Internal Revenue
bulletin

Bulletin No. 2008-38
September 22, 2008

HIGHLIGHTS OF THIS ISSUE

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

INCOME TAX

Rev. Rul. 2008–48, page 713.

Fringe benefits aircraft valuation formula. The Standard Industry Fare Level (SIFL) cents-per-mile rates and terminal charge in effect for the second half of 2008 are set forth for purposes of determining the value of noncommercial flights on employer-provided aircraft under section 1.61–21(g) of the regulations.

REG–155087–05, page 726.

Proposed regulations under section 40 of the Code provide guidance relating to credits and payments for alcohol mixtures, biodiesel mixtures, renewable diesel mixtures, alternative fuel mixtures, and alternative fuel sold for use or used as a fuel. The regulations also provide guidance relating to the definition of gasoline and diesel fuel.

REG–102822–08, page 744.

Proposed regulations under section 108 of the Code provide guidance on the manner in which an S corporation reduces its tax attributes under section 108(b) for taxable years in which the S corporation has discharge of indebtedness income that is excluded from gross income under section 108(a). A public hearing is scheduled for December 8, 2008.

Notice 2008–74, page 718.

This notice delays the effective date of Rev. Rul. 2006–57. Rev. Rul. 2006–57 provides guidance to employers on the use of smartcards, debit or credit cards, or other electronic media to provide qualified transportation fringes under sections 132(a)(5) and (f) of the Code. This guidance is intended to provide relief to mass transit providers that are currently finding it difficult to update their present systems in order to comply with the Rev. Rul. guidelines prior to the current effective date of January 1, 2009. The effective date of Rev. Rul. 2006–57 is further delayed until January 1, 2010. Rev. Rul. 2006–57 modified.

Rev. Proc. 2008–54, page 722.

This procedure provides guidance on the increased amount of IRC section 179 expensing and the 50% additional first year depreciation provided by sections 102 and 103, respectively, of the Economic Stimulus Act of 2008. Rev. Proc. 2007–66 modified and superseded. Notice 2007–36 clarified, modified, and amplified.

Announcement 2008–84, page 748.

This announcement modifies the transition rules in the effective date provisions of Rev. Proc. 2008–52, 2008–36 I.R.B. 1, in general, to allow taxpayers to elect to apply the procedures of Rev. Proc. 2002–9 for applications to change a method of accounting filed on or after August 18, 2008, through September 15, 2008, subject to certain limitations. Rev. Proc. 2008–52 modified.

EMPLOYEE PLANS

T.D. 9418, page 713.

Final regulations under section 408A of the Code provide guidance concerning the tax consequences of converting a non-Roth IRA annuity to a Roth IRA.

(Continued on the next page)

Announcement of Declaratory Judgment Proceedings Under Section 7428 begins on page 749.
Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

Notice 2008–73, page 717.

This notice expands the availability of the transition relief for certain small pension plans that was originally provided in Notice 2008–21, 2008–7 I.R.B. 431. This expanded transition relief is needed because technical corrections to the Pension Protection Act of 2006 (PPA) have not yet been enacted. This guidance will expand the transition relief provided in Notice 2008–21 to apply to plans with end-of-year valuation dates for 2006 and 2007, regardless of the valuation date used for 2008.

Notice 2008–75, page 719.

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

EXCISE TAX

REG–155087–05, page 726.

Proposed regulations under section 40 of the Code provide guidance relating to credits and payments for alcohol mixtures, biodiesel mixtures, renewable diesel mixtures, alternative fuel mixtures, and alternative fuel sold for use or used as a fuel. The regulations also provide guidance relating to the definition of gasoline and diesel fuel.

The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are compiled semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

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

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

Section 40.—Alcohol Used as Fuel

A proposed regulation relates to credits and payments for alcohol mixtures, biodiesel mixtures, renewable diesel mixtures, alternative fuel mixtures, and alternative fuel sold for use or used as a fuel, as well as relating to the definition of gasoline and diesel fuel. See REG-155087-05, page 726.

Section 40A.—Biodiesel and Renewable Diesel Used as Fuel

A proposed regulation relates to credits and payments for alcohol mixtures, biodiesel mixtures, renewable diesel mixtures, alternative fuel mixtures, and alternative fuel sold for use or used as a fuel, as well as relating to the definition of gasoline and diesel fuel. See REG-155087-05, page 726.

Section 61.—Gross Income Defined

26 CFR 1.61–21: Taxation of fringe benefits.

Fringe benefits aircraft valuation formula. The Standard Industry Fare Level (SIFL) cents-per-mile rates and terminal charge in effect for the second half of 2008 are set forth for purposes of determining the value of noncommercial flights on employer-provided aircraft under section 1.61–21(g) of the regulations.

Rev. Rul. 2008–48

For purposes of the taxation of fringe benefits under section 61 of the Internal Revenue Code, section 1.61–21(g) of the Income Tax Regulations provides a rule for valuing noncommercial flights on employer-provided aircraft. Section 1.61–21(g)(5) provides an aircraft valuation formula to determine the value of such flights. The value of a flight is determined under the base aircraft valuation formula (also known as the Standard Industry Fare Level formula or SIFL) by multiplying the SIFL cents-per-mile rates applicable for the period during which the flight was taken by the appropriate aircraft multiple provided in section 1.61–21(g)(7) and then adding the applicable terminal charge. The SIFL cents-per-mile rates in the formula and the terminal charge are calculated by the Department of Transportation and are reviewed semi-annually.

The following chart sets forth the terminal charge and SIFL mileage rates:

Period During Which the Flight Is Taken	*Terminal Charge*	*SIFL Mileage Rates*
7/1/08 - 12/31/08	$42.26	Up to 500 miles = $.2312 per mile 501–1500 miles = $.1763 per mile Over 1500 miles = $.1695 per mile

DRAFTING INFORMATION

The principal author of this revenue ruling is Kathleen Edmondson of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt/Government Entities). For further information regarding this revenue ruling, contact Ms. Edmondson at (202) 622–0047 (not a toll-free call).

Section 168.—Accelerated Cost Recovery System

A revenue ruling provides guidance regarding the increased amount of section 179 expensing and the 50% additional first year depreciation provided by sections 102 and 103, respectively, of the Economic Stimulus Act of 2008. See Rev. Proc. 2008-54, page 722.

Section 179.—Election to Expense Certain Depreciable Business Assets

A revenue ruling provides guidance regarding the increased amount of section 179 expensing and the 50% additional first year depreciation provided by sections 102 and 103, respectively, of the Economic Stimulus Act of 2008. See Rev. Proc. 2008-54, page 722.

Section 408A.—Roth IRAs

26 CFR 1.408A–4: Converting amounts to Roth IRAs.

T.D. 9418

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Converting an IRA Annuity to a Roth IRA

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations.

SUMMARY: This document contains final regulations under section 408A of the Internal Revenue Code (Code). These final regulations provide guidance concern-

ing the tax consequences of converting a non-Roth IRA annuity to a Roth IRA. These final regulations affect individuals establishing Roth IRAs, beneficiaries under Roth IRAs, and trustees, custodians and issuers of Roth IRAs.

DATES: *Effective date:* These final regulations are effective July 29, 2008.

Applicability date: These regulations are applicable to any Roth IRA conversion where an annuity contract is distributed or treated as distributed from a traditional IRA on or after August 19, 2005.

FOR FURTHER INFORMATION CONTACT: William D. Gibbs at 202–622–6060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Roth IRAs and Conversions

This document contains final regulations that amend the Income Tax Regulations (26 CFR Part 1) under section 408A of the Code relating to Roth IRAs. Section 408A of the Code, which was added by section 302 of the Taxpayer Relief Act of 1997, Public Law 105–34 (111 Stat. 788), establishes the Roth IRA as a type of individual retirement plan, effective for taxable years beginning on or after January 1, 1998.

The identifying characteristic of Roth IRAs is that all contributions to Roth IRAs are after-tax contributions (that is, an IRA owner cannot take a deduction for a contribution made to a Roth IRA) but qualified distributions are tax-free. A qualified distribution from a Roth IRA is a distribution that is made: (1) at least 5 years after the account owner (or the account owner's spouse) made a Roth IRA contribution, and (2) after age 59½, after death, on account of disability, or for a first-time home purchase.

A taxpayer whose modified adjusted gross income for a year does not exceed $100,000 (and who, if married, files jointly)[1] may convert an amount held in a non-Roth IRA (that is, a traditional IRA or SIMPLE IRA) to an amount held in a Roth IRA. If a taxpayer converts an amount held in a non-Roth IRA to a Roth IRA, the taxpayer must include the value of the non-Roth IRA being converted in gross income (to the extent the conversion is not a conversion of basis in the non-Roth IRA).

A conversion may be accomplished by means of a rollover, trustee-to-trustee transfer, or account redesignation. Regardless of the means used to convert, any amount converted from a non-Roth IRA to a Roth IRA is treated as distributed from the non-Roth IRA and rolled over to the Roth IRA. In the case of a conversion involving property, the conversion amount generally is the fair market value of the property on the date of distribution or the date the property is treated as distributed from the traditional IRA.

Final regulations regarding Roth IRAs were published in the **Federal Register** on February 4, 1999 (T.D. 8816, 1999–1 C.B. 518 [64 FR 5597]). On August 19, 2005, the IRS issued temporary regulations under section 408A (T.D. 9220, 2005–2 C.B. 596 [70 FR 48868]) relating to conversions involving annuities. These temporary regulations were also issued in identical form as proposed regulations (REG–122857–05, 2005–2 C.B. 609 [70 FR 48924]).

Rev. Proc. 2006–13, 2006–1 C.B. 315, which was issued on January 17, 2006, in response to several comments received on the temporary and proposed regulations, provided interim guidance with respect to the temporary regulations. See §601.601(d)(2)(ii)(*b*). After consideration of all comments received on the proposed regulations, these final regulations adopt the provisions of the proposed regulations with certain modifications described in the Explanation of Provisions.

Explanation of Provisions

Like the proposed regulations, these final regulations clarify that when a non-Roth individual retirement annuity is converted to a Roth IRA, the amount that is treated as distributed is the fair market value of the annuity contract on the date the annuity contract is converted. Similarly, when a non-Roth individual retirement account holds an annuity contract as an account asset and the account is converted to a Roth IRA, the amount that is treated as distributed with respect to the annuity contract is the fair market value of the annuity contract on the date the annuity contract is converted (that is distributed or treated as distributed from the non-Roth IRA).

One commentator suggested that the final regulations should clarify that where a conversion is made by surrendering an annuity without retaining or transferring rights, the amount converted, and hence the amount that must be included in income as a result of the conversion, is limited to the surrendered cash value (the actual proceeds to be deposited into the Roth IRA). Rev. Proc. 2006–13 provided that, in such a case, the valuation methods in the temporary regulations do not apply.

The final regulations adopt this suggestion. Thus, to the extent an individual retirement annuity or an annuity contract held by an individual retirement account is surrendered with no retained or transferred rights, the amount treated as a distribution is limited to the surrendered cash value (the actual proceeds available to be deposited into the Roth IRA).

The proposed regulations used a methodology from the gift tax regulations (§25.2512–6) to determine fair market value of an annuity contract. Those rules depend on how soon after purchase the contract was converted and whether future premiums were to be paid. The different time periods were "soon after" the contract was sold and after the contract "has been in force for some time." A commentator stated that these terms are not defined and do not lend themselves to clear or uniform interpretation.

In response to these comments, the final regulations modify the application of the valuation rules taken from the gift tax regulations (collectively referred to under these regulations as the gift tax method). The applicability of one valuation rule within the gift tax method is based upon whether the company which sold the initial contract sells comparable annuities. If there is such a comparable contract currently being sold, the fair market value of the contract is determined as the price of the comparable contract. For example, assume a taxpayer who is age 60 at the time of the conversion had purchased from an insurance company a contract at an earlier

[1] These limitations are removed for taxable years beginning after December 31, 2009.

age which will pay him $500 per month for life beginning at age 70. If the insurance company is selling contracts that will provide a taxpayer who is age 60 $500 per month for life at age 70, then the fair market value of the taxpayer's contract, for purposes of determining the amount converted, is the current price of the similar contract. (If the conversion occurs soon after the annuity was sold, the comparable contract is the annuity itself and, thus, the fair market value of the annuity is established by the actual premiums paid for such contract.) This comparable contract valuation rule subsumes the first two methods under the proposed regulations.

The gift tax method under the final regulations includes a second alternative for situations where there is no comparable contract. If no comparable contract is available to make a comparison, the fair market value is established through an approximation that is based on the interpolated terminal reserve at the date of the conversion, plus the proportionate part of the gross premium paid before the date of the conversion which covers the period extending beyond that date. This reserve alternative is the same as the third method under the proposed regulations, except that it applies whenever there is no comparable contract.

Rev. Proc. 2006–13 provided an alternative to the valuation method in the proposed regulations based on the accumulation of premiums and this alternative is included in the final regulations. Under this "accumulation method", the fair market value of an annuity contract is permitted to be determined using the methodology provided in §1.401(a)(9)–6, A–12, with the following modifications. First, all front-end loads and other non-recurring charges assessed in the twelve months immediately preceding the conversion must be added to the account value. Second, future distributions are not to be assumed in the determination of the actuarial present value of additional benefits. Finally, the exclusions provided under §1.401(a)(9)–6, A–12(c)(1) and (c)(2), are not to be taken into account.

These final regulations also provide authority for the Commissioner to issue additional guidance regarding the fair market value of an individual retirement annuity, including formulas to be used for determining fair market value.

Effective Date

These regulations are applicable to any Roth IRA conversion where an annuity contract is distributed or treated as distributed from a traditional IRA on or after August 19, 2005. However, taxpayers may instead apply the valuation methods in the temporary regulations and Rev. Proc. 2006–13 for annuity contracts distributed or treated as distributed from a traditional IRA on or before December 31, 2008. See §601.601(d)(2)(ii)(*b*). Thus, for example, the adoption of these final regulations does not eliminate the special rule for 2005 conversions set forth in section 4 of Rev. Proc. 2006–13.

Special Analyses

It has been determined that these final regulations are 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 final regulations and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the proposed regulations preceding these final regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these regulations are William Douglas Gibbs and Cathy V. Pastor of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in the development of these regulations.

* * * * *

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 1.408A–4T is removed.

§1.408A–4T [Removed].

Par. 3. Section 1.408A–4 is amended by revising Q–14 and A–14 to read as follows:

§1.408A–4 Converting amounts to Roth IRAs.

* * * * *

Q–14. What is the amount that is treated as a distribution, for purposes of determining income inclusion, when a conversion involves an annuity contract?

A–14. (a) *In general*—(1) *Distribution of Fair Market Value Upon Conversion.* Notwithstanding §1.408–4(e), when part or all of a traditional IRA that is an individual retirement annuity described in section 408(b) is converted to a Roth IRA, for purposes of determining the amount includible in gross income as a distribution under §1.408A–4, A–7, the amount that is treated as distributed is the fair market value of the annuity contract on the date the annuity contract is converted. Similarly, when a traditional IRA that is an individual retirement account described in section 408(a) holds an annuity contract as an account asset and the traditional IRA is converted to a Roth IRA, for purposes of determining the amount includible in gross income as a distribution under §1.408A–4, A–7, the amount that is treated as distributed with respect to the annuity contract is the fair market value of the annuity contract on the date that the annuity contract is distributed or treated as distributed from the traditional IRA. The rules in this A–14 also apply to conversions from SIMPLE IRAs.

(2) *Annuity contract surrendered.* Paragraph (a)(1) of this paragraph A–14 does not apply to a conversion of a traditional IRA to the extent the conversion is accomplished by the complete surrender of an annuity contract for its cash value and the reinvestment of the cash proceeds in a Roth IRA, but only if the surrender extinguishes all benefits and other characteristics of the contract. In such a case, the cash from the surrendered contract is the amount reinvested in the Roth IRA.

(3) *Definitions*. The definitions set forth in §1.408A–8 apply for purposes of this paragraph A–14.

(b) *Determination of fair market value*—(1) *Overview*—(i) *Use of alternative methods*. This paragraph (b) sets forth methods which may be used to determine the fair market value of an individual retirement annuity for purposes of paragraph (a)(1) of this paragraph A–14. However, if, because of the unusual nature of the contract, the value determined under one of these methods does not reflect the full value of the contract, that method may not be used.

(ii) *Additional guidance*. Additional guidance regarding the fair market value of an individual retirement annuity, including formulas to be used for determining fair market value, may be issued by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*)).

(2) *Gift tax method*—(i) *Cost of contract or comparable contract.* If with respect to an annuity, there is a comparable contract issued by the company which sold the annuity, the fair market value of the annuity may be established by the price of the comparable contract. If the conversion occurs soon after the annuity was sold, the comparable contract may be the annuity itself, and thus, the fair market value of the annuity may be established through the sale of the particular contract by the company (that is, the actual premiums paid for such contract).

(ii) *Use of reserves where no comparable contract available*. If with respect to an annuity, there is no comparable contract available in order to make the comparison described in paragraph (b)(2)(i) of this paragraph A–14, the fair market value may be established through an approximation that is based on the interpolated terminal reserve at the date of the conversion, plus the proportionate part of the gross premium last paid before the date of the conversion which covers the period extending beyond that date.

(3) *Accumulation method.* As an alternative to the gift tax method described in paragraph (b)(2) of this paragraph A–14, this paragraph (b)(3) provides a method that may be used for an annuity contract which has not been annuitized. The fair market value of such an annuity contract is permitted to be determined using the methodology provided in §1.401(a)(9)–6, A–12, with the following modifications:

(i) All front-end loads and other nonrecurring charges assessed in the twelve months immediately preceding the conversion must be added to the account value.

(ii) Future distributions are not to be assumed in the determination of the actuarial present value of additional benefits.

(iii) The exclusions provided under §1.401(a)(9)–6, A–12(c)(1) and (c)(2), are not to be taken into account.

(c) *Effective/applicability date*. The provisions of this paragraph A–14 are applicable to any conversion in which an annuity contract is distributed or treated as distributed from a traditional IRA on or after August 19, 2005. However, for annuity contracts distributed or treated as distributed from a traditional IRA on or before December 31, 2008, taxpayers may instead apply the valuation methods in §1.408A–4T (as it appeared in the April 1, 2008, edition of 26 CFR part 1) and Revenue Procedure 2006–13, 2006–1 C.B. 315 (See §601.601(d)(2)(ii)(*b*)).

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

Approved July 20, 2008.

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

(Filed by the Office of the Federal Register on July 28, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 29, 2008, 73 F.R. 43860)

Section 6426.—Credit for Alcohol Fuel, Biodiesel and Alternative Fuel Mixtures

A proposed regulation relates to credits and payments for alcohol mixtures, biodiesel mixtures, renewable diesel mixtures, alternative fuel mixtures, and alternative fuel sold for use or used as a fuel, as well as relating to the definition of gasoline and diesel fuel. See REG-155087-05, page 726.

Section 6427.—Fuels Not Used for Taxable Purposes

A proposed regulation relates to credits and payments for alcohol mixtures, biodiesel mixtures, renewable diesel mixtures, alternative fuel mixtures, and alternative fuel sold for use or used as a fuel, as well as relating to the definition of gasoline and diesel fuel. See REG-155087-05, page 726.

Part III. Administrative, Procedural, and Miscellaneous

Transition Guidance for New Funding Rules and Funding-Related Benefit Limitations Under PPA '06

Notice 2008–73

I. PURPOSE

This notice expands the availability of the transition relief for certain small pension plans that was originally provided in Notice 2008–21, 2008–7 I.R.B. 431.

II. BACKGROUND

Section 412 provides minimum funding requirements that generally apply for defined benefit pension plans. Section 430, which was added by the Pension Protection Act of 2006 (PPA), specifies the minimum funding requirements that apply to single employer pension plans (including multiple employer plans) pursuant to § 412. Section 430 generally applies for plan years beginning on or after January 1, 2008.

Section 430(f) provides for certain funding balances referred to as the prefunding balance and the funding standard carryover balance to be used to reduce the otherwise applicable minimum required contribution for a plan year. On August 31, 2007, proposed regulations under § 430(f) were published in the Federal Register as § 1.430(f)–1 (REG–113891–07, 2007–42 I.R.B. 821 [72 FR 50544]).

Section 401(a)(29) requires that a defined benefit plan (other than a multiemployer plan) satisfy the requirements of § 436. Section 436 sets forth a series of limitations on the accrual and payment of benefits under an underfunded plan. Section 436(b) places limitations on the payment of plant shutdown benefits and other unpredictable contingent event benefits, § 436(c) places limitations on plan amendments that increase liabilities for benefits, § 436(d) places limitations on the payment of accelerated benefit distributions, and § 436(e) places limitations on benefit accruals. These limitations are applied based on the plan's adjusted funding target attainment percentage (AFTAP) for the plan year, as certified by the plan's enrolled actuary.

Section 436(j) provides definitions that are used under § 436, including the definition of a plan's AFTAP. In general, a plan's AFTAP is based on the plan's funding target attainment percentage (FTAP) under § 430(d)(2) for the plan year. However, the plan's AFTAP is determined by adding the aggregate amount of purchases of annuities for employees other than highly compensated employees (within the meaning of § 414(q)) made by the plan during the two preceding plan years to the numerator and the denominator of the fraction used to determine the FTAP.

Section 436(h) sets forth a series of presumptions that apply during the portion of the plan year that is before the plan's enrolled actuary has certified the plan's AFTAP for the year. Under § 436(h)(3), if any of the § 436 limitations did not apply to the plan for the preceding year, but the AFTAP of the plan for the preceding year was not more than 10 percentage points greater than the percentage that would have caused a limitation to apply to the plan for the preceding year and, as of the first day of the 4th month of the current plan year, the enrolled actuary of the plan has not certified the actual AFTAP for the current plan year, then, until the enrolled actuary certifies the plan's actual AFTAP for the current plan year, the plan's AFTAP for the current plan year is presumed to be equal to 10 percentage points less than the AFTAP of the plan for the preceding plan year. Under § 436(h)(2), if the plan's enrolled actuary has not certified the plan's AFTAP by the first day of the 10th month of the current plan year, the plan's AFTAP for the current plan year is conclusively presumed to be less than 60 percent as of that day.

Section 430(g)(1) provides that all determinations made under § 430 for a plan year (including the determination of a plan's FTAP and AFTAP) must be made as of the plan's valuation date. Section 430(g)(2) provides that, other than for small plans with 100 or fewer participants (determined as provided in § 430(g)(2)(B) and (C)), the valuation date for a plan year must be the first day of the plan year.

Section 436(k) provides that, for purposes of § 436, in the case of plan years beginning in 2008, the FTAP for the preceding plan year may be determined using such methods of estimation as the Secretary may provide.

The House of Representatives and the Senate have both passed similar but not identical bills containing technical corrections to PPA (H.R. 6382, passed by the House of Representatives on July 8, 2008, and S. 1974, passed by the Senate on December 19, 2007). Both of these bills would grant the Treasury Department authority to develop special rules under § 436 with respect to plans with valuation dates other than the first day of the plan year.

Proposed regulations under § 436 were published as § 1.436–1 on August 31, 2007 (REG–113891–07, 2007–42 I.R.B. 821 [72 FR 50544]).[1] Section 1.436–1(j)(2) and (3) of the proposed regulations would provide rules for determining the FTAP and AFTAP for purposes of applying the § 436 benefit limitations. Section 1.436–1(j)(3)(iii)(B) provides that, for purposes of determining the plan's AFTAP for the first year § 436 applies to the plan, the adjusted funding target is equal to the current liability determined pursuant to § 412(l)(7) as of the plan's valuation date for the plan year that precedes the first plan year for which § 436 applies to the plan, increased by the aggregate amount of purchases of annuities for employees other than highly compensated employees (as defined in § 414(q)) which were made by the plan during the preceding 2 plan years.

Proposed § 1.436–1(j)(3)(iv) provides that, in any case in which the plan's enrolled actuary has not issued a certification of the AFTAP of the plan for the plan year preceding the plan year § 436 first applies to the plan (the pre-effective plan year), the AFTAP of the plan for the plan year is presumed to be less than 60 percent until the AFTAP of the plan for that pre-effective plan year has been certified. Under the proposed regulations, this rule applies for purposes of § 1.436–1(b) and (c) at the beginning of the first plan year that § 436 applies to the plan and applies for purposes of § 1.436–1(d) and (e) as of the first day of

[1] A correction notice was published with respect to this notice of proposed rulemaking in the Federal Register dated November 9, 2007 (72 FR 63528).

the fourth month of the first plan year that § 436 applies to the plan. The guidance set forth in the proposed § 436 regulations with respect to application of these presumptions does not address how the rules of § 436(h) apply to a plan with a valuation date that is not the first day of the plan year. See proposed § 1.436–1(h)(5).

On December 31, 2007, proposed regulations under §§ 430(d), 430(g), 430(h), and 430(i) were published in the Federal Register (REG–139236–07, 2008–9 I.R.B. 491 [72 FR 74215]). Those regulations are proposed to apply to plan years beginning on or after January 1, 2009.

On April 15, 2008, proposed regulations under §§ 430(a), 430(c), 430(e), and 430(j) were published in the Federal Register (REG–108508–08, 2008–19 I.R.B. 923 [73 FR 20203]). Those regulations are proposed to apply to plan years beginning on or after January 1, 2009.

On February 19, 2008, the Service published Notice 2008–21. Part III.B of Notice 2008–21 provides a transition rule for application of § 436 benefit limitations by small plans with end of the plan year valuation dates. Under this transition rule, in the case of a plan that has a valuation date that is the last day of the plan year for each of the plan years beginning in 2006, 2007, and 2008, for purposes of applying the benefit limitations of § 436 for the plan year beginning during 2008, a certification of the plan's AFTAP for the prior plan year (the 2007 plan year) is permitted to be made by determining the FTAP for the 2007 plan year as follows:

- The FTAP for the 2007 plan year is equal to a fraction (expressed as a percentage), the numerator of which is the value of net plan assets, and the denominator of which is the plan's current liability determined pursuant to § 412(l)(7) on the valuation date for the second plan year that begins before 2008 (the 2006 plan year), including the increase in current liability for the 2006 plan year.

- For purposes of determining the FTAP for the 2007 plan year, the value of net plan assets is determined as the value of plan assets under § 412(c)(2) as in effect for the 2006 plan year, adjusted as follows: (1) contributions made for the 2006 plan year are taken into account, regardless of whether those contributions are made during the plan year or after the end of the plan year and within the period specified under § 412(c)(10); (2) the value of plan assets taking into account the amount of contributions made for the 2006 plan year is increased or decreased, as necessary, so that it is neither less than 90 percent of the fair market value of plan assets nor greater than 110 percent of the fair market value of plan assets on the valuation date for the 2006 plan year (taking into account assets attributable to contributions for the 2006 plan year); and (3) the plan's funding standard account credit balance as of the end of the 2006 plan year is subtracted (unless the value of plan assets is greater than or equal to 90 percent of the plan's current liability determined under § 412(l)(7) on the valuation date for the 2006 plan year).

Section IV of Notice 2008–21 describes rules that the Service and the Treasury Department are considering with respect to end-of-year valuation dates in the event that technical corrections are enacted.

Additional transition relief

Because technical corrections to PPA have not yet been enacted, many small plans that would have otherwise retained end-of-year valuation dates will adopt beginning-of-year valuation dates for the 2008 plan year. This change will make those plans ineligible for the transition relief set forth in Section III.B of Notice 2008–21. Accordingly, these plans may have difficulty in complying with the timing requirements for certifying the plan's AFTAP. To address these difficulties, the transition relief of Section III.B of Notice 2008–21 is expanded to apply with respect to any plan that had an end-of-year valuation date for both the 2006 and 2007 plan years, regardless of the plan's valuation date for 2008. The Service and the Treasury Department are considering the extent to which automatic approval to change valuation dates and to make other funding method changes should be granted for the 2009 plan year.

DRAFTING INFORMATION

The principal authors of this notice are David Ziegler of the Employee Plans, Tax Exempt and Government Entities Division, and Lauson C. Green and Linda S. F. Marshall of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Mr. Ziegler via e-mail at *RetirementPlanQuestions@irs.gov*, and contact Mr. Green and Ms. Marshall at (202) 622–6090 (not a toll-free number).

Qualified Transportation Fringes

Notice 2008–74

The purpose of this notice is to delay the effective date of Revenue Ruling 2006–57, 2006–2 C.B. 911. Revenue Ruling 2006–57 provides guidance to employers on the use of smartcards, debit or credit cards, or other electronic media to provide qualified transportation fringes under Internal Revenue Code §§ 132(a)(5) and 132(f). The ruling's effective date was set for January 1, 2008. In 2007, however, Treasury and the IRS became aware that certain transit systems needed additional time to modify their technology and make it compatible with the requirements for vouchers set forth in Revenue Ruling 2006–57. Consequently, Treasury and the IRS delayed the effective date of Revenue Ruling 2006–57 until January 1, 2009. See Notice 2007–76, 2007–40 I.R.B. 735. Certain transit systems continue to experience technology barriers to achieving compatibility with the requirements for vouchers. Therefore, the ruling's effective date is further delayed until January 1, 2010. Nevertheless, employers and employees may rely on Revenue Ruling 2006–57 with respect to transactions occurring prior to January 1, 2010. The principal author of this notice is Don M. Parkinson of the Office of Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding this notice, contact Don M. Parkinson at (202) 622–6040 (not a toll-free call).

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

Notice 2008–75

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

CORPORATE BOND WEIGHTED AVERAGE INTEREST RATE

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

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

The composite corporate bond rate for August 2008 is 6.76 percent. Pursuant to Notice 2004–34, the Service has determined this rate as the average of the monthly yields for the included corporate bond indices for that month.

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

For Plan Years Beginning in		Corporate Bond Weighted	Permissible Range		
Month	*Year*	Average	90%	to	100%
September	2008	6.10	5.49		6.10

YIELD CURVE AND SEGMENT RATES

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

Notice 2007–81, 2007–44 I.R.B. 899, provides guidelines for determining the monthly corporate bond yield curve, the 24-month average corporate bond segment rates, and the funding transitional segment rates used to compute the target normal cost and the funding target. Pursuant to Notice 2007–81, the monthly corporate bond yield curve derived from August 2008 data is in Table I at the end of this notice. The spot first, second, and third segment rates for the month of August 2008 are, respectively, 5.21, 6.87, and 6.91. The three 24-month average corporate bond segment rates applicable for September 2008 under the election of § 430(h)(2)(G)(iv) are as follows:

First Segment	Second Segment	Third Segment
5.07	6.09	6.56

The transitional segment rates under § 430(h)(2)(G) applicable for September 2008, taking into account the corporate bond weighted average of 6.10 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2008	5.76	6.10	6.25
2009	5.41	6.09	6.41

30-YEAR TREASURY SECURITIES INTEREST RATES

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

The rate of interest on 30-year Treasury securities for August 2008 is 4.50 percent. The Service has determined this rate as the average of the yield on the 30-year Treasury bond maturing in February 2038 determined each day through August 6, 2008, and the yield on the 30-year Treasury bond maturing in May 2038 determined each day for the balance of the month.

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

For Plan Years Beginning in		30-Year Treasury Weighted Average	Permissible Range		
Month	*Year*		90%	to	105%
September	2008	4.72	4.24		4.95

MINIMUM PRESENT VALUE SEGMENT RATES

Generally for plan years beginning after December 31, 2007, the applicable interest rates under § 417(e)(3)(D) are segment rates computed without regard to a 24-month average. For plan years beginning in 2008 through 2011, the applicable interest rate is the monthly spot segment rate blended with the applicable rate under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning in 2007. Notice 2007–81 provides guidelines for determining the minimum present value segment rates. Pursuant to that notice, the minimum present value transitional segment rates determined for August 2008, taking into account the August 2008 30-year Treasury rate of 4.50 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2008	4.64	4.97	4.98
2009	4.78	5.45	5.46

DRAFTING INFORMATION

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

Table I

Monthly Yield Curve for August 2008

Maturity	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*
0.5	3.79	20.5	7.02	40.5	6.90	60.5	6.86	80.5	6.84
1.0	4.27	21.0	7.02	41.0	6.89	61.0	6.86	81.0	6.84
1.5	4.69	21.5	7.01	41.5	6.89	61.5	6.86	81.5	6.84
2.0	5.04	22.0	7.00	42.0	6.89	62.0	6.86	82.0	6.84
2.5	5.31	22.5	7.00	42.5	6.89	62.5	6.86	82.5	6.84
3.0	5.51	23.0	6.99	43.0	6.89	63.0	6.86	83.0	6.84
3.5	5.67	23.5	6.98	43.5	6.89	63.5	6.86	83.5	6.84
4.0	5.81	24.0	6.98	44.0	6.89	64.0	6.86	84.0	6.84
4.5	5.93	24.5	6.97	44.5	6.89	64.5	6.86	84.5	6.84
5.0	6.04	25.0	6.97	45.0	6.89	65.0	6.86	85.0	6.84
5.5	6.15	25.5	6.96	45.5	6.88	65.5	6.86	85.5	6.84
6.0	6.25	26.0	6.96	46.0	6.88	66.0	6.86	86.0	6.84
6.5	6.34	26.5	6.95	46.5	6.88	66.5	6.85	86.5	6.84
7.0	6.43	27.0	6.95	47.0	6.88	67.0	6.85	87.0	6.84
7.5	6.52	27.5	6.95	47.5	6.88	67.5	6.85	87.5	6.84
8.0	6.60	28.0	6.94	48.0	6.88	68.0	6.85	88.0	6.84
8.5	6.67	28.5	6.94	48.5	6.88	68.5	6.85	88.5	6.84
9.0	6.74	29.0	6.94	49.0	6.88	69.0	6.85	89.0	6.84
9.5	6.80	29.5	6.94	49.5	6.88	69.5	6.85	89.5	6.84
10.0	6.85	30.0	6.93	50.0	6.88	70.0	6.85	90.0	6.84
10.5	6.90	30.5	6.93	50.5	6.88	70.5	6.85	90.5	6.84
11.0	6.94	31.0	6.93	51.0	6.87	71.0	6.85	91.0	6.84
11.5	6.97	31.5	6.93	51.5	6.87	71.5	6.85	91.5	6.84
12.0	7.00	32.0	6.92	52.0	6.87	72.0	6.85	92.0	6.84
12.5	7.02	32.5	6.92	52.5	6.87	72.5	6.85	92.5	6.84
13.0	7.04	33.0	6.92	53.0	6.87	73.0	6.85	93.0	6.84
13.5	7.06	33.5	6.92	53.5	6.87	73.5	6.85	93.5	6.84
14.0	7.07	34.0	6.92	54.0	6.87	74.0	6.85	94.0	6.84
14.5	7.07	34.5	6.91	54.5	6.87	74.5	6.85	94.5	6.84
15.0	7.08	35.0	6.91	55.0	6.87	75.0	6.85	95.0	6.84
15.5	7.08	35.5	6.91	55.5	6.87	75.5	6.85	95.5	6.84
16.0	7.08	36.0	6.91	56.0	6.87	76.0	6.85	96.0	6.84
16.5	7.07	36.5	6.91	56.5	6.87	76.5	6.85	96.5	6.83
17.0	7.07	37.0	6.91	57.0	6.87	77.0	6.85	97.0	6.83
17.5	7.06	37.5	6.90	57.5	6.86	77.5	6.85	97.5	6.83
18.0	7.06	38.0	6.90	58.0	6.86	78.0	6.85	98.0	6.83
18.5	7.05	38.5	6.90	58.5	6.86	78.5	6.85	98.5	6.83
19.0	7.05	39.0	6.90	59.0	6.86	79.0	6.84	99.0	6.83
19.5	7.04	39.5	6.90	59.5	6.86	79.5	6.84	99.5	6.83
20.0	7.03	40.0	6.90	60.0	6.86	80.0	6.84	100.0	6.83

26 CFR 1.179–1: Election to expense certain depreciable assets.
(Also: §§ 168, 179; 1.168(k)–1.)

Rev. Proc. 2008–54

SECTION 1. PURPOSE

This revenue procedure provides guidance under §§ 102 and 103 of the Economic Stimulus Act of 2008, Pub. L. No. 110–185, 122 Stat. 613 (February 13, 2008) (Stimulus Act). Section 102 of the Stimulus Act amends § 179 of the Internal Revenue Code by increasing the dollar limitations that apply to taxpayers who elect to expense certain depreciable assets under § 179 for taxable years beginning in 2008 (Stimulus § 179 deduction). Section 103 of the Stimulus Act amends § 168(k) of the Code to allow a 50-percent additional first year depreciation for certain new property acquired and placed in service during 2008 (Stimulus additional first year depreciation deduction). This revenue procedure also announces that the Internal Revenue Service and the Treasury Department intend to amend § 1.179–5(c) of the Income Tax Regulations to permit taxpayers to make an election under § 179 without the consent of the Commissioner of Internal Revenue on an amended return for taxable years beginning after 2007.

SECTION 2. BACKGROUND

.01 Section 179(a) allows a taxpayer to elect to treat as an expense the cost of any § 179 property that is not chargeable to capital account. Section 179(b) prescribes a dollar limitation on the aggregate cost of § 179 property that can be treated as an expense. The dollar limitation is the amount under § 179(b)(1) ($125,000 for any taxable year beginning after 2006 and before 2011), reduced by the amount under § 179(b)(2) (the amount by which the cost of § 179 property placed in service during the taxable year exceeds $500,000 for any taxable year beginning after 2006 and before 2011), with both amounts adjusted annually for inflation. For taxable years beginning in 2008, section 3.20 of Rev. Proc. 2007–66, 2007–45 I.R.B. 970, 975, provides that the amounts provided in § 179(b)(1) and (2), adjusted for inflation, are $128,000 and $510,000, respectively.

Section 102(a) of the Stimulus Act added § 179(b)(7) to the Code. For any taxable year beginning in 2008, § 179(b)(7) changes the amount provided in § 179(b)(1) to $250,000 and the amount provided in § 179(b)(2) to $800,000. Section 179(b)(7) also provides that these amounts will not be adjusted for inflation. This revenue procedure modifies Rev. Proc. 2007–66 to reflect these statutory changes to § 179 (see section 3 of this revenue procedure).

.02 Under § 179(d)(8), the limitations of § 179(b) apply to a partnership and to each partner, and in similar fashion apply to an S corporation and each of its shareholders. In the case of a partnership, § 1.179–2(b)(3)(iv) provides that the partner's distributive share of the partnership's § 179 expenses for the partnership's taxable year is taken into account in the partnership's taxable year that ends with or within the partner's taxable year. Similar rules apply in the case of S corporations and their shareholders. Section 1.179–2(b)(4). Thus, when the taxable years of a partnership (or an S corporation) and a partner (or an S corporation shareholder) do not coincide, each will be subject to a different dollar limitation under § 179(b)(1) and (2). This revenue procedure clarifies the application of the § 179(b)(1) limitation of $250,000 for the Stimulus § 179 deduction to partners (or S corporation shareholders) that are calendar-year taxpayers and have interests in partnerships (or S corporations) with taxable years beginning in 2008 and ending in 2009 (see section 4 of this revenue procedure).

.03 Prior to the enactment of the Stimulus Act, § 168(k)(1) provided a 30-percent additional first year depreciation deduction for qualified property acquired after September 10, 2001, and before January 1, 2005. Section 103 of the Stimulus Act amends § 168(k) to allow a taxpayer to claim the Stimulus additional first year depreciation deduction for certain new property acquired by the taxpayer after 2007 and placed in service by the taxpayer before 2009 (before 2010 in the case of property described in § 168(k)(2)(B) or (C)). Section 103 of the Stimulus Act also provides that the amount of the Stimulus additional first year depreciation allowance is 50 percent. With the exception of the increased amounts and the revised dates, the rules for determining whether depreciable property is eligible for the Stimulus additional first year depreciation deduction are the same as the rules in § 168(k) in effect before the enactment of the Stimulus Act. This revenue procedure clarifies the application of the revised rules (see section 5 of this revenue procedure).

.04 Section 1400N(d) provides a 50-percent additional first year depreciation deduction (GO Zone additional first year depreciation deduction) for qualified Gulf Opportunity Zone property placed in service by the taxpayer on or before December 31, 2007 (December 31, 2008, in the case of nonresidential real property and residential rental property) (GO Zone property). Section 1400N(d)(6) provides that in the case of any specified GO Zone extension property (GO Zone extension property), the placed-in-service date is extended to December 31, 2010. Section 103(c)(10) of the Stimulus Act amends § 1400N(d)(6) by providing that GO Zone extension property shall not include any property to which § 168(k) applies.

Section 1400N(e)(1) provides that, for purposes of § 179, the dollar amount in effect under § 179(b)(1) for the taxable year is increased by the lesser of $100,000, or the cost of qualified § 179 Gulf Opportunity Zone property (§ 179 GO Zone property) placed in service during the taxable year, and the dollar amount in effect under § 179(b)(2) for the taxable year is increased by the lesser of $600,000, or the cost of § 179 GO Zone property placed in service during the taxable year.

Section 15345 of the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1651 (June 18, 2008) (Farm Bill) provides a 50-percent additional first year depreciation deduction for certain property substantially used in the Kansas disaster area. Section 15345 of the Farm Bill also extends the increased § 179 amounts provided for § 179 GO Zone property to certain property substantially used in the Kansas disaster area.

.05 This revenue procedure clarifies:

(1) how the Stimulus § 179 deduction interacts with the increased § 179 amounts provided under § 1400N(e) for certain § 179 GO Zone property placed in service during 2008 (see section 6.01(1) of this revenue procedure);

(2) how the Stimulus additional first year depreciation deduction interacts with the GO Zone additional first year depreciation deduction for GO Zone property, including GO Zone extension property, placed in service during 2008 (see section 6.01(2) of this revenue procedure);

(3) how the Stimulus § 179 deduction interacts with the increased § 179 amounts applicable to the Kansas disaster area (see section 6.02(1) of this revenue procedure); and

(4) how the Stimulus additional first year depreciation deduction interacts with the 50-percent additional first year depreciation deduction applicable to the Kansas disaster area (see section 6.02(2) of this revenue procedure).

.06 Section 179(c) provides the rules for making and revoking elections under § 179 (§ 179 election). Pursuant to § 179(c)(1), a § 179 election is made in the manner prescribed by regulations. Prior to 2006, § 179(c)(2) provided that a § 179 election for taxable years beginning after 2002 and before 2008 may be revoked by the taxpayer with respect to any § 179 property. Section 1.179–5(c)(1) provides that for any taxable year beginning after 2002 and before 2008, a taxpayer is permitted to make or revoke a § 179 election without the consent of the Commissioner on an amended federal tax return for that taxable year.

Section 101 of the Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109–222, 120 Stat. 345 (2006) and § 8212(a) of the Small Business and Work Opportunity Tax Act of 2007, Pub. L. No. 110–28, 121 Stat. 112 (2007) amended § 179(c)(2) by extending from "2008" to "2011" the rules for revoking a § 179 election. Section 1.179–5(c) was promulgated in 2005 and has not been amended to reflect the extension to 2011. Therefore, some taxpayers are uncertain about whether a § 179 election for taxable years beginning after 2007 may be made on an amended federal tax return. This revenue procedure provides the rules for making such a § 179 election (see section 7 of this revenue procedure).

SECTION 3. MODIFICATION OF SECTION 3.20 OF REV. PROC. 2007–66

To reflect the statutory changes made to § 179 by § 102 of the Stimulus Act, section 3.20 of Rev. Proc. 2007–66 is modified to read as follows:

.20 *Election to Expense Certain Depreciable Assets.* For any taxable year beginning in 2008, under § 179(b)(1) the aggregate cost of any § 179 property a taxpayer may elect to treat as an expense cannot exceed $250,000. Under § 179(b)(2) the $250,000 limitation is reduced (but not below zero) by the amount by which the cost of § 179 property placed in service during the 2008 taxable year exceeds $800,000.

SECTION 4. APPLICATION OF § 179(b)(1) STIMULUS ACT LIMITATION WHEN TAXABLE YEARS OF PASSTHROUGH ENTITY AND ITS PARTNERS OR SHAREHOLDERS DO NOT COINCIDE

.01 *In General*. For any taxable year beginning in 2008, the § 179(b)(1) limitation under the Stimulus Act is $250,000. For taxable years beginning in 2009, the § 179(b)(1) limitation will be $125,000 plus an additional amount determined in accordance with the inflation adjustment provision of § 179(b)(5) (2009 § 179(b)(1) dollar limitation).

.02 *Application of § 179(b)(1) Limitation in Taxable Years 2008 and 2009 to Passthrough Entity and Its Partners or Shareholders with Different Taxable Years*.

(1) *Partnership or S corporation*. A partnership or an S corporation (passthrough entity) with a taxable year beginning in 2007 and ending in 2008 is subject to the § 179(b)(1) limitation of $125,000 for § 179 property placed in service by the passthrough entity during that taxable year. A passthrough entity with a taxable year beginning in 2008 and ending in 2009 is subject to the § 179(b)(1) limitation under the Stimulus Act of $250,000 for § 179 property placed in service by the passthrough entity during that taxable year.

(2) *Partner or S corporation shareholder*. Pursuant to § 1.179–2(b)(3)(iv), a partner or a S corporation shareholder that is a calendar-year taxpayer is subject to the § 179(b)(1) limitation under the Stimulus Act of $250,000 for (a) § 179 property placed in service by the partner or the S corporation shareholder during 2008 and (b) its allocable share of the § 179 deduction from any partnership or S corporation with a taxable year ending in 2008. Similarly, a partner or S corporation shareholder that is a calendar-year taxpayer is subject to the 2009 § 179(b)(1) dollar limitation for (a) § 179 property placed in service by the partner or S corporation shareholder during 2009 and (b) its allocable share of the § 179 deduction from any partnership or S corporation with a taxable year ending in 2009.

(3) *Example*. The following example illustrates the provisions of this section 4.

Example. XY, an S corporation, has a taxable year beginning April 1, 2008, and ending March 31, 2009. X, a calendar-year taxpayer, is the sole shareholder of XY. X is engaged in the active conduct of XY's trade or business. X does not own any interests in any other partnerships or S corporations. Further, X is not engaged in the active conduct of any other trades or businesses. XY purchases only one item of § 179 property, costing $250,000, during its taxable year beginning April 1, 2008, and ending March 31, 2009, and places this § 179 property in service on April 18, 2008. For its taxable year beginning April 1, 2008, and ending March 31, 2009, XY elects under § 179 to expense the $250,000 cost of that § 179 property and allocates its § 179 deduction of $250,000 to X. Because XY's taxable year ends within X's 2009 taxable year, X cannot claim its share of the $250,000 attributable to XY's § 179 deduction until X's 2009 taxable year. As a result, X is subject to the 2009 § 179(b)(1) dollar limitation, instead of the Stimulus Act limitation of $250,000, for its taxable year beginning in 2009.

SECTION 5. STIMULUS ADDITIONAL FIRST YEAR DEPRECIATION DEDUCTION

.01 *Application of § 1.168(k)–1*. For purposes of the Stimulus additional first year depreciation deduction, rules similar to the rules in § 1.168(k)–1 for "qualified property" or for "30-percent additional first year depreciation deduction" apply. However, in applying § 1.168(k)–1(d)(1)(i), the computation of the allowable Stimulus additional first year depreciation deduction is made in accordance with the rules for 50-percent bonus depreciation property.

.02 *Certain Aircraft*. For aircraft described in § 168(k)(2)(C), the nonrefundable deposit requirement in § 168(k)(2)(C)(iii) is satisfied if the purchaser, at the time of the purchase contract, has made a nonrefundable deposit of at

least the lesser of 10 percent of the cost of the aircraft or $100,000.

SECTION 6. INTERACTION OF THE STIMULUS ACT WITH CERTAIN TAX INCENTIVES FOR GO ZONE AND KANSAS DISASTER AREA

.01 *Stimulus Act and GO Zone*.

(1) *Section 179*.

(a) *In general*. Section 1400N(e)(1) provides that, for purposes of § 179, the dollar amount in effect under § 179(b)(1) for the taxable year is increased by the lesser of $100,000, or the cost of § 179 GO Zone property placed in service during the taxable year, and the dollar amount in effect under § 179(b)(2) for the taxable year is increased by the lesser of $600,000, or the cost of § 179 GO Zone property placed in service during the taxable year.

(b) *Section 179 GO Zone property substantially used in specified portions of the GO Zone*. For any taxable year beginning in 2008, the only § 179 GO Zone property eligible for the increased § 179 amounts under § 1400N(e)(1) is § 179 GO Zone property substantially all of the use of which is in one or more specified portions of the GO Zone (as defined in § 1400N(d)(6) and section 3 of Notice 2007–36, 2007–17 I.R.B. 1000) and placed in service by the taxpayer on or before December 31, 2008. For all such § 179 GO Zone property, the § 179(b)(1) dollar amount for any taxable year beginning in 2008 is $250,000, increased by the lesser of $100,000, or the cost of that property placed in service during that taxable year, and the § 179(b)(2) dollar amount for any taxable year beginning in 2008 is $800,000, increased by the lesser of $600,000, or the cost of that property placed in service during that taxable year. Accordingly, for all § 179 GO Zone property described in this section 6.01(1)(b), the maximum § 179(b)(1) and § 179(b)(2) amounts available for any taxable year beginning in 2008 are $350,000 and $1,400,000, respectively.

(c) *Other § 179 GO Zone property*. For all § 179 GO Zone property (other than the property described in section 6.01(1)(b) of this revenue procedure) placed in service by the taxpayer during any taxable year beginning in 2008, the maximum § 179(b)(1) and § 179(b)(2) amounts available for that taxable year are $250,000 and $800,000, respectively. For all § 179 GO Zone property placed in service by the taxpayer during any taxable year beginning in 2007 and ending in 2008, the § 179(b)(1) dollar amount is $125,000, increased by the lesser of $100,000, or the cost of that property placed in service during that taxable year, and the § 179(b)(2) dollar amount is $500,000, increased by the lesser of $600,000, or the cost of that property placed in service during that taxable year. Accordingly, for all § 179 GO Zone property placed in service by the taxpayer during any taxable year beginning in 2007 and ending in 2008, the maximum § 179(b)(1) and § 179(b)(2) amounts available for that taxable year are $225,000 and $1,100,000, respectively.

(2) *Additional first year depreciation deduction*.

(a) *Nonresidential real property or residential rental property*. Except for qualified leasehold improvement property (as defined in § 168(k)(3) and § 1.168(k)–1(c)), the Stimulus additional first year depreciation deduction does not apply to nonresidential real property or residential rental property. Accordingly, in the case of nonresidential real property or residential rental property (other than qualified leasehold improvement property) that is GO Zone property or GO Zone extension property, the rules under § 1400N(d) apply (including the self-constructed property rules under § 1400N(d)(3), as amended by the Stimulus Act).

(b) *Other property*.

(i) *GO Zone extension property*. For the taxable year beginning after 2007, the only property to which both §§ 168(k) and 1400N(d) apply is GO Zone extension property that is described in § 1400N(d)(6)(B)(ii)(II), is new property, is acquired by the taxpayer after 2007, and is placed in service by the taxpayer before 2009. For such property, the rules under § 168(k) apply. For all other GO Zone extension property described in § 1400N(d)(6)(B)(ii)(II) (including used property), the rules under § 1400N(d) apply.

(ii) *GO Zone property other than GO Zone extension property*. Because the GO Zone additional first year depreciation deduction has expired for GO Zone property described in § 1400N(d)(2)(A)(i)(I) (other than GO Zone extension property), the rules under § 168(k) apply to such property.

.02 *Stimulus Act and Kansas Disaster Area*.

(1) *Section 179 property*.

(a) *In general*. Sections 15345(a)(2) and (d)(2) of the Farm Bill increased the dollar amounts under § 179(b)(1) and (b)(2) that are available to taxpayers for qualified § 179 Recovery Assistance property (§ 179 RA property) placed in service by the taxpayer on or before December 31, 2008. Section 179 RA property is § 179 property (as defined in § 179(d) and § 1.179–4(a)) that is qualified Recovery Assistance property (as defined in § 1400N(d)(2) and in sections 2.02 and 2.03 of Notice 2008–67, 2008–32 I.R.B. 307 (August 11, 2008)). *See* § 1400N(e)(2)(A). Section 15345(d)(2) provides that, with the exception of newly revised dates for determining the eligibility of § 179 RA property, the rules for determining the eligibility of the increased dollar amounts under § 179(b)(1) and (b)(2) that are available to taxpayers for § 179 RA property will be determined by following § 1400N(e) (other than § 1400N(e)(2)(B)). Accordingly, for purposes of § 179, the dollar amount in effect under § 179(b)(1) for the taxable year is increased by the lesser of $100,000, or the cost of § 179 RA property placed in service during the taxable year, and the dollar amount in effect under § 179(b)(2) for the taxable year is increased by the lesser of $600,000, or the cost of § 179 RA property placed in service during the taxable year.

(b) *Section 179 RA property placed in service during any taxable year beginning in 2008*. For all § 179 RA property placed in service by a taxpayer during any taxable year beginning in 2008, the § 179(b)(1) dollar amount is $250,000, increased by the lesser of $100,000, or the cost of that property placed in service during that taxable year, and the § 179(b)(2) dollar amount is $800,000, increased by the lesser of $600,000, or the cost of that property placed in service during that taxable year. Accordingly, for all § 179 RA property described in this section 6.01(2)(b), the maximum § 179(b)(1) and § 179(b)(2) amounts available for any taxable year beginning in 2008 are $350,000 and $1,400,000, respectively.

(c) *Other § 179 RA property*. For all § 179 RA property placed in service by the taxpayer during any taxable year beginning in 2007 and ending in 2008, the § 179(b)(1) dollar amount is $125,000, increased by the lesser of $100,000, or the cost of that property placed in service during that taxable year, and the § 179(b)(2) dollar amount is $500,000, increased by the lesser of $600,000, or the cost of that property placed in service during that taxable year. Accordingly, for all § 179 RA property placed in service by the taxpayer during any taxable year beginning in 2007 and ending in 2008, the maximum § 179(b)(1) and § 179(b)(2) amounts available for that taxable year are $225,000 and $1,100,000, respectively.

(2) *Additional first year depreciation deduction*.

(a) *In general*. Sections 15345(a)(1) and (d)(1) of the Farm Bill allow a 50-percent additional first year depreciation deduction (Kansas additional first year depreciation deduction) for qualified Recovery Assistance property (RA property) acquired by the taxpayer after May 4, 2007, and placed in service by the taxpayer before 2009 (2010, in the case of qualified nonresidential real property and residential rental property). Section 15345(d)(1) provides that, with the exception of newly revised dates for determining the eligibility of the Kansas additional first year depreciation deduction for RA property, the rules for determining the eligibility of the Kansas additional first year depreciation deduction for RA property will be determined by following § 1400N(d)(1) through (5). For more details about the Kansas additional first year depreciation deduction, see Notice 2008–67, 2008–32 I.R.B. 307 (August 11, 2008).

(b) *Nonresidential real property or residential rental property*. Except for qualified leasehold improvement property (as defined in § 168(k)(3) and §1.168(k)–1(c)), the Stimulus additional first year depreciation deduction does not apply to nonresidential real property or residential rental property. Accordingly, in the case of nonresidential real property or residential rental property (other than qualified leasehold improvement property) that is RA property, the rules under § 1400N(d) apply (including the self-constructed property rules under § 1400N(d)(3), as amended by the Stimulus Act).

(c) *Other RA property*. If property qualifies for both the Kansas additional first year depreciation deduction and the Stimulus additional first year depreciation deduction, only one additional first year depreciation deduction is allowable for that property. For a taxable year beginning after 2007, the only property to which § 15345(a)(1) and (d)(1) of the Farm Bill and § 168(k) apply is RA property that is described in § 1400N(d)(2)(A)(i)(I), is new property, is acquired by the taxpayer after 2007, and is placed in service by the taxpayer before 2009. For such property, the rules under § 168(k) apply. For all other RA property described in § 1400N(d)(2)(A)(i)(I) (including used property), the rules under § 1400N(d) apply.

SECTION 7. MAKING SECTION 179 ELECTIONS BY AMENDED RETURNS FOR TAXABLE YEARS BEGINNING AFTER 2007

For any taxable year beginning after 2007 and before the last year provided in § 179(c)(2) for revoking a § 179 election by a taxpayer with respect to any § 179 property, the taxpayer will be permitted to make a § 179 election without the Commissioner's consent on an amended federal tax return for that taxable year. Currently, the last year provided in § 179(c)(2) is 2011. The Internal Revenue Service and the Treasury Department intend to amend § 1.179–5(c) to incorporate the guidance set forth under this section 7. Until § 1.179–5(c) is amended, taxpayers may rely on the guidance set forth in this section 7.

SECTION 8. EFFECT ON OTHER DOCUMENTS

.01 Section 3.20 of Rev. Proc. 2007–66 is modified and superseded.

.02 Section 4.01(4)(b) of Notice 2007–36, 2007–17 C.B. 1000, is clarified, modified, and amplified as provided in section 6.01(2)(b)(i) of this notice.

SECTION 9. EFFECTIVE DATE

This revenue procedure is effective for (1) § 179 property placed in service by the taxpayer in its taxable year beginning in 2007 or 2008, and (2) property eligible for the Stimulus additional first year depreciation deduction that is acquired by the taxpayer after 2007 and placed in service by the taxpayer before 2009 (before 2010 in the case of property described in § 168(k)(2)(B) or (C)).

SECTION 10. DRAFTING INFORMATION

The principal authors of this revenue procedure are Winston H. Douglas and Douglas Kim of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding the Stimulus, GO Zone, or Kansas additional first year depreciation deduction, contact Mr. Kim at (202) 622–4930 (not a toll-free call). For further information regarding § 179, contact Mr. Douglas at (202) 622–4930 (not a toll-free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking

Alcohol Fuel and Biodiesel; Renewable Diesel; Alternative Fuel; Diesel-Water Fuel Emulsion; Taxable Fuel Definitions; Excise Tax Returns

REG–155087–05

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to credits and payments for alcohol mixtures, biodiesel mixtures, renewable diesel mixtures, alternative fuel mixtures, and alternative fuel sold for use or used as a fuel, as well as proposed regulations relating to the definition of gasoline and diesel fuel. These regulations reflect changes made by the American Jobs Creation Act of 2004, the Energy Policy Act of 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, and the Tax Technical Corrections Act of 2007. These regulations affect producers of alcohol, biodiesel, and renewable diesel; producers of alcohol, biodiesel, renewable diesel, and alternative fuel mixtures; sellers and users of alternative fuel; and certain persons liable for the tax on removals, entries, or sales of gasoline or diesel fuel.

DATES: Written or electronic comments and requests for a public hearing must be received by October 27, 2008.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–155087–05), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–155087–05), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *http:/www.regulations.gov* (IRS REG–155087–05).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Stephanie Bland, Taylor Cortright, or DeAnn Malone, all of whom can be reached at (202) 622–3130 (not a toll-free call); concerning the submission of comments or requests for a public hearing, Oluwafunmilayo Taylor at (202) 622–7180 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by September 29, 2008. Comments are specifically requested concerning:

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

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

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

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

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

The collection of information in this proposed regulation is in §48.6426–3(e), describing the certificate the biodiesel producer must give to the claimant of a biodiesel mixture credit or biodiesel credit; §48.6426–3(f), describing the statement a biodiesel reseller must give to the claimant of a biodiesel mixture credit or biodiesel credit; §48.6426–4(e), describing the certificate the renewable diesel producer must give to the claimant of a renewable diesel mixture credit or renewable diesel credit; §48.6426–4(f), describing the statement a renewable diesel reseller must give to the claimant of a renewable diesel mixture credit or renewable diesel credit; and §48.6426–6(c), describing the statement given to a seller of liquefied natural gas. This information is required to obtain a tax benefit. This information will be used by the IRS to substantiate claims for the tax benefits. The likely recordkeepers are business or other for-profit institutions and small businesses or organizations.

Estimated total annual reporting burden: 17,710 hours.

Estimated average annual burden hours per respondent varies from 2.5 hours to 25 hours, depending on individual circumstances, with an estimated average of 22 hours.

Estimated number of respondents: 756.

Estimated annual frequency of responses: On occasion.

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

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

Background

The Internal Revenue Code (Code) provides incentives for certain renewable and alternative fuels. Before January 1, 2005, a reduced rate of tax applied to most

alcohol-blended fuels. The American Jobs Creation Act of 2004 (Public Law 108–357) replaced the reduced rate of tax for alcohol-blended fuels with credits or payments for alcohol and alcohol mixtures that are sold for use or used as a fuel. The Act also added credits and payments for biodiesel and biodiesel mixtures sold for use or used as a fuel. Credit and payment provisions for renewable diesel, renewable diesel mixtures, alternative fuel, alternative fuel mixtures, and diesel-water fuel emulsions were added to the Code by the Energy Policy Act of 2005 (Public Law 109–58) and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Public Law 109–59) (SAFETEA). Technical corrections to SAFETEA were made by the Tax Technical Corrections Act of 2007 (Public Law 110–172).

The incentives include a credit under section 6426 for alcohol fuel mixtures, biodiesel mixtures, renewable diesel mixtures (incorporated into section 6426 by section 40A(f)), and alternative fuel mixtures sold for use or used as a fuel and alternative fuel sold for use or used as a fuel in a motor vehicle or motorboat. The credit under section 6426 is allowed against the claimant's fuel tax liability. The incentives for these fuels also include a payment under section 6427(e) and a refundable income tax credit under section 34. The amount allowed as a payment or credit under these provisions is reduced by the claimant's excise tax liability against which a credit is allowed under section 6426. Section 40 provides a nonrefundable income tax credit for alcohol fuel mixtures, alcohol that is sold for use or used as a fuel, and for the production of alcohol by certain small ethanol producers; section 40A provides similar rules relating to biodiesel and renewable diesel. The Code includes coordination rules that limit the maximum incentive that may be claimed for any particular gallon of alcohol, biodiesel, renewable diesel, and alternative fuel. Generally, for alcohol that is ethanol, the benefit is $0.51 per gallon; for biodiesel, the incentive is $0.50 per gallon ($1.00 per gallon in the case of agri-biodiesel); for renewable diesel, the incentive is $1.00 per gallon; and, for alternative fuel, the incentive is $0.50 per gallon. In the case of small ethanol producers and small agri-biodiesel producers, however, the Code allows an additional income tax credit of $0.10 per gallon.

Notice 2005–4, 2005–1 C.B. 289, describes the alcohol and biodiesel credits and payments and provides general guidance for these incentives. Comments received after the publication of Notice 2005–4 requested additional guidance with regard to the biodiesel producer certificates in the case of resale, commingled biodiesel, the definition of agri-biodiesel, and the definition of a biodiesel mixture. Guidance on these issues was provided in Notice 2005–62, 2005–2 C.B. 443. Notice 2005–80, 2005–2 C.B. 953, describes the registration requirements related to diesel-water fuel emulsions. Notice 2006–92, 2006–2 C.B. 774, describes the alternative fuel credits and payments. Notice 2007–37, 2007–17 I.R.B. 1002, provides guidance on renewable diesel. Notice 2007–97, 2007–49 I.R.B. 1092, provides guidance on liquid hydrocarbons for purposes of the definition of alternative fuel. Comments were received in response to these notices and have been considered in the development of this notice of proposed rulemaking.

Renewable and alternative fuels; currently applicable rules.

The IRS has received numerous inquiries about the proper steps that must be taken to comply with the tax laws and to take full advantage of the tax incentives for certain renewable and alternative fuels. The following are general rules that are currently applicable and would not be changed by these proposed regulations.

Registration.

Registration by the IRS is required for each person that produces alcohol, biodiesel, renewable diesel, or blended taxable fuel or claims credits or payments with respect to alternative fuel.

Application for registration is made on Form 637, *"Application for Registration (For Certain Excise Tax Activities)."* A person generally may not engage in an activity for which registration is required until the IRS has approved the person's registration with respect to the activity.

Imposition of tax.

Tax is imposed on the removal of a biodiesel mixture that is diesel fuel from the terminal at the terminal rack. In the case of blended taxable fuel, tax is imposed on a blender's sale or removal of the fuel and the blender is liable for the tax. Blended taxable fuel includes diesel fuel or gasoline produced outside of the bulk transfer/terminal system by mixing an untaxed liquid, such as biodiesel or alcohol, with a taxable fuel, such as diesel fuel or gasoline, that has been previously taxed (even if only at the Leaking Underground Storage Tank Trust Fund financing rate). Thus, for example, if a person produces, outside the bulk transfer/terminal system, a biodiesel mixture that is diesel fuel, that person is liable for tax on its removal or sale of the mixture. Further, tax generally is imposed on the delivery of fuel that has not been taxed into the fuel supply tank of a motor vehicle or diesel-powered train and on the delivery of alternative fuel (liquid fuel other than gas oil, fuel oil, or taxable fuel) into the fuel supply tank of a motorboat unless the delivery of the fuel or alternative fuel is for a nontaxable purpose.

Liability for these excise taxes is reported on Form 720, *"Quarterly Federal Excise Tax Return."* Persons that are liable for excise taxes may also be required to make semi-monthly deposits. See Form 720 for more information on deposits.

Tax incentives for mixtures.

The excise tax credits for mixtures containing alcohol, biodiesel, renewable diesel, or alternative fuel must be claimed on Form 720, Schedule C. These credits are allowed to the extent of certain fuel tax liability. The credits are claimed by the person producing the mixture.

The mixture producer may also claim payments (or refundable income tax credits) for incentives that exceed tax liability; that is, for the amount by which the maximum incentive allowable for the mixture exceeds the credit allowed on the Form 720. Notice 2005–62 contains guidance on the computation of payment limitations. Claims for payment are made either on Form 8849, *"Claim for Refund of Excise Taxes,"* or Schedule C, Form 720, *"Quarterly Federal Excise Tax Return."* (Thus, claims on Form 720 may be for both an

excise tax credit and a payment.) Claims for the refundable income tax credit are made on Form 4136, *"Credit for Federal Tax Paid on Fuels,"* which is attached to the claimant's income tax return.

Tax incentives for neat fuels.

A nonrefundable general business tax credit may be claimed for alcohol, biodiesel, and renewable diesel fuels that are not in a mixture and are used as a fuel. This is the only credit or payment allowed with respect to the use of these neat fuels as a fuel. Claims for the credit are made by the person using the renewable fuel in a trade or business or by the person that sold the fuel at retail and delivered it into a vehicle. The small ethanol producer credit and the small agri-biodiesel producer credit are also nonrefundable general business credits. Claims for nonrefundable general business credits are made on Form 6478, *"Credit for Alcohol Used as Fuel,"* and Form 8864, *"Biodiesel and Renewable Diesel Fuels Credit,"* attached to the claimant's income tax return.

An excise tax credit may be claimed for alternative fuel that is not in a mixture and is used as a fuel. The excise tax credit is claimed on Form 720, Schedule C. The credit is allowed to the extent of certain fuel excise tax liability. The credit is claimed by the alternative fueler (unmixed fuel). If the incentive for unmixed alternative fuel exceeds the applicable excise tax liability the excess may be claimed as a payment on Form 8849 or as a refundable income tax credit on Form 4136.

Explanation of Provisions

The proposed regulations add provisions relating to registration requirements and excise tax credits or payments for alcohol, biodiesel, renewable diesel and alternative fuel mixtures and for alternative fuel and diesel-water fuel emulsions. The regulations provide definitions and prescribe rules for claiming a credit or payment. Specifically, the regulations prescribe the conditions to allowance of a credit or payment, the content of claims for credit or payment, and the form of applicable certificates. The proposed regulations also remove obsolete regulations relating to gasohol and other alcohol fuels.

The proposed regulations generally adopt the rules of Notices 2005–4, 2005–62, 2005–80, 2006–92, 2007–37, and 2007–97. Differences between the notices and the proposed regulations are described in this preamble.

Biodiesel mixtures and liability for tax.

Notice 2005–62 provides that *biodiesel mixture* means a mixture of biodiesel and diesel fuel that contains at least 0.1 percent (by volume) of diesel fuel. That rule is unchanged by these proposed regulations.

Under existing regulations, diesel fuel does not include "excluded liquid"; biodiesel mixtures with a high concentration of biodiesel typically are classified as an excluded liquid. The definition of "excluded liquid" predates the biodiesel incentives and was intended to ensure that the diesel fuel tax was not imposed on certain liquids typically not used as fuel. The proposed regulations revise the definition of "excluded liquid" so that all biodiesel mixtures, which are generally used as a substitute for diesel fuel, will be classified as diesel fuel for tax purposes. As a result, under the proposed regulations, tax is imposed on a biodiesel mixture when it is removed from the bulk transfer/terminal system. If a biodiesel mixture is produced outside the bulk transfer/terminal system, tax is imposed on the sale or removal of the mixture by the mixture producer. The mixture producer is liable for the tax and must be registered as a blender of taxable fuel. The tax incentive for the biodiesel mixture generally must be taken as a credit against the producer's fuel tax liability and any excess over the fuel tax liability is allowable as either a payment or an income tax credit.

Also, the *de minimis* exception to the definition of "blended taxable fuel" is removed. Under this exception, a mixture is not blended fuel if the person creating the mixture adds less than 400 gallons of untaxed liquid to previously taxed fuel during the quarter and the operator of the vehicle using the mixture is liable for the tax on the untaxed liquid. Thus, in cases in which the untaxed liquid is alcohol, biodiesel, or alternative fuel, the exception prevents the credit for which the mixture producer is eligible from being used to offset the tax. With the removal of this exception, the same person (the producer of the mixture) will be liable for the tax and eligible for the credit that can be used to offset the tax.

Biodiesel and EPA registration requirements.

The Code defines *biodiesel* as monoalkyl esters of long chain fatty acids derived from plant or animal matter that meet (1) the registration requirements of the Environmental Protection Agency (EPA) for fuel and fuel additives and, (2) ASTM D6751. Under the proposed regulations, a product meets the EPA registration requirements if the EPA does not require the product to be registered. Thus, for example, if a biodiesel mixture is to be sold only at a marina for use in boats, the biodiesel in the mixture meets the EPA registration requirement because EPA registration requirements do not apply to fuels or fuel additives sold for use in boats.

Biodiesel certificates.

The Code provides that a claim relating to a biodiesel mixture is not allowed unless, among other conditions, the claimant obtains the prescribed certificate from the biodiesel producer. Under existing rules, as well as the proposed regulations, this certificate must be attached to the claim that is filed with the IRS. However, the proposed regulations do not require a separate certificate to accompany the claim filed by a mixture producer that is also the producer of the biodiesel in the mixture. Further, the proposed regulations require, as a condition to allowance of an excise tax credit or a payment, that the claimant obtain the certificate from a registered biodiesel producer. If the claim is for a nonrefundable general business credit, the certificate may be from the registered producer or importer.

Erroneous biodiesel certificates.

Under the Code, a claim relating to a biodiesel mixture is not allowed if the mixture does not actually contain biodiesel. Guidance was requested on whether a claim would be allowed if the claimant attached a certificate for biodiesel and the information on the certificate proved to be incorrect. The proposed regulations make clear that such a claim is not allowed even if the claim is based on a biodiesel certificate that the claimant accepted in good faith. In such a case, however, the proposed regulations generally provide that reliance on the certificate will be treated

as reasonable cause for purposes of the penalties imposed by sections 6651 (relating to failure to pay) and 6675 (relating to excessive claims).

Alternative fuel.

The Code allows a credit or payment for alternative fuel that is not in a mixture if the alternative fuel is sold for use or used as a fuel in a motor vehicle or motorboat. If the claim is based on a sale, the claimant must deliver the fuel into the fuel supply tank of the motor vehicle or motorboat or, in the case of a bulk sale, obtain the statement described in §48.4041–5(a)(2), §48.4041–21(b), or proposed §48.6426–6(c).

Registration of alternative fuelers.

A person must be registered by the IRS before claiming the alternative fuel or alternative fuel mixture credit or payment. Section 34 allows a refundable income tax credit with respect to alternative fuel or an alternative fuel mixture. This credit is claimed on Form 4136 filed with the claimant's Federal income tax return. Because partnerships do not file federal income tax returns, the refundable income tax credit allowable with respect to a partnership's sale or use of alternative fuel is made by its partners. The partners may file Form 4136 with their income tax returns to claim a credit based on the information provided them on the partnership's Schedule K–1.

The proposed regulations provide that a partner in a partnership is treated as a registered alternative fueler for purposes of claims on Form 4136 if the partnership is registered for purposes of claims for an excise tax credit or payment. A partner that is treated as registered under this rule is to provide the partnership's registration number on Form 4136. These rules also apply for purposes of ultimate vendor claims by partners in partnerships that are ultimate vendors of diesel fuel or kerosene.

Small ethanol producer credit.

Section 40(a)(3) provides an income tax credit for ethanol produced by eligible small ethanol producers. The amount of ethanol that is eligible for the credit during any taxable year cannot exceed 15,000,000 gallons for any producer. A small ethanol producer generally means a person whose productive capacity for all alcohol, including alcohol for which a credit is not allowable under section 40, does not exceed 60,000,000 gallons at any time during the taxable year. Section 40(g)(5) authorizes the Secretary to prescribe regulations to prevent the credit from benefiting a person that directly or indirectly has a productive capacity for alcohol in excess of 60,000,000 gallons and to prevent any person from directly or indirectly benefiting with respect to more than 15,000,000 gallons during the taxable year. Section 40A provides similar rules with respect to the small agri-biodiesel producer credit.

The proposed regulations provide that *producer* means the person that has title to the ethanol immediately after the ethanol is created. Also, the producer must use a feedstock other than ethanol to produce the ethanol. The proposed regulations do not allow the credit for ethanol produced at the facilities of a contract manufacturer if the contract manufacturer has a direct or indirect productive capacity of more than 60,000,000 gallons of alcohol during the taxable year. Similarly, if the manufacturer does not have a productive capacity of more than 60,000,000 gallons but more than 15,000,000 gallons of ethanol is produced at the manufacturer's facilities during the taxable year, the proposed regulations allow the credit with respect to only the first 15,000,000 gallons of ethanol produced at the facilities during the taxable year. These rules apply to small agri-biodiesel producers also.

Gasoline and gasoline blends.

The Code defines gasoline as including gasoline blends. The proposed regulations generally define a gasoline blend as any liquid that contains at least 0.1 percent (by volume) of finished gasoline and that is suitable for use as a fuel in a motor vehicle or motorboat. Thus, for example, E–85 (a mixture of 85 percent ethanol made from corn or other agricultural products and 15 percent gasoline) is treated as a gasoline blend. Tax is imposed on the gasoline blend when it is removed from the bulk transfer/terminal system or, if it is blended taxable fuel, when it is sold or removed by the blender. The proposed regulations also classify leaded gasoline as gasoline. Thus, for example, gasoline products that are sold as "racing gasoline" generally are treated as gasoline even though their lead content make them unsuitable for highway use.

Excise tax returns.

The privilege to file consolidated returns under section 1501 applies only to income tax returns and not to excise tax returns. The proposed regulations note this rule and also reflect the rules of §301.7701–2(c)(2)(v), which was added by T.D. 9356, 2007–39 I.R.B. 675 (72 FR 45891, August 16, 2007), relating to the excise tax treatment of certain business entities that are treated as separate from their owner for income tax purposes.

Proposed effective/applicability date.

The amendments to the regulations generally are proposed to be effective on the date they are published as final regulations in the **Federal Register**.

Future regulations projects.

Future proposed regulations will address other fuel-related provisions in the American Jobs Creation Act, the Energy Policy Act, and SAFETEA. These include provisions related to kerosene used in aviation, the Leaking Underground Storage Tank Trust Fund tax, the tax on alternative fuel, and two-party exchanges.

Availability of IRS documents.

IRS notices cited in this preamble are published in the Internal Revenue Bulletin or Cumulative Bulletin and are available at *IRS.gov*.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these proposed regulations. It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on IRS estimates that less than 700

small entities will be required to provide certificates each year, such certificates will be provided only on occasion, and the average annual burden per respondent will be 22 hours. The economic impact of the collection of information is limited to completing a certificate in the form prescribed by the regulations. The certificate can be completed by filling in a small number of fields with information that is readily available to the taxpayer, and completion of a certificate should generally take less than 15 minutes. Accordingly, the time and resources required to prepare and provide these certificates is minimal and will not have a significant effect on those entities providing them. Therefore, an analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

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

Drafting Information

The principal authors of these regulations are Taylor Cortright and Frank Boland, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1, 40, and 48 are proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Section 1.40–2 also issued under 26 U.S.C. 40(g)(5);

Section 1.40A–1 also issued under 26 U.S.C. 40A(e)(5); * * *

Par. 2. Section 1.40–1 is revised to read as follows:

§1.40–1 Alcohol used as a fuel.

For the definition of "alcohol" for purposes of the credits allowed by section 40, see §48.6426–1(c) of this chapter.

Par. 3. Sections 1.40–2 and 1.40A–1 are added to read as follows:

§1.40–2 Small ethanol producer credit.

(a) *In general*. Section 40 provides a small ethanol producer credit for each gallon of qualified ethanol production of an eligible small ethanol producer. Section 40(b)(4)(B) defines "qualified ethanol production". Section 40(g)(1) defines "eligible small ethanol producer". Section 40(g)(5) provides authority to prescribe such regulations as may be necessary to prevent the credit from directly or indirectly benefiting any person with a direct or indirect productive capacity of more than 60 million gallons of alcohol during the taxable year. A person has produced ethanol if the person has title to the ethanol immediately after it is created.

(b) *Qualified ethanol production*. Section 40(b)(4)(B) limits qualified ethanol production to ethanol that is produced by an eligible small ethanol producer. Ethanol is "produced" for this purpose only when a feedstock other than ethanol is transformed into ethanol.

(c) *Denial of credit for ethanol produced at certain facilities*. The person at whose facilities ethanol is produced is treated for purposes of section 40(g)(5) as an indirect beneficiary of any credit allowed with respect to the ethanol. Accordingly, the small ethanol producer credit is not allowed with respect to ethanol that is produced at the facilities of a contract manufacturer or other person if such contract manufacturer or other person has a direct or indirect productive capacity of more than 60 million gallons of alcohol during the taxable year. Similarly, if the manufacturer does not have a productive capacity of more than 60 million gallons but more than 15 million gallons of ethanol is produced at the manufacturer's facilities during the taxable year, the small ethanol producer credit is allowed with respect to only the first 15 million gallons of ethanol produced at the facilities during the taxable year.

(d) *Examples*. The following examples illustrate the application of this section:

Example 1. X purchases hydrous ethanol and processes it into anhydrous ethanol. X is not the producer of the ethanol because X does not transform a feedstock other than ethanol into ethanol.

Example 2. Y arranges with contract manufacturer Z to produce 10 million gallons of ethanol. Y is not related to Z. Y provides the raw materials and retains title to them and to the finished ethanol. Z has the capacity to produce 100 million gallons of alcohol per year. The small producer credit is not allowed with respect to the 10 million gallons of ethanol because it is produced at the facilities of a contract manufacturer that has a productive capacity of more than 60 million gallons of alcohol during the taxable year.

(e) *Effective/applicability date*. This section is applicable on and after the date of publication of these regulations in the **Federal Register** as final regulations.

§1.40A–1 Biodiesel.

(a) *In general*. Rules similar to the rules of §1.40–2 apply for purposes of the small agri-biodiesel producer credit allowed by section 40A.

(b) *Definitions*. For the definitions of "biodiesel" and "renewable diesel" for purposes of the credits allowed by section 40A, see §48.6426–1(b) of this chapter.

(c) *Effective/applicability date*. This section is applicable on and after the date of publication of these regulations in the **Federal Register** as final regulations.

PART 40—EXCISE TAX PROCEDURAL REGULATIONS

Par. 4. The authority citation for part 40 is amended by removing the entry for section 40.6071(a)–3 to read in part as follows:

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

Par. 5. Section 40.0–1 is amended by revising paragraph (d) and adding paragraph (e) to read as follows:

§40.0–1 Introduction.

* * * * *

(d) *Person*. For purposes of this part, each business unit that has, or is required to have, a separate employer identification number is treated as a separate person. Thus, business units (for example, a parent corporation and a subsidiary corporation, a proprietorship and a related partnership, or the various members of a consolidated group), each of which has a different employer identification number, are separate persons.

(e) *Effective/applicability date*. This part is effective for returns and deposits that relate to calendar quarters beginning after September 30, 2008. For rules applicable to returns and deposits that relate to prior periods, see 26 CFR part 40 (revised as of April 1, 2008).

§40.6302(c)–1 [Amended]

Par. 6. Section 40.6302(c)–1 is amended as follows:

1. Paragraph (e)(1)(ii) is amended by removing the language "components);" and adding "components); and" in its place.

2. Paragraph (e)(1)(iii) is amended by removing the language "chemicals); and" and adding "chemicals)." in its place.

3. Paragraph (e)(1)(iv) is removed.

PART 48—MANUFACTURERS AND RETAILERS EXCISE TAXES

Par. 7. The authority citation for part 48 is amended by removing the entries for §§48.4081–6, 48.6427–8, 48.6427–9, 48.6427–10, and 48.6427–11 and adding entries in numerical order to read in part as follows:

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

Section 48.6426–3 also issued under 26 U.S.C. 6426(c).

Section 48.6426–4 also issued under 26 U.S.C. 6426(c).

Section 48.6427–8 also issued under 26 U.S.C. 6427(n).

Section 48.6427–9 also issued under 26 U.S.C. 6427(n).

Section 48.6427–10 also issued under 26 U.S.C. 6427(n).

Section 48.6427–11 also issued under 26 U.S.C. 6427(n).

Section 48.6427–12 also issued under 26 U.S.C. 6427(n).

§48.0–1 [Amended]

Par. 8. Section 48.0–1 is amended as follows:

1. In the second sentence, "and related credits, refunds, and payments" is added after "Code".

2. In the third sentence, "certain luxury items," is removed.

3. In the fourth sentence, "aviation fuel," is removed.

Par. 9. Section 48.0–4 is added to read as follows:

§48.0–4 Forms.

Any reference to a form in this part is also a reference to any other form designated for the same use by the Commissioner after the date these regulations are published in the **Federal Register** as final regulations. All such forms must be completed in accordance with the instructions for the forms and contain any additional information required by this part.

§48.4041–0 [Amended]

Par. 10. Section 48.4041–0 is amended as follows:

1. In the first sentence, the language "sales or uses of diesel fuel" is removed and "any liquid (other than biodiesel) that is sold for use or used as a fuel in a diesel-powered highway vehicle or diesel-powered train" is added in its place.

2. In the second sentence, the language "diesel fuel tax" is removed and "tax with respect to these liquids" is added in its place.

§48.4041–18 [Removed and Reserved]

Par. 11. Section 48.4041–18 is removed and reserved.

Par. 12. Section 48.4041–19 is revised to read as follows:

§48.4041–19 Reduction in tax for qualified methanol or ethanol fuel and partially exempt methanol or ethanol fuel.

(a) *In general*. Section 4041(b)(2) provides a reduced rate of tax under sections 4041(a)(2) and (d) for qualified methanol or ethanol fuel. Section 4041(m) provides a reduced rate of tax under section 4041(a)(2) for partially exempt methanol or ethanol fuel.

(b) *Qualified methanol or ethanol fuel and partially exempt methanol or ethanol fuel defined*. For purposes of section 4041(b)(2) and this section, qualified methanol or ethanol fuel is liquid motor fuel, at least 85 percent of which (by volume) consists of alcohol produced from coal (including peat). For purposes of section 4041(m) and this section, partially exempt methanol or ethanol fuel is a liquid motor fuel, at least 85 percent of which (by volume) consists of alcohol produced from natural gas (including ethanol produced through the process of thermally cracking ethane that is a constituent of natural gas). The actual gallonage of each component of the mixture (without adjustment for temperature) shall be used in determining whether, at the time of the taxable sale or use, the applicable 85 percent alcohol requirement has been met. A mixture containing less than 85 percent alcohol produced from coal (or less than 85 percent alcohol produced from natural gas) may be treated as satisfying the applicable percentage requirement. In determining whether a particular mixture should be so treated, the Commissioner shall take into account the existence of any facts and circumstances establishing that, but for the commercial and operational realities of the blending process, it may reasonably be concluded that the mixture would have contained at least 85 percent alcohol from the appropriate source. The necessary facts and circumstances will not be found to exist if over a period of time the mixtures blended by a blender show a consistent pattern of failing to contain at least 85 percent alcohol from the appropriate source.

(c) *Effective/applicablity date*. This section is applicable on and after the date of publication of these regulations in the **Federal Register** as final regulations. For provisions applicable to prior periods, see 26 CFR §48.4041–19 (revised as of April 1, 2008).

§48.4041–20 [Removed and Reserved]

Par. 13. Section 48.4041–20 is removed and reserved.

Par. 14. Section 48.4081–1 is amended as follows:

1. Paragraph (b) is amended by:

a. Revising the definition of Blender.

b. Adding the definition of Diesel-water fuel emulsion in alphabetical order.

c. Adding the language "(other than a mixture as defined in §48.6426–1(b))" after "any liquid" in the introductory text of the definition of Excluded liquid.

d. Revising the definition of Finished gasoline.

e. Revising the definition of Gasoline.

f. Adding the definition of Gasoline blend in alphabetical order.

g. Revising the definition of Refinery.

h. Removing the language "effective January 2, 1998," from the last sentence in the definition of Terminal.

2. Paragraph (c) is amended by:

a. In paragraph (c)(1)(i), removing the language "paragraphs (c)(1)(ii) and (c)(1)(iii)" in the introductory phrase and adding "paragraph (c)(1)(ii)" in its place.

b. In paragraph (c)(1)(ii), removing the language "A mixture" and adding "In calendar quarters beginning before the date of publication of these regulations in the **Federal Register** as final regulations, a mixture" in its place.

c. Removing paragraph (c)(1)(iii).

d. In paragraph (c)(2)(i), first sentence, adding the language "any of the following: a mixture (as defined in §48.6426–1(b)) that contains diesel fuel; renewable diesel as defined in section 40A(f)(3); transmix (as defined in section 4083(a)(3)(B)); and" after "*diesel fuel* means".

e. In paragraph (c)(2)(ii), first sentence, adding the language "biodiesel, alternative fuel (as defined in section 6426(d)(2)), qualified methanol or ethanol fuel (as defined in section 4041(b)(2)(B)), partially exempt methanol or ethanol fuel (as defined in section 4041(m)(2))," after "kerosene,".

f. In paragraph (c)(3)(i)(V) removing the language "gasoline;" and adding "gasoline; and" in its place.

g. In paragraph (c)(3)(i)(W), removing the language "Toluene; and" and adding "Toluene." in its place.

h. Removing paragraph (c)(3)(i)(X).

3. Paragraph (e) is amended by removing the language "48.4081–6(b)," and by adding the language "48.6426–1(b)" after "48.4101–1(b),".

4. Revising paragraph (f).

The revisions and additions read as follows:

§48.4081–1 Taxable fuel; definitions.

* * * * *

(b) * * *

Blender means the person that has title to blended taxable fuel immediately after it is created.

* * * * *

Diesel-water fuel emulsion means diesel fuel at least 14 percent of which is water and with respect to which the emulsion additive is registered by a United States manufacturer with the Environmental Protection Agency pursuant to section 211 of the Clean Air Act (as in effect on March 31, 2003).

* * * * *

Finished gasoline means all products that are commonly or commercially known or sold as gasoline and are suitable for use as a motor fuel, other than—

(1) Products that have an ASTM octane number of less than 75 as determined by the motor method; and

(2) Alternative fuel as defined in section 6426(d)(2).

Gasoline means aviation gasoline, finished gasoline, gasoline blends, gasoline blendstocks, and leaded gasoline.

Gasoline blend includes any liquid (other than finished gasoline) that contains at least 0.1 percent (by volume) of finished gasoline and that is suitable for use as a fuel in a motor vehicle or motorboat. However, the term does not include qualified methanol or ethanol fuel (as defined in section 4041(b)(2)(B)), partially exempt methanol or ethanol fuel (as defined in section 4041(m)(2)), or alcohol that is denatured under a formula approved by the Secretary.

* * * * *

Refinery means a facility used to produce taxable fuel and from which taxable fuel may be removed by pipeline, by vessel, or at a rack. However, the term does not include a facility where only blended taxable fuel, and no other type of taxable fuel, is produced.

* * * * *

(f) *Effective/applicability date.* This section is applicable on and after the date of publication of these regulations in the **Federal Register** as final regulations. For provisions applicable to prior periods, see 26 CFR §48.4081–1 (revised as of April 1, 2008).

48.4081–2 [Amended]

Par. 15. Section 48.4081–2 is amended by removing the last sentence of paragraph (d).

48.4081–3 [Amended]

Par. 16. Section 48.4081–3 is amended as follows:

1. Paragraph (b)(1)(iii) is removed.

2. Removing the last sentence in paragraphs (g)(1) and (h).

§48.4081–6 [Removed and Reserved]

Par. 17. Section 48.4081–6 is removed and reserved.

§48.4082–4 [Amended]

Par. 18. Section 48.4082–4, is amended by adding the language "or biodiesel" after "taxable fuel" in paragraphs (a)(1)(iii) and (b)(1)(iii).

Par. 19. Section 48.4101–1 is amended as follows:

1. Paragraph (a)(1) is amended by removing the language "4081 and" and adding "4081, for certain producers and importers of alcohol, biodiesel, and renewable diesel, and alternative fuelers under sections 6426 and 6427, and for purposes of" in its place.

2. Revising paragraphs (a)(2), (c)(1)(vi), (c)(1)(vii), and adding paragraph (c)(1)(viii).

3. Paragraphs (a)(3) and (b)(3) are removed and reserved.

4. Paragraph (b)(9) is amended by removing the language "48.4081–6(b), 48.4082–5(b), 48.4082–6(b), 48.4082–7(b)" and adding "48.4082–5(b), 48.4082–7(b), 48.6426–1(b)," in its place.

5. Revising paragraph (d)(2) and adding paragraph (d)(7).

6. Paragraph (d)(5) is amended by, removing the language "vendor; or" and adding "vendor;" in its place.

7. Paragraph (d)(6) is amended by removing the language "pump)." and adding "pump); or" in its place.

8. Paragraph (f)(1)(i) is amended by removing from the heading the language "and vessel operators." and adding "vessel operators, alternative fuelers, producers or

importers of alcohol, biodiesel, or renewable diesel, and diesel-water fuel emulsion producers." in its place.

9. Paragraph (f)(1)(ii) is amended by removing the language in the heading "and vessel operators" and adding "vessel operators, alternative fuelers, producers or importers of alcohol, biodiesel, or renewable diesel, and diesel-water fuel emulsion producers" in its place.

10. Paragraph (f)(1)(ii) is amended by removing the language in the introductory text "or vessel operator" and adding "vessel operator, alternative fueler, producer or importer of alcohol, biodiesel, or renewable diesel, or diesel-water fuel emulsion producer" in its place.

11. Paragraph (f)(1)(ii)(B) is amended by adding the language "reporting," after "payment,".

12. Paragraph (f)(4)(ii)(A) is amended by removing the language in the introductory text "district director" and adding "Commissioner" in its place.

13. Paragraph (f)(4)(ii)(A)(*1*) is amended by removing the language "district director);" and adding "Commissioner); and" in its place.

14. Paragraph (f)(4)(ii)(A)(*2*) is amended by removing the language "district director); and" and adding "Commissioner." in its place.

15. Removing paragraph (f)(4)(i)(A)(*3*).

16. Paragraph (f)(4)(iii) is amended by removing the language "deposit, and payment" and adding "deposit, payment, reporting, and claim" in its place.

17. Revising paragraph (h)(2)(iii).

18. Paragraph (j)(2) is amended by removing the language in the introductory text "district director" and adding "Commissioner" in its place.

19. Paragraph (j)(2)(i), is amended by removing the language "district director);" and adding "Commissioner); and" in its place.

20. Paragraph (j)(2)(ii) is amended by removing the language "district director); and" and adding "Commissioner)." in its place.

21. Removing paragraph (j)(2)(iii).

22. Paragraph (k) is amended by adding a new sentence between the existing second and third sentences.

23. Paragraph (l)(5) is added.

The revisions and additions read as follows:

§48.4101–1 Taxable fuel; registration.

(a) * * *

(2) A person is registered under section 4101 only if the Commissioner has issued a registration letter to the person and the registration has not been revoked or suspended or the person is treated under this paragraph (a)(2) as registered under section 4101. The following persons are treated as registered under section 4101:

(i) The United States is treated as registered under section 4101 for all purposes.

(ii) A partner in a partnership is treated as registered under section 4101 for purposes of claims filed under section 34 if the partnership is registered under section 4101 for purposes of filing claims under section 6426 or 6427.

(iii) A taxable fuel registrant is treated as registered under section 4101 as a diesel-water fuel emulsion producer.

(iv) A foreign person is treated as registered under section 4101 as a producer of alcohol, biodiesel, or renewable diesel if—

(A) The person produces alcohol, biodiesel, or renewable diesel outside the United States and does not produce alcohol, biodiesel, or renewable diesel within the United States; and

(B) The alcohol, biodiesel, or renewable diesel is imported into the United States by a person registered under section 4101 as a producer or importer of alcohol, biodiesel, or renewable diesel.

* * * * *

(c) * * *

(1) * * *

(vi) A terminal operator;

(vii) A vessel operator; or

(viii) A producer or importer of alcohol, biodiesel, or renewable diesel.

* * * * *

(d) * * *

(2) An alternative fueler;

* * * * *

(7) A diesel-water fuel emulsion producer.

* * * * *

(h) * * *

(2) * * *

(iii) Make any false statement on, or violate the terms of, any certificate given to another person to support—

(A) Any claim for credit, refund, or payment; or

(B) An exemption from, or reduced rate of, tax imposed by section 4081; or

* * * * *

(k) * * * For rules relating to claims with respect to alcohol, biodiesel, renewable diesel and alternative fuel, see §§48.6426–1 through 48.6426–7. * * *

(l) * * *

(5) References in this section to biodiesel and alcohol are applicable after December 31, 2004. References in this section to renewable diesel and diesel-water fuel emulsion are applicable after December 31, 2005. References in this section to alternative fuel are applicable after September 30, 2006.

Par. 20. Sections 48.6426–1 through 48.6426–7 are added to read as follows:

§48.6426–1 Renewable and alternative fuels; explanation of terms.

(a) *Overview.* This section provides an explanation of terms for purposes of the credits allowed by sections 34 and 6426 and the payments allowed by section 6427(e). The definition of *alcohol* in paragraph (c) of this section is also applicable for purposes of the credits allowed by section 40. The definitions of *biodiesel* and *renewable diesel* in paragraph (b) of this section are also applicable for purposes of the credits allowed by section 40A.

(b) *Explanation of terms.*

Agri-biodiesel means biodiesel derived solely from virgin oils. Virgin oils include virgin vegetable oils from the sources listed in section 40A(d)(2), as well as virgin oils not listed, such as palm oil and fish oil. Biodiesel produced from a feedstock that includes any recycled oils (such as recycled cooking oils) is not agri-biodiesel because it is not derived solely from virgin oils.

Alcohol is defined in paragraph (c) of this section.

Alcohol fuel mixture means a mixture of alcohol and taxable fuel that contains at least 0.1 percent (by volume) of taxable fuel.

Alternative fuel means, except as otherwise provided in the following sentence, liquefied petroleum gas, P Series Fuels (as defined by the Secretary of Energy under 42 U.S.C. 13211(2)), compressed or liquefied natural gas, liquefied hydrogen, any liquid fuel derived from coal (including peat) through the Fischer-Tropsch process,

and liquid fuel derived from biomass (as defined in section 45K(c)(3)). The term does not include ethanol, methanol, biodiesel, or renewable diesel.

Alternative fuel mixture means a mixture of alternative fuel and taxable fuel that contains at least 0.1 percent (by volume) of taxable fuel.

Alternative fueler means a person that—

(1) Is an alternative fueler (unmixed fuel); or

(2) Produces alternative fuel mixtures for sale or use in its trade or business.

Alternative fueler (unmixed fuel) with respect to any alternative fuel that is sold for use or used as a fuel in a motor vehicle or motorboat is—

(1) In the case of alternative fuel on which tax is imposed by section 4041(a)(2) or (3), the person liable for such tax (determined in the case of compressed natural gas after the application of §48.4041–21 and in the case of any other alternative fuel after the application of rules similar to the rules of §§48.4041–3 and 48.4041–5);

(2) In the case of alternative fuel that is not described in paragraph (1) or (3) of this definition, the person that would be so liable for such tax but for the application of an exemption provided by section 4041(a)(3)(B), (b), (f), (g), or (h); and

(3) In the case of liquefied natural gas (LNG) that is sold in bulk for the exclusive use of a State that provides the written waiver described in §48.6426–6(c)(4) and is delivered into a bulk supply tank that can only fuel motor vehicles and motorboats of the State, the person that sells the alternative fuel to the State.

Biodiesel means biodiesel as defined in section 40A(d)(1). Biodiesel may be produced either within or outside the United States. Fuel meets the Environmental Protection Agency (EPA) registration requirements described in section 40A(d)(1)(A) if the EPA does not require the fuel to be registered.

Biodiesel mixture means a mixture of biodiesel and diesel fuel that contains at least at least 0.1 percent (by volume) of diesel fuel. The kerosene in a biodiesel mixture is not included in either the overall volume of the mixture or the volume of diesel fuel in the mixture for purposes of determining whether the biodiesel mixture satisfies the 0.1 percent requirement. The diesel fuel in a biodiesel mixture may be dyed or undyed. See, however, section 6715 for the penalty for willful alteration of the strength or composition of any dye in dyed fuel and §48.6715–1 for related rules.

Commingled biodiesel means biodiesel that is held by—

(1) Its producer in a storage tank at a time when the tank is used only for the storage of biodiesel and is used to store both biodiesel (other than agri-biodiesel) and agri-biodiesel; or

(2) A person other than its producer in a storage tank at a time when the tank is used only for the storage of biodiesel and is used to store biodiesel to which more than a single Certificate for Biodiesel applies.

Commingled renewable diesel means renewable diesel held by a person other than its producer in a storage tank at a time when the tank is used only for the storage of renewable diesel and is used to store renewable diesel to which more than a single Certificate for Renewable Diesel applies.

Mixture means an alcohol fuel mixture, a biodiesel mixture, a renewable diesel mixture, or an alternative fuel mixture.

Mixture producer is the person that has title to the mixture immediately after it is created.

Motor vehicle has the meaning given to the term by §48.4041–8(c). Thus, for example, the term includes forklift trucks used to carry loads at industrial plants and warehouses.

Producer means the person that produces alcohol, biodiesel, or renewable diesel.

Registered biodiesel producer means a biodiesel producer that is registered under section 4101 as a producer of biodiesel.

Registered renewable diesel producer means a renewable diesel producer that is registered under section 4101 as a producer of renewable diesel.

Renewable diesel means renewable diesel as defined in section 40A(f)(3). For this purpose, a fuel meets the Environmental Protection Agency's (EPA) registration requirements described in section 40A(f)(3)(A) if the EPA does not require the fuel to be registered or if diesel fuel coproduced from renewable diesel and petroleum feedstocks is registered. Renewable diesel may be produced either within or outside the United States.

Renewable diesel mixture is defined in paragraph (d) of this section.

Reseller means, with respect to any biodiesel or renewable diesel, a person that buys and subsequently sells such fuel without using the fuel to produce a biodiesel or renewable diesel mixture.

Thermal depolymerization process means, for purposes of the definition of *renewable diesel* in section 40A(f)(3), a process for the reduction of complex organic materials through the use of pressure and heat to decompose long chain polymers of hydrogen, oxygen, and carbon into short-chain petroleum hydrocarbons with a maximum length of around 18 carbons. A process may qualify as thermal depolymerization even if catalysts are used in the process.

Use as a fuel is defined in paragraph (e) of this section.

(c) *Alcohol; definition*—(1) *In general*. Except as otherwise provided in this paragraph (c), *alcohol* means any alcohol, including methanol and ethanol, that is not a derivative product of petroleum, natural gas, or coal (including peat). Thus, for example, the term does not include an ethanol by-product produced from a derivative of petroleum or natural gas. However, the term does include alcohol made from renewable resources, such as agricultural or forestry products. The term also includes alcohol made from urban wastes, such as methanol made from methane gas formed at waste disposal sites.

(2) *Source of the alcohol*. Alcohol may be produced either within or outside the United States.

(3) *Proof and denaturants*. Except for purposes of section 40, alcohol does not include alcohol with a proof of less than 190 degrees (determined without regard to added denaturants). For purposes of section 40, alcohol does not include alcohol with a proof of less than 150 degrees (determined without regard to added denaturants). If alcohol includes impurities or denaturants, the volume of alcohol is determined under the following rules:

(i) Except for purposes of section 40, the volume of alcohol includes the volume of any impurities (other than added denaturants and any fuel with which the alcohol is mixed) that reduce the purity of the alcohol to not less than 190 proof (determined without regard to added denaturants and any fuel with which the alcohol is mixed).

(ii) For purposes of section 40, the volume of alcohol includes the volume of any impurities (other than added denaturants and any fuel with which the alcohol is mixed) that reduce the purity of the alcohol to not less than 150 proof (determined without regard to added denaturants and any fuel with which the alcohol is mixed).

(iii) The volume of alcohol includes the volume of any approved denaturants that reduce the purity of the alcohol, but only to the extent that the volume of the approved denaturants does not exceed five percent of the unadjusted volume of the alcohol. The unadjusted volume of the alcohol is determined for this purpose by including in unadjusted volume the approved denaturants and the impurities included in volume under paragraph (c)(3)(i) or (ii) of this section. If the volume of the approved denaturants exceeds five percent of the unadjusted volume of the alcohol, the excess over five percent is not considered alcohol.

(iv) For purposes of this paragraph (c)(3), approved denaturants are any denaturants (including gasoline and other nonalcohol fuel denaturants) that reduce the purity of the alcohol and are added to such alcohol under a formula approved by the Secretary.

(4) *ETBE*. Ethyl tertiary butyl ether (ETBE) and other ethers produced from alcohol are treated as alcohol. The ether is treated as alcohol of the same type as the alcohol used to produce the ether and the volume of alcohol resulting from such treatment is the volume of alcohol of such type with an energy content equal to the energy content of the ether.

(d) *Renewable diesel mixture; definition*—(1) *In general*. *Renewable diesel mixture* means—

(i) A mixture of renewable diesel and diesel fuel (other than renewable diesel) that contains at least 0.1 percent (by volume) of diesel fuel (other than renewable diesel); and

(ii) Fuel produced from biomass (as defined in section 45K(c)(3)) and petroleum feedstocks using a thermal depolyermization process if such fuel has been registered by the Environmental Protection Agency (EPA) under section 211 of the Clean Air Act (42 U.S.C. 7545) and meets the requirements of ASTM D975 or D396.

(2) *Special rules*. The kerosene in a renewable diesel mixture is not included in either the overall volume of the mixture or the volume of diesel fuel in the mixture for purposes of determining whether the renewable diesel mixture satisfies the 0.1 percent requirement. The diesel fuel in the renewable diesel mixture may be dyed or undyed. See, however, section 6715 for the penalty for willful alteration of the strength or composition of any dye in dyed fuel and §48.6715–1 for related rules. For availability for ASTM specifications, see §48.4081–1(d).

(e) *Use as a fuel; definitions*—(1) A mixture is *used as a fuel* when it is consumed in the production of energy. Thus, for example, a mixture is used as a fuel when it is consumed in an internal combustion engine to power a vehicle or in a furnace to produce heat. However, a mixture that is destroyed in a fire or other casualty loss is not used as a fuel.

(2) A mixture is *sold for use as a fuel* if the producer sells the fuel and has reason to believe that the mixture will be used as a fuel by either the producer's buyer or any later buyer of the mixture.

(3) Alternative fuel (not in a mixture) is sold for use or used as a fuel in a motor vehicle or motorboat when the alternative fueler (unmixed fuel) with respect to the fuel delivers it into the fuel supply tank of a motor vehicle or motor boat or sells it in bulk for use by the buyer as a fuel in a motor vehicle or motorboat.

(f) *Other definitions*. For the definitions of taxable fuel and diesel fuel, see §48.4081–1.

(g) *Effective/applicability date*. This section is applicable on and after the date these regulations are published as final regulations in the **Federal Register**.

§48.6426–2 Alcohol fuel mixtures.

(a) *Overview*. This section provides rules under which an alcohol fuel mixture producer may claim an excise tax credit under section 6426, a payment under section 6427, or an income tax credit under section 34. These claims relate to the mixture producer's sale or use of an alcohol fuel mixture and are based on the amount of alcohol used to produce the alcohol fuel mixture. For the applicable claim rate, see section 6426.

(b) *Conditions to allowance*—(1) *Excise tax credit*. A claim for the alcohol fuel mixture credit with respect to an alcohol fuel mixture is allowed under section 6426 only if each of the following conditions is satisfied:

(i) The claimant produced the alcohol fuel mixture for sale or use in the trade or business of the claimant.

(ii) The claimant sold the alcohol fuel mixture for use as a fuel or used the alcohol fuel mixture as a fuel.

(iii) The claimant has made no other claim with respect to the alcohol in the mixture or, if another claim has been made, such other claim is disregarded under this paragraph (b)(1)(iii). A claim is disregarded under this paragraph (b)(1)(iii) if it is—

(A) A claim for the small ethanol producer credit under section 40; or

(B) An erroneous claim under section 6427 and either the claim has been disallowed or the claimant has repaid the government the amount received under section 6427 with interest.

(iv) The claimant has filed a timely claim on Form 720, *"Quarterly Federal Excise Tax Return,"* that contains all the information required in paragraph (c) of this section.

(2) *Payment or income tax credit*. A claim for an alcohol fuel mixture payment under section 6427 or an income tax credit under section 34 is allowed only if—

(i) The conditions of paragraphs (b)(1)(i) and (ii) of this section are met; and

(ii) The claimant has filed a timely claim for payment on Form 720 or Form 8849, *"Claim for Refund of Excise Taxes,"* or for a credit on Form 4136, *"Credit for Federal Tax Paid on Fuels,"* that contains all the information required by paragraph (c) of this section.

(3) *ETBE; sold for use or used as a fuel*. An alcohol fuel mixture that is produced at a refinery and that includes ethyl tertiary butyl ether or other ethers produced from alcohol is treated as meeting the requirement of paragraph (b)(1)(ii) of this section when the mixture is removed from the refinery and any subsequent sale or use of the mixture is disregarded for purposes of this section.

(4) *Overall limitations on credits and payments*. See §48.6426–7(a) for overall limitations on credits and payments allowed with respect to mixtures under sections 34, 6426, and 6427.

(c) *Content of claim*. Each claim for an alcohol fuel mixture credit or payment

must contain the following information with respect to the mixture covered by the claim:

(1) The amount of alcohol in the alcohol fuel mixture.

(2) A statement that the conditions to allowance described in paragraph (b) of this section have been met.

(3) A statement that the claimant either—

(i) Produced the alcohol it used in the mixture; or

(ii) Has in its possession a record of the name, address, and employer identification number of the person(s) that sold the alcohol to the claimant and the date of purchase.

(d) *Effective/applicability date*. This section is applicable on and after the date these regulations are published as final regulations in the **Federal Register**.

§48.6426–3 Biodiesel mixtures.

(a) *Overview*. This section provides rules under which a biodiesel mixture producer may claim an excise tax credit under section 6426, a payment under section 6427, or an income tax credit under section 34. These claims relate to the mixture producer's sale or use of a biodiesel mixture and are based on the amount of biodiesel used to produce the biodiesel mixture. For the applicable claim rate, see section 6426.

(b) *Conditions to allowance*—(1) *Excise tax credit*. A claim for the biodiesel mixture credit with respect to a biodiesel mixture is allowed under section 6426 only if each of the following conditions is satisfied:

(i) The claimant produced the biodiesel mixture for sale or use in the trade or business of the claimant.

(ii) The claimant sold the biodiesel mixture for use as a fuel or used the biodiesel mixture as a fuel.

(iii) The claimant—

(A) Produced the biodiesel in the mixture; or

(B) Has obtained a certificate from the registered biodiesel producer as described in paragraph (e) of this section and, if applicable, a statement described in paragraph (f) of this section, for such biodiesel and has no reason to believe any information in the certificate and statement is false.

(iv) The claimant has made no other claim with respect to the biodiesel in the mixture or, if another claim has been made, such other claim is disregarded under this paragraph (b)(1)(iv). A claim is disregarded under this paragraph (b)(1)(iv) if it is—

(A) A claim for the small agri-biodiesel producer credit under section 40A; or

(B) An erroneous claim under section 6427 and either the claim has been disallowed or the claimant has repaid the government the amount received under section 6427 with interest.

(v) The claimant has filed a timely claim on Form 720, *"Quarterly Federal Excise Tax Return,"* that contains all the information required in paragraph (c) of this section.

(2) *Payment or income tax credit*. A claim for a biodiesel mixture payment under section 6427 or an income tax credit under section 34 is allowed only if—

(i) The conditions of paragraphs (b)(1)(i), (ii), and (iii) of this section are met; and

(ii) The claimant has filed a timely claim for payment on Form 720 or Form 8849, *"Claim for Refund of Excise Taxes,"* or for a credit on Form 4136, *"Credit for Federal Tax Paid on Fuels,"* that contains all the information required by paragraph (c) of this section.

(3) *Overall limitations on credits and payments*. See §48.6426–7(a) for overall limitations on credits and payments allowed with respect to mixtures under sections 34, 6426, and 6427.

(c) *Content of claim*. Each claim for a biodiesel mixture credit or payment must contain the following information with respect to the mixture covered by the claim:

(1) The amount of agri-biodiesel and biodiesel other than agri-biodiesel in the biodiesel mixture.

(2) Unless the claimant is the producer of the biodiesel in the biodiesel mixture, a copy of the applicable Certificate for Biodiesel described in paragraph (e) of this section and Statement(s) of Biodiesel Reseller described in paragraph (f) of this section. In the case of a certificate and statement that support a claim made on more than one claim form, the certificate and statement are to be included with the first claim and the claimant is to provide information related to the certificate and statement on any subsequent claim in accordance with the instructions applicable to the claim form.

(3) A statement that the conditions to allowance described in paragraph (b) of this section have been met.

(4) A statement that the claimant either—

(i) Is a registered biodiesel producer and produced the biodiesel it used in the mixture; or

(ii) Has in its possession a record of the name, address, and employer identification number of the person(s) that sold the biodiesel to the claimant and the date of purchase.

(d) *Commingled biodiesel; accounting method*. For purposes of determining the certificate applicable to commingled biodiesel, a person that holds commingled biodiesel may identify the biodiesel it sells or uses by any reasonable method, including the first-in, first-out method applied either on a tank-by-tank basis or on an aggregate basis to all commingled biodiesel the person holds.

(e) *Certificate for Biodiesel*—(1) *In general*. The certificate to be obtained by the claimant is a statement that is signed under penalties of perjury by a person with authority to bind the registered biodiesel producer, is in substantially the same form as the model certificate in paragraph (e)(4) of this section, and contains all the information necessary to complete such model certificate.

(2) *Certificate identification number*. The certificate identification number is determined by the producer and must be unique to each certificate.

(3) *Multiple certificates for single sale*. A registered biodiesel producer may, with respect to a particular sale of biodiesel, provide multiple separate certificates, each applicable to a portion of the total volume of biodiesel sold. Thus, for example, a biodiesel producer that sells 5,000 gallons of biodiesel may provide its buyer with five certificates for 1,000 gallons each. The multiple certificates may be provided either to the buyer at or after the time of sale or to a reseller in the circumstances described in paragraph (f)(2) of this section.

(4) *Model certificate*.

CERTIFICATE FOR BIODIESEL

Certificate Identification Number: _____

(To support a claim related to biodiesel or a biodiesel mixture under the Internal Revenue Code)

The undersigned biodiesel producer ("Producer") hereby certifies the following under penalties of perjury:

1._____

_____

Producer's name, address, and employer identification number

2._____

_____

_____

Name, address, and employer identification number of person buying the biodiesel from Producer

3._____

Date and location of sale to buyer

4. This certificate applies to _____ gallons of biodiesel.

5. Producer certifies that the biodiesel to which this certificate relates is:
_____% Agri-biodiesel (derived solely from virgin oils)
_____% Biodiesel other than agri-biodiesel

6. This certificate applies to the following sale:
_____ Invoice or delivery ticket number
_____ Total number of gallons of biodiesel sold under that invoice or delivery ticket number (including biodiesel not covered by this certificate)

7. _____ Total number of certificates issued for that invoice or delivery ticket number

8._____

_____

_____

Name, address, and employer identification number of reseller to whom certificate is issued (only in the case of certificates reissued to a reseller after the return of the original certificate)

9._____ Original Certificate Identification Number (only in the case of certificates reissued to a reseller after return of the original certificate)

10. Producer is registered as a biodiesel producer with registration number _____. Producer's registration has not been suspended or revoked by the Internal Revenue Service.

Producer certifies that the biodiesel to which this certificate relates is monoalkyl esters of long chain fatty acids derived from plant or animal matter and that it meets the requirements of the American Society of Testing and Materials D6751 and the registration requirements for fuels and fuel additives established by EPA under section 211 of the Clean Air Act (42 U.S.C. 7545).

Producer understands that the fraudulent use of this certificate may subject Producer and all parties making any fraudulent use of this certificate to a fine or imprisonment, or both, together with the costs of prosecution.

_____

Printed or typed name of person signing this certificate

_____

Title of person signing

_____

Signature and date signed

(f) *Statement of Biodiesel Reseller*—(1) *In general*. A person that receives a Certificate for Biodiesel, and subsequently sells the biodiesel without producing a biodiesel mixture, is to give the certificate and a statement that satisfies the requirements of this paragraph (f) to its buyer. The statement must contain all of the information necessary to complete the model statement in paragraph (f)(4) of this section and be attached to the Certificate for Biodiesel. A reseller cannot make mul-

tiple copies of a Certificate for Biodiesel to divide the certificate between multiple buyers.

(2) *Multiple resales*. If a single Certificate for Biodiesel applies to biodiesel that a reseller expects to sell to multiple buyers, the reseller should return the certificate (together with any statements provided by intervening resellers) to the producer who may reissue to the reseller multiple Certificates for Biodiesel in the appropriate volumes. The reissued certificates must include the Certificate Identification Number from the certificate that has been returned.

(3) *Withdrawal of the right to provide a certificate*. The Internal Revenue Service may withdraw the right of a reseller of biodiesel to provide the certificate and a statement under this section if the Internal Revenue Service cannot verify the accuracy of the reseller's statements. The Internal Revenue Service may notify any person to whom the buyer has provided a statement that the reseller's right to provide the certificate and a statement has been withdrawn.

(4) *Model statement of biodiesel reseller*.

STATEMENT OF BIODIESEL RESELLER

(To support a claim related to biodiesel or a biodiesel mixture under the Internal Revenue Code)

The undersigned biodiesel reseller ("Reseller") hereby certifies the following under penalties of perjury:

1._____

_____

Reseller's name, address, and employer identification number

2._____

_____

Name, address, and employer identification number of Reseller's buyer

3._____

Date and location of sale to buyer

4._____

Volume of biodiesel sold

5._____

Certificate Identification Number on the Certificate for Biodiesel

Reseller has bought the biodiesel described in the accompanying Certificate for Biodiesel and Reseller has no reason to believe that any information in the certificate is false.

Reseller has not been notified by the Internal Revenue Service that its right to provide a certificate and a statement has been withdrawn.

Reseller understands that the fraudulent use of this statement may subject Reseller and all parties making any fraudulent use of this statement to a fine or imprisonment, or both, together with the costs of prosecution.

_____

Printed or typed name of person signing this certificate

_____

Title of person signing

_____

Signature and date signed

(g) *Erroneous certificates; reasonable cause*. If a claim for credit or payment described in this section is based on erroneous information in a certificate or statement described in paragraph (e)(4) or (f)(4) of this section, the claim is not allowed. Thus, for example, if a producer identifies a product as agri-biodiesel on a Certificate for Biodiesel and the product does not meet the registration requirements established by EPA, a claim for a biodiesel mixture credit based on the certificate is not allowed. However, if the claimant has met the conditions of paragraph (b)(1)(iii)(B) of this section with respect to the certificate or statement, reliance on the certificate or statement will be treated as reasonable cause for purposes of the penalties imposed by sections 6651 (relating to failure to pay) and 6675 (relating to excessive claims).

(h) *Effective/applicability date*. This section is applicable on and after the date of publication of these regulations as final regulations in the **Federal Register**.

§48.6426–4 Renewable diesel mixtures.

(a) *Overview*. This section provides rules under which a renewable diesel mixture producer may claim an excise tax credit under section 6426, a payment un-

der section 6427, or an income tax credit under section 34. These claims relate to the mixture producer's sale or use of a renewable diesel mixture and are based on the amount of renewable diesel used to produce the renewable diesel mixture. For the applicable claim rate, see section 40A(f)(2).

(b) *Conditions to allowance*—(1) *Excise tax credit*. A claim for the renewable diesel mixture credit with respect to a renewable diesel mixture is allowed under section 6426 only if each of the following conditions is satisfied:

(i) The claimant produced the renewable diesel mixture for sale or use in the trade or business of the claimant.

(ii) The claimant sold the renewable diesel mixture for use as a fuel or used the renewable diesel mixture as a fuel.

(iii) The claimant—

(A) Produced the renewable diesel in the mixture; or

(B) Has obtained a certificate from the registered renewable diesel producer as described in paragraph (e) of this section and, if applicable, a statement described in paragraph (f) of this section, for such renewable diesel and has no reason to believe any information in the certificate and statement is false.

(iv) The claimant has made no other claim with respect to the renewable diesel in the mixture or, if another claim has been made, such other claim is disregarded under this paragraph (b)(1)(iv). A claim is disregarded under this paragraph (b)(1)(iv) if it is an erroneous claim under section 6427 and either the claim has been disallowed or the claimant has repaid the government the amount received under section 6427 with interest.

(v) The claimant has filed a timely claim on Form 720, *"Quarterly Federal Excise Tax Return,"* that contains all the information required in paragraph (c) of this section.

(2) *Payment or income tax credit*. A claim for a renewable diesel mixture payment under section 6427 or an income tax credit under section 34 is allowed only if—

(i) The conditions of paragraphs (b)(1)(i), (ii), and (iii) of this section are met; and

(ii) The claimant has filed a timely claim for payment on Form 720 or Form 8849, *"Claim for Refund of Excise Taxes,"* or for a credit on Form 4136, *"Credit for Federal Tax Paid on Fuels,"* that contains all the information required by paragraph (c) of this section.

(3) *Overall limitations on credits and payments*. See §48.6426–7(a) for overall limitations on credits and payments allowed with respect to mixtures under sections 34, 6426, and 6427.

(c) *Content of claim*. Each claim for a renewable diesel mixture credit or payment must contain the following information with respect to the mixture covered by the claim:

(1) The amount of renewable diesel in the renewable diesel mixture.

(2) Unless the claimant is the producer of the renewable diesel in the renewable diesel mixture, a copy of the applicable Certificate for Renewable Diesel described in paragraph (e) of this section and Statement(s) of Renewable Diesel Reseller described in paragraph (f) of this section. In the case of a certificate and statement that support a claim made on more than one claim form, the certificate and statement are to be included with the first claim and the claimant is to provide information related to the certificate and statement on any subsequent claim in accordance with the instructions applicable to the claim form.

(3) A statement that the conditions to allowance described in paragraph (b) of this section have been met.

(4) A statement that the claimant either—

(i) Is a registered renewable diesel producer and produced the renewable diesel it used in the mixture; or

(ii) Has in its possession a record of the name, address, and employer identification number of the person(s) that sold the renewable diesel to the claimant and the date of purchase.

(d) *Commingled renewable diesel; accounting method*. For purposes of determining the certificate applicable to commingled renewable diesel, a person that holds commingled renewable diesel may identify the renewable diesel it sells or uses by any reasonable method, including the first-in, first-out method applied either on a tank-by-tank basis or on an aggregate basis to all commingled renewable diesel the person holds.

(e) *Certificate for Renewable Diesel*—(1) *In general*. The certificate to be obtained by the claimant is a statement that is signed under penalties of perjury by a person with authority to bind the registered renewable diesel producer, is substantially in the same form as the model certificate in paragraph (e)(4) of this section, and contains all the information necessary to complete such model certificate.

(2) *Certificate identification number*. The certificate identification number is determined by the producer and must be unique to each certificate.

(3) *Multiple certificates for single sale*. A registered renewable diesel producer may, with respect to a particular sale of renewable diesel, provide multiple separate certificates, each applicable to a portion of the total volume of renewable diesel sold. Thus, for example, a renewable diesel producer that sells 5,000 gallons of renewable diesel may provide its buyer with five certificates for 1,000 gallons each. The multiple certificates may be provided either to the buyer at or after the time of sale or to a reseller in the circumstances described in paragraph (f)(2) of this section.

(4) *Model certificate*.

CERTIFICATE FOR RENEWABLE DIESEL

Certificate Identification Number: _____

(To support a claim related to renewable diesel or a renewable diesel mixture under the Internal Revenue Code)

The undersigned renewable diesel producer ("Producer") hereby certifies the following under penalties of perjury:

1._____

_____

Producer's name, address, and employer identification number

2._____

_____

Name, address, and employer identification number of person buying the renewable diesel from Producer

3._____

Date and location of sale to buyer

4. This certificate applies to _____ gallons of renewable diesel.

5. This certificate applies to the following sale:

_____ Invoice or delivery ticket number

_____ Total number of gallons of renewable diesel sold under that invoice or delivery ticket number (including renewable diesel not covered by this certificate)

6. _____ Total number of certificates issued for that invoice or delivery ticket number

7._____

_____

Name, address, and employer identification number of reseller to whom certificate is issued (only in the case of certificates reissued to a reseller after the return of the original certificate)

8._____ Original Certificate Identification Number (only in the case of certificates reissued to a reseller after return of the original certificate)

9. Producer is registered as a renewable diesel producer with registration number _____. Producer's registration has not been suspended or revoked by the Internal Revenue Service.

Producer certifies that the renewable diesel to which this certificate relates is diesel fuel derived from biomass (as defined in section 45K(c)(3) of the Internal Revenue Code) using a thermal depolymerization process and that it meets the requirements of the American Society of Testing and Materials D975 or D396 and the registration requirements for fuels and fuel additives established by EPA under section 211 of the Clean Air Act (42 U.S.C. 7545).

Producer understands that the fraudulent use of this certificate may subject Producer and all parties making any fraudulent use of this certificate to a fine or imprisonment, or both, together with the costs of prosecution.

_____

Printed or typed name of person signing this certificate

_____

Title of person signing

_____

Signature and date signed

(f) *Statement of Renewable Diesel Reseller*—(1) *In general*. A person that receives a Certificate for Renewable Diesel, and subsequently sells the renewable diesel without producing a renewable diesel mixture, is to give the certificate and a statement that satisfies the requirements of this paragraph (f) to its buyer. The statement must contain all of the information necessary to complete the model statement in paragraph (f)(4) of this section and be attached to the Certificate for Renewable Diesel. A reseller cannot make multiple copies of a Certificate for Renewable Diesel to divide the certificate between multiple buyers.

(2) *Multiple resales*. If a single Certificate for Renewable Diesel applies to renewable diesel that a reseller expects to sell to multiple buyers, the reseller should return the certificate (together with any statements provided by intervening resellers) to the producer who may reissue to the reseller multiple Certificates for Renewable Diesel in the appropriate volumes. The reissued certificates must include the Certificate Identification Number from the certificate that has been returned.

(3) *Withdrawal of the right to provide a certificate*. The Internal Revenue Service may withdraw the right of a reseller of renewable diesel to provide the certificate and a statement under this section if the Internal Revenue Service cannot verify the accuracy of the reseller's statements. The Internal Revenue Service may notify any person to whom the buyer has provided a statement that the reseller's right to provide the certificate and a statement has been withdrawn.

(4) *Model statement of renewable diesel reseller*.

STATEMENT OF RENEWABLE DIESEL RESELLER

(To support a claim related to renewable diesel or a renewable diesel mixture under the Internal Revenue Code)

The undersigned renewable diesel reseller ("Reseller") hereby certifies the following under penalties of perjury:

1._____

_____

Reseller's name, address, and employer identification number

2._____

_____

_____

Name, address, and employer identification number of Reseller's buyer

3._____

Date and location of sale to buyer

4._____

Volume of renewable diesel sold

5._____

Certificate Identification Number on the Certificate for Renewable Diesel

Reseller has bought the renewable diesel described in the accompanying Certificate for Renewable Diesel and Reseller has no reason to believe that any information in the certificate is false.

Reseller has not been notified by the Internal Revenue Service that its right to provide a certificate and a statement has been withdrawn.

Reseller understands that the fraudulent use of this statement may subject Reseller and all parties making any fraudulent use of this statement to a fine or imprisonment, or both, together with the costs of prosecution.

_____

Printed or typed name of person signing this certificate

_____

Title of person signing

_____

Signature and date signed

(g) *Erroneous certificates; reasonable cause*. If a claim for credit or payment described in this section is based on erroneous information in a certificate or statement described in paragraph (e)(4) or (f)(4) of this section, the claim is not allowed. Thus, for example, if a producer identifies a product as renewable diesel on a Certificate for Renewable Diesel and the product does not meet the registration requirements established by EPA, a claim for a renewable diesel mixture credit based on the certificate is not allowed. However, if the claimant has met the conditions of paragraph (b)(1)(iii)(B) of this section with respect to the certificate or statement, reliance on the certificate or statement will be treated as reasonable cause for purposes of the penalties imposed by sections 6651 (relating to failure to pay) and 6675 (relating to excessive claims).

(h) *Effective/applicability date*. This section is applicable on and after the date these regulations are published as final regulations in the **Federal Register**.

§48.6426–5 Alternative fuel mixtures.

(a) *Overview*. This section provides rules under which an alternative fueler that produces an alternative fuel mixture may claim an excise tax credit under section 6426, a payment under section 6427, or an income tax credit under section 34. These claims relate to the mixture producer's sale or use of an alternative fuel mixture and are based on the amount of alternative fuel used to produce the alternative fuel mix-

ture. For the applicable claim rate, see section 6426.

(b) *Conditions to allowance*—(1) *Excise tax credit*. A claim for the alternative fuel mixture credit with respect to an alternative fuel mixture is allowed under section 6426 only if each of the following conditions is satisfied:

(i) The claimant produced the alternative fuel mixture for sale or use in the trade or business of the claimant.

(ii) The claimant sold the alternative fuel mixture for use as a fuel or used the alternative fuel mixture as a fuel.

(iii) The claimant is registered under section 4101 as an alternative fueler.

(iv) The claimant has made no other claim with respect to the alternative fuel in the mixture or, if another claim has been made, such other claim is disregarded under this paragraph (b)(1)(iv). A claim is disregarded under this paragraph (b)(1)(iv) if it is an erroneous claim under section 6427 and either the claim has been disallowed or the claimant has repaid the government the amount received under section 6427 with interest.

(v) The claimant has filed a timely claim on Form 720, *"Quarterly Federal Excise Tax Return,"* that contains all the information required by the claim form described in paragraph (c) of this section.

(2) *Payment or income tax credit*. A claim for an alternative fuel mixture payment under section 6427 or an alternative fuel mixture credit under sections 34 and 6427 is allowed only if—

(i) The conditions of paragraphs (b)(1)(i), (ii), and (iii) of this section are met; and

(ii) The claimant has filed a timely claim for payment on Form 720 or Form 8849, *"Claim for Refund of Excise Taxes,"* or for a credit on Form 4136, *"Credit for Federal Tax Paid on Fuels,"* that contains all the information required by the claim form described in paragraph (c) of this section.

(3) *Overall limitations on credits and payments*. See §48.6426–7(a) for overall limitations on credits and payments allowed with respect to mixtures under sections 34, 6426, and 6427.

(c) *Content of claim*. Each claim for an alternative fuel mixture credit or payment must contain the following information with respect to the mixture covered by the claim:

(1) The amount of alternative fuel in the alternative fuel mixture.

(2) A statement that the conditions to allowance described in paragraph (b) of this section have been met.

(3) A statement that the claimant either—

(i) Produced the alternative fuel it used in the mixture; or

(ii) Has in its possession—

(A) A record of the name, address, and employer identification number of the person(s) that sold the alternative fuel to the claimant and the date of purchase; and

(B) An invoice or other purchase documentation identifying the alternative fuel.

(d) *Effective/applicability date*. This section is applicable on and after the date these regulations are published as final regulations in the **Federal Register**.

§48.6426–6 Alternative fuel.

(a) *Overview*. This section provides rules under which an alternative fueler (unmixed fuel) may claim an excise tax credit under section 6426, a payment under section 6427, or an income tax credit under section 34. These claims are based on the amount of alternative fuel sold or used. For the applicable claim rate, see section 6426.

(b) *Conditions to allowance*—(1) *Excise tax credit*. A claim for the alternative fuel excise tax credit with respect to alternative fuel sold for use or used as a fuel in a motor vehicle or motorboat is allowed under section 6426 only if each of the following conditions is satisfied:

(i) The claimant is the alternative fueler (unmixed fuel) with respect to the fuel.

(ii) The claimant is registered under section 4101 as an alternative fueler (unmixed fuel).

(iii) The claimant has made no other claim with respect to the alternative fuel or, if another claim has been made, such other claim is disregarded under this paragraph (b)(1)(iii). A claim is disregarded under this paragraph (b)(1)(iii) if it is an erroneous claim under section 6427 and either the claim has been disallowed or the claimant has repaid the government the amount received under section 6427 with interest.

(iv) The claimant has filed a timely claim on Form 720, *"Quarterly Federal Excise Tax Return,"* that contains all the information required by the claim form described in paragraph (c) of this section.

(2) *Payment or income tax credit*. A claim for an alternative fuel payment under section 6427 or an income tax credit under section 34 is allowed only if—

(i) The conditions of paragraphs (b)(1)(i) and (ii) of this section are met;

(ii) The sale or use is in the claimant's trade or business; and

(iii) The claimant has filed a timely claim for payment on Form 8849, *"Claim for Refund of Excise Taxes,"* or for a credit on Form 4136, *"Credit for Federal Tax Paid on Fuels,"* that contains all the information required by paragraph (c) of this section.

(3) *Overall limitations on credits and payments*. See §48.6426–7(b) for overall limitations on credits and payments allowed with respect to alternative fuel under sections 34, 6426, and 6427.

(c) *Content of claim*. Each claim for an alternative fuel credit or payment must contain the following information with respect to the alternative fuel covered by the claim:

(1) The amount of alternative fuel sold or used.

(2) A statement that the conditions to allowance described in paragraph (b) of this section have been met.

(3) A statement that the claimant either—

(i) Produced the alternative fuel it sold or used; or

(ii) Has in its possession—

(A) A record of the name, address, and employer identification number of the person(s) that sold the alternative fuel to the claimant and the date of purchase; and

(B) An invoice or other purchase documentation identifying the alternative fuel.

(4) In the case of liquefied natural gas (LNG) that the claimant sold in bulk for the exclusive use of the State and delivered into a bulk supply tank that can only fuel motor vehicles or motorboats of the State, a statement that the claimant has in its possession a written waiver, signed under penalties of perjury by a person with authority to bind the State, stating that the LNG is delivered in bulk for the exclusive use of the State in a motor vehicle or motorboat and that the State gives up its right to claim any alternative fuel credit for such LNG.

(d) *Effective/applicability date*. This section is applicable on and after the date these regulations are published as final regulations in the **Federal Register**.

§48.6426–7 Overall limitations on credits and payments.

(a) *Limitations applicable to mixtures*. In the case of mixtures, the following limitations apply:

(1) The aggregate amount that, but for the coordination rules in sections 6426(g) and 6427(e)(3), would be allowable to a claimant either as a credit under section 6426 or a payment under section 6427 with respect to sales and uses of mixtures during a calendar quarter is allowed only as a credit under section 6426 to the extent such amount does not exceed the claimant's tax liability under section 4081 for the calendar quarter.

(2) The aggregate amount allowed to a claimant as a payment under section 6427 or an income tax credit under section 34 with respect to sales and uses of mixtures during a calendar quarter shall not exceed the amount that, but for the coordination rules in sections 6426(g) and 6427(e)(3), would be allowable to the claimant with respect to such sales and uses reduced by the claimant's tax liability under section 4081 for the calendar quarter.

(b) *Limitations applicable to alternative fuel*. In the case of alternative fuel, the following limitations apply:

(1) The aggregate amount that, but for the coordination rules in sections 6426(g) and 6427(e)(3), would be allowable to a claimant either as a credit under section 6426 or a payment under section 6427 with respect to sales and uses of alternative fuel during a calendar quarter is allowed only as a credit under section 6426 to the extent such amount does not exceed the claimant's tax liability under section 4041 for the calendar quarter.

(2) The aggregate amount allowed to a claimant as a payment under section 6427 or an income tax credit under section 34 with respect to sales and uses of alternative fuel during a calendar quarter shall not exceed the amount that, but for the coordination rules in sections 6426(g) and 6427(e)(3), would be allowable to the claimant with respect to such sales and uses reduced by the claimant's tax liability under section 4041 for the calendar quarter.

(c) *Effective/applicability dates*. This section is applicable on and after the date of publication of these regulations as final regulations in the **Federal Register**.

Par. 21. Section 48.6427–8 is amended as follows:

1. Revising paragraphs (b)(1)(v) and adding (b)(1)(vii)(E).

2. Paragraph (b)(1)(vii)(C) is amended by removing the language "vehicle; or" and adding "vehicle;" in its place.

3. Paragraph (b)(1)(vii)(D) is amended by removing the language "6427(b)(3))." and adding "6427(b)(3)); or" in its place.

4. Paragraph (f) is amended by removing the language from the first sentence "1994." and adding "1994, and paragraph (b)(1)(vii)(E), which is applicable after the date these regulations are published as final regulations in the **Federal Register**." in its place.

The revision and addition read as follows:

§48.6427–8 Diesel fuel and kerosene; claims by ultimate purchasers.

* * * * *

(b) * * *

(1) * * *

(v) The diesel fuel or kerosene was not used on a farm for farming purposes (as defined in §48.6420–4) or, except in the case of fuel described in paragraph (b)(1)(vii)(E) of the section, by a State;

* * * * *

(vii) * * *

(E) For the exclusive use, in the case of blended taxable fuel that is produced by a State and is both diesel fuel and a mixture (as defined in §48.6426–1(b)), of the State that produced the blended taxable fuel.

* * * * *

Par. 22. Section 48.6427–12 is added to read as follows:

§48.6427–12 Alcohol, Alternative Fuel, Biodiesel, and Renewable Diesel.

(a) *In general*. This section contains special rules for payments related to fuels containing alcohol, alternative fuel, biodiesel, and renewable diesel. Other rules for these payments are in §§48.6426–1 through 48.6426–7.

(b) *Coordination with excise tax credit*. If the aggregate amount a person receives as a payment under section 6427(e) with respect to sales and uses of mixtures during a calendar quarter exceeds the amount allowed under §48.6426–7(a), the excess constitutes an excessive amount for purposes of section 6206 and such amount, as well as the civil penalty under section 6675, may be assessed as if it were a tax imposed by section 4081. If the excessive amount is repaid to the government, with interest from the date of the payment (section 6602), on or before the due date of the Form 720, *"Quarterly Federal Excise Tax Return,"* for the calendar quarter, the claim for the excessive amount will be treated as due to reasonable cause and the penalty under section 6675 will not be imposed with respect to the claim. If a person claims an income tax credit under section 34 in lieu of a payment under section 6427(e) with respect to sales and uses of mixtures during a calendar quarter and the aggregate amount claimed as an income tax credit with respect to such sales and uses exceeds the amount allowed under §48.6426–7(a)(2), the income tax rules related to assessing an underpayment of income tax liability apply. The section 6675 penalty for excessive claims with respect to fuels does not apply in the case of section 34 income tax credits. Similar rules apply to excessive claims under sections 34 or 6427 with respect to sales and uses of alternative fuel.

(c) *Payment computation for certain blenders*—(1) *In general*. This paragraph (c) applies to a blender for any calendar quarter in which the blender's entire tax liability under section 4081 is based solely on the volume of alcohol in alcohol fuel mixtures, biodiesel in biodiesel mixtures, renewable diesel in renewable diesel mixtures, or alternative fuel in alternative fuel mixtures. If this paragraph (c) applies for a calendar quarter, the blender may use the following procedure to determine the amount it may claim as an income tax credit under section 34 or a payment under section 6427(e) with respect to each mixture that it sells or uses during the quarter:

(i) First, determine the amount allowed under section 6426 as a credit on Form 720 by multiplying the volume of untaxed liquid used to produce the mixture by the tax imposed per gallon on the untaxed liquid.

(ii) Then, determine the total credit and payment allowable by multiplying the volume of untaxed liquid used to produce the mixture by the tax credit rate per gallon.

(iii) Then, subtract the amount determined in paragraph (c)(1)(i) of this section (the section 6426 credit amount) from the amount determined in paragraph (c)(1)(ii) of this section. This difference is the amount of the payment or income tax credit that may be claimed with respect to that mixture.

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

(i) P is a biodiesel mixture producer. P produces blended taxable fuel outside of the bulk transfer/terminal system by adding biodiesel that is agri-biodiesel to taxed diesel fuel. See §§48.4081–1(c)(1) and 48.4081–3(g). P has no §4081 liability other than its liability as a blender on its sale of the biodiesel mixture. During the period August 1 through August 10 (at which time the tax rate on diesel fuel is $0.244 per gallon and the claim amount on agri-biodiesel is $1.00 per gallon), P uses 5,000 gallons of agri-biodiesel to produce a biodiesel mixture. P determines that it may claim $3,780 as a payment under section 6427(e) with respect to this mixture. P computes this amount by—

(A) Multiplying 5,000 (gallons of agri-biodiesel) x $0.244 (tax imposed per gallon) = $1,220;

(B) Multiplying 5,000 (gallons of agri-biodiesel) x $1.00 (tax credit rate per gallon) = $5,000; and

(C) Subtracting $1,220 from $5,000 = $3,780.

(ii) On August 11, P files Form 8849 for the period August 1 — August 10. To avoid an excessive claim, P limits the claim on Form 8849 to $3,780 reporting 3,780 gallons of agri-biodiesel.

(iii) On Form 720 P reports liability for IRS No. 60(c) of $1,220 (5,000 gallons x $.244) and claims a credit on Schedule C for $1,220 for period August 1 — August 10, reporting on Schedule C 1,220 gallons of agri-biodiesel.

(d) *Effective/applicability date*. This section is applicable on and after the date these regulations are published as final regulations in the **Federal Register**.

Kevin M. Brown,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on July 28, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 29, 2008, 73 F.R. 43890)

Notice of Proposed Rulemaking and Notice of Public Hearing

Section 108 Reduction of Tax Attributes for S Corporations

REG–102822–08

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations that provide guidance on the manner in which an S corporation reduces its tax attributes under section 108(b) for taxable years in which the S corporation has discharge of indebtedness income that is excluded from gross income under section 108(a). In particular, the regulations address situations in which the aggregate amount of the shareholders' disallowed section 1366(d) losses and deductions that are treated as a net operating loss tax attribute of the S corporation exceeds the amount of the S corporation's excluded discharge of indebtedness income. The proposed regulations will affect S corporations and their shareholders. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written and electronic comments must be received by November 4, 2008. Outlines of topics to be discussed at the public hearing scheduled for December 8, 2008, must be received by November 4, 2008.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–102822–08), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–102822–08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov/* (IRS REG–102822–08). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Jennifer N. Keeney, (202) 622–3060; concerning submissions of comments, the hearing, or to be placed on the building access list to attend the hearing, Funmi Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by November 4, 2008. Comments are specifically requested concerning:

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

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

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

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

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

The collection of information in these proposed regulations is in §1.108–7(d)(4). This information must be provided by both

the S corporations that exclude discharge of indebtedness income from gross income under section 108(a) and the shareholders of those S corporations. The information will be used by the S corporation to properly reduce its tax attributes under section 108(b), and the information will be used by the shareholders of S corporations to calculate their taxable income in succeeding taxable years. The respondents will be S corporations and their shareholders.

Estimated total annual reporting burden: 1,000 hours.

Estimated average annual burden hours per respondent: 1 hour.

Estimated number of respondents: 1,000.

Estimated annual frequency of responses: On occasion.

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

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

Background

This document contains proposed amendments to 26 CFR part 1 under section 108 of the Internal Revenue Code (Code). Section 61(a) provides that *gross income* means all income from whatever source derived, including (but not limited to) income from discharge of indebtedness, also known as cancellation of debt (COD income). Section 108(a) provides an exclusion from gross income for COD income if the discharge occurs while the taxpayer is bankrupt or insolvent, or if the indebtedness discharged is qualified farm indebtedness, certain qualified real property business indebtedness, or certain qualified principal residence indebtedness. In the case of a discharge of indebtedness during insolvency, the exclusion from income is limited to the amount by which the taxpayer is insolvent. Section 108(b) provides that the taxpayer must reduce certain specified tax attributes to the extent COD income is excluded under section 108(a)(1)(A), (B), or (C). Section 108(b) also provides the order in which these tax attributes must be reduced. Unless the taxpayer makes an election under section 108(b)(5) to first reduce the basis of depreciable property, section 108(b)(2)(A) provides that the first tax attribute to be reduced is any net operating loss for the taxable year of the discharge, and any net operating loss carryover to such taxable year.

Explanation of Provisions

A. Allocation of Excess Losses and Deductions After Section 108(b) Tax Attribute Reduction

Section 108 provides special rules for an S corporation that has COD income. Section 108(d)(7)(A), as amended by the Job Creation and Worker Assistance Act of 2002, Public Law 107–147, provides, in part, that the rules under section 108(a) for the exclusion of COD income and under section 108(b) for the reduction of tax attributes are applied at the corporate level, including by not taking into account under section 1366(a) any amount excluded under section 108(a). Therefore, if an S corporation excludes COD income from its gross income under section 108(a), the amount excluded is applied to reduce the S corporation's tax attributes under section 108(b)(2). Under section 108(b)(4)(A), the reduction of tax attributes occurs after the S corporation's items of income, loss, deduction and credit for the taxable year of the discharge pass through to its shareholders under section 1366(a). Under section 1366(d)(1), the aggregate amount of losses and deductions a shareholder can take into account under section 1366(a) cannot exceed the shareholder's adjusted basis in the shareholder's stock in the S corporation and the shareholder's adjusted basis of any indebtedness of the S corporation to the shareholder. For purposes of the tax attribute reduction rule under section 108(b)(2), any loss or deduction that is disallowed for the taxable year of the discharge under section 1366(d)(1) is treated as a net operating loss of the S corporation under section 108(d)(7)(B) (deemed NOL). The proposed regulations clarify that the S corporation's deemed NOL includes all losses and deductions disallowed under section 1366(d)(1) for the taxable year of the discharge, including disallowed losses and deductions of a shareholder that had transferred all of the shareholder's stock in the S corporation during such year.

If the amount of the S corporation's deemed NOL exceeds the amount of excluded COD income, the proposed regulations provide that the S corporation's excess deemed NOL is allocated to the shareholder or shareholders of the S corporation as losses and deductions disallowed under section 1366(d)(1) for the taxable year of the discharge. If an S corporation has more than one shareholder during the taxable year of the discharge, the proposed regulations provide a rule for determining the amount of excess deemed NOL allocated to each shareholder. The allocation rule in the proposed regulations takes into account the amount of each shareholder's disallowed losses or deductions under section 1366(d)(1) (before the tax attribute reduction under section 108(b)(2)) and the amount of excluded COD income that would have been taken into account by each shareholder under section 1366(a) had the COD income not been excluded under section 108(a). This allocation method alleviates, within the parameters of section 108(d)(7)(B), the disparate treatment that could occur where the shareholders' respective disallowed losses or deductions under section 1366(d)(1) that are treated as the S corporation's deemed NOL are disproportionate to the shareholders' respective ownership interests. The IRS and the Treasury Department recognize that shareholders may be disproportionately impacted where the shareholders' respective disallowed losses or deductions are disproportionate to their respective ownership interests. The IRS and the Treasury Department request comments on alternative mechanisms that could address such disproportionate economic effects and on the collateral consequences of such mechanisms.

The proposed regulations also provide that any amount of the S corporation's excess deemed NOL that is allocated under this allocation method to a shareholder that had transferred all of the shareholder's stock in the S corporation during the year of the discharge is treated as a disallowed loss or deduction that is permanently disallowed under §1.1366–2(a)(5) of the In-

come Tax Regulations, unless the transfer is described in section 1041(a).

B. Character of Excess Deemed NOL Allocated to a Shareholder

A shareholder's losses or deductions disallowed under section 1366(d)(1) consist of a *pro rata* share of the total losses and deductions allocated to the shareholder under section 1366(a) during the corporation's taxable year (including losses and deductions disallowed under section 1366(d)(1) for prior years that are treated as current year losses and deductions with respect to the shareholder under section 1366(d)(2)). The character of any item included in a shareholder's *pro rata* share under section 1366(a) is determined as if such item were realized directly from the source from which it was realized by the S corporation, or incurred in the same manner as incurred by the corporation. The items of income, loss, or deduction that pass through to a shareholder, and that comprise a shareholder's suspended loss or deduction under section 1366(d)(1), retain their character (for example, ordinary deduction, long-term capital loss).

Section 108(d)(7)(B) does not address potential character differences that may exist in a shareholder's disallowed losses or deductions under section 1366(d)(1) that are included in the S corporation's deemed NOL. Under the general rules of section 108(b)(2), a taxpayer's net operating loss is reduced before any other tax attributes, such as capital loss carryovers. Therefore, to be consistent with the ordering rule in section 108(b)(2), the proposed regulations provide that in determining the character of the amount of the S corporation's excess deemed NOL that is allocated to a shareholder, any ordinary loss or deduction that was disallowed under section 1366(d)(1) and that was included in the S corporation's deemed NOL is treated as reduced before any capital loss that was disallowed under section 1366(d)(1) and that was included in the S corporation's deemed NOL. With respect to section 1231 losses, where it is uncertain whether the loss ultimately will be characterized as ordinary or capital, the proposed regulations provide that any section 1231 loss or deduction that was disallowed under section 1366(d)(1) and that was included in the S corporation's deemed NOL is treated as reduced after any ordinary loss and before any capital loss.

C. Information Sharing Requirements

An S corporation shareholder determines the amount of any suspended loss or deduction under section 1366(d)(1) for a taxable year. If the shareholder has a suspended loss or deduction under section 1366(d)(1), the shareholder maintains a record of the carryover loss or deduction amount. Because any suspended loss or deduction under section 1366(d)(1) is treated as a net operating loss of the S corporation for purposes of the tax attribute reduction rule under section 108(b)(2), the S corporation will need to know the amount of each shareholder's suspended loss or deduction under section 1366(d)(1). The proposed regulations require shareholders of an S corporation that excludes COD income from its gross income in a taxable year to provide this information to the S corporation. In addition, because each shareholder will need to know the amount of the shareholder's disallowed losses or deductions remaining after the tax attribute reduction, the proposed regulations require the S corporation to provide to its shareholders the amount of any excess deemed NOL that is allocated to a shareholder after the tax attribute reduction, even if such amount is zero. The IRS and the Treasury Department request comments on whether the information sharing requirements in the proposed regulations are necessary or overly burdensome and on whether special rules are needed if shareholders fail to provide the required information to the S corporation.

Proposed Effective Date

These regulations are proposed to apply to discharges of indebtedness occurring on or after the date these regulations are published as final regulations in the **Federal Register.**

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information contained in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the collection burden imposed on S corporations and their shareholders is minimal in that it requires S corporations and their shareholder(s) to share information that shareholders already maintain to determine their respective tax liability. Moreover, it should take an S corporation or a shareholder no more than one hour to satisfy the information sharing requirements in these regulations. Finally, the collection burden imposed applies only to S corporations that are required to reduce their tax attributes under section 108(b) of the Code – a group estimated to be less than 1 percent of all existing S corporations. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

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

A public hearing has been scheduled for December 8, 2008, beginning at 10 a.m. in the auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 30 minutes before the hearing starts. For information about having your

name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by November 4, 2008, and submit an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by November 4, 2008. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the schedule of speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Jennifer N. Keeney, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.108–7 is amended by:

1. Redesignating paragraphs (d) and (e) as paragraphs (e) and (f), respectively.

2. Adding new paragraph (d).

3. Adding paragraph (e) *Example 5* and *Example 6* to newly-redesignated paragraph (e).

4. Revising newly-redesignated paragraph (f).

The additions and revision read as follows:

§1.108–7 Reduction of attributes.

* * * * *

(d) *Special rules for S corporations*—(1) *In general*. If an S corporation excludes COD income from gross income under section 108(a)(1)(A), (B), or (C), the amount excluded shall be applied to reduce the S corporation's tax attributes under paragraph (a)(1) of this section. For purposes of paragraph (a)(1)(i) of this section, the aggregate amount of the shareholders' losses or deductions that are disallowed for the taxable year of the discharge under section 1366(d)(1), including disallowed losses or deductions of a shareholder that transfers all of the shareholder's stock in the S corporation during the taxable year of the discharge, is treated as the net operating loss tax attribute (deemed NOL) of the S corporation for the taxable year of the discharge.

(2) *Allocation of excess losses or deductions*—(i) *In general*. If the amount of an S corporation's deemed NOL exceeds the amount of the S corporation's COD income that is excluded from gross income under section 108(a)(1)(A), (B), or (C), the excess deemed NOL shall be allocated to the shareholder or shareholders of the S corporation as a loss or deduction that is disallowed under section 1366(d) for the taxable year of the discharge.

(ii) *Multiple shareholders*—(A) *In general*. If an S corporation has multiple shareholders, to determine the amount of the S corporation's excess deemed NOL to be allocated to each shareholder under paragraph (d)(2)(i) of this section, calculate with respect to each shareholder the shareholder's excess amount. The shareholder's excess amount is the amount (if any) by which the shareholder's losses or deductions disallowed under section 1366(d)(1) (before any reduction under paragraph (a)(1) of this section) exceed the amount of COD income that would have been taken into account by that shareholder under section 1366(a) had the COD income not been excluded under section 108(a).

(B) *Shareholders with a shareholder's excess amount*. Each shareholder that has a shareholder's excess amount, as determined under paragraph (d)(2)(ii)(A) of this section, is allocated an amount equal to the S corporation's excess deemed NOL multiplied by a fraction, the numerator of which is the shareholder's excess amount and the denominator of which is the sum of all shareholders' excess amounts.

(C) *Shareholders with no shareholder's excess amount*. If a shareholder does not have a shareholder's excess amount as determined in paragraph (d)(2)(ii)(A) of this section, none of the S corporation's excess deemed NOL shall be allocated to that shareholder.

(iii) *Terminating shareholder*. Any amount of the S corporation's excess deemed NOL allocated under paragraph (d)(2) of this section to a shareholder that had transferred all of the shareholder's stock in the corporation during the taxable year of the discharge is permanently disallowed under §1.1366–2(a)(5), unless the transfer of stock is described in section 1041(a). If the transfer of stock is described in section 1041(a), the amount of the S corporation's excess deemed NOL allocated to the transferor under paragraph (d)(2) of this section shall be treated as a loss or deduction incurred by the corporation in the succeeding taxable year with respect to the transferee. See section 1366(d)(2)(B).

(3) *Character of excess losses or deductions allocated to a shareholder*. In determining the character of the amount of the S corporation's excess deemed NOL allocated to a shareholder under paragraph (d)(2) of this section, any ordinary loss or deduction that was included in the shareholder's aggregate amount of disallowed losses or deductions under section 1366(d)(1) is treated as reduced under section 108(b) before any section 1231 loss that was included in the shareholder's aggregate amount of disallowed losses or deductions under section 1366(d)(1), and any section 1231 loss is treated as reduced under section 108(b) before any capital loss that was included in the shareholder's aggregate amount of disallowed losses or deductions under section 1366(d)(1).

(4) *Information requirements*. If an S corporation excludes COD income from gross income under section 108(a) for a taxable year, each shareholder of the S corporation during the taxable year of the discharge must provide to the S corporation the amount of the shareholder's losses and deductions that are disallowed for the taxable year of the discharge under section 1366(d)(1). The S corporation must provide to each shareholder the amount of any of the S corporation's excess deemed NOL that is allocated to that shareholder under paragraph (d)(2) of this section, even if that amount is zero.

(e) * * *

Example 5. (i) *Facts*. During the entire calendar year 2008, A, B, and C each own equal shares of stock in X, a calendar year S corporation. As of December 31, 2008, A, B, and C each have a zero stock basis and X does not have any indebtedness to A, B, or C. For the 2008 taxable year, X excludes from gross income $30,000 of COD income under section 108(a)(1)(A). The COD income (had it not been excluded) would have been allocated $10,000 to A, $10,000 to B, and $10,000 to C under section 1366(a). For the 2008 taxable year, X has $30,000 of losses and deductions that X passes through *pro-rata* to A, B, and C in the amount of $10,000 each. The losses and deductions that pass through to A, B, and C are disallowed under section 1366(d)(1). In addition, B has $10,000 of section 1366(d) losses from prior years and C has $20,000 from prior years. A's ($10,000), B's ($20,000) and C's ($30,000) combined $60,000 of disallowed losses and deductions for the taxable year of the discharge are treated as a current year net operating loss tax attribute for X under section 108(d)(7)(B) (deemed NOL) for purposes of the section 108(b) reduction of tax attributes.

(ii) *Allocation*. Under section 108(b)(2)(A), X's $30,000 of excluded COD income reduces this $60,000 deemed NOL to $30,000. Therefore, X has a $30,000 excess net operating loss (excess deemed NOL) to allocate to the shareholders. Under paragraph (d)(2)(ii)(C) of this section, none of the $30,000 excess deemed NOL is allocated to A because A's section 1366(d) losses and deductions immediately prior to the section 108(b)(2)(A) reduction ($10,000) do not exceed A's share of the excluded COD income for 2008 ($10,000). Thus, A has no shareholder's excess amount. Each of B's and C's respective section 1366(d) losses and deductions immediately prior to the section 108(b)(2)(A) reduction exceed each of B's and C's respective shares of the excluded COD income for 2008. B's excess amount is $10,000 ($20,000 - $10,000) and C's excess amount is $20,000 ($30,000 - $10,000). Therefore, the total of all shareholders' excess amounts is $30,000. Under paragraph (d)(2) of this section, X will allocate $10,000 of the $30,000 excess deemed NOL to B ($30,000 x $10,000 / $30,000) and $20,000 of the $30,000 excess deemed NOL to C ($30,000 x $20,000 / $30,000). These amounts are treated as losses and deductions disallowed under section 1366(d)(1) for the taxable year of the discharge. Accordingly, at the beginning of 2009, A has no section 1366(d)(2) carryovers, B has $10,000 of carryovers, and C has $20,000 of carryovers.

(iii) *Character*. Immediately prior to the section 108(b)(2)(A) reduction, B's $20,000 of section 1366(d) losses and deductions consisted of $8,000 of long-term capital losses, $7,000 of section 1231 losses, and $5,000 of ordinary losses. After the section 108(b)(2)(A) tax attribute reduction, X will allocate $10,000 of the excess deemed NOL to B. Under paragraph (d)(3) of this section, the $5,000 of ordinary losses are treated as reduced first, followed by $5,000 of section 1231 losses. Accordingly, the $10,000 of losses allocated to B consist of the remaining $2,000 of section 1231 losses and $8,000 of long-term capital losses. As a result, at the beginning of 2009, B's $10,000 of section 1366(d)(2) carryovers include $2,000 of section 1231 losses and $8,000 of long-term capital losses.

Example 6. (i) A and B each own 50 percent of the shares of stock in X, a calendar year S corporation. On June 30, 2008, A sells all of her shares of stock in X to C in a transfer not described in section 1041(a). For the 2008 taxable year, X excludes from gross income $12,000 of COD income under section 108(a)(1)(A). The COD income (had it not been excluded) would have been allocated $3,000 to A, $6,000 to B, and $3,000 to C under section 1366(a). Prior to the section 108(b)(2)(A) reduction, for the taxable year of the discharge the shareholders have disallowed losses and deductions under section 1366(d) (including disallowed losses carried over to the current year under section 1366(d)(2)) in the following amounts: A- $9,000, B- $9,000, and C- $2,000. These combined $20,000 of disallowed losses and deductions for the taxable year of the discharge are treated as a current year net operating loss tax attribute for X under section 108(d)(7)(B) (deemed NOL).

(ii) Under section 108(b)(2)(A), X's $12,000 of excluded COD income reduces the $20,000 deemed NOL to $8,000. Therefore, X has an $8,000 excess net operating loss (excess deemed NOL) to allocate to the shareholders. Under paragraph (d)(2)(ii)(C) of this section, none of the $8,000 excess deemed NOL is allocated to C because C's section 1366(d) losses and deductions immediately prior to the section 108(b)(2)(A) reduction ($2,000) do not exceed C's share of the excluded COD income for 2008 ($3,000). However, each of A's and B's respective section 1366(d) losses and deductions immediately prior to the section 108(b)(2)(A) reduction exceed each of A's and B's respective shares of the excluded COD income for 2008. A's excess amount is $6,000 ($9,000 - $3,000) and B's excess amount is $3,000 ($9,000 - $6,000). Therefore, the total of all shareholders' excess amounts is $9,000. Under paragraph (d)(2) of this section, X will allocate $5,333 of the $8,000 excess deemed NOL to A ($8,000 x $6,000 / $9,000) and $2,667 of the $8,000 excess deemed NOL to B ($8,000 x $3,000 / $9,000). However, because A transferred all of her shares of stock in X in a transaction not described in section 1041(a), A's $5,333 of section 1366(d) losses and deductions are permanently disallowed under paragraph (d)(2)(iii) of this section. Accordingly, at the beginning of 2009, B has $2,667 of section 1366(d)(2) carryovers and C has no section 1366(d)(2) carryovers.

(f) *Effective/applicability date*—(1) Paragraphs (a), (b), (c), and *Examples 1*, *2*, *3*, and *4* of paragraph (e) of this section apply to discharges of indebtedness occurring on or after May 10, 2004.

(2) Paragraph (d) and *Examples 5* and *6* of paragraph (e) of this section apply to discharges of indebtedness occurring on or after the date that these regulations are published as final regulations in the **Federal Register**.

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

(Filed by the Office of the Federal Register on August 5, 2008, 8:45 a.m., and published in the issue of the Federal Register for August 6, 2008, 73 F.R. 45656)

Change in Method of Accounting

Announcement 2008–84

On August 18, 2008, the Internal Revenue Service (Service) released Rev. Proc. 2008–52, 2008–36 I.R.B. 587, relating to the automatic consent procedures by which taxpayers may obtain the Commissioner's consent to make changes in methods of accounting that are described in the revenue procedure's APPENDIX. Rev. Proc. 2008–52 clarified, modified, amplified, and superseded Rev. Proc. 2002–9, 2002–1 C.B. 327, as modified and clarified by Announcement 2002–17, 2002–1 C.B. 561, modified and amplified by Rev. Proc. 2002–19, 2002–1 C.B. 696, and amplified, clarified, and modified by Rev. Proc. 2002–54, 2002–2 C.B. 432.

The automatic consent procedures of Rev. Proc. 2008–52 are generally effective as of August 18, 2008. Any application to change a method of accounting subject to the automatic consent procedures that is to be filed by a taxpayer on or after August 18, 2008, for a year of change ending on or after December 31, 2007, is required to be filed using the provisions of Rev. Proc. 2008–52.

The Service recently became aware that the August 18, 2008 effective date of Rev. Proc. 2008–52 presented an administrative burden to some taxpayers. In order to ameliorate any burden, the Service has determined that taxpayers should be allowed to elect to apply the procedures of Rev. Proc. 2002–9 through September 15, 2008, subject to certain limitations.

Accordingly, section 12.02 of Rev. Proc. 2008–52 is modified by revising the introductory language of section 12.02 and adding a new paragraph (3). These changes read as follows:

.02 *Transition rules*. The following transition rules apply:

* * *

(3) *No application filed by August 18, 2008.*

(a) *General rule.* If, prior to August 18, 2008, a taxpayer has not filed an application requesting consent to change a par-

ticular method of accounting for its first taxable year ending on or before July 31, 2008, the taxpayer may elect to apply the provisions of Rev. Proc. 2002–9 with respect to such method of accounting for such taxable year. For taxpayers making such election, the timely duplicate filing requirement of section 6.02(3)(a) of Rev. Proc. 2002–9 is modified to require the copy of the application to be submitted to the National Office on or before September 15, 2008.

(b) *Exception for changes from a hybrid method.* As of August 18, 2008, a taxpayer may not apply the provisions of Rev. Proc. 2002–9 with respect to a change described in section 5.01 of the APPENDIX to Rev. Proc. 2002–9 if such change is not also described in either section 14.01 or 14.09 of the APPENDIX to this revenue procedure. Notwithstanding section 5.01(1)(a) of Rev. Proc. 97–27, the Service will treat as timely filed under Rev. Proc. 97–27 any Form 3115 requesting consent to a change in method of accounting that is described in section 5.01 of the APPENDIX to Rev. Proc. 2002–9 but is not described in either section 14.01 or 14.09 of the APPENDIX to this revenue procedure for a taxpayer's first taxable year ending on or before July 31, 2008 if it is filed on or before September 15, 2008.

The final revenue procedure appears in this Internal Revenue Bulletin as Rev. Proc. 2008–52.

The authors of this announcement are Kari Fisher, Karla Meola, and Cheryl Oseekey of the Office of the Associate Chief Counsel (Income Tax & Accounting). For further information regarding this announcement, contact Ms. Fisher or Ms. Oseekey at (202) 622–4970 or Ms. Meola at (202) 622–4930.

Notice of Disposition of Declaratory Judgment Proceedings Under Section 7428

Announcement 2008–85

This announcement serves notice to donors that on August 13, 2008, the United States Tax Court entered a stipulated decision that the organization listed below is recognized as an organization described in section 501(c)(3), is exempt from tax under section 501(a), and is an organization described in section 170(c)(2).

Families on the Move, Inc.
New Brunswick, NJ

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

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