

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. 2009-5, page 432.

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, and other sections of the Code, tables set forth the rates for February 2009.

T.D. 9442, page 434.

Final regulations under section 1502 of the Code provide guidance regarding the treatment of transactions involving debt obligations and securities between members of a consolidated group.

Notice 2009-12, page 446.

Allocation of homebuyer credit between unmarried co-purchasers of a principal residence. This notice explains how to allocate the first-time homebuyer credit under section 36 of the Code between unmarried co-purchasers of a principal residence.

Notice 2009-13, page 447.

This notice provides interim guidance regarding section 7216 of the Code and regulations section 301.7216-2(o), relating to the ability of a tax return preparer to disclose and use statistical compilations of anonymous tax return information in support of the preparer's tax return preparation business without the consent of the preparer's taxpayer clients. The notice expands, during 2009 only, the ability of tax return preparers to disclose statistical compilations, subject to specific requirements to ensure anonymity and other restrictions.

Notice 2009-15, page 449.

This notice sets forth the manner in which the Treasury Department and the Service will determine and announce the credit rates for certain tax credit bonds for purposes of sections 54, 54A, 1400N(l) of the Code, and similar provisions. Notice 99-35 obsolete. Notice 2007-26 modified.

Rev. Proc. 2009-16, page 449.

Section 168(k)(4) guidance. This procedure provides additional guidance with respect to new section 168(k)(4) of the Code, which was added by section 3081(a) of the Housing and Economic Recovery Act of 2008 (the "Housing Act"). This procedure provides guidance regarding the time and manner for making the section 168(k)(4) election, the allocation of the credit limitation increases allowed by this election among members of a controlled group, the effect of the election on partnerships with corporate partners that make the section 168(k)(4) election, the application of section 168(k)(4) to S corporations, and the election under section 3081(b) of the Housing Act by certain automotive partnerships. Rev. Proc. 2008-65 amplified and supplemented.

EXEMPT ORGANIZATIONS

Announcement 2009-3, page 459.

The IRS has revoked its determination that the Hoodland Community Childrens Center of Welches, OR, qualifies as an organization described in sections 501(c)(3) and 170(c)(2) of the Code.

Finding Lists begin on page ii.



The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying

the tax law with integrity and fairness to all.

Introduction

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

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

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

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations,

court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.

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

Part II.—Treaties and Tax Legislation.

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

Part III.—Administrative, Procedural, and Miscellaneous.

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

Part IV.—Items of General Interest.

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

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

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

Section 38.—General Business Credit

Section 168(k)(4) allows corporations to make an election to forgo additional first year depreciation and instead to increase their business credit limitation under section 38(c) (including the research credit determined under section 41) or alternative minimum tax credit limitation under section 53(c). See Rev. Proc. 2009-16, page 449.

Section 41.—Credit for Increasing Research Activities

Section 168(k)(4) allows corporations to make an election to forgo additional first year depreciation and instead to increase their business credit limitation under section 38(c) (including the research credit determined under section 41) or alternative minimum tax credit limitation under section 53(c). See Rev. Proc. 2009-16, page 449.

Section 42.—Low-Income Housing Credit

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

Section 52.—Special Rules

All corporations which are treated as a single employer under section 52(a) (generally any controlled group of corporations within the meaning of section 1563(a), determined by substituting “more than 50 percent” for “more than 80 percent” each place it appears in that section) shall be treated as one taxpayer for purposes of section 168(k)(4) and as having elected to apply section 168(k)(4) if any such corporation so elects. See Rev. Proc. 2009-16, page 449.

Section 53.—Credit for Prior Year Minimum Tax Liability

Section 168(k)(4) allows corporations to make an election to forgo additional first year depreciation and instead to increase their business credit limitation under section 38(c) (including the research credit determined under section 41) or alternative minimum tax credit limitation under section 53(c). See Rev. Proc. 2009-16, page 449.

Section 54.—Credit to Holders of Clean Renewable Energy Bonds

A notice sets forth the manner in which the Treasury Department and the Internal Revenue Service will determine and announce the credit rates for certain tax credit bonds for purposes of sections 54, 54A, 1400N(l), and similar provisions. See Notice 2009-15, page 449.

Section 54A.—Credit to Holders of Qualified Tax Credit Bonds

A notice sets forth the manner in which the Treasury Department and the Internal Revenue Service will determine and announce the credit rates for certain tax credit bonds for purposes of sections 54, 54A, 1400N(l), and similar provisions. See Notice 2009-15, page 449.

Section 168.—Accelerated Cost Recovery System

Section 168(k)(4) allows corporations to make an election to forgo additional first year depreciation and instead to increase their business credit limitation under section 38(c) (including the research credit determined under section 41) or alternative minimum tax credit limitation under section 53(c). See Rev. Proc. 2009-16, page 449.

Section 280G.—Golden Parachute Payments

Federal short-term, mid-term, and long-term rates are set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

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

The adjusted applicable federal long-term rate is set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

Section 383.—Special Limitations on Certain Excess Credits, Etc.

The increases in the business credit limitation under section 38(c) and AMT credit limitation under

section 53(c) that result from a section 168(k)(4) election do not allow a taxpayer to utilize credit carryforwards that are otherwise limited by section 383. See Rev. Proc. 2009-16, page 449.

Section 412.—Minimum Funding Standards

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

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

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

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

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

Section 482.—Allocation of Income and Deductions Among Taxpayers

Federal short-term, mid-term, and long-term rates are set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

Section 483.—Interest on Certain Deferred Payments

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

Section 642.—Special Rules for Credits and Deductions

Federal short-term, mid-term, and long-term rates are set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

Section 702.—Income and Credits for Partner

If a corporation makes the section 168(k)(4) election and is a partner in a partnership (electing corporate partner), the partnership must provide the electing corporate partner with sufficient information to apply section 168(k)(4)(G)(ii) in determining its distributive share of partnership items under section 702 relating to any eligible qualified property placed in service by the partnership during the taxable year. This information must be provided in the time and manner required by section 6031(b) and section 1.6031(b)—IT(a)(3)(ii) and (b). See Rev. Proc. 2009-16, page 449.

Section 807.—Rules for Certain Reserves

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

Section 846.—Discounted Unpaid Losses Defined

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

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

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

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, and other sections of the Code, tables set forth the rates for February 2009.

Rev. Rul. 2009-5

This revenue ruling provides various prescribed rates for federal income tax purposes for February 2009 (the current month). Table 1 contains the short-term, mid-term, and long-term applicable federal rates (AFR) for the current month for purposes of section 1274(d) of the Internal Revenue Code. Table 2 contains the short-term, mid-term, and long-term adjusted applicable federal rates (adjusted AFR) for the current month for purposes of section 1288(b). Table 3 sets forth the

adjusted federal long-term rate and the long-term tax-exempt rate described in section 382(f). Table 4 contains the appropriate percentages for determining the low-income housing credit described in section 42(b)(1) for buildings placed in service during the current month. However, under section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, and before December 31, 2013, shall not be less than 9%. Finally, Table 5 contains the federal rate for determining the present value of an annuity, an interest for life or for a term of years, or a remainder or a reversionary interest for purposes of section 7520.

REV. RUL. 2009-5 TABLE 1
Applicable Federal Rates (AFR) for February 2009

	<i>Period for Compounding</i>			
	<i>Annual</i>	<i>Semiannual</i>	<i>Quarterly</i>	<i>Monthly</i>
<i>Short-term</i>				
AFR	.60%	.60%	.60%	.60%
110% AFR	.66%	.66%	.66%	.66%
120% AFR	.72%	.72%	.72%	.72%
130% AFR	.78%	.78%	.78%	.78%
<i>Mid-term</i>				
AFR	1.65%	1.64%	1.64%	1.63%
110% AFR	1.81%	1.80%	1.80%	1.79%
120% AFR	1.98%	1.97%	1.97%	1.96%
130% AFR	2.14%	2.13%	2.12%	2.12%
150% AFR	2.48%	2.46%	2.45%	2.45%
175% AFR	2.89%	2.87%	2.86%	2.85%
<i>Long-term</i>				
AFR	2.96%	2.94%	2.93%	2.92%
110% AFR	3.26%	3.23%	3.22%	3.21%
120% AFR	3.56%	3.53%	3.51%	3.50%
130% AFR	3.86%	3.82%	3.80%	3.79%

REV. RUL. 2009-5 TABLE 2
Adjusted AFR for February 2009

	<i>Period for Compounding</i>			
	<i>Annual</i>	<i>Semiannual</i>	<i>Quarterly</i>	<i>Monthly</i>
Short-term adjusted AFR	1.50%	1.49%	1.49%	1.49%
Mid-term adjusted AFR	2.83%	2.81%	2.80%	2.79%
Long-term adjusted AFR	5.27%	5.20%	5.17%	5.14%

REV. RUL. 2009-5 TABLE 3
Rates Under Section 382 for February 2009

Adjusted federal long-term rate for the current month	5.27%
Long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months.)	5.49%

REV. RUL. 2009-5 TABLE 4
Appropriate Percentages Under Section 42(b)(1) for February 2009

Note: Under Section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, and before December 31, 2013, shall not be less than 9%.

Appropriate percentage for the 70% present value low-income housing credit	7.53%
Appropriate percentage for the 30% present value low-income housing credit	3.23%

REV. RUL. 2009-5 TABLE 5
Rate Under Section 7520 for February 2009

Applicable federal rate for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest	2.0%
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Section 1288.—Treatment of Original Issue Discount on Tax-Exempt Obligations

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

Section 1374.—Tax Imposed on Certain Built-In Gains

Under section 1374(b)(3)(B), an S corporation is allowed as a credit against the section 1374(a) tax any business and AMT credit carryforwards that arose in a taxable year in which the corporation was a C corporation. The section 168(k)(4) election does not increase the S corporation's section 1374(b)(3)(B) lim-

itations and, therefore, if the section 168(k)(4) election is made an S corporation may not claim business credits or AMT credits in excess of its section 1374(a) tax for the taxable year. Any credits allowed as a result of the increases in the business or AMT credit limitations, which may be used only as an additional credit against the section 1374(a) tax, are not refundable to the S corporation. See Rev. Proc. 2009-16, page 449.

Section 1400N.—Tax Benefits for Gulf Opportunity Zone

A notice sets forth the manner in which the Treasury Department and the Internal Revenue Service will determine and announce the credit rates for certain tax credit bonds for purposes of sections 54, 54A, 1400N(l), and similar provisions. See Notice 2009-15, page 449.

Section 1502.—Regulations

If all members of a controlled group are members of an affiliated group of corporations that file a consolidated return (hereinafter, a "consolidated group"), the common parent (within the meaning of section 1.1502-77(a)(1)(i)) of the consolidated group makes the section 168(k)(4) election on behalf of all members of the consolidated group. A section 168(k)(4) election (or the lack of a section 168(k)(4) election) made by a consolidated group (or a controlled group in which the consolidated group is a member) applies to any eligible qualified property placed in service by a member of the consolidated group during a consolidated return year, even if such member is not a member of the consolidated group on the date that controlled group membership is determined under this revenue procedure. See Rev. Proc. 2009-16, page 449.

T.D. 9442

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

Consolidated Returns; Intercompany Obligations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 1502 of the Internal Revenue Code (Code). The regulations provide guidance regarding the treatment of transactions involving obligations between members of a consolidated group. These final regulations will affect affiliated groups of corporations filing consolidated returns.

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

Applicability Date: For dates of applicability, see §§1.1502-13(g)(8) and 1.1502-28(d).

FOR FURTHER INFORMATION CONTACT: Frances Kelly, (202) 622-7770 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On September 28, 2007, the IRS and the Treasury Department published a notice of proposed rulemaking (REG-107592-00, 2007-44 I.R.B. 908) in the **Federal Register** (72 FR 55139) (the 2007 Proposed Regulations) which proposed to amend §1.1502-13(g) (regarding the treatment of transactions involving obligations between members of a consolidated group) and to add §1.1502-13(e)(2)(ii)(C) (regarding the treatment of certain transactions involving the provision of insurance between members of a consolidated group). The 2007 Proposed Regulations replaced an earlier proposal (REG-105964-98, 1999-1 C.B. 22 [63 FR 70354]), published in the **Federal**

Register on December 21, 1998, which was withdrawn.

On February 25, 2008, the IRS and the Treasury Department published a notice (Announcement 2008-25, 2008-14 I.R.B. 732) in the **Federal Register** (73 FR 9972) withdrawing the portion of the 2007 Proposed Regulations relating to the treatment of intercompany insurance transactions. No public hearing regarding the remaining portion of the 2007 Proposed Regulations was requested or held. However, written, electronic, and oral comments were received. After consideration of all of the comments, the 2007 Proposed Regulations are adopted as revised by this Treasury decision. The principal comments and changes are discussed in this preamble.

Explanation of Provisions

Former Regulations Under §1.1502-13(g) (the Former Regulations)

An intercompany obligation is generally defined as an obligation between members of a consolidated group, but only for the period during which both the creditor and debtor are members of the group. The Former Regulations under §1.1502-13(g) (the 1995 regulations and the 1998 proposed regulations, as in effect before these final regulations), prescribe rules relating to the treatment of transactions involving such obligations, and apply generally to three broad categories of transactions; transactions in which an obligation between a group member and a nonmember becomes an intercompany obligation (inbound transactions), transactions in which an intercompany obligation ceases to be an intercompany obligation (outbound transactions), and transactions in which an intercompany obligation is assigned or extinguished within the consolidated group (intragroup transactions).

For all three types of transactions, the intercompany obligation is treated as satisfied and, if it remains outstanding, reissued as a new obligation (the deemed satisfaction-reissuance model).

Significant Changes Made by the 2007 Proposed Regulations

The 2007 Proposed Regulations make several significant changes to the Former Regulations, principally with respect to intragroup and outbound transactions.

First, the 2007 Proposed Regulations simplify the mechanics of the deemed satisfaction-reissuance model by separating the deemed transactions from the actual transaction. In general, the new model deems the following sequence of events to occur immediately before, and independently of, the actual transaction: (i) the debtor is deemed to satisfy the obligation for a cash amount equal to the obligation's fair market value, and (ii) the debtor is deemed to immediately reissue the obligation to the original creditor for that same cash amount. The parties are then treated as engaging in the actual transaction but with the new obligation.

Second, the 2007 Proposed Regulations provide that for transactions where it is appropriate to require a deemed satisfaction and reissuance, the intercompany obligation generally should be deemed satisfied and reissued for its fair market value (rather than issue price determined under the original issue discount principles of sections 1273 and 1274).

Third, the 2007 Proposed Regulations narrow the scope of intragroup and outbound transactions that trigger the deemed satisfaction-reissuance model by providing a number of exceptions to its application. A deemed satisfaction and reissuance generally is not required for these excepted transactions either because it is not necessary to apply the deemed satisfaction-reissuance model to carry out the purposes of §1.1502-13(g) or because the burdens associated with valuing the obligation or applying the mechanics of the deemed satisfaction-reissuance model outweigh the benefits achieved by its application.

Finally, the 2007 Proposed Regulations include two anti-abuse rules, the "material tax benefit rule" and the "off-market issuance rule," which are intended to prevent distortions of consolidated taxable income resulting from the shifting of built-in items from intercompany obligations, or from the issuance of obligations at a materially off-market rate of interest through the manipulation of a member's tax attributes or stock basis. These rules are aimed at intragroup transactions otherwise excepted from the deemed satisfaction-reissuance model (to ensure that the exceptions cannot be used to distort consolidated taxable income through intragroup transactions) and similar direct lending transactions.

General Comments

In general, commentators have been supportive of the 2007 Proposed Regulations, particularly with respect to the simplified mechanics of the deemed satisfaction-reissuance model and the availability of exceptions to its application. However, concerns have been raised regarding the application of the material tax benefit rule and the off-market issuance rule. The principal comments made with respect to these rules and other significant provisions, as well as the changes made in the final regulations in response to these comments, are discussed in this preamble.

A. Anti-Abuse Rules

As proposed, the material tax benefit rule generally applies to an intragroup assignment or extinguishment otherwise excepted from the deemed satisfaction-reissuance model. Under this rule, if, at the time of the assignment or extinguishment, it is reasonably foreseeable that the shifting of built-in items from an intercompany obligation between members will secure a material tax benefit, the intercompany transaction will be subject to the deemed satisfaction-reissuance model.

The proposed off-market issuance rule generally applies if an intercompany obligation is issued at a materially off-market rate of interest, and at the time of issuance, it is reasonably foreseeable that the shifting of built-in items from the obligation will secure a material tax benefit. In such cases, the intercompany obligation will be treated as originally issued for its fair market value, and any difference between the amount loaned and the fair market value of the obligation will be treated as transferred between the creditor member and the debtor member, as appropriate (for example, as a distribution or a contribution to capital).

While acknowledging certain benefits of the “reasonably foreseeable” test, commentators believed that it would be difficult to apply because the results of the test would not be easily determined. These commentators suggested that, for purposes of determining the applicability of each of the rules, the “reasonably foreseeable” test be replaced with a test that placed more emphasis on the intent of the parties at the time of the transaction (or is-

surance). Specifically, they recommended that the rules apply if “a principal purpose” of the transaction (or the issuance) was to secure a material tax benefit. If such a test were adopted, the commentators also thought it appropriate to provide certain pro-government presumptions in cases where the facts surrounding the transaction suggested such intent.

These final regulations adopt the commentators’ suggestions that the rules should be “intent-based.” However, consistent with other consolidated return anti-abuse rules, these final regulations provide that the rules’ application will be determined based upon a “with a view” standard and eliminate the requirement that the tax benefit to be secured by the transaction (or issuance) be material. In addition, because the IRS and the Treasury Department remain concerned about distortions that could result from transfers of intercompany obligations in section 351 exchanges that are excepted from the deemed satisfaction and reissuance model, these final regulations also adopt more specific rules regarding such transfers (described in part C.3.a. of this Preamble).

B. Deemed Satisfaction and Reissuance for Fair Market Value

Commentators were generally supportive of the 2007 Proposed Regulations’ use of fair market value as the amount for which an intercompany obligation is deemed satisfied and reissued. However, commentators also noted the difficulty in valuing intercompany obligations. Based upon these comments, the IRS and the Treasury Department are continuing to study whether it is appropriate to include certain simplifying presumptions in determining value, and comments are requested in this regard.

C. Exceptions and Related Provisions

1. *Overlap of Exceptions and Deemed Exchanges under §1.1001-3*

The 2007 Proposed Regulations provide a number of special rules for transactions in which intercompany debt is exchanged for newly issued intercompany debt. With respect to these intragroup debt-for-debt exchanges, the newly issued obligation generally is treated as issued for

its fair market value, and the intercompany debt is deemed satisfied and reissued for its fair market value.

Commentators questioned whether this latter rule applied only in cases in which the intragroup debt-for-debt exchange involved a single issuer or also in cases in which the obligations had different issuers. The requirement is intended to apply in both such cases. Because the language of the 2007 Proposed Regulations encompasses both of these situations, this rule has been retained without change.

However, the 2007 Proposed Regulations also contain an exception to the deemed satisfaction-reissuance model for certain routine debt modifications involving a single issuer (the routine modification exception). This exception applies if all of the rights and obligations under an intercompany obligation are extinguished in an exchange (or deemed exchange under §1.1001-3) for a newly issued intercompany obligation, and the issue price of the new obligation equals both the adjusted issue price and basis of the extinguished obligation.

In addition to the routine modification exception, the 2007 Proposed Regulations except from the deemed satisfaction-reissuance model many transactions that involve the assumption of a debtor member’s obligations under an intercompany obligation (for example, an assumption of an intercompany obligation in connection with an intercompany nonrecognition transaction). A number of commentators noted that, in some cases, these assumption transactions also may be a significant modification of the instrument resulting in a deemed exchange under §1.1001-3. In such cases, commentators questioned how the deemed exchange interacted with the various exceptions to the deemed satisfaction-reissuance model.

The IRS and the Treasury Department believe that a deemed exchange under §1.1001-3 that results from an assumption transaction should be subject to the same set of rules and exceptions as apply to an actual two-party exchange of a debt instrument. Thus, even if the assumption transaction is excepted from the deemed satisfaction-reissuance model, any deemed exchange resulting from the assumption would be a triggering transaction potentially subject to the model. However, in most such cases the deemed exchange will

generally qualify for the routine modification exception and thus not require a deemed satisfaction-reissuance.

Accordingly, these final regulations clarify that the routine modification exception applies to a deemed exchange of intercompany debt for intercompany debt that occurs under §1.1001-3 as a result of an assumption transaction. Specifically, these final regulations provide that, solely for purposes of this exception, a newly issued intercompany obligation will include an obligation that is issued (or deemed issued) by a member other than the original debtor if such other member assumes the original debtor's obligations in certain excepted transactions (intercompany nonrecognition exchanges or intercompany taxable assumption transactions), and the assumption results in a significant modification and deemed exchange under §1.1001-3.

2. Exception for Intercompany Taxable Assumption Transactions

The 2007 Proposed Regulations provide an exception to the application of the deemed satisfaction-reissuance model for certain intercompany sales or dispositions of assets where intercompany obligations are assumed as part of the transaction. This exception was intended to apply only in the case of a taxable sale (or other taxable disposition) of assets. Commentators noted, however, that the 2007 Proposed Regulations may be read to apply to nonrecognition transactions as well as taxable transactions. The IRS and the Treasury Department agree with the commentators and have revised the regulation to reflect its intended scope. However, as discussed in this preamble, these final regulations also clarify that the exception for certain section 351 nonrecognition exchanges is available for transactions in which a debtor's obligation is assumed.

3. Intercompany Nonrecognition Exchange Exceptions

The 2007 Proposed Regulations provide an exception to the deemed satisfaction-reissuance model for intercompany exchanges to which section 332 or 361 apply if neither the creditor nor the debtor recognize an amount of income, gain, deduction, or loss in the transaction, or in intercompany exchanges to which section

351 applies if no such amount is recognized by the creditor.

a. Section 351 Exception

Commentators questioned whether the exception for section 351 exchanges is available only for transactions in which a creditor assigns an intercompany obligation or if it also is available for transactions in which a debtor's obligation under an intercompany obligation is assumed. The exception is intended to apply to both such transactions. Consistent with the exception for intercompany exchanges under section 332 and section 361, these final regulations revise the exception for intercompany exchanges under section 351 by providing that it will apply only if neither the creditor nor the debtor recognizes an amount.

In addition, because the IRS and the Treasury Department believe that the assignment by a creditor of an intercompany obligation in an intercompany section 351 exchange presents significant potential for distortion, these final regulations limit the availability of the exception for certain of these section 351 transactions. These transactions generally involve exchanges where the transferor or transferee member has a unique tax attribute or special status, where the transferee member issues preferred stock in the exchange, or where the stock of the transferee member (or the stock of a direct or indirect owner of the transferee member) is disposed of within a short period after the exchange.

b. Scope of Exception under Section 332

With respect to intercompany exchanges under section 332, commentators requested clarification as to the scope of the exception, particularly with respect to the requirement that no amount be recognized in the exchange. Accordingly, these final regulations revise the exception to provide that it applies to exchanges to which both section 332 and section 337(a) apply in which no amount is recognized by either the creditor or debtor member.

c. Gain or Loss With Respect to an Intercompany Obligation

The exception to the deemed satisfaction-reissuance model for intercompany exchanges under sections 332, 351, and

361 generally is available if no amount of income, gain, deduction or loss is recognized. Commentators questioned whether this exception was available only where the amount recognized was with respect to the intercompany obligation. The requirement that no amount be recognized in the exchange applies to amounts recognized with respect to all assets. In exchanges where amounts are recognized, the fair market value of all assets (including the intercompany obligation) must be determined. In such cases, the IRS and the Treasury Department do not believe it is unduly burdensome to require a deemed satisfaction and reissuance. Accordingly, these final regulations retain the language of the 2007 Proposed Regulations.

4. Outbound Exception for Intercompany Obligations Newly-Issued in a Reorganization

The 2007 Proposed Regulations provide an exception to the deemed satisfaction-reissuance model for the outbound transfer of an intercompany obligation that is newly issued in an intragroup reorganization and pursuant to the plan of reorganization, is distributed to a nonmember shareholder or creditor in a transaction to which section 361(c) applies. Commentators generally supported this exception but also suggested that, under similar circumstances, an exception be added to apply to certain intercompany distributions of an intercompany obligation if the obligation is transferred outside of the group within a relatively short period of time.

The IRS and the Treasury Department are continuing to study the effects of the deemed satisfaction-reissuance model on such intercompany distributions in conjunction with a broader study regarding the interaction of section 361 and the intercompany transaction rules. Accordingly, these final regulations do not include the suggested exception. However, the IRS and the Treasury Department request further comments in this regard.

5. Exceptions to the Application of Section 108(e)(4)

The 2007 Proposed Regulations retain the exceptions in the Former Regulations for transactions involving an obligation that becomes (in the context of an inbound transaction) or became (in the context of

an intragroup or outbound transaction), an intercompany obligation by reason of an event described in §1.108-2(e). In general, these events are: (1) acquisitions of indebtedness with a stated maturity date within one year of the acquisition date if the indebtedness is retired on or before that date (the “short-term debt exception”); and (2) acquisitions of indebtedness by a dealer that acquires and disposes of the indebtedness in the ordinary course of its business of dealing in securities (the “dealer exception”).

The short-term debt exception is premised upon the view that imposition of the deemed satisfaction-reissuance model is unwarranted because the indebtedness would be retired within the short term by its own terms (and the retirement would produce the same results as that of the deemed satisfaction and reissuance). With respect to the dealer exception, because the indebtedness’ status as an intercompany obligation is likely transitory, the burden associated with the deemed satisfaction-reissuance model does not warrant its application.

One commentator questioned whether the short-term debt exception is appropriate because the intragroup retirement of the instrument may produce items that differ in character from those that would be obtained if the instrument were subject to the deemed satisfaction-reissuance model upon entering the group. For example, if a depreciated obligation is deemed satisfied and reissued immediately after it enters the group, the attributes of the creditor’s loss and the debtor’s discharge of indebtedness income are determined on a separate entity basis. However, if the instrument is accepted from the deemed satisfaction-reissuance model when it enters the group, the subsequent retirement of the note may result, arguably, in a character match of the creditor’s and debtor’s items. In cases where the adjusted issue price and basis of the note differ in amount, the potential for differing results is amplified. Therefore, the IRS and the Treasury Department agree that the short term debt exceptions for both inbound and intragroup transactions should be eliminated in these final regulations. The dealer exception has been retained in these final regulations.

Consistent with the Former Regulations’ treatment of inbound transactions, the 2007 Proposed Regulations treat the

attributes of the debtor and creditor member’s items from the deemed satisfaction on a separate entity basis. The IRS and the Treasury Department continue to believe that separate entity treatment is appropriate for such inbound transactions.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations do not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations primarily affect affiliated groups of corporations that have elected to file consolidated returns, which tend to be larger businesses, and, moreover, that any burden on taxpayers is minimal. 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 Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

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

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Sections 1.1502-13 and 1.1502-28 also issued under 26 U.S.C. 1502. * * *

Par. 2. Section 1.1502-13 is amended by:

1. Revising the heading and the entries for §1.1502-13(g)(5) in paragraph (a)(6)(ii).
2. Revising the first sentence of paragraph (e)(2)(i).
3. Revising paragraph (g).
4. Removing paragraph (j)(9) *Example* (5)(c).

The revisions read as follows:

§1.1502-13 Intercompany transactions.

- (a) * * *
- (6) * * *
- (ii) * * *

Obligations of members. (§1.1502-13(g)(7)(ii))

Example 1. Interest on intercompany obligation.

Example 2. Intercompany obligation becomes nonintercompany obligation.

Example 3. Loss or bad debt deduction with respect to intercompany obligation.

Example 4. Intercompany nonrecognition transactions.

Example 5. Assumption of intercompany obligation.

Example 6. Extinguishment of intercompany obligation.

Example 7. Exchange of intercompany obligations.

Example 8. Tax benefit rule.

Example 9. Issuance at off-market rate of interest.

Example 10. Nonintercompany obligation becomes intercompany obligation.

Example 11. Notional principal contracts.

* * * * *

(e) * * *

(2) * * * (i) * * * Except as provided in paragraph (g)(4)(v) of this section (deferral of items from an intercompany obligation), a member’s addition to, or reduction of, a reserve for bad debts that is maintained under section 585 is taken into account on a separate entity basis. * * *

* * * * *

(g) *Obligations of members*—(1) *In general*. In addition to the general rules of this section, the rules of this paragraph (g) apply to intercompany obligations.

(2) *Definitions*. For purposes of this section, the following definitions apply—

(i) *Obligation of a member* is a debt or security of a member.

(A) *Debt of a member* is any obligation of the member constituting indebtedness under general principles of Federal income tax law (for example, under non-statutory authorities, or under section 108, section 163, or §1.1275-1(d)), but not an executory obligation to purchase or provide goods or services.

(B) *Security of a member* is any security of the member described in section 475(c)(2)(D) or (E), and any commodity of the member described in section 475(e)(2)(A), (B), or (C), but not if the security or commodity is a position with respect to the member's stock. See paragraphs (f)(4) and (f)(6) of this section for special rules applicable to positions with respect to a member's stock.

(ii) *Intercompany obligation* is an obligation between members, but only for the period during which both parties are members.

(iii) *Intercompany obligation subgroup* is comprised of two or more members that include the creditor and debtor on an intercompany obligation if the creditor and debtor bear the relationship described in section 1504(a)(1) to each other through an intercompany obligation subgroup parent.

(iv) *Intercompany obligation subgroup parent* is the corporation (including either the creditor or debtor) that bears the same relationship to the other members of the intercompany obligation subgroup as a common parent bears to the members of a consolidated group. Any reference to an intercompany obligation subgroup parent includes, as the context may require, a reference to a predecessor or successor. For this purpose, a predecessor is a transferor of assets to a transferee (the successor) in a transaction to which section 381(a) applies.

(v) *Tax benefit* is the benefit of, for Federal tax purposes, a net reduction in income or gain, or a net increase in loss, deduction, credit, or allowance. A tax benefit includes, but is not limited to, the use of a built-in item or items from an intercompany obligation to reduce gain or increase loss on the sale of member stock, or to create or absorb a tax attribute of a member or subgroup.

(vi) *Eighty-percent chain* is a chain of two or more corporations in which stock meeting the requirements of section 1504(a)(2) of each lower-tier member is

held directly by a higher-tier member of such chain.

(3) *Deemed satisfaction and reissuance of intercompany obligations in triggering transactions*—(i) *Scope*—(A) *Triggering transactions*. For purposes of this paragraph (g)(3), a triggering transaction includes the following:

(1) *Assignment and extinguishment transactions*. Any intercompany transaction in which a member realizes an amount, directly or indirectly, from the assignment or extinguishment of all or part of its remaining rights or obligations under an intercompany obligation or any comparable transaction in which a member realizes any such amount, directly or indirectly, from an intercompany obligation (for example, a mark to fair market value of an obligation or a bad debt deduction). However, a reduction of the basis of an intercompany obligation pursuant to §1.1502-36(d) (attribute reduction to prevent duplication of loss), or pursuant to sections 108 and 1017 and §1.1502-28 (basis reductions upon the exclusion from gross income of discharge of indebtedness) or any other provision that adjusts the basis of an intercompany obligation as a substitute for income, gain, deduction, or loss, is not a comparable transaction.

(2) *Outbound transactions*. Any transaction in which an intercompany obligation becomes an obligation that is not an intercompany obligation.

(B) *Exceptions*. Except as provided in paragraph (g)(3)(i)(C) of this section, a transaction is not a triggering transaction as described in paragraph (g)(3)(i)(A) of this section if any of the exceptions in this paragraph (g)(3)(i)(B) apply. In making this determination, if a creditor or debtor realizes an amount in a transaction in which a creditor assigns all or part of its rights under an intercompany obligation to the debtor, or a debtor assigns all of or part of its obligations under an intercompany obligation to the creditor, the transaction will be treated as an extinguishment and will be excepted from the definition of "triggering transaction" only if either of the exceptions in paragraphs (g)(3)(i)(B)(5) or (6) of this section apply. The exceptions are as follows.

(1) *Intercompany section 361, 332, or 351 exchange*. The transaction is an intercompany exchange to which section 361(a), sections 332 and 337(a), or (except

as provided in the following sentence) section 351 applies in which no amount of income, gain, deduction or loss is recognized by the creditor or debtor. The assignment of an intercompany obligation by a creditor member in an intercompany exchange to which section 351 applies is a triggering transaction, notwithstanding the preceding sentence, if a member of the group is described in, or engages in a transaction that is described in, any of the following paragraphs.

(i) The transferor or transferee member has a loss subject to a limitation (for example, a loss from a separate return limitation year that is subject to limitation under §1.1502-21(c), or a dual consolidated loss that is subject to limitation under §1.1503(d)-4), but only if the other member is not subject to a comparable limitation;

(ii) The transferor or transferee member has a special status within the meaning of §1.1502-13(c)(5) (for example, a bank defined in section 581, or a life insurance company subject to tax under section 801) that the other member does not also possess;

(iii) A member of the group realizes discharge of indebtedness income that is excluded from gross income under section 108(a) within the same taxable year as that of the exchange, and the tax attributes attributable to either the transferor or the transferee member are reduced under sections 108, 1017, and §1.1502-28 (except if the attribute reduction results solely from the application of §1.1502-28(a)(4) (reduction of certain tax attributes attributable to other members));

(iv) The transferee member has a non-member shareholder;

(v) The transferee member issues preferred stock to the transferor member in exchange for the assignment of the intercompany obligation; or

(vi) The stock of the transferee member (or a higher-tier member other than a higher-tier member of an 80-percent chain that includes the transferee) is disposed of within 12 months from the assignment of the intercompany obligation, unless at the time of the assignment, the transferor member, transferee member (or in the case of successive section 351 exchanges, each transferor and transferee member) and the debtor member are all in the same 80-percent chain; and all of the stock of the trans-

feree (or in the case of successive section 351 exchanges, the lowest-tier transferee) held by members of the group is disposed of as part of the same plan or arrangement, either directly or indirectly, to persons that are not members of the group.

(2) *Intercompany assumption transaction.* All of the debtor's obligations under an intercompany obligation are assumed in connection with the debtor's sale or other disposition of property (other than solely money) in an intercompany transaction in which gain or loss is recognized under section 1001.

(3) *Exception to the application of section 108(e)(4).* The obligation became an intercompany obligation by reason of an event described in §1.108-2(e)(2) (exception to the application of section 108(e)(4) in the case of acquisitions by securities dealers).

(4) *Reserve accounting.* The amount realized is from reserve accounting under section 585 (see paragraph (g)(4)(v) of this section for special rules).

(5) *Intercompany extinguishment transaction.* All or part of the rights and obligations under the intercompany obligation are extinguished in an intercompany transaction (other than an exchange or deemed exchange of an intercompany obligation for a newly issued intercompany obligation), the adjusted issue price of the obligation is equal to the creditor's basis in the obligation, and the debtor's corresponding item and the creditor's intercompany item (after taking into account the special rules of paragraph (g)(4)(i)(C) of this section) with respect to the obligation offset in amount.

(6) *Routine modification of intercompany obligation.* All of the rights and obligations under the intercompany obligation are extinguished in an intercompany transaction that is an exchange (or deemed exchange) for a newly issued intercompany obligation, and the issue price of the newly issued obligation equals both the adjusted issue price of the extinguished obligation and the creditor's basis in the extinguished obligation. Solely for purposes of the preceding sentence, a newly issued intercompany obligation includes an obligation that is issued (or deemed issued) by a member other than the original debtor if such other member assumes the original debtor's obligations under the original obligation in a transac-

tion that is described in either paragraph (g)(3)(i)(B)(1) or (g)(3)(i)(B)(2) of this section and the assumption results in a significant modification of the original obligation under §1.1001-3(e)(4) and a deemed exchange under §1.1001-3(b).

(7) *Outbound distribution of newly issued intercompany obligation.* The intercompany obligation becomes an obligation that is not an intercompany obligation in a transaction in which a member that is a party to the reorganization exchanges property in pursuance of the plan of reorganization for a newly issued intercompany obligation of another member that is a party to the reorganization and distributes such intercompany obligation to a nonmember shareholder or nonmember creditor in a transaction to which section 361(c) applies.

(8) *Outbound subgroup exception.* The intercompany obligation becomes an obligation that is not an intercompany obligation in a transaction in which the members of an intercompany obligation subgroup cease to be members of a consolidated group, neither the creditor nor the debtor recognize any income, gain, deduction, or loss with respect to the intercompany obligation, and such members constitute an intercompany obligation subgroup of another consolidated group immediately after the transaction.

(C) *Tax benefit rule.* If an assignment or extinguishment of an intercompany obligation in an intercompany transaction is otherwise excepted from the definition of triggering transaction under paragraph (g)(3)(i)(B)(1), (2), (5), or (6) of this section (and not also under paragraph (g)(3)(i)(B)(3) or (4) of this section), and the assignment or extinguishment is engaged in with a view to shift items of built-in gain, loss, income, or deduction from the obligation from one member to another member in order to secure a tax benefit (as defined in paragraph (g)(2)(v) of this section) that the group or its members would not otherwise enjoy in a consolidated or separate return year, then the assignment or extinguishment will be a triggering transaction to which paragraph (g)(3)(ii) of this section applies.

(ii) *Application of deemed satisfaction and reissuance.* This paragraph (g)(3)(ii) applies if a triggering transaction occurs.

(A) *General rule.* If the intercompany obligation is debt of a member, then (ex-

cept as provided in the following sentence) the debt is treated for all Federal income tax purposes as having been satisfied by the debtor for cash in an amount equal to its fair market value, and then as having been reissued as a new obligation (with a new holding period but otherwise identical terms) for the same amount of cash, immediately before the triggering transaction. However, if the creditor realizes an amount with respect to the debt in the triggering transaction that differs from the debt's fair market value, and the triggering transaction is not an exchange (or deemed exchange) of debt of a member for newly issued debt of a member, then the debt is treated for all Federal income tax purposes as having been satisfied by the debtor for cash in an amount equal to such amount realized, and reissued as a new obligation (with a new holding period but otherwise identical terms) for the same amount of cash, immediately before the triggering transaction. If the triggering transaction is a mark to fair market value under section 475, then the intercompany obligation will be deemed satisfied and reissued for its fair market value (as determined under section 475 and applicable regulations) and section 475 will not otherwise apply with respect to that triggering transaction. If the intercompany obligation is a security of a member, similar principles apply (with appropriate adjustments) to treat the security as having been satisfied and reissued immediately before the triggering transaction.

(B) *Treatment as separate transaction.* The deemed satisfaction and deemed reissuance are treated as transactions separate and apart from the triggering transaction. The deemed satisfaction and reissuance of a member's debt will not cause the debt to be recharacterized as other than debt for Federal income tax purposes.

(4) *Special rules—(i) Timing and attributes.* For purposes of applying the matching rule and the acceleration rule to a transaction involving an intercompany obligation (other than a transaction to which paragraph (g)(5) of this section applies)—

(A) Paragraph (c)(6)(i) of this section (treatment of intercompany items if corresponding items are excluded or non-deductible) will not apply to exclude any amount of income or gain attributable to a reduction of the basis of the intercompany

obligation pursuant to §1.1502-36(d), or pursuant to sections 108 and 1017 and §1.1502-28 or any other provision that adjusts the basis of an intercompany obligation as a substitute for income or gain;

(B) Paragraph (c)(6)(ii) of this section (limitation on treatment of intercompany income or gain as excluded from gross income) does not apply to prevent any intercompany income or gain from the intercompany obligation from being excluded from gross income;

(C) Any income, gain, deduction, or loss from the intercompany obligation is not subject to section 108(a), section 354, section 355(a)(1), section 1091, or, in the case of an extinguishment of an intercompany obligation in a transaction in which the creditor transfers the obligation to the debtor in exchange for stock in such debtor, section 351(a); and

(D) Section 108(e)(7) does not apply upon the extinguishment of an intercompany obligation.

(ii) *Newly issued obligation in intercompany exchange.* If an intercompany obligation is exchanged (or is deemed exchanged) for a newly issued intercompany obligation and the exchange (or deemed exchange) is not a routine modification of an intercompany obligation (as described in paragraph (g)(3)(i)(B)(6) of this section), then the newly issued obligation will be treated for all Federal income tax purposes as having an issue price equal to its fair market value.

(iii) *Off-market issuance.* If an intercompany obligation is issued at a rate of interest that is materially off-market (off-market obligation) with a view to shift items of built-in gain, loss, income, or deduction from the obligation from one member to another member in order to secure a tax benefit (as defined in paragraph (g)(2)(v) of this section), then the intercompany obligation will be treated, for all Federal income tax purposes, as originally issued for its fair market value, and any difference between the amount loaned and the fair market value of the obligation will be treated as transferred between the creditor and the debtor at the time the obligation is issued. For example, if S lends \$100 to B in return for an off-market B note valued at \$130, and the note is issued with a view to shift items from the note to secure a tax benefit, then the B note will be treated as

issued for \$130. The \$30 difference will be treated as a distribution or capital contribution between S and B (as appropriate) at the time of issuance, and this amount will be reflected in future payments on the note as bond issuance premium. An adjustment to an off-market obligation under this paragraph (g)(4)(iii) will be made without regard to the application of, and in lieu of any adjustment under, section 467 (certain payments for the use of property or services), 482 (allocations among commonly controlled taxpayers), 483 (interest on certain deferred payments), 1274 (determination of issue price for certain debt instruments issued for property), or 7872 (treatment of loans with below-market interest rates).

(iv) *Deferral of loss or deduction with respect to nonmember indebtedness acquired in certain debt exchanges.* If a creditor transfers an intercompany obligation to a nonmember (former intercompany obligation) in exchange for newly issued debt of a nonmember (nonmember debt), and the issue price of the nonmember debt is not determined by reference to its fair market value (for example, the issue price is determined under section 1273(b)(4) or 1274(a) or any other provision of applicable law), then any loss of the creditor otherwise allowable on the subsequent disposition of the nonmember debt, or any comparable tax benefit that would otherwise be available in any other transaction that directly or indirectly results from the disposition of the nonmember debt, is deferred until the date the debtor retires the former intercompany obligation.

(v) *Bad debt reserve.* A member's deduction under section 585 for an addition to its reserve for bad debts with respect to an intercompany obligation is not taken into account, and is not treated as realized for purposes of paragraph (g)(3)(i)(A)(I) of this section, until the intercompany obligation is extinguished or becomes an obligation that is not an intercompany obligation.

(5) *Deemed satisfaction and reissuance of obligations becoming intercompany obligations—(i) Application of deemed satisfaction and reissuance—(A) In general.* This paragraph (g)(5) applies if an obligation that is not an intercompany obligation becomes an intercompany obligation.

(B) *Exceptions.* This paragraph (g)(5) does not apply to an intercompany obligation if either of the following exceptions apply.

(1) *Exception to the application of section 108(e)(4).* The obligation becomes an intercompany obligation by reason of an event described in §1.108-2(e)(2) (exception to the application of section 108(e)(4) in the case of acquisitions by securities dealers); or

(2) *Inbound subgroup exception.* The obligation becomes an intercompany obligation in a transaction in which the members of an intercompany obligation subgroup cease to be members of a consolidated group, neither the creditor nor the debtor recognize any income, gain, deduction, or loss with respect to the intercompany obligation, and such members constitute an intercompany obligation subgroup of another consolidated group immediately after the transaction.

(ii) *Deemed satisfaction and reissuance—(A) General rule.* If the intercompany obligation is debt of a member, then the debt is treated for all Federal income tax purposes, immediately after it becomes an intercompany obligation, as having been satisfied by the debtor for cash in an amount determined under the principles of §1.108-2(f), and then as having been reissued as a new obligation (with a new holding period but otherwise identical terms) for the same amount of cash. If the intercompany obligation is a security of a member, similar principles apply (with appropriate adjustments) to treat the security, immediately after it becomes an intercompany obligation, as satisfied and reissued by the debtor for cash in an amount equal to its fair market value.

(B) *Treatment as separate transaction.* The deemed satisfaction and deemed reissuance are treated as transactions separate and apart from the transaction in which the debt becomes an intercompany obligation, and the tax consequences of the transaction in which the debt becomes an intercompany obligation must be determined before the deemed satisfaction and reissuance occurs. (For example, if the debt becomes an intercompany obligation in a transaction to which section 351 applies, any limitation imposed by section 362(e) on the basis of the intercompany obligation in the hands of the transferee member

is determined before the deemed satisfaction and reissuance.) The deemed satisfaction and reissuance of a member's debt will not cause the debt to be recharacterized as other than debt for Federal income tax purposes.

(6) *Special rules*—(i) *Timing and attributes*. If paragraph (g)(5) of this section applies to an intercompany obligation—

(A) Section 108(e)(4) does not apply;

(B) The attributes of all items taken into account from the satisfaction of the intercompany obligation are determined on a separate entity basis, rather than by treating S and B as divisions of a single corporation; and

(C) Any intercompany gain or loss realized by the creditor is not subject to section 354 or section 1091.

(ii) *Waiver of loss carryovers from separate return limitation years*. Solely for purposes of §1.1502-32(b)(4) and the effect of any election under that provision, any loss taken into account under paragraph (g)(5) of this section by a corporation that becomes a member as a result of the transaction in which the obligation becomes an intercompany obligation is treated as a loss carryover from a separate return limitation year.

(iii) *Deduction of repurchase premium in certain debt exchanges*. If an obligation to which paragraph (g)(5) of this section applies is acquired in exchange for the issuance of an obligation to a nonmember and the issue price of this newly issued obligation is not determined by reference to its fair market value (for example, the issue price is determined under section 1273(b)(4) or 1274(a) or any other provision of applicable law), then, under the principles of §1.163-7(c), any repurchase premium from the deemed satisfaction of the intercompany obligation under paragraph (g)(5)(ii) of this section will be amortized by the debtor over the term of the obligation issued to the nonmember in the same manner as if it were original issue discount and the obligation to the nonmember had been issued directly by the debtor.

(7) *Examples*—(i) *In general*. For purposes of the examples in this paragraph (g), unless otherwise stated, interest is qualified stated interest under §1.1273-1(c), and the intercompany obligations are capital assets and are not subject to section 475.

(ii) The application of this section to obligations of members is illustrated by the following examples:

Example 1. Interest on intercompany obligation.

(i) *Facts*. On January 1 of year 1, B borrows \$100 from S in return for B's note providing for \$10 of interest annually at the end of each year, and repayment of \$100 at the end of year 5. B fully performs its obligations. Under their separate entity methods of accounting, B accrues a \$10 interest deduction annually under section 163, and S accrues \$10 of interest income annually under section 61(a)(4) and §1.446-2.

(ii) *Matching rule*. Under paragraph (b)(1) of this section, the accrual of interest on B's note is an intercompany transaction. Under the matching rule, S takes its \$10 of income into account in each of years 1 through 5 to reflect the \$10 difference between B's \$10 of interest expense taken into account and the \$0 recomputed expense. S's income and B's deduction are ordinary items. (Because S's intercompany item and B's corresponding item would both be ordinary on a separate entity basis, the attributes are not redetermined under paragraph (c)(1)(i) of this section.)

(iii) *Original issue discount*. The facts are the same as in paragraph (i) of this *Example 1*, except that B borrows \$90 (rather than \$100) from S in return for B's note providing for \$10 of interest annually and repayment of \$100 at the end of year 5. The principles described in paragraph (ii) of this *Example 1* for stated interest also apply to the \$10 of original issue discount. Thus, as B takes into account its corresponding expense under section 163(e), S takes into account its intercompany income under section 1272. S's income and B's deduction are ordinary items.

(iv) *Tax-exempt income*. The facts are the same as in paragraph (i) of this *Example 1*, except that B's borrowing from S is allocable under section 265 to B's purchase of state and local bonds to which section 103 applies. The timing of S's income is the same as in paragraph (ii) of this *Example 1*. Under paragraph (c)(4)(i) of this section, the attributes of B's corresponding item of disallowed interest expense control the attributes of S's offsetting intercompany interest income. Paragraph (c)(6) of this section does not prevent the redetermination of S's intercompany item as excluded from gross income because section 265(a)(2) permanently and explicitly disallows B's corresponding deduction and because, under paragraph (g)(4)(i)(B) of this section, paragraph (c)(6)(ii) of this section does not apply to prevent any intercompany income from the B note from being excluded from gross income. Accordingly, S's intercompany income is treated as excluded from gross income.

Example 2. Intercompany obligation becomes nonintercompany obligation. (i) *Facts*. On January 1 of year 1, B borrows \$100 from S in return for B's note providing for \$10 of interest annually at the end of each year, and repayment of \$100 at the end of year 5. As of January 1 of year 3, B has paid the interest accruing under the note and S sells B's note to X for \$70, reflecting an increase in prevailing market interest rates. B is never insolvent within the meaning of section 108(d)(3).

(ii) *Deemed satisfaction and reissuance*. Because the B note becomes an obligation that is not an intercompany obligation, the transaction is a triggering transaction under paragraph (g)(3)(i)(A)(2) of this

section. Under paragraph (g)(3)(ii) of this section, B's note is treated as satisfied and reissued for its fair market value of \$70 immediately before S's sale to X. As a result of the deemed satisfaction of the note for less than its adjusted issue price, B takes into account \$30 of discharge of indebtedness income under §1.61-12. On a separate entity basis, S's \$30 loss would be a capital loss under section 1271(a)(1). Under the matching rule, however, the attributes of S's intercompany item and B's corresponding item must be redetermined to produce the same effect as if the transaction had occurred between divisions of a single corporation. Under paragraph (c)(4)(i) of this section, the attributes of B's \$30 of discharge of indebtedness income control the attributes of S's loss. Thus, S's loss is treated as ordinary loss. B is also treated as reissuing, immediately after the satisfaction, a new note to S with a \$70 issue price, a \$100 stated redemption price at maturity, and a \$70 basis in the hands of S. S is then treated as selling the new note to X for the \$70 received by S in the actual transaction. Because S has a basis of \$70 in the new note, S recognizes no gain or loss from the sale to X. After the sale, the new note held by X is not an intercompany obligation, it has a \$70 issue price, a \$100 stated redemption price at maturity, and a \$70 basis. The \$30 of original issue discount will be taken into account by B and X under sections 163(e) and 1272.

(iii) *Creditor deconsolidation*. The facts are the same as in paragraph (i) of this *Example 2*, except that P sells S's stock to X (rather than S selling B's note to X). Because the B note becomes an obligation that is not an intercompany obligation, the transaction is a triggering transaction under paragraph (g)(3)(i)(A)(2) of this section. Under paragraph (g)(3)(ii) of this section, B's note is treated as satisfied and reissued for its \$70 fair market value immediately before S becomes a nonmember. The treatment of S's \$30 of loss and B's \$30 of discharge of indebtedness income is the same as in paragraph (ii) of this *Example 2*. The new note held by S upon deconsolidation is not an intercompany obligation, it has a \$70 issue price, a \$100 stated redemption price at maturity, and a \$70 basis. The \$30 of original issue discount will be taken into account by B and S under sections 163(e) and 1272.

(iv) *Debtor deconsolidation*. The facts are the same as in paragraph (i) of this *Example 2*, except that P sells B's stock to X (rather than S selling B's note to X). The results to S and B are the same as in paragraph (iii) of this *Example 2*.

(v) *Subgroup exception*. The facts are the same as in paragraph (i) of this *Example 2*, except that P owns all of the stock of S, S owns all of the stock of B, and P sells all of the S stock to X, the parent of another consolidated group. Because B and S, members of an intercompany obligation subgroup, cease to be members of the P group in a transaction that does not cause either member to recognize an item with respect to the B note, and such members constitute an intercompany obligation subgroup in the X group, P's sale of S stock is not a triggering transaction under paragraph (g)(3)(i)(B)(8) of this section, and the note is not treated as satisfied and reissued under paragraph (g)(3)(ii) of this section. After the sale, the note held by S has a \$100 issue price, a \$100 stated redemption price at maturity, and a \$100 basis. The results are the same if the S stock is sold to an individual and the S-B affiliated group elects to file

a consolidated return for the period beginning on the day after S and B cease to be members of the P group.

(vi) *Section 338 election.* The facts are the same as paragraph (i) of this *Example 2*, except that P sells S's stock to X and a section 338 election is made with respect to the stock sale. Under section 338, S is treated as selling all of its assets to new S, including the B note, at the close of the acquisition date. The aggregate deemed sales price (within the meaning of §1.338-4) allocated to the B note is \$70. Because the B note becomes an obligation that is not an intercompany obligation, the transaction is a triggering transaction under paragraph (g)(3)(i)(A)(2) of this section. Under paragraph (g)(3)(ii) of this section, B's note is treated as satisfied and reissued immediately before S's deemed sale to new S for \$70, the amount realized with respect to the note (the aggregate deemed sales price allocated to the note under §1.338-6). The results to S and B are the same as in paragraph (ii) of this *Example 2*.

(vii) *Appreciated note.* The facts are the same as in paragraph (i) of this *Example 2*, except that S sells B's note to X for \$130 (rather than \$70), reflecting a decline in prevailing market interest rates. Because the B note becomes an obligation that is not an intercompany obligation, the transaction is a triggering transaction under paragraph (g)(3)(i)(A)(2) of this section. Under paragraph (g)(3)(ii) of this section, B's note is treated as satisfied and reissued for its fair market value of \$130 immediately before S's sale to X. As a result of the deemed satisfaction of the note for more than its adjusted issue price, B takes into account \$30 of repurchase premium under §1.163-7(c). On a separate entity basis, S's \$30 gain would be a capital gain under section 1271(a)(1). Under the matching rule, however, the attributes of S's intercompany item and B's corresponding item must be redetermined to produce the same effect as if the transaction had occurred between divisions of a single corporation. Under paragraph (c)(4)(i) of this section, the attributes of B's premium deduction control the attributes of S's gain. Accordingly, S's gain is treated as ordinary income. B is also treated as reissuing, immediately after the satisfaction, a new note to S with a \$130 issue price, \$100 stated redemption price at maturity, and \$130 basis in the hands of S. S is then treated as selling the new note to X for the \$130 received by S in the actual transaction. Because S has a basis of \$130 in the new note, S recognizes no gain or loss from the sale to X. After the sale, the new note held by X is not an intercompany obligation, it has a \$130 issue price, a \$100 stated redemption price at maturity, and a \$130 basis. The treatment of B's \$30 of bond issuance premium under the new note is determined under §1.163-13.

(viii) *Deferral of loss or deduction with respect to nonmember indebtedness acquired in debt exchange.* The facts are the same as in paragraph (i) of this *Example 2*, except that S sells B's note to X for a non-publicly traded X note with an issue price and face amount of \$100 and a fair market value of \$70, and that, subsequently, S sells the X note for \$70. Because the B note becomes an obligation that is not an intercompany obligation, the transaction is a triggering transaction under paragraph (g)(3)(i)(A)(2) of this section. Under paragraph (g)(3)(ii) of this section, B's note is treated as satisfied and reissued immediately before S's sale to X for \$100, the amount realized with respect to the note (determined under

section 1274). As a result of the deemed satisfaction, neither S nor B take into account any items of income, gain, deduction, or loss. S is then treated as selling the new B note to X for the X note received by S in the actual transaction. Because S has a basis of \$100 in the new note, S recognizes no gain or loss from the sale to X. After the sale, the new B note held by X is not an intercompany obligation, it has a \$100 issue price, a \$100 stated redemption price at maturity, and a \$100 basis. S also holds an X note with a basis of \$100 but a fair market value of \$70. When S disposes of the X note, S's loss on the disposition is deferred under paragraph (g)(4)(iv) of this section, until B retires its note (the former intercompany obligation in the hands of X).

Example 3. Loss or bad debt deduction with respect to intercompany obligation. (i) *Facts.* On January 1 of year 1, B borrows \$100 from S in return for B's note providing for \$10 of interest annually at the end of each year, and repayment of \$100 at the end of year 5. On January 1 of year 3, the fair market value of the B note has declined to \$60 and S sells the B note to P for property with a fair market value of \$60. B is never insolvent within the meaning of section 108(d)(3). The B note is not a security within the meaning of section 165(g)(2).

(ii) *Deemed satisfaction and reissuance.* Because S realizes an amount of loss from the assignment of the B note, the transaction is a triggering transaction under paragraph (g)(3)(i)(A)(I) of this section. Under paragraph (g)(3)(ii) of this section, B's note is treated as satisfied and reissued for its fair market value of \$60 immediately before S's sale to P. As a result of the deemed satisfaction of the note for less than its adjusted issue price (\$100), B takes into account \$40 of discharge of indebtedness income under §1.61-12. On a separate entity basis, S's \$40 loss would be a capital loss under section 1271(a)(1). Under the matching rule, however, the attributes of S's intercompany item and B's corresponding item must be redetermined to produce the same effect as if the transaction had occurred between divisions of a single corporation. Under paragraph (c)(4)(i) of this section, the attributes of B's \$40 of discharge of indebtedness income control the attributes of S's loss. Thus, S's loss is treated as ordinary loss. B is also treated as reissuing, immediately after the satisfaction, a new note to S with a \$60 issue price, \$100 stated redemption price at maturity, and \$60 basis in the hands of S. S is then treated as selling the new note to P for the \$60 of property received by S in the actual transaction. Because S has a basis of \$60 in the new note, S recognizes no gain or loss from the sale to P. After the sale, the note is an intercompany obligation, it has a \$60 issue price and a \$100 stated redemption price at maturity, and the \$40 of original issue discount will be taken into account by B and P under sections 163(e) and 1272.

(iii) *Partial bad debt deduction.* The facts are the same as in paragraph (i) of this *Example 3*, except that S claims a \$40 partial bad debt deduction under section 166(a)(2) (rather than selling the note to P). Because S realizes a deduction from a transaction comparable to an assignment of the B note, the transaction is a triggering transaction under paragraph (g)(3)(i)(A)(I) of this section. Under paragraph (g)(3)(ii) of this section, B's note is treated as satisfied and reissued for its fair market value of \$60 immediately before section 166(a)(2) applies. The

treatment of S's \$40 loss and B's \$40 of discharge of indebtedness income are the same as in paragraph (ii) of this *Example 3*. After the reissuance, S has a basis of \$60 in the new note. Accordingly, the application of section 166(a)(2) does not result in any additional deduction for S. The \$40 of original issue discount on the new note will be taken into account by B and S under sections 163(e) and 1272.

(iv) *Insolvent debtor.* The facts are the same as in paragraph (i) of this *Example 3*, except that B is insolvent within the meaning of section 108(d)(3) at the time that S sells the note to P. As explained in paragraph (ii) of this *Example 3*, the transaction is a triggering transaction and the B note is treated as satisfied and reissued for its fair market value of \$60 immediately before S's sale to P. On a separate entity basis, S's \$40 loss would be capital, B's \$40 income would be excluded from gross income under section 108(a), and B would reduce attributes under section 108(b) or section 1017 (see also §1.1502-28). However, under paragraph (g)(4)(i)(C) of this section, section 108(a) does not apply to characterize B's income as excluded from gross income. Accordingly, the attributes of S's loss and B's income are redetermined in the same manner as in paragraph (ii) of this *Example 3*.

Example 4. Intercompany nonrecognition transactions. (i) *Facts.* On January 1 of year 1, B borrows \$100 from S in return for B's note providing for \$10 of interest annually at the end of each year, and repayment of \$100 at the end of year 5. As of January 1 of year 3, B has fully performed its obligations, but the note's fair market value is \$130, reflecting a decline in prevailing market interest rates. On January 1 of year 3, S transfers the note and other assets to a newly formed corporation, Newco, for all of Newco's common stock in an exchange to which section 351 applies.

(ii) *No deemed satisfaction and reissuance.* Because the assignment of the B note is an exchange to which section 351 applies and S recognizes no gain or loss, the transaction is not a triggering transaction under paragraph (g)(3)(i)(B)(I) of this section, and the note is not treated as satisfied and reissued under paragraph (g)(3)(ii) of this section.

(iii) *Receipt of other property.* The facts are the same as in paragraph (i) of this *Example 4*, except that the other assets transferred to Newco have a basis of \$100 and a fair market value of \$260, and S receives, in addition to Newco common stock, \$15 of cash. Because S would recognize \$15 of gain under section 351(b), the assignment of the B note is a triggering transaction under paragraph (g)(3)(i)(A)(I) of this section. Under paragraph (g)(3)(ii) of this section, B's note is treated as satisfied and reissued for its fair market value of \$130 immediately before the transfer to Newco. As a result of the deemed satisfaction of the note for more than its adjusted issue price, B takes into account \$30 of repurchase premium under §1.163-7(c). On a separate entity basis, S's \$30 gain would be a capital gain under section 1271(a)(1). Under the matching rule, however, the attributes of S's intercompany item and B's corresponding item must be redetermined to produce the same effect as if the transaction had occurred between divisions of a single corporation. Under paragraph (c)(4)(i) of this section, the attributes of B's premium deduction control the attributes of S's gain. Accordingly, S's gain is treated as ordinary income. B is also treated as reissuing, immediately after the satisfaction, a new note to S with a \$60 issue price, \$100 stated redemption price at maturity, and \$60 basis in the hands of S. S is then treated as selling the new note to P for the \$60 of property received by S in the actual transaction. Because S has a basis of \$60 in the new note, S recognizes no gain or loss from the sale to P. After the sale, the note is an intercompany obligation, it has a \$60 issue price and a \$100 stated redemption price at maturity, and the \$40 of original issue discount will be taken into account by B and P under sections 163(e) and 1272.

suing, immediately after the satisfaction, a new note to S with a \$130 issue price, \$100 stated redemption price at maturity, and \$130 basis in the hands of S. S is then treated as transferring the new note to Newco for the Newco stock and cash received by S in the actual transaction. Because S has a basis of \$130 in the new B note, S recognizes no gain or loss with respect to the transfer of the note in the section 351 exchange, and S recognizes \$10 of gain with respect to the transfer of the other assets under section 351(b). After the transfer, the note has a \$130 issue price and a \$100 stated redemption price at maturity. The treatment of B's \$30 of bond issuance premium under the new note is determined under §1.163-13.

(iv) The facts are the same as in paragraph (i) of this *Example 4*, except that T is a member with a loss from a separate return limitation year that is subject to limitation under §1.1502-21(c) (a SRLY loss), and on January 1 of year 3, S transfers the assets and the B note to T in an exchange to which section 351 applies. Because the transferee, T, has a loss that is subject to a limitation, the assignment of the B note is a triggering transaction under paragraph (g)(3)(i)(A)(I) of this section (the exception in paragraph (g)(3)(i)(B)(I) of this section does not apply). Under paragraph (g)(3)(ii) of this section, B's note is treated as satisfied and reissued for its fair market value, immediately before S's transfer to T. As a result of the deemed satisfaction of the note for more than its adjusted issue price, B takes into account \$30 of repurchase premium under §1.163-7(c). On a separate entity basis, S's \$30 gain would be a capital gain under section 1271(a)(1). Under the matching rule, however, the attributes of S's intercompany item and B's corresponding item must be redetermined to produce the same effect as if the transaction had occurred between divisions of a single corporation. Under paragraph (c)(4)(i) of this section, the attributes of B's premium deduction control the attributes of S's gain. Accordingly, S's gain is treated as ordinary income. B is also treated as reissuing, immediately after the satisfaction, a new note to S with a \$130 issue price, \$100 stated redemption price at maturity, and \$130 basis in the hands of S. The treatment of B's \$30 of bond issuance premium under the new note is determined under §1.163-13. S is then treated as transferring the new note to T as part of the section 351 exchange. Because T will have a fair market value basis in the reissued B note immediately after the exchange, T's intercompany item from the subsequent retirement of the B note will not reflect any of S's built-in gain (and the amount of T's SRLY loss that may be absorbed by such item will be limited to any appreciation in the B note accruing after the exchange).

(v) *Intercompany obligation transferred in section 332 transaction.* The facts are the same as in paragraph (i) of this *Example 4*, except that S transfers the B note to P in complete liquidation under section 332. Because the transaction is an exchange to which section 332 and section 337(a) applies, and neither S nor B recognize gain or loss, the transaction is not a triggering transaction under paragraph (g)(3)(i)(B)(I) of this section, and the note is not treated as satisfied and reissued under paragraph (g)(3)(ii) of this section.

Example 5. Assumption of intercompany obligation. (i) *Facts.* On January 1 of year 1, B borrows \$100 from S in return for B's note providing for \$10 of interest annually at the end of each year, and repay-

ment of \$100 at the end of year 5. The note is fully recourse and is incurred for use in Business Z. As of January 1 of year 3, B has fully performed its obligations, but the note's fair market value is \$110 reflecting a decline in prevailing market interest rates. Business Z has a fair market value of \$95. On January 1 of year 3, B transfers all of the assets of Business Z and \$15 of cash (substantially all of B's assets) to member T in exchange for the assumption by T of all of B's obligations under the note in a transaction in which gain or loss is recognized under section 1001. The terms and conditions of the note are not modified in connection with the sales transaction, the transaction does not result in a change in payment expectations, and no amount of income, gain, loss, or deduction is recognized by S, B, or T with respect to the note.

(ii) *No deemed satisfaction and reissuance.* Because all of B's obligations under the B note are assumed by T in connection with the sale of the Business Z assets, the assignment of B's obligations under the note is not a triggering transaction under paragraph (g)(3)(i)(B)(2) of this section, and the note is not treated as satisfied and reissued under paragraph (g)(3)(ii) of this section.

Example 6. Extinguishment of intercompany obligation. (i) *Facts.* On January 1 of year 1, B borrows \$100 from S in return for B's note providing for \$10 of interest annually at the end of each year, and repayment of \$100 at the end of year 20. The note is a security within the meaning of section 351(d)(2). As of January 1 of year 3, B has fully performed its obligations, but the fair market value of the B note is \$130, reflecting a decline in prevailing market interest rates, and S transfers the note to B in exchange for \$130 of B stock in a transaction to which both section 351 and section 354 applies.

(ii) *No deemed satisfaction and reissuance.* As a result of the satisfaction of the note for more than its adjusted issue price, B takes into account \$30 of repurchase premium under §1.163-7(c). Although the transfer of the B note is a transaction to which both section 351 and section 354 applies, under paragraph (g)(4)(i)(C) of this section, any gain or loss from the intercompany obligation is not subject to either section 351(a) or section 354, and therefore, S has a \$30 gain under section 1001. Because the note is extinguished in a transaction in which the adjusted issue price of the note is equal to the creditor's basis in the note, and the debtor's and creditor's items offset in amount, the transaction is not a triggering transaction under paragraph (g)(3)(i)(B)(5) of this section, and the note is not treated as satisfied and reissued under paragraph (g)(3)(ii) of this section. On a separate entity basis, S's \$30 gain would be a capital gain under section 1271(a)(1). Under the matching rule, however, the attributes of S's intercompany item and B's corresponding item must be redetermined to produce the same effect as if the transaction had occurred between divisions of a single corporation. Under paragraph (c)(4)(i) of this section, the attributes of B's premium deduction control the attributes of S's gain. Accordingly, S's gain is treated as ordinary income. Under paragraph (g)(4)(i)(D) of this section, section 108(e)(7) does not apply upon the extinguishment of the B note, and therefore, the B stock received by S in the exchange will not be treated as section 1245 property.

Example 7. Exchange of intercompany obligations. (i) *Facts.* On January 1 of year 1, B borrows

\$100 from S in return for B's note providing for \$10 of interest annually at the end of each year, and repayment of \$100 at the end of year 20. As of January 1 of year 3, B has fully performed its obligations and, pursuant to a recapitalization to which section 368(a)(1)(E) applies, B issues a new note to S in exchange for the original B note. The new B note has an issue price, stated redemption price at maturity, and stated principal amount of \$100, but contains terms that differ sufficiently from the terms of the original B note to cause a realization event under §1.1001-3. The original B note and the new B note are both securities (within the meaning of section 354(a)(1)).

(ii) *No deemed satisfaction and reissuance.* Because the original B note is extinguished in exchange for a newly issued B note and the issue price of the new B note is equal to both the adjusted issue price of the original B note and S's basis in the original B note, the transaction is not a triggering transaction under paragraph (g)(3)(i)(B)(6) of this section, and the note is not treated as satisfied and reissued under paragraph (g)(3)(ii) of this section. B has neither income from discharge of indebtedness under section 108(e)(10) nor a deduction for repurchase premium under §1.163-7(c). Although the exchange of the original B note for the new B note is a transaction to which section 354 applies, under paragraph (g)(4)(i)(C) of this section, any gain or loss from the intercompany obligation is not subject to section 354. Under section 1001, S has no gain or loss from the exchange of notes.

Example 8. Tax benefit rule. (i) *Facts.* On January 1 of year 1, B borrows \$100 from S in return for B's note providing for \$10 of interest annually at the end of each year, and repayment of \$100 at the end of year 5. As of January 1 of year 3, B has fully performed its obligations, but the note's fair market value has depreciated, reflecting an increase in prevailing market interest rates. On that date, S transfers the B note to member T as part of an exchange for T common stock which is intended to qualify for nonrecognition treatment under section 351 but with a view to sell the T stock at a reduced gain. On February 1 of year 4, all of the stock of T is sold at a reduced gain.

(ii) *Deemed satisfaction and reissuance.* Because the assignment of the B note does not occur within 12 months of the sale of T stock, paragraph (g)(3)(i)(B)(I)(vi) of this section does not apply to treat the assignment as a triggering transaction. However, because the assignment of the B note was engaged in with a view to shift built-in loss from the obligation in order to secure a tax benefit that the group or its members would not otherwise enjoy, under paragraph (g)(3)(i)(C) of this section, the assignment of the B note is a triggering transaction to which paragraph (g)(3)(ii) of this section applies. Under paragraph (g)(3)(ii) of this section, B's note is treated as satisfied and reissued for its fair market value, immediately before S's transfer to T. As a result of the deemed satisfaction of the note for less than its adjusted issue price, B takes into account discharge of indebtedness income and S has a corresponding loss which is treated as ordinary loss. B is also treated as reissuing, immediately after the deemed satisfaction, a new note to S with an issue price and basis equal to its fair market value. S is then treated as transferring the new note to T as part of the section 351 exchange. Because S's basis in

the T stock received with respect to the transferred B note is equal to its fair market value, S's gain with respect to the T stock will not reflect any of the built-in loss attributable to the B note. (This example does not address common law doctrines or other authorities that might apply to recharacterize the transaction or to otherwise affect the tax treatment of the transaction.)

Example 9. Issuance at off-market rate of interest.

(i) *Facts.* T is a member with a SRLY loss. T's sole shareholder, P, borrows an amount of cash from T in return for a P note that provides for a materially above market rate of interest. The P note is issued with a view to generate additional interest income to T over the term of the note to facilitate the absorption of T's SRLY loss.

(ii) *With a view.* Because the P note is issued with a view to shift interest income from the off-market obligation in order to secure a tax benefit that the group or its members would not otherwise enjoy, under paragraph (g)(4)(iii) of this section, the intercompany obligation is treated, for all Federal income tax purposes, as originally issued for its fair market value so T is treated as purchasing the note at a premium. The difference between the amount loaned and the fair market value of the obligation is treated as transferred from P to T as a capital contribution at the time the note is issued. Throughout the term of the note, T takes into account interest income and bond premium and P takes into account interest deduction and bond issuance premium under generally applicable Internal Revenue Code sections. The adjustment under paragraph (g)(4)(iii) of this section is made without regard to the application of, and in lieu of any adjustment under, section 482 or 1274.

Example 10. Nonintercompany obligation becomes intercompany obligation. (i) *Facts.* On January 1 of year 1, B borrows \$100 from X in return for B's note providing for \$10 of interest annually at the end of each year, and repayment of \$100 at the end of year 5. As of January 1 of year 3, B has fully performed its obligations, but the note's fair market value is \$70, reflecting an increase in prevailing market interest rates. On January 1 of year 3, P buys all of X's stock. B is solvent within the meaning of section 108(d)(3).

(ii) *Deemed satisfaction and reissuance.* Under paragraph (g)(5)(ii) of this section, B's note is treated as satisfied for \$70 (determined under the principles of §1.108-2(f)(2)) immediately after it becomes an intercompany obligation. Both X's \$30 capital loss (under section 1271(a)(1)) and B's \$30 of discharge of indebtedness income (under §1.61-12) are taken into account in determining consolidated taxable income for year 3. Under paragraph (g)(6)(i)(B) of this section, the attributes of items resulting from the satisfaction are determined on a separate entity basis. But see section 382 and §1.1502-15 (as appropriate). B is also treated as reissuing a new note to X. The new note is an intercompany obligation, it has a \$70 issue price and \$100 stated redemption price at maturity, and the \$30 of original issue discount will be taken into account by B and X in the same manner as provided in paragraph (iii) of *Example 1* of this paragraph (g)(7).

(iii) *Amortization of repurchase premium.* The facts are the same as in paragraph (i) of this *Example 10*, except that on January 1 of year 3, the B note has a fair market value of \$130 and rather than P pur-

chasing the X stock, P purchases the B note from X by issuing its own note. The P note has an issue price, stated redemption price at maturity, stated principal amount, and fair market value of \$130. Under paragraph (g)(5)(ii) of this section, B's note is treated as satisfied for \$130 (determined under the principles of §1.108-2(f)(1)) immediately after it becomes an intercompany obligation. As a result of the deemed satisfaction of the note, P has no gain or loss and B has \$30 of repurchase premium. Under paragraph (g)(6)(iii) of this section, B's \$30 of repurchase premium from the deemed satisfaction is amortized by B over the term of the newly issued P note in the same manner as if it were original issue discount and the newly issued P note had been issued directly by B. B is also treated as reissuing a new note to P. The new note is an intercompany obligation, it has a \$130 issue price and \$100 stated redemption price at maturity, and the treatment of B's \$30 of bond issuance premium under the new B note is determined under §1.163-13.

(iv) *Election to file consolidated returns.* Assume instead that B borrows \$100 from S during year 1, but the P group does not file consolidated returns until year 3. Under paragraph (g)(5)(ii) of this section, B's note is treated as satisfied and reissued as a new note immediately after the note becomes an intercompany obligation. The satisfaction and reissuance are deemed to occur on January 1 of year 3, for the fair market value of the obligation (determined under the principles of §1.108-2(f)(2)) at that time.

Example 11. Notional principal contracts. (i) *Facts.* On April 1 of year 1, M1 enters into a contract with counterparty M2 under which, for a term of five years, M1 is obligated to make a payment to M2 each April 1, beginning in year 2, in an amount equal to the London Interbank Offered Rate (LIBOR), as determined by reference to LIBOR on the day each payment is due, multiplied by a \$1,000 notional principal amount. M2 is obligated to make a payment to M1 each April 1, beginning in year 2, in an amount equal to 8 percent multiplied by the same notional principal amount. LIBOR is 7.80 percent on April 1 of year 2, and therefore, M2 owes \$2 to M1.

(ii) *Matching rule.* Under §1.446-3(d), the net income (or net deduction) from a notional principal contract for a taxable year is included in (or deducted from) gross income. Under §1.446-3(e), the ratable daily portion of M2's obligation to M1 as of December 31 of year 1 is \$1.50 (\$2 multiplied by 275/365). Under the matching rule, M1's net income for year 1 of \$1.50 is taken into account to reflect the difference between M2's net deduction of \$1.50 taken into account and the \$0 recomputed net deduction. Similarly, the \$.50 balance of the \$2 of net periodic payments made on April 1 of year 2 is taken into account for year 2 in M1's and M2's net income and net deduction from the contract. In addition, the attributes of M1's intercompany income and M2's corresponding deduction are redetermined to produce the same effect as if the transaction had occurred between divisions of a single corporation. Under paragraph (c)(4)(i) of this section, the attributes of M2's corresponding deduction control the attributes of M1's intercompany income. (Although M1 is the selling member with respect to the payment on April 1 of year 2, it might be the buying member in a subsequent period if it owes the net payment.)

(iii) *Dealer.* The facts are the same as in paragraph (i) of this *Example 11*, except that M2 is a dealer in securities, and the contract with M1 is not inventory in the hands of M2. Under section 475, M2 must mark its securities to fair market value at year-end. Assume that under section 475, M2's loss from marking to fair market value the contract with M1 is \$10. Because M2 realizes an amount of loss from the mark to fair market value of the contract, the transaction is a triggering transaction under paragraph (g)(3)(i)(A)(1) of this section. Under paragraph (g)(3)(ii) of this section, M2 is treated as making a \$10 payment to M1 to terminate the contract immediately before a new contract is treated as reissued with an up-front payment by M1 to M2 of \$10. M1's \$10 of income from the termination payment is taken into account under the matching rule to reflect M2's deduction under §1.446-3(h). The attributes of M1's intercompany income and M2's corresponding deduction are redetermined to produce the same effect as if the transaction had occurred between divisions of a single corporation. Under paragraph (c)(4)(i) of this section, the attributes of M2's corresponding deduction control the attributes of M1's intercompany income. Accordingly, M1's income is treated as ordinary income. Under §1.446-3(f), the deemed \$10 up-front payment by M1 to M2 in connection with the issuance of a new contract is taken into account over the term of the new contract in a manner reflecting the economic substance of the contract (for example, allocating the payment in accordance with the forward rates of a series of cash-settled forward contracts that reflect the specified index and the \$1,000 notional principal amount). (The timing of taking items into account is the same if M1, rather than M2, is the dealer subject to the mark-to-market requirement of section 475 at year-end. However in this case, because the attributes of the corresponding deduction control the attributes of the intercompany income, M1's income from the deemed termination payment from M2 might be ordinary or capital). Under paragraph (g)(3)(ii)(A) of this section, section 475 does not apply to mark the notional principal contract to fair market value after its deemed satisfaction and reissuance.

(8) *Effective/applicability date.* The rules of this paragraph (g) apply to transactions involving intercompany obligations occurring in consolidated return years beginning on or after December 24, 2008.

* * * * *

Par. 3. Section 1.1502-28 is amended by:

1. Revising paragraph (b)(5)(i).
2. Revising the last sentence of paragraph (b)(5)(ii).
3. Adding a sentence to the end of paragraph (d).

The revisions and addition reads as follows:

§1.1502-28 Consolidated section 108.

* * * * *

(b) * * * *

(5) *Reduction of basis of intercompany obligations and former intercompany obligations*—(i) *Intercompany obligations that cease to be intercompany obligations.* If excluded COD income is realized in a consolidated return year in which an intercompany obligation becomes an obligation that is not an intercompany obligation because the debtor or creditor becomes a nonmember, or because the assets of the debtor or the creditor are acquired by a nonmember in a transaction to which section 381 applies, then the basis of such intercompany obligation (or new obligation if the intercompany obligation is deemed reissued under §1.1502-13(g)(3)) is available for reduction in respect of such excluded COD income pursuant to sections 108 and 1017 and this section.

(ii) * * * See §1.1502-13(g)(3)(i)(A)(I) and (g)(4)(i)(A).

* * * * *

(d) * * * Paragraph (b)(5)(i) of this section and the last sentence of paragraph (b)(5)(ii) of this section applies to transactions occurring in consolidated return years beginning on or after December 24, 2008.

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

Approved December 18, 2008.

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

(Filed by the Office of the Federal Register on December 24, 2008, 8:45 a.m., and published in the issue of the Federal Register for December 29, 2008, 73 F.R. 79324)

Section 6031.—Return of Partnership Income

If a corporation makes the section 168(k)(4) election and is a partner in a partnership (electing corporate partner), the partnership must provide the electing corporate partner with sufficient information to apply section 168(k)(4)(G)(ii) in determining its distributive share of partnership items under section 702 relating to any eligible qualified property placed in service by the partnership during the taxable year. This information must be provided in the time and manner required by section 6031(b) and section 1.6031(b)-IT(a)(3)(ii) and (b). See Rev. Proc. 2009-16, page 449.

Section 6401.—Amounts Treated as Overpayments

To the extent that taxpayer is allowed the business credit or alternative minimum tax credit in an amount allocable to the aggregate increases in the business credit limitation and the alternative minimum tax credit limitation that result from the section 168(k)(4) election, such amounts(s) are treated as overpayments within the meaning of section 6041(b) that are refundable to the taxpayer. See Rev. Proc. 2009-16, page 449.

Section 7520.—Valuation Tables

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

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

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2009. See Rev. Rul. 2009-5, page 432.

Part III. Administrative, Procedural, and Miscellaneous

Allocation of Section 36 First-Time Homebuyer Credit Between Taxpayers Who Are Not Married

Notice 2009-12

PURPOSE

This notice provides guidance under § 36(b)(1)(C) of the Internal Revenue Code (Code) for allocating the first-time homebuyer credit between taxpayers who are not married.

LAW

Section 36 was added to the Code by section 3011 of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654, 2888 (2008). Section 36(a) provides that a taxpayer who

is a first-time homebuyer of a principal residence (as defined in § 121) may claim a credit on the taxpayer's income tax return equal to 10 percent of the purchase price of the residence. Section 36(c)(1) defines "first-time homebuyer" as any individual (and if married, the individual's spouse) who has not had an ownership interest in any principal residence during the three-year period ending on the date of the purchase of the principal residence. Section 36(c)(3) defines "purchase" as any acquisition, but only if (i) the taxpayer did not acquire the property from a related person, and (ii) the taxpayer's basis in the property is not determined, in whole or in part, by reference to the adjusted basis of the property in the hands of the person from whom the taxpayer acquired the property, or determined under § 1014(a) (relating to property acquired from a decedent). For purposes of § 36(c)(3)(i),

§ 36(c)(5) provides that a person is treated as related to another person if the relationship would result in the disallowance of losses under § 267 or § 707, except that members of a family of an individual include only the individual's spouse, ancestors, and lineal descendants.

Pursuant to § 36(h), the first-time homebuyer credit applies to a home purchased on or after April 9, 2008, and before July 1, 2009. The maximum amount of the credit is \$7,500 (\$3,750 for a married taxpayer filing a separate return), as provided in § 36(b)(1)(A) and (B). Under § 36(b)(2), the credit begins to phase out for a taxpayer whose modified adjusted gross income (MAGI) is \$75,000 (\$150,000 for married taxpayers filing a joint return) ("MAGI threshold"). The allowable credit is reduced by an amount equal to:

$$\text{Maximum Allowable Credit} \times \frac{\text{MAGI in excess of } \$75,000 \text{ (}\$150,000 \text{ for married filing jointly)}}{\$20,000}$$

The credit is completely phased out for a taxpayer whose MAGI is \$95,000 (\$170,000 for married taxpayers filing a joint return) ("MAGI cap").

Section 36(f) generally requires a taxpayer who claims the first-time homebuyer credit to repay the credit allowed in 15 equal annual installments beginning with the second taxable year after the taxable year in which the taxpayer claims the credit. This repayment obligation may be accelerated or forgiven under certain exceptions as provided in § 36(f).

For eligible purchases in 2008, a taxpayer claims the credit by attaching Form 5405, "First-Time Homebuyer Credit," to the taxpayer's 2008 tax return. For eligible purchases in 2009, a taxpayer may elect to claim the credit for 2008 or 2009 by attaching Form 5405 to the taxpayer's original or amended 2008 tax return or 2009 tax return.

APPLICATION

Section 36(b)(1)(C) provides that the Secretary may prescribe the manner in which the first-time homebuyer credit is allocated between two or more taxpayers who are not married and who purchase a principal residence. The total credit allo-

cated between the taxpayers cannot exceed \$7,500. For purposes of § 36(b)(1)(C), if two or more taxpayers who are not married purchase (within the meaning of § 36(c)(3)) a principal residence and otherwise satisfy the requirements of § 36, the first-time homebuyer credit may be allocated between the taxpayers using any reasonable method. A reasonable method is any method that does not allocate any portion of the credit to a taxpayer not eligible to claim that portion. A reasonable method includes allocating the credit between taxpayers who are eligible to claim the credit based on (1) the taxpayers' contributions towards the purchase price of a residence as tenants in common or joint tenants, or (2) the taxpayers' ownership interests in a residence as tenants in common.

EXAMPLES

The examples illustrate how the first-time homebuyer credit may be allocated when *A* and *B* purchase a principal residence as tenants in common. The rules

illustrated in the examples also apply in a similar manner to taxpayers who purchase a principal residence as joint tenants. Unless otherwise indicated, assume that in each example *A* and *B* (i) purchase a principal residence on May 1, 2008, (ii) are not married to each other, (iii) do not have MAGI in excess of the MAGI threshold, and (iv) are first-time homebuyers who otherwise satisfy the requirements of § 36.

Example 1.

A contributes \$45,000 and *B* contributes \$15,000 towards the \$60,000 purchase price of a residence. Each owns a one-half interest in the residence as tenants in common. Under § 36(a), the allowable credit is limited to 10 percent of the purchase price, or \$6,000. *A* and *B* may allocate the allowable \$6,000 credit three-fourths to *A* and one-fourth to *B* based on their contributions toward the purchase price of the residence, one-half to each based on their ownership interests in the residence, or using any other reasonable method (for example, the entire credit to *A* or *B* because both *A* and *B* are eligible to claim the entire allowable credit).

Example 2.

A contributes \$10,000 for a down payment towards the \$100,000 purchase price of a residence, and *A* and *B* obtain and are jointly liable for a \$90,000 mortgage for the remainder of the purchase price.

Each owns a one-half interest in the residence as tenants in common. Under § 36(b)(1)(A), the allowable credit is not \$10,000 (10 percent of the purchase price) but is limited to \$7,500. *A* and *B* may allocate the allowable \$7,500 credit 55 percent to *A* and 45 percent to *B* based on their contributions toward the purchase price, one-half to each based on their ownership interests in the residence, or using any other reasonable method (for example, the entire credit to *A* or *B* because both *A* and *B* are eligible to claim the entire allowable credit).

Example 3.

On April 15, 2008, *A* pays the entire \$100,000 purchase price of a residence and is the sole owner. Under § 36(b)(1)(A), the allowable credit is not \$10,000 (10 percent of the purchase price) but is limited to \$7,500. On May 12, 2008, *A* transfers a one-half interest in the residence to *B* as a tenant in common for \$10,000. *A* may claim the entire allowable \$7,500 credit. Because *B* acquired *B*'s interest in the residence from *A* in part by gift, *B*'s basis in the residence is determined under § 1015 by reference to *A*'s basis in the residence. Therefore, *B* did not purchase an interest in the residence within the meaning of § 36(c)(3), and no portion of the credit may be allocated to *B* because *B* is not eligible to claim any portion of the credit.

Example 4.

A and *B* each contributes \$50,000 towards the \$100,000 purchase price of a residence and owns a one-half interest in the residence as tenants in common. Under § 36(b)(1)(A), the allowable credit is not \$10,000 (10 percent of the purchase price) but is limited to \$7,500. However, *B* is not a first-time homebuyer within the meaning of § 36(c)(1). Therefore, no portion of the credit may be allocated to *B* because *B* is not eligible to claim any portion of the credit. *A* may claim the entire allowable \$7,500 credit.

Example 5.

A contributes \$75,000 and *B* contributes \$25,000 towards the \$100,000 purchase price of a residence, and each owns a one-half interest in the residence as tenants in common. Under § 36(b)(1)(A), the allowable credit is not \$10,000 (10 percent of the purchase price) but is limited to \$7,500. *A*'s MAGI is \$100,000 and *B*'s MAGI is \$60,000. Because *A*'s MAGI exceeds the \$95,000 MAGI cap, any portion of the credit allocated to *A* would be reduced to \$0. *A* and *B* may allocate the entire allowable \$7,500 credit to *B* because *B*'s MAGI is less than the \$75,000 MAGI threshold and, therefore, *B* is eligible to claim the entire allowable credit.

Example 6.

A and *B* each contributes \$50,000 towards the \$100,000 purchase price of a residence and owns a one-half interest in the residence as tenants in common. Under § 36(b)(1)(A), the allowable credit is not \$10,000 (10 percent of the purchase price) but is limited to \$7,500. *A*'s MAGI is \$80,000 and *B*'s MAGI is \$60,000. Because *A*'s MAGI exceeds the \$75,000 MAGI threshold by \$5,000, any portion of the allowable credit allocated to *A* will be reduced by one-quarter, \$5,000 (MAGI in excess of \$75,000) / \$20,000. *A* and *B* may allocate the allowable \$7,500 credit one-half to *A* and one-half to *B* (\$3,750 each) based on their contributions toward the purchase price of the residence or their ownership interests in the residence. However, *A*'s \$3,750 portion of the credit is limited by § 36(b)(2) and is reduced by one-quarter

($\$3,750 \times .25 = \937.50) to \$2,812.50 ($\$3,750 - 937.50$). Alternatively, *A* and *B* may allocate the allowable \$7,500 credit using any other reasonable method (for example, the entire credit to *B* because *B*'s MAGI is less than the \$75,000 MAGI threshold and, therefore, *B* is eligible to claim the entire allowable credit).

Example 7.

A and *B*, who are sisters, each contributes \$50,000 towards the \$100,000 purchase price of a residence and each owns a one-half interest as tenants in common. Under § 36(b)(1)(A), the allowable credit is not \$10,000 (10 percent of the purchase price) but is limited to \$7,500. *A* and *B* purchase the residence from their cousin, *C*. *A*, *B*, and *C* are not related persons within the meaning of § 36(c)(5). Therefore, *A* and *B* may allocate the allowable \$7,500 credit one-half to *A* and one-half to *B* based on their contributions toward the purchase price of the residence or their ownership interests in the residence. Alternatively, *A* and *B* may allocate the allowable \$7,500 credit using any other reasonable method (for example, the entire credit to *A* or *B* because both *A* and *B* are eligible to claim the entire allowable credit).

DRAFTING INFORMATION

The principal author of this notice is Christina M. Glendening of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this notice, contact Ms. Glendening at (202) 622-4920 (not a toll-free call).

Disclosure of Statistical Compilations of Anonymous Tax Return Information Under Section 7216

Notice 2009-13

PURPOSE

This notice provides interim guidance relating to the ability of a tax return preparer to disclose and use statistical compilations of anonymous tax return information (*i.e.*, information in a form that cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer) described in § 301.7216-1(b)(3)(i)(B) in support of a tax return preparer's tax return preparation business. This notice provides guidance on the tax return information a tax return preparer may use to compile anonymous statistical information that the tax return preparer may disclose without taxpayer consent. The ability of a tax return preparer to disclose and use statistical compilations of tax return information that

contain any taxpayer identifying information is not addressed in this notice and continues to be governed by § 301.7216-2(o).

BACKGROUND

On January 3, 2008, the Treasury Department and IRS issued final regulations under section 7216 (T.D. 9375, 2008-5 I.R.B. 344) applicable to disclosures or uses of tax return information occurring on or after January 1, 2009. The final regulations replaced previously issued final regulations that remained applicable to disclosures or uses of tax return information occurring prior to January 1, 2009. The final regulations included § 301.7216-1(b)(3)(i)(B) which, for disclosures and uses of tax return information occurring on or after January 1, 2009, provides that tax return information includes statistical compilations of tax return information, including information in a form that cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. The final regulations also included the addition of § 301.7216-2(o), which provides limited purposes for when a tax return preparer may use tax return information to produce statistical compilations and for when it may use or disclose the produced statistical compilation. Section 301.7216-2(o) currently allows a tax return preparer to use statistical compilations if such use directly supports the tax return preparer's tax return preparation business. However, § 301.7216-2(o) also currently prohibits the disclosure of all statistical compilations, both taxpayer-identifying and anonymous, unless the disclosure is made in order to comply with financial accounting or regulatory reporting requirements or occurs in conjunction with the sale or other disposition of the compiler's tax return preparation business. This notice provides interim guidance with respect to the ability of a tax return preparer to disclose and use statistical compilations of anonymous tax return information data in support of its tax return preparation business.

The Treasury Department and IRS have become aware that, under current § 301.7216-2(o), tax return preparers may not disclose anonymous statistical compilations for other purposes that may provide benefits to taxpayers generally or to the public as a whole. Anonymous statistical

data disclosed within the constraints provided by the interim guidance described in this notice may be used by tax return preparers to assist taxpayers in making informed choices about filing options and tax return preparers. The availability of anonymous statistical data can be useful from a public policy perspective, as the availability of such data can assist lawmakers, academics, non-profits and other agencies in the facilitation of sound tax policy analysis and decisions. In addition, volunteer tax return preparers that provide free tax return preparation services to low- and moderate-income taxpayers and families would be able to demonstrate the impact of their efforts in order to obtain and administer funding necessary for their continued operation.

The interim guidance provides that tax return preparers may use and disclose, without taxpayer consent, statistical compilations of tax return information to support the tax return preparer's tax return preparation business, but any disclosure of a statistical compilation must be in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. To further ensure anonymity, this interim guidance prohibits the disclosure of statistical compilations with cells containing data from fewer than twenty-five tax returns. Finally, the sale or exchange for value of all or any part of an anonymous statistical compilation is prohibited except if the sale occurs in conjunction with the transfer of assets made pursuant to the sale or other disposition of the tax return preparer's tax return preparation business.

This interim guidance continues to prohibit disclosure of anonymous statistical compilations of average refund, credit, or rebate amounts, or a part thereof, for purposes of advertising or marketing. The Treasury Department and IRS are concerned that advertising and marketing that discloses average refund, credit, or rebate amounts could create inaccurate expectations on the part of taxpayers and improper incentives on the part of tax return preparers to meet those expectations at the expense of tax return accuracy. Accordingly, in the case of the use or disclosure in advertising and marketing of statistical compilations of average refund, credit, or rebate amounts, this interim guidance retains the existing rules gov-

erning the use and disclosure of statistical compilations found in § 301.7216-2(o). In addition, the IRS will continue to rely on all existing enforcement powers to address concerns regarding advertising and marketing claims by tax return preparers.

The Treasury Department and the IRS believe that this interim guidance appropriately balances concerns regarding safeguarding the confidentiality of tax return information against the tax industry's (public, private, and governmental) need to evaluate and use anonymous tax return information. The Treasury Department and the IRS will apply the rules set forth in this notice during 2009 while devoting further consideration, including the consideration of any public comments in response to this notice, to whether this interim guidance should be adopted by regulations or further modified.

INTERIM GUIDANCE UNDER SECTION 7216

A tax return preparer may use tax return information to produce a statistical compilation of data described in § 301.7216-1(b)(3)(i)(B). The purpose and use of the statistical compilation must relate directly to the internal management or support of the tax return preparer's tax return preparation business. A tax return preparer who produces a statistical compilation of data described in § 301.7216-1(b)(3)(i)(B) may not disclose the compilation, or any part thereof, to any other person unless disclosure of the statistical compilation is anonymous as to taxpayer identity, does not disclose cells containing data from fewer than twenty-five tax returns, and is in direct support of the tax return preparer's tax return preparation business. A statistical compilation is anonymous as to taxpayer identity for purposes of this interim guidance if it is in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. For purposes of this interim guidance, marketing and advertising is in direct support of the tax return preparer's tax return preparation business as long as the marketing and advertising is not false, misleading, or unduly influential. However, this interim guidance does not apply to the use or disclosure in marketing or advertising of statistical compilations con-

taining or reflecting average amounts of refund, credit, or rebate, which use and disclosure will continue to be governed by the provisions of § 301.7216-2(o). Fundraising activities conducted by Volunteer Income Tax Assistance programs and other organizations described in section 501(c) of the Internal Revenue Code in direct support of their tax return preparation services are not marketing and advertising under this interim guidance. For purposes of this interim guidance, "tax return preparation business" includes *bona fide* research or public policy discussions concerning state or federal taxation or requiring data acquired during the tax return preparation process. Except as provided in this interim guidance, the provisions of § 301.7216-2(o) apply to the use and disclosure of statistical compilations of tax return information.

A tax return preparer may not sell or exchange for value a statistical compilation of data described in § 301.7216-1(b)(3)(i)(B), in whole or in part, except in conjunction with the transfer of assets made pursuant to the sale or other disposition of the tax return preparer's tax return preparation business.

EXAMPLES

The interim guidance described by this notice may be illustrated by the following examples.

Example 1. Preparer A is a tax return preparer as defined by § 301.7216-1(b)(2)(i)(A). In 2008, A used tax return information to produce a statistical compilation of data for both internal management purposes and to support A's tax return preparation business. The statistical compilation included a cell containing the information that A prepared thirty-two S corporation tax returns in 2008. In 2009, A decides to embark upon a new marketing campaign emphasizing its experience preparing small business tax returns. In the campaign, A discloses the cell containing the number of S corporation tax returns prepared in 2008. A's disclosure does not include any information that can be associated with or that can identify any specific taxpayers. A may disclose the anonymous statistical compilation without taxpayer consent because it complies with the interim guidance described in this notice.

Example 2. Preparer B is a tax return preparer as defined by § 301.7216-1(b)(2)(i)(A). In 2009, in support of B's tax preparation business, B advertises that the average tax refund obtained for its clients in 2008 was \$2,800. B may not disclose this information because it contains a statistical compilation reflecting average refund amounts.

Example 3. Preparer C is a tax return preparer as defined by § 301.7216-1(b)(2)(i)(A) and is a Volunteer Income Tax Assistance program. In 2009, in

support of C's tax preparation business, C makes a grant request to a charitable foundation to fund C's operations providing free tax preparation services to low- and moderate-income families. In support of C's request, C includes anonymous statistical data showing that, in 2008, C provided services to 500 taxpayers, that 95% of the taxpayer population served by C received the Earned Income Tax Credit (EITC), and that the average amount of the EITC received was \$3,300. C may disclose this information because it contains an anonymous statistical compilation, is in direct support of their tax return preparation services, and is consistent with this interim guidance.

Example 4. Preparer D is a tax return preparer as defined by § 301.7216-1(b)(2)(i)(A). In December 2007, D produced an anonymous statistical compilation of tax return information obtained during the 2007 filing season. In 2009, D discloses portions of the anonymous statistical compilation in connection with the marketing of its financial advisory and asset planning services. D is required to receive taxpayer consent under § 301.7216-3 before disclosing the tax return information contained in the anonymous statistical compilation because the disclosure is not being made in support of the tax return preparation business.

EFFECTIVE DATE

This interim guidance applies to disclosures of anonymous statistical compilations of tax return information occurring on or after February 9, 2009. This interim guidance expires on the earlier of the date that it is superseded or December 31, 2009.

REQUESTS FOR COMMENTS

Interested parties are invited to submit comments on this notice and modifications to § 301.7216-2(o) by May 10, 2009. Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2009-13), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Alternatively, comments may be hand-delivered Monday through Friday between the hours of 8:00 a.m. to 4:00 p.m. to: CC:PA:LPD:PR (Notice 2009-13), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC. Comments may also be submitted electronically via the following e-mail address: Notice.Comments@irscounsel.treas.gov. Please include Notice 2009-13 in the subject line of any electronic submission.

DRAFTING INFORMATION

The principal author of this notice is Molly K. Donnelly, Office of the Associate

Chief Counsel (Procedure and Administration). For further information regarding this notice, contact Molly K. Donnelly at (202) 622-4940 (not a toll-free call).

Credit Rates on Tax Credit Bonds

Notice 2009-15

SECTION 1. Purpose

This notice provides guidance regarding how the Treasury Department and the Internal Revenue Service (IRS) will determine and announce credit rates on certain tax credit bonds described in this notice.

SECTION 2. Background

Section 54A provides for the issuance of certain qualified tax credit bonds in which investors are eligible to receive Federal tax credits in lieu of the payment of all or a portion of the interest on the tax credit bonds. Qualified tax credit bonds under § 54A include qualified forestry conservation bonds, new clean renewable energy bonds, qualified energy conservation bonds, and qualified zone academy bonds. Section 54A(b)(3) provides that the applicable credit rate for a qualified tax credit bond is the rate which the Secretary of the Treasury estimates will permit the issuance of the qualified tax credit bond with a specified maturity or redemption date without discount and without interest cost to the qualified issuer. Section 54A(b)(3) further provides that the applicable credit rate with respect to any qualified tax credit bond shall be determined as of the first day on which there is a binding written contract for the sale or exchange of the bond. In addition, §§ 54 and 1400N(l) provide for the issuance of certain tax credit bonds known as clean renewable energy bonds and Midwestern tax credit bonds, respectively, which have similar credit rate-setting procedures. Unless otherwise provided, references in this notice to tax credit bonds include qualified tax credit bonds under § 54A, clean renewable energy bonds under § 54, and Midwestern tax credit bonds under § 1400N(l).

SECTION 3. Credit Rates

Pending further notice in a manner described in this notice, the Treasury Department will determine and announce credit rates for tax credit bonds daily for purposes of §§ 54, 54A, 1400N(l), and other similar provisions, based on its estimate of the yields on outstanding bonds from market sectors selected by the Treasury Department in its discretion that have an investment grade rating of between A and BBB for bonds of a similar maturity for the business day immediately preceding the sale date of the tax credit bonds. The applicable credit rate for a tax credit bond on its sale date is the credit rate published for that date by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: <https://www.treasurydirect.gov>. The Treasury Department and the IRS will set forth future refinements in the manner for determining credit rates on tax credit bonds in regulations, public notices, forms, instructions, or public notice directly on the above-referenced Internet site on which credit rates on tax credit bonds presently are published.

SECTION 4. Effect on Other Documents

Notice 99-35, 1999-2 C.B. 26 (July 12, 1999) is obsolete. Notice 2007-26, 2007-14 C.B. 870 (April 2, 2007) is modified.

SECTION 5. Effective Date.

This notice is effective as of January 22, 2009.

26 CFR 1.168(k)-1: Additional first year depreciation deduction.
(Also: §§ 38, 41, 52, 53, 168, 383, 702, 1374, 1502, 6031, 6401.)

Rev. Proc. 2009-16

SECTION 1. PURPOSE

This revenue procedure supplements Rev. Proc. 2008-65, 2008-44 I.R.B. 1082, to provide additional guidance under § 3081 of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289,

122 Stat. 2654 (July 30, 2008) (Housing Act). Section 3081(a) of the Housing Act amends § 168(k) of the Internal Revenue Code by adding § 168(k)(4), allowing corporations to elect not to claim the 50-percent additional first year depreciation for certain new property acquired after March 31, 2008, and placed in service generally before January 1, 2009, and instead to increase their business credit limitation under § 38(c) and alternative minimum tax (AMT) credit limitation under § 53(c). Section 3081(b) of the Housing Act allows certain automotive partnerships to elect to be treated as making a refundable deemed payment of income tax in a certain amount. Rev. Proc. 2008–65 provides guidance regarding the effects of making the § 168(k)(4) election, the property eligible for this election, and the computation of the amount by which the business credit limitation and AMT credit limitation may be increased if the § 168(k)(4) election is made. This revenue procedure provides guidance regarding the time and manner for making the § 168(k)(4) election, the allocation of the credit limitation increases allowed by this election among members of a controlled group, the effect of the election on partnerships with corporate partners that make the § 168(k)(4) election, the application of § 168(k)(4) to S corporations, and the election under § 3081(b) of the Housing Act by certain automotive partnerships.

SECTION 2. BACKGROUND

.01 Section 168(k), amended by § 103 of the Economic Stimulus Act of 2008, Pub. L. No. 110–185, 122 Stat. 613 (February 13, 2008) (Stimulus Act), allows a 50-percent additional first year depreciation deduction (Stimulus additional first year depreciation deduction) for certain new property acquired by a 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)).

.02 Section 3081(a) of the Housing Act added § 168(k)(4) to the Code. If a corporation elects to apply § 168(k)(4), § 168(k)(4)(A) provides that, for the corporation's first taxable year ending after March 31, 2008, and for any subsequent taxable year, the corporation forgoes the Stimulus additional first year deprecia-

tion deduction allowable under § 168(k) for eligible qualified property placed in service by the taxpayer and increases the limitations described in § 38(c) (relating to the general business credit) and § 53(c) (relating to the AMT credit). As a result, the corporation will be able to claim unused credits from taxable years beginning before January 1, 2006, that are allocable to research expenditures or AMT liabilities. Rev. Proc. 2008–65 clarifies which depreciable property is eligible qualified property for purposes of the § 168(k)(4) election and clarifies the effects of making the § 168(k)(4) election.

.03 In general, the amount by which the § 168(k)(4) election increases the business credit limitation under § 38(c) and the AMT credit limitation under § 53(c) is the bonus depreciation amount. See § 168(k)(4)(A)(iii). Except as provided below, the bonus depreciation amount generally is equal to 20 percent of the excess of the aggregate amount of depreciation that would be allowable for eligible qualified property if the Stimulus additional first year depreciation deduction applied to all such property, over the aggregate amount of depreciation that would be allowable for all such property if the Stimulus additional first year depreciation deduction did not apply. See § 168(k)(4)(C)(i). However, the bonus depreciation amount for any taxable year must not exceed the maximum increase amount reduced by the sum of the bonus depreciation amounts determined for all prior taxable years. See § 168(k)(4)(C)(ii). In general, the maximum increase amount is equal to the lesser of \$30 million, or 6 percent of the sum of the unexpired and unused pre-2006 business credit carryforwards allocable to the research credit and AMT credit carryforwards to the current taxable year. See § 168(k)(4)(C)(iii). For any taxable year, the bonus depreciation amount allocated to either the business credit limitation or AMT credit limitation must not exceed the amount of unexpired and unused pre-2006 business credit carryforwards allocable to the research credit or AMT credit carryforwards less bonus depreciation amounts allocated to each limitation, respectively, for all prior taxable years. See § 168(k)(4)(E)(ii). To the extent that a taxpayer is allowed the business credit or AMT credit in an amount allocable to the aggregate increases in the business

credit limitation or AMT credit limitation that result from the § 168(k)(4) election, such amount(s) are treated as overpayments within the meaning of § 6401(b) that are refundable to the taxpayer. See § 168(k)(4)(F).

.04 Rev. Proc. 2008–65 states that the Internal Revenue Service (IRS) and Treasury Department intend to publish separate guidance on the time and manner for making the § 168(k)(4) election and for specifying the allocation of the bonus depreciation amount to increase the business and AMT credit limitations under, respectively, §§ 38(c) and 53(c). This revenue procedure provides the time and manner for making the § 168(k)(4) election (see section 3 of this revenue procedure) and provides guidance on making and reporting the allocation of the bonus depreciation amount to increase the business and AMT credit limitations (see section 4 of this revenue procedure).

.05 Section 168(k)(4)(C)(iv) provides that all corporations that are treated as a single employer under § 52(a) (generally any controlled group of corporations within the meaning of § 1563(a), determined by substituting “more than 50 percent” for “more than 80 percent” each place it appears in § 1563(a)(1)) (hereinafter such group of corporations is referred to as a “controlled group”) are treated as one taxpayer for purposes of § 168(k)(4) and as having elected to apply § 168(k)(4) if any member of such controlled group so elects. This revenue procedure provides guidance regarding the allocation of the bonus depreciation amount to increase the business and AMT credit limitations among members of a controlled group (see section 4.02 of this revenue procedure).

.06 Under § 168(k)(4)(G)(ii), if a corporation that makes the § 168(k)(4) election is a partner in a partnership, the electing corporate partner's distributive share of partnership items under § 702 for any eligible qualified property placed in service by the partnership must be computed by using the straight line method and without claiming the Stimulus additional first year depreciation deduction. This revenue procedure provides guidance regarding partnerships with corporate partners that make the § 168(k)(4) election (see section 5 of this revenue procedure).

.07 Except as provided in § 3081(b) of the Housing Act, only a corporation may elect to apply § 168(k)(4). Some S corporations and their shareholders are uncertain about whether § 168(k)(4) applies to them. This revenue procedure clarifies the application of § 168(k)(4) to S corporations and their shareholders (see section 6 of this revenue procedure).

.08 Section 3081(b)(1) of the Housing Act provides that an applicable partnership may elect to be treated as making a refundable deemed payment of income tax in a certain amount. This revenue procedure provides guidance regarding this election (see section 7 of this revenue procedure).

.09 Section 168(k)(4) does not modify the rules under §§ 383 and 1502. Section 383 limitations do not affect the credit amounts that a taxpayer takes into consideration in calculating its maximum increase amount under section 5.04 of Rev. Proc. 2008-65. However, the increases in the business credit limitation under § 38(c) and AMT credit limitation under § 53(c) that result from a § 168(k)(4) election do not allow a taxpayer to utilize credit carryforwards that are otherwise limited by § 383.

SECTION 3. TIME AND MANNER FOR MAKING THE § 168(k)(4) ELECTION

.01 *In General.* Except as provided in sections 3.02 and 3.03 of this revenue procedure, a corporate taxpayer must make the § 168(k)(4) election by the due date (including extensions) of the federal income tax return for the taxpayer's first taxable year ending after March 31, 2008. Even if the taxpayer does not place in service any eligible qualified property during its first taxable year ending after March 31, 2008, the taxpayer must make the § 168(k)(4) election for that taxable year if the taxpayer wishes to apply the election to eligible qualified property placed in service in subsequent taxable years. If a taxpayer is not a member of a controlled group, the taxpayer makes the § 168(k)(4) election in the manner provided in either sections 3.02, 3.03, or 3.04 of this revenue procedure. If a taxpayer is a member of a controlled group, the taxpayer makes the § 168(k)(4) election in the manner provided in section 3.05 of this revenue procedure. Failure to comply with any of the

reporting or notification requirements provided by this section 3 will nullify a taxpayer's attempted § 168(k)(4) election.

.02 *Taxpayer's First Taxable Year Ending After March 31, 2008, Ends Before December 31, 2008.*

(1) *In general.* Except as provided in section 3.03 of this revenue procedure, if a taxpayer's first taxable year ending after March 31, 2008, ends before December 31, 2008, and:

(a) If the taxpayer has not filed its original federal income tax return for such taxable year on or before March 11, 2009, the taxpayer makes the § 168(k)(4) election:

(i) Either:

(I) By claiming the Stimulus additional first year depreciation deduction for any eligible qualified property placed in service by the taxpayer during such taxable year on its timely-filed federal income tax return for such taxable year. Such property must not be property in a class for which the taxpayer elects out of the Stimulus additional first year depreciation deduction under § 168(k)(2)(D)(iii); or

(II) By filing with its timely-filed federal income tax return for such taxable year the 2007 Form 4562, *Depreciation and Amortization (Including Information on Listed Property)*, indicating that the taxpayer used the straight line method and did not claim the Stimulus additional first year depreciation deduction for all eligible qualified property. Taxpayers that choose to follow this section 3.02(1)(a)(i)(II) must not claim a refundable credit on their original federal income tax return. To claim the refundable credit, see section 3.02(1)(a)(ii).

(ii) By filing an amended federal income tax return for such taxable year in the manner described in section 3.02(2) on or before the due date (without regard to extensions) of the taxpayer's federal income tax return for the succeeding taxable year; and

(iii) If the taxpayer is a partner in a partnership, by notifying the partnership in accordance with section 5.02 of this revenue procedure.

(b) If the taxpayer has filed its original federal income tax return for such taxable year on or before March 11, 2009, the taxpayer makes the § 168(k)(4) election by following the procedures set forth in section 3.02(1)(a)(ii) and (iii) of this revenue procedure.

(2) *Special rules for filing amended return.* If the taxpayer filing the amended federal income tax return under section 3.02(1)(a)(ii) of this revenue procedure:

(a) is not an S corporation, the taxpayer (i) includes the amount of the refundable credit allowed by the § 168(k)(4) election on Line 5g of the Form 1120X, *Amended U.S. Corporation Income Tax Return*, (ii) makes appropriate adjustments to Lines 2, 3, and 4 of the Form 1120X to reflect the requirements of § 168(k)(4)(A) (requiring that the depreciation deduction for all eligible qualified property be determined by using the straight line method and by not claiming the Stimulus additional first year depreciation deduction), and (iii) indicates in Part II of the Form 1120X that the taxpayer is making the § 168(k)(4) election. The taxpayer should refer to the instructions to the 2008 Form 1120, *U.S. Corporation Income Tax Return*, the 2008 Form 3800, *General Business Credit*, and the 2008 Form 8827, *Credit for Prior Year Minimum Tax — Corporations*, for guidance regarding computation of the refundable credit and allocation of the bonus depreciation amount between the business and AMT credit limitations; or

(b) is an S corporation, the taxpayer (i) makes appropriate adjustments to Line 22b of the amended Form 1120S, *U.S. Income Tax Return for an S Corporation*, to reflect the results described in section 6.02 of this revenue procedure from making the § 168(k)(4) election, (ii) makes appropriate adjustments on the amended Form 1120S to reflect the requirements of § 168(k)(4)(A) (requiring that the depreciation deduction for all eligible qualified property be determined by using the straight line method and by not claiming the Stimulus additional first year depreciation deduction), and (iii) attaches a statement to the amended Form 1120S indicating that the taxpayer is making the § 168(k)(4) election and a statement showing the computation of the increases to the business credit and AMT credit limitations under, respectively, §§ 38(c) and 53(c) resulting from making the § 168(k)(4) election. The S corporation also should follow the instructions to the Form 1120S for filing an amended return.

.03 *Special Rules for Taxpayers Whose First Taxable Year Ending After March 31, 2008, Ends Before December 31, 2008.*

(1) If a taxpayer described in section 3.02(1)(b) of this revenue procedure makes the § 168(k)(4) election on its timely-filed original federal income tax return and receives a refundable credit attributable to the § 168(k)(4) election made on such return, such taxpayer must not file the amended federal income tax return required by section 3.02(1)(a)(ii) and 3.02(1)(b) of this revenue procedure. However, such taxpayer must follow the notification procedures described in section 3.02(1)(a)(iii) of this revenue procedure.

(2) If a taxpayer described in section 3.02(1) of this revenue procedure wishes to make the § 168(k)(4) election but has not placed in service any eligible qualified property during its first taxable year ending after March 31, 2008, the taxpayer makes the § 168(k)(4) election by attaching a statement to its timely-filed federal income tax return for that taxable year, indicating that the taxpayer is making the § 168(k)(4) election. If a taxpayer described in section 3.02(1)(b) of this revenue procedure wishes to make the § 168(k)(4) election but has not placed in service any eligible qualified property during its first taxable year ending after March 31, 2008, and did not attach a statement to its original federal income tax return for such taxable year indicating that the taxpayer is making the § 168(k)(4) election, the taxpayer must attach such statement to the amended federal income tax return required by section 3.02(1)(a)(ii) and 3.02(1)(b) of this revenue procedure and follow the notification procedures described in section 3.02(1)(a)(iii) of this revenue procedure.

.04 Taxpayer's First Taxable Year Ending After March 31, 2008, Ends on or After December 31, 2008.

(1) *C corporations.* Except as provided in section 3.04(3) of this revenue procedure, if a taxpayer's first taxable year ending after March 31, 2008, ends on or after December 31, 2008, a C corporation makes the § 168(k)(4) election by:

(a) Claiming the refundable credit on Line 32g of the 2008 Form 1120;

(b) Filing the 2008 Form 3800 or Form 8827, or both, as applicable. Taxpayers should refer to the applicable instructions to the 2008 Forms 3800 and 8827 for guidance regarding computation of the refundable credit and allocation of the bonus de-

preciation amount between the business credit limitation and AMT credit limitation;

(c) Filing the 2008 Form 4562, *Depreciation and Amortization (Including Information on Listed Property)*, indicating that the taxpayer used the straight line method and did not claim the Stimulus additional first year depreciation deduction for all eligible qualified property; and

(d) Notifying any partnership in which the C corporation is a partner, in accordance with section 5.02 of this revenue procedure.

(2) *S corporations.* Except as provided in section 3.04(3) of this revenue procedure, if a taxpayer's first taxable year ending after March 31, 2008, ends on or after December 31, 2008, an S corporation makes the § 168(k)(4) election by:

(a) Making appropriate adjustments to Line 22b of the 2008 Form 1120S to reflect the results described in section 6.02 of this revenue procedure from making the § 168(k)(4) election;

(b) Attaching to the Form 1120S a statement indicating that the taxpayer is making the § 168(k)(4) election and a statement showing the computation of the increases to the business credit and AMT credit limitations under, respectively, §§ 38(c) and 53(c) resulting from making the § 168(k)(4) election;

(c) Filing the 2008 Form 4562 indicating that the taxpayer used the straight line method and did not claim the Stimulus additional first year depreciation deduction for all eligible qualified property; and

(d) Notifying any partnership in which the S corporation is a partner, in accordance with section 5.02 of this revenue procedure.

(3) *No eligible qualified property placed in service during first taxable year ending after March 31, 2008, ending on or after December 31, 2008.* If a taxpayer's first taxable year ending after March 31, 2008, ends on or after December 31, 2008, and the taxpayer has not placed in service any eligible qualified property during such taxable year, the taxpayer makes the § 168(k)(4) election by attaching a statement to its timely-filed federal income tax return for that taxable year, indicating that the taxpayer is making the § 168(k)(4) election.

.05 Controlled Groups.

(1) *Determination of Controlled Group Members.*

(a) *First taxable year ending after March 31, 2008.* For purposes of applying § 168(k)(4) and this revenue procedure for the first taxable year ending after March 31, 2008, § 168(k)(4)(C)(iv) is applied to determine the members of a controlled group (as defined in section 2.05 of this revenue procedure) on December 31, 2008, and all such members on that date are treated as a controlled group and as one taxpayer. However, if the first taxable year ending after March 31, 2008, ends on the same date for all members of a controlled group (as defined in section 2.05 of this revenue procedure), all members on such ending date are treated as a controlled group and as one taxpayer for purposes of applying § 168(k)(4) and this revenue procedure for the first taxable year ending after March 31, 2008.

(b) *Subsequent taxable years.* For purposes of applying § 168(k)(4) and this revenue procedure for any taxable year subsequent to a taxpayer's first taxable year ending after March 31, 2008, § 168(k)(4)(C)(iv) is applied to determine the members of a controlled group (as defined in section 2.05 of this revenue procedure) on December 31. However, if a taxable year subsequent to the first taxable year ending after March 31, 2008, ends on the same date for all members of a controlled group (as defined in section 2.05 of this revenue procedure), all members on such ending date are treated as a controlled group and as one taxpayer for purposes of applying § 168(k)(4) and this revenue procedure for that subsequent taxable year.

(2) *Time and manner of making the § 168(k)(4) election.*

(a) *In general.* A § 168(k)(4) election made by any member of a controlled group (as determined under section 3.05(1)(a) of this revenue procedure) is binding on all other members of the controlled group for all members' first taxable year ending after March 31, 2008. If in a subsequent taxable year, a controlled group determined under section 3.05(1)(b) of this revenue procedure (the second controlled group) includes 2 or more members of a controlled group determined under 3.05(1)(a) of this revenue procedure (the first controlled group), all members of the second controlled group that were members of the

first controlled group are deemed to have made (or not made, as the case may be) the § 168(k)(4) election of the first controlled group. Whether members of the second controlled group that were not members of the first controlled group are bound by a § 168(k)(4) election made by the first controlled group (or bound by the first controlled group's lack of a § 168(k)(4) election) is determined under the rules of section 3.05(2)(d) of this revenue procedure.

(b) *All members of a controlled group constitute a single consolidated group.* If all members of a controlled group are members of an affiliated group of corporations that file a consolidated return (hereinafter, a "consolidated group"), the common parent (within the meaning of § 1.1502-77(a)(1)(i)) of the consolidated group makes the § 168(k)(4) election on behalf of all members of the consolidated group. The common parent makes this election within the time and in the manner provided in sections 3.01, 3.02, 3.03, or 3.04 of this revenue procedure, as applicable.

(c) *All members of a controlled group do not constitute a single consolidated group.*

(i) *In general.* This section 3.05(2)(c) applies when separate federal income tax returns are filed by some or all members of a controlled group. If a controlled group includes, but is not limited to, members of a consolidated group, the consolidated group is treated as a single member of the controlled group. A member of the controlled group makes the § 168(k)(4) election by:

(I) Following the procedures in section 3.05(2)(c)(ii) or (iii) of this revenue procedure, as applicable; and

(II) Notifying all other members of the controlled group that the § 168(k)(4) election has been made. This notification must be made before the due date (excluding extensions) of the member's federal income tax return for the first taxable year ending after March 31, 2008. If the electing member makes the § 168(k)(4) election by filing an amended return under sections 3.02(1)(a)(ii) or 3.03(2) of this revenue procedure, as applicable, the electing member must notify the other members no later than the date it files an amended return containing the § 168(k)(4) election. If the electing member is described in section 3.03(1) of this revenue

procedure, the electing member must notify the other members on or before March 11, 2009.

(ii) *Controlled group member's first taxable year ending after March 31, 2008, ends before December 31, 2008.* If a controlled group member's first taxable year ending after March 31, 2008, ends before December 31, 2008, that member makes the § 168(k)(4) election within the time and in the manner provided in sections 3.02 or 3.03(2) of this revenue procedure, as applicable. In addition, the member must attach to the amended federal income tax return:

(I) a statement describing the computation of the group bonus depreciation amount (as provided in section 4.02(3)(b)(ii) of this revenue procedure); and

(II) Schedule O (Form 1120X), *Consent Plan and Apportionment Schedule for a Controlled Group*, and indicating in column (f) of Part IV that the controlled group has made the § 168(k)(4) election and the portion of the group bonus depreciation amount allocated to the member (as provided in section 4.02 of this revenue procedure).

(iii) *Controlled group member's first taxable year ending after March 31, 2008, ends on or after December 31, 2008.* If a controlled group member's first taxable year ending after March 31, 2008, ends on or after December 31, 2008, that member makes the § 168(k)(4) election within the time provided in section 3.01 of this revenue procedure and in the manner provided in section 3.04 of this revenue procedure. In addition, the member must attach to the federal income tax return:

(I) a statement describing the computation of the group bonus depreciation amount (as provided in section 4.02(3)(b)(ii) of this revenue procedure); and

(II) Schedule O (Form 1120) and indicating in column (f) of Part IV that the controlled group has made the § 168(k)(4) election and the portion of the group bonus depreciation amount allocated to the member (as provided in section 4.02 of this revenue procedure).

(d) *Effect of § 168(k)(4) election for members entering or leaving a controlled group.*

(i) *Member leaves controlled group that made § 168(k)(4) election.* If a taxpayer

is a member of a controlled group that makes the § 168(k)(4) election (the old group), and in a subsequent taxable year becomes a member of another controlled group that has not made the § 168(k)(4) election (the new group), the § 168(k)(4) election of the old group is not binding on the new group. The taxpayer, however, continues to be treated as having made the § 168(k)(4) election and must continue to apply §§ 167(f)(1) and 168 as if the § 168(k)(4) election was made. Similarly, if a taxpayer is a member of a controlled group that makes the § 168(k)(4) election (the old group), and in a subsequent taxable year leaves the old group and does not become a member of another controlled group, the taxpayer continues to be treated as having made the § 168(k)(4) election and must continue to apply §§ 167(f)(1) and 168 as if the § 168(k)(4) election was made.

(ii) *Taxpayer becomes a member of a controlled group after § 168(k)(4) election is made.* If a taxpayer was not a member of any controlled group when the taxpayer made the § 168(k)(4) election and in a subsequent taxable year becomes a member of a controlled group that did not make the § 168(k)(4) election, the taxpayer's election is not binding on the controlled group. The taxpayer, however, continues to be treated as having made the § 168(k)(4) election and must continue to apply §§ 167(f)(1) and 168 as if the § 168(k)(4) election was made. If a taxpayer neither made the § 168(k)(4) election nor was a member of a controlled group that made the § 168(k)(4) election, and in a subsequent taxable year becomes a member of a controlled group that made the § 168(k)(4) election, the controlled group's election does not apply to the taxpayer.

(iii) *Special rule for consolidated groups.* Notwithstanding section 3.05(2)(d)(i) and (ii) of this revenue procedure, a § 168(k)(4) election (or the lack of a § 168(k)(4) election) made by a consolidated group (or a controlled group in which the consolidated group is a member) applies to any eligible qualified property placed in service by a member of the consolidated group during a consolidated return year, even if such member is not a member of the consolidated group on the date that controlled group membership

is determined under section 3.05(1)(a) of this revenue procedure.

(iv) *Special rule for new taxpayers.* If a taxpayer was not in existence for the first taxable year for which the § 168(k)(4) election is made by a controlled group (as defined in section 3.05(1)(a) of this revenue procedure), immediately after the taxpayer's formation the taxpayer is a member of that controlled group, and the taxpayer is a member of that controlled group as determined under section 3.05(1)(b) of this revenue procedure, that controlled group's § 168(k)(4) election, if any election is made, applies to the taxpayer. For example, if a controlled group makes the § 168(k)(4) election and subsequently transfers eligible qualified property to a newly formed member of the same controlled group (on the day of its formation and on the determination date under section 3.05(1)(b) of this revenue procedure), such property remains eligible qualified property to which the § 168(k)(4) election applies and must be depreciated using the straight line method.

(v) *Overlapping groups.* For purposes of this revenue procedure, for any taxable year a taxpayer will not be considered a member of more than one controlled group. A taxpayer is considered a member of a single controlled group in accordance with the principles of § 1.1563-1T(c) of the temporary Income Tax Regulations.

.06 *Limited Relief for Late Election.*

(1) *Automatic 6-Month Extension.* Pursuant to § 301.9100-2(b) of the Procedure and Administration Regulations, an automatic extension of 6 months from the due date of the federal tax return (*excluding* extensions) for the taxpayer's first taxable year ending after March 31, 2008, is granted to make the § 168(k)(4) election, provided the taxpayer timely filed the taxpayer's federal tax return for the taxpayer's first taxable year ending after March 31, 2008, and the taxpayer satisfies the requirements in § 301.9100-2(c) and (d).

(2) *Other Extensions.* A taxpayer that fails to make the § 168(k)(4) election for the taxpayer's first taxable year ending after March 31, 2008, as provided in section 3.01, 3.02, 3.03, 3.04, 3.05, or 3.06(1) of this revenue procedure but wants to do so must file a request for an extension of time to make the election under the rules in § 301.9100-3.

SECTION 4. ALLOCATION OF THE BONUS DEPRECIATION AMOUNT

.01 *In General.* A taxpayer allocates the bonus depreciation amount between the business credit limitation under § 38(c) and the AMT credit limitation under § 53(c) by the due date (including extensions) of the taxpayer's federal income tax return for the taxable year. Except as provided in section 4.02 of this revenue procedure, the taxpayer specifies this allocation by reporting the amounts on the appropriate lines of the Forms 3800 and 8827. However, if a taxpayer's first taxable year ending after March 31, 2008, ends before December 31, 2008, the taxpayer makes and specifies the allocation for such taxable year on the amended federal income tax return filed pursuant to section 3.02(1)(a)(ii) or 3.03(2) of this revenue procedure. A different allocation may be used for different taxable years.

.02 *Controlled Groups.*

(1) *In general.* If a taxpayer is a member of a controlled group (as determined under section 3.05(1) of this revenue procedure) and any member of the controlled group makes the § 168(k)(4) election, the allocation of the group bonus depreciation amount to each member of the controlled group must be determined in accordance with section 4.02(2) or 4.02(3) of this revenue procedure, as applicable. This allocation of the group bonus depreciation amount for any taxable year is reported on Schedule O (Form 1120) (or a similar statement) that is attached to the federal income tax return or amended federal income tax return for that taxable year, as the case may be, filed by each member of the controlled group within the time provided in section 4.01 of this revenue procedure. However, if a member of a controlled group does not have the information necessary to allocate the group bonus depreciation amount for a taxable year on or before the due date (including extensions) of the member's federal income tax return for the taxable year, the member must make and specify the allocation for that taxable year on an amended federal income tax return for that taxable year that is filed on or before the due date (including extensions) of the member's federal income tax return for the succeeding taxable year. The allocation described in this section 4.02 of this revenue procedure applies

to all controlled group members who have made a section 168(k)(4) election or who are treated as having made such an election pursuant to section 3.05 of this revenue procedure.

(2) *All members of a controlled group constitute a single consolidated group.* If all members of a controlled group are members of a consolidated group (as defined in section 3.05(2)(b) of this revenue procedure), the consolidated group determines its bonus depreciation amount in accordance with section 5 of Rev. Proc. 2008-65, treating the consolidated group as a single taxpayer. The allocation of the bonus depreciation amount among the members of the consolidated group must be pursuant to an allocation by the common parent in accordance with the principles of § 1502 and its accompanying regulations.

(3) *All members of a controlled group do not constitute a single consolidated group.*

(a) *In general.* This section 4.02(3) applies when separate federal income tax returns are filed by some or all members of a controlled group. If a controlled group includes, but is not limited to, members of a consolidated group, the consolidated group is treated as a single member of the controlled group. The allocation of the bonus depreciation amount among the members of the controlled group must be made pursuant to section 4.02(3)(b) or (c) of this revenue procedure, as applicable. Any group bonus depreciation amount allocated to a consolidated group under this section 4.02(3) is allocated among the members of the consolidated group pursuant to an allocation by the common parent in accordance with the principles of § 1502 and its accompanying regulations.

(b) *Allocation of group bonus depreciation amount.*

(i) *In general.* The bonus depreciation amount allocable to a member of a controlled group is determined by arriving at each member's proportionate share of the group bonus depreciation amount, unless all members of the group agree to an alternative allocation under section 4.02(3)(c) of this revenue procedure.

(ii) *Computation of group bonus depreciation amount.* The group bonus depreciation amount is computed as follows:

(A) First, calculate the bonus depreciation amount in the manner provided in sec-

tions 5.01 and 5.02 of Rev. Proc. 2008–65 treating the controlled group as a single taxpayer. To calculate this amount, the eligible qualified property placed in service by each member of the controlled group during the taxable year is taken into account. However, if some or all members of the controlled group have different taxable years, the eligible qualified property to be taken into account is such property placed in service by each member of the controlled group after March 31, 2008, and before January 1, 2009 (or, for taxable years ending in 2009 or thereafter, during such calendar year);

(B) Second, calculate the maximum increase amount in section 5.04 of Rev. Proc. 2008–65, the business credit increase amount in section 5.05 of Rev. Proc. 2008–65, and the AMT credit increase amount in section 5.06 of Rev. Proc. 2008–65 by taking into account the sum of all member’s pre–2006 unexpired and unused research credits and AMT credits as of the last day of the taxable year. However, if the taxable years of some or all members of the controlled group end on different dates, the sum of all members’ pre–2006 unexpired and unused research credits and AMT credits as of the last day of each member’s last taxable year ending on or before December 31 (determined for each calendar year) are taken into account; and

(C) Finally, calculate the maximum amount in section 5.03 of Rev. Proc. 2008–65 to arrive at the group bonus depreciation amount for the taxable year.

(iii) *Member’s proportionate share of group bonus depreciation amount.* Each member’s proportionate share of the group bonus depreciation amount is equal to the group bonus depreciation amount determined under section 4.02(3)(b)(ii)(C) of this revenue procedure multiplied by a fraction, the numerator of which is the amount such member contributed to the total computed under section 4.02(3)(b)(ii)(A) of this revenue procedure and the denominator of which is the total computed under section 4.02(3)(b)(ii)(A) of this revenue procedure. If the taxable years of some or all members of the controlled group end on different dates, all (if any) of a member’s proportionate share of group bonus depreciation amount must be claimed by such member in the taxable year of the member to which such share

relates (determined by reference to the eligible qualified property’s placed in service date).

(c) *Allocation agreement.* In lieu of the method provided in section 4.02(3)(b) of this revenue procedure, the controlled group may allocate the group bonus depreciation amount (computed as provided in section 4.02(3)(b)(ii) of this revenue procedure) to any member in any proportion that all members of the controlled group agree. Any agreement, and the amounts allocated to all members pursuant to such agreement, must be shown on Schedule O (Form 1120) (or a similar statement) within the time and in the manner provided in section 4.02(1) of this revenue procedure. A subsequent agreement may be filed (shown on Schedule O (or similar statement) within the time and in the manner provided in section 4.01(1) of this revenue procedure) that varies the group bonus depreciation amounts allocated to controlled group members in taxable years after the group’s first taxable year ending after March 31, 2008.

.04 *Example 1.* A, B, and C are corporations that, on December 31, 2008, are the only members of the ABC controlled group. A’s first taxable year ending after March 31, 2008, ends on June 30, 2008. B and C’s first taxable year ending after March 31, 2008, ends on December 31, 2008. As of June 30, 2008, A has \$300 million of unexpired and unused pre–2006 research and AMT credit carryforwards. As of December 31, 2008, B and C each have \$300 million of unexpired and unused pre–2006 research and AMT credit carryforwards. Therefore, as of December 31, 2008, the ABC controlled group has \$900 million of unexpired and unused pre–2006 research and AMT credit carryforwards.

On May 1, 2008, A and B each placed in service eligible qualified property that costs \$50 million and is 5-year property under § 168(e). On September 1, 2008, A also placed in service eligible qualified property that costs \$100 million and is 5-year property under § 168(e). A, B, and C depreciate their 5-year property using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention. For each of the properties placed in service on May 1, 2008, the difference between the aggregate amount of depreciation that would be allowable for the property if the Stimulus additional first year depreciation deduction applied over the aggregate amount of depreciation that would be allowable for the property if the Stimulus additional first year depreciation deduction did not apply is \$20 million. That amount for the property placed in service by A on September 1, 2008, is \$40 million.

For its taxable year ending June 30, 2008, A makes the § 168(k)(4) election by filing an amended federal income tax return (Form 1120X) on January 15, 2009, in the manner provided by section

3.05(2)(c)(ii) of this revenue procedure. At the time A’s Form 1120X is filed, A, B, and C have not entered into any agreement regarding the allocation of the bonus depreciation amount among them.

(1) Under section 4.02(3)(b)(ii) of this revenue procedure, the ABC controlled group’s group bonus depreciation amount is 20 percent of \$80 million, or \$16 million. Under section 4.02(3)(b)(ii) of this revenue procedure, because \$16 million is less than (i) \$30 million and (ii) 6 percent of the ABC controlled group aggregate unexpired and unused pre–2006 research and AMT credits (.06 X \$900 million, or \$54 million), the ABC controlled group is not limited by the maximum increase amount. Thus, under section 4.02(3)(b)(ii)(C) of this revenue procedure, the ABC controlled group’s group bonus depreciation amount for the period ending on December 31, 2008, is \$16 million.

(2) Under section 4.02(3)(b)(iii) of this revenue procedure, A’s proportionate share of the group bonus depreciation amount is \$12 million (\$16 million X (\$60 million/\$80 million)). For its taxable year ending June 30, 2008, A may increase its business credit and AMT credit limitations under, respectively, §§ 38(c) and 53(c) by, and claim a refundable credit of, \$4 million (\$12 million X (\$20 million/\$60 million)) on its Form 1120X. For its taxable year ending June 30, 2009, A may increase its business credit and AMT credit limitations by \$8 million (\$12 million X (\$40 million/\$60 million)) (plus any group bonus depreciation amount calculated for the group and allocated to A for the period January 1, 2009, through December 31, 2009). In addition, B’s proportionate share of the group bonus depreciation amount is \$4 million (\$16 million X (\$20 million/\$80 million)). B may increase its business credit and AMT credit limitations under, respectively, §§ 38(c) and 53(c) by, and claim a refundable credit of, \$4 million on its original federal income tax return for its taxable year ending December 31, 2008. The ABC controlled group then has a maximum amount of \$14 million of bonus depreciation amount (\$30 million less the \$16 million allocated to A and B) remaining to be used for eligible qualified property placed in service by the ABC controlled group after December 31, 2008 (e.g., long-lived property or certain aircraft). The result of this Example is the same if, instead of a single corporation, A represents a consolidated group of corporations, except the \$12 million of group bonus depreciation amount allocated to A is reallocated within the A consolidated group pursuant to an allocation by the common parent in accordance with the principles of § 1502 and its accompanying regulations.

(b) *Example 2.* The facts are the same as in *Example 1*, except A has no pre–2006 business credit or AMT credit carryforwards as of the last day of its June 30, 2008, taxable year and C has \$600 million of pre–2006 research credit and AMT credit carryforwards as of December 31, 2008. Although A may increase its §§ 38(c) and 53(c) credit limitations for its taxable year ending June 30, 2008, A has no credit carryforwards that A may use to claim a refundable credit. Absent an allocation agreement, B and C may not be allocated any portion of the bonus depreciation amount that was allocated to A under section 4.02(3)(b)(iii) of this revenue procedure. The ABC controlled group, therefore, has \$26 million of group bonus depreciation (\$30 million less the \$4 million

allocated to B) remaining to be used for eligible qualified property placed in service by the ABC controlled group after December 31, 2008.

(c) *Example 3.* The facts are the same as *Example 2*, except A, B, and C have entered into an agreement regarding the allocation of the group bonus depreciation amount. The agreement provides that C will be allocated all of the group bonus depreciation amount. C, therefore, may increase its business and AMT credit limitations under, respectively, §§ 38(c) and 53(c) by, and claim a refundable credit of, \$16 million on its original income tax return for its taxable year ending December 31, 2008. Neither A nor B may claim the refundable credit for their taxable years ending June 30, 2008, and December 31, 2008, respectively. The ABC controlled group has a maximum amount of \$14 million of bonus depreciation amount (\$30 million less the \$16 million allocated to C) remaining to be used for eligible qualified property placed in service by the ABC controlled group after December 31, 2008.

SECTION 5. PARTNERSHIPS WITH CORPORATE PARTNERS THAT MAKE THE § 168(k)(4) ELECTION

.01 *Partnership's Information to Partner.*

(1) *In general.* If a corporation makes the § 168(k)(4) election and is a partner in a partnership (electing corporate partner), the partnership must provide the electing corporate partner with sufficient information to apply § 168(k)(4)(G)(ii) in determining its distributive share of partnership items under § 702 relating to any eligible qualified property placed in service by the partnership during the taxable year. This information must be provided in the time and manner required by § 6031(b) and § 1.6031(b)-1T(a)(3)(ii) and (b). If the partnership has filed its federal tax return for its first taxable year ending after March 31, 2008, on or before February 9, 2009, and did not provide the electing corporate partner with sufficient information to apply § 168(k)(4)(G)(ii), the partnership must provide such information to the electing corporate partner by the later of May 11, 2009, or 90 calendar days after receiving the corporate partner's notification as required by section 5.02 of this revenue procedure.

(2) *Determination of Electing Corporate Partner's Distributive Share.* A partnership must compute an electing corporate partner's distributive share of depreciation and make other correlative adjustments attributable to eligible qualified property placed in service by the partnership using any reasonable

method that is consistent with the intent of § 168(k)(4)(G)(ii). For example, the partnership may apply principles similar to those in § 743(b) and the regulations thereunder to the extent appropriate to make adjustments to the basis of the eligible qualified property and the electing corporate partner's distributive share of depreciation attributable to such property.

.02 *Electing Corporate Partner's Notification to Partnership.* An electing corporate partner must notify the partnership, in writing, that the corporate partner is making the § 168(k)(4) election. This notification must be made on or before the due date (including extensions) of the electing corporate partner's federal income tax return for its first taxable year ending after March 31, 2008. If the electing corporate partner makes the § 168(k)(4) election by filing an amended return under sections 3.02(1)(a)(ii) or 3.03(2) of this revenue procedure, as applicable, the electing corporate partner must notify the partnership on or before the date it files an amended return containing the § 168(k)(4) election. If the electing corporate partner is described in section 3.03(1) of this revenue procedure, the electing corporate partner must notify the partnership on or before March 11, 2009. Failure to comply with the notification requirement provided by this section 5.02 will nullify a taxpayer's attempted § 168(k)(4) election.

SECTION 6. APPLICATION OF § 168(k)(4) TO S CORPORATIONS AND THEIR SHAREHOLDERS

.01 *In General.* An S corporation is allowed to make the § 168(k)(4) election. However, any business or AMT credit limitation increases that result from a § 168(k)(4) election are applied at the corporate level and not at the shareholder level. Thus, a shareholder of an S corporation must not increase the shareholder's business or AMT credit limitations under, respectively, §§ 38(c) and 53(c) by the bonus depreciation amount that results from a § 168(k)(4) election made by the S corporation.

.02 *Applicability to S Corporations.* Under § 1374(a), an S corporation is subject to tax on its recognized built-in gains during its taxable year. In general, under § 1374(b)(3)(B), an S corporation is allowed as a credit against the § 1374(a)

tax any business and AMT credit carryforwards that arose in a taxable year in which the corporation was a C corporation. The credits allowed by § 1374(b)(3)(B) are subject to three limitations: the business credit limitation in § 38(c), the AMT credit limitation in § 53(c), and the amount of the § 1374(a) tax. Sections 1374(b)(3)(B) and 1.1374-6(b). If an S corporation makes the § 168(k)(4) election, the S corporation calculates its bonus depreciation amount as provided in section 5 of Rev. Proc. 2008-65, increases its business and AMT credit limitations, uses the straight line method for depreciating its eligible qualified property, and must not claim the Stimulus additional first year depreciation deduction for such property. However, the § 168(k)(4) election does not increase the S corporation's § 1374(b)(3)(B) limitation. Therefore, if the § 168(k)(4) election is made, an S corporation may not claim business credits or AMT credits in excess of its § 1374(a) tax for the taxable year. Any credits allowed as a result of the increase in the business or AMT credit limitations, which may be used only as an additional credit against the § 1374(a) tax, are not refundable to the S corporation.

.03 *Time and Manner for Making the § 168(k)(4) Election.* An S corporation makes the § 168(k)(4) election within the time and in the manner provided in section 3 of this revenue procedure.

SECTION 7. APPLICATION OF § 3081(b) OF THE HOUSING ACT

.01 *In General.* Section 3081(b)(1) of the Housing Act allows an applicable partnership to elect to be treated as making a deemed payment of income tax (the "deemed payment") in the amount determined under section 7.03 of this revenue procedure. This election applies to any taxable year during which eligible qualified property is placed in service by the applicable partnership. See section 3 of Rev. Proc. 2008-65 for determining which depreciable property qualifies as eligible qualified property. Notwithstanding any other provision of the Code, the deemed payment is refundable to the applicable partnership and may not be treated as an offset or credit against any tax liability of the applicable partnership or any partner. Section 3081(b)(2)(A) of the Housing Act.

.02 *Definition of Applicable Partnership.* An applicable partnership is a domestic partnership that was formed effective on August 3, 2007, and will produce in excess of 675,000 automobiles during the period beginning on January 1, 2008, and ending on June 30, 2008. Section 3081(b)(4)(A) of the Housing Act.

.03 *Computation of the Deemed Payment.* Pursuant to § 3081(b)(1)(A) and (b)(3) of the Housing Act, the amount of the deemed payment for the taxable year is equal to the lesser of:

(1) 20 percent of the excess (if any) of the aggregate amount of depreciation that would be allowable for eligible qualified property placed in service by the applicable partnership during the taxable year if the Stimulus additional first year depreciation deduction applied to all such property, over the aggregate amount of depreciation that would be allowable for all eligible qualified property placed in service by the applicable partnership during the taxable year if the Stimulus additional first year depreciation deduction did not apply to any such property. For purposes of computing this amount, the rules in section 5.02 of Rev. Proc. 2008-65 apply;

(2) the applicable partnership's research credit (determined under § 41) for the taxable year; or

(3) \$30 million less any deemed payments made by the applicable partnership under § 3081(b) of the Housing Act for all prior taxable years.

.04 *Effect of Making Election under § 3081(b) of the Housing Act.* If an applicable partnership makes the election to apply § 3081(b) of the Housing Act (the "§ 3081(b) Housing Act election"), the applicable partnership (1) must determine the depreciation deduction for any eligible qualified property placed in service by the partnership during the taxable year by using the straight line method and by not claiming the Stimulus additional first year depreciation deduction, and (2) must reduce the amount of its research credit for the taxable year by the amount of the deemed payment for the taxable year. Section 3081(b)(1)(B) and (C).

.05 *Time and Manner of Making § 3081(b) Housing Act Election.*

(1) *Time for making election.* An applicable partnership must make the § 3081(b) Housing Act election by the due date (including extensions) of the Form 1065, U.S.

Return of Partnership Income, for the partnership's first taxable year ending after March 31, 2008. Even if an applicable partnership does not place in service any eligible qualified property during its first taxable year ending after March 31, 2008, the partnership must make the § 3081(b) Housing Act election for that taxable year if the partnership wishes to apply the election to eligible qualified property placed in service in subsequent taxable years.

(2) *Manner of making election.* An applicable partnership makes the § 3081(b) Housing Act election by making the following statement (printed legibly or typed) on its timely-filed Form 1065 for the first taxable year ending after March 31, 2008, in the space below the signature section of the Form 1065: "A refund in the amount of \$[Insert Amount] is requested pursuant to Section 3081(b)(1) of P. L. 110-289, the Housing and Economic Recovery Act of 2008."

(3) *Limited Relief for Late Election.*

(a) *Automatic 6-Month Extension.* Pursuant to § 301.9100-2(b) of the Procedure and Administration Regulations, an automatic extension of 6 months from the due date of the federal tax return (excluding extensions) for the applicable partnership's first taxable year ending after March 31, 2008, is granted to make the § 3081(b) Housing Act election, provided the applicable partnership timely filed its federal tax return for its first taxable year ending after March 31, 2008, and the applicable partnership satisfies the requirements in § 301.9100-2(c) and (d).

(b) *Other Extensions.* An applicable partnership that fails to make the § 3081(b) Housing Act election for the applicable partnership's first taxable year ending after March 31, 2008, as provided in section 7.05(1) and (2) of this revenue procedure or in section 7.05(3)(a) of this revenue procedure but wants to do so must file a request for an extension of time to make the election under the rules in § 301.9100-3.

.06 *Filing of Form 1065.*

(1) *In general.* For the taxable year in which the § 3081(b) Housing Act election is made (the "year of election") and for any subsequent taxable year in which an applicable partnership is claiming a refundable deemed payment under § 3081(b) of the Housing Act, the partnership's Form 1065 and related forms and schedules (including Schedules K-1) must not be filed

electronically. Further, the applicable partnership must mail the Form 1065 and related forms and schedules (including Schedules K-1) to: Internal Revenue Service, 1973 N. Rulon White Blvd., Attn: Audrey Martinez Mail Stop 1120, Ogden, UT 84201.

(2) *Taxable years subsequent to the year of election.* If the applicable partnership claims a refundable deemed payment under § 3081(b) of the Housing Act for any taxable year subsequent to the year of election, the partnership must make the following statement (printed legibly or typed) on its Form 1065 for that taxable year in the space below the signature section of the Form 1065: "A refund in the amount of \$[Insert Amount] is requested pursuant to Section 3081(b)(1) of P. L. 110-289, the Housing and Economic Recovery Act of 2008."

SECTION 8. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2008-65 is amplified and supplemented.

SECTION 9. PAPERWORK REDUCTION ACT

The collections of information contained in this revenue procedure have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-2133. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this revenue procedure are in sections 3, 4, 5, and 7. This information is necessary and will be used to determine whether the taxpayer is eligible to make the § 168(k)(4) election and the amount by which the election increases the taxpayer's applicable credit limitations. The collections of information are required for the taxpayer to make the § 168(k)(4) election. The likely respondents are the following: business and other for-profit institutions.

The estimated total annual reporting and/or recordkeeping burden is 2,700 hours.

The estimated annual burden per respondent/recordkeeper varies from 0.25 hours to 1 hour, depending on individual circumstances, with an estimated average of 0.5 hours. The estimated number of respondents is 5,400. The estimated annual frequency of responses is on occasion.

SECTION 10. EFFECTIVE DATE

This revenue procedure is effective January 23, 2009.

SECTION 11. DRAFTING INFORMATION

The principal author of this revenue procedure is Jeffrey T. Rodrick of the Of-

vice of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue procedure, contact Mr. Rodrick at (202) 622-4930 (not a toll-free call).

Part IV. Items of General Interest

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

Announcement 2009-3

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

Generally, the Service will not disallow deductions for contributions made to a listed organization on or before the date

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

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organiza-

tions described in section 170(c)(2) that are otherwise allowable will continue to be deductible. Protection under section 7428(c) would begin on February 9, 2009, and would end on the date the court first determines that the organization is not described in section 170(c)(2) as more particularly set forth in section 7428(c)(1). For individual contributors, the maximum deduction protected is \$1,000, with a husband and wife treated as one contributor. This benefit is not extended to any individual, in whole or in part, for the acts or omissions of the organization that were the basis for revocation.

Hoodland Community Childrens Center
Welches, OR

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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