Internal Revenue
bulletin

Bulletin No. 2011-39
September 26, 2011

HIGHLIGHTS OF THIS ISSUE

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

INCOME TAX

Rev. Rul. 2011–18, page 428.

Interest rates; underpayments and overpayments. The rates for interest determined under section 6621 of the Code for the calendar quarter beginning October 1, 2011, will be 3 percent for overpayments (2 percent in the case of a corporation), 3 percent for underpayments, and 5 percent for large corporate underpayments. The rate of interest paid on the portion of a corporate overpayment exceeding $10,000 will be 0.5 percent.

T.D. 9535, page 415.

Final regulations under section 901 of the Code provide guidance relating to the determination of the amount of taxes paid for purposes of the foreign tax credit that involves structural passive investment arrangements.

T.D. 9536, page 426.
REG–126519–11, page 452.

Final, temporary, and proposed regulations under section 901 of the Code provide guidance relating to the determination of the amount of taxes paid for purposes of the foreign tax credit. The regulations affect taxpayers that claim direct and indirect foreign tax credit.

T.D. 9542, page 411.

Final regulations under sections 195, 248, and 709 of the Code provide guidance for making elections to amortize expenses.

Rev. Proc. 2011–45, page 449.

This procedure provides domestic asset/liability percentages and domestic investment yields needed by foreign life insurance companies and foreign property and liability insurance companies to compute their minimum effectively connected net investment income under section 842(b) of the Code for taxable years beginning after December 31, 2009.

EMPLOYEE PLANS

T.D. 9541, page 438.
REG–120391–10, page 451.

Interim final and proposed regulations under section 9815 of the Code implement the rules for group health plans and health insurance coverage in the group and individual markets under provisions of the Affordable Care Act regarding preventive health services.

Rev. Proc. 2011–44, page 446.

This procedure supplements the procedures for requesting a letter ruling under section 414(e) of the Code relating to church plans. This procedure requires that plan participants and other interested persons receive a notice in connection with a letter ruling request under section 414(e) for a qualified plan, requires that a copy of the notice be submitted to the IRS as part of the ruling request, and provides procedures for the IRS to receive and consider comments relating to the ruling request from interested persons. Rev. Proc. 2011–4 (and any applicable predecessor revenue procedure) modified.

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Announcements of Disbarments and Suspensions begin on page 453.
Finding Lists begin on page ii.
Index for July through September begins on page iv.

Department of the Treasury
Internal Revenue Service

EXCISE TAX

T.D. 9541, page 438.
REG–120391–10, page 451.

Interim final and proposed regulations under section 9815 of the Code implement the rules for group health plans and health insurance coverage in the group and individual markets under provisions of the Affordable Care Act regarding preventive health services.

Notice 2011–69, page 445.

This notice describes the relief the IRS will provide in connection with the retroactive extension of certain aviation related excise taxes by the Airport and Airway Extension Act of 2011, Part IV.

The IRS Mission

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

Introduction

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

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

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

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

The Bulletin is divided into four parts as follows:

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

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

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

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

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

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

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

Section 195.—Start-Up Expenditures

26 CFR 1.195–1: Election to amortize start-up expenditures.

T.D. 9542

Elections Regarding Start-up Expenditures, Corporation Organizational Expenditures, and Partnership Organizational Expenses

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations relating to elections to deduct start-up expenditures, organizational expenditures of corporations, and organizational expenses of partnerships. The American Jobs Creation Act of 2004 amended the Internal Revenue Code to permit the optional deduction of a limited amount of these types of expenses that are paid or incurred after October 22, 2004. The regulations affect taxpayers that pay or incur these expenses and provide guidance on how to elect to deduct the expenses in accordance with the new rules.

DATES: *Effective Date:* These regulations are effective on August 16, 2011.

Applicability Dates: For dates of applicability, see §§1.195–1(d), 1.248–1(f), and 1.709–1(b)(5).

FOR FURTHER INFORMATION CONTACT: R. Matthew Kelley, (202) 622–7900 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final amendments to the Income Tax Regulations (26 CFR Part 1) under sections 195, 248, and 709 of the Internal Revenue Code to reflect amendments made by section 902 of the American Jobs Creation Act of 2004 (Public Law 108–357, 118 Stat. 1418) (the Act). The amendments made by section 902 of the Act are effective for amounts paid or incurred after October 22, 2004, the date of the enactment of the Act.

As amended by section 902(a) of the Act, section 195(b) allows an electing taxpayer to deduct, in the taxable year in which the taxpayer begins an active trade or business, an amount equal to the lesser of (1) the amount of the start-up expenditures that relate to the active trade or business, or (2) $5,000, reduced (but not below zero) by the amount by which the start-up expenditures exceed $50,000. The remainder of the start-up expenditures is deductible ratably over the 180-month period beginning with the month in which the active trade or business begins.

As amended by section 902(b) of the Act, section 248(a) allows an electing corporation to deduct, in the taxable year in which the corporation begins business, an amount equal to the lesser of (1) the amount of the organizational expenditures of the corporation, or (2) $5,000, reduced (but not below zero) by the amount by which the organizational expenditures exceed $50,000. The remainder of the organizational expenditures is deductible ratably over the 180-month period beginning with the month in which the corporation begins business.

As amended by section 902(c) of the Act, section 709(b) allows an electing partnership to deduct, in the taxable year in which the partnership begins business, an amount equal to the lesser of (1) the amount of the organizational expenses of the partnership, or (2) $5,000, reduced (but not below zero) by the amount by which the organizational expenses exceed $50,000. The remainder of the organizational expenses is deductible ratably over the 180-month period beginning with the month in which the partnership begins business.

On July 8, 2008, temporary regulations (T.D. 9411, 2008–34 I.R.B. 398) regarding elections to deduct start-up and organizational expenditures under sections 195, 248, and 709 were published in the **Federal Register** (73 FR 38910). A notice of proposed rulemaking (REG–164965–04, 2008–34 I.R.B. 450) cross-referencing the temporary regulations was published in the **Federal Register** (73 FR 38940) on the same day. One written comment responding to the notice of proposed rulemaking was received. No public hearing was requested or held. After consideration of the comment, the regulations are adopted as amended by this Treasury decision. The comment is discussed elsewhere in this preamble.

These regulations apply to expenditures paid or incurred after August 16, 2011. However, taxpayers may apply all the provisions of these regulations to expenditures paid or incurred under sections 195, 248, and 709 after October 22, 2004, provided the period of limitations on assessment of tax has not expired for the year the election under section 195, 248, or 709 is deemed made. Expenditures paid or incurred on or before October 22, 2004, may be amortized over a period of not less than 60 months as provided for under prior law.

Summary of Comment

The commentator recommended that the final regulations clarify what is meant in the proposed regulations by "clearly electing to capitalize" start-up and organizational costs. The commentator noted that it is unclear whether a taxpayer that unintentionally does not deduct or amortize start-up and organizational costs could be considered to have "clearly elected to capitalize" them. The IRS and the Treasury Department agree with the recommendation to clarify the election requirements, and the final regulations provide that a taxpayer wishing to make an election to capitalize start-up and organizational costs must "affirmatively elect to capitalize" the costs on a timely filed Federal income tax return.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866 as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is R. Matthew Kelley of the Office of the Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.195–1 is revised to read as follows:

§1.195–1 Election to amortize start-up expenditures.

(a) *In general*. Under section 195(b), a taxpayer may elect to amortize start-up expenditures as defined in section 195(c)(1). In the taxable year in which a taxpayer begins an active trade or business, an electing taxpayer may deduct an amount equal to the lesser of the amount of the start-up expenditures that relate to the active trade or business, or $5,000 (reduced (but not below zero) by the amount by which the start-up expenditures exceed $50,000). The remainder of the start-up expenditures is deductible ratably over the 180-month period beginning with the month in which the active trade or business begins. All start-up expenditures that relate to the active trade or business are considered in determining whether the start-up expenditures exceed $50,000, including expenditures incurred on or before October 22, 2004.

(b) *Time and manner of making election*. A taxpayer is deemed to have made an election under section 195(b) to amortize start-up expenditures as defined in section 195(c)(1) for the taxable year in which the active trade or business to which the expenditures relate begins. A taxpayer may choose to forgo the deemed election by affirmatively electing to capitalize its start-up expenditures on a timely filed Federal income tax return (including extensions) for the taxable year in which the active trade or business to which the expenditures relate begins. The election either to amortize start-up expenditures under section 195(b) or to capitalize start-up expenditures is irrevocable and applies to all start-up expenditures that are related to the active trade or business. A change in the characterization of an item as a start-up expenditure is a change in method of accounting to which sections 446 and 481(a) apply if the taxpayer treated the item consistently for two or more taxable years. A change in the determination of the taxable year in which the active trade or business begins also is treated as a change in method of accounting if the taxpayer amortized start-up expenditures for two or more taxable years.

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

Example 1. Expenditures of $5,000 or less. Corporation X, a calendar year taxpayer, incurs $3,000 of start-up expenditures after October 22, 2004, that relate to an active trade or business that begins on July 1, 2011. Under paragraph (b) of this section, Corporation X is deemed to have elected to amortize start-up expenditures under section 195(b) in 2011. Therefore, Corporation X may deduct the entire amount of the start-up expenditures in 2011, the taxable year in which the active trade or business begins.

Example 2. Expenditures of more than $5,000 but less than or equal to $50,000. The facts are the same as in *Example 1* except that Corporation X incurs start-up expenditures of $41,000. Under paragraph (b) of this section, Corporation X is deemed to have elected to amortize start-up expenditures under section 195(b) in 2011. Therefore, Corporation X may deduct $5,000 and the portion of the remaining $36,000 that is allocable to July through December of 2011 ($36,000/180 x 6 = $1,200) in 2011, the taxable year in which the active trade or business begins. Corporation X may amortize the remaining $34,800 ($36,000 - $1,200 = $34,800) ratably over the remaining 174 months.

Example 3. Subsequent change in the characterization of an item. The facts are the same as in *Example 2* except that Corporation X determines in 2013 that Corporation X incurred $10,000 for an additional start-up expenditure erroneously deducted in 2011 under section 162 as a business expense. Under paragraph (b) of this section, Corporation X is deemed to have elected to amortize start-up expenditures under section 195(b) in 2011, including the additional $10,000 of start-up expenditures. Corporation X is using an impermissible method of accounting for the additional $10,000 of start-up expenditures and must change its method under §1.446–1(e) and the applicable general administrative procedures in effect in 2013.

Example 4. Subsequent redetermination of year in which business begins. The facts are the same as in *Example 2* except that, in 2012, Corporation X deducted the start-up expenditures allocable to January through December of 2012 ($36,000/180 x 12 = $2,400). In addition, in 2013 it is determined that Corporation X actually began business in 2012. Under paragraph (b) of this section, Corporation X is deemed to have elected to amortize start-up expenditures under section 195(b) in 2012. Corporation X impermissibly deducted start-up expenditures in 2011, and incorrectly determined the amount of start-up expenditures deducted in 2012. Therefore, Corporation X is using an impermissible method of accounting for the start-up expenditures and must change its method under §1.446–1(e) and the applicable general administrative procedures in effect in 2013.

Example 5. Expenditures of more than $50,000 but less than or equal to $55,000. The facts are the same as in *Example 1* except that Corporation X incurs start-up expenditures of $54,500. Under paragraph (b) of this section, Corporation X is deemed to have elected to amortize start-up expenditures under section 195(b) in 2011. Therefore, Corporation X may deduct $500 ($5,000 - $4,500) and the portion of the remaining $54,000 that is allocable to July through December of 2011 ($54,000/180 x 6 = $1,800) in 2011, the taxable year in which the active trade or business begins. Corporation X may amortize the remaining $52,200 ($54,000 - $1,800 = $52,200) ratably over the remaining 174 months.

Example 6. Expenditures of more than $55,000. The facts are the same as in *Example 1* except that Corporation X incurs start-up expenditures of $450,000. Under paragraph (b) of this section, Corporation X is deemed to have elected to amortize start-up expenditures under section 195(b) in 2011. Therefore, Corporation X may deduct the amounts allocable to July through December of 2011 ($450,000/180 x 6 = $15,000) in 2011, the taxable year in which the active trade or business begins. Corporation X may amortize the remaining $435,000 ($450,000 - $15,000 = $435,000) ratably over the remaining 174 months.

(d) *Effective/applicability date*. This section applies to start-up expenditures paid or incurred after August 16, 2011. However, taxpayers may apply all the provisions of this section to start-up expenditures paid or incurred after October 22, 2004, provided that the period of limitations on assessment of tax for the year the election under paragraph

(b) of this section is deemed made has not expired. For start-up expenditures paid or incurred on or before September 8, 2008, taxpayers may instead apply §1.195–1, as in effect prior to that date (§1.195–1 as contained in 26 CFR part 1 edition revised as of April 1, 2008).

§1.195–1T [Removed]

Par. 3. Section 1.195–1T is removed.

Par. 4. Section 1.248–1 is amended by revising paragraphs (a) and (c), and adding paragraphs (d), (e), and (f) to read as follows:

§1.248–1 Election to amortize organizational expenditures.

(a) *In general*. Under section 248(a), a corporation may elect to amortize organizational expenditures as defined in section 248(b) and §1.248–1(b). In the taxable year in which a corporation begins business, an electing corporation may deduct an amount equal to the lesser of the amount of the organizational expenditures of the corporation, or $5,000 (reduced (but not below zero) by the amount by which the organizational expenditures exceed $50,000). The remainder of the organizational expenditures is deducted ratably over the 180-month period beginning with the month in which the corporation begins business. All organizational expenditures of the corporation are considered in determining whether the organizational expenditures exceed $50,000, including expenditures incurred on or before October 22, 2004.

* * * * *

(c) *Time and manner of making election*. A corporation is deemed to have made an election under section 248(a) to amortize organizational expenditures as defined in section 248(b) and §1.248–1(b) for the taxable year in which the corporation begins business. A corporation may choose to forgo the deemed election by affirmatively electing to capitalize its organizational expenditures on a timely filed Federal income tax return (including extensions) for the taxable year in which the corporation begins business. The election either to amortize organizational expenditures under section 248(a) or to capitalize organizational expenditures is irrevocable and applies to all organizational expenditures of the corporation. A change in the characterization of an item as an organizational expenditure is a change in method of accounting to which sections 446 and 481(a) apply if the corporation treated the item consistently for two or more taxable years. A change in the determination of the taxable year in which the corporation begins business also is treated as a change in method of accounting if the corporation amortized organizational expenditures for two or more taxable years.

(d) *Determination of when corporation begins business*. The deduction allowed under section 248 must be spread over a period beginning with the month in which the corporation begins business. The determination of the date the corporation begins business presents a question of fact which must be determined in each case in light of all the circumstances of the particular case. The words "begins business," however, do not have the same meaning as "in existence." Ordinarily, a corporation begins business when it starts the business operations for which it was organized; a corporation comes into existence on the date of its incorporation. Mere organizational activities, such as the obtaining of the corporate charter, are not alone sufficient to show the beginning of business. If the activities of the corporation have advanced to the extent necessary to establish the nature of its business operations, however, it will be deemed to have begun business. For example, the acquisition of operating assets which are necessary to the type of business contemplated may constitute the beginning of business.

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

Example 1. Expenditures of $5,000 or less. Corporation X, a calendar year taxpayer, incurs $3,000 of organizational expenditures after October 22, 2004, and begins business on July 1, 2011. Under paragraph (c) of this section, Corporation X is deemed to have elected to amortize organizational expenditures under section 248(a) in 2011. Therefore, Corporation X may deduct the entire amount of the organizational expenditures in 2011, the taxable year in which Corporation X begins business.

Example 2. Expenditures of more than $5,000 but less than or equal to $50,000. The facts are the same as in *Example 1* except that Corporation X incurs organizational expenditures of $41,000. Under paragraph (c) of this section, Corporation X is deemed to have elected to amortize organizational expenditures under section 248(a) in 2011. Therefore, Corporation X may deduct $5,000 and the portion of the remaining $36,000 that is allocable to July through December of 2011 ($36,000/180 x 6 = $1,200) in 2011, the taxable year in which Corporation X begins business. Corporation X may amortize the remaining $34,800 ($36,000 - $1,200 = $34,800) ratably over the remaining 174 months.

Example 3. Subsequent change in the characterization of an item. The facts are the same as in *Example 2* except that Corporation X determines in 2013 that Corporation X incurred $10,000 for an additional organizational expenditure erroneously deducted in 2011 under section 162 as a business expense. Under paragraph (c) of this section, Corporation X is deemed to have elected to amortize organizational expenditures under section 248(a) in 2011, including the additional $10,000 of organizational expenditures. Corporation X is using an impermissible method of accounting for the additional $10,000 of organizational expenditures and must change its method under §1.446–1(e) and the applicable general administrative procedures in effect in 2013.

Example 4. Subsequent redetermination of year in which business begins. The facts are the same as in *Example 2* except that, in 2012, Corporation X deducted the organizational expenditures allocable to January through December of 2012 ($36,000/180 x 12 = $2,400). In addition, in 2013 it is determined that Corporation X actually began business in 2012. Under paragraph (c) of this section, Corporation X is deemed to have elected to amortize organizational expenditures under section 248(a) in 2012. Corporation X impermissibly deducted organizational expenditures in 2011, and incorrectly determined the amount of organizational expenditures deducted in 2012. Therefore, Corporation X is using an impermissible method of accounting for the organizational expenditures and must change its method under §1.446–1(e) and the applicable general administrative procedures in effect in 2013.

Example 5. Expenditures of more than $50,000 but less than or equal to $55,000. The facts are the same as in *Example 1* except that Corporation X incurs organizational expenditures of $54,500. Under paragraph (c) of this section, Corporation X is deemed to have elected to amortize organizational expenditures under section 248(a) in 2011. Therefore, Corporation X may deduct $500 ($5,000 - $4,500) and the portion of the remaining $54,000 that is allocable to July through December of 2011 ($54,000/180 x 6 = $1,800) in 2011, the taxable year in which Corporation X begins business. Corporation X may amortize the remaining $52,200 ($54,000 - $1,800 = $52,200) ratably over the remaining 174 months.

Example 6. Expenditures of more than $55,000. The facts are the same as in *Example 1* except that Corporation X incurs organizational expenditures of $450,000. Under paragraph (c) of this section, Corporation X is deemed to have elected to amortize organizational expenditures under section 248(a) in 2011. Therefore, Corporation X may deduct the amounts allocable to July through December of 2011 ($450,000/180 x 6 = $15,000) in 2011, the taxable year in which Corporation X begins business. Corporation X may amortize the remaining $435,000 ($450,000 - $15,000 = $435,000) ratably over the remaining 174 months.

(f) *Effective/applicability date*. This section applies to organizational expenditures paid or incurred after

August 16, 2011. However, taxpayers may apply all the provisions of this section to organizational expenditures paid or incurred after October 22, 2004, provided that the period of limitations on assessment of tax for the year the election under paragraph (c) of this section is deemed made has not expired. For organizational expenditures paid or incurred on or before September 8, 2008, taxpayers may instead apply §1.248–1, as in effect prior to that date (§1.248–1 as contained in 26 CFR part 1 edition revised as of April 1, 2008).

§1.248–1T [Removed]

Par. 5. Section 1.248–1T is removed.

Par. 6. Section 1.709–1 is amended by revising paragraph (b) to read as follows:

§1.709–1 Treatment of organization and syndication costs.

* * * * *

(b) *Election to amortize organizational expenses*—(1) *In general*. Under section 709(b), a partnership may elect to amortize organizational expenses as defined in section 709(b)(3) and §1.709–2(a). In the taxable year in which a partnership begins business, an electing partnership may deduct an amount equal to the lesser of the amount of the organizational expenses of the partnership, or $5,000 (reduced (but not below zero) by the amount by which the organizational expenses exceed $50,000). The remainder of the organizational expenses is deductible ratably over the 180-month period beginning with the month in which the partnership begins business. All organizational expenses of the partnership are considered in determining whether the organizational expenses exceed $50,000, including expenses incurred on or before October 22, 2004.

(2) *Time and manner of making election*. A partnership is deemed to have made an election under section 709(b) to amortize organizational expenses as defined in section 709(b)(3) and §1.709–2(a) for the taxable year in which the partnership begins business. A partnership may choose to forgo the deemed election by affirmatively electing to capitalize its organizational expenses on a timely filed Federal income tax return (including extensions) for the taxable year in which the partnership begins business. The election either to amortize organizational expenses under section 709(b) or to capitalize organizational expenses is irrevocable and applies to all organizational expenses of the partnership. A change in the characterization of an item as an organizational expense is a change in method of accounting to which sections 446 and 481(a) apply if the partnership treated the item consistently for two or more taxable years. A change in the determination of the taxable year in which the partnership begins business also is treated as a change in method of accounting if the partnership amortized organizational expenses for two or more taxable years.

(3) *Liquidation of partnership*. If there is a winding up and complete liquidation of the partnership prior to the end of the amortization period, the unamortized amount of organizational expenses is a partnership deduction in its final taxable year to the extent provided under section 165 (relating to losses). However, there is no partnership deduction with respect to its capitalized syndication expenses.

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

Example 1. Expenditures of $5,000 or less. Partnership X, a calendar year taxpayer, incurs $3,000 of organizational expenses after October 22, 2004, and begins business on July 1, 2011. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to amortize organizational expenses under section 709(b) in 2011. Therefore, Partnership X may deduct the entire amount of the organizational expenses in 2011, the taxable year in which Partnership X begins business.

Example 2. Expenditures of more than $5,000 but less than or equal to $50,000. The facts are the same as in *Example 1* except that Partnership X incurs organizational expenses of $41,000. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to amortize organizational expenses under section 709(b) in 2011. Therefore, Partnership X may deduct $5,000 and the portion of the remaining $36,000 that is allocable to July through December of 2011 ($36,000/180 x 6 = $1,200) in 2011, the taxable year in which Partnership X begins business. Partnership X may amortize the remaining $34,800 ($36,000 - $1,200 = $34,800) ratably over the remaining 174 months.

Example 3. Subsequent change in the characterization of an item. The facts are the same as in *Example 2* except that Partnership X realizes in 2013 that Partnership X incurred $10,000 for an additional organizational expense erroneously deducted in 2011 under section 162 as a business expense. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to amortize organizational expenses under section 709(b) in 2011, including the additional $10,000 of organizational expenses. Partnership X is using an impermissible method of accounting for the additional $10,000 of organizational expenses and must change its method under §1.446–1(e) and the applicable general administrative procedures in effect in 2013.

Example 4. Subsequent redetermination of year in which business begins. The facts are the same as in *Example 2* except that, in 2012, Partnership X deducted the organizational expenses allocable to January through December of 2012 ($36,000/180 x 12 = $2,400). In addition, in 2013 it is determined that Partnership X actually began business in 2012. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to amortize organizational expenses under section 709(b) in 2012. Partnership X impermissibly deducted organizational expenses in 2011, and incorrectly determined the amount of organizational expenses deducted in 2012. Therefore, Partnership X is using an impermissible method of accounting for the organizational expenses and must change its method under §1.446–1(e) and the applicable general administrative procedures in effect in 2013.

Example 5. Expenditures of more than $50,000 but less than or equal to $55,000. The facts are the same as in *Example 1* except that Partnership X incurs organizational expenses of $54,500. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to amortize organizational expenses under section 709(b) in 2011. Therefore, Partnership X may deduct $500 ($5,000 - $4,500) and the portion of the remaining $54,000 that is allocable to July through December of 2011 ($54,000/180 x 6 = $1,800) in 2011, the taxable year in which Partnership X begins business. Partnership X may amortize the remaining $52,200 ($54,000 - $1,800 = $52,200) ratably over the remaining 174 months.

Example 6. Expenditures of more than $55,000. The facts are the same as in *Example 1* except that Partnership X incurs organizational expenses of $450,000. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to amortize organizational expenses under section 709(b) in 2011. Therefore, Partnership X may deduct the amounts allocable to July through December of 2011 ($450,000/180 x 6 = $15,000) in 2011, the taxable year in which Partnership X begins business. Partnership X may amortize the remaining $435,000 ($450,000 - $15,000 = $435,000) ratably over the remaining 174 months.

(5) *Effective/applicability date*. This section applies to organizational expenses paid or incurred after August 16, 2011. However, taxpayers may apply all the provisions of this section to organizational expenses paid or incurred after October 22, 2004, provided that the period of limitations on assessment of tax for the year the election under paragraph (b)(2) of this section is deemed made has not expired. For organizational expenses paid or incurred on or before September 8, 2008, taxpayers may instead apply §1.709–1, as in effect prior to that date (§1.709–1 as contained in 26 CFR part 1 edition revised as of April 1, 2008).

§1.709–1T [Removed]

Par. 7. Section 1.709–1T is removed.

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

Approved August 9, 2011.

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

(Filed by the Office of the Federal Register on August 16, 2011, 8:45 a.m., and published in the issue of the Federal Register for August 17, 2011, 76 F.R. 50887)

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

26 CFR 1.901–1: Allowance of credit for taxes.

T.D. 9535

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Determining the Amount of Taxes Paid for Purposes of the Foreign Tax Credit

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations providing guidance relating to the determination of the amount of taxes paid for purposes of the foreign tax credit. These regulations address certain highly structured transactions that produce inappropriate foreign tax credit results. The regulations affect individuals and corporations that claim direct and indirect foreign tax credits.

DATES: *Effective Date:* These regulations are effective on July 18, 2011.

Applicability Date: For dates of applicability, see §1.901–1(j) and §1.901–2(h)(2).

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SUPPLEMENTARY INFORMATION:

Background

On March 30, 2007, the **Federal Register** published proposed regulations (REG–156779–06, 2007–2 C.B. 1015 [72 FR 15081]) under section 901 of the Internal Revenue Code ("Code") relating to the amount of taxes paid for purposes of the foreign tax credit (the "2007 proposed regulations"). The IRS and the Treasury Department received written comments on the 2007 proposed regulations and a public hearing was held on July 30, 2007. In response to written comments, the IRS and the Treasury Department issued Notice 2007–95, 2007–2 C.B. 1091 (December 3, 2007) (see §601.601(d)(2)(ii)(*b*)) providing that the proposed rule for U.S.-owned foreign groups would be severed from the portion of the 2007 proposed regulations addressing the treatment of foreign payments attributable to certain structured passive investment arrangements. On July 16, 2008, a notice of proposed rulemaking by cross-reference to temporary regulations and temporary regulations (T.D. 9416, 2008–46 I.R.B. 1142) (the "2008 temporary regulations") were published in the **Federal Register** at 73 FR 40792 and 73 FR 40727, respectively. Corrections to those temporary regulations were published on November 14, 2008, in the **Federal Register** (73 FR 67387). The 2008 temporary regulations address the treatment of foreign payments attributable to structured passive investment arrangements and do not address the treatment of U.S.-owned foreign groups.

The IRS and the Treasury Department received written comments on the 2008 temporary regulations, which are discussed in this preamble. All comments are available at *www.regulations.gov* or upon request. A public hearing was not requested and none was held. This Treasury decision adopts the proposed regulation with the changes discussed in this preamble.

Summary of Comments and Explanation of Revisions

A. *Treatment of Amounts Attributable to a Structured Passive Investment Arrangement*

These final regulations retain the basic approach and structure of the 2008 temporary regulations. Thus, the final regulations provide that amounts paid to a foreign taxing authority that are attributable to a structured passive investment arrangement are not treated as an amount of tax paid for purposes of the foreign tax credit. An arrangement that satisfies six conditions, as described in this preamble, is treated as a structured passive investment arrangement.

A comment presented several proposals that collectively would have required further differentiation both among the various investors in structured passive investment arrangements based upon their business practices and relationships to other parties, as well as among the particular transactions undertaken by a special purpose vehicle involved in the arrangement. Because the IRS and the Treasury Department believe these proposals would introduce several subjective and factually-intensive elements into the regulations that would increase administrative burdens for taxpayers and the IRS, including a rule providing for only partial disallowance of foreign tax credits, the final regulations retain the approach of the 2008 temporary regulations, relying on objective, generally applicable standards to the extent possible. The IRS and the Treasury Department believe that this approach will appropriately disallow any foreign tax credits arising from artificial structures that are utilized to generate foreign tax credits and material duplicative foreign tax benefits.

B. *Structured Passive Investment Arrangements*

A comment recommended adding a requirement that the 2008 temporary regulations' six conditions be fulfilled as part of a plan or series of related transactions. The IRS and the Treasury Department did not adopt this comment. The standard in the regulations is designed to depend upon key objective aspects of an arrangement that indicate an abusive arrangement. The IRS and the Treasury Department believe that the introduction of a plan requirement or similar rule would introduce a subjective inquiry that is difficult to apply and unnecessary to achieve the purpose of the regulations.

C. *Section 1.901–2(e)(5)(iv)(B)(1): Special Purpose Vehicle*

The first condition provided in §1.901–2T(e)(5)(iv)(B)(*1*) of the 2008 temporary regulations is that the arrangement utilizes an entity that meets two requirements (the "SPV condition"). The first requirement is that substantially all of the entity's gross income, as determined under U.S. tax principles, is attributable to passive investment income and substantially all of the entity's assets are held to produce such passive investment income. The term entity, as defined in §1.901–2T(e)(5)(iv)(C)(*3*) of the 2008 temporary regulations, includes a corporation, trust, partnership, or disregarded entity. For purposes of the first requirement, §1.901–2T(e)(5)(iv)(C)(*5*) of the 2008 temporary regulations defines passive investment income as income defined in section 954(c) with certain modifications. Passive investment income generally includes the income of an upper-tier entity attributable to its equity interest in a lower-tier entity, but such income may be excluded from passive investment income where it is attributable to a qualified equity interest in certain lower-tier entities that are engaged in an active trade or business and other conditions apply (the "holding company exception"). See §1.901–2T(e)(5)(iv)(c)(*5*)(*ii*).

One comment recommended that the definition of passive investment income be modified to exclude personal service contract income as described in section 954(c)(1)(H) because such income is not derived from passive assets and would not ordinarily be used in a structured passive investment arrangement. The IRS and the Treasury Department agree with the comment, and accordingly these final regulations provide that passive investment income does not include personal service contract income as described in section 954(c)(1)(H).

The IRS and the Treasury Department also received several comments regarding the holding company exception. One comment recommended that the definition of passive investment income exclude income attributable to equity interests in pass-through entities except to the extent that the income of the lower-tier entity satisfies the definition of passive investment income. The IRS and the Treasury Department did not adopt this proposal because the IRS and the Treasury Department believe that the rule in the 2008 temporary regulations is necessary to prevent taxpayers from using pass-through entities to avoid the limitations on the holding company exception, such as the holding of qualified equity interests and the sharing of investment risk. The interests in a pass-through entity can be substantially indistinguishable from interests in a corporate subsidiary, and, therefore, these final regulations treat such interests the same for purposes of the definition of passive investment income. The final regulations clarify that income attributable to equity interests in pass-through entities (including a partner's distributive share of partnership income and the income attributable to an entity disregarded for U.S. tax purposes) is treated as passive investment income unless the holding company exception applies.

The IRS and the Treasury Department have deleted the last two sentences in the 2008 temporary regulations in §1.901–2T(e)(5)(iv)(B)(*1*)(*i*). These sentences described rules set out in more detail in the definition of passive investment income. The IRS and the Treasury Department believe that these sentences did not provide additional clarity to the definition of passive investment income.

One comment recommended expanding the holding company exception to treat income attributable to certain portfolio interests as active income if the income earned by the lower-tier entity was active income. As a condition to the application of the holding company exception, the potential holding company's equity interest in the lower-tier entity must be a qualified equity interest. The holding company exception focuses on whether a joint venture arrangement conducted through a holding company structure economically replicates the interests of the joint venturers in the active business of the lower-tier entity. It is not intended to insulate portfolio investments in lower-tier entities even if they operate active businesses. Therefore, the IRS and the Treasury Department do not believe that it is appropriate to broaden the holding company exception to apply to portfolio investments notwithstanding that in certain cases the lower-tier entity may have active operations.

Another comment recommended that the holding company exception be replaced with a rule that generally attributes all activities of lower-tier entities to their owners, subject to an anti-abuse exception. Under the suggested anti-abuse rule, the attribution rule would not apply if, with a view to avoiding the SPV condition, a holding company holds assets other than stock in subsidiaries, and, based on all the facts and circumstances, the ownership of those assets is expected to achieve substantially the same effect as holding those assets in a separate entity. A similar comment was considered and not adopted during the promulgation of the 2008 temporary regulations. The IRS and the Treasury Department believe that the commentator's recommendation would be difficult to administer because it would require factually intensive and subjective determinations. Therefore, this comment was not adopted.

Additionally, comments recommended clarifying the requirement in the holding company exception that substantially all of a potential holding company's opportunity for gain and risk of loss with respect to its qualified equity interest in a lower-tier entity be shared by the U.S. party or parties (or persons that are related to a U.S. party) and a counterparty or counterparties (or persons that are related to a counterparty). According to the comments, there are common situations where it is not clear that gain and risk of loss are shared, including preferred stock and stock-based compensation. The IRS and the Treasury Department believe that existing legal principles should apply to determine if an interest holder possesses the opportunity for gain and risk of loss and that additional guidance is generally unnecessary. The IRS and the Treasury Department further believe that the sharing of gain and risk of loss is dependent on facts and circumstances and therefore the final regulations provide that the assessment of opportunity for gain and risk of loss is based on all facts and circumstances.

Finally, comments requested clarification regarding the application of the holding company exception to fact patterns involving multiple counterparties or multiple U.S. parties. In response to the comments, these final regulations clarify that in cases involving more than one U.S. party or more than one counterparty or both, the requirement that the parties must share in substantially all of the upper-tier entity's opportunity for gain and risk of loss with respect to its interest in a lower-tier entity is applied by examining whether there is sufficient risk sharing by each of the groups comprising all U.S. parties (or person related to such U.S. parties) and all counterparties (or persons related to such counterparties). The IRS and the Treasury Department believe that the risk sharing requirement, as so modified, will continue to ensure that only *bona fide* joint ventures are eligible for the holding company exception. If there is more than one U.S. party or more than one counterparty, the final regulations do not require that each member of the U.S. party and counterparty groups share in the underlying investment risk. Finally, the holding company exception has been modified to provide that where a U.S. party owns an interest in an entity indirectly through a chain of entities, the exception is applied beginning with the lowest-tier entity in the chain before proceeding upward and the opportunity for gain and risk of loss borne by any upper-tier entity in the chain that is a counterparty is disregarded to the extent borne indirectly by a U.S. party.

The second of the two requirements of the SPV condition in the 2008 temporary regulations is that there is a foreign payment attributable to income of the entity. See §1.901–2T(e)(5)(iv)(B)(*1*)(*ii*). The foreign payment may be paid by the entity itself or by the owner(s) of the entity. The 2007 proposed regulations and the 2008 temporary regulations both provide an exception that a foreign payment does not include a withholding tax imposed on distributions or payments made by an entity to a U.S. party. However, the IRS and the Treasury Department have become aware that taxpayers can enter into arrangements that generate duplicative benefits involving foreign withholding taxes imposed on distributions made by an entity to a U.S. party. For example, if the parties undertake a transaction in which interests in an SPV are transferred by the U.S. party to a counterparty subject to a repurchase obligation, withholding taxes imposed on distributions from the SPV may be claimed as creditable in both jurisdictions.

Accordingly, the exception for withholding taxes imposed on distributions or payments to U.S. parties is eliminated from §1.901–2(e)(5)(iv)(B)(*1*)(*ii*) of the final regulations. The IRS and the Treasury Department will promulgate additional guidance to clarify that a foreign payment attributable to income of an entity includes a withholding tax imposed on a dividend or other distribution (including distributions made by a pass-through entity or an entity that is disregarded as an entity separate from its owner for U.S. tax purposes) with respect to the equity of the entity.

The 2008 temporary regulations attribute to income of an entity foreign payments attributable to the entity's share of income of a lower-tier entity that is a branch or pass-through entity under either foreign or U.S. law. One comment recommended that the foreign payment rule be modified by eliminating the attribution of foreign payments made by a lower-tier entity that is a branch or pass-through entity under only U.S. law to the income of its owner because such attribution would not occur if the lower-tier entity were regarded as a corporation for U.S. tax purposes. The IRS and the Treasury Department agree with the comment that foreign payments by a lower-tier entity should not be attributed to the income of its owner. In cases where a lower-tier entity is liable for foreign payments under foreign law, the disallowance of foreign tax credits with respect to such taxes should turn on whether that entity, and not the owner of such entity, satisfies the SPV condition. Accordingly, the applicable sentence has been eliminated from §1.901–2(e)(5)(iv)(B)(*1*)(*ii*) of the final regulations.

D. *Section 1.901–2(e)(5)(iv)(B)(2): U.S. Party*

Section 1.901–2(e)(5)(iv)(B)(*2*) of the final regulations adopts without change the second condition of the 2008 temporary regulations that a U.S. party is a person who is eligible to claim a credit under section 901(a), including a credit for taxes deemed paid under section 902 or 960, for all or a portion of the foreign payment if the foreign payment were an amount of tax paid (the "U.S. party condition"). Comments recommended that the U.S. party condition be supplemented with a *de minimis* exception, including an exclusion for U.S. citizens and residents. The IRS and the Treasury Department do not believe that such a modification is consistent with the purposes of these regulations. Therefore, the IRS and the Treasury Department have not adopted this comment.

Another comment recommended that if a U.S. party is a member of an affiliated group of corporations that files a consolidated federal income tax return, then all members of the affiliated group should be treated as a single U.S. party for purposes of applying the final regulations. The IRS and the Treasury Department did not adopt this comment because the final regulations provide aggregation rules that address the comment.

E. *Section 1.901–2(e)(5)(iv)(B)(3): Direct Investment*

Section 1.901–2(e)(5)(iv)(B)(*3*) of the final regulations adopts without change the third condition of the 2008 temporary regulations (the "direct investment condition"). The direct investment condition requires that the U.S. party's share of the foreign payment or payments is (or is expected to be) substantially greater than the amount of credits, if any, that the U.S. party reasonably would expect to be eligible to claim under section 901(a) for foreign taxes attributable to income generated by the U.S. party's proportionate share of the assets owned by the SPV if the U.S. party directly owned such assets.

Comments suggested that this condition in the 2008 temporary regulations will always be satisfied because it assumes the assets would not be held through a branch operation subject to net basis taxation and excludes assets that produce income subject to gross basis withholding tax. One comment recommended that the final regulations limit the condition to cases in which the arrangement increases the foreign payments attributable to the U.S. party relative to what would have been paid in the absence of a duplicative tax benefit. In contrast, the 2008 temporary regulations compare the amount of the U.S. party's foreign payment with the amount of taxes that would be expected to be paid if the U.S. party directly owned the assets in question.

The IRS and the Treasury Department disagree with this recommendation. The introduction of a standard that compares the foreign payments arising from a structured passive investment arrangement to alternative transactions that might have been undertaken under different incentives would add administrative complexity and uncertainty in the application of these regulations. Accordingly, the IRS and the Treasury Department have retained the condition unchanged from the 2008 temporary regulations both because it describes one of the abusive aspects of these arrangements and because it ensures that the regulations cannot be avoided through the use of foreign securities that produce income subject to withholding taxes.

F. *Section 1.901–2(e)(5)(iv)(B)(4): Foreign Tax Benefit*

Section 1.901–2(e)(5)(iv)(B)(*4*) of the final regulations adopts with minor changes the fourth condition of the 2008 temporary regulations (the "foreign tax benefit condition"). The foreign tax benefit condition requires that the arrangement is reasonably expected to result in a tax benefit to a counterparty (or a related person) under the laws of a foreign country. If the foreign tax benefit available to the counterparty is a credit, then such credit must correspond to 10 percent or more of the U.S. party's share (for U.S. tax purposes) of the foreign payment. Other types of foreign tax benefits, such as exemptions, deductions, exclusions or losses, must correspond to 10 percent or more of the foreign base with respect to which the U.S. party's share (for U.S. tax purposes) of the foreign payment is imposed.

The IRS and the Treasury Department received several comments with respect to the foreign tax benefit condition. The comments asserted that the rule in the 2008 temporary regulations requiring at least 10 percent correspondence between the foreign tax benefit and the U.S. party's share of the foreign payment ("the 10 percent correspondence requirement") is vague and more difficult to apply than a similar rule in the 2007 proposed regulations. Under the 2007 proposed regulations, any foreign tax benefit satisfied the condition, but the counterparty condition, described below, included minimum ownership requirements. One comment favored the clarity of the 2007 proposed rule. In addition, the comments questioned whether certain types of foreign tax benefits, such as exemptions or reduced tax rates on certain types of income, should be treated as foreign tax benefits for these purposes. Finally, comments sought clarification regarding how the percentage of correspondence is determined in cases involving more than two persons owning an interest in an SPV.

The 10 percent correspondence requirement is intended to limit any potential disallowance of foreign tax credits to cases in which there is a material duplication of the tax benefits. Accordingly, the final regulations retain this requirement. In addition, the final regulations do not exclude any particular tax benefit from the foreign tax benefit condition because duplication of tax benefits can assume a wide variety of forms. The IRS and the Treasury Department also believe that whether foreign tax benefits duplicate or correspond to the U.S. party's share of the foreign tax benefits will generally be clear and no further elaboration of the rules is required.

Another comment noted that the foreign tax benefit condition may be difficult to apply in cases where the foreign tax benefit is claimed by a party related to the counterparty. The IRS and the Treasury Department concluded that it was necessary to include related parties because of the variety of duplication techniques otherwise available to taxpayers, including the use of benefits arising to members of a related group of entities, and accordingly the comment was not adopted.

Comments sought clarification that in arrangements involving two or more unrelated counterparties, the 10 percent correspondence requirement cannot be satisfied by aggregating the value of duplicative tax benefits received by the unrelated counterparties. The comments assert that the inclusion of benefits received by parties related to a counterparty in the foreign tax benefit condition in the 2008 temporary regulations suggested, by negative implication, that any benefits claimed by unrelated counterparties should not be aggregated. The IRS and the Treasury Department did not adopt this comment. The 10 percent correspondence requirement is intended to ensure that the disallowance of credits applies only where the duplication of tax benefits in the arrangement is material relative to the value of the otherwise creditable foreign payment, irrespective of whether the arrangement involves multiple U.S. parties, multiple counterparties, or both. Thus, in the final regulations the 10 percent correspondence requirement compares the aggregate amount of foreign tax benefits available to all counterparties and persons related to such counterparties to the aggregate amount of the U.S. parties' share of the foreign payment or the foreign base, as the case may be.

Comments also objected to the language in the foreign tax benefit condition providing that the arrangement is "reasonably expected" to result in a foreign tax benefit. According to the comments, a U.S. party may be unable to assess whether a counterparty is reasonably expected to receive a foreign tax benefit and it would be inappropriate to disallow a foreign tax credit where a U.S. party cannot make such an assessment. The IRS and the Treasury Department believe the reasonableness standard in the 2008 temporary regulations affords sufficient protection against unknowable or unexpected outcomes in the majority of cases. Further, the IRS and the Treasury Department are concerned that an actual knowledge requirement would be difficult to administer. Accordingly, the IRS and the Treasury Department have not adopted this comment.

G. *Section 1.901–2(e)(5)(iv)(B)(5): Counterparty*

The fifth condition provided in §1.901–2T(e)(5)(iv)(B)(*5*) of the 2008 temporary regulations is that the arrangement include a person that, under the tax laws of a foreign country in which the person is subject to tax on the basis of place of management, place of incorporation or similar criterion or otherwise subject to a net basis tax, directly or indirectly owns or acquires equity interests in, or assets of, the SPV (the "counterparty condition"). The 2008 temporary regulations provide that a counterparty does not include the SPV or a person with respect to which the same domestic corporation, U.S. citizen or resident alien individual directly or indirectly owns more than 80 percent of the total value of the stock (or equity interests) of each of the U.S. party and such person. Also, a counterparty does not include a person with respect to which the U.S. party directly or indirectly owns more than 80 percent of the total value of the stock (or equity interests), but only if the U.S. party is a domestic corporation, a U.S. citizen or a resident alien individual.

The IRS and the Treasury Department received several comments with respect to the counterparty condition. Comments noted that in certain tiered structures the rule could treat as a counterparty an upper-tier entity in which a U.S. investor and a foreign investor each hold interests, and that to the extent that the foreign tax benefits resulting from such structures are not duplicative, the counterparty condition is overly broad. For example, if a U.S. investor and foreign investor each own 50 percent of an upper-tier entity which in turn owns an SPV, the comments argue that the exempt treatment of distributions from the SPV to its upper-tier owner is not problematic so long as each of the investors in the upper-tier entity ultimately receives only those tax benefits associated with its 50 percent interest in the upper-tier entity. Comments suggested revising the counterparty condition to exclude such intermediary entities.

The IRS and the Treasury Department agree that foreign tax benefits claimed by a jointly-held upper-tier entity are not problematic so long as none of the indirect U.S. or foreign owners of the SPV claims duplicative tax benefits attributable to the arrangement. However, the IRS and the Treasury Department are concerned that revising the counterparty condition to exclude jointly-held entities could create opportunities for avoidance of the regulations. Accordingly, in lieu of revising the counterparty condition, the final regulations revise the foreign tax benefit condition to provide that certain tax benefits claimed by upper-tier entities do not correspond to the U.S. party's share of the foreign payment. Specifically, where a U.S. party indirectly owns a non-hybrid equity interest in an SPV, a foreign tax benefit available to a foreign entity in the chain of ownership which begins with the SPV and ends with the first-tier entity in such chain does not correspond to the U.S. party's share of the foreign payment attributable to the SPV to the extent that such benefit relates to earnings of the SPV that are distributed with respect to non-hybrid equity interests in the SPV that are owned indirectly by the U.S. party for purposes of both U.S. and foreign tax law. See §1.901–2(e)(5)(iv)(B)(*4*). This revision is intended to ensure that the foreign tax benefit condition is not satisfied in cases where the U.S. and foreign investors claim only those tax benefits that are consistent with their respective investments in the arrangement and their interests are treated as equity and owned by the same persons in both jurisdictions.

One comment also recommended that dual citizens or U.S. residents, who are generally subject to U.S. tax on their worldwide income, should not be treated as counterparties because any reduction in foreign tax liability will result in a corresponding increase in U.S. tax. The IRS and the Treasury Department agree with this comment and have modified the final regulations to reflect this change.

One comment also recommended that individuals who are family members of a U.S. party not be treated as counterparties. The IRS and the Treasury Department disagree with the comment. The exception from the counterparty condition for certain U.S.-controlled foreign counterparties is based on the premise that the foreign tax benefit available to such a counterparty confers only a timing benefit that will reverse when the counterparty repatriates its earnings to the United States. Because such timing benefits are not the focus of these regulations, the 2007 proposed regulations and 2008 temporary regulations excluded certain foreign persons owned by the U.S. party or by certain United States persons who also own the U.S. party. In contrast, where an individual is related to a U.S. party but is not a United States person for U.S. tax purposes, the reduction in foreign tax liability obtained by such individual does not result in a corresponding increase in U.S. tax. Accordingly, the final regulations do not include an exclusion for such individuals.

One comment recommended that individuals receiving stock in connection with the performance of services should not be treated as counterparties. The tax policy concerns of the IRS and the Treasury Department regarding structured transactions addressed by these regulations exist regardless of the means by which a person acquires its interest in an SPV. The presence of a duplicative tax benefit is no less problematic because its recipient acquired its interest in an SPV in return for services instead of capital. Accordingly, this recommendation was not adopted.

One comment recommended that in cases where one U.S. party owns more than 80 percent of a counterparty but another U.S. party does not, the regulations should treat a foreign payment as noncompulsory only to the extent of the unrelated U.S. party's share of the foreign payment. This comment was not adopted. These regulations are intended to disallow foreign tax credits claimed in connection with structured passive investment arrangements. The tax policy concerns of the IRS and the Treasury Department regarding such abusive transactions remain the same regardless of whether the arrangement satisfies the six conditions of the regulations with respect to one U.S. party or multiple U.S. parties.

One comment recommended that the final regulations adopt the *de minimis* rule set forth in the 2007 proposed regulations that requires a counterparty to own a certain percentage of the equity or assets of the SPV. In contrast, as explained in the preamble to the 2008 temporary regulations, the 2008 temporary regulations focus on whether there is a duplicative foreign tax benefit. The IRS and the Treasury Department continue to believe that focusing on a threshold amount of duplicative tax benefits is more consistent with the concerns underlying the regulations. Accordingly, this comment is not adopted.

Another comment recommended that the percentage of U.S. ownership required to exclude a person from being treated as a counterparty be reduced from the 2008 temporary regulations' threshold of more than 80 percent. The comment recommended that the threshold be reduced to either 80 percent or more, or 75 percent or more. The IRS and the Treasury Department do not believe that the proposal is consistent with the policy concerns addressed by these final regulations. Accordingly, this comment is not adopted.

H. *Section 1.901–2(e)(5)(iv)(B)(6): Inconsistent Treatment*

The IRS and the Treasury Department also received several comments with respect to the sixth condition of the 2008 temporary regulations (the "inconsistent treatment condition"). The inconsistent treatment condition requires that the United States and an applicable foreign country treat the arrangement inconsistently under their respective tax systems and that the U.S. treatment results in either materially less income or a materially greater amount of foreign tax credits than would be available if the foreign law controlled the U.S. tax treatment. This condition is intended to limit the disallowance of credits to those arrangements that exploit inconsistencies in U.S. and foreign law to secure a foreign tax credit benefit.

A comment recommended that the final regulations adopt an additional requirement that the foreign tax benefit obtained by the counterparty be materially less if the U.S. tax treatment controlled for foreign tax purposes as well. The recommendation is intended to require that both the U.S. party's share of the foreign payments and the foreign tax benefit arise from the inconsistent treatment. The IRS and the Treasury Department believe that the foreign tax benefit condition of the 2008 temporary regulations is sufficient to ensure that the foreign tax benefit corresponds to or duplicates the U.S. party's share of the foreign payments or the foreign base and that such duplication is sufficiently indicative of inconsistency. Therefore, the IRS and the Treasury Department believe that any additional requirement under the inconsistent treatment condition is unnecessary, and the comment was not adopted.

These final regulations clarify the application of the inconsistent treatment condition in cases where multiple U.S. parties exist. Where an arrangement involves multiple U.S. parties, the inconsistent treatment condition is satisfied only if the amount of income attributable to the SPV that is recognized for U.S. tax purposes by the SPV and all the U.S. parties (and persons related to the U.S. party or parties) is materially less than the amount of income that would be recognized if the foreign tax treatment controlled for U.S. tax purposes or if the amount of foreign tax credits claimed by all U.S. parties is materially greater than it would be if the foreign tax treatment controlled for U.S. tax purposes.

I. *Examples*

These final regulations provide two new examples to illustrate changes that were adopted in the final regulations. Example 8 illustrates the application of the holding company exception when there is more than one U.S. party or more than one counterparty. Example 12 illustrates the application of the revised foreign tax benefit condition to a tiered holding company structure. Modifications to examples in the 2008 temporary regulations were also made to reflect comments received and other changes to the regulations.

J. *Miscellaneous Amendments*

These final regulations adopt with minor changes amendments made by the 2008 temporary regulations to §1.901–1(a) and (b) to reflect statutory changes made by the Foreign Investors Tax Act of 1966 (Public Law 89–809 (80 Stat. 1539), section 106(b)), the Tax Reform Act of 1976 (Public Law 94–455 (90 Stat. 1520), section 1901(a)(114)), and the American Jobs Creation Act of 2004 (Public Law 108–357 (118 Stat. 1418–20), section 405(b)).

K. *Effective Date*

These final regulations generally apply to payments that, if such payments were an amount of tax paid, would be considered paid or accrued on or after July 13, 2011.

The IRS and the Treasury Department will continue to closely scrutinize other arrangements that are not covered by the regulations but produce inappropriate foreign tax credit results. Such arrangements may include arrangements that are similar to arrangements described in the final regulations, but that do not meet all of the conditions included in the final regulations. The IRS will continue to challenge the claimed U.S. tax results in appropriate cases, including under judicial doctrines. The IRS and the Treasury Department may also issue additional regulations in the future to address such other arrangements.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations will primarily affect affiliated groups of corporations that have foreign operations which tend to be larger businesses. Moreover the number of taxpayers affected and the average burden are minimal. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

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

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.901–1 is amended by revising paragraphs (a) and (b), and adding a second sentence in paragraph (j) to read as follows:

§1.901–1 Allowance of credit for taxes.

(a) *In general*. Citizens of the United States, domestic corporations, and certain aliens resident in the United States or Puerto Rico may choose to claim a credit, as provided in section 901, against the tax imposed by chapter 1 of the Internal Revenue Code (Code) for taxes paid or accrued to foreign countries and possessions of the United States, subject to the conditions prescribed in paragraphs (a)(1) through (a)(3) and paragraph (b) of this section.

(1) *Citizen of the United States*. A citizen of the United States, whether resident or nonresident, may claim a credit for—

(i) The amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

(ii) His share of any such taxes of a partnership of which he is a member, or of an estate or trust of which he is a beneficiary.

(2) *Domestic corporation*. A domestic corporation may claim a credit for—

(i) The amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States;

(ii) Its share of any such taxes of a partnership of which it is a member, or of an estate or trust of which it is a beneficiary; and

(iii) The taxes deemed to have been paid under section 902 or 960.

(3) *Alien resident of the United States or Puerto Rico*. Except as provided in a Presidential proclamation described in section 901(c), an alien resident of the United States, or an alien individual who is a *bona fide* resident of Puerto Rico during the entire taxable year, may claim a credit for—

(i) The amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

(ii) His distributive share of any such taxes of a partnership of which he is a member, or of an estate or trust of which he is a beneficiary.

(b) *Limitations*. Certain Code sections, including sections 814, 901(e) through (m), 904, 906, 907, 908, 909, 911, 999, and 6038, limit the credit against the tax imposed by chapter 1 of the Code for certain foreign taxes.

* * * * *

(j) *Effective/applicability date*. * * * Paragraphs (a) and (b) of this section apply to taxable years ending after July 13, 2011.

§1.901–1T [Removed].

Par. 3. Section 1.901–1T is removed.

Par. 4. Section 1.901–2 is amended by removing and reserving paragraph (e)(5)(iii), revising paragraph (e)(5)(iv), and revising paragraph (h)(2) to read as follows:

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

* * * * *

(e) * * *

(5) * * *

(iii) [Reserved].

(iv) *Structured passive investment arrangements*—(A) *In general*. Notwithstanding paragraph (e)(5)(i) of this section, an amount paid to a foreign country (a "foreign payment") is not a compulsory payment, and thus is not an amount of tax paid, if the foreign payment is attributable (within the meaning of paragraph (e)(5)(iv)(B)(*1*)(*ii*) of this section) to a structured passive investment arrangement (as described in paragraph (e)(5)(iv)(B) of this section).

(B) *Conditions*. An arrangement is a structured passive investment arrangement if all of the following conditions are satisfied:

(*1*) *Special purpose vehicle (SPV)*. An entity that is part of the arrangement meets the following requirements:

(*i*) Substantially all of the gross income (for U.S. tax purposes) of the entity, if any, is passive investment income, and substantially all of the assets of the entity are assets held to produce such passive investment income.

(*ii*) There is a foreign payment attributable to income of the entity (as determined under the laws of the foreign country to which such foreign payment is made), including the entity's share of income of a lower-tier entity that is a branch or pass-through entity under the laws of such foreign country, that, if the foreign payment were an amount of tax paid, would be paid or accrued in a U.S. taxable year in which the entity meets the requirements of paragraph (e)(5)(iv)(B)(*1*)(*i*) of this section. A foreign payment attributable to income of an entity includes a foreign payment attributable to income that is required to be taken into account by an owner of the entity, if the entity is a branch or pass-through entity under the laws of such foreign country.

(*2*) *U.S. party*. A person would be eligible to claim a credit under section 901(a) (including a credit for foreign taxes deemed paid under section 902 or 960) for all or a portion of the foreign payment described in paragraph (e)(5)(iv)(B)(*1*)(*ii*) of this section if the foreign payment were an amount of tax paid.

(*3*) *Direct investment*. The U.S. party's proportionate share of the foreign payment or payments described in paragraph (e)(5)(iv)(B)(*1*)(*ii*) of this section is (or is expected to be) substantially greater than the amount of credits, if any, that the U.S. party reasonably would expect to be eligible to claim under section 901(a) for foreign taxes attributable to income generated by the U.S. party's proportionate share of the assets owned by the SPV if the U.S. party directly owned such assets. For this purpose, direct ownership shall not include ownership through a branch, a permanent establishment or any other arrangement (such as an agency arrangement or dual resident status) that would result in the income generated by the U.S. party's proportionate share of the assets being subject to tax on a net basis in the foreign country to which the payment is made. A U.S. party's proportionate share of the assets of the SPV shall be determined by reference to such U.S. party's proportionate share of the total value of all of the outstanding interests in the SPV that are held by its equity owners and creditors. A U.S. party's proportionate share of the assets of the SPV, however, shall not include any assets that produce income subject to gross basis withholding tax.

(*4*) *Foreign tax benefit*. The arrangement is reasonably expected to result in a credit, deduction, loss, exemption, exclusion or other tax benefit under the laws of a foreign country that is available to a counterparty or to a person that is related to the counterparty (determined under the principles of paragraph (e)(5)(iv)(C)(*7*) of this section by applying the tax laws of a foreign country in which the counterparty is subject to tax on a net basis). However, a foreign tax benefit in the form of a credit is described in this paragraph (e)(5)(iv)(B)(*4*) only if the amount of any such credit corresponds to 10 percent or more of the amount of the U.S. party's share (for U.S. tax purposes) of the foreign payment referred to in paragraph (e)(5)(iv)(B)(*1*)(*ii*) of this section. In addition, a foreign tax benefit in the form of a deduction, loss, exemption, exclusion or other tax benefit is described in this paragraph (e)(5)(iv)(B)(*4*) only if such amount corresponds to 10 percent or more of the foreign base with respect to which the U.S. party's share (for U.S. tax purposes) of the foreign payment is imposed. For purposes of the preceding two sentences, if an arrangement involves more than one U.S. party or more than one counterparty or both, the aggregate amount of foreign tax benefits available to all of the counterparties and persons related to such counterparties is compared to the aggregate amount of all of the U.S. parties' shares of the foreign payment or foreign base, as the case may be. Where a U.S. party indirectly owns interests in an SPV that are treated as equity interests for both U.S. and foreign tax purposes, a foreign tax benefit available to a foreign entity in the chain of ownership that begins with the SPV and ends with the first-tier entity in the chain does not correspond to the U.S. party's share of the foreign payment attributable to income of the SPV to the extent that such benefit relates to earnings of the SPV that are distributed with respect to equity interests in the SPV that are owned directly or indirectly by the U.S. party for purposes of both U.S. and foreign tax law.

(*5*) *Counterparty*. The arrangement involves a counterparty. A counterparty is a person that, under the tax laws of a foreign country in which the person is subject to tax on the basis of place of management, place of incorporation or similar criterion or otherwise subject to a net basis tax, directly or indirectly owns or acquires equity interests in, or assets of, the SPV. However, a counterparty does not include the SPV or a person with respect to which for U.S. tax purposes the same domestic corporation, U.S. citizen or resident alien individual directly or indirectly owns more than 80 percent of the total value of the stock (or equity interests) of each of the U.S. party and such person. A counterparty also does not include a person with respect to which for U.S. tax purposes the U.S. party directly or indirectly owns more than 80 percent of the total value of the stock (or equity interests), but only if the U.S. party is a domestic corporation, a U.S. citizen or a resident alien individual. In addition, a counterparty does not include an individual who is a U.S. citizen or resident alien.

(*6*) *Inconsistent treatment*. The United States and an applicable foreign country treat one or more of the aspects of the arrangement listed in paragraph (e)(5)(iv)(B)(*6*)(*i*) through (e)(5)(iv)(B)(*6*)(*iv*) of this section differently under their respective tax systems, and for one or more tax years when the arrangement is in effect one or both of the following two conditions applies; either the amount of income attributable to the SPV that is recognized for U.S. tax purposes by the SPV, the U.S. party or parties, and persons related to a U.S. party or parties is materially less than the amount of income that would be recognized if the foreign tax treatment controlled for U.S. tax purposes; or the amount of credits claimed by the U.S. party or parties (if the foreign payment described in paragraph (e)(5)(iv)(B)(*1*)(*ii*) of this section were an amount of tax paid) is materially greater than it would be if the foreign tax treatment controlled for U.S. tax purposes:

(*i*) The classification of the SPV (or an entity that has a direct or indirect ownership interest in the SPV) as a corporation or other entity subject to an entity-level tax, a partnership or other flow-through entity or an entity that is disregarded for tax purposes.

(*ii*) The characterization as debt, equity or an instrument that is disregarded for tax purposes of an instrument issued by the SPV (or an entity that has a direct or indirect ownership interest in the SPV) to a U.S. party, a counterparty or a person related to a U.S. party or a counterparty.

(*iii*) The proportion of the equity of the SPV (or an entity that directly or indirectly owns the SPV) that is considered to be owned directly or indirectly by a U.S. party and a counterparty.

(*iv*) The amount of taxable income that is attributable to the SPV for one or more tax years during which the arrangement is in effect.

(C) *Definitions*. The following definitions apply for purposes of paragraph (e)(5)(iv) of this section.

(*1*) *Applicable foreign country*. An *applicable foreign country* means each foreign country to which a foreign payment described in paragraph (e)(5)(iv)(B)(*1*)(*ii*) of this section is made or which confers a foreign tax benefit described in paragraph (e)(5)(iv)(B)(*4*) of this section.

(*2*) *Counterparty*. The term *counterparty* means a person described in paragraph (e)(5)(iv)(B)(*5*) of this section.

(*3*) *Entity*. The term *entity* includes a corporation, trust, partnership or disregarded entity described in §301.7701–2(c)(2)(i).

(*4*) *Indirect ownership*. Indirect ownership of stock or another equity interest (such as an interest in a partnership) shall be determined in accordance with the principles of section 958(a)(2), regardless of whether the interest is owned by a U.S. or foreign entity.

(*5*) *Passive investment income*—(*i*) *In general*. The term *passive investment income* means income described in section 954(c), as modified by this paragraph (e)(5)(iv)(C)(*5*)(*i*) and paragraph (e)(5)(iv)(C)(*5*)(*ii*) of this section. In determining whether income is described in section 954(c), paragraphs (c)(1)(H), (c)(3), and (c)(6) of that section shall be disregarded. Sections 954(c), 954(h), and 954(i) shall be applied at the entity level as if the entity (as defined in paragraph (e)(5)(iv)(C)(*3*) of this section) were a controlled foreign corporation (as defined in section 957(a)). For purposes of determining if sections 954(h) and 954(i) apply for purposes of this paragraph (e)(5)(iv)(C)(*5*)(*i*) and paragraph (e)(5)(iv)(C)(*5*)(*ii*) of this section, any income of an entity attributable to transactions that, assuming the entity is an SPV, are with a person that is a counterparty, or with persons that are related to a counterparty within the meaning of paragraph (e)(5)(iv)(B)(*4*) of this section, shall not be treated as qualified banking or financing income or as qualified insurance income, and shall not be taken into account in applying sections 954(h) and 954(i) for purposes of determining whether other income of the entity is excluded from section 954(c)(1) under section 954(h) or 954(i), but only if any such person (or a person that is related to such person within the meaning of paragraph (e)(5)(iv)(B)(*4*) of this section) is eligible for a foreign tax benefit described in paragraph (e)(5)(iv)(B)(*4*) of this section. In addition, in applying section 954(h) for purposes of this paragraph (e)(5)(iv)(C)(*5*)(*i*) and paragraph (e)(5)(iv)(C)(*5*)(*ii*) of this section, section 954(h)(3)(E) shall not apply, section 954(h)(2)(A)(ii) shall be satisfied only if the entity conducts substantial activity with respect to its business through its own employees, and the term "any foreign country" shall be substituted for "home country" wherever it appears in section 954(h).

(*ii*) *Income attributable to lower-tier entities; holding company exception*. Income of an upper-tier entity that is attributable to an equity interest in a lower-tier entity, including dividends, an allocable share of partnership income, and income attributable to the ownership of an interest in an entity that is disregarded as an entity separate from its owner is passive investment income unless substantially all of the upper-tier entity's assets consist of qualified equity interests in one or more lower-tier entities, each of which is engaged in the active conduct of a trade or business and derives more than 50 percent of its gross income from such trade or business, and substantially all of the upper-tier entity's opportunity for gain and risk of loss with respect to each such interest in a lower-tier entity is shared by the U.S. party (or persons that are related to a U.S. party) and, assuming the entity is an SPV, a counterparty (or persons that are related to a counterparty) ("holding company exception"). If an arrangement involves more than one U.S. party or more than one counterparty or both, then substantially all of the upper-tier entity's opportunity for gain and risk of loss with respect to its interest in any lower-tier entity must be shared (directly or indirectly) by one or more U.S. parties (or persons related to such U.S. parties) and, assuming the upper-tier entity is an SPV, one or more counterparties (or persons related to such counterparties). Substantially all of the upper-tier entity's opportunity for gain and risk of loss with respect to its interest in any lower-tier entity is not shared if the opportunity for gain and risk of loss is borne (directly or indirectly) by one or more U.S. parties (or persons related to such U.S. party or parties) or, assuming the upper-tier entity is an SPV, by one or more counterparties (or persons related to such counterparty or counterparties). Whether and the extent to which a person is considered to share in an upper-tier entity's opportunity for gain and risk of loss is determined based on all the facts and circumstances, provided, however, that a person does not share in an upper-tier entity's opportunity for gain and risk of loss if its equity interest in the upper-tier entity was acquired in a sale-repurchase transaction or if its interest is treated as debt for U.S. tax purposes. If a U.S. party owns an interest in an entity indirectly through a chain of entities, the application of the holding company exception begins with the lowest-tier entity in the chain that may satisfy the holding company exception and proceeds upward; provided, however, that the opportunity for gain and risk of loss borne by any upper-tier entity in the chain that is a counterparty shall be disregarded to the extent borne indirectly by a U.S. party. An upper-tier entity that satisfies the holding company exception is itself considered to be engaged in the active conduct of a trade or business and to derive more than 50 percent of its gross income from such trade or business for purposes of applying the holding company exception to the owners of such entity. A lower-tier entity that is engaged in a banking, financing, or similar business shall not be considered to be engaged in the active conduct of a trade or business unless the income derived by such entity would be excluded from section 954(c)(1) under section 954(h) or 954(i) as modified by paragraph (e)(5)(iv)(C)(*5*)(*i*) of this section.

(*6*) *Qualified equity interest*. With respect to an interest in a corporation, the term *qualified equity interest* means stock representing 10 percent or more of the total combined voting power of all classes of stock entitled to vote and 10 percent or more of the total value of the stock of the corporation or disregarded entity, but does not include any preferred stock (as defined in section 351(g)(3)). Similar rules shall apply to determine whether an interest in an entity other than a corporation is a qualified equity interest.

(*7*) *Related person*. Two persons are related if—

(*i*) One person directly or indirectly owns stock (or an equity interest) possessing more than 50 percent of the total value of the other person; or

(*ii*) The same person directly or indirectly owns stock (or an equity interest) possessing more than 50 percent of the total value of both persons.

(*8*) *Special purpose vehicle (SPV)*. The term *SPV* means the entity described in paragraph (e)(5)(iv)(B)(*1*) of this section.

(*9*) *U.S. party*. The term *U.S. party* means a person described in paragraph (e)(5)(iv)(B)(*2*) of this section.

(D) *Examples*. The following examples illustrate the rules of paragraph (e)(5)(iv) of this section. No inference is intended as to whether a taxpayer would be eligible to claim a credit under section 901(a) if a foreign payment were an amount of tax paid. The examples set forth below do not limit the application of other principles of existing law to determine the proper tax consequences of the structures or transactions addressed in the regulations.

Example 1. U.S. borrower transaction. (i) *Facts*. A domestic corporation (USP) forms a country M corporation (Newco), contributing $1.5 billion in exchange for 100% of the stock of Newco. Newco, in turn, loans the $1.5 billion to a second country M corporation (FSub) wholly owned by USP. USP then sells its entire interest in Newco to a country M corporation (FP) for the original purchase price of $1.5 billion, subject to an obligation to repurchase the interest in five years for $1.5 billion. The sale has the effect of transferring ownership of the Newco stock to FP for country M tax purposes. Assume the sale-repurchase transaction is structured in a way that qualifies as a collateralized loan for U.S. tax purposes. Therefore, USP remains the owner of the Newco stock for U.S. tax purposes. In year 1, FSub pays Newco $120 million of interest. Newco pays $36 million to country M with respect to such interest income and distributes the remaining $84 million to FP. Under country M law, the $84 million distribution is excluded from FP's income. None of FP's stock is owned, directly or indirectly, by USP or any shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Under an income tax treaty between country M and the United States, country M does not impose country M tax on interest received by U.S. residents from sources in country M.

(ii) *Result*. The $36 million payment by Newco to country M is not a compulsory payment, and thus is not an amount of tax paid because the foreign payment is attributable to a structured passive investment arrangement. First, Newco is an SPV because all of Newco's income is passive investment income described in paragraph (e)(5)(iv)(C)(*5*) of this section; Newco's only asset, a note, is held to produce such income; the payment to country M is attributable to such income; and if the payment were an amount of tax paid it would be paid or accrued in a U.S. taxable year in which Newco meets the requirements of paragraph (e)(5)(iv)(B)(*1*)(*i*) of this section. Second, if the foreign payment were treated as an amount of tax paid, USP would be deemed to pay the foreign payment under section 902(a) and, therefore, would be eligible to claim a credit for such payment under section 901(a). Third, USP would not pay any country M tax if it directly owned Newco's loan receivable. Fourth, the distribution from Newco to FP is exempt from tax under country M law, and the exempt amount corresponds to more than 10% of the foreign base with respect to which USP's share (which is 100% under U.S. tax law) of the foreign payment was imposed. Fifth, FP is a counterparty because FP owns stock of Newco under country M law and none of FP's stock is owned by USP or shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Sixth, FP is the owner of

100% of Newco's stock for country M tax purposes, while USP is the owner of 100% of Newco's stock for U.S. tax purposes, and the amount of credits claimed by USP if the payment to country M were an amount of tax paid is materially greater than it would be if country M tax treatment controlled for U.S. tax purposes such that FP, rather than USP, owned 100% of Newco's stock. Because the payment to country M is not an amount of tax paid, USP is not deemed to pay any country M tax under section 902(a). USP has dividend income of $84 million and also has interest expense of $84 million. FSub's post–1986 undistributed earnings are reduced by $120 million of interest expense.

Example 2. U.S. borrower transaction. (i) *Facts*. The facts are the same as in *Example 1*, except that FSub is a wholly-owned subsidiary of Newco. In addition, assume FSub is engaged in the active conduct of manufacturing and selling widgets and derives more than 50% of its gross income from such business.

(ii) *Result*. The results are the same as in *Example 1*. Although Newco wholly owns FSub, which is engaged in the active conduct of manufacturing and selling widgets and derives more than 50% of its income from such business, Newco's income that is attributable to Newco's equity interest in FSub is passive investment income because the sale-repurchase transaction limits FP's interest in Newco and its assets to that of a creditor, so that substantially all of Newco's opportunity for gain and risk of loss with respect to its stock in FSub is borne by USP. See paragraph (e)(5)(iv)(C)(*5*)(*ii*) of this section. Accordingly, Newco's stock in FSub is held to produce passive investment income. Thus, Newco is an SPV because all of Newco's income is passive investment income described in paragraph (e)(5)(iv)(C)(*5*) of this section, Newco's assets are held to produce such income, the payment to country M is attributable to such income, and if the payment were an amount of tax paid it would be paid or accrued in a U.S. taxable year in which Newco meets the requirements of paragraph (e)(5)(iv)(B)(*1*)(*i*) of this section.

Example 3. U.S. borrower transaction. (i) *Facts*. (A) A domestic corporation (USP) loans $750 million to its wholly-owned domestic subsidiary (Sub). USP and Sub form a country M partnership (Partnership) to which each contributes $750 million. Partnership loans all of its $1.5 billion of capital to Issuer, a wholly-owned country M affiliate of USP, in exchange for a note and coupons providing for the payment of interest at a fixed rate over a five-year term. Partnership sells all of the coupons to Coupon Purchaser, a country N partnership owned by a country M corporation (Foreign Bank) and a wholly-owned country M subsidiary of Foreign Bank, for $300 million. At the time of the coupon sale, the fair market value of the coupons sold is $290 million and, pursuant to section 1286(b)(3), Partnership's basis allocated to the coupons sold is $290 million. Several months later and prior to any interest payments on the note, Foreign Bank and its subsidiary sell all of their interests in Coupon Purchaser to an unrelated country O corporation for $280 million. None of Foreign Bank's stock or its subsidiary's stock is owned, directly or indirectly, by USP or Sub or by any shareholders of USP or Sub that are domestic corporations, U.S. citizens, or resident alien individuals.

(B) Assume that both the United States and country M respect the sale of the coupons for tax law purposes. In the year of the coupon sale, for country M tax purposes USP's and Sub's shares of Partnership's profits total $300 million, a payment of $60 million to country M is made with respect to those profits, and Foreign Bank and its subsidiary, as partners of Coupon Purchaser, are entitled to deduct the $300 million purchase price of the coupons from their taxable income. For U.S. tax purposes, USP and Sub recognize their distributive shares of the $10 million premium income and claim a direct foreign tax credit for their shares of the $60 million payment to country M. Country M imposes no additional tax when Foreign Bank and its subsidiary sell their interests in Coupon Purchaser. Country M also does not impose country M tax on interest received by U.S. residents from sources in country M.

(ii) *Result*. The payment to country M is not a compulsory payment, and thus is not an amount of tax paid, because the foreign payment is attributable to a structured passive investment arrangement. First, Partnership is an SPV because all of Partnership's income is passive investment income described in paragraph (e)(5)(iv)(C)(*5*) of this section; Partnership's only asset, Issuer's note, is held to produce such income; the payment to country M is attributable to such income; and if the payment were an amount of tax paid, it would be paid or accrued in a U.S. taxable year in which Partnership meets the requirements of paragraph (e)(5)(iv)(B)(*1*)(*i*) of this section. Second, if the foreign payment were an amount of tax paid, USP and Sub would be eligible to claim a credit for such payment under section 901(a). Third, USP and Sub would not pay any country M tax if they directly owned Issuer's note. Fourth, for country M tax purposes, Foreign Bank and its subsidiary deduct the $300 million purchase price of the coupons and are exempt from country M tax on the $280 million received upon the sale of Coupon Purchaser, and the deduction and exemption correspond to more than 10% of the $300 million base with respect to which USP's and Sub's 100% share of the foreign payments was imposed. Fifth, Foreign Bank and its subsidiary are counterparties because they indirectly acquired assets of Partnership, the interest coupons on Issuer's note, and are not directly or indirectly owned by USP or Sub or shareholders of USP or Sub that are domestic corporations, U.S. citizens, or resident alien individuals. Sixth, the amount of taxable income of Partnership for one or more years is different for U.S. and country M tax purposes, and the amount of income attributable to USP and Sub for U.S. tax purposes is materially less than the amount of income they would recognize if the country M tax treatment of the coupon sale controlled for U.S. tax purposes. Because the payment to country M is not an amount of tax paid, USP and Sub are not considered to pay tax under section 901. USP and Sub have income of $10 million in the year of the coupon sale.

Example 4. Active business; no SPV. (i) *Facts*. A, a domestic corporation, wholly owns B, a country X corporation engaged in the manufacture and sale of widgets. On January 1, year 1, C, also a country X corporation, loans $400 million to B in exchange for an instrument that is debt for U.S. tax purposes and equity in B for country X tax purposes. As a result, C is considered to own stock of B for country X tax purposes. B loans $55 million to D, a country Y corporation wholly owned by A. In year 1, B has $166 million of net income attributable to its sales of widgets and $3.3 million of interest income attributable to the loan to D. Substantially all of B's assets are used in its widget business. Country Y does not impose tax on interest paid to nonresidents. B makes a payment of $50.8 million to country X with respect to B's net income. Country X does not impose tax on dividend payments between country X corporations. None of C's stock is owned, directly or indirectly, by A or by any shareholders of A that are domestic corporations, U.S. citizens, or resident alien individuals.

(ii) *Result*. B is not an SPV within the meaning of paragraph (e)(5)(iv)(B)(*1*) of this section because the amount of interest income received from D does not constitute substantially all of B's income and the $55 million note from D does not constitute substantially all of B's assets. Accordingly, the $50.8 million payment to country X is not attributable to a structured passive investment arrangement.

Example 5 . U.S. lender transaction. (i) *Facts*. (A) A country X corporation (Foreign Bank) contributes $2 billion to a newly-formed country X company (Newco) in exchange for 90% of the common stock of Newco and securities that are treated as debt of Newco for U.S. tax purposes and preferred stock of Newco for country X tax purposes. A domestic corporation (USP) contributes $1 billion to Newco in exchange for 10% of Newco's common stock and securities that are treated as preferred stock of Newco for U.S. tax purposes and debt of Newco for country X tax purposes. Newco loans the $3 billion to a wholly-owned, country X subsidiary of Foreign Bank (FSub) in return for a $3 billion, seven-year note paying interest currently. The Newco securities held by USP entitle the holder to fixed distributions of $4 million per year, and the Newco securities held by Foreign Bank entitle the holder to receive $82 million per year, payable only on maturity of the $3 billion FSub note in year 7. At the end of year 5, pursuant to a prearranged plan, Foreign Bank acquires USP's Newco stock and securities for a prearranged price of $1 billion. Country X does not impose tax on dividends received by one country X corporation from a second country X corporation. Under an income tax treaty between country X and the United States, country X does not impose country X tax on interest received by U.S. residents from sources in country X. None of Foreign Bank's stock is owned, directly or indirectly, by USP or any shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals.

(B) In each of years 1 through 7, FSub pays Newco $124 million of interest on the $3 billion note. Newco distributes $4 million to USP in each of years 1 through 5. The distributions are deductible for country X tax purposes, and Newco pays country X $36 million with respect to $120 million of taxable income from the FSub note in each year. For U.S. tax purposes, in each year Newco's post–1986 undistributed earnings are increased by $124 million of interest income and reduced by accrued interest expense with respect to the Newco securities held by Foreign Bank.

(ii) *Result*. The $36 million payment to country X is not a compulsory payment, and thus is not an amount of tax paid, because the foreign payment is attributable to a structured passive investment arrangement. First, Newco is an SPV because all of

Newco's income is passive investment income described in paragraph (e)(5)(iv)(C)(*5*) of this section; Newco's only asset, a note of FSub, is held to produce such income; the payment to country X is attributable to such income; and if the payment were an amount of tax paid it would be paid or accrued in a U.S. taxable year in which Newco meets the requirements of paragraph (e)(5)(iv)(B)(*1*)(*i*) of this section. Second, if the foreign payment were an amount of tax paid, USP would be deemed to pay its *pro rata* share of the foreign payment under section 902(a) in each of years 1 through 5 and, therefore, would be eligible to claim a credit under section 901(a). Third, USP would not pay any country X tax if it directly owned its proportionate share of Newco's assets, a note of FSub. Fourth, for country X tax purposes, Foreign Bank is eligible to receive a tax-free distribution of $82 million attributable to each of years 1 through 5, and that amount corresponds to more than 10% of the foreign base with respect to which USP's share of the foreign payment was imposed. Fifth, Foreign Bank is a counterparty because it owns stock of Newco for country X tax purposes and none of Foreign Bank's stock is owned, directly or indirectly, by USP or shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Sixth, the United States and country X treat various aspects of the arrangement differently, including whether the Newco securities held by Foreign Bank and USP are debt or equity. The amount of credits claimed by USP if the payment to country X were an amount of tax paid is materially greater than it would be if the country X tax treatment controlled for U.S. tax purposes such that the securities held by USP were treated as debt or the securities held by Foreign Bank were treated as equity, and the amount of income recognized by Newco for U.S. tax purposes is materially less than the amount of income recognized for country X tax purposes. Because the payment to country X is not an amount of tax paid, USP is not deemed to pay any country X tax under section 902(a). USP has dividend income of $4 million in each of years 1 through 5.

Example 6. Holding company; no SPV. (i) *Facts*. A, a country X corporation, and B, a domestic corporation, each contribute $1 billion to a newly-formed country X entity (C) in exchange for 50% of the common stock of C. C is treated as a corporation for country X purposes and a partnership for U.S. tax purposes. C contributes $1.95 billion to a newly-formed country X corporation (D) in exchange for 100% of D's common stock. C loans its remaining $50 million to D. Accordingly, C's sole assets are stock and debt of D. D uses the entire $2 billion to engage in the business of manufacturing and selling widgets. In year 1, D derives $300 million of income from its widget business and derives $2 million of interest income. Also in year 1, C has dividend income of $200 million and interest income of $3.2 million with respect to its investment in D. Country X does not impose tax on dividends received by one country X corporation from a second country X corporation. C makes a payment of $960,000 to country X with respect to C's net income.

(ii) *Result*. C qualifies for the holding company exception described in paragraph (e)(5)(iv)(C)(*5*)(*ii*) of this section because C holds a qualified equity interest in D, D is engaged in an active trade or business and derives more than 50% of its gross income from such trade or business, C's interest in D constitutes substantially all of C's assets, and A and B share in substantially all of C's opportunity for gain and risk of loss with respect to D. As a result, C's dividend income from D is not passive investment income and C's stock in D is not held to produce such income. Accordingly, C is not an SPV within the meaning of paragraph (e)(5)(iv)(B)(*1*) of this section, and the $960,000 payment to country X is not attributable to a structured passive investment arrangement.

Example 7. Holding company; no SPV. (i) *Facts*. The facts are the same as in *Example 6*, except that instead of loaning $50 million to D, C contributes the $50 million to E in exchange for 10% of the stock of E. E is a country Y corporation that is not engaged in the active conduct of a trade or business. Also in year 1, D pays no dividends to C, E pays $3.2 million in dividends to C, and C makes a payment of $960,000 to country X with respect to C's net income.

(ii) *Result*. C qualifies for the holding company exception described in paragraph (e)(5)(iv)(C)(*5*)(*ii*) of this section because C holds a qualified equity interest in D, D is engaged in an active trade or business and derives more than 50% of its gross income from such trade or business, C's interest in D constitutes substantially all of C's assets, and A and B share in substantially all of C's opportunity for gain and risk of loss with respect to D. As a result, less than substantially all of C's assets are held to produce passive investment income. Accordingly, C is not an SPV because it does not meet the requirements of paragraph (e)(5)(iv)(B)(*1*) of this section, and the $960,000 payment to country X is not attributable to a structured passive investment arrangement.

Example 8. Holding company; no SPV. (i) *Facts*. The facts are the same as in *Example 6*, except that B's $1 billion investment in C consists of 30% of C's common stock and 100% of C's preferred stock. A's $1 billion investment in C consists of 70% of C's common stock. B sells its preferred stock to F, a country X corporation, subject to a repurchase obligation. Assume that under country X tax law, but not U.S. tax law, F is treated as the owner of the preferred shares and receives a distribution in year 1 of $50 million. The remaining earnings are distributed 70% to A and 30% to B.

(ii) *Result*. C qualifies for the holding company exception described in paragraph (e)(5)(iv)(C)(*5*)(*ii*) of this section because C holds a qualified equity interest in D, D is engaged in an active trade or business and derives more than 50% of its gross income from such trade or business, and C's interest in D constitutes substantially all of C's assets. Additionally, although F does not share in C's opportunity for gain and risk of loss with respect to C's interest in D because F acquired its interest in C in a sale-repurchase transaction, B (the U.S. party) and in the aggregate A and F (who would be counterparties assuming C were an SPV) share in substantially all of C's opportunity for gain and risk of loss with respect to D and such opportunity for gain and risk of loss is not borne exclusively either by B or by A and F in the aggregate. Accordingly, C's shares in D are not held to produce passive investment income and the $200 million dividend from D is not passive investment income. C is not an SPV within the meaning of paragraph (e)(5)(iv)(B)(*1*) of this section, and the $960,000 payment to country X is not attributable to a structured passive investment arrangement.

Example 9. Asset holding transaction. (i) *Facts*. (A) A domestic corporation (USP) contributes $6 billion of country Z debt obligations to a country Z entity (DE) in exchange for all of the class A and class B stock of DE. DE is a disregarded entity for U.S. tax purposes and a corporation for country Z tax purposes. A corporation unrelated to USP and organized in country Z (FC) contributes $1.5 billion to DE in exchange for all of the class C stock of DE. DE uses the $1.5 billion contributed by FC to redeem USP's class B stock. The terms of the class C stock entitle its holder to all income from DE, but FC is obligated immediately to contribute back to DE all distributions on the class C stock. USP and FC enter into—

(*1*) A contract under which USP agrees to buy after five years the class C stock for $1.5 billion; and

(*2*) An agreement under which USP agrees to pay FC periodic payments on $1.5 billion.

(B) The transaction is structured in such a way that, for U.S. tax purposes, there is a loan of $1.5 billion from FC to USP, and USP is the owner of the class C stock and the class A stock. In year 1, DE earns $400 million of interest income on the country Z debt obligations. DE makes a payment to country Z of $100 million with respect to such income and distributes the remaining $300 million to FC. FC contributes the $300 million back to DE. None of FC's stock is owned, directly or indirectly, by USP or shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Assume that country Z imposes a withholding tax on interest income derived by U.S. residents.

(C) Country Z treats FC as the owner of the class C stock. Pursuant to country Z tax law, FC is required to report the $400 million of income with respect to the $300 million distribution from DE, but is allowed to claim credits for DE's $100 million payment to country Z. For country Z tax purposes, FC is entitled to current deductions equal to the $300 million contributed back to DE.

(ii) *Result*. The payment to country Z is not a compulsory payment, and thus is not an amount of tax paid because the payment is attributable to a structured passive investment arrangement. First, DE is an SPV because all of DE's income is passive investment income described in paragraph (e)(5)(iv)(C)(*5*) of this section; all of DE's assets are held to produce such income; the payment to country Z is attributable to such income; and if the payment were an amount of tax paid it would be paid or accrued in a U.S. taxable year in which DE meets the requirements of paragraph (e)(5)(iv)(B)(*1*)(*i*) of this section. Second, if the payment were an amount of tax paid, USP would be eligible to claim a credit for such amount under section 901(a). Third, USP's proportionate share of DE's foreign payment of $100 million is substantially greater than the amount of credits USP would be eligible to claim if it directly held its proportionate share of DE's assets, excluding any assets that would produce income subject to gross basis withholding tax if directly held by USP. Fourth, FC is entitled to claim a credit under country Z tax law for the payment and recognizes a deduction for the $300 million contributed to DE under country Z law. The credit claimed by FC corresponds to more than 10% of USP's share (for U.S. tax purposes) of the foreign payment and the deductions claimed by FC correspond to more than 10% of the base with respect to which USP's share of the foreign payment was imposed. Fifth, FC is a counterparty because FC is considered to own equity of DE under country Z law and none of FC's stock is owned, directly or indirectly, by USP or shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Sixth, the United States and country X treat certain aspects of the transaction differently, including the proportion of equity owned in DE by USP and FC, and the amount of credits claimed by USP if the country Z payment were an amount of tax paid is materially greater than it would be if the country X tax treatment controlled for U.S. tax purposes such that FC, rather than USP, owned the class C stock. Because the payment to country Z is not an amount of tax paid, USP is not considered to pay tax under section 901. USP has $400 million of interest income.

Example 10. Loss surrender. (i) *Facts*. The facts are the same as in *Example 9*, except that the deductions attributable to the arrangement contribute to a loss recognized by FC for country Z tax purposes, and pursuant to a group relief regime in country Z FC elects to surrender the loss to its country Z subsidiary.

(ii) *Result*. The results are the same as in *Example 9*. The surrender of the loss to a related party is a foreign tax benefit that corresponds to the base with respect to which USP's share of the foreign payment was imposed.

Example 11. Joint venture; no foreign tax benefit. (i) *Facts*. FC, a country X corporation, and USC, a domestic corporation, each contribute $1 billion to a newly-formed country X entity (C) in exchange for stock of C. FC and USC are entitled to equal 50% shares of all of C's income, gain, expense and loss. C is treated as a corporation for country X purposes and a partnership for U.S. tax purposes. In year 1, C earns $200 million of net passive investment income, makes a payment to country X of $60 million with respect to that income, and distributes $70 million to each of FC and USC. Country X does not impose tax on dividends received by one country X corporation from a second country X corporation.

(ii) *Result*. FC's tax-exempt receipt of $70 million, or its 50% share of C's profits, is not a foreign tax benefit within the meaning of paragraph (e)(5)(iv)(B)(*4*) of this section because it does not correspond to any part of the foreign base with respect to which USC's share of the foreign payment was imposed. Accordingly, the $60 million payment to country X is not attributable to a structured passive investment arrangement.

Example 12. Joint venture; no foreign tax benefit. (i) *Facts*. The facts are the same as in *Example 11*, except that C in turn contributes $2 billion to a wholly-owned and newly-formed country X entity (D) in exchange for stock of D. D is treated as a corporation for country X purposes and disregarded as an entity separate from its owner for U.S. tax purposes. C has no other assets and earns no other income. In year 1, D earns $200 million of passive investment income, makes a payment to country X of $60 million with respect to that income, and distributes $140 million to C.

(ii) *Result*. C's tax-exempt receipt of $140 million is not a foreign tax benefit within the meaning of paragraph (e)(5)(iv)(B)(*4*) of this section because it does not correspond to any part of the foreign base with respect to which USC's share of the foreign payment was imposed. Fifty percent of C's foreign tax exemption is not a foreign tax benefit within the meaning of paragraph (e)(5)(iv)(B)(*4*) because it relates to earnings of D that are distributed with respect to an equity interest in D that is owned indirectly by USC under both U.S. and foreign tax law. The remaining 50% of C's foreign tax exemption, as well as FC's tax-exempt receipt of $70 million from C, is also not a foreign tax benefit because it does not correspond to any part of the foreign base with respect to which USC's share of the foreign payment was imposed. Accordingly, the $60 million payment to country X is not attributable to a structured passive investment arrangement.

* * * * *

(h) * * *

(2) Paragraph (e)(5)(iv) of this section applies to foreign payments that, if such payments were an amount of tax paid, would be considered paid or accrued under §1.901–2(f) on or after July 13, 2011. See 26 CFR 1.901–2T(e)(5)(iv) (revised as of April 1, 2011), for rules applicable to foreign payments that, if such payments were an amount of tax paid, would be considered paid or accrued before July 13, 2011.

§1.901–2T [Removed].

Par. 5. Section 1.901–2T is removed.

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

Approved July 11, 2011.

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

(Filed by the Office of the Federal Register on July 13, 2011, 11:15 a.m., and published in the issue of the Federal Register for July 18, 2011, 76 F.R. 42038)

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26 CFR 1.901–2: Income, war profits, or excess profits tax paid or accrued.

T.D. 9536

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Determining the Amount of Taxes Paid for Purposes of the Foreign Tax Credit

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations providing guidance relating to the determination of the amount of taxes paid for purposes of the foreign tax credit. These regulations address certain highly structured arrangements that produce inappropriate foreign tax credit results. The regulations affect individuals and corporations that claim direct and indirect foreign tax credits. The text of these temporary regulations also serves as the text of the proposed regulations (REG–126519–11) published in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective on July 18, 2011.

Applicability Date: For dates of applicability, see §1.901–2T(h)(3).

FOR FURTHER INFORMATION CONTACT: Jeffrey P. Cowan, at (202) 622–3850.

SUPPLEMENTARY INFORMATION:

Background

On March 30, 2007, the **Federal Register** published proposed regulations (REG–156779–06, 2007–2 C.B. 1015 [72 FR 15081]) under section 901 of the Internal Revenue Code relating to the amount of taxes paid for purposes of the foreign tax credit. The IRS and the Treasury Department received written comments on the 2007 proposed regulations and a public hearing was held on July 30, 2007. On July 16, 2008, a notice of proposed rulemaking by cross-reference to temporary regulations and temporary regulations (T.D. 9416, 2008–35 I.R.B. 1142) (the "2008 temporary regulations") were published in the **Federal Register** at 73 FR 40792 and 73 FR 40727, respectively. Final regulations were published in the **Federal Register** in July 2011, and adopted the proposed regulations with the changes discussed in the preamble to the final regulations.

Explanation of Provision

Section 1.901–2(e)(5)(iv) of the final regulations provides that an amount paid to a foreign country is not a compulsory payment, and thus is not an amount of tax paid for purposes of the foreign tax credit, if such amount is attributable to a structured passive investment arrangement. An arrangement that satisfies the six conditions described in §1.901–2(e)(5)(iv) is treated as a structured passive investment arrangement. One of the conditions is that the arrangement utilizes an entity that meets two requirements (the "SPV condition"). See §1.901–2(e)(5)(iv)(B)(*1*).

The first requirement of the SPV condition is that substantially all of the entity's gross income, as determined under U.S. tax principles, is attributable to passive investment income and substantially all of the entity's assets are held to produce such passive investment income. The second requirement is that there is a putative foreign tax payment (a "foreign payment") attributable to income of the entity, as determined under the laws of the foreign country to which such foreign payment is made. The foreign payment may be paid by the entity itself or by the owner(s) of the entity. Under the 2008 temporary regulations, a foreign payment attributable to income of the entity does not include a withholding tax imposed on a distribution or payment from the entity to a U.S. party. See §1.901–2T(e)(5)(iv)(B)(*1*)(*ii*) of the 2008 temporary regulations.

The IRS and the Treasury Department have become aware that taxpayers can enter into arrangements that generate duplicative benefits involving foreign withholding taxes imposed on distributions made by an entity to a U.S. party. For example, if the parties undertake a transaction in which interests in an SPV are transferred by the U.S. party to a counterparty subject to a repurchase obligation, withholding taxes imposed on distributions from the SPV may be claimed as creditable in both jurisdictions. Accordingly, the exception for withholding taxes imposed on distributions or payments to U.S. parties was eliminated in the 2011 final regulations. These temporary regulations clarify the provisions of §1.901–2(e)(5)(iv)(B)(*1*) by providing in a new paragraph §1.901–2T(e)(5)(iv)(B)(*1*)(*iii*) that a foreign payment attributable to income of an entity includes a withholding tax imposed on a dividend or other distribution (including distributions made by a pass-through entity or an entity that is disregarded as an entity separate from its owner for U.S. tax purposes) with respect to the equity of the entity.

Special Analysis

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations will primarily affect affiliated groups of corporations that have foreign operations which tend to be larger businesses. Moreover the number of taxpayers affected and the average burden are minimal. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

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

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

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

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

* * * * *

(e) * * *

(5) * * *

(iv) * * *

(B) * * *

(*1*) * * *

(*iii*) [Reserved]. For further guidance, see §1.901–2T(e)(5)(iv)(B)(*1*)(*iii*).

* * * * *

(h) * * *

(3) [Reserved]. For further guidance, see §1.901–2T(h)(3).

Par. 3. Section 1.901–2T is revised to read as follows:

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

(a) through (e)(5)(iv)(B)(*1*)(*ii*) [Reserved]. For further guidance, see §1.901–2(a) through (e)(5)(iv)(B)(*1*)(*ii*).

(*iii*) A foreign payment attributable to income of the entity, within the meaning of §1.901–2(e)(5)(iv)(B)(*1*)(*ii*), also includes a withholding tax (within the meaning of section 901(k)(1)(B)) imposed on a dividend or other distribution (including distributions made by a pass-through entity or an entity that is disregarded as an entity separate from its owner for U.S. tax purposes) with respect to the equity of the entity.

(e)(5)(iv)(B)(*2*) through (h)(2) [Reserved]. For further guidance, see §1.901–2(e)(5)(iv)(B)(*2*) through (h)(2).

(h)(3) *Effective/applicability date*. This section applies to foreign payments that, if such payments were an amount of tax paid, would be considered paid or accrued under §1.901–2(f) on or after July 14, 2011.

(h)(4) *Expiration date*. The applicability of this section expires on July 14, 2014.

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

Approved July 11, 2011.

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

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Section 6621.—Determination of Rate of Interest

26 CFR 301.6621–1: Interest rate.

Interest rates; underpayments and overpayments. The rates for interest determined under section 6621 of the Code for the calendar quarter beginning October 1, 2011, will be 3 percent for overpayments (2 percent in the case of a corporation), 3 percent for underpayments, and 5 percent for large corporate underpayments. The rate of interest paid on the portion of a corporate overpayment exceeding $10,000 will be 0.5 percent.

Rev. Rul. 2011–18

Section 6621 of the Internal Revenue Code establishes the rates for interest on tax overpayments and tax underpayments. Under section 6621(a)(1), the overpayment rate is the sum of the federal short-term rate plus 3 percentage points (2 percentage points in the case of a corporation), except the rate for the portion of a corporate overpayment of tax exceeding $10,000 for a taxable period is the sum of the federal short-term rate plus 0.5 of a percentage point. Under section 6621(a)(2), the underpayment rate is the sum of the federal short-term rate plus 3 percentage points.

Section 6621(c) provides that for purposes of interest payable under section 6601 on any large corporate underpayment, the underpayment rate under section 6621(a)(2) is determined by substituting "5 percentage points" for "3 percentage points." See section 6621(c) and section 301.6621–3 of the Regulations on Procedure and Administration for the definition of a large corporate underpayment and for the rules for determining the applicable date. Section 6621(c) and section 301.6621–3 are generally effective for periods after December 31, 1990.

Section 6621(b)(1) provides that the Secretary will determine the federal short-term rate for the first month in each calendar quarter. Section 6621(b)(2)(A) provides that the federal short-term rate determined under section 6621(b)(1) for any month applies during the first calendar quarter beginning after that month. Section 6621(b)(3) provides that the federal short-term rate for any month is the federal short-term rate determined during that month by the Secretary in accordance with section 1274(d), rounded to the nearest full percent (or, if a multiple of 1/2 of 1 percent, the rate is increased to the next highest full percent).

Notice 88–59, 1988–1 C.B. 546, announced that, in determining the quarterly interest rates to be used for overpayments and underpayments of tax under section 6621, the Internal Revenue Service will use the federal short-term rate based on daily compounding because that rate is most consistent with section 6621 which, pursuant to section 6622, is subject to daily compounding.

The federal short-term rate determined in accordance with section 1274(d) during July 2011 is the rate published in Revenue Ruling 2011–16, 2011–32 I.R.B. 93 to take effect beginning August 1, 2011. The federal short-term rate, rounded to the nearest full percent, based on daily compounding determined during the month of July 2011 is 0 percent. Accordingly, an overpayment rate of 3 percent (2 percent in the case of a corporation) and an underpayment rate of 3 percent are established for the calendar quarter beginning October 1, 2011. The overpayment rate for the portion of a corporate overpayment exceeding $10,000 for the calendar quarter beginning October 1, 2011, is 0.5 percent. The underpayment rate for large corporate underpayments for the calendar quarter beginning October 1, 2011, is 5 percent. These rates apply to amounts bearing interest during that calendar quarter.

Interest factors for daily compound interest for annual rates of 0.5 percent are published in Appendix A of this Revenue Ruling. Interest factors for daily compound interest for annual rates of 2 percent, 3 percent and 5 percent are published in Tables 7, 9, 11, and 15 of Rev. Proc. 95–17, 1995–1 C.B. 561, 563, 565, and 569

Annual interest rates to be compounded daily pursuant to section 6622 that apply for prior periods are set forth in the tables accompanying this revenue ruling.

DRAFTING INFORMATION

The principal author of this revenue ruling is Deborah Colbert-James of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue ruling, contact Ms. Colbert-James at (202) 622–8143 (not a toll-free call).

APPENDIX A

365 Day Year

0.5% Compound Rate 184 Days

Days	Factor	Days	Factor	Days	Factor
1	0.000013699	63	0.000863380	125	0.001713784
2	0.000027397	64	0.000877091	126	0.001727506
3	0.000041096	65	0.000890801	127	0.001741228
4	0.000054796	66	0.000904512	128	0.001754951
5	0.000068495	67	0.000918223	129	0.001768673
6	0.000082195	68	0.000931934	130	0.001782396
7	0.000095894	69	0.000945646	131	0.001796119

365 Day Year

0.5% Compound Rate 184 Days

Days	Factor	Days	Factor	Days	Factor
8	0.000109594	70	0.000959357	132	0.001809843
9	0.000123294	71	0.000973069	133	0.001823566
10	0.000136995	72	0.000986781	134	0.001837290
11	0.000150695	73	0.001000493	135	0.001851013
12	0.000164396	74	0.001014206	136	0.001864737
13	0.000178097	75	0.001027918	137	0.001878462
14	0.000191798	76	0.001041631	138	0.001892186
15	0.000205499	77	0.001055344	139	0.001905910
16	0.000219201	78	0.001069057	140	0.001919635
17	0.000232902	79	0.001082770	141	0.001933360
18	0.000246604	80	0.001096484	142	0.001947085
19	0.000260306	81	0.001110197	143	0.001960811
20	0.000274008	82	0.001123911	144	0.001974536
21	0.000287711	83	0.001137625	145	0.001988262
22	0.000301413	84	0.001151339	146	0.002001988
23	0.000315116	85	0.001165054	147	0.002015714
24	0.000328819	86	0.001178768	148	0.002029440
25	0.000342522	87	0.001192483	149	0.002043166
26	0.000356225	88	0.001206198	150	0.002056893
27	0.000369929	89	0.001219913	151	0.002070620
28	0.000383633	90	0.001233629	152	0.002084347
29	0.000397336	91	0.001247344	153	0.002098074
30	0.000411041	92	0.001261060	154	0.002111801
31	0.000424745	93	0.001274776	155	0.002125529
32	0.000438449	94	0.001288492	156	0.002139257
33	0.000452154	95	0.001302208	157	0.002152985
34	0.000465859	96	0.001315925	158	0.002166713
35	0.000479564	97	0.001329641	159	0.002180441
36	0.000493269	98	0.001343358	160	0.002194169
37	0.000506974	99	0.001357075	161	0.002207898
38	0.000520680	100	0.001370792	162	0.002221627
39	0.000534386	101	0.001384510	163	0.002235356
40	0.000548092	102	0.001398227	164	0.002249085
41	0.000561798	103	0.001411945	165	0.002262815
42	0.000575504	104	0.001425663	166	0.002276544
43	0.000589211	105	0.001439381	167	0.002290274
44	0.000602917	106	0.001453100	168	0.002304004
45	0.000616624	107	0.001466818	169	0.002317734
46	0.000630331	108	0.001480537	170	0.002331465
47	0.000644039	109	0.001494256	171	0.002345195
48	0.000657746	110	0.001507975	172	0.002358926
49	0.000671454	111	0.001521694	173	0.002372657
50	0.000685161	112	0.001535414	174	0.002386388
51	0.000698869	113	0.001549133	175	0.002400120
52	0.000712578	114	0.001562853	176	0.002413851
53	0.000726286	115	0.001576573	177	0.002427583
54	0.000739995	116	0.001590293	178	0.002441315
55	0.000753703	117	0.001604014	179	0.002455047
56	0.000767412	118	0.001617734	180	0.002468779
57	0.000781121	119	0.001631455	181	0.002482511
58	0.000794831	120	0.001645176	182	0.002496244
59	0.000808540	121	0.001658897	183	0.002509977
60	0.000822250	122	0.001672619	184	0.002523710
61	0.000835960	123	0.001686340		
62	0.000849670	124	0.001700062		

366 Day Year					
0.5% Compound Rate 184 Days					
Days	Factor	Days	Factor	Days	Factor
1	0.000013661	63	0.000861020	125	0.001709097
2	0.000027323	64	0.000874693	126	0.001722782
3	0.000040984	65	0.000888366	127	0.001736467
4	0.000054646	66	0.000902040	128	0.001750152
5	0.000068308	67	0.000915713	129	0.001763837
6	0.000081970	68	0.000929387	130	0.001777522
7	0.000095632	69	0.000943061	131	0.001791208
8	0.000109295	70	0.000956735	132	0.001804893
9	0.000122958	71	0.000970409	133	0.001818579
10	0.000136620	72	0.000984084	134	0.001832265
11	0.000150283	73	0.000997758	135	0.001845951
12	0.000163947	74	0.001011433	136	0.001859638
13	0.000177610	75	0.001025108	137	0.001873324
14	0.000191274	76	0.001038783	138	0.001887011
15	0.000204938	77	0.001052459	139	0.001900698
16	0.000218602	78	0.001066134	140	0.001914385
17	0.000232266	79	0.001079810	141	0.001928073
18	0.000245930	80	0.001093486	142	0.001941760
19	0.000259595	81	0.001107162	143	0.001955448
20	0.000273260	82	0.001120839	144	0.001969136
21	0.000286924	83	0.001134515	145	0.001982824
22	0.000300590	84	0.001148192	146	0.001996512
23	0.000314255	85	0.001161869	147	0.002010201
24	0.000327920	86	0.001175546	148	0.002023889
25	0.000341586	87	0.001189223	149	0.002037578
26	0.000355252	88	0.001202900	150	0.002051267
27	0.000368918	89	0.001216578	151	0.002064957
28	0.000382584	90	0.001230256	152	0.002078646
29	0.000396251	91	0.001243934	153	0.002092336
30	0.000409917	92	0.001257612	154	0.002106025
31	0.000423584	93	0.001271291	155	0.002119715
32	0.000437251	94	0.001284969	156	0.002133405
33	0.000450918	95	0.001298648	157	0.002147096
34	0.000464586	96	0.001312327	158	0.002160786
35	0.000478253	97	0.001326006	159	0.002174477
36	0.000491921	98	0.001339685	160	0.002188168
37	0.000505589	99	0.001353365	161	0.002201859
38	0.000519257	100	0.001367044	162	0.002215550
39	0.000532925	101	0.001380724	163	0.002229242
40	0.000546594	102	0.001394404	164	0.002242933
41	0.000560262	103	0.001408085	165	0.002256625
42	0.000573931	104	0.001421765	166	0.002270317
43	0.000587600	105	0.001435446	167	0.002284010
44	0.000601269	106	0.001449127	168	0.002297702
45	0.000614939	107	0.001462808	169	0.002311395
46	0.000628608	108	0.001476489	170	0.002325087
47	0.000642278	109	0.001490170	171	0.002338780
48	0.000655948	110	0.001503852	172	0.002352473
49	0.000669618	111	0.001517533	173	0.002366167
50	0.000683289	112	0.001531215	174	0.002379860
51	0.000696959	113	0.001544897	175	0.002393554
52	0.000710630	114	0.001558580	176	0.002407248
53	0.000724301	115	0.001572262	177	0.002420942
54	0.000737972	116	0.001585945	178	0.002434636
55	0.000751643	117	0.001599628	179	0.002448331
56	0.000765315	118	0.001613311	180	0.002462025
57	0.000778986	119	0.001626994	181	0.002475720
58	0.000792658	120	0.001640678	182	0.002489415

366 Day Year					
0.5% Compound Rate 184 Days					
Days	Factor	Days	Factor	Days	Factor
59	0.000806330	121	0.001654361	183	0.002503110
60	0.000820003	122	0.001668045	184	0.002516806
61	0.000833675	123	0.001681729		
62	0.000847348	124	0.001695413		

TABLE OF INTEREST RATES

PERIODS BEFORE JUL. 1, 1975 — PERIODS ENDING DEC. 31, 1986

OVERPAYMENTS AND UNDERPAYMENTS

PERIOD	RATE	In 1995–1 C.B. DAILY RATE TABLE
Before Jul. 1, 1975	6%	Table 2, pg. 557
Jul. 1, 1975—Jan. 31, 1976	9%	Table 4, pg. 559
Feb. 1, 1976—Jan. 31, 1978	7%	Table 3, pg. 558
Feb. 1, 1978—Jan. 31, 1980	6%	Table 2, pg. 557
Feb. 1, 1980—Jan. 31, 1982	12%	Table 5, pg. 560
Feb. 1, 1982—Dec. 31, 1982	20%	Table 6, pg. 560
Jan. 1, 1983—Jun. 30, 1983	16%	Table 37, pg. 591
Jul. 1, 1983—Dec. 31, 1983	11%	Table 27, pg. 581
Jan. 1, 1984—Jun. 30, 1984	11%	Table 75, pg. 629
Jul. 1, 1984—Dec. 31, 1984	11%	Table 75, pg. 629
Jan. 1, 1985—Jun. 30, 1985	13%	Table 31, pg. 585
Jul. 1, 1985—Dec. 31, 1985	11%	Table 27, pg. 581
Jan. 1, 1986—Jun. 30, 1986	10%	Table 25, pg. 579
Jul. 1, 1986—Dec. 31, 1986	9%	Table 23, pg. 577

TABLE OF INTEREST RATES

FROM JAN. 1, 1987 — DEC. 31, 1998

	OVERPAYMENTS			UNDERPAYMENTS		
		1995–1 C.B.			1995–1 C.B.	
	RATE	TABLE	PG	RATE	TABLE	PG
Jan. 1, 1987—Mar. 31, 1987	8%	21	575	9%	23	577
Apr. 1, 1987—Jun. 30, 1987	8%	21	575	9%	23	577
Jul. 1, 1987—Sep. 30, 1987	8%	21	575	9%	23	577
Oct. 1, 1987—Dec. 31, 1987	9%	23	577	10%	25	579
Jan. 1, 1988—Mar. 31, 1988	10%	73	627	11%	75	629
Apr. 1, 1988—Jun. 30, 1988	9%	71	625	10%	73	627
Jul. 1, 1988—Sep. 30, 1988	9%	71	625	10%	73	627
Oct. 1, 1988—Dec. 31, 1988	10%	73	627	11%	75	629
Jan. 1, 1989—Mar. 31, 1989	10%	25	579	11%	27	581
Apr. 1, 1989—Jun. 30, 1989	11%	27	581	12%	29	583
Jul. 1, 1989—Sep. 30, 1989	11%	27	581	12%	29	583
Oct. 1, 1989—Dec. 31, 1989	10%	25	579	11%	27	581
Jan. 1, 1990—Mar. 31, 1990	10%	25	579	11%	27	581
Apr. 1, 1990—Jun. 30, 1990	10%	25	579	11%	27	581
Jul. 1, 1990—Sep. 30, 1990	10%	25	579	11%	27	581
Oct. 1, 1990—Dec. 31, 1990	10%	25	579	11%	27	581
Jan. 1, 1991—Mar. 31, 1991	10%	25	579	11%	27	581
Apr. 1, 1991—Jun. 30, 1991	9%	23	577	10%	25	579
Jul. 1, 1991—Sep. 30, 1991	9%	23	577	10%	25	579
Oct. 1, 1991—Dec. 31, 1991	9%	23	577	10%	25	579
Jan. 1, 1992—Mar. 31, 1992	8%	69	623	9%	71	625

TABLE OF INTEREST RATES

FROM JAN. 1, 1987 — DEC. 31, 1998

	OVERPAYMENTS			UNDERPAYMENTS		
	RATE	1995–1 C.B. TABLE	PG	RATE	1995–1 C.B. TABLE	PG
Apr. 1, 1992—Jun. 30, 1992	7%	67	621	8%	69	623
Jul. 1, 1992—Sep. 30, 1992	7%	67	621	8%	69	623
Oct. 1, 1992—Dec. 31, 1992	6%	65	619	7%	67	621
Jan. 1, 1993—Mar. 31, 1993	6%	17	571	7%	19	573
Apr. 1, 1993—Jun. 30, 1993	6%	17	571	7%	19	573
Jul. 1, 1993—Sep. 30, 1993	6%	17	571	7%	19	573
Oct. 1, 1993—Dec. 31, 1993	6%	17	571	7%	19	573
Jan. 1, 1994—Mar. 31, 1994	6%	17	571	7%	19	573
Apr. 1, 1994—Jun. 30, 1994	6%	17	571	7%	19	573
Jul. 1, 1994—Sep. 30, 1994	7%	19	573	8%	21	575
Oct. 1, 1994—Dec. 31, 1994	8%	21	575	9%	23	577
Jan. 1, 1995—Mar. 31, 1995	8%	21	575	9%	23	577
Apr. 1, 1995—Jun. 30, 1995	9%	23	577	10%	25	579
Jul. 1, 1995—Sep. 30, 1995	8%	21	575	9%	23	577
Oct. 1, 1995—Dec. 31, 1995	8%	21	575	9%	23	577
Jan. 1, 1996—Mar. 31, 1996	8%	69	623	9%	71	625
Apr. 1, 1996—Jun. 30, 1996	7%	67	621	8%	69	623
Jul. 1, 1996—Sep. 30, 1996	8%	69	623	9%	71	625
Oct. 1, 1996—Dec. 31, 1996	8%	69	623	9%	71	625
Jan. 1, 1997—Mar. 31, 1997	8%	21	575	9%	23	577
Apr. 1, 1997—Jun. 30, 1997	8%	21	575	9%	23	577
Jul. 1, 1997—Sep. 30, 1997	8%	21	575	9%	23	577
Oct. 1, 1997—Dec. 31, 1997	8%	21	575	9%	23	577
Jan. 1, 1998—Mar. 31, 1998	8%	21	575	9%	23	577
Apr. 1, 1998—Jun. 30, 1998	7%	19	573	8%	21	575
Jul. 1, 1998—Sep. 30, 1998	7%	19	573	8%	21	575
Oct. 1, 1998—Dec. 31, 1998	7%	19	573	8%	21	575

TABLE OF INTEREST RATES

FROM JANUARY 1, 1999 — PRESENT

NONCORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 1999—Mar. 31, 1999	7%	19	573
Apr. 1, 1999—Jun. 30, 1999	8%	21	575
Jul. 1, 1999—Sep. 30, 1999	8%	21	575
Oct. 1, 1999—Dec. 31, 1999	8%	21	575
Jan. 1, 2000—Mar. 31, 2000	8%	69	623
Apr. 1, 2000—Jun. 30, 2000	9%	71	625
Jul. 1, 2000—Sep. 30, 2000	9%	71	625
Oct. 1, 2000—Dec. 31, 2000	9%	71	625
Jan. 1, 2001—Mar. 31, 2001	9%	23	577
Apr. 1, 2001—Jun. 30, 2001	8%	21	575
Jul. 1, 2001—Sep. 30, 2001	7%	19	573
Oct. 1, 2001—Dec. 31, 2001	7%	19	573
Jan. 1, 2002—Mar. 31, 2002	6%	17	571
Apr. 1, 2002—Jun. 30, 2002	6%	17	571
Jul. 1, 2002—Sep. 30, 2002	6%	17	571
Oct. 1, 2002—Dec. 31, 2002	6%	17	571
Jan. 1, 2003—Mar. 31, 2003	5%	15	569
Apr. 1, 2003—Jun. 30, 2003	5%	15	569
Jul. 1, 2003—Sep. 30, 2003	5%	15	569

TABLE OF INTEREST RATES FROM JANUARY 1, 1999 — PRESENT NONCORPORATE OVERPAYMENTS AND UNDERPAYMENTS			
	RATE	1995–1 C.B. TABLE	PG
Oct. 1, 2003—Dec. 31, 2003	4%	13	567
Jan. 1, 2004—Mar. 31, 2004	4%	61	615
Apr. 1, 2004—Jun. 30, 2004	5%	63	617
Jul. 1, 2004—Sep. 30, 2004	4%	61	615
Oct. 1, 2004—Dec. 31, 2004	5%	63	617
Jan. 1, 2005—Mar. 31, 2005	5%	15	569
Apr. 1, 2005—Jun. 30, 2005	6%	17	571
Jul. 1, 2005—Sep. 30, 2005	6%	17	571
Oct. 1, 2005—Dec. 31, 2005	7%	19	573
Jan. 1, 2006—Mar. 31, 2006	7%	19	573
Apr. 1, 2006—Jun. 30, 2006	7%	19	573
Jul. 1, 2006—Sep. 30, 2006	8%	21	575
Oct. 1, 2006—Dec. 31, 2006	8%	21	575
Jan. 1, 2007—Mar. 31, 2007	8%	21	575
Apr. 1, 2007—Jun. 30, 2007	8%	21	575
Jul. 1, 2007—Sep. 30, 2007	8%	21	575
Oct. 1, 2007—Dec. 31, 2007	8%	21	575
Jan. 1, 2008—Mar. 31, 2008	7%	67	621
Apr. 1, 2008—Jun. 30, 2008	6%	65	619
Jul. 1, 2008—Sep. 30, 2008	5%	63	617
Oct. 1, 2008—Dec. 31, 2008	6%	65	619
Jan. 1, 2009—Mar. 31, 2009	5%	15	569
Apr. 1, 2009—Jun. 30, 2009	4%	13	567
Jul. 1, 2009—Sep. 30, 2009	4%	13	567
Oct. 1, 2009—Dec. 31, 2009	4%	13	567
Jan. 1, 2010—Mar. 31, 2010	4%	13	567
Apr. 1, 2010—Jun. 30, 2010	4%	13	567
Jul. 1, 2010—Sep. 30, 2010	4%	13	567
Oct. 1, 2010—Dec. 31, 2010	4%	13	567
Jan. 1, 2011—Mar. 31, 2011	3%	11	565
Apr. 1, 2011—Jun. 30, 2011	4%	13	567
Jul. 1, 2011—Sep. 30, 2011	4%	13	567
Oct. 1, 2011—Dec. 31, 2011	3%	11	565

TABLE OF INTEREST RATES FROM JANUARY 1, 1999 — PRESENT CORPORATE OVERPAYMENTS AND UNDERPAYMENTS						
	OVERPAYMENTS			UNDERPAYMENTS		
	RATE	1995–1 C.B. TABLE	PG	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 1999—Mar. 31, 1999	6%	17	571	7%	19	573
Apr. 1, 1999—Jun. 30, 1999	7%	19	573	8%	21	575
Jul. 1, 1999—Sep. 30, 1999	7%	19	573	8%	21	575
Oct. 1, 1999—Dec. 31, 1999	7%	19	573	8%	21	575
Jan. 1, 2000—Mar. 31, 2000	7%	67	621	8%	69	623
Apr. 1, 2000—Jun. 30, 2000	8%	69	623	9%	71	625
Jul. 1, 2000—Sep. 30, 2000	8%	69	623	9%	71	625
Oct. 1, 2000—Dec. 31, 2000	8%	69	623	9%	71	625
Jan. 1, 2001—Mar. 31, 2001	8%	21	575	9%	23	577
Apr. 1, 2001—Jun. 30, 2001	7%	19	573	8%	21	575
Jul. 1, 2001—Sep. 30, 2001	6%	17	571	7%	19	573

TABLE OF INTEREST RATES
FROM JANUARY 1, 1999 — PRESENT
CORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	OVERPAYMENTS			UNDERPAYMENTS		
	RATE	1995–1 C.B. TABLE	PG	RATE	1995–1 C.B. TABLE	PG
Oct. 1, 2001—Dec. 31, 2001	6%	17	571	7%	19	573
Jan. 1, 2002—Mar. 31, 2002	5%	15	569	6%	17	571
Apr. 1, 2002—Jun. 30, 2002	5%	15	569	6%	17	571
Jul. 1, 2002—Sep. 30, 2002	5%	15	569	6%	17	571
Oct. 1, 2002—Dec. 31, 2002	5%	15	569	6%	17	571
Jan. 1, 2003—Mar. 31, 2003	4%	13	567	5%	15	569
Apr. 1, 2003—Jun. 30, 2003	4%	13	567	5%	15	569
Jul. 1, 2003—Sep. 30, 2003	4%	13	567	5%	15	569
Oct. 1, 2003—Dec. 31, 2003	3%	11	565	4%	13	567
Jan. 1, 2004—Mar. 31, 2004	3%	59	613	4%	61	615
Apr. 1, 2004—Jun. 30, 2004	4%	61	615	5%	63	617
Jul. 1, 2004—Sep. 30, 2004	3%	59	613	4%	61	615
Oct. 1, 2004—Dec. 31, 2004	4%	61	615	5%	63	617
Jan. 1, 2005—Mar. 31, 2005	4%	13	567	5%	15	569
Apr. 1, 2005—Jun. 30, 2005	5%	15	569	6%	17	571
Jul. 1, 2005—Sep. 30, 2005	5%	15	569	6%	17	571
Oct. 1, 2005—Dec. 31, 2005	6%	17	571	7%	19	573
Jan. 1, 2006—Mar. 31, 2006	6%	17	571	7%	19	573
Apr. 1, 2006—Jun. 30, 2006	6%	17	571	7%	19	573
Jul. 1, 2006—Sep. 30, 2006	7%	19	573	8%	21	575
Oct. 1, 2006—Dec. 31, 2006	7%	19	573	8%	21	575
Jan. 1, 2007—Mar. 31, 2007	7%	19	573	8%	21	575
Apr. 1, 2007—Jun. 30, 2007	7%	19	573	8%	21	575
Jul. 1, 2007—Sep. 30, 2007	7%	19	573	8%	21	575
Oct. 1, 2007—Dec. 31, 2007	7%	19	573	8%	21	575
Jan. 1, 2008—Mar. 31, 2008	6%	65	619	7%	67	621
Apr. 1, 2008—Jun. 30, 2008	5%	63	617	6%	65	619
Jul. 1, 2008—Sep. 30, 2008	4%	61	615	5%	63	617
Oct. 1, 2008—Dec. 31, 2008	5%	63	617	6%	65	619
Jan. 1, 2009—Mar. 31, 2009	4%	13	567	5%	15	569
Apr. 1, 2009—Jun. 30, 2009	3%	11	565	4%	13	567
Jul. 1, 2009—Sep. 30, 2009	3%	11	565	4%	13	567
Oct. 1, 2009—Dec. 31, 2009	3%	11	565	4%	13	567
Jan. 1, 2010—Mar. 31, 2010	3%	11	565	4%	13	567
Apr. 1, 2010—Jun. 30, 2010	3%	11	565	4%	13	567
Jul. 1, 2010—Sep. 30, 2010	3%	11	565	4%	13	567
Oct. 1, 2010—Dec. 31, 2010	3%	11	565	4%	13	567
Jan. 1, 2011—Mar. 31, 2011	2%	9	563	3%	11	565
Apr. 1, 2011—Jun. 30, 2011	3%	11	565	4%	13	567
Jul. 1, 2011—Sep. 30, 2011	3%	11	565	4%	13	567
Oct. 1, 2011—Dec. 31, 2011	2%	9	563	3%	11	565

TABLE OF INTEREST RATES FOR
LARGE CORPORATE UNDERPAYMENTS
FROM JANUARY 1, 1991 — PRESENT

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 1991—Mar. 31, 1991	13%	31	585
Apr. 1, 1991—Jun. 30, 1991	12%	29	583
Jul. 1, 1991—Sep. 30, 1991	12%	29	583
Oct. 1, 1991—Dec. 31, 1991	12%	29	583

TABLE OF INTEREST RATES FOR
LARGE CORPORATE UNDERPAYMENTS

FROM JANUARY 1, 1991 — PRESENT

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 1992—Mar. 31, 1992	11%	75	629
Apr. 1, 1992—Jun. 30, 1992	10%	73	627
Jul. 1, 1992—Sep. 30, 1992	10%	73	627
Oct. 1, 1992—Dec. 31, 1992	9%	71	625
Jan. 1, 1993—Mar. 31, 1993	9%	23	577
Apr. 1, 1993—Jun. 30, 1993	9%	23	577
Jul. 1, 1993—Sep. 30, 1993	9%	23	577
Oct. 1, 1993—Dec. 31, 1993	9%	23	577
Jan. 1, 1994—Mar. 31, 1994	9%	23	577
Apr. 1, 1994—Jun. 30, 1994	9%	23	577
Jul. 1, 1994—Sep. 30, 1994	10%	25	579
Oct. 1, 1994—Dec. 31, 1994	11%	27	581
Jan. 1, 1995—Mar. 31, 1995	11%	27	581
Apr. 1, 1995—Jun. 30, 1995	12%	29	583
Jul. 1, 1995—Sep. 30, 1995	11%	27	581
Oct. 1, 1995—Dec. 31, 1995	11%	27	581
Jan. 1, 1996—Mar. 31, 1996	11%	75	629
Apr. 1, 1996—Jun. 30, 1996	10%	73	627
Jul. 1, 1996—Sep. 30, 1996	11%	75	629
Oct. 1, 1996—Dec. 31, 1996	11%	75	629
Jan. 1, 1997—Mar. 31, 1997	11%	27	581
Apr. 1, 1997—Jun. 30, 1997	11%	27	581
Jul. 1, 1997—Sep. 30, 1997	11%	27	581
Oct. 1, 1997—Dec. 31, 1997	11%	27	581
Jan. 1, 1998—Mar. 31, 1998	11%	27	581
Apr. 1, 1998—Jun. 30, 1998	10%	25	579
Jul. 1, 1998—Sep. 30, 1998	10%	25	579
Oct. 1, 1998—Dec. 31, 1998	10%	25	579
Jan. 1, 1999—Mar. 31, 1999	9%	23	577
Apr. 1, 1999—Jun. 30, 1999	10%	25	579
Jul. 1, 1999—Sep. 30, 1999	10%	25	579
Oct. 1, 1999—Dec. 31, 1999	10%	25	579
Jan. 1, 2000—Mar. 31, 2000	10%	73	627
Apr. 1, 2000—Jun. 30, 2000	11%	75	629
Jul. 1, 2000—Sep. 30, 2000	11%	75	629
Oct. 1, 2000—Dec. 31, 2000	11%	75	629
Jan. 1, 2001—Mar. 31, 2001	11%	27	581
Apr. 1, 2001—Jun. 30, 2001	10%	25	579
Jul. 1, 2001—Sep. 30, 2001	9%	23	577
Oct. 1, 2001—Dec. 31, 2001	9%	23	577
Jan. 1, 2002—Mar. 31, 2002	8%	21	575
Apr. 1, 2002—Jun. 30, 2002	8%	21	575
Jul. 1, 2002—Sep. 30, 2002	8%	21	575
Oct. 1, 2002—Dec. 30, 2002	8%	21	575
Jan. 1, 2003—Mar. 31, 2003	7%	19	573
Apr. 1, 2003—Jun. 30, 2003	7%	19	573
Jul. 1, 2003—Sep. 30, 2003	7%	19	573
Oct. 1, 2003—Dec. 31, 2003	6%	17	571
Jan. 1, 2004—Mar. 31, 2004	6%	65	619
Apr. 1, 2004—Jun. 30, 2004	7%	67	621
Jul. 1, 2004—Sep. 30, 2004	6%	65	619
Oct. 1, 2004—Dec. 31, 2004	7%	67	621
Jan. 1, 2005—Mar. 31, 2005	7%	19	573
Apr. 1, 2005—Jun. 30, 2005	8%	21	575
Jul. 1, 2005—Sep. 30, 2005	8%	21	575
Oct. 1, 2005—Dec. 31, 2005	9%	23	577
Jan. 1, 2006—Mar. 31, 2006	9%	23	577

TABLE OF INTEREST RATES FOR
LARGE CORPORATE UNDERPAYMENTS

FROM JANUARY 1, 1991 — PRESENT

	RATE	1995–1 C.B. TABLE	PG
Apr. 1, 2006—Jun. 30, 2006	9%	23	577
Jul. 1, 2006—Sep. 30, 2006	10%	25	579
Oct. 1, 2006—Dec. 31, 2006	10%	25	579
Jan. 1, 2007—Mar. 31, 2007	10%	25	579
Apr. 1, 2007—Jun. 30, 2007	10%	25	579
Jul. 1, 2007—Sep. 30, 2007	10%	25	579
Oct. 1, 2007—Dec. 31, 2007	10%	25	579
Jan. 1, 2008—Mar. 31, 2008	9%	71	625
Apr. 1, 2008—Jun. 30, 2008	8%	69	623
Jul. 1, 2008—Sep. 30, 2008	7%	67	621
Oct. 1, 2008—Dec. 31, 2008	8%	69	623
Jan. 1, 2009—Mar. 31, 2009	7%	19	573
Apr. 1, 2009—Jun. 30, 2009	6%	17	571
Jul. 1, 2009—Sep. 30, 2009	6%	17	571
Oct. 1, 2009—Dec. 31, 2009	6%	17	571
Jan. 1, 2010—Mar. 31, 2010	6%	17	571
Apr. 1, 2010—Jun. 30, 2010	6%	17	571
Jul. 1, 2010—Sep. 30, 2010	6%	17	571
Oct. 1, 2010—Dec. 31, 2010	6%	17	571
Jan. 1, 2011—Mar. 31, 2011	5%	15	569
Apr. 1, 2011—Jun. 30, 2011	6%	17	571
Jul. 1, 2011—Sep. 30, 2011	6%	17	571
Oct. 1, 2011—Dec. 31, 2011	5%	15	569

TABLE OF INTEREST RATES FOR CORPORATE
OVERPAYMENTS EXCEEDING $10,000

FROM JANUARY 1, 1995 — PRESENT

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 1995—Mar. 31, 1995	6.5%	18	572
Apr. 1, 1995—Jun. 30, 1995	7.5%	20	574
Jul. 1, 1995—Sep. 30, 1995	6.5%	18	572
Oct. 1, 1995—Dec. 31, 1995	6.5%	18	572
Jan. 1, 1996—Mar. 31, 1996	6.5%	66	620
Apr. 1, 1996—Jun. 30, 1996	5.5%	64	618
Jul. 1, 1996—Sep. 30, 1996	6.5%	66	620
Oct. 1, 1996—Dec. 31, 1996	6.5%	66	620
Jan. 1, 1997—Mar. 31, 1997	6.5%	18	572
Apr. 1, 1997—Jun. 30, 1997	6.5%	18	572
Jul. 1, 1997—Sep. 30, 1997	6.5%	18	572
Oct. 1, 1997—Dec. 31, 1997	6.5%	18	572
Jan. 1, 1998—Mar. 31, 1998	6.5%	18	572
Apr. 1, 1998—Jun. 30, 1998	5.5%	16	570
Jul. 1, 1998—Sep. 30, 1998	5.5%	16	570
Oct. 1, 1998—Dec. 31, 1998	5.5%	16	570
Jan. 1, 1999—Mar. 31, 1999	4.5%	14	568
Apr. 1, 1999—Jun. 30, 1999	5.5%	16	570
Jul. 1, 1999—Sep. 30, 1999	5.5%	16	570
Oct. 1, 1999—Dec. 31, 1999	5.5%	16	570
Jan. 1, 2000—Mar. 31, 2000	5.5%	64	618
Apr. 1, 2000—Jun. 30, 2000	6.5%	66	620
Jul. 1, 2000—Sep. 30, 2000	6.5%	66	620
Oct. 1, 2000—Dec. 31, 2000	6.5%	66	620

TABLE OF INTEREST RATES FOR CORPORATE OVERPAYMENTS EXCEEDING $10,000

FROM JANUARY 1, 1995 — PRESENT

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 2001—Mar. 31, 2001	6.5%	18	572
Apr. 1, 2001—Jun. 30, 2001	5.5%	16	570
Jul. 1, 2001—Sep. 30, 2001	4.5%	14	568
Oct. 1, 2001—Dec. 31, 2001	4.5%	14	568
Jan. 1, 2002—Mar. 31, 2002	3.5%	12	566
Apr. 1, 2002—Jun. 30, 2002	3.5%	12	566
Jul. 1, 2002—Sep. 30, 2002	3.5%	12	566
Oct. 1, 2002—Dec. 31, 2002	3.5%	12	566
Jan. 1, 2003—Mar. 31, 2003	2.5%	10	564
Apr. 1, 2003—Jun. 30, 2003	2.5%	10	564
Jul. 1, 2003—Sep. 30, 2003	2.5%	10	564
Oct. 1, 2003—Dec. 31, 2003	1.5%	8	562
Jan. 1, 2004—Mar. 31, 2004	1.5%	56	610
Apr. 1, 2004—Jun. 30, 2004	2.5%	58	612
Jul. 1, 2004—Sep. 30, 2004	1.5%	56	610
Oct. 1, 2004—Dec. 31, 2004	2.5%	58	612
Jan. 1, 2005—Mar. 31, 2005	2.5%	10	564
Apr. 1, 2005—Jun. 30, 2005	3.5%	12	566
Jul. 1, 2005—Sep. 30, 2005	3.5%	12	566
Oct. 1, 2005—Dec. 31, 2005	4.5%	14	568
Jan. 1, 2006—Mar. 31, 2006	4.5%	14	568
Apr. 1, 2006—Jun. 30, 2006	4.5%	14	568
Jul. 1, 2006—Sep. 30, 2006	5.5%	16	570
Oct. 1, 2006—Dec. 31, 2006	5.5%	16	570
Jan. 1, 2007—Mar. 31, 2007	5.5%	16	570
Apr. 1, 2007—Jun. 30, 2007	5.5%	16	570
Jul. 1, 2007—Sep. 30, 2007	5.5%	16	570
Oct. 1, 2007—Dec. 31, 2007	5.5%	16	570
Jan. 1, 2008—Mar. 31, 2008	4.5%	62	616
Apr. 1, 2008—Jun. 30, 2008	3.5%	60	614
Jul. 1, 2008—Sep. 30, 2008	2.5%	58	612
Oct. 1, 2008—Dec. 31, 2008	3.5%	60	614
Jan. 1, 2009—Mar. 31, 2009	2.5%	10	564
Apr. 1, 2009—Jun. 30, 2009	1.5%	8	562
Jul. 1, 2009—Sep. 30, 2009	1.5%	8	562
Oct. 1, 2009—Dec. 31, 2009	1.5%	8	562
Jan. 1, 2010—Mar. 31, 2010	1.5%	8	562
Apr. 1, 2010—Jun. 30, 2010	1.5%	8	562
Jul. 1, 2010—Sep. 30, 2010	1.5%	8	562
Oct. 1, 2010—Dec. 31, 2010	1.5%	8	562
Jan. 1, 2011—Mar. 31, 2011	0.5%*		
Apr. 1, 2011—Jun. 30, 2011	1.5%	8	562
Jul. 1, 2011—Sep. 30, 2011	1.5%	8	562
Oct. 1, 2011—Dec. 31, 2011	0.5%*		

Section 9815.—Additional Market Reforms

26 CFR 54.9815–2713T: Coverage of preventive health services (temporary).

T.D. 9541

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 54

DEPARTMENT OF LABOR
Employee Benefits Security Administration
29 CFR Part 2590

DEPARTMENT OF HEALTH AND HUMAN SERVICES
CMS–9992–IFC2
45 CFR Part 147

Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act

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

ACTION: Interim final rules with request for comments.

SUMMARY: This document contains amendments to the interim final regulations (REG–120391–10) implementing the rules for group health plans and health insurance coverage in the group and individual markets under provisions of the Patient Protection and Affordable Care Act regarding preventive health services.

DATES: *Effective date*. These interim final regulations are effective on August 1, 2011.

Comment date. Comments are due on or before September 30, 2011.

Applicability dates. These interim final regulations generally apply to group health plans and group health insurance issuers on August 1, 2011.

ADDRESSES: Written comments may be submitted to any of the addresses specified below. Any comment that is submitted to any Department will be shared with the other Departments. Please do not submit duplicates.

All comments will be made available to the public. ***WARNING***: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments are posted on the Internet exactly as received, and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

Department of Labor. Comments to the Department of Labor, identified by RIN 1210–AB44, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Email*: *E-OHPSCA2713.EBSA@dol.gov*.
- *Mail or Hand Delivery*: Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N–5653, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, *Attention*: RIN 1210–AB44.

Comments received by the Department of Labor will be posted without change to *http://www.regulations.gov* and *http://www.dol.gov/ebsa*, and available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, 200 Constitution Avenue, NW, Washington, DC 20210.

Department of Health and Human Services. In commenting, please refer to file code CMS–9992–IFC2. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically*. You may submit electronic comments on this regulation to *http://www.regulations.gov*. Follow the "Submit a comment" instructions.

2. *By regular mail*. You may mail written comments to the following address ONLY:

Centers for Medicare &
Medicaid Services,
Department of Health and
Human Services,
Attention: CMS–9992–IFC2,
P.O. Box 8010,
Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail*. You may send written comments to the following address ONLY:

Centers for Medicare &
Medicaid Services,
Department of Health and
Human Services,
Attention: CMS–9992–IFC2,
Mail Stop C4–26–05,
7500 Security Boulevard,
Baltimore, MD 21244–1850.

4. *By hand or courier*. Alternatively, you may deliver (by hand or courier) your written comments ONLY to the following addresses prior to the close of the comment period:

Centers for Medicare &
Medicaid Services,
Department of Health and
Human Services,
Room 445–G, Hubert H. Humphrey
Building,
200 Independence Avenue, SW,
Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—

Centers for Medicare &
Medicaid Services,
Department of Health and
Human Services,
7500 Security Boulevard,
Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786–4492 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *http://www.regulations.gov*. Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. EST. To schedule an appointment to view public comments, phone 1–800–743–3951.

Internal Revenue Service. Comments to the IRS, identified by REG–120391–10, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail*: CC:PA:LPD:PR (REG–120391–10), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.
- *Hand or courier delivery*: Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–120391–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington DC 20224.

All submissions to the IRS will be open to public inspection and copying in room 1621, 1111 Constitution Avenue, NW, Washington, DC from 9 a.m. to 4 p.m.

FOR FURTHER INFORMATION CONTACT: Amy Turner or Beth Baum, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335; Karen Levin, Internal Revenue Service, Department of the Treasury, at (202) 622–6080; Robert Imes, Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, at (410) 786–1565.

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

SUPPLEMENTARY INFORMATION:

I. Background

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

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

Section 2713 of the PHS Act, as added by the Affordable Care Act and incorporated under section 715(a)(1) of ERISA and section 9815(a)(1) of the Code, specifies that a group health plan and a health insurance issuer offering group or individual health insurance coverage provide

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

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

benefits for and prohibit the imposition of cost-sharing with respect to:

- Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force (Task Force) with respect to the individual involved.[3]
- Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention (Advisory Committee) with respect to the individual involved. A recommendation of the Advisory Committee is considered to be "in effect" after it has been adopted by the Director of the Centers for Disease Control and Prevention. A recommendation is considered to be for routine use if it appears on the Immunization Schedules of the Centers for Disease Control and Prevention.
- With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration (HRSA).
- With respect to women, preventive care and screening provided for in comprehensive guidelines supported by HRSA (not otherwise addressed by the recommendations of the Task Force), which will be commonly known as HRSA's Women's Preventive Services: Required Health Plan Coverage Guidelines.

The requirements to cover recommended preventive services without any cost-sharing do not apply to grandfathered health plans.[4] The Departments previously issued interim final regulations implementing PHS Act section 2713; these interim final rules were published in the **Federal Register** on July 19, 2010 (75 FR 41726). For the reasons explained below, the Departments are now issuing an amendment to these interim final rules.

II. Overview of the Amendment to the Interim Final Regulations

The interim final regulations provided that a group health plan or health insurance issuer must cover certain items and services, without cost-sharing, as recommended by the U.S. Preventive Services Task Force, the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, and the Health Resources and Services Administration. Notably, to the extent not described in the U.S. Preventive Services Task Force recommendations, HRSA was charged with developing comprehensive guidelines for preventive care and screenings with respect to women (*i.e.*, the Women's Preventive Services: Required Health Plan Coverage Guidelines or "HRSA Guidelines"). The interim final regulations also require that changes in the required items and services be implemented no later than plan years (in the individual market, policy years) beginning on or after the date that is one year from when the new recommendation or guideline is issued.

In response to the request for comments on the interim final regulations, the Departments received considerable feedback regarding which preventive services for women should be considered for coverage under PHS Act section 2713(a)(4). Most commenters, including some religious organizations, recommended that HRSA Guidelines include contraceptive services for all women and that this requirement be binding on all group health plans and health insurance issuers with no religious exemption. However, several commenters asserted that requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom. One commenter noted that some religious employers do not currently cover such benefits under their group health plan due to their religious beliefs.

The Departments note that PHS Act section 2713(a)(4) gives HRSA the authority to develop comprehensive guidelines for additional preventive care and screenings for women "for purposes of this paragraph." In other words, the statute contemplated HRSA Guidelines that would be developed with the knowledge that certain group health plans and health insurance issuers would be required to cover the services recommended without cost-sharing, unlike the other guidelines referenced in section 2713(a), which pre-dated the Affordable Care Act and were originally issued for purposes of identifying the non-binding recommended care that providers should provide to patients. These HRSA Guidelines exist solely to bind non-grandfathered group health plans and health insurance issuers with respect to the extent of their coverage of certain preventive services for women. In the Departments' view, it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required in the group health plans in which employees in certain religious positions participate. Specifically, the Departments seek to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions. Such an accommodation would be consistent with the policies of States that require contraceptive services coverage, the majority of which simultaneously provide for a religious accommodation.

In light of the above, the Departments are amending the interim final rules to provide HRSA additional discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned. The amendment to the interim final rules provides HRSA with the discretion to establish this exemption. Consistent with most States that have such exemptions, as described below, the amended regulations specify that, for purposes of this policy, a religious employer is one that: (1) has the inculcation of religious values as its purpose; (2)

[3] Under PHS Act section 2713(a)(5), the Task Force recommendations regarding breast cancer screening, mammography, and prevention issued in or around November of 2009 are not to be considered current recommendations on this subject for purposes of PHS Act section 2713(a)(1). Thus, the recommendations regarding breast cancer screening, mammography, and prevention issued by the Task Force prior to those issued in or around November of 2009 (that is, those issued in 2002) will be considered current until new recommendations in this area are issued by the Task Force or appear in comprehensive guidelines supported by HRSA concerning preventive care and screenings for women, which will be commonly known as HRSA's Women's Preventive Services: Required Health Plan Coverage Guidelines.

[4] See 26 CFR 54.9815–1251T, 29 CFR 2590.715–1251 and 45 CFR 147.140 (75 FR 34538, June 17, 2010).

primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code. Section 6033(a)(3)(A)(i) and (iii) refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order. The definition of religious employer, as set forth in the amended regulations, is based on existing definitions used by most States that exempt certain religious employers from having to comply with State law requirements to cover contraceptive services. We will be accepting comments on this definition as well as alternative definitions, such as those that have been developed under Title 26 of the United States Code. The definition set forth here is intended to reasonably balance the extension of any coverage of contraceptive services under the HRSA Guidelines to as many women as possible, while respecting the unique relationship between certain religious employers and their employees in certain religious positions. The change in policy effected by this amendment to these interim final rules is intended solely for purposes of PHS Act section 2713 and the companion provisions of ERISA and the Internal Revenue Code.

Because HRSA's discretion to establish an exemption applies only to group health plans sponsored by certain religious employers and group health insurance offered in connection with such plans, health insurance issuers in the individual health insurance market would not be covered under any such exemption.

III. Interim Final Regulations and Waiver of Delay of Effective Date

Section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act authorize the Secretaries of the Treasury, Labor, and HHS (collectively, the Secretaries) to promulgate any interim final rules that they determine are appropriate to carry out the provisions of chapter 100 of the Code, part 7 of subtitle B of title I of ERISA, and part A of title XXVII of the PHS Act, which include PHS Act sections 2701 through 2728 and the incorporation of those sections into ERISA section 715 and Code section 9815. The amendments promulgated in this rulemaking carry out the provisions of these statutes. Therefore, the foregoing interim final rule authority applies to these amendments.

Under the Administrative Procedure Act (APA) (5 U.S.C. 551, *et seq.*), while a general notice of proposed rulemaking and an opportunity for public comment is generally required before promulgation of regulations, an exception is made when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. The provisions of the APA that ordinarily require a notice of proposed rulemaking do not apply here because of the specific authority to issue interim final rules granted by section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act.

Even if the APA requirements for notice and comment were applicable to these regulations, they have been satisfied. This is because the Secretaries find that providing for an additional opportunity for public comment is unnecessary, as the July 19, 2010 interim final rules implementing section 2713 of the PHS Act provided the public with an opportunity to comment on the implementation of the preventive services requirements in this provision, and the amendments made in these interim final rules in fact are based on such public comments. Specifically, commenters expressed concerns that HRSA-supported guidelines issued under section 2713(a)(4) that included coverage of contraceptive services could impinge upon the religious freedom of certain religious employers. The flexibility that is afforded under these amendments is being provided to HRSA in order to allow HRSA the discretion to accommodate, in a balanced way, as discussed above, these commenter concerns.

In addition, the Departments have determined that an additional opportunity for public comment would be impractical and contrary to the public interest. The requirement in section 2713(a)(4) that preventive services supported by HRSA be provided without cost-sharing took effect at the beginning of the first plan or policy year beginning on or after September 23, 2010. At that time, however, HRSA had not issued any such guidelines. Under the July 19, 2010 interim final rules, group health plans and insurance issuers do not have to begin covering preventive services supported in HRSA guidelines until the first plan or policy year that begins one year after the guidelines are issued. Thus, while the law requiring coverage of recommended women's preventive health services was enacted on March 23, 2010, and has been in effect since September 23, 2010, no such guidelines have yet been issued, and it will be at least a full year after they are issued before group health plans and issuers will be required to start covering preventive services recommended in the guidelines without cost sharing.

The July 19, 2010 interim final rules indicated that HRSA expected to issue guidelines by August 1, 2011. After considering public comments raising the issue addressed in these amendments, however, the Departments determined that HRSA should be granted the discretion to address the commenter concerns at issue prior to issuing guidelines under section 2713(a)(4). Many college student policy years begin in August and an estimated 1.5 million young adults are estimated to be covered by such policies.[5] Providing an opportunity for public comment as described above would mean that the guidelines could not be issued until after August of 2011. This delay would mean that many students could not benefit from the new prevention coverage without cost-sharing following from the issuance of the guidelines until the 2013–14 school year, as opposed to the 2012–13 school year. Similarly, 2008 data from the Department of Labor indicate that over 4 million Americans have ERISA group health plan coverage that starts in August or September; they too would experience over a year's delay in the receipt of the new benefit if the public comment period delayed the issuance of the guidance for over a month. The Departments have determined that such a delay in implementation of the statutory requirement that women receive vital preventive services without cost-sharing would be contrary to

[5] Department of Health and Human Services, Notice of Proposed Rulemaking on Student Health Insurance Coverage (76 FR 7767, February 22, 2011).

the public interest because it could result in adverse health consequences that may not otherwise have occurred.

While the Departments have determined that, even if the APA were applicable, issuing these regulations in proposed form, so they would not become effective until after public comment, would be contrary to the public interest in the case of these amendments, the Departments are issuing these amendments as interim final rules so as to provide the public with an opportunity for public comment on these amendments.

The APA also generally requires that a final rule be effective no sooner than 30 days after the date of publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an agency finds good cause why the effective date should not be delayed, and the agency incorporates a statement of the findings and its reasons in the rule issued.

As indicated above, many college student policy years begin in August. Delaying the effective date of this amendment by 30 days would mean that the HRSA guidelines could not be issued until after August of 2011. This delay would mean many students could not benefit from the new prevention coverage without cost-sharing following from the issuance of the guidelines until the 2013–14 school year, as opposed to the 2012–13 school year. As discussed above, all other participants, beneficiaries and enrollees in plans or policies with a plan or a policy year beginning in the months between August 1 and whenever a final rule would be published should the Departments provide a pre-promulgation opportunity for public comment would face a similar one-year delay in receiving these important health benefits. The Departments have determined that such a delay in implementation of the statutory requirement that women receive vital preventive services without cost-sharing would be impracticable and contrary to the public interest because it could result in adverse health consequences that may not otherwise have occurred. Therefore, the Departments are waiving the 30-day delay in effective date of these amendments.

IV. Economic Impact and Paperwork Burden

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

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action," although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

1. Need for Regulatory Action

As stated earlier in this preamble, the Departments previously issued interim final regulations implementing PHS Act section 2713 that were published in the **Federal Register** on July 19, 2010 (75 FR 41726). Comments received in response to the interim final regulations raised the issue of imposing on certain religious employers through binding guidelines the requirement to cover contraceptive services that would be in conflict with the religious tenets of the employer. The Departments have determined that it is appropriate to amend the interim final rules to provide HRSA the discretion to exempt from its guidelines group health plans maintained by certain religious employers where contraceptive services are concerned.

2. Anticipated Effects

The Departments expect that this amendment will not result in any additional significant burden or costs to the affected entities.

B. Special Analyses—Department of the Treasury

Notwithstanding the determinations of the Department of Labor and Department of Health and Human Services, for purposes of the Department of the Treasury, it has been determined that this Treasury decision is not a significant regulatory action for purposes of Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the APA (5 U.S.C. chapter 5) does not apply to these interim final regulations. For the applicability of the RFA, refer to the Special Analyses section in the preamble to the cross-referencing notice of proposed rulemaking published elsewhere in this issue of the Bulletin. Pursuant to section 7805(f) of the Code, these temporary regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses.

C. Paperwork Reduction Act

As stated in the previously issued interim final regulations, this rule is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) because it does not contain a "collection of information" as defined in 44 U.S.C. 3502 (11).

V. Statutory Authority

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

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

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

* * * * *

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Chapter 1

Accordingly, 26 CFR Part 54 is amended as follows:

PART 54—PENSION EXCISE TAXES

Paragraph 1. The authority citation for part 54 continues to read as follows:

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

Par. 2. Section 54.9815–2713T is amended by revising paragraph (a)(1)(iv) to read as follows:

§54.9815–2713T Coverage of preventive health services (temporary).

(a) * * *

(1) * * *

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration and developed in accordance with 45 CFR 147.130(a)(1)(iv).

* * * * *

DEPARTMENT OF LABOR
Employee Benefits Security Administration
29 CFR Chapter XXV

29 CFR Part 2590 is amended as follows:

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

1. The authority citation for Part 2590 continues to read as follows:

Authority:

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

Subpart C-Other Requirements

2. Section 2590.715–2713 is amended by revising paragraph (a)(1)(iv) to read as follows:

§2590.715–2713 Coverage of preventive health services.

(a) * * *

(1) * * *

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration and developed in accordance with 45 CFR 147.130(a)(1)(iv).

* * * * *

DEPARTMENT OF HEALTH AND HUMAN SERVICES

For the reasons stated in the preamble, the Department of Health and Human Services amends 45 CFR part 147 as follows:

PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

1. The authority citation for part 147 continues to read as follows:

Authority: 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 USC 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

2. Section 147.130 is amended by revising paragraph (a)(1)(iv) to read as follows:

§147.130 Coverage of preventive health services.

(a) * * *

(1) * * *

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:

(*1*) The inculcation of religious values is the purpose of the organization.

(*2*) The organization primarily employs persons who share the religious tenets of the organization.

(*3*) The organization serves primarily persons who share the religious tenets of the organization.

(*4*) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

* * * * *

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

Approved July 28, 2011.

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

Signed this 29th day of July, 2011.

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

Dated July 28, 2011.

Donald M. Berwick,
Administrator, Centers for Medicare & Medicaid Services.

Approved July 28, 2011.

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

(Filed by the Office of the Federal Register on August 1, 2011, 8:45 a.m., and published in the issue of the Federal Register for August 3, 2011, 76 F.R. 46621)

Part III. Administrative, Procedural, and Miscellaneous

Air Transportation and Aviation Fuels Excise Taxes

Notice 2011–69

SECTION 1. OVERVIEW

This notice describes the relief the IRS will provide in connection with the retroactive extension of certain aviation related excise taxes by the Airport and Airway Extension Act of 2011, Part IV (Extension Act, Part IV) (Pub. L. 112–27).

SECTION 2. BACKGROUND

Before July 23, 2011, the Internal Revenue Code (Code) imposed excise taxes on amounts paid for taxable air transportation of persons (§ 4261) and property (§ 4271). In addition, the Code imposed excise taxes on certain removals, entries, and sales of aviation gasoline and aviation fuel (§ 4081). On July 23, 2011, the taxes imposed by §§ 4261 and 4271 expired under the terms of the Airport and Airway Extension Act of 2011, Part III (Pub. L. 112–21) and did not apply to amounts paid on and after that date. Air transportation providers were not authorized to collect these taxes for air transportation services purchased on and after July 23, 2011. Also under the Airport and Airway Extension Act of 2011, Part III, the tax rates for aviation gasoline and aviation fuel taxes were reduced beginning on July 23, 2011.

On August 5, 2011, the President signed the Extension Act, Part IV, into law, reinstating the taxes imposed by §§ 4261 and 4271, and the pre-July 23, 2011, tax rates for aviation gasoline and aviation fuel as if they had never expired.

In an August 5, 2011, statement made pursuant to its authority under § 7805(a) (relating to prescribing rules as may be necessary by reason of any alteration of internal revenue laws), the IRS announced that it intends to provide relief for passengers and airlines with respect to ticket taxes that were not paid or collected on or after July 23, 2011, and before August 8, 2011. The IRS also announced that persons who purchased airline tickets before July 23, 2011, and traveled on or after July 23, 2011, and before the reinstatement of the taxes, are not entitled to a refund of the air transportation taxes imposed by § 4261.

SECTION 3. AIR TRANSPORTATION TAXES

The air transportation excise taxes under §§ 4261 and 4271 of the Code are imposed on the person making the payment for the air transportation services and collected and paid over to the government by the person receiving that payment.

To relieve the administrative burden that would be associated with payment and collection of air transportation excise taxes on purchases that have already occurred, the IRS is providing the following relief with respect to these taxes:

1. Purchasers of air transportation services (including individuals who purchase frequent flyer miles for their own use) will not be required to pay, and air transportation providers and other collectors of air transportation excise taxes will not be required to collect and pay over, taxes imposed by §§ 4261 and 4271 on purchases of air transportation services (or frequent flyer miles) for which payment was made after July 22, 2011, and before August 8, 2011.
2. Persons required to make deposits of tax in accordance with the rules provided under §§ 40.6302(c)–1 and 40.6302(c)–3 of the Excise Tax Procedural Regulations (Regulations) may treat the taxes imposed by §§ 4261 and 4271 as being in effect after July 22, 2011, and before August 8, 2011, for purposes of determining whether the safe harbor rules provided in § 40.6302(c)–1(b)(2) apply and in determining the amount of the net tax liability that is taken into account in applying those rules.

The relief granted in paragraph 1 of this section does not apply to any amount paid (and the value of any other benefit provided) to an air carrier (or any related person) for the right to provide mileage awards for (or other reductions in the cost of) any transportation of persons by air under § 4261(e)(3) (right to provide free or reduced rate air transportation). Purchases of the right to provide free or reduced rate air transportation made after July 22, 2011, and before August 8, 2011, are subject to the taxes imposed by § 4261. Accordingly, purchasers of the right to provide free or reduced rate air transportation are required to pay the taxes imposed by § 4261 on purchases made after July 22, 2011, and before August 8, 2011.

The relief provided in paragraph 1 applies only to amounts paid after July 22, 2011, and before August 8, 2011. Accordingly, purchasers of air transportation services are required to pay, and air transportation providers and other collectors of air transportation excise taxes are required to collect taxes on air transportation services for which payment is made on or after 12:01 am, August 8, 2011. In addition, persons who purchased air transportation services (including purchasers of the right to provide free or reduced rate air transportation) before July 23, 2011, for travel after that date are not entitled to refunds of taxes paid on those purchases (other than refunds allowable under the law in effect after the enactment of the Extensions Act, Part IV).

SECTION 4. DEPOSITS OF TAX ON AVIATION GASOLINE AND KEROSENE FOR USE IN AVIATION

Section 4081 of the Code imposes excise taxes on certain removals, entries, and sales of aviation gasoline and aviation kerosene. On July 23, 2011, the tax imposed by § 4081(a)(2)(A)(ii) on aviation gasoline was reduced from 19.4 cents per gallon to 4.4 cents per gallon, but was reinstated by the Extension Act, Part IV, at 19.4 cents per gallon effective July 23, 2011. Also on July 23, 2011, the tax imposed by § 4081(a)(2)(C)(ii) on kerosene removed from any refinery or terminal directly into the fuel tank of an aircraft for use in noncommercial aviation (aviation kerosene) was reduced from 21.9 cents per gallon to 4.4 cents per gallon, but was reinstated by the Extension Act, Part IV at 21.9 cents per gallon tax effective July 23, 2011. Under § 40.6302(c)–1(b)(1) of the Regulations, persons required to make semimonthly deposits of tax on aviation gasoline and aviation kerosene generally must deposit at least 95 percent of the net tax liability incurred during the semimonthly period. The IRS will not impose § 6656 penalties with respect to semimonthly deposits made in August 2011 if the taxpayer made a timely deposit of at least 95 percent of the net tax liability for the semimonthly period determined without regard to the reinstated rates. The penalty relief provided in this section does not apply to taxpayers that deposit under the safe harbor rules of § 40.6302(c)–1(b)(2) (relating to depositing 1/6 of net tax liability reported for a look-back quarter).

SECTION 5. DRAFTING INFORMATION

The principal author of this notice is Michael H. Beker of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Michael H. Beker at (202) 622–3130 (not a toll-free call).

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26 CFR 601.201: Rulings and determination letters. (Also, Part I, § 414.)

Rev. Proc. 2011–44

SECTION 1. PURPOSE

The purpose of this revenue procedure is to supplement the procedures for requesting a letter ruling under § 414(e) of the Internal Revenue Code (Code) relating to church plans. This revenue procedure modifies Rev. Proc. 2011–4, 2011–1 I.R.B. 123, to require that plan participants and other interested persons receive a notice in connection with a letter ruling request under § 414(e) for a qualified plan, to require that a copy of the notice be submitted to the Internal Revenue Service (IRS) as part of the ruling request, and to provide procedures for the IRS to receive and consider comments relating to the ruling request from interested persons.

SECTION 2. BACKGROUND

Section 414(e) generally defines a church plan as a plan established and maintained for its employees or their beneficiaries by a church or by a convention or association of churches which is exempt from tax under § 501 (church plan). For purposes of § 414(e), an employee of a church or a convention or association of churches includes an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under § 501 and which is controlled by or associated with a church or a convention or association of churches.

Section 1.414(e)–1 of the Income Tax Regulations provides that a church plan is a plan established and at all times maintained for its employees by a church or by a convention or association of churches which is exempt from tax under § 501(a), provided that the plan otherwise meets the requirements of the regulations.

To qualify under § 401(a), a retirement plan must meet certain requirements, including the minimum participation requirements under § 410(a), the minimum coverage requirements under § 410(b), and the minimum vesting requirements under § 411. A church plan (for which no special election described below has been made (nonelecting church plan)) is ordinarily not subject to various requirements that apply to tax-qualified plans under § 401(a) and is not covered by the Employee Retirement Income Security Act of 1974 (ERISA).

Thus, Code provisions that do not apply to a nonelecting church plan include § 410 (relating to minimum participation standards), § 411 (relating to minimum vesting standards), § 412 (relating to minimum funding standards for pension plans), and § 4975 (relating to prohibited transactions). In addition, the flush language at the end of § 401(a) provides that paragraphs (11), (12), (13), (14), (15), (19), and (20) of § 401(a) do not apply to nonelecting church plans. These paragraphs relate to joint and survivor annuities, mergers and consolidations, assignment or alienation of benefits, time of benefit commencement, certain social security increases, withdrawals of employee contributions, and distributions after plan termination, respectively.

Under section 4(b)(2) of ERISA, a nonelecting church plan is excluded from coverage under Title I of ERISA. Thus, for example, it is not subject to ERISA's rules governing reporting, disclosure, and fiduciary conduct. In the case of a defined benefit pension plan, the plan is also not covered by the insurance provisions of Title IV of ERISA, which provides for certain benefit guarantees by the Pension Benefit Guaranty Corporation (PBGC) in the event of termination of an underfunded pension plan. These results are not limited to a church plan whose only participants are employees of a church, but may also in some cases include substantial numbers of employees of certain affiliated entities who are participants in a church plan as defined in § 414(e).

A nonelecting church plan is instead primarily subject to certain qualification requirements that pre-date the enactment of ERISA. The plan is treated as a tax-qualified plan only if the plan satisfies the participation, vesting, and funding requirements of the Code as in effect prior to ERISA.

Section 514(a) of ERISA generally provides that ERISA supersedes state laws that relate to an employee benefit plan described in section 4(a) of ERISA and not exempt under section 4(b) of ERISA. A nonelecting church plan is exempt under section 4(b) of ERISA. Thus, state laws that relate to an employee benefit plan generally would apply to the nonelecting church plan.

Section 410(d) permits an election to be made under which a church plan would be subject to the same requirements as apply to other qualified plans (electing church plan). Section 1.410(d)–1 of the Income Tax Regulations provides that the election is irrevocable and may be made only by the plan administrator and only in the manner provided in the regulations. If the election is made, the plan must comply with the applicable provisions of the Code. In addition, an electing church plan would be covered by and subject to Title I and, if a defined benefit pension plan, Title IV of ERISA.

Rev. Proc. 2011–4 contains procedures for an applicant to submit a letter ruling request that a qualified plan is a church plan under § 414(e). Although a church plan is not required to have a favorable letter ruling from the IRS, a letter ruling would ordinarily confirm a plan's status for tax purposes, as noted in Rev. Proc. 2011–4, section 4. Additionally, other agencies may require the applicant to have an IRS letter ruling. Appendix B of Rev. Proc. 2011–4 contains a checklist to comply with the general procedures for all such ruling requests. Appendix E contains an additional checklist applicable to church plan ruling requests. Rev. Proc. 2011–4 does not require any notice to interested persons prior to issuing a letter ruling with respect to a church plan under § 414(e).

Because a nonelecting church plan is exempt from certain requirements under the Code and is not subject to ERISA, the IRS has determined that advance notice should be given to interested persons, with an opportunity for interested persons to comment, before a letter ruling is issued on a church plan under § 414(e). Accordingly, in the case of a nonelecting church plan, the IRS will not issue a letter ruling that a qualified plan (which, for this purpose, means a § 401(a) plan, a § 403(a) insurance annuity plan, and a § 403(b) plan) is a church plan unless the notice requirements of section 3 of this revenue procedure have been met.

SECTION 3. NOTICE TO PARTICIPANTS, BENEFICIARIES, ALTERNATE PAYEES, AND EMPLOYEE ORGANIZATIONS

.01 General Requirements. The applicant must give notice to interested persons that a letter ruling under § 414(e) on behalf of a church plan will be submitted to the IRS. A copy of such notice must be submitted to the IRS as part of the ruling request.

.02 Information in the Notice. The notice must include the information set forth in the Model Notice attached as an appendix to this revenue procedure. However, information that is not applicable should be deleted. For example, in the case of a plan that is not a defined benefit plan, the notice should omit any information relating to the insurance protection provided by the PBGC (see references to PBGC in the notice). Similarly, the notice should be modified appropriately in the case of a § 403(b) plan (by deleting the reference to "the Code relating to retirement plans and with" in the paragraph under the heading "What is the Effect of an Election to be Subject to ERISA?"). In addition, if the notice is posted under section 3.05 below, it must provide that the interested person may request and receive the applicable notice on paper from the applicant at no charge.

While the notice may include additional information if that information is necessary or helpful to interested persons to understanding the information in the Model Notice, the notice should not have the effect of misleading or misinforming recipients or of distracting recipients from the information in the Model Notice.

.03 New Ruling Requests. Except as provided in section 3.04, the applicant must submit a copy of the notice to interested persons to the IRS containing the information under section 3.02 along with a statement that such notice was provided. The statement must specify the date or dates the notice was provided, and the date must be within 30 days before the letter ruling request is submitted to the IRS.

.04 Pending Ruling Requests. For a ruling request pending with the IRS on September 26, 2011, the applicant must submit a copy of the notice to interested persons to the IRS containing the information under section 3.02 along with a statement in a cover letter referencing the pending ruling request and stating the date or dates on which such notice was provided. This date must be within 60 days after September 26, 2011. The notice to interested persons must be in substantially the form set forth in the Model Notice attached as an appendix to this revenue procedure, but modified to specify that the letter ruling request has already been submitted to the IRS.

If an applicant for a pending letter ruling request chooses not to provide the notice to interested persons in connection with the letter ruling request, the applicant should notify the Service in writing within 60 days after September 26, 2011. The Service will then decline to rule, and the applicant's user fee will be refunded. If an applicant does not timely respond by notifying the IRS in the manner set forth under this section 3.04, the Service may consider the ruling request withdrawn and the user fee might not be refunded.

.05 Reasonable Effort. If the applicant makes a reasonable effort to satisfy the notice rules of this section 3, failure of one or more interested persons to receive the required notice will not cause the applicant to fail the notice requirement. Mere posting of the notice on a bulletin board is not sufficient to constitute a reasonable effort to satisfy this notice requirement, unless (a) the notice is prominently displayed on a bulletin board at a principal place of employment, (b) the bulletin board is regularly and actively used for a wide variety of purposes by employees who are plan participants, and (c) notice is given to all other interested persons by other methods that constitute a reasonable effort to satisfy the notice requirement.

.06 Modification of Prior Revenue Procedures. This revenue procedure modifies Rev. Proc. 2011–4 (and any applicable predecessor revenue procedure) by adding a notice requirement for ruling requests under § 414(e) involving church plans, and requiring that an applicant represent whether the plan is a nonelecting church plan.

.07 Interested Person. For purposes of this section 3, the term *interested person* means each plan participant, beneficiary, or alternate payee (within the meaning of § 414(p)(8)), and any employee organization representing employees who are plan participants. In the case of a plan covering more than one employer, the term *interested person* also includes each contributing employer other than the applicant.

SECTION 4. EFFECTIVE DATE

This revenue procedure is effective for all ruling requests received after September 26, 2011, and ruling requests pending with the IRS as of September 26, 2011.

SECTION 5. EFFECT ON OTHER REVENUE PROCEDURES

Rev. Proc. 2011–4 (and any applicable predecessor revenue procedure) is modified.

SECTION 6. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. sec. 3507) under control number 1545–1520.

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 section 3. This information is required to inform interested persons of the significance of being a nonelecting church plan in order to evaluate and process a request for a letter ruling that a plan is a church plan under § 414(e). The likely respondents are participants, beneficiaries, alternate payees, and employee organizations.

The estimated total annual reporting burden is 60 hours.

The estimated annual burden per respondent/recordkeeper varies from 1 to 3 hours, depending on individual circumstances, with an estimated average burden of 2 hours. The estimated number of respondents and/or recordkeepers is 30.

The estimated annual frequency of responses is on occasion.

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

DRAFTING INFORMATION

The principal author of this revenue procedure is Sherri M. Edelman of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue procedure, contact the Employee Plans taxpayer assistance answering service at 1–877–829–5500 or email Ms. Edelman at *RetirementPlanQuestions@irs.gov*.

APPENDIX

MODEL NOTICE TO INTERESTED PERSONS OF THE REQUEST FOR AN IRS RULING ON A RETIREMENT PLAN'S STATUS AS A CHURCH PLAN

WHY ARE YOU RECEIVING THIS NOTICE?

You are receiving this notice because a letter ruling request will be submitted by [INSERT PLAN SPONSOR'S NAME AND EIN] to the Internal Revenue Service (IRS) for the [INSERT PLAN NAME] [INSERT PLAN NUMBER, IF APPLICABLE] for the plan year beginning [INSERT DATE]. The applicant requests the IRS to determine that the plan is a church plan under § 414(e) of the Internal Revenue Code (Code).

The applicant has represented that a special election (described below, relating to § 410(d) of the Code) has not been made. Therefore, the IRS requires that this notice be provided to you.

This notice informs you that a church plan under § 414(e) of the Code is generally not required to comply with many rules that apply to other retirement plans. Thus, those protections and rights under federal law are not required to be provided to participants and other interested persons. This notice also informs you that you may give the IRS comments.

WHY DOES CHURCH PLAN STATUS MATTER?

In general, a church plan is a plan established and at all times maintained for its employees by a church or by a convention or association of churches which is exempt from tax under Code § 501(a). A church plan is generally not subject to various requirements that generally apply to retirement plans under federal law. Instead, the plan is primarily subject to certain qualification requirements that pre-date the enactment of the Employee Retirement Income Security Act of 1974 (ERISA).

The applicant is representing that this plan is a church plan that is exempt from ERISA. This means that the plan is not required to provide certain protections and rights to plan participants. The protections applicable to ERISA-covered retirement plans that a church plan is not required to provide include the following:

- A participant's eligibility to join the plan cannot be delayed past a stated period of time
- A participant's entitlement to fully vested benefits must be set forth in schedules depending on years of service, and cannot be delayed past a stated period of time
- The plan may not generally be amended to reduce previously earned benefits
- Specific minimum funding requirements apply for pension plans
- A participant has the right to bring suit under federal law for payment of benefits, fiduciary violations (such as inappropriate management of plan assets or impermissible self-dealing), and failure to receive a statement of benefits and other plan information
- A participant has the right to be notified about certain changes in the plan, and to obtain a copy of plan documents and certain reports filed with the government
- The insurance protection provided by the Pension Benefit Guaranty Corporation (PBGC) that applies in the event of termination of an underfunded defined benefit pension plan.

If a church plan is excluded from ERISA coverage, state laws could independently provide protections and rights to participants, beneficiaries, and alternate payees. However, this would depend on the applicable state law.

Further, if a church plan is excluded from ERISA coverage, a sponsor of the plan may choose to provide similar protections to those provided under ERISA and the Code (though PBGC insurance protection would not be available). However, the plan might be able to cease providing those protections (for future benefits or previously earned benefits) at any time, to the extent applicable state law does not prohibit such action. Also, the plan administrator is not precluded from making an election under § 410(d) (as discussed below) at a later time, in which case the plan would then become subject to ERISA and to the provisions of the Code that generally apply to tax-qualified retirement plans (and any applicable state law protection would then cease to apply).

WHAT IS THE EFFECT OF AN ELECTION TO BE SUBJECT TO ERISA?

The plan administrator of a church plan is permitted to make an irrevocable election under § 410(d) of the Code under which the plan will be subject to all of the Code requirements that generally apply to tax-qualified retirement plans including the protections and rights listed in the preceding section. If the plan administrator of a church plan makes that election, the plan must comply with applicable provisions of the Code relating to retirement plans and with ERISA. The applicant has represented that no such election has been made with respect to this plan.

WHAT IS THE SCOPE OF A LETTER RULING?

Please be aware that, if the IRS issues a ruling stating that the [INSERT PLAN NAME] is a church plan under Code § 414(e), that ruling is based on the information provided and is limited to the plan's status as a church plan under § 414(e). The ruling will not make any determination regarding other events or actions, for example, regarding whether the plan administrator actually has or has not made an election under § 410(d) for this plan in the past. Also note that while a letter ruling from the IRS would confirm a plan's status as a church plan under § 414(e), a plan is not required to have a letter ruling from the IRS in order to be a church plan under § 414(e). However, other agencies may require the applicant to have an IRS letter ruling in order for the plan to be treated as a church plan.

YOU HAVE AN OPPORTUNITY TO COMMENT

The IRS will consider any written information submitted by plan participants or other interested persons that is relevant to the ruling request. Comments not relevant to this issue will be disregarded, but relevant information, such as whether the employer is or is not controlled by or associated with a church and whether an election has or has not been made under § 410(d), will be taken into account. The relevant information must be submitted within 60 calendar days from the date this notice is provided to interested persons and must include all identifying information relating to the plan and plan sponsor listed in the first paragraph of this notice (which includes the name and identifying number of the plan sponsor, the plan name, and the plan number, if applicable). Information may be sent to the following address:

Internal Revenue Service
Attention: EP Letter Rulings
P.O. Box 27063
McPherson Station
Washington, DC 20038

In addition to considering relevant written information from interested persons, the IRS may permit interested persons to participate in the decision-making procedure by making oral presentations at meetings to which interested persons are invited. However, it is solely within the discretion of the IRS as to whether or not there will be meetings to which interested persons are invited.

Due to the tax disclosure restrictions of § 6103 of the Code, the IRS is prohibited from providing any information with respect to the letter ruling request.

WHERE TO OBTAIN FURTHER INFORMATION

For further information on rules that apply to plans that are subject to ERISA (such as to a church plan that has made an election under § 410(d) of the Code), see the information on retirement plans provided by the Department of Labor at *www.dol.gov/ebsa* and the Pension Benefit Guaranty Corporation at *www.pbgc.gov*.

[NAME OF PLAN SPONSOR]
[NAME AND TITLE OF APPROPRIATE OFFICER]

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of tax liability.
(Also: §842(b).)

Rev. Proc. 2011–45

SECTION 1. PURPOSE

This revenue procedure provides the domestic asset/liability percentages and domestic investment yields needed by foreign life insurance companies and foreign property and liability insurance companies to compute their minimum effectively connected net investment income under section 842(b) of the Internal Revenue Code for taxable years beginning after

December 31, 2009. Instructions are provided for computing foreign insurance companies' liabilities for the estimated tax and installment payments of estimated tax for taxable years beginning after December 31, 2009. For more specific guidance regarding the computation of the amount of net investment income to be included by a foreign insurance company on its U.S. income tax return, see Notice 89–96, 1989–2 C.B. 417. For the domestic asset/liability percentage and domestic investment yield, as well as instructions for computing foreign insurance companies' liabilities for estimated tax and installment payments of estimated tax for taxable years beginning after December 31, 2008, see Rev. Proc. 2010–29, 2010–35 I.R.B. 309.

SECTION 2. CHANGES

DOMESTIC ASSET/LIABILITY PERCENTAGES FOR 2010. The Secretary determines the domestic asset/liability percentage separately for life insurance companies and property and liability insurance companies. For the first taxable year beginning after December 31, 2009, the relevant domestic asset/liability percentages are:

143.7 percent for foreign life insurance companies, and

190.5 percent for foreign property and liability insurance companies.

.02 DOMESTIC INVESTMENT YIELDS FOR 2010. The Secretary is required to prescribe separate domestic investment yields for foreign life insurance companies and for foreign property and liability insurance companies. For the first taxable year beginning after December 31, 2009, the relevant domestic investment yields are:

3.3 percent for foreign life insurance companies, and

3.4 percent for foreign property and liability insurance companies.

.03 SOURCE OF DATA FOR 2010. The section 842(b) percentages to be used for the 2010 tax year are based on tax return data following the same methodology used for the 2009 year.

SECTION 3. APPLICATION—ESTIMATED TAXES

To compute estimated tax and the installment payments of estimated tax due for taxable years beginning after December 31, 2009, a foreign insurance company must compute its estimated tax payments by adding to its income other than net investment income the greater of (i) its net investment income as determined under section 842(b)(5), that is actually effectively connected with the conduct of a trade or business within the United States for the relevant period, or (ii) the minimum effectively connected net investment income under section 842(b) that would result from using the most recently available domestic asset/liability percentage and domestic investment yield. Thus, for installment payments due after the publication of this revenue procedure, the domestic asset/liability percentages and the domestic investment yields provided in this revenue procedure must be used to compute the minimum effectively connected net investment income. However, if the due date of an installment is less than 20 days after the date this revenue procedure is published in the Internal Revenue Bulletin, the asset/liability percentages and domestic investment yields provided in Rev. Proc. 2010–29 may be used to compute the minimum effectively connected net investment income for such installment. For further guidance in computing estimated tax, see Notice 89–96.

SECTION 4. EFFECTIVE DATE

This revenue procedure is effective for taxable years beginning after December 31, 2009.

SECTION 10. DRAFTING INFORMATION

The principal author of this revenue procedure is Sheila Ramaswamy of the Office of Associate Chief Counsel (International). For further information regarding this revenue procedure, contact Sheila Ramaswamy at (202) 622–3870 (not a toll-free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

Requirements for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act

REG–120391–10

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: Elsewhere in this issue of the Bulletin, the IRS is issuing an amendment to temporary regulations (T.D. 9541) published July 19, 2010 under the provisions of the Patient Protection and Affordable Care Act (the Affordable Care Act) relating to coverage of preventive services without any participant cost sharing. The IRS is issuing the temporary regulations at the same time that the Employee Benefits Security Administration of the U.S. Department of Labor and the Center for Consumer Information & Insurance Oversight of the U.S. Department of Health and Human Services are issuing a substantially similar amendment to interim final regulations published July 19, 2010 with respect to group health plans and health insurance coverage offered in connection with a group health plan under the Employee Retirement Income Security Act of 1974 and the Public Health Service Act. The temporary regulations provide guidance to employers, group health plans, and health insurance issuers providing group health insurance coverage. The text of those temporary regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by October 3, 2011.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–120391–10), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered to: CC:PA:LPD:PR (REG–120391–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington DC 20224. Alternatively, taxpayers may submit comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–120391–10).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Karen Levin at 202–622–6080; concerning submissions of comments, Treena Garrett at 202–622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

The temporary regulations published elsewhere in this issue of the Bulletin amend §54.9815–2713T of the Miscellaneous Excise Tax Regulations. The proposed and temporary regulations are being published as part of a joint rulemaking with the Department of Labor and the Department of Health and Human Services (the joint rulemaking). The text of those temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

Special Analyses

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

Comments and Requests for a Public Hearing

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

Drafting Information

The principal author of these proposed regulations is Karen Levin, Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), IRS. The proposed regulations, as well as the temporary regulations, have been developed in coordination with personnel from the U.S. Department of Labor and the U.S. Department of Health and Human Services.

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 54 is proposed to be amended as follows:

PART 54—PENSION EXCISE TAXES

Paragraph 1. The authority citation for part 54 continues to read in part as follows:

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

Par. 2. Proposed section 54.9815–2713 as published on July 19, 2010, 75 FR 41787, is amended by revising paragraph (a)(1)(iv) to read as follows:

§54.9815–2713 Coverage of preventive health services.

(a) * * *

(1) * * *

(iv) [The text of proposed §54.9815–2713(a)(1)(iv) is the same as the text of §54.9815–2713T(a)(1)(iv) published elsewhere in this issue of the Bulletin].

* * * * *

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

(Filed by the Office of the Federal Register on August 1, 2011, 8:45 a.m., and published in the issue of the Federal Register for August 3, 2011, 76 F.R. 46677)

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

Determining the Amount of Taxes Paid for Purposes of the Foreign Tax Credit

REG–126519–11

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations that provide guidance relating to the determination of the amount of taxes paid for purposes of the foreign tax credit. These regulations address certain highly structured arrangements that produce inappropriate foreign tax credit results. The text of those temporary regulations published in this issue of the Bulletin also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by October 17, 2011.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–126519–11), room 5205, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–126519–11), Courier's desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20044, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–126519–11).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Jeffrey P. Cowan, (202) 622–3850; concerning submissions of comments or a request for a public hearing, Oluwafunmilayo Taylor at (202) 622–7180.

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in this issue of the Bulletin contain amendments to the Income Tax Regulations (26 CFR Part 1) which provide rules relating to the determination of the amount of taxes paid for purposes of the foreign tax credit. The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations. The regulations affect individuals and corporations that claim direct and indirect foreign tax credits.

Special Analyses

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

Comments and Requests for a Public Hearing

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

Drafting Information

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

* * * * *

Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

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

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

* * * * *

(e) * * *

(5) * * *

(iv) * * *

(B) * * *

(*1*) * * *

(*iii*) [The text of proposed §1.901–2(e)(5)(iv)(B)(*1*)(*iii*) is the same as the text of §1.901–2T(e)(5)(iv)(B)(*1*)(*iii*) published elsewhere in this issue of the Bulletin.

* * * * *

(h) * * *

(3) [The text of proposed §1.901–2(h)(3) is the same as the text of §1.901–2T(h)(3) published elsewhere in this issue of the Bulletin.]

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

(Filed by the Office of the Federal Register on July 14, 2011, 8:45 a.m., and published in the issue of the Federal Register for July 18, 2011, 76 F.R. 42076)

Announcement of Disciplinary Sanctions From the Office of Professional Responsibility

Announcement 2011-61

The Office of Professional Responsibility (OPR) announces recent disciplinary sanctions involving attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and appraisers. These individuals are subject to the regulations governing practice before the Internal Revenue Service (IRS), which are set out in Title 31, Code of Federal Regulations, Part 10, and which are published in pamphlet form as Treasury Department Circular No. 230. The regulations prescribe the duties and restrictions relating to such practice and prescribe the disciplinary sanctions for violating the regulations.

The disciplinary sanctions to be imposed for violation of the regulations are:

Disbarred from practice before the IRS—An individual who is disbarred is not eligible to represent taxpayers before the IRS.

Suspended from practice before the IRS—An individual who is suspended is not eligible to represent taxpayers before the IRS during the term of the suspension.

Censured in practice before the IRS—Censure is a public reprimand. Unlike disbarment or suspension, censure does not affect an individual's eligibility to represent taxpayers before the IRS, but OPR may subject the individual's future representations to conditions designed to promote high standards of conduct.

Monetary penalty—A monetary penalty may be imposed on an individual who engages in conduct subject to sanction or on an employer, firm, or entity if the individual was acting on its behalf and if it knew, or reasonably should have known, of the individual's conduct.

Disqualification of appraiser—An appraiser who is disqualified is barred from presenting evidence or testimony in any administrative proceeding before the Department of the Treasury or the IRS.

Under the regulations, attorneys, certified public accountants, enrolled agents, enrolled actuaries, and enrolled retirement plan agents may not assist, or accept assistance from, individuals who are suspended or disbarred with respect to matters constituting practice (*i.e.*, representation) before the IRS, and they may not aid or abet suspended or disbarred individuals to practice before the IRS.

Disciplinary sanctions are described in these terms:

Disbarred by decision after hearing, Suspended by decision after hearing, Censured by decision after hearing, Monetary penalty imposed after hearing, and Disqualified after hearing—An administrative law judge (ALJ) conducted an evidentiary hearing upon OPR's complaint alleging violation of the regulations and issued a decision imposing one of these sanctions. After 30 days from the issuance of the decision, in the absence of an appeal, the ALJ's decision became the final agency decision.

Disbarred by default decision, Suspended by default decision, Censured by default decision, Monetary penalty imposed by default decision, and Disqualified by default decision—An ALJ, after finding that no answer to OPR's complaint had been filed, granted OPR's motion for a default judgment and issued a decision imposing one of these sanctions.

Disbarment by decision on appeal, Suspended by decision on appeal, Censured by decision on appeal, Monetary penalty imposed by decision on appeal, and Disqualified by decision on appeal—The decision of the ALJ was appealed to the agency appeal authority, acting as the delegate of the Secretary of the Treasury, and the appeal authority issued a decision imposing one of these sanctions.

Disbarred by consent, Suspended by consent, Censured by consent, Monetary penalty imposed by consent, and Disqualified by consent—In lieu of a disciplinary proceeding being instituted or continued, an individual offered a consent to one of these sanctions and OPR accepted the offer. Typically, an offer of consent will provide for: suspension for an indefinite term; conditions that the individual must observe during the suspension; and the individual's opportunity, after a stated number of months, to file with OPR a petition for reinstatement affirming compliance with the terms of the consent and affirming current eligibility to practice (*i.e.*, an active professional license or active enrollment status). An enrolled agent or an enrolled retirement plan agent may also offer to resign in order to avoid a disciplinary proceeding.

Suspended by decision in expedited proceeding, Suspended by default decision in expedited proceeding, Suspended by consent in expedited proceeding—OPR instituted an expedited proceeding for suspension (based on certain limited grounds, including loss of a professional license and criminal convictions).

OPR has authority to disclose the grounds for disciplinary sanctions in these situations: (1) an ALJ or the Secretary's delegate on appeal has issued a decision on or after September 26, 2007, which was the effective date of amendments to the regulations that permit making such decisions publicly available; (2) the individual has settled a disciplinary case by signing OPR's "consent to sanction" form, which requires consenting individuals to admit to one or more violations of the regulations and to consent to the disclosure of the individual's own return information related to the admitted violations (for example, failure to file Federal income tax returns);

or (3) OPR has issued a decision in an expedited proceeding for suspension.

Announcements of disciplinary sanctions appear in the Internal Revenue Bulletin at the earliest practicable date. The sanctions announced below are alphabetized first by the names of states and second by the last names of individuals. Unless otherwise indicated, section numbers (*e.g.*, §10.51) refer to the regulations.

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
Arizona				
Tucson	Parra, Oscar C.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (attorney disbarment in California)	Indefinite from July 14, 2011
California				
Newport Beach	Burton, Thomas W.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (attorney disbarment and conviction under 18 U.S.C. §1956, international money laundering conspiracy and aiding and abetting)	Indefinite from July 5, 2011
Alameda	Gilpin, Scott E.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (attorney disbarment)	Indefinite from July 5, 2011
San Jose	Kidwell, Thomas B.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (attorney disbarment)	Indefinite from July 5, 2011
El Cajon	Luebkeman, Theodore C.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (attorney disbarment)	Indefinite from July 5, 2011
Sacramento	O'Neal, Michael E.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (attorney disbarment and conviction under 26 U.S.C. §7206, aiding and assisting the filing of a false income tax return)	Indefinite from July 5, 2011
	Parra, Oscar C., See Arizona			
	Posin, Mitchell L., See Nevada			

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
California (Continued)				
San Diego	Prozinski, Deidre J.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (attorney disbarment)	Indefinite from July 5, 2011
Colorado				
Lakewood	Cabral, Alfonso S.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (suspension of attorney license)	Indefinite from July 22, 2011
Arvada	Duggan, Daniel S.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (suspension of attorney license)	Indefinite from July 22, 2011
Iowa				
Dubuque	Netti Jr., John E.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (suspension of attorney license)	Indefinite from July 14, 2011
Louisiana				
	Octave, Shantel C., See Texas			
Massachusetts				
Quincy	Kirby, Gerald M.	Attorney	Suspended by decision in expedited proceeding under §10.82 (suspension of attorney license)	Indefinite from July 18, 2011
North Adams	McDonough, Matthew J.	Attorney	Suspended by decision in expedited proceeding under §10.82 (suspension of attorney license)	Indefinite from July 18, 2011
Michigan				
Livonia	Matusz, Mark M.	CPA	Suspended by consent for admitted violation of §10.22 (failure to exercise due diligence in preparing own Federal individual income tax returns for tax years 2003–2005)	Indefinite from July, 8 2011, but at least 6 months

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
Mississippi				
Pascagoula	McElroy, John S.	CPA	Suspended by default decision in expedited proceeding under §10.82 (revocation of CPA license)	Indefinite from July 14, 2011
Nevada				
Las Vegas	Posin, Mitchell L.	Attorney	Suspended by default decision in expedited proceeding under §10.82 (suspension of attorney license in California)	Indefinite from July 14, 2011
New Jersey				
Newark	Frohling, John B.	Attorney	Suspended by decision in expedited proceeding under §10.82 (attorney disbarment)	Indefinite from July 18, 2011
Neptune	Martz, Edward J.	Attorney	Suspended by decision in expedited proceeding under §10.82 (suspension of attorney license in New York)	Indefinite from July 18, 2011
New York				
Spencer	Gugino, Mark C.	Attorney	Suspended by decision in expedited proceeding under §10.82 (suspension of attorney license)	Indefinite from July 18, 2011
	Martz, Edward J., See New Jersey			
East Meadow	Shah, Hemang	CPA	Suspended by decision in expedited proceeding under §10.82 (conviction under 26 U.S.C. §7206, making and subscribing to a false U.S. tax return)	Indefinite from July 18, 2011
Ohio				
Columbus	Smith, Patrick E.	CPA	Suspended by default decision in expedited proceeding under §10.82 (revocation of CPA license)	Indefinite from July 6, 2011

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
Texas				
Houston	Miller, Clyde	Attorney	Suspended by decision in expedited proceeding under §10.82 (suspension of attorney license)	Indefinite from January 25, 2011
Pearland	Octave, Shantel C.	Attorney	Suspended by decision in expedited proceeding under §10.82 (suspension of attorney license in Louisiana)	Indefinite from July 18, 2011

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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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2011–1 through 2011–26 is in Internal Revenue Bulletin 2011–26, dated June 27, 2011.

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[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2011–1 through 2011–26 is in Internal Revenue Bulletin 2011–26, dated June 27, 2011.

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Key to Abbreviations:

Ann	Announcement
CD	Court Decision
DO	Delegation Order
EO	Executive Order
PL	Public Law
PTE	Prohibited Transaction Exemption
RP	Revenue Procedure
RR	Revenue Ruling
SPR	Statement of Procedural Rules
TC	Tax Convention
TD	Treasury Decision
TDO	Treasury Department Order

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