example, foreign integration and anti-deferral regimes) apply solely for purposes of determining whether a foreign income tax is imposed on combined income, and do not apply for purposes of determining each person's ratable share of the combined income base. The Treasury Department and the IRS agree that these exclusions from the definition of a combined income base do not exclude any amount of income otherwise subject to tax on a combined basis from the operation of the combined income rule. However, since nothing in the list of exclusions affects the amount of income in the combined income base, which is computed under foreign law, the Treasury Department and the IRS believe a change is unnecessary.

Section 1.901–2(f)(2)(iii) of the 2006 proposed regulations provides that a reverse hybrid is considered to have legal liability under foreign law for foreign taxes imposed on the owners of the reverse hybrid in respect of each owner's share of the reverse hybrid's income. As stated in Notice 2010–92, the Treasury Department and the IRS will not finalize the portion of the 2006 proposed regulations relating to the determination of the person who paid a foreign income tax with respect to the income of a reverse hybrid. Notice 2010–92 identifies reverse hybrids as pre-2011 splitter arrangements, and the temporary regulations under section 909 also identify reverse hybrids as splitter arrangements.

Section 1.901–2(f)(2)(iv) of the 2006 proposed regulations provides rules for determining each person's share of the combined income tax base, generally relying on foreign tax reporting of separate taxable income or books maintained for that purpose. The 2006 proposed regulations provide that payments between group members that result in a deduction under both U.S. and foreign tax law will be given effect in determining each person's share of the combined income. The 2006 proposed regulations, however, explicitly reserve with respect to the effect of hybrid instruments and disregarded payments between related parties, which the preamble to the proposed regulations describes as a matter to be addressed in subsequent published guidance. Section 1.901–2(f)(2)(iv) of the 2006 proposed regulations also provides special rules addressing the effect of dividends (and deemed dividends) and net losses of group members on the determination of separate taxable income.

Section 1.901–2(f)(3)(iii) of the final regulations adopts Prop. §1.901–2(f)(2)(iv) with modifications reflecting that certain hybrid instruments and certain disregarded payments are treated as splitter arrangements subject to section 909. In particular, the final regulations provide that in determining separate taxable income of members of a combined income group, effect will be given to intercompany payments that are deductible under foreign law, even if such payments are not deductible (or are disregarded) for purposes of U.S. tax law. Thus, for example, interest accrued by one group member with respect to an instrument held by another member that is treated as debt for foreign tax purposes but as equity for U.S. tax purposes would be considered income of the holder and would reduce the taxable income of the issuer. The final regulations, however, include a cross-reference to §1.909–2T(b)(3)(i) for rules requiring suspension of foreign income taxes paid or accrued by the owner of a U.S. equity hybrid instrument.

Section 1.901–2(f)(2)(v) of the 2006 proposed regulations provides that U.S. tax principles apply to determine the tax consequences if one person remits a tax that is the legal liability of another person. For example, a payment of tax for which a corporation has legal liability by a shareholder of that corporation (including an owner of a reverse hybrid), will ordinarily result in a deemed capital contribution and deemed payment of tax by the corporation. Prop. §1.901–2(f)(2)(v) also provides that if the corporation reimburses the shareholder for the tax payment, such reimbursement would ordinarily be treated as a distribution for U.S. tax purposes. The Treasury Department and the IRS received several comments regarding Prop. §1.901–2(f)(2)(v) noting that a shareholder's payment of a corporation's tax and a corporation's reimbursement of a shareholder for paying its tax liability will not result in deemed capital contribution and deemed dividend treatment if arrangements are in place that treat the shareholder's payment of the tax as pursuant to a lending or agency arrangement. In response to these comments, the second and third sentences of §1.901–2(f)(2)(v) of the 2006 proposed regulations are not included in §1.901–2(f)(3)(iv) of the final regulations, and the final regulations simply provide that U.S. tax principles apply to determine the tax consequences if one person remits a tax that is the legal liability of another person.

III. *Taxes Imposed on Partnerships and Disregarded Entities*

Section 1.901–2(f)(3) of the 2006 proposed regulations provides rules regarding the treatment of two types of hybrid entities. First, in the case of an entity that is treated as a partnership for U.S. income tax purposes but is taxable at the entity level under foreign law (which the 2006 proposed regulations define as a hybrid partnership), such entity is considered to have legal liability under foreign law for foreign income tax imposed on the income of the entity. The 2006 proposed regulations also provide rules for allocating foreign tax paid or accrued by a hybrid partnership if the partnership's U.S. taxable year closes with respect to one or more (or all) partners or if there is a change in ownership of the hybrid partnership. See Prop. §1.901–2(f)(3)(i).

Second, in the case of an entity that is disregarded as separate from its owner for U.S. federal income tax purposes, the person that is treated as owning the assets of such entity for U.S. tax purposes is considered to have legal liability under foreign law for tax imposed on the income of the entity. The 2006 proposed regulations provide rules for allocating foreign tax between the old owner and the new owner of a disregarded entity if there is a change in the ownership of the disregarded entity

during the entity's foreign taxable year and such change does not result in a closing of the entity's foreign taxable year. See Prop. §1.901–2(f)(3)(ii). The 2006 proposed regulations generally provide that for hybrid partnerships and disregarded entities, allocations of tax will be made under the principles of §1.1502–76(b) based on the respective portions of the taxable income of the hybrid entity (as determined under foreign law) for the foreign taxable year that are attributable to the period ending on the date of the ownership change (or the last day of the terminating partnership's U.S. taxable year) and the period ending after such date. This approach is consistent with the rule provided in §1.338–9(d) for apportioning foreign tax paid by a target corporation that is acquired in a transaction that is treated as an asset acquisition pursuant to an election under section 338, if the foreign taxable year of the target does not close at the end of the acquisition date.

A change in the ownership of a hybrid partnership or disregarded entity during the entity's foreign taxable year that does not result in the closing of the hybrid entity's foreign taxable year may result in the separation of income from the associated foreign income taxes. A change in the ownership occurs if there is a disposition of all or a portion of the owner's interest. A separation of income from the associated foreign income taxes could occur if the foreign tax paid or accrued with respect to such foreign taxable year has not been allocated appropriately between the old owner and the new owner. Certain changes of ownership involving related parties could be treated as a foreign tax credit splitting event under section 909. Comments recommended that the proposed legal liability rules addressing the treatment of hybrid entities be finalized in lieu of treating the above-described case of a change in the ownership of a hybrid entity as a foreign tax credit splitting event under section 909. The Treasury Department and the IRS agree, and accordingly, the final regulations adopt the proposed rules with modifications in response to comments.

One comment recommended that, if a termination under section 708(b)(1)(B) requires a closing of the books to allocate U.S. taxable income between the old partnership and new partnership but the foreign taxable year does not close, or if a change in a partner's interest results in a closing of the partnership's taxable year with respect to the partner and an allocation of partnership items based on a closing of the books under section 706, foreign tax for the year of change should similarly be allocated under the principles of sections 706 and 708 and the regulations under those sections based on a closing of the books, rather than under the principles of §1.1502–76(b), which permits ratable allocation of the foreign tax with an exception for extraordinary items. The comment noted that apportioning the foreign tax using the same methodology as is used to apportion U.S. taxable income between the terminating partnership and the new partnership, or between the partner whose interest changes and the other partners, would lead to better matching of foreign tax and the associated income. The Treasury Department and the IRS are concerned about the increased administrative and compliance burdens associated with requiring a closing of the foreign tax books in order to apportion foreign tax for the year of change. Accordingly, this comment was not adopted.

In response to a comment, the final regulations apply the same foreign tax allocation rules to section 708 terminations that arise under section 708(b)(1)(A) in the case of a partnership that has ceased its operations, including a change in ownership in which a partnership becomes a disregarded entity. The final regulations also apply the same allocation rules if there are multiple ownership changes within a single foreign taxable year.

Finally, §1.901–2(f)(3)(i) of the 2006 proposed regulations defines a hybrid partnership as an entity that is treated as a partnership for U.S. income tax purposes but is taxable at the entity level under foreign law. Because the Treasury Department and the IRS believe that a special definition of the term hybrid partnership is unnecessary and could cause confusion, references to the term hybrid partnership are replaced in the final regulations with references to the term partnership. No substantive change is intended by this revision.

IV. *Effective/Applicability Date*

The 2006 proposed regulations would generally apply to foreign taxes paid or accrued during taxable years beginning on or after January 1, 2007. However, consistent with Notice 2007–95, §1.901–2(h)(4) provides that these final regulations are generally effective for foreign taxes paid or accrued in taxable years beginning after February 14, 2012.

A comment raised several transition-related questions arising in situations where applying the final regulations changes the person who is considered the taxpayer with respect to a particular foreign income tax. First, the comment stated it is unclear what happens to the carryover under section 904(c) of foreign taxes paid or accrued in a taxable year beginning before the effective date of the final regulations (pre-effective date year) to a taxable year beginning on or after the effective date of the final regulations (post-effective date year). The comment recommended that the regulations clarify the treatment of foreign tax credit carryovers from pre-effective date years and foreign tax credit carrybacks from post-effective date years, and that the regulations provide that taxes paid or accrued in a pre-effective date year that are carried forward to a post-effective date year be assigned to the taxpayer that paid or accrued the foreign taxes in the pre-effective date year. Similarly, the comment recommended that taxes paid or accrued in a post-effective date year that are carried back to the last pre-effective date year should be treated in the carryback year as paid or accrued by the taxpayer that paid or accrued the taxes in the post-effective date year.

The Treasury Department and the IRS believe it is clear under current law that the person who paid or accrued foreign income taxes in a pre-effective date year is the person who is eligible under section 904(c) to carry forward such taxes to a post-effective date year, notwithstanding that such person may not be considered the taxpayer under these final regulations had the taxes been paid or accrued in the post-effective date carryover year. Similarly, the Treasury Department and the IRS believe it is clear that the person who paid or accrued foreign income taxes in a post-effective date year is the person who is eligible under section 904(c) to carry back such taxes to the last pre-effective date year. Therefore, the Treasury Department and the IRS believe that revision of the final regulations to reflect this comment is unnecessary.

The comment also recommended that taxpayers be permitted to apply the final regulations retroactively, but that taxpayers should not be permitted to take inconsistent positions with respect to the incidence of the foreign tax. The comment recommended that a duty of consistency be imposed on related parties, or parties that were related at the time the foreign tax was imposed. If parties that were related but are now unrelated do not agree on an election to apply the regulations retroactively, the comment stated no election should be permitted.

In response to the comment, the final regulations permit taxpayers to apply the combined income rules of §1.901–2(f)(3) of the final regulations to taxable years beginning after December 31, 2010, and on or before February 14, 2012. This provision will permit taxpayers to avoid uncertainty regarding the application of section 909 to foreign taxes paid or accrued by foreign consolidated groups in pre-effective date taxable years beginning in 2011 and 2012. No inference is intended as to the determination of the person who paid the foreign tax under the rules in effect prior to the amendment of the regulations by this Treasury decision. To the extent that a taxpayer did not allocate foreign consolidated tax liability among the members of a foreign consolidated group based on each member's share of the consolidated taxable income included in the foreign tax base under the principles of §1.901–2(f)(3), the foreign consolidated group is a foreign tax credit splitting event under section 909. See Section 4.03 of Notice 2010–92 and §1.909–5T.

The Treasury Department and the IRS have concerns about the administrative complexity and burden on taxpayers associated with requirements to elect to apply §1.901–2(f)(4) retroactively that would be necessary to prevent potential whipsaws from two unrelated persons claiming a foreign tax credit for a single payment of foreign income tax, in cases where different persons are considered to pay the tax under the final regulations and under prior law. Although taxpayers may not elect to apply §1.901–2(f)(4) retroactively, certain portions of that provision, specifically with respect to the person that has legal liability for a foreign tax paid by a disregarded entity or a partnership in the absence of a change in ownership, were consistent with the rules in effect under the final regulations prior to amendment by this Treasury decision. In addition, to prevent treating more than one person as paying a single amount of tax, §1.901–2(f)(4) of the final regulations will not apply to any amount of tax paid or accrued in a post-effective date year of any person, if such tax would be treated as paid or accrued by a different person in a pre-effective date year under the prior regulations.

Availability of IRS Documents

IRS notices cited in this preamble are made available by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Effect on Other Documents

The following publication is obsolete in part as of February 14, 2012.

Notice 2007–95, 2007–2 C.B. 1091.

Special Analyses

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

Drafting Information

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

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.706–1 is amended by adding paragraph (c)(6) to read as follows:

§1.706–1 Taxable years of partner and partnership.

* * * * *

(c) * * *

(6) *Foreign taxes.* For rules relating to the treatment of foreign taxes paid or accrued by a partnership, see §1.901–2(f)(4)(i) and (f)(4)(ii).

* * * * *

Par. 3. Section 1.901–2 is amended by revising paragraph (f)(3) and adding paragraphs (f)(4), (f)(5), and (h)(4) to read as follows:

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

* * * * *

(f) * * *

(3) *Taxes imposed on combined income of two or more persons*—(i) *In general.* If foreign tax is imposed on the combined income of two or more persons (for example, a husband and wife or a corporation and one or more of its subsidiaries), foreign law is considered to impose legal liability on each such person for the amount of the tax that is attributable to such person's portion of the base of the tax. Therefore, if foreign tax is imposed on the combined income of two or more persons, such tax is allocated among, and considered paid by, such persons on a *pro rata* basis in proportion to each person's portion of the combined income, as determined under foreign law and paragraph (f)(3)(iii) of this section. Combined income with respect to each foreign tax that is imposed on a combined basis is computed separately, and the tax on that combined income is allocated separately under this paragraph (f)(3)(i). If foreign law exempts from tax, or provides for specific rates of tax with respect

to, certain types of income, or if certain expenses, deductions or credits are taken into account only with respect to a particular type of income, combined income with respect to such portions of the combined income is also computed separately, and the tax on that combined income is allocated separately under this paragraph (f)(3)(i). The rules of this paragraph (f)(3) apply regardless of which person is obligated to remit the tax, which person actually remits the tax, or which person the foreign country could proceed against to collect the tax in the event all or a portion of the tax is not paid. For purposes of this paragraph (f)(3), the term *person* means an individual or an entity (including a disregarded entity described in §301.7701–2(c)(2)(i) of this chapter) that is subject to tax in a foreign country as a corporation (or otherwise at the entity level). In determining the amount of tax paid by an owner of a partnership or a disregarded entity, this paragraph (f)(3) first applies to determine the amount of tax paid by the partnership or disregarded entity, and then paragraph (f)(4) of this section applies to allocate the amount of such tax to the owner.

(ii) *Combined income.* For purposes of this paragraph (f)(3), foreign tax is imposed on the combined income of two or more persons if such persons compute their taxable income on a combined basis under foreign law and foreign tax would otherwise be imposed on each such person on its separate taxable income. For example, income is computed on a combined basis if two or more persons add their items of income, gain, deduction, and loss to compute a single consolidated taxable income amount for foreign tax purposes. Foreign tax is considered to be imposed on the combined income of two or more persons even if the combined income is computed under foreign law by attributing to one such person (for example, the foreign parent of a foreign consolidated group) the income of other such persons or by treating persons that would otherwise be subject to tax as separate entities as unincorporated branches of a single corporation for purposes of computing the foreign tax on the combined income of the group. However, foreign tax is not considered to be imposed on the combined income of two or more persons if, because one or more persons is a fiscally transparent entity (under the principles of §1.894–1(d)(3)) under foreign law, only one of such persons is subject to tax under foreign law (even if two or more of such persons are corporations for U.S. Federal income tax purposes). Therefore, foreign tax is not considered to be imposed on the combined income of two or more persons solely because foreign law:

(A) Permits one person to surrender a loss to another person pursuant to a group relief or other loss-sharing regime described in §1.909–2T(b)(2)(vi);

(B) Requires a shareholder of a corporation to include in income amounts attributable to taxes imposed on the corporation with respect to distributed earnings, pursuant to an integrated tax system that allows the shareholder a credit for such taxes;

(C) Requires a shareholder to include, pursuant to an anti-deferral regime (similar to subpart F of the Internal Revenue Code (sections 951 through 965)), income attributable to the shareholder's interest in the corporation;

(D) Reallocates income from one person to a related person under foreign transfer pricing rules;

(E) Requires a person to take into account a distributive share of income of an entity that is a partnership or other fiscally transparent entity for foreign tax law purposes; or

(F) Requires a person to take all or part of the income of an entity that is a corporation for U.S. Federal income tax purposes into account because foreign law treats the entity as a branch or fiscally transparent entity (a reverse hybrid). A reverse hybrid does not include an entity that is treated under foreign law as a branch or fiscally transparent entity solely for purposes of calculating combined income of a foreign consolidated group.

(iii) *Portion of combined income*—(A) *In general.* Each person's portion of the combined income is determined by reference to any return, schedule or other document that must be filed or maintained with respect to a person showing such person's income for foreign tax purposes, as properly amended or adjusted for foreign tax purposes. If no such return, schedule or other document must be filed or maintained with respect to a person for foreign tax purposes, then, for purposes of this paragraph (f)(3), such person's income is determined from the books of account regularly maintained by or on behalf of the person for purposes of computing its income for foreign tax purposes. Each person's portion of the combined income is determined by adjusting such person's income determined under this paragraph (f)(3)(iii)(A) as provided in paragraph (f)(3)(iii)(B) and (f)(3)(iii)(C) of this section.

(B) *Effect of certain payments*—(*1*) Each person's portion of the combined income is determined by giving effect to payments and accrued amounts of interest, rents, royalties, and other amounts between persons whose income is included in the combined base to the extent such amounts would be taken into account in computing the separate taxable incomes of such persons under foreign law if they did not compute their income on a combined basis. Each person's portion of the combined income is determined without taking into account any payments from other persons whose income is included in the combined base that are treated as dividends or other non-deductible distributions with respect to equity under foreign law, and without taking into account deemed dividends or any similar attribution of income made for purposes of computing the combined income under foreign law, regardless of whether any such deemed dividend or attribution of income results in a deduction or inclusion under foreign law.

(*2*) For purposes of determining each person's portion of the combined income, the treatment of a payment is determined under foreign law. Thus, for example, interest accrued by one group member with respect to an instrument held by another member that is treated as debt for foreign tax purposes but as equity for U.S. Federal income tax purposes would be considered income of the holder and would reduce the income of the issuer. See also §1.909–2T(b)(3)(i) for rules requiring suspension of foreign income taxes paid or accrued by the owner of a U.S. equity hybrid instrument.

(C) *Net losses.* If tax is considered to be imposed on the combined income of three or more persons and one or more of such persons has a net loss for the taxable year for foreign tax purposes, the following rules apply. If foreign law provides mandatory rules for allocating the net loss among the other persons, then the rules

that apply for foreign tax purposes apply for purposes of this paragraph (f)(3). If foreign law does not provide mandatory rules for allocating the net loss, the net loss is allocated among all other such persons on a *pro rata* basis in proportion to the amount of each person's income, as determined under paragraphs (f)(3)(iii)(A) and (f)(3)(iii)(B) of this section. For purposes of this paragraph (f)(3)(iii)(C), foreign law is not considered to provide mandatory rules for allocating a net loss solely because such loss is attributed from one person to a second person for purposes of computing combined income, as described in paragraph (f)(3)(ii) of this section.

(iv) *Collateral consequences.* U.S. tax principles apply to determine the tax consequences if one person remits a tax that is the legal liability of, and thus is considered paid by, another person.

(4) *Taxes imposed on partnerships and disregarded entities*—(i) *Partnerships*. If foreign law imposes tax at the entity level on the income of a partnership, the partnership is considered to be legally liable for such tax under foreign law and therefore is considered to pay the tax for U.S. Federal income tax purposes. The rules of this paragraph (f)(4)(i) apply regardless of which person is obligated to remit the tax, which person actually remits the tax, or which person the foreign country could proceed against to collect the tax in the event all or a portion of the tax is not paid. See §§1.702–1(a)(6) and 1.704–1(b)(4)(viii) for rules relating to the determination of a partner's distributive share of such tax. If the U.S. taxable year of a partnership closes for all partners due to a termination of the partnership under section 708(b)(1)(A) and the regulations under that section and the foreign taxable year of the partnership does not close, then foreign tax paid or accrued with respect to the foreign taxable year in which the termination occurs is allocated between the terminating partnership and its successors or assigns. For example, if, as a result of a change in ownership during a partnership's foreign taxable year, the partnership becomes a disregarded entity and the entity's foreign taxable year does not close, foreign tax paid or accrued by the owner of the disregarded entity with respect to the foreign taxable year is allocated between the partnership and the owner of the disregarded entity. If the U.S. taxable year of a partnership closes for all partners due to a termination of the partnership under section 708(b)(1)(B) and the regulations under that section and the foreign taxable year of the partnership does not close, then foreign tax paid or accrued by the new partnership with respect to the foreign taxable year in which the termination occurs is allocated between the terminating partnership and the new partnership. If multiple terminations under section 708(b)(1)(B) occur within the foreign taxable year, foreign tax paid or accrued with respect to that foreign taxable year by a new partnership is allocated among all terminating and new partnerships. In the case of any termination under section 708(b)(1), the allocation of foreign tax is made based on the respective portions of the taxable income (as determined under foreign law) for the foreign taxable year that are attributable under the principles of §1.1502–76(b) to the period of existence of each terminating and new partnership, or successor or assign of a terminating partnership, during the foreign taxable year. Foreign tax allocated to a terminating partnership under this paragraph (f)(4)(i) is treated as paid or accrued by such partnership as of the close of the last day of its final U.S. taxable year. In the case of a change in any partner's interest in the partnership (a variance), except as otherwise provided in section 706(d)(2) (relating to certain cash basis items) or 706(d)(3) (relating to tiered partnerships), foreign tax paid or accrued by the partnership during its U.S. taxable year in which the variance occurs is allocated between the portion of the U.S. taxable year ending on, and the portion of the U.S. taxable year beginning on the day after, the day of the variance. The allocation is made under the principles of this paragraph (f)(4)(i) as if the variance were a termination under section 708(b)(1).

(ii) *Disregarded entities*. If foreign law imposes tax at the entity level on the income of an entity described in §301.7701–2(c)(2)(i) of this chapter (a *disregarded entity*), the person (as defined in section 7701(a)(1)) who is treated as owning the assets of the disregarded entity for U.S. Federal income tax purposes is considered to be legally liable for such tax under foreign law. Such person is considered to pay the tax for U.S. Federal income tax purposes. The rules of this paragraph (f)(4)(ii) apply regardless of which person is obligated to remit the tax, which person actually remits the tax, or which person the foreign country could proceed against to collect the tax in the event all or a portion of the tax is not paid. If there is a change in the ownership of such disregarded entity during the entity's foreign taxable year and such change does not result in a closing of the disregarded entity's foreign taxable year, foreign tax paid or accrued with respect to such foreign taxable year is allocated between the transferor and the transferee. If there is more than one change in the ownership of a disregarded entity during the entity's foreign taxable year, foreign tax paid or accrued with respect to that foreign taxable year is allocated among all transferors and transferees. The allocation is made based on the respective portions of the taxable income of the disregarded entity (as determined under foreign law) for the foreign taxable year that are attributable under the principles of §1.1502–76(b) to the period of ownership of each transferor and transferee during the foreign taxable year. If, as a result of a change in ownership, the disregarded entity becomes a partnership and the entity's foreign taxable year does not close, foreign tax paid or accrued by the partnership with respect to the foreign taxable year is allocated between the owner of the disregarded entity and the partnership under the principles of this paragraph (f)(4)(ii). If the person who owns a disregarded entity is a partnership for U.S. Federal income tax purposes, see §1.704–1(b)(4)(viii) for rules relating to the allocation of such tax among the partners of the partnership.

(5) *Examples*. The following examples illustrate the rules of paragraphs (f)(3) and (f)(4) of this section:

Example 1. (i) *Facts.* A, a United States person, owns 100 percent of B, an entity organized in country X. B owns 100 percent of C, also an entity organized in country X. B and C are corporations for U.S. and foreign tax purposes that use the "u" as their functional currency. Pursuant to a consolidation regime, country X imposes an income tax described in (a)(1) of this section on the combined income of B and C within the meaning of paragraph (f)(3)(ii) of this section. In year 1, C pays 25u of interest to B. If B and C did not report their income on a combined basis for country X tax purposes, the interest paid from C to B would result in 25u of interest income to B and 25u of deductible interest expense to C. For purposes of reporting the combined income of B and C, country X first requires B and C to determine their own

income (or loss) on a separate schedule. For this purpose, however, neither B nor C takes into account the 25u of interest paid from C to B because the income of B and C is included in the same combined base. The separate income of B and C reported on their country X schedules for year 1, which do not reflect the 25u intercompany payment, is 100u and 200u, respectively. The combined income reported for country X purposes is 300u (the sum of the 100u separate income of B and 200u separate income of C).

(ii) *Result*. On the separate schedules described in paragraph (f)(3)(iii)(A) of this section, B's separate income is 100u and C's separate income is 200u. Under paragraph (f)(3)(iii)(B)(*1*) of this section, the 25u interest payment from C to B is taken into account for purposes of determining B's and C's portions of the combined income under paragraph (f)(3)(iii) of this section, because B and C would have taken the items into account if they did not compute their income on a combined basis. Thus, B's portion of the combined income is 125u (100u plus 25u) and C's portion of the combined income is 175u (200u less 25u). The result is the same regardless of whether the 25u interest payment from C to B is deductible for U.S. Federal income tax purposes. See paragraph (f)(3)(iii)(B)(*2*) of this section.

Example 2. (i) *Facts*. A, a United States person, owns 100 percent of B, an entity organized in country X. B is a corporation for country X tax purposes, and a disregarded entity for U.S. income tax purposes. B owns 100 percent of C and D, entities organized in country X that are corporations for both U.S. and country X tax purposes. B, C, and D use the "u" as their functional currency and file on a combined basis for country X income tax purposes. Country X imposes an income tax described in paragraph (a)(1) of this section at the rate of 30 percent on the taxable income of corporations organized in country X. Under the country X combined reporting regime, income (or loss) of C and D is attributed to, and treated as income (or loss) of, B. B has the sole obligation to pay country X income tax imposed with respect to income of B and income of C and D that is attributed to, and treated as income of, B. Under the law of country X, country X may proceed against B, but not C or D, if B fails to pay over to country X all or any portion of the country X income tax imposed with respect to such income. In year 1, B has income of 100u, C has income of 200u, and D has a net loss of (60u). Under the law of country X, B is considered to have 240u of taxable income with respect to which 72u of country X income tax is imposed. Country X does not provide mandatory rules for allocating D's loss.

(ii) *Result.* Under paragraph (f)(3)(ii) of this section, the 72u of country X tax is considered to be imposed on the combined income of B, C, and D. Because country X law does not provide mandatory rules for allocating D's loss between B and C, under paragraph (f)(3)(iii)(C) of this section D's (60u) loss is allocated *pro rata*: 20u to B ((100u/300u) x 60u) and 40u to C ((200u/300u) x 60u). Under paragraph (f)(3)(i) of this section, the 72u of country X tax must be allocated *pro rata* among B, C, and D. Because D has no income for country X tax purposes, no country X tax is allocated to D. Accordingly, 24u (72u x (80u/240u)) of the country X tax is allocated to B, and 48u (72u x (160u/240u)) of such tax is allocated to C. Under paragraph (f)(4)(ii) of this section, A is considered to have legal liability for the 24u of country X tax allocated to B under paragraph (f)(3) of this section.

Example 3. (i) *Facts.* A, B, and C are U.S. persons that each use the calendar year as their taxable year. A and B each own 50 percent of the capital and profits of D, an entity organized in country M. D is a partnership for U.S. tax purposes, but is a corporation for country M tax purposes. D uses the "u" as its functional currency and the calendar year as its taxable year for both U.S. tax purposes and country M tax purposes. Country M imposes an income tax described in paragraph (a)(1) of this section at a rate of 30 percent at the entity level on the taxable income of D. On September 30 of Year 1, A sells its 50 percent interest in D to C. A's sale of its partnership interest results in a termination of the partnership under section 708(b)(1)(B) for U.S. tax purposes. As a result of the termination, "old" D's taxable year closes on September 30 of Year 1 for U.S. tax purposes. New D also has a short U.S. taxable year, beginning on October 1 and ending on December 31 of Year 1. The sale of A's interest does not close D's taxable year for country M tax purposes. D has 400u of taxable income for its foreign taxable year ending December 31, Year 1 with respect to which country M imposes 120u of income tax, equal to $120 as translated in accordance with section 986(a).

(ii) *Result.* Under paragraph (f)(4)(i) of this section, partnership D is legally liable for the $120 of country M income tax imposed on its foreign taxable income. Because D's taxable year closes on September 30, Year 1, for U.S. tax purposes, but does not close for country M tax purposes, under paragraph (f)(4)(i) of this section the $120 of country M tax must be allocated under the principles of §1.1502–76(b) between terminating D and new D. See §1.704–1(b)(4)(viii) for rules relating to the allocation of terminating D's country M taxes between A and B and the allocation of new D's country M taxes between B and C.

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(h) * * *

(4) Paragraphs (f)(3), (f)(4), and (f)(5) of this section apply to foreign taxes paid or accrued in taxable years beginning after February 14, 2012. However, if an amount of tax is paid or accrued in a taxable year of any person beginning on or before February 14, 2012, and the tax is treated as paid or accrued by such person under 26 CFR §1.901–2(f) (revised as of April 1, 2011), then paragraph (f)(4) of this section will not apply, and 26 CFR §1.901–2(f) (revised as of April 1, 2011) will apply, to determine the person with legal liability for that tax. No other person will be treated as legally liable for such tax, even if the tax is paid or accrued on a date that falls within a taxable year of such other person beginning after February 14, 2012. Taxpayers may choose to apply paragraph (f)(3) of this section to foreign taxes paid or accrued in taxable years beginning after December 31, 2010, and on or before February 14, 2012.

Steven T. Miller,
Deputy Commissioner for Services and Enforcement.

Approved February 8, 2012.

Emily S. McMahon,
Acting Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on February 9, 2011, 4:15 p.m., and published in the issue of the Federal Register for February 14, 2011, 77 F.R. 8120)

Section 909.—Outlines of Regulation Provisions for Section 909

26 CFR 1.909–0T: Outlines of regulation provisions for section 909 (temporary).

T.D. 9577

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Foreign Tax Credit Splitting Events

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary Income Tax Regulations with respect to a new provision of the Internal Revenue Code (Code) that addresses situations in which foreign income taxes have been separated from the related income. These regulations are necessary to provide guidance on applying the new statutory provision, which was enacted as part of legislation commonly referred to as the Education Jobs and Medicaid Assistance Act (EJMAA) on August 10, 2010. These regulations affect taxpayers claiming foreign tax credits. The text of the temporary regulations also serves as the text of the proposed regulations

(REG–132736–11) published in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective on February 14, 2012.

Applicability Dates: For dates of applicability, see §§1.704–1T(b)(1)(ii)(*b*)(*3*), 1.909–1T(e), 1.909–2T(c), 1.909–3T(c), 1.909–4T(b), 1.909–5T(c), and 1.909–6T(h).

FOR FURTHER INFORMATION CONTACT: Suzanne M. Walsh, (202) 622–3850 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

I. *Section 909*

Section 909 was enacted as part of EJMAA (Public Law 111–226, 124 Stat. 2389 (2010)) to address situations in which foreign income taxes have been separated from the related income. Section 909(a) provides that if there is a foreign tax credit splitting event with respect to a foreign income tax paid or accrued by a taxpayer, such tax is not taken into account for federal tax purposes before the taxable year in which the related income is taken into account by the taxpayer. Section 909(b) provides special rules with respect to a "section 902 corporation," which is defined in section 909(d)(5) as any foreign corporation with respect to which one or more domestic corporations meets the ownership requirements of section 902(a) or (b) (a section 902 shareholder of the relevant section 902 corporation). If there is a foreign tax credit splitting event with respect to a foreign income tax paid or accrued by a section 902 corporation, the tax is not taken into account for purposes of section 902 or 960, or for purposes of determining earnings and profits under section 964(a), before the taxable year in which the related income is taken into account by such section 902 corporation or a section 902 shareholder. Thus, the tax is not added to the section 902 corporation's pool of "post-1986 foreign income taxes" (as defined in section 902(c)(2) and §1.902–1(a)(8)), and its pool of "post-1986 undistributed earnings" (as defined in section 902(c)(1) and §1.902–1(a)(9)) is not reduced by such tax. Accordingly, section 909 suspends foreign income taxes paid or accrued by a section 902 corporation at the level of the payor section 902 corporation. In the case of a partnership, section 909(a) and (b) apply at the partner level, and, except as otherwise provided by the Secretary, a similar rule applies in the case of an S corporation or trust. See section 909(c)(1).

For purposes of section 909, there is a foreign tax credit splitting event with respect to a foreign income tax if the related income is (or will be) taken into account by a covered person. See section 909(d)(1). Section 909 does not suspend foreign income taxes if the same person pays the tax but takes into account the related income in a different taxable period (or periods) due to, for example, timing differences between the U.S. and foreign tax accounting rules. The term "foreign income tax" means any income, war profits, or excess profits tax paid or accrued to any foreign country or to any possession of the United States. See section 909(d)(2). The Joint Committee on Taxation's technical explanation of the revenue provisions of EJMAA states that a foreign income tax includes any tax paid in lieu of such a tax within the meaning of section 903. Staff of the Joint Committee on Taxation, Technical Explanation of the Revenue Provisions of the Senate Amendment to the House Amendment to the Senate Amendment to H.R. 1586, Scheduled For Consideration by the House of Representatives on August 10, 2010, at 5 (August 10, 2010) (JCT Explanation). Section 909(d)(3) provides that the term "related income" means, with respect to any portion of any foreign income tax, the income (or, as appropriate, earnings and profits) to which such portion of the foreign income tax relates. The term "covered person" means, with respect to any person who pays or accrues a foreign income tax (the "payor"): (1) any entity in which the payor holds, directly or indirectly, at least a 10 percent ownership interest (determined by vote or value); (2) any person that holds, directly or indirectly, at least a 10 percent ownership interest (determined by vote or value) in the payor; (3) any person that bears a relationship to the payor described in section 267(b) or 707(b); and (4) any other person specified by the Secretary. See section 909(d)(4).

Except as otherwise provided by the Secretary, any foreign income tax not currently taken into account by reason of section 909 is taken into account as a foreign income tax paid or accrued in the taxable year in which, and to the extent that, the taxpayer, the section 902 corporation or a section 902 shareholder (as the case may be) takes the related income into account under chapter 1 of Subtitle A of the Code. See section 909(c)(2). Notwithstanding this general rule, foreign income taxes are translated into U.S. dollars under the rules of section 986(a) in the year actually paid or accrued and suspended, and not as if they were paid or accrued in the year in which the related income is taken into account. See section 909(c)(2).

Section 909(e) provides that the Secretary may issue such regulations or other guidance as is necessary or appropriate to carry out the purposes of section 909, including guidance providing appropriate exceptions from the provisions of section 909 and for its proper application to hybrid instruments. The JCT Explanation states that such guidance may address the proper application of section 909 in cases involving disregarded payments, group relief, or other arrangements having a similar effect. JCT Explanation at 6. Section 211(c)(1) of EJMAA provides that section 909 applies to foreign income taxes paid or accrued (including foreign income taxes paid or accrued by section 902 corporations) in taxable years beginning after December 31, 2010 (post-2010 taxable years). Section 211(c)(2) of EJMAA provides that section 909 also applies to foreign taxes paid or accrued in taxable years beginning on or before December 31, 2010 (pre-2011 taxable years), but only for purposes of applying sections 902 and 960 to periods after December 31, 2010. For this purpose, there is no increase to a section 902 corporation's earnings and profits for the amount of any pre-2011 taxes to which section 909 applies that were previously deducted in computing earnings and profits in a pre-2011 taxable year. The JCT Explanation clarifies that the section 902 effective date rule "applies for purposes of applying sections 902 and 960 to dividends paid, and inclusions under section 951(a) that occur, in taxable years beginning after December 31, 2010." JCT Explanation at 6–7.

II. *Section 901 Proposed Regulations Issued in 2006*

Section 909 was enacted to address concerns about the inappropriate separation of foreign income taxes and related income. These concerns were also the basis for the issuance in 2006 of proposed regulations under section 901 (2006 proposed regulations) concerning the determination of the person who paid a foreign income tax for foreign tax credit purposes (REG–124152–06, 2006–2 C.B. 368 [71 FR 44240] (Aug. 4, 2006)). In particular, the proposed regulations would provide guidance under §1.901–2(f) relating to the person on whom foreign law imposes legal liability for tax, including in the case of taxes imposed on the income of foreign consolidated groups and entities that have different classifications for U.S. and foreign tax law purposes. The Treasury Department and the IRS received written comments on the proposed regulations and held a hearing on October 13, 2006. All comments are available at *www.regulations.gov* or upon request. After taking into account the comments received, the 2006 proposed regulations are adopted, in part, as final regulations published elsewhere in this issue of the Bulletin.

III. *Notice 2010–92*

The Treasury Department and the IRS issued Notice 2010–92, 2010–52 I.R.B. 916 (December 6, 2010), which primarily addresses the application of section 909 to foreign income taxes paid or accrued by a section 902 corporation in pre-2011 taxable years. The notice provides rules for determining whether foreign income taxes paid or accrued by a section 902 corporation in pre-2011 taxable years (pre-2011 taxes) are suspended under section 909 in post-2010 taxable years of a section 902 corporation. It also identifies an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events in pre-2011 taxable years (pre-2011 splitter arrangements) and provides guidance on determining the amount of related income and pre-2011 taxes paid or accrued with respect to pre-2011 splitter arrangements. The pre-2011 splitter arrangements are reverse hybrid structures, certain foreign consolidated groups, disregarded debt structures in the context of group relief and other loss-sharing regimes, and two classes of hybrid instruments. The notice states that the Treasury Department and the IRS expect future guidance will treat pre-2011 splitter arrangements as giving rise to foreign tax credit splitting events in post-2010 taxable years.

Notice 2010–92 states that future guidance may identify additional transactions or arrangements to which section 909 applies (including, for example, additional arrangements involving group relief regimes), although any such guidance will apply only with respect to foreign taxes paid or accrued in post-2010 taxable years. The notice also states that the Treasury Department and the IRS do not intend to finalize the portion of the 2006 proposed regulations relating to the determination of the person who paid a foreign income tax with respect to the income of a reverse hybrid. See Prop. §1.901–2(f)(2)(iii).

Concerning the effective date of section 909(b) (addressing a foreign tax credit splitting event with respect to a foreign income tax paid or accrued by a section 902 corporation), Notice 2010–92 provides that, consistent with the JCT Explanation, the Treasury Department and the IRS intend to issue regulations providing that section 909 does not apply in computing foreign taxes deemed paid under section 902 or 960 before the first day of the section 902 corporation's first post-2010 taxable year. Regarding the application of the section 909 effective date to situations involving partnerships, the notice states that in the case of a section 902 corporation that is a partner in a partnership, the section 902 corporation's distributive share of foreign income taxes paid or accrued by the partnership in a pre-2011 taxable year of the partnership that is included in a post-2010 taxable year of the section 902 corporation will be treated as a tax paid or accrued by the section 902 corporation in a post-2010 taxable year. See §1.702–1(a)(6).

Notice 2010–92 also provides guidance concerning the application of section 909 to partnerships and trusts, as well as the interaction between section 909 and other Code provisions. In addition, the notice solicits comments on issues that should be addressed in regulations, including whether portions of the 2006 proposed regulations should be finalized or modified in light of the enactment of section 909. The Treasury Department and the IRS received written comments on Notice 2010–92, which are discussed in this preamble.

Explanation of Provisions

I. *Section 704(b)*

Section 1.704–1(b)(4)(viii)(*d*)(*3*) provides that if a branch of a partnership (including a disregarded entity owned by the partnership) is required to include in income under foreign law a payment (an inter-branch payment) it receives from the partnership or another branch of the partnership, any creditable foreign tax expenditure (CFTE) imposed with respect to the payment relates to the income in the CFTE category that includes the items attributable to the recipient (the recipient CFTE category). However, because the inter-branch payment is disregarded for U.S. Federal income tax purposes, the income related to the CFTEs imposed with respect to the payment may remain in the CFTE category that includes the items attributable to the payor of the inter-branch payment (the payor CFTE category). This is an exception to the general application of the principles of §1.904–6 that would allocate the CFTEs to the payor CFTE category that includes the related income. See §1.704–1(b)(4)(viii)(*d*)(*1*). Because this exception allows the CFTEs and related income to be allocated to different CFTE categories, they may potentially be allocated to the partners in a manner that separates the CFTEs from the related income.

Notice 2010–92 states that the Treasury Department and the IRS recognize that certain allocations of CFTEs and income of a partnership can result in a separation of the CFTEs and the related income for purposes of section 909, notwithstanding that these allocations satisfy the requirements of section 704(b) and the regulations under that section. The notice states that partnership allocations that satisfy the requirements of section 704(b) and the regulations under that section will not constitute pre-2011 splitter arrangements except to the extent the arrangement otherwise constitutes one of the arrangements identified in the notice as a pre-2011 splitter arrangement (for example, allocations

of taxes paid by a hybrid partnership on income of a reverse hybrid). However, the notice also states that the Treasury Department and the IRS will provide in future guidance that allocations described in §1.704–1(b)(4)(viii)(*d*)(*3*) will result in a foreign tax credit splitting event in post-2010 taxable years to the extent such allocations result in foreign income taxes being allocated to a different partner than the related income. The notice also solicits comments on the extent to which §1.704–1(b)(4)(viii)(*d*) and (b)(5), *Example 24* should be modified in light of the enactment of section 909. A comment recommended eliminating the special exception for inter-branch payments set forth in §1.704–1(b)(4)(viii)(*d*)(*3*). The Treasury Department and the IRS have determined that the regulations should be revised to prevent allocations under §1.704–1(b)(4)(viii)(*d*)(*3*) that would result in such a separation of taxes and related income from satisfying the safe harbor, regardless of whether section 909 applies.

These temporary regulations remove the special exception for inter-branch payments set forth in §1.704–1(b)(4)(viii)(*d*)(*3*). As a result, the general principles of §1.904–6 will apply to an inter-branch payment so that the CFTEs imposed on that payment will be allocated to the CFTE category that includes the related income for U.S. Federal income tax purposes. Accordingly, if the CFTEs and related income are allocated to partners in the same ratios, the safe harbor is satisfied and the allocation does not give rise to a foreign tax credit splitting event. The temporary regulations revise *Example 24* of §1.704–1(b)(5) to reflect these changes. These changes are generally effective for taxable years beginning on or after January 1, 2012. Allocations made in accordance with §1.704–1(b)(4)(viii)(*d*)(*3*) in taxable years beginning on or after January 1, 2011, and before January 1, 2012, will result in a foreign tax credit splitting event and suspension of foreign income taxes that are allocated to a different partner than the covered person that is allocated the related income. See §1.909–5T(a)(2).

The temporary regulations also provide a transition rule for partnerships whose agreements were entered into prior to February 14, 2012. If there has been no material modification to the partnership agreement on or after February 14, then the partnership may apply the provisions of §1.704–1(b)(4)(viii)(*c*)(*3*)(*ii*) and §1.704–1(b)(4)(viii)(*d*)(*3*) as in effect prior to February 14, 2012. See §1.704–1T(b)(1)(ii)(*b*)(*3*). For purposes of this transition rule, any change in ownership constitutes a material modification to the partnership agreement. This transition rule does not apply to any taxable year in which persons bearing a relationship to each other specified in section 267(b) or 707(b) collectively have the power to amend the partnership agreement without the consent of any unrelated party (and all subsequent taxable years). In the case of any partnership that applies, under the transition rule, the provisions of §1.704–1(b)(4)(viii)(*c*)(*3*)(*ii*) and §1.704–1(b)(4)(viii)(*d*)(*3*) as in effect prior to February 14, 2012, an allocation of foreign income taxes paid or accrued by the partnership with respect to an inter-branch payment will result in a foreign tax credit splitting event to the extent that the tax on the inter-branch payment is not allocated to the partners in proportion to the distributive shares of income to which the inter-branch payment tax relates. See §1.909–2T(b)(4).

II. *Section 909*

A. *In general*

The temporary regulations provide an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events under section 909 with respect to foreign income taxes paid or accrued in taxable years beginning on or after January 1, 2012, as well as an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events with respect to foreign income taxes paid or accrued in a taxable year beginning on or after January 1, 2011, and before January 1, 2012. The temporary regulations further treat the foreign consolidated group splitter arrangement described in §1.909–6T(b)(2) as giving rise to a foreign tax credit splitting event with respect to foreign income taxes paid or accrued in a taxable year beginning on or after January 1, 2012, and on or before February 14, 2012. In addition, these regulations provide rules for determining related income and split taxes and for coordinating the interaction between section 909 and other Code provisions. Finally, these regulations include the guidance described in Notice 2010–92, which primarily addresses the application of section 909 to foreign income taxes paid or accrued by section 902 corporations in taxable years beginning on or before December 31, 2010.

B. *Definitions and special rules*

Section 1.909–1T(a) provides definitions, and §1.909–1T(b), (c), and (d) provide rules that apply for purposes of that section and §§1.909–2T through 1.909–5T. First, §1.909–1T(b) and (c) provide rules substantially similar to those set forth in Notice 2010–92 concerning the application of section 909 to partnerships and trusts, except that the temporary regulations expand the scope of the rules to include S corporations and taxes paid or accrued by persons other than section 902 corporations. Section 1.909–1T(b) provides that under section 909(c)(1), section 909 applies at the partner level, and similar rules apply in the case of an S corporation or trust. Accordingly, in the case of foreign income taxes paid or accrued by a partnership, S corporation or trust, taxes allocated to one or more partners, shareholders or beneficiaries (as the case may be) will be treated as split taxes to the extent such taxes would be split taxes if the partner, shareholder or beneficiary had paid or accrued the taxes directly on the date such taxes are taken into account by the partner under sections 702 and 706(a), by the shareholder under section 1373(a), or by the beneficiary under section 901(b)(5). Any such split taxes will be suspended in the hands of the partner, shareholder or beneficiary.

Section 5.02 of Notice 2010–92 provides that, for purposes of applying section 909 in post-2010 taxable years, there will not be a foreign tax credit splitting event with respect to a foreign income tax paid or accrued by a partner with respect to its distributive share of the related income of a partnership that is a covered person with respect to the partner to the extent the related income is taken into account by the partner. A comment recommended that regulations adopt an aggregate approach in the partnership context in determining whether related income

is taken into account by a covered person. The Treasury Department and the IRS agree with this comment. Accordingly, §1.909–1T(c) provides that for purposes of determining whether related income is taken into account by a covered person, related income of a partnership, S corporation or trust is considered to be taken into account by the partner, shareholder or beneficiary to whom the related income is allocated.

Second, §1.909–1T(d) addresses the application of section 909 to annual layers of pre-1987 accumulated profits and pre-1987 foreign income taxes of a section 902 corporation. Section 909 and the regulations under that section will apply to pre-1987 accumulated profits and pre-1987 foreign income taxes of a section 902 corporation attributable to taxable years beginning on or after January 1, 2012. Pursuant to section 902(c)(6) and §1.902–1(a)(10)(i) and (a)(10)(iii), earnings and profits and associated foreign income taxes paid or accrued by a foreign corporation in taxable years before it was a section 902 corporation are treated as pre-1987 accumulated profits and pre-1987 foreign income taxes. Section 1.909–1T(d) provides that foreign corporations that become section 902 corporations must account for split taxes paid or accrued and related income in pre-acquisition taxable years beginning on or after January 1, 2012. Suspension of split taxes paid or accrued with respect to pre-1987 accumulated profits attributable to earlier taxable years is not required.

The rules of §1.909–1T apply to taxable years beginning on or after January 1, 2011.

C. *Splitter arrangements*

1. *In general*

Section 909(d)(1) provides that there is a foreign tax credit splitting event with respect to a foreign income tax if the related income is (or will be) taken into account by a covered person. The Treasury Department and the IRS believe that a transaction or arrangement in which the related income was taken into account by a covered person before the associated foreign income tax is paid or accrued (for example, due to a timing difference) presents the same concerns about the inappropriate separation of foreign income taxes and related income that section 909 was intended to address. Accordingly, §1.909–2T(a)(1) provides that there is a foreign tax credit splitting event with respect to foreign income taxes paid or accrued if and only if, in connection with an arrangement described in §1.909–2T(b) (a splitter arrangement) the related income was, is or will be taken into account for U.S. Federal income tax purposes by a person that is a covered person with respect to the payor of the tax.

Foreign income taxes that are paid or accrued in connection with a splitter arrangement are split taxes to the extent provided in §1.909–2T(b). Income (or, as the case may be, earnings and profits) that was, is or will be taken into account by a covered person in connection with a splitter arrangement is related income to the extent provided in §1.909–2T(b). Split taxes will not be taken into account for U.S. Federal income tax purposes before the taxable year in which the related income is taken into account by the payor or, in the case of split taxes paid or accrued by a section 902 corporation, by a section 902 shareholder of such section 902 corporation. Therefore, in the case of split taxes paid or accrued by a section 902 corporation, split taxes will not be taken into account for purposes of section 902 or 960, or for purposes of determining earnings and profits under section 964(a), before the taxable year in which the related income is taken into account by the payor section 902 corporation, a section 902 shareholder of the section 902 corporation, or a member of the section 902 shareholder's consolidated group. See §1.909–3T(a) for rules relating to when split taxes and related income are taken into account.

A comment requested that the regulations provide an exclusive list of arrangements that are subject to section 909 for post-2010 taxable years, similar to the approach adopted in Notice 2010–92, which provides an exclusive list of arrangements that are treated as giving rise to foreign tax credit splitting events for purposes of applying section 909 to pre-2011 taxes paid or accrued by section 902 corporations. The Treasury Department and the IRS agree with the comment, and accordingly, §1.909–2T(b) sets forth an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events. Future guidance may identify additional transactions or arrangements to which section 909 applies, although any such guidance will apply to foreign taxes paid or accrued in taxable years beginning on or after the date such guidance is issued.

In particular, the Treasury Department and the IRS are concerned about certain types of asset transfers that can result in the separation of foreign income taxes and the related income, for example, because of differences in when income accrues or how basis is determined for purposes of U.S. and foreign tax law. Section 901(m) applies to foreign taxes paid or accrued in connection with certain transactions that are covered asset acquisitions described in section 901(m)(2). The Treasury Department and the IRS considered several approaches to address the interaction of sections 901(m) and 909, including providing taxpayers with an election to apply section 909 in lieu of section 901(m). The Treasury Department and the IRS concluded that applying section 909 to covered asset acquisitions between related parties would substantially increase the complexity and administrative burdens associated with such transactions. Accordingly, a covered asset acquisition is not a foreign tax credit splitting event for purposes of section 909. Nevertheless, section 901(m) may apply to foreign taxes paid or accrued in connection with a foreign tax credit splitting event, for example, if an election under section 338(a) is made with respect to the acquisition of the interests in a reverse hybrid. In such case, the Treasury Department and the IRS are considering the extent to which section 909 should apply to suspend deductions for foreign income taxes with respect to which section 901(m) disallows a credit.

The Treasury Department and the IRS are also considering whether to treat as foreign tax credit splitting events other arrangements or transactions that can result in the separation of foreign income taxes and the related income, for example, because of differences in when a shareholder is taxed on a dividend out of earnings of a covered person. One such arrangement is a distribution that is a dividend for foreign tax purposes but for U.S. Federal income tax purposes is either not includible in the shareholder's gross income pursuant to section 305(a) or is disregarded. See Rev. Rul. 80–154, 1980–1 C.B. 68 (involving a series of arrangements that were treated

as a stock distribution from a foreign corporation to which section 305(a) applies), and Rev. Rul. 83–142, 1983–2 C.B. 68 (involving a cash payment by a corporation to its shareholder which was returned to the corporation and disregarded for U.S. Federal income tax purposes even though treated as a dividend subject to withholding tax under foreign law). The Treasury Department and the IRS are considering whether and to what extent such types of asset transfers and distributions should be treated as foreign tax credit splitting events and request comments on the circumstances in which such treatment should apply.

2. *Reverse hybrid splitter arrangements*

Section 1.909–2T(b)(1) describes a reverse hybrid splitter arrangement. The definition of a reverse hybrid splitter arrangement is substantially identical to that set forth in Notice 2010–92, except that the scope is extended to cover taxes paid or accrued by persons other than section 902 corporations. A reverse hybrid is an entity that is a corporation for U.S. Federal income tax purposes but is a fiscally transparent entity (under the principles of §1.894–1(d)(3)) or a branch under the laws of a foreign country imposing tax on the income of the entity. A reverse hybrid is a splitter arrangement when a payor pays or accrues foreign income taxes with respect to income of a reverse hybrid. A reverse hybrid splitter arrangement exists even if the reverse hybrid has a loss or a deficit in earnings and profits for a particular year for U.S. Federal income tax purposes (for example, due to a timing difference). The foreign income taxes paid or accrued with respect to income of the reverse hybrid are split taxes. The related income with respect to split taxes from a reverse hybrid splitter arrangement is the earnings and profits (computed for U.S. Federal income tax purposes) of the reverse hybrid attributable to the activities of the reverse hybrid that gave rise to income included in the payor's foreign tax base with respect to which the split taxes were paid or accrued. Accordingly, related income of the reverse hybrid only includes items of income or expense attributable to a disregarded entity owned by the reverse hybrid to the extent that the income attributable to the activities of the disregarded entity is included in the payor's foreign tax base.

3. *Loss-sharing splitter arrangements*

Section 1.909–2T(b)(2) expands the types of loss-sharing arrangements that Notice 2010–92 treats as splitter arrangements. A foreign group relief or loss-sharing regime is a regime in which one entity may surrender its loss to offset the income of one or more other entities. Such a loss of one entity that, in connection with a foreign group relief or other loss-sharing regime, is taken into account by one or more other entities for foreign tax purposes is a "shared loss." Shared losses can be used to shift foreign tax liability from one entity to another without a concomitant shift in U.S. earnings and profits. Notice 2010–92 applied only to shared losses attributable to debt that is disregarded for U.S. Federal income tax purposes. A comment suggested that it would be appropriate to treat other loss-sharing arrangements as foreign tax credit splitter arrangements as well, in particular, when the payor of a tax could have used the shared loss to offset foreign tax on income that is treated as the payor's own income under U.S. Federal income tax principles. The Treasury Department and the IRS agree that the scope of loss-sharing arrangements that are treated as splitter arrangements should be expanded to cover these cases. Accordingly §1.909–2T(b)(2)(i) defines a "loss-sharing splitter arrangement" as arising under a foreign group relief or other loss-sharing regime to the extent a shared loss of a U.S. combined income group could have been used to offset income of that group (a "usable shared loss") but is used instead to offset income of another U.S. combined income group.

Under §1.909–2T(b)(2)(ii), a U.S. combined income group consists of a single individual or corporation and all other entities (including entities that are fiscally transparent for U.S. Federal income tax purposes under the principles of §1.894–1(d)(3)) that for U.S. Federal income tax purposes combine any of their respective items of income, deduction, gain or loss with the income, deduction, gain or loss of such individual or corporation. A U.S. combined income group may arise, for example, as a result of an entity being disregarded for U.S. Federal income tax purposes or, in the case of a partnership or hybrid partnership and a partner, as a result of the allocation of income or any other item of the partnership to the partner. For this purpose, a branch is treated as an entity, all members of a U.S. consolidated group are treated as a single corporation, and individuals filing a joint return are treated as a single individual. A U.S. combined income group may consist of a single individual or corporation and no other entities, but cannot include more than one individual or corporation. In addition, an entity that combines items of income, deduction, gain or loss with the income, deduction, gain or loss of two or more other entities can belong to more than one U.S. combined income group. For example, a hybrid partnership that has two corporate partners that do not combine items of income, deduction, gain or loss with each other belongs to each partner's separate U.S. combined income group, because each partner receives an allocable share of hybrid partnership items.

Under §1.909–2T(b)(2)(iii)(A), the income of a U.S. combined group consists of the aggregate amount of taxable income of the members of the group that have positive taxable income, as computed under foreign law. Under §1.909–2T(b)(2)(iii)(B), the amount of shared loss of a U.S. combined income group is the sum of the shared losses of all members of the group. Section 1.909–2T(b)(2)(iii)(A) and (B) provide that in the case of an entity that is fiscally transparent (under the principles of §1.894–1(d)(3)) for foreign tax purposes and that is a member of more than one U.S. combined income group, the foreign taxable income or shared loss of the entity is allocated between or among the groups under foreign tax law. In the case of an entity that is not fiscally transparent for foreign tax purposes and is a member of more than one U.S. combined income group, the entity's foreign taxable income or shared loss is allocated between the separate U.S. combined income groups based on U.S. Federal income tax principles. Although the allocations are based on U.S. Federal income tax principles, the amount of the foreign taxable income or shared loss to be allocated is determined under foreign law. In the case of a hybrid partnership with two partners that are in different U.S. combined income groups,

income or a shared loss incurred by the hybrid partnership, as determined under foreign law, is allocated between or among the U.S. combined income groups based on how the hybrid partnership allocated the income or loss under section 704(b). To the extent the income or shared loss would be income or loss under U.S. tax principles in another year, the income or shared loss is allocated to the U.S. combined income groups based on how the hybrid partnership would allocate the income or shared loss if it were recognized for U.S. tax purposes in the year it is recognized for foreign tax purposes. To the extent the income or shared loss would not constitute income or loss under U.S. tax principles in any year, the income or shared loss is allocated to the U.S. combined income groups in the same manner as the partnership items attributable to the activity giving rise to the income or shared loss.

Section 1.909–2T(b)(2)(iv) provides that split taxes from a loss-sharing splitter arrangement are foreign income taxes paid or accrued by a member of a U.S. combined income group with respect to income equal to the amount of the usable shared loss of that U.S. combined income group that offsets income of a different U.S. combined income group. Under §1.909–2T(b)(2)(v), the related income is an amount of income of the individual or corporate member of a U.S. combined income group equal to the amount of income of that U.S. combined income group that is offset by the usable shared loss of another U.S. combined income group.

4. *Hybrid instrument splitter arrangements*

Section 1.909–2T(b)(3) describes hybrid instrument splitter arrangements. The definition of hybrid instrument splitter arrangements is substantially identical to that set forth in Notice 2010–92, except that the scope is extended to cover taxes paid or accrued by persons other than section 902 corporations. In addition, §1.909–2T(b)(3)(i)(D) defines a U.S. equity hybrid instrument as an instrument that is treated as equity for U.S. Federal income tax purposes but is treated as indebtedness for foreign tax purposes, or with respect to which the issuer is otherwise entitled to a deduction for foreign tax purposes for amounts paid or accrued with respect to the instrument. For example, an instrument that is treated as equity for U.S. Federal income tax purposes but with respect to which amounts paid or accrued by the issuer are treated for foreign tax purposes as a deductible notional interest payment (even though the instrument is otherwise treated as equity for foreign tax purposes) is a U.S. equity hybrid instrument. Under §1.909–2T(b)(3)(i)(A), a U.S. equity hybrid instrument is a splitter arrangement if foreign income taxes are paid or accrued by the owner of a U.S. equity hybrid instrument with respect to payments or accruals on or with respect to the instrument that are deductible by the issuer under the laws of a foreign jurisdiction in which the issuer is subject to tax but that do not give rise to income for U.S. Federal income tax purposes.

Under §1.909–2T(b)(3)(i)(B), split taxes from a U.S. equity hybrid instrument splitter arrangement equal the total amount of foreign income taxes, including withholding taxes, paid or accrued by the owner of the hybrid instrument less the amount of foreign income taxes that would have been paid or accrued had the owner of the U.S. equity hybrid instrument not been subject to foreign tax on income from the instrument. Under §1.909–2T(b)(3)(i)(C), the related income with respect to split taxes from a U.S. equity hybrid instrument splitter arrangement is income of the issuer of the U.S. equity hybrid instrument in an amount equal to the payments or accruals giving rise to the split taxes that are deductible by the issuer for foreign tax purposes, determined without regard to the actual amount of the issuer's income or earnings and profits for U.S. Federal income tax purposes.

Section 1.909–2T(b)(3)(ii)(D) defines a U.S. debt hybrid instrument as an instrument that is treated as equity for foreign tax purposes but as indebtedness for U.S. Federal income tax purposes. Under §1.909–2T(b)(3)(ii)(A), a U.S. debt hybrid instrument is a splitter arrangement if foreign income taxes are paid or accrued by the issuer of a U.S. debt hybrid instrument with respect to income in an amount equal to the interest (including original issue discount) paid or accrued on the instrument that is deductible for U.S. Federal income tax purposes but that does not give rise to a deduction under the laws of a foreign jurisdiction in which the issuer is subject to tax. Under §1.909–2T(b)(3)(ii)(B), split taxes from a U.S. debt hybrid instrument splitter arrangement are the foreign income taxes paid or accrued by the issuer on the income that would have been offset by the interest paid or accrued on the U.S. debt hybrid instrument had such interest been deductible for foreign tax purposes. Under §1.909–2T(b)(3)(ii)(C), the related income from a U.S. debt hybrid instrument splitter arrangement is the gross amount of the interest income recognized for U.S. Federal income tax purposes by the owner of the U.S. debt hybrid instrument, determined without regard to the actual amount of the owner's income or earnings and profits for U.S. Federal income tax purposes.

5. *Partnership inter-branch payment splitter arrangements*

Section 1.909–2T(b)(4) describes a partnership inter-branch payment splitter arrangement. The Treasury Department and the IRS stated in section 5.03 of Notice 2010–92 that future guidance would provide that allocations described in §1.704–1(b)(4)(viii)(*d*)(*3*) will result in a foreign tax credit splitting event in post-2010 taxable years to the extent such allocations result in foreign income taxes being allocated to a different partner than the related income.

Under §1.909–2T(b)(4)(i), an allocation of foreign income tax paid or accrued by a partnership with respect to an inter-branch payment as described in §1.704–1(b)(4)(viii)(*d*)(*3*) (revised as of April 1, 2011) (the inter-branch payment tax), is a splitter arrangement to the extent the inter-branch payment tax is not allocated to the partners in the same proportion as the distributive shares of income in the CFTE category to which the inter-branch payment tax is or would be assigned under §1.704–1(b)(4)(viii)(*d*) without regard to §1.704–1(b)(4)(viii)(*d*)(*3*). Under §1.909–2T(b)(4)(ii), split taxes from a partnership inter-branch payment splitter arrangement equal the excess of the amount of the inter-branch payment tax allocated to a partner under the partnership agreement over the amount of the inter-branch payment tax that would have been allocated to the partner if the tax had been allocated in the same

proportion as the distributive shares of income in that CFTE category. Under §1.909–2T(b)(4)(iii), related income from a partnership inter-branch payment splitter arrangement equals the amount of income allocated to a partner that exceeds the amount of income that would have been allocated to the partner if income in that CFTE category in the amount of the inter-branch payment had been allocated to the partners in the same proportion as the inter-branch payment tax was allocated under the partnership agreement.

D. *Rules regarding related income and split taxes and coordination rules*

Section 4.06 of Notice 2010–92 provides guidance on determining the amount of related income and pre-2011 split taxes paid or accrued with respect to pre-2011 splitter arrangements. A comment requested guidance on the treatment of related income and split taxes in the case of certain dispositions that were not described in section 4.06 of Notice 2010–92 (specifically, dispositions of section 902 corporations in transactions other than those that qualify under section 381). The Treasury Department and the IRS expect to issue regulations that provide additional guidance on determining the amount of related income and split taxes attributable to a foreign tax credit splitting event, and intend to address the comment when such regulations are issued. Until such guidance is issued, §1.909–3T(a) provides that the principles of §1.909–6T(d) through 1.909–6T(f) (which adopt the rules described in section 4.06 of Notice 2010–92) will apply to related income and split taxes in taxable years beginning on or after January 1, 2011, except that the alternative "related income first" method described in §1.909–6T(d)(4) (which adopts section 4.06(b)(4) of Notice 2010–92) for identifying distributions of related income applies only to identify the amount of pre-2011 split taxes of a section 902 corporation that are suspended as of the first day of the section 902 corporation's first taxable year beginning on or after January 1, 2011. A comment recommended that taxpayers be given the choice to apply the "related income first" method to identify post-2010 split taxes of a section 902 corporation, with use of such method conditioned on the taxpayer not applying section 902 to distributions from a section 902 corporation until all of the corporation's earnings and profits attributable to related income have been distributed. The Treasury Department and the IRS believe that the recommendation would necessitate rules that would result in significant administrative complexity, and accordingly, the comment was not adopted.

These temporary regulations include a rule concerning split taxes that was not described in Notice 2010–92. Section 1.909–3T(b) provides that split taxes include taxes paid or accrued in taxable years beginning on or after January 1, 2011, with respect to the amount of a disregarded payment that is deductible by the payor of the disregarded payment under the laws of a foreign jurisdiction in which the payor of the disregarded payment is subject to tax on related income from a splitter arrangement. The amount of the deductible disregarded payment to which this rule applies is limited to the amount of related income from such splitter arrangement.

In addition to future guidance on determining the amount of related income and split taxes, the Treasury Department and the IRS expect to issue regulations that provide additional guidance on the interaction between section 909 and other Code provisions such as sections 904(c), 905(a), and 905(c). Until such guidance is issued, §1.909–4T(a) provides that the principles of §1.909–6T(g), which adopt the rules described in section 6 of Notice 2010–92, will apply to taxable years beginning on or after January 1, 2011.

E. *2011 and certain 2012 splitter arrangements*

Section 909 applies to foreign income taxes paid or accrued in taxable years beginning after December 31, 2010. Section 1.909–2T(b), setting forth the exclusive list of splitter arrangements, is effective for foreign income taxes paid or accrued in taxable years beginning on or after January 1, 2012. Notice 2010–92 states that pre-2011 splitter arrangements will give rise to foreign tax credit splitting events in post-2010 taxable years. Accordingly, §1.909–5T(a)(1) provides that foreign income taxes paid or accrued by any person in a taxable year beginning on or after January 1, 2011, and before January 1, 2012, in connection with a pre-2011 splitter arrangement (as defined in §1.909–6T(b)), are split taxes to the same extent that such taxes would have been treated as pre-2011 split taxes if such taxes were paid or accrued by a section 902 corporation in a pre-2011 taxable year. The related income with respect to split taxes from such an arrangement is the related income described in §1.909–6T(b), determined as if the payor were a section 902 corporation.

In addition, Notice 2010–92 states that allocations described in §1.704–1(b)(4)(viii)(*d*)(*3*) will result in a foreign tax credit splitting event in post-2010 taxable years to the extent such allocations result in foreign income taxes being allocated to a different partner than the related income. Accordingly, §1.909–5T(a)(2) provides that foreign income taxes paid or accrued by any person in a taxable year beginning on or after January 1, 2011, and before January 1, 2012, in connection with a partnership inter-branch payment splitter arrangement described in §1.909–2T(b)(4) are split taxes to the extent such taxes are identified as split taxes in §1.909–2T(b)(4)(ii). The related income with respect to the split taxes is the related income described in §1.909–2T(b)(4)(iii).

Finally, these temporary regulations provide that foreign income taxes paid or accrued by any person in a taxable year beginning on or after January 1, 2012, and on or before February 14, 2012 in connection with a foreign consolidated group splitter arrangement described in §1.909–6T(b)(2) are split taxes to the same extent that such taxes would have been treated as pre-2011 split taxes if such taxes were paid or accrued by a section 902 corporation in a pre-2011 taxable year. This rule ensures that section 909 applies to suspend foreign tax on income of foreign consolidated groups paid or accrued in post-2010 taxable years to the extent the tax is not apportioned among the members of the group in accordance with the principles of Treas. Reg. §1.901–2(f)(3). Final regulations published elsewhere in this issue of the Bulletin explicitly apply the ratable allocation rules of Treas. Reg. §1.901–2(f)(3) to tax paid on combined income of foreign consolidated groups, without regard to whether the group members are jointly and severally liable for the tax under foreign law.

F. *Pre-2011 foreign tax credit splitting events*

Section 1.909–6T adopts the rules described in Notice 2010–92 regarding pre-2011 foreign tax credit splitting events and the application of section 909 to foreign income taxes paid or accrued by a section 902 corporation in pre-2011 taxable years.

Availability of IRS Documents

IRS notices and revenue rulings cited in this preamble are made available by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Effect on Other Documents

The following publication is obsolete as of February 14, 2012:

Notice 2010–92, 2010–52 I.R.B. 916.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble of the cross-referenced notice of proposed rulemaking published in this issue of the Bulletin. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Drafting Information

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

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.704–1 is amended as follows:

1. Paragraph (b)(0) is amended by adding an entry for §1.704–1(b)(1)(ii)(*b*)(*3*) and revising the entry for §1.704–1(b)(4)(viii)(*d*)(*3*).

2. Paragraph (b)(1)(ii)(*b*)(*3*) is added.

3. Paragraph (b)(4)(viii)(*c*)(*3*)(*ii*) is revised.

4. Paragraph (b)(4)(viii)(*d*)(*3*) is revised.

5. Paragraph (b)(5) *Example 24* is revised.

The additions and revisions read as follows:

§1.704–1. Partner's distributive share.

* * * * *

(b) *Determination of partner's distributive share* —(0) *Cross-references.*

Heading	Section
* * * * *	
[Reserved]	1.704–1(b)(1)(ii)(*b*)(*3*)
* * * * *	
[Reserved]	1.704–1(b)(4)(viii)(*d*)(*3*)
* * * * *	

(1) * * *

(ii) * * *

(*b*) * * *

(*3*) [Reserved]. For further guidance, see §1.704–1T(b)(1)(ii)(*b*)(*3*).

* * * * *

(4) * * *

(viii) * * *

(*c*) * * *

(*3*) * * *

(*ii*) *Special rules.* Income attributable to an activity shall include the amount included in a partner's income as a guaranteed payment (within the meaning of section 707(c)) from the partnership to the extent that the guaranteed payment is not deductible by the partnership under foreign law. See paragraph (b)(5) *Example 25 (iv)* of this section. Income attributable to an activity shall not include an item of partnership income to the extent the allocation of such item of income (or payment thereof) results in a deduction under foreign law. See paragraph (b)(5) *Example 25 (iii)* and *(iv)* of this section. Similarly, income attributable to an activity shall not include net income that foreign law would exclude from the foreign tax base as a result of the status of a partner. See paragraph (b)(5) *Example 27* of this section.

(*d*) * * *

(*3*) [Reserved]. For further guidance, see §1.704–1T(b)(4)(viii)(*d*)(*3*).

* * * * *

(5) * * *

Example 24. [Reserved]. For further guidance, see §1.704–1T(b)(5) *Example 24*.

* * * * *

Par. 3. Section 1.704–1T is added to read as follows:

§1.704–1T Partner's distributive share (temporary).

(a) through (b)(1)(ii)(*b*)(*2*) [Reserved]. For further guidance, see §1.704–1(a) through (b)(1)(ii)(*b*)(*2*).

(*3*) *Special rules for certain inter-branch payments*—(A) *In general.* The provisions of §1.704–1(b)(4)(viii)(*c*)(*3*)(*ii*) and §1.704–1(b)(4)(viii)(*d*)(*3*) apply for partnership taxable years beginning on or after January 1, 2012.

(B) *Transition rule.* Transition relief is provided herein to partnerships whose agreements were entered into

prior to February 14, 2012. In such case, if there has been no material modification to the partnership agreement on or after February 14, 2012, then the partnership may apply the provisions of §1.704–1(b)(4)(viii)(*c*)(*3*)(*ii*) and §1.704–1(b)(4)(viii)(*d*)(*3*) (revised as of April 1, 2011). For purposes of this paragraph (b)(1)(ii)(*b*)(*3*), any change in ownership constitutes a material modification to the partnership agreement. This transition rule does not apply to any taxable year in which persons bearing a relationship to each other that is specified in section 267(b) or section 707(b) collectively have the power to amend the partnership agreement without the consent of any unrelated party (and all subsequent taxable years).

(b)(1)(iii) through (b)(4)(viii)(*d*)(*2*) [Reserved]. For further guidance, see §1.704–1(b)(1)(iii) through (b)(4)(viii)(*d*)(*2*).

(*3*) *Special rules for inter-branch payments*. For rules relating to foreign tax paid or accrued in partnership taxable years beginning before January 1, 2012 in respect of certain inter-branch payments, see 26 CFR 1.704–1(b)(4)(viii)(*d*)(*3*) (revised as of April 1, 2011).

(b)(4)(ix) through (b)(5) *Example 23* [Reserved]. For further guidance, see §1.704–1(b)(4)(ix) through (b)(5) *Example 23*.

Example 24. (i) The facts are the same as in *Example 21*, except that businesses M and N are conducted by entities (DE1 and DE2, respectively) that are corporations for country X and Y tax purposes and disregarded entities for U.S. tax purposes. Also, assume that DE1 makes payments of $75,000 during 2012 to DE2 that are deductible by DE1 for country X tax purposes and includible in income of DE2 for country Y tax purposes. As a result of such payments, DE1 has taxable income of $25,000 for country X purposes on which $10,000 of taxes are imposed and DE2 has taxable income of $125,000 for country Y purposes on which $25,000 of taxes are imposed. For U.S. tax purposes, $100,000 of AB's income is attributable to the activities of DE1 and $50,000 of AB's income is attributable to the activities of DE2. Pursuant to the partnership agreement, all partnership items from business M, excluding CFTEs paid or accrued by business M, are allocated 75 percent to A and 25 percent to B, and all partnership items from business N, excluding CFTEs paid or accrued by business N, are split evenly between A and B (50 percent each). Accordingly, A is allocated 75 percent of the income from business M ($75,000), and 50 percent of the income from business N ($25,000). B is allocated 25 percent of the income from business M ($25,000), and 50 percent of the income from business N ($25,000).

(ii) Because the partnership agreement provides for different allocations of the net income attributable to businesses M and N, the net income attributable to each of business M and business N is income in separate CFTE categories. See paragraph (b)(4)(viii)(*c*)(*2*) of this section. Under paragraph (b)(4)(viii)(*c*)(*3*) of this section, the $100,000 of net income attributable to business M is in the business M CFTE category and the $50,000 of net income attributable to business N is in the business N CFTE category. Under paragraph (b)(4)(viii)(*d*)(*1*) of this section, the $10,000 of country X taxes is allocated to the business M CFTE category and $10,000 of the country Y taxes is allocated to the business N CFTE category. The additional $15,000 of country Y tax imposed with respect to the inter-branch payment is assigned to the business M CFTE category because for U.S. tax purposes, the related $75,000 of income that country Y is taxing is in the business M CFTE category. Therefore, $25,000 of taxes ($10,000 of country X taxes and $15,000 of the country Y taxes) is related to the $100,000 of net income in the business M CFTE category and the other $10,000 of country Y taxes is related to the $50,000 of net income in the business N CFTE category. See paragraph (b)(4)(viii)(*c*)(*1*) of this section. The allocations of country X taxes will be in proportion to the distributive shares of income to which they relate and will be deemed to be in accordance with the partners' interests in the partnership if such taxes are allocated 75 percent to A and 25 percent to B. The allocations of country Y taxes will be in proportion to the distributive shares of income to which they relate and will be deemed to be in accordance with the partners' interests in the partnership if $15,000 of such taxes is allocated 75 percent to A and 25 percent to B and the other $10,000 of such taxes is allocated 50 percent to A and 50 percent to B. No inference is intended with respect to the application of other provisions to arrangements that involve disregarded payments.

(iii) Assume that the facts are the same as in paragraph (i) of this *Example 24*, except that in order to reflect the $75,000 payment from DE1 to DE2, the partnership agreement allocates $75,000 of the income attributable to business M equally between A and B (50 percent each). In order to prevent separating the CFTEs from the related foreign income, the $75,000 payment is treated as a divisible part of the business M activity and, therefore, a separate activity. See paragraph (b)(4)(viii)(*c*)(*2*)(*iii*) of this section. Because items from the disregarded payment and business N are both shared equally between A and B, the disregarded payment activity and the business N activity are treated as a single CFTE category. See paragraph (b)(4)(viii)(*c*)(*2*)(*i*) of this section. Accordingly, $25,000 of net income attributable to business M is in the business M CFTE category and $75,000 of income of business M attributable to the disregarded payment and the $50,000 of net income attributable to business N are in the business N CFTE category. Under paragraph (b)(4)(viii)(*d*)(*1*) of this section, the $10,000 of country X taxes is allocated to the business M CFTE category and all $25,000 of the country Y taxes is allocated to the business N CFTE category. The allocations of country X taxes will be in proportion to the distributive shares of income to which they relate and will be deemed to be in accordance with the partners' interests in the partnership if such taxes are allocated 75 percent to A and 25 percent to B. The allocations of country Y taxes will be in proportion to the distributive shares of income to which they relate and will be deemed to be in accordance with the partners' interests in the partnership if such taxes are allocated 50 percent to A and 50 percent to B.

Example 25 through (e) [Reserved]. For further guidance, see §1.704–1(b)(5) *Example 25* through (e).

(f) *Expiration date*. The applicability of this section expires on February 9, 2015.

Par. 4. Section 1.909–0T is added to read as follows:

§1.909–0T Outline of regulation provisions for section 909 (temporary).

This section lists the headings for §§1.909–1T through 1.909–6T.

§1.909–1T Definitions and special rules (temporary).

(a) Definitions.

(b) Taxes paid or accrued by a partnership, S corporation or trust.

(c) Related income of a partnership, S corporation or trust.

(d) Application of section 909 to pre-1987 accumulated profits and pre-1987 foreign income taxes.

(e) Effective/applicability date.

(f) Expiration date.

§1.909–2T Splitter arrangements (temporary).

(a) Foreign tax credit splitting event.

(1) In general.

(2) Split taxes not taken into account.

(b) Splitter arrangements.

(1) Reverse hybrid splitter arrangements.

(i) In general.

(ii) Split taxes from a reverse hybrid splitter arrangement.

(iii) Related income from a reverse hybrid splitter arrangement.

(iv) Reverse hybrid.

(2) Loss-sharing splitter arrangements.

(i) In general.

(ii) U.S. combined income group.

(iii) Income and shared loss of a U.S. combined income group.

(iv) Split taxes from a loss-sharing splitter arrangement.

(v) Related income from a loss-sharing splitter arrangement.

(vi) Foreign group relief or other loss-sharing regime.

(vii) Examples.

(3) Hybrid instrument splitter arrangements.

(i) U.S. equity hybrid instrument splitter arrangement.

(ii) U.S. debt hybrid instrument splitter arrangement.

(4) Partnership inter-branch payment splitter arrangements.

(i) In general.

(ii) Split taxes from a partnership inter-branch payment splitter arrangement.

(iii) Related income from a partnership inter-branch payment splitter arrangement.

(c) Effective/applicability date.

(d) Expiration date.

§1.909–3T Rules regarding related income and split taxes (temporary).

(a) Interim rules for identifying related income and split taxes.

(b) Split taxes on deductible disregarded payments.

(c) Effective/applicability date.

(d) Expiration date.

§1.909–4T Coordination rules (temporary).

(a) Interim rules.

(b) Effective/applicability date.

(c) Expiration date.

§1.909–5T 2011 and 2012 splitter arrangements (temporary).

(a) Taxes paid or accrued in taxable years beginning in 2011.

(b) Taxes paid or accrued in certain taxable years beginning in 2012 with respect to a foreign consolidated group splitter arrangement.

(c) Effective/applicability date.

(d) Expiration date.

§1.909–6T Pre-2011 foreign tax credit splitting events (temporary).

(a) Foreign tax credit splitting event.

(1) In general.

(2) Taxes not subject to suspension under section 909.

(3) Taxes subject to suspension under section 909.

(b) Pre-2011 splitter arrangements.

(1) Reverse hybrid structure splitter arrangements.

(2) Foreign consolidated group splitter arrangements.

(3) Group relief or other loss-sharing regime splitter arrangements.

(i) In general.

(ii) Split taxes and related income.

(4) Hybrid instrument splitter arrangements.

(i) In general.

(ii) U.S. equity hybrid instrument splitter arrangement.

(iii) U.S. debt hybrid instrument splitter arrangement.

(c) General rules for applying section 909 to pre-2011 split taxes and related income.

(1) Annual determination.

(2) Separate categories.

(d) Special rules regarding related income.

(1) Annual adjustments.

(2) Effect of separate limitation losses and deficits.

(3) *Pro rata* method for distributions out of earnings and profits that include both related income and other income.

(4) Alternative method for distributions out of earnings and profits that include both related income and other income.

(5) Distributions, deemed distributions, and inclusions out of related income.

(6) Carryover of related income.

(7) Related income taken into account by a section 902 shareholder.

(8) Related income taken into account by a payor section 902 corporation.

(9) Related income taken into account by an affiliated group of corporations that includes a section 902 shareholder.

(10) Distributions of previously-taxed earnings and profits.

(e) Special rules regarding pre-2011 split taxes.

(1) Taxes deemed paid *pro rata* out of pre-2011 split taxes and other taxes.

(2) Pre-2011 split taxes deemed paid in pre-2011 taxable years.

(3) Carryover of pre-2011 split taxes.

(4) Determining when pre-2011 split taxes are no longer treated as pre-2011 split taxes.

(f) Rules relating to partnerships and trusts.

(1) Taxes paid or accrued by partnerships.

(2) Section 704(b) allocations.

(3) Trusts.

(g) Interaction between section 909 and other Code provisions.

(1) Section 904(c).

(2) Section 905(a).

(3) Section 905(c).

(4) Other foreign tax credit provisions.

(h) Effective/applicability date.

(i) Expiration date.

Par. 5. Sections 1.909–1T, 1.909–2T, 1.909–3T, 1.909–4T, 1.909–5T, and 1.909–6T are added to read as follows:

§1.909–1T Definitions and special rules (temporary).

(a) *Definitions.* For purposes of section 909, this section, and §§1.909–2T through –5T, the following definitions apply:

(1) The term *section 902 corporation* means any foreign corporation with respect to which one or more domestic corporations meet the ownership requirements of section 902(a) or (b).

(2) The term *section 902 shareholder* means any domestic corporation that meets the ownership requirements of section 902(a) or (b) with respect to a section 902 corporation.

(3) The term *payor* means a person that pays or accrues a foreign income tax within the meaning of §1.901–2(f), and also includes a person that takes foreign income taxes paid or accrued by a partnership, S corporation, estate or trust into account pursuant to section 702(a)(6), section 901(b)(5) or section 1373(a).

(4) The term *covered person* means, with respect to a payor—

(i) Any entity in which the payor holds, directly or indirectly, at least a 10 percent ownership interest (determined by vote or value);

(ii) Any person that holds, directly or indirectly, at least a 10 percent ownership interest (determined by vote or value) in the payor; or

(iii) Any person that bears a relationship that is described in section 267(b) or 707(b) to the payor.

(5) The term *foreign income tax* means any income, war profits, or excess profits tax paid or accrued to any foreign country or to any possession of the United States. A foreign income tax includes any tax paid in lieu of such a tax within the meaning of section 903.

(6) The term *post-1986 foreign income taxes* has the meaning provided in §1.902–1(a)(8).

(7) The term *post-1986 undistributed earnings* has the meaning provided in §1.902–1(a)(9).

(8) The term *disregarded entity* means an entity that is disregarded as an entity separate from its owner, as provided in §301.7701–2(c)(2)(i).

(9) The term *hybrid partnership* means a partnership that is subject to income tax in a foreign country as a corporation (or otherwise at the entity level) on the basis of residence, place of incorporation, place of management or similar criteria.

(b) *Taxes paid or accrued by a partnership, S corporation or trust.* Under section 909(c)(1), section 909 applies at the partner level, and similar rules apply in the case of an S corporation or trust. Accordingly, in the case of foreign income taxes paid or accrued by a partnership, S corporation or trust, taxes allocated to one or more partners, shareholders or beneficiaries (as the case may be) will be treated as split taxes to the extent such taxes would be split taxes if the partner, shareholder or beneficiary had paid or accrued the taxes directly on the date such taxes are taken into account by the partner under sections 702 and 706(a), by the shareholder under section 1373(a), or by the beneficiary under section 901(b)(5). Any such split taxes will be suspended in the hands of the partner, shareholder or beneficiary.

(c) *Related income of a partnership, S corporation or trust.* For purposes of determining whether related income is taken into account by a covered person, related income of a partnership, S corporation or trust is considered to be taken into account by the partner, shareholder or beneficiary to whom the related income is allocated.

(d) *Application of section 909 to pre-1987 accumulated profits and pre-1987 foreign income taxes.* Section 909 and §§1.909–1T through –5T will apply to pre-1987 accumulated profits (as defined in §1.902–1(a)(10)(i)) and pre-1987 foreign income taxes (as defined in §1.902–1(a)(10)(iii)) of a section 902 corporation attributable to taxable years beginning on or after January 1, 2012.

(e) *Effective/applicability date.* This section applies to taxable years beginning on or after January 1, 2011.

(f) *Expiration date.* The applicability of this section expires on February 9, 2015.

§1.909–2T Splitter arrangements (temporary).

(a) *Foreign tax credit splitting event*—(1) *In general.* There is a foreign tax credit splitting event with respect to foreign income taxes paid or accrued if and only if, in connection with an arrangement described in paragraph (b) of this section (a *splitter arrangement*) the related income was, is or will be taken into account for U.S. Federal income tax purposes by a person that is a covered person with respect to the payor of the tax. Foreign income taxes that are paid or accrued in connection with a splitter arrangement are split taxes to the extent provided in paragraph (b) of this section. Income (or, as appropriate, earnings and profits) that was, is or will be taken into account by a covered person in connection with a splitter arrangement is related income to the extent provided in paragraph (b) of this section.

(2) *Split taxes not taken into account.* Split taxes will not be taken into account for U.S. Federal income tax purposes before the taxable year in which the related income is taken into account by the payor or, in the case of split taxes paid or accrued by a section 902 corporation, by a section 902 shareholder of such section 902 corporation. Therefore, in the case of split taxes paid or accrued by a section 902 corporation, split taxes will not be taken into account for purposes of sections 902 or 960, or for purposes of determining earnings and profits under section 964(a), before the taxable year in which the related income is taken into account by the payor section 902 corporation, a section 902 shareholder of the section 902 corporation, or a member of the section 902 shareholder's consolidated group. See §1.909–3T(a) for rules relating to when split taxes and related income are taken into account.

(b) *Splitter arrangements.* The arrangements set forth in this paragraph (b) are splitter arrangements.

(1) *Reverse hybrid splitter arrangements*—(i) *In general.* A reverse hybrid is a splitter arrangement when a payor pays or accrues foreign income taxes with respect to income of a reverse hybrid. A reverse hybrid splitter arrangement exists even if the reverse hybrid has a loss or a deficit in earnings and profits for a particular year for U.S. Federal income tax purposes (for example, due to a timing difference).

(ii) *Split taxes from a reverse hybrid splitter arrangement.* The foreign income taxes paid or accrued with respect to income of the reverse hybrid are split taxes.

(iii) *Related income from a reverse hybrid splitter arrangement.* The related income with respect to split taxes from a reverse hybrid splitter arrangement is the earnings and profits (computed for U.S. Federal income tax purposes) of the reverse hybrid attributable to the activities of the reverse hybrid that gave rise to income included in the payor's foreign tax base with respect to which the split taxes were paid or accrued. Accordingly, related income of the reverse hybrid only includes items of income or expense attributable to a disregarded entity owned by the reverse hybrid to the extent that the income attributable to the activities of the disregarded entity is included in the payor's foreign tax base.

(iv) *Reverse hybrid.* The term *reverse hybrid* means an entity that is a corporation for U.S. Federal income tax purposes but is a fiscally transparent entity (under the principles of §1.894–1(d)(3)) or a branch under the laws of a foreign country imposing tax on the income of the entity.

(2) *Loss-sharing splitter arrangements*—(i) *In general.* A foreign group relief or other loss-sharing regime is a loss-sharing splitter arrangement to the extent that a shared loss of a U.S. combined income group could have been used to offset income of that group (*usable shared loss*) but is used instead to offset income of another U.S. combined income group.

(ii) *U.S. combined income group.* The term *U.S. combined income group* means an individual or a corporation and all entities (including entities that are fiscally transparent for U.S. Federal income tax purposes under the principles of §1.894–1(d)(3)) that for U.S. Federal income tax purposes combine any of their respective items of income, deduction, gain or loss with the income, deduction, gain or loss of such individual or corporation. A U.S. combined income group can arise, for example, as a result of an entity being disregarded or, in the case of a partnership or hybrid partnership and a partner, as a result of the allocation of income or any other item of the partnership to the partner. For purposes of this

paragraph (b)(2)(ii), a branch is treated as an entity, all members of a U.S. affiliated group of corporations (as defined in section 1504) that file a consolidated return are treated as a single corporation, and two or more individuals that file a joint return are treated as a single individual. A U.S. combined income group may consist of a single individual or corporation and no other entities, but cannot include more than one individual or corporation. In addition, an entity may belong to more than one U.S. combined income group. For example, a hybrid partnership with two corporate partners that do not combine any of their items of income, deduction, gain or loss for U.S. Federal income tax purposes is in a separate U.S. combined income group with each of its partners.

(iii) *Income and shared loss of a U.S. combined income group*—(A) *Income*. Except as otherwise provided in this paragraph (b)(2)(iii)(A), the income of a U.S. combined income group is the aggregate amount of taxable income recognized or taken into account for foreign tax purposes by those members that have positive taxable income for foreign tax purposes. In the case of an entity that is fiscally transparent (under the principles of §1.894–1(d)(3)) for foreign tax purposes and that is a member of more than one U.S. combined income group, the foreign taxable income of the entity is allocated between or among the groups under foreign tax law. In the case of an entity that is not fiscally transparent for foreign tax purposes and that is a member of more than one U.S. combined income group, the foreign taxable income of that entity is allocated between or among those groups based on U.S. Federal income tax principles. For example, in the case of a hybrid partnership, the foreign taxable income of the partnership is allocated between or among the groups in the manner the partnership allocates the income under section 704(b). To the extent the foreign taxable income would be income under U.S. tax principles in another year, the income is allocated between or among the groups based on how the hybrid partnership would allocate the income if the income were recognized for U.S. tax purposes in the year in which the income is recognized for foreign tax purposes. To the extent the foreign taxable income would not constitute income under U.S. tax principles in any year, the income is allocated between or among the groups in the same manner as the partnership items attributable to the activity giving rise to the foreign taxable income.

(B) *Shared loss*. The term *shared loss* means a loss of one entity for foreign tax purposes that, in connection with a foreign group relief or other loss-sharing regime, is taken into account by one or more other entities. Except as otherwise provided in this paragraph (b)(2)(iii)(B), the amount of shared loss of a U.S. combined income group is the sum of the shared losses of all members of the U.S. combined income group. In the case of an entity that is fiscally transparent (under the principles of §1.894–1(d)(3)) for foreign tax purposes and that is a member of more than one U.S. combined income group, the shared loss of the entity is allocated between or among the groups under foreign tax law. In the case of an entity that is not fiscally transparent for foreign tax purposes and that is a member of more than one U.S. combined income group, the shared loss of that entity will be allocated between or among those groups based on U.S. Federal income tax principles. For example, in the case of a hybrid partnership, the shared loss of the partnership will be allocated between or among the groups in the manner the partnership allocates the loss under section 704(b). To the extent the shared loss would be a loss under U.S. tax principles in another year, the loss is allocated between or among the groups based on how the partnership would allocate the loss if the loss were recognized for U.S. tax purposes in the year in which the loss is recognized for foreign tax purposes. To the extent the shared loss would not constitute a loss under U.S. tax principles in any year, the loss is allocated between or among the groups in the same manner as the partnership items attributable to the activity giving rise to the shared loss.

(iv) *Split taxes from a loss-sharing splitter arrangement*. Split taxes from a loss-sharing splitter arrangement are foreign income taxes paid or accrued by a member of the U.S. combined income group with respect to income equal to the amount of the usable shared loss of that group that offsets income of another U.S. combined income group.

(v) *Related income from a loss-sharing splitter arrangement*. The related income with respect to split taxes from a loss-sharing splitter arrangement is an amount of income of the individual or corporate member of the U.S. combined income group equal to the amount of income of that U.S. combined income group that is offset by the usable shared loss of another U.S. combined income group.

(vi) *Foreign group relief or other loss-sharing regime*. A foreign group relief or other loss-sharing regime exists when an entity may surrender its loss to offset the income of one or more other entities. A foreign group relief or other loss-sharing regime does not include an allocation of loss of an entity that is a partnership or other fiscally transparent entity (under the principles of §1.894–1(d)(3)) for foreign tax purposes or regimes in which foreign tax is imposed on combined income (such as a foreign consolidated regime), as described in §1.901–2(f)(3).

(vii) *Examples*. The following examples illustrate the rules of paragraph (b)(2) of this section.

Example 1. (i) *Facts*. USP, a domestic corporation, wholly owns CFC1, a corporation organized in country A. CFC1 wholly owns CFC2 and CFC3, both corporations organized in country A. CFC2 wholly owns DE, an entity organized in country A. DE is a corporation for country A tax purposes and a disregarded entity for U.S. Federal income tax purposes. Country A has a loss-sharing regime under which a loss of CFC1, CFC2, CFC3 or DE may be used to offset the income of one or more of the others. Country A imposes an income tax at the rate of 30% on the taxable income of corporations organized in country A. In year 1, before any loss sharing, CFC1 has no income, CFC2 has income of 50u, CFC3 has income of 200u, and DE has a loss of 100u. Under the provisions of country A's loss-sharing regime, the group decides to use DE's 100u loss to offset 100u of CFC3's income. After the loss is shared, for country A's tax purposes, CFC2 still has 50u of income on which it pays 15u of country A tax. CFC3 has income of 100u (200u less the 100u shared loss) on which it pays 30u of country A tax. For U.S. tax purposes, the loss sharing with CFC3 is not taken into account. Because DE is a disregarded entity, its 100u loss is taken into account by CFC2 and reduces its earnings and profits for U.S. Federal income tax purposes. Accordingly, before application of section 909, CFC2 has a loss for earnings and profits purposes of 65u (50u income less 15u taxes paid to country A less 100u loss of DE). CFC2 also has the U.S. dollar equivalent of 15u of foreign taxes to add to its post-1986 foreign income taxes pool. CFC3 has earnings and profits of 170u (200u income less 30u of taxes) and the dollar equivalent of 30u of foreign taxes to add to its post-1986 foreign income taxes pool.

(ii) *Result*. Pursuant to §1.909–2T(b)(2)(ii), CFC2 and DE constitute one U.S. combined income group, while CFC1 and CFC3 each constitute sep-

arate U.S. combined income groups. Pursuant to §1.909–2T(b)(2)(iii)(A), the income of the CFC2 combined income group is 50u (CFC2's country A taxable income of 50u). The income of the CFC3 U.S. combined income group is 200u (CFC3's country A taxable income of 200u). Pursuant to §1.909–2T(b)(2)(iii)(B), the shared loss of the CFC2 U.S. combined income group includes the 100u of shared loss incurred by DE. The usable shared loss of the CFC2 U.S. combined income group is 50u, the amount of the group's shared loss that could have otherwise offset CFC2's 50u of country A taxable income that is included in the income of the CFC2 U.S. combined income group. There is a splitter arrangement because the 50u usable shared loss of the CFC2 U.S. combined income group was used instead to offset income of CFC3, which is included in the CFC3 U.S. combined income group. Pursuant to §1.909–2T(b)(2)(iv), the split taxes are the 15u of country A income taxes paid by CFC2 on 50u of income, an amount of income of the CFC2 U.S. combined income group equal to the amount of usable shared loss of that group that was used to offset income of the CFC3 U.S. combined income group. Pursuant to §1.909–2T(b)(2)(v), the related income is the 50u of CFC3's income that equals the amount of income of the CFC3 U.S. combined income group that was offset by the usable shared loss of the CFC2 U.S. combined income group.

Example 2. (i) *Facts*. USP, a domestic corporation, wholly owns CFC1, a corporation organized in country B. CFC1 wholly owns CFC2 and CFC3, both corporations organized in country B. CFC2 wholly owns DE, an entity organized in country B. DE is a corporation for country B tax purposes and a disregarded entity for U.S. Federal income tax purposes. CFC2 and CFC3 each own 50% of HP1, an entity organized in country B. HP1 is a corporation for country B tax purposes and a partnership for U.S. Federal income tax purposes. Assume that all items of income and loss of HP1 are allocated for U.S. Federal income tax purposes equally between CFC2 and CFC3, and that all entities use the country B currency "u" as their functional currency. Country B has a loss-sharing regime under which a loss of any of CFC1, CFC2, CFC3, DE, and HP1 may be used to offset the income of one or more of the others. Country B imposes an income tax at the rate of 30% on the taxable income of corporations organized in country B. In year 1, before any loss sharing, CFC2 has income of 100u, CFC1 and CFC3 have no income, DE has a loss of 100u, and HP1 has income of 200u. Under the provisions of country B's loss-sharing regime, the group decides to use DE's 100u loss to offset 100u of HP1's income. After the loss is shared, for country B tax purposes, CFC2 has 100u of income on which it pays 30u of country B income tax, and HP1 has 100u of income (200u less the 100u shared loss) on which it pays 30u of country B income tax. For U.S. Federal income tax purposes, the loss sharing with HP1 is not taken into account, and, because DE is a disregarded entity, its 100u loss is taken into account by CFC2 and reduces CFC2's earnings and profits for U.S. Federal income tax purposes. The 200u income of HP1 is allocated 50/50 to CFC2 and CFC3, as is the 30u of country B income tax paid by HP1. Accordingly, before application of section 909, for U.S. Federal income tax purposes, CFC2 has earnings and profits of 55u (100u income + 100u share of HP1's income - 100u loss of DE - 30u country B income tax paid by CFC2 - 15u share of HP1's country B income tax) and the dollar equivalent of 45u of country B income tax to add to its post-1986 foreign income taxes pool. CFC3 has earnings and profits of 85u (100u share of HP1's income less 15u share of HP1's country B income taxes) and the dollar equivalent of 15u of country B income tax to add to its post-1986 foreign income taxes pool.

(ii) *U.S. combined income groups*. Pursuant to §1.909–2T(b)(2)(ii), because the income and loss of HP1 are combined in part with the income and loss of both CFC2 and CFC3, it belongs to both of the separate CFC2 and CFC3 U.S. combined income groups. DE is a member of the CFC2 U.S. combined income group.

(iii) *Income of the U.S. combined income groups*. Pursuant to §1.909–2T(b)(2)(iii)(A), the income of the CFC2 U.S. combined income group is the 200u country B taxable income of the members of the group with positive taxable incomes (CFC2's country B taxable income of 100u + 50% of HP1's country B taxable income of 200u, or 100u). Because DE does not have positive taxable income for country B tax purposes, its 100u loss is not included in the income of the CFC2 U.S. combined income group. The income of the CFC3 U.S. combined income group is 100u (50% of HP1's country B taxable income of 200u, or 100u).

(iv) *Shared loss of the U.S. combined income groups*. Pursuant to §1.909–2T(b)(2)(iii)(B), the shared loss of the CFC2 U.S. combined income group is the 100u loss incurred by DE that is used to offset 100u of HP1's income. The CFC3 U.S. combined income group has no shared loss. Pursuant to §1.909–2T(b)(2)(i), the usable shared loss of the CFC2 U.S. combined income group is 100u, the full amount of the group's 100u shared loss that could have been used to offset income of the CFC2 U.S. combined income group had the loss been used to offset 100u of CFC2's country B taxable income.

(v) *Income offset by shared loss*. The shared loss of the CFC2 combined income group is used to offset 100u country B taxable income of HP1. Because the taxable income of HP1 is allocated 50/50 between the CFC2 and CFC3 U.S. combined income groups, the shared loss is treated as offsetting 50u of the CFC2 U.S. combined income group's income and 50u of the CFC3 U.S. combined income group's income.

(vi) *Splitter arrangement*. There is a splitter arrangement because 50u of the 100u usable shared loss of the CFC2 U.S. combined income group was used to offset income of the CFC3 U.S. combined income group. Pursuant to §1.909–2T(b)(2)(iv), the split taxes are the 15u of country B income tax paid by CFC2 on 50u of its income, which is equal to the amount of the CFC2 U.S. combined income group's usable shared loss that was used to offset income of another U.S. combined income group. Pursuant to §1.909–2T(b)(2)(v), the related income is the 50u of CFC3's income that was offset by the usable shared loss of the CFC2 U.S. combined income group.

(3) *Hybrid instrument splitter arrangements*—(i) *U.S. equity hybrid instrument splitter arrangement*—(A) *In general*. A U.S. equity hybrid instrument is a splitter arrangement if payments or accruals on or with respect to such instrument:

(*1*) Give rise to foreign income taxes paid or accrued by the owner of such instrument;

(*2*) Are deductible by the issuer under the laws of a foreign jurisdiction in which the issuer is subject to tax; and

(*3*) Do not give rise to income for U.S. Federal income tax purposes.

(B) *Split taxes from a U.S. equity hybrid instrument splitter arrangement*. Split taxes from a U.S. equity hybrid instrument splitter arrangement equal the total amount of foreign income taxes paid or accrued by the owner of the hybrid instrument less the amount of foreign income taxes that would have been paid or accrued had the owner of the U.S. equity hybrid instrument not been subject to foreign tax on income from the instrument.

(C) *Related income from a U.S. equity hybrid instrument splitter arrangement*. The related income with respect to split taxes from a U.S. equity hybrid instrument splitter arrangement is income of the issuer of the U.S. equity hybrid instrument in an amount equal to the payments or accruals giving rise to the split taxes that are deductible by the issuer for foreign tax purposes, determined without regard to the actual amount of the issuer's income or earnings and profits for U.S. Federal income tax purposes.

(D) *U.S. equity hybrid instrument*. The term *U.S. equity hybrid instrument* means an instrument that is treated as equity for U.S. Federal income tax purposes but is treated as indebtedness for foreign tax purposes, or with respect to which the issuer is otherwise entitled to a deduction for foreign tax purposes for amounts paid or accrued with respect to the instrument.

(ii) *U.S. debt hybrid instrument splitter arrangement*—(A) *In general*. A U.S. debt hybrid instrument is a splitter arrangement if foreign income taxes are paid or accrued by the issuer of a U.S. debt hybrid instrument with respect to income in an amount equal to the interest (including original issue discount) paid or accrued on the instrument that is deductible for U.S. Federal income tax purposes but that does not give rise to a deduction under the laws of a foreign jurisdiction in which the issuer is subject to tax.

(B) *Split taxes from a U.S. debt hybrid instrument splitter arrangement*. Split taxes from a U.S. debt hybrid instrument splitter arrangement are the foreign in-

come taxes paid or accrued by the issuer on the income that would have been offset by the interest paid or accrued on the U.S. debt hybrid instrument had such interest been deductible for foreign tax purposes.

(C) *Related income from a U.S. debt hybrid instrument splitter arrangement*. The related income from a U.S. debt hybrid instrument splitter arrangement is the gross amount of the interest income recognized for U.S. Federal income tax purposes by the owner of the U.S. debt hybrid instrument, determined without regard to the actual amount of the owner's income or earnings and profits for U.S. Federal income tax purposes.

(D) *U.S. debt hybrid instrument*. The term *U.S. debt hybrid instrument* means an instrument that is treated as equity for foreign tax purposes but as indebtedness for U.S. Federal income tax purposes.

(4) *Partnership inter-branch payment splitter arrangements*—(i) *In general*. An allocation of foreign income tax paid or accrued by a partnership with respect to an inter-branch payment as described in §1.704–1(b)(4)(viii)(*d*)(*3*) (revised as of April 1, 2011) (the *inter-branch payment tax*) is a splitter arrangement to the extent the inter-branch payment tax is not allocated to the partners in the same proportion as the distributive shares of income in the CFTE category to which the inter-branch payment tax is or would be assigned under §1.704–1(b)(4)(viii)(*d*) without regard to §1.704–1(b)(4)(viii)(*d*)(*3*).

(ii) *Split taxes from a partnership inter-branch payment splitter arrangement*. The split taxes from a partnership inter-branch splitter arrangement equal the excess of the amount of the inter-branch payment tax allocated to a partner under the partnership agreement over the amount of the inter-branch payment tax that would have been allocated to the partner if the inter-branch payment tax had been allocated to the partners in the same proportion as the distributive shares of income in the CFTE category referred to in paragraph (b)(4)(i) of this section.

(iii) *Related income from a partnership inter-branch payment splitter arrangement*. The related income from a partnership inter-branch payment splitter arrangement equals the amount of income allocated to a partner that exceeds the amount of income that would have been allocated to the partner if income in the CFTE category referred to in paragraph (b)(4)(i) of this section in the amount of the inter-branch payment had been allocated to the partners in the same proportion as the inter-branch payment tax was allocated under the partnership agreement.

(c) *Effective/applicability date*. This section applies to foreign income taxes paid or accrued in taxable years beginning on or after January 1, 2012.

(d) *Expiration date*. The applicability of this section expires on February 9, 2015.

§1.909–3T Rules regarding related income and split taxes (temporary).

(a) *Interim rules for identifying related income and split taxes*. The principles of paragraphs (d) through (f) of §1.909–6T apply to related income and split taxes in taxable years beginning on or after January 1, 2011, except that the alternative method for identifying distributions of related income described in §1.909–6T(d)(4) applies only to identify the amount of pre-2011 split taxes of a section 902 corporation that are suspended as of the first day of the section 902 corporation's first taxable year beginning on or after January 1, 2011.

(b) *Split taxes on deductible disregarded payments*. Split taxes include taxes paid or accrued in taxable years beginning on or after January 1, 2011, with respect to the amount of a disregarded payment that is deductible by the payor of the disregarded payment under the laws of a foreign jurisdiction in which the payor of the disregarded payment is subject to tax on related income from a splitter arrangement. The amount of the deductible disregarded payment to which this paragraph (b) applies is limited to the amount of related income from such splitter arrangement.

(c) *Effective/applicability date*. The rules of this section apply to taxable years beginning on or after January 1, 2011.

(d) *Expiration date*. The applicability of this section expires on February 9, 2015.

§1.909–4T Coordination rules (temporary).

(a) *Interim rules*. The principles of paragraph (g) of §1.909–6T apply to taxable years beginning on or after January 1, 2011.

(b) *Effective/applicability date*. The rules of this section apply to taxable years beginning on or after January 1, 2011.

(c) *Expiration date*. The applicability of this section expires on February 9, 2015.

§1.909–5T 2011 and 2012 splitter arrangements (temporary).

(a) *Taxes paid or accrued in taxable years beginning in 2011*. (1) Foreign income taxes paid or accrued by any person in a taxable year beginning on or after January 1, 2011, and before January 1, 2012, in connection with a pre-2011 splitter arrangement (as defined in §1.909–6T(b)), are split taxes to the same extent that such taxes would have been treated as pre-2011 split taxes if such taxes were paid or accrued by a section 902 corporation in a taxable year beginning on or before December 31, 2010. The related income with respect to split taxes from such an arrangement is the related income described in §1.909–6T(b), determined as if the payor were a section 902 corporation.

(2) Foreign income taxes paid or accrued by any person in a taxable year beginning on or after January 1, 2011, and before January 1, 2012, in connection with a partnership inter-branch payment splitter arrangement described in §1.909–2T(b)(4) are split taxes to the extent that such taxes are identified as split taxes in §1.909–2T(b)(4)(ii). The related income with respect to the split taxes is the related income described in §1.909–2T(b)(4)(iii).

(b) *Taxes paid or accrued in certain taxable years beginning in 2012 with respect to a foreign consolidated group splitter arrangement*. Foreign income taxes paid or accrued by any person in a taxable year beginning on or after January 1, 2012, and on or before February 14, 2012, in connection with a foreign consolidated group splitter arrangement described in §1.909–6T(b)(2) are split taxes to the same extent that such taxes would have been treated as pre-2011 split taxes if such taxes were paid or accrued by a section 902 corporation in a taxable year beginning on or before December 31, 2010. The related income with respect to split taxes from such an arrangement is the related income described in §1.909–6T(b)(2), determined as if the payor were a section 902 corporation.

(c) *Effective/applicability date*. The rules of this section apply to foreign taxes paid or accrued in taxable years beginning on or after January 1, 2011, and on or before February 14, 2012.

(d) *Expiration date*. The applicability of this section expires on February 9, 2015.

§1.909–6T Pre-2011 foreign tax credit splitting events (temporary).

(a) *Foreign tax credit splitting event*—(1) *In general*. This section provides rules for determining whether foreign income taxes paid or accrued by a section 902 corporation (as defined in section 909(d)(5)) in taxable years beginning on or before December 31, 2010 (*pre-2011 taxable years* and *pre-2011 taxes*) are suspended under section 909 in taxable years beginning after December 31, 2010, (*post-2010 taxable years*) of a section 902 corporation. Paragraph (b) of this section identifies an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events in pre–2011 taxable years (*pre-2011 splitter arrangements*). Paragraphs (c), (d), and (e) of this section provide rules for determining the related income and pre-2011 split taxes paid or accrued with respect to pre-2011 splitter arrangements. Paragraph (f) of this section provides rules concerning the application of section 909 to partnerships and trusts. Paragraph (g) of this section provides rules concerning the interaction between section 909 and other Internal Revenue Code (*Code*) provisions.

(2) *Taxes not subject to suspension under section 909*. Pre-2011 taxes that will not be suspended under section 909 or paragraph (a) of this section are:

(i) Any pre-2011 taxes that were not paid or accrued in connection with a pre-2011 splitter arrangement identified in paragraph (b) of this section;

(ii) Any pre-2011 taxes that were paid or accrued in connection with a pre-2011 splitter arrangement identified in paragraph (b) of this section (*pre-2011 split taxes*) but that were deemed paid under section 902(a) or 960 on or before the last day of the section 902 corporation's last pre-2011 taxable year;

(iii) Any pre-2011 split taxes if either the payor section 902 corporation took the related income into account in a pre-2011 taxable year or a section 902 shareholder (as defined in §1.909–1T(a)(2)) of the relevant section 902 corporation took the related income into account on or before the last day of the section 902 corporation's last pre-2011 taxable year; and

(iv) Any pre-2011 split taxes paid or accrued by a section 902 corporation in taxable years of such section 902 corporation beginning before January 1, 1997.

(3) *Taxes subject to suspension under section 909*. To the extent that the section 902 corporation paid or accrued pre-2011 split taxes that are not described in paragraph (a)(2) of this section, section 909 and the regulations under that section will apply to such pre-2011 split taxes for purposes of applying sections 902 and 960 in post-2010 taxable years of the section 902 corporation. Accordingly, these taxes will be removed from the section 902 corporation's pools of post-1986 foreign income taxes and suspended under section 909 as of the first day of the section 902 corporation's first post-2010 taxable year. There is no increase to a section 902 corporation's earnings and profits for the amount of any pre-2011 taxes to which section 909 applies that were previously deducted in computing earnings and profits in a pre-2011 taxable year.

(b) *Pre-2011 splitter arrangements*. The arrangements set forth in this paragraph (b) are pre-2011 splitter arrangements.

(1) *Reverse hybrid structure splitter arrangements*. A reverse hybrid structure exists when a section 902 corporation owns an interest in a reverse hybrid. A reverse hybrid is an entity that is a corporation for U.S. Federal income tax purposes but is a pass-through entity or a branch under the laws of a foreign country imposing tax on the income of the entity. As a result, the owner of the reverse hybrid is subject to tax on the income of the entity under foreign law. A pre-2011 splitter arrangement involving a reverse hybrid structure exists when pre-2011 taxes are paid or accrued by a section 902 corporation with respect to income of a reverse hybrid that is a covered person with respect to the section 902 corporation. A pre-2011 splitter arrangement involving a reverse hybrid structure may exist even if the reverse hybrid has a deficit in earnings and profits for a particular year (for example, due to a timing difference). Such taxes paid or accrued by the section 902 corporation are pre-2011 split taxes. The related income is the earnings and profits (computed for U.S. Federal income tax purposes) of the reverse hybrid attributable to the activities of the reverse hybrid that gave rise to income included in the foreign tax base with respect to which the pre-2011 split taxes were paid or accrued. Accordingly, related income of the reverse hybrid would not include any item of income or expense attributable to a disregarded entity (as defined in §301.7701–2(c)(2)(i) of this chapter) owned by the reverse hybrid if income attributable to the activities of the disregarded entity is not included in the foreign tax base.

(2) *Foreign consolidated group splitter arrangements*. A foreign consolidated group exists when a foreign country imposes tax on the combined income of two or more entities. Tax is considered imposed on the combined income of two or more entities even if the combined income is computed under foreign law by attributing to one such entity the income of one or more entities. A foreign consolidated group is a pre-2011 splitter arrangement to the extent that the taxpayer did not allocate the foreign consolidated tax liability among the members of the foreign consolidated group based on each member's share of the consolidated taxable income included in the foreign tax base under the principles of §1.901–2(f)(3) (revised as of April 1, 2011). A pre-2011 splitter arrangement involving a foreign consolidated group may exist even if one or more members has a deficit in earnings and profits for a particular year (for example, due to a timing difference). Pre-2011 taxes paid or accrued with respect to the income of a foreign consolidated group are pre-2011 split taxes to the extent that taxes paid or accrued by one member of the foreign consolidated group are imposed on a covered person's share of the consolidated taxable income included in the foreign tax base. The related income is the earnings and profits (computed for U.S. Federal income tax purposes) of such other member attributable to the activities of that other member that gave rise to income included in the foreign tax base with respect to which the pre-2011 split taxes were paid or accrued. No inference should be drawn from the treatment of foreign consolidated groups under section 909 as to the determination of the person

who paid the foreign income tax for U.S. Federal income tax purposes.

(3) *Group relief or other loss-sharing regime splitter arrangements*—(i) *In general*. A foreign group relief or other loss-sharing regime exists when one entity with a loss permits the loss to be used to offset the income of one or more entities (*shared loss*). A pre-2011 splitter arrangement involving a shared loss exists when the following three conditions are met:

(A) There is an instrument that is treated as indebtedness under the laws of the jurisdiction in which the issuer is subject to tax and that is disregarded for U.S. Federal income tax purposes (*disregarded debt instrument*). Examples of a disregarded debt instrument include a debt obligation between two disregarded entities that are owned by the same section 902 corporation, two disregarded entities that are owned by a partnership with one or more partners that are section 902 corporations, a section 902 corporation and a disregarded entity that is owned by that section 902 corporation, or a partnership in which the section 902 corporation is a partner and a disregarded entity that is owned by such partnership.

(B) The owner of the disregarded debt instrument pays a foreign income tax attributable to a payment or accrual on the instrument.

(C) The payment or accrual on the disregarded debt instrument gives rise to a deduction for foreign tax purposes and the issuer of the instrument incurs a shared loss that is taken into account under foreign law by one or more entities that are covered persons with respect to the owner of the instrument.

(ii) *Split taxes and related income*. In situations described in paragraph (b)(3)(i) of this section, pre-2011 taxes paid or accrued by the owner of the disregarded debt instrument with respect to amounts paid or accrued on the instrument (up to the amount of the shared loss) are pre-2011 split taxes. The related income of a covered person is an amount equal to the shared loss, determined without regard to the actual amount of the covered person's earnings and profits.

(4) *Hybrid instrument splitter arrangements*—(i) *In general*. A hybrid instrument for purposes of this paragraph (b)(4) is an instrument that either is treated as equity for U.S. Federal income tax purposes but is treated as indebtedness for foreign tax purposes (*U.S. equity hybrid instrument*), or is treated as indebtedness for U.S. Federal income tax purposes but is treated as equity for foreign tax purposes (*U.S. debt hybrid instrument*).

(ii) *U.S. equity hybrid instrument splitter arrangement*. If the issuer of a U.S. equity hybrid instrument is a covered person with respect to a section 902 corporation that is the owner of the U.S. equity hybrid instrument, there is a pre-2011 splitter arrangement with respect to the portion of the pre-2011 taxes paid or accrued by the owner section 902 corporation with respect to the amounts on the instrument that are deductible by the issuer as interest under the laws of a foreign jurisdiction in which the issuer is subject to tax but that do not give rise to income for U.S. Federal income tax purposes. Pre-2011 split taxes paid or accrued by the section 902 corporation equal the total amount of pre-2011 taxes paid or accrued by the section 902 corporation less the amount of pre-2011 taxes that would have been paid or accrued had the section 902 corporation not been subject to tax on income from the U.S. equity hybrid instrument. The related income of the issuer of the U.S. equity hybrid instrument is an amount equal to the amounts that are deductible by the issuer for foreign tax purposes, determined without regard to the actual amount of the issuer's earnings and profits.

(iii) *U.S. debt hybrid instrument splitter arrangement*. If the owner of a U.S. debt hybrid instrument is a covered person with respect to a section 902 corporation that is the issuer of the U.S. debt hybrid instrument, there is a pre-2011 splitter arrangement with respect to the portion of the pre-2011 taxes paid or accrued by the section 902 corporation on income in an amount equal to the interest (including original issue discount) paid or accrued on the instrument that is deductible for U.S. Federal income tax purposes but that does not give rise to a deduction under the laws of a foreign jurisdiction in which the issuer is subject to tax. Pre-2011 split taxes are the pre-2011 taxes paid or accrued by the section 902 corporation on the income that would have been offset by the interest paid or accrued on the U.S. debt hybrid instrument had such interest been deductible for foreign tax purposes. The related income with respect to a U.S. debt hybrid instrument is the gross amount of the interest income recognized for U.S. Federal income tax purposes by the owner of the U.S. debt hybrid instrument, determined without regard to the actual amount of the owner's earnings and profits.

(c) *General rules for applying section 909 to pre-2011 split taxes and related income*—(1) *Annual determination*. The determination of related income, other income, pre-2011 split taxes, and other taxes, and the portion of these amounts that were distributed, deemed paid or otherwise transferred or eliminated must be made on an annual basis beginning with the first taxable year of the section 902 corporation beginning after December 31, 1996 (*post-1996 taxable year*) in which the section 902 corporation paid or accrued a pre-2011 tax with respect to a pre-2011 splitter arrangement and ending with the section 902 corporation's last pre-2011 taxable year. Annual amounts of related income and pre-2011 split taxes are aggregated for each separate pre-2011 splitter arrangement.

(2) *Separate categories*. The determination of annual and aggregate amounts of related income and pre-2011 split taxes with respect to each pre-2011 splitter arrangement must be made for each separate category as defined in §1.904–4(m) of the section 902 corporation, each covered person, and any other person that succeeds to the related income and pre-2011 split taxes. In the case of a pre-2011 splitter arrangement involving a shared loss (as described in paragraph (b)(3) of this section), the amount of the related income in each separate category of the covered person is equal to the amount of income in that separate category that was offset by the shared loss for foreign tax purposes. In the case of a pre-2011 splitter arrangement involving a U.S. equity hybrid instrument (as described in paragraph (b)(4)(ii) of this section), the related income is assigned to the issuer's separate categories in the same proportions as the pre-2011 split taxes. Earnings and profits, including related income, are assigned to separate categories under the rules of §§1.904–4, 1.904–5, and 1.904–7. Foreign income taxes, including pre-2011 split taxes, are assigned to separate categories under the rules of §1.904–6. A section 902 shareholder must consistently apply methodologies for determining pre-2011 split taxes

and related income with respect to all pre-2011 splitter arrangements.

(d) *Special rules regarding related income*—(1) *Annual adjustments*. In the case of each pre-2011 splitter arrangement involving a reverse hybrid or a foreign consolidated group (as described in paragraphs (b)(1) and (b)(2) of this section, respectively), a covered person's aggregate amount of related income must be adjusted each year by the net amount of income and expense attributable to the activities of the covered person that give rise to income included in the foreign tax base, even if the net amount is negative and regardless of whether the section 902 corporation paid or accrued any pre-2011 split taxes in such year.

(2) *Effect of separate limitation losses and deficits*. Related income is determined without regard to the application of §1.960–1(i)(4) (relating to the effect of separate limitation losses on earnings and profits in another separate category) or section 952(c)(1) (relating to certain earnings and profits deficits).

(3) *Pro rata method for distributions out of earnings and profits that include both related income and other income*. If the earnings and profits of a covered person include amounts attributable to both related income and other income, including earnings and profits attributable to taxable years beginning before January 1, 1997, then distributions, deemed distributions, and inclusions out of earnings and profits (for example, under sections 301, 304, 367(b), 951(a), 964(e), 1248, or 1293) of the covered person are considered made out of related income and other income on a *pro rata* basis. Any reduction of a covered person's earnings and profits that results from a payment on stock that is not treated as a dividend for U.S. Federal income tax purposes (for example, pursuant to section 312(n)(7)) will also reduce related income and other income on a *pro rata* basis.

(4) *Alternative method for distributions out of earnings and profits that include both related income and other income*. Solely for purposes of identifying the amount of pre-2011 split taxes of a section 902 corporation that are suspended as of the first day of the section 902 corporation's first post-2010 taxable year, in lieu of the rule set forth in paragraph (d)(3) of this section, a section 902 shareholder may choose to treat all distributions, deemed distributions, and inclusions out of earnings and profits of a covered person as attributable first to related income. A section 902 shareholder may choose to use this alternative method on a timely filed original income tax return for the first post-2010 taxable year in which the shareholder computes an amount of foreign income taxes deemed paid with respect to a section 902 corporation that paid or accrued pre-2011 split taxes. Such choice by a section 902 shareholder is evidenced by employing the method on its income tax return; the section 902 shareholder need not file a separate statement. A section 902 shareholder that chooses this alternative method must consistently apply it with respect to all pre-2011 splitter arrangements.

(5) *Distributions, deemed distributions, and inclusions of related income*. Distributions, deemed distributions, and inclusions of related income (including indirectly through a partnership) to persons other than the payor section 902 corporation retain their character as related income with respect to the associated pre-2011 split taxes.

(6) *Carryover of related income*. Related income carries over to other corporations in the same manner as earnings and profits carry over under section 381, §1.367(b)–7, or similar rules, and retains its character as related income with respect to the associated pre-2011 split taxes.

(7) *Related income taken into account by a section 902 shareholder*. Related income will be considered taken into account by a section 902 shareholder to the extent that the related income is recognized as gross income by the section 902 shareholder, or by an affiliated corporation described in paragraph (d)(9) of this section, upon a distribution, deemed distribution, or inclusion (such as under section 951(a)) out of the earnings and profits of the covered person attributable to such related income.

(8) *Related income taken into account by a payor section 902 corporation*. Related income will be considered taken into account by a payor section 902 corporation if:

(i) The related income is reflected in the earnings and profits of such section 902 corporation for U.S. Federal income tax purposes by reason of a distribution, deemed distribution, or inclusion out of the earnings and profits of the covered person attributable to such related income; or

(ii) The payor section 902 corporation and the covered person are combined in a transaction described in section 381(a)(1) or (a)(2).

(9) *Related income taken into account by an affiliated group of corporations that includes a section 902 shareholder*. A section 902 shareholder will be considered to have taken related income into account if one or more members of an affiliated group of corporations (as defined in section 1504) that files a consolidated Federal income tax return that includes the section 902 shareholder takes the related income into account.

(10) *Distributions of previously-taxed earnings and profits*. Distributions and deemed distributions described in paragraph (d) of this section (including in the case of a section 902 shareholder that has chosen the alternative method described in paragraph (d)(4) of this section) do not include distributions of amounts described in section 959(c)(1) or (c)(2), which are distributed before amounts described in section 959(c)(3).

(e) *Special rules regarding pre-2011 split taxes*—(1) *Taxes deemed paid pro-rata out of pre-2011 split taxes and other taxes*. If the pre-2011 taxes of a section 902 corporation include both pre-2011 split taxes and other taxes, then foreign taxes deemed paid under section 902 or 960 or otherwise removed from post-1986 foreign income taxes in pre-2011 taxable years will be treated as attributable to pre-2011 split taxes and other taxes on a *pro-rata* basis.

(2) *Pre-2011 split taxes deemed paid in pre-2011 taxable years*. Pre-2011 split taxes deemed paid in pre-2011 taxable years in connection with a dividend paid to a shareholder described in section 902(b) retain their character as pre-2011 split taxes. The section 902(b) shareholder will be treated as the payor section 902 corporation with respect to those pre-2011 split taxes.

(3) *Carryover of pre-2011 split taxes*. Pre-2011 split taxes that carry over to another foreign corporation, including under section 381, §1.367(b)–7 or similar rules, retain their character as pre-2011 split taxes. The transferee foreign corporation will be treated as the payor section 902

corporation with respect to those pre-2011 split taxes.

(4) *Determining when pre-2011 split taxes are no longer treated as pre-2011 split taxes*. For each pre-2011 splitter arrangement, as related income is taken into account by the payor section 902 corporation or a section 902 shareholder as provided in paragraph (d) of this section, a ratable portion of the associated pre-2011 split taxes will no longer be treated as pre-2011 split taxes. In the case of a pre-2011 splitter arrangement involving a reverse hybrid or a foreign consolidated group (as described in paragraphs (b)(1) and (b)(2) of this section, respectively), if aggregate related income is reduced to zero (other than as a result of a distribution, deemed distribution, or inclusion described in paragraph (d) of this section) or less than zero, pre-2011 split taxes will retain their character as pre-2011 split taxes until the amount of aggregate related income is positive and the related income is taken into account by the payor section 902 corporation or a section 902 shareholder as provided in paragraph (d) of this section.

(f) *Rules relating to partnerships and trusts*—(1) *Taxes paid or accrued by partnerships*. In the case of foreign income taxes paid or accrued by a partnership, the taxes will be treated as pre-2011 split taxes to the extent such taxes are allocated to one or more section 902 corporations and would be pre-2011 split taxes if the partner section 902 corporation had paid or accrued the taxes directly on the date such taxes are included by the section 902 corporation under sections 702 and 706(a). Further, any foreign income taxes subject to section 909 will be suspended in the hands of the partner section 902 corporation.

(2) *Section 704(b) allocations*. Partnership allocations that satisfy the requirements of section 704(b) and the regulations thereunder will not constitute pre-2011 splitter arrangements except to the extent the arrangement is otherwise described in paragraph (b) of this section (for example, a payment or accrual on a disregarded debt instrument that gives rise to a shared loss).

(3) *Trusts*. Rules similar to the rules of paragraph (f)(1) of this section will apply in the case of any trust with one or more beneficiaries that is a section 902 corporation.

(g) *Interaction between section 909 and other Code provisions*—(1) *Section 904(c)*. Section 909 does not apply to excess foreign income taxes that were paid or accrued in pre-2011 taxable years and carried forward and deemed paid or accrued under section 904(c) in a post-2010 taxable year.

(2) *Section 905(a)*. For purposes of determining in post-2010 taxable years the allowable deduction for foreign income taxes paid or accrued under section 164(a), the carryover of excess foreign income taxes under section 904(c), and the extended period for claiming a credit or refund under section 6511(d)(3)(A), foreign income taxes to which section 909 applies are first taken into account and treated as paid or accrued in the year in which the related income is taken into account, and not in the earlier year to which the tax relates (determined without regard to section 909).

(3) *Section 905(c)*. If a redetermination of foreign taxes claimed as a direct credit under section 901 occurs in a post-2010 taxable year and the foreign tax redetermination relates to a pre-2011 taxable year, to the extent such foreign tax redetermination increased the amount of foreign income taxes paid or accrued with respect to the pre-2011 taxable year (for example, due to an additional assessment of foreign tax or a payment of a previously accrued tax not paid within two years), section 909 will not apply to such taxes. If a redetermination of foreign tax paid or accrued by a section 902 corporation occurs in a post-2010 taxable year and increases the amount of foreign income taxes paid or accrued by the section 902 corporation with respect to a pre-2011 taxable year (for example, due to an additional assessment of foreign tax or a payment of a previously accrued tax not paid within two years), such taxes will be treated as pre-2011 taxes. Section 909 will apply to such taxes if they are pre-2011 split taxes and the taxes will be suspended in the post-2010 taxable year in which they would otherwise be taken into account as a prospective adjustment to the section 902 corporation's pools of post-1986 foreign income taxes.

(4) *Other foreign tax credit provisions*. Section 909 does not affect the applicability of other restrictions or limitations on the foreign tax credit under existing law, including, for example, the substantiation requirements of section 905(b).

(h) *Effective/applicability date*. This section applies to foreign income taxes paid or accrued by section 902 corporations in pre-2011 taxable years for purposes of computing foreign income taxes deemed paid with respect to distributions or inclusions out of earnings and profits of section 902 corporations in taxable years of the section 902 corporation beginning after December 31, 2010.

(i) *Expiration date*. The applicability of this section expires on February 9, 2015.

Steven T. Miller,
Deputy Commissioner for Services and Enforcement.

Approved February 8, 2012.

Emily S. McMahon,
Acting Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on February 9, 2012, 4:15 p.m., and published in the issue of the Federal Register for February 14, 2012, 77 F.R. 8127)

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

(Also Sections 382, 1288.)

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. The March 2012 Applicable Federal Rate is modified to correct the annual long-term adjusted Applicable Federal Rate and the long-term tax-exempt rate for ownership changes. Rev. Rul. 2012–9 modified.

Rev. Rul. 2012–12

This revenue ruling modifies Rev. Rul. 2012–9, 2012–11 I.R.B. 475, which provides various prescribed rates for federal income tax purposes for March 2012, to correct two of the rates.

Table 2 of Rev. Rul. 2012–9 contains short-term, mid-term, and long-term adjusted applicable federal rates (adjusted AFR) for March 2012 for purposes of section 1288(b) of the Internal Revenue Code. The rate published in Table 2 of Rev. Rul. 2012–9 as the annual long-term adjusted

AFR (3.47 percent) is corrected to be 2.97 percent.

Table 3 of Rev. Rul. 2012–9 sets forth the adjusted federal long-term rate for March 2012 and the long-term tax-exempt rate described in section 382(f) for March 2012. The rate published in Table 3 of Rev. Rul. 2012–9 as the long-term tax-exempt rate for ownership changes during March 2012 (3.55 percent) is corrected to be 3.47 percent.

EFFECT ON OTHER REVENUE RULING(S)

Rev. Rul. 2012–9 is modified.

PROSPECTIVE APPLICATION

Under the authority of section 7805(b), the corrected rates will not be applied adversely with respect to debt instruments issued on or before March 20, 2012, or to ownership changes that occurred on or before March 20, 2012.

DRAFTING INFORMATION

The principal author of this revenue ruling is Andrea M. Hoffenson of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue ruling, contact Andrea M. Hoffenson at (202) 622–4188 (not a toll-free call).

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

The March 2012 Applicable Federal Rate is modified to correct the annual long-term adjusted Applicable Federal Rate and the long-term tax-exempt rate for ownership changes. See Rev. Rul. 2012-12, page 748.

Section 9815.—Additional Market Reforms

26 CFR 54.9815–2715: Summary of benefits and coverage and uniform glossary.

T.D. 9575

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Parts 54 and 602

DEPARTMENT OF LABOR
Employee Benefits Security Administration
29 CFR Part 2590

DEPARTMENT OF HEALTH AND HUMAN SERVICES
CMS–9982–F
45 CFR Part 147

Summary of Benefits and Coverage and Uniform Glossary

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

ACTION: Final rule.

SUMMARY: This document contains final regulations regarding the summary of benefits and coverage and the uniform glossary for group health plans and health insurance coverage in the group and individual markets under the Patient Protection and Affordable Care Act. This document implements the disclosure requirements under section 2715 of the Public Health Service Act to help plans and individuals better understand their health coverage, as well as other coverage options. A guidance document published elsewhere in this issue of the Bulletin provides further guidance regarding compliance.

DATES: *Effective Date:* These final regulations are effective April 16, 2012.

Applicability date: The requirements to provide an SBC, notice of modification, and uniform glossary under PHS Act section 2715 and these final regulations apply for disclosures to participants and beneficiaries who enroll or re-enroll in group health coverage through an open enrollment period (including re-enrollees and late enrollees) beginning on the first day of the first open enrollment period that begins on or after September 23, 2012. For disclosures to participants and beneficiaries who enroll in group health plan coverage other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), the requirements under PHS Act section 2715 and these final regulations apply beginning on the first day of the first plan year that begins on or after September 23, 2012. For disclosures to plans, and to individuals and dependents in the individual market, these requirements are applicable to health insurance issuers beginning on September 23, 2012.

FOR FURTHER INFORMATION CONTACT: Amy Turner or Heather Raeburn, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335; Karen Levin, Internal Revenue Service, Department of the Treasury, at (202) 622–6080; Jennifer Libster or Padma Shah, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (301) 492–4222.

SUPPLEMENTARY INFORMATION:

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1–866–444–EBSA (3272) or visit the Department of Labor's website (*http://www.dol.gov/ebsa*). In addition, information from HHS on private health insurance for consumers can be found on the Centers for Medicare & Medicaid Services (CMS) website (*http://www.cms.hhs.gov/HealthInsReformforConsume/01_Overview.asp*) and information on health reform can be found at *http://www.healthcare.gov*.

I. Executive Summary

A. *Purpose of the Regulatory Action*

1. *Need for Regulatory Action*

Under section 2715 of the Public Health Service Act (PHS Act), as added by the Patient Protection and Affordable Care Act (Affordable Care Act), the Departments of Health and Human Services, Labor, and the Treasury (the Departments) are to develop standards for use by group health plans and health insurance issuers offering group or individual health insurance coverage in compiling and providing a summary of benefits and coverage (SBC) that "accurately describes the benefits and coverage under the applicable plan or coverage." PHS Act section 2715 also calls for the "development of standards for the definitions of terms used in health insurance coverage."

This regulation establishes the standards required to be met under PHS Act section 2715. Among other things, these standards ensure this information is presented in clear language and in a uniform format that helps consumers to better understand their coverage and better compare coverage options. The current patchwork of non-uniform consumer disclosure requirements makes shopping for coverage inefficient, difficult, and time-consuming, particularly in the individual and small group market, but also in some large employer plans in which workers may be confused about the value of their health benefits as part of their total compensation. As a result of this confusion, health insurance issuers and employers may face less pressure to compete on price, benefits, and quality, contributing to inefficiency in the health insurance and labor markets.

The statute is detailed but not self-implementing, contains ambiguities, and specifically requires the Departments to develop standards, consult with the National Association of Insurance Commissioners, and issue regulations. Therefore these consumer protections cannot be established without this regulation.

2. *Legal Authority*

The substantive authority for this regulation is generally PHS Act section 2715, which is incorporated by reference into Employee Retirement Income Security Act (ERISA) section 715 and the Internal Revenue Code (Code) section 9815. PHS Act section 2792, ERISA section 734, and Code section 9833 also provide rulemaking authority. (For a fuller discussion of the Departments' legal authority, see section V. of this preamble.)

B. *Summary of the Major Provisions of This Regulatory Action*

Paragraph (a) of the final regulations implements the general disclosure requirement and sets forth the standards for who provides an SBC, to whom, and when. The regulations outline three different scenarios under which an SBC will be provided: (1) by a group health insurance issuer to a group health plan; (2) by a group health insurance issuer and a group health plan to participants and beneficiaries; and (3) by a health insurance issuer to individuals and dependents in the individual market. For each scenario, an SBC must be provided in several different circumstances, such as upon application for coverage, by the first day of coverage (if information in the SBC has changed), upon renewal or reissuance, and upon request. The final regulations also include special rules to prevent unnecessary duplication in the provision of an SBC with respect to group health coverage and individual health insurance coverage.

The final regulations set forth a list of requirements for the SBC that generally mirror those set forth in the statute. There are a total of 12 required content elements under the regulations, including uniform standard definitions of medical and health coverage terms, which will help consumers better understand their coverage; a description of the coverage including the cost sharing requirements such as deductibles, coinsurance, and co-payments; and information regarding any exceptions, reductions, or limitations under the coverage. The final regulations also require inclusion of coverage examples, which illustrate benefits provided under the plan or coverage for common benefits scenarios. In addition, the regulations specify requirements related to the appearance of the SBC, which generally must be presented in a uniform format, cannot exceed four double-sided pages in length, and must not include print smaller than 12-point font. These requirements are detailed further in a notice published elsewhere in today's Federal Register providing additional guidance related to PHS Act section 2715 and these final regulations.

PHS Act section 2715 and the final regulations also require that plans and issuers provide notice of modification in any of the terms of the plan or coverage involved that would affect the content of the SBC, that is not reflected in the most recently provided SBC, and that occurs other than in connection with a renewal or reissuance of coverage.

Finally, the statute directs the Departments to develop standards for definitions for certain insurance-related and medical terms, as well as other terms that will help consumers understand and compare the terms of coverage and the extent of medical benefits (including any exceptions and limitations). Group health plans and health insurance issuers must provide the uniform glossary in the appearance specified by the Departments, so that the glossary is presented in a uniform format and uses terminology understandable by the average plan enrollee or individual covered under an individual policy. A guidance document published elsewhere in today's **Federal Register** provides further guidance with respect to the uniform glossary.

The requirements to provide an SBC, notice of modification, and uniform glossary under PHS Act section 2715 and these final regulations apply for disclosures with respect to participants and beneficiaries who enroll or re-enroll in group health coverage through an open enrollment period (including re-enrollees and late enrollees), beginning on the first day of the first open enrollment period that begins on or after September 23, 2012. For disclosures to participants and beneficiaries who enroll in group health plan coverage other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), the requirements under PHS Act section 2715 and these final regulations apply beginning on the first day of the first plan year that begins on or after September 23, 2012. For disclosures to plans, and to individuals and dependents in the individual market, these requirements apply to health insurance issuers beginning on September 23, 2012.

C. Costs and Benefits

The direct benefits of these final regulations come from improved information, which will enable consumers, both individuals and employers, to better understand the coverage they have and make better coverage decisions, based on their preferences with respect to benefit design, level of financial protection, and cost. The Departments believe that such improvements will result in a more efficient, competitive market. These final regulations will also benefit consumers by reducing the time they spend searching for and compiling health plan and coverage information.

Under the final regulations, group health plans and health insurance issuers will incur costs to compile and provide the summary of benefits and coverage and uniform glossary of health coverage and medical terms. The Departments estimate that the annualized cost may be around $73 million. As is common with regulations implementing new policies, there is considerable uncertainty arising from general data limitations and the degree to which economies of scale exist for disclosing this information. Nonetheless, the Departments believe that these final regulations lower overall administrative costs from the proposed regulations because of several policy changes, notably flexibility in the instructions for completing the SBC, the omission of premium (or cost of coverage) information from the SBC, the reduction in the number of coverage examples required from three to two, and provisions allowing greater flexibility for electronic disclosure.

In accordance with Executive Orders 12866 and 13563, the Departments believe that the benefits of this regulatory action justify the costs.

II. Background

The Patient Protection and Affordable Care Act, Pub. L. 111–148, was enacted on March 23, 2010; the Health Care and Education Reconciliation Act, Pub. L. 111–152, was enacted on March 30, 2010 (these are collectively known as the "Affordable Care Act"). The Affordable Care Act reorganizes, amends, and adds to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The term "group health plan" includes both insured and self-insured group health plans.[1] The Affordable Care Act adds section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (the Code) to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and make them applicable to group health plans, and health insurance issuers providing health insurance coverage in connection with group health plans. The PHS Act sections incorporated by this reference are sections 2701 through 2728. PHS Act sections 2701 through 2719A are substantially new, though they incorporate some provisions of prior law. PHS Act sections 2722 through 2728 are sections of prior law renumbered, with some, mostly minor, changes.

Subtitles A and C of title I of the Affordable Care Act amend the requirements of title XXVII of the PHS Act (changes to which are incorporated into ERISA by section 715). The preemption provisions of ERISA section 731 and PHS Act section 2724[2] (implemented in 29 CFR 2590.731(a) and 45 CFR 146.143(a)) apply so that the requirements of part 7 of ERISA and title XXVII of the PHS Act, as amended by the Affordable Care Act, are not to be "construed to supersede any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group or individual health insurance coverage except to the extent that such standard or requirement prevents the application of a requirement" of provisions added to the PHS Act by the Affordable Care Act. Accordingly, State laws with stricter health insurance issuer requirements than those imposed by the PHS Act will not be superseded by those provisions. (Preemption and State flexibility under PHS Act section 2715 are discussed more fully below under section III.D.)

The Departments of Health and Human Services (HHS), Labor, and the Treasury (the Departments) are taking a phased approach to issuing regulations implementing the revised PHS Act sections 2701 through 2719A and related provisions of the Affordable Care Act. These final regulations are being published to implement the disclosure requirements under PHS Act section 2715. As discussed more fully below, a document containing further guidance for compliance is published elsewhere in this issue of the Bulletin.

III. Overview of the Final Regulations

A. *Summary of Benefits and Coverage*

1. In General

Section 2715 of the PHS Act, added by the Affordable Care Act, directs the Departments to develop standards for use by a group health plan and a health insurance issuer offering group or individual health insurance coverage in compiling and providing a summary of benefits and coverage (SBC) that "accurately describes the benefits and coverage under the applicable plan or coverage." PHS Act section 2715 also calls for the "development of standards for the definitions of terms used in health insurance coverage."

The statute directs the Departments, in developing such standards, to "consult with the National Association of Insurance Commissioners" (referred to in this document as the "NAIC"), "a working group composed of representatives of health insurance-related consumer advocacy organizations, health insurance issuers, health care professionals, patient advocates including those representing individuals with limited English profi-

[1] The term "group health plan" is used in title XXVII of the PHS Act, part 7 of ERISA, and chapter 100 of the Code, and is distinct from the term "health plan," as used in other provisions of title I of the Affordable Care Act. The term "health plan" does not include self-insured group health plans.

[2] Code section 9815 incorporates the preemption provisions of PHS Act section 2724. Prior to the Affordable Care Act, there were no express preemption provisions in chapter 100 of the Code.

ciency, and other qualified individuals."[3] On July 29, 2011, the NAIC provided its final recommendations to the Departments regarding the SBC. On August 22, 2011, the Departments published in the **Federal Register** proposed regulations (76 FR 52442) and an accompanying document with templates, instructions, and related materials (76 FR 52475) for implementing the disclosure provisions under PHS Act section 2715. The proposed regulations and accompanying document adhered to the recommendations of the NAIC. After consideration of all the comments received on the proposed regulations and accompanying document, the Departments are publishing these final regulations. In conjunction with these final regulations, the Departments are also publishing a guidance document elsewhere in this issue of the Bulletin that contains further guidance for compliance, including information on how to obtain the SBC template (with instructions and sample language for completing the template) and the uniform glossary. All of these items are displayed at *www.dol.gov/ebsa/healthreform* and *www.cciio.cms.gov*.

2. *Providing the SBC*

Paragraph (a) of the final regulations implements the general disclosure requirement and sets forth the standards for who provides an SBC, to whom, and when. PHS Act section 2715 generally requires that an SBC be provided to applicants, enrollees, and policyholders or certificate holders. PHS Act section 2715(d)(3) places the responsibility to provide an SBC on "(A) a health insurance issuer (including a group health plan that is not a self-insured plan) offering health insurance coverage within the United States; or (B) in the case of a self-insured group health plan, the plan sponsor or designated administrator of the plan (as such terms are defined in section 3(16) of ERISA)."[4] Accordingly, the final regulations interpret PHS Act section 2715 to apply to both group health plans and health insurance issuers offering group or individual health insurance coverage. In addition, consistent with the statute, the final regulations hold the plan administrator of a group health plan responsible for providing an SBC. Under the final regulations, the SBC must be provided in writing and free of charge.

Several commenters argued that large group health plans or self-insured group health plans should be exempt from the requirement to provide the SBC. Many of these commenters noted that such plans already provide a wealth of useful information, including a summary plan description and open season materials that accurately describe the plan and any coverage options. However, the statute includes no such exemption for large or self-insured plans. Moreover, the Departments believe that the SBC's uniform format and appearance requirements will allow individuals to easily compare coverage options across different types of plans and insurance products, including those offered through Affordable Insurance Exchanges (Exchanges) beginning in 2014.

Several commenters asked whether the SBC is required to be provided with respect to all group health plans, including certain account-type arrangements such as health flexible spending arrangements (health FSAs)[5], health reimbursement arrangements (HRAs)[6], and health savings accounts (HSAs)[7]. An SBC need not be provided for plans, policies, or benefit packages that constitute excepted benefits. Thus, for example, an SBC need not be provided for stand-alone dental or vision plans or health FSAs if they constitute excepted benefits under the Departments' regulations.[8] If benefits under a health FSA do not constitute excepted benefits, the health FSA is a group health plan generally subject to the SBC requirements. For a health FSA that does not meet the criteria for excepted benefits and that is integrated with other major medical coverage, the SBC is prepared for the other major medical coverage, and the effects of the health FSA can be denoted in the appropriate spaces on the SBC for deductibles, copayments, coinsurance, and benefits otherwise not covered by the major medical coverage. A stand-alone health FSA must satisfy the SBC requirements independently.

An HRA is a group health plan. Benefits under an HRA generally do not constitute excepted benefits, and thus HRAs are generally subject to the SBC requirements. A stand-alone HRA generally must satisfy the SBC requirements (though many of the limitations that apply under traditional fee-for-service or network plans do not apply under stand-alone HRAs). An HRA integrated with other major medical coverage need not separately satisfy the SBC requirements; the SBC is prepared for the other major medical coverage, and the effects of employer allocations to an account under the HRA can be denoted in the appropriate spaces on the SBC for deductibles, copayments, coinsurance, and benefits otherwise not covered by the other major medical coverage.

HSAs generally are not group health plans and thus generally are not subject to the SBC requirements. Nevertheless, an SBC prepared for a high deductible health plan associated with an HSA can mention the effects of employer contributions to HSAs in the appropriate spaces on the SBC for deductibles, copayments, coinsurance, and benefits otherwise not covered by the high deductible health plan.

There are three general scenarios under which an SBC will be provided: (1) by a group health insurance issuer to a group health plan; (2) by a group health insur-

[3] The NAIC convened a working group (NAIC working group) comprised of a diverse group of stakeholders. This working group met frequently each month for over one year while developing its recommendations. In developing its recommendations, the NAIC considered the results of various consumer testing sponsored by both insurance industry and consumer associations. Throughout the process, NAIC working group draft documents and meeting notes were displayed on the NAIC's website for public review, and several interested parties filed formal comments. In addition to participation from the NAIC working group members, conference calls and in-person meetings were open to other interested parties and individuals and provided an opportunity for non-member feedback. See *www.naic.org/committees_b_consumer_information.htm*.

[4] ERISA section 3(16) defines an administrator as: (i) the person specifically designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor; or (iii) in the case of a plan for which an administrator is not designated and plan sponsor cannot be identified, such other person as the Secretary of Labor may by regulation prescribe.

[5] See Code section 106(c)(2).

[6] See IRS Notice 2002–45, 2002–2 C.B. 93.

[7] See Code section 223.

[8] See 26 CFR 54.9831–1(c), 29 CFR 2590.732(c), 45 CFR 146.145(c).

ance issuer and a group health plan to participants and beneficiaries; and (3) by a health insurance issuer to individuals and dependents in the individual market. In general, the proposed regulations directed that, in each of these scenarios, the SBC be provided when an employer or individual is comparing health coverage options, including prior to purchasing or enrolling in a particular plan or policy.

Some commenters asserted that certain timing requirements in the proposed regulations could be administratively difficult for plans and issuers to meet under certain conditions, such as when negotiations of policy terms are ongoing less than 30 days before renewal, making the proposed timeframe for providing the SBC difficult or impossible to achieve. In response to public comments, the final regulations streamline and harmonize the rules for providing the SBC, while ensuring that individuals and employers have timely and complete information under all three scenarios in which an SBC might be provided. Moreover, in certain circumstances, the final regulations provide plans and issuers with additional time to provide the SBC. For example, under the proposed regulations, an SBC would have been required to be provided as soon as practicable following an application for health coverage or a request for an SBC, but in no event later than seven days following the application or request. For all three scenarios under which an SBC might be provided, the final regulations substitute a seven business day period for the seven calendar day period in the proposed regulations in each place it appeared.

The Departments also received comments regarding issuance of an SBC at renewal or reissuance of coverage. The proposed regulations would have required that, if written application materials are required for renewal, the SBC must be provided no later than the date on which the materials are distributed. This requirement has been retained without change in the final regulations. In addition, upon an automatic renewal of coverage (that is, when written application materials are not required for renewal), the proposed regulations would have required a new SBC to be provided no later than 30 days prior to the first day of coverage under the new plan or policy year. The final regulations require that, in general, if renewal or reissuance of coverage is automatic, the SBC must be provided no later than 30 days prior to the first day of the new plan or policy year. However, with respect to insured coverage, in situations in which the SBC cannot be provided within this timeframe because, for instance, the issuer and the purchaser have not yet finalized the terms of coverage for the new policy year, the final regulations provide an exception. Under that circumstance, the SBC must be provided as soon as practicable, but in no event later than seven business days after the issuance of the policy, certificate, or contract of insurance (for simplicity, referred to collectively as a "policy" in the remainder of this preamble), or the receipt of written confirmation of intent to renew, whichever is earlier. The regulations provide this flexibility only when the terms of coverage are finalized in fewer than 30 days in advance of the new policy year; otherwise, the SBC must be provided upon automatic renewal no later than 30 days prior to the first day of coverage under the new plan or policy year.

a. *Provision of the SBC by an Issuer to a Plan*

Paragraph (a)(1)(i) of the final regulations requires a health insurance issuer offering group health insurance coverage to provide an SBC to a group health plan (including, for this purpose, its sponsor) upon an application by the plan for health coverage. The SBC must be provided as soon as practicable following receipt of the application, but in no event later than seven business days following receipt of the application. If there is any change to the information required to be in the SBC before the first day of coverage, the issuer must update and provide a current SBC to the plan no later than the first day of coverage. If the information is unchanged, the SBC does not need to be provided again in connection with coverage for that plan year, except upon request. As noted later in this preamble, the final regulations, in contrast to the proposed regulations, do not include premium or cost of coverage information as a required element of the SBC. In many cases, the only change to the information the proposed regulations required to be in the SBC between application for coverage and the first day of coverage is the premium or cost of coverage information. Because these final regulations eliminate the requirement to include premium or cost of coverage information in the SBC, the Departments anticipate that the number of circumstances in which issuers will have to provide a second SBC will be significantly fewer under the final regulations than they would have been under the proposed regulations.

b. *Provision of the SBC by a Plan or Issuer to Participants and Beneficiaries*

Under paragraph (a)(1)(ii) of the final regulations, a group health plan (including the plan administrator), and a health insurance issuer offering group health insurance coverage, must provide an SBC to a participant or beneficiary[9] with respect to each benefit package offered by the plan or issuer for which the participant or beneficiary is eligible.[10] Some commenters stated that SBCs should only be provided to participants, not beneficiaries, or that the SBC should only be provided to beneficiaries upon request. The statutory language, which refers to "applicants" and "enrollees," could be interpreted to support either interpretation. These final regulations retain the requirement that the SBC be provided to both participants and beneficiaries. However, as described below, the final regulations include an anti-duplication rule under which a single SBC may be provided to a family unless any beneficiaries are known to reside at a different address. Accordingly, separate SBCs need

[9] ERISA section 3(7) defines a participant as: any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employers or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. ERISA section 3(8) defines a beneficiary as: a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

[10] With respect to insured group health plan coverage, PHS Act section 2715 generally places the obligation to provide an SBC on both a plan and issuer. As discussed below, under section III.A.2.d., "Special Rules to Prevent Unnecessary Duplication With Respect to Group Health Coverage", if either the issuer or the plan provides the SBC, both will have satisfied their obligations. As they do with other notices required of both plans and issuers under Part 7 of ERISA, Title XXVII of the PHS Act, and Chapter 100 of the Code, the Departments expect plans and issuers to make contractual arrangements for sending SBCs. Accordingly, the remainder of this preamble generally refers to requirements for plans or issuers.

to be provided to beneficiaries only in limited circumstances.

The SBC must be provided as part of any written application materials that are distributed by the plan or issuer for enrollment. If the plan does not distribute written application materials for enrollment, the SBC must be distributed no later than the first date the participant is eligible to enroll in coverage for the participant or any beneficiaries. If there is any change to the information required to be in the SBC between the application for coverage and the first day of coverage, the plan or issuer must update and provide a current SBC to a participant or beneficiary no later than the first day of coverage.

Under the final regulations, the plan or issuer must also provide the SBC to special enrollees.[11] The proposed regulations would have required that the SBC be provided within seven calendar days of a request for special enrollment. One commenter stated that special enrollees should not be distinguished from other enrollees with such expedited disclosure, particularly since they have already enrolled in coverage and are no longer comparing coverage options. The final rule provides that special enrollees must be provided the SBC no later than when a summary plan description is required to be provided under the timeframe set forth in ERISA section 104(b)(1)(A) and its implementing regulations, which is 90 days from enrollment. The revised timing requirement related to providing an SBC in connection with special enrollment is expected to reduce administrative costs for providing SBCs to these individuals, who have already chosen the plan, policy, or benefit package in which to enroll. To the extent individuals who are eligible for special enrollment and are contemplating their coverage options would like to receive SBCs earlier, they may always request an SBC with respect to any particular plan, policy, or benefit package and the SBC is required to be provided as soon as practicable, but in no event later than seven business days following receipt of the request (as discussed more fully below).

c. *Provision of the SBC Upon Request in Group Health Coverage*

As discussed earlier in this preamble, a health insurance issuer offering group health insurance coverage must provide the SBC to a group health plan (and a plan or issuer must provide the SBC to a participant or beneficiary) upon request for an SBC or summary information about the health coverage, as soon as practicable, but in no event later than seven business days following receipt of the request. The Departments received several comments addressing the requirement to provide the SBC upon request. Many comments were supportive of this approach, especially with regards to participants and beneficiaries needing information about their coverage in the middle of a plan year after life changes. Other comments suggested that providing SBCs to employers and individuals who are only "shopping" for coverage and not yet enrolled is unnecessary and will require multiple SBCs to be provided as employers and individuals go through underwriting.

The final regulations retain the requirement that the SBC be provided upon request to participants, beneficiaries and employers, including prior to submitting an application for coverage, because the SBC provides information that not only helps consumers understand their coverage, but also helps consumers compare coverage options prior to selecting coverage. The Departments believe it is essential for employers, participants, and beneficiaries to have this information to help make informed coverage decisions and believe that the modifications to the SBC template, including the removal of premium information, adequately addresses the concerns that health insurance issuers will have to provide multiple SBCs to employers and individuals prior to underwriting.

Health insurance issuers offering individual market coverage must also provide the SBC to individuals upon request, to allow consumers reviewing coverage options the same ability to compare coverage options in the individual market, as well in the Exchanges and the group markets.

d. *Special Rules to Prevent Unnecessary Duplication With Respect to Group Health Coverage*

The proposed regulations provided three rules to streamline provision of the SBC and prevent unnecessary duplication with respect to group health plan coverage. Paragraph (a)(1)(iii) of the final regulations retains these special rules, with some modifications. The first states that the requirement to provide an SBC generally will be considered satisfied for all entities if it is provided by any entity, so long as all timing and content requirements are satisfied. The second states that a single SBC may be provided to a participant and any beneficiaries at the participant's last known address. However, if a beneficiary's last known address is different than the participant's last known address, a separate SBC is required to be provided to the beneficiary at the beneficiary's last known address. Finally, under the special rule providing that SBCs are not required to be provided automatically upon renewal for benefit packages in which the participant or beneficiary is not enrolled, a plan or issuer generally has up to seven business days (rather than seven calendar days, as specified in the proposed regulation) to respond to a request to provide the SBC with respect to another benefit package for which the participant or beneficiary is eligible.

Many commenters pointed out the potential duplication and confusion that can result with carve-out arrangements, which is generally when a plan or issuer contracts with an administrative service provider (such as a pharmacy benefit manager or managed behavioral health organization) to manage prescribed functions such as managed care and utilization review. Plans and issuers should coordinate with their service providers, and with each other, to ensure that the SBCs they provide are accurate.

e. *Provision of the SBC by an Issuer Offering Individual Market Coverage*

Under these final regulations, the Secretary of HHS sets forth standards applicable to individual health insurance coverage about who provides an SBC, to whom, and when. The provisions of the final

[11] Regulations regarding special enrollment are available at 26 CFR 54.9801–6, 29 CFR 2590.701–6, and 45 CFR 146.117.

regulations for individual market coverage parallel the group market requirements described above, with only those changes necessary to reflect the differences between the two markets, and the provisions of the final regulations are intended to more clearly reflect the similarity between the two sets of rules. For example, individuals and dependents in the individual market are comparable to group health plan participants and beneficiaries. Accordingly, an issuer offering individual health insurance coverage must provide an SBC to an individual or dependent upon receiving an application for any health insurance policy, as soon as practicable following receipt of the application, but in no event later than seven business days following receipt of the application. If there is any change in the information required to be in the SBC between the application for coverage and the first day of coverage, the issuer must update and provide a current SBC to an individual or dependent no later than the first day of coverage.[12] Additionally, an issuer must provide the SBC to any individual or dependent upon request for an SBC or summary information about a health insurance product as soon as practicable, but in no event later than seven business days following the request. Similar to the group market, a request for an SBC or summary information includes a request made at any time, including prior to applying for coverage.

The final regulations retain the individual market anti-duplication rule, similar to the group health coverage anti-duplication rule, for individual health insurance coverage that covers more than one individual (or an application for coverage that is being made for more than one individual). In that case, as under the proposed regulations, a single SBC may generally be provided to one address, unless any dependents are known to reside at a different address.

3. *Content*

PHS Act section 2715(b)(3) generally provides that the SBC must include:

a. Uniform definitions of standard insurance terms and medical terms so that consumers may compare health coverage and understand the terms of (or exceptions to) their coverage;
b. A description of the coverage, including cost sharing, for each category of benefits identified by the Departments;
c. The exceptions, reductions, and limitations on coverage;
d. The cost-sharing provisions of the coverage, including deductible, coinsurance, and copayment obligations;
e. The renewability and continuation of coverage provisions;
f. A coverage facts label that includes examples to illustrate common benefits scenarios (including pregnancy and serious or chronic medical conditions) and related cost sharing based on recognized clinical practice guidelines;
g. A statement about whether the plan provides minimum essential coverage as defined under section 5000A(f) of the Code, and whether the plan's or coverage's share of the total allowed costs of benefits provided under the plan or coverage meets applicable requirements;
h. A statement that the SBC is only a summary and that the plan document, policy, or certificate of insurance should be consulted to determine the governing contractual provisions of the coverage; and
i. A contact number to call with questions and an Internet web address where a copy of the actual individual coverage policy or group certificate of coverage can be reviewed and obtained.

The proposed regulations generally mirrored the content elements set forth in the statute, with four additional elements recommended by the NAIC: (1) for plans and issuers that maintain one or more networks of providers, an Internet address (or similar contact information) for obtaining a list of the network providers; (2) for plans and issuers that maintain a prescription drug formulary, an Internet address where an individual may find more information about the prescription drug coverage under the plan or coverage; (3) an Internet address where an individual may review and obtain the uniform glossary; and (4) premiums (or cost of coverage for self-insured group health plans). The proposed regulations solicited comments on these additional four content elements. In addition, the proposed regulations solicited comments on whether the SBC should include a disclosure informing individuals of their right to receive a paper copy of the glossary upon request.

These final regulations retain the first two proposed additional content elements without change, modify the third, and delete the fourth. The final regulations retain: (1) the inclusion of an Internet address (or other contact information) for obtaining a list of the network providers, and (2) the inclusion of an Internet address (or similar contact information) where an individual may find more information about the prescription drug coverage under the plan or coverage. The final regulations also retain the requirement of the inclusion of an Internet address where an individual may review and obtain the uniform glossary, with a modification. The Departments received several comments regarding the inclusion of information concerning the uniform glossary including a suggestion that individuals be informed of their right to request a paper copy of the uniform glossary. Commenters noted that the omission of such a disclosure would deny important information to some individuals who are most in need of this information. After review and consideration of the comments, the final regulations require information for obtaining copies of the uniform glossary, which includes an Internet address where an individual may review the uniform glossary, a contact phone number to obtain a paper copy of the uniform glossary, and a disclosure that paper copies of the uniform glossary are available. It is important to note that the definitions in the glossary are solely for the purpose of these regulations; they do not, for example, apply to Medicare coverage policy nor the Secretary of Health and Human Services' definition of essential health benefits.

The final regulations do not require the SBC to include premium or cost of coverage information. The Departments

[12] As noted elsewhere in this preamble, the final regulations, in contrast to the proposed regulations, do not include premium information as a required element of the SBC. Because, in many cases, the only change to the information required to be in the SBC before the first day of coverage is the premium, the Departments anticipate that the number of circumstances in which issuers will have to provide a second SBC before the first day of coverage will significantly decrease under the final regulation.

received numerous comments on this issue. Comments supporting the inclusion of premium information stated that this information was essential for consumers to make meaningful coverage comparisons, and it was necessary for consumers to make coverage comparisons and understand their total financial exposure, as well as useful to encourage competition in the markets on both price and value. One comment stated that employees also need this information to know if the coverage offered by an employer meets the Affordable Care Act's affordability test,[13] which determines the eligibility of employees for premium tax credits with respect to qualified health plans purchased on an Exchange.[14] Comments opposing this additional content requirement stated that this requirement would be administratively burdensome in the group market, where health insurance issuers do not have information on employer contributions, and would not be able to provide accurate cost of coverage information to employees. In addition, some comments noted that it would not be possible to provide an accurate premium estimate prior to medical underwriting. Some comments recommended that premium information be provided in a separate document, for example, a premium table.

After considering all of the comments, the final regulations do not require the SBC to include premium or cost of coverage information. The Departments understand that it is administratively and logistically complex to convey this information to individuals in an SBC in divergent circumstances in both the individual and group markets, including, for example, when premiums differ based on family size and when, in the group market, employer contributions impact cost of coverage. The Departments recognize that the inclusion of premium information in the SBC could result in numerous SBCs being required to be provided to individuals. However, if premium information is not required, only a single SBC might be necessary. The Departments believe that premium information can be more efficiently and effectively provided by means other than the SBC. For example, in the individual market, the Departments note that some of this information may be available through the Federal health care reform Web portal, *HealthCare.gov*,[15] to individuals shopping for coverage. Furthermore, the Departments anticipate that premium information for qualified health plans will be made widely available through Exchanges for coverage effective beginning in 2014.

With respect to the uniform definitions required by the statute, the Departments proposed to follow the NAIC's recommended two-part approach, requiring provision of — (1) a uniform glossary, which includes definitions of health coverage terminology, to be provided in connection with the SBC, and (2) a "Why this Matters" column for the SBC template (with instructions for plans and issuers to use in completing the SBC template).[16] The Departments retain this approach in the final regulations. The guidance document published elsewhere in today's **Federal Register** addresses comments received on the SBC and related materials (including the uniform glossary) and details the changes from the initial proposal.

The statute also directs that the SBC include a statement about whether a plan or coverage provides minimum essential coverage, as defined under section 5000A(f) of the Code, (minimum essential coverage statement) and whether the plan's or coverage's share of the total allowed costs of benefits provided under the plan or coverage meets applicable minimum value requirements (minimum value statement).[17] However, this content is not relevant until other elements of the Affordable Care Act are implemented. Therefore, the final regulations require the minimum essential coverage and minimum value statements to be included in SBCs with respect to coverage beginning on or after January 1, 2014.[18] Future guidance will address the minimum essential coverage and minimum value statements.

The statute also requires that an SBC contain a "coverage facts label." For ease of reference, the proposed regulations used the term "coverage examples" in place of the statutory term. The Departments received many comments regarding the coverage examples. Some comments supported the general approach in the proposed regulations and indicated that coverage examples would be a valuable comparison tool for consumers. Other comments expressed concerns that the coverage examples would cause confusion for consumers, as the examples do not represent the actual treatment plan for any particular individual, or might not represent the actual costs that an individual might incur for a similar cost of treatment. Some such comments urged the Departments to take a different approach to the coverage examples, such as providing an actual cost calculator. The Departments also received comments on the number of coverage examples that should be required, as well as which benefit scenarios should be included in the final regulations. Comments varied with regards to the number of recommended coverage examples, ranging from one to more than six.

These final regulations retain the general approach to the coverage examples

[13] See Code section 36B(c)(2)(C)(i)(II), as added by section 1401 of the Affordable Care Act.

[14] Providing information in the SBC for individuals relating to Exchanges and the premium tax credit is addressed in the document containing further compliance guidance that is published elsewhere in this issue of the Bulletin.

[15] Established pursuant to 45 CFR 159.120 (75 FR 24470).

[16] National Association of Insurance Commissioners, Consumer Information Working Group, December 17, 2010, Final Package of Attachments. Available at *http://www.naic.org/documents/committees_b_consumer_information_ppaca_final_materials.pdf*.

[17] PHS Act section 2715(b)(3)(G) provides that this statement must indicate whether the plan or coverage (1) provides minimum essential coverage (as defined under section 5000A(f) of the Code) and (2) ensures that the plan's or coverage's share of the total allowed costs of benefits provided under the plan or coverage is not less than 60 percent of such costs. The minimum essential coverage and minimum value requirements are part of a larger set of health coverage reforms that take effect on January 1, 2014.

[18] In the notice providing compliance guidance published separately in today's Federal Register, the Departments state that the SBC template (with instructions, samples, and a guide for coverage example calculations to be used in completing the SBC template) does not provide language to comply with these requirements because the notice authorizes these documents only with respect to the first year of applicability. Information on the minimum essential coverage statement and the minimum value statement will be provided in future guidance.

that was proposed.[19] Consumer testing performed on behalf of the NAIC[20] demonstrated that the coverage examples facilitated individuals' understanding of the benefits and limitations of a plan or policy and helped them make more informed choices about their options. Such testing also showed that individuals were able to comprehend that the examples were only illustrative. Additionally, while some plans provide very useful coverage calculators to their enrollees to help them make health care decisions, they are not uniform across all plans and most are not available to individuals prior to enrollment, making it difficult for individuals and employers to make coverage comparisons. Nonetheless, as discussed in the guidance document issued elsewhere in this issue of the Bulletin, the Departments are taking a phased approach to implementing the coverage examples and intend to consider additional feedback from consumer testing in the future.

To the extent a plan's terms that are required to be in the SBC template cannot reasonably be described in a manner consistent with the template and instructions, the plan or issuer must accurately describe the relevant plan terms while using its best efforts to do so in a manner that is still consistent with the instructions and template format as reasonably possible. Such situations may occur, for example, if a plan provides a different structure for provider network tiers or drug tiers than is contemplated by the template and these instructions, if a plan provides different benefits based on facility type (such as hospital inpatient versus non-hospital inpatient), in a case where the effects of a health FSA or an HRA are being described, or if a plan provides different cost sharing based on participation in a wellness program.

Finally, the Departments solicited comments on whether any special rules are necessary to accommodate expatriate plans and received comments related to adjustments needed for expatriate plan coverage. Some commenters noted that PHS Act section 2715(d)(3) refers to a health insurance issuer "offering health insurance coverage within the United States."[21] Other commenters suggested that coverage information that is particularly important to expatriates (such as medical evacuation, repatriation benefits, and country-appropriate care) be exempt from the requirements under PHS Act section 2715. These final regulations include a special provision that provides that, in lieu of summarizing coverage for items and services provided outside the United States, a plan or issuer may provide an Internet address (or similar contact information) for obtaining information about benefits and coverage provided outside the United States. Also, to the extent the plan or policy provides coverage available within the United States, the plan or issuer is still required to provide an SBC in accordance with PHS Act section 2715 that accurately summarizes benefits and coverage available within the United States.

4. *Appearance*

PHS Act section 2715 sets forth standards related to the appearance of the SBC. Specifically, the statute provides that the SBC is to be presented in a uniform format utilizing terminology understandable by the average plan enrollee, that does not exceed four pages in length, and does not include print smaller than 12-point font. The final regulations retain the interpretation from the proposed regulations that the four-page limitation is four double-sided pages.[22]

The proposed regulations requested comments regarding the requirement to provide the SBC as a stand-alone document. Specifically, comments were requested about whether the SBC should be allowed to be included in a summary plan description (SPD) if it is intact and prominently displayed and the timing requirements for delivery of the SBC are met. The Departments received many comments in response to this request. Some comments opposed allowing the SBC to be included alongside or within an SPD, noting that SPDs tend to be lengthy documents and allowing this would be contrary to the purpose of requiring a short summary document. However, many comments supported this approach, indicating that permitting this option would reduce burdens and costs associated with printing and disseminating the SBC documents.

Paragraph (a)(3) of these final regulations requires plans and issuers to provide the SBC in the form specified by the Secretaries in guidance and completed in accordance with the instructions for completing the SBC that are specified by the Secretaries in guidance. A guidance document published elsewhere in this issue of the Bulletin provides such guidance. The notice specifies that SBCs provided in connection with group health plan coverage may be provided either as a stand-alone document or in combination with other summary materials (for example, an SPD), if the SBC information is intact and prominently displayed at the beginning of the materials (such as immediately after the Table of Contents in an SPD) and in accordance with the timing requirements for providing an SBC. For health insurance coverage offered in the individual market, the SBC must be provided as a stand-alone document, but HHS notes that it can be included in the same mailing as other plan materials. This guidance regarding appearance may be modified for years after the first year of applicability.

[19] The Departments are making one technical change in these final regulations. The proposed regulations stated that the underlying benefits scenario for a coverage example must be based on recognized clinical practice guidelines "available through" the National Guideline Clearinghouse (NGC), Agency for Healthcare Research and Quality. The Departments believe that the proposed regulations would have inadvertently excluded recognized clinical practice guidelines available through other sources, such as the National Comprehensive Cancer Network. Accordingly, these final regulations provide that a benefits scenario must be based on recognized clinical guidelines "as defined by" the NGC. Currently, the NGC uses a definition set forth by the Institute of Medicine. The current definition of clinical practice guidelines adopted by NGC is available at *http://www.guideline.gov/about/inclusion-criteria.aspx.*

[20] A summary of the focus group testing done by America's Health Insurance Plans is available at: *http://www.naic.org/documents/committees_b_consumer_information_101012_ahip_focus_group_summary.pdf*, a summary of the focus group testing done by Consumers Union on the coverage examples is available at: *http://prescriptionforchange.org/wordpress/wp-content/uploads/2011/08/A_New_Way_of_Comparing_Health_Insurance.pdf.*

[21] The Departments note that, in the context of group health plan coverage, section 4(b)(4) of ERISA provides that a plan maintained outside the United States primarily for the benefit of persons substantially all of whom are nonresident aliens is exempt from ERISA title I, including ERISA section 715.

[22] PHS Act section 2715(b)(1) does not prescribe whether the four pages are four single-sided pages or four double-sided pages. The SBC template transmitted by NAIC exceeded four single-sided pages. After considering the extent of statutorily-required content in PHS Act section 2715(b)(3), as well as the appearance and language requirements of PHS Act sections 2715(b)(1) and (2), the Departments are interpreting four pages to be four double-sided pages, in order to ensure that this information is presented in an understandable and meaningful way.

5. *Form*

a. *Group health plan coverage*

To facilitate faster and less burdensome disclosure of the SBC, and to be consistent with PHS Act section 2715(d)(2), which permits disclosure in either paper or electronic form, the proposed regulations set forth rules to permit greater use of electronic transmittal of the SBC. Those proposed regulations generally permitted issuers to provide the SBC to plans electronically (such as an e-mail or Internet posting) if certain conditions were met, and required plans and issuers providing the SBC to participants and beneficiaries to comply with the Department of Labor's electronic disclosure safe harbor requirements at 29 CFR 2520.104b–1(c). In all circumstances, the proposed regulations permitted plans and issuers to provide SBCs in paper form.

Comments generally supported permitting provision of the SBC electronically; however, some comments also asked for more flexibility with regard to electronic provision to participants and beneficiaries. These comments generally requested the rule for provision to participants and beneficiaries mirror the rule for provision to plans, and suggested this change would reduce costs and burdens associated with delivery. Other comments raised concerns about decreased consumer protection if the rules for providing an electronic SBC are too flexible. Some commenters also asked to extend to the group market the option available to individual market issuers to provide information to *HealthCare.gov* to be in compliance with the requirement to provide the SBC upon request for information about coverage prior to submitting an application.

After taking into account all of the comments, these final regulations generally retain the approach from the proposed regulations with respect to an SBC provided electronically by an issuer to a plan. For SBCs provided electronically by a plan or issuer to participants and beneficiaries, these final regulations make a distinction between a participant or beneficiary who is already covered under the group health plan, and a participant or beneficiary who is eligible for coverage but not enrolled in a group health plan. This distinction should provide new flexibility in some circumstances, while also ensuring adequate consumer protections where necessary. For participants and beneficiaries who are already covered under the group health plan, these final regulations permit provision of the SBC electronically if the requirements of the Department of Labor's regulations at 29 CFR 2520.104b–1 are met. (Paragraph (c) of those regulations includes an electronic disclosure safe harbor.[23]) For participants and beneficiaries who are eligible for but not enrolled in coverage, these final regulations permit the SBC to be provided electronically if the format is readily accessible and a paper copy is provided free of charge upon request. Additionally, if the electronic form is an Internet posting, the plan or issuer must timely advise the individual in paper form (such as a postcard) or email that the documents are available on the Internet, provide the Internet address, and notify the individual that the documents are available in paper form upon request. The Departments note that the rules for participants and beneficiaries who are eligible for but not enrolled in coverage are substantially similar to the requirements for an issuer providing an electronic SBC to a plan. Finally, as in the proposed regulations, plans, and participants and beneficiaries (both covered, and eligible but not enrolled) have the right to receive an SBC in paper format, free of charge, upon request.

b. *Individual health insurance coverage*

The Departments received several comments on the proposed regulations, which generally required paper delivery of the SBC and set forth certain circumstances in which electronic disclosure is permissible. Some comments recommended the SBC for individual market coverage be provided in paper form by default, unless the individual explicitly elects electronic delivery. These comments cautioned against assuming individuals have regular access to a computer or a requisite level of computer literacy simply because an individual submits a request online. Instead, they argued individuals should be able to specify the form in which they prefer to receive the SBC.

Other comments recommended greater flexibility for electronic delivery to reduce the costs of compliance, including eliminating the requirement to acknowledge receipt of an SBC provided through electronic delivery methods. These comments urged the Departments to adopt broader standards that reflect the current state of technology. Specifically, they recommended extending the electronic delivery rules that apply to disclosure from the issuer to the plan in paragraph (a)(4)(i) of the final regulations, to disclosure in the individual market. Some comments also suggested that plans provide in their enrollment materials a notice of the individual's right to receive a paper copy of the SBC upon request, and a telephone number or other contact information for making such request.

The Departments determined it is appropriate to amend the individual market standards in the proposed regulations related to the form and manner of delivery. Rather than specifying the circumstances making paper or electronic appropriate, these final regulations establish the general standard that an issuer offering individual health insurance coverage must provide the SBC in a manner that can reasonably be expected to provide actual notice regardless of the format. These final regulations provide several examples of methods of delivery that may satisfy this requirement. For instance, an issuer may reasonably expect an individual or dependent to receive actual notice if the issuer provides the SBC by e-mail to an individual who has agreed to receive the SBC (or other electronic disclosures) by e-mail from the issuer and who has provided an e-mail address for that purpose. Or, if the SBC is posted on the Internet, an individual may reasonably be expected to receive actual notice if the issuer timely advises the individual in paper form (such as a postcard) that the documents are available on the Internet and includes the applicable Internet address.

These final regulations substantially retain the safeguards for electronic disclosure in the proposed regulations. Under these final regulations, an issuer providing

[23] On April 7, 2011, the Department of Labor published a Request for Information regarding electronic disclosure at 76 FR 19285. In it, the Department of Labor stated that it is reviewing the use of electronic media by employee benefit plans to furnish information to participants and beneficiaries covered by employee benefit plans subject to ERISA. Because these regulations adopt the ERISA electronic disclosure rules by cross-reference, any changes that may be made to 29 CFR 2520.104b–1 in the future would also apply to the SBC.

the SBC electronically must ensure that the format is readily accessible; the SBC is placed in a location that is prominent and readily accessible; the SBC is provided in an electronic form that is consistent with the appearance, content, and language requirements of these final regulations; and that the issuer notifies the individual or dependent that the SBC is available from the issuer in paper form without charge upon request. These final regulations remove the "acknowledge receipt" requirement. However, the regulations also require that the SBC be provided in an electronic form which can be electronically retained and printed. These final regulations provide standards for the form and manner of providing the SBC that balance the objective of protecting consumers by providing accessible information with the goal of simplifying information collection burdens on issuers.

Finally, the final regulations clarify the provision that would deem health insurance issuers in the individual market to be in compliance with the requirement to provide the SBC to an individual requesting information about coverage prior to submitting an application if the issuer provides the information to *HealthCare.gov*. The final regulations clarify that a health insurance issuer offering individual health insurance coverage must provide all of the content required under paragraph (a)(2), as specified in guidance by the Secretary, to *HealthCare.gov* to be deemed compliant with the requirement to provide an SBC to an individual requesting summary information prior to submitting an application for coverage. The final regulations further clarify that any SBC furnished pursuant to a request for an SBC, at the time of application or subsequently, would be required to be provided in a form and manner consistent with the rules described above. The Departments determined that this provision is consistent with the standards for electronic disclosure and reduces the burden of providing an SBC to individuals shopping for individual health insurance coverage.

The Departments received comments in support of this approach which stated *HealthCare.gov* provides useful summary information about health insurance products that are available to both individuals and small employers shopping for coverage and recommended the final regulations similarly extend the "deemed compliance" provision to the small group market. At this time, the Departments are reviewing comments requesting that the regulations extend the deemed compliance provision to the small group market and may issue future guidance on this issue.

6. *Language*

PHS Act section 2715(b)(2) provides that standards shall ensure that the SBC "is presented in a culturally and linguistically appropriate manner." The final regulations retain the approach of the proposed regulations and provide that, to satisfy the requirement to provide the SBC in a culturally and linguistically appropriate manner, a plan or issuer follows the rules for providing notices with respect to claims and appeals in a culturally and linguistically appropriate manner under PHS Act section 2719, and paragraph (e) of its implementing regulations.[24] Note, nothing in these final regulations should be construed as limiting an individual's rights under Federal or State civil rights statutes, such as Title VI of the Civil Rights Act of 1964 (Title VI) which prohibits recipients of Federal financial assistance, including issuers participating in Medicare Advantage, from discriminating on the basis of race, color, or national origins. To ensure non-discrimination on the basis of national origin, recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by limited English proficient persons. For more information, see, "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons," available at *http://www.hhs.gov/ocr/civilrights/resources/specialtopics/lep/policyguidancedocument.html*. While the Departments received several comments regarding the thresholds set forth in the claims and appeals regulations, the Departments are not making any changes to those standards through these final regulations. Any changes suggested will be considered as part of future rulemakings related to the regulations under PHS Act section 2719, so that the two rules remain consistent.

B. *Notice of Modification*

PHS Act section 2715(d)(4) directs that a group health plan or health insurance issuer offering group or individual health insurance coverage must provide notice of any material modification if it makes a material modification (as defined under ERISA section 102) in any of the terms of the plan or coverage involved that is not reflected in the most recently provided SBC. The comments generally supported the standards regarding the notice of modification in the proposed regulations, which are adopted as final regulations without change.

However, some comments requested clarification concerning the requirement to provide a notice of modification. For example, several comments requested clarification on what changes in the terms of coverage would rise to the level of a material modification. For purposes of PHS Act section 2715, the proposed and final regulations interpret the statutory reference to the SBC to mean that only a material modification in the terms of the plan or coverage that would affect the content of the SBC; that is not reflected in the most recently provided SBC; and that occurs other than in connection with a renewal or reissuance of coverage would trigger the notice. In these circumstances, the notice would be required to be provided to enrollees (or, in the individual market, covered individuals) no later than 60 days prior to the date on which such change will become effective. A material modification, within the meaning of section 102 of ERISA, includes any modification to the coverage offered under a plan or policy that, independently, or in conjunction with other contemporaneous modifications or changes, would be considered by an average plan participant (or in the case of individual market coverage, an average individual covered under a policy) to be an important change in covered benefits or other terms of coverage under the plan or policy.[25] A material modification could be an enhancement of covered

[24] *See* 75 FR 43330 (July 23, 2010), as amended by 76 FR 37208 (June 24, 2011).

[25] *See* DOL Information Letter, Washington Star/Washington-Baltimore Newspaper Guild to Munford Page Hall, II, Baker & McKenzie (February 8, 1985).

benefits or services or other more generous plan or policy terms. It includes, for example, coverage of previously excluded benefits or reduced cost-sharing. A material modification could also be a material reduction in covered services or benefits, as defined in 29 CFR 2520.104b–3(d)(3) of the Department of Labor' regulations, or more stringent requirements for receipt of benefits. As a result, it also includes changes or modifications that reduce or eliminate benefits, increase cost-sharing, or impose a new referral requirement.[26] (However, changes to the information in the SBC resulting from changes in the regulatory requirements for an SBC are not changes to the plan or policy requiring the mid-year provision of a notice of modification, unless specified in such new requirements.)

The Departments also received comments seeking clarification on when a notice of modification must be provided. Several comments suggested that this notice must also be provided for modifications effective for new plan or policy years. The final regulations require that this notice be provided only for changes other than in connection with a renewal or reissuance of coverage. At renewal, plans and issuers must provide an updated SBC in accordance with the requirements otherwise applicable to SBCs. PHS Act section 2715 and paragraph (b) of the final regulations specify the timing for providing a notice of modification in situations other than in connection with a renewal or reissuance of coverage. To the extent a plan or policy implements a mid-year change that is a material modification, that affects the content of the SBC, and that occurs other than in connection with a renewal or reissuance of coverage, the final regulations require a notice of modification to be provided 60 days in advance of the effective date of the change. Comments generally supported the flexibility provided in the proposed regulations, which permitted plans and issuers to either provide an updated SBC reflecting the modifications or provide a separate notice describing the material modifications. Plans and issuers continue to have this flexibility under these final regulations.

For ERISA-covered group health plans subject to PHS Act section 2715, this notice is required in advance of the timing requirements under the Department of Labor's regulations at 29 CFR 2520.104b–3 for providing a summary of material modification (SMM) (generally not later than 210 days after the close of the plan year in which the modification or change was adopted, or, in the case of a material reduction in covered services or benefits, not later than 60 days after the date of adoption of the modification or change). In situations where a complete notice is provided in a timely manner under PHS Act section 2715(d)(4), an ERISA-covered plan will also satisfy the requirement to provide an SMM under Part 1 of ERISA.

C. *Uniform Glossary*

Section 2715(g)(2) of the PHS Act directs the Departments to develop standards for definitions for at least the following insurance-related terms: co-insurance, co-payment, deductible, excluded services, grievance and appeals, non-preferred provider, out-of-network co-payments, out-of-pocket limit, preferred provider, premium, and UCR (usual, customary and reasonable) fees. Section 2715(g)(3) of the PHS Act directs the Departments to develop standards for definitions for at least the following medical terms: durable medical equipment, emergency medical transportation, emergency room care, home health care, hospice services, hospital outpatient care, hospitalization, physician services, prescription drug coverage, rehabilitation services, and skilled nursing care. Additionally, the statute directs the Departments to develop standards for such other terms as will help consumers understand and compare the terms of coverage and the extent of medical benefits (including any exceptions and limitations).

The final regulations adopt the approach of the proposed regulations with respect to the uniform glossary. This includes the adoption of the NAIC recommendation to include the following additional terms in the uniform glossary: allowed amount, balance billing, complications of pregnancy, emergency medical condition, emergency services, habilitation services, health insurance, in-network co-insurance, in-network co-payment, medically necessary, network, out-of-network co-insurance, plan, preauthorization, prescription drugs, primary care physician, primary care provider, provider, reconstructive surgery, specialist, and urgent care.

The Departments received a number of comments on the proposed uniform glossary. Several comments recommended that the final glossary include additional terms. In general, these comments recommended additional terms to provide consumers with additional information to help them better understand their coverage and the content of the SBC. These comments suggested the glossary include additional terms that may appear in the SBC and that may cause confusion, including specialty drugs, mental health services and behavioral health, cosmetic surgery, and preventive care. In addition, some commenters recommended including definitions for complex or potentially confusing insurance terms, including explanations of plan types (such as health maintenance organizations or ERISA plans) and terms such as actuarial value and cost-sharing. Other commenters warned against making the uniform glossary too long.

Some commenters recommended modifications to certain definitions in the uniform glossary. For example, several comments recommended modification to the term "medical necessity." In developing the final uniform glossary, the Departments were very cognizant of the consumer testing performed by the NAIC with respect to the uniform glossary included in the proposed regulations and the need to convey in concise, easy-to-understand language basic medical and coverage terms.[27] Accordingly, very minor changes were made in the final uniform glossary, and it continues to include a disclaimer that the terms and definitions of terms in particular plans or policies may differ from those contained in the glossary, together with information on how to get a copy of the actual policy or plan document.

[26] See, *e.g.*, Ward v. Maloney, 386 F. Supp.2d 607, 612 (M.D.N.C. 2005), which discusses judicial interpretations of when an amendment is and is not a material modification.

[27] A summary of the focus group testing done by America's Health Insurance Plans is available at: *http://www.naic.org/documents/committees_b_consumer_information_101012_ahip_focus_group_summary.pdf*, a summary of the focus group testing done by Consumers Union on the SBC template and the uniform glossary is available at: *http://www.commonwealthfund.org/Publications/Issue-Briefs/2011/Feb/Making-Health-Insurance-Cost-Sharing-Clear.aspx*.

Some commenters requested flexibility to use their own, plan-specific or policy-specific terms in the glossary. PHS Act section 2715(g) is titled "Development of Standard Definitions." The NAIC developed the uniform glossary to provide generalized, plain-English definitions for common coverage and medical terms. The document was intended to help consumers understand the basics of insurance. At the same time, the document specifically cautions that it is intended to be a general educational tool and that individual plan terms may differ (and refers consumers to the SBC for information on how to get an accurate description of their actual plan or policy terms). A guidance document published elsewhere in this issue of the Bulletin announces the availability of the final uniform glossary. The SBC may be used by plans and issuers to convey more accurate descriptions, where appropriate.

Like the proposed regulations, the final regulations direct a plan or issuer to make the uniform glossary available upon request within seven business days. A plan or issuer satisfies this requirement by complying with the content requirement described in paragraph (a)(2)(i)(L) of the final regulations, which requires that the SBC include an Internet address where an individual may review and obtain the uniform glossary, a contact phone number to obtain a paper copy of the uniform glossary, and a disclosure that paper copies are available upon request. The Internet address may be a place where the document can be found on the plan's or issuer's website, or the website of either the Department of Labor or HHS. However, a plan or issuer must make a paper copy of the glossary available within seven business days upon request. Group health plans and health insurance issuers must provide the uniform glossary in the appearance specified by the Departments, so that the glossary is presented in a uniform format and uses terminology understandable by the average plan enrollee or individual covered under an individual policy.

D. *Preemption*

Section 2715 of the PHS Act is incorporated into ERISA section 715, and Code section 9815, and is subject to the preemption provisions of ERISA section 731 and PHS Act section 2724 (implemented in 29 CFR 2590.731(a) and 45 CFR 146.143(a)). Under these provisions, the requirements of part 7 of ERISA and part A of title XXVII of the PHS Act, as amended by the Affordable Care Act, are not to be "construed to supersede any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group or individual health insurance coverage except to the extent that such standard or requirement prevents the application of a requirement" of part A of title XXVII of the PHS Act. Accordingly, State laws that impose requirements on health insurance issuers that are stricter than those imposed by the Affordable Care Act will not be superseded by the Affordable Care Act. Moreover, PHS Act section 2715(e) provides that the standards developed under PHS Act section 2715(a), "shall preempt any related State standards that require [an SBC] that provides less information to consumers than that required to be provided under this section, as determined by the [Departments]."

Reading these two preemption provisions together, the final regulations do not prevent States from imposing separate, additional disclosure requirements on health insurance issuers.

The Departments received several comments seeking clarification on the preemption of State disclosure standards. These comments indicate that many States have existing disclosure requirements that may be duplicative and noted consumers could be confused by multiple disclosures. These final regulations retain the preemption standard as stated in the proposed regulations. However, the Departments take note of the concerns about the potential for consumer confusion, and encourage States to take steps to harmonize existing State requirements with these Federal consumer disclosure requirements. The Departments will work with States to clarify the requirements, potential differences, and options.

In addition, some comments requested clarification that States may not require the modification of the SBC or uniform glossary in their own disclosure standards. Comments stated that any State modifications to these documents would defeat the purpose of having an SBC template and uniform glossary, and one comment requested that any State law modifications to these documents be preempted, and that any additional content required by State law be limited to an addendum to the SBC. If States require health insurance issuers to provide information not contained in the SBC or uniform glossary, then they may require issuers to provide that information only if it is provided in a document that is separate from the SBC. This separate document can, however, be provided at the same time as the SBC.

E. *Failure to Provide*

PHS Act section 2715(f), incorporated into ERISA section 715 and Code section 9815, provides that a group health plan (including its administrator), and a health insurance issuer offering group or individual health insurance coverage, that "willfully fails to provide the information required under this section shall be subject to a fine of not more than $1,000 for each such failure." In addition, under PHS Act section 2715(f), a separate fine may be imposed for each individual or entity for whom there is a failure to provide an SBC. Due to the different enforcement jurisdictions of the Departments, as well as their different underlying enforcement structures, the mechanisms for imposing the new penalty vary slightly, as discussed below.

1. *Department of HHS*

Enforcement of Part A of Title XXVII of the PHS Act, including section 2715, is generally governed by PHS Act section 2723 and corresponding regulations at 45 CFR 150.101 *et seq*. Under those provisions, a State has the discretion to enforce the provisions against health insurance issuers in the first instance, and the Secretary of HHS only enforces a provision after the Secretary determines that a State has failed to substantially enforce the provision. If a State enforces a provision such as PHS Act section 2715, it uses its own enforcement mechanisms. If the Secretary enforces, the statute provides for penalties of up to $100 per day for each affected individual.

PHS Act section 2715(f) provides that an entity that willfully fails to provide the information required under PHS Act section 2715 shall be subject to a fine of not more than $1,000 for each such failure. Such failure constitutes a separate offense

with respect to each enrollee. This penalty can only be imposed by the Secretary.

Paragraph (e) of the final regulations clarifies that States have primary enforcement authority over health insurance issuers for any violations, whether willful or not, using their own remedies and that PHS Act section 2715 does not limit the Secretary's authority to impose penalties for willful violations regardless of State enforcement. However, the Secretary intends to use enforcement discretion if the Secretary determines that the State is adequately addressing willful violations.

The Secretary of HHS has direct enforcement authority for violations by non-Federal governmental plans, and will use the appropriate penalty for violations of section 2715, depending on whether the violation is willful. Paragraph (e) of the HHS final regulations cross references the enforcement regulations at 45 CFR 150.101 *et seq*., and states that they relate to any failure, regardless of intent, by a health insurance issuer or non-Federal governmental plan, to comply with any requirement of PHS Act section 2715.

2. *Departments of Labor and the Treasury*

The Department of Labor enforces the requirements of part 7 of ERISA with respect to ERISA-covered group health plans (generally, plans other than church plans or plans maintained by a governmental entity) and the Department of the Treasury enforces the requirements of chapter 100 of the Code with respect to group health plans maintained by an entity that is not a governmental entity. On April 21, 1999, pursuant to section 104 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104–191, the Secretaries entered into a memorandum of understanding[28] that, among other things, established a mechanism for coordinating enforcement and avoiding duplication of effort for shared jurisdiction. The memorandum of understanding applies, as appropriate, to health legislation enacted after April 21, 1999 over which at least two of the Departments share jurisdiction, including PHS Act section 2715 as incorporated into ERISA and the Code. Therefore, in enforcing PHS Act section 2715, the Departments of Labor and the Treasury will coordinate to avoid duplication in the case of group health plans that are not church plans and that are not maintained by a governmental entity.

a. *Department of Labor*

The Department of Labor will issue separate regulations in the future describing the procedures for assessment of the civil fine provided under PHS Act section 2715(f) as incorporated by section 715 of ERISA. In accordance with ERISA section 502(b)(3), 29 U.S.C. 1132(b)(3), the Secretary of Labor is not authorized to assess this fine against a health insurance issuer.

b. *Department of the Treasury*

If a group health plan (other than a plan maintained by a governmental entity) fails to comply with the requirements of chapter 100 of the Code, an excise tax is imposed under section 4980D of the Code. The excise tax is generally $100 per day per individual for each day that the plan fails to comply with chapter 100 with respect to that individual. Numerous rules under section 4980D reduce the amount of the excise tax for failures due to reasonable cause and not to willful neglect. Special rules apply for church plans. Taxpayers subject to the excise tax under section 4980D are required to report the failures under chapter 100 and the amount of the excise tax on IRS Form 8928. See 26 CFR 54.4980D–1, 54.6011–2, and 54.6151–1.

Section 2715(f) of the PHS Act subjects a plan sponsor or designated administrator to a fine of not more than $1,000 for each failure to provide an SBC. Unless and until future guidance provides otherwise, group health plans subject to chapter 100 of the Code should continue to report the excise tax of section 4980D on IRS Form 8928 with respect to failures to comply with PHS Act section 2715. The Secretaries of Labor and the Treasury will coordinate to determine appropriate cases in which the fine of PHS Act section 2715(f) should be imposed on group health plans that are in the jurisdiction of both Departments.

F. *Applicability*

PHS Act section 2715 provides that the requirement for group health plans and health insurance issuers to provide an SBC applies not later than 24 months after the date of enactment of the Affordable Care Act (which is March 23, 2012). PHS Act section 2715 also provides that group health plans and health insurance issuers shall provide the SBC pursuant to standards developed by the Departments. The proposed regulations proposed an applicability date beginning March 23, 2012. At the same time, the Departments invited comments generally, as well as on a range of discrete issues, including the timing of the application of the SBC requirement. On November 17, 2011, the Departments issued guidance[29] providing that, until final regulations are issued and applicable, plans and issuers are not required to comply with PHS Act section 2715.

The Departments received numerous comments on the applicability date of the regulations. Several comments stated plans and issuers would need time to make changes to their systems and workflow processes and could not come into compliance by March 23, 2012 without incurring significant cost and administrative challenges. Some comments recommend delaying applicability for 12 months, noting that PHS Act section 2715 contemplates that plans and issuers would have 12 months from the date the Secretary develops standards to begin providing the SBC, while others recommended delaying applicability for 18 to 24 months to allow sufficient time for group health plans to revise and coordinate service vendor agreements. Other comments stated the requirements should apply beginning with a plan's open enrollment period to avoid disruption during the plan year. Still others recommended phasing in the requirements by market segment, starting with the individual market initially and broadening over time to include the group market. These commenters emphasized the complexity in the group market of coordinating between the plan and the

[28] *See* 64 FR 70164 (December 15, 1999).

[29] See FAQs About Affordable Care Act Implementation Part VII and Mental Health Parity Implementation, available at *www.dol.gov/ebsa/faqs/faq-aca7.html* and *cciio.cms.gov/resources/factsheets/aca_implementation_faqs7.html*.

issuer (and perhaps across multiple issuers and/or service providers) and the greater need for standardized information in the individual market (where there are no other Federal requirements to provide summary information). Finally, some comments expressed support for the proposed March 23, 2012 applicability date, arguing individuals and employers should receive the consumer protections of PHS Act section 2715 no later than the date intended by statute.

Following review of the comments submitted on this issue and further consideration of the administrative and systems changes required to implement these requirements, the Departments have determined it would not be feasible to require plans and issuers to comply with the standards in the final regulations beginning March 23, 2012 and have delayed the applicability date for six months from that which was proposed to provide sufficient time for plans and issuers to come into compliance with these provisions. The Departments agree that implementing these provisions to coincide with employers' typical open enrollment processes in the group market will reduce confusion for current enrollees who typically make enrollment decisions during annual open enrollment periods and will avoid unnecessary cost to group health plan sponsors of producing these materials off-cycle. The final regulations provide that the requirements to provide an SBC, notice of modification, and uniform glossary under PHS Act section 2715 and these final regulations apply for disclosures with respect to participants and beneficiaries who enroll or re-enroll in group health coverage through an open enrollment period (including re-enrollees and late enrollees), beginning on the first day of the first open enrollment period that begins on or after September 23, 2012. For administrative simplicity, with respect to disclosures to participants and beneficiaries who enroll in group health plan coverage other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), PHS Act section 2715 and these final regulations apply on the first day of the first plan year that begins on or after September 23, 2012. For disclosures to plans, and to individuals and dependents in the individual market, these requirements are applicable to health insurance issuers beginning September 23, 2012.

IV. Economic Impact and Paperwork Burden

A. Executive Orders 12866 and 13563—Department of Labor and Department of Health and Human Services

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). As discussed below, the Departments have concluded that these final regulations would not have economic impacts of $100 million or more in any one year or otherwise meet the definition of an "economically significant rule" under Executive Order 12866. Nonetheless, consistent with Executive Orders 12866 and 13563, the Departments have provided an assessment of the potential benefits and the costs associated with this final regulation.

The Departments have updated the cost estimates from what was presented in the proposed regulations. Since publication of the proposed regulations, the Departments have continued to refine assumptions and estimates to take into account policy decisions made in the final regulations and to incorporate better data. The estimates presented in this rule are a result of those efforts and represent the Departments' best estimate. Discussion of the public comments and the updates to the Departments' estimates are included in the relevant sections of the impact analysis. While the Departments believe the estimates in these final regulations represent the Departments' best estimate, the Departments emphasize there is considerable uncertainty, as is common with regulations implementing new policies, and the discussion throughout the impact analysis reflects this.

1. Current Regulatory Framework

Health plan sponsors and issuers do not currently uniformly disclose information to consumers about benefits and coverage in a simple and consistent way. ERISA-covered group health plans are required to describe important plan information concerning eligibility, benefits, and participant rights and responsibilities in a summary plan description (SPD). But as these documents have increased in size and complexity — for example, due to the insertion of more legalistic language that is designed to mitigate the employer's risk of litigation — they have become more difficult for participants and beneficiaries to understand.[30] Indeed, a recent analysis of SPDs from 40 employer health plans from across the United States (varying based on geography, firm size, and industry sector) found that, on average, SPDs are generally written at a first year college reading level (with readability ranging from a 9th grade reading level to nearly a college graduate reading level).[31] Moreover, the formats of existing SPDs are not standardized. For example, while these documents could be dozens of pages long, there is no requirement that they include an executive summary. Additionally, group health plans not covered by ERISA, such as plans sponsored by State and local governments, are not required to comply with such disclosure requirements.

In the individual market, health insurance issuers are subject to various, diverse State disclosure laws. For example,

[30] ERISA Advisory Council. Report of the Working Group on health and Welfare Benefit Plans' Communication. November 2005. Available at: *http://www.dol.gov/ebsa/publications/AC_1105c_report.html*.

[31] "How Readable Are Summary Plan Descriptions For Health Care Plans?" Employee Benefit Research Institute (EBRI) Notes. October 2006, Vol. 27, No. 10. Available at: *http://www.ebri.org/pdf/notespdf/EBRI_Notes_10–20061.pdf*.

States like Massachusetts,[32] New York,[33] Rhode Island,[34] Utah[35] and Vermont[36] have established minimum standards for disclosure of health insurance information. However, even within such States, consumer disclosures vary widely with respect to their required content. Additionally, some State disclosure laws are limited to current enrollees, so that individuals shopping for coverage do not receive information about health insurance coverage options. Other State disclosure requirements only extend to managed care organizations, and not to other segments of the market.[37]

2. Need for Regulatory Action

Congress added new PHS Act section 2715 through the Affordable Care Act to ensure that plans and issuers provide benefits and coverage information in a more uniform format that helps consumers to better understand their coverage and better compare coverage options. These final regulations are necessary to provide standards for a summary of benefits and coverage (SBC) and a uniform glossary of terms used in health coverage. This approach is consistent with Executive Order 13563, which directs agencies to "identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include... disclosure requirements as well as provision of information to the public in a form that is clear and intelligible."

The current patchwork of consumer disclosure requirements makes the process of shopping for coverage an inefficient, difficult, and time-consuming task. Consumers incur significant search costs while trying to locate reliable cost, coverage and benefit data.[38] Such search costs arise, in part, due to a lack of uniform information across the various coverage options, particularly in the individual and small group markets, but also in large employer plans. Although not directly comparable, in Medigap, a market with standardized benefits, the average per-beneficiary search cost was estimated at $72 —far higher than in other insurance markets, such as auto insurance.[39]

In addition to individual consumers, employers, especially small business employers, also face a daunting search process when they shop for health coverage. A 2011 study of the commercial health insurance market found that many employers, especially small businesses, lack the necessary knowledge, sophistication, and information to efficiently choose appropriate health plans to purchase on behalf of their employees. This lack of knowledge, sophistication, and information requires health insurers to spend more money on marketing to target small business employers. Health insurers then pass the extra marketing costs on to employers in the form of higher premiums. The study determined that in 1997, this inefficiency cost consumers in the fully insured market $34.4 billion. Employers' lack of knowledge, sophistication, and information also produces incentives for health insurers to charge different prices for identical products to different customers, depending upon the customer's negotiating skills. This price variability causes 64 percent more turnover in plan membership, than would otherwise occur. High levels of turnover discourage health insurers from promoting healthy lifestyles and investing in the future health of their policyholders.[40]

Given this difficulty in obtaining comparable information across and within health insurance markets, consumers may not always make informed purchase decisions that best meet the health and financial needs of themselves, their families, or their employees. Similarly, workers may overestimate or underestimate the value of employer-sponsored health benefits, and thus their total compensation; and health insurance issuers and employers may face less pressure to compete on price, benefits, and quality, leading to inefficiency in the health insurance and labor markets.

Furthermore, research suggests that many consumers do not understand how health coverage works. Oftentimes, contracts and benefit descriptions are written in technical language that requires a sophisticated level of literacy that many people do not have.[41] One study found that consumers have particular difficulty understanding cost sharing and tend to underestimate their coverage for mental health, substance abuse and prescription drug benefits, while overestimating their coverage for long-term care.[42]

3. Summary of Impacts

Table 1 below depicts an accounting statement summarizing the Departments' assessment of potential benefits, costs, and transfers associated with this regulatory action. The Departments have limited the

[32] M.G.L.A. 176Q §5 (2010).

[33] NY Ins. Law §3217–a (2010).

[34] Office of the Health Insurance Commissioner Regulation 5: Standards for Readability of Health Insurance Forms, State of Rhode Island and Providence Plantations, August 21, 2010.

[35] Utah Code §31A–22–613.5 (2010).

[36] Division of Health Care Administration, Rule 10.000: Quality Assurance Standards and Consumer Protections for Managed care Plans, State of Vermont, September 20, 1997.

[37] For example, New York requires Health Maintenance Organizations to provide to prospective members, as well as policyholders, information on cost-sharing, including out-of-network costs, limitations and exclusions on benefits, prior authorization requirements, and other disclosures such as appeal rights. NY Ins. Law section 3217–a (2010). Utah requires each insurer issuing a health benefit plan to provide all enrollees, prior to enrollment in the health benefit plan, written disclosure of restrictions or limitations on prescription drugs and biologics, coverage limits under the plan, and any limitation or exclusion of coverage. Utah Code section 31A–22–613.5 (2010). Rhode Island requires all health insurance forms to meet minimum readability standards. Office of the Health Insurance Commissioner Regulation 5: Standards for Readability of Health Insurance Forms, State of Rhode Island and Providence Plantations, August 21, 2010.

[38] M. Susan Marquis *et al*., "Consumer Decision Making in the Individual Health Insurance Market," 25 Health Affairs w.226, w.231-w.232 (May 2006). Available at: *http://content.healthaffairs.org/content/25/3/w226.full.pdf+html*.

[39] Nicole Maestas *et al*., "Price Variation in Markets with Homogenous Goods: The Case of Medigap," National Bureau of Economic Research (January 2009).

[40] Cebul, Randall D., James B. Rebitzer, Lowell J. Taylor, and Mark E. Votruba. 2011. "Unhealthy Insurance Markets: Search Frictions and the Cost and Quality of Health Insurance." *American Economic Review*, 101 (August 2011): 1842–1871.

[41] For example, as discussed earlier, the average Summary Plan Description is written at a first-year college reading level. See Employee Benefit Research Institute, October 2006.

[42] D.W. Garnick, A.M. Hendricks, K.E. Thorpe, J.P. Newhouse, K. Donelan and R.J. Blendon. "How well do Americans understand their health coverage?" Health Affairs, 12(3). 1993:204–12. Available at: *http://content.healthaffairs.org/content/12/3/204.full.pdf*.

period covered by the RIA to 2012–2013. Estimates are not provided for subsequent years, because there will be significant changes in the marketplace in 2014, including those related to the offering of new individual and small group plans through the Affordable Insurance Exchanges, and new market reforms outside of the new Exchanges, and the wide-ranging scope of these changes makes it difficult to project results for 2014 and beyond.

The direct benefits of these final regulations come from improved information, which will enable consumers, both individuals and employers, to better understand the coverage they have and allow consumers choosing coverage to more easily compare coverage options. As a result, consumers may make better coverage decisions, which more closely match their preferences with respect to benefit design, level of financial protection, and cost. The Departments believe that such improvements will result in a more efficient, competitive market. These final regulations would also benefit consumers by reducing the time they spend searching for and compiling health plan and coverage information.

Under the final regulations, group health plans and health insurance issuers would incur costs to compile and provide the summary of benefits and coverage disclosures and a uniform glossary of health coverage and medical terms. The Departments estimate that the annualized cost may be around $73 million, although there is considerable uncertainty arising from general data limitations and the degree to which economies of scale exist for disclosing this information. The Departments' annualized cost estimates for the final regulation are higher than the estimated annualized cost of $50 million, which was set forth in the proposed regulations, because, among other things, the Departments now have narrowed the cost estimate period from 2011–2013 to 2012–2013. This change reflects the fact that the Departments issued guidance on November 17, 2011 providing that, until final regulations are issued and applicable, plans and issuers are not required to comply with PHS Act section 2715, and the fact that these final regulations are being published in 2012.[43] Nonetheless, these final regulations lower overall administrative costs compared to the proposed regulations because of several policy changes, notably the omission of premium or cost of coverage information from SBCs, the provision of only two coverage examples, and provisions allowing greater flexibility for electronic disclosures prior to enrollment in coverage.

The Departments anticipate that the provisions of these final regulations will help consumers, including employers, make better health coverage choices and more easily understand their coverage. In accordance with Executive Orders 12866 and 13563, the Departments believe that the benefits of this regulatory action justify the costs.

Table 1. Accounting Table

Benefits:				
Qualitative: Improved information will enable consumers, including applicants, enrollees, and policyholders, to more easily and efficiently understand and compare coverage, and as a result, make better choices.				
Costs:	Estimate	Year Dollar	Discount Rate Percent	Period Covered
Annualized Monetized ($ millions/year)	$73	2012	7	2012–2013
	$73	2012	3	2012–2013

4. Benefits

In developing these final regulations, the Departments carefully considered their potential effects, including costs, benefits, and transfers. Because of data limitations, the Departments did not attempt to quantify expected benefits of these final regulations. Nonetheless, the Departments were able to identify several benefits, which are discussed below.

These final regulations could generate significant economic and social welfare benefits to consumers. Under these final regulations, health insurance issuers and group health plans would provide clear and consistent information to consumers. Uniform disclosure is anticipated to benefit individuals shopping for, or enrolled in, group and individual health insurance coverage and group health plans. The direct benefits of these final regulations come from improved information, which will enable consumers to better understand the coverage they have and allow consumers choosing coverage to more easily compare options. As a result, consumers will make better coverage decisions, which more closely match their preferences with respect to benefit design, level of financial protection, and cost. The Departments believe that such improvements will result in a more efficient, competitive market.

These final regulations would also benefit consumers by reducing the time they spend searching for and compiling health plan and coverage information. As stated above, consumers in the individual market, as well as consumers in some large employer-sponsored plans, have a number of coverage options and must make a choice using disclosures

[43] See FAQs About Affordable Care Act Implementation Part VII and Mental Health Parity Implementation, available at *www.dol.gov/ebsa/faqs/faq-aca7.html* and *cciio.cms.gov/resources/factsheets/aca_implementation_faqs7.html*.

and tools that vary widely in content and format. A growing body of decision-making research suggests that the abundance and complexity of information can overwhelm consumers and create a significant non-price barrier to coverage.[44] For example, a RAND study of California's individual market found that reducing barriers to information about health insurance products would lead to increases in purchase rates comparable to modest price subsidies.[45] By ensuring consumers have access to readily available, concise, and understandable information about their coverage options, these final regulations could reduce consumers' cost of obtaining information and may increase health insurance purchase rates and satisfaction with the plan purchased.

Furthermore, greater transparency in pricing and benefits information will allow consumers to make more informed purchasing decisions, resulting in cost-savings for some value-conscious consumers who today pay higher premiums because of imperfect information about benefits.[46] In particular, the use of coverage examples called for by these final regulations would better enable consumers to understand how key coverage provisions operate in the context of recognizable health care situations and more meaningfully compare the level of financial protection offered by a plan or coverage, resulting in potential cost-savings.[47],[48] The Departments therefore expect that uniform disclosures under these final regulations will enable consumers to derive more value from their health coverage and enhance the ability of plan sponsors, particularly small businesses, to purchase products that are appropriate to both their needs and the health and financial needs of their employees.

Finally, these final regulations are expected to facilitate consumers' ability to understand their coverage. As stated above, research suggests that consumers do not understand how coverage works or the terminology used in health insurance policies. Consequently, consumers may face unexpected medical expenses if they become seriously ill. They may also become confused by a coverage or payment decision made by their plan or issuer, leading to inefficiency in the operation of employee benefit plans and health insurance coverage. By making it easier for consumers to understand the key features of their coverage, these final regulations would enhance consumers' ability to use their coverage. Additionally, the uniform format will make it easier for consumers who change jobs or insurance coverage to see how their new plan or coverage benefits are similar to and different from their previous coverage.

5. Costs

Section 2715 of the PHS Act and these final regulations direct group health plans and health insurance issuers to compile and provide an SBC and a uniform glossary of health coverage and medical terms. The Departments have attempted to quantify one-time start-up costs as well as maintenance costs associated with these requirements. However, there is considerable uncertainty arising from general data limitations and the degree to which economies of scale can be realized to reduce costs for issuers and third party administrators (TPAs).

In the proposed regulations, the Departments estimated total administrative costs to be $25 million in 2011, $73 million in 2012, and $58 million in 2013. The Departments now estimate that issuers and TPAs will incur approximately $90 million in one-time costs and maintenance costs in 2012, and $55 in maintenance costs in 2013. These costs and the methodology used to estimate them are discussed below, and presented in Tables 2–6 below.

General Assumptions

In order to assess the potential administrative costs relating to these final regulations, the Departments consulted with several industry experts, including individuals at large health insurance issuers and representing a TPA association, individuals who formerly worked at health insurance companies, and insurance market researchers, to gain insight into the tasks and level of resources required. The discussions focused on estimating the costs that would be start-up versus maintenance, and determining which functions or departments of an insurance company or TPA would be involved in implementing the provision. In addition, we reviewed the analyses of other Affordable Care Act regulations that impose new requirements on health insurance issuers and TPAs, to determine appropriate work levels and categories for this regulation. Particularly, we analyzed the Medical Loss Ratio (MLR) interim final rule (75 FR 74918). Based on these discussions, the Departments estimate that there will be two categories of principal costs associated with the standards in these final regulations: one-time start-up costs and ongoing maintenance costs. The one-time start-up costs include costs to develop teams to review the new standards and costs to implement workflow and process changes, particularly the development of information technology (IT) systems interfaces that would generate SBC disclosures through data housed in a number of different systems. The maintenance costs include costs to maintain and update IT systems in compliance with the final standards; to produce, review, distribute, and update the SBC disclosures; to produce and distribute notices of modifications; and to provide the glossary in paper form upon request.

With respect to the individual market, issuers are responsible for generating, reviewing, updating, and distributing SBCs. With respect to employer-sponsored cov-

[44] Judith H. Hibbard and Ellen Peters, "Supporting Informed Consumer Health Care Decisions: Data Presentation Approaches that Facilitate the Use of Information in Choice," 24 *Annu. Rev. Public Health* 413, 416 (2003).

[45] M. Susan Marquis et al., "Consumer Decision Making in the Individual Health Insurance Market," 25 Health Affairs w.226, w.231-w.232 (May 2006). Available at: *http://content.healthaffairs.org/content/25/3/w226.full.pdf+html*.

[46] A study of California's individual market found that 25 percent of consumers chose products with premiums that were more than 30 percent higher than the median price for an actuarially equivalent product for a similar person. Melinda Beeuwkes Buntin *et al*., "Trends and Variability In Individual Insurance Products," Health Affairs w3.449, w3.457 (2003), available at *http://content.healthaffairs.org/content/early/2003/09/24/hlthaff.w3.449.citation*.

[47] Shoshanna Sofaer *et al*., "Helping Medicare Beneficiaries Choose Health Insurance: The Illness Episode Approach, 30 The Gerontologist 308–315 (1990).

[48] Michael Schoenbaum *et al*., "Health Plan Choice and Information about Out-of-Pocket Costs: An Experimental Analysis," 38 *Inquiry* 35–48 (Spring 2001).

erage, the Departments assume that fully-insured plans will rely on health insurance issuers, and self-insured plans will rely on TPAs, to perform these functions. Some commenters stated that some employers internally prepare plan materials and do not rely on TPAs. While the Departments acknowledge that some plans may internally prepare the SBC disclosures, the Departments do not have sufficient data to develop separate estimates for such plans. Therefore, the Departments continue to make this simplifying assumption because most plans appear to rely on issuers and TPAs for the purpose of administrative duties such as enrollment and claims processing.[49] Thus, the Departments have used health insurance issuers and TPAs as the units of analysis for the purposes of estimating administrative costs in this regulatory impact analysis.

As discussed in the MLR interim final rule, the Departments estimate there are about 440 firms offering comprehensive coverage in the individual, small, or large group markets, and 75 million covered lives therein.[50] The number of covered lives includes individuals in the individual market as well as those in insured group health plans.

With respect to the self-insured market, the Departments estimate there are 77 million individuals in self-insured ERISA-covered plans and approximately 14 million individuals in self-insured non-Federal governmental plans.[51] The Departments note that, according to 2007 Economic Census data, there are 2,243 TPAs providing administrative services for health and/or welfare funds. However, there is some uncertainty as to whether all of those TPAs serve self-insured plans; many issuers, for example, have subsidiary lines of business through administrative services only (ASO) contracts through which they perform third-party administrative functions for self-insured plans.[52] Based on conversations with a national TPA association, the Departments assume that about one-third of the total number of TPAs, or about 748 TPAs, are relevant for purposes of this analysis. However, given the considerable overlap between issuers and TPAs, the Departments recognize there may be fewer affected TPAs, so these estimates should be considered an upper bound of burden estimates.

Because the SBC disclosures are closely related to disclosures that issuers and TPAs provide today as a part of their normal operations (for example, covered benefits and cost sharing), the Departments estimate that the incremental costs of compiling and providing such readily available information in the final, standardized format is estimated to be modest.[53] The regulated community has taken exception to this assumption, and it has stated in written comments, and discussions with the Departments, that information will need to be pulled from multiple sources. However, an opposite conclusion appears to have been reached by a November 2011 survey related to the regulated community's preparedness for SBCs. Particularly, the survey noted that existing communications practices and technology would allow affected entities to be in compliance even by the statutory compliance date of March 23, 2012.[54] The results of this survey are also consistent with comments indicating that timely compliance is feasible.

The per-issuer or per-TPA cost will largely be determined by size (based on annual premium revenues) and current practices—most importantly, whether the issuer or TPA maintains a robust information technology infrastructure, including a plan benefits design database. Moreover, with regard to issuers, administrative costs may be related to the number of markets in which a company operates (that is, individual, small group, or large group market); the number of policies it offers; and the number of States and licensed entities through which it offers coverage.

To account for variations among issuers, the Departments classify them by size as small, medium, and large issuers based on 2009 premium revenue for individual, small group, and large group comprehensive coverage.[55] Consistent with the assumptions that were used in the MLR interim final rule, small issuers are defined as those earning up to $50 million in annual premium revenue; medium issuers as those earning between $50 million and $1 billion in annual premium revenue; and large issuers as those earning more than $1 billion in annual premium revenue. Based on these assumptions, the Departments estimate there are 140 small, 230 medium, and 70 large issuers.

To account for variations among TPAs, the Departments applied the proportions of small, medium, and large issuers to the estimated 750 TPAs. The Departments acknowledge that issuers and TPAs are different and may not have the same size variation. Nonetheless, given general data limitations, the Departments have adopted this methodology, and, on its basis, estimate that there are 240 small, 390 medium, and 120 large TPAs. Table 2 below summarizes the estimated number of issuers and TPAs.

[49] See, for example, the Department of Labor's March 2011 report to Congress on self-insured health plans, available at *http://www.dol.gov/ebsa/pdf/ACAReportToCongress032811.pdf.*

[50] The NAIC data actually indicate 442 issuers and 74,830,101 covered lives. But the Departments have limited these values to only two significant figures given general data uncertainty. For example, the NAIC data do not include issuers regulated by California's Department of Managed Health Care (DMHC) as well as small, single-State issuers that are not required by State regulators to submit NAIC annual financial statements.

[51] U.S. Department of Labor, EBSA calculations using the March 2009 Current Population Survey Annual Social and Economic Supplement and the 2009 Medical Expenditure Panel Survey; see also interim final rule for internal claims and appeals and external review processes (75 FR 43330, 43345).

[52] See, for example, the Department of Labor's March 2011 report to Congress on self-insured health plans, available at *http://www.dol.gov/ebsa/pdf/ACAReportToCongress032811.pdf.*

[53] For example, issuers in the individual and small group markets already report some of the SBC information to HHS for display in the plan finder on the *HealthCare.gov* website. Issuers have been reporting data to HHS since May 2010 and have refreshed that data on a quarterly basis. These reporting entities have demonstrated that they have the capacity to report information on plan benefit design. See *http://finder.healthcare.gov/.* Further, ERISA-covered plans already report some of the SBC information in summary plan descriptions (SPDs).

[54] See December 13, 2011 news release for HighRoads Pulse Study, available at *http://newsroom.highroads.com/hr-compliance-connection/highroads-study-shows-employers-will-not-eliminate-benefits-coverage-due-to-health-care-reform.* Among other things, the study's author noted, "SBCs have not caused a great concern among organizations...This is partly a reflection of current communications practices—many employers are already providing a level of communication close to that required by the SBC regulations—and partly a reflection of HR departments embracing technology. By using automation to leverage existing data, they are better able to respond to required changes. That will enable timely compliance once the new deadline is determined."

[55] The premium revenue data come from the 2009 NAIC financial statements, also known as "Blanks," where insurers report information about their various lines of business.

Table 2. Issuer and TPA size classification

	Small	Medium	Large
Issuers	140	230	70
TPAs	240	390	120

Staffing Assumptions

Table 5 below summarizes the Departments' staffing assumptions, including the estimated number of hours for each task for a small, medium, or large issuer/TPA as well as the percentage of time that different professionals devote to each task. The following assumptions are based on the best information available to the Departments at this time. Particularly, the following series of assumptions are based on conversations with industry experts, the Departments' understanding of the regulated community, and previous analysis in the MLR interim final rule.

IT Systems and Workflow Process Changes

In the proposed regulations, the Departments estimated that it would take a large issuer/TPA about 960 hours to implement IT systems and workflow process changes, based on discussions with a large issuer. These final regulations incorporate policy changes designed to reduce administrative burden. The Departments estimate that the administrative burden to implement IT systems and workflow process changes would be reduced, at least, by about 10 percent.[56] Accordingly, the Departments are reducing the 960 hours time burden downward, by 10 percent, to 864 hours. The Departments continue to assume that IT systems and workflow process changes would be implemented only by IT professionals. Furthermore, the Departments continue to assume that a medium issuer/TPA would need about 75 percent of a large issuer's/TPA's time, and a small issuer would need about 50 percent of a large issuer's/TPA's time, to implement IT systems and workflow process changes. These estimates are based on the assumption that medium and smaller issuers and TPA's have fewer products/clients that need to come into compliance.

In the proposed regulations, the Departments estimated that it would take a large issuer/TPA about 160 hours to develop teams to analyze the new standards in relation to their current workflow processes. These final regulations incorporate policy changes designed to reduce administrative burden. The Departments estimate that the administrative burden to develop teams would be reduced by about 10 percent. Accordingly, the Departments are revising the 160 hours time burden downward, by 10 percent, to 144 hours. The Departments continue to assume teams would be comprised of IT professionals (45 percent), benefits/sales professionals (50 percent), and attorneys (5 percent), based on technical analysis presented in the MLR interim final rule. The Departments also continue to scale down the burden for medium and small issuers/TPAs by assuming the same relative proportion as above (that is, 75 percent and 50 percent, respectively).

In the proposed regulations, the Departments assumed that, in 2013, each issuer/TPA would incur a separate maintenance cost to maintain IT systems and address changes in regulatory provisions. The Departments assumed the maintenance cost would equal 15% of the total one-time burden noted above (for example, the Departments assumed it will take a large issuer 15% of 1008 hours, or 151 hours). The Departments further assumed that the teams to implement the maintenance tasks would be comprised of IT professionals (55%), benefits/sales professionals (40%), and attorneys (5%). The Departments maintain these assumptions in these final regulations.

The Departments continue to assume that the one-time and maintenance costs to implement IT systems changes and address regulatory requirements would be split between the costs to produce SBCs and the costs to produce the coverage examples (CEs).

Production and Review of SBCs and CEs

In the proposed regulations, the Departments estimated that each issuer/TPA would need 3 hours to produce, and 1 hour to review, SBCs (not including CEs) for all products. Some commenters thought this time burden was an underestimate. However, these commenters did not provide data that could allow the Departments to adjust their estimates. Accordingly, in these final regulations, the Departments are retaining their original estimates. The Departments also continue to assume that the 3 hours needed to produce SBCs would be equally divided between IT professionals and benefits/sales professionals. The Departments also continue to assume that the 1 hour needed to review SBCs would be equally divided between financial managers for benefits/sales professionals and attorneys, based on previous analyses related to the MLR regulation.

In the proposed regulations, the Departments estimated it would take each issuer/TPA about 90 hours to produce, and about 30 hours to review, CEs related to three benefits scenarios for all applicable products, based on the MLR regulation. However, under the guidance document published elsewhere in this issue of the Bulletin, issuers and TPAs will need to produce a CE related to only two benefits scenarios in 2012 and 2013. Accordingly, in these final regulations, the Departments are adjusting the time burden downward by one-third. The Departments now estimate that each issuer/TPA would need about 60 hours to produce, and about 20 hours to review, two CEs for all products. The Departments continue to assume that the 60 hours to produce the two CEs would

[56] A 10 percent is a conservative estimate of the reduction in administrative burden. A national association of insurance companies informed the Departments that premium information alone may account for 10 percent of compliance costs. Given that the omission of premium information from SBCs is one of several policy changes in these final regulations, we conclude that there could be, at a minimum, a 10 percent reduction in administrative burden.

be equally divided between IT professionals and benefits/sales professionals. The Departments also continue to assume that the 20 hours to review the two CEs would be equally divided between financial managers and attorneys.

For each individual who receives the SBC in paper form, the Departments estimate that printing and distributing the paper disclosures would take clerical staff about 1 minute (0.02 hours) in the group markets and about 2 minutes (0.03 hours) in the individual market. The Departments assume that the individual market has lower economies of scale and, thus, increased distribution costs.

Labor Cost Assumptions

Table 7 below presents the Departments' hourly labor cost assumptions (stated in 2012 dollars) for each staff category based on Bureau of Labor Statistics (BLS) data. The Departments use mean hourly wage estimates from the BLS May 2010 National Occupational Employment and Wage Estimates (accessed at *http://www.bls.gov/oes/current/oes_nat.htm#00–0000*) for computer systems analysts (Occupation Code 15–1121), insurance underwriters (Occupation Code 13–2053), financial managers (Occupation Code 23–1011), executive secretaries and administrative assistants (Occupation Code 43–6011), and attorneys (Occupation Code 23–1011) as the basis for estimating labor costs for 2012 through 2013 and adjust the hourly wage rate to include a 33 percent fringe benefit estimate for private sector employees.[57]

Distribution Assumptions

The Departments make the following assumptions regarding the distribution of the SBC disclosures (including CEs).[58] These assumptions are based on the best information available to the Departments at this time. Particularly, the following series of assumptions are based on conversations with industry experts, the Departments' understanding of the regulated community, and previous analysis in the MLR interim final rule. The distribution assumptions are as follows:

- The SBCs would be limited to one per household for family members located at the same residence. According to one large issuer, there are 2.2 covered lives per family.
- The number of individuals who would receive an SBC before enrolling in the plan or coverage equals 20 percent of the number of enrollees at any point during the course of a year.[59]
- In 2012 and 2013, respectively, about 2.5 percent and 5 percent of covered individuals who receive a paper SBC would receive a paper glossary from issuers and TPAs. The Departments assume that the burden and cost of providing paper glossaries would be proportional to the burden and cost of providing papers SBCs, excluding coverage examples. The Departments also assume that individuals who do not request a paper copy of the glossary will access it electronically using the Internet address provided in the SBC. These assumptions, presented here in these final regulations, have not changed from the proposed regulations.
- In 2013, about 2 percent of covered individuals would receive a notice of modifications.[60] Further, the burden and cost of providing such notices would be proportional to the combined burden and cost of providing the SBCs, including CEs. In 2012, the first year of implementation, the number of notices of modifications would be negligible.
- In the proposed regulations, the Departments estimated that electronic distribution would account for 38 percent of all disclosures in the group market and 70 percent of all disclosures in the individual market. The estimate for the group market was based on the methodology used to analyze the cost burden for the Department of Labor's claims procedure regulation (OMB Control Number 1210–0053).[61]
- In these final regulations, the Departments are revising upward their estimate of electronic distribution in the group market to 50 percent for pre-enrollment disclosures. This upward revision is justified, because, for participants and beneficiaries who are eligible but not enrolled for coverage, these final regulations permit the SBC to be provided electronically if the format is readily accessible and a paper copy is provided free of charge upon request.
- The estimate for the group market remains the same for post-enrollment disclosures. The estimate for the individual market also remains the same, and is based on statistics set forth by the National Telecommunications and Information Administration, which indicate that 30 percent of Americans do not use the Internet.[62]
- SBC disclosures would be distributed with usual marketing and enrollment materials, thus, costs to mail the documents will be negligible. However, paper glossaries and notices of modifications would require mailing and supply costs as follows: $0.45 postage cost per mailing and $0.05 supply cost per mailing. The postage costs have increased by $0.01 from the $0.44, as set

[57] See the Technical Appendix to the MLR interim final rule, available at *http://cciio.cms.gov*.

[58] Although CEs are an integral component of SBCs, the costs associated with CEs are different from the rest of the SBC, and, thus, are separately calculated within this analysis.

[59] Based on this assumption, the Departments make the following estimate. Prior to enrollment in a given year, 180,000 individuals would receive SBCs from small issuers or TPAs; 3,700,000 individuals would receive SBCs from medium issuers or TPAs; 11,000,000 individuals would receive SBCs from large issuers or TPAs.

[60] ERISA section 104(b) requires ERISA-covered plans to furnish participants and beneficiaries with a Summary of Material Modifications (SMM) no later than 210 days after the end of the plan year in which the material change was adopted or in the case of a material reduction in covered services or benefits, no later than 60 days after adoption of the modification or change. As part of its analysis for the Department of Labor's SPD/SMM regulations (29 CFR 2520.104b–3), the Department estimated that about 20 percent of health plans would need to distribute SMM in a given year due to plan amendments. However, almost all of these modifications occur between plan years — not during a plan year; therefore, the modifications would be required to be disclosed in a SBC that is distributed upon renewal of coverage. The Departments, thus, expect that only two percent of plans will need to issue a notice of modification in the middle of a plan year, because mid-year changes that would result in an update to the SBC are very rare, based on the Department of Labor's experience with ERISA plans. For purposes of simplification, the Departments extend this assumption to the individual market as well.

[61] See the ERISA e-disclosure rule at 29 CFR 2520.104b–1.

[62] U.S. Department of Commerce, National Telecommunications and Information Administration, *Digital Nation* (February 2010), available at *http://www.ntia.doc.gov/reports/2010/NTIA_internet_use_report_Feb2010.pdf*.

forth in the proposed regulations, to reflect new first-class postage rates effective January 22, 2012.

- Printing costs $0.03 per side of a page. The Departments estimate that it would cost $0.18 to print a complete SBC (which is six sides of a page based on the length of the NAIC sample completed SBC) and $0.12 to print the uniform glossary (which is four sides of a page, based on the length of the NAIC recommended uniform glossary). This cost burden is in addition to the time it would take clerical staff to print and distribute the SBC or glossary.

Cost Estimate

The Tables below present costs and burden hours for issuers and TPAs associated with the final disclosure requirements of PHS Act section 2715. Tables 3–4 contain cost estimates for 2012 and 2013, derived from the labor hours presented in Table 5 and the hourly rate estimates presented in Table 6, as well as estimates of non-labor costs. Labor hour estimates were developed for each one-time and maintenance task associated with analyzing requirements, developing IT systems, and producing SBCs (that include CEs).

TABLE 3. 2012 Hour Burden, Equivalent Cost, and Cost Burden — 2012 Dollars

	Number of Affected Entities	Hour Burden	Equivalent Cost	Cost Burden (non-labor)	Number of Disclosures
SBC Requirements — Issuers	440	570,000	$21,000,000	$2,700,000	570,000
SBC Requirements — TPAs	750	760,000	$30,000,000	$3,600,000	760,000
Coverage Example Requirements — Issuers	440	193,000	$10,500,000	$1,400,000	193,000
Coverage Example Requirements — TPAs	750	330,000	$17,900,000	$1,800,000	330,000
Glossary Requests — Issuers	440	10,000	$310,000	$350,000	10,000
Glossary Requests — TPAs	750	12,000	$380,000	$460,000	12,000
Subtotal		1,900,000	$80,000,000	$10,000,000	1,900,000
Total 2012 Costs			**$90,000,000**		

TABLE 4. 2013 Hour Burden, Equivalent Cost, and Cost Burden — 2012 Dollars

	Number of Affected Entities	Hour Burden	Equivalent Cost	Cost Burden (non-labor)	Number of Disclosures
SBC Requirements — Issuers	440	430,000	$14,000,000	$2,700,000	41,000,000
SBC Requirements — TPAs	750	540,000	$18,000,000	$3,600,000	49,000,000
Coverage Example Requirements — Issuers	440	59,000	$3,300,000	$1,400,000	41,000,000
Coverage Example Requirements — TPAs	750	100,000	$5,600,000	$1,800,000	49,000,000
Notice of Material Modifications — Issuers	440	8,900	$290,000	$310,000	820,000
Notice of Material Modifications — TPAs	750	11,000	$380,000	$400,000	990,000
Glossary Requests — Issuers	440	20,000	$630,000	$710,000	1,100,000
Glossary Requests — TPAs	750	25,000	$760,000	$920,000	1,500,000
Subtotal		1,200,000	$43,000,000	$12,000,000	94,000,000
Total 2013 Costs			**$55,000,000**		

TABLE 5. Estimated Staffing Hours for Small, Medium, and Large Issuers and TPAs

STAFFING HOUR ASSUMPTIONS	Percent of Hours by Task	Hours		
		Small Issuer/ TPA	Medium Issuer/ TPA	Large Issuer/ TPA
IT Development and Workflow Process Change				
One-Time				
Develop Teams / Analyze Requirements (IT, underwriting / sales)		**72**	**108**	**144**
IT Professionals	45%	32	49	65
Benefits / Sales Professionals	50%	36	54	72
Attorneys	5%	4	5	7
Implementing Systems Changes (IT and workflow)		**432**	**648**	**864**
IT Professionals	100%	432	648	864
Maintenance				
Updating to Address Changes in Requirements		**76**	**113**	**151**
IT Professionals	55%	42	62	83
Benefits / Sales Professionals	40%	30	45	60
Attorneys	5%	4	6	8
SBC Requirement (maintenance)				
Producing SBCs		**3**	**3**	**3**
IT Professionals	50%	1.5	1.5	1.5
Benefits / Sales Professionals	50%	1.5	1.5	1.5
Internal Review of SBCs		**1**	**1**	**1**
Financial Managers — Benefits / Sales Professionals	50%	0.5	0.5	0.5
Attorneys	50%	0.5	0.5	0.5

Producing and Distributing Paper Version of SBCs (Group Markets)				
Clerical Staff	100%	0.02	0.02	0.02
Producing and Distributing Paper Version of SBCs (Individual Market)				
Clerical Staff	100%	0.03	0.03	0.03
CE Requirement (maintenance)				
Producing CEs		**60**	**60**	**60**
IT Professionals	50%	30	30	30
Benefits / Sales Professionals	50%	30	30	30
Internal Review of CEs		**20**	**20**	**20**
Financial Managers — Benefits / Sales Professionals	50%	10	10	10
Attorneys	50%	10	10	10

TABLE 6. Estimated Loaded Hourly Wages for Staff Categories

Staff Category	BLS Code	Loaded Hourly Wage (2012 Dollars)
IT Professionals	Computer Systems Analysts (Occupation Code 15–1121)	$54.52
Financial Professionals — Benefits / Sales	Insurance Underwriters (Occupation Code 13–2053)	$43.76
Financial Manager	Financial Managers (Occupation Code 11–3031)	$78.50
Attorneys	Lawyers (Occupation Code 23–1011)	$86.86
Clerical Staff	Executive Secretaries and Administrative Assistants (Occupation Code 43–6011)	$30.78

The Departments received many comments stating that the preliminary cost analysis underestimated the one-time start-up costs as well as maintenance costs. For example, one commenter did a survey of its members (hereinafter "regulated community survey"), wherein 36 member companies responded to questions regarding implementation and maintenance costs. The commenter extrapolated the survey results to all enrollees with coverage in the United States. Accordingly, the commenter projected that one-time implementation costs would be $188 million and maintenance costs would be $194 million per year. The commenter stated that a significant cost driver was the March 23, 2012 deadline to switch from current benefit

descriptions to the new uniform SBCs. Accordingly, the commenter estimated that there could be a savings of 23 percent with an 18-month extension of the implementation timeline. The commenter also stated that additional factors affecting costs were, among other things, the proposed regulations' requirement to provide premium information; the number and complexity of coverage examples; the renewal process and timeframe to provide SBCs; the number of variations of SBCs to be delivered to each applicant or enrollee; paper delivery of SBCs to most group enrollees; and insufficient flexibility in the SBC template. As discussed elsewhere in this preamble, the Departments have taken steps to ease administrative burden related to most of these factors, and therefore believe that these estimates do not reflect the policies in the final rule.

Because the regulated community survey, as well other commenters' cost estimates, did not provide specific, detailed cost information, it is difficult for the Department to acquire more than a general understanding of the differences between the Departments' cost estimates and the commenters' cost estimates. Accordingly, the Departments continue to believe that there is considerable uncertainty arising from general data limitations and the degree to which economies of scale are achievable.

Even if the Departments were to utilize the regulated community survey, or other commenters' cost estimates, it would be necessary for the Departments to discount those projected costs to account for policy changes in these final regulations. Particularly, these final regulations now omit premium or cost of coverage information from SBCs, provide for only two coverage examples, and allow greater flexibility for electronic disclosures prior to enrollment in coverage.

6. Regulatory Alternatives

Several provisions in these final regulations involved policy choices. A first policy choice involved the applicability date of these final regulations. The Departments received many comments indicating that the proposed March 23, 2012 applicability date was not practical for compliance. Accordingly, in these final regulations, the Departments are delaying the applicability of these provisions by six months to provide plans and issuers additional time to comply. As discussed elsewhere in this preamble, for disclosures to plans, and to individuals and dependents in the individual market, these final regulations apply to health insurance issuers beginning September 23, 2012. Similarly, for the group market, for disclosures with respect to participants and beneficiaries who enroll or re-enroll through an open enrollment period (including re-enrollees and late enrollees), these final regulations apply beginning on the first day of the first open enrollment period that begins on or after September 23, 2012. For disclosures with respect to participants and beneficiaries who enroll other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), these final regulations apply on the first day of the first plan year that begins on or after September 23, 2012. This approach to implementation should lessen administrative burden on the regulated community.

A second policy choice involved whether to include premium or cost of coverage information in the SBC. The Departments received many comments that expressed concerns about the complexity of conveying such information in both the individual and group markets. As noted above in the preamble to these final regulations, the Departments believe that premium information can be more efficiently and effectively provided in documentation other than the SBC. Therefore, the Departments are not requiring plans and issuers to include premium or cost of coverage information in the SBC. Accordingly, this policy choice should also lessen administrative burden on the regulated community.

A third policy choice involved the number of coverage examples that plans issuers must provide in the SBC. The Departments received a number of comments about the potential cost and burden associated with providing coverage examples. To address these concerns, the guidance document published elsewhere in this issue of the Bulletin clarifies that for the first year of applicability, the SBC will include only two coverage examples — having a baby (normal delivery) and routine maintenance of well-controlled type 2 diabetes. Additional coverage examples will be added in later years. This policy choice should also lessen administrative burden on the regulated community.

A fourth policy choice involved determining how to minimize the burden of providing the SBC to individuals shopping for health insurance coverage. The Departments recognize it may be difficult for issuers to provide accurate information about the terms of coverage prior to underwriting. Accordingly, these final regulations provide that if individual health insurance issuers provide the information required by these final regulations and as specified in guidance published by the Secretary to the HHS Secretary's Web portal (*HealthCare.gov*), as established by 45 CFR 159.120, then they will be deemed to have satisfied the requirement to provide an SBC to individuals who request summary information about coverage prior to submitting an application. The Departments determined this approach promotes regulatory efficiency, minimizing the administrative burden on health insurance issuers without significantly lessening the protections under PHS Act section 2715.

A fifth policy choice related to electronic distribution of SBCs. The Departments received comments about the electronic transmission of SBCs to participants and beneficiaries in the group market. Specifically, some comments requested that plans and issuers be permitted to provide SBCs to participants and beneficiaries in a manner other than those set forth by the Department of Labor's electronic disclosure safe harbor requirements at 29 CFR 2520.104b–1(c). These final regulations retain the proposed requirements, but make a distinction between a participant or beneficiary who is already covered under the group health plan, and a participant or beneficiary who is eligible for coverage but not enrolled in a group health plan. This distinction should provide new flexibility in some circumstances, while also ensuring adequate consumer protections where necessary, and will help reduce the burden of providing the SBC to participants and beneficiaries prior to enrollment.

A sixth policy choice related to whether, in the case of covered individuals residing at the same address, one SBC would satisfy the disclosure requirement with respect to all such individuals, or

whether multiple SBCs would be required to be provided. Under these final regulations, a single SBC may be provided to a family unless any individuals are known to reside at a different address. Separate SBCs will therefore need to be provided only in limited circumstances.

A seventh policy choice related to how many SBCs a participant or beneficiary would automatically receive from a group health plan at renewal. The final regulations would further limit burden by requiring a plan or issuer to provide, at renewal, a new SBC for only the benefit package in which a participant or beneficiary is enrolled. That is, if the plan offers multiple benefits packages, an SBC is not required for each benefit package offered under the group health plan, which the Departments believe would otherwise create an undue burden during open season. Participants and beneficiaries would be able to receive upon request an SBC for any benefits package for which they are eligible. The Departments believe this balanced approach addresses the needs of plans, issuers, and consumers, at renewal.

An eighth policy choice related to the interpretation of the PHS Act section 2715(d)(4), which requires notice of any material modification in any of the terms of the plan or coverage that is not reflected in the most recently provided SBC. The Departments note that a material modification, within the meaning of section 102 of ERISA and its implementing regulations at 29 CFR 2520.104b–3, is broadly defined to include any modification to the coverage offered under the plan or policy, that independently, or in conjunction with other contemporaneous modifications or changes, would be considered by the average plan participant to be an important change in covered benefits or other terms of coverage under the plan or policy. The final regulations interpret this provision as requiring notice only for a material modification that would affect the content of the SBC; that is not reflected in the most recently provided SBC; and that occurs other than in connection with renewal or reissuance of coverage (that is, a mid-plan or -policy year change). This approach is consistent with the language of PHS Act section 2715(d)(4) and is more narrowly focused on what we interpret to be the purpose of that provision.

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

The Regulatory Flexibility Act (RFA) requires agencies that issue a regulation to analyze options for regulatory relief of small businesses if a final rule has a significant impact on a substantial number of small entities. The RFA generally defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a nonprofit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000. (States and individuals are not included in the definition of "small entity.") The Departments use as their measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 to 5 percent.

As discussed in the Web Portal interim final rule (75 FR 24481), HHS examined the health insurance industry in depth in the Regulatory Impact Analysis that HHS prepared for the final rule on establishment of the Medicare Advantage program (69 FR 46866, August 3, 2004). In that analysis, HHS determined that there were few if any insurance firms underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) that fell below the size thresholds for "small" business established by the SBA. Currently, the SBA size threshold is $7 million in annual receipts for both health insurers (North American Industry Classification System, or NAICS, Code 524114) and TPAs (NAICS Code 524292).

Additionally, as discussed in the Medical Loss Ratio interim final rule (75 FR 74918), HHS used a data set created from 2009 National Association of Insurance Commissioners (NAIC) Health and Life Blank annual financial statement data to develop an updated estimate of the number of small entities that offer comprehensive major medical coverage in the individual and group markets. For purposes of that analysis, HHS used total Accident and Health (A&H) earned premiums as a proxy for annual receipts. HHS estimated that there were 28 small entities with less than $7 million in A&H earned premiums offering individual or group comprehensive major medical coverage; however, this estimate may overstate the actual number of small health insurance issuers offering such coverage, since it does not include receipts from these companies' other lines of business. These 28 small entities represent about 6.4 percent of the approximately 440 health insurers that are accounted for in this RIA. Based on this calculation, the Departments assume that there are an equal percentage of TPAs that are small entities. That is, 48 small entities represent about 6.4 percent of the approximately 750 TPAs that are accounted for in this RIA.

The Departments estimate that issuers and TPAs earning less than $50 million in annual premium revenue, including the 76 small entities mentioned above, would incur costs of approximately $33,000 and $10,000 per issuer/TPA in 2012 and 2013, respectively. Numbers of this magnitude do not approach the amounts necessary to be considered a "significant economic impact" on firms with revenues in the order of millions of dollars. Additionally, as discussed earlier, the Departments believe that these estimates overstate the number of small entities that will be affected by the requirements in this final regulation, as well as the relative impact of these requirements on these entities, because the Departments have based their analysis on the affected entities' total A&H earned premiums (rather than their total annual receipts). Accordingly, the Departments have determined and certify that these final regulations will not have a significant economic impact on a substantial number of small entities, and that a regulatory flexibility analysis is not required.

C. Special Analyses—Department of the Treasury

For purposes of the Department of the Treasury it has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these final regulations. It is hereby certified that the collections of information contained in this Treasury decision will not have a significant impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act

(5 U.S.C. chapter 6) is not required. Section 54.9815–2715 of the final regulations requires both group health insurance issuers and group health plans to distribute an SBC and notice of any material modifications to the plan that affect the information required in the SBC. Under these final regulations, if a health insurance issuer satisfies the obligations to distribute an SBC and a notice of modifications, those obligations are satisfied not just for the issuer but also for the group health plan. For group health plans maintained by small entities, it is anticipated that the health insurance issuer will satisfy these obligations for both the plan and the issuer in almost all cases. For this reason, these information collection requirements will not impose a significant impact on a substantial number of small entities. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

D. Unfunded Mandates Reform Act—Department of Labor and Department of Health and Human Services

Section 202 of the Unfunded Mandates Reform Act (UMRA) of 1995 that agencies assess anticipated costs and benefits before issuing any final rule that includes a Federal mandate that could result in expenditure in any one year by State, local or Tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars updated annually for inflation. In 2011, that threshold level is approximately $136 million. These final regulations include no mandates on State, local, or Tribal governments. These final regulations include directions to produce standardized consumer disclosures that will affect private sector firms (for example, health insurance issuers offering coverage in the individual and group markets, and third-party administrators providing administrative services to group health plans), but we conclude that these costs will not exceed the $136 million threshold. Thus, we conclude that these final regulations do not impose an unfunded mandate on State, local or Tribal governments or the private sector. Regardless, consistent with policy embodied in UMRA, this notice of final rulemaking has been designed to be the least burdensome alternative for State, local and Tribal governments, and the private sector while achieving the objectives of the Affordable Care Act.

E. Paperwork Reduction Act

1. Department of Labor and Department of the Treasury

Section 2715 of the PHS Act directs the Departments, in consultation with the National Association of Insurance Commissioners (NAIC) and a working group comprised of stakeholders, to "develop standards for use by a group health plan and a health insurance issuer in compiling and providing to applicants, enrollees, and policyholders and certificate holders a summary of benefits and coverage explanation that accurately describes the benefits and coverage under the applicable plan or coverage." For disclosures to plans, and to individuals and dependents in the individual market, these final regulations apply to health insurance issuers beginning September 23, 2012. Similarly, for the group market, for disclosures with respect to participants and beneficiaries who enroll or re-enroll through an open enrollment period (including re-enrollees and late enrollees), these final regulations apply beginning on the first day of the first open enrollment period that begins on or after September 23, 2012. For disclosures with respect to participants and beneficiaries who enroll other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), these final regulations apply on the first day of the first plan year that begins on or after September 23, 2012.

To implement this provision, collection of information requirements relate to the provision of the following:

- Summary of benefits and coverage.
- Coverage examples (as components of each SBC).
- A uniform glossary of health coverage and medical terms (uniform glossary).
- Notice of modifications.

A copy of the ICR may be obtained by contacting the PRA addressee: G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW, Room N–5718, Washington, DC 20210. Telephone: (202) 693–8410; Fax: (202) 219–4745. These are not toll-free numbers. E-mail: *ebsa.opr@dol.gov*. ICRs submitted to OMB also are available at *reginfo.gov* (*http://www.reginfo.gov/public/do/PRAMain*).

The Departments estimate 858 respondents each year from 2012–2013. This estimate reflects approximately 220 issuers offering comprehensive major medical coverage in the small and large group markets, and approximately 638 third-party administrators (TPAs).[63]

To account for variation in firm size, the Departments estimate a weighted burden on the basis of issuer's 2009 total earned premiums for comprehensive major medical coverage.[64] The Departments define small issuers as those with total earned premiums less than $50 million; medium issuers as those with total earned premiums between $50 million and $999 million; and large issuers as those with total earned premiums of $1 billion or more. Accordingly, the Departments estimate approximately 70 small, 115 medium, and 35 large issuers. Similarly, the Departments estimate approximately 204 small, 332 medium, and 102 large TPAs.

2012 Burden Estimate

In 2012, the Departments estimate a one-time administrative burden of about 620,000 hours with an equivalent cost of about $34,000,000 across the industry to prepare for the provisions of these final regulations. This calculation is made assuming issuers and TPAs will need to im-

[63] The Departments estimate that there are 440 issuers and 750 TPAs. Because the Department of Labor and the Department of the Treasury share the hour and cost burden for issuers and TPAs with the Department of Health and Human Services, the burden to produce the SBCs including Coverage Examples for group health plans is calculated using half the number of issuers (220) and 85 percent of the TPAs (638). While the group health plans could prepare their own SBCs, the Departments assume that SBCs would be prepared by service providers, *i.e.*, issuers and TPAs.

[64] The premium revenue data come from the 2009 NAIC financial statements, also known as "Blanks," where insurers report information about their various lines of business

plement two principal tasks: (1) develop teams to analyze current workflow processes against the new rules and (2) make appropriate changes to IT systems and processes.

With respect to task (1), the Departments estimate about 88,000 burden hours with an equivalent cost of about $4,500,000. The Departments calculate these estimates as follows:[65]

Task 1: Analyze current workflow and new rules

	Hourly Wage Rate	Small Issuer / TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent Cost	Hours	Equivalent Cost	Hours	Equivalent Cost
IT Professionals	$54.52	32	$1,800	49	$2,600	65	$3,500
Benefits/Sales Professionals	$43.76	36	$1,600	54	$2,400	72	$3,200
Attorneys	$86.86	4	$310	5	$500	7	$630
Total per issuer/TPA		72	$3,700	108	$5,500	144	$7,300
Total for all issuers/TPAs		20,000	$1,000,000	48,000	$2,500,000	20,000	$1,000,000

With respect to task (2), the Departments estimate about 530,000 burden hours with an equivalent cost of about $29,000,000. The Departments calculate these estimates as follows:

Task 2: IT Changes

	Hourly Wage Rate	Small Issuer / TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent Cost	Hours	Equivalent Cost	Hours	Equivalent Cost
IT Professionals	$54.52	432	$24,000	648	$35,000	864	$47,000
Total per issuer/TPA		432	$24,000	648	$35,000	864	$47,000
Total for all issuers/TPAs		120,000	$6,600,000	290,000	$16,000,000	120,000	$6,400,000

In addition to the one-time administrative costs mentioned above, the Departments assume that plans and issuers will incur additional administrative burden. With regard to this administrative burden, the estimated hour and cost burden for the collections of information in 2012 are as follows:

- The Departments estimate that there will be about 77,000,000 SBCs.
- The Departments assume 50 percent of the total number of SBCs would be sent electronically prior to enrollment, and 38 percent would be sent electronically after enrollment, in the small and large group markets. Accordingly, the Departments estimate that about 31,000,000 SBCs would be electronically distributed, and about 46,000,000 SBCs would be distributed in paper form. The Departments assume there are costs only for paper disclosures, but no costs for electronic disclosures.

Task 3: SBCs — The estimated hour burden for preparing the SBCs is about 780,000 hours with an equivalent cost of about $24,000,000, and a cost burden of about $5,500,000. The Departments calculate these estimates as follows:

[65] For the purposes of these and other estimates in this section IV.E, the Departments again use the assumptions outlined above in section IV.A.5.

Task 3: Equivalent Costs for Producing SBCs (Except Coverage Examples)

	Hourly Wage Rate	Small Issuer / TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent Cost	Hours	Equivalent Cost	Hours	Equivalent Cost
IT Professionals	$54.52	1.5	$82	1.5	$82	1.5	$82
Benefits/Sales Professionals	$43.76	1.5	$66	1.5	$66	1.5	$66
Financial Managers	$78.50	0.5	$39	0.5	$39	0.5	$39
Attorneys	$86.86	0.5	$43	0.5	$43	0.5	$43
Total per issuer/TPA		4	$230	4	$230	4	$230
Total for all issuers/TPAs		1,100	$63,000	1,800	$100,000	500	$32,000

Task 3: Equivalent Costs for Distributing SBCs

	Hourly Wage Rate	Hours per SBC	Total Number of SBCs	Total Hours	Total Equivalent Cost
Clerical Staff	$30.78	0.017	46,000,000	780,000	$24,000,000

Task 3: Cost Burden for Printing SBCs

	Cost per SBC	Total Number of SBCs	Total Cost Burden
Printing Costs	$0.12	46,000,000	$5,500,000

Task 4: Two Coverage Examples — The estimated hour burden for producing and printing coverage examples is about 69,000 hours with an equivalent cost of about $4 million, and a cost burden of about $2,800,000. The Departments calculate these estimates as follows:

Task 4: Equivalent Costs for Producing Coverage Examples

	Hourly Wage Rate	Small Issuer / TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent Cost	Hours	Equivalent Cost	Hours	Equivalent Cost
IT Professionals	$54.52	30	$1,640	30	$1,640	30	$1,640
Benefits/Sales Professionals	$43.76	30	$1,310	30	$1,310	30	$1,310
Financial Managers	$78.50	10	$780	10	$780	10	$780
Attorneys	$86.86	10	$870	10	$870	10	$870
Total per issuer/TPA		80	$4,600	80	$4,600	80	$4,600
Total for all issuers/TPAs		21,900	$1,260,000	36,000	$2,100,000	11,000	$630,000

Task 4: Cost Burden for Printing Coverage Examples

	Printing Cost Per CE Set	Total CE Sets Printed	Total Cost Burden
Printing Costs	$0.06	46,000,000	$2,800,000

Task 5: Glossary Requests —The Departments assume that, in 2012, issuers and TPAs will begin responding to glossary requests from covered individuals, and that 2.5 percent of covered individuals, who receive paper SBCs, will request glossaries in paper form. The Departments estimate that the hour and cost burden of providing the notices to be 2.5 percent of the hour and cost burden of distributing paper SBCs, plus an additional cost burden of $0.50 for each glossary (including $0.45 for first-class postage and $0.05 for supply costs). Accordingly, in 2012, the Departments estimate an hour burden of about 24,000 hours with an equivalent cost of about $740,000 and a cost burden of about $740,000 associated with about 1,200,000 glossary requests.

The total 2012 burden estimate is about 1,500,000 hours with an equivalent cost of about $63,000,000 and cost burden of about $9,000,000.

2013 Burden Estimate

Task 1: SBCs — The number of disclosures is assumed to remain constant at about 77,000,000. Accordingly, in 2013, the Departments again estimate a burden of about 780,000 hours with an equivalent cost of about $5,500,000 and a cost burden of about $24,000,000 for preparing and distributing SBCs.

Task 2: Two Coverage Examples — The Departments again estimate about 69,000 hours with an equivalent cost of about $4,000,000 and a cost burden of about $2,800,000 for producing and printing coverage examples.

Task 3: Notices of Modifications — The Departments assume that, in 2013, issuers and TPAs would send notices of modifications to covered individuals, and that two percent of covered individuals would receive such notice. The Departments estimate that the hour and cost burden of providing the notices to be two percent of the combined hour and cost burden of providing the SBCs including the coverage examples, plus an additional cost burden of $0.50 for each paper notice (including $0.45 for first-class postage and $0.05 for supply costs). Accordingly, in 2013, the Departments estimate an hour burden of about 17,000 hours with an equivalent cost of $570,000 and a cost burden of about $630,000 associated with preparing and distributing about 1,500,000 notices of modification.

Task 4: Glossary Requests — The Departments assume that, in 2013, issuers and TPAs will again respond to glossary requests from covered individuals, and that five percent of covered individuals, who receive paper SBCs, will request glossaries in paper form. The Departments estimate that the burden and cost of providing the glossaries to be five percent of the hour and cost burden of distributing paper SBCs, plus an additional cost burden for $0.50 for each glossary (including $0.45 for first-class postage and $0.05 for supply costs). Accordingly, in 2013, the Departments estimate an hour burden of about 39,000 hours with an equivalent cost of about $1,200,000 and a cost burden of about $1,400,000 associated with 2,300,000 glossary requests.

Task 5: Maintenance Administrative Costs — In 2013, the Departments assume that issuers and TPAs will need to make updates to address changes in standards, and, thus, incur 15 percent of the one-time administrative burden. Accordingly, the estimated hour burden is about 93,000 hours, with an equivalent cost of about $4,800,000. The Departments calculate these estimates as follows:

	Hourly Wage Rate	Small Issuer / TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent Cost	Hours	Equivalent Cost	Hours	Equivalent Cost
IT Professionals	$54.52	42	$2,300	62	$3,400	83	$4,500
Benefits/Sales Professionals	$43.76	30	$1,300	45	$2,000	60	$2,600
Attorneys	$86.86	4	$350	6	$520	8	$690
Total per issuer/TPA		76	$4,000	113	$5,900	151	$7,800
Total for all issuers/TPAs		21,000	$1,100,000	51,000	$2,600,000	21,000	$1,100,000

The total 2013 burden estimate is about 1,000,000 hours with an equivalent cost of nearly $35,000,000 and a cost burden of $10,000,000.

Estimates are not provided for subsequent years, because there will be signifi-

cant changes in the marketplace in 2014, including those related to the offering of new individual and small group plans through the Affordable Insurance Exchanges, and new market reforms outside of the new Exchanges, and the wide-ranging scope of these changes makes it difficult to project results for 2014 and beyond.

The Departments note that persons are not required to respond to, and generally are not subject to any penalty for failing to comply with, an ICR unless the ICR has a valid OMB control number.

The 2012–2013 paperwork burden estimates are summarized as follows:

Type of Review: New collection.

Agencies: Employee Benefits Security Administration, Department of Labor; Internal Revenue Service, U.S. Department of the Treasury.

Title: Affordable Care Act Uniform Explanation of Coverage Documents

OMB Number: 1210–0147; 1545–2229.

Affected Public: Business or other for profit; not-for-profit institutions.

Total Respondents: 858.

Total Responses: 79,500,000.

Frequency of Response: On-going.

Estimated Total Annual Burden Hours (two year average): 620,000 hours (Employee Benefits Security Administration); 620,000 hours (Internal Revenue Service).

Estimated Total Annual Cost Burden (two year average): $4,800,000 (Employee Benefits Security Administration); $4,800,000 (Internal Revenue Service).

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2. Department of Health and Human Services

ICRs Related to the Summary of Benefits and Uniform Glossary (45 CFR 147.200)

The Department estimates 333 respondents each year from 2012–2013. This estimate reflects the approximately 220 issuers offering comprehensive major medical coverage in the individual market and to fully-insured non-federal governmental plans, and 113 TPAs acting as service providers for self-insured non-federal governmental plans.[66]

To account for variation in firm size, the Department estimates a weighted burden on the basis of issuers' 2009 total earned premiums for comprehensive major medical coverage.[67] The Department defines small issuers as those with total earned premiums less than $50 million; medium issuers as those with total earned premiums between $50 million and $999 million; and large issuers as those with total earned premiums of $1 billion or more. Accordingly, the Department estimates approximately 70 small, 115 medium, and 35 large issuers. Similarly, the Department estimates approximately 36 small, 59 medium, and 18 large TPAs.

2012 Burden Estimate

In 2012, the Department estimates a one-time administrative burden of about 230,000 hours with an equivalent cost of about $13,000,000 across the industry to prepare for the provisions of these final regulations. This calculation is made assuming issuers and TPAs will need to implement two principal tasks: (1) develop teams to analyze current workflow processes against the new standards and (2) make appropriate changes to IT systems and processes.

With respect to task (1), the Department estimates about 34,000 burden hours with an equivalent cost of about $1,800,000. The Department calculates these estimates as follows:[68]

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[66] The Department estimates that there are 440 issuers and 750 TPAs. Because the Department shares the hour and cost burden for issuers with the Department of Labor and the Department of the Treasury, the burden to produce the SBCs including coverage examples for non-federal governmental plans and issuers in the individual market is calculated using half the number of issuers (221) and 15% of TPAs (113). While non-federal governmental plans could prepare their own SBCs, the Department assumes that SBCs would be prepared by service providers, *i.e.*, issuers and TPAs.

[67] The premium revenue data come from the 2009 NAIC financial statements, also known as "Blanks," where insurers report information about their various lines of business

[68] For the purposes of these and other estimates in this section IV.E, the Department again use the assumptions outlined above in section IV.A.5.

Task 1: Analyze Current Workflow and New Rules

	Hourly Wage Rate	Small Issuer / TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent Cost	Hours	Equivalent Cost	Hours	Equivalent Cost
IT Professionals	$54.52	32	$1,800	49	$2,600	65	$3,500
Benefits/Sales Professionals	$43.76	36	$1,600	54	$2,400	72	$3,200
Attorneys	$86.86	4	$310	5	$500	7	$600
Total per issuer/TPA		72	$3,700	108	$6,000	144	$7,000
Total for all issuers/TPAs		7,600	$390,000	19,000	$1,000,000	7,600	$370,000

With respect to task (2), the Department estimates about 200,000 burden hours with an equivalent cost of about $11,000,000. The Department calculates these estimates as follows:

Task 2: IT Changes

	Hourly Wage Rate	Small Issuer / TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent Cost	Hours	Equivalent Cost	Hours	Equivalent Cost
IT Professionals	$54.52	432	$24,000	648	$35,000	864	$50,000
Total per issuer/TPA		432	$24,000	648	$35,000	864	$50,000
Total for all issuers/TPAs		46,000	$2,500,000	110,000	$6,100,000	46,000	$2,700,000

In addition to the one-time administrative costs mentioned above, the Department assumes that plans and issuers will incur additional administrative burden. With regard to this administrative burden, the estimated hour and cost burden for the collections of information in 2012 are as follows:

- The Department estimates that there will be about 13,000,000 SBCs.
- The Department assumes 50 percent of the total number of SBCs would be sent electronically prior to enrollment, and 38 percent would be sent electronically after enrollment, in the small and large group markets. The Department further assumes 70 percent of SBCs would be sent electronically in the individual market. Accordingly, the Department estimates that about 7,100,000 disclosures would be electronically distributed, and about 6,200,000 disclosures would be distributed in paper form. The Department assumes there are costs only for paper disclosures, but no costs for electronic disclosures

Task 3: SBCs — The estimated hour burden is about 130,000 hours with an equivalent cost of about $4,200,000, and a cost burden of about $740,000. The Department calculates these estimates as follows:

Task 3: Equivalent Costs for Producing SBCs (Except Coverage Examples)

	Hourly Wage Rate	Small Issuer / TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent Cost	Hours	Equivalent Cost	Hours	Equivalent Cost
IT Professionals	$54.52	1.5	$82	1.5	$82	1.5	$82
Benefits/Sales Professionals	$43.76	1.5	$66	1.5	$66	1.5	$66
Financial Managers	$78.50	0.5	$39	0.5	$39	0.5	$39
Attorneys	$86.86	0.5	$43	0.5	$43	0.5	$43
Total per issuer		4	$230	4	$230	4	$230
Total for all issuers		420	$24,000	700	$40,000	210	$12,000

Task 3: Equivalent Costs for Distributing SBCs (Including Coverage Examples)

	Hourly Wage Rate	Hours per SBC	Total Number of SBCs	Total Hours	Total Equivalent Cost
Clerical Staff, Individual Market	$30.78	0.033	1,700,000	56,000	$1,700,000
Clerical, Group Market	$30.78	0.017	4,500,000	77,000	$2,400,000
Total			6,200,000	130,000	$4,100,000

Task 3: Cost Burden for Printing SBCs (Except Coverage Examples)

	Cost per SBC	Total SBCs	Cost Burden
Printing Costs	$0.12	6,200,000	$740,000

Task 4: Two Coverage Examples — The estimated hour burden for producing and printing coverage examples is about 27,000 hours with an equivalent cost of about $1,500,000, and a cost burden of about $370,000. The Department calculates these estimates as follows:

Task 4: Equivalent Costs for Producing Coverage Examples

	Hourly Wage Rate	Small Issuer / TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent Cost	Hours	Equivalent Cost	Hours	Equivalent Cost
IT Professionals	$54.52	30	$1,640	30	$1,640	30	$1,640
Benefits/Sales Professionals	$43.76	30	$1,310	30	$1,310	30	$1,310
Financial Managers	$78.50	10	$780	10	$780	10	$780
Attorneys	$86.86	10	$870	10	$870	10	$870
Total per issuer/TPA		80	$4,600	80	$4,600	80	$4,600
Total for all issuers/TPAs		8,500	$490,000	14,000	$800,000	4,200	$240,000

Task 4: Cost Burden for Printing Coverage Examples

	Printing Cost Per CE Set	Total CE Sets Printed	Total Cost Burden
Printing Costs	$0.06	6,200,000	$370,000

Task 5: Glossary Requests — The Department assumes that, in 2012, issuers and TPAs will begin responding to glossary requests from covered individuals, and that 2.5 percent of covered individuals, who receive paper SBCs, will request glossaries in paper form. The Department assumes that the hour and cost burden of providing the glossaries to be 2.5 percent of the hour and cost burden of distributing paper SBCs, plus an additional cost burden of $0.50 for each glossary (including $0.45 for first-class postage and $0.05 for supply costs). Accordingly, in 2012, the Department estimates an hour burden of about 2,700 hours with an equivalent cost of about $82,000 and a cost burden of about $99,000 associated with about 160,000 glossary requests.

The total 2012 burden estimate is about 390,000 hours, or 1,200 hours per respondent, with an equivalent cost of about $19,000,000, or $57,000 per respondent, and cost burden of about $1,200,000, or $3,600 per respondent.

2013 Burden Estimate

Task 1: SBCs — The number of disclosures is assumed to remain constant at 13,000,000. Thus, in 2013, the Department again estimates an hour burden of about 130,000 hours with an equivalent cost of about $4,200,000 and cost burden of about $740,000.

Task 2: Two Coverage Examples — The Department again estimates an hour burden of about 27,000 hours with an equivalent cost of about $1,500,000 and cost burden of about $370,000 for producing and printing coverage examples.

Task 3: Notices of Modifications — The Department assumes that, in 2013, issuers will begin sending notices of modifications to covered individuals, and that two percent of covered individuals would receive such notice. The Department estimates that the hour and cost burden of providing the notices to be two percent of the combined hour and cost burden of providing the SBCs including the coverage examples, plus an additional cost burden of $0.50 for each paper notice (including $0.45 for first-class postage and $0.05 for supply costs). Accordingly, in 2013, the Department estimates an hour burden of about 3,100 hours with an equivalent cost of about $118,000 and a cost burden of about $22,000 associated with about 260,000 notices of modification.

Task 4: Glossary Requests — The Department assumes that, in 2013, issuers and TPAs will again respond to glossary requests from covered individuals, and that five percent of covered individuals, who receive paper SBCs, will request glossaries in paper form. The Department estimates that the hour and cost burden of providing the glossaries to be 5 percent of the hour and cost burden of distributing paper SBCs, plus an additional cost burden of $0.50 for each glossary (including $0.45 for first-class postage and $0.05 for supply costs). Accordingly, in 2013, the Department estimates an hour burden of about 5,300 hours with an equivalent cost of $160,000 and a cost burden of about $190,000 associated with 310,000 glossary requests.

Task 5: Maintenance Administrative Costs — In 2013, the Department assumes that issuers and TPAs will need to make updates to address changes in standards, and, thus, incur 15 percent of the one-time administrative burden. Accordingly, the estimated hour burden is about 36,000 hours with an equivalent cost of about $1,800,000. The Department calculates these estimates as follows:

	Hourly Wage Rate	Small Issuer / TPA		Medium Issuer/TPA		Large Issuer/TPA	
		Hours	Equivalent Cost	Hours	Equivalent Cost	Hours	Equivalent Cost
IT Professionals	$54.52	42	$2,300	62	$3,400	83	$4,500
Benefits/Sales Professionals	$43.76	30	$1,300	45	$2,000	60	$2,600
Attorneys	$86.86	4	$350	6	$520	8	$690
Total per issuer/TPA		76	$4,000	113	$5,900	151	$7,800
Total for all issuers/TPAs		8,100	$420,000	20,000	$1,000,000	8,000	$410,000

The total 2013 burden estimate is about 200,000 hours, or about 600 hours per respondent, with an equivalent cost of about $7,800,000, or $23,000 per respondent, and cost burden of about $1,400,000, or $4,200 per respondent.

Estimates are not provided for subsequent years, because there will be significant changes in the marketplace in 2014, including those related to the offering of new individual and small group plans through the Affordable Insurance Exchanges, and new market reforms outside of the new Exchanges, and the wide-ranging scope of these changes makes it difficult to project results for 2014 and beyond.

The Department notes that persons are not required to respond to, and generally are not subject to any penalty for failing to comply with, an ICR unless the ICR has a valid OMB control number.

The 2012–2013 paperwork burden estimates are summarized as follows:

Type of Review: New collection (Request for a new OMB Control Number).

Agency: Department of Health and Human Services.

Title: Affordable Care Act Uniform Explanation of Coverage Documents

CMS Identifier (OMB Control Number): CMS–10407 (0938–1146).

Affected Public: Business; State, Local, or Tribal Governments.

Total Respondents: 333.

Total Responses: 13,000,000.

Frequency of Response: On-going.

Estimated Total Annual Burden Hours (two year average): 300,000 hours.

Estimated Total Annual Cost Burden (two year average): $1,300,000.

ICRs Related to Deemed Compliance Reporting (45 CFR 147.200(a)(4)(iii)(C))

Under 45 CFR 147.200(a)(4)(iii)(C), if individual health insurance issuers provide information required by these final regulations to the HHS Secretary's Web portal (*HealthCare.gov*), as established by 45 CFR 159.120, then they will be deemed to have satisfied the requirement to provide an SBC to individuals who request information about coverage prior to submitting an application for coverage. Individual health insurance issuers already provide most SBC content elements to *HealthCare.gov*, except for five data elements related to patient responsibility for each coverage example: deductibles, co-payments, co-insurance, limits or exclusions, and the total of all four cost-sharing amounts.

Accordingly, the additional burden associated with the requirements under §147.200(a)(4)(iii)(C) is the time and effort it would take each of the 220 issuers in the individual market to enter the five additional data elements into an Excel spreadsheet. We estimate that it will take these issuers about 110 hours, at a total estimated cost of about $3,300, for each coverage example. For two coverage examples, the burden and cost would be about 220 hours at a cost of about $6,600.

In deriving these figures, we used the following hourly labor rates and estimated the time to complete each task: $ 30.78/hr and 0.5 hr/issuer for clerical staff to enter data into an Excel spreadsheet, or about $15 per respondent per coverage example.

This information collection requirement reflects the clarification in these final regulations that issuers must provide all content required in the SBC, including the information necessary for coverage examples, to *Healthcare.gov* to be deemed compliant. The aforementioned burden estimates will be submitted for OMB review and approval as a revision to the information collection request currently approved under OMB control number 0938–1086.

To obtain copies of the supporting statement and any related forms for the final paperwork collections referenced above, access CMS' Web site at *http://www.cms.gov/PaperworkReductionActof1995/PRAL/list.asp#TopOfPage* or email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office at 410–786–1326.

F. Federalism Statement—Department of Labor and Department of Health and Human Services

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

In the Departments' view, these final rules have federalism implications, because it would have direct effects on the States, the relationship between national governments and States, or on the distribution of power and responsibilities among various levels of government relating to the disclosure of health insurance coverage information to consumers. Under these final rules, all group health plans and health insurance issuers offering group or individual health insurance coverage, including self-funded non-federal governmental plans as defined in section 2791 of the PHS Act, would be required to follow uniform standards for compiling and providing a summary of benefits and coverage to consumers. Such Federal standards developed under PHS Act section 2715(a) would preempt any related State standards that require a summary of benefits and coverage that provides less information to

consumers than that required to be provided under PHS Act section 2715(a).

In general, through section 514, ERISA supersedes State laws to the extent that they relate to any covered employee benefit plan, and preserves State laws that regulate insurance, banking, or securities. While ERISA prohibits States from regulating a plan as an insurance or investment company or bank, the preemption provisions of section 731 of ERISA and section 2724 of the PHS Act (implemented in 29 CFR 2590.731(a) and 45 CFR 146.143(a)) apply so that the HIPAA requirements (including those of the Affordable Care Act) are not to be "construed to supersede any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group health insurance coverage except to the extent that such standard or requirement prevents the application of a requirement" of a Federal standard. The conference report accompanying HIPAA indicates that this is intended to be the "narrowest" preemption of State laws (See House Conf. Rep. No. 104–736, at 205, reprinted in 1996 U.S. Code Cong. & Admin. News 2018). States may continue to apply State law requirements except to the extent that such requirements prevent the application of the Affordable Care Act requirements that are the subject of this rulemaking. Accordingly, States have significant latitude to impose requirements on health insurance issuers that are more restrictive than the Federal law. However, under these final rules, a State would not be allowed to impose a requirement that modifies the summary of benefits and coverage required to be provided under PHS Act section 2715(a), because it would prevent the application of this final rule's uniform disclosure requirement.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, the Departments have engaged in efforts to consult with and work cooperatively with affected States, including consulting with, and attending conferences of, the National Association of Insurance Commissioners and consulting with State insurance officials on an individual basis. It is expected that the Departments will act in a similar fashion in enforcing the Affordable Care Act, including the provisions of section 2715 of the PHS Act. Throughout the process of developing these final regulations, to the extent feasible within the specific preemption provisions of HIPAA as it applies to the Affordable Care Act, the Departments have attempted to balance the States' interests in regulating health insurance issuers, and Congress' intent to provide uniform minimum protections to consumers in every State. By doing so, it is the Departments' view that they have complied with the requirements of Executive Order 13132.

Pursuant to the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to this final rule, the Departments certify that the Employee Benefits Security Administration and the Centers for Medicare & Medicaid Services have complied with the requirements of Executive Order 13132 for the attached final rule in a meaningful and timely manner.

G. Congressional Review Act

This regulation is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), which specifies that before a rule can take effect, the Federal agency promulgating the rule shall submit to each House of the Congress and to the Comptroller General a report containing a copy of the rule along with other specified information, and has been transmitted to Congress and the Comptroller General for review.

V. Statutory Authority

The Department of the Treasury regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor regulations are adopted pursuant to the authority contained in 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L.104–191, 110 Stat. 1936; sec. 401(b), Pub. L. 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029; Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

The Department of Health and Human Services regulations are adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 USC 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

Steven T. Miller,
Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Approved February 7, 2012.

Emily S. McMahon,
Acting Assistant Secretary, of the Treasury (Tax Policy).

Signed this *7th* day of *February*, 2012.

Phyllis C. Borzi,
Assistant Secretary,
Employee Benefits Security Administration,
Department of Labor.

CMS–9982–F

Dated: February 6, 2012.

Marilyn Tavenner,
Acting Administrator,
Centers for Medicare & Medicaid Services.

Dated: February 6, 2012.

Kathleen Sebelius,
Secretary,
Department of Health and Human Services.

CMS–9982–F

BILLING CODE 4120–01–P

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Chapter 1

Accordingly, the Internal Revenue Service amends 26 CFR Parts 54 and 602 as follows:

PART 54—PENSION EXCISE TAXES

Paragraph 1. The authority citation for Part 54 is amended by adding an entry for §54.9815–2715 in numerical order to read in part as follows:

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

Section 54.9815–2715 also issued under 26 U.S.C. 9833.

Par. 2. Section 54.9815–2715 is added to read as follows:

§54.9815–2715 Summary of benefits and coverage and uniform glossary.

(a) *Summary of benefits and coverage*—(1) *In general.* A group health plan (and its administrator as defined in section 3(16)(A) of ERISA), and a health insurance issuer offering group health insurance coverage, is required to provide a written summary of benefits and coverage (SBC) for each benefit package without charge to entities and individuals described in this paragraph (a)(1) in accordance with the rules of this section.

(i) *SBC provided by a group health insurance issuer to a group health plan*—(A) *Upon application.* A health insurance issuer offering group health insurance coverage must provide the SBC to a group health plan (or its sponsor) upon application for health coverage, as soon as practicable following receipt of the application, but in no event later than seven business days following receipt of the application.

(B) *By first day of coverage (if there are changes).* If there is any change in the information required to be in the SBC that was provided upon application and before the first day of coverage, the issuer must update and provide a current SBC to the plan (or its sponsor) no later than the first day of coverage.

(C) *Upon renewal.* If the issuer renews or reissues the policy, certificate, or contract of insurance (for example, for a succeeding policy year), the issuer must provide a new SBC as follows:

(*1*) If written application is required (in either paper or electronic form) for renewal or reissuance, the SBC must be provided no later than the date the written application materials are distributed.

(*2*) If renewal or reissuance is automatic, the SBC must be provided no later than 30 days prior to the first day of the new plan or policy year; however, with respect to an insured plan, if the policy, certificate, or contract of insurance has not been issued or renewed before such 30-day period, the SBC must be provided as soon as practicable but in no event later than seven business days after issuance of the new policy, certificate, or contract of insurance, or the receipt of written confirmation of intent to renew, whichever is earlier.

(D) *Upon request.* If a group health plan (or its sponsor) requests an SBC or summary information about a health insurance product from a health insurance issuer offering group health insurance coverage, an SBC must be provided as soon as practicable, but in no event later than seven business days following receipt of the request.

(ii) *SBC provided by a group health insurance issuer and a group health plan to participants and beneficiaries*—(A) *In general.* A group health plan (including its administrator, as defined under section 3(16) of ERISA), and a health insurance issuer offering group health insurance coverage, must provide an SBC to a participant or beneficiary (as defined under sec-

tions 3(7) and 3(8) of ERISA), and consistent with paragraph (a)(1)(iii) of this section, with respect to each benefit package offered by the plan or issuer for which the participant or beneficiary is eligible.

(B) *Upon application*. The SBC must be provided as part of any written application materials that are distributed by the plan or issuer for enrollment. If the plan or issuer does not distribute written application materials for enrollment, the SBC must be distributed no later than the first date on which the participant is eligible to enroll in coverage for the participant or any beneficiaries.

(C) *By first day of coverage (if there are changes)*. If there is any change to the information required to be in the SBC that was provided upon application and before the first day of coverage, the plan or issuer must update and provide a current SBC to a participant or beneficiary no later than the first day of coverage.

(D) *Special enrollees*. The plan or issuer must provide the SBC to special enrollees (as described in §54.9801–6) no later than the date by which a summary plan description is required to be provided under the timeframe set forth in ERISA section 104(b)(1)(A) and its implementing regulations, which is 90 days from enrollment.

(E) *Upon renewal*. If the plan or issuer requires participants or beneficiaries to renew in order to maintain coverage (for example, for a succeeding plan year), the plan or issuer must provide a new SBC when the coverage is renewed, as follows:

(*1*) If written application is required for renewal (in either paper or electronic form), the SBC must be provided no later than the date on which the written application materials are distributed.

(*2*) If renewal is automatic, the SBC must be provided no later than 30 days prior to the first day of the new plan or policy year; however, with respect to an insured plan, if the policy, certificate, or contract of insurance has not been issued or renewed before such 30-day period, the SBC must be provided as soon as practicable but in no event later than seven business days after issuance of the new policy, certificate, or contract of insurance, or the receipt of written confirmation of intent to renew, whichever is earlier.

(F) *Upon request*. A plan or issuer must provide the SBC to participants or beneficiaries upon request for an SBC or summary information about the health coverage, as soon as practicable, but in no event later than seven business days following receipt of the request.

(iii) *Special rules to prevent unnecessary duplication with respect to group health coverage*—(A) An entity required to provide an SBC under this paragraph (a)(1) with respect to an individual satisfies that requirement if another party provides the SBC, but only to the extent that the SBC is timely and complete in accordance with the other rules of this section. Therefore, for example, in the case of a group health plan funded through an insurance policy, the plan satisfies the requirement to provide an SBC with respect to an individual if the issuer provides a timely and complete SBC to the individual.

(B) If a single SBC is provided to a participant and any beneficiaries at the participant's last known address, then the requirement to provide the SBC to the participant and any beneficiaries is generally satisfied. However, if a beneficiary's last known address is different than the participant's last known address, a separate SBC is required to be provided to the beneficiary at the beneficiary's last known address.

(C) With respect to a group health plan that offers multiple benefit packages, the plan or issuer is required to provide a new SBC automatically upon renewal only with respect to the benefit package in which a participant or beneficiary is enrolled; SBCs are not required to be provided automatically upon renewal with respect to benefit packages in which the participant or beneficiary is not enrolled. However, if a participant or beneficiary requests an SBC with respect to another benefit package (or more than one other benefit package) for which the participant or beneficiary is eligible, the SBC (or SBCs, in the case of a request for SBCs relating to more than one benefit package) must be provided upon request as soon as practicable, but in no event later than seven business days following receipt of the request.

(2) *Content* — (i) *In general*. Subject to paragraph (a)(2)(iii) of this section, the SBC must include the following:

(A) Uniform definitions of standard insurance terms and medical terms so that consumers may compare health coverage and understand the terms of (or exceptions to) their coverage, in accordance with guidance as specified by the Secretary;

(B) A description of the coverage, including cost sharing, for each category of benefits identified by the Secretary in guidance;

(C) The exceptions, reductions, and limitations of the coverage;

(D) The cost-sharing provisions of the coverage, including deductible, coinsurance, and copayment obligations;

(E) The renewability and continuation of coverage provisions;

(F) Coverage examples, in accordance with paragraph (a)(2)(ii) of this section;

(G) With respect to coverage beginning on or after January 1, 2014, a statement about whether the plan or coverage provides minimum essential coverage as defined under section 5000A(f) and whether the plan's or coverage's share of the total allowed costs of benefits provided under the plan or coverage meets applicable requirements;

(H) A statement that the SBC is only a summary and that the plan document, policy, certificate, or contract of insurance should be consulted to determine the governing contractual provisions of the coverage;

(I) Contact information for questions and obtaining a copy of the plan document or the insurance policy, certificate, or contract of insurance (such as a telephone number for customer service and an Internet address for obtaining a copy of the plan document or the insurance policy, certificate, or contract of insurance);

(J) For plans and issuers that maintain one or more networks of providers, an Internet address (or similar contact information) for obtaining a list of network providers;

(K) For plans and issuers that use a formulary in providing prescription drug coverage, an Internet address (or similar contact information) for obtaining information on prescription drug coverage; and

(L) An Internet address for obtaining the uniform glossary, as described in paragraph (c) of this section, as well as a contact phone number to obtain a paper copy of the uniform glossary, and a disclosure that paper copies are available.

(ii) *Coverage examples*. The SBC must include coverage examples specified by the Secretary in guidance that illus-

trate benefits provided under the plan or coverage for common benefits scenarios (including pregnancy and serious or chronic medical conditions) in accordance with this paragraph (a)(2)(ii).

(A) *Number of examples*. The Secretary may identify up to six coverage examples that may be required in an SBC.

(B) *Benefits scenarios*. For purposes of this paragraph (a)(2)(ii), a benefits scenario is a hypothetical situation, consisting of a sample treatment plan for a specified medical condition during a specific period of time, based on recognized clinical practice guidelines as defined by the National Guideline Clearinghouse, Agency for Healthcare Research and Quality. The Secretary will specify, in guidance, the assumptions, including the relevant items and services and reimbursement information, for each claim in the benefits scenario.

(C) *Illustration of benefit provided*. For purposes of this paragraph (a)(2)(ii), to illustrate benefits provided under the plan or coverage for a particular benefits scenario, a plan or issuer simulates claims processing in accordance with guidance issued by the Secretary to generate an estimate of what an individual might expect to pay under the plan, policy, or benefit package. The illustration of benefits provided will take into account any cost sharing, excluded benefits, and other limitations on coverage, as specified by the Secretary in guidance.

(iii) *Coverage provided outside the United States*. In lieu of summarizing coverage for items and services provided outside the United States, a plan or issuer may provide an Internet address (or similar contact information) for obtaining information about benefits and coverage provided outside the United States. In any case, the plan or issuer must provide an SBC in accordance with this section that accurately summarizes benefits and coverage available under the plan or coverage within the United States.

(3) *Appearance*. A group health plan and a health insurance issuer must provide an SBC in the form, and in accordance with the instructions for completing the SBC, that are specified by the Secretary in guidance. The SBC must be presented in a uniform format, use terminology understandable by the average plan enrollee, not exceed four double-sided pages in length, and not include print smaller than 12-point font.

(4) *Form* — (i) An SBC provided by an issuer offering group health insurance coverage to a plan (or its sponsor), may be provided in paper form. Alternatively, the SBC may be provided electronically (such as by email or an Internet posting) if the following three conditions are satisfied —

(A) The format is readily accessible by the plan (or its sponsor);

(B) The SBC is provided in paper form free of charge upon request; and

(C) If the electronic form is an Internet posting, the issuer timely advises the plan (or its sponsor) in paper form or email that the documents are available on the Internet and provides the Internet address.

(ii) An SBC provided by a group health plan or health insurance issuer to a participant or beneficiary may be provided in paper form. Alternatively, the SBC may be provided electronically (such as by email or an Internet posting) if the requirements of this paragraph (a)(4)(ii) are met.

(A) With respect to participants and beneficiaries covered under the plan, the SBC may be provided electronically if the requirements of 29 CFR 2520.104b–1 are met.

(B) With respect to participants and beneficiaries who are eligible but not enrolled for coverage, the SBC may be provided electronically if—

(*1*) The format is readily accessible;

(*2*) The SBC is provided in paper form free of charge upon request; and

(*3*) In a case in which the electronic form is an Internet posting, the plan or issuer timely notifies the individual in paper form (such as a postcard) or email that the documents are available on the Internet, provides the Internet address, and notifies the individual that the documents are available in paper form upon request.

(5) *Language*. A group health plan or health insurance issuer must provide the SBC in a culturally and linguistically appropriate manner. For purposes of this paragraph (a)(5), a plan or issuer is considered to provide the SBC in a culturally and linguistically appropriate manner if the thresholds and standards of §54.9815–2719T(e) are met as applied to the SBC.

(b) *Notice of modification*. If a group health plan, or health insurance issuer offering group health insurance coverage, makes any material modification (as defined under section 102 of ERISA) in any of the terms of the plan or coverage that would affect the content of the SBC, that is not reflected in the most recently provided SBC, and that occurs other than in connection with a renewal or reissuance of coverage, the plan or issuer must provide notice of the modification to enrollees not later than 60 days prior to the date on which the modification will become effective. The notice of modification must be provided in a form that is consistent with paragraph (a)(4) of this section.

(c) *Uniform glossary* — (1) *In general*. A group health plan, and a health insurance issuer offering group health insurance coverage, must make available to participants and beneficiaries the uniform glossary described in paragraph (c)(2) of this section in accordance with the appearance and the form and manner requirements of paragraphs (c)(3) and (4) of this section.

(2) *Health-coverage-related terms and medical terms*. The uniform glossary must provide uniform definitions, specified by the Secretary in guidance, of the following health-coverage-related terms and medical terms:

(i) Allowed amount, appeal, balance billing, co-insurance, complications of pregnancy, co-payment, deductible, durable medical equipment, emergency medical condition, emergency medical transportation, emergency room care, emergency services, excluded services, grievance, habilitation services, health insurance, home health care, hospice services, hospitalization, hospital outpatient care, in-network co-insurance, in-network co-payment, medically necessary, network, non-preferred provider, out-of-network co-insurance, out-of-network co-payment, out-of-pocket limit, physician services, plan, preauthorization, preferred provider, premium, prescription drug coverage, prescription drugs, primary care physician, primary care provider, provider, reconstructive surgery, rehabilitation services, skilled nursing care, specialist, usual customary and reasonable (UCR), and urgent care; and

(ii) Such other terms as the Secretary determines are important to define so that individuals and employers may compare and understand the terms of coverage and medical benefits (including any exceptions to those benefits), as specified in guidance.

(3) *Appearance*. A group health plan, and a health insurance issuer, must provide the uniform glossary with the appearance specified by the Secretary in guidance to ensure the uniform glossary is presented in a uniform format and uses terminology understandable by the average plan enrollee.

(4) *Form and manner*. A plan or issuer must make the uniform glossary described in this paragraph (c) available upon request, in either paper or electronic form (as requested), within seven business days after receipt of the request.

(d) *Preemption*. State laws that require a health insurance issuer to provide an SBC that supplies less information than required under paragraph (a) of this section are preempted.

(e) *Failure to provide*. A group health plan or health insurance issuer that willfully fails to provide information required under this section to a participant or beneficiary is subject to a fine of not more than $1,000 for each such failure. A failure with respect to each participant or beneficiary constitutes a separate offense for purposes of this paragraph (e).

(f) *Effective/Applicability date* — (1) This section is applicable to group health plans and group health insurance issuers in accordance with this paragraph (f). (*See* §54.9815–1251T(d), providing that this section applies to grandfathered health plans.)

(i) For disclosures with respect to participants and beneficiaries who enroll or re-enroll through an open enrollment period (including re-enrollees and late enrollees), this section applies beginning on the first day of the first open enrollment period that begins on or after September 23, 2012; and

(ii) For disclosures with respect to participants and beneficiaries who enroll in coverage other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), this section applies beginning on the first day of the first plan year that begins on or after September 23, 2012.

(2) For disclosures with respect to plans, this section is applicable to health insurance issuers beginning September 23, 2012.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 3. The authority citation for part 602 continues to read in part as follows:

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

Par. 4. Section 602.101(b) is amended by adding the following entry in numerical order to the table to read as follows:

§602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where Identified and described	Current OMB control No.
* * * * *	
54.9815–2715	1545–2229
* * * * *	

Part III. Administrative, Procedural, and Miscellaneous

Public Comment Invited on Recommendations for 2012–2013 Guidance Priority List

Notice 2012–25

The Department of Treasury and the Internal Revenue Service invite public comment on recommendations for items that should be included on the 2012–2013 Guidance Priority List.

The Treasury Department's Office of Tax Policy and the Service use the Guidance Priority List each year to identify and prioritize the tax issues that should be addressed through regulations, revenue rulings, revenue procedures, notices, and other published administrative guidance. The 2012–2013 Guidance Priority List will establish the guidance that the Treasury Department and the Service intend to work on from July 1, 2012, through June 30, 2013. The Treasury Department and the Service recognize the importance of public input to formulate a Guidance Priority List that focuses resources on guidance items that are most important to taxpayers and tax administration. Published guidance plays an important role in increasing voluntary compliance by helping to clarify ambiguous areas of the tax law.

As is the case whenever significant legislation is enacted, the Treasury Department and the Service have dedicated substantial resources during the current plan year to published guidance projects necessary to implement the provisions of the multitude of tax Acts that have been enacted over the past several years including, but not limited to, the American Recovery and Reinvestment Tax Act of 2009, Pub. L. No. 111–5, 123 Stat. 115, which was enacted on February 17, 2009; the Hiring Incentives to Restore Employment Act, Pub. L. No. 111–147, 124 Stat. 71, which was enacted on March 18, 2010; the Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119, which was enacted on March 23, 2010; the Health Care and Education Reconciliation Act, Pub. L. 111–152, 124 Stat. 1029, which was enacted on March 30, 2010; the Small Business Jobs Act of 2010, Pub. L. No. 111–240, 124 Stat 2504, which was enacted on September 27, 2010; the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111–312, 124 Stat. 3296, which was enacted on December 17, 2010; and the 3% Withholding Repeal and Job Creation Act, Pub. L. No. 112–56, 125 Stat. 711, which was enacted on November 21, 2011. The Treasury Department and the Service will continue to evaluate the priority of each guidance project in light of the above-mentioned tax legislation and other developments occurring during the 2012–2013 plan year.

In reviewing recommendations and selecting projects for inclusion on the 2012–2013 Guidance Priority List, the Treasury Department and the Service will consider the following:

1. Whether the recommended guidance resolves significant issues relevant to many taxpayers;
2. Whether the recommended guidance promotes sound tax administration;
3. Whether the recommended guidance can be drafted in a manner that will enable taxpayers to easily understand and apply the guidance;
4. Whether the recommended guidance involves regulations that are outmoded, ineffective, insufficient, or excessively burdensome and that should be modified, streamlined, expanded, or repealed;
5. Whether the Service can administer the recommended guidance on a uniform basis; and
6. Whether the recommended guidance reduces controversy and lessens the burden on taxpayers or the Service.

Recommendations for the 2012–2013 Guidance Priority List.

Please submit recommendations by May 1, 2012, for possible inclusion on the original 2012–2013 Guidance Priority List. The Treasury Department and the Service may update the 2012–2013 Guidance Priority List periodically to reflect additional guidance that the Treasury Department and the Service intend to work on during the plan year. The periodic updates allow the Treasury Department and the Service to respond to needs for additional guidance that may arise during the plan year. Note, however, that the additional guidance items that are added to the Guidance Priority List as part of a periodic update usually are limited to those that have been published during an update period or that address situations the Treasury Department and the Service determine require immediate guidance, such as recently enacted legislation with provisions that take effect upon enactment or shortly thereafter, high priority Service initiatives, adverse court opinions, or potentially abusive matters.

Taxpayers are not required to submit recommendations for guidance in any particular format. Taxpayers should, however, briefly describe the recommended guidance and explain the need for the guidance. In addition, taxpayers may include an analysis of how the issue should be resolved. It would be helpful if taxpayers suggesting more than one guidance project prioritize the projects by order of importance. If a large number of projects are being suggested, it also would be helpful if the projects were grouped in terms of high, medium, or low priority.

Taxpayers should send written comments to:

Internal Revenue Service
Attn: CC:PA:LPD:PR
(Notice 2012–25)
Room 5203
P. O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

or hand deliver comments Monday through Friday between the hours of 8 a.m. and 4 p.m. to:

Courier's Desk
Internal Revenue Service
Attn: CC:PA:LPD:PR
(Notice 2012–25)
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Alternatively, taxpayers may submit comments electronically via e-mail to the following address: *Notice.Comments@irscounsel.treas.gov*. Taxpayers should include "Notice 2012–25" in the subject line. All

comments submitted by the public will be available for public inspection and copying in their entirety.

For further information regarding this notice, contact Henry Schneiderman of the Office of Associate Chief Counsel (Procedure and Administration) at (202) 622–3400 (not a toll-free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking

Furnishing Identifying Number of Tax Return Preparer

REG–124791–11

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance on the eligibility of tax return preparers to obtain a preparer tax identification number (PTIN). These proposed regulations expand the list of tax return preparers who may obtain and renew a PTIN. The proposed regulations additionally provide guidance concerning those tax forms submitted to the Internal Revenue Service that are considered returns of tax or claims for refund of tax for purposes of the requirement to obtain a PTIN and related provisions. This document also invites comments from the public regarding these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by May 15, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–124791–11), room 5205, 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–124791–11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–124791–11).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Stuart Murray at (202) 622–4940; concerning submissions of comments and requests for a hearing, Oluwafunmilayo (Funmi) Taylor at (202) 622–7180 (not a toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to regulations under section 6109 of the Internal Revenue Code (Code) relating to the identifying number of a tax return preparer and furnishing a tax return preparer's identifying number on tax returns and claims for refund of tax. The Department of Treasury and the Internal Revenue Service published in the **Federal Register** on September 30, 2010 (T.D. 9501, 2010–46 I.R.B. 651 [75 FR 60309]) final regulations under section 6109 that prescribe certain requirements relating to the identifying number of tax return preparers.

In particular, the final regulations provided that for tax returns or claims for refund of tax filed after December 31, 2010, the identifying number of a tax return preparer is a PTIN or other identifying number that the IRS prescribes in forms, instructions, or other guidance. The final regulations also provided that after December 31, 2010, a tax return preparer must have a PTIN that is applied for and renewed in the manner the IRS prescribes. The final regulations added §1.6109–2(d) to the regulations under title 26, providing that to obtain a PTIN or other prescribed identifying number, a tax return preparer must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer authorized to practice before the IRS under Treasury Department Circular No. 230, 31 CFR Part 10 (which Treasury and the IRS amended in final regulations published in the **Federal Register** on June 3, 2011 (T.D. 9527, 2011–27 I.R.B. 1 [76 FR 32286])). For purposes of these requirements, a *tax return preparer* means any individual who is compensated for preparing, or assisting in the preparation of, all or substantially all of a tax return or claim for refund of tax. The final regulations under section 6109 additionally added §1.6109–2(f), which provides that the IRS may conduct a Federal tax compliance check on a tax return preparer who applies for or renews a PTIN or other prescribed identifying number.

Although the rules in the final regulations under section 6109 went into effect on January 1, 2011, §1.6109–2(h) allows Treasury and the IRS to prescribe, through forms, instructions, or other appropriate guidance, exceptions to the rules in §1.6109–2, as necessary, in the interest of effective tax administration. Section 1.6109–2(h) also provides that the IRS may specify through other appropriate guidance "specific returns, schedules, and other forms that qualify as tax returns or claims for refund for purposes of these regulations."

After §1.6109–2 was amended, Treasury and the IRS issued Notice 2011–6, 2011–3 I.R.B. 315, January 17, 2011) (see §601.601(d)(2)(ii)(*b*) of this chapter), which provides additional guidance on the implementation of §1.6109–2. Specifically, Notice 2011–6, in part, provides further guidance as to tax return preparers who may obtain a PTIN. As explained in Notice 2011–6, the IRS "decided to allow certain individuals who are not attorneys, certified public accountants, enrolled agents, or registered tax return preparers to obtain a PTIN and prepare, or assist in the preparation of, all or substantially all of a tax return in certain discrete circumstances." Pursuant to the authority in §1.6109–2(h), Notice 2011–6 established two additional categories of tax return preparers who may obtain a PTIN: (1) tax return preparers supervised by attorneys, certified public accountants, enrolled agents, enrolled retirement plan agents, and enrolled actuaries (see §1.02a of Notice 2011–6); and (2) tax return preparers who prepare tax returns not covered by a competency examination applicable to registered tax return preparers (see §1.02b of Notice 2011–6). Notice 2011–6 prescribes the requirements an individual must satisfy under each of these two categories, including passing a Federal tax compliance check and a suitability check (when available). Individuals who obtain or renew a PTIN under either of these categories are not registered tax return preparers. Registered tax return preparers are subject to separate, more extensive requirements in Circular 230, including continuing education.

Also pursuant to the authority in §1.6109–2(h), the IRS in Notice 2011–6 specified that all tax returns, claims for

refund, and other tax forms submitted to the IRS are considered tax returns or claims for refund of tax for purposes of §1.6109–2 unless the IRS provides otherwise. Section 1.03 of Notice 2011–6 explains that the IRS interprets the term "tax forms" broadly for this purpose, and a tax return preparer must obtain a PTIN to prepare for compensation, or to assist in preparing for compensation, all or substantially all of "any form" except those forms that the IRS explicitly excludes. Notice 2011–6 lists the forms by number and title that are currently excluded.

Explanation of Provisions

Treasury and the IRS propose to incorporate the relevant provisions of Notice 2011–6 discussed earlier in this preamble in §1.6109–2. The proposed regulations provide for two additional categories of tax return preparers to obtain a PTIN (or other identifying number the IRS prescribes), namely, certain supervised tax return preparers and tax return preparers who prepare tax returns and claims for refund that are not covered by a competency examination. As to the first category, the proposed regulations provide that any individual 18 years of age or older is eligible for a PTIN if the individual is supervised as a tax return preparer by an attorney, certified public accountant, enrolled agent, enrolled retirement plan agent, or enrolled actuary authorized to practice before the IRS under Circular 230. The proposed regulations provide that the supervision must be in accordance with any requirements the IRS may prescribe; these requirements are currently set forth in §1.02a of Notice 2011–6.

As to the second category, the proposed regulations provide that any individual 18 years of age or older is eligible for a PTIN if the individual exclusively prepares tax returns and claims for refund that are not covered by any minimum competency test or tests that the IRS prescribes for registered tax return preparers. To be eligible for a PTIN, an individual must certify, at the time and in whatever manner the IRS may prescribe, that the individual only prepares tax returns and claims for refund that are not covered by a minimum competency test. Under the proposed regulations, the individual must also comply with any other eligibility requirements that the IRS may prescribe; these requirements are currently set forth in §1.02b of Notice 2011–6.

The proposed regulations provide that for purposes of §1.6109–2, the terms *tax return* and *claim for refund of tax* include all tax forms submitted to the IRS except forms that the IRS specifically excludes in other appropriate guidance. Notice 2011–6 (§1.03) is the current guidance specifying the excluded tax forms. The proposed regulations also amend §1.6109–2(f) to clarify that the IRS may conduct a suitability check, in addition to a Federal tax compliance check, on certain tax return preparers who apply for or renew a PTIN or other prescribed identifying number. This clarification is consistent with the provisions in both the final Circular 230 regulations and Notice 2011–6 stating that certain individuals who apply to obtain or renew a PTIN or to become a registered tax return preparer will be subject to a suitability check, as well as a tax compliance check.

Proposed Effective/Applicability Date

These regulations are effective on the date that final regulations are published in the **Federal Register**. For proposed dates of applicability, see §1.6109–2(i).

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the 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 Requests for 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. Treasury and the IRS request comments on all aspects of the proposed rules. All comments that are submitted by the public will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person who timely submits comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Stuart Murray of the Office of the Associate Chief Counsel, Procedure and Administration.

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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 * * *

Section 1.6109–2 also issued under 26 U.S.C. 6109(a) * * *

Par. 2. Section 1.6109–2 is amended by adding a new sentence to the end of paragraph (a)(1) and revising paragraphs (d), (f), (h) and (i) to read as follows:

§1.6109–2 Tax return preparers furnishing identifying numbers for returns or claims for refund and related requirements.

(a) * * * (1) * * * For purposes of this section only, the terms *tax return* and *claim for refund of tax* include all tax forms submitted to the Internal Revenue Service unless specifically excluded by the Internal Revenue Service in other appropriate guidance.

* * * * *

(d)(1) Beginning after December 31, 2010, all tax return preparers must have a preparer tax identification number or other prescribed identifying number that was applied for and received at the time and in the manner, including the payment of a user

fee, as may be prescribed by the Internal Revenue Service in forms, instructions, or other appropriate guidance.

(2) Except as provided in paragraph (h) of this section, to obtain a preparer tax identification number or other prescribed identifying number, a tax return preparer must be one of the following:

(i) An attorney;

(ii) A certified public accountant;

(iii) An enrolled agent;

(iv) A registered tax return preparer authorized to practice before the Internal Revenue Service under 31 U.S.C. 330 and the regulations thereunder;

(v) An individual 18 years of age or older who is supervised, in the manner the Internal Revenue Service prescribes in forms, instructions, or other appropriate guidance, as a tax return preparer by an attorney, certified public accountant, enrolled agent, enrolled retirement plan agent, or enrolled actuary authorized to practice before the Internal Revenue Service under 31 U.S.C. 330 and the regulations thereunder; or

(vi) An individual 18 years of age or older who certifies that the individual is a tax return preparer exclusively with respect to tax returns and claims for refund of tax that are not covered, at the time the tax return preparer applies for or renews the number, by a minimum competency examination prescribed by the Internal Revenue Service in forms, instructions, or other appropriate guidance. An individual must comply with any requirements at the time and in the manner that the Internal Revenue Service may prescribe in forms, instructions, or other appropriate guidance.

* * * * *

(f) As may be prescribed in forms, instructions, or other appropriate guidance, the Internal Revenue Service may conduct a Federal tax compliance check and a suitability check on a tax return preparer who applies for or renews a preparer tax identification number or other prescribed identifying number.

* * * * *

(h) The Internal Revenue Service, through forms, instructions, or other appropriate guidance, may prescribe exceptions to the requirements of this section, including the requirement that an individual be authorized to practice before the Internal Revenue Service before receiving a preparer tax identification number or other prescribed identifying number, as necessary in the interest of effective tax administration.

(i) *Effective/applicability date*. Paragraph (a)(1) of this section applies to tax returns and claims for refund filed after December 31, 2008, except the last sentence of paragraph (a)(1), which applies to tax returns and claims for refund filed on or after the date that final regulations are published in the **Federal Register**. Paragraph (a)(2)(i) of this section applies to tax returns and claims for refund filed on or before December 31, 2010. Paragraph (a)(2)(ii) of this section applies to tax returns and claims for refund filed after December 31, 2010. Paragraph (d)(1) of this section applies to tax return preparers after December 31, 2010. Paragraph (d)(2) of this section applies to tax return preparers on or after the date that final regulations are published in the **Federal Register**. Paragraph (e) of this section applies after September 30, 2010. Paragraph (f) of this section applies on or after the date that final regulations are published in the **Federal Register**. Paragraphs (g) and (h) of this section apply after September 30, 2010.

Steven T. Miller,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on February 14, 2012, 8:45 a.m., and published in the issue of the Federal Register for February 15, 2012, 77 F.R. 8753)

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

Foreign Tax Credit Splitting Events

REG–132736–11

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9577) that provide guidance relating to a new provision of the Internal Revenue Code (Code) that addresses situations in which foreign income taxes have been separated from the related income. Those regulations are necessary to provide guidance on applying the new statutory provision, which was enacted as part of legislation commonly referred to as the Education Jobs and Medicaid Assistance Act (EJMAA) on August 10, 2010. The text of those temporary regulations published in this issue of the Bulletin also serves as the text of these proposed regulations.

DATES: Comments and requests for a public hearing must be received by May 14, 2012.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–132736–11), room 5205, 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–132736–11), Courier's desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20044, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–132736–11).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Suzanne M. Walsh, (202) 622–3850; concerning submissions of comments, Oluwafunmilayo Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in this issue of the Bulletin contain amendments to the Income Tax Regulations (26 CFR Part 1) which provide rules relating to a new provision of the Code that was enacted as part of EJMAA (Public Law 111–226, 124 Stat. 2389 (2010)) which addresses situations in which foreign income taxes have been separated from the related income. The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed

regulations. The regulations affect taxpayers claiming foreign tax credits.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also 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), these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under "Addresses." The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available at *www.regulations.gov* or upon request. 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 these regulations is Suzanne M. Walsh of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 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 1.704–1 is amended as follows:

1. Paragraph (b)(1)(ii)(*b*)(*3*) is added.

2. Paragraph (b)(4)(viii)(*d*)(*3*) and paragraph (b)(5) *Example 24* are revised.

The addition and revisions read as follows:

§1.704–1 Partner's distributive share.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(*b*) * * *

(*3*) [The text of the proposed amendments to §1.704–1(b)(1)(ii)(*b*)(*3*) is the same as the text of §1.704–1T(b)(1)(ii)(*b*)(*3*) published elsewhere in this issue of the Bulletin.]

* * * * *

(4) * * *

(viii) * * *

(*d*) * * *

(*3*) [The text of the proposed amendments to §1.704–1(b)(4)(viii)(*d*)(*3*) is the same as the text of §1.704–1T(b)(4)(viii)(*d*)(*3*) published elsewhere in this issue of the Bulletin.]

* * * * *

(5) * * *

Example 24. [The text of the proposed amendments to §1.704–1(b)(5) *Example 24* is the same as the text of §§1.704–1T(b)(5) *Example 24* published elsewhere in this issue of the Bulletin.]

* * * * *

Par. 3. Section 1.909–0 is added to read as follows:

§1.909–0 Outline of regulation provisions for section 909.

[The text of proposed §1.909–0 is the same as the text of §1.909–0T published elsewhere in this issue of the Bulletin.]

Par. 4. Sections 1.909–1 through 1.909–6 are added to read as follows:

§1.909–1 Definitions and special rules.

[The text of proposed §1.909–1 is the same as the text of §1.909–1T(a) through (e) published elsewhere in this issue of the Bulletin.]

§1.909–2 Splitter arrangements.

[The text of proposed §1.909–2 is the same as the text of §1.909–2T(a) through (c) published elsewhere in this issue of the Bulletin.]

§1.909–3 Rules regarding related income and split taxes.

[The text of proposed §1.909–3 is the same as the text of §1.909–3T(a) through (c) published elsewhere in this issue of the Bulletin.]

§1.909–4 Coordination rules.

[The text of proposed §1.909–4 is the same as the text of §1.909–4T(a) through (b) published elsewhere in this issue of the Bulletin.]

§1.909–5 2011 and 2012 Splitter arrangements.

[The text of proposed §1.909–5 is the same as the text of §1.909–5T(a) through (c) published elsewhere in this issue of the Bulletin.]

§1.909–6 Pre-2011 foreign tax credit splitting events.

[The text of proposed §1.909–6 is the same as the text of §1.909–6T(a) through (h) published elsewhere in this issue of the Bulletin.]

Steven T. Miller,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on February 9, 2012, 4:15 p.m., and published in the issue of the Federal Register for February 14, 2012, 77 F.R. 8184)

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

Announcement 2012–15

The Internal Revenue Service has revoked its determination that the organi-

zations 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 April 9, 2012, 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.

Budget Right Debt Management, Inc.
Maitland, FL

Budget Right Debt Management, Inc.
Lake Mary, FL

Columbus Building Association of Kingsville Texas
Kingsville, TX

Garment Industry Day Care Center of Chinatown, Inc.
New York, NY

Renewal Ministries, Inc.
Spring, TX

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

Numerical Finding List[1]

Bulletins 2012–1 through 2012–15

Announcements:

Notices:

Proposed Regulations:

Proposed Regulations— Continued:

Revenue Procedures:

Revenue Rulings:

Treasury Decisions:

Treasury Decisions— Continued:

[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2011–27 through 2011–52 is in Internal Revenue Bulletin 2011–52, dated December 27, 2011.

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

Bulletins 2012–1 through 2012–15

Announcements:

2002-44
Supplemented by
Notice 2012-13, 2012-9 I.R.B. *421*

2010-19
Obsoleted by
Ann. 2012-12, 2012-12 I.R.B. *562*

2011-63
Corrected by
Ann. 2012-9, 2012-7 I.R.B. *377*

Notices:

2006-87
Superseded by
Notice 2012-19, 2012-10 I.R.B. *440*

2006-99
Superseded in part by
Notice 2012-20, 2012-13 I.R.B. *574*

2007-25
Superseded by
Notice 2012-19, 2012-10 I.R.B. *440*

2007-77
Superseded by
Notice 2012-19, 2012-10 I.R.B. *440*

2007-95
Obsoleted in part by
T.D. 9576, 2012-15 I.R.B. *723*

2008-107
Superseded by
Notice 2012-19, 2012-10 I.R.B. *440*

2010-27
Superseded by
Notice 2012-19, 2012-10 I.R.B. *440*

2010-88
As modified by Ann. 2011-40, is superseded by
Notice 2012-1, 2012-2 I.R.B. *260*

2010-92
Obsoleted by
T.D. 9577, 2012-15 I.R.B. *730*

2011-8
Superseded by
Notice 2012-19, 2012-10 I.R.B. *440*

2011-28
Superseded by
Notice 2012-9, 2012-4 I.R.B. *315*

Proposed Regulations:

REG-208274-86
Withdrawn by
Ann. 2012-11, 2012-13 I.R.B. *611*

Revenue Procedures:

2000-43
Amplified, modified and superseded by
Rev. Proc. 2012-18, 2012-10 I.R.B. *455*

2003-61
Superseded by
Notice 2012-8, 2012-4 I.R.B. *309*

2007-44
Modified by
Ann. 2012-3, 2012-4 I.R.B. *335*

2011-1
Superseded by
Rev. Proc. 2012-1, 2012-1 I.R.B. *1*

2011-2
Superseded by
Rev. Proc. 2012-2, 2012-1 I.R.B. *92*

2011-3
Superseded by
Rev. Proc. 2012-3, 2012-1 I.R.B. *113*

2011-4
Superseded by
Rev. Proc. 2012-4, 2012-1 I.R.B. *125*

2011-5
Superseded by
Rev. Proc. 2012-5, 2012-1 I.R.B. *169*

2011-6
Superseded by
Rev. Proc. 2012-6, 2012-1 I.R.B. *197*

2011-7
Superseded by
Rev. Proc. 2012-7, 2012-1 I.R.B. *232*

2011-8
Superseded by
Rev. Proc. 2012-8, 2012-1 I.R.B. *235*

2011-9
Superseded by
Rev. Proc. 2012-9, 2012-2 I.R.B. *261*

2011-10
Superseded by
Rev. Proc. 2012-10, 2012-2 I.R.B. *273*

2011-14
Modified and clarified by
Rev. Proc. 2012-19, 2012-14 I.R.B. *689*
Rev. Proc. 2012-20, 2012-14 I.R.B. *700*

Revenue Procedures— Continued:

2011-37
Obsoleted in part by
Rev. Proc. 2012-16, 2012-10 I.R.B. *452*

2011-40
Corrected by
Ann. 2012-6, 2012-6 I.R.B. *366*

2011-49
Modified by
Ann. 2012-3, 2012-4 I.R.B. *335*

2011-50
Corrected by
Ann. 2012-6, 2012-6 I.R.B. *366*

2011-51
Corrected by
Ann. 2012-6, 2012-6 I.R.B. *366*

2012-8
Corrected by
Ann. 2012-7, 2012-6 I.R.B. *367*

Revenue Rulings:

92-19
Supplemented in part by
Rev. Rul. 2012-6, 2012-6 I.R.B. *349*

2008-40
Modified by
Notice 2012-6, 2012-3 I.R.B. *293*

2011-1
Modified by
Notice 2012-6, 2012-3 I.R.B. *293*

2012-9
Modified by
Rev. Rul. 2012-12, 2012-15 I.R.B. *748*

Treasury Decision:

9517
Corrected by
Ann. 2012-4, 2012-4 I.R.B. *335*
Ann. 2012-5, 2012-5 I.R.B. *348*

[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2011–27 through 2011–52 is in Internal Revenue Bulletin 2011–52, dated December 27, 2011.

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