Internal Revenue bulletin

Bulletin No. 2010-51
December 20, 2010

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

REG–100194–10, page 891.

Proposed regulations under section 6011(e)(3) of the Code relate to the requirement for "specified tax return preparers," generally tax return preparers who reasonably expect to file more than 10 individual income tax returns in a calendar year (100 or more in 2011), to file individual income tax returns using magnetic media (electronically). A public hearing is scheduled for January 7, 2011.

Notice 2010–82, page 857.

Section 45R provides a Federal income tax credit to certain small employers that make nonelective contributions towards their employees' health insurance premiums under an arrangement that meets certain requirements. The notice provides guidance on the credit, including guidance for determining eligibility for the credit and for meeting the qualifying arrangement requirement for the credit. Notice 2010–44 amplified.

Notice 2010–85, page 877.

This notice contains a proposed revenue procedure that provides guidance to specified tax return preparers regarding the procedures to request a waiver of the magnetic media (electronic) filing requirement, due to undue hardship, under section 6011(e)(3) of the Code and proposed section 301.6011-6 of the Regulations on Procedure and Administration, which is being published contemporaneously with this notice. The proposed revenue procedure also provides guidance regarding how to document a taxpayer's choice to file the taxpayer's individual income tax return in paper format when the return is prepared by the preparer but filed by the taxpayer.

EMPLOYEE PLANS

Notice 2010–77, page 851.

This notice further extends the deadline for amending qualified defined benefit plans to meet certain requirements of the Code that were added by the Pension Protection Act of 2006 (PPA '06) and subsequently modified by the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) and the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010). The deadline for adopting an interim or discretionary plan amendment under sections 401, 436, and 411 is extended to the last day of the first plan year that begins on or after January 1, 2011. A plan must continue to satisfy the operational compliance requirements of section 1107 of PPA '06 as a condition of the extension of the deadline for adopting plan amendments provided by this notice. Notice 2009–97 and Rev. Proc. 2007–44 modified.

Notice 2010–80, page 853.

This notice provides additional relief for nonqualified deferred compensation plans covered under section 409A. This notice also expands the types of plans eligible for relief under Notice 2010-6, provides an additional method of correction and transition relief under Notice 2010-6 for certain plan document failures relating to payments at separation from service, and modifies the correction reporting requirements in Notice 2008-113 and Notice 2010-6. Notices 2008–113 and 2010–6 modified.

(Continued on the next page)

Announcement of Declaratory Judgment Proceedings Under Section 7428 begins on page 897.
Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

Notice 2010–83, page 862.

Funding relief for multiemployer defined benefit plans under PRA 2010. This notice provides guidance in the form of questions and answers for sponsors of multiemployer defined benefit plans with respect to the special funding rules under section 431(b)(8), as added by section 211(a)(2) of the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010).

Notice 2010–84, page 872.

Section 2112 of the Small Business Jobs Act of 2010 ("SBJA") added section 402A(c)(4) to the Code, effective for distributions made after September 27, 2010, to permit plans that include a qualified Roth contribution program to allow individuals to roll over amounts from their accounts other than designated Roth accounts to their designated Roth accounts in the plan. This notice provides guidance under section 402A(c)(4) relating to rollovers from section 401(k) plans to designated Roth accounts in the same plan ("in-plan Roth rollovers"). The guidance in this notice also generally applies to rollovers from section 403(b) plans to designated Roth accounts in the same plan.

EXEMPT ORGANIZATIONS

Announcement 2010–92, page 897.

The IRS has revoked its determination that Chesapeake Wildlife Sanctuary, Inc., of Valley Park, MO; Communities in Schools of Northern Virginia of Alexandria, VA; Luxury for Learning, Inc., of Brunswick, MO; Owls Nest 1230 of Parkersburg, WV; Rensselaer Alumni Association, Inc., Orange County Chapter of Lakewood, CA; Retired Enlisted Association of Fayetteville, NC; and Youth Education Scholarship Services of Lathrop, CA, qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Code.

ADMINISTRATIVE

REG–100194–10, page 891.

Proposed regulations under section 6011(e)(3) of the Code relate to the requirement for "specified tax return preparers," generally tax return preparers who reasonably expect to file more than 10 individual income tax returns in a calendar year (100 or more in 2011), to file individual income tax returns using magnetic media (electronically). A public hearing is scheduled for January 7, 2011.

Notice 2010–85, page 877.

This notice contains a proposed revenue procedure that provides guidance to specified tax return preparers regarding the procedures to request a waiver of the magnetic media (electronic) filing requirement, due to undue hardship, under section 6011(e)(3) of the Code and proposed section 301.6011-6 of the Regulations on Procedure and Administration, which is being published contemporaneously with this notice. The proposed revenue procedure also provides guidance regarding how to document a taxpayer's choice to file the taxpayer's individual income tax return in paper format when the return is prepared by the preparer but filed by the taxpayer.

Notice 2010–88, page 882.

Optional standard mileage rates for 2011. This notice announces 51 cents as the optional standard mileage rate for business use of an automobile, 14 cents as the optional rate for use of an automobile as a charitable contribution, and 19 cents as the optional rate for use of an automobile as a medical or moving expense for 2011. The notice also provides the amount a taxpayer must use in calculating reductions to basis for depreciation taken under the business standard mileage rate and the maximum standard automobile cost for automobiles under a FAVR allowance.

Rev. Proc. 2010–51, page 883.

Optional standards mileage rates procedures. This procedure provides the rules for substantiating the deductible expenses of using an automobile for business, moving, medical, or charitable purposes. The revenue procedure also provides rules for substantiating the amount of an employee's ordinary and necessary business expenses of local travel or transportation away from home that a payor (an employer, its agent, or a third party) reimburses using a mileage allowance. Rev. Proc. 2009–54 superseded.

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

Introduction

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

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

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

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

The Bulletin is divided into four parts as follows:

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

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

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

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

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

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

Section 62.—Adjusted Gross Income Defined

26 CFR 1.62–2: Reimbursements and other expense allowance arrangements.

Rules are provided under which a reimbursement or other expense allowance arrangement for the cost of operating an automobile for business purposes will satisfy the requirements of section 62(c) of the Code as to business connection, substantiation, and returning amounts in excess of expenses. See Rev. Proc. 2010-51, page 883.

Section 162.—Trade or Business Expenses

26 CFR 1.162–17: Reporting and substantiation of certain business expenses of employees.

Rules are provided for substantiating the amount of a deduction for an expense for business use of an automobile. See Rev. Proc. 2010-51, page 883.

Section 170.—Charitable, etc., Contribution and Gifts

26 CFR 1.170A–1: Charitable, etc., contributions and gifts; allowance of deduction.

Rules are provided for substantiating the amount of a deduction for an expense for charitable use of an automobile. See Rev. Proc. 2010-51, page 883.

Section 213.—Medical, Dental, etc., Expenses

26 CFR 1.1213–1: Medical, dental, etc., expenses.

Rules are provided for substantiating the amount of a deduction or an expense for use of an automobile as medical services. See Rev. Proc. 2010-51, page 883.

Section 217.—Moving Expenses

26 CFR 1.217–2: Moving expenses.

Rules are provided for substantiating the amount of a deduction or an expense for use of an automobile as moving expense. See Rev. Proc. 2010-51, page 883.

Section 1016.—Adjustments to Basis

26 CFR 1.1016–3: Exhaustion, wear and tear, obsolescence, amortization, and depletion for periods since February 28, 1913.

Rules are provided for reduction of basis for business use of an automobile under either the optional standard mileage rate method or a mileage allowance under a reimbursement or other expense allowance arrangement. See Rev. Proc. 2010-51, page 883.

Part III. Administrative, Procedural, and Miscellaneous

Extension of Deadline to Adopt Certain Retirement Plan Amendments

Notice 2010–77

I. Purpose

This notice further extends the deadline for amending qualified defined benefit plans to meet certain requirements of the Internal Revenue Code that were added by the Pension Protection Act of 2006 (PPA '06), Pub. L. 109–280, and subsequently modified by the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), Pub. L. 110–458, and the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010), Pub. L. 111–192. This is a further extension of the deadline for adopting certain defined benefit plan amendments as previously extended in Notice 2009–97, 2009–52 I.R.B. 972. The deadline is now extended to the last day of the first plan year that begins on or after January 1, 2011. This extension applies to:

1. The deadline for amending single-employer defined benefit plans to meet the requirements of §§ 401(a)(29) and 436, relating to funding-based limits on benefits and benefit accruals under single-employer plans; and
2. The deadline for amending cash balance and other applicable defined benefit plans, within the meaning of § 411(a)(13)(C), to meet the requirements of § 411(a)(13) (other than § 411(a)(13)(A)) and § 411(b)(5), relating to vesting and other special rules applicable to these plans.

The notice provides that the additional extension of time to amend also applies for the purpose of a plan's eligibility for the relief from the requirements of § 411(d)(6) described in Notice 2009–97.

II. Background

Section 401(a)(29) requires single-employer defined benefit plans that are subject to the minimum funding requirements of § 412 to meet the requirements of § 436. Section 436, which was added by section 113(a)(1) of PPA '06, imposes funding-based limits on benefits and benefit accruals under single-employer plans. The requirements of § 436 generally apply to plan years that begin after December 31, 2007.

Final regulations under § 436 were published in the Federal Register on October 15, 2009, 74 FR 53004. The final regulations do not include rules interpreting the amendments with respect to § 436 made by section 101(c)(2) of WRERA, which are generally effective as if included in PPA '06, and section 203(a)(2) of PRA 2010, which are generally effective for plan years beginning on or after October 1, 2008.

Section 411(a)(13), which was added by section 701(b)(2) of PPA '06, contains special rules for cash balance and other applicable defined benefit plans. Section 411(a)(13)(A) provides, in general, that an applicable defined benefit plan will not fail to satisfy the requirements of § 411(a)(2), 411(c), or 417(e) solely because the present value of the participant's accrued benefit under the plan equals the balance in the participant's hypothetical account or the accumulated percentage of the participant's final average compensation. Section 411(a)(13)(B) requires an applicable defined benefit plan to provide 100 percent vesting for employer-derived benefits on completion of three years of service. Section 411(a)(13) is generally effective for years that begin after December 31, 2007, and for distributions made after August 17, 2006.

Section 411(b)(5), which was added by section 701(b)(1) of PPA '06 and is generally effective for years that begin after December 31, 2007, contains special rules for applicable defined benefit plans with regard to the requirements of § 411(b)(1)(H), which prohibits a defined benefit plan from ceasing an employee's benefit accruals or reducing an employee's rate of benefit accrual because of the attainment of any age.

Final and proposed regulations under §§ 411(a)(13) and 411(b)(5) were published in the Federal Register on October 19, 2010 (75 FR 64123 and 75 FR 64197, respectively).

Section 401(b) provides a period during which a plan may be amended retroactively to comply with the Code's qualification requirements. Section 1.401(b)–1 of the Treasury regulations and Rev. Proc. 2007–44, 2007–2 C.B. 54, describe the disqualifying provisions that may be amended retroactively and the remedial amendment period during which retroactive amendments may be adopted. The regulations also grant the Commissioner the discretion to extend the remedial amendment period.

Section 5.05 of Rev. Proc. 2007–44 provides that when there are statutory or regulatory changes to the plan qualification requirements that will impact provisions of the written plan document, the adoption of an interim amendment will generally be required by the later of the end of the plan year in which the change is first effective or the due date of the employer's tax return for the tax year that includes the date the change is first effective. The filing of a determination letter application for a plan generally requires the plan to be restated to take into account changes in qualification requirements and guidance that are listed in the Cumulative List of Changes in the Plan Qualification Requirements in effect at the time the application is filed. (See sections 4 and 12.03 of Rev. Proc. 2007–44.) Thus, as noted in section 12.03 of Rev. Proc. 2007–44, a determination letter filing may accelerate to an earlier date one or more of the interim amendment deadlines that would otherwise apply to a plan.

Section 411(d)(6) provides generally that a plan will not satisfy § 401(a) if an amendment to the plan decreases a participant's accrued benefit. For this purpose, a plan amendment which has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy or eliminating an optional form of benefit with respect to benefits attributable to service before the amendment is treated as reducing accrued benefits. Section 401(b) does not relieve a plan of the requirement to satisfy § 411(d)(6) with respect to any amendment.

Section 1.411(d)–4, A–2(b)(2)(i), provides that a plan may be amended to eliminate or reduce a § 411(d)(6) protected benefit, within the meaning of § 1.411(d)–4, A–1, if the following three requirements

are met: the amendment constitutes timely compliance with a change in law affecting plan qualification; there is an exercise of § 7805(b) relief by the Commissioner; and the elimination or reduction is made only to the extent necessary to enable the plan to continue to satisfy the requirements for qualified plans.

Section 1107 of PPA '06 generally requires plans to be amended for the changes in the plan qualification requirements made by PPA '06 by the last day of the first plan year that begins on or after January 1, 2009 ("the section 1107 date") and provides relief from the requirements of § 411(d)(6) for plan amendments adopted by that date pursuant to PPA '06 or regulations thereunder. Section 1107 of PPA '06 also generally requires that such an amendment be effective as of the effective date of the relevant provision of PPA '06 and that the plan be operated in accordance with the amendment as of the effective date of the amendment.

Section 5.07(2) of Rev. Proc. 2007–44 provides an exception from the general deadline for adopting interim amendments. This section provides that the deadline for adopting an interim amendment pursuant to a provision of PPA '06 or regulations thereunder is the section 1107 date. This is also the deadline for adopting a discretionary amendment (within the meaning of section 5.05(2) of Rev. Proc. 2007–44) pursuant to a provision of PPA '06 or regulations thereunder.

Under the Commissioner's authority to extend remedial amendment periods under § 401(b), Notice 2009–97 extends the time to adopt interim and discretionary plan amendments for certain requirements of PPA '06, including §§ 401(a)(29), 436, 411(a)(13) (other than § 411(a)(13)(A)), and 411(b)(5), to the last day of the first plan year beginning on or after January 1, 2010.

Notice 2009–97 also grants relief from the requirements of § 411(d)(6) (pursuant to § 7805(b) and § 1.411(d)–4, A–2(b)(2)(i)) for an interim amendment that eliminates or reduces a § 411(d)(6) protected benefit, provided that the amendment is adopted by the last day of the first plan year that begins on or after January 1, 2010, and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of §§ 401(a)(29) and 436. Further, Notice 2009–97 states that, once final regulations under §§ 411(a)(13) and 411(b)(5) are issued, it is expected that relief from the requirements of § 411(d)(6) will be granted for a plan amendment that eliminates or reduces a § 411(d)(6) protected benefit, provided that the amendment is adopted by the last day of the first plan year that begins on or after January 1, 2010, and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of § 411(b)(5).

The preamble to the proposed regulations under §§ 411(a)(13) and 411(b)(5) that were published in the Federal Register on October 19, 2010, 75 FR 64197, extends the duration of the expected relief and provides that the relief from the requirements of § 411(d)(6) is expected to apply if the amendment is adopted before regulations that finalize the proposed regulations apply to the plan. The regulations are proposed to be effective for plan years beginning on or after January 1, 2012, and the extensions provided by this notice are tailored to the expectation that this will be the effective date of the regulations when they are finalized. (See footnote six of the preamble to the proposed regulations.)

In order to give plan sponsors time to take the WRERA and PRA 2010 changes to § 436 into account, this notice provides a one-year extension of the time by which plans must be amended for §§ 401(a)(29) and 436, as well as the time by which such amendments must be adopted to be eligible for relief from the requirements of § 411(d)(6). In order to give plan sponsors time to take the final regulations under §§ 411(a)(13) and 411(b)(5) into account when adopting amendments to comply with §§ 411(a)(13) and 411(b)(5) (and consistent with the anticipated duration of the expected § 411(d)(6) relief that is discussed in the preamble to the proposed regulations), this notice also provides a one-year extension of the time by which plans must be amended for §§ 411(a)(13) (other than § 411(a)(13)(A)) and 411(b)(5). This notice does not extend the deadline for adopting any other plan amendments for PPA '06.

III. Extension of Deadline for Adopting Amendments Under §§ 401(a)(29), 436, 411(a)(13) (other than § 411(a)(13)(A)), and 411(b)(5)

The deadline for adopting an interim or discretionary plan amendment under §§ 401(a)(29), 436, 411(a)(13) (other than § 411(a)(13)(A)), and 411(b)(5) is extended to the last day of the first plan year that begins on or after January 1, 2011. A plan must continue to satisfy the operational compliance requirements of section 1107 of PPA '06 as a condition of the extension of the deadline for adopting plan amendments provided by this notice.

IV. Section 411(d)(6) Relief for Certain Amendments

A. Relief for Amendments Under §§ 401(a)(29) and 436

Pursuant to § 7805(b) and § 1.411(d)–4, A–2(b)(2)(i), an interim plan amendment that eliminates or reduces a § 411(d)(6) protected benefit will not cause a plan to fail to meet the requirements of § 411(d)(6) if the amendment is adopted by the last day of the first plan year that begins on or after January 1, 2011, and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of §§ 401(a)(29) and 436.

B. Relief for Amendments Under § 411(b)(5)

When the regulations under §§ 411(a)(13) and 411(b)(5) that were proposed on October 19, 2010, are finalized, it is expected that relief from the requirements of § 411(d)(6) will be granted for a plan amendment that eliminates or reduces a § 411(d)(6) protected benefit, provided that the amendment is adopted by the last day of the first plan year that begins on or after January 1, 2011, and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of § 411(b)(5). Plan sponsors and their advisers are reminded that the preamble to the proposed regulations specifically requests comments regarding the amendments to a hybrid plan's interest crediting rate that should be considered "necessary to enable the plan to meet the requirements of § 411(b)(5)"

for purposes of the expected relief from the requirements of § 411(d)(6).

V. Determination Letters

The Service's review of an application for a determination letter that is submitted before February 1, 2012, will not take into account the requirements of §§ 401(a)(29) and 436. Accordingly, a determination letter issued with respect to such an application cannot be relied upon with respect to the requirements of §§ 401(a)(29) and 436.

The Service's review of an application for a determination letter submitted after January 31, 2011, will take into account the requirements of §§ 411(a)(13) and 411(b)(5), including the final regulations under those sections that were published in the Federal Register on October 19, 2010, 75 FR 64123. The Service's review will not take into account the proposed regulations under §§ 411(a)(13) and 411(b)(5) but will be based on a standard of reasonable interpretation of the statute with respect to matters addressed in those regulations. As noted in section II of this notice, the filing of a determination letter application for a plan after January 31, 2011, may accelerate the time by which the plan's sponsor must adopt an interim plan amendment for §§ 411(a)(13) (other than § 411(a)(13)(A)) and 411(b)(5).

VI. Effect on Other Documents

Notice 2009–97 and section 5.07(2) of Rev. Proc. 2007–44 are modified.

Drafting Information

The principal author of this notice is James P. Flannery of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to *retirementplanquestions@irs.gov*.

Modification to the Relief and Guidance on Corrections of Certain Failures of a Nonqualified Deferred Compensation Plan to Comply with § 409A(a)

Notice 2010–80

I. PURPOSE

This notice modifies certain provisions of Notice 2008–113, Relief and Guidance on Corrections of Certain Failures of a Nonqualified Deferred Compensation Plan to Comply with § 409A(a) in Operation, 2008–2 C.B. 1305, and Notice 2010–6, Relief and Guidance on Corrections of Certain Failures of a Nonqualified Deferred Compensation Plan to Comply with § 409A(a), 2010–3 I.R.B. 275. Specifically, this notice:

- Clarifies that the types of plans eligible for relief under Notice 2010–6 include a nonqualified plan linked to a qualified plan or another nonqualified plan, provided that the linkage does not affect the time and form of payments under the plans;
- Expands the types of plans eligible for relief under Notice 2010–6 to include certain stock rights that were intended to comply with the requirements of § 409A(a) of the Internal Revenue Code (rather than be exempt from the requirements of § 409A(a));
- Provides an additional method of correction under Notice 2010–6 for certain failures involving payments at separation from service subject to the requirement to submit a release of claims or similar document; and provides transition relief permitting the correction of such failures that were in effect on or before December 31, 2010 (including relief from the service provider information reporting requirements);
- Provides relief from the service provider information reporting requirements under Notice 2010–6 for corrections made under the transition relief ending December 31, 2010; and
- Provides relief from the requirement that service recipients provide certain information to service providers under Notice 2008–113 for corrections made in the same taxable year as the failure occurs.

II. BACKGROUND

On December 3, 2008, the Treasury Department and the IRS issued Notice 2008–113, providing relief and guidance on corrections of certain failures of a nonqualified deferred compensation plan to comply with the operational requirements applicable under § 409A(a). On January 5, 2010, the Treasury Department and the IRS released Notice 2010–6, providing relief and guidance on corrections of certain failures of a nonqualified deferred compensation plan to comply with the plan document requirements applicable under § 409A(a). Section XI of Notice 2010–6 provided transition relief under which taxpayers generally could avoid income inclusion under § 409A(a) solely due to the failure of the plan language to comply with the requirements of § 409A(a), if the plan document failure and any related operational failure were corrected before January 1, 2011 in accordance with the guidance (although an amount may be required to be included in income under § 409A(a) due to the correction of the related operational failure).

The Treasury Department and the IRS received numerous comments on the guidance regarding the correction of failures to comply with § 409A(a). The Treasury Department and the IRS continue to analyze the comments and anticipate issuing further corrections guidance in the future. However, because certain transition relief provided in Section XI of Notice 2010–6 requires correction of plan document and related operational failures before January 1, 2011, the Treasury Department and the IRS are issuing this guidance to provide immediate relief to taxpayers with respect to certain issues under Notice 2008–113 and Notice 2010–6.

III. GUIDANCE

A. This § III.A. clarifies § III.G. of Notice 2010–6 by providing that the types of plans eligible for relief under Notice 2010–6 include (1) certain linked plans with plan document failures if the linkage does not affect the time and form of payment of amounts under the plans, and (2) certain stock rights (stock options

and stock appreciation rights) that were intended at the time of grant (or upon a modification pursuant to applicable transition relief) to be subject to, and compliant with, § 409A but that have a plan document failure. Accordingly, § III.G of Notice 2010–6 is modified to read as follows:

"G. *Certain Linked Plans and Stock Rights not Eligible for Relief*

Except as specifically provided in § XI.B of this notice, the relief provided under this notice does not apply to a plan to the extent that the document failure is due to the time and form of payment being affected by the amount deferred under, or the payment provisions of, one or more other nonqualified deferred compensation plans or one or more qualified plans (as defined in §1.409A–1(a)(2)). However, a plan does not fail to qualify for the relief provided under this notice merely because the amount paid under one plan is affected by the amount paid under the other plan, provided the time and form of payment under the first plan is not affected by the amount deferred under, or the payment provisions of, the other plan. In addition, the relief provided under this notice does not apply to a stock right (as defined in §1.409A–1(l)) unless pursuant to the terms of the stock right at the time of grant or as modified in accordance with applicable transition relief, the recipient of the stock right has the right to exercise such stock right only upon one or more of the following: (1) a fixed date or a period beginning and ending within one taxable year (generally the calendar year for individual taxpayers); or (2) a permissible payment event under § 409A and §1.409A–3(a) (including any period following a payment event permitted under §1.409A–3(b)). For this purpose, a permissible payment event under § 409A and 1.409A–3(a) includes a payment event eligible for correction under §§ IV and V of this notice. For example, the relief provided under this notice would apply to a stock right subject to § 409A granted to an employee with a calendar year taxable year, where the right had an exercise date of the earlier of a fixed date or the period beginning with the employee's separation from service and ending on December 31 of the calendar year in which the employee separated from service, provided that the definition of separation from service either complied with the requirements of §1.409A–1(h) or was eligible for correction under § V.A of this notice. For certain relief with respect to a stock right with an exercise price that is less than the fair market value of the underlying shares of stock at the date of grant, see Notice 2008–113, §§ IV.D and V.E."

B. This § III.B modifies § VI.B.2 of Notice 2010–6 by providing an additional method of correction for certain failures involving payments dependent upon the service provider completing certain employment-related actions (such as the execution and submission of a noncompetition agreement, a nonsolicitation agreement, or a release of claims). Under this additional method, the failure may be corrected by providing for payment during a specified period not longer than 90 days following a permissible payment event, provided that if the period begins in a service provider taxable year and ends in the subsequent service provider taxable year, the payment will be made in the subsequent taxable year. Accordingly, § VI.B.2 of Notice 2010–6 is modified to read as follows:

"2. Correction

A plan provision eligible for this section may be corrected in accordance with this section before the date an event occurs that would be a permissible payment event under § 409A to which the provision applies. The plan may be corrected by amending the plan to remove the ability of the service provider to delay or accelerate the timing of the payment as a result of the service provider's action. If the plan provides for payment (subject to the service provider's action) within a designated period following the permissible payment event under § 409A that is a permissible payment period under §1.409A–3(b), except that the service provider's action could affect the taxable year of payment, the amendment must provide either (a) for payment only on the last day of such designated period, or (b) for payment in the second taxable year if in any event the designated period begins in a first taxable year and ends in a second taxable year. If the plan does not provide for payment (subject to the service provider's action) within a designated period following the permissible payment event under § 409A that is a permissible payment period under §1.409A–3(b), the amendment must provide either (a) for payment only upon a fixed date either 60 or 90 days following the occurrence of the permissible payment event, or (b) for payment during a specified period not longer than 90 days following the occurrence of the permissible payment event under the condition that if the specified period begins in one taxable year and ends in a second taxable year, the payment will be made in the second taxable year. In addition, a plan may be amended to provide for payment in accordance with clause (b) of the immediately preceding sentence even though the plan was previously amended under § XI of this notice to correct a plan provision that allowed the service provider to delay or accelerate the timing of a payment as a result of the service provider's action. In each case the amendment may not otherwise change the time or form of payment."

C. This § III.C modifies § VI.B of Notice 2010–6 by providing additional transition relief through December 31, 2012 for plans that contain certain failures involving payments dependent upon the service provider completing certain employment-related actions (such as the execution and submission of a noncompetition agreement, a nonsolicitation agreement, or a release of claims) as of December 31, 2010, provided that any payments made after March 31, 2011 that could be paid during a period that begins in one taxable year and ends in the subsequent taxable year are made during the subsequent taxable year and provided further that to the extent any amounts remain deferred under the plan, the plan is amended to be compliant by no later than December 31, 2012. Accordingly, the following § VI.B.3 is added to § VI.B of Notice 2010–6:

"3. Transition Relief

For any plan with a provision eligible for correction under this section on or before December 31, 2010, such provision will not be treated as failing to comply with § 409A(a) in form and a payment pursuant to such provision will not be treated as having failed to comply with § 409A(a) in operation with respect to an amount deferred under the plan that is paid on or before March 31, 2011. For

any plan provision eligible for correction under this section as of December 31, 2010, with respect to an amount deferred under the plan that is paid after March 31, 2011, such provision will not be treated as failing to comply with § 409A(a) in form for taxable years commencing on or after January 1, 2009, and payment pursuant to such provision will not be treated as failing to comply with § 409A(a) in operation, provided that (a) any amounts paid under the plan pursuant to such provision where the potential payment period begins in a service provider taxable year and ends in a subsequent service provider taxable year are paid in the subsequent taxable year, or if paid in the first taxable year are treated as an operational failure and corrected in accordance with Notice 2008–113; and (b) if any amounts that are subject to such a plan provision remain deferred after December 31, 2012 (other than any remaining installment, annuity or other payments of an amount that has already become payable pursuant to such a plan provision), the plan provision has been corrected in accordance with this section on or before December 31, 2012. For purposes of this § VI.B.3, the failure to pay an amount during the subsequent taxable year may be treated as an operational failure eligible for correction under Notice 2008–113 even though the plan provision under which the amount is paid fails to comply with § 409A. For purposes of this paragraph, a plan includes a substantially similar arrangement under which another service provider commences participation after December 31, 2010 in accordance with the plan terms as of December 31, 2010."

D. To provide an example of the additional method of correction available for certain failures involving payments dependent upon the service provider completing certain employment-related actions (such as the execution and submission of a noncompetition agreement, a nonsolicitation agreement, or a release of claims), the following examples are added to § VI.C of Notice 2010–6:

"*Example 5 (impermissible payment provision making timing of payment after a permissible payment event dependent upon service provider action).* The facts are the same as in *Example 4*, except that on April 1, 2011, Employer and Employee N amend Employee N's employment agreement to provide for payment within 90 days following Employee N's separation from service, provided that Employee N has executed and submitted a release of claims and the statutory period during which Employee N is entitled to revoke the release of claims has expired prior to payment during the 90-day period, and further provided that the payment would be made in the second taxable year if the 90-day period began in one taxable year and ended in the subsequent taxable year. Employee N has a separation from service with Employer on December 1, 2011. Employee N executes and submits a release of claims on December 15, 2011. Employer pays Employee N $100x on January 1, 2012.

Conclusion: Because Employer and Employee N corrected the plan before Employee N's separation from service, Employee N is not required to include any amount in income under § 409A(a) solely due to the pre-correction plan provision.

Example 6 (transition relief - impermissible payment provision making timing of payment after a permissible payment event dependent upon service provider action). Employee SS is an employee of Employer whose employment agreement, entered into on January 1, 2009, entitles Employee SS to $100x upon a separation from service (defined to comply with § 1.409A–1(h)), paid in ten annual installments (that were not designated as separate payments for purposes of the application of § 409A) commencing within 90 days following Employee SS's separation from service, provided that Employee SS executes and submits a release of claims and the period during which Employee SS may revoke the release pursuant to applicable law has expired within the 90 day period. Employee SS has a separation from service with Employer on December 15, 2010. Employee SS executes and submits a release of claims on December 20, 2010, and Employer commences the annual installments of $10X to Employee SS on December 31, 2010.

Conclusion: Because Employer paid Employee SS $10X in accordance with the plan terms on or before March 31, 2011, Employee SS is not required to include any amount in income under § 409A(a) solely due to the plan provision or the payment of the $10X.

Example 7 (transition relief - impermissible payment provision making timing of payment after a permissible payment event dependent upon service provider action). The facts are the same as in *Example 6*, except that Employee SS's separation from service occurs on December 1, 2011, Employee SS executes and submits a release of claims on December 20, 2011, and Employer commences the annual installments of $10X to Employee SS on December 31, 2011. No amounts remain deferred under the plan on December 31, 2011 except for the remaining installments on the amount payable at separation from service.

Conclusion: Provided that Employer and Employee SS treat the commencement of payment in 2011 as an operational failure under Notice 2008–113, and such failure is eligible to be corrected, and is actually corrected as an impermissible payment in accordance with Notice 2008–113, Employee SS is not required to include any amount in income under § 409A(a) solely due to the plan provision. Note that had the payment commenced in accordance with the terms of the plan but during 2012, Employer and Employee SS would not have been required to treat the commencement of the payment as an operational failure under Notice 2008–113, and Employee SS would not have been required to include any amount in income under § 409A solely due to the plan provision.

Example 8 (transition relief - impermissible payment provision making timing of payment after a permissible payment event dependent upon service provider action). Employee TT is an employee of Employer. Employer maintains a supplemental executive retirement plan that is a nonaccount balance plan for purposes of § 409A and that, as of December 31, 2010, provides for participation by every Level AA employee of Employer. On April 1, 2011, Employee TT receives a promotion to a Level AA position of employment, and accordingly becomes eligible for, and commences participation in, Employer's supplemental executive retirement plan. The plan provides for payment of a participant's benefit in a lump sum within 90 days following the participant's separation from service (defined to comply with § 1.409A–1(h)), provided that the participant executes and submits a release of claims and the period during which the participant may revoke the release pursuant to applicable law has expired within the 90 day period. On December 1, 2012, Employer corrects the plan provision in accordance with § VI.B.2 of this notice. Employee TT continues in employment continuously through December 31, 2012.

Conclusion: Because Employee TT became eligible to participate in accordance with the terms of the supplemental executive retirement plan that were effective as of December 31, 2010, Employee TT is eligible for the relief provided by § VI.B.3 of this notice. Because Employer corrected the plan provision under § VI.B.2 of this notice before December 31, 2012, the plan provision is not treated as having failed to comply with § 409A(a) for periods on or before December 31, 2012."

E. This § III.E modifies § XII.A of Notice 2010–6 to provide relief from the requirement that a service recipient provide certain information to a service provider with respect to a plan document correction made in accordance with the transition relief under § VI.B.3 and § XI of Notice 2010–6. (However, the requirement that a service recipient include information with its own tax return relating to such a correction is not changed.) In addition, the modifications of § XII.A of Notice 2010–6 in this § III.E provide relief from the requirement that a service provider attach a statement to his or her return with respect to a plan correction made in accordance with the transition relief in § VI.B 3 and § XI of Notice 2010–6. Accordingly, § XII.A of Notice 2010–6 is modified to read as follows:

"A. *Information and Reporting Required for Correction of a Document Failure*

1. Service Recipient Requirements

A service recipient described in any of §§ V through XI of this notice must attach to its timely-filed (including extensions) original federal income tax return for its taxable year in which it corrects the failure, a statement entitled "§ 409A Document Correction under § [INSERT APPROPRIATE SECTION(S)] of Notice 2010–6" setting out the information required by § XII.B of this notice. This statement must also be attached to the service recipient's timely-filed (including extensions) original federal income tax return for the service recipient's taxable year subsequent to the taxable year in which the failure was corrected, but only to the extent that a service provider is required to include an amount in income during such subsequent year to be eligible for the relief under this notice. In addition, a service recipient described in any of §§ V through X of this notice must provide to each such service provider who is affected by such failure a statement entitled "§ 409A Document Correction under § [INSERT APPROPRIATE SECTION(S)] of Notice 2010–6" setting out the information required by § XII.C of this notice not later than the date (with extensions) on which it is required to provide an information return (Form W–2 or 1099) to such service provider (or if no information return is required for such service provider, not later than the January 31 following the calendar year in which it corrects such failure) for the calendar year in which it corrects such failure. The service recipient described in any of §§ V through X of this notice must also provide the same information for the subsequent calendar year to the extent the service provider is required to include an amount in income during such subsequent year to be eligible for relief under this notice. In addition, any service recipient relying on the relief provided in any of §§ V through XI of this notice must make reasonable efforts to provide notice to the examining agent upon the commencement of an examination of such service recipient's federal tax return that the service recipient was relying upon the relief provided under this notice for years covered by the examination. A service recipient is not required to provide the information statements described in this § XII.A.1 to affected service providers with respect to a plan that is eligible for, and corrected under, § VI.B.3 or § XI of this notice, but the service recipient must attach the information statement described in this § XII.A.1 to its federal income tax return with respect to such corrections.

2. Service Provider Requirements

A service provider who is relying on the relief provided in any of §§ V through X of this notice for a failure to comply with § 409A(a) must attach to the service provider's timely filed (including extensions) original federal income tax return for the year in which the failure was corrected the information required by § XII.D of this notice. A service provider relying on the relief provided in any of §§ V through X of this notice for a failure to comply with § 409A(a) must also attach the information required by § XII.D of this notice to that service provider's timely-filed (including extensions) original federal income tax return for the year subsequent to the year in which the failure was corrected, but only if the service provider is required to include an amount in income during that year to be eligible for the relief in this notice. In addition, any service provider relying on the relief provided in any of §§ V through X of this notice must make reasonable efforts to provide notice to the examining agent upon the commencement of an examination of such taxpayer's federal tax return that the taxpayer was relying upon the relief provided under this notice for years covered by the examination. A service provider is not subject to the requirements of this paragraph XII.A.2 with respect to a plan that is eligible for, and corrected under, § VI.B.3 or § XI of this notice.

3. Section References

For purposes of §§ XII.A.1 and XII.A.2, a section of this notice refers to each separate section of this notice, such that §§ VI.A and VI.B are separate sections, and for service recipients includes any use of the transition relief in § IV.B.3 or § XI."

F. To provide conforming relief with respect to the information to be provided to service providers upon use of the transition relief in § IV.B.3 or § XI of Notice 2010–6, § XII.C of Notice 2010–6 is modified to read as follows:

"C. *Information to be Provided to Service Provider for Failures Described in any of §§ V through X of this Notice not Eligible for Relief Under § VI.B. 3 or § XI of this Notice*

The service recipient must provide the following information to each service provider affected by a failure to comply with § 409A who is entitled to relief under any of §§ V through X of this notice (but is not eligible for and corrected under the relief provided in § VI.B.3 or § XI of this notice) with respect to such failure:

(1) A statement that the service provider is entitled to the relief provided in §§ V through X of this notice (identifying the applicable section of this notice under which the document failure is corrected) with respect to a failure to comply with § 409A, and that the service provider must attach a copy of the statement to the service provider's income tax return for the taxable year in which the failure was corrected and also to the extent applicable, any subsequent taxable year in which an amount is included in income under § 409A by the service provider as part of the correction.

(2) The information described in §§ XII.B.(1) through (4) of this notice, but only to the extent that the information relates to a deferred amount of that service provider."

G. To provide relief from the employee information reporting requirements upon use of the transition relief in § VI.B.3 or § XI of Notice 2010–6, § XII.D of Notice 2010–6 is modified to read as follows:

"D. *Attachment to Service Provider Tax Return for Failures Described in any of §§ V through X of this Notice not Eligible for Relief under § VI.B.3 or § XI of this Notice*

The service provider must attach to the service provider's income tax return a copy of the statement the service provider received from the service recipient with respect to a failure described in any of §§ V through X of this notice that is not eligible for and corrected under the relief provided in § VI.B.3 or § XI of this notice. If a service provider has included an amount

in income to be eligible for relief under this notice, and that inclusion in income occurs in a year subsequent to the year the plan was corrected, the service provider must include the statement with the return for the year of the correction as well as the return for the year of income inclusion."

H. To provide relief from the employee information reporting requirements upon the correction of an operational failure in the same taxable year as the failure occurs, § IX.A of Notice 2008–113 is modified to read as follows:

"A. *Information Required with Respect to Correction of an Operational Failure in the Same Taxable Year as the Failure Occurs*

A service recipient described in § IV of this notice must attach to its timely filed (including extensions) original federal income tax return for its taxable year in which the failure occurred a statement entitled "§ 409A Relief under IV of Notice 2008–113" stating that it is relying upon § IV of this notice with respect to a correction of a failure to comply with § 409A and setting out the following information with respect to each such failure:

1. The name and taxpayer identification number of each service provider affected by the failure and whether such service provider is an insider with respect to the service recipient. Where the same or a substantially similar operational failure has occurred with respect to multiple service providers, the information required in § IX.A.2 through 5 may be supplied only once with respect to such operational failure, provided that the identification of each service provider affected by the operational failure in this § IX.A.1 references such information and the amount involved in the operational failure with respect to such service provider.
2. Identification of the nonqualified deferred compensation plan with respect to which such failure occurred.
3. A brief description of the failure and the circumstances under which it occurred, including the amount involved and date on which the failure occurred.
4. A brief description of the steps taken to correct the failure and the date on which such correction was completed.
5. A statement that the operational failure is eligible for the correction under the terms of this notice, and that the service recipient has taken all actions required, and otherwise met all requirements, for such correction.

In addition, each service recipient relying on the relief provided in § IV of this notice must make reasonable efforts to provide notice to the examining agent upon the commencement of an examination of the service recipient's federal tax return that the service recipient was relying upon the relief provided under this notice for years covered by the examination."

IV. EFFECTIVE DATE

Taxpayers may rely on this Notice 2010–80 for the modifications to Notice 2008–113 for taxable years beginning on or after January 1, 2010. Taxpayers may rely on this Notice 2010–80 for the modifications to Notice 2010–6 for taxable years beginning on or after January 1, 2009.

V. EFFECT ON OTHER DOCUMENTS

Notice 2008–113 and Notice 2010–6 are modified as provided in this notice. Except as explicitly provided, this notice does not otherwise affect the guidance provided in Notice 2010–6 and Notice 2008–113.

VI. DRAFTING INFORMATION

The principal author of this notice is Keith Ranta of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), although other Treasury and IRS officials participated in its development. For further information on the provisions of this notice, contact Keith Ranta at (202) 927–9639 (not a toll-free number).

Tax Credit for Employee Health Insurance Expenses of Small Employers

Notice 2010–82

I. PURPOSE AND BACKGROUND

Section 45R of the Internal Revenue Code (Code) offers a tax credit to certain small employers that provide health insurance coverage to their employees. The credit is available for taxable years beginning after December 31, 2009. Both taxable employers and employers that are organizations described in § 501(c) and exempt from tax under § 501(a) (tax-exempt employers) may be eligible for the § 45R credit. Employers that satisfy the requirements for the credit are referred to in this notice as "eligible small employers."

Notice 2010–44, 2010–22 I.R.B. 717, provides guidance on § 45R as in effect for taxable years beginning before January 1, 2014, including transition relief for taxable years beginning in 2010 with respect to the requirements for a qualifying arrangement under § 45R. This notice expands on the guidance provided in Notice 2010–44 and provides guidance on additional issues relating to the small employer tax credit.

II. ISSUES RELATING TO EMPLOYER'S ELIGIBILITY FOR THE CREDIT

To be an eligible small employer: (1) the employer must have fewer than 25 full-time equivalent employees (FTEs) for the taxable year; (2) the average annual wages of its employees for the year must be less than $50,000 per FTE; and (3) the employer must maintain a "qualifying arrangement." In general, a qualifying arrangement is an arrangement under which the employer pays premiums for each employee enrolled in health insurance coverage offered by the employer in an amount equal to a uniform percentage (not less than 50 percent) of the premium cost of the coverage.

A. Tax-Exempt Employers Not Described in § 501(c) and Exempt Under § 501(a)

Section 45R(f)(1) provides that the credit is available to a tax-exempt eligible small employer, defined in § 45R(f)(2) as "any organization described in § 501(c) which is exempt from taxation under § 501(a)." Tax-exempt organizations that are not both described in § 501(c) and exempt from taxation under § 501(a) are not eligible to claim the credit. However, a § 521 farmers cooperative that is subject to tax under § 1381 is eligible to claim the credit as a taxable employer, if it otherwise meets the definition of an eligible small employer.

B. Employers Not Engaged in a Trade or Business

The statute does not require that, in order for an employer to be an eligible small employer, the employees of the employer must be performing services in a trade or business. Thus, an employer that otherwise meets the requirements for the credit under § 45R for a taxable year beginning before January 1, 2014 does not fail to be an eligible small employer merely because the employees of the employer are not performing services in a trade or business. For example, a household employer that otherwise satisfies the requirements of § 45R is eligible for the credit.

C. Employers Located Outside the United States

For taxable years 2010 through 2013, an eligible small employer's credit is based on premiums paid for health insurance coverage offered by a health insurance issuer, as described in § 9832(b)(1). Section 9832(b)(2) requires that an insurer be licensed to engage in the business of insurance in a State and that the insurer is subject to State law regulating insurance. For purposes of § 9832(b)(2) and § 45R, "State" is defined in § 7701(a)(10), and means the 50 States plus the District of Columbia. Therefore, an eligible small employer located outside the United States (including an employer located in a U.S. territory), which has income effectively connected with the conduct of a trade or business in the United States, may claim the § 45R credit only if it pays premiums for an employee's health insurance coverage that is issued in and regulated by one of the 50 States or the District of Columbia. Similarly, a tax-exempt eligible small employer located outside the United States (including an employer located in a U.S. territory) would also be required to pay premiums for an employee's health insurance coverage that is issued in and regulated by one of the 50 States or the District of Columbia in order to obtain the refundable credit described in § 45R(f).

III. OTHER ISSUES RELATING TO ELIGIBILITY FOR THE CREDIT

A. Determining Employees Taken Into Account — Spouses

Employees who perform services for the employer during the taxable year are taken into account in determining the employer's FTEs, average wages, and premiums paid, with certain individuals excluded and with employees of certain related employers included. See section II.B of Notice 2010–44. Sole proprietors, partners in a partnership, shareholders owning more than two percent of the stock in an S corporation, and any owners of more than five percent of other businesses are not taken into account as employees for purposes of the credit. Family members of these owners and partners are also not taken into account as employees.

The definition of "family members" for purposes of § 45R does not specifically refer to spouses. However, spouses of certain business owners are excluded from being taken into account as employees by operation of the ownership attribution rules in the Code. Therefore, the following individuals also are not taken into account as employees for purposes of § 45R: (1) the employee-spouse of a shareholder owning more than two percent of the stock of an S corporation; (2) the employee-spouse of an owner of more than five percent of a business; (3) the employee-spouse of a partner owning more than a five percent interest in a partnership; and (4) the employee-spouse of a sole proprietor. *See* §§ 45R(e)(1)(A); 1372(b), 318, 416(i)(1)(B)(i).

B. Determining Employees Taken Into Account — Leased Employees and Others

Leased employees (as defined in § 414(n)) are counted in computing an employer's FTEs and average annual wages. See § 45R(e)(1)(B). However, no provision of § 45R supports attributing to the service recipient the leasing organization's payment of premiums. Therefore, premiums for health insurance coverage paid by a leasing organization for a leased employee are not taken into account by the service recipient in computing the service recipient's § 45R credit.

Unless specifically excluded, all employees of the employer during the year for which the credit is being claimed are taken into account in computing an employer's FTEs and annual average wages under § 45R, including, for example, former employees who terminated employment during the year for which the credit is being claimed, employees covered under a collective bargaining agreement, and employees who do not enroll in their employer's health insurance plan (whether or not they are covered under another health insurance plan).

A minister performing services in the exercise of his or her ministry is treated as self-employed for Social Security and Medicare tax purposes. See §§ 1402(c)(2)(D) and 3121(b)(8)(A). However, for other tax purposes, including § 45R, whether a minister is an employee or self-employed is determined under the common law test for determining worker status. If, under the common law test, a minister is self-employed, the minister is not taken into account in determining an employer's FTEs and premiums paid because § 45R(e)(A)(i) excludes a self-employed individual from the term "employee" for purposes of the credit. If, under the common law test, the minister is an employee, the minister is taken into account in determining an employer's FTEs and premiums paid by the employer for the minister's health insurance coverage can be taken into account in computing the credit, subject to limitations on the credit. (Note that, under § 45R(f)(1)(B), a tax-exempt employer's § 45R credit cannot exceed the total of the tax-exempt eligible small employer's income tax and Medicare tax withholding and its Medicare tax liability for the year). Because compensation of a minister performing services in the exercise of his or her ministry is not subject to Social Security or Medicare tax under the Federal Insurance Contributions Act (FICA), a minister has no wages as defined under § 3121(a) for purposes of computing an employer's average annual wages.

C. Determining Average Annual Wages, Number of Hours Worked, and Number of FTEs

All wages (as defined under § 3121(a) but without regard to the wage base limitation under § 3121(a)) paid (including overtime pay) are taken into account in

computing an employer's average annual wages. Thus, for example, if an employee works more than 2,080 hours in a year, all wages paid to the employee, including wages for the hours in excess of 2,080, are taken into account in computing the employer's average annual wages.

Notice 2010–44 provides three methods that employers are permitted to use for calculating employees' hours of service for the taxable year: (1) counting actual hours worked; (2) using a days-worked equivalency; or (3) using a weeks-worked equivalency. Employers need not use the same method for all employees, but may apply different methods for different classifications of employees, if the classifications are reasonable and consistently applied. For example, an employer may use the actual hours worked method for all hourly employees and the weeks-worked equivalency method for all salaried employees. In addition, employers may change the method for calculating employees' hours of service for each taxable year.

As explained in Notice 2010–44, the number of an employer's FTEs is determined by dividing the total hours of service (but not more than 2,080 hours of service for any employee) by 2,080 hours. See § 45R(d)(2). The result, if not a whole number, is then rounded to the next lowest whole number. However, if, after dividing the total hours of service by 2,080, the resulting number is less than one, the employer rounds up to one FTE.

D. HSAs and Self-Insured Plans, including HRAs and FSAs, are not Qualifying Arrangements

An employer's premium payments are not taken into account for purposes of the § 45R credit unless they are paid for health insurance coverage under a qualifying arrangement. A qualifying arrangement is an arrangement under which the employer pays premiums for each employee enrolled in health insurance coverage offered by the employer in an amount equal to a uniform percentage (not less than 50 percent) of the premium cost of the coverage. Under § 45R(g)(2)(B), for years prior to 2014, health insurance coverage for purposes of the credit is defined in § 9832(b)(1). Among the requirements of § 9832(b)(1) is that the coverage be offered by a health insurance issuer. A health insurance issuer is defined in § 9832(b)(2) as an entity licensed to engage in the business of insurance in a State and which is subject to State law regulating insurance. *See* § 9832(b)(1) and section II.G of Notice 2010–44. Thus, an employer's self-insured plan is not health insurance coverage for purposes of the credit and any employer contribution to such coverage is not a qualifying arrangement for purposes of § 45R.

Because Health Reimbursement Arrangements (HRAs) and health Flexible Spending Arrangements (health FSAs) are self-insured plans, these arrangements are not health insurance coverage. Health Savings Accounts (HSAs) (defined in § 223(d)(1)) are also not health insurance coverage. Thus, employer contributions to HRAs, health FSAs, or HSAs are not taken into account for purposes of the § 45R credit.

E. Multiemployer Health and Welfare Plans Providing Health Insurance Coverage

For purposes of the § 45R credit, contributions by an employer to a multiemployer plan that are used to pay premiums for health insurance coverage for employees covered by the multiemployer plan are treated as payment of health insurance premiums by the employer. Moreover, if 100 percent of the cost of coverage under the multiemployer plan is paid from nonelective employer contributions, and not by employees, each employer in the multiemployer plan is considered to be contributing a uniform percentage of 100 percent of the premium on behalf of each employee covered by the plan. Accordingly, an employer that is otherwise an eligible small employer and that contributes to a multiemployer plan that provides for insured health care coverage does not fail to satisfy the requirements for the § 45R credit merely because the insurance premiums are paid by the plan and not directly paid by the employer. In addition, the employer does not fail to be considered to be contributing a uniform percentage of the premium for each employee if 100 percent of the cost of coverage for all employees covered by the plan is paid through employer nonelective contributions. However, self-insured health coverage provided through a multiemployer plan is not health insurance coverage provided under a qualifying arrangement under § 45R.

Multiemployer plans may provide welfare-type benefits in addition to health insurance, such as life insurance or short- or long-term disability benefits. Only the employer contributions to the multiemployer plan that are used to purchase health insurance for an employee are permitted to be taken into account in determining premium payments by the employer under § 45R. Thus, if amounts are contributed to a multiemployer plan for health insurance coverage and also for other benefits, the employer must allocate contributions among the benefits provided, and only the amount allocable to health insurance premiums applies in calculating the § 45R credit. An employer contributing to a multiemployer plan is permitted to rely on information provided by the plan to determine the amount of its contribution that is used to purchase health insurance.

F. Qualifying Arrangements – Church Welfare Benefit Plans

As noted above, for taxable years beginning prior to 2014, health insurance coverage for purposes of the credit means benefits consisting of medical care offered by a health insurance issuer, which is an entity licensed to engage in the business of insurance in a State, and which is subject to State law regulating insurance. *See* §§ 9832(b)(1) and 9832(b)(2). The Church Plan Parity and Entanglement Prevention Act of 1999 (CPPEPA), Pub. L. No. 106–244, clarifies the status of church welfare benefit plans providing medical benefits in the context of State insurance laws. Section 2(d) of CPPEPA provides that "[n]otwithstanding any other provision of this section, for purposes of enforcing provisions of State insurance laws that apply to a church plan that is a welfare plan, the church plan shall be subject to State enforcement as if the church plan were an insurer licensed by the State." Thus, under § 2(d) of CPPEPA, a church welfare benefit plan is subject to State insurance law enforcement as if it were licensed as an insurance company. Section 2(e) of the CPPEPA provides that § 2 generally shall not be construed as recharacterizing the status, or modifying or affecting the rights, of any plan participant or beneficiary.

Pursuant to this notice, because a church welfare benefit plan is subject to State insurance law enforcement as if it were licensed under State law, it will be treated as satisfying the requirements for health insurance coverage for purposes of the § 45R credit. Therefore, for these purposes, an arrangement under which a small church employer pays premiums for employees who receive medical care provided through a church welfare benefit plan may be a qualifying arrangement and a small church employer paying for employees' medical coverage under such a plan may be a tax-exempt eligible small employer. This treatment of church plan coverage as health insurance coverage applies solely for purposes of § 45R, which applies to the tax treatment of the employer but does not affect the rights of plan participants and beneficiaries.

G. Uniformity Requirement

To receive the tax credit, an eligible small employer must pay a uniform percentage (not less than 50 percent) of the premium for each employee enrolled in health insurance coverage offered by the employer. See § 45R(d)(4). Section V of Notice 2010–44 provides transition relief in applying the uniformity requirement for taxable years beginning in 2010. This section provides rules for applying the uniformity requirement in taxable years beginning after December 31, 2009 and prior to 2014. For taxable years beginning in 2010, an employer may satisfy the uniformity requirement either by meeting the requirements of this section or by meeting the requirements of Section V of Notice 2010–44.

1. Terminology Used in this Notice

For purposes of this notice:

(a) Each benefits package is considered a separate health insurance plan. For example, an employer offers a single health insurance plan if the employer makes only one benefits package available to its employees.

(b) A health insurer that charges a uniform premium for each of the employer's employees or that charges a single aggregate premium for the group of covered employees that the employer may then divide by the number of covered employees to determine the uniform premium is referred to as using "composite billing."

(c) A health insurer that lists a separate premium for each employee based on the age of the employee or other factors is referred to as using "list billing."

(d) A "tier" of coverage is coverage under a benefits package that varies only by the number of individuals covered. For example, self-only coverage, self plus one coverage, and family coverage would constitute three separate tiers of coverage.

(e) The "employer-computed composite rate" for a tier of coverage is the average rate determined by adding the premiums for that tier of coverage for all employees eligible to participate in the employer's health insurance plan (whether or not they actually receive coverage under the plan or under that tier of coverage) and dividing by the total number of such eligible employees.

2. Employers Offering One Plan. An employer that offers a single health insurance plan will satisfy the uniformity requirement of section 45R if it satisfies the requirements of this subsection G.2. An employer whose health insurer uses composite billing must satisfy the requirements of paragraph (a) of this subsection G.2 with respect to self-only coverage under the plan. An employer whose health insurer uses list billing must satisfy the requirements of paragraph (c) of this subsection G.2 with respect to self-only coverage under the plan. If an employer offers a more expensive tier of coverage than single coverage, it must also satisfy paragraph (b) of this subsection G.2 with respect to each such more expensive tier if its insurer uses composite billing and paragraph (d) of this subsection G.2 if its insurer uses list billing.

(a) Employers offering one plan -Self-only coverage — composite billing. An employer satisfies the requirements of this paragraph (a) if it pays the same amount toward the premium for each employee receiving self-only coverage under the plan, so long as that amount is equal to at least 50 percent of the self-only premium.

(b) Employers offering one plan -other tiers of coverage — composite billing. If an employer offers a tier of coverage that is more expensive than self-only coverage, the employer satisfies the requirements of this paragraph (b) if it pays an amount for each employee enrolled in that more expensive tier of coverage that is the same for all employees and that is no less than the amount that the employer would have contributed toward self-only coverage for that employee. Alternatively, an employer that offers a tier of coverage that is more expensive than self-only coverage may satisfy the requirements of this paragraph (b) by meeting the requirements of paragraph (a) of this subsection G.2 for each tier of coverage that it offers.

(c) Employers offering one plan -self-only coverage — list billing. An employer satisfies the requirements of this paragraph (c) if the employer either: (i) pays toward the premium an amount equal to a uniform percentage (not less than 50 percent) of the premium charged for each employee or (ii) converts the individual premiums for self-only coverage into an employer-computed composite rate for self-only coverage, and, if an employee contribution is required, each employee who receives coverage under the plan pays a uniform amount toward the self-only premium that is no more than 50 percent of the employer-computed composite rate for self-only coverage.

(d) Employers offering one plan -other tiers of coverage — list billing. If an employer offers a tier of coverage that is more expensive than self-only coverage, the employer satisfies the requirements of this paragraph (d) by paying toward the premium for each employee covered under that tier of coverage an amount equal to the amount that the employer would have contributed with respect to that employee for self-only coverage, calculated either based upon the actual premium that would have been charged by the insurer for that employee for self-only coverage or based upon the employer-computed composite rate for self-only coverage. Alternatively, an employer that offers a tier of coverage that is more expensive than self-only coverage may satisfy the requirements of this paragraph (d) by meeting the requirements of paragraph (b) of this subsection G.2 for each tier of coverage that it offers and substituting the employer-computed composite rate for that tier of coverage for the employer-computed composite rate for self-only coverage.

3. Employers Offering More than One Plan. If an employer offers more than one health insurance plan (*i.e.*, more than one benefit package), the employer may satisfy

the uniformity requirement in either of two ways:

(a) The employer's payments toward the premium with respect to each plan for which the employer is claiming the credit satisfy subsection G.2 on a plan-by-plan basis. The amounts or percentages of premium paid by the employer for each plan need not be identical, so long as the payments with respect to each plan satisfy subsection G.2, or

(b) If the requirements of subsection G.4 are satisfied, the employer may designate a "reference plan" and make employer contributions in accordance with the following requirements:

(i) The employer determines a level of employer contributions for each employee such that, if all eligible employees enrolled in the reference plan, the contributions would satisfy subsection G.2.

(ii) The employer allows each employee to apply the amount determined under (i) of this paragraph (b) either toward the reference plan or toward the cost of coverage under any of the other available plans.

4. Anti-abuse rule for employers offering more than one plan and using reference plan. The requirements of this subsection G.4 are satisfied if the self-only composite rate for the reference plan is at least 66 percent of the self-only composite rate for each non-reference plan with respect to which the employer claims the credit. For purposes of this paragraph, the self-only composite rate is, in the case of a plan with composite billing, the rate actually charged by the health insurance issuer for self-only coverage, and, in the case of a plan with list billing, the employer-computed composite rate for self-only coverage.

Example 1. (i) In 2011, Employer offers one health insurance plan, Plan A. The premiums for Plan A are $5,000 per year for self-only coverage, and $10,000 for family coverage. Employees can elect self-only or family coverage under Plan A.

(ii) Employer pays $3,000 (60% of the premium) toward self-only coverage under Plan A and $6,000 (60% of the premium) toward family coverage under Plan A.

(iii) Employer's contributions of 60% of the premium for each tier of coverage satisfy the uniformity requirement in § 45R(d)(4).

Example 2. (i) Same facts as *Example 1*, except that Employer pays $3,000 (60% of the premium) for each employee electing self-only coverage under Plan A and pays $3,000 (30% of the premium) for each employee electing family coverage under Plan A.

(ii) Employer's contributions of 60% of the premium toward self-only coverage and the same dollar amount toward the premium for family coverage satisfy the uniformity requirement in § 45R(d)(4).

Example 3. (i) In 2011, Employer offers two health insurance plans, Plan A and Plan B, both of which use composite billing. The premiums for Plan A are $5,000 per year for self-only coverage and $10,000 for family coverage. The premiums for Plan B are $7,000 per year for self-only coverage and $13,000 for family coverage. Employees can elect self-only or family coverage under either Plan A or Plan B.

(ii) Employer pays $3,000 (60% of the premium) for each employee electing self-only coverage under Plan A, $3,000 (30% of the premium) for each employee electing family coverage under Plan A, $3,500 (50% of the premium) for each employee electing self-only coverage under Plan B, and $3,500 (27% of the premium) for each employee electing family coverage under Plan B.

(ii) Employer's contributions of 60% of the premiums for self-only coverage and the same dollar amounts toward the premium for family coverage under Plan A, and of 50% of the premium for self-only of coverage and the same dollar amount toward the premium for family coverage under Plan B, satisfy the uniformity rule on a plan-by-plan basis; therefore the employer's contributions to both plans satisfy the uniformity requirement in § 45R(d)(4).

Example 4. (i) Same facts as *Example 3*, except that Employer designates Plan A as the reference plan. Employer pays $2,500 (50% of the premium) for each employee electing self-only coverage under Plan A and pays $2,500 of the premium for each employee electing family coverage under Plan A or either self-only or family coverage under Plan B.

(iii) The self-only composite rate for Plan A ($5,000) is greater than 66% of the self-only composite rate for Plan B ($7,000). ($5,000 ÷ $7,000 = 71%).

(iv) Employer's contribution of $2,500 toward the premium of each employee enrolled under Plan A or Plan B satisfies the uniformity requirement in § 45R(d)(4).

Example 5. (i) Same facts as *Example 4*, except that the self-only composite rate for Plan B is $8,000.

(ii) The self-only composite rate for Plan A ($5,000) is less than 66% of the self-only composite rate for Plan B ($8,000). ($5,000 ÷ $8,000 = 63%). Accordingly, Employer may not designate Plan A as the reference plan. The Employer's contribution of $2,500 toward the premium of each employee enrolled under Plan B fails to satisfy the uniformity requirement in § 45R(d)(4) and the Employer is not eligible for a credit with respect to the premiums paid for Plan B. However, the Employer's contribution of $2,500 toward the premium of each employee enrolled under Plan A satisfies the uniformity requirement in § 45R(d)(4) and, accordingly, if the other requirements of section 45R are satisfied, the Employer may receive a credit with respect to its contributions to Plan A.

Example 6. (i) For the 2011 taxable year, Employer receives a list billing premium quote from Health Insurance Issuer W for health insurance coverage for each of Employer's four employees.

(ii) For Employee L, age 20, the self-only premium is $3,000 per year, and the family premium is $8,000. For Employees M, N and O, each age, 40, the self-only premium is $5,000 per year and the family premium is $10,000.

(iii) The total self-only premium for the four employees is $18,000 ($3,000 + (3 x $5,000)). Employer calculates a employer-computed composite self-only rate of $4,500 ($18,000 ÷ 4).

(iii) Employer offers to make contributions such that each employee would need to pay $2,000 of the premium for self-only coverage. Under this arrangement, Employer would contribute $1,000 toward self-only coverage for L and $3,000 toward self-only coverage for M, N, and O. In the event an employee elects family coverage, Employer would make the same contribution ($1,000 for L or $3,000 for M, N, or O) toward the family premium.

(v) Employer satisfies the uniformity requirement in § 45R(d)(4), because it offers and makes contributions based on an employer-calculated composite self-only rate such that, to receive self-only coverage, each employee must pay a uniform amount which is not more than 50 percent of the composite rate, and it allows employees to use the same employer contributions toward family coverage.

Example 7. (i) Same facts as *Example 6*, except that Employer calculates a employer-computed composite family rate of $9,500 (($8,000 + (3 x $10,000)) ÷ 4) and requires each employee to pay $4,000 of the premium for family coverage.

(ii) Employer satisfies the uniformity requirement in § 45R(d)(4), because it offers and makes contributions based on a calculated self-only and family rate such that, to receive either self-only or family coverage, each employee must pay a uniform amount which is not more than 50 percent of the composite rate for coverage of that tier.

Example 8. (i) Same facts as *Example 6*, except that Employer also receives a list billing premium quote from Health Insurance Issuer X for health insurance coverage for each of Employer's four employees, in addition to the list billing premium quote from Health Insurance Issuer W.

(ii) Health Insurance Issuer X's quote for Employee L, age 20, is $4,000 per year for self-only coverage or $12,000 per year for family coverage. For Employees M, N and O, each age 40, the premium is $7,000 per year for self-only coverage or $15,000 per year for family coverage.

(iii) The total self-only premium under Plan X is $25,000 ($4,000 + (3 x $7,000). The employer-computed composite self-only rate is $6,250 ($25,000 ÷ 4).

(iv) Employer designates Health Insurance Issuer W's health care coverage as the reference plan.

(v) Employer offers to make contributions based on the employer-calculated composite premium for the reference plan (Plan W) such that each employee has to contribute $2,000 to receive self-only coverage through Plan W. Under this arrangement, Employer would contribute $1,000 toward self-only coverage for L and $3,000 toward self-only coverage for M, N, and O. In the event an employee elects family coverage through Plan W or either self-only or family coverage through Plan X, Employer would make the same contribution ($1,000 for L or $3,000 for M, N, or O) toward that coverage.

(vi) The self-only composite rate for Plan W ($4,500) is at least 66% of the self-only composite rate for Plan X ($6,250). ($4,500 ÷ $6,250 = 72%).

(vii) Employer satisfies the uniformity requirement in § 45R(d)(4), because it offers and makes contributions based on the employer-calculated composite self-only premium for the Plan W reference plan such that, in order to receive self-only coverage, each employee must pay a uniform amount which is not more than 50 percent of the self-only composite premium of the reference plan; it allows employees to use the same employer contributions toward family coverage in the reference plan or coverage through another plans; and the self-only composite rate for the reference plan is at least 66% of the self-only composite rate for the non-reference plan.

Section 45R does not impose a coverage requirement (although, other provisions of the Code, such as § 105(h), may impose coverage requirements on the health plan).

IV. ISSUES RELATING TO CALCULATING THE CREDIT

A. Small Group Market — Employees in Multiple States

Under § 45R(b)(2), the credit is limited by the average premium for the small group market in the State (or area within the State) in which the employee enrolls for coverage. *See* Rev. Rul. 2010–13, 2010–21 I.R.B. 691, for average State premiums for the taxable year beginning after December 31, 2009. If an employer has employees in multiple States, the employer applies the average premium for the small group market in the State (or area within the State) separately for each employee using the average State premium for the State in which the employee works.

B. Application of Average Premium Cap

Under § 45R(b)(2) and 45R(g)(2)(c), the amount of an employer's premium payments that are taken into account in calculating the credit is limited to the premium payments the employer would have made under the same arrangement if the average premium for the small group market in the State (or an area within the State) in which the employer offers coverage were substituted for the actual premium. See Notice 2010–44 for additional detail. Rev. Rul. 2010–13, 2010–21 I.R.B. 691 lists the applicable average premium for self-only and family plans in the small group market in each State for the 2010 taxable year. For purposes of this calculation, the cap that is used for each employee (be it self-only or family) depends on the coverage the employee takes. This is not affected by whether the employer's contribution for that employee is determined with reference to the self-only plan, or whether an employer satisfies the uniformity requirement in § 45R(d)(4) by paying an amount equal to at least 50 percent of the premium for self-only coverage.

Example 9. (i) In 2011, Employer offers one health insurance plan, Plan X. The premiums for Plan X are $4,000 per year for self-only coverage, and $6,000 for family coverage.

(ii) Employer pays 50% of the premiums ($2,000) for each employee electing self-only coverage and pays $2,000 for each employee electing family coverage.

(iii) $2,000 is 50% of the premium for self-only coverage and 33% of the premium for family coverage.

(iv) For employees electing self-only coverage, the limitation to the average State premium for the small group market is 50% of the premium for self-only coverage, and for employees electing family coverage, the limitation to the average State premium for the small group market is 33% of the premium for family coverage.

C. Taxpayers With Fiscal Taxable Years

Section 45R is effective for taxable years beginning after December 31, 2009. If a taxpayer is a calendar year taxpayer, the § 45R credit first applies for the taxable year beginning on January 1, 2010 and ending on December 31, 2010. If the taxpayer is a fiscal year taxpayer with a taxable year beginning, for example, on July 1, 2010, the § 45R credit first applies for the taxable year beginning on July 1, 2010 and ending on June 30, 2011.

EFFECT ON OTHER DOCUMENTS

Notice 2010–44, 2010–22 I.R.B. 717, is amplified.

EFFECTIVE DATE

Section 45R is effective for taxable years beginning after December 31, 2009.

DRAFTING INFORMATION

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Funding Relief For Multiemployer Defined Benefit Plans Under PRA 2010

Notice 2010–83

I. PURPOSE

This notice provides guidance in the form of questions and answers for sponsors of multiemployer defined benefit plans with respect to the special funding rules under § 431(b)(8), as added by section 211(a)(2) of the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010), Pub. L. No. 111–192.

II. BACKGROUND

Section 412 contains minimum funding rules that generally apply to pension plans. Section 431 sets forth the funding rules that apply specifically to multiemployer defined benefit plans. Section 432 sets forth additional rules that apply to multiemployer plans in effect on July 16, 2006, that are in endangered or critical status.

Section 431 provides rules for determining, based on charges and credits to the plan's funding standard account, the minimum contribution that must be made to a multiemployer defined benefit plan in order to satisfy the funding requirements under § 412. Under § 431(b)(2)(B)(iii) and (b)(3)(B)(ii), net experience losses and gains are amortized by charges (in the case of losses) and credits (in the case of gains) in equal annual installments over 15 plan years.

Section 431(b)(8), added to the Code by section 211(a)(2) of PRA 2010, provides two special funding rules available to multiemployer plans, a special amortization rule in § 431(b)(8)(A) and a special asset valuation rule in § 431(b)(8)(B).

Section 431(b)(8)(A) provides a special amortization rule for certain net investment losses in the case of a multiemployer plan that meets a solvency test. The special rule applies to the portion of the plan's experience loss or gain for a plan year attributable to net investment losses (if any) incurred in either or both of the first two plan years ending after August 31, 2008 (an eligible loss year). This portion of the experience loss or gain may be treated as an item

separate from other experience losses, to be amortized in equal annual installments (until fully amortized) over the period beginning with the plan year in which such portion is first recognized in the actuarial value of assets and ending with the last plan year in the 30-plan-year period beginning with the eligible loss year.

For this purpose, net investment losses are determined in the manner prescribed by the Secretary on the basis of the difference between actual and expected returns, including any difference attributable to any criminally fraudulent investment arrangement. The determination as to whether an arrangement is a criminally fraudulent investment arrangement is made under rules substantially similar to the rules prescribed by the Secretary for purposes of § 165.

Section 431(d) provides for the extension of certain amortization periods applicable under § 431. Under § 431(b)(8)(A)(ii)(I), the amortization period under the special amortization rule cannot be further extended under § 431(d). In addition, if an extension of an amortization period was granted under § 431(d) for any plan year before a decision to apply the special amortization rule for the plan year, that extension cannot result in the amortization period under the special amortization rule exceeding 30 years.

Under § 431(c)(2)(A), for purposes of the minimum funding rules, the value of a plan's assets must be determined on the basis of any reasonable asset valuation method that takes into account fair market value and is permitted under regulations prescribed by the Secretary. Section 1.412(c)(2)–1(b)(6) of the Income Tax Regulations establishes a corridor for the actuarial value of plan assets, under which the actuarial value generally cannot be less than 80 percent or more than 120 percent of fair market value. If the plan's asset valuation method would result in an actuarial value outside the corridor, the actuarial value must be adjusted to be within the corridor.

Section 1.412(c)(1)–2 permits a collectively bargained plan to use a shortfall funding method that adapts a plan's underlying funding method for purposes of the minimum funding rules. If a multiemployer plan uses the shortfall method, § 1.412(c)(1)–2(h) provides special rules for the amortization of any net experience gains or losses under which the amortization charges and credits with respect to the gain or loss are deferred until the earlier of (1) the fifth plan year following the plan year in which the gain or loss arose, or (2) the first plan year beginning after the latest scheduled expiration date of a contract in effect during the plan year in which the net experience gain or loss arose. In such a case, the net experience gain or loss is increased with interest until the first year of the amortization charge or credit and the amortization period is shortened so that it ends with the same year that would apply in the absence of the shortfall method.

Rev. Proc. 2000–40, 2000–2 C.B. 357, provides for certain changes that can be made in a plan's funding method (including a plan's asset valuation method) that are automatically approved by the Service. An asset valuation method that recognizes gains and losses in the value of plan assets over a period of more than five plan years is not eligible for automatic approval. Under Rev. Proc. 2000–40, any change in unfunded accrued liability resulting from a change in funding method is amortized over a period of 10 years. Rev. Proc. 2000–41, 2000–2 C.B. 371, provides procedures for obtaining Service approval of a change in funding method that is not eligible for automatic approval. Section 5 of Rev. Proc. 2000–41 provides a procedure for a funding method change "class ruling," *i.e.*, a ruling that approves an identical change in funding method for more than 40 plans receiving actuarial services from the same insurance company or consulting firm.

Section 431(b)(8)(B) provides a special asset valuation rule in the case of a multiemployer plan that meets a solvency test. The special rule permits a multiemployer plan to change its asset valuation method in a manner that (1) spreads the difference between expected returns and actual returns for either or both of the eligible loss years over a period of not more than 10 years, (2) provides that, for either or both of the first two plan years beginning after August 31, 2008, the value of plan assets at any time is not permitted to be less than 80 percent or greater than 130 percent of the fair market value of the assets at that time, or (3) provides for both (1) and (2). Section 431(b)(8)(B)(ii) provides that, if the special asset valuation rule applies, the Secretary will not treat the plan's asset valuation method as unreasonable solely because of the changes described above and the changes will be deemed approved by the Secretary.

If the special amortization rule and the special asset valuation rule both apply for any plan year, the plan is required to treat any reduction in the plan's unfunded accrued liability resulting from the application of the special asset valuation rule as a separate experience amortization base. This separate base is amortized in equal annual installments (until fully amortized) over a period of 30 plan years, rather than the period over which the reduction in unfunded accrued liability would otherwise be amortized.

PRA 2010 also added § 431(b)(8)(C), (D), and (E). Section 431(b)(8)(C) describes the solvency test that a multiemployer plan must meet in order for either or both of the special funding rules to apply. The solvency test is met only if the plan actuary certifies that the plan is projected to have sufficient assets to timely pay expected benefits and anticipated expenditures over the amortization period, taking into account the changes in the funding standard account under § 431(b)(8).

Under § 431(b)(8)(D), if either or both of the special funding rules apply for any plan year, a special restriction on benefit increases applies in addition to any other applicable restrictions on benefit increases. Under the special restriction, a plan amendment increasing benefits may not go into effect during either of the two plan years immediately following that plan year unless (1) the plan actuary certifies that the increase is paid for out of additional contributions not allocated to the plan immediately before the plan's application of the special amortization rule or the special asset valuation rule and that the plan's funded percentage and projected credit balances for those two plan years are reasonably expected to be at least as high as they would have been if the benefit increase had not been adopted, or (2) the amendment is required as a condition of qualification under the Code or to comply with other applicable law.

Under § 431(b)(8)(E), the plan sponsor of a multiemployer plan to which either or both of the special funding rules apply must give notice of application of the special rules to plan participants and beneficiaries. In addition, the plan sponsor must inform the Pension Benefit Guaranty

Corporation (PBGC) of the application of the special funding rules in such form and manner as the Director of the PBGC may prescribe.

Under section 211(b) of PRA 2010, § 431(b)(8) takes effect as of the first day of the first plan year ending after August 31, 2008. However, if the application of the special funding rules affects the plan's funding standard account for the first plan year beginning after August 31, 2008, application of the special funding rules is disregarded for purposes of applying § 432 (and § 305 of the Employee Retirement Income Security Act of 1974, as amended (ERISA)), relating to multiemployer plans in endangered or critical status. In addition, the restriction on plan amendments under § 431(b)(8)(D) is effective on June 25, 2010, the date of the enactment of PRA 2010.

Section 304(b)(8) of ERISA, added to ERISA by section 211(a)(1) of PRA 2010, is parallel to § 431(b)(8). Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of Treasury has interpretive jurisdiction over the subject matter of this notice for purposes of ERISA as well as the Code. Thus, this notice applies to the provisions of § 304(b)(8) of ERISA as well as the Code.

Notice 2010–56, 2010–33 I.R.B. 254, states that the Service expects to issue future guidance on the special funding rules under PRA 2010 for multiemployer plans. Notice 2010–56 also states that in the case of a plan year that ends before the guidance is issued, the special rules may be applied without regard to whether the Form 5500 (and Schedule MB) has been filed for that plan year. This notice constitutes the guidance anticipated in Notice 2010–56.

III. QUESTIONS AND ANSWERS

The following questions and answers address issues relating to the special amortization rule and special asset valuation rule under § 431(b)(8), using the following designations to indicate the topic addressed.

A – Extended Amortization Period for Eligible Net Investment Losses
V – Asset Valuation Rules
S – Solvency Test
R – Restrictions on Plan Amendments Increasing Benefits
D – Decision to Apply the Special Funding Rules
N – Notification to Participants, Beneficiaries, and the PBGC
C – Certification of Status under § 432
F – Form 5500 Requirements

A. Extended Amortization Period for Eligible Net Investment Losses

Q A–1. For purposes of the special amortization rule in § 431(b)(8)(A), how is the net investment loss incurred in an eligible loss year determined?

A A–1. Except as otherwise provided in this Q&A A–1, if the valuation date for a plan is either the first day of the plan year or the last day of the plan year, then the net investment loss incurred in an eligible loss year (an eligible net investment loss) is equal to the excess of the expected market value of plan assets as of the end of the eligible loss year over the market value of the assets as of that date, including any difference attributable to a criminally fraudulent investment arrangement. For this purpose, the expected market value of plan assets as of the end of the eligible loss year is equal to (1) the market value of plan assets at the beginning of the eligible loss year, plus (2) contributions made during the eligible loss year, minus (3) disbursements made during the eligible loss year, with all such amounts adjusted to the end of the eligible loss year with interest at the plan's valuation rate for the plan year.

However, if the determination of the actuarial value of assets under the plan's asset valuation method involves a calculation of the difference between the actual return for the plan year (determined on a market value basis) and the expected return on the actuarial value of assets for the plan year, then the eligible net investment loss for the plan year is equal to that actual return minus the expected return.

If the valuation date for a plan year is neither the first day of the plan year nor the last day of the plan year, the calculation of the eligible net investment loss for the plan year is made as of the valuation date, based on the difference between the actual return (determined on a market value basis as of the valuation date) and the expected return (based on either market or actuarial value, as the case may be, as of the valuation date for the prior year).

Q A–2. For purposes of determining an eligible net investment loss, what is a criminally fraudulent investment arrangement?

A A–2. For purposes of determining an eligible net investment loss, a criminally fraudulent investment arrangement is an investment arrangement with respect to which a loss would be treated as a theft loss under § 165 if § 165 applied.

Q A–3. If a plan has a net experience loss for a recognition year *(i.e.*, a plan year in which a portion of an eligible net investment loss is recognized in the value of plan assets), how does the special amortization rule in § 431(b)(8)(A) affect the treatment of the portion of that loss that is attributable to an eligible net investment loss?

A A–3. If a plan has a net experience loss for a recognition year and the special amortization rule under § 431(b)(8)(A) applies, the net experience loss is bifurcated into the portion attributable to the eligible net investment loss (as determined under Q&A A–5) and the portion not attributable to the eligible net investment loss (*i.e.*, the portion attributable to other gains or losses).

A separate amortization base is established for the portion attributable to the eligible net investment loss, and that portion is amortized over the period beginning with the recognition year and ending with the last plan year in the 30-plan-year period beginning with the eligible loss year. Thus, if a plan uses a valuation date of the first day of the plan year, so that a por-

tion of an eligible net investment loss is first recognized in the actuarial value of assets for the plan year after the eligible loss year, the amortization period for that portion is the 29-plan-year period beginning with that recognition year.

The portion of the net experience loss that is not attributable to the eligible net investment loss is amortized over 15 plan years, as provided in § 431(b)(2)(B)(iii). Thus, if the net experience loss for a plan year exceeds the amount attributable to the eligible net investment loss, then the balance of the net experience loss (*i.e.*, the amount by which the net experience loss exceeds the amount attributable to the eligible net investment loss) is amortized over 15 plan years.

The establishment of a special amortization period for the portion of the net experience loss attributable to the eligible net investment loss continues for each plan year that the plan applies the provisions of § 431(b)(8)(A) and without regard to whether the portion of the eligible net investment loss recognized in a plan year is a positive or negative number. For example, if, as a result of the application of the requirement that the actuarial value of assets not exceed 120 percent of market value, the portion of the eligible net investment loss that is recognized in the actuarial value of plan assets for the first recognition year exceeds the combined portions that would otherwise be recognized for the first and second recognition years, then the portion of the eligible net investment loss that is recognized in the second year's actuarial value of assets could instead be an actuarial gain. In such a case, the gain would be recognized over 28 plan years. However, in that case, the plan sponsor could decide to no longer apply the special amortization rule. See Q&A A–8 and Q&A D–3.

See Q&A A–4 for the rules that apply if the net experience loss for a plan year is less than the amount attributable to the eligible net investment loss, if the amount attributable to the eligible net investment loss that is recognized in a recognition year is an actuarial gain, or if there is an overall experience gain for the plan year.

Q A–4. What is the appropriate treatment with respect to a plan year for which the special amortization rule applies, if the net experience loss for the plan year is less than the amount attributable to the eligible net investment loss, if the amount attributable to the eligible net investment loss is an actuarial gain, or if there is an overall experience gain for the plan year?

A A–4. In any of these cases, in lieu of the bifurcation described in Q&A A–3, two amortization bases are established. The initial balance of the first base (which can be a gain base or a loss base) is the amount attributable to the eligible net investment loss, and that base is amortized over the extended period described in Q&A A–3. The initial balance of the second base (which can also be a gain base or a loss base) is the amount that, when combined with the initial balance of the first base, equals the plan's net experience gain or loss for that plan year, and that base is amortized over 15 plan years.

For instance, if the amount attributable to an eligible net investment loss is an actuarial loss that exceeds the net experience loss for the plan year, then the amount attributable to the eligible net investment loss is amortized over the extended period described in Q&A A–3 and an offsetting gain base equal to the excess is established and amortized over 15 plan years. Similarly, if there is an overall experience gain for the plan year and the amount attributable to an eligible net investment loss is an actuarial loss, then the amount attributable to the eligible net investment loss is amortized over the extended period described in Q&A A–3, and an offsetting gain base equal to the sum of that amount and the amount of the overall experience gain is established and amortized over 15 plan years.

The following examples illustrate the application of the rules in Q&A A–3 and Q&A A–4:

Example (1) Assume that the sponsor of a multiemployer plan that uses the calendar year as its plan year and a beginning of year valuation date decides to apply the special amortization rule in § 431(b)(8)(A) in order to extend the amortization period for the eligible net investment loss of $1,000,000 incurred in the 2008 plan year. The valuation interest rate for the plan is 7 percent. The plan has a net experience loss in 2010 that is first reflected in the January 1, 2011, valuation that exceeds the portion attributable to the 2008 eligible net investment loss, as shown in the table below:

		Amounts (Dollars)
(1)	Net experience gain or (loss) in 2010 reflected in actuarial valuation as of 1/1/2011	($500,000)
(2)	Portion of 2008 eligible net investment loss reflected in actuarial value of plan assets as of 1/1/2011	($45,000)
(3)	Portion of net experience loss not attributable to 2008 eligible net investment loss	($455,000)

Under § 431(b)(2)(B)(iii), amortization of the experience loss of $500,000 would be over 15 plan years at $51,306 per year (*i.e.*, $500,000/9.745468). Under the special amortization rule, the net experience loss of $500,000 is bifurcated into two pieces: (a) the portion attributable to the 2008 eligible net investment loss, resulting in an amortization charge base of $45,000, amortized over 27 plan years at $3,509 per year (*i.e.*, $45,000/12.825779), plus (b) the remaining loss, resulting in an amortization charge base of $455,000 amortized over 15 plan years at $46,688 per year (*i.e.*, $455,000/9.745468).

The combined amortization charges are $50,197 annually for the first 15 plan years (*i.e.*, $3,509 plus $46,688), and $3,509 annually for the succeeding 12 plan years. This results in a reduction in amortization charges of $1,109 (*i.e.*, $51,306 – $50,197) during those first 15 plan years and an increase in amortization charges of $3,509

per year for each of those succeeding 12 plan years, as contrasted with the schedule of charges under § 431(b)(2)(B)(iii).

Example (2) The facts are the same as in Example (1), except that the plan has a net experience loss in 2010 of $30,000 that is first reflected in the January 1, 2011, actuarial valuation.

Under § 431(b)(2)(B)(iii), amortization of the net experience loss of $30,000 would be over 15 plan years at $3,078 per year (*i.e.*, $30,000/9.745468). Under the special amortization rule, the experience loss of $30,000 is bifurcated into two pieces: (a) the portion attributable to the 2008 eligible net investment loss, resulting in an amortization charge base of $45,000, amortized over 27 plan years at $3,509 per year (*i.e.*, $45,000/12.825779), plus (b) an offsetting gain base, resulting in an amortization credit base of $15,000 amortized over 15 plan years at $1,539 per year (*i.e.*, $15,000/9.745468).

Example (3) The facts are the same as in Example (1), except that the plan has a net experience gain in 2010 of $100,000 that is first reflected in the January 1, 2011, actuarial valuation.

Under § 431(b)(3)(B)(ii), amortization of the net experience gain of $100,000 would be over 15 plan years at $10,261 per year (*i.e.*, $100,000/9.745468). Under the special amortization rule, the experience gain of $100,000 is bifurcated into two pieces: (a) the portion attributable to the 2008 eligible net investment loss, resulting in an amortization charge base of $45,000, amortized over 27 plan years at $3,509 per year (*i.e.*, $45,000/12.825779), plus (b) an offsetting gain base, resulting in an amortization credit base of $145,000 amortized over 15 plan years at $14,879 per year (*i.e.*, $145,000/9.745468).

Q A–5. How is the portion of the net experience gain or loss for a recognition year that is attributable to an eligible net investment loss determined?

A A–5. The portion of the net experience loss or gain for a recognition year that is attributable to an eligible net investment loss is permitted to be determined under either the prospective or retrospective method described in this Q&A A–5. Whichever method is chosen becomes part of the plan's funding method and can only be changed with the consent of the Commissioner.

Under the prospective method, the portion of an eligible net investment loss that is recognized for the first recognition year and for each future plan year is fixed as of the first recognition year, based on a projection of asset values. Specifically, the amount of an eligible net investment loss that is recognized in the first recognition year is the hypothetical value of plan assets as of the valuation date for that plan year minus the actuarial value of plan assets as of that date. For this purpose, the hypothetical value of plan assets is the value that would have resulted under the plan's asset valuation method if the plan had earned the expected rate of return for the eligible loss year.

In order to determine the portion of an eligible net investment loss that is to be recognized in any future recognition year, the hypothetical value of plan assets and the actuarial value of plan assets must be projected to that future year assuming that the plan assets earn the expected rate of return for all future years and based on a reasonable projection of future contributions and distributions. Based on this projection, the accumulated portion of the eligible net investment loss recognized as of the valuation date for a future plan year (the accumulated recognized eligible loss) is determined as the projected hypothetical value of plan assets minus the projected actuarial value of plan assets as of that date. The portion of the eligible net investment loss that is recognized for that future year is (1) the accumulated recognized eligible loss for that future year, minus (2) the accumulated recognized eligible loss for the plan year immediately preceding that future year.

Under the retrospective method, the portion of an eligible net investment loss that is recognized for any recognition year (*i.e.*, the first recognition year or any later recognition year) is determined as of the valuation date for the relevant recognition year, taking into account actual rates of return since the eligible loss year. The portion of an eligible net investment loss that is recognized in the first recognition year is the same as under the prospective method. For a recognition year after the first recognition year, a reconstructed hypothetical value of plan assets is determined for that year which is then compared with the actuarial value of plan assets for that year. For this purpose, the reconstructed hypothetical value of plan assets is the value that would have resulted under the plan's asset valuation method if the plan had earned the expected rate of return for the eligible loss year and actual rates of return for any subsequent years. Based on this determination, the accumulated recognized eligible loss (as defined in the preceding paragraph) is determined as of the valuation date for the future plan year as the reconstructed hypothetical value of plan assets minus the actuarial value of plan assets as of that date. The portion of the eligible net investment loss that is recognized for that future year is (1) the accumulated recognized eligible loss for that future year, minus (2) the accumulated recognized eligible loss for the plan year immediately preceding that future year.

In either case, if the determination of actuarial value of assets under the plan's asset valuation method requires distinguishing between realized or unrealized appreciation and other types of investment return (such as the average value described in § 1.412(c)(2)–1(b)(8)), then the hypothetical value of plan assets, the projected hypothetical value of plan assets, the projected actuarial value of plan assets, and the reconstructed hypothetical value of plan assets are determined by assuming that the expected rate of return for the relevant plan year did not include any realized or unrealized appreciation.

The following example illustrates the application of the rules in Q&A A–5:

Example (a) A multiemployer plan with a calendar year plan year and a beginning of year valuation date determines the actuarial value of assets by spreading the difference between actual and expected investment return on a level basis over five years (as described in approval 15 of Rev. Proc. 2000–40), subject to the limitation that the actuarial value of assets be no less than 80 percent of fair market value and no greater than 120 percent of fair market value. The market value of assets as of January 1, 2008, is $150. The valuation interest rate used for all years after 2007 is 7 percent, although the actual rate of return on a market value basis for 2008 was -25 percent. The difference between expected and actual return for past years is

	Difference between Expected and Actual Return (Dollars)
2005	20
2006	-15
2007	5

For 2008, contributions and disbursements, increased with interest at the expected rate through the end of the plan year, are $10 and $9, respectively. As of January 1, 2009, projected contributions and disbursements, increased with interest at the expected rate through the end of each plan year is

	Contributions (Dollars)	Disbursements (Dollars)
2009	12	10
2010	14	11
2011	16	12
2012	18	13

(b) The expected market value of assets as of the end of 2008 is $161.50 [($150 * 1.07) + $10 - $9].

(c) The net investment loss for 2008 is $48 (determined as the expected market value as of the end of 2008 ($161.50) minus the actual market value as of the end of 2008 ($113.50)) and the plan sponsor has decided to apply the special amortization rule of § 431(b)(8)(A) to that eligible net investment loss.

(d) Under the asset valuation method for the plan, the actuarial value of assets on January 1, 2009, prior to applying the 80/120 percent corridor is $150.90 [$113.50 - (20% * $20) + (40% * $15) - (60% * $5) + (80% * $48)]. After applying the 80/120 percent corridor, the actuarial value of assets is $136.20 (120% of $113.50).

(e) The plan actuary determines the hypothetical value of assets for the 2009 plan year by determining what the actuarial value of assets would have been had the plan assets earned the expected return during 2008. In such a case, the market value of assets would have been $161.50 and the actuarial value of assets prior to applying the 80/120 percent corridor would have been $160.50 [$161.50 - (20% * $20) + (40% * $15) - (60% * $5) + (80% * $0)]. After applying the 80/120 percent corridor the hypothetical value of assets would have been $160.50.

(f) Accordingly, the accumulated recognized eligible loss (*i.e.*, the portion of the eligible net investment loss that would have been recognized in the actuarial value of assets) as of January 1, 2009, is $24.30 (the difference between the hypothetical value of assets on that date ($160.50) and the actuarial value of assets on that date ($136.20)).

(g) 2009 is the first recognition year (*i.e.*, the first year for which any portion of the eligible net investment loss is recognized in the actuarial value of plan assets), and the portion of the eligible net investment loss that is recognized in the actuarial value of assets on January 1, 2009, is $24.30 ($24.30, the accumulated recognized eligible loss for 2009, minus zero, the accumulated recognized eligible loss for the preceding year).

(h) If the plan is using the prospective method of determining the portion of the eligible net investment loss that is recognized each plan year, then the calculations set forth in steps (d) through (f) are repeated for each future recognition year up to the plan year as of which the entire eligible net investment loss will have been recognized. This calculation is a projection of future results made as of January 1, 2009, and, for this purpose, it is assumed that the plan assets earn the assumed rate of return for each year after 2008. The portion of the eligible net investment loss recognized for a future year is the result in step (f) for that future year minus the result in step (f) for the year immediately preceding that future year. For example,

- The market value of assets as of January 1, 2010, is projected to be $123.45 [($113.50 * 1.07) + $12 - $10] and there is projected to be no difference between actual and expected returns for 2009.
- Under the asset valuation method for the plan, the actuarial value of assets at January 1, 2010, prior to applying the 80/120 percent corridor is projected to be $153.25 [$123.45 + (20% * $15) - (40% * $5) + (60% * $48) + (80% * $0)]. After applying the 80/120 percent corridor, the actuarial value of assets is projected to be $148.14 (120% of $123.45).
- Had the plan earned the expected rate of return during 2008, the market value of assets as of January 1, 2010, would have been projected to be $174.81 [($161.50 * 1.07) + $12 - $10].
- Under the asset valuation method for the plan, the actuarial value of assets at January 1, 2010, prior to applying the 80/120 percent corridor would have been $175.81 [$174.81 + (20% * $15) - (40% * $5) + (60% * $0) + (80% * $0)]. After applying the 80/120 percent corridor the actuarial value of assets would have been $175.81.
- The accumulated recognized eligible loss as of the January 1, 2010, valuation date is $27.67 (the difference between the projected hypothetical value of assets ($175.81) and the projected actuarial value of assets ($148.14)).

- The portion of the eligible net investment loss that is projected to be first recognized in the January 1, 2010, actuarial value of assets is $3.37 (the accumulated recognized eligible loss as of January 1, 2010 ($27.67) minus the accumulated recognized eligible loss as of January 1, 2009 ($24.30)).

(i) If the plan is using the retrospective method of determining the portion of the eligible net investment loss that is recognized each plan year, then calculations set forth in steps (d) through (f) are repeated for each future recognition year up to the plan year as of which the entire eligible net investment loss will have been recognized. This calculation is made as of a valuation date for each future plan year and takes into account the actual earnings on plan assets for each year after 2008. The portion of the eligible net investment loss recognized for a future year is the result in step (f) for that future year minus the result in step (f) for the year immediately preceding that future year. For example, if the plan assets earned 10 percent during 2009, and assuming that the contributions and disbursements during 2009 were as projected,

- The market value of assets as of January 1, 2010, will be $126.85 [($113.50 * 1.10) + $12 - $10] and the difference between actual and expected returns for 2009 will be $3.40.
- Under the asset valuation method for the plan, the actuarial value of assets on January 1, 2010, prior to applying the 80/120 percent corridor will be $153.93 [$126.85 + (20% * $15) - (40% * $5) + (60% * $48) - (80% * $3.40)]. After applying the 80/120 percent corridor, the actuarial value of assets will be $152.22 (120% of $126.85).
- Had the plan earned the expected rate of return during 2008, the market value of assets as of January 1, 2010, will be $179.65 [($161.50 * 1.10) + $12 - $10] and the difference between actual and expected returns for 2009 will be $4.84.
- Under the asset valuation method for the plan, the actuarial value of assets on January 1, 2010, prior to applying the 80/120 percent corridor will be $176.78 [$179.65 + (20% * $15) - (40% * $5) + (60% * $0) - (80% * $4.84)]. After applying the 80/120 percent corridor, the actuarial value of assets will be $176.78. This value is the reconstructed hypothetical value of plan assets.
- The accumulated recognized eligible loss as of the January 1, 2010, valuation date is $24.56 (the difference between the reconstructed hypothetical value of assets ($176.78) and the actuarial value of assets ($152.22)).
- The portion of the eligible net investment loss that will be first recognized in the January 1, 2010, actuarial value of assets is $0.26 (the accumulated recognized eligible loss as of January 1, 2010 ($24.56) minus the accumulated recognized eligible loss as of January 1, 2009 ($24.30)).

Q A–6. If a plan uses the shortfall method, how does the special amortization rule apply to the amortization of experience gain or loss under § 1.412(c)(1)–2(h)?

A A–6. If a multiemployer plan uses the shortfall method, the net experience gain or loss for a plan year is bifurcated into the portion attributable to the eligible net investment loss and the portion not attributable to the eligible net investment loss in the same manner as in the case of a plan that is not using the shortfall method. The amortization of each of these portions is deferred until the earlier of (1) the fifth plan year following the plan year in which the net experience gain or loss arose, or (2) the first plan year beginning after the latest scheduled expiration date of a contract in effect during the plan year in which the net experience gain or loss arose. In such a case, the net experience gain or loss is increased with interest at the rate used for determining the plan's normal cost until the first year of the amortization charge or credit, and the amortization period is shortened so that it ends with the same year that would apply in the absence of the shortfall method.

Q A–7. Can the special amortization rule for eligible net investment losses be applied to a multiemployer plan that does not use a funding method that determines experience gains or losses?

A A–7. The special amortization rule for eligible net investment losses is not permitted to be applied to a multiemployer plan that does not use a funding method that determines experience gains or losses. However, a multiemployer plan that does not use a funding method that determines an experience gain or loss for each plan year may change its funding method to an immediate gain method under which an experience gain or loss is determined for each plan year. Such a change in funding method is automatically approved and, pursuant to Rev. Proc. 2000–40, the amortization period applicable to any change in unfunded accrued liability attributable to the change in funding method is 10 years.

Q A–8. For what plan years does the special amortization rule in § 431(b)(8)(A) apply?

A A–8. The special amortization rule under § 431(b)(8)(A) applies beginning with the first recognition year with respect to an eligible net investment loss and ending with the earliest of:

1) The plan year in which the entire unrecognized balance of the eligible net investment loss as of the preceding plan year is recognized in the actuarial value of assets,

2) The plan year for which, if the special amortization rule were to apply to establish a new special amortization base, the amortization period applicable to that base would be 15 plan years, or

3) The plan year for which the plan sponsor chooses to end the application of the special amortization rule in accordance with Q&A D–3.

If the special amortization rule no longer applies, then no new amortization bases are established under Q&A A–3 (and any portion of an eligible net investment loss recognized in a subsequent year is taken into account under the regular rules of § 431(b)(2) or (b)(3)). However, the annual charges or credits to the funding standard account with respect to any amortization base previously established are unaffected.

Q A–9. How do the rules in this notice apply if the special amortization rule in § 431(b)(8)(A) applies with respect to net investment losses incurred in two eligible loss years?

A A–9. If the special amortization rule in § 431(b)(8)(A) applies with respect to net investment losses incurred in two eligible loss years, the rules in this notice apply separately to each portion of a net experience gain or loss that is attributable to an eligible net investment loss incurred in a

different eligible loss year. For example, in applying the rules in Q&A A–3, the plan's net experience loss would be divided into three portions: the portion attributable to the eligible net investment loss (as determined under Q&A A–5) incurred in one eligible loss year; the portion attributable to the eligible net investment loss (as determined under Q&A A–5) incurred in the other eligible loss year; and the portion not attributable to the eligible net investment loss incurred in any eligible loss year. A separate amortization base would be established for each portion attributable to the eligible net investment loss incurred in a different eligible loss year, and each of those portions would be amortized over an extended period described in Q&A A–3. The portion of the net experience loss that is not attributable to eligible net investment loss would be amortized over 15 plan years, as provided in § 431(b)(2)(B)(iii).

V. Asset Valuation Rules

Q V–1. What does § 431(b)(8)(B)(i)(I) permit with respect to the period over which the difference between actual and expected returns for an eligible loss year is recognized in the value of plan assets as determined under a plan's asset valuation method?

A V–1. Subject to the solvency test under § 431(b)(8)(C), a plan's asset valuation method may be changed so as to recognize the difference between actual and expected returns for an eligible loss year (*i.e.*, an eligible net investment loss) in the value of plan assets on a level basis over a period of not more than 10 years. An asset valuation method is not considered unreasonable for purposes of § 431(c)(2)(A) merely because of such a change, without regard to the period over which the difference between actual and expected returns is otherwise recognized under the plan's method.

Q V–2. Is there automatic approval for the change in method described in Q&A V–1?

A V–2. If the asset valuation method for a multiemployer plan provides for a spreading of the difference between expected and actual returns on a level basis over a fixed number of years, then a change in the asset valuation method to extend the period-to not more than 10 years-over which an eligible net investment loss is recognized in the value of plan assets on a level basis is automatically approved. This applies even though the difference between expected and actual returns for other plan years is spread over a different number of years. For this purpose, a plan that uses market value of assets as the asset valuation method spreads the difference between expected and actual returns over one plan year.

If the plan uses some other asset valuation method, the plan will need to obtain approval from the Service for the change. This approval may be requested using the class-rulings procedure prescribed under section 5 of Rev. Proc. 2000–41, if it otherwise meets the requirements for using the class-rulings procedure.

Q V–3. What does § 431(b)(8)(B)(i)(II) permit with respect to the extent to which the actuarial value of plan assets can vary from the market value of plan assets?

A V–3. Subject to the solvency test under § 431(b)(8)(C), a plan's asset valuation method may be changed so that, for either or both of the first two plan years beginning after August 31, 2008, the otherwise applicable corridor limits under § 1.412(c)(2)–1(b)(6) are expanded to permit the actuarial value of plan assets to be as much as 130 percent of the fair market value of plan assets. An asset valuation method is not considered unreasonable for purposes of § 431(c)(2)(A) merely because of such a change, and such a change is automatically approved.

Q V–4. What amortization period applies to a change in a plan's unfunded accrued liability attributable to a change in asset valuation method as described in Q&A V–1 or Q&A V–3 (or both)?

A V–4. In general, pursuant to Rev. Proc. 2000–40, the amortization period applicable to the change in unfunded accrued liability attributable to a change in asset valuation method as described in Q&A V–1 or Q&A V–3 (or both) is 10 years. However, if a plan's asset valuation method is changed under § 431(b)(8)(B) for a plan year and the special amortization rule in § 431(b)(8)(A) also applies, then the net experience gain or loss for the plan year and the portion of that experience gain or loss attributable to the eligible net investment loss are determined disregarding the change in asset valuation method. In such a case, the change in unfunded accrued liability attributable to the change in asset valuation method is then amortized over 30 plan years.

S. Solvency Test

Q S–1. What is the period that applies for purposes of a plan actuary's certification of the solvency test (solvency certification) under § 431(b)(8)(C)?

A S–1. The period that applies for purposes of a solvency certification under § 431(b)(8)(C) is the period beginning with the plan year in which the solvency certification is made. If the special amortization rule (but not the special asset valuation rule) applies with respect to a multiemployer plan, such period ends with the last plan year in the 30-plan-year period beginning with the eligible loss year. If the special asset valuation rule (but not the special amortization rule) applies, such period ends with the last plan year in the 10-year period over which the change in unfunded accrued liability attributable to the change in asset valuation method is amortized. If both the special amortization rule and the special asset valuation rule apply, such period ends with the last plan year in the 30-plan-year period over which the change in unfunded accrued liability attributable to the change in asset valuation method is amortized.

Q S–2. When must the solvency certification be made?

A S–2. The solvency certification must be made before a formal decision is made to apply either or both of the special funding rules in accordance with Q&A D–1. If the plan passes the solvency test as of the plan year in which a formal decision is made to apply either or both of the special funding rules, the plan is deemed to pass the test as of any preceding plan year.

Q S–3. What is the actuarial basis for the solvency certification under § 431(b)(8)(C)?

A S–3. In making the solvency certification under § 431(b)(8)(C), the plan actuary must use the same actuarial basis (*e.g.*, actuarial assumptions, data, and terms of any existing funding improvement plan or rehabilitation plan) that is used for purposes of the certification of the plan's status under § 432(b)(3) for the plan year in which the solvency certification is made. The actuarial assumptions with respect to plan years that are after the plan years that are taken into account for purposes of that certification of plan status under § 432(b)(3) must be consistent with the assumptions used for purposes of that certification of plan status. In making a solvency certification, the plan actuary is not permit-

ted to take into account any benefit reductions under § 418D or § 418E projected for future years.

R. Restrictions on Plan Amendments Increasing Benefits

Q R–1. How does the restriction on plan amendments under § 431(b)(8)(D) apply if the special amortization rule in § 431(b)(8)(A) applies?

A R–1. If the special amortization rule applies with respect to the portion of an eligible net investment loss that is recognized in a plan year (*i.e.*, if a new amortization base with an extended amortization period under § 431(b)(8)(A) is established in the plan year for a portion of the eligible net investment loss), a plan amendment increasing benefits may not go into effect during either of the two plan years immediately following that plan year unless one of the two conditions in the following paragraph are met.

The restriction in the preceding paragraph does not apply if (1) the plan actuary certifies that (i) the increase is paid for out of additional contributions not allocated to the plan as of the end of the immediately preceding plan year, and (ii) the plan's funded percentage and projected credit balances for the two plan years are reasonably expected to be at least as high as they would have been if the benefit increase had not been adopted, or (2) the amendment is required as a condition of qualification under the Code or to comply with other applicable law.

Q R–2. How does the restriction on plan amendments under § 431(b)(8)(D) apply if the special asset valuation rule in § 431(b)(8)(B) applies?

A R–2. If the special asset valuation rule applies for a plan year (*i.e.*, the plan's asset valuation method for that plan year is changed in accordance with § 431(b)(8)(B)), a plan amendment increasing benefits may not go into effect during either of the two plan years immediately following that plan year unless one of the two conditions in the following paragraph are met.

The restriction in the preceding paragraph does not apply if (1) the plan actuary certifies that (i) the increase is paid for out of additional contributions not allocated to the plan as of the end of the immediately preceding plan year, and (ii) the plan's funded percentage and projected credit balances for the two plan years are reasonably expected to be at least as high as they would have been if the benefit increase had not been adopted, or (2) the amendment is required as a condition of qualification under the Code or to comply with other applicable law.

Q R–3. How does the effective date provision of section 211(b)(2) of PRA 2010 affect the application of the restriction on plan amendments increasing benefits?

A R–3. Under section 211(b)(2) of PRA 2010, the restriction on plan amendments increasing benefits is effective on June 25, 2010, the date of the enactment of PRA 2010. Thus, benefit increases that went into effect before June 25, 2010, are not subject to the restriction under § 431(b)(8)(D). Benefit increases that are effective on or after June 25, 2010, are subject to the restriction, even if adopted before that date.

D. Decision to Apply the Special Funding Rules

Q D–1. How must a decision to apply either or both of the special funding rules under § 431(b)(8) be made?

A D–1. A decision to apply either or both of the special funding rules under § 431(b)(8) with respect to a multiemployer plan must be made as a formal decision by the plan sponsor using its normal procedures for making such decisions.

Q D–2. What is the deadline for a formal decision to apply either or both of the special funding rules?

A D–2. The deadline for a formal decision to apply either or both of the special funding rules with respect to a multiemployer plan is the earliest of:

1) The deadline for certification of the plan's status under § 432(b)(3) for the first plan year beginning on or after January 1, 2011,

2) The date of certification of the plan's status under § 432(b)(3) for the first plan year beginning on or after January 1, 2011, or

3) June 30, 2011.

However, if, as of the otherwise applicable deadline, a plan sponsor has been unable to reach agreement as to whether to apply either or both of the special funding rules, and, before the otherwise applicable deadline, formally decides to resolve the issue through arbitration, then the deadline is extended until 30 days after the resolution of the arbitration.

Q D–3. May a plan sponsor decide to stop applying the special amortization rule as of a future plan year?

A D–3. A plan sponsor may decide to stop applying the special amortization rule as of a plan year, provided that a formal decision is made by the plan sponsor. If the special amortization rule no longer applies, then no new amortization bases are established under Q&A A–3 (and any portion of an eligible net investment loss recognized in a subsequent year is taken into account under the regular rules of § 431(b)(2) or (b)(3)). However, the annual charges or credits to the funding standard account with respect to any amortization base previously established are unaffected.

N – Notification to Participants, Beneficiaries, and the PBGC

Q N–1. When must notice of the application of the special funding rules be provided to participants and beneficiaries?

A N–1. If the special amortization rule or special asset valuation rule, or both, apply with respect to a multiemployer plan, the plan sponsor must give notice to participants and beneficiaries that the special rule (or rules) applies, within 30 days after the deadline for the plan sponsor's formal decision to apply the special rule or rules. Notice need be provided only once, even if the special funding rules under § 431(b)(8) apply for more than one plan year.

Q N–2. Which participants and beneficiaries must receive the notice?

A N–2. Except as otherwise provided in the following sentence, notice is required to be provided to all plan participants and beneficiaries. However, the notice does not have to be provided to any person who either became a plan participant or beneficiary after the last day of the last plan year ending before the notice is due or ceased to be a participant or beneficiary prior to the date on which the notice is provided.

Q N–3. What information must the notice to participants and beneficiaries contain?

A N–3. The notice must provide (1) the name of the plan, along with the taxpayer identification number and plan number for the plan, (2) an explanation of which of the special funding rules apply and the plan year or years for which they apply, (3) the effect of the application of the special funding rules (*i.e.*, the amortization of losses beyond the otherwise applicable 15-plan-year period and/or the recog-

nition of losses in the value of plan assets over a period as long as 10 years), (4) a general description of the effect of applying the special funding rules, including the fact that applying the special rules will decrease the amount of required minimum contributions that are taken into account in determining the appropriate contribution rates under collective bargaining agreements and may also affect the plan's status under § 432(b) for the current and future plan years, (5) a statement that the plan is not permitted to increase benefits during the two plan years immediately following any plan year in which either or both of the special funding rules apply, unless certain conditions are met, and (6) the name, address, and telephone number of the plan administrator or other contact person from whom more information may be obtained.

The notice must be written in a manner calculated to be understood by the average plan participant or beneficiary. In addition, the notice must be written in such a manner that the average participant or beneficiary will understand the significance of the required information in the notice. While the notice may include any additional information that is necessary or helpful for recipients to understand the required information in the notice, the notice should not have the effect of misleading or misinforming recipients or of distracting recipients from the required information in the notice. The notice must be a separate notice and cannot be combined with other information. However, the notice can be provided at the same time as another notice is provided; for example, the notice does not fail to meet the requirements of this Q&A N–3 merely because it is provided at the same time as a notice under section 101(f) of ERISA.

Q N–4. What are the acceptable methods of providing the required notice? In particular, can the notice be provided electronically?

A N–4. The notice must be in writing and may be furnished in any paper or electronic form to the extent such form is reasonably accessible to persons to whom the notice is required to be provided. Permissible electronic methods include those permitted under regulations of the Department of Labor at 29 C.F.R. § 2520.104b–1(c) and those described at § 54.4980F–1, Q&A–13(c).

Q N–5. How does a plan sponsor making a formal decision to apply either or both of the special funding rules comply with the requirement to inform PBGC of such application?

A N–5. The PBGC has informed the Treasury Department and the Service that the plan sponsor must provide the PBGC with a copy of the notice provided to participants and beneficiaries under Q&A N–3, by the deadline described in Q&A N–6. The notice must be provided by mail or e-mail. Hard copies of the notice must be mailed to the Pension Benefit Guaranty Corporation, ATTN: Multiemployer Data Coordinator, 1200 K Street, NW, Suite 930, Washington, DC 20005–4026. Electronic copies of the notice must be e-mailed to the PBGC at *Multiemployerprogram@pbgc.gov*. The subject line of the e-mail, or the notice sent by mail, must contain the plan's taxpayer identification number, plan number, and the name of the plan.

Q N–6. What is the deadline for notifying the PBGC?

A N–6. The plan sponsor must give notice of the application of the special funding rules by the later of: (i) 30 days after the date the plan sponsor makes a formal decision to apply either or both of the special funding rules, or (ii) January 18, 2011. If the plan sponsor makes separate decisions on different dates regarding which of the special funding rules will apply, or the plan years for which they apply, the plan sponsor must send separate notices with respect to each application of the special funding rules. The deadline in this Q&A N–6 also applies to any formal decision to apply the special funding rules made prior to the issuance of this notice.

C – Certification of Status under § 432

Q C–1. To what extent must the application of the special funding rules under § 431(b)(8) be taken into account for purposes of § 432?

A C–1. Once a formal decision to apply either or both of the special funding rules under § 431(b)(8) has been made, the application of the special rules must be taken into account in any contemporaneous or subsequent certification of status required under § 432(b)(3) and in any contemporaneous or subsequent required adoption or update of a funding improvement plan or rehabilitation plan.

Q C–2. Is a plan sponsor permitted to modify a funding improvement plan or rehabilitation plan that was previously adopted to take into account the application of the special funding rules under § 431(b)(8)?

A C–2. A plan sponsor is permitted to update a previously adopted funding improvement plan or rehabilitation plan to take into account the application of the special funding rules under § 431(b)(8), even if an update is not otherwise required under § 432.

Q C–3. If a multiemployer plan's status under § 432 for a plan year was already certified before a plan sponsor's formal decision to apply either or both of the special funding rules under § 431(b)(8), can the plan's status for the plan year be recertified to take into account the application of the special funding rules?

A C–3. Normally, a formal decision to apply the special funding rules under § 431(b)(8) will be reflected in any certifications of a plan's status under § 432(b)(3) made after the formal decision. Thus, if a formal decision to apply the special funding rules under § 431(b)(8) is made after the certification of a plan's status under § 432(b)(3) for a plan year, the application of the special funding rules will not be reflected in the certification of the plan's status until the following plan year. However, the plan sponsor is permitted to request that the plan actuary redetermine the plan's status under § 432(b)(3) for a plan year, taking into account the application of the special funding rules. The redetermined status will be treated as the certified status for the entire plan year (including for purposes of the requirement to adopt or update a funding improvement or rehabilitation plan in that plan year), provided that (1) a revised certification of the plan's status for the plan year is made and sent to the plan sponsor and the Service before the end of the plan year, (2) the revised certification otherwise satisfies the requirements of § 432(b)(3), (3) notice of the revised certification is provided to participants and beneficiaries, the bargaining parties, the PBGC, and the Secretary of Labor within 30 days after the revised certification is made, (4) any measures previously taken that would not be permitted pursuant to the plan's status under the revised certification (such as restrictions on distributions as described

in § 432(f)(2), reductions as described in § 432(e)(8) in benefits that are protected under the anti-cutback rules of § 411(d)(6), and the imposition of employer surcharges under § 432(e)(7)) are reversed, and (5) the plan actuary certifies that reversing the measures described in clause (4) would not cause the plan to fail to meet the solvency test under § 431(b)(8)(C).

Q C–4. How does the effective date provision of section 211(b)(1) of PRA 2010 affect the application of the special funding rules for purposes of § 432 for the first plan year beginning after August 31, 2008?

A C–4. Under section 211(b)(1) of PRA 2010, the application of the special funding rules is disregarded for purposes of applying § 432 for the first plan year beginning after August 31, 2008. Thus, application of the special funding rules is not taken into account in any certification of plan status under § 432(b)(3) for that plan year or the adoption or update of a funding improvement plan or rehabilitation plan for that plan year.

F – Form 5500 Requirements

Q F–1. How should the effect of the application of the special funding rules under § 431(b)(8) for a plan year be reported if the plan sponsor decides to apply either or both of the special funding rules for that plan year and a Form 5500 and Schedule MB were filed for the plan year that did not reflect application of the special funding rules, as permitted under Notice 2010–56?

A F–1. If a plan sponsor decides to apply either or both of the special funding rules under § 431(b)(8) for a plan year after the filing of a Form 5500 and Schedule MB for that plan year that did not reflect application of the special funding rules, as permitted under Notice 2010–56, an amended Form 5500 and Schedule MB for that plan year are not required to be filed for that plan year. Instead, the Schedule MB filed for a subsequent plan year that is no later than the plan year beginning in 2010 must include an attachment showing how the information on a Schedule MB filed for any previous plan year would have differed if it had reflected application of the special funding rules (to the extent applicable) for any such previous plan year. The attachment already described in the instructions for Line 9f of the Schedule MB is an appropriate means for providing an explanation of this difference.

Q F–2. How should the effect of the application of the special funding rules under § 431(b)(8) for a plan year be reported if the plan sponsor decided to apply either or both of the special funding rules for that plan year and a Form 5500 and Schedule MB were filed for that plan year that reflected application of the special funding rules, but the calculations were different from the calculations required by this notice?

A F–2. If a plan sponsor decided to apply either or both of the special funding rules under § 431(b)(8) for a plan year and a Form 5500 and Schedule MB were filed for that plan year that reflected application of the special funding rules, but the calculations were different from the calculations required by this notice, an amended Form 5500 and Schedule MB are not required to be filed for that plan year. Instead, the Schedule MB filed for a subsequent plan year that is no later than the plan year beginning in 2010 must include an attachment showing how the information on a Schedule MB filed for any previous plan year would have differed if it had reflected application of the special funding rules (to the extent applicable) in accordance with this notice for any such previous plan year. The attachment already described in the instructions for Line 9f of the Schedule MB is an appropriate means for providing an explanation of this difference.

Q F–3. As an alternative to Q&A F–1 or Q&A F–2, if the special funding rules under § 431(b)(8) apply to a plan for which a Form 5500 and Schedule MB have already been filed as described in Q&A F–1 or Q&A F–2, may an amended Form 5500 with a revised Schedule MB be filed?

A F–3. As an alternative to Q&A F–1 or Q&A F–2, if the special funding rules under § 431(b)(8) apply to a plan for which a Form 5500 and Schedule MB have already been filed as described in Q&A F–1 or Q&A F–2, an amended Form 5500 with a revised Schedule MB showing corrected information for a previous plan year may be filed.

IV. PAPERWORK REDUCTION ACT

The collections of information contained in this notice have been approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. § 3507) under control number 1545–2196.

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 notice are in section III. The information is required in order to determine the application of the special funding rules under § 431(b)(8) and to provide the required notice of the decision to apply the special funding rules. The collections of information are mandatory for those plan sponsors who decide to use the special funding rules. The likely respondents are sponsors of multiemployer defined benefit plans. The estimated total number of respondents for 2010 and 2011 is 1,500.

The estimated annual burden per respondent varies from 45 minutes to 65 minutes, depending on individual circumstances, with an estimated average of 55 minutes.

The estimated total annual reporting and/or recordkeeping burden is 1,375 hours.

Estimates of the annualized cost to respondents for the hour burdens shown are not available at this time.

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

V. DRAFTING INFORMATION

The principal authors of this notice are Adrien LaBombarde and Yaguo Zhang of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to *RetirementPlanQuestions@irs.gov*.

Guidance on In-Plan Roth Rollovers

Notice 2010–84

I. PURPOSE

This notice provides guidance under § 402A(c)(4) of the Internal Revenue Code, relating to rollovers from § 401(k)

plans to designated Roth accounts in the same plan ("in-plan Roth rollovers"), as added by § 2112 of the Small Business Jobs Act of 2010 ("SBJA"), P.L. 111–240. The guidance in this notice also generally applies to rollovers from § 403(b) plans to designated Roth accounts in the same plan.

II. BACKGROUND

Section 402A of the Code sets forth the rules for designated Roth contributions. A designated Roth contribution is an elective deferral that would otherwise be excludable from gross income but that has been designated by the plan participant who elects the deferral as not being so excludable. An employee's designated Roth contributions and attributable earnings must be maintained by the plan in a separate account (a designated Roth account). A qualified distribution, as defined in § 402A(d)(2), from an employee's designated Roth account is excludable from gross income. A distribution from an employee's designated Roth account that is not a qualified distribution is includible in gross income pursuant to § 72 in proportion to the employee's investment in the contract (basis) and earnings on the contract.

Section 408A of the Code sets forth the rules for Roth IRAs. A Roth IRA is a type of IRA under which contributions are not deductible from the owner's gross income and qualified distributions, as defined in § 408A(d)(2), are excludable from gross income. Section 408A(d)(4) prescribes a special ordering rule for distributions from a Roth IRA.

Section 408A(d)(3)(A) of the Code provides that, generally, the taxable amount of a rollover or conversion to a Roth IRA is includible in gross income as if it were not rolled over or converted. For taxable years beginning in 2010 only, however, the taxable amount of a rollover or a conversion to a Roth IRA that would otherwise be includible in gross income for the taxable year beginning in 2010 is includible half in the taxable year beginning in 2011 and half in the taxable year beginning in 2012, unless the taxpayer elects to include the entire taxable amount in the taxable year beginning in 2010.

Section 408A(d)(3)(D) of the Code provides for such additional reporting "as the Secretary may require to ensure that amounts required to be included in gross income under [§ 408A(d)(3)(A)] are so included."

Under section 408A(d)(3)(E) of the Code, in the case of a taxpayer who is deferring income inclusion of the taxable amount of a rollover to a Roth IRA made in the taxpayer's taxable year beginning in 2010, the taxpayer's gross income for the taxable year beginning in 2010 or 2011 is increased by the amount of any distribution in such year from the Roth IRA that is allocable to the taxable amount of the rollover.

Section 408A(d)(3)(F) of the Code provides that any distribution from a Roth IRA that is allocable to the taxable amount of a rollover to the Roth IRA (other than from another Roth IRA or a designated Roth account) made within the preceding 5 taxable years is treated as includible in gross income for purposes of applying the 10% additional tax under § 72(t). The 5-year recapture rule also applies if the rollover to the Roth IRA is from a designated Roth account and the distribution is allocable to the taxable amount of an in-plan Roth rollover made within the preceding 5 years. (See Q&A–12 of this notice.)

Section 2112 of SBJA adds § 402A(c)(4) to the Code, effective for distributions made after September 27, 2010, to permit plans that include a qualified Roth contribution program to allow individuals to roll over amounts from their accounts other than designated Roth accounts to their designated Roth accounts in the plan. Currently, only § 401(k) plans and § 403(b) plans are permitted to include qualified Roth contribution programs. For taxable years beginning after 2010, § 2111 of SBJA permits governmental § 457(b) plans to include designated Roth accounts.

Section 402A(c)(4)(A) of the Code provides that any distribution described in § 402A(c)(4) is included in gross income as if it were not rolled over to a designated Roth account. However, for such distributions made in taxable years beginning in 2010, unless the individual elects to include the taxable amount of the distribution in gross income for the taxable year beginning in 2010, the taxable amount of the distribution is includible half in the taxable year beginning in 2011 and half in the taxable year beginning in 2012.

Section 402A(c)(4)(B) of the Code provides that in-plan Roth rollovers of eligible rollover distributions may only be made within a plan containing a qualified Roth contribution program from accounts other than designated Roth accounts and only if the otherwise applicable rollover requirements of §§ 402(c), 403(b)(8) and 457(e)(16) are satisfied.

Section 402A(c)(4)(D) of the Code provides that the rules of § 408A(d)(3)(D), (E), and (F) apply for purposes of § 402A(c)(4).

The Joint Committee on Taxation's Technical Explanation of H.R. 5297, which became SBJA, states that an employer may add new, permissible distribution options to a plan that are conditioned on the employee directly rolling over the distribution to his or her designated Roth account under the plan. (JCX–47–10, September 16, 2010, at page 42.)

III. GUIDANCE

Q–1. What is an "in-plan Roth rollover"?

A–1. An "in-plan Roth rollover" is a distribution from an individual's plan account, other than a designated Roth account, that is rolled over to the individual's designated Roth account in the same plan, pursuant to new § 402A(c)(4) of the Code. The rollover may be accomplished by a direct rollover (an "in-plan Roth direct rollover") or by a distribution of funds to the individual who then rolls over the funds into his or her designated Roth account in the plan within 60 days (an "in-plan Roth 60-day rollover"). Section 402A(c)(4) applies to distributions made after September 27, 2010.

Q–2. What amounts are eligible for in-plan Roth rollovers?

A–2. Any vested amount held in a plan account for a plan participant (other than an amount held in a designated Roth account) is eligible for an in-plan Roth rollover to a designated Roth account in the same plan. However, an amount is not eligible for an in-plan Roth rollover unless it satisfies the rules for distribution under the Code and is an eligible rollover distribution as defined in § 402(c)(4). Thus, in the case of a § 401(k) plan participant who has not had a severance from employment, an in-plan Roth rollover from the participant's pre-tax elective deferral account is

permitted to be made only if the participant has reached age 59½, has died or become disabled, or receives a qualified reservist distribution as defined in § 72(t)(2)(G)(iii). See Rev. Rul. 2004–12, 2004–1 C.B. 478, for a discussion of the various distribution timing restrictions applicable to amounts held in a plan. An amount is eligible for an in-plan Roth rollover only if the plan provides for such rollovers. But see Q&As–15 through –20 of this notice, permitting retroactive amendments for this purpose.

Q–3. Is an in-plan Roth direct rollover treated as a distribution for all purposes?

A–3. No. Because an in-plan Roth direct rollover merely changes the account in a plan under which an amount is held and the tax character of the amount, a distribution that is rolled over in an in-plan Roth direct rollover is not treated as a distribution for the following purposes:

(a) *Section 72(p) (relating to plan loans).* A plan loan transferred in an in-plan Roth direct rollover without changing the repayment schedule is not treated as a new loan (so the rule in § 1.72(p)–1, Q&A–20, of the Income Tax Regulations does not apply).

(b) *Section 401(a)(11) (relating to spousal annuities).* A married plan participant is not required to obtain spousal consent in connection with an election to make an in-plan Roth direct rollover.

(c) *Section 411(a)(11) (relating to participant consent before an immediate distribution of an accrued benefit in excess of $5,000).* The amount rolled over continues to be taken into account in determining whether the participant's accrued benefit exceeds $5,000, and a notice of the participant's right to defer receipt of the distribution is not triggered by the in-plan Roth direct rollover.

(d) *Section 411(d)(6)(B)(ii) (relating to elimination of optional forms of benefit).* A participant who had a distribution right (such as a right to an immediate distribution of the amount rolled over) prior to the rollover cannot have this right eliminated through an in-plan Roth direct rollover.

Q–4. Can a plan add an in-plan Roth direct rollover option for amounts that are not otherwise distributable under the terms of the plan but that would be permitted to be distributed under the Code if the plan so provided?

A–4. Yes. A plan may be amended to add an in-plan Roth direct rollover option for amounts that are permitted to be distributed under the Code but that have not been distributable under more restrictive terms contained in the plan. Moreover, such an amendment is not required to permit any other rollover or distribution option for these amounts. For example, a plan that does not currently allow for in-service distributions from a participant's pre-tax elective deferral account may be amended to permit in-plan Roth direct rollovers from this account by participants who have attained age 59½, while not otherwise permitting distribution of these amounts. (However, a plan amendment imposing such a restriction on a pre-existing distribution option would violate § 411(d)(6).)

Q–5. Must a plan that offers in-plan Roth rollovers include a description of this feature in the written explanation the plan provides pursuant to § 402(f) to an individual receiving an eligible rollover distribution?

A–5. Yes. For example, if the plan administrator generally bases its explanation under § 402(f) on the safe harbor explanation published in Notice 2009–68, 2009–39 I.R.B. 423, the safe harbor explanation for payments not from a designated Roth account could be revised by adding a new section in the "SPECIAL RULES AND OPTIONS" portion of the explanation that describes the consequences if the distributee were to roll over a payment to a designated Roth account in the same plan, including the following information:

- If the distributee rolls over the payment to a designated Roth account in the plan, the amount of the payment rolled over (reduced by any after-tax amounts directly rolled over) will be taxed. However, the 10% additional tax on early distributions will not apply (unless the distributee takes the amount rolled over out of the designated Roth account within the 5-year period that begins on January 1 of the year of the rollover). For payments from the plan in 2010 that are rolled over to a designated Roth account in the plan (and that are not distributed from that account until after 2011), the taxable amount of the rollover will be taxed half in 2011 and half in 2012, unless the distributee elects to be taxed in 2010.
- If the distributee rolls over the payment to a designated Roth account in the plan, later payments from the designated Roth account that are qualified distributions will not be taxed (including earnings after the rollover). A qualified distribution from a designated Roth account is a payment made both after the distributee attains age 59½ (or after the distributee's death or disability) and after the distributee has had a designated Roth account in the plan for a period of at least 5 years. The 5-year period described in the preceding sentence begins on January 1 of the year the distributee's first contribution was made to the designated Roth account. However, if the distributee made a direct rollover to a designated Roth account in the plan from a designated Roth account in a plan of another employer, the 5-year period begins on January 1 of the year the distributee's first contribution was made to the designated Roth account in the plan or, if earlier, to the designated Roth account in the plan of the other employer. Payments from the designated Roth account that are not qualified distributions will be taxed to the extent allocable to earnings after the rollover, including the 10% additional tax on early distributions (unless an exception applies).

The section in the safe harbor explanation on payments to a Roth IRA would also need to be revised to reflect that rollovers to the plan's designated Roth account are permitted. Further, for an in-plan Roth direct rollover for in which other distribution alternatives are not available, the safe harbor explanation would need to be revised to reflect the inapplicability of information in the explanation about other distribution alternatives.

Q–6. If a participant elects an in-plan Roth rollover, can he or she later unwind the in-plan Roth rollover, as can be done with rollovers to Roth IRAs?

A–6. No. The recharacterization rule in § 408A(d)(6) applies only to contributions to IRAs.

Q–7. What are the tax consequences of an in-plan Roth rollover?

A–7. The taxable amount of the in-plan Roth rollover must be included in the participant's gross income. The taxable amount of an in-plan Roth rollover is the amount that would be includible in a participant's gross income if the rollover were made to a Roth IRA. This amount is equal to the fair market value of the distribution reduced by any basis the participant has in the distribution. (See Notice 2009–75, 2009–35 I.R.B. 436.) Thus, if the distribution includes employer securities attributable to employee contributions, the fair market value includes any net unrealized appreciation within the meaning of § 402(e)(4). If an outstanding loan is rolled over in an in-plan Roth rollover, the amount includible in gross income is the balance of the loan.

Q–8. Are in-plan Roth direct rollovers subject to 20% mandatory withholding?

A–8. No, 20% mandatory withholding under § 3405(c) does not apply to an in-plan Roth direct rollover. However, a participant electing an in-plan Roth rollover may have to increase his or her withholding or make estimated tax payments to avoid an underpayment penalty. See Publication 505, *Tax Withholding and Estimated Tax.*

Q–9. When is the taxable amount of an in-plan Roth rollover includible in gross income?

A–9. Generally, the taxable amount of a distribution that an individual rolls over in an in-plan Roth rollover is includible in gross income in the taxable year in which the distribution occurs.

Q–10. Is there an exception to the general rule regarding the year of income inclusion for in-plan Roth rollovers made in 2010?

A–10. Yes. For distributions made in 2010 that are rolled over in an in-plan Roth rollover, the taxable amount is includible in gross income half in 2011 and half in 2012 unless the individual elects to include the taxable amount in gross income in 2010 (or unless the special rules described in Q&A–11 of this notice apply). An individual's election of 2010 income inclusion may not be changed after the due date (including extensions) for filing the individual's 2010 income tax return. The election applies to all of an individual's 2010 distributions that are rolled over in an in-plan Roth rollover. The election is independent of any election made with respect to qualified rollover contributions (as defined in § 408A(e)) to a Roth IRA from either a non-Roth IRA or a plan account other than a designated Roth account. The rules in this Q&A–10 and in Q&A–11 relating to the years 2010, 2011 and 2012 apply to calendar-year taxpayers; parallel rules apply to taxable years beginning in 2010, 2011 and 2012 for individuals who are not calendar-year taxpayers.

Q–11. If a plan participant is deferring, to 2011 and 2012, inclusion in income of the taxable amount from a 2010 in-plan Roth rollover, are there any special income acceleration rules for distributions allocable to the 2010 in-plan Roth rollover?

A–11. Yes, pursuant to §§ 402A(c)(4)(D) and 408A(d)(3)(E), if the participant receives a distribution of an amount in 2010 or 2011 allocable to the taxable amount of a 2010 in-plan Roth rollover that would otherwise not be includible in gross income until 2011 and 2012, then the participant's gross income for the year of the distribution is increased by the amount of the distribution that would otherwise not be includible in gross income until a later year. In such a case, the amount that would otherwise be includible in the participant's gross income in 2012 is reduced by the income accelerated. Also, if the distribution is made in 2010, the amount that would otherwise be includible in the participant's gross income in 2011 is reduced by the amount the income accelerated to 2010 exceeds the amount that would otherwise be includible in income in 2012.

For example, if a participant makes an in-plan Roth rollover in 2010 with the taxable amount of the rollover, $8,000, being deferred to 2011 and 2012 and then takes a distribution in 2010 or 2011 from the designated Roth account that consists of $5,000 allocable to the taxable amount of the 2010 in-plan Roth rollover, then the participant's gross income for the year of the distribution must be increased by the taxable amount of the rollover that would otherwise be deferred to a later year. If this distribution occurred in 2010, the $5,000 is included in the participant's 2010 gross income and the remaining taxable amount of the 2010 in-plan Roth rollover, $3,000, is included in the participant's 2011 gross income.

The income acceleration rule in this Q&A–11 does not apply to a distribution that is rolled over to another designated Roth account of the participant or to a Roth IRA owned by the participant; however, the rule does apply to subsequent distributions made from such other designated Roth account or Roth IRA in 2010 or 2011. For purposes of this Q&A–11, the rules in §§ 1.408A–4, Q&A–11, and 1.408A–6, Q&A–6, on income acceleration (as modified by substituting the 2-year spread under § 2112 of SBJA for the 4-year spread in the regulations under § 408A of the Code) also apply. See Q&A–13 of this notice for rules on allocating distributions to in-plan Roth rollovers.

Q–12. Are there any special rules relating to the application of the 10% additional tax under § 72(t) for distributions allocable to the taxable amount of an in-plan Roth rollover made within the preceding 5 years?

A–12. Yes, pursuant to §§ 402A(c)(4)(D) and 408A(d)(3)(F), if an amount allocable to the taxable amount of an in-plan Roth rollover is distributed within the 5-taxable-year period beginning with the first day of the participant's taxable year in which the rollover was made, the amount distributed is treated as includible in gross income for the purpose of applying § 72(t) to the distribution. The 5-taxable-year period ends on the last day of the participant's fifth taxable year in the period. Thus, if a participant withdraws an amount that includes $6,000 allocable to the taxable amount of an in-plan Roth rollover made within the preceding 5 years, the $6,000 is treated as includible in the participant's gross income for purposes of applying § 72(t) to the distribution. In such a case, the participant would owe an additional tax of $600 unless an exception under § 72(t)(2) applies. The 5-year recapture rule in this Q&A–12 does not apply to a distribution that is rolled over to another designated Roth account of the participant or to a Roth IRA owned by the participant; however, the rule does apply to subsequent distributions made from such other designated Roth account or Roth IRA within the 5-taxable-year period. For purposes of this Q&A–12, the rules in § 1.408A–6, Q&A–5, on the application of § 72(t) also apply. See Q&A–13 of this notice for rules on allocating distributions to the taxable amount of in-plan Roth rollovers.

Q–13. How is an amount distributed from a plan allocated to the taxable amount of an in-plan Roth rollover for purposes of Q&As–11 and –12 of this notice?

A–13. Solely for purposes of the income acceleration rule in Q&A–11 and the 5-year recapture rule in Q&A–12, an amount distributed that, under the terms of the plan, is paid from a separate account maintained solely for in-plan Roth rollovers (an in-plan Roth rollover account) is treated as attributable to an in-plan Roth rollover to the extent the amount distributed constitutes recovery of basis determined under the rules of § 72 and § 1.402A–1, Q&A–9.

Any amount distributed from a designated Roth account that, under the terms of the plan is not paid from an in-plan Roth rollover account, is treated as attributable to an in-plan Roth rollover to the extent the portion of the distribution that represents a recovery of basis under the rules of § 72 and § 1.402A–1, Q&A–9, exceeds the basis in the designated Roth account other than the basis resulting from in-plan Roth rollovers.

If an amount distributed is treated as attributable to an in-plan Roth rollover, then the rules of § 408A(d)(4)(B)(ii)(II) and the last sentence of § 408A(d)(4) apply. Thus, a distribution is attributed to an in-plan Roth rollover on a first-in-first-out basis and any amount attributed to such a rollover is allocated first to the taxable amount of the rollover.

Example.

In 2010, Participant P, age 45, makes a $100,000 in-plan Roth direct rollover from his profit-sharing account and defers the inclusion of the $90,000 taxable amount of the rollover to 2011 and 2012 ($45,000 in 2011 and $45,000 in 2012). At the time of the in-plan Roth direct rollover, P's designated Roth account contains $78,000 of regular Roth contributions and $25,000 of earnings. Since this is an in-plan Roth direct rollover, the rollover amount is separately accounted for within the designated Roth account. Later in 2010, P takes a $106,000 in-service withdrawal from his designated Roth account. The source can only be the in-plan Roth rollover account, since P is under age 59½, which is the earliest the plan allows in-service distributions of elective deferrals from a designated Roth account. At the time of the distribution, P's designated Roth account consists of:

In-Plan Roth Rollover Account:		
	In-plan Roth rollover contributions ($10,000 basis)	$100,000
	Earnings	$6,000
	Total	$106,000
Regular Roth Account:		
	Regular Roth contributions	$80,000
	Earnings	$24,000
	Total	$104,000
Total in designated Roth account		$210,000

Under the *pro-rata* rules of § 72, of the $106,000 distribution, $106,000 x 30,000/210,000, or $15,143, is includible in P's gross income. All of the $90,857 of the distribution that is a return of basis is allocated to the in-plan Roth rollover account. P is subject to the additional 10% tax under § 72(t) on $105,143 (the $90,000 taxable amount of the in-plan Roth rollover under the 5-year recapture rule plus $15,143 that is includible in P's gross income under the *pro-rata* rules of § 72). Also, the entire $90,000 taxable amount of the in-plan Roth rollover is includible in P's gross income for 2010 (rather than being includible in gross income half in 2011 and half in 2012).

Since the amount of the in-plan Roth rollover was $100,000, there is $9,143 that may still be allocated to the rollover. This will be reported on a Form 1099-R, *Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.*, by the trustee if another distribution within 5 years is allocable to this rollover, but none of it will be subject to § 72(t) under the 5-year recapture rule because all the taxable amount of the in-plan Roth rollover has been used up.

If P were eligible for a distribution from his regular Roth account within his designated Roth account, he could have withdrawn $93,333 and none of it would be allocable to the in-plan Roth rollover (because, of the $93,333 distribution, $80,000 is a return of basis and that would be absorbed by the $80,000 basis in P's regular Roth account). If P withdrew more than $93,333, some would be allocated to the taxable amount of the in-plan Roth rollover even if P asked that the distribution be made from his regular Roth account.

Q–14. Is a beneficiary or alternate payee eligible to elect an in-plan Roth rollover?

A–14. An in-plan Roth rollover can be elected by a beneficiary only if he or she is a surviving spouse and by an alternate payee only if he or she is a spouse or former spouse. This is because in-plan Roth rollovers can only be elected with respect to distributions that are eligible rollover distributions as defined in § 402(c)(4) that can be rolled over to § 401(k) plans. Section 402(c)(4) defines an eligible rollover distribution as any of certain distributions "to an employee." Section 402(c)(9) and § 402(e)(1)(B) provide that a spousal beneficiary, and an alternate payee who is a spouse or former spouse, is treated as the employee for purposes of § 402(c)(4). (While § 402(c)(11) permits a non-spouse beneficiary to elect rollover treatment of certain amounts, that provision does not apply to rollovers to qualified plans.)

Q–15. Is a plan amendment providing for in-plan Roth rollovers in a § 401(k) plan required to be adopted by the end of the 2010 plan year?

A–15. No. Under section 5.02 of Rev. Proc. 2007–44, 2007–2 C.B. 54, which sets forth certain deadlines for adopting amendments to qualified plans, a plan amendment that provides for in-plan Roth rollovers is a discretionary amendment and ordinarily the amendment would have to be adopted by the last day of the plan year in which the amendment is effective. However, to give plan sponsors sufficient time to adopt plan amendments and thereby enable plan participants to make in-plan Roth rollovers before the end of the 2010 plan year, the Service is extending the deadline for adopting a plan amendment described in Q&A–17 (including amendments to provide for in-plan Roth rollovers in a § 401(k) plan) to the later of the last day of the plan year in which the amendment is effective or December 31, 2011, provided that the amendment is effective as of the date the plan first operates in accordance with the amendment.

Q–16. What is the deadline for adopting a plan amendment providing for in-plan Roth rollovers in a § 403(b) plan?

A–16. Announcement 2009–89, 2009–52 I.R.B. 1009, provides that if an employer adopts, on or before December 31, 2009 (or, if later, the date the plan is established) a written § 403(b) plan intended to satisfy the requirements of § 403(b) and the regulations, the employer will have a remedial amendment period in which to amend the plan to correct any form defects retroactive to January 1, 2010 (or the date the plan is established), provided that the employer subsequently adopts a pre-approved plan that has received a favorable opinion letter from the Service or applies for an individual determination letter, under forthcoming procedures. In this case, the employer will have reliance that the form of its written plan satisfies the requirements of § 403(b) and the regulations, provided that, during the remedial amendment period, the plan is amended to correct any defects retroactive to January 1, 2010 (or the date the plan is established). In the case of a § 403(b) plan that has a remedial amendment period pursuant to Announcement 2009–89, a plan amendment described in Q&A–17 (including a plan amendment providing for in-plan Roth rollovers) is not required to be adopted before the later of the end of that remedial amendment period or the last day of the first plan year in which the amendment is effective, provided the amendment is effective as of the date the plan first operates in accordance with the amendment.

Q–17. What plan amendments does the extension of time under Q&A–15 or Q&A–16 apply to?

A–17. The extension of time to adopt a plan amendment under Q&A–15 or Q&A–16 applies to any plan amendment that is adopted pursuant to § 2112 of SBJA. Thus, for example, if a § 401(k) plan or a § 403(b) plan is amended to permit in-plan Roth rollovers, the applicable extension of time under Q&A–15 or Q&A–16 applies to a plan amendment that permits elective deferrals under the plan to be designated as Roth contributions, a plan amendment that provides for the acceptance of rollover contributions by the designated Roth account, and the plan amendment that permits in-plan Roth rollovers, including a plan amendment described in Q&A–4. However, the extension of time to adopt a plan amendment does not apply to a plan amendment that adds a § 401(k) cash or deferred arrangement to the plan. See § 1.401(k)–1(a)(3)(iii)(A).

Q–18. Does the extension of time described in Q&As–15 through –17 of this notice apply to § 401(k) safe harbor plans described in § 401(k)(12) or (13)?

A–18. Yes, however, instead of the extension being to the later of the last day of the plan year in which the amendment is effective or December 31, 2011, the extension for a § 401(k) safe harbor plan described in § 401(k)(12) or (13) is to the later of December 31, 2011, or the time specified in § 1.401(k)–3(e)(1) (requiring, generally, that safe harbor plan provisions be adopted before the first day of the plan year in which they are effective). Thus, for example, a § 401(k) safe harbor plan with a plan year beginning July 1 may operationally comply with § 2112 of SBJA during the plan year beginning July 1, 2010 (for distributions made after September 27, 2010) and the plan year beginning July 1, 2011, without having to be amended for such change in operation until December 31, 2011.

Q–19. Must a plan have a qualified Roth contribution program in place at the time a rollover contribution to a designated Roth account is made in an in-plan Roth rollover?

A–19. Yes. Thus, for participants to be eligible for the 2-year income deferral described in Q&A–10 of this notice, the distribution must be made no later than December 31, 2010, and, at the time of the rollover contribution to the designated Roth account, the plan must have a qualified Roth contribution program in place.

Q–20. For purposes of Q&A–19 of this notice, when is a qualified Roth contribution program in place?

A–20. Although, pursuant to Q&As–15 through –18 of this notice, a plan may be amended retroactively to add a qualified Roth contribution program, such a program is in place on a given date only if, with respect to compensation that could be deferred beginning with that date, eligible employees are given an opportunity to elect on that date to have designated Roth contributions made to the plan (or would have such an opportunity but for a statutory or plan limitation on the amount of an employee's elective deferrals).

DRAFTING INFORMATION

The principal author of this notice is Roger Kuehnle of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to *RetirementPlanQuestions@irs.gov*.

Undue Hardship Waiver of the Section 6011(e)(3) Electronic Filing Requirement and Taxpayer Choice Statements to File in Paper Format

Notice 2010–85

PURPOSE

This notice contains a proposed revenue procedure that provides guidance to specified tax return preparers regarding the format and content of requests for waiver of the magnetic media (electronic) filing requirement due to undue hardship, under section 6011(e)(3) of the Internal Revenue Code and proposed § 301.6011–6 of the Regulations on Procedure and Administration (26 CFR Part 301), which is being published contemporaneously with this notice. The proposed revenue procedure also provides guidance regarding the time and manner in which specified tax return preparers who seek an undue hardship waiver of the electronic filing requirement must submit their written requests for consideration by the IRS. Finally, the proposed revenue procedure provides guidance to tax return preparers, specified tax return preparers, and taxpayers regarding how to document a taxpayer's choice to file the taxpayer's individual income tax return in paper format when the return is prepared by a tax return preparer or specified tax return preparer but filed by the taxpayer.

Proposed § 301.6011–6 implements the requirement under newly enacted section 6011(e)(3) that all specified tax return preparers, generally tax return preparers who reasonably expect to file (if the preparer is a member of a firm, whose firm's members in the aggregate reasonably expect to file) more than 10 individual income tax returns in a calendar year, electronically file all individual income tax returns they prepare

and file. To promote the effective and efficient administration of the electronic filing requirement in section 6011(e)(3), proposed § 301.6011–6(a)(3) provides a transition rule for 2011, based upon the number of individual income tax returns a tax return preparer reasonably expects (if the preparer is a member of a firm, the preparer's firm members in the aggregate reasonably expect) to file, to permit the IRS and affected tax return preparers sufficient time to prepare for and implement the requirement of section 6011(e)(3) and proposed § 301.6011–6. Beginning January 1, 2011, tax return preparers who reasonably expect to file (if a preparer is a member of a firm, the firm's members in the aggregate reasonably expect to file) 100 or more individual income tax returns in calendar year 2011 are specified tax return preparers who are subject to these regulations in 2011. Beginning January 1, 2012, tax return preparers who reasonably expect to file (if a preparer is a member of a firm, the firm's members in the aggregate reasonably expect to file) 11 or more individual income tax returns in a calendar year are specified tax return preparers who are subject to these regulations for that calendar year.

Proposed § 301.6011–6(c)(1) authorizes the IRS to grant to a specified tax return preparer a waiver of this requirement in the case of undue hardship upon application by the specified tax return preparer consistent with instructions provided in additional published guidance and as prescribed in relevant forms and instructions. Proposed § 301.6011–6(a)(4)(ii) also provides that a specified tax return preparer is not required to electronically file individual income tax returns that taxpayers choose to file in paper format and which the taxpayers file with the IRS themselves, and that the IRS may provide guidance through forms, instructions, or other appropriate guidance regarding how a preparer can document a taxpayer's choice to file in paper format. The proposed revenue procedure provides such additional guidance regarding undue hardship waiver requests and regarding how the preparer can document a taxpayer's choice to file individual income tax returns in paper format.

The IRS requests comments on this proposed revenue procedure. In particular, the IRS requests comments regarding the procedures and methods for how a specified tax return preparer can request and obtain an undue hardship waiver, the proposed time period for making an undue hardship waiver request, and the elements required to be provided in an undue hardship waiver request, as well as comments on the Paperwork Reduction Act burden estimates contained in Section 11 of the proposed revenue procedure. The IRS also requests comments on the proposed procedures for how a preparer can document a taxpayer's choice to file an individual income tax return in paper format. The comments should address procedures or mechanisms intended to make the proposed revenue procedure more efficient or functional.

Interested parties are invited to submit comments on this notice by January 3, 2011. Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2010–85), Room 5205, 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 2010–85), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Comments may also be submitted electronically via the following e-mail address: *Notice.Comments@irscounsel.treas.gov*. Please include "Notice 2010–85" in the subject line of any electronic submission.

For calendar year 2011 only, and only until such time that the proposed revenue procedure is published in final form or Form 8944 is finalized and approved, tax return preparers who meet the definition of a *specified tax return preparer* for calendar year 2011 and who believe they may qualify for an undue hardship waiver may voluntarily submit written waiver requests to the IRS, and will not be required to use Form 8944 if the form is not yet publically available, provided each hardship waiver request contains the information described in sections 6.02(1) — (12) and 6.03 of the proposed revenue procedure. The IRS will provide further information on processing these hardship waiver requests, including time, place and date information, in a later announcement or notice.

For further information regarding this notice, contact Keith Brau of the Office of Associate Chief Counsel (Procedure & Administration). Mr. Brau may be contacted at 202–622–4940 (not a toll-free call).

APPENDIX (PROPOSED REVENUE PROCEDURE)

SECTION 1. PURPOSE

This revenue procedure provides guidance to specified tax return preparers regarding the format and content of requests for waiver of the magnetic media (electronic) filing requirement due to undue hardship, and regarding the time and manner in which specified tax return preparers who seek an undue hardship waiver of the electronic filing requirement must submit their written requests for consideration by the IRS, under section 6011(e)(3) and § 301.6011–6 of the Regulations on Procedure and Administration (26 CFR Part 301). This revenue procedure also provides guidance to tax return preparers, specified tax return preparers, and taxpayers regarding how to document a taxpayer's choice to file an individual income tax return in paper format when the return is prepared by a tax return preparer or specified tax return preparer but filed by the taxpayer.

SECTION 2. BACKGROUND

.01 Pursuant to section 6011(e)(3), § 301.6011–6 implements the requirement that specified tax return preparers file individual income tax returns electronically if they prepare and file the returns for taxpayers. Under section 6011(e)(3)(B) and as further defined in § 301.6011–6(a)(3), a specified tax return preparer means, with respect to any calendar year, any tax return preparer within the meaning of section 7701(a)(36) and § 301.7701–15 who prepares any individual income tax return

unless such tax return preparer reasonably expects to file 10 or fewer individual income tax returns in the calendar year, and if a person who is a tax return preparer is a member of a firm, that person is a specified tax return preparer unless the person's firm members in the aggregate reasonably expect to file 10 or fewer individual income tax returns in a calendar year. Solely for the 2011 calendar year, a tax return preparer will not be considered a specified tax return preparer if the preparer reasonably expects, or if the preparer is a member of a firm, the firm's members in the aggregate reasonably expect, to file fewer than 100 individual income tax returns in the 2011 calendar year. Solely for purposes of section 6011(e)(3) and § 301.6011–6, an individual is considered a member of a firm if the individual is an employee, agent, member, partner, shareholder, or other equity holder of the firm.

.02 Section 6011(e)(3)(C) and § 301.6011–6(a)(2) define an individual income tax return as any return of income tax imposed by subtitle A on individuals, estates, and trusts. This includes the Form 1040 series of income tax returns for individuals, the Form 1041 series of income tax returns for estates and trusts, and Form 990–T (*Exempt Organization Business Income Tax Return*) when the exempt organization is a trust subject to tax on unrelated business taxable income under section 511(b).

.03 Under § 301.6011–6(b) any individual income tax return prepared by a specified tax return preparer in a calendar year must be filed on magnetic media if the return is filed by the specified tax return preparer.

.04 Section 301.6011–6(a)(4)(i) provides that an individual income tax return is considered to be *filed* by a tax return preparer or a specified tax return preparer if the preparer or any member, employee or agent of the preparer or the preparer's firm submits the tax return to the IRS on the taxpayer's behalf, either electronically (by e-file or other magnetic media) or in non-electronic or non-magnetic media (paper) form. Submission of a tax return in paper form includes the direct or indirect transmission, sending, mailing, or otherwise delivering of the paper tax return to the IRS by the tax return preparer or the specified tax return preparer, or by any member, employee, or agent of the preparer or the preparer's firm, and includes any act or acts of assistance that go beyond providing filing or delivery instructions to the taxpayer.

.05 Section 301.6011–6(a)(4)(ii) also provides that a tax return preparer or specified tax return preparer, or the preparer's firm, is not required to electronically file an individual income tax return if the preparer who prepared the return obtains a signed statement from the taxpayer that states the taxpayer chooses to file the return in paper format and that the taxpayer, and not the preparer, is submitting the paper return to the IRS. Such statement must be signed by the taxpayer (by both spouses if a joint return) and dated on or before the date the taxpayer files the return. The IRS may provide guidance through forms, instructions or other appropriate guidance regarding how the preparer can document a taxpayer's choice to file a paper individual income tax return. This revenue procedure provides guidance to tax return preparers, specified tax return preparers, and taxpayers regarding how tax return preparers and specified tax return preparers can document a taxpayer's choice to file an individual income tax return in paper format.

.06 Section 301.6011–6(c)(1) authorizes the IRS to grant a waiver of the electronic filing requirement in cases of undue hardship to specified tax return preparers requesting an undue hardship waiver in the manner prescribed in IRS forms, instructions, or other appropriate guidance. This revenue procedure prescribes guidance on how to submit an undue hardship waiver request for consideration by the IRS.

SECTION 3. SCOPE

.01 *Undue Hardship Waiver Requests*. This revenue procedure applies to all specified tax return preparers, as defined in section 6011(e)(3)(B) and § 301.6011–6(a)(3), who seek a waiver of the electronic filing requirement in cases of undue hardship. This revenue procedure is intended to be applicable immediately to specified tax return preparers who reasonably expect to file, or if a member of a firm whose firm's members in the aggregate reasonably expect to file, 100 or more individual income tax returns in calendar year 2011. An undue hardship waiver, however, is not needed for, and waiver requests will not be accepted from, any tax return preparer who during calendar year 2011 is not required to file individual income tax returns electronically due to the transition rule set forth in § 301.6011–6(a)(3), *i.e.* tax return preparers who reasonably expect to file, or if a member of a firm whose firm's members in the aggregate reasonably expect to file, more than 10 but fewer than 100 individual income tax returns during calendar year 2011. For these tax return preparers, this revenue procedure will apply to undue hardship waiver requests for calendar year 2012 and thereafter.

.02 *Documenting a Taxpayer's Choice to File Return in Paper Format*. The provisions of this revenue procedure that explain how tax return preparers and specified tax return preparers can document a taxpayer's choice to file an individual income tax return in paper format are intended to be applicable immediately.

SECTION 4. OTHER EXCLUSIONS FROM THE ELECTRONIC FILING REQUIREMENT

.01 *In General*. Section 301.6011–6(c)(2) provides for a second category of exclusion or exemption from the electronic filing requirement of section 6011(e)(3) and § 301.6011–6, administrative exemptions.

.02 *Administrative Exemptions*. Under § 301.6011–6(c)(2), the IRS may provide administrative exemptions for certain classes of specified tax return preparers or types of individual income tax returns, as the IRS determines necessary to promote the effective and efficient administration of section 6011(e)(3) and § 301.6011–6. The IRS generally will provide an administrative exemption, and not an undue hardship waiver, when technology issues affecting a range of specified tax return preparers in a similar manner prevent specified tax return preparers from filing returns electronically. Undue hardship waiver requests should not be submitted by or for specified tax return preparers, or for the individual income tax returns they prepare and file, that meet the criteria for an administrative exemption for purposes of claiming the exemption. The IRS will provide the criteria and procedures for claiming an administrative exemption, if

any, through forms, instructions, or other appropriate guidance.

.03 *Further Information*. Further information on the electronic filing requirement, undue hardship waiver requests, documentation for a taxpayer's choice to file in paper format, and administrative exemptions will be posted on *www.irs.gov* and may also be available in recorded messages on an IRS telephone help-line. The IRS also intends to post answers to Frequently Asked Questions on *www.irs.gov*.

SECTION 5. REQUESTS FOR WAIVER OF THE ELECTRONIC FILING REQUIREMENT DUE TO UNDUE HARDSHIP

.01 Under § 301.6011–6(c)(1), the IRS may grant waivers of the electronic filing requirement in cases of undue hardship. Undue hardship waivers generally are intended to be granted to specified tax return preparers for undue hardships that can be identified in advance before the specified tax return preparers would otherwise be required to file individual income tax returns electronically for a particular calendar year.

.02 The IRS will ordinarily grant undue hardship waivers only in rare cases. An undue hardship waiver may be granted to a specified tax return preparer for a specified period of time or for a series or class of individual income tax returns, although undue hardship waivers will not ordinarily be granted for more than one calendar year period.

.03 A specified tax return preparer must request an undue hardship waiver in the manner prescribed in this revenue procedure. See section 6 below.

.04 The IRS will approve or deny requests for an undue hardship waiver of the electronic filing requirement based on each specified tax return preparer's particular facts and circumstances. In determining whether to approve or deny an undue hardship waiver request, the IRS may consider the specified tax return preparer's ability to file individual income tax returns electronically without incurring an undue financial hardship. The IRS will generally grant an undue hardship waiver only when the specified tax return preparer can demonstrate the undue hardship that would result by complying with the electronic filing requirement, including, but not limited to, any incremental costs to the specified tax return preparer.

.05 The fact that a specified tax return preparer does not have a computer or appropriate software or does not desire to obtain or use a computer or software does not, standing alone, constitute an undue hardship. An undue hardship waiver request based solely on this fact or personal desire, without any further explanation or justification, will be denied.

SECTION 6. WAIVER REQUEST FORM CLAIMING UNDUE HARDSHIP

.01 To request an undue hardship waiver the specified tax return preparer must complete a Form 8944, *Preparer e-file Hardship Waiver Request*, and submit the completed form and the documentation required by the instructions to the form to the IRS at the address provided in the instructions to the form. (Note Form 8944 and accompanying instructions have not been published by the IRS as of the date of the release of this notice. The IRS will publish a final Form 8944 when available.)

.02 In completing Form 8944, the specified tax return preparer seeking the waiver must provide all information requested by that form. This information may include:

(1) The name, address, email address, telephone number and other contact information for the requesting specified tax return preparer;

(2) The specified tax return preparer's preparer tax identification number (PTIN), and, if the specified tax return preparer is a member of a firm, the firm's employer identification number (EIN);

(3) The reason for the waiver request, for example, financial hardship, personal hardship (personal or business casualty, bankruptcy, other), or other hardship (technical or systems-based, client-based);

(4) The calendar year for which the waiver is being requested;

(5) The type of individual income tax form or forms to which the waiver is to apply, or a statement that the specified tax return preparer is seeking a general undue hardship waiver applicable to the specified tax return preparer for all individual income tax returns the specified tax return preparer may file in that calendar year;

(6) Information regarding the specified tax return preparer's history of filing individual income tax returns on behalf of clients, and the number of individual income tax returns the preparer reasonably expects to file in the year for which the waiver is being requested;

(7) An explanation of the process by which the specified tax return preparer prepares and files individual income tax returns, and of the systems and technologies the specified tax return preparer uses to prepare and file the returns;

(8) An explanation of the steps the specified tax return preparer has taken to meet the requirement to timely file the individual income tax returns electronically and why the steps were unsuccessful (if applicable), the undue hardship that would result by complying with the electronic filing requirement, including gross income earned from tax return preparation and any estimated incremental costs to the specified tax return preparer of complying with this requirement (with two vendor estimates or advertising material itemizing these costs), and whether adjustments to preparation fees can offset the estimated additional costs;

(9) If applicable, an explanation of the nature of any other personal (non-financial) hardship, how this personal hardship affects the specified tax return preparer's individual income tax return preparation ability and/or business, and what steps are still needed to overcome the claimed personal hardship or to become enabled to electronically file individual income tax returns;

(10) If applicable, an explanation of the basis for waiver requests not based on hardship to the specified tax return preparer, the steps that have been taken by the specified tax return preparer to become an electronic filer of the affected individual income tax returns (and the results of those steps), and the steps that are still needed to be taken by the specified tax return preparer to become enabled to electronically file the affected individual income tax returns;

(11) A statement describing the steps the specified tax return preparer will take to ensure the preparer's ability to file future individual income tax returns electronically;

(12) A statement signed under penalty of perjury that, to the best of the specified tax return preparer's knowledge, the infor-

mation provided is true, correct and complete; and

(13) Any other information the IRS determines necessary or helpful in considering whether to grant a waiver request as set forth in forms, instructions, or other guidance.

.03 The Form 8944 must be signed and dated.

.04 The Form 8944 and any notice from the IRS granting an undue hardship waiver should not be attached to a taxpayer's paper individual income tax return. This form and any notice should be retained by the tax return preparer.

SECTION 7. TIME FOR FILING A WAIVER REQUEST

.01 Because the electronic filing requirement under section 6011(e)(3) and § 301.6011–6 is based on a determination of how many individual income tax returns a tax return preparer reasonably expects, or if a member of a firm, the firm's members in the aggregate reasonably expect, to file during a calendar year, a specified tax return preparer must make this reasonable expectation determination prior to the time the specified tax return preparer or the preparer's firm first files an individual income tax return during the calendar year.

.02 Tax return preparers who meet the definition of specified tax return preparer must therefore ordinarily submit their requests for undue hardship waivers between October 1 of the calendar year preceding the applicable calendar year and February 15 of the applicable calendar year. This will give the IRS time to process the undue hardship waiver request. Untimely requests for undue hardship waivers will not be considered absent the existence of unusual or unforeseen and unavoidable circumstances. It is important to submit requests for undue hardship waivers timely because if a waiver request is denied, it can take up to 45 days to obtain authorization from the IRS to electronically file individual income tax returns. *See* IRS Publication 3112, *IRS e-file Application and Participation*.

SECTION 8. APPROVAL OF THE WAIVER REQUEST AND RECONSIDERATION OF DENIED WAIVER REQUESTS

.01 The IRS will review and process undue hardship waiver requests in a timely manner and will send the specified tax return preparer written notice of any approval or denial of the undue hardship waiver request. The IRS will not be considered to have waived the electronic filing requirement unless the specified tax return preparer receives written notice from the IRS that the undue hardship waiver request has been approved.

.02 If an undue hardship waiver request is denied, the specified tax return preparer may send a written request for reconsideration to the address listed on the written notice of denial by the date specified on that notice. The specified tax return preparer must state in the request for reconsideration the grounds for reconsideration and may include additional information or documentation, if any, to support the request for reconsideration. The Electronic Products and Services Support e-help Operation Manager (or designee) will make a reconsideration determination in writing on whether to approve or deny the undue hardship waiver request, as supplemented by the request for reconsideration and will send the specified tax return preparer written notice of any approval or denial of the undue hardship waiver request. There is no further administrative review of this reconsideration determination, nor is there a right to judicial review of an adverse determination.

SECTION 9. DOCUMENTING A TAXPAYER'S CHOICE TO FILE IN PAPER FORMAT

.01 Section 301.6011–6(a)(4)(i) provides that an individual income tax return is considered to be *filed* by a tax return preparer or a specified tax return preparer if the preparer submits the tax return to the IRS on the taxpayer's behalf, either electronically (by e-file or other magnetic media) or in non-electronic (paper) form, and that submission of an individual income tax return by a tax return preparer or a specified tax return preparer in non-electronic form includes the direct or indirect transmission, sending, mailing or otherwise delivering of the paper tax return to the IRS by the preparer, any member, employee, or agent of the preparer, or any member, employee, or agent of the preparer's firm, and includes any act or acts of assistance beyond providing filing or delivery instructions to the taxpayer. Section 301.6011–6(a)(4)(ii), however, provides that an individual income tax return will not be considered to be filed, as defined in § 301.6011–6(a)(4)(i), by a tax return preparer or specified tax return preparer if the tax return preparer or specified tax return preparer who prepared the return obtains, on or prior to the date the return is filed, a signed (by both spouses if a joint return) and dated written statement from the taxpayer that states the taxpayer chooses to file the return in paper format, and that the taxpayer, and not the preparer, is submitting the paper return to the IRS.

.02 A tax return preparer or specified tax return preparer should document a taxpayer's choice to file in paper format in the manner prescribed in this revenue procedure.

.03 A taxpayer's choice to file an individual income tax return in paper format must be in writing, must affirm that the taxpayer is choosing to file the return in paper format, and must affirm that the taxpayer, and not the preparer, is filing the return. This written statement must be signed by the taxpayer (by both spouses if a joint return) and dated on or before the date the taxpayer's return is filed with the IRS. The choice to file in paper format is the taxpayer's alone.

.04 If signed and dated by the taxpayer on or before the date the subject individual income tax return is filed with the IRS, the following statement contained in the signed writing will be sufficient to show that a taxpayer chooses to file the taxpayer's return in paper format and that the taxpayer, and not the tax return preparer or specified tax return preparer, will file the return:

> My tax return preparer [INSERT PREPARER'S NAME] has informed me that [INSERT s/he] may be required to electronically file my [INSERT TAX YEAR] individual income tax return [INSERT TYPE OF RETURN: Form 1040, Form 1040A, Form 1040EZ, Form 1041, Form 990–T] if [INSERT s/he] files it with the IRS on my behalf. I do not want to file my return electron-

ically and choose to file my return on paper forms. My preparer will not file my paper return with the IRS. I will file my paper return with the IRS myself. I was not influenced by [INSERT PREPARER'S NAME] or any member of [INSERT "his" or "her"] firm to sign this statement.

.05 The written statement containing the taxpayer's choice to file in paper format should not be attached to the taxpayer's individual income tax return. This statement should be retained by the tax return preparer.

SECTION 10. EFFECTIVE DATE

This revenue procedure is effective on [ ].

SECTION 11. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure relating to undue hardship waiver requests will be submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act (44 U.S.C. 3507(c)). The collection of information related to documenting a taxpayer's choice to file in paper format was previously submitted to the Office of Management and Budget for review. See [75 FR 75439] for details.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue procedure is in Sections 5 and 6 of this revenue procedure. This information is required for a tax return preparer who meets the definition of specified tax return preparer to obtain an undue hardship waiver of the electronic filing requirement contained in section 6011(e)(3) and § 301.6011–6. This information will be used in exercising the IRS's discretion to grant undue hardship waivers and approving or denying requests for such waivers based on the specified tax return preparer's particular facts and circumstances, or for purposes of reconsidering an undue hardship waiver request that has been denied. The likely respondents are individuals and small businesses who prepare and file individual income tax returns as paid tax return preparers and who meet the definition of specified tax return preparer contained in section 6011(e)(3)(B) and § 301.6011–6(a)(3).

The estimated total annual reporting and/or recordkeeping burden is 3,949 total hours for waiver requests for calendar year 2011, and 7,328 total hours for waiver requests for calendar year 2012.

The estimated annual burden per respondent/recordkeeper varies from 15 minutes to 2 hours, depending on individual circumstances, with an estimated average of 1 hour. We calculated 15 minutes of preparation for a basic waiver without attachments and minimal explanation (*e.g.* federal disaster declaration); 31 minutes for a bankruptcy waiver with attachments; 51 minutes for "other" waiver with attachments and detailed explanation; and 2 hours for an economic hardship waiver with attachments. We estimated 6 minutes for recordkeeping, consisting of maintaining a copy of the information submitted for the respondent's records.

The estimated number of respondents and/or recordkeepers is 3,949 for waiver requests for calendar year 2011 and 7,328 for waiver requests for calendar year 2012.

The estimated annual frequency of responses (used for reporting requirements only) is no more than once per respondent.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law.

SECTION 12. DRAFTING INFORMATION

The principal author of this revenue procedure is Keith Brau of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this proposed revenue procedure, contact Keith Brau at (202) 622–4940 (not a toll-free call).

2011 Standard Mileage Rates

Notice 2010–88

SECTION 1. PURPOSE

This notice provides the 2011 standard mileage rates for taxpayers to use in computing the deductible costs of operating an automobile for business, charitable, medical, or moving expense purposes. This notice also provides the amount taxpayers must use in calculating reductions to basis for depreciation taken under the business standard mileage rate, and the maximum standard automobile cost that may be used in computing the allowance under a fixed and variable rate (FAVR) plan.

Further, this notice requests comments from the public concerning whether taxpayers should be permitted to use the business standard mileage rate for automobiles used in fleet operations.

SECTION 2. BACKGROUND

Rev. Proc. 2010–51 provides rules for computing the deductible costs of operating an automobile for business, charitable, medical, or moving expense purposes, and for substantiating, under § 274(d) of the Internal Revenue Code and § 1.274–5 of the Income Tax Regulations, the amount of ordinary and necessary business expenses of local transportation or travel away from home. Taxpayers using the standard mileage rates must comply with Rev. Proc. 2010–51.

An independent contractor conducts an annual study for the Internal Revenue Service of the fixed and variable costs of operating an automobile to determine the standard mileage rates for business, medical, and moving use reflected in this notice. The standard mileage rate for charitable use is set by § 170(i).

SECTION 2. STANDARD MILEAGE RATES

The standard mileage rate for transportation or travel expenses is 51 cents per mile for all miles of business use (business standard mileage rate). See section 4 of Rev. Proc. 2010–51.

The standard mileage rate is 14 cents per mile for use of an automobile in rendering gratuitous services to a charitable organization under § 170 (charitable standard mileage rate). See section 5 of Rev. Proc. 2010–51.

The standard mileage rate is 19 cents per mile for use of an automobile (1) for medical care described in § 213, or (2) as part of a move for which the expenses are deductible under § 217 (medical and moving standard mileage rate). See section 5 of Rev. Proc. 2010–51.

SECTION 3. BASIS REDUCTION AMOUNT

For automobiles a taxpayer uses for business purposes, the portion of the standard mileage rate treated as depreciation is 19 cents per mile for 2007, 21 cents per mile for 2008 and 2009, 23 cents per mile for 2010, and 22 cents per mile for 2011. See section 4.04 of Rev. Proc. 2010–51.

SECTION 4. MAXIMUM STANDARD AUTOMOBILE COST

For purposes of computing the allowance under a FAVR plan, the standard automobile cost may not exceed $26,900 for automobiles (excluding trucks and vans) or $28,200 for trucks and vans. See section 6.02(6) of Rev. Proc. 2010–51.

SECTION 5. COMMENTS REQUESTED

The Internal Revenue Service is evaluating the need for the limitation in section 4.05(1) of Rev. Proc. 2010–51 that prohibits a taxpayer from using the business standard mileage rate to compute the deductible expenses of five or more automobiles a taxpayer owns or leases and uses simultaneously (such as in fleet operations), and requests public comments on this issue. Comments should be submitted by March 31, 2011, to: Internal Revenue Service, CC:PA:LDP:PR (Notice 2010–88), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Comments also may be hand delivered between the hours of 8:00 a.m. and 4:00 p.m. Monday to Friday to CC:PA:LDP:PR (Notice 2010–88), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC. Alternatively, comments may be transmitted electronically to *Notice.Comments@irscounsel.treas.gov*, indicating Notice 2010–88 in the subject line. All comments will be available for public inspection and copying.

EFFECTIVE DATE

This notice is effective for (1) deductible transportation expenses paid or incurred on or after January 1, 2011, and (2) mileage allowances or reimbursements paid to an employee or to a charitable volunteer (a) on or after January 1, 2011, and (b) for transportation expenses the employee or charitable volunteer pays or incurs on or after January 1, 2011.

DRAFTING INFORMATION

The principal author of this notice is Bernard P. Harvey of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information on this notice, contact Bernard P. Harvey at (202) 622–4930 (not a toll-free call).

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26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also Part I, §§ 62, 162, 170, 213, 217, 274, 1016; 1.62–2, 1.162–17, 1.170A–1, 1.213–1, 1.217–2, 1.274–5, 1.1016–3.)

Rev. Proc. 2010–51

SECTION 1. PURPOSE

This revenue procedure updates Rev. Proc. 2009–54, 2009–51 I.R.B. 930, and provides rules for using optional standard mileage rates in computing the deductible costs of operating an automobile for business, charitable, medical, or moving expense purposes. This revenue procedure also provides rules for substantiating, under § 274(d) of the Internal Revenue Code and § 1.274–5 of the Income Tax Regulations, the amount of an employee's ordinary and necessary expenses of local travel or transportation away from home that a payor (an employer, its agent, or a third party) reimburses using a mileage allowance. Taxpayers are not required to use the substantiation methods described in this revenue procedure. A taxpayer may substantiate actual allowable expense amounts if the taxpayer maintains adequate records or other sufficient evidence. The Internal Revenue Service prospectively adjusts the standard mileage rates for business, medical, and moving expenses annually (to the extent warranted). Beginning with the rates for 2011, the Service will publish the standard mileage rates for the use of an automobile for business, charitable, medical, and moving expense purposes in a separate annual notice.

SECTION 2. BACKGROUND AND CHANGES

.01 Section 162(a) allows a deduction for the ordinary and necessary expenses a taxpayer pays or incurs during the taxable year in carrying on any trade or business, including the cost of operating an automobile to the extent that it is used in a trade or business.

.02 Under § 262, a taxpayer may not deduct any portion of the cost of operating an automobile attributable to personal use.

.03 To deduct expenses for travel or listed property, a taxpayer must substantiate the expenses under § 274(d). Section 280F(d)(4) provides that listed property includes passenger automobiles and any other property used as a means of transportation.

.04 Section 1.274–5(g) and (j) authorizes the Commissioner to prescribe rules and establish methods under which mileage rates and allowances that comply with reasonable business practice are treated as (1) equivalent to substantiation, by adequate records or other sufficient evidence, of the amount of transportation expenses for purposes of § 1.274–5(c), and (2) satisfying the requirements of an adequate accounting to the employer of the amount of the expenses for purposes of § 1.274–5(f).

.05 For purposes of determining adjusted gross income, § 62(a)(2)(A) allows an employee to deduct business expenses the employee pays or incurs in performing services as an employee under a reimbursement or other expense allowance arrangement with a payor.

.06 Section 62(c) provides that an arrangement is not treated as a reimbursement or other expense allowance arrangement for purposes of § 62(a)(2)(A) if it—

(1) Does not require the employee to substantiate the expenses covered under the arrangement to the payor, or

(2) Allows the employee to retain any amount in excess of the substantiated expenses covered under the arrangement.

.07 Section 62(c) further provides, however, that substantiation is not required for the expense to the extent provided in regulations under § 274(d).

.08 Under § 1.62–2(c), a reimbursement or other expense allowance arrangement satisfies the requirements of § 62(c) if it meets the requirements of business

connection, substantiation, and returning amounts in excess of expenses. If an arrangement meets these requirements, all amounts paid under the arrangement are treated as paid under an accountable plan and are excluded from income and wages. If an arrangement does not meet one or more of these requirements, all amounts paid under the arrangement are treated as paid under a nonaccountable plan and are included in the employee's gross income, must be reported as wages or compensation on the employee's Form W–2, and are subject to the withholding and payment of employment taxes.

.09 Section 1.62–2(e)(2) provides that the amount of a business expense substantiated under § 1.274–5(g) is treated as substantiated for purposes of § 1.62–2.

.10 Under § 1.62–2(f)(2), the Commissioner may prescribe rules for treating an arrangement providing mileage allowances as satisfying the requirement of returning amounts in excess of expenses if the arrangement requires the employee to return amounts that relate to unsubstantiated travel miles, even if the employee is not required to return the portion of the allowance for substantiated travel miles that exceeds the deemed substantiated amount for those miles. The allowance must be reasonably calculated not to exceed the amount of the employee's expenses and the employee must be required to return within a reasonable period (as defined in § 1.62–2(g)) any portion of the allowance that relates to unsubstantiated travel miles. Under § 1.62–2(h)(2)(i)(B), the portion of an allowance that relates to substantiated travel miles but exceeds the substantiated amount for those miles, and that the employee is not required to return, is subject to withholding and payment of employment taxes. *See* §§ 31.3121(a)–3, 31.3231(e)–1(a)(5), 31.3306(b)–2, and 31.3401(a)–4 of the Employment Tax Regulations.

.11 Under § 1.62–2(h)(2)(i)(B)(4), the Commissioner may prescribe special rules for the timing of withholding and paying employment taxes on mileage allowances.

.12 This revenue procedure modifies Rev. Proc. 2009–54 as follows:

(1) The standard mileage rates for the use of an automobile for business, charitable, medical, and moving expense purposes are now published in a separate annual notice. The notice provides the amount a taxpayer must use in calculating reductions to basis for depreciation taken under the business standard mileage rate (see section 4.04 of this revenue procedure) and the maximum standard automobile cost for automobiles under a FAVR allowance (see section 6.02(6) of this revenue procedure). The Service plans to discontinue publishing this revenue procedure annually but will publish modifications as required. This revenue procedure remains in effect until superseded.

(2) Section 4.05(1) is modified to allow taxpayers to use the business standard mileage rate to calculate the amount of deductions for automobiles used for hire, such as taxicabs.

SECTION 3. DEFINITIONS

.01 *Standard mileage rate*. The term "standard mileage rate" means the amount the Service provides for optional use by taxpayers to substantiate the amount of—

(1) Deductible costs of operating for business purposes automobiles (including vans, pickups, or panel trucks) they own or lease, and

(2) Deductible costs of operating automobiles for charitable, medical, or moving expense purposes.

.02 *Transportation expenses*. The term "transportation expenses" means the expenses of operating an automobile for local transportation or transportation away from home.

.03 *Mileage allowance*. The term "mileage allowance" means a payment under a reimbursement or other expense allowance arrangement that is—

(1) Paid for the ordinary and necessary business expenses an employee incurs, or that the payor reasonably anticipates an employee will incur, for transportation expenses in performing services as an employee,

(2) Reasonably calculated not to exceed the amount of the expenses or anticipated expenses, and

(3) Paid at the applicable standard mileage rate, a flat rate or stated schedule, or under any other Service-specified rate or schedule.

.04 *Flat rate or stated schedule*. A mileage allowance is paid at a flat rate or stated schedule if it is paid on a uniform and objective basis for the expenses described in section 3.03 of this revenue procedure. The allowance may be paid periodically at a fixed rate, at a cents-per-mile rate, at a variable rate based on a stated schedule, at a rate that combines any of these rates, or on any other basis that is consistently applied and accords with reasonable business practice. Thus, for example, a periodic payment at a fixed rate to cover the fixed costs (including depreciation or lease payments, insurance, registration and license fees, and personal property taxes) of driving an automobile in performing services as an employee, coupled with a periodic payment at a cents-per-mile rate to cover the variable costs (including gasoline and all taxes thereon, oil, tires, and routine maintenance and repairs) of using an automobile for those purposes, is an allowance paid at a flat rate or stated schedule. Likewise, a periodic payment at a variable rate based on a stated schedule for different locations to cover the costs of driving an automobile in performing services as an employee is an allowance paid at a flat rate or stated schedule.

.05 *Lease period*. The term "lease period" includes renewal periods.

SECTION 4. BUSINESS STANDARD MILEAGE RATE

.01 *Use of the business standard mileage rate*. A taxpayer may use the business standard mileage rate (published in an annual notice) to substantiate the amount of a deduction for an automobile that a taxpayer either owns or leases. A taxpayer generally may deduct an amount equal to either the business standard mileage rate times the number of business miles traveled or the actual costs (both fixed and variable) the taxpayer pays or incurs that are allocable to traveling those business miles (subject to the limitations in section 4.05 of this revenue procedure).

.02 *Business standard mileage rate in lieu of fixed and variable costs*. A taxpayer computes a deduction using the business standard mileage rate on a yearly basis and in lieu of computing the fixed and variable costs of the automobile allocable to business purposes (except as provided in section 7.06 of this revenue procedure). Items such as depreciation or lease payments, maintenance and repairs, tires, gasoline (including all taxes thereon), oil, insurance, and license and registration fees

are included in fixed and variable costs for this purpose.

.03 *Parking fees, tolls, interest, and taxes*. A taxpayer may deduct, as separate items, parking fees and tolls attributable to use of the automobile for business purposes. A taxpayer also may deduct interest relating to the purchase of the automobile and state and local personal property taxes as separate items to the extent allowable under § 163 or § 164, respectively. Under § 163(h)(2)(A), interest is nondeductible personal interest if it is paid or incurred on indebtedness properly allocable to the trade or business of performing services as an employee. Section 164 provides that state and local taxes a taxpayer pays or incurs in connection with an acquisition or disposition of property are treated as part of the cost of the acquired property or as a reduction in the amount realized on the disposition of the property. If the automobile is operated less than 100 percent for business purposes, a taxpayer must allocate the business and nonbusiness portion of the allowable taxes and interest deduction.

.04 *Depreciation*. Under § 1016, a taxpayer must reduce the basis of an automobile used in business by the amount of depreciation the taxpayer claims for the automobile. If a taxpayer uses the business standard mileage rate to compute the expense of operating an automobile for any year, a per-mile amount (published in an annual notice) is treated as depreciation for those years in which the taxpayer used the business standard mileage rate. If the taxpayer deducted the actual costs of operating an automobile for one or more of those years, the taxpayer may not use the business standard mileage rate to determine the amount treated as depreciation for those years.

.05 *Limitations*.

(1) A taxpayer may not use the business standard mileage rate to compute the deductible expenses of five or more automobiles a taxpayer owns or leases and uses simultaneously (such as in fleet operations).

(2) A taxpayer may not use the business standard mileage rate to compute the deductible business expenses of an automobile a taxpayer leases unless the taxpayer uses either the business standard mileage rate or a fixed and variable rate allowance (FAVR allowance) (as provided in section 6 of this revenue procedure) for the entire lease period.

(3) A taxpayer may not use the business standard mileage rate to compute the deductible expenses of an automobile for which the taxpayer has (a) claimed depreciation using a method other than straight-line for its estimated useful life, (b) claimed a § 179 deduction, (c) claimed the additional first-year depreciation allowance under, for example, § 168(k) or § 168(n), or (d) used the Accelerated Cost Recovery System (ACRS) under former § 168 or the Modified Accelerated Cost Recovery System (MACRS) under current § 168. By using the business standard mileage rate, the taxpayer has elected to exclude the automobile (if owned) from MACRS pursuant to § 168(f)(1). If, after using the business standard mileage rate, the taxpayer uses actual costs, the taxpayer must use straight-line depreciation for the automobile's remaining estimated useful life (subject to the applicable depreciation deduction limitations under § 280F).

(4) A taxpayer who is an employee of the United States Postal Service may not use the business standard mileage rate or this revenue procedure to compute the amount of the taxpayer's deductible automobile expenses incurred in performing services involving the collection and delivery of mail on a rural route if the taxpayer receives qualified reimbursements (as defined in § 162(o)) for the expenses. *See* § 162(o) for the rules that apply to these qualified reimbursements.

SECTION 5. CHARITABLE AND MEDICAL AND MOVING STANDARD MILEAGE RATES

.01 *Charitable standard mileage rate*. A taxpayer may use the charitable standard mileage rate (published in an annual notice) to compute the charitable contribution deduction for use of an automobile in rendering gratuitous services to a charitable organization under § 170.

.02 *Medical and moving standard mileage rate*. A taxpayer may use the medical and moving standard mileage rate (published in an annual notice) to compute the deduction for use of an automobile (1) as medical care described in § 213, or (2) as a moving expense deductible under § 217.

.03 *Charitable or medical and moving standard mileage rate in lieu of variable expenses*. A deduction computed using the applicable standard mileage rate for charitable, medical, or moving expense miles is in lieu of a deduction for variable expenses (including gasoline and oil) of the automobile allocable to those purposes. Costs for items such as depreciation or lease payments, insurance, and license and registration fees are not deductible for these purposes and are not included in the charitable or medical and moving standard mileage rates.

.04 *Parking fees, tolls, interest, and taxes*. A taxpayer may deduct, as separate items, parking fees and tolls attributable to the use of the automobile for charitable, medical, or moving expense purposes. Interest relating to the purchase of the automobile and state and local personal property taxes are not deductible as charitable, medical, or moving expenses, but they may be deducted as separate items to the extent allowable under § 163 or § 164.

SECTION 6. FIXED AND VARIABLE RATE ALLOWANCE

.01 *In general*.

(1) The ordinary and necessary expenses an employee pays or incurs in driving an automobile the employee owns or leases in performing services as an employee of the employer are deemed substantiated (in an amount determined under section 7 of this revenue procedure) when a payor reimburses those expenses using a FAVR allowance. A FAVR allowance is a mileage allowance using a flat rate or stated schedule that combines periodic fixed and variable rate payments that meet all the requirements of this section 6.

(2) A payor must base the amount of a FAVR allowance on data that (a) is derived from the base locality, (b) reflects retail prices paid by consumers, and (c) is reasonable and statistically defensible in approximating the actual expenses employees receiving the allowance would incur as owners of the standard automobile.

.02 *Computing a FAVR allowance*.

(1) *FAVR allowance*. A FAVR allowance includes periodic fixed payments and periodic variable payments. A payor may maintain more than one FAVR allowance. A FAVR allowance that uses the same payor, standard automobile (or an

automobile of the same make and model that is comparably equipped), retention period, and business use percentage is considered one FAVR allowance, even though other features of the allowance may vary. A FAVR allowance also includes any optional high mileage payments. However, optional high mileage payments are included in an employee's gross income, are reported as wages or other compensation on the employee's Form W–2, and are subject to withholding and payment of employment taxes when paid. *See* section 7.05 of this revenue procedure. An optional high mileage payment covers the additional depreciation for a standard automobile attributable to business miles an employee drives and substantiates for a calendar year in excess of the annual business mileage for that year. If a FAVR allowance covers an employee for less than the entire calendar year, the annual business mileage may be prorated on a monthly basis for purposes of the preceding sentence.

(2) *Periodic fixed payment*. A periodic fixed payment covers the projected fixed costs (including depreciation or lease payments, insurance, registration and license fees, and personal property taxes) of driving the standard automobile in performing services as an employee of the employer in a base locality, and must be paid at least quarterly. A payor may compute a periodic fixed payment by (a) dividing the total projected fixed costs of the standard automobile for all years of the retention period, determined at the beginning of the retention period, by the number of periodic fixed payments in the retention period, and (b) multiplying the resulting amount by the business use percentage.

(3) *Periodic variable payment*. A periodic variable payment covers the projected variable costs (including gasoline and all taxes thereon, oil, tires, and routine maintenance and repairs) of driving a standard automobile in performing services as an employee in a base locality, and must be paid at least quarterly. A payor may compute a periodic variable payment rate for a computation period by dividing the total projected variable costs for the standard automobile for the computation period, determined at the beginning of the computation period, by the computation period mileage. A computation period may be any period of a year or less. Computation period mileage is the total mileage (business and personal) a payor reasonably projects a standard automobile will be driven during a computation period and equals the retention mileage divided by the number of computation periods in the retention period. For each business mile an employee substantiates for the computation period, a payor must make a periodic variable payment at a rate that does not exceed the rate for that computation period.

(4) *Base locality*. A base locality is the particular geographic locality or region of the United States where an employee generally pays or incurs the costs of driving an automobile in performing services as an employee. Thus, for purposes of determining the amount of fixed costs, the base locality is generally the geographic locality or region where the employee resides. For purposes of determining the amount of variable costs, the base locality is generally the geographic locality or region where the employee drives the automobile in performing services as an employee.

(5) *Standard automobile*. A standard automobile is the automobile a payor selects on which a specific FAVR allowance is based.

(6) *Standard automobile cost*. The standard automobile cost for a calendar year may not exceed 95 percent of the sum of (a) the retail dealer invoice cost of the standard automobile in the base locality, and (b) state and local sales or use taxes on the purchase of the automobile. The maximum standard automobile cost for a given taxable year is published in an annual notice.

(7) *Annual mileage*. Annual mileage is the total mileage (business and personal) a payor reasonably projects an employee will drive a standard automobile during a calendar year. Annual mileage equals the annual business mileage divided by the business use percentage.

(8) *Annual business mileage*. Annual business mileage is the mileage a payor reasonably projects an employee will drive a standard automobile in performing services as an employee during the calendar year, but may not be less than 6,250 miles for a calendar year. Annual business mileage equals the annual mileage multiplied by the business use percentage.

(9) *Business use percentage*. A payor determines the business use percentage by dividing the annual business mileage by the annual mileage. The business use percentage may not exceed 75 percent. In lieu of demonstrating the reasonableness of the business use percentage based on records of total mileage and business mileage driven by employees annually, a payor may use a business use percentage that is less than or equal to the following percentages for a FAVR allowance that is paid for the following annual business mileage:

Annual business mileage	*Business use percentage*
6,250 or more but less than 10,000	45 percent
10,000 or more but less than 15,000	55 percent
15,000 or more but less than 20,000	65 percent
20,000 or more	75 percent

(10) *Retention period*. A retention period is the period in calendar years a payor selects during which the payor expects an employee to drive a standard automobile in performing services as an employee before the automobile is replaced. The period may not be less than two calendar years.

(11) *Retention mileage*. Retention mileage is the annual mileage multiplied by the number of calendar years in the retention period.

(12) *Residual value*. The residual value of a standard automobile is the projected amount for which it could be sold at the

end of the retention period after being driven the retention mileage. The Service will accept the following safe harbor residual values for a standard automobile computed as a percentage of the standard automobile cost:

Retention period	*Residual value*
2 years	70 percent
3 years	60 percent
4 years	50 percent

.03 *FAVR allowance in lieu of fixed and variable costs*.

(1) A reimbursement computed using a FAVR allowance is in lieu of the employee's deduction of all the fixed and variable costs the employee pays or incurs in driving the automobile in performing services as an employee, except as provided in section 7.06 of this revenue procedure. Items such as depreciation or lease payments, maintenance and repairs, tires, gasoline (including all taxes thereon), oil, insurance, license and registration fees, and personal property taxes are included in fixed and variable costs for this purpose.

(2) An employee may deduct, as separate items, parking fees and tolls attributable to the employee driving the standard automobile in performing services as an employee. Similarly, an employee may deduct, as a separate item, interest relating to the purchase of the standard automobile to the extent that the interest is an allowable deduction under § 163.

.04 *Depreciation*.

(1) A payor may not provide a FAVR allowance for an automobile for which an employee has (a) claimed depreciation using a method other than straight-line for its estimated useful life, (b) claimed a § 179 deduction, (c) claimed the additional first-year depreciation allowance under, for example, § 168(k) or § 168(n), or (d) used ACRS under former § 168 or MACRS under current § 168. If an employee uses actual costs for an owned automobile that has been covered by a FAVR allowance, the employee must use straight-line depreciation for the automobile's remaining estimated useful life (subject to the applicable depreciation deduction limitations under § 280F).

(2) Except as provided in section 6.04(3) of this revenue procedure, the total amount of the depreciation component for the retention period a payor includes in computing the periodic fixed payments for that retention period may not exceed the excess of the standard automobile cost over the residual value of the standard automobile. In addition, the total amount of the depreciation component may not exceed the sum of the annual § 280F limitations on depreciation in effect at the beginning of the retention period that apply to the standard automobile during the retention period.

(3) If the depreciation component of the periodic fixed payments exceeds the limitations in section 6.04(2) of this revenue procedure, the Service will treat that section as satisfied if the total annual amount of the FAVR (periodic fixed and variable) payments a payor makes to an employee driving 80 percent of the annual business mileage of the standard automobile does not exceed the business standard mileage rate for that year multiplied by 80 percent of the annual business mileage of the standard automobile.

(4) The depreciation included in each periodic fixed payment portion of a FAVR allowance paid for an automobile reduces the basis of the automobile (but not below zero) in determining adjusted basis as required by § 1016. *See* section 6.07(2) of this revenue procedure for the requirement that the employer report the depreciation component of a periodic fixed payment to the employee.

.05 *FAVR allowance limitations*.

(1) A payor may provide a FAVR allowance only to an employee who substantiates to the payor for a calendar year at least 5,000 miles driven in performing services as an employee or, if greater, 80 percent of the annual business mileage of that FAVR allowance. If the employee is covered by the FAVR allowance for less than the entire calendar year, the payor may prorate these limits on a monthly basis.

(2) A payor may not provide a FAVR allowance to a control employee (as defined in § 1.61–21(f)(5) and (6), excluding the $100,000 limitation in paragraph (f)(5)(iii)).

(3) A payor may not provide a FAVR allowance if at any time during a calendar year a majority of the employees the FAVR allowance covers are management employees.

(4) A payor may not provide a FAVR allowance to any employee unless at all times during a calendar year FAVR allowances provided by the payor cover at least five employees in total.

(5) A payor may provide a FAVR allowance only for an automobile (a) the employee receiving the payment owns or leases, (b) the cost of which, as a new vehicle (whether or not purchased new by the employee), was at least 90 percent of the standard automobile cost included in determining the FAVR allowance for the first calendar year the employee receives the allowance for that automobile, and (c) for which the model year does not differ from the current calendar year by more than the number of years in the retention period.

(6) A payor may not provide a FAVR allowance for an automobile an employee leases for which the employee has used actual expenses to compute the deductible business expenses of the automobile for any year during the lease period.

(7) The insurance cost component of a FAVR allowance must be based on the rates charged in the base locality for insurance coverage on the standard automobile during the current calendar year without considering rate-increasing factors such as poor driving records or young drivers.

(8) A payor may provide a FAVR allowance only to an employee whose insurance coverage limits on the automobile for which the FAVR allowance is paid are at least equal to the insurance coverage limits used to compute the periodic fixed payment under that FAVR allowance.

.06 *Employee reporting*. Within 30 days after a FAVR allowance initially covers an employee's automobile, or again covers the automobile if coverage has lapsed, the employee by written declaration must provide the payor with the fol-

lowing information: (1) the make, model, and year of the employee's automobile, (2) written proof of the insurance coverage limits on the automobile, (3) the odometer reading of the automobile, (4) if owned, the purchase price of the automobile or, if leased, the price at which the automobile is ordinarily sold by retailers (the gross capitalized cost of the automobile), and (5) if owned, whether the employee has claimed depreciation for the automobile using any of the depreciation methods prohibited by section 6.04(1) of this revenue procedure or, if leased, whether the employee has computed deductible business expenses for the automobile using actual expenses. The employee also must provide the information in (1), (2), and (3) to the payor within 30 days after the beginning of each calendar year that a FAVR allowance covers the employee's automobile.

.07 *Payor recordkeeping and reporting*.

(1) The payor or its agent must maintain written records stating (a) the statistical data and projections on which the FAVR allowance payments are based, and (b) the information the employees provided under section 6.06 of this revenue procedure.

(2) Within 30 days of the end of each calendar year, the payor must provide each employee covered by a FAVR allowance during that year with a statement that lists the amount of depreciation included in each periodic fixed payment portion of the FAVR allowance paid during that calendar year to an automobile owner and explains that by receiving a FAVR allowance the employee has elected to exclude the automobile from the Modified Accelerated Cost Recovery System under § 168(f)(1). For automobile lessees, the statement must explain that by receiving the FAVR allowance the employee may not compute the deductible business expenses of the automobile using actual expenses for the lease period.

.08 *Failure to meet section 6 requirements*. If an employee receives a mileage allowance that fails to meet one or more of the requirements of this section 6, the employee may not be treated as covered by any FAVR allowance of the payor during the period of the failure. Nevertheless, the expenses to which that mileage allowance relates may be deemed substantiated using the method described in sections 4, 7.01(1), and 7.02 of this revenue procedure to the extent the requirements of those sections are met.

SECTION 7. MILEAGE ALLOWANCES

.01 If a payor pays a mileage allowance in lieu of reimbursing actual transportation expenses an employee incurs or may incur, the payor is deemed to have substantiated either:

(1) For any mileage allowance other than a FAVR allowance, the lesser of the amount paid under the mileage allowance or the business standard mileage rate multiplied by the number of substantiated business miles; or

(2) For a FAVR allowance, the amount paid under the FAVR allowance less the sum of (a) any periodic variable rate payment that relates to miles in excess of the substantiated business miles that the employee fails to return to the payor although required to do so, (b) any portion of a periodic fixed payment that relates to a period during which the employee is treated as not covered by the FAVR allowance and that the employee fails to return to the payor although required to do so, and (c) any optional high mileage payments.

.02 An employee is deemed to satisfy the adequate accounting requirements of § 1.274–5(f) and the requirement to substantiate by adequate records or other sufficient evidence for purposes of § 1.274–5(c) if the amount of transportation expenses is deemed substantiated under the rules provided in section 7.01 of this revenue procedure, and the employee actually substantiates to the payor the elements of time, place (or use), and business purpose of the transportation expenses under § 1.274–5T(b)(2) (travel away from home), § 1.274–5T(b)(6) (listed property, which includes passenger automobiles and any other property used as a means of transportation), and § 1.274–5(c).

.03 An arrangement providing mileage allowances is treated as satisfying the requirement of § 1.62–2(f)(2) on returning amounts in excess of expenses as follows:

(1) For a mileage allowance (other than a FAVR allowance) paid only at a cents-per-mile rate, the requirement to return excess amounts is treated as satisfied if an employee is required to return within a reasonable period of time (as defined in § 1.62–2(g)) any portion of the allowance that relates to unsubstantiated travel miles, even though the arrangement does not require the employee to return the portion of the allowance that relates to substantiated travel miles and that exceeds the amount of the employee's expenses deemed substantiated. For example, a payor provides an employee an advance mileage allowance of $120.00 based on an anticipated 200 business miles at 60 cents per mile (at a time when the business standard mileage rate is 50 cents per mile), and the employee substantiates 120 business miles. The requirement to return excess amounts is treated as satisfied if the employee is required to return the portion of the allowance that relates to the 80 unsubstantiated business miles ($40.00) even though the employee is not required to return the portion of the allowance ($12.00) that exceeds the amount of the employee's expenses deemed substantiated under section 7.01 of this revenue procedure ($60.00) for the 120 substantiated business miles. However, the $12.00 excess portion of the allowance is treated as paid under a nonaccountable plan as discussed in section 7.05 of this revenue procedure.

(2) For a mileage allowance (other than a FAVR allowance) paid other than only at a cents-per-mile rate, the requirement to return excess amounts is treated as satisfied if the employee is required to return within a reasonable period of time (as defined in § 1.62–2(g)) any portion of the allowance that exceeds the product of the business standard mileage rate and the number of substantiated travel miles. For example, a payor provides an employee an advance mileage allowance of $400 per month plus 20 cents per mile based on an anticipated 2000 miles for a total of $800 (at a time when the business standard mileage rate is 50 cents per mile), and the employee substantiates 1000 business miles. The requirement to return excess amounts is treated as satisfied if the employee is required to return $300, the portion of the allowance that exceeds the product of the standard mileage rate and the miles substantiated ($500).

(3) For a FAVR allowance, the requirement to return excess amounts is treated as satisfied if the employee is required to return, within a reasonable period of time (as defined in § 1.62–2(g)), (a) the portion (if any) of the periodic variable payment received that relates to miles in excess of

substantiated business miles, and (b) the portion (if any) of a periodic fixed payment that relates to a period during which the employee was not covered by the FAVR allowance.

.04 An employee is not required to include in gross income the portion of a mileage allowance received from a payor that is less than or equal to the amount deemed substantiated under section 7.01 of this revenue procedure, provided the employee substantiates under section 7.02 of this revenue procedure. *See* § 1.274–5T(f)(2)(i). Assuming that the remaining requirements for an accountable plan provided in § 1.62–2 are satisfied, that portion of the allowance is treated as paid under an accountable plan, is not reported as wages or other compensation on the employee's Form W–2, and is exempt from withholding and payment of employment taxes. *See* § 1.62–2(c)(2) and (c)(4).

.05 An employee is required to include in gross income the portion of a mileage allowance received from a payor that exceeds the amount deemed substantiated under section 7.01 of this revenue procedure. *See* § 1.274–5T(f)(2)(ii). In addition, the excess portion of the allowance is treated as paid under a nonaccountable plan, is reported as wages or other compensation on the employee's Form W–2, and is subject to withholding and payment of employment taxes. *See* § 1.62–2(c)(3)(ii), (c)(5), and (h)(2)(i)(B).

.06 If an employee's substantiated expenses are less than the employee's actual expenses, the following rules apply:

(1) Except as otherwise provided in section 7.06(2) of this revenue procedure on leased automobiles, if the amount of the expenses deemed substantiated under the rules provided in section 7.01 of this revenue procedure is less than the amount of the employee's business transportation expenses, the employee may claim an itemized deduction for the amount by which the business transportation expenses exceed the amount that is deemed substantiated, provided the employee substantiates all the business transportation expenses (not just the excess over the business standard mileage rate), includes on Form 2106, *Employee Business Expenses*, the deemed substantiated portion of the mileage allowance received from the payor, and includes in gross income the portion (if any) of the mileage allowance received from the payor that exceeds the amount deemed substantiated. *See* § 1.274–5T(f)(2)(iii). However, for purposes of claiming this itemized deduction, the employee is not required to substantiate the amount of the expenses if the employee is claiming a deduction that is equal to or less than the business standard mileage rate multiplied by the number of business miles the employee substantiated minus the amount deemed substantiated under section 7.01 of this revenue procedure. The itemized deduction is subject to the 2-percent floor on miscellaneous itemized deductions under § 67.

(2) An employee whose business transportation expenses for a leased automobile are deemed substantiated under section 7.01(1) of this revenue procedure (relating to an allowance other than a FAVR allowance) may not claim a deduction based on actual expenses under section 7.06(1) unless the employee does so consistently beginning with the first business use of the automobile after December 31, 1997. An employee whose business transportation expenses for a leased automobile are deemed substantiated under section 7.01(2) of this revenue procedure (relating to a FAVR allowance) may not claim a deduction based on actual expenses.

.07 An employee may deduct an amount computed under section 4 of this revenue procedure only as an itemized deduction. This itemized deduction is subject to the 2-percent floor on miscellaneous itemized deductions in § 67.

.08 A self-employed individual may deduct an amount computed under section 4 of this revenue procedure in determining adjusted gross income under § 62(a)(1).

SECTION 8. WITHHOLDING AND PAYMENT OF EMPLOYMENT TAXES

.01 The portion of a mileage allowance (other than a FAVR allowance), if any, that relates to substantiated business miles and that exceeds the amount deemed substantiated for those miles under section 7.01(1) of this revenue procedure is treated as paid under a nonaccountable plan and is subject to withholding and payment of employment taxes. *See* § 1.62–2(h)(2)(i)(B).

(1) For a mileage allowance paid as a reimbursement, the excess described in section 8.01 of this revenue procedure is subject to withholding and payment of employment taxes in the payroll period in which a payor reimburses the expenses for the substantiated business miles. *See* § 1.62–2(h)(2)(i)(B)(2).

(2) For a mileage allowance paid as an advance, the excess described in section 8.01 of this revenue procedure is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the business miles for which the advance was paid are substantiated. *See* § 1.62–2(h)(2)(i)(B)(3). If some or all of the business miles for which the advance was paid are not substantiated within a reasonable period of time and the employee does not return the portion of the allowance that relates to those miles within a reasonable period of time, the portion of the allowance that relates to those miles is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period. *See* § 1.62–2(h)(2)(i)(A).

(3) For a mileage allowance that is not computed on the basis of a fixed amount per mile of travel (for example, a mileage allowance that combines periodic fixed and variable rate payments, but that does not satisfy the requirements of section 6 of this revenue procedure), the payor must compute periodically (no less frequently than quarterly) the amount, if any, that exceeds the amount deemed substantiated under section 7.01(1) of this revenue procedure by comparing the total mileage allowance paid for the period to the business standard mileage rate multiplied by the number of business miles the employee substantiated for the period. Any excess is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the excess is computed. *See* § 1.62–2(h)(2)(i)(B)(4).

(4) For example, a payor provides employees a mileage allowance under an arrangement that otherwise meets the requirements of an accountable plan at a rate of 60 cents per mile (when the business standard mileage rate is 50 cents per mile). The payor does not require the return of the portion of the allowance that exceeds the business standard mileage rate for the substantiated business miles (10 cents). In June, the payor advances an employee $300.00 for 500 miles to be

traveled during the month. In July, the employee substantiates to the payor 400 business miles traveled in June and returns $60.00 to the payor for the 100 business miles not traveled. The amount deemed substantiated for the 400 miles traveled is $200.00 and the employee is not required to return $40.00. No later than the first payroll period following the payroll period in which the 400 business miles traveled are substantiated, the payor must withhold and pay employment taxes on $40.00.

.02 The portion of a FAVR allowance, if any, that exceeds the amount deemed substantiated for those miles under section 7.01(2) of this revenue procedure is subject to withholding and payment of employment taxes. *See* § 1.62–2(h)(2)(i)(B).

(1) Any periodic variable rate payment that relates to miles in excess of the business miles an employee substantiates and that the employee fails to return within a reasonable period, or any portion of a periodic fixed payment that relates to a period during which the employee is treated as not covered by the FAVR allowance and that the employee fails to return within a reasonable period, is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period. *See* § 1.62–2(h)(2)(i)(A).

(2) Any optional high mileage payment is subject to withholding and payment of employment taxes when paid.

.03 All payments to an employee under a mileage allowance are treated as paid under a nonaccountable plan if the arrangement evidences a pattern of abuse. An arrangement evidences a pattern of abuse if, for example, it has no process to determine when an allowance exceeds the amount that may be deemed substantiated and the arrangement routinely pays allowances in excess of the amount that may be deemed substantiated without (1) requiring actual substantiation or repayment of the excess amount, or (2) treating the excess allowances as wages for employment tax purposes. See § 62(c), § 1.62–2(k), and Rev. Rul. 2006–56, 2006–2 C.B. 874. Thus, these payments are included in the employee's gross income, are reported as wages or other compensation on the employee's Form W–2, and are subject to withholding and payment of employment taxes. See §§ 1.62–2(c)(3), (c)(5), and (h)(2).

SECTION 9. EFFECTIVE DATE

This revenue procedure is effective for (1) deductible transportation expenses paid or incurred on or after January 1, 2011, and (2) mileage allowances or reimbursements (a) paid to an employee or to a charitable volunteer on or after January 1, 2011, and (b) for transportation expenses the employee or charitable volunteer pays or incurs on or after January 1, 2011.

SECTION 10. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2009–54 is superseded.

DRAFTING INFORMATION

The principal author of this revenue procedure is Bernard P. Harvey of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information regarding this revenue procedure, contact Mr. Harvey at (202) 622–4930 (not a toll-free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking and Notice of Public Hearing

Specified Tax Return Preparers Required to File Individual Income Tax Returns Using Magnetic Media

REG–100194–10

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations relating to the requirement for "specified tax return preparers," generally tax return preparers who reasonably expect to file more than 10 individual income tax returns in a calendar year, to file individual income tax returns using magnetic media pursuant to section 6011(e)(3) of the Internal Revenue Code (Code). The proposed regulations reflect changes to the law made by the Worker, Homeownership, and Business Assistance Act of 2009. The proposed regulations affect specified tax return preparers who prepare and file individual income tax returns, as defined in section 6011(e)(3)(C). For calendar year 2011, the proposed regulations define a specified tax return preparer as a tax return preparer who reasonably expects to file (or if the preparer is a member of a firm, the firm's members in the aggregate reasonably expect to file) 100 or more individual income tax returns during the year, while beginning January 1, 2012 a specified tax return preparer is a tax return preparer who reasonably expects to file (or if the preparer is a member of a firm, the firm's members in the aggregate reasonably expect to file) 11 or more individual income tax returns in a calendar year. The proposed regulations are unrelated to and are not intended to address the requirements for obtaining a preparer tax identification number (PTIN) under section 6109. See the final regulations under section 6109 published in the **Federal Register** (75 FR 60309–01). This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by January 3, 2011. Outlines of topics to be discussed at the public hearing scheduled for January 7, 2011 must be received by January 3, 2011.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–100194–10), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–100194–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS — REG–100194–10). The public hearing will be held in the auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Keith L. Brau, (202) 622–4940; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Oluwafunmilayo Taylor of the Publications and Regulations Branch at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by January 3, 2011. Comments are specifically requested concerning:

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

The accuracy of the estimated burden associated with the proposed collection of information (see below) or of the certification contained under the heading "Special Analyses";

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

How the burden of complying with the proposed collection of information may be minimized; and

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

The collection of information in this proposed regulation is in §301.6011–6(a)(4)(ii). This information can be used by tax return preparers and specified tax return preparers, if necessary, to demonstrate to the IRS that the related individual income tax returns filed in paper format were not required to be filed electronically pursuant to section 6011(e)(3) and §301.6011–6. The collection of information is voluntary to obtain a benefit. The likely respondents are the individuals and small businesses who prepare individual income tax returns in exchange for compensation. It is estimated that 5 minutes of preparation time is needed for a tax return preparer to explain the purpose of the information and obtain it from the taxpayer in the manner prescribed by the IRS and 6 minutes for recordkeeping, consisting of maintaining a copy of the information submitted for the respondent's records.

Estimated total annual reporting burden: 1,222,815 hours in calendar year 2011 and 1,689,930 hours in calendar year 2012.

Estimated average annual burden hours per respondent: 9.06 hours (per firm) in calendar year 2011 and 5.42 hours (per firm) in calendar year 2012.

Estimated number of respondents or recordkeepers: 135,000 in calendar year 2011 and 312,000 in calendar year 2012.

Estimated annual frequency of responses per respondent: 49 in calendar year 2011 and 29.5 in calendar year 2012.

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

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law.

Background

Recognizing the benefits of electronic filing, Congress enacted section 2001(a) of the IRS Restructuring and Reform Act of 1998, Public Law 105–206 (112 Stat. 727), which states that a policy of Congress is to promote paperless filing. Electronic filing of tax returns benefits taxpayers and the IRS by reducing errors that are more likely to occur during the manual preparation and processing of paper returns. Electronic filing of tax returns results in faster settling of accounts and better customer service because the time required to process paper returns is eliminated. Electronic filing of tax returns improves taxpayer satisfaction and confidence in the filing process, and may be more cost effective. Electronic filing of tax returns enables the IRS to review taxpayer submissions expeditiously to reduce audit cycle time and helps the IRS identify emerging trends more efficiently.

Section 6011(e)(1) generally authorizes the Secretary to prescribe regulations providing the standards for determining which returns must be filed on magnetic media, including electronic filing. Prior to passage of the Worker, Homeownership, and Business Assistance Act of 2009, Public Law 111–92 (123 Stat. 2984, 2997 (2009)) (Act), section 6011(e)(1) provided that, without exception, the Secretary may not require returns of any tax imposed by subtitle A on individuals, estates, and trusts to be other than on paper forms supplied by the Secretary. Under section 6011(e)(2)(A), in prescribing regulations under section 6011(e)(1), the Secretary shall not require any person (taxpayer) to file on magnetic media (including electronically) unless the person is required to file at least 250 returns during the calendar year.

With respect to the restriction that the Secretary may not require returns of any tax imposed by subtitle A on individuals, estates, and trusts to be filed in any format other than paper forms supplied by the Secretary, the Act amended section 6011(e)(1) to provide an exception for individual income tax returns filed by specified tax return preparers, as set forth in new section 6011(e)(3). New section 6011(e)(3) provides that the Secretary shall require the filing on magnetic media of any individual income tax returns prepared and filed by a specified tax return preparer. As more fully discussed below, filing on magnetic media includes electronic filing.

The Act's amendment to section 6011(e) requires the Secretary to issue regulations to implement the statute. These proposed regulations require that the individual income tax returns prepared and filed by specified tax return preparers be filed electronically. To enhance compliance and to promote effective and efficient administration of the congressionally-mandated requirement of section 6011(e)(3), the proposed regulations provide a transition rule for certain specified tax return preparers.

Explanation of Provisions

1. *Specified Tax Return Preparers Required to File Individual Income Tax Returns Using Magnetic Media*

In general

With certain exclusions, discussed in the next section, the proposed regulations provide that any individual income tax return prepared and filed by a specified tax return preparer must be filed using magnetic media, as required under section 6011(e)(3). For purposes of these proposed regulations, *magnetic media* is defined in §301.6011–2(a)(1), which generally includes magnetic tape, tape cartridge, and diskette, as well as other media, such as electronic filing, specifically permitted under the applicable regulations, procedures, or publications. Also, for purposes of these proposed regulations and as defined under section 6011(e)(3)(C), an *individual income tax return* is any return of income tax imposed by subtitle A on individuals, estates, and trusts. This includes any return of income tax in the Form 1040 series and Form 1041 series. It also includes Form 990–T *(Exempt Organization Business Income Tax Return)* when the exempt organization is a trust subject to tax on unrelated business taxable income under section 511(b).

The electronic filing requirement in these proposed regulations applies to specified tax return preparers. A *specified tax return preparer* is defined as any person who is a tax return preparer, as defined in section 7701(a)(36) and §301.7701–15, unless the tax return preparer reasonably expects to file 10 or fewer individual income tax returns in a calendar year, and if a person who is a tax return preparer is a member of a firm, that person is a specified tax return preparer unless the person's firm members in the aggregate reasonably expect to file 10 or fewer individual income tax returns in a calendar year. The proposed regulations do not apply to individuals described in section 7701(a)(36)(B)(i) through (iv) and §301.7701–15(f) who are not defined as tax return preparers under that Code section and regulation, such as an individual who provides tax assistance under a Volunteer Income Tax Assistance (VITA) program, a person who merely prepares a return of the employer (or of an officer or employee of the employer) by whom the person is regularly and continuously employed, or a person who prepares a return as a fiduciary for any person. Solely for the 2011 calendar year, a tax return preparer will not be considered a specified tax return preparer if the tax return preparer reasonably expects, or the preparer's firm members in the aggregate reasonably expect, to file fewer than 100 individual income tax returns in the 2011 calendar year.

Under section 6011(e)(3), the concept of "file" or "filed" individual income tax returns affects both tax return preparers and specified tax return preparers. Tax return preparers are affected by this concept because a tax return preparer's classification as a specified tax return preparer is based upon the number of individual income tax returns the tax return preparer reasonably expects to file in a given calendar year. Specified tax return preparers are further affected by this concept be-

cause the electronic filing requirement for any particular or specific individual income tax return depends upon whether the specified tax return preparer files the return. Therefore, for purposes of section 6011(e)(3) and these regulations only, an individual income tax return is considered to be "filed" by a tax return preparer or a specified tax return preparer if the preparer or any member, employee, or agent of the preparer or the preparer's firm submits the tax return to the IRS on the taxpayer's behalf, either electronically (by e-file or other magnetic media) or in non-electronic or non-magnetic media (paper) form. Submission of a tax return in paper form includes the direct or indirect transmission, sending, mailing, or otherwise delivering of the paper tax return to the IRS by the tax return preparer or the specified tax return preparer, or by any member, employee, or agent of the tax return preparer or the preparer's firm, and may include any act or acts of assistance that go beyond the provision of filing or delivery instructions to the taxpayer. For example, this can include the preparer or a member of the preparer's firm dropping the return in the mailbox for the taxpayer. The assistance of others is considered for purposes of determining whether a return is filed by a tax return preparer or specified tax return preparer, to prevent a preparer from avoiding these rules by merely handing the return to an employee or someone else in the firm to mail to the IRS.

A tax return preparer or specified tax return preparer, or if the preparer is a member of a firm, the preparer's firm, will be able to affirmatively demonstrate, if asked, that it was a taxpayer's choice to file an individual income tax return in paper format if the preparer who prepared the return obtains a signed statement from the taxpayer that states the taxpayer chooses to file the return in paper format and that the taxpayer, and not the preparer, will submit the paper return to the IRS. This statement must be signed by the taxpayer (by both spouses if a joint return) and dated on or before the date the taxpayer files the return. The IRS may provide guidance through forms, instructions or other appropriate guidance regarding how preparers can document taxpayer choices to file individual income tax returns in paper format. A notice containing a proposed revenue procedure outlining the requirements and format of statements to document when a taxpayer chooses to file individual income tax returns in paper format is being published in the Internal Revenue Bulletin (IRB) concurrently with these proposed regulations.

In addition, the proposed regulations provide that the definition of file or filed does not alter or affect a taxpayer's obligation to file any type of tax return required under any other provision of law. The definition of *file* or *filed* by a tax return preparer or a specified tax return preparer contained in these proposed regulations applies only for the purposes of section 6011(e)(3) and these regulations, and does not apply for any other purpose under any other provision of law, such as the statutory period of limitations based on the filing of a tax return.

2. *Exclusions*

The proposed regulations provide the following exclusions from the electronic filing requirement.

A. *Undue hardship waivers*

Under the proposed regulations, the IRS may grant a waiver of the requirement of this rule in cases of undue hardship. A waiver may generally be granted to a specified tax return preparer for an undue hardship that can be identified in advance, before the specified tax return preparer would otherwise be required to file individual income tax returns electronically. Because this electronic filing requirement is statutorily imposed, the IRS will ordinarily grant undue hardship waivers only in rare cases. An undue hardship waiver may be granted to a specified tax return preparer for a series or class of individual income tax returns or for a specified period of time. A determination of undue hardship will be based upon all facts and circumstances. A specified tax return preparer shall request an undue hardship waiver in the manner prescribed by the IRS in forms, instructions, or other appropriate guidance. A notice containing a proposed revenue procedure outlining the requirements and format for undue hardship waiver requests is being published concurrently with these proposed regulations.

B. *Administrative exemptions*

The IRS may provide administrative exemptions for certain classes of specified tax return preparers or types of individual income tax returns as the IRS determines necessary to promote effective and efficient tax administration. For example, the IRS may provide a broad administrative exemption applicable to all tax return preparers for a particular type of form if the IRS does not yet provide the capability to file the form electronically, or for individual income tax returns prepared by specified tax return preparers who meet certain conditions defined by the IRS. The IRS may also provide an administrative exemption for individual income tax returns that contain or require documentation or attachments that the IRS does not yet provide the capability to file electronically, for example, documentation for the First-Time Homebuyer Credit, section 6707A disclosures, or required appraisals to support charitable contributions. The IRS may also provide a limited administrative exemption for specified tax return preparers who are certified members of, and follow the teachings of, a recognized religious group that is conscientiously opposed to using electronic media, which would include filing electronically. Unlike undue hardship waivers, specified tax return preparers who meet the criteria of an administrative exemption generally need not submit a request to the IRS to claim applicability of the administrative exemption. The IRS may provide the criteria and procedures, if any are necessary, for administrative exemptions through forms, instructions, or other appropriate guidance.

3. *Reasonably Expect to File*

A. *In general*

The determination of whether a tax return preparer (or if the preparer is a member of a firm, the preparer's firm members in the aggregate) reasonably expects to file 10 or fewer individual income tax returns (or, in the case of the 2011 calendar year, fewer than 100 individual income tax returns) is made by adding together all of the individual income tax returns (forms in the Form 1040 series, Form 1041 series, and Forms 990–T (when the exempt organizations are trusts subject to

tax on unrelated business taxable income under section 511(b)), in the aggregate) the tax return preparer and, if the preparer is a member of a firm, the firm's members, reasonably expect to prepare and file in each calendar year. In making this determination individual income tax returns that are excluded from the electronic filing requirement due to taxpayer choice or under the administrative exemption exclusion, as provided in these proposed regulations, are not to be counted. Returns excluded under the undue hardship waiver exclusion are to be counted, however, because it is expected that such waivers will generally be sought by tax return preparers who are specified tax return preparers and who would ordinarily have to file these returns electronically but for the waivers granted by the IRS in cases of undue hardship.

B. *Time for making determination of reasonable expectations*

The determination regarding reasonable expectations is made separately for each calendar year in order to ascertain whether the electronic filing requirement applies to a tax return preparer for that year. For each calendar year, the determination of whether a tax return preparer and the preparer's firm reasonably expect to file 10 or fewer individual income tax returns (or, in the case of the 2011 calendar year, fewer than 100 individual income tax returns) is made based on all relevant, objective, and demonstrable facts and circumstances prior to the time the tax return preparer and the preparer's firm first file an individual income tax return during the calendar year.

4. *Additional guidance*

The proposed regulations authorize the IRS to implement the requirements of section 6011(e)(3) and the regulations through additional guidance, including by revenue procedures, notices, publications, forms, and instructions, including those issued electronically.

5. *Proposed effective and applicability dates*

The proposed regulations are effective and applicable on January 1, 2011. To promote the effective and efficient administration of the electronic filing requirement in section 6011(e)(3), the proposed regulations provide a transition rule for 2011, based upon the number of individual income tax returns a tax return preparer files, to permit the IRS and affected tax return preparers sufficient time to prepare for and implement the requirements of section 6011(e)(3) and these proposed regulations. Beginning January 1, 2011, tax return preparers who reasonably expect to file (if a member of a firm whose firm members in the aggregate reasonably expect to file) 100 or more individual income tax returns in calendar year 2011 are specified tax return preparers who are subject to these regulations in 2011. Beginning January 1, 2012, tax return preparers who reasonably expect to file (if a member of a firm whose firm members in the aggregate reasonably expect to file) 11 or more individual income tax returns in a calendar year are specified tax return preparers who are subject to these regulations for that calendar year.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required.

It is hereby certified that the collection of information contained in these proposed regulations would not have a significant economic impact on a substantial number of small entities. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. This certification is based on a determination that these proposed regulations would impose, at most, a minimal additional reporting or recordkeeping requirement. As discussed in the Paperwork Reduction Act section of this preamble, the economic impact on affected small entities is not significant.

It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these proposed regulations. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS request comments on the clarity of the proposed rules and how they can be made easier to understand. The Treasury Department and the IRS also request comments on the procedures and criteria to be established to document taxpayer choices to file in paper format and to request the undue hardship waiver, as well as circumstances that may warrant the granting of an administrative exemption for the 2011 calendar year. Finally, the Treasury Department and the IRS request comments on the accuracy of the certification that the regulations in this document will not have a significant economic impact on a substantial number of small entities as well as comments on the Paperwork Reduction Act burden estimates contained in the Special Analysis section of this preamble. All comments that are submitted by the public will be available for public inspection and copying.

A public hearing has been scheduled for Friday, January 7, 2011 at 10 a.m. in the auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, all visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic by January 3, 2011.

A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the

deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Keith L. Brau, Office of the Associate Chief Counsel (Procedure and Administration).

* * * * *

Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Section 1.6011–6 also issued under 26 U.S.C. 6011. * * *

Par. 2. Section 1.6011–6 is added to read as follows:

§1.6011–6 Specified tax return preparers required to file individual income tax returns using magnetic media.

Individual income tax returns that are required to be filed on magnetic media by tax return preparers under §301.6011–6 of this chapter must be filed in accordance with Internal Revenue Service regulations, revenue procedures, revenue rulings, publications, forms or instructions, including those posted electronically.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 3. The authority citation for part 301 is amended by adding an entry in numerical order to read, in part, as follows:

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

Section 301.6011–6 also issued under 26 U.S.C. 6011. * * *

Par. 4. Section 301.6011–6 is added to read as follows:

§301.6011–6 Specified tax return preparers required to file individual income tax returns using magnetic media.

(a) *Definitions*.

(1) *Magnetic media*. For purposes of this section, the term *magnetic media* has the same meaning as in §301.6011–2(a)(1).

(2) *Individual income tax return*. The term *individual income tax return* means any return of tax imposed by subtitle A on individuals, estates, and trusts.

(3) *Specified tax return preparer*. The term *specified tax return preparer* means any person who is a tax return preparer, as defined in section 7701(a)(36) and §301.7701–15, unless that person reasonably expects to file 10 or fewer individual income tax returns in a calendar year. If a person who is a tax return preparer is a member of a firm, that person is a specified tax return preparer unless the person's firm members in the aggregate reasonably expect to file 10 or fewer individual income tax returns in a calendar year. Solely for the 2011 calendar year, a person will not be considered a specified tax return preparer if that person reasonably expects, or if the person is a member of a firm, the firm's members in the aggregate reasonably expect, to file fewer than 100 individual income tax returns in the 2011 calendar year. Solely for purposes of this section, an individual is considered a member of a firm if the individual is an employee, agent, member, partner, shareholder, or other equity holder of the firm.

(4) *File or Filed*. (i) For purposes of section 6011(e)(3) and these regulations only, an individual income tax return is considered to be "filed" by a tax return preparer or a specified tax return preparer if the preparer submits the tax return to the IRS on the taxpayer's behalf, either electronically (by e-file or other magnetic media) or in non-electronic (paper) form. Submission of an individual income tax return by a tax return preparer or a specified tax return preparer in non-electronic form includes the direct or indirect transmission, sending, mailing or otherwise delivering of the paper tax return to the IRS by the preparer, any member, employee, or agent of the preparer, or any member, employee, or agent of the preparer's firm, and includes any act or acts of assistance beyond providing filing or delivery instructions to the taxpayer.

(ii) An individual income tax return will not be considered to be filed, as defined in paragraph (a)(4)(i) of this section, by a tax return preparer or specified tax return preparer if the tax return preparer or specified tax return preparer who prepared the return obtains, on or prior to the date the return is filed, a signed (by both spouses if a joint return) and dated written statement from the taxpayer that states the taxpayer chooses to file the return in paper format, and that the taxpayer, and not the preparer, will submit the paper return to the IRS. The IRS may provide guidance through forms, instructions or other appropriate guidance regarding how preparers can document taxpayer choices to file individual income tax returns in paper format.

(iii) The rules contained in this section do not alter or affect a taxpayer's obligation to file returns under any other provision of law. The definition of *file* or *filed* by a tax return preparer or specified tax return preparer contained in paragraph (a)(4)(i) of this section applies only for the purposes of section 6011(e)(3) and these regulations and does not apply for any other purpose under any other provision of law.

(b) *Magnetic media filing requirement*. Except as provided in paragraphs (a)(4)(ii) and (c) of this section, any individual income tax return prepared by a specified tax return preparer in a calendar year must be filed on magnetic media if the return is filed by the specified tax return preparer.

(c) *Exclusions*. The following exclusions apply to the magnetic media filing requirement in this section:

(1) *Undue hardship waiver*. The IRS may grant a waiver of the requirement of this section in cases of undue hardship. An undue hardship waiver may be granted upon application by a specified tax return preparer consistent with instructions provided in published guidance and as prescribed in relevant forms and instructions. A determination of undue hardship will be based upon all facts and circumstances. The undue hardship waiver provided to a specified tax return preparer may apply to a series or class of individual income tax returns or for a specified period of time, subject to the terms and conditions regarding the method of filing prescribed in such waiver.

(2) *Administrative exemptions*. The IRS may provide administrative exemptions from the requirement of this section for certain classes of specified tax return preparers, or regarding certain types of

individual income tax returns, as the IRS determines necessary to promote effective and efficient tax administration. The IRS may provide administrative exemptions and any criteria or procedures necessary to claim an administrative exemption through forms, instructions, or other appropriate guidance.

(d) *Reasonably expect to file*—(1) *In general*. The determination of whether a tax return preparer reasonably expects, or if the preparer is a member of a firm, the firm's members in the aggregate reasonably expect, to file 10 or fewer individual income tax returns (or, in the case of the 2011 calendar year, fewer than 100 individual income tax returns) is made by adding together all of the individual income tax returns the tax return preparer and, if the preparer is a member of a firm, the firm's members reasonably expect to prepare and file in the calendar year. In making this determination, individual income tax returns that the tax return preparer reasonably expects will not be subject to the magnetic media filing requirement under paragraph (a)(4)(ii) of this section or are excluded from the requirement under (c)(2) of this section are not to be counted. Returns excluded from the magnetic media filing requirement under paragraph (c)(1) of this section are to be counted for purposes of making this determination.

(2) *Time for making determination of reasonable expectations*. The determination regarding reasonable expectations is made separately for each calendar year in order to ascertain whether the magnetic media filing requirement applies to a tax return preparer for that year. For each calendar year, the determination of whether a tax return preparer and the preparer's firm reasonably expect to file 10 or fewer individual income tax returns (or, in the case of the 2011 calendar year, fewer than 100 individual income tax returns) is made based on all relevant, objective, and demonstrable facts and circumstances prior to the time the tax return preparer and the preparer's firm first file an individual income tax return during the calendar year.

(e) *Examples*. The examples read as follows:

Example 1. Tax Return Preparer A is an accountant who recently graduated from college with an accounting degree and has opened his own practice. A has not prepared individual income tax returns for compensation in the past and does not plan to focus his practice on individual income tax return preparation. A intends instead to focus his practice on providing specialized accounting services to certain health care service providers. A has no plans to, and does not, employ or engage any other tax return preparers. A estimates that he may be asked by some clients to prepare and file their individual income tax returns for compensation, but A expects that the number of people who do ask him to provide this service will be no more than seven in 2012. In fact, A actually prepares and files six paper Form 1040 *(U.S. Individual Income Tax Return)* returns in 2012. Due to a growing client base, and based upon his experience in 2012, A expects that the number of individual income tax returns he will prepare and file in 2013 will at least double, estimating he will prepare and file 12 Form 1040 returns in 2013. A does not qualify as a specified tax return preparer for 2012 because A reasonably expects to file 10 or fewer (seven) in 2012. Consequently, A is not required to electronically file the individual income tax returns he prepares and files in 2012. He does not qualify as a specified tax return preparer for that year because A reasonably expects to file 10 or fewer returns (seven) in 2012. A's expectation is reasonable based on his business projections, individual income tax return filing history, and staffing decisions. A is a specified tax return preparer in 2013, however, because based on those same factors A reasonably expects to file more than 10 individual income tax returns (12) during that calendar year. A, therefore, must electronically file all individual income tax returns that A prepares and files in 2013 that are not otherwise excluded from the electronic filing requirement.

Example 2. Same facts as in *Example 1*, except three of Tax Return Preparer A's clients specifically chose to have A prepare their individual income tax returns in paper format in 2012 with the clients mailing their respective returns to the IRS. A expects that these three clients will similarly choose to have him prepare their returns in paper format in 2013, with the clients being responsible for mailing their returns to the IRS. A is not required to electronically file these three returns in 2013 because the taxpayers chose to file their returns in paper format, and A obtained a dated written statement from each of those taxpayers, indicating that they chose to file their returns in paper format. These three individual income tax returns are not counted in determining how many individual income tax returns A reasonably expects to file in 2013. Because the total number of individual income tax returns A reasonably expects to file in 2013 (nine) does not exceed 10, A is not a specified tax return preparer for calendar year 2013, and A is not required to electronically file any individual income tax return that he prepares and files in 2013.

Example 3. Tax Return Preparer B is a solo general practice attorney in a small county. Her practice includes the preparation of wills and assisting executors in administering estates. As part of her practice, B infrequently prepares and files Forms 1041 (*U.S. Income Tax Return for Estates and Trusts*) for executors. In the past three years, she prepared and filed an average of five Forms 1041 each year and never exceeded more than seven Forms 1041 in any year. Based on B's prior experience and her estimate for 2012, made prior to the time she first files an individual income tax return in 2012, she reasonably expects to prepare and file no more than five Forms 1041 in 2012. Due to the unforeseen deaths of several of her clients in late 2011, B actually prepares and files 12 Forms 1041 in 2012. B does not find out about these deaths until after she has already filed the first Form 1041 in 2012 for another client. B is not required to electronically file these returns in 2012. She does not qualify as a specified tax return preparer for calendar year 2012 because prior to the time she filed the first Form 1041 in 2012, she reasonably expected to file 10 or fewer individual income tax returns in 2012.

Example 4. Same facts as *Example 3*, except, in addition to the five Forms 1041 that she expects to prepare and file in 2012, Tax Return Preparer B also expects to prepare and file 10 paper Forms 1040 *(U.S. Individual Income Tax Return)* in 2012, based upon the requests that she has received from some of her clients. Because the total number of individual income tax returns B reasonably expects to file in 2012 (fifteen) exceeds 10, B is a specified tax return preparer for calendar year 2012, and B must electronically file all individual income tax returns that B prepares and files in 2012 that are not otherwise excluded from the electronic filing requirement.

Example 5. Firm X consists of two tax return preparers, Tax Return Preparer C who owns Firm X, and Tax Return Preparer D who is employed by C in Firm X. Based upon the firm's experience over the past three years, C and D reasonably expect to file nine and ten individual income tax returns for compensation, respectively, in 2012. Both C and D must electronically file the individual income tax returns that they prepare in 2012, unless the returns are otherwise excluded from the electronic filing requirement, because they are members of the same firm and the aggregated total of individual income tax returns that they reasonably expect to file in 2012 (nineteen), exceeds 10 individual income tax returns.

(f) *Additional guidance*. The IRS may implement the requirements of this section through additional guidance, including by revenue procedures, notices, publications, forms and instructions, including those issued electronically.

(g) *Proposed effective/applicability dates*. This section is proposed to be effective and applicable on January 1, 2011.

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

(Filed by the Office of the Federal Register on December 1, 2010, 4:15 p.m., and published in the issue of the Federal Register for December 3, 2010, 75 F.R. 75439)

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

Announcement 2010–92

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

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

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organizations described in section 170(c)(2) that are otherwise allowable will continue to be deductible. Protection under section 7428(c) would begin on December 20, 2010, 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.

Chesapeake Wildlife Sanctuary, Inc.
Valley Park, MO
Communities in Schools of Northern Virginia
Alexandria, VA
Luxury for Learning, Inc.
Brunswick, MO
Owls Nest 1230
Parkersburg, WV
Rensselaer Alumni Association, Inc., Orange County Chapter
Lakewood, CA
The Retired Enlisted Association
Fayetteville, NC
Youth Education Scholarship Services
Lathrop, CA

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

Announcement 2010–93

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

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

In the case of individual contributors, the maximum amount of contributions protected during this period is limited to $1,000.00, with a husband and wife being treated as one contributor. This protection is not extended to any individual who was responsible, in whole or in part, for the acts or omissions of the organizations that were the basis for the revocation.

This protection also applies (but without limitation as to amount) to organizations described in section 170(c)(2) which are exempt from tax under section 501(a). If the organization ultimately prevails in its declaratory judgment suit, deductibility of contributions would be subject to the normal limitations set forth under section 170.

The Hope And Dreams Foundation,
Palo Alto, CA
Credit Counseling Bureau of San Diego County, Inc.,
San Diego, CA

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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